

DEPARTMENT OF INDUSTRIAL RELATIONS

Katrina S. Hagen, Director

Office of the Director

1515 Clay Street, 17th Floor

Oakland, CA 94612

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



October 4, 2021

Jesse Jimenez
Director of Field Operations
Foundation for Fair Contracting
3807 Pasadena Avenue, Suite 150
Sacramento, California 95821

Re: Public Works Case No. 2020-005
Street Sweeping Maintenance Services
City of Elk Grove

Dear Mr. Jimenez:

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 1773.5¹ 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 street sweeping maintenance services for the City of Elk Grove constitute public work and are therefore subject to prevailing wage requirements.

Facts

The City of Elk Grove (City) solicited bid proposals for its "Street Sweeping Maintenance Services Project (OM 2005)," which includes in its scope of work "street sweeping either by machine sweeping or hand sweeping all designated improved public streets including curb returns and median islands within the City of Elk Grove city limits on a uniform schedule including approximately 14,000 curb miles throughout the City." The sweeping is conducted in "residential areas, major corridors or arterial streets, commercial/industrial corridors, parking lots, and intersection sweeps at signalized intersections." Depending on the area, the frequency of the sweeping can be as often as once per week for major streets but is generally done on a once-per-month basis.

The contractor must employ regenerative air or vacuum sweepers to remove all loose debris and material along the sweeping path, including, but not limited to: sand, gravel, glass, nails, bottles, cans, leaves, silt, mud, litter, trash, small tree limbs, palm fronds, and other debris. Larger debris may be swept by a broom sweeper. Any debris

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

that is swept onto the sidewalk, driveway aprons, and access ramps must also be removed. The contractor must manually remove debris that cannot be swept mechanically. Unusually heavy debris that cannot be removed by “extra effort sweeping” must be immediately reported to the City. The contract includes other related services. The contractor must include “residential street leaf pickup” that occurs four times a year, typically in the months of December and January. The contractor must also be able to respond within an hour to “remove and eliminate a public safety hazard.”

The solicitation originally contained provisions requiring compliance with prevailing wage requirements. An addendum later removed all references to prevailing wage requirements, and the City’s response to bidders’ “requests for interpretation” expressly states that prevailing wage rates are not required for the contract. The City cites PW Case No. 2005-007, *City of Santa Clarita* (June 1, 2005/Feb. 7, 2006) (*Santa Clarita Street Sweeping*), which determined that street sweeping, under the specific facts of that particular case, does not constitute public works. In analyzing the impact of coverage under the prevailing wage law, a City staff report estimated that prevailing wage requirements would double the annual cost of the contract from \$400,000 to approximately \$800,000.

Contentions Advanced by Interested Parties

The Foundation for Fair Contracting (FFC), which made the request for this determination, argues that street sweeping is maintenance because it is routine, recurring, and usual work done for the preservation, protection, sanitation, and keeping of publicly-owned and operated facilities and for the protection and safety of the public as a whole. FFC raises a number of dangerous road conditions that are alleviated by routine street sweeping, and FFC’s overriding concern is that unsafe conditions for motorists and cyclists are created when roadway debris accumulates.

In support of its argument, FFC refers to four prior coverage determinations issued by the Department finding that street sweeping work is covered under the prevailing wage law, later discussed below. FFC also cites PW Case No. 2016-015, *Snow Removal and Snow Staking Services – County of El Dorado* (Jan. 31, 2017) (*El Dorado Snow Removal*) and argues that street sweeping is similar to snow removal and is not subject to the janitorial or custodial exceptions to the maintenance definition because street sweeping is neither janitorial nor custodial in nature.

The City of Elk Grove states that it determined prevailing wage requirements do not apply to street sweeping, based on the *Santa Clarita Street Sweeping* determination. The City makes no other additional argument and requests guidance from the Department to comply with its prevailing wage obligations, if any.

Discussion

All workers employed on public works projects must be paid at least the prevailing wage rates applicable to their work. (§ 1771.) The standard and most common definition of “public works” is 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).)

Maintenance work is also a 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*).) A regulation defines “maintenance” to include:

(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.

Exception:1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

Exception:2: Protection of the sort provided by guards, watchmen, or other security forces is excluded.

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

Exception: Landscape maintenance work by "sheltered workshops" is excluded.

(Cal. Code Regs., tit. 8, § 16000 (hereafter Regulation 16000).)

There is no dispute that the street sweeping maintenance services at issue are done under contract and paid for out of public funds. The issue is whether the street sweeping work constitutes maintenance under the prevailing wage law.

A. Prior Coverage Determinations and Relevant Case Law.

The Department has published a number of coverage determinations addressing the question of whether street sweeping is considered maintenance, which FFC cited in its request for coverage determination. In PW 1999-028, *County of San Diego Road Maintenance* (June 30, 1999) (*San Diego Road Maintenance*), the Department found work tasks that fell under the designation of “roadway cleaning” fit within Regulation 16000’s definition of maintenance. “The tasks involve cleaning roads with a street sweeper, manually picking garbage up off the roads with a hand picker and plastic bags, and removing sand, mudslides, vegetative debris deposited in the roads by weather-related phenomenon with a loader, grader and ramp trailer. These are routine, recurring and usual tasks intended to keep the roads in a safe and continually usable condition.” (*San Diego Road Maintenance, supra*, PW 1999-028.)

In PW 2000-021, *City of Santee/California Street Maintenance Street Sweeping* (Aug. 11, 2000) (*Santee Street Sweeping*), the Department again reasoned that street sweeping “done with standard heavy-duty mechanical brush and broom-type street sweeping equipment, as necessary, to clean the designated areas of all paper, wet leaves, dirt, rocks and other debris” was considered maintenance because the “cleanliness of the streets is a necessary function of keeping them in a safe and continually usable condition.” (*Santee Street Sweeping, supra*, PW 2000-021.) This conclusion – on a different but substantially similar City of Santee street sweeping contract – was reaffirmed two years later. (See PW 2001-061, *City Street Sweeping* (Mar. 7, 2002).) The Department relied on the *Santee Street Sweeping* coverage determination to once again conclude that another contract for street sweeping for the City of Rohnert Park constituted maintenance. (PW 2002-067, *City of Rohnert Park-Street Sweeping* (Apr. 16, 2003).)

A mere two years later, the Department departed from all four of the above street sweeping determinations. Instead, the Department then decided that street sweeping for aesthetic or environmental reasons does not serve to maintain the city streets in “good order or condition,” does not keep the streets from “harm or damage,” does not “shield from injury, danger or loss, nor does it constitute guarding or defending.” (*Santa Clarita Street Sweeping, supra*, PW 2005-027.) The City relies on *Santa Clarita Street Sweeping*.

In the more than 15 years since the *Santa Clarita Street Sweeping* determination, the Department and the Court of Appeal have continued to issue guidance on the definition of maintenance that has helped flesh out the law.² For instance, in PW 2005-028, *Self-Generated Waste Program and Highway Spill Program – California Department of Transportation* (May 17, 2006) (*Self-Generated Waste*), the Department concluded that routine work to “remove hazardous liquid waste from floor sumps, hydraulic hoist pits and wash rack clarifiers” for Department of Transportation (Caltrans) facilities was considered maintenance. “Failure to clean these facilities in a timely fashion would impede maintenance operations, violate Caltrans storm water permit and create safety concerns for Caltrans maintenance workers.” (*Self-Generated Waste, supra*, PW 2005-028.) In another determination involving Caltrans, the Department determined that homeless encampment debris removal constituted maintenance “because the debris poses a health and safety threat to both Caltrans workers and the motoring public,” and “unlike scattered roadside litter, the large volume of debris concentrated at a homeless site can move into and obstruct the roadways, constituting a direct impediment to the motoring public.” (PW 2009-008, *Agreement No. 07A2407 - Homeless Sites Debris Removal and Disposal – California Department of Transportation* (June 5, 2009) (*Homeless Sites Debris Removal*).) Consequently, the debris removal work at homeless encampment sites that

² In a case that actually predated *Santa Clarita Street Sweeping* by a few months, the Court of Appeal held that “placing 13,480 tons of earth fill and 400 tons of class 2 aggregate base” on a levee to maintain the levee in a condition to withstand flooding was considered maintenance and subject to prevailing wage requirements. (*Reclamation Dist. No. 684 v. Department of Industrial Relations* (2005) 125 Cal.App.4th 1000, 1003.) *Santa Clarita Street Sweeping*, however, did not discuss or cite this published appellate opinion.

were located next to state highways is “necessary to keep the state highway system in a safe, and continually usable condition.” (*Ibid.*)

With respect to another Caltrans contract, the Court of Appeal held that “brush removal, tree trimming and tree removal” work on state-owned highway rights-of-way performed by a private contractor constituted maintenance. (*Reliable Tree, supra*, 200 Cal.App.4th at p. 789.) Because Caltrans was responsible for “maintaining thousands of miles of paved roads and highways,” Caltrans was “in effect sharing its statutory responsibility” when it decided to hire an outside contractor to do this work. (*Reliable Tree, supra*, 200 Cal.App.4th at p. 796.) Although the *Reliable Tree* court did not delve into the specifics of why tree removal fit Regulation 16000’s definition of maintenance, implicit in the court’s conclusion is that the recurring need to trim or remove trees ensures that branches, leaves, or the trees themselves do not fall into or otherwise obstruct the state highway. In that sense, the work was done “for the preservation, protection and keeping” of the state highways “in a safe and continually usable condition” for open use by the public. (Regulation 16000; see also Veh. Code, § 360.)

Embracing the *Reliable Tree* court’s less rigid interpretation of maintenance, the Department determined that standalone testing and inspection of fire sprinkler and fire alarm systems qualified as maintenance.³ The Department then found that work removing snow from streets and parking lots is covered as maintenance, reversing a 22-year-old determination that snow removal from roadways and parking lots was merely custodial work. (*El Dorado Snow Removal, supra*, PW 2016-015.) And very recently, the Department has found maintenance to include routine tree removal and disposal and lead dust removal work.⁴ This evolution of the law on maintenance guides the Department’s analysis of the work at issue here.

B. Street Sweeping is Routine and Recurring Work that Keeps Public Streets and Facilities in a Safe and Continually Usable Condition for Public Use.

Under the contracts, the City requires once-a-week sweeping on some arterial (i.e. major) streets, twice-a-month on other arterial streets, and once-a-month sweeping on all other streets and parking lots. Four times a year, the contractor must also pick up leaves from residential streets. Like the tree removal work in *Reliable Tree*, the street sweeping maintenance services described here are indisputably “routine, recurring and usual.” The issue is whether such work preserves, protects, and keeps public streets and facilities in a safe and continually usable condition.

³ PW 2015-012, *Sprinkler Inspection, Testing, and Maintenance Work - City of Santa Rosa* (Oct. 30, 2015); PW 2015-007, *Stand-Alone Testing and Inspection of Fire Alarm Systems - California Department of Corrections and Rehabilitation* (June 26, 2015); PW 2019-021, *Napa State Hospital Fire Alarm and Fire Pump Testing Services - Department of State Hospitals* (May 20, 2020).

⁴ PW 2018-030, *Salinas Fairways – Tree Removal – City of Salinas* (July 29, 2021); PW 2019-022, *Gun Range Lead Dust Removal Work – City of Chino* (Aug. 30, 2021).

FFC contends that one of the most significant benefits street sweeping provides is a safe public space that can be used by motorists and bicyclists. Public entities have an interest in maintaining streets and ensuring they are usable and safe for public use. Street sweeping “lessens the opportunity of skids and collisions” by providing a clear view of the streets. Roadway debris could “cause pedestrians, runners, and cyclists to swerve into the roadway.” Although the Department notes that generally pedestrians or runners would not be on the roadway in the first place, accumulated debris does drift from the roadway onto the sidewalk and is sometimes swept from the roadway onto the sidewalk, which the contractor must then remove.

There is merit to FFC’s overall argument regarding clean streets. When a street is clean, drivers are more likely to identify potholes and safely maneuver around them. Street sweeping removes sharp objects, such as nails, screws, and glass, which can puncture tires. Clean curbs and streets provide safety benefits for vehicles in myriad situations. Larger debris is not only unsightly, but when it accumulates around and obscures the curb, drivers and others who use the road have a more difficult time judging the distance to the curb. Bicyclists, motorcyclists, and riders of motorized scooters also benefit from clean streets, perhaps more so than drivers of automobiles, even though they are all subject to the same rules of the road. (See Veh. Code, §§ 21200, 21221.)⁵ A small piece of debris has a far greater impact on bicycles and motorized scooters than on an automobile, as even small debris can cause them to lose their balance or swerve into traffic. Because bicycles and motorized scooters operate at a slower speed and may enjoy exclusive use of lanes close to the curb, they more heavily depend on a curb clear of debris for their safe operation. The safety benefits described above, though not gleaned from any formal study, appear to be reasonable, commonsense effects of streets free of debris. One can imagine streets that are never swept imposing a significant hurdle to the free flow of traffic.

Aside from the safety benefits, street sweeping helps preserve and protect the asphalt on the road by keeping debris off the curb lines where moisture accumulates. Heavily soiled areas with leaves and other debris draw moisture, and if left undisturbed, eventually cause deterioration of the asphalt, leading to cracks and potholes. While road debris probably only has an incremental impact on asphalt deterioration – wear and tear from heavy traffic and seasonal conditions likely are the key contributing factors – street sweeping plays some role in slowing deterioration of the roads.

Like Caltrans, the City has a general statutory obligation to maintain its streets and roadways. (See Sts. & Hy. Code, § 1800 et seq.) If Caltrans-awarded contracts to trim and remove trees satisfied its mandate to maintain state highways (*Reliable Tree, supra*, 200 Cal.App.4th at p. 796), it is hard to envision street sweeping not being part of the City’s duties to maintain its streets. As leaves, branches, and trees may obstruct the Caltrans-maintained state highway, debris such as sand, gravel, glass, nails, bottles, cans, leaves, silt, mud, litter, trash, small tree limbs, and palm fronds on City streets that

⁵ Motorized scooters may not operate at all on sidewalks and must share the road with automobiles. (Veh. Code, § 21235, subd. (g).) Bicyclists in some parts of the state must also share the road as their operation on sidewalks is restricted. (See, e.g., Sac. County Code, ch. 10.2, § 10.12.010.)

are not swept likewise obstruct the roadway and pose a danger to members of the public that use City streets. Furthermore, because snow removal qualifies as maintenance of streets (*El Dorado Snow Removal*, supra, PW 2016-015), street sweeping should be no different.⁶ In fact, at least one statute refers to both street sweeping and snow removal as *maintenance* of public streets.⁷ As in the *Self-Generated Waste* determination, accumulated debris on streets would “create safety concerns for [City] maintenance workers” and the general public.

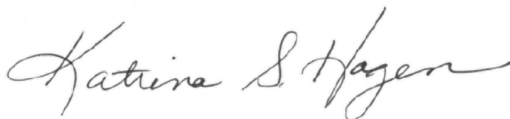
While *Santa Clarita Street Sweeping* noted that public health concerns do not serve as a basis for finding work to constitute maintenance, in *Homeless Sites Debris Removal*, the Department cited public health concerns associated with bio-waste, broken glass, hypodermic needles, decaying trash, and breeding vermin in accumulated garbage in finding that removal of those items from homeless encampments constitutes maintenance. Many similar types of debris accumulate along curbs, and unless cleaned and swept on a recurring basis, pose a similar safety risk to bicyclists, motorists, and pedestrians, thereby suggesting that street sweeping of the type here also qualifies as maintenance. Streets were designed to be traversed without obstruction from debris and can be used safely only in the absence of such debris. In short, given the additional guidance from the *Reliable Tree* court and the intervening coverage determinations since *Santa Clarita Street Sweeping*, the routine street sweeping work done for the City here is properly considered maintenance.

Conclusion

For the foregoing reasons, the street sweeping maintenance services for the City of Elk Grove constitute public work and are therefore subject to prevailing wage requirements.

I hope this determination satisfactorily answers your inquiry.

Sincerely,



Katrina S. Hagen
Director of Industrial Relations

⁶ “Although snow removal may not be considered precisely the same as street sweeping, it is clearly the same general type of service.” (65 Ops.Cal.Atty.Gen 176 (1982).)

⁷ A county service area is authorized to provide governmental services such as: the “acquisition, construction, improvement, and *maintenance, including, but not limited to, street sweeping and snow removal, of public streets*, roads, bridges, highways, rights-of-way, easements, and any incidental works.” (Gov. Code, § 25213, subd. (i), italics added [County Service Area Law].)