

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RGW Construction, Inc.

Case No. 20-0300-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor RGW Construction, Inc. (RGW) and subcontractor Capax Group, Inc. (Capax) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on August 24, 2020, with respect to work performed on California Department of Transportation (Caltrans) Contract 04-1Q3704 for the project named San Jose Homeless Encampment at Multiple Sites (Project) in Santa Clara County.¹ The Assessment determined that \$140,983.91 was due in unpaid prevailing wages (including unpaid training fund contributions), and \$41,890.00 was due in statutory penalties resulting in an overall Assessment of \$182,873.91.

On April 27 and 28, 2021, a Hearing on the Merits occurred via video and audio conferencing before Hearing Officer Edward Kunnes. David Cross appeared as counsel for DLSE, Roger Mason appeared as counsel for RGW and Capax, and Brandon Reeves appeared as counsel for Caltrans.² Jerry McClain, Deputy Labor Commissioner, and

¹ Each request for review normally generates separate case numbers. In this matter, however, only one case number was generated. As the same counsel represented both requesting parties, no party either requested or required consolidation of the cases.

² The Hearing Office granted the Awarding Body, Caltrans', request for intervention as an interested Person, pursuant to California Code of Regulations, title 8, section 17208, at the first prehearing conference held on December 28, 2020. There was no objection from DLSE. Subsequently, at a pretrial conference conducted on April 19, 2021, the requesting parties agreed that Caltrans would present Capax and RGW's joint defense at the Hearing on the Merits. RGW's counsel retained the right to present RGW's contention that it met the requirements of the safe harbor provisions under Labor Code section 1775. DLSE requested the Prehearing Conference to discuss among other things the extent to which Caltrans would be permitted to participate in the Hearing on the Merits, however, it never articulated a clear objection to Caltrans' role.

Cesar Godinez, Capax worker, testified in support of the Assessment. Lindsey Woolsey, Caltrans Headquarters Branch Chief for Labor Compliance, Rey Arcena, Caltrans transportation civil engineer, Rachel McIntyre, Capax president, and Jennifer Wilson, Caltrans Supervising Transportation Engineer, testified for RGW and Capax. Following the submission of posttrial briefs, the matter was submitted for decision on May 28, 2021.

Prior to the first day of hearing, the parties stipulated to the following:

- The work at issue in the Assessment was subject to the prevailing wage requirements.
- DLSE served the Assessment timely.
- RGW and Capax filed a timely Request for Review.
- Caltrans, on behalf of RGW and Capax, deposited the full amount of the Assessment with the Department of Industrial Relations (DIR) within 60 days after service of the Assessment.³
- There is no training fund committee for work classified as Tree Maintenance (Laborer) performed on a public work in Santa Clara County.
- There is no applicable apprenticeship committee to dispatch apprentices for public work classified as Tree Maintenance (Laborer) in Santa Clara County.

The issues for decision are as follows:

- Does the Labor Commissioner have concurrent jurisdiction with Caltrans Labor Compliance Program (LCP) over the work performed on this Project?
- Should Tree Maintenance (Laborer) (NC-102-X-2) or Laborer (23-102-1) be used as the scope of work classification for the work performed by Capax on the Project?

³ The stipulation removes contractors' liability for liquidated damages under section 1742.1, subdivision (b).

- If Tree Maintenance (Laborer) is the correct scope of work, do Capax's Certified Payroll Records (CPRs) indicate that the correct prevailing wages were paid?
- If Laborer was the correct scope of work, were DLSE calculations on the Assessment correct?
- Was the work performed by Capax on the Project routine, recurring and usual work for the preservation, protection and keeping of publicly owned real property for its intended purposes in safe and continually usable condition for which it has been improved?
- Is DLSE estopped or otherwise equitably precluded from asserting Capax should not have followed the wage rate Caltrans set? ⁴
- Does RGW qualify for the safe harbor provision in Labor Code section 1775?⁵
- Does RGW qualify for the safe harbor provision in section 1777.7?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment in part and that the Requesting Parties rebutted the remainder of the Assessment, including penalties under sections 1775, 1813, and 1777.7. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision partially affirming the Assessment, and partially denying the Assessment.

⁴ DLSE and the Requesting Parties submitted separate statements of issues for decision. At the Hearing on the Merits, before placing the matter on the record, the Hearing Office worked with the parties to arrive at the issues for decision. RGW and Capax, through Caltrans, asserted that the timeliness of the Labor Union filing a complaint with DLSE under Labor Code section 1773.4 was a relevant issue while DLSE stated that it was irrelevant to the inquiry before the Director. It appears the parties seeking review abandoned this issue, as Caltrans neither raised it at the Hearing on the Merits nor in its briefing.

⁵ All further section references are to the California Labor Code, unless otherwise indicated.

FACTS

The Project.

On May 17, 2018, the Awarding Body Caltrans conducted a Mandatory Pre-bid Meeting for an Emergency Limited Bid Contract.⁶ This Contract was to remove litter, debris, biological and chemical hazardous waste, clear vegetation, trim and remove trees, construct hardened fencing, landscaping and hardscaping, and repair drainage related to homeless encampments at four locations: Routes 101/280/680 Interchange, 101/880/Thirteenth Street Interchange, 280/Bird Avenue Interchange and 17/280/880 Interchange. (DLSE Exhibit No. 6, p. 58 and Joint Exhibit ⁷ A, p. 2.) RGW signed the contract on May 22, 2018. (DLSE Exhibit No. 7, pp. 61 and 79.) RGW entered a subcontract with Capax to perform “tree trimming and removal.” (DLSE Exhibit No. 8, p. 66.) RGW did not attach a copy of section 1775, 1771, 1776, 1777.5, 1813 and 1815 to the subcontract as required by section 1775, subdivision (b)(1). Capax had workers on the Project from July 28, 2018, to June 26, 2019. (DLSE Exhibit No. 19, pp. 136-203.) Caltrans did not issue or record a Notice of Completion.

The Public Works Complaint Investigation.

On or about March 9, 2020, DLSE received a complaint from a union official about the Project. (Joint Exhibit M, pp 288-289; DLSE Exhibit No. 5, p. 6.) The complainant, Oscar De La Torre of the Northern California District Council of Laborers, complained of non-payment / underpayment of wages by Capax on the Project. He also complained that Capax failed to submit contract award information to applicable apprenticeship committees, failed to request dispatch of apprentices, failed to employ registered apprentices, and failed to make apprenticeship training fund contributions. (*Ibid.*)

⁶ For dating the effective prevailing wage rate determination, DLSE used the date of the Mandatory Pre-bid Meeting because there was no published advertised bid date.

⁷ RGW, Capax, and Caltrans submitted Joint Exhibits.

Jerry McClain, a Deputy Labor Commissioner, investigated the complaint. Essentially, the complaint concerned the classification of the workers on the Project. The complainant believed the correct classification to use was Laborer. The Awarding Body believed the correct classification to use was Tree Maintenance (Laborer). (DLSE Exhibit No. 5, pp. 54-55.)

The Prevailing Wage Rate Determinations.

The two prevailing wage determinations (PWDs) at issue in this matter are Laborer and Related Classifications, NC-23-102-1-2018-1 (Laborer), and Tree Maintenance (Laborer), NC-102-X-21-2018-1 (Tree Maintenance). The applicable classification under the Laborer PWD is Area 1, Construction Specialist and Group 3(A). The applicable classification under the Tree Maintenance PWD is Senior Tree Trimmer and Groundsperson.⁸ (DLSE Exhibit No. 9, p. 81; DLSE Exhibit No. 10, p. 86; DLSE Exhibit No. 11, p. 94; DLSE Exhibit No. 12, p. 96). As stipulated by the parties, apprentice rates are applicable to Laborer but not to Tree Maintenance, which has no apprenticeship committee or program.

The PWD for the craft of Tree Maintenance includes a specific limitation in its title. It specifies as follows: "(APPLIES ONLY TO ROUTINE TREE MAINTENANCE WORK, NOT CONSTRUCTION AND/OR LANDSCAPE CONSTRUCTION. [fn 2]." The footnote states: "This determination does not apply to tree trimming, removal, or planting work

⁸ The basic hourly rate for a journey-level Construction Specialist, including predetermined wage increases effective June 25, 2018, is \$31.49, and combined fringe benefits (excluding training fund contributions of \$0.45 per hour) are \$23.50 per hour, for a total of \$55.44 for each straight-time hour. The basic hourly rate for journey-level Group 3(A), including predetermined wage increases effective June 25, 2018 is \$30.54, and combined fringe benefits (excluding training fund contributions of \$.045 per hour) are \$23.50, for a total of \$54.49 for each straight-time hour. (Beginning July 1, 2019, there is a rate increase of \$1.90 for all Laborers.) The basic hourly rate for journey-level Senior Tree Trimmer is \$23.50, and combined fringe benefits (there is no training fund contribution) are \$8.12 per hour, for a total of \$31.62 for each straight-time hour. The basic hourly rate for journey-level Goundsperson is \$17.50, and combined fringe benefits (there is no training fund contribution) are \$7.77 per hour, for a total of \$25.27 for each straight-time hour.

performed on construction or landscape construction contracts.” (DLSE Exhibit No 11, p. 94.)

The PWDs and scopes of work include further discrete classification. Laborers operating a chainsaw are Construction Specialists. (DLSE Exhibit No. 9, p. 82.) Laborers performing cleanup duties are Group 3(A) Laborers.⁹ (*Ibid.*) Under the Tree Maintenance scope of work, those workers who direct and perform the trimming and pruning of trees are classified as Senior Tree Trimmers. (DLSE Exhibit No. 12, p. 99.), while those workers performing all maintenance work other than trimming and pruning trees are classified as Groundspersons. (*Ibid.*)

The scopes of work include descriptions that are relevant to determining classification. The scope of work for the Laborer craft provides, in relevant part: “All Laborers’ work necessary to tend . . . landscaping . . . all cleanup of debris.” (DLSE Exhibit No. 10, p. 88.) The scope of work for the Tree Maintenance craft provides, in relevant part: “tree maintenance, including trimming, pruning, topping, tree/stump removal, grinding of stumps, root pruning and root barrier installation; handling, piling, hauling and chipping of brush and limbs; removal and replacement of trees[.]” It continues: “The operation of all vehicles, tools and equipment including but not limited to hand tools of any type, chainsaws, poles, saws, pruners, stump grinders for trees, boom trucks, loaders and trucks for personnel, material and equipment, debris removal and towing.” (DLSE Exhibit No. 12, p. 98.) The Tree Maintenance craft scope of work provides the following limitation: “This Agreement does not cover (a) any work of any employee performing construction or landscape construction work (including work incidental to construction or post-construction maintenance during the plant installation and establishment period) . . .” (*Ibid.*)

⁹ In Caltrans’ posttrial brief, it erroneously attributed fence erectors as DLSE’s basis for which it classified Capax workers under Group 3 Laborers--a misunderstanding evidently based on both cleanup and fence erectors appearing as work performed by Group 3 Laborers.

The Assessment.

DLSE found that Capax misclassified and underpaid prevailing wages to workers. Capax paid six employees at the journey-level Groundsperson rate for work that should have been classified and paid at the Group 3 Laborer journey-level rate. In addition, Capax paid 11 employees at the journey-level Senior Tree Trimmer rate for work that should have been classified and paid at the Construction Specialist journey-level rate. Altogether, the Assessment indicated that Capax underpaid the required prevailing wages of \$138,612.19, excluding training fund contributions. Capax failed to pay \$2,371.73 in training fund contributions to the applicable training fund committee or California Apprenticeship Council. DLSE assessed penalties under section 1775 at the rate of \$40 per violation for 643 violations for a total of \$25,720.00. Due to the wage rate differential between the wage rate assessed by DLSE and the wage rate used by Capax, DLSE found Capax failed to pay proper overtime subjecting it to penalties under section 1813 at the rate of \$25 per violation for 106 violations for a total of \$2,650.00.

DLSE also found apprenticeship violations based on the misclassification. Capax failed to employ Laborer apprentices in the 1 to 5 ratio. Thus, it was subject to penalties under section 1777.7 at the rate of \$40 per violation for 338 violations for a total of \$13,520.00.

Testimony of Worker Cesar Godinez.

Godinez testified that he performed work for Capax on the Project as a foreman. He trimmed trees, and directed cleanup of cuttings and ground vegetation to clear the homeless encampment area. Godinez used various tree trimming equipment, including a chainsaw. None of the equipment was stored on the site. He estimated that Capax worked two to three days clearing areas on each jobsite specifically for construction of fencing. However, Godinez was unable to compare the overall amount of the time

Capax performed tree work for general clearing as opposed to clearing specifically to make space for new fencing.¹⁰

Testimony of Jerry McClain.

McClain testified that he investigated the public works complaint of Oscar De La Torre of the Northern California District Council of Laborers (NCDCL) against Capax. Based on the description of constructing hardened fencing, landscaping, hardscaping and repairing drainage found in the contract and the pre-bid materials, McClain determined that Capax could not classify any of its workers under the scope of work for Tree Maintenance because that scope of work excluded tree work incidental to construction. (DLSE Exhibit No. 5, pp. 54-55; DLSE Exhibit No. 6, p. 58; DLSE Exhibit No 7, p. 61; DLSE Exhibit No. 12, p. 98; and, DLSE Exhibit No. 11, p. 94.) McClain testified that he relied on the scope of work provision for Laborer, which described Laborers' work as landscaping in conjunction with construction. (DLSE Exhibit No. 10, p. 88.) Pursuant to the Laborer PWD, he reclassified Senior Tree Trimmers to Labor Construction Specialists based on their use of chainsaws. He reclassified Groundspersons to Group 3 Laborers based on their forming the cleanup crew. (DLSE Exhibit No. 9, pp. 81-82.) Aside from straight-time wage underpayment, the misclassifications that McClain identified resulted in underpayment of overtime and training fund contributions, and apprenticeship violations. (DLSE Exhibit No. 5.)

Testimony of Lindsey Woolsey.

Woolsey testified that before Caltrans entered the contract for the Project, various factors caused the cancellation of other Caltrans contracts for cleanup of homeless encampments in the San Francisco Bay Area. These cancellations stalled cleanup work, and caused a health and safety hazard. As a result, the Caltrans Director authorized an emergency contract for this Project.

¹⁰ As Caltrans states in its response brief, Godinez's testimony on this point was unclear and the request for clarification from the Hearing Officer resulted in Godinez acknowledging his uncertainty of Capax workers' time spent clearing for fencing.

At the time Caltrans prepared the emergency contract, the contract referenced drainage repair and hardscaping to cover all possible work because the full extent of the required work was unknown. Notwithstanding what the contract said, the only work performed on the sites for this Project were trash removal (including biohazardous trash), tree work, vegetation removal, and fencing. Additionally, Woolsey noted over a three-year period Caltrans entered more than 95 multi-year, multi-site contracts for cleanup of homeless encampments throughout California. Further, Woolsey testified that Caltrans pays the rates sets forth in the Laborer PWD to tree workers when appropriate and enforces compliance with prevailing wage law on its projects through its LCP.

When a labor union submitted a complaint to Caltrans for an alleged failure to pay prevailing wages to Capax workers, Woolsey monitored the Caltrans' investigation. Woolsey worked with District LCP Officers. They determined that there were no prevailing wage violations based on her understanding of the work performed on the Project: cleanup, tree trimming, and installation of fencing. Woolsey concluded that there was no construction or landscape construction performed on the Project. The only new structure at these former homeless encampments was prefabricated fencing.

Testimony of Rey Arcena.

Arcena testified that he regularly visited the Project's jobsites, six in all, twice a day. In fact, he was on the jobsites more frequently than any other witness was (and probably any other Caltrans employee).

As a transportation civil engineer for Caltrans, Arcena prepared Daily Reports for the Project.¹¹ Arcena observed the work performed by the prime contractor and subcontractors and included his observations in the Daily Reports. He described the work performed and equipment used by each contractor, and listed the names of the

¹¹ Arcena explained that although the (Caltrans) Director's Order Request – Fund Request only identified four locations, some of the locations were so large that they had multiple jobsites. (Caltrans Exhibit A.)

workers and their hours worked on the Project. (Caltrans Exhibit E.) One other Caltrans civil engineer on the Project, Tuan Le, prepared Daily Reports. However, as evidenced from Arcena's testimony and the number of Daily Reports Arcena prepared, Arcena spent significantly more time at the Project's jobsites than Le did. (Caltrans Exhibit E; Caltrans Exhibit F.)

Arcena noted that almost all the tree work consisted of tree trimming. The purpose of the trimming was to raise the skirts of the trees ten to twelve feet high to make the camps visible and to deny shelter at the encampments. He estimated that less than 10 percent of all the tree work was dedicated to clearing trees for installing fencing. Arcena confirmed that Capax did nothing other than tree work on the Project. Further, that the only work performed on the Project was tree trimming, debris and biohazardous cleanup, and fencing.

With respect to the fencing, Arcena described the work done. He testified that the fence was erected in ten to twelve foot long prefabricated units, moved into place with forklifts, welded together, and secured in holes dug into the ground with cement surrounding the posts.

Testimony of Rachel McIntyre.

McIntyre understood from the pre-bid meeting, which she attended, that the tree work was to prevent the homeless from engaging in dangerous behaviors obscured from view by tree branches. She indicated that Caltrans determined and directed Capax's payment of wages at the rates set forth in the Tree Maintenance (Laborer) PWD. McIntyre testified that there was no planting or landscaping work on the Project. Additionally, McIntyre testified that Capax did not stand to gain from Caltrans making a determination of a lower wage rate paid to its workers because the contract between Caltrans and RGW ultimately passed all material and labor costs to Caltrans.

The balance of McIntyre's testimony concerned Capax's efforts to obtain information and advice from DIR regarding the prevailing wage rate to pay its workers. This occurred prior to the time NCDCL submitted its prevailing wage complaint to DLSE.

McIntyre testified that personnel at the DIR Research Unit indicated that the Labor Commissioner would generally accept the Awarding Body's classification of work. Furthermore, she stated, that a facsimile message from the DIR Research Data Specialist to NCDCL left open the possibility that Capax had properly compensated its workers under the classification of Senior Tree Trimmers and Groundspersons. (Caltrans Exhibit J, pp. 278–279.) Finally, Caltrans confirmed that Capax had paid the correct wage rates and used the proper classifications of Senior Tree Trimmers and Groundspersons. (Caltrans Exhibit K.)

Testimony of Jennifer Wilson.

Wilson testified to her familiarity with Caltrans' restoration of properties where homeless encampments had previously been located. The work on these projects consisted of maintenance work rather than construction work, although sometimes Caltrans divisions other than the maintenance division administered the contract.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on various specified public works projects. The California Supreme Court summarized the purpose of the CPWL as follows:

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*).)

DLSE 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); see also *Lusardi, supra*, at p. 985.) Section 1775, subdivision (a), requires 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 the unpaid wages are not paid within 60 days or the amount of the full assessment deposited with DIR following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the DIR, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general PWD for a

craft, such as Tree Maintenance (Laborer) or Laborer, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 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.) Ultimately, the Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

DLSE Properly Reclassified Tree Maintenance To Laborer For Tree Trimming Work Incidental To Construction Of Hardened Fencing.

DLSE determined that all work performed by Capax employees on the Project should be classified under the scope of work for Laborer. It did so based on the finding of the deputy labor commissioner (deputy) that "this [work by Capax] was not routine tree maintenance work" because it "include[s] construction such as construct hardened fencing, landscaping & hardscaping, [and] repairing drainage. . ." (DLSE Exhibit 5, p. 55.) The deputy's finding that Capax's work on the Project was not routine maintenance derived from the contract's emergency designation. (DLSE Exhibit 7.) In addition, the deputy found that Capax's work on the Project was incidental to construction work. That finding derived from the mandatory pre-bid meeting material and contract, where "construct hardened fencing", "landscaping & hardscaping", and "repair drainage" were each indicated as work to be performed.¹²

When Capax workers removed trees for the construction of hardened fencing, DLSE properly reclassified the workers as Laborers. The testimony about the actual

¹² As stated *infra*, the scope of work provision for Tree Maintenance (Laborer) expressly excludes tree work incidental to construction.

work performed indicated that erection of the hardened fencing was construction. While there was testimony that segments of the metal fence were prefabricated offsite, Arcena, Caltrans's civil engineer, testified that the fencing crew, from a subcontractor other than Capax, moved segments of the fence with forklifts, welded segments together, and dug holes into which fence posts were cemented in place. That description of work duties is typically associated with construction, as "construct" means, "to make or form by combining or arranging parts or elements."¹³ The testimony also described workers using skills, such as welding, doing cement work, and using heavy machinery, which are typical of building trades. Since the Scope of Work provisions for Tree Maintenance excluded tree-trimming incidental to the construction of the hardened fencing, DLSE properly identified the Scope of Work provisions for Laborer as the applicable work.¹⁴

The Scope of Work provisions for Laborer most closely matched the tree work incidental to fence construction performed by Capax. Laborers tend[ed] the building trades crafts through landscaping and clearing tree debris. More specifically, DLSE properly classified those Capax workers, who used chainsaws as Construction Specialist, and those Capax workers, who performed cleanup as Group 3 Laborers, based on the Laborer PWD.

However, not all Capax's work on the Project was incidental to construction. The testimony of Caltrans transportation civil engineer and his Daily Reports showed that there was no landscaping, hardscaping, planting, or drainage repair done. Other Caltrans' witnesses testified that other than the hardened fencing, the contractors erected no new structures on the Project. The testimony described tree work performed

¹³ <https://merriam-webster.com>. To install means, "to set up for use or service." (*Ibid.*) Thus, installation connotes putting in place previously built products.

¹⁴ Caltrans pointed out correctly that an awarding body may choose between two applicable classifications. However, as here, where there is an explicit prohibition against use of the classification for specified work, neither the awarding body nor the contractors on the Project may use that classification for the specified work.

throughout the jobsites, not just in the areas Caltrans intended to fence, and described the purpose of the tree work performed beyond clearing for fencing. Accordingly, the evidence did not support DLSE's finding that *a//* Capax work was incidental to construction and properly classified as Laborer's work. In fact, the deputy admitted that he issued the Assessment without doing further investigation and without reviewing the Daily Reports. In this regard, DLSE's approach was contrary to the CPWL, which requires it to match the scope of work for the applicable craft to the actual work on a project.

While DLSE properly reclassified 11 Capax workers as Construction Specialist and six Capax workers as Group 3 Laborers, these reclassifications applied to only a portion of the work performed by Capax. Otherwise, Capax classified these workers properly as Senior Tree Trimmers and Groundspersons under the Tree Maintenance PWD. DLSE relied on the emergency designation of the contract in reaching its decision to reclassify workers; however, that designation did not characterize the nature of the work. Rather, the work itself, not the events that created the need for the work, indicated that the work was routine and usual. There was testimony showing the frequency with which Caltrans undertook to cleanup homeless encampments throughout California. The description and purpose of the work performed by Capax, tree trimming, tree removal, stump grinding, and tree cleanup on publicly owned real property, indicated that the work was for the preservation, protection and keeping of publicly owned real property for its intended purposes. Overall, the majority of the tree work performed by Capax matched the definition of maintenance provided in California Code of Regulation, title 8, section 16000.

The only testimony related to the amount of time the Capax workers spent performing tree work incidental to fence construction came from Capax worker Godinez and Caltrans transportation civil engineer Arcena. On this topic, only Arcena was capable of providing a percentage of the time Capax workers spent performing tree work to clear the area for fencing compared to all the tree work performed on the

Project. Arcena's testimony that tree clearing incidental to fencing comprised approximately 10% of the overall work performed by Capax on the Project was credible given that he spent the most time at the jobsites of any testifying witness, and prepared almost all of the Daily Reports.

Although DLSE and Capax indicated that the accuracy of the wage calculations in the Assessment and CPRs were issues, no party presented evidence of incorrect calculations or raised any concern over accounting. Therefore, the parties implicitly consented to the calculations made by the other. DLSE's finding that the total wages due and owing of \$138,612.19 in the Assessment for the entirety of all Capax tree work, should be reduced to reflect the actual proper scope of work applicable to Capax's work trimming trees and clearing tree debris incidental to fence construction on the Project. That amounted to 10 percent of the overall tree work.¹⁵ Thus, the prevailing wages due are set at \$13,861.22, a sum equal to 10 percent of the wages assessed by DLSE.

Under section 1743, RGW is jointly and severally liable for payment of prevailing wages and training fund contributions. Accordingly, the Assessment is affirmed and modified that Capax underpaid its workers \$13,861.22 in prevailing wages, excluding training fund contributions.

Training fund contributions are due only for work that can be classified under the Labor PWD, and not work that can be classified under the Tree Maintenance PWD, as stipulated *infra*. The finding by DLSE that the total training fund contribution due and owing of \$2,371.73 in the Assessment for the entirety of all Capax tree work should be reduced to reflect the actual proper scopes of work applicable to Capax's work trimming trees and clearing tree debris incidental to fence construction on the Project.

¹⁵ Overtime accounted for 3 percent of Capax's overall tree work but the percentage of overtime work dedicated to trimming and clearing for fence construction is unknown. Without evidence of overtime dedicated to tree trimming incidental to construction, there is no basis upon which to find overtime due.

Accordingly, the Assessment is affirmed and modified that Capax and RGW owe \$237.17 in training fund contributions.

Finally, the Requesting Party and the Awarding Body argued that deference to the Awarding Body's choice of classifications and the doctrine of promissory estoppel prohibited DLSE from reclassifying any workers on the Project. The Awarding Body claims that its LCP deserves deference from DLSE because of its extensive qualifications to determine job classifications and the applicable prevailing wage rate. However, nothing in the Labor Code or the regulations provides for such deference.

In fact, the opposite appears to be the case. "The failure of an Awarding Body or [LCP] to comply with any requirement imposed by this subchapter," including the responsibility of the LCP to enforce prevailing wage requirements, "shall not . . . constitute a defense to the failure to pay prevailing wages or to comply with any other obligation . . ." (Cal. Code Regs., tit. 8, § 16421, subd. (f).) Moreover, the Director of Industrial Relations oversees the application and revocation process for an Awarding Body's LCP. (Cal. Code Regs., tit. 8, §§ 16424, 16425, 16427, 16428 and 16431.) The Labor Commissioner oversees the enforcement of LCPs, affirming, rejecting, or modifying a forfeiture in whole or in part as to wage and penalties due. (Cal. Code Regs., tit. 8, §§ 16436 and 16437.) Therefore, LCPs depend upon the oversight of both the Director of Industrial Relations and the Labor Commissioner to function. Accordingly, it is implicit within the structure of the program that the Director of Industrial Relations and the Labor Commissioner have at minimum concurrent jurisdiction over prevailing wage enforcement.

Similarly, the defense of promissory estoppel is inapplicable as a doctrine to shield contractors from liability for underpayment of wages. The CPWL is a statutory construct that no party to a project may avoid through contract terms, especially promises that conflict with prevailing wage requirements. It is axiomatic that contractors cannot rely on an Awarding Body or LCP's failure to comply with CPWL's requirements to avoid payment of the prevailing wage to workers. (Cal. Code Regs., tit.

8, § 16421.) Moreover, the Labor Code provides an interested party the exclusive remedy of “a petition to [the Director of Industrial Relations to] review a determination of any rate or rates . . . specified in . . . the call for bids.” (§ 1773.4; Cal. Code Regs., tit. 8, § 16302.) No person, including the Awarding Body, requested review of the classification of Capax workers.

Capax and RGW Are Not Liable For Penalties Assessed Under Sections 1775, 1813, and 1777.7.

A contractor or subcontractor has the same burden of proof with respect to the penalty determinations as to the wage Assessment. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

However, where a contractor relies to its detriment on representations made by an awarding body, equitable relief may be appropriate. (*Lusardi, supra*, 1 Cal.4th 976, 996-997.) Here, the Awarding Body supplied Capax with the scope of work for Tree Maintenance. Throughout the Project, the Awarding Body indicated to Capax that all tree work required application of the Tree Maintenance PWD. Initially, Capax’s local labor union in San Francisco had agreed the Awarding Body identified an applicable prevailing wage rate for each of the workers. Almost a year before DLSE issued its Assessment, NCDCL contacted Capax’s workers and claimed error with the classification. Shortly thereafter, Capax contacted the DIR Research Unit and was told that the Labor Commissioner would not reclassify an Awarding Body’s classification unless there was no good faith basis for the classification. Subsequently, when the DIR Research Unit responded to NCDCL’s request to identify the work classification for tree work on the Project, it assumed the work was construction not tree maintenance – based on the requester’s representations, only identified possible classifications and noted that the work described was common among multiple crafts/classifications. (Joint Exhibit J.) Added to this uncertainty, the Awarding Body’s ‘ LCP affirmed the prevailing

wage rates identified under Senior Tree Trimmer and Groundsperson were applicable prevailing wage rates for the work performed by Capax on the Project. (Joint Exhibit K.)¹⁶ Thus, the Awarding Body dictated the Scope of Work provisions for Tree Maintenance and corresponding classifications, the DIR Research Unit did not exclude Tree Maintenance as a proper classification for the tree work on the Project, and the Awarding Body's LCP confirmed Tree Maintenance was the proper scope of work for the tree work on the Project.¹⁷

Capax reasonably and in good faith attempted to comply with the requirements of the prevailing wage laws. Substantial justice would not be achieved by determining Capax liable for statutory penalties under sections 1775, 1813,¹⁸ and 1777.7. (*Lusardi, supra*, 1 Cal.4th at p. 997.)

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. Capax Group, Inc. and RGW Construction, Inc. are jointly and severally liable for underpayment of prevailing wages to Capax Group, Inc. workers as follows: six Group 3 Laborers and 11 Construction Specialists, in the amount of \$13,861.22 for the time Capax Group, Inc. Performed tree work incidental to fence construction.
2. Capax Group, Inc. and RGW Construction, Inc. are jointly and severally liable for failure to pay \$237.17 in training fund contributions.
3. No penalties are due under section 1775.

¹⁶ There was no evidence of bad faith on the part of the LCP in arriving at its determination.

¹⁷ In addition, there were no applicable apprenticeship committees in the area for the classification Tree Maintenance.

¹⁸ DLSE provided no evidence that the overtime worked was spent performing tree work incidental to fence construction. Thus, DLSE did not carry its burden with regard to section 1813 penalties in any event.

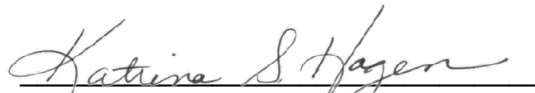
4. No liquidated damages are due as a timely deposit for the full amount of the Civil Wage and Penalty Assessment was made to the Department of Industrial Relation.
5. No penalties are due under section 1813.
6. No penalties are due under section 1777.7.

The amounts found due under the Assessment, as affirmed and modified by this Decision, are as follows:

Basis of the Assessment	Amount
Wages Due:	\$13,861.22
Training Fund Contributions Due:	\$ 237.17
TOTAL:	\$14,098.39

The Hearing Officer shall issue a Notice of Findings, which shall be served with this Decision on the parties.

Dated: 8-12-22



Katrina S. Hagen, Director
California Department of Industrial Relations