STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Butte Steel & Fabrication, Inc. Case No. 13-0632-PWH

From a Notice of Withholding of Contract Payments issued by:

3QC, Inc.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Butte Steel & Fabrication, Inc. (Butte) submitted a timely request for review of a Notice of Withholding of Contract Payments (Notice) issued by 3QC, Inc. (3QC), as Labor Compliance Program (LCP) for Buckeye Union School District (District), with respect to the construction of Valley View Elementary School (Project) in El Dorado County. The Notice determined that $6,673.67 in unpaid prevailing wages, training fund contributions, and statutory penalties was due. A Hearing on the Merits was conducted on February 26, 2014, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. David J. Murray appeared for Butte and Matthew J. Durket appeared for 3QC.

The issues for decision are:

- Whether the Assessment correctly found that Butte misclassified and paid nine of its workers under the classification of Laborer Group 3 rather than Iron Worker for some or all of their work on the Project that involved the installation of handrails or guardrails.
- Whether 3QC abused its discretion in assessing penalties under Labor Code section 1775[1] at the mitigated rate of $10.00 per violation.

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

- Whether Butte has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Director finds that Butte failed to pay the affected workers the correct prevailing wage rate for their work on the Project by paying the Laborer Group 3 rate rather than the higher Iron Worker that applies to the work performed. Butte has established, however, that it had substantial grounds for appealing the Notice, justifying a waiver of liquidated damages. Therefore, the Director issues this Decision affirming the Notice as to unpaid prevailing wages and penalties but waiving liquidated damages.

FACTS

The District advertised the Project for bid on December 10, 2010. Broward Builders, Inc. (Broward) was awarded the contract. Broward subcontracted with Butte on or about September 7, 2011, to "perform **Structural Steel and Miscellaneous Metal Fabrications** work." (Emphasis in original.) Nine Butte employees performed the work in issue, which involved the installation of handrails or guardrails, between approximately February 26, 2012, and June 2, 2012.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

Laborer and Related Classifications for Northern California (NC-23-102-1-2010-2): This PWD was issued August 22, 2010, and includes the Laborer Group 3 rate that was paid by Butte for the work in issue.[2] Laborer Group 3 includes the subclassification of "Guardrail Erectors."

Iron Worker (C-20-X-1-2009-1): This PWD was issued August 22, 2009, and

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[2] Throughout the relevant time period, the prevailing hourly wage due under the Laborer PWD for the subclassification of Laborer Group 3 in El Dorado County was $42.93, comprised of a base rate of $25.89, fringe benefits totaling $16.70 and a training fund contribution of $0.34.

provides the rates used in the Notice for the work in issue that was reclassified by 3QC.[3] The applicable scope of work for Iron Worker includes:

> All work in connection with field fabrication and/or erection . . . of structural, ornamental and reinforcing steel; including but not limited to the fabrication, erection and construction of all iron and steel, ornamental lead, bronze, brass, copper and aluminum, plastics and all other substitute materials, including, but not limited to . . . all barrier railings, handrail, . . . railings . . . materials altered in field such as framing, cutting, bending, drilling, burning and welding . . .

The Notice: 3QC served the Assessment on April 3, 2012. The Notice found that Butte misclassified and paid several workers at the Laborer Group 3 rate for work that should have been classified and paid at the higher Iron Worker rate. As a result of the misclassification, the Notice found that Butte had underpaid the required prevailing wages in the total amount of $5,973.67 in underpaid prevailing wages, including $78.33 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of $10.00 per violation for 70 violations, totaling $700.00. 3QC's Request for Forfeiture, which was approved by the Labor Commissioner, recommended penalties at the mitigated rate of $10.00 per violation because Butte was cooperative in 3QC's investigation, was willing to promptly and voluntarily resolve the issue and had made a reasonable mistake in its interpretation of the Laborer scope of work.

Jennifer Meredith, an accountant employed by 3QC, testified that she investigated a complaint that Butte had misclassified several workers on the Project as Laborers when they were performing work within the scope of Iron Worker. In the course of her investigation, Meredith requested and reviewed Butte's certified payroll records (CPRs), timesheets, pay stubs and daily inspector logs for the Project. Meredith stated that she worked with Wanda Peters, Butte's human resource and payroll administrator at the time of the Project, and found Peters and Butte to be very cooperative in assisting with her

[3] Throughout the relevant time period, the prevailing hourly wage due under the Iron Worker PWD was $57.31, comprised of a base rate of $33.00, fringe benefits totaling $23.59 and a training fund contribution of $0.72.

investigation. In addition to the payroll information and inspector logs, Meredith also made a site inspection, reviewed the site plans and specifications for the Project and reviewed the applicable scopes of work. Meredith testified that 3QC accepted Butte's CPRs as accurate as to the number of workers, hours worked and amounts paid, but that her investigation led her to the conclusion that work listed on Butte's timesheets as "rail" involved the installation of metal handrails and should have been paid at the Iron Worker rate rather than the Laborer Group 3 rate reported on Butte's CPRs. Meredith explained that while the Laborer Group 3 scope of work includes "Guardrail Erectors," it does not reference handrails. The Iron Worker scope of work, however, includes "all barrier railings, handrail . . . railings." Based on her finding that the Iron Worker classification applied to Butte's railing installation work on the Project, Meredith prepared an audit converting all hours of work reported on Butte's time sheets as "rail" from the Labor Group 3 rate to the Iron Worker rate. On cross-examination, Meredith admitted that she had not spoken to any of the affected workers during her investigation.

Jeff Brochheuser, Butte's CEO, has been a structural steel and miscellaneous metals contractor since 1986 and has worked in the field since 1982. Brochheuser testified that Butte had both Iron Workers and Laborers working on the Project. He explained that Iron Workers fabricate and install structural steel that is specifically indicated on the specially marked plans and drawings and always requires inspection. Brochheuser stated that Iron Workers typically don't do railing work unless it is in conjunction with a structural steel job. Butte workers that assembled the building skeleton and did other structural steel work were paid at the Iron Worker rate. By contrast, Brochheuser explained that architectural and ornamental steel, like the railings in issue, do not normally require inspections and do not appear on the structural steel drawings. He stated that, in his experience, there is no difference between "handrails" and "guardrails" and that he has always classified the type of work in issue as Laborer work. Brochheuser testified that the work in issue, reported on Butte's timesheets as "rail," involved placing prefabricated railing assemblies, which had been made in Butte's shop in Chico, into predrilled holes and grouting them into place. He did not believe that any

of the railings in issue had been attached directly to the building, but admitted that he had not been to the work site during construction. Brochheuser further testified that some welding was required to connect railing assemblies on larger runs, but noted that the Laborer scope of work allows "welding in connection with Laborer's work."[4] Brochheuser estimated that welding would not have accounted for more than five percent of the work in issue and stated that this sort of welding typically would not require a welding inspection.

Jose Garnica was Butte's on-site supervisor for the Project and is still employed by Broccheuser. Garnica testified that he is not a member of the Iron Workers Union and that he was hired as a Laborer to install rail for the Project. He stated that he did not consider there to be any difference between handrail and guardrail. Garnica stated that prefabricated railing assemblies arrived by truck from Butte's shop in Chico. For the majority of the railing installations, Butte Laborers unloaded the railing assemblies from the trailer, dropped them into predrilled holes, confirmed that the rail heights were to code and plan and grouted them into place without the need for any drilling or bolting. Garnica testified that welding was required to connect the assemblies only for long runs. In cases where railings were attached to the building, however, Garnica testified that he did need to drill holes in the wall to match up with brackets that had been attached to the railings at the shop and then bolt the railings in place. Garnica estimated that approximately 30 percent of his work on the Project involved stripping, cleaning and repainting the prefabricated railing assemblies after they had been installed and that the balance of his time was involved with actual installation work.

Peters testified that she had prepared Butte's CPRs for the Project. She explained that she would get the workers' timesheets, would check with the workers to confirm the work performed and would check the published scopes of work to determine the correct classification and wage rate. Peters testified that she was fairly new to the industry at the

[4] "Burning and welding in connection with Laborer's work" is included in the scope of work for Laborer Group 1(C), a higher paid classification than Laborer Group 3, which was the rate paid by Butte. There is no evidence that any Butte workers on the Project were paid at the Laborer Group 1(C) rate.

time of the Project and had erroneously overpaid some of the workers at the Iron Worker rate for work that should have been paid at the Laborer rate. Peters stated that she corrected this prospectively only and that Butte did not retroactively adjust the overpayments to the correct rate. Peters testified that she was not aware that any welding had been done in conjunction with railing installation.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*] (*Lusardi*).) An LCP like 3QC enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Notice of Withholding under section 1776.1.

When 3QC determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected

contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

<u>Butte Is Required To Pay The Prevailing Rate For Iron Worker For The Disputed Work.</u>

The single prevailing rate of pay for a given "craft, classification, or type of work" is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082.) The Director determines these rates and publishes general wage determinations such as C-20-X-1-2009-1 and NC-23-102-1-2010-2 to inform all interested parties and the public of the applicable wage rates for each type of worker that might be employed in public works. (Section 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) In the unusual circumstance when the advisory scopes of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work.

In this case, the disputed work falls clearly within the Iron Worker scope of work which includes "all barrier railings, handrail, . . . railings." The question is whether the disputed work also falls clearly within the Laborer Group 3 scope of work entitling Butte to pay the lower Laborer rate for the work. I find that it does not and therefore affirm the Notice's reclassification of the affected workers from Laborer Group 3 to Iron Worker.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* section 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) There is no evidence that any such petition was submitted for this Project. In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers, supra,* at pp. 1084-1085.)

The evidence establishes that the majority of the disputed work consisted of setting prefabricated railing assemblies, shipped from Butte's shop in Chico,[5] into predrilled holes, confirming that the rail heights were to code and plan and grouting the assemblies into place without the need for any drilling or bolting. In some cases, the affected workers welded multiple prefabricated assemblies together at the work site. A smaller part of the disputed work involved the attachment of railings to a building and required holes to be drilled in the wall to match up with the holes in brackets that had been attached to the railings at the shop. After drilling the holes, the affected workers bolted the railings into place. Garnica testified that, in conjunction with the installation work, approximately 30 percent of his work on the Project involved stripping, cleaning and repainting the prefabricated railing assemblies after they had been installed. The record does not establish, however, whether the stripping and painting work was also reported as "rail" work on Butte's timesheets or whether any of the other affected workers also performed this additional work.

3QC contends that the disputed work is covered exclusively by the Iron Worker classification, focusing on explicit language in the Iron Worker scope of work which includes "[a]ll work in connection with . . . erection . . . of structural, ornamental and

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[5] No work hours related to fabrication of the railing assemblies in Butte's shop are in issue in this proceeding.

reinforcing steel; including but not limited to . . . all barrier railings, handrail, . . . railings . . . [and] materials altered in field such as . . . drilling . . . and welding." By contrast, the Laborer scope of work includes only the general subclassification of "Guardrail Erectors" under Group 3 and only includes "welding in connection with Laborer's work" under Group 1(C), a classification that does not appear on any of Butte's CPRs. On these bases, 3QC determined that the work in issue fell exclusively under the Iron Worker scope of work and reclassified all of the hours reported as "rail" work on Butte's timesheets under the Laborer Group 3 classification to Iron Worker.

Butte makes two arguments in support of its contention that the work in issue also falls under the Laborer scope of work and can be paid at the Laborer Group 3 rate. First, Butte contends that the Iron Worker rate is only mandatory for work involving erection of structural steel. Because the railings in issue do not appear on the structural steel drawings, Butte contends that they need not be installed by Iron Workers and can be installed by "Guardrail Erectors" paid at the Laborer Group 3 rate. Butte's structural versus non-structural steel argument is not compelling, however, because the plain language of the Iron Worker scope of work includes "[a]ll work in connection with . . . erection . . . of structural, ornamental *and* reinforcing steel." (Emphasis added.) Butte's second argument is that handrails and guardrails are essentially the same thing and thus, the work in issue falls under both scopes of work and can properly be paid at either rate. Butte submitted as a hearing exhibit an article entitled *Holding On* by Benjamin R. Baer, P.E., S.E. from the February 2009 issue of Modern Steel Construction magazine which discusses the differences between handrails and guardrails. While neither precedential nor binding, the following excerpt is illuminating:

> The terms handrails and guardrail are often used interchangeably, although they have two different definitions. According to most building codes, guardrails (or guards) are required at the open side of elevated walking surfaces to prevent a fall to the lower surface. . . . Handrails, on the other hand, are something that can be grasped for guidance or support while walking, usually on a stair. The biggest difference between a handrail and a guardrail is that the area below the top of a guardrail is infilled with additional components such that there is no opening large enough for a 4-

> in.-diameter sphere to pass through; this approximates the size of a small child's head. . . .

(Baer, *Holding On* (Feb. 2009) Modern Steel Construction.)

It is theoretically possible that the Laborer scope of work could overlap with the Iron Worker scope of work on some projects. The Project here is not one of those possibilities, however. First, even if the work in issue were found to involve guardrails, it is undisputed that the welding of prefabricated railing assemblies was part of the work performed by the affected workers and welding is only included in the Laborer Group 1(C) classification; a classification that does not appear on Butte's CPRs for the Project. Moreover, if we apply the definitions of guardrail and handrail contained in Butte's own evidence to the photographs of the railings in issue produced at hearing, it is clear that the vast majority of the work, which consists of railings along the sides and in the center of flights of steps and inclined ramps, and which do not contain infill, should be considered handrails. As handrails are specified as being exclusively within the Iron Worker scope of work, I find that there is no overlap between the Iron Worker and Laborer classifications with regard to this Project and that the single prevailing rate applicable to the disputed work is Iron Worker.

<u>3QC's Penalty Assessment Under Section 1775 Does Not Constitute an Abuse of Discretion.</u>

Section 1775, subdivision (a), as it read at the time the Project was bid, states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) The penalty may not be less than twenty dollars ($20) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[6]

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused

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[6] Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, § 17250, subd. (c)].)

3QC found that the mitigated penalty amount of $10.00 per violation was appropriate, and the Labor Commissioner approved penalties at that rate, because Butte was cooperative in 3QC's investigation, was willing to promptly and voluntarily resolve the issue and had made a reasonable mistake in its interpretation of the Laborer scope of work. In addition, no evidence was presented of any prior violations by Butte. While Butte was cooperative throughout the investigative process, prevailing wages remained in dispute and unpaid at the time of the hearing. Consequently, while 3QC found that substantial mitigation was warranted, the imposition of the minimum $10.00 penalty rate in this case was not an abuse of discretion.

<u>Butte Has Demonstrated A Basis For Waiver Of Liquidated Damages.</u>

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of a . . . a Notice of Withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the . . . notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, Butte is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is partially tied to Butte's position on the merits and specifically whether, within the sixty-day period after service of the Assessment, it had "substantial grounds for appealing the . . . notice with

respect to a portion of the unpaid wages covered by the . . . notice." While ultimately found to be erroneous, Butte relied on a reasonable good faith interpretation of the Laborer Group 3 scope of work when determining the applicable wage rate for the work in issue and was cooperative with 3QC throughout the investigative and appeal process. Therefore, Butte has demonstrated substantial grounds for appealing the assessment and I find that waiver of liquidated damages is warranted.

FINDINGS

1. Affected contractor Butte Steel & Fabrication, Inc. filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by 3QC with respect to the Project.

2. Butte failed to pay the affected workers the required Iron Worker prevailing wage rate for the work in issue resulting in underpayment of prevailing wages in the aggregate amount of $5,973.67, including $78.33 in unpaid training fund contributions.

3. 3QC did not abuse its discretion in setting section 1775, subdivision (a) penalties at the mitigated rate of $10.00 per violation. Penalties under section 1775 are due for 70 violations on the Project, for a total of $700.00 in penalties.

4. The unpaid wages found due in Finding No. 2 remained due and owing more than 60 days following issuance of the Assessment, but Butte has demonstrated substantial grounds for appealing the assessment and waiver of liquidated damages is warranted.

5. The amounts found remaining due in the Assessment as affirmed and modified by this Decision are as follows:

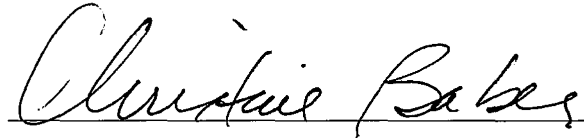
Wages Due:	$5,895.34
Training Fund Contributions Due:	$78.33
Penalties under section 1775, subdivision (a):	$700.00
TOTAL:	$6,673.67

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

ORDER

The Notice of Withholding of Contract Payments is affirmed as set forth in the above findings. The Hearing Officer shall issue a notice of Findings that shall be served with this Decision on the parties.

Dated: 11/10/2014



Christine Baker
Director of Industrial Relations