

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Tricorp Construction Inc.
A Corporation dba Tricorp/Hearn**

Case No. 13-0007-PWH

**William Charles Falconer dba
Majestic Interiors**

Case No. 12-0406-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Prime contractor Tricorp Construction, Inc. (Tricorp) and William Charles Falconer dba Majestic Interiors (Majestic) requested review of a Civil Wage and Penalty Assessment (Assessment) issued and served by the Division of Labor Standards Enforcement (DLSE) on December 7, 2012. The Assessment concerned a public works project at Hyatt Place Hotel in the City of Riverside (City).¹ Tricorp moved to set aside the Assessment on the ground that DLSE failed to serve the Assessment within 180 days after acceptance of the work as required by Labor Code section 1741, subdivision (a).²

The parties submitted evidence and legal arguments by way of written motion and opposition as well as declarations and exhibits. For the reasons discussed below, Tricorp's Motion to Dismiss the Assessment as Untimely is granted, and the Director issues this Decision dismissing the Assessment in its entirety.

FACTS

Tricorp was awarded with the contract to build Hyatt Place Hotel in the City of

¹ The project involved construction of Hyatt Place Hotel, a private building. However, all or parts of the funds for this project were provided by the Redevelopment Agency of the City of Riverside. Thus, the project was considered a public work subject to the prevailing wage law.

² All further statutory references are to the California Labor Code, unless otherwise indicated.

Riverside. Majestic was a subcontractor responsible for drywall work. While the project was constructed on privately owned land and for the benefit and use of a private entity, i.e. Hyatt Hotels, some or all of funding was provided by the City's Redevelopment Agency. Therefore, the project was considered a public work and required payment of prevailing wages.

The City inspected the project and issued a Temporary Certificate of Occupancy on April 13, 2012. This Temporary Certificate of Occupancy was valid for 60 days, within which time, "[a]ll remaining correction items as identified by the building Inspector or by other City representative shall be corrected."

On April 17, 2012, Hyatt Place Hotel held a grand opening and the hotel and adjacent shopping center opened for business. Tricorp, however, had not finished correcting all the correction items identified prior to issuance of the Temporary Certificate of Occupancy at that time. Tricorp workers worked until May 25, 2012, to complete the necessary correction items.

On May 25, 2012, Carl Carey, the City's Capital Project Manager, informed the owner of Hyatt Place Hotel that "Building Dept has final approved (*sic*) the Hyatt project. Robert [another city employee] will submit your NOC asap." However, the City apparently did not record a Notice of Completion as promised. Instead, the owner of the hotel recorded a Notice of Completion on July 19, 2012, stating that the project was completed on June 12, 2012. The owner used June 12, 2012, as the completion date because that was the date when the Certificate of Occupancy was issued.

DLSE served the Assessment by mail on December 7, 2012. The Assessment alleges that the workers were underpaid by \$10,686.23. DLSE also assessed penalties in the amount of \$2,910.00. Tricorp and Majestic timely requested a review of this Assessment.

DISCUSSION

Section 1741, subdivision (a) provides that "[t]he assessment shall be served no later than 180 days after the filing of a valid notice of completion ... or no later than 180 days after acceptance of the public work, whichever is last. However, if the assessment is

served after expiration of this 180-day period, but before the expiration of an additional 180 days, and the Awarding Body has not yet made full payment to the contractor, the assessment is valid up to the amount of funds retained.”³

Civil Code section 3093, subdivision (c) states “[t]he notice of completion shall be recorded in the office of the county recorder of the county in which the site is located, within 10 days after such completion.” The Notice of Completion filed by the owner here states that the project was completed on June 12, 2012 but was not recorded until July 19, 2012, over a month after the completion date as stated on its face. It is undisputed that this Notice of Completion is invalid.

DLSE argues that the date of acceptance was June, 2012, i.e. the date the Notice of Completion states the project was completed. However, undisputed evidence shows that this “completion day” simply mirrored the date the Certificate of Occupancy was issued. In *In re El Dorado Improvement Corporation* (9th Cir, 2002) 335 F.3d 835, 839, the Ninth Circuit Court of Appeal states that acceptance should “not be equated with ... the issuance of certificates of occupancy.” “[A]cceptance means ‘receiving the work of improvement as public property or for public use.’” (*Id.*) DLSE’s argument that the date Certificate of Occupancy was issued should be the acceptance date is not consistent with *In re El Dorado*.

On the other hand, Tricorp argues that the date of the grand opening of the hotel, April 17, 2012, should be considered the acceptance date. However, the evidence is undisputed that all the work necessary to complete the Project had not been completed at that time and the City had done nothing to indicate it had “determin[ed] that the improvement was satisfactorily built.” (*In re El Dorado*, 335 F.3d at 840.)

Rather, such determination by the City in this case occurred via an e-mail from the City’s Capital Project Manager to the owner stating “Building Dept has final approved (*sic*) the Hyatt project. Robert [another city employee] will submit your NOC asap.” The date of this e-mail was May 25, 2012, and thus, the evidence supports a finding that the City accepted the project as final and complete on May 25, 2012.

³ It is undisputed that no contract funds were retained by the City.

Accordingly, the Assessment, issued and served on December 7, 2012, which was beyond the expiration of the 180 day limit under Section 1741, subdivision (a), was untimely and must be dismissed.

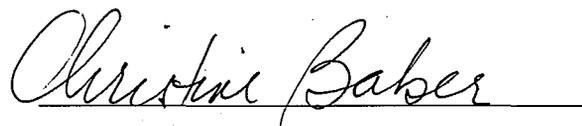
FINDINGS

1. The Notice of Completion recorded for the Project on July 19, 2012, was invalid on its face under Civil Code section 3093, subdivision (c), as it was recorded more than 10 days after the completion date stated therein.
2. Carl Carey, the City's Capital Project Manager was delegated to accept the project as final, complete, and satisfactorily done.
3. The City, through an e-mail by Carl Carey, accepted the project on May 25, 2012.
4. The Assessment was issued and served on December 7, 2012, after expiration of 180 days under Labor Code section 1741, subdivision (a).
5. No contract funds have been retained by the City of Riverside.

ORDER

Based on these findings, it is ordered that Tricorp's motion to dismiss the Assessment as untimely is granted. Accordingly, the Assessment is dismissed in its entirety. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 8/23/2013



Christine Baker
Director of Industrial Relations