STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2011-028

AMERICAN TRAFFIC SOLUTIONS
AXSIS RED LIGHT CAMERA ENFORCEMENT SYSTEMS
CITY OF SOUTH SAN FRANCISCO

I. INTRODUCTION

On January 31, 2012, the Director of the Department of Industrial Relations (Department) issued a public works coverage determination (Determination) in the above-referenced matter finding that the installation and maintenance work performed in connection with the American Traffic Solutions' (ATS) Axsis Red Light Camera Enforcement Systems (Camera Systems) in the City of South San Francisco (City) is public work subject to prevailing wage requirements.

On February 29, 2012, ATS timely filed a notice of appeal of the Determination pursuant to section 16002.5 of title 8 of the California Code of Regulations (Appeal). All interested parties were given an opportunity to provide position statements concerning the Appeal. None were received.

The arguments submitted by ATS have been carefully considered. For the reasons set forth below and in the Determination, which is incorporated herein, the Appeal is denied and the Determination affirmed.

II. DISCUSSION

A. The Determination Correctly Found That Installation Of The Axsis Red Light Camera Enforcement System Is Public Work Subject To Prevailing Wage Requirements.

ATS argues on appeal, as it has throughout the administrative proceedings, that the installation of the Camera Systems is merely incidental to the provision of services and

that public funds are paying only for other services provided by ATS under the contract. The undisputed facts show otherwise.

ATS bases its contentions on selective citations to provisions in the contract, the Professional Services Agreement (Agreement), and a mistaken reliance on *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 (*McIntosh*) and PW 2008-025, *Construction of Animal Community Center, Humane Society Silicon Valley* (August 5, 2009) (*Humane Society Silicon Valley*).

It is true, as ATS argues, that City is paying for services in addition to the installation of the camera equipment. It is equally clear, however, that installation of the equipment is not "incidental" to these services. To the contrary, it is essential to the purpose for which City entered into the Agreement, that is, "to use [the Camera Systems] to monitor red light violations ..." City cannot *use* the red light camera enforcement system to monitor red light violations unless and until the cameras and related equipment are installed by ATS. The equipment is the heart of the system.

Moreover, the Agreement clearly states that City is paying for the installation of the equipment. The fees paid by City pay for "*all* equipment, services, and maintenance." (Agreement, para. 6, p. 2; italics added.) One of the services required by the Agreement for which City is paying is installation of the camera equipment. (Agreement, Exhibit A, ATS Scope of Work, section 1.2.16.) The Service Fee Schedule cited by ATS includes as cost elements the red light camera system for monitoring front and rear images and a digital video system for monitoring one direction of travel. By the express terms of the Agreement, this is equipment for which City is paying. City is not buying the equipment; it is paying for its installation and use.

These facts distinguish this case from *McIntosh* and *Humane Society Silicon Valley*. In *McIntosh*, the ground lease required that the lessee construct and operate a residential care facility for emotionally disturbed minors. However, as the court found, the *only* public funds in the project were AFDC-FC funds specifically earmarked as payment for care and treatment services to be provided to the minors. Hence, the court held that the public funds were payment for later services, not construction.

Likewise, in *Humane Society Silicon Valley*, two possible sources of public funds, an annual Host Fee and payments for Live Animal costs, were specifically earmarked for the

provision of services to animals housed in the facility. A third source of funds, a Capital Payment, which the Director found arguably rendered the construction paid for in part out of public funds, was determined to be "de minimus" under Labor Code[1] section 1720, subdivision (c)(3). Thus, even assuming that the Capital Payment was payment for construction, construction of the Animal Shelter nevertheless was exempt from prevailing wage requirements.

In this case, by contrast, a plain reading of the Agreement confirms that City is paying for all equipment and services, which includes Camera Systems installed at designated intersections. Thus, the installation constitutes public work subject to prevailing wage requirements because it is paid for in whole or in part out of public funds. (§ 1720(a)(1).)

B. The Determination Correctly Found That Maintenance Of The Camera Systems Is Public Work Subject to Prevailing Wage Requirements

The Agreement requires ATS to maintain the camera equipment. It is not disputed that City is paying for this maintenance work out of public funds. ATS nevertheless argues on appeal that the Agreement is not a "contract let for maintenance work" under section 1771 because it is "incidental" to the operation of City's red light camera enforcement system and is not performed on a publicly owned or operated facility pursuant to title 8, California Code of Regulations, section 16000 (Section 16000).

ATS' argument that the maintenance work is incidental to the "true purpose" of the Agreement fails for the reasons stated above. City has entered into the Agreement for the purpose of using the Camera Systems to reduce the incidence of red light traffic violations. For City to use the Camera Systems, the cameras must, as the Agreement requires, be installed. Moreover, to be continuously operational, the cameras and related equipment must be regularly maintained, which the Agreement also requires. As ATS acknowledges, "ATS must perform routine maintenance to its cameras and related equipment in order to carry out the objectives of the Agreement." (Appeal, p. 6.)

Equally without merit is ATS' contention that the maintenance work is not being performed on a publicly operated facility. "Facility" is defined in the Merriam-Webster on-line dictionary in relevant part as "something (as a hospital) that is built, installed or

[1] All further statutory references are to the California Labor Code unless otherwise indicated.

established to serve a particular purpose." It is undisputed that the Camera Systems are installed to serve a particular purpose, namely, to enforce red light traffic violations. It is equally clear that the law requires that the Camera Systems be operated by City. In fact, Vehicle Code (VC) section 21455.5 (c) provides that *only* a governmental agency, such as City, in cooperation with a law enforcement agency, may operate an automated traffic enforcement system. The statute also provides that certain functions relating to the operation of the system may be contracted out; however, this may be done only if the governmental agency "maintains overall control and supervision of the system." (VC § 21455.5 (d).) As the court in *Leonte v. ACS State and Local Solutions, Inc.* ((2004) 123 Cal.App.4th 521 concluded in construing an earlier version of VC section 21455.5, by retaining "the right to oversee and control the functioning of the [automated traffic enforcement] system" (which City must do as a matter of law), the governmental agency "thereby ultimately [is] the system operator." (*Id.* at p. 527.)

In short, the maintenance work performed on the Camera Systems is performed on a publicly operated facility, is paid for out of public funds and, therefore, is subject to prevailing wage requirements.

As ATS argues, the Department has interpreted the scope of section 1771 in certain cases to be limited by Section 16000's definition of "maintenance." In the cases cited, however, limiting section 1771 to maintenance work solely performed on "publicly owned or publicly operated facilities" would not have changed the result. In PW 2008-038, *Solar Photovoltaic Distributed Generation Facility, Santa Cruz School District* (April 21, 2010) and PW 2009-005, *Solar Photovoltaic Distributed Generation Facility, West County Waste Water District* (April 21, 2010), the maintenance work was paid for entirely by private funds and the Department determined that there either were no public funds or de minimus public funds that paid for construction. Thus, the projects were not public works. In PW 2004-013, *Dry Creek Joint Elementary School District* (December 16, 2005), the work was found to be covered under section 1720, subdivision (a)(1). In PW 2009-008, *Agreement No. 07A2407 - Homeless Sites Debris Removal and Disposal - California Department of Transportation* (June 5, 2009), the work was determined to fall within the regulatory definition of maintenance in Section 16000. Finally, in PW 2005-026, *Tree Removal Project, County of San Bernardino Fire Department* (November 18,

2005), the Department found that a one-time tree-removal project on private property did not constitute "maintenance."

The maintenance work in this case falls within Section 16000's definition of "maintenance." Section 16000 defines maintenance in relevant part 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.

Although an expansive interpretation of the regulatory definition of maintenance in Section 16000 is not necessary for the reasons stated *supra*, the definition begins with the word "includes," which, as the Court held in *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 639 "connotes enlargement, not limitation." A recent court of appeal decision suggests that a broader construction of section 1771 may be appropriate, especially given the plain language of the statute and the general rule that prevailing wage statutes are to be liberally construed. (*See*, e.g., *McIntosh*, *supra*, at p. 1589.)

In *Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 758, the court held that work done for the California Department of Transportation that included tree pruning and removal of diseased trees along state highways was covered maintenance work under section 1771. In reaching its decision, the court noted that an agency's interpretation of a statute may be "helpful," nevertheless, "[i]n the end ... the court must ... independently judge the text of the statute." (Id. at p. 794; case cite and quotes omitted.) The court confirmed that, as amended in 1974, section 1771 expressly brings maintenance work within the general definition of public works. (Id. at p. 796.) While finding Section 16000 to be "long-standing," and, therefore, entitled to "some deference," the court concluded that the "underlying" consideration in interpreting the statute is "the policy of

liberally construing the scope of the Prevailing Wage Law." (*Id.* at p. 797; citations omitted.)

On the facts of this case, the routine maintenance work clearly falls within section 1771 as defined by Section 16000. Thus, it is not necessary to address the question whether the work would be covered under section 1771 if it did not fall within the regulatory definition.

III. CONCLUSION

The Determination correctly found that installation of the ATS Camera Systems at intersections in the City of South San Francisco and maintenance work performed on the Camera Systems is public work subject to prevailing wage requirements. For the reasons set forth in the Determination and in this Decision, the appeal is denied and the Determination affirmed.

This Decision constitutes the final administrative action in this matter.

Dated: 8/16/2012

Christine Baker, Director