

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Baron Services, Inc.

Case No. **14-0209-PWH**

From a Notice of Withholding of Contract Payments issued by:

Labor Compliance Providers, Inc.
For the County of San Bernardino Labor Compliance Program

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected contractor Baron Services, Inc. (Baron) timely requested review of a Notice of Withholding of Contract Payments (Notice of Withholding) issued by Labor Compliance Providers, Inc. (LCP), the labor compliance program for the awarding body, the County of San Bernardino (County) with respect to the work of improvement known as the Adelanto Detention Center Expansion (Project). The Notice of Withholding determined that \$56,328.48 in wages and statutory penalties was due. Baron contended that its workers employed on the Project had been paid the appropriate wages, and denied that any unpaid wages were due. A Hearing on the Merits was held on June 23, 2014, in Los Angeles, California, before Hearing Officer John J. Korbol. James Reed, a non-attorney hearing representative, appeared for LCP¹ with two previously disclosed witnesses: Armando Rivas and Sophia Ramirez. Jeff Baron appeared for Baron, in pro per. He was assisted by Lou Desmond, who was permitted to participate as a hearing representative. Two of Baron's previously disclosed witnesses were also present, in addition to Desmond: Lowell Connor and Donnell Johnson. The matter was taken under submission on July 22, 2014.

¹ Reed, a non-attorney representative from LCP, was permitted to put on the County's case by the Hearing Officer, despite the fact that Mr. Reed's participation was in violation of California Code of Regulations, title 8, section 16434(a), requiring approved Labor Compliance Programs to be represented by an attorney in hearings conducted pursuant to Labor Code section 1742 subdivision (b).

Now, based on a lack of evidence showing that Baron's workers received payment in return for their labor on the Project, and based on a finding that the construction cleanup work performed in the execution of the Baron's subcontract is not janitorial or custodial work of a routine or recurring nature and therefore not exempt from the prevailing wage law, the Director of Industrial Relations affirms the Notice of Withholding.

FACTS

At the Hearing, Rivas and Ramirez were called to testify for LCP. Connor and Johnson testified for Baron.² LCP's Exhibits 1-9, 12, 14, and 15 were admitted into evidence, with Exhibit 4 being augmented on June 24, 2014, the day following the hearing. Baron's Exhibits A, D-E, P and R were admitted into evidence, subject to various objections as to their relevance and weight by LCP.^{3,4}

The prime contractor on the Project, Lydig Construction, Inc., subcontracted with Baron on May 4, 2012 to perform final cleanup work at the Project site.⁵ The prime contractor had previously entered into a contract with the County to construct the Project. The Scope of Work in the subcontract is described as "All work necessary or incidental to complete the Final Cleaning." Appendix 1 to the subcontract requires that Baron perform "all detailed final cleaning work," and describes over 20 specific tasks, including "vacuum all carpeted floors," "clean all baseboards," "wipe all dust from walls, signage and railings," "clean all bathrooms," "debris removal," and removing construction build-up. Appendix 1 also requires "all applicable prevailing wages," a mandate that is echoed in paragraph B.1 of the General Conditions of the subcontract. Exhibit D to the subcontract consists of the text of Labor Code

² Jeff Baron did not testify on his own behalf and was not called to testify as an adverse witness by Reed.

³ LCP's Exhibit 10 was not offered or admitted because it was identical to Baron's Exhibit E.

⁴ Baron offered an audio recording on a disc as its Exhibit O, and a ruling on the admissibility of this exhibit was deferred until Baron could provide a transcript of the recording and LCP had an opportunity to object. The transcription is that of an undated radio program hosted by Desmond and consisting of a discussion between Reed and Desmond. The discussion centers on whether, as a matter of law and policy, workers employed on public works projects to do janitorial work are entitled to be paid at prevailing wage rates. LCP filed an objection to Exhibit O on the grounds of relevancy. The Hearing Officer sustained the objection and Baron's Exhibit O was not admitted into evidence.

⁵ The work encompassed by Baron's subcontract was advertised for bid as of October 15, 2010.

sections 1771, 1775, 1776, 177.5, 1813, and 1815.⁶ The agreed amount of payment for work done under the subcontract is \$84,990.00.

Seven individuals performed cleanup work at the Project on various dates from September 16 through October 25, 2013: Lowell Connor, Marcus Willis, Walter Beasley, Al Orozco, Jose Pena, Felipe Ruiz, and Ron Wolf. Baron's certified payroll records list the work classification for all seven workers as "SEIU – Janitor." According to the certified payroll records, Connor was paid at the rate of \$15.00 per hour; Willis and Beasley were paid at the rate of \$10.00 per hour, and Orozco, Pena, Ruiz, and Wolf were paid at the rate of \$8.52 per hour.

Connor testified on behalf of Baron and stated that he worked as Baron's foreman on the Project. He testified that Baron became a signatory to a contract with the SEIU⁷ on May 1, 2012. This testimony was apparently elicited to support Baron's argument that the wage rates paid to Baron's workers were approved by the SEIU and paid by Baron in the absence of a job classification for "janitors" under the prevailing wage law. Connor further testified that he was responsible for handing out weekly paychecks to his fellow workers and that nobody complained to him about a lack of payment. On cross-examination, Connor admitted that the paychecks he distributed were in sealed envelopes and that he did not personally see the checks. He also testified that he had no personal knowledge of the rate of pay reflected in the checks he distributed.

Connor testified that he and his crew had to clean the new cells constructed as part of the Project, which primarily consisted of wiping down toilets, beds, windows, and doors, as well as mopping floors and cleaning windows. He and his crew used mops and brooms. Connor denied using heavy equipment or wearing a hardhat. He denied doing "rough construction cleanup" and denied having used tools such as a wheelbarrow or shovel on the Project. He did not train his crew how to do janitorial work.

Johnson, a licensed contractor with his own business, testified that he had experience with prevailing wage jobs. He explained that construction is finished by the time final cleanup is performed and that he has never paid \$45.00 per hour for that kind of work because he would be underbid at that level of pay. He complained that a janitorial classification is lacking

⁶ All further statutory references are to the Labor Code, unless otherwise indicated.

⁷ Service Employees International Union.

but needed because final construction cleanup should not be covered by the Laborer classification.

Armando Rivas, a field investigator for LCP, testified that he was assigned to investigate the work of subcontractors on the Project, including Baron. He prepared the documents that make up LCP's Exhibit 8. They include notes of his site visit on October 23, 2013 and interviews with two of Baron's workers, Walter Beasley and Ronald Wolf. Exhibit 8 reflects that Rivas was informed that Baron's workers were not getting paid for the work they were doing; rather, they were provided room & board by Victory Outreach, a religious organization.

Sophia Ramirez, Project Manager for LCP, testified that she conducted an audit of the Project to determine whether Baron was in compliance with the prevailing wage laws. She reviewed the subcontract and concluded that it required the payment of workers at the prevailing wage rate. She also concluded that Baron misclassified its workers on its certified payroll records as "SEIU – Janitor" rather than the proper classification of Laborer Group 1. Ramirez stated that Baron's workers should have been paid at the prevailing wage rate set forth in prevailing wage coverage determination SC-23-102-2-2010-2, issued August 22, 2010 and covering laborer and related classifications for San Bernardino County (LCP's Exhibit 3.) Ramirez explained the Project had been advertised for bids as of October 15, 2010. (Bid documents included in LCP's Exhibit 12.) Ramirez testified that she informed Baron that the SEIU had no jurisdiction over the Project, and that the contract was let under the provisions of the Labor Code, not the Public Utilities Code, and that the Baron's certified payroll records were inaccurate. Ramirez further testified that she asked Baron to give her evidence of payments made to Baron's workers, including LCP's Exhibits 6 and 7 requesting back-up documents to prove the payment of wages and fringe benefits, but that no such evidence was ever provided by Baron. From this, Ramirez concluded that no wages were paid by Baron on this Project.

Ramirez stated that she relied on the certified payroll records to determine the hours worked on the Project. She also relied on the notes taken by Rivas, and she spoke with Beasley to confirm that the workers had been employed to do final clean-up work. She applied the prevailing wage rate applicable to the Laborer Group 1 classification. On behalf of LCP, she produced a Notice of Withholding of Contract Payments (part of LCP's Exhibit 12) for unpaid wages in the aggregate amount of \$35,928.48 and unpaid training fund contributions

totaling an additional \$522.24 at the rate of 64 cents per hour worked. Ramirez testified that, based upon Baron's previous history of violations and her impression that Baron's failure to pay its workers was willful and intentional, LCP assessed penalties at the maximum rate of \$200.00 per day per worker under section 1775. The total amount of penalties assessed is \$20,400.00 for 102 violations.⁸

The Notice of Withholding also apprised Baron that it may be liable for liquidated damages of an additional \$36,450.72.⁹ Baron timely requested review.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

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].)

Section 1774 provides:

The contractor for whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

A labor compliance program 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.*)

⁸ The Notice of Withholding also refers to section 1813 penalties, but LCP provided no evidence of overtime violations by Baron, and Ramirez orally confirmed that all penalties were assessed under Labor Code section 1775.

⁹ In addition to the assessed unpaid wages, this amount appears to erroneously include unpaid training funds which are not considered wages for the purpose of liquidated damages since they are not paid directly to the workers.

When the County, through its labor compliance program, determines that a violation of the prevailing wage law has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.¹⁰

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also 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 those wages are not paid within sixty days following the service of a Notice of Withholding.

The Work Performed by Baron is Subject to the Prevailing Wage Law.

Section 1771 provides:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed ... shall be paid to all workers employed on public works. . . . This section is applicable to contracts let for maintenance work.

Section 1772 provides:

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Section 1774 provides:

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

In *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, the Court of Appeal acknowledged that the right to be paid prevailing wages is governed by the plain meaning of sections 1771, 1772 and 1774:

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing

¹⁰ Section 1771.6, subdivision (b) provides that a notice of withholding shall be reviewable in the same manner as a civil wage and penalty assessment under section 1742.

them. [Citations and quotation marks omitted.] The familiar meaning of “execution” is “the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment” (5 Oxford English Dict. (2d ed.1989) p. 521); “the act of carrying out or putting into effect,” (Black's Law Dict. (8th ed.2004) p. 405, col. 1); “the act of carrying out fully or putting completely into effect, doing what is provided or required.” (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of “execution” in the phrase “in the execution of any contract for public work,” plainly means the carrying out and completion of all provisions of the contract.

(*Williams, supra*, 156 Cal.App.4th at 749-750.)

Sections 1771, 1772, and 1774, collectively require the payment of prevailing wages in two distinct situations: to workers employed in the execution of a public works contract and on “contracts let for maintenance.” (§ 1771.) This interpretation is consistent with the section's history, as the maintenance provision, as a standalone basis for requiring prevailing wages, was not added until 1974, well after the creation of the obligation to pay prevailing wages on public works. (Stats. 1974, ch. 1202, pg. 2593, § 1; see also, *Franklin v. City of Riverside* (1962) 58 Ca1.2d 114.)

Baron's argument is that the work Baron performed must be deemed “janitorial” and therefore is excluded from any obligation to pay prevailing wages for maintenance work. Maintenance (from which janitorial work is excluded) is defined in California Code of Regulations, title 8, section 16000 as:

Maintenance. Includes:

(1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure, ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

Exception: 1: Janitorial or custodial services of a routine, recurring or usual nature is excluded.

Contrary to Baron's argument, the janitorial exception to maintenance work has no applicability where the root obligation to pay prevailing wages is found in sections 1772 and 1774. The janitorial exception only applies to contracts let solely for maintenance work that will be performed on a routine and recurring basis, and not to the final cleanup work performed as a requirement of a broader public works contract. Baron's subcontract to do

final cleanup at the Project site was not independent of the prime contractor's contract with the County, and therefore the janitorial exception cannot apply.

Baron also took the position that the Department has not issued a prevailing wage classification that would cover the type of "janitorial" work done at the construction cleanup phase of a public works project. Given this deficiency, according to Baron, it could pay its workers an appropriate wage by ascertaining the closest union-approved wage rate for janitorial work. This is how Baron arrived at the wage rate purportedly approved by the SEIU. In essence, this is an argument that the prevailing wage law does not extend to final construction cleanup work.

The Department, however, has consistently taken the position that all phases of the construction of a public works project are covered by the prevailing wage law.¹¹ Given the type of work carried out by Baron's workers, it was reasonable for LCP to determine that the Laborer Group 1 prevailing wage rate was applicable in this case.¹² The Department's position has been codified by the Legislature with the recent adoption of AB 26, effective January 1, 2015, whereby section 1720, subdivision (a)(1) was amended to expressly include "all cleanup work at the jobsite" within the definition of "construction" under the prevailing wage law.

Baron Did Not Meet Its Burden of Proving That the Basis For The Notice of Withholding Is Incorrect.

LCP produced prima facie evidence for the Notice of Withholding. It did so through the credible testimony of Ramirez and Rivas, as well as its documentary evidence. Baron then had the burden of proving that the basis for the Notice of Withholding was incorrect, per section 1742, subdivision (b). Baron has not met its burden to prove that its work was not in the execution of its contract with the prime contractor and the prime contractor's contract with the County. Baron produced no evidence to establish that any wages were actually paid to Baron's workers employed on the Project. Thus, Baron did not meet its burden to disprove

¹¹ See, for example, the Director's Decision from 2009, *Harbor Construction Co., Inc.*, Case No. 09-0095-CPR, finding that the prevailing wage law applied to construction cleanup work under a contract awarded by the Antelope Valley Union High School District. Although the prior decisions of the Director are not precedential, the Department strives to apply the requirements of the prevailing wage law in a consistent and predictable manner for the guidance of the regulated public. The facts in the *Harbor Construction Co., Inc.* case are similar to those of the present case, and Baron has not explained why the reasoning used in that case should not also apply here.

¹² The Group 1 category includes general cleanup work, and carries the lowest wage rate for the Laborer classification.

the basis for the Notice of Withholding which determined that no wages had in fact been paid. The assessment for unpaid wages is affirmed.

LCP's Penalty Assessment Under Section 1775 Is Appropriate.

LCP assessed Baron a penalty of \$200.00 per day for each instance that one of its workers was unpaid on the Project, pursuant to section 1775. A contractor or subcontractor has the same burden of proof with respect to the penalty assessment as to the wage assessment. Specifically, the contractor or subcontractor must prove that the labor compliance program abused its discretion in determining that a penalty was due or in determining the amount of the penalty. (Rule 50(c) [Cal. Code Regs., tit. 8 § 17250, subd. (c)].)

In this case the County, through LCP, assessed penalties at the maximum rate of \$200.00 per violation. The Director is not free to substitute her own judgment. Baron has not shown an abuse of discretion, and the assessment of penalties at the rate of \$200.00 per violation is affirmed.

Baron Is Liable For Liquidated Damages.

Baron presented no evidence to support a waiver of liquidated damages under section 1742.1, subdivision (a). Because the assessed wages remain due and owing more than 60 days after service of the Notice of Withholding, Baron is liable for liquidated damages in an amount equal to the unpaid prevailing wages.

FINDINGS

1. Affected subcontractor Baron Services, Inc., filed a timely Request for Review from a Notice of Withholding of Contract Payment issued by Labor Compliance Providers, Inc., the labor compliance program for the County of San Bernardino.
2. Baron entered into a subcontract for public works with a prime contractor that had entered into a contract with San Bernardino County for the construction and completion of the Adelanto Detention Center Expansion project. All work in the execution of the subcontract required compliance with sections 1720 et. seq.
3. Baron was required by section 1774 to pay not less than the specified prevailing wage rate to all workers employed in the execution of the subcontract. Baron failed to do so.

4. Affected workers Lowell Connor, Marcus Willis, Walter Beasley, Al Orozco, Jose Pena, Felipe Ruiz, and Ron Wolf were not paid for the work they performed on the Project.

5. Unpaid wages are due to the affected workers in the aggregate amount of \$35,928.48.

6. Unpaid training fund contributions are due in the amount of \$522.24.

7. In light of Findings 5 and 6 above, Baron underpaid its employees in the aggregate amount of \$36,450.72.

8. Penalties under section 1775 are due in the amount of \$20,400 for 102 violations at the rate of \$200.00 per violation.

9. Liquidated damages are due in the amount of \$35,928.48, and are not subject to waiver under section 1742.1, subdivision (a).

10. The amounts found due in the Notice of Withholding as affirmed by this Decision are as follows:

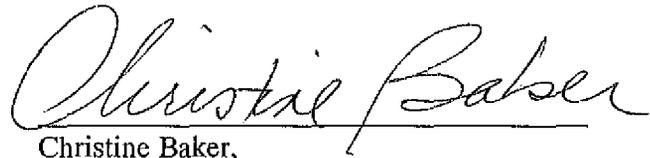
Wages Due:	\$35,928.48
Training Fund Contributions Due:	522.24
Penalties under section 1775, subdivision (a):	20,400.00
Liquidated damages:	35,928.48
TOTAL:	\$92,779.20

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

ORDER

The Notice of Withholding of Contract Payments is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 1/7/2015



Christine Baker,
Director of Industrial Relations