

DEPARTMENT OF INDUSTRIAL RELATIONS

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April 29, 2020

Ryan Buras

Deputy Director of Recovery Operations

California Governor's Office of Emergency Services

3650 Schriever Avenue

Mather, California 95655

Re: Public Works Case No. 2020-008
Camp Fire Tree Removal
California Department of Resources Recycling and Recovery

Dear Mr. Buras:

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 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 Camp Fire Tree Removal work awarded by the California Department of Resources Recycling and Recovery (CalRecycle) in partnership with the California Governor's Office of Emergency Services (Cal OES) is public work and therefore subject to prevailing wage requirements.

Facts

A. The Camp Fire and its Aftermath.

On November 8, 2018, the deadliest and most destructive wildfire in California history broke out near the community of Pulga in Butte County (Camp Fire). With tinder dry vegetation and Red Flag Warning conditions consisting of strong winds, low humidity and warm temperature, the wildfire quickly spread over 153,336 acres, across Concow, Town of Paradise, Magalia and the outskirts of east Chico. The area is no stranger to wildfires, as it has experienced at least 13 large wildfires² in the last 20 years. By the time

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

² Doe Mill Fire (1999), Bloomer Fire (1999), Bucks Fire (1999), Concow Fire (2000), Highway 70 Fire (2001), Poe Fire (2001), Skyway Fire (2002), Skyway Fire (2006), Honey Fire (2007), BTU Lightning Complex Fire (2008), Humboldt Fire (2008), Saddle Fire (2016), Ninety Nine Fire (2016) were all large wildfires that burned in the area, according to Risk Management Solutions, a catastrophic risk modeling company, which compiled CAL FIRE data to complete its research.

the Camp Fire was completely contained on November 25, 2018, it had caused 85 fatalities, destroyed 18,804 structures, and destroyed or damaged between 600,000 and 1,200,000 trees. The Camp Fire is estimated to have caused losses of \$16.5 billion.

B. FEMA Funding for the Demolition and Debris Removal Effort.

On November 28, 2018, Cal OES requested Federal Emergency Management Agency (FEMA) assistance for the removal of debris from eligible private properties. (44 C.F.R. § 206.224.) Cal OES stated in the request that it was in the public interest to remove contaminated debris “in order to protect and preserve property, eliminate an immediate threat to public health and safety, and to ensure the economic recovery of the affected communities” and further added that the State of California and affected local political subdivisions have the legal responsibility to carry out the debris removal. FEMA approved the funding request for removal of debris, which included items such as burned structures, remnants of homes, remnants of buildings with more than one wall standing, chimneys, trees, ash, unsupported walls, and concrete foundations. FEMA later clarified that its approval extended to the removal of trees that “posed an immediate threat to debris removal crews” and the public right-of-way, and acknowledged that the removal of such trees was “incidental to the mission to abate hazardous debris and ash.”

The State of California and the affected political subdivisions undertook the approved private property debris removal (PPDR) work to eliminate threats to public health and safety. Subsequently, the Town of Paradise and Butte County asked Cal OES to request approval and confirmation from FEMA for “additional items of work” under the PPDR program to include standing burnt trees that threaten roads. In its request to FEMA, Cal OES stated that the Town of Paradise and Butte County have a large number of fire-damaged trees that are in danger of falling onto public property and rights-of-way, posing an immediate danger to passersby and obstructing the delivery of essential public services such as law enforcement, fire, and emergency medical services to the affected communities. Cal OES further asserted that the fire-damaged trees create both an increased fire risk, because they are more prone to burn as fuel for wildfires, and a heightened risk to non-damaged trees, because fire-damaged trees are more vulnerable to invasive insect species, which in turn can spark an infestation among healthy trees.

FEMA approved the Cal OES request and confirmed that: “Removal and disposal of hazard trees on private property that pose an imminent threat of falling on the public ROW [right-of-way], or other public improved property, are eligible for PPDR assistance.” FEMA noted that fire-damaged trees meeting certain criteria are considered debris eligible for FEMA assistance, and later clarified that funding is available to remove eligible fire-damaged trees if they threaten private roads (known as “orphan roads”) that are (1) connected to two or more public roads; (2) primarily used as a ROW to a publicly owned property or facility; or (3) used as a ROW for waste collection services. According to Cal OES, orphan roads are a critical part of the local transportation system, and “they provide unrestricted access to all members of the public,” who use them on a regular basis.

Federal funding provided by FEMA as described above comprises 90 percent of the funding for the tree removal work. State funding provided under the California Disaster Assistance Act (CDAA) covers the remainder.

C. Camp Fire Tree Removal Scope of Work.

Cal OES states that up to 300,000 trees damaged by the Camp Fire are trees that need to be removed. Citing its mandate to coordinate assistance to local government and communities impacted by disasters to ensure their recovery, Cal OES tasked CalRecycle to manage the coordinated removal, transport, and disposition of fire-damaged hazard trees from private property in the Town of Paradise and Butte County. CalRecycle plans to award contracts for removal of fire-damaged hazard trees and related services. According to Cal OES, tree removal is usual work for the local agencies responsible for maintaining the roads. Consistent with the scope of FEMA's approval for the tree removal work, CalRecycle's contracts will cover the removal of trees that threaten public roads, public property, and certain orphan roads.

Cal OES indicates that the contracts will require contractors to perform "falling, delimiting, topping, removing, processing, and trucking" fire-damaged hazard trees, and follow environmental requirements to protect surface water, endangered species, and cultural resources. Contractors must also provide related support services such as dust control, installation of erosion control, and other environmental stewardship best management practices for fire-damaged hazard trees located on public, commercial, or private properties that "threaten public rights-of-way, publicly-owned property, or [are] near public structures (i.e., buildings, bicycle or walking trails, parks, schools, etc.)." Contractors will maintain roads and shoulders used as part of the tree removal project as needed. Contractors will prepare and provide daily, monthly, and quarterly summary reports of the tree removal status and operational activities. Cal OES adds that the tree removal "work is intended to preserve" the rights-of-way in a "safe, efficient and continuously usable condition" for the use of the public.

Discussion

A. Definitions of Public Works Under the Prevailing Wage Law.

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) Section 1720 contains several different definitions of "public works" under the prevailing wage law. (See § 1720, subds. (a)(1)-(a)(8), (e).) "Public works" is defined in one subdivision to mean construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds. (§ 1720, subd. (a)(1).) Another subdivision defines "public works" to also mean: "Tree removal work done in the execution of a project under paragraph (1)." (§ 1720, subd. (a)(8).)

Maintenance work is another type of public work, and the prevailing wage law expressly applies to "contracts let for maintenance work." (§ 1771; *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 795-796 (*Reliable Tree*).) Under California Code of Regulations, title 8, section 16000, "maintenance" under section 1771 includes:

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its

intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

...

(3) Landscape maintenance. See Public Contract Code Section 21002.

...

There is no dispute that the Camp Fire tree removal work is done under contract and paid for out of public funds. CalRecycle will be awarding two contracts for tree removal work – one for work in Butte County and the other for work specifically in the Town of Paradise. The work will be paid out of CDAA and FEMA funds. Thus, the issue is whether the tree removal work under these particular circumstances is the type of work covered under the prevailing wage law.

B. Contentions Advanced by Interested Parties.

A number of interested parties³ consisting of labor organizations, joint labor-management committees, and a construction contractor expressed their opinions as to why they believe the Camp Fire tree removal work is public work. Foundation for Fair Contracting (FFC), Northern California District Council of Laborers (NCDCL), and Sierra Mountain Construction, Inc. (SMCI) presented related arguments that the tree removal work is covered under both subdivisions (a)(1) and (a)(8), because the work is done to clear the way for reconstruction. Operating Engineers Local Union No. 3 (Local 3) agrees that the tree removal clears the way for development and rebuilding of public structures. Local 3, International Union of Operating Engineers, Local Union No. 12 (Local 12), and Southern California District Council of Laborers (SCDCL) also believe the tree removal is alteration work, but for a different reason. Tree removal will alter the land because land once populated with trees will be replaced with tree stumps.

Local 3, Local 12, SCDCL, and Center for Contract Compliance (CCC) all see the tree removal work as being maintenance, because wildfires have become routine and post-wildfire tree removal is accordingly also routine. They refer to the coverage determination in PW 2016-001, *Valley Fire Hazard Tree Mitigation and CAL FIRE Tree Removal Work – County of Lake and Department of Forestry and Fire Protection* (Feb. 5, 2016) (*Valley Fire*) as being distinguishable and no longer applicable, given the changed circumstances. SCDCL, CCC, Local 12 further contend that the work constitutes maintenance on the ground that tree removal involves “craft work.”

³ (See Cal. Code Regs., tit. 8, § 16000.)

SCDCL also makes reference to Assembly Bill No. 1066 (2017-2018 Reg. Sess.) as “a clear mandate to cover the tree removal work on the Project.”

Cal OES, the requester, does not announce its position on coverage of the tree removal work under the prevailing wage law.

C. Camp Fire Tree Removal Work is Routine and Recurring Work to Preserve the Roads for the Use of the Public.

Many of the interested parties point out that wildfires have become the “new abnormal.”⁴ Local 3 cites the “increasing regularity” of wildfires and argues that tree removal, which is inevitable following a wildfire, “has become more routine.” SCDCL shares that sentiment, maintaining that “in this age of climate change, wild fires are becoming a routine part of life in California, as is the aftermath of the debris removal and reconstruction.” Citing CAL FIRE statistics, Local 12 notes that the vast majority of California’s most destructive wildfires transpired within the last decade. CAL FIRE, in its 2019 Strategic Plan issued under Governor Gavin Newsom, noted that it “responds to nearly 6,000 wildland fires that burn on average over 260,000 acres each year.” Based on those facts, Local 3 and Local 12 insist that circumstances have undeniably changed since the *Valley Fire* determination such that removal of fire-damaged hazard trees is now a recurring matter. The fact that wildfires have become more routine, recurring, and usual casts serious doubt on the continuing vitality of *Valley Fire*’s conclusion that fire-damaged hazard tree removal in the aftermath of a wildfire is not maintenance.⁵ This is perhaps especially true in the Camp Fire burn area, which has sustained 13 large wildfires in the past 20 years.

In light of the reality that wildfires in California are a cyclical, recurring event, fire-damaged tree removal work, which inevitably follows such recurring wildfires, is subject to the prevailing wage law as maintenance when done for the “preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.” (Cal. Code Regs., tit. 8, § 16000.) Here, the publicly owned or operated facilities at issue are rights-of-way. “Public ways, as applied to ways by land, are

⁴ At a Camp Fire press conference, then Governor Edmund G. Brown, Jr. remarked that the recurrence of catastrophic wildfires “is the new abnormal, and this new abnormal will continue, certainly in the next 10, 15, 20 years.”

⁵ Assembly Bill No. 1066 (2017-2018 Reg. Sess.) was introduced by the Legislature to nullify the *Valley Fire* determination and resulted in the addition of subdivision (a)(8) to section 1720. (Stats. 2017, ch. 616, § 2.) The legislative history confirms that the author’s intent was to eliminate the “ambiguity in existing law” that allowed the result in *Valley Fire*. Given the extensive demolition and debris removal in response to the Camp Fire described above, subdivision (a)(8) is likely an alternate ground for coverage of the post-Camp Fire tree removal work to be performed in connection with the overall demolition and reconstruction effort.

usually termed ‘highways’ or ‘public roads,’ and are such ways as every citizen has a right to use.” (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1501.) A street, highway, or road is “a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel.” (Veh. Code, §§ 360, 590.) Aside from the unrestricted access by members of the general public, the roads are used for waste collection and the delivery of essential public services, including law enforcement, fire and rescue, emergency medical services, postal delivery, and transit for students and the mobility-impaired.

Cal OES described the fire-damaged trees as being more vulnerable to invasive insect species that can trigger an outbreak among healthy trees, and more susceptible to burn as fuel for future wildfires, which destroys public property. The Camp Fire tree removal work will mitigate these risks and also preserve the roads in a “safe, efficient and continuously usable condition” for public use. If the fire-damaged trees fell over, they would obstruct the ability of public agencies to deliver essential services and hinder the safe and efficient use by members of the public, which are the intended purposes for which the roads were designed. Fire-damaged trees also pose an immediate danger to passersby and other members of the public traversing the roads. Work to remove these fire-damaged trees is therefore maintenance as it falls within the definition. (Cal. Code Regs., tit. 8, § 16000.)

SCDCL, CCC, and Local 3 further add that the Camp Fire tree removal work is identical to the work found to constitute maintenance in tree removal contracts awarded by the California Department of Transportation. (*Reliable Tree, supra*, 200 Cal.App.4th at p. 798.) Cal OES acknowledges that “tree removal is usual work for agencies typically tasked with keeping the ROWs safe and in a continually usable condition.” In support of that assertion, CCC cites a Streets and Highways Code provision tasking counties with the responsibility to maintain their roads. (Sts. & Hy. Code, § 941.) A similar provision imposes a duty on cities to maintain city streets. (Sts. & Hy. Code, § 1806.) The maintenance cities and counties are required to perform include the “preservation and keeping of rights-of-way, and each type of roadway . . . planting . . . and other facility, in the safe and usable condition to which it has been improved or constructed” and “special or emergency maintenance or repair necessitated by accidents or by storms or other weather conditions, slides, settlements, or other unusual or unexpected damage to a roadway, structure, or facility.” (Sts. & Hy. Code, § 27, subs. (a), (c).)

Since local agencies are required to routinely remove trees to ensure the roads are not obstructed, the fact that the particular CalRecycle contracts here will be awarded in response to the Camp Fire does not change the routine nature of the work for the local agencies, because the “focus must be on the work in terms of the property being worked, not the terms of an individual contract.” (*Reliable Tree, supra*, 200 Cal.App.4th at p. 798.) Maintenance is not restricted to “long-term contracts, or contracts calling for repeated performance of the same work.” (*Ibid.*) In other words, maintenance work does not lose its routine, recurring, and usual nature, merely because suddenly more of the work needs to be done following a wildfire disaster.

D. Camp Fire Tree Removal Work is Craft Work Designed to Preserve the Roads for the Use of the Public.

Even if the tree removal is not considered routine, recurring and usual, there is another basis for finding the work to constitute maintenance. The relevant regulation also defines maintenance alternatively as “[c]arpentry, electrical, plumbing, glazing, [touchup painting,] and other craft work designed to preserve the publicly owned or publicly operated facility in a safe, efficient and continuously usable condition for which it was intended.” (Cal. Code Regs., tit. 8, § 16000.) SCDCL, CCC, and Local 12 each cite the “craft work” maintenance definition and argue that the Camp Fire tree removal work fits within that definition. As discussed above, tree removal work is designed to preserve the roads in a safe, efficient, and continually usable condition for their intended use by the public. The question is whether tree removal work can be categorized as “craft work,” a term not readily defined in the prevailing wage law or implementing regulations. A number of factors are relevant to this determination, as discussed in the following paragraphs.

Because “other craft work” follows a list of specifically enumerated examples of work, the term should usually be “limited to those items that are similar to those specifically listed.” (*Clark v. Superior Court* (2010) 50 Cal.4th 605, 614.) Absent any overriding considerations, craft work should be construed to embrace work similar to carpentry, electrical, plumbing, glazing, or touchup painting work. All those enumerated examples point to work that is performed by construction trades crafts and classifications for which the Department has issued prevailing wage determinations. If the Department has issued a prevailing wage determination for a craft that performs a particular type of work, that fact is a consideration in finding whether the work is craft work. In addition, as the enumerated types of work all require a contractor’s license⁶ from the Contractors’ State License Board, another factor that weighs in favor of finding work to be craft work is that the work requires a contractor’s license. (See Bus. & Prof. Code, §§ 7025, et seq.) Due to the fact that the listed types of work are highly-regulated,⁷ a high degree of regulation of the work at issue is also a factor to be considered.

Applying these criteria to the Camp Fire tree removal work, some of the key tree removal tasks described by Cal OES appear to be covered by several crafts for which the Department publishes prevailing wage rates. Some unions have adopted craft classifications covering many key aspects of tree removal work in their respective collective bargaining agreements, and prevailing wage determinations for some crafts are based on those agreements.⁸ A contractor’s license is required for tree removal work.

⁶ (See Cal. Code Regs., tit. 16, §§ 832.05 [carpentry requires C-5 license], 832.10 [electrical requires C-10 license], 832.26 [plumbing requires C-36 license]; 832.17 [glazing requires C-17 license]; 832.33 [painting requires C-33 license].)

⁷ (See, e.g., §§ 108, et seq. [electrician certification law].)

⁸ Local 12 claims that the Operating Engineer craft performs work with machinery such as “backhoes, excavators, dozers, hydraulic boom trucks, cranes and other hoisting and earthmoving equipment,” which are examples of equipment used in tree removal. CCC and SCDCL claim that “tree felling, delimiting, topping, removing, wood material

(Bus. & Prof. Code, § 7026.1, subd. (a)(4).) Moreover, tree removal work, which requires a certain level of training and skill,⁹ is governed by an extensive set of safety regulations specific to the industry. (Cal. Code Regs., tit. 8, §§ 3420, et seq.) The prevailing wage law also expressly enumerates tree removal work as a type of work subject to prevailing wage requirements. (§ 1720, subd. (a)(8).)

Under the specific factual circumstances here, the Camp Fire tree removal work is skilled “craft work.” Because the Camp Fire tree removal work is done, as Cal OES explains, to preserve the roads so that they “are in a safe, efficient and continuously usable condition” for use by the public, the work constitutes maintenance subject to the prevailing wage law. Concluding that the tree removal work is craft work maintenance under these facts is in accord with the principle that the prevailing wage law, as a minimum wage law, “is to be liberally construed.” (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950.)

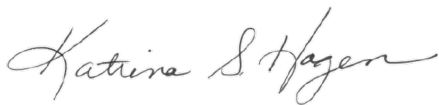
Given the conclusion that the Camp Fire tree removal work is public work as described above, it is unnecessary to address the other arguments raised.

Conclusion

For the foregoing reasons, the Camp Fire Tree Removal work awarded by the California Department of Resources Recycling and Recovery in partnership with the California Governor’s Office of Emergency Services is public work subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations

processing, transporting trees, dust control, installation of erosion control, and if authorized, stump and root removal” are work activities included within the Laborer craft.

⁹ Local 12 contends that tree removal work is skilled craft work, because of the amount of training required to acquire the skill to competently operate the machinery used in a tree removal project. Local 12 highlights the fact that the craft of Operating Engineer is an “apprenticeable craft” and it sponsors an apprenticeship program that provides hands-on training to operate tree removal equipment. The argument is supported by the statewide minimum industry training criteria established for apprenticeship programs training in the Operating Engineer craft, which require *at least* 6,000 on-the-job work hours in a four-year program. (See Cal. Code Regs., tit. 8, § 212.01.)