

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Tricorp Construction, Inc.

Case No. 12-0400-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Tricorp Construction, Inc. (Tricorp) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Hyatt Place Hotel Riverside (Project) in Riverside County. While the project called for construction of a Hyatt Place Hotel for a private owner, Metroriverside LLD (Metroriverside), some of the funds for the construction were public funds from the City of Riverside (City). Thus the project was considered a public work and was subject to the prevailing wage law.

The Assessment determined that \$144,791.74 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on October 31, 2013, in Los Angeles, California, before Hearing Officer Makiko I. Meyers. Lisa D. Nicolls appeared for Tricorp, and David D. Cross appeared for DLSE.

Testimony was taken and exhibits were admitted on October 31, 2013. The parties submitted closing briefs simultaneously on November 15, 2013. Any responses to the closing briefs were due on November 25, 2013, but neither party submitted one. The matter was therefore submitted for decision on November 25, 2013.

The parties stipulated to the correctness of the contents of the audit and amount of the Assessment. The sole issue for decision is whether the Assessment was timely served.

The Director finds that Tricorp has failed to carry its burden of proving that the Assessment was untimely. Therefore, the Director issues this Decision affirming the Assessment.

FACTS

The City advertised the Project for bid on October 26, 2010, and awarded the contract to Tricorp. Tricorp subcontracted with WH Smith Resources, Inc. (WH Smith) on January 21, 2011 for installation of the HVAC system.

Applicable Prevailing Wage Determinations (PWDs): The following applicable PWDs and scopes of work were in effect on the bid advertisement date: Prevailing Wage Determination No. Riv-2010-2 for Sheet Metal Worker and Apprentice Prevailing Wage Determination No. 2010-2 (for counties including Riverside) for Sheet Metal Worker (HAVC).

The Assessment: The Assessment found that WH Smith failed to pay the wages reported by its certified payroll records (CPRs), failed to report all hours worked on the Project, failed to apply the correct prevailing wage rates, failed to pay the required fringe benefits, and failed to make the required training fund contributions. The Assessment found a total of \$11,0384.47 in underpaid prevailing wages and \$7507.27 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of \$40 per violation for 665 violations, totaling \$26,600.00. DLSE determined that penalties at the rate of \$40.00 per violation were warranted, because it found that the violations were willful, but warranted some mitigation because WH Smith had no prior violations. In addition, penalties were assessed under section 1813 for 12 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$300.00.

Service of the Assessment: DLSE served the Assessment on October 25, 2012, by mail, and there was no retention by the awarding body. The owner of the hotel and the project recorded a notice of completion on July 19, 2012, stating that the project was completed on June 12, 2013. DLSE argues that June 12, 2012, the date the owner stated on the notice of completion as the date of completion, should be considered the date of

the acceptance of the project by the Awarding Body. DLSE therefore contends that the Assessment was timely since it was served on 135th day after the acceptance. On the other hand, Tricorp argues that the date of acceptance was April 17, 2012, the date of the grand opening of the hotel, and that the Assessment was therefore untimely as it was served on 201st day after the acceptance.

DISCUSSION

The sole issue which was presented for trial was whether the Assessment was timely served.

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.”

California 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 it 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 therefore invalid.

DLSE argues that the date of acceptance was June 12, 2012, the date the Notice of Completion states the project was completed. However, undisputed evidence shows that this “completion day” simply mirrored the date that the Certificate of Occupancy was issued. *In re El Dorado Improvement Corporation* (9th Cir. 2002) 335 F.3d 835, 839, (*In re El Dorado*) 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.* Therefore, DLSE’s argument that the date the Certificate of Occupancy was issued should be considered the acceptance date is not consistent with *In re El Dorado*.

Tricorp, on the other hand, argues that the date of acceptance is the date when the hotel had its grand opening, April 17, 2012. Although the City building inspector had conducted the final inspection, which the building passed, on April 13, 2012, mere routine approval by a public official does not constitute acceptance. (*In re El Dorado*, 335 F.3d at 842; *Howard A. Deason & Co. v. Costa Tierra Ltd.* (1969) 2 Cal. App. 3d 742, 750-51.) Furthermore, the grand opening of the hotel on April 27, 2012, was an action taken by the owner and does not constitute action by the City “receiving the work of improvement as public property or for public use.”

In the present case, the only documented determination by the City 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.

Accordingly, the Assessment was timely issued and served on October 25, 2012, the 153th day from the acceptance, within the 180 day limit under Section 1741, subdivision (a).

FINDINGS

1. Affected contractor Tricorp construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. The Assessment which was served on October 25, 2012, was timely because it was served within 180 days of acceptance by the Awarding Body which occurred on May 25, 2012.

3. In light of Finding 2 above, W.H. Smith underpaid its employees on the Project in the aggregate amount of \$117,891.74, including unpaid training fund contributions.

4. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$40.00 per violation, and the resulting total penalty of \$26,600.00,

as assessed for 665 violations is affirmed.

5. Penalties under section 1813 at the rate of \$25.00 per violation are due for 12 violations on the Project, for a total of \$300.00 in penalties.

6. The unpaid wages found due in Finding No. 3 remained due and owing more than sixty days following issuance of the Assessment and WH Smith is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$117,891.74, and there are insufficient grounds to waive payment of these damages.

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

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| Wages Due: | \$110,384.47 |
| Training Fund Contributions Due: | \$7,507.27 |
| Penalties under section 1775, subdivision (a): | \$26,600.00 |
| Penalties under section 1813: | \$300.00 |
| Liquidated Damages: | \$117,891.74 |
| TOTAL: | \$262,683.48 |

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

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

Dated: 1/31/2013



Christine Baker
Director of Industrial Relations