

DEPARTMENT OF INDUSTRIAL RELATIONS

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Jessica Pirrone, Hearing Officer
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Re: Public Works Case No. 2018-018
Los Angeles Southwest College School of Behavioral and Social Sciences
HVAC Upgrade Commissioning Work
Los Angeles Community College District

Public Works Case No. 2018-031
East Los Angeles College Campus Student Center and Bookstore
Commissioning Work
Los Angeles Community College District

Dear Mr. Wien and Ms. Pirrone:

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 Labor Code section 1773.5¹ 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 commissioning work performed for the Los Angeles Southwest College's (LASWC) School of Behavioral and Social Sciences HVAC Upgrade project and the East Los Angeles College (ELAC) Campus Student Center and Bookstore project, both awarded by the Los Angeles Community College District (LACCD), is public work and therefore subject to prevailing wage requirements.

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

Facts²

A. Los Angeles Southwest College.

LACCD serves the City of Los Angeles, some neighboring cities, and certain unincorporated areas of Los Angeles County through nine college campuses. Established in 1967, LASWC is one of LACCD's public community colleges and is located in West Athens, an unincorporated area in Los Angeles County east of the City of Hawthorne, north of the City of Gardena, and south and west of the City of Los Angeles. LASWC's School of Behavioral and Social Sciences is housed in the Student Services Education Center, a large building near LASWC's Denker Avenue entrance.

B. LACCD Contract No. 33886 with Climatec.

Pursuant to its statutory authority, LACCD issued a Notice to Bidders to invite sealed bids for a project to upgrade the HVAC systems at the School of Behavioral and Social Sciences. After the close of bids, LACCD awarded Contract No. 33886 to Climatec, LLC to provide general construction services for LASWC's School of Behavioral and Social Sciences HVAC upgrade project. The project was funded by the Proposition A Community College Facilities Construction and Repair Bond Program, which was approved by voters in 2001 to provide \$1.245 billion in improvements to LACCD facilities.

Under Contract No. 33886, Climatec is to perform work for the repair and completion of upgrades to the HVAC system. More specifically, the contract documents describe the following tasks: (1) replacement of the existing Invensys variable air volume (VAV) controls to Honeywell controls; (2) reprogramming the new Honeywell controls; (3) performing testing, adjusting, and balancing (TAB) of the HVAC system; (4) participating in the commissioning process; and (5) providing training. Details regarding the TAB work and the commissioning process are spelled out in separate attachments to the contract.

TAB work entails "services and coordination required to deliver a completely balanced, tested and certified air and water system." The testing and balance services are performed after the air and water systems are completely installed and involve some level of cutting into insulation, ducts, and pipes to install test probes, making necessary adjustments to ensure the manufacturer's standards are met, and then closing up the probe holes with new materials identical to those removed.

Commissioning is described in the contract documents as "a quality focused process for enhancing the delivery of a project. The process focuses upon verifying and documenting that the facility and all of its systems and assemblies are planned, designed, installed, tested, operated and maintained to meet the Owner's Project Requirements."

² The parties agree that the question of whether commissioning work is subject to prevailing wages requirements is identical in both the LASWC and ELAC projects, and so the pertinent factual and legal issues with respect to coverage of the commissioning work are also identical. To avoid unnecessary repetition, the facts are drawn only from the LASWC HVAC Upgrade project.

The process of commissioning described in the contract documents is involved and extremely technical. In very general terms, commissioning is achieved through pre-functional testing, startup, functional performance testing, and calibration. One of the key objectives of commissioning for LACCD is to verify that the systems are installed in accordance with industry accepted standards and with LACCD's operational needs.

C. Declarations from Climatec and Local 11.

The request for a coverage determination arose from a request for review proceeding under section 1742. In that proceeding, the affected contractor Climatec, the enforcing agency Division of Labor Standards Enforcement (DLSE), and intervenor International Brotherhood of Electrical Workers Local 11 (Local 11) submitted briefs and accompanying declarations to the appointed hearing officer on the issue of whether commissioning work is covered by the prevailing wage law.

Climatec submitted a declaration from Operations Manager Steve Polinsky arguing against coverage of commissioning work. Polinsky's characterization of the work required under Contract No. 33886 departs somewhat from the language in the contract itself. Polinsky stated that Climatec won the bid to procure and install an energy management system at LASWC's School of Behavioral and Social Science for \$161,342. With respect to commissioning work, Climatec evaluated "overall HVAC operations and interoperability of related building systems to assure that intended results are achieved," configured the "computers and servers that will be used by the owner as their interface to the system," and verified that "all software sequences are operating as designed and that all connected points are reporting and annunciating properly on system graphics and dashboards." Polinsky also asserted that a Honeywell certificate was required to commission the installed Honeywell systems, and that any work performed by individuals without the certificate would void Honeywell's warranty.

Local 11 submitted a declaration from Senior Assistant Business Manager Richard Reed. Reed explained that Climatec's work on the HVAC upgrade project was to "commission an energy management system to control and monitor the HVAC equipment" and that an energy management system (in this case, the "Building Automation System" (BAS)) is a computer-aided electrical control system commonly used to monitor, measure, and control electrical building loads such as HVAC units, and sometimes lighting systems, across multiple locations. Reed described commissioning as the "process of setting up and calibrating BAS components that make up the system, including programming, tuning, and verifying the BAS is setup properly" and ensuring all electrical connections are correct. Reed further detailed Local 11's history as the collective bargaining representative for workers who perform commissioning work, and he noted that the Inside Wireman apprenticeship program sponsored by Local 11 provides training in the commissioning, tuning, and verification of energy management systems.

Polinsky responded with a supplemental declaration that clarified that the use of specially trained, highly skilled workers (but not necessarily workers with Honeywell certification) was actually the condition for the Honeywell warranty's validity. He indicated that Climatec workers did "nothing more than essentially plug [the system] in and begin programming." Further, Polinsky declared that in his decades of experience, he had never

seen commissioning work paid at prevailing wage rates, and that it was not customary in the industry for commissioning work to be classified as Inside Wireman work, particularly when, as with Climatec, the contractor is a factory-authorized dealer of the equipment.

Polinsky and Reed disagree on most points, but they agree on at least one thing: the workers who physically installed the system were paid prevailing wages for their work.

The Parties' Contentions

Climatec argues that commissioning is “computer programming” or “supervisory” work, and in its experience, commissioning has never been subject to prevailing wage requirements. Moreover, Climatec claims that the commissioning of Honeywell systems must be done by workers who have undergone Honeywell-specific training, and that Climatec typically only hires workers with a college degree in “a mechanical, electrical or computer science related field.” Finally, Climatec contends that commissioning is not within the scope of work for any published prevailing wage classifications.

DLSE and Local 11 disagree. Local 11 claims that commissioning work falls within the scope of work for the classification of Inside Wireman, and the industry practice is to pay prevailing wages for commissioning work, “even when the contractor is a factory-authorized vendor of proprietary equipment and the employees have received extensive training on the system.” Further, Local 11 argues that commissioning work is done “in the execution” of the contract. (§§ 1772.) DLSE’s main argument is that commissioning is a part of the “installation” work required under the contract. (§ 1720, subd. (a)(1).)

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) “Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” (§ 1772.) Section 1720, subdivision (a)(1) (hereafter section 1720(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. The work to install the upgrades to the HVAC system at LASWC’s School of Behavioral and Social Sciences is indisputably installation work done under contract and paid for out of public funds, as Climatec performed the work pursuant to a contract with LACCD, and LACCD used Proposition A bond proceeds to pay for the work.

The issues, which are closely related, are whether the commissioning work also constitutes “installation” for the purposes of section 1720(a)(1), or whether the commissioning work is done “in the execution of” the contract with LACCD, such that workers performing the commissioning work must be paid prevailing wages.

A. Installation under Section 1720(a)(1).

Senate Bill No. 975 (2001-2002 Reg. Sess.) (S.B. 975) added “installation” to section 1720(a)(1) as a type of “public work” subject to prevailing wage requirements, if done under contract and paid for out of public funds. The statute, however, left installation

undefined,³ and no published case has interpreted what installation means. S.B. 975's legislative history also lacks any detailed discussion as to what the Legislature intended the term installation to encompass, though the legislative bill analyses suggest that installation was added to codify the Department's coverage determinations. Those pre-S.B. 975 determinations found that installation work generally involving securing fixtures to real property constituted "construction" under section 1720(a)(1) and was also done in the execution of the overall public works construction contract under section 1772. (See, e.g., PW 99-034, *Valley View Elementary School, Pleasanton Unified School District – Installation of Signage by Marketshare, Inc.* (Sept. 29, 1999) (*Marketshare*)). After S.B. 975, the Department has consistently hewed to the interpretation that installation includes the "bolting, securing or mounting of fixtures to realty." (PW 2015-015, *County-Sponsored Messages on Private Billboards – County of Kern* (Sept. 9, 2016).)

B. Commissioning is the Final Phase of the Installation Process.

There is no disagreement that the physical installation of the energy management system constitutes "installation" under section 1720(a)(1). The dispute is whether the commissioning work, which entails programming, calibration, and verification that the energy management system is installed correctly, is also "installation." Because the Department's coverage determinations involving "installation" dealt with the installation of equipment that does not appear to have required commissioning or other "final" work, they are only marginally useful here. The definition distilled from coverage determinations that installation includes "bolting, securing or mounting of fixtures to realty" is also unhelpful, given that commissioning does not entail any of those things. The pre-S.B. 975 *Marketshare* coverage determination, however, provides limited guidance. The installation of the signs was done "as part of the construction of the elementary school" and was to be "performed as the buildings are completed." (*Marketshare, supra*, PW 99-034.) In other words, the public works contract was for the construction of the school, and the school was not considered complete until the installation of the signs was completed.

Contract No. 33886 was awarded to Climatec for the upgrade of the HVAC system, which, as Polinsky points out, included "the purchase and installation of an energy management system." All the work physically installing the system was done by workers of Climatec's subcontractors, while Climatec commissioned the energy management system after its installation. The energy management system, which controls the HVAC system and manages the building's energy use, is not fully operational until the system is commissioned. One of the key objectives of commissioning is to verify that the equipment and systems are installed in accordance with LACCD's operational needs. And the HVAC upgrades are not complete until the energy management system can communicate, manage, and properly control the HVAC system. LACCD expects, and its contract calls for, the delivery of a functional HVAC system, digitally controlled via the energy management system. Absent commissioning of the energy management system, installation of the HVAC system upgrades is *incomplete*. Climatec's commissioning is therefore a continuation of the physical installation of the upgrades and, in essence, is the

³ A subsequent amendment provided that installation "includes, but is not limited to the assembly and disassembly of freestanding and affixed modular office systems." (Stats. 2012, ch. 810, §1.) That definition is not relevant to the issues in this case.

last step. Given that commissioning is essentially the final phase of the installation process,⁴ Climatec's commissioning work under this specific factual scenario is properly considered installation for the purposes of the prevailing wage law. (§ 1720, subd. (a)(1).)

C. Commissioning is Done in the Execution of the Contract.

The issues of whether commissioning work is installation, and whether work is done in the execution of the contract, are similar, and closely intertwined. If work is so essential to the installation process such that it constitutes installation, then that work is also done "in the execution" of the contract for the installation. (§ 1772.) In determining whether certain types of work are done "in the execution," courts have looked to whether "certain functions are integral to the performance of a public works contract." (*Sheet Metal Workers' Internat. Assn., Local 104 v. Duncan* (2014) 229 Cal.App.4th 192, 205-206 (*Local 104*); see also *Williams v. SnSands Corp.* (2007) 156 Cal.App.4th 742, 753 ["integral part of the process of the public works project"]; *O. G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 444 ["integrated aspect of the 'flow' process of construction."]) As discussed above, commissioning verifies that the system is installed correctly and according to LACCD's operational needs. Because it is the final phase of installation and must be performed before the installation is deemed complete, the commissioning is an "integral part of the [installation] process" (*Local 104, supra*, 229 Cal.App.4th at p. 212.)⁵

Unlike offsite prefabrication of HVAC components (see *id.* at p. 214), commissioning is done at the site of the public work to ensure that installed systems perform according to design and in conformity with LACCD's operational needs under the contract. Commissioning is therefore more akin to final stage or post-completion "testing" that the Department has long found to constitute public work. (See PW 2002-029, *Installation, Testing and Calibration of Truck Scale Cells, City of Los Angeles - Hyperion Treatment Plant – Miron Electric, Inc./Mettler-Toledo* (Apr. 16, 2003) (*Truck Scale Cells*) ["Under longstanding Department precedent, 'testing' is part of construction under Section 1720(a)(1) as well as work done in the execution of a public work under Section 1772."]) As the commissioning here is also a form of testing and verification that the energy management system is installed correctly and operating properly, finding the commissioning work covered is in accord with the Department's determination in *Truck Scale Cells* that "testing" work is covered public work.

⁴ The concept – that the prevailing wage law extends to work not envisioned as construction or installation work in the traditional sense, but done as the final step to "complete" the public works project – is far from novel. In fact, the Legislature recognized that "work performed during the postconstruction phases of construction, *including, but not limited to*, all cleanup work at the jobsite" is public work. (§ 1720, subd. (a)(1), as amended by Stats. 2014, ch. 864, § 1, italics added.)

⁵ This conclusion is also consistent with the Department's pre-S.B. 975 coverage determinations on installation, which found that installation work was covered both as construction and because it was in the execution of a public works construction contract.

D. The Director's *Bedard Controls* Decision under Labor Code Section 1742 Also Supports the Conclusion Here.

Contrary to Polinsky's assertion that prevailing wages are never paid for commissioning work, DLSE has enforced prevailing wage requirements on this type of work for at least a decade, as reflected in *Bedard Controls, Inc.*, 09-0256-PWH (June 9, 2011), a prevailing wage enforcement decision issued under section 1742.⁶

In *Bedard Controls*, the affected subcontractor contended that commissioning work performed by one of its employees on a public works project was not subject to prevailing wage requirements. The employee's primary job duty was commissioning the HVAC system by "setting up and calibrating the sensors, air flow control boxes, air handlers and other components that comprise the system. [The employee] first connected each control box and air handler to the system's computerized central interface using proprietary software installed on a laptop computer." (*Ibid.*) After that, the employee calibrated the software system, confirmed that each device functioned as intended, and made necessary adjustments. All of the commissioning work was performed on site. Under the specific terms of the contract, the subcontractor was obligated to "[p]rovide and install a complete and operating direct digital control and energy management system." (*Ibid.*)

The Department reasoned that the contract called for the installation of a complete and functional HVAC system, and that without the commissioning work, the subcontractor could not have met its contractual obligations. The *Bedard Controls* decision concluded that the commissioning work was done in the execution of the contract and therefore covered, because the work was "*unquestionably necessary* to carry out and complete the terms of the subcontract." (*Id.*, italics added.)

Recognizing that the worker in *Bedard Controls* performed essentially the same commissioning work that is at issue here, Climatec attempts to distinguish *Bedard Controls*. Climatec's main contention is that there was no "clear delineation" as to when the worker performed commissioning work and when the worker performed installation work. Based on that bare, unsupported contention, Climatec posits that the Department "ruled that all the work performed by the worker was covered work." Climatec's arguments are misguided and find no support in the reasoning in the *Bedard Controls* decision. The Department found the commissioning work covered, because commissioning was necessary to carry out the terms of the contract to deliver a complete energy management system. Consequently, the commissioning work in *Bedard Controls* was done "in the execution" of the contract for public work. (§ 1772.) Though not precedential, the reasoning in *Bedard Controls* supports the conclusion that the commissioning work here is covered, particularly in light of the fact that commissioning is

⁶ After an investigation, DLSE may issue a civil wage and penalty assessment against a contractor for violations of the prevailing wage law. (§ 1741.) As Climatec did here, the contractor may request review of the assessment with the Director of Industrial Relations, who appoints a hearing officer to hold a hearing, and issues "a written decision affirming, modifying, or dismissing the assessment. (§ 1742.) The Department has not designated these enforcement decisions as precedential. (Gov. Code, § 11425.60.)

analogous to the testing work that the Department has previously determined to be covered by the prevailing wage law. (*Truck Scale Cells, supra*, PW 2002-029.)

E. Courts in Other States Have Come to Similar Conclusions.

Courts in Massachusetts,⁷ Pennsylvania,⁸ and Ohio⁹ have concluded that commissioning and other similar work is necessary for the completion of a public works project and is therefore covered by their respective prevailing wage schemes, each of which is considerably different from California's prevailing wage law. Yet the fact that they have come to the same conclusion – with respect to work necessary to ensure that systems have been properly installed on a public works project – is further support for the Department's conclusion that commissioning work under these specific facts is covered.

F. Climatec's Remaining Arguments are Unpersuasive.

Climatec's other arguments are unpersuasive. One of the key points Climatec initially made was that Honeywell's agreement requires it to employ only Honeywell-certified workers. The argument was abandoned in its most recent brief and supplemental declaration from Polinsky. The argument is also factually unsupported because the terms of the dealership agreement that Polinsky attached do not state that Climatec is at risk of voiding the Honeywell warranty if it uses workers without specific Honeywell training. After reviewing the dealership requirement, it is clear that the requirement is only that Climatec use specially trained, highly skilled workers.

⁷ The Appeals Court of Massachusetts held that HVAC technicians, who performed onsite commissioning by installing software and testing HVAC components to ensure that they operated properly, were employed "in the construction of public works" and were therefore entitled to prevailing wages. (*Niles v. Huntington Controls, Inc.* (Mass. App. Ct. 2017) 92 Mass.App.Ct. 15, 25.) Many of the systems used in public works projects, the court explained, "are tested by means of handheld computers and software applications as opposed to more traditional tools." (*Id.* at p. 24.) Despite the use of computers, commissioning is covered because the "construction work is incomplete unless the owner has the assurance that the system purchased actually works as designed." (*Id.* at p. 23.)

⁸ In *Butler Balancing Co., Inc. v. Department of Labor & Industry, Prevailing Wage Appeals Bd.* (Pa. Commw. Ct. 2001) 780 A.2d 840, the court held that TAB technicians who performed the "testing and regulation of the flow of fluids, air or water in the HVAC system installed by the mechanical contractor" were performing covered work. (*Id.* at p. 844.) Like the commissioning work here, "TAB work on HVAC systems is an integral part of building construction and necessary for project completion." (*Id.* at p. 846.)

⁹ The Court of Appeals of Ohio concluded that prevailing wages were required to be paid to "technicians" who "primarily utilize[d] a laptop computer and small hand tools" to install, commission, and calibrate digital electronic controls used in HVAC systems on a public works project. (*Ohio St. Assn. of United Assn. of Journeymen and Apprentices v. Johnson Controls, Inc.* (Ohio Ct. App. 1997) 123 Ohio App.3d 190, 198.)

In addition, whether the warranty is voided when a specific type of worker is used is irrelevant to whether the work is covered under the prevailing wage law. If private dealership agreements were allowed to dictate public works coverage, manufacturers and contractors could contractually require any number of certifications to install all types of equipment and materials used in public works projects to circumvent and “reduce the prevailing wage law to merely an advisory expression of the Legislature’s view.” (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 988.) The same is true for Climatec’s other argument that it typically only hires workers with college degrees in certain disciplines. Climatec’s hiring criteria for its own workers have no bearing on whether the work those workers perform is subject to prevailing wage requirements.

Further, whether work is within the scope of work of a published prevailing wage classification is not dispositive as to whether such work is subject to prevailing wage requirements. (*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 126.) Where no classification matches perfectly, a dispute as to the correct classification is resolved by the factfinder. (*Id.* at p. 129; § 1742, subd. (b).)

Conclusion

For the foregoing reasons, under section 1720, subdivision (a)(1) and section 1772, the commissioning work performed for the Los Angeles Southwest College’s School of Behavioral and Social Sciences HVAC Upgrade project and for the East Los Angeles College Campus Student Center and Bookstore project under these specific factual circumstances is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations