

## **Appellate Court Applies Prevailing Wage Laws to Landscape Maintenance Work on Government-Owned Property**

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Spring 2012 by [Benjamin Ehrhart](#)

California's prevailing wage laws generally require that persons employed on public works receive "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed." The prevailing wage laws are in place to ensure minimum labor standards for workers and promote an equal playing field among contractors. "Public works" includes "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds." Further, prevailing wage laws are applicable "to contracts let for maintenance work."

A contractor or subcontractor who pays less than the established prevailing rate when required to do so subjects itself to significant consequences including payment of the required prevailing wages that were not paid, penalties, suspension from bidding on or working on public works for up to three years and even criminal prosecution for failing to maintain payroll records demonstrating compliance. Further, failure to pay prevailing wages can be a basis for a state agency to withhold payment.

### **A One-Time Contract to Prune and Remove Trees Along State Highways Is "Maintenance Work" Subject to Prevailing Wage Laws**

Recently, the California Department of Transportation (Caltrans) withheld payment from a tree-pruning and tree removal contractor, Reliable Tree Experts, for failing to pay prevailing wages to its workers. Reliable challenged Caltrans' decision and sought review by the Department of Industrial Relations (DIR). The contract between Caltrans and Reliable was for "tree pruning and removal work" on state-owned highways. The work lasted almost a year and Reliable was paid close to \$1 million dollars. Notably, Reliable won the one-time contract after responding to a public notice for

Highway Planting Restoration (Remove and Prune Diseased Trees) that specified that the contractor to whom the contract is awarded "shall pay not less than the...prevailing rate of wages."

The DIR determined that Reliable's work was "public work" and that Reliable must pay its workers the prevailing wage rates. The trial court agreed. Reliable appealed, contending that the work called for in its contract with Caltrans did not qualify as "maintenance work" as defined under the prevailing wage laws because its contract with Caltrans was for **one-time** pruning and removal of trees and not "routine, recurring and usual activity." The DIR has defined "maintenance" as: "(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or operated facility...for its intended purposes in a safe and continually usable condition...." The appellate court rejected Reliable's contention, holding that maintenance landscape work is the type of work that is subject to prevailing wage laws because when determining whether work is "routine, recurring and usual," the focus must be on the property being worked, not the terms of an individual contract. Here, the appellate court noted that work on thousands of trees along state highways is not a "one time project" but an on-going task requiring many contracts throughout the state.

The court of appeal also pointed out the absurdity of Reliable's argument, if adopted, in that all first-time maintenance contractors would be excluded from the burden of prevailing wage laws because their work would not be routine, recurring and usual work **to them**.

### **Don't Cut Off Your Branch to Spite Your Tree**

As noted in the appellate court's opinion, Caltrans paid Reliable in the neighborhood of \$1 million dollars for work under the contract and, at the time of the appeal, Reliable had roughly \$7,000 at stake because it had already paid the wage shortages to all but one worker. One can only assume Reliable's costs and legal fees for the appeal were far greater than \$7,000. Although there may have been extenuating circumstances beyond those contained in the court's opinion, this case is a strong reminder not to get entrenched in litigation unless absolutely necessary, and to evaluate the case at each stage, making sure that continuing to litigate is the right business decision.

## **Bottom Line**

During the private sector's construction slow-down, more and more contractors are competing for public works contracts. Having an understanding of the prevailing wage laws at the outset of a project is critical to winning a public works contract and subsequently turning a profit. Of course, because the legal authority controlling prevailing wage laws is a hodgepodge of statutes, regulations and case law, it is prudent to seek out knowledgeable and experienced legal counsel to address specific application questions.

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