

DEPARTMENT OF INDUSTRIAL RELATIONS

**Katrina S. Hagen, Director**

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May 26, 2021

Carrie Bushman  
Cook Brown, LLP on behalf of  
V&A Consulting Engineers, Inc.  
2407 J Street, 2nd Floor  
Sacramento, California 95816

Re: Public Works Case No. 2018-007  
Temporary Sanitary Sewer Flow Monitoring Services  
City of Stockton

Dear Ms. Bushman:

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 California Labor Code section 1773.5<sup>1</sup> and California Code of Regulations, title 8, section 16001, subdivision (a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the placement of temporary flow-monitoring devices in sanitary sewers in the City of Stockton (City) is not public work and therefore not subject to prevailing wage requirements.

### Facts

The City seeks to place flow-monitoring devices at eleven locations for a period of between 8-12 weeks. The purpose of the placement of these devices is to measure sanitary sewer flows at the flow monitoring sites, estimate available sewer capacity, and analyze the amount of infiltration and inflow occurring near the flow monitoring sites. The City requested quotes for this work due on March 7, 2018. (City of Stockton, Municipal Utilities Department, Request for Quotation, Feb. 23, 2018.)

The work is to be paid for directly by the City from an allocation from the City's Municipal Utilities Department, Wastewater Connection Fee Fund. The flow-monitoring devices are intended to provide sewer flow data to be used in an analysis of the City's sewer system capacity which will be incorporated into a report (Report) prepared by the contractor performing the work. The City intends to use the Report to plan capital

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the California Labor Code and all subdivision references are to the subdivisions of section 1720.

improvement projects of the City's municipal sewer collection system including sewer pipeline upsizing, replacement, and rehabilitation.

The flow-monitoring devices are to be placed within the sewer system using one of four methods: (1) the flow meters will be installed on a temporary basis, typically with spring rings (21" diameter pipe); (2) scissor jack rings (21"- 42" diameter pipe); (3) hooked over ladder rungs (42" or greater diameter pipe); or if none of the preceding methods are feasible, (4) fastened to the wall of the manhole using concrete anchor screws. The method of installation is to be determined by the diameter of the point of access to the sanitary sewer system and the feasibility of the various methods of installation. The contractor performing the installation estimated that three site visits would be required in relation to placement of flow-monitoring devices: (1) installation and calibration, (2) calibration of the meters, and (3) removal of the flow-monitoring devices.

### **Discussion**

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Labor Code section 1720, subdivision (a)(1) 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. "Construction" also includes "work performed during the design and preconstruction phases of construction, including, but not limited to, inspection and land surveying work . . ." (Former § 1720, subd. (a)(1).)<sup>2</sup>

#### **A. The Work at Issue Does Not Constitute Preconstruction Work Under the Prior Version of the Statute that Is Applicable Here.**

The contractor is placing flow-monitoring devices in order to collect data concerning the capacity of the municipal infrastructure. The data is intended to be used in the Report and is solely for the purpose of assessing and documenting the current conditions of a portion of the City's sewer system in order that the City may determine the

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<sup>2</sup> During the pendency of this request, the Legislature passed Assembly Bill 1768 (2019) to amend subdivision (a)(1). Effective January 1, 2020, subdivision (a)(1) reads in relevant part:

For purposes of this paragraph, "construction" includes work performed during the design, *site assessment, feasibility study, and other* preconstruction phases of construction, including, but not limited to, inspection and land surveying work, *regardless of whether any further construction work is conducted*, and work performed during the postconstruction phases of construction, including, but not limited to, all cleanup work at the jobsite.

(Stats. 2019, ch. 719, § 1, italics added.) Because A.B. 1768 operates prospectively, it does not apply to this determination. (See *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840; and PW 2018-037, *Alturas Fire Department Parking Structure Feasibility – City of Alturas* (Oct. 11, 2020) (*City of Alturas*).)

nature and extent to which it undertakes such improvements to that system. The City intends to use the Report to plan future construction and rehabilitation projects of its municipal sewer collection system.

The placement of the flow-monitoring devices and the creation of the Report in this instance were not to be performed in proximity to any actually contemplated construction project.<sup>3</sup> Prior to the Assembly Bill 1768's amendment to the statute, work to prepare a study unrelated to any contemplated construction could not be characterized as work done during the "preconstruction" phase of construction.<sup>4</sup> (Former § 1720, subd. (a)(1).) The current version of section 1720, subdivision (a)(1), however, describes covered "construction" as "work performed during the design, *site assessment, feasibility study*, and other preconstruction phases of construction," potentially extending the reach of the prevailing wage law to the work performed in the creation of the Report here. (§ 1720, subd. (a)(1), italics added.)

#### **B. The Placement of Flow-Monitoring Devices Is Temporary and Does Not Constitute Installation.**

Installation is explicitly covered under section 1720, subdivision (a)(1). To the extent that flow-monitoring devices are fastened to the wall of the manhole using concrete anchor screws, such placement may constitute installation depending, in this instance, on the relative permanence of the placement of these devices.

"Installation" has been consistently defined in prior public works coverage determinations as work involving the bolting, securing, or mounting of fixtures to realty. (See, e.g., PW 2005-039, *Kiwi Substation - Orange County Water District* (April 25, 2007); PW 2007-005, *Erection and Removal of Portable Fencing System - Peninsula Camp Ground - Folsom Lake State Recreation Area* (June 26, 2007); PW 2005-041, *Pre-rinse Spray Valve Program (Phase II) California Urban Water Conservation Council* (May 11, 2006).) Further, "fixture" is defined in relevant part under Civil Code section 660 as "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; . . . ." (Civ. Code, § 660.)

In a recently issued determination, the Director of Industrial Relations found the temporary affixing of vinyl sheets on billboards did not constitute installation under section

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<sup>3</sup> While the Report may be the basis for future construction projects, the compilation of the data to be used in the Report and the creation of the Report itself, cannot be considered a "preconstruction phase of construction" as that term was understood and interpreted prior to the passage of Assembly Bill 1768.

<sup>4</sup> The Department's coverage determinations have found publicly funded preconstruction work to be covered work in instances where construction had been contemplated in relation to the preconstruction phases of construction. (See, e.g., PW 2002-002, *Survey Work - Construction of Veritas Elementary School - Manteca Unified School District* (July 19, 2002); PW 2007-005, *Erection and Removal of Portable Fencing System - Peninsula Camp Ground - Folsom Lake State Recreation Area* (June 26, 2007); and *City of Alturas*.)

1720, subdivision (a)(1). (PW 2015-015, *County-Sponsored Messages on Private Billboards - County of Kern* (Sept. 9, 2016) (*County of Kern*)). The large vinyl sheets printed with public messages were fastened in place with straps for a limited period of time and could be easily and cheaply removed “reflecting the intent of the parties not to make the vinyl prints a permanent part of the realty.” (*County of Kern, supra*, at p. 3.)

In the instant inquiry, the flow-monitoring devices are to be affixed to the wall of the manhole with concrete anchor screws where no other placement method is feasible. The use of screws in affixing the flow-monitoring devices is relevant but not dispositive. Both the method by which the device is attached and the degree to which the attachment is intended to be permanent must be examined when determining whether the placement constitutes installation. While the use of screws falls within the specifically defined methods that the Civil Code specifies in defining the characteristics of a “fixture,” the flow-monitoring devices are only placed at specified locations for a period of 8-12 weeks. This is an insufficient period of time to be characterized as permanent, and despite the use of fasteners in the placement of the flow-monitoring devices, the placement of the devices does not constitute installation. Relatedly, the primary methods for securing flow-monitoring devices specified by the City which do not employ fasteners could conceivably constitute installation under the Labor Code in the event that the devices were not scheduled to be removed, or were intended to remain in place for a prolonged or indeterminate period of time.

### **Conclusion**

For the foregoing reasons, the placement of temporary flow-monitoring devices in sanitary sewers in the City of Stockton is not public work and therefore not subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen  
Director of Industrial Relations