

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Case No. 17-0470 PWH
17-0472-PWH**

Bay City, Inc. and Broward Builders, Inc.,

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Bay City, Inc., a California corporation, (Bay City) and affected prime contractor Broward Builders, Inc., a California corporation, (Broward Builders) each requested review of a Civil Wage and Penalty Assessment (Assessment).¹ On December 26, 2017, the Division of Labor Standards Enforcement (DLSE) issued the Assessment with respect to the New Dillard Elementary School – Increment 2 (Project), undertaken for the Elk Grove Unified School District (School District). The Assessment determined that \$18,441.26 in unpaid prevailing wages and statutory penalties were due.

A Hearing on the Merits on both requests for review was held on May 31, 2018, in Sacramento, California, before Hearing Officer Gayle Oshima. David Cross appeared and represented DLSE, and Anthony Basile appeared for Broward Builders and Bay City (Requesting Parties). At the Hearing on the Merits, the Hearing Officer granted DLSE's oral motion made pursuant to California Code of Regulations, title 8, section 17226, subdivision (a), to amend the Assessment downward to a total of \$17,092.66, consisting of unpaid prevailing wages of \$10,457.67, penalties of \$5,480.00 under Labor Code section 1775, penalties of

¹ Case No. 17-0470-PWH is associated with Bay City's request for review and Case No. 17-0472-PWH is associated with Broward Builders' request for review. No party objected to issuance of one Decision covering both cases.

\$375.00 under Labor Code section 1813, and \$779.99 in training fund contributions under Labor Code section 1777.5, subdivision (m)(1).²

At the Hearing on the Merits, Thuy Pham, Deputy Labor Commissioner, and Christopher Kim, Senior Deputy Labor Commissioner, testified for DLSE. DLSE also submitted Exhibits 1 through 20, all of which were admitted into evidence without objection. Michael Nuss, president and owner of Bay City, and Holly Navarro, bookkeeper for Bay City, testified for Requesting Parties. Requesting Parties also submitted Exhibits A through X, all of which were admitted into evidence without objection.³ After post-trial briefing, the matter was submitted for decision on June 29, 2018.

The issues presented for decision are:

- Did the Requesting Parties use the correct prevailing wage classification for spraying fire proofing onto structural items?
- Did the Requesting Parties pay the prevailing wage rate, including fringe benefits, to the workers?

In this Decision, the Director finds that Bay City used the correct classification of Painter: Brush, Spray, Paperhanger for Bay City's work on the Project, and properly paid those workers pursuant to the prevailing wage law. Therefore, the Requesting Parties are subject to no penalties and no liquidated damages, and the Assessment is dismissed.

Facts

The Project was advertised for bid on February 12, 2014. (DLSE Exhibit No. 8.) Pursuant to its bid, Broward Builders entered into a contract with the School District on April 28, 2014 (Contract), to perform the work of the Project. (DLSE Exhibit No. 9.) Paragraph numbers 6 and 7 of the Contract specify that Broward Builders was to pay prevailing wages as determined by the Director of Industrial Relations and to comply with various Labor Code provisions

² All further section references are to the California Labor Code unless otherwise specified.

³ To some extent the parties' exhibits duplicate each other. For sake of clarity, when referencing a document, this Decision will cite to DLSE's set of exhibits, unless the document only appears in the exhibits for the Requesting Parties.

including making, keeping and disclosing detailed payroll records and employing registered apprentices.

Pursuant to the Contract with the School District, Broward Builders agreed to construct a two-story steel framed building, parking lots, hard courts, a play field, and associated site utilities. (DLSE Exhibit No. 7.) On November 6, 2014, Broward Builders entered into a subcontractor with Bay City, pursuant to which Bay City agreed to provide cementitious fireproofing on beams, columns, and a roof deck. (Subcontract, Requesting Parties Exhibit C.)

Applicable Employee Classifications and Prevailing Wage Determinations.

The Assessment used the prevailing wage rates contained in the prevailing wage rate determination (PWD) for the classification Plasterer (SAC 2014-1) (Plasterer PWD).⁴ The scope of work provision for the Plasterer PWD includes, in relevant part:

Section 2. ...The preparation, installation, caulking, sealing and repair of all interior and exterior insulation systems, including, but not limited to, foam systems, bead boards, out-sulation, ultralation, lead abatement, escapsulation and all fire-stopping and fire proofing to include hard, soft and intumescent fireproofing and refraction work, including, but not limited to all steel beams, columns, metal decks, and vessels.

(DLSE Exhibit No. 12.)

Bay City classified its employees as “Painting.” Nuss and Navarro testified that by using the term “Painting,” they intended to indicate the “Painter” classification, and they used a sub-classification called Painter: Brush, Spray, and Paperhanger (SAC 2014-1) (Painter PWD).⁵ The scope of work provision for the Painter PWD states, in relevant part:

Section 1: ... (g) Work or services pertaining to the application of all fire retardant, fire proofing and/or insulation material used on structural items or as architectural finishes.

⁴ The general per diem prevailing wage rate under the Plasterer PWD totals \$54.55 per hour, which includes a basic hourly rate of \$29.24, \$12.03 per hour for health and welfare, \$8.43 per hour for pension, \$3.00 per hour for vacation, \$.95 per hour for training, and \$.90 per hour for “other.”

⁵ This case involves PWDs with the same number designation, SAC-2014-1, which encompasses both the Plasterer PWD and the Painter PWD. The general per diem prevailing wage rate under the Painter PWD totals \$46.65 per hour, which includes a basic hourly rate of \$29.97, \$9.70 per hour for health and welfare, \$6.31 per hour for pension, \$.31 per hour for training, and \$.30 per hour for “other.”

(DLSE Exhibit No. 13.)

The Assessment.

Deputy Labor Commissioner Pham conducted DLSE's investigation of Bay City's wage payments on the Project. To perform her audit, Pham used the Contract, the certified payroll records (CPRs), employee questionnaires, and the School District Inspector's Daily Reports (IDRs).

The Assessment found that Bay City had misclassified twelve of its workers using the Painter PWD, as opposed to the Plasterer PWD, resulting in an alleged underpayment of \$11,426.26, and associated penalties pursuant to sections 1775 and 1813, as well as an amount for underpayment of training fund contributions.

Pham testified that based on the scopes of work for the Painter PWD and the Plasterer PWD, the work had to be classified as Plasterer rather than Painter. Pham noted that the Subcontract contains a description of the work of cementitious fire proofing to include application to beams and columns. Pham also noted that the IDRs and employee questionnaires refer to the work of fire proofing and spraying steel beams and columns. To Pham, the reference in the Plasterer scope of work to steel beams and columns made the Plasterer "closest" to the actual work. DLSE also argues that Bay City's classification of "Painting" on the CPRs, did not appear as a classification under a prevailing wage rate determination. Instead, the applicable prevailing wage rate determination for Painter uses the term "Painter: Brush, Spray, and Paperhanger." Based on the competing scopes of work, DLSE reclassified the work according to the Plasterer PWD in order to match an allegedly more precise description of the work performed on the Project. Pham acknowledged and agreed, however, that if the proper determination was the Painter PWD, Bay City paid the required straight time and overtime-prevailing wage rates and fringe benefits on the Project.

For Bay City, Nuss testified the workers applied the fire proofing medium by spray. Based on the nature of that work task, he maintained that Bay City properly relied upon the Painter PWD. Nuss, a licensed painting contractor, testified that the steel beams and columns to

which Bay City employees applied fire proofing were structural items as defined in the scope of work for the Painter PWD. DLSE did not rebut Nuss's testimony that the steel beams and columns constituted to "structural items" as listed in the scope of work for the Painter PWD. Nuss also testified that Bay City had previously paid workers installing fire proofing the prevailing wage under the classification Painter PWD on numerous other public work projects, without incident. He further stated that his license classification with the Contractors State License Board (CLSB), C-33 (Painting and Decorating Contractors), permits application of fire proofing to the surface of structures, pursuant to California Code of Regulations title 16, section 832.33.

Navarro testified for Bay City that when the company entered into a public works project, she would submit the notification of public work contract award form DAS 140 to the ABC NorCal Training Trust, a nonprofit trade association from which Bay City obtains its apprentices. She would also find the appropriate prevailing wage determination on the Department of Industrial Relations (DIR) website; determine the proper prevailing wage for the workers including fringe payments; and monitor making monthly training fund contributions to the ABC NorCal Training Trust. She also testified that she checked the scope of work for the Painter PWD and determined that the work on the Project constituted a work covered by the Painter PWD due to the mention of "spray" in the title and the reference to fire proofing in section 1(g) of the scope of work.

Discussion

The California Prevailing Wage Law, set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the Prevailing Wage Law was summarized by the California Supreme Court in one case 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), and *Lusardi, supra*, at p. 985.)

Section 1775, subdivision (a) requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate; section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a) (2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation when the Labor Commissioner determines that mitigation is inappropriate. Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of \$25.00 per day per worker for each violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

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 the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (the CWPA), the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. In the instant case, Bay City deposited with the DIR the full amount of the Assessment in timely fashion.

When DLSE determines that a violation of the prevailing wage laws has occurred,

including with respect to any violation of the apprenticeship and/or certified payroll records requirements, 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. The request for review is transmitted to the Director of the Department of Industrial Relations, 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 producing 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).)

In this case, for the following reasons, the Director finds that Bay City properly classified its workers, rendering moot the issues of underpayment of wages, statutory penalties and liquidated damages.

Bay City Properly Paid the Prevailing Rate for Painter for the Work Performed on the Project.

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 [*Sheet Metal Workers*].) The Director determines these rates and publishes general wage determinations (i.e., a PWD) 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. (§ 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 [*Ericsson*].) 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.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (See §1773.2 and *Ericsson, supra*, 221 Cal.App.3d at p. 119.) 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 § 1773.4].) In this case, Bay City submitted no such petition 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*, 153 Cal.App.4th at pp. 1084-1085.) Bid forms attached to the Contract show Broward Builders designated Bay City to perform fire proofing on the Project. No evidence discloses that the School District specified any particular prevailing wage rate for fire proofing on the Project. Bay City selected the published Painter PWD for the prevailing wage rate to pay its workers.

As of the time of the bid advertisement date, the scope of work for the Painter PWD provisions relating to SAC-2014-1 for Painter provides that covered work includes “application of all fire retardant, fire proofing and/or insulation material on structural items or architectural finishes.” (DLSE Exhibit No. 13.)⁶ In comparison, the scope of work provisions for the Plasterer PWD provides that the covered work include “installation” of “exterior insulation systems ... including ... all fire-stopping and fire proofing ... including... all steel beams, columns, metal decks, and vessels.” (DLSE Exhibit No. 12.) Both rate determinations, then, include work involving fire proofing of the structural parts of a building.

⁶ While DLSE noted that on its CPRs Bay City had used the term “Painting” as the applicable classification and not “Painter,” as explained in Bay City testimony a reasonable interpretation of “Painting” is that it meant “Painter.”

Identification of the objects and structures to be constructed, installed, altered or repaired on a public works project is a valid consideration when determining the applicable classification of the workers that is required by the Prevailing Wage Law. In that regard, DLSE reasonably considered the references to steel beams and columns in the Plasterer PWD when determining the applicable rate determination. Nevertheless, the identification of objects and structures alone does not exhaust the analysis. Other relevant factors include the work processes employed and the function and purpose of the objects or structures that are the subject of the work. In this case, consideration of these additional factors compels the conclusion that Bay City properly paid its workers under the Painter PWD.

The word “spray” appears in the title of the Painter PWD (“Painter: Brush, Spray, and Paperhanger,” a sub-classification of Painter). Further, the determination specifically refers to fire proofing in the scope of work, demonstrating that the Painter PWD covers the work process of spraying fire proofing material. With respect to the function of the objects that were the subject of work, both the Painter PWD and the Plasterer PWD refer to structural components. The Plasterer PWD refers specifically to steel beams and columns, among other components, while the Painter PWD refers to “structural items.” Because steel beams and columns *are* structural items, it is apparent that the two prevailing wage determinations overlap in this area.

Further, the scope of work for the Plasterer PWD (at sections 1 and 2) refers to a variety of work processes for plastering, including finishing, fastening, taping, caulking, and sealing, but not “spraying” as a work process falling within its jurisdiction. Where the Plasterer PWD lays out the specific work of fire proofing as a covered type of work, it covers “preparation, installation, caulking, sealing and repair,” but does not purport to include spraying. In contrast, the Painter PWD does include spraying, as stated *ante*.

DLSE’s argument for the Plasterer rate rests on the contention that the description of fire proofing in the Plasterer scope of work provisions more closely matches that of the work performed by Bay City on the Project. While it appears the opposite is true – that the Painter scope of work actually more closely matches the work that was done – what is ultimately relevant for purposes of this Decision is that the work performed appears to reasonably fall within the scopes of work for *both* classifications. And in these circumstances, a contractor may

choose which classification and attendant prevailing wage determination to use. Because Bay City paid the prevailing wage rates for the Painter classification and the related scope of work encompasses the work performed, Bay City did not violate its statutory duty to pay prevailing wage rates.

The parties cite to a previous Director's decision, *In the Matter of the Request for Review of CEI West Roofing Company, Inc. and Thompson Pacific Construction, Inc.* (Case Nos. 04-0276-PWH and 05-0010-PWH, issued March 28, 2007) (*CEI West Roofing*). That case, like the instant case, concerned competing scope of work provisions claimed for the same work. The *CEI West Roofing* decision applied the long-standing rule that where two scopes of work overlap, a subcontractor does not violate the Prevailing Wage Law by paying the lower rate:

Because CEI West paid the prevailing wages specified for the Roofer classification and the scope of work provisions encompassed metal roofing, it did not violate its statutory obligation to pay prevailing wages, even though the scope of work overlapped with some of the provisions of the Sheet Metal Worker scope of work provisions.

(*CEI West Roofing*, p. 11, [applying *Ericsson, supra*, 221 Cal.App.3d at p. 125])⁷ The Director rejected DLSE's argument in *CEI West Roofing* that a higher rate than the published rate for Roofer applied based upon an unpublished special determination made for another project favoring the Sheet Metal worker rate.

Here, the Requesting Parties demonstrated that the published prevailing wage rate determinations for both Painter and Plasterer contain scopes of work that may reasonably be interpreted to include the spray application of fire proofing material to building structures. Further, the Requesting Parties also demonstrated that the CSLB allows fire proofing by licensed painters, and that Bay City held a CSLB license for painting. Accordingly, the Director determines that Bay City properly used the Painter PWD for its workers on the Project. As there is no dispute that the workers were paid the correct prevailing wage under the Painter PWD, and all other required payments and contributions were made, there were no unpaid prevailing wages

⁷ An administrative decision may not be expressly relied on as precedent unless so designated by the agency. (Gov. Code, § 11425.60 subd. (a); *Sheet Metal Workers Internat. Ass'n, Local No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1086). *CEI West Roofing* was not designated as precedential.

due.

All Other Issues Are Moot.

In light of the analysis, *ante*, all other issues in this matter are moot and need not be addressed.

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

FINDINGS

1. Bay City, Inc. reasonably relied on and used the Painter: Brush, Spray and Paperhanger prevailing wage rate determination (SAC-2014-1) for the work performed under its Subcontract with Broward Buildings, Inc.
2. Bay Cities, Inc. did not fail to pay its workers the applicable prevailing wage rates, as it paid its employees at the rates under the Painter: Brush, Spray and Paperhanger prevailing wage rate determination (SAC-2014-1).
3. All other issues are moot.

ORDER

The Civil Wage and Penalty Assessment is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with Decision on the parties.

Dated: 1/22/19



André Schoorl
Acting Director of Industrial Relations