

DEPARTMENT OF INDUSTRIAL RELATIONS

Christine Baker, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

Tel: (510) 286-7087 Fax: (510) 622-3265



September 9, 2016

Michael F. Wright
Attorney at Law
10100 Santa Monica Boulevard, 23rd Floor
Los Angeles, CA 90067

Emily Watts Blenner
Office of the County Counsel
County of Kern
1115 Truxtun Avenue, 4th Floor
Bakersfield, CA 93301

Re: Public Works Case No. 2015-015
County-Sponsored Messages on Private Billboards
County of Kern

Dear Mr. Wright and Ms. Blenner:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced projects under California's prevailing wage laws and is made pursuant to California Labor Code section 1773.5¹ and California Code of Regulations, title 8, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the installation of vinyl prints carrying Kern County-sponsored messages on Lamar Advertising Company's (Lamar) billboards is not public work and therefore not subject to prevailing wage requirements.

Facts

This determination involves three Purchase Orders that Kern County issued to Lamar for work to be performed for different Kern County agencies. The scope of work for each Purchase Order is essentially the same and is summarized as follows: Lamar is to provide all labor, materials and equipment required to install and run outdoor billboard display/advertising of Kern County sponsored messages at the various designated locations for set display periods.

The Purchase Orders

More specifically, PO #1570247, in the amount of \$4,350, is for the Kern County Fire Department's illegal fireworks prevention campaign and is funded by the Kern County Firework Trust Fund. Purchase Order #1570563, in the amount of \$20,000, is for the Kern County Solid Waste Management Fund's illegal dumping-cover your load campaign and is funded by the Kern

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

County Solid Waste Enterprise Fund. Purchase Order #1570756, in the amount of \$15,000, is for the Kern County District Attorney's Office's insurance fraud campaign and is funded by a grant from the California Department of Insurance for insurance fraud prevention.

Two of the three Purchase Orders reference prevailing wage requirements. PO #1570247 contains the following notation: "prevailing wages quoted." PO#1570563 has the following provision: "Installation pricing in accordance with prevailing wage and DIR requirements." The main text of PO #1570756 makes no direct reference to prevailing wages.

Attached to PO #1570247 is a Kern County Purchase Order Terms and Conditions. Paragraph 2 of the Terms and Conditions states, "Any public works contract for materials and labor exceeding \$1,000 shall be subject to the prevailing wage resolution currently in effect by order of the Board of Supervisors. Copies of the prevailing scales are available for inspection in the office of the Purchasing Agent."² Paragraph 7 of the Terms and Conditions provides: "This Purchase Order, including any attachments hereto, contains the entire agreement between the County and Vendor relating to the goods and/or services identified herein" There is also an Appendix A to the Terms and Conditions that Myrth Boozer, Lamar's Vice President, signed. Above his signature is the following statement: " I (We) agree to supply or perform subject to the printed terms and conditions noted on this form titled Kern County Purchase Order Terms and Conditions and Appendix A to Kern County Purchase Order Terms and Conditions."

While there are PO Terms and Conditions attached to PO# 1570563 and PO# 1570756 containing prevailing wage language, Lamar did not sign the Appendix A for those Purchase Orders.

Under each Purchase Order, the respective Kern County agency is to provide the artwork for the messages to be displayed and Lamar is to supply finished and printed vinyl artwork that meets the display specifications for the contracted billboards. Lamar describes the production of the advertisements as follows: "The messages displayed on Lamar's signs are printed on polyvinyl chloride (PVC) sheets. Lamar's supplier, Circle Graphics (Circle) in Longmont, Colorado, fabricates the printed sheets." Once produced, the billboard vinyl prints are then shipped to Lamar, who then installs the vinyl prints onto its contracted billboards. (Letter from Lamar's counsel, Michael F Wright, dated July 22, 2015; see also Declaration of Myrth Boozer.)

The Process of Installing the Vinyl Prints over the Billboards

According to Lamar, the installation process is as follows: "Lamar vinyl sheets are only temporarily attached to its signs. They are attached by straps and are designed to be removed within a short time without damage to the sign or the sheet." Additionally, "The PVC sheets are made with vertical and horizontal sleeves. Fiberglass rods, called "gripper bars" are inserted into the sleeves. This allows the signs to be placed firmly against the sign structure. The gripper bars are strapped to the sign. Ratchet straps are used to pull the gripper bars tightly to the sign. To remove the sign, a Lamar crewman removes the vertical gripper bars, which allows the sign to be rolled down. The crewman detaches the upper gripper bar and lowers it from the sign structure. The PVC sheet is then removed from the sign and replaced with another. Attachment of each sign is designed to be temporary." (Letter from Lamar's counsel, Michael F Wright, dated July 22, 2015; see also Declaration of Myrth Boozer.)

² In response to the Department's inquiry, Kern County advised that there is no such resolution for outside vendors.

Kern County does not dispute the production of the billboard vinyl prints or the installation of these vinyl prints over the billboard face as described by Lamar.

Discussion

Under the Labor Code, “public works” is generally defined as construction, alteration, demolition, installation, or repair work that is done under contract and paid for in whole or in part out of public funds. (§ 1720, subd. (a)(1).) Workers employed on public works must be paid at least the applicable prevailing wage. (§ 1771.)

The above-described work relating to the production and installation of billboard advertisement is done under contract that is paid for out of public funds. The only issue presented is whether the work constitutes “installation” within the meaning of section 1720(a)(1).

Installation Generally Involves Bolting, Securing, or Mounting of Fixtures to Realty

“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 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 determining whether an article is a fixture, there are three tests: “(1) the manner of its annexation to the realty; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention with which the annexation is made.” (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 887.)

The Vinyl Prints are Only Temporarily Tied Down Over the Existing Billboards

Here, a vinyl print is what the actual advertisements are printed on. Once the prints are delivered to Lamar by Circle, Lamar’s installation crew unfolds and stretches the vinyl prints over Lamar’s billboard face. The vinyl prints are held in place by numerous ratchet straps that allow the graphic prints to be secured. The vinyl prints apparently can be easily removed from the billboards and, under the Purchase Orders, are to be removed at the end of their respective display period. There is no physical attachment of the vinyl prints to the realty by cement, plaster, nails, bolts, screws, or anything similar. Under the provisions of Civil Code section 660, affixation to realty could result only if these vinyl sheets are “permanently resting” on the realty or “permanently attached to what is thus permanent.” There is nothing here to indicate that these vinyl sheets are “permanently resting” on the realty or that they are permanently attached to what is permanent. The vinyl prints can be removed from the billboards with little cost and minor inconvenience. The straps used to secure or mount these vinyl prints are not permanently affixed to the billboards. The display period under each Purchase Order is limited in duration, thus reflecting the intent of the parties not to make the vinyl prints a permanent part of the realty. Therefore, the work called for in these Purchase Orders does not constitute “installation” under section 1720(a)(1).

Prior Coverage Determinations Finding Work Constituting “Installation”
Do Not Involve the Same Type of Work at Issue Here

Kern County contends that Lamar’s placement of billboard advertisements is “installation” because the billboards are installed into the ground and/or on buildings or other structures and are therefore mounted to the realty. In support of its assertion, Kern County cites the Department’s determinations in PW Case No. 2010-010, *Photo Red Light Enforcement Program – City of Hayward* (August 12, 2010) (*Redflex*) and PW Case No. 2011-009, *Service Authority for Freeway Emergencies (SAFE) - Installation, Repair and Maintenance of Freeway and Highway Emergency Call Boxes* (March 27, 2012) (*SAFE*). Those determinations, however, involved facts distinguishable from the facts in this case. In fact, those determinations actually support Lamar’s position.

In *SAFE*, the work at issue was found to constitute the installation, repair and maintenance of freeway and highway emergency call boxes in thirteen counties. Because the work done securing pedestals and poles for the callbox to the ground, wall or bridge, and mounting or otherwise attaching the callbox to the pedestals or poles involved “the bolting, securing or mounting of fixtures to realty,” the Department found the work constituted “installation” within the meaning of section 1720(a)(1).

Unlike the installation work in *SAFE*, the work contemplated in these Purchase Orders involve only the temporary installation of vinyl prints on existing billboards and do not involve extensive work such as permanently installing or securing billboards to the ground.

Redflex is likewise inapplicable because whether the work involved constituted “installation” under section 1720(a)(1) was not an issue in that determination. In *Redflex*, there was an agreement between the City and the contractor Redflex, in which Redflex was “to provide certain equipment, processes and back office services” so that City was able “to monitor, identify and enforce red light running violations.” Under the agreement, Redflex was required to construct and install a photo red light system at three intersections. The construction and installation work included “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 poles 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.” There was no question that the work constituted “installation” done under contract, and the parties agreed.

The dispute in *Redflex* was whether the payments from the City were for the construction and installation work under the agreement subject to the prevailing wage laws. The City and Redflex contended the payments were made under a services contract, that the installation work was incidental to the main purpose of the agreement, and, therefore, the agreement was not a contract for public works under the holdings of *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 and *International Brotherhood of Electrical Workers v. Board of Harbor Commissioner* (1977) 69 Cal. App.3d 566. Based on the facts presented, the Department determined that the work involved in installing the poles, camera, flashing units and other equipment was as an essential component of

the Fixed Red Light Enforcement Program and therefore could not be considered to be merely incidental to City's interest in reducing red light violations.

Here, unlike the comprehensive construction and installation of the various parts of the red light system, which was more permanent in nature, the vinyl prints are only temporarily attached to Lamar's existing billboards using straps and cannot be considered to be a "fixture" to realty unless more permanent methods of securing or mounting, such as using cement, plaster, nails, bolts or screws, are involved.

For the foregoing reasons, under the specific facts of this case, the work involved in installing vinyl prints carrying Kern County-sponsored messages on Lamar's existing billboards, as described above, is not public work and therefore is not subject to prevailing wage requirements.³ Given that conclusion, it is unnecessary to analyze the First Amendment issue raised by Lamar.

Sincerely,

A handwritten signature in cursive script that reads "Christine Baker".

Christine Baker
Director

³ This coverage determination offers no opinion as to whether Lamar is contractually bound to pay prevailing wages as indicated in PO#1570247 and PO#1570563.