

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050



August 12, 2010

Bryan Berthiaume
Executive Director
Foundation For Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, CA 95821

Re: Public Works Case No. 2010-010
Photo Red Light Enforcement Program
City of Hayward

Dear Mr. Berthiaume:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to section 16001(a) of title 8 of the California Code of Regulations. Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the construction and installation work performed in connection with the Photo Red Light Enforcement Program at designated intersection approaches in the City of Hayward ("City") is public work subject to prevailing wage requirements.

Facts

On February 14, 2007, City issued a request for proposals for the provision of "a comprehensive and fully integrated red light photo enforcement program" (the "RFP"). The successful bidder would be required "to deploy red light camera equipment at designated intersections." The scope of mandated services includes "all hardware, software, installation, maintenance, operation, training, and all back-office processing of violations" Specifically, the RFP provides that the successful bidder would be responsible to "provide and install all equipment including, but not limited to, poles, cabinet and related operational equipment at the selected intersections" and for "all permit acquisition, site design, construction, installation and maintenance of the equipment."

The successful bidder, Redflex Traffic System, Inc. ("Redflex"), submitted its proposal to City on March 29, 2007. In its proposal, Redflex agrees to provide and install all equipment for the Photo Red Light Enforcement Program. Redflex identifies J.D. Baker Construction Company ("J.D. Baker") as the subcontractor who will "complete the construction aspects of the installation of the red light enforcement system equipment," noting that J.D. Baker's employees are affiliated with the Operating Engineers, Local Union No. 3.

In the RFP, City requested a cost proposal that would include "all equipment, services, training and maintenance." In its proposal, Redflex suggests a fee of \$5,000 to \$6,000 per month for each intersection approach depending on the intersection's complexity. The monthly fee is "all inclusive of all services, equipment and training."

On or about November 9, 2007, City and Redflex entered into an exclusive agreement (the "Agreement"). The Agreement provides that City is engaging the services of Redflex "to provide certain equipment, processes and back office services" so that City is able "to monitor, identify and enforce red light running violations." "Equipment" is defined in the Agreement to mean "any and all cameras, sensors, equipment, components, products, software and other tangible and intangible property relating to the Redflex Photo Red Light System(s), including but not limited to all camera systems, housings, radar units, sensors and poles."

The construction and installation work Redflex is required to perform for each designated intersection approach is set forth in paragraph 3.1 of the Agreement and in Exhibit B, "Construction and Installation Obligations." Under these provisions, Redflex is required to submit for City approval construction and installation specifications for each designated intersection; to install under City supervision all necessary equipment at each designated intersection; and to cause an electrical contractor to perform the necessary electrical work, including installation of all related equipment, detection sensors, poles, telecommunications equipment and wiring (the "Fixed Photo Red Light System").

The Agreement provides that City shall designate a "Police Project Manager" (the "Authorized Officer") to oversee the construction and installation, to implement the Photo Red Light Enforcement Program, to review the data collected by the Redflex System to determine whether a violation has occurred, and to authorize the issuance of citations. If the Authorized Officer determines that a citation shall be issued, he/she transmits such determination to Redflex whereupon Redflex prints and mails a citation to the vehicle's registered owner together with data and photo images documenting the alleged violation and any other documentation deemed necessary by the Authorized Officer for successful prosecution of the violation.

The initial term of the Agreement commences November 9, 2007, and continues for each intersection for a period of five years after the date Redflex completes the construction and installation of the Fixed Photo Red Light System at that intersection. City may extend the term for up to two additional two-year periods. Upon termination of the Agreement, Redflex is obligated to remove all equipment and materials, including poles, housings and cameras installed under the Agreement and to return the intersections to substantially the same condition they were in prior to the Agreement.

Under the Agreement, City is obligated to pay Redflex the sum of \$5,679 per month for each intersection with up to two contiguous lanes, and \$5,879 per month for each intersection with three or more contiguous lanes "as full remuneration for performing all of the services contemplated" in the Agreement. In the event City terminates the Agreement without cause, City is required to pay Redflex, as a cancellation fee, a pro rata share of the direct labor and material costs (not including equipment costs) incurred in installing the Fixed Photo Red Light System for each intersection approach installed prior to the effective date of termination (the "Reimbursable Costs"). The fee is calculated based on the percentage of months remaining in the Agreement multiplied by the value of the Reimbursable Costs, which are estimated in the Agreement to be approximately \$50,000 to \$80,000 per intersection approach.

Since execution of the Agreement, Redflex has entered into subcontracts with St. Francis Electric Inc. ("St. Francis"), Rader Excavating Inc. ("Rader"), and Pacific West Space Communications Inc. ("Pacific West") for the construction and installation work required in connection with the

Photo Red Light Enforcement Program. Redflex entered into three subcontracts in 2008 with St. Francis for the construction and installation of the Fixed Photo Red Light System at three intersections: Industrial Parkway and Huntwood Avenue at a cost of \$42,350; 2nd Street and B Street at a cost of \$39,088.85; and Winston Avenue and Hesperian Blvd. at a cost of \$43,647.25. Redflex entered into one subcontract in 2009 with Rader for the construction and installation of the Fixed Photo Red Light System at Hesperian Blvd. and A Street at a cost of \$20,873.59. Redflex entered into four subcontracts in 2009 with Pacific West for the construction and installation of the Fixed Photo Red Light System at four intersections: A Street and Highway 880 at a cost of \$55,552; Santa Clara Street and Jackson Street at a cost of \$32,365; Mission Blvd. and Industrial Parkway at a cost of \$27,931; and Industrial Parkway and Whipple Road at a cost of \$28,570.

While the construction and installation work may vary somewhat from intersection to intersection, the scope of work generally involves installing a foundation for the poles by removing existing concrete panels, placing prefabricated threaded bolts into the ground, pouring back the concrete panels, mounting the poles on the threaded anchor bolts, and restoring concrete damaged during the construction process. The camera unit housing is mounted directly on top of the installed pole. Flash units are attached to the pole with stainless straps. Conduit is buried in the roadway or sidewalk at depths required by City. A power pedestal is installed by mounting the power meter on a small foundation. Wire is pulled through the conduit to connect the power source with the equipment. Sensors are installed in holes cored into the asphalt in each lane of traffic and held in place with epoxy.

Discussion

Section 1771 generally requires the payment of prevailing wages to workers employed on public works. Labor Code section 1720 (a)(1)¹ generally defines “public works” to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ...”

The parties do not dispute that the work involved in installing the Fixed Photo Red Light System at the designated intersections entails “installation” performed under contract within the meaning of section 1720 (a)(1). “Installation” has consistently been defined in prior public works coverage determinations as work involving the bolting, securing or mounting of fixtures to realty. (See, e.g., PW 2008-034, *Installation of Smart Classroom Technology, Fresno Unified School District* (July 27, 2009) and cases referenced therein.) Here, the work falls within the definition of installation in that the poles are secured to the ground, the camera unit housing and flash units are mounted or otherwise attached to the pole, the conduit is buried under the roadway or sidewalk, the power meter is mounted on a foundation, and the sensors are embedded in the street or highway. Also, the work of removing, re-pouring and restoring the concrete entails “construction.”

There is also no dispute that City’s payments to Redflex under the Agreement are out of public funds. The question raised is whether they are payments for the construction and installation work. Both City and Redflex take the position that the Agreement is a contract for services, that the installation work is incidental to the main purpose of the Agreement, and, therefore, that the Agreement is not a contract for “public works” under *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 (“*McIntosh*”) and *International Brotherhood of Electrical Workers v. Board of Harbor*

¹ All statutory references are to the California Labor Code unless otherwise indicated.

Commissioners (1977) 69 Cal.App.3d 566 (“*IBEW*”). The facts of this case are distinguishable, however, and render *McIntosh* and *IBEW* inapplicable.

In *McIntosh*, the County of Riverside entered into a 30-year ground lease with Helicon, Inc., a non-profit corporation, for 5.65 acres of undeveloped land in which the County held a ground lease. Helicon was required to use the land for the construction and operation of a residential care facility for emotionally disturbed minors. In a memorandum of understanding incorporated into the sublease, the County agreed to place minors in the facility using AFDC-FC funds, which the court described as “undoubtedly public funds.” The AFDC-FC funds were to be used to pay for the minors’ care and treatment. (*McIntosh*, 14 Cal.App.4th at p. 1586.) The court found that the AFDC-FC payments were “payments for later services” and not for construction. The court explained:

By a memorandum of understanding incorporated in the sublease, the County “commits” to placing minors in the finished facility and using what are undisputedly public funds to pay for their care and treatment there However, that is payment for later services, not preliminary construction. We hold that paying for public services does not make incidental construction work done by a private provider of those services “public works” under section 1720, subdivision (a). The statute requires payment for “construction”; to take that as meaning “services” would violate plain, unambiguous language, which we cannot do.

(*Ibid.*)

In *IBEW*, the parties entered into an oil and gas lease requiring the production of oil by the Long Beach Oil Company and the payment of royalties to the City of Long Beach. The court found that the City’s only interest was in the payment of royalties. *McIntosh* correctly characterized the contract in *IBEW* as one for services, not for construction. The *McIntosh* court considered the construction to be merely incidental to the provision of those services. (*McIntosh*, 14 Cal.App.4th at p. 1586.)

The facts of this case show that the work involved in installing the poles, camera, flash units and other equipment comprising the Fixed Photo Red Light System is specifically required by the Agreement and is an essential component of the Photo Red Light Enforcement Program. Pursuant to paragraph 3.1 of the Agreement and Exhibit B to the Agreement, City is actively involved in the construction and installation of the Fixed Photo Red Light System at each of the designated intersection approaches. City is responsible for designating the intersections, approving the construction and installation specifications for each intersection, and overseeing the work. Once the Fixed Photo Red Light System at a designated intersection is operational, the images and evidence of violations are collected and provided electronically to City for review. If the Fixed Photo Red Light System were not installed at intersections designated by City, the Photo Red Light Enforcement Program would not exist nor could it function. Thus, the construction and installation work cannot be considered to be merely incidental to City’s interest in reducing red light violations.

Moreover, it is clear that the public funds paid to compensate Redflex are for *all* services required of Redflex or its subcontractors under the Agreement without distinction, including construction and installation of the Fixed Photo Red Light System. The conclusion that the monthly payments

to Redflex pay for the construction and installation is reinforced by the fact that the Agreement requires City, if it terminates the Agreement without cause, to pay a cancellation fee measured by the Reimbursable Costs, including direct labor costs, to install the Fixed Photo Red Light System at each intersection prorated based on the percentage of months remaining in the term of the Agreement. The clear implication is that a portion of each monthly payment made by City for the months that have transpired prior to termination is paying a pro rata share of the cost of the construction and installation. That the monthly payments may also pay for administrative services provided by Redflex under the Agreement is not relevant. The relevant consideration is that the public funds pay for the cost of the construction and installation work.

This determination is consistent with other recent cases in which the application of *McIntosh* was at issue.

PW 2008-025, *Construction of Animal Community Center, Humane Society Silicon Valley* (August 5, 2009), entailed the construction of an Animal Community Center by the Humane Society Silicon Valley ("HSSV"). The only public funds involved were paid by the City of Sunnyvale to HSSV pursuant to an Animal Services Agreement, which took effect after HSSV moved into and began operation of the new facility. The Agreement provides that the city will pay an initial \$1 million Capital Payment, and an annual "Host Fee" and "Live Animal Cost." The Agreement specifically states that the "Host Fee" and "Live Animal Cost" payments are for the provision of services for animals. The Director found that they therefore fell within the holding of *McIntosh* cited above as payment for on-going services rather than for construction. Consistent with prior public works determinations, the Capital Payment was determined to be "de minimis" in the context of the overall cost of the Project, and, thus, even if considered to be a public subsidy for construction, it did not render the Project paid for, in part, out of public funds.

In PW 2008-026, *King/Chavez Preparatory Academy, City of San Diego* (October 1, 2009), the City of San Diego constructed a new charter school with conduit bond financing. The bonds were repaid with rental income derived from public funds appropriated by the California Legislature under the Charter Schools Act of 1992 (Stats. 1992, ch. 781). None of these funds were paid to the developer or used to pay for construction of the school. Moreover, the legislative intent in providing such aid for charter schools was to assist them in providing learning opportunities to their pupils and not to pay for construction of the facilities. Thus, these payments likewise were found to be within the holding in *McIntosh* that payments for services, in this instance for the education of pupils, do not come within the provisions of section 1720, subdivision (a).

In PW 2010-008, *Southwest Community Health Center, Construction of Tenant Improvements at 3569 Round Hill Circle, County of Sonoma* (April 8, 2010), County grant funds were paid to purchase property for use as a primary care facility. The funds were paid under the same statutory provision at issue in *McIntosh*, Government Code section 26227 ("Section 26227"), which authorizes the payment of public funds to establish or to fund programs deemed by a county board of supervisors "to meet the social needs of the population of the county . . ." The Director found that the public funds were paid for the provision of public services under Section 26227, and, under *McIntosh*, were not payment for construction. Of particular relevance to the determination was the *McIntosh* court's discussion of Section 26227, in which the court noted that it is "arguably inconsistent" for counties to encourage private development of projects to provide public services of a type specified in that section and then to "subject such development to the disincentive of public works status." (*McIntosh*, supra, 14 Cal.App.4th at p. 1587.)

Finally, in PW 2009-005, *Solar Photovoltaic Distributed Generation Facility, West County Wastewater District* (April 21, 2010), and PW 2008-038, *Solar Photovoltaic Distributed Generation Facility, Santa Cruz School District* (April 21, 2010), public entities entered into Power Purchase Agreements with developers to purchase electricity generated by solar facilities to be built by the developers on the public entities' properties. Because the payments were specifically limited to the purchase of electrical power generated by each facility, and calculated based on the kilowatt-hours of electricity generated, it was determined that under *McIntosh* they were payments for the provision of the electric power and not for construction of the solar facility that generated the power.

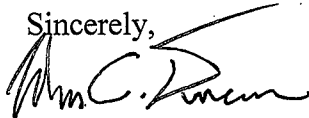
Thus, in each of these cases, the public funds paid only for public services. In contrast, here, City is paying a monthly fee for work and services that includes the cost of constructing and installing the Fixed Photo Red Light System at each intersection designated by City. That this cost is amortized over the term of the Agreement is shown by the manner in which the cancellation fee is calculated. Accordingly, the holding in *McIntosh* regarding payment for services does not apply.

Finally, City and Redflex argue that the construction and installation work is not public work because the equipment is owned by Redflex. There is nothing in the statutory scheme, however, that limits public work to the installation of equipment, materials, facilities or other works of improvement owned by the public entity. If the work meets the elements of "public works" under section 1720(a)(1), prevailing wage requirements apply.²

For the foregoing reasons, under the specific facts of this case, the construction and installation work performed in connection with the Photo Red Light Enforcement Program is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



John C. Duncan
Director

² See, e.g., PW 2005-018, *Installation and Removal of Temporary Fencing and Power Communications Facilities/Eastside High School, Antelope Valley Union High School District* (February 28, 2006), wherein the Director found that the installation and removal of temporary fencing and temporary power and communications facilities at a school construction site was covered work.