BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT

DEPARTMENT OF INDUSTRIAL RELATIONS

FOR THE STATE OF CALIFORNIA

In the matter of the Debarment Proceeding Against: SUTTER FOAM & COATING, INC., a California Corporation; DAVID ALVIN TREXLER, CEO/ Pres and KENNETH A. TREXLER, RMO/CEO/ Pres of SUTTER FOAM & COATING, INC., Respondents.	Case No. SAC 5012 DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS [Labor Code § 1777.1]

The attached proposed Statement of Decision and Order of Debarment making SUTTER FOAM & COATING, INC., a California corporation, DAVID ALVIN TREXLER, and KENNETH A. TREXLER, ineligible to bid on or be awarded a contract for a public works project and ineligible to perform work as a subcontractor on a public works project in the State of California for three years, is hereby adopted by the Division of Labor Standards Enforcement as the Decision in the above-captioned matter.

This decision shall become effective July 1, 2010

IT IS SO ORDERED

Dated: June 22, 2010

ANGELA BRADSTREET
Labor Commissioner and Chief of the California
Division of Labor Standards Enforcement

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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Attorney for the Labor Commissioner

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Debarment proceedings pursuant to Labor Code §1777.1 were initiated by the Division of Labor Standards Enforcement ("DLSE") on April 8, 2010, by the filing and service of a Statement of Alleged Violations against the following named respondents: SUTTER FOAM & COATING, INC., a California corporation; DAVID ALVIN TREXLER, CEO/President; and KENNETH A. TREXLER, RMO/CEO/President of SUTTER FOAM & COATING, INC. (hereinafter "Respondents").

The hearing on the alleged violations was held on June 3, 2010, at the Oakland Office of the Labor Commissioner. Susan Dovi served as the Hearing Officer. David D. Cross, appeared on behalf of Complainant, the Labor Commissioner, Chief of the Division

of Labor Standards Enforcement, Department of Industrial Relations, State of California. None of the Respondents appeared for the hearing although they were duly served with Notice of Hearing, and the Statement of Alleged Violations by First Class and Certified Mail to the address currently listed with the Contractors State License Board. The signature on the certified mail receipts and a letter to Mr. Cross from David A. Trexler and Kenneth A. Trexler indicate that both Kenneth A. Trexler and David A. Trexler received the Notice of Hearing and Statement of Alleged Violations. Present as witnesses for Complainant were Deputy Labor Commissioners Arleen Elberg and Jessica Kaiser.

The hearing was tape recorded. Witnesses Elberg and Kaiser took the oath and evidence was received. At the conclusion of the hearing, the matter was taken under submission.

FINDINGS

I. NOTICE

The Hearing Officer finds that the Respondents received lawful notice of the June 3, 2010, hearing. The proof of service for the Notice of Hearing and Statement of Alleged Violations together with the return receipts indicating that notice was served both by First Class and Certified Mail and the letter to Mr. Cross from David A. Trexler and Kenneth A. Trexler are on file in this proceeding and indicate that Notice of Hearing was received by all Respondents.

II. VIOLATIONS OF THE PUBLIC WORKS LAW

1. Respondent SUTTER FOAM & COATING INC., is a corporation licensed by the Contractor's State Licensing Board under license number 732014.

2. Respondent KENNETH A. TREXLER was the Responsible Managing Officer, Chief Executive Officer, and President of SUTTER FOAM & COATING, INC., until 4/30/08, and at all relevant times for purposes of these proceedings. As such, KENNETH

A. TREXLER held a substantial interest in SUTTER FOAM AND COATING, INC.

3. Respondent DAVID A. TREXLER is the Chief Executive Officer and President of SUTTER FOAM & COATING, INC. As such, DAVID A. TREXLER holds a substantial interest in SUTTER FOAM AND COATING, INC.

4. Respondents were subcontractors on three public works projects, namely the Cordova Lane Elementary and White Rock Elementary School Modernization – Phase 2 project in Sacramento County, California; the American River College PE Combo Expansion Re-Bid #7001 project, in Sacramento County, California and the 12 Classroom Building Liberty Union High School project in Sacramento County, California (hereinafter "projects"), during the periods, July 5, 2006 through September 20, 2006; April 6, 2007 through October 6, 2007; and February 5, 2007 through July 23, 2008, respectively.

5. Deputy Labor Commissioner Elberg was assigned to the Public Works Unit from 2006 through 2009. Deputy Labor Commissioner Kaiser is currently assigned to the Public Works Unit. Deputy Elberg testified that on the Cordova Lane and White Rock Elementary Schools projects her investigations revealed that respondents violated Labor Code §§ 1774, 1776, 1773.1, and 1815 by failing to pay the prevailing wage rates to employees, failing to maintain accurate certified payroll reports, failing to pay the correct overtime rate, failing to pay travel time and paying less than the hourly rate stated on the certified payroll reports. Ms. Elberg testified that Respondent KENNETH A. TREXLER signed the certified payroll reports.

6. Deputy Elberg testified that on the American River College project, her investigation revealed that Respondents violated Labor Code§§ 1774, 1776, 1773.1, and 1815 by failing to pay the prevailing wage rates to employees, failing to maintain accurate certified payroll reports, failing to pay travel time and failing to record all hours worked. In addition, respondents were deducting amounts for health benefits that were not paid to a

trustee or to a third party pursuant to a plan, fund or program for the benefit of Respondents employees. An employee had his health coverage cancelled because of the nonpayment to a Health and Welfare Fund yet amounts were deducted from his pay.

7. Deputy Kaiser testified that on the 12 Classroom Building Liberty Union High School project, her investigation revealed that Respondents violated Labor Code §§ 1774, 1776, 1773.1, and 1815 by failing to pay the prevailing wage rates to employees, failing to maintain accurate certified payroll reports, failing to pay travel time, failing to pay workers for the last 2 weeks of work, even though the certified payroll records indicate payment was made, and by failing to pay the correct overtime rate.

9. DLSE issued three Civil Wage and Penalty Assessments against Respondents based on the violations on the projects listed in paragraph 4 above. DLSE exercised its discretion and assessed full penalties pursuant to Labor Code § 1775 due to the egregious nature of the violations.

CONCLUSIONS OF LAW

Labor Code §1777.1 provides:

> (a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter **with intent to defraud**, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership of association in which the contractor, or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following:
>
> (1) Bid or be awarded a contract for a public works project;
>
> (2) Perform work as a subcontractor on a public works project.
>
> (b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be **in willful violation** of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to

three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

(1) bid on or be awarded a contract for a public works project;

(2) perform work as a subcontractor on a public works project.

California Code of Regulations, Title 8, Section 16800 defines "Intent to Defraud" as "the intent to deceive another person or entity, as defined in this article, and to induce such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind."

Labor Code §1777.1(c) defines a "willful violation" as "when 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." *California Code of Regulations* 8 CCR § 16800 defines "deliberately" as "premeditated and intentional."

Labor Code section 1777.1(b) provides that once a contractor or subcontractor willfully violates this section, that contractor or subcontractor is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation. An intent to deceive or defraud can be inferred from the facts. (*People v. Kiperman* (1977) 69 Cal.App.3d Supp. 25,31.) "An unlawful intent is logically inferred from the doing of an unlawful act." *(People v. McLaughlin* (1952) 111 Cal. App.2d 781, 789.*)*

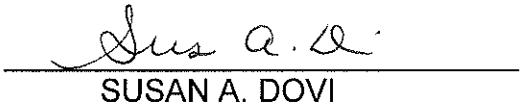
The credible and unrefuted evidence presented by Deputies Elberg and Frazier establishes that Respondents failed to pay the proper prevailing wage rates, including the failure to pay the proper overtime rate, falsified the certified payroll reports and deducted amounts for health and benefits that were not deposited to a third party for payment of benefits for the employees. Furthermore, the evidence presented by Deputies Elberg and

Frazier indicates that the actual rate paid was not the rate stated on the certified payroll report. In addition, there was a failure to pay for certain travel time and a failure to pay anything at all for the last two weeks of work. The testimony of Deputies Elberg and Frazier corroborated by documentary evidence, establishes that Labor Code §§ 1774 and 1776 were violated with an intent to defraud SUTTER FOAM & COATING, INC.'S workers and the awarding bodies. Furthermore, the violations were willful within the meaning of Labor Code § 1777.1(c) and 8 CCR § 16800, in that the deductions for health benefits were not paid to a trustee, or to a third party pursuant to a plan, fund or program for the benefit of Respondents employees. Further, the preparation of false and fraudulent certified payroll records was intentional and deliberate and also exhibits an intent to deceive Respondents' workers, the awarding body and the DLSE.

ORDER OF DEBARMENT

In accordance with the foregoing, it is hereby ordered that Respondents SUTTER FOAM & COATING, INC., a California corporation; KENNETH A. TREXLER and DAVID A. TREXLER, shall be ineligible to, and shall not, bid on or be awarded a contract for a public works project, and shall not perform work as a subcontractor on a public work as defined in Labor Code §§ 1720, 1720.2 and 1720.3, for a period of three (3) years, effective July 1, 2010. A three year period is appropriate under these circumstances where Respondents, experienced contractors, willfully and fraudulently prepared false certified payroll records, failed to pay workers the prevailing wage, kept benefit payments that were deducted from employees' wages, and refused to cooperate and supply records and information requested by DLSE during its investigation, justifying a three year period of debarment.

Dated: June 21, 2010



SUSAN A. DOVI
Hearing Officer

PROOF OF SERVICE

(Sutter Foam & Coating, Inc.; David Alvin Trexler; Kenneth A. Trexler)
(DLSE Case No. SAC 5012)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9th Floor, San Francisco, California 94102.

On June 22, 2010 I served the following document:

DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS; PROPOSED STATEMENT OF DECISION RE DEBARMENT OF RESPONDENTS FROM PUBLIC WORKS PROJECTS [Labor Code §1777.1]

by placing a true copy thereof in an envelope addressed as follows:

DAVID CROSS (prosecuting attorney)
2031 Howe Avenue, #100
Sacramento, CA 95825

SUTTER FOAM & COATING, INC.
909 A. George Washington
Yuba City, CA 95993

KENNETH A. TREXLER
AGENT FOR SERVICE
SUTTER FOAM & COATING, INC.
2603 Lago Lane
Marysville, CA 95901

DAVID ALVIN TREXLER
909 A. George Washington
Yuba City, CA 95993

KENNETH A. TREXLER
2603 Lago Lane
Marysville, CA 95901

[ ] FACSIMILE: I caused the foregoing document to be served by facsimile transmission to each interested party at the facsimile machine telephone number(s) shown as stated above.

[ ] U.S. MAIL: I deposited in the United States mail in the city and county of San Francisco by ordinary first class mail or Express Mail, a true copy of the foregoing document in a sealed envelope with postage thereon fully prepaid.

[X] FEDERAL EXPRESS. Next Day Delivery. I deposited or delivered to a courier or driver authorized by FedEx to receive documents, in the city and county of San Francisco for overnight (next day) delivery, a true copy of the foregoing document in a sealed envelope with fees provided for.

I certify under penalty of perjury that the foregoing is true and correct. Executed on June 22, 2010 at San Francisco, California.

Mary Ann E. Galapon
MARY ANN E. GALAPON