

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Falcon Builders, Inc.

Case No. 13-0215-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

DECISION OF THE DIRECTOR

Affected contractor Falcon Builders, Inc. (Falcon) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the City Hall Façade Demolition & Construction project (Project) performed for the City of Villa Park (City) in the County of Orange. Falcon's surety for the Project, American Safety Casualty Insurance Company, intervened in the case under Rule 8(b) (Cal. Code Regs., tit. 8, § 17208, subd. (b).) The Assessment determined that \$31,608.33 in unpaid prevailing wages and statutory penalties was due. Pursuant to written notice, a hearing on the Merits was held on November 14, 2013, in Los Angeles, California, before Hearing Officer Harold L. Jackson. David Cross appeared for DLSE and Danielle St. Claire appeared for American Safety Casualty Insurance Company (Intervener). There was no appearance for Falcon, which similarly did not appear for the two scheduled prehearing conferences. Falcon's telephone number was disconnected and Falcon provided no other telephone number.

The parties had settled the issues related to unpaid prevailing wages and unpaid training fund contributions, leaving only the issue of statutory penalties. Now, based on un rebutted evidence showing that Falcon failed to pay the required prevailing wages, the Director affirms the Assessment, as amended.

Facts

Failure to Appear: According to the Request for Review filed by John A. Mercer, President of Falcon, Falcon's telephone number is (760) 770-7762 and Falcon's mailing address is 73-850 Dinah Shore Drive, Suite 105, Palm Desert, CA 92211. On September 24, 2013, and October 15, 2013, notices of prehearing conference were mailed to Falcon at that address, giving Falcon notice that the Hearing Officer would be conducting a telephone prehearing conference on October 4, 2013, and October 29, 2013, respectively. On those dates, when the Hearing Officer attempted to contact Falcon at its telephone number, the call to Falcon's telephone number indicated the number had been disconnected without a referring number. DLSE served its exhibit list on Falcon on October 30, 2013, and its witness list and proposed joint statement of issues on Falcon on November 7, 2013. Falcon submitted neither exhibit list nor witness list, and did not respond to DLSE's proposed joint statement of issues.

Falcon did not appear at the Hearing on the Merits. Pursuant to notice, the Hearing Officer proceeded to conduct the Hearing on the Merits on November 14, 2013, for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record based on the testimony of DLSE's Deputy Labor Commissioner, Reynaldo S. Tuyor (Tuyor).

Assessment: The facts stated below are based on Exhibits 1, 2, 3, 8 and 18 submitted by DLSE, including the Assessment and other documents in the Hearing Officer's file.

On or about November 3, 2011, City advertised the Project for bid for the City Hall façade demolition and construction. City awarded the contract to Falcon, and ten workers performed work for Falcon under the contract between February 12, 2012, and July 22, 2012. The applicable prevailing wage determinations in effect on the bid advertisement date were: (1) Laborer Group 3 (SC-23-102-2-2011-1); (2) Iron Worker (C-20-X-1-2001-2); (3) Plasterer (ORA-2011-2); and (4) Plaster Tender (ORA-2011-2).

Based on Falcon's certified payroll records (CPRs) and employee questionnaires, the Assessment and attached audit worksheets found that Falcon failed to pay the required prevailing

wages to ten workers employed on the Project in four classifications and failed to pay training fund contributions for those workers. The wage underpayments appear to have resulted from a combination of failing to report all workers on the CPRs, misclassifying workers as laborers when they were performing work within the scope of other crafts, failure to pay the correct prevailing wage rate to workers who were correctly classified, and/or failure to report and pay all hours of work.

Based on the unrebutted evidence and testimony regarding the nature of the work performed, the number of hours worked, and the amount paid, the record shows that Falcon failed to pay the required prevailing wages. There also is no evidence that Falcon paid training fund contributions as required by the applicable prevailing wage determinations. In addition, DLSE assessed \$6,550.00 in penalties under Labor Code section 1775 for 131 instances of failure to pay the applicable prevailing wages.¹ Penalties under section 1775 were assessed at the rate of \$50.00 per violation based on DLSE's records that Falcon had a record of section 1775 violations as prime contractor on four other projects. DLSE also assessed \$325 in penalties under section 1813 for 13 instances of failure to pay the proper overtime rate.

The record shows that after the Assessment was issued, Intervener provided DLSE with documentation of payments that had been made for one worker and Tuyor granted credit for those payments. Also, one worker admitted not recalling if he had worked one of the weeks shown in the audit and Tuyor removed the associated hours from the audit. DLSE's motion to revise the Assessment downward to reflect these changes was granted, reducing the total section 1775 penalties sought by DLSE to \$6,300.00 for 126 violations. The section 1813 penalties remained unchanged. Intervener and DLSE reported that they were able to settle the underpaid prevailing wage and unpaid training fund contribution portions of the Assessment, leaving only the issues of the section 1775 penalties and section 1813 penalties to be decided by the Director.

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. DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect

¹ All further statutory references to code sections are to the California Labor Code unless otherwise indicated.

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). See, too, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. During the relevant period, the penalty under section 1775 was a maximum of \$50 for each calendar day for each worker paid less than the prevailing wage. The penalty is a minimum of \$30 for each calendar day for each worker paid less than the prevailing wage where it is determined that the violation is willful. During the relevant period, section 1813 prescribed a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review shall be conducted and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing.

At the hearing the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).) In this case, the record establishes the basis for the revised Assessment and Falcon has presented no evidence to disprove that basis. Nor has Falcon shown that DLSE’s determination on the amount of section 1775 penalties constituted an abuse of discretion. Accordingly, the revised Assessment is affirmed. Because Intervener and DLSE voluntarily settled the issues other than penalties, there is no need for a finding as to Falcon’s liability for unpaid prevailing wages and training fund contributions.

FINDINGS AND ORDER

1. Affected contractor Falcon Builders, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Penalties under section 1775 are due in the amount of \$6,300.00 for 126 violations at the maximum rate of \$50.00 per violation.

3. Penalties under section 1813 are due in the amount of \$325.00 for 13 violations.

4. The amounts found remaining due in the revised Assessment, as affirmed by this Decision, are as follows:

Penalties under section 1775, subdivision (a):	\$6,300.00
Penalties under section 1813:	\$325.00
TOTAL	\$6,625.00

The Civil Wage and Penalty Assessment, as revised, is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 7/3/2014



Christine Baker
Director of Industrial Relations