STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Alvand Construction, Inc. Case No. 15-0421-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Alvand Construction (Alvand) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the WRF Chlorine Building Monorail Project (Project) performed for the Padre Dam Water District (District) in the County of San Diego. The Assessment determined that $6,017.75 in unpaid prevailing wages and training fund contributions, $5,195.00 in penalties under Labor Code sections 1775 and 1813, and $4,840.00 in penalties under Labor Code section 1777.7 were due.[1] Alvand did not deposit the Assessment amount with the Department of Industrial Relations under section 1742.1, subdivision (b).

Pursuant to written notice, a Hearing on the Merits was held on December 8, 2016, in San Diego, California, before Hearing Officer Douglas P. Elliott. Max D. Norris appeared as counsel for DLSE; Chris Ashtari, president of Alvand, appeared for Alvand. Testimony was presented at the Hearing by DLSE Deputy Labor Commissioner Cari Anderson and by District inspector Steve Grabowski in support of the Assessment; Mr. Ashtari and worker Jose Valenzuela testified on behalf of Alvand.

The issues for decision are:

[1] All further section references are to the California Labor Code, unless otherwise specified.

- Whether the classifications used in the Assessment were correct;
- Whether the prevailing wage rates used in the Assessment were correct;
- Whether the amounts credited in the Assessment for training funds were correct;
- Whether the credits given in the Assessment for payment of wages to the workers were correct;
- Whether the hours worked as listed in the Assessment were correct;
- Whether Alvand can establish that the Labor Commissioner abused her discretion in assessing penalties under section 1775;
- Whether Alvand is liable for penalties under section 1813 as assessed;
- Whether Alvand has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1;
- Whether Alvand is liable for section 1777.7 penalties, and if so, in what amount.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, but Alvand thereafter carried its burden of proving that the basis of the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subd. (b).) Also, Alvand has carried its burden of proving grounds for a partial waiver of liquidated damages. Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

Facts

The Project.

The District advertised the Project for bid on June 24, 2013. The Project involved the construction of a new monorail system, including foundations, supports, hoists and trolley. Alvand was awarded the Project and entered into a contract to perform the work

on August 7, 2013 (Contract). The Contract directs Alvand to pay the applicable prevailing wages, cites the Labor Code sections containing the applicable prevailing wage provisions, advises that the Director's determinations of prevailing wages are available for inspection at the District's office, and sets forth the requirements for employing apprentices and submitting certified payroll records (CPRs).

The Assessment.

DLSE served the Assessment on October 28, 2015. It found that Alvand had failed to pay the required prevailing wage rates under sections 1771 and 1774, failed to pay workers for all hours worked, failed to properly classify workers according to work actually performed per section 1774, and failed to pay the required training fund contributions per section 1777.5. It further found that Alvand failed to submit contract award information to applicable apprentice programs in accordance with section 1777.5, subdivision (e), and California Code of Regulations, title 8, section 230, and failed to request apprentices from applicable apprentice programs and employ apprentices in accordance with section 1777.5, subdivision (g), and California Code of Regulations, title 8, section 230.1.

The amount of underpaid wages found due in the Assessment is based on the prevailing wage determination for Laborer - Engineering Construction (Laborer Group 1) for San Diego County (SD-23-102-3-2013-1) (Engineering Laborer PWD).[2] The Assessment determined that Engineering Laborer rates were applicable for certain workers, and that the required rate for straight time was $45.07 per hour (excluding the required training fund contribution amount, but including a predetermined increase). Alvand's CPRs established that it had paid Laborers $42.27 per hour. Accordingly, the Assessment determined that Alvand was liable for the $2.80 per hour difference between the rate Alvand actually paid and the Engineering Laborer rate.

[2] DLSE submitted at the Hearing the Engineering Laborer PWD, and neither party submitted any other Laborer PWD. The Engineering Laborer PWD requires $44.36 in general prevailing wages, fringe benefits, and training fund contributions, plus a predetermined increase of $1.35 per hour that was effective July 1, 2013, and thus was applicable to the Project.

Deputy Labor Commissioner Cari Anderson testified that the bid advertisement requires any contractor bidding on the Project to hold a General Engineering Contractor (Class A) license and maintain that license for the duration of the contract. Anderson noted that Alvand possesses both a Class A license and a General Building Contractor (Class B) license.

Alvand president Chris Ashtari testified that he believed the Building Construction Laborer rate was applicable because the work was being done inside a building.

Relevant Prevailing Wage Rate Determinations.

The following prevailing wage determinations were relevant in some manner to the Assessment, as discussed *infra*.

Engineering Laborer. Section (B)(21) of the scope of work provisions for the Engineering Laborer PWD includes as covered work:

> (B) …all engineering work coming within the claimed jurisdiction of the Laborers' International Union of North America, including the following:
>
> (21) All work involved in the construction, replacement, alteration or modification of all rail lines, including salvage, demolition and take-up, on main lines, siding, service lines or any structure part of or appurtenant to such facilities, whether located on railroad, public or private property and rights of way of any sort.

Iron Worker. Section 3 of the scope of work provisions for the Iron Worker classification (C-20-X-1-2013-1) (Iron Worker PWD) includes as covered work:

> (A) all work in connection with field fabrication and/or erection of structural, ornamental and reinforcing steel work …
>
> (C) job classifications of …Erectors and Riggers, …Structural [workers]…and shall include …all work in connection with field fabrication and/or erector or deconstruction of structural, ornamental, or reinforcing steel….including … monorails….

Cement Mason. Section 4 of the scope of work for two Cement Mason classifications (SD-23-203-3-2012-1, and SD-23-203-3-2012-1A) (Cement Mason PWD) includes as covered work:

(A) ...construction jobsite work including ... construction, alteration, modification, improvement, or repair, in whole or in part, of building, structure, or other construction jobsite work ... and shall not include any other jobsite construction industry work.

Carpenter Engineering. Section 4 of the scope of work provisions for Carpenter-Engineering Construction (SD 23-31-4-2012-1) (Carpenter Engineering PWD) includes as covered work:

> The prefabrication or construction of forms for: footings, foundations, slabs, walls, suspended slabs or columns, for structures of all descriptions, whether made of wood ... or any other type of material, including the erection thereof....

Other PWDs peripherally relevant to this case are Operating Engineer, Operating Engineer (Special Shift, Operating Engineer, Multi-Shift) (SD-23-63-3-2012-1) (Operating Engineer PWD), and Plasterer (SD-2013-1) (Plasterer PWD).[3]

Unreported Hours.

The Assessment found that Alvand failed to report all hours of work in its CPRs. Anderson testified that she compared the District inspector's Construction Progress Reports (Progress Reports), worker time sheets, and Alvand's own daily reports (Daily Reports) with the CPRs. She discovered that for some days, more workers were reported on the Progress Reports than on Alvand's CPRs, and that for other days, more hours were reported on the Daily Reports than on the CPRs. Based on those discrepancies, in preparing the Assessment, Anderson added hours for workers Jose Valenzuela, Stacy Kearns, Roman Mendoza, and Oscar Rios. The Assessment further found that one Plasterer, Mike LaBarre, was correctly classified as such, but was underpaid by a total of $6.05 for the five hours total he worked on the Project.

District inspector Steve Grabowski testified that he monitored the work on the Project for several hours each day, and wrote the Progress Reports on the basis of his personal observations and conversations with personnel on the site. He identified the workers by classification based on his observations, and occasionally would ask a worker

[3] These other classifications are mainly relevant to this Decision only insofar as the related PWDs, like the Engineering Laborer PWD, Iron Worker PWD, Cement Mason PWD, and Carpenter-Engineering PWD, all bear a hashtag (#) in the PWD, indicating they are apprenticeable crafts subject to the apprentice requirements under sections 1777.5 and 1777.7.

what he was doing. He testified that he was on site every day that work was done from the start date, November 19, 2013, until completion. Grabowski wrote the Progress Reports at the end of the day, or sometimes later in the week. He described the scope of work on the Project as installing an overhead monorail system to lift large (approximately 1,000 gallon) chlorine tanks and move them on and off the tracks.[4]

The Assessment found that Valenzuela was not paid for a total of 60 hours he worked as a Laborer in February and March 2014. Valenzuela testified that he worked for Alvand for more than ten years and was always paid by company check, never in cash, and was paid for all the hours he worked. On cross-examination, Valenzuela testified that every Friday, he received his time sheets, completed by Ashtari, and would check them.

Anderson also identified the following workers as being entitled to more hours for work on the listed dates, based on the Progress Reports:

Worker Name	Dates of Work	Additional Hours
Jose Valenzuela	February 10, 11, & 12, 2014 February 13, 14, 18-20, and March 20, 2014	4 hours per day 8 hours per day
Stacy Kearns	January 8, 2014	6 hours
Roman Mendoza	November 19, 2013 January 25, 2014	8 hours 8 overtime hours & 1 double time hour
Oscar Rios	November 29, 2013 December 9, 10, 13, and 20, 2013	8 hours 8 hours per day

[4] Grabowski further testified that he saw Ashtari's nephew, Bobby Ashtari, on the Project site on some days, sometimes performing work. Bobby Ashtari is not listed in Alvand's CPRs, and was not included in the Assessment. Ashtari asserts in his post-hearing letter brief that Bobby normally worked in the office 20 to 30 hours per week, for which he received a salary of $2,000.00 per month. Ashtari represents that Bobby asked to come to the Project site to observe the workers. Over the course of the Project, Ashtari states in his brief "he probably helped out about 20-25 hours and mostly just to learn."

Reclassification of Workers.

The Assessment determined that Alvand occasionally misclassified workers who were performing duties that fell within the scopes of work for Engineering Laborer, Operating Engineer, Iron Worker, and Carpenter Engineering. Anderson testified that she compared the Progress Reports with Alvand's CPRs and discovered discrepancies. For example, on February 18, 2014, the Progress Report shows that one worker was performing structural steel work that Anderson determined to fall under the scope of the Iron Worker classification. On the CPR for that date, Alvand classified the worker, Jorge Yepiz, as "Fence," while other workers were classified consistently with the Progress Report (in various classifications). In her audit, Anderson reclassified Yepiz to Iron Worker for that one date, credited Alvand with the payment of $44.37 per hour that had been made, and found an underpayment for the difference between what the CPR showed and the rate under the Iron Worker PWD. For the following two days, February 19 and 20, 2014, Anderson determined that Yepiz was only installing panels, and she reclassified him from "Fence" to Engineering Laborer for those dates.[5] In response to the reclassification, in his post-hearing brief filed on behalf of Alvand, Ashtari conceded a classification error by stating that "Alvand never, ever intentionally classified any workers in any project to cheat on their wages. This project had no carpenter and no fence work. As I mentioned the fence should be labor (*sic*), since Mr. Yepiz's trade was fencing, I just want to pay him about $2 and change extra because of the short duration of the work."

Anderson also testified that another worker, Rios, performed work within the scopes of work of several different classifications over the course of the Project, including Cement Mason, Laborer, and Carpenter. Alvand classified Rios as a Cement Mason while he was preparing concrete formwork on December 9, 10, 13, and 20, 2013. This type of work is specified in the applicable Carpenter Engineering PWD scope of

[5] Anderson also determined that the Engineering Laborer rate instead of the lower Laborer rate shown on Alvand's CPRs should have been used for workers Valenzuela, Kearns, Mendoza, and Rios, and the Assessment reclassified those workers accordingly.

work. Grabowski testified he called Ashtari's attention to this classification issue, as he recorded in the following excerpt from the Progress Report for December 9, 2013:

> Questioned Ashtari as to the classification of the worker on site performing carpentry work. Ashtari informed me that he was a 'concrete worker.' I informed him that I was not aware of this classification and that I felt he should be a laborer or carpenter based on what I observed he was doing. Ashtari informed me that he would produce paperwork that the [*sic*] is a classification of 'concrete worker' for Prevailing Wage jobs.

Notwithstanding Grabowski's observation, according to its CPRs, Alvand continued to classify Rios as a Cement Mason on the subsequent days he prepared formwork. Ashtari testified that Alvand classified workers according to the trade he associated with each of them. In that regard, he regarded Rios as a "cement guy," and classified him as a Cement Mason. Alvand presented no other evidence that, based on the work performed by Rios, the proper classification was Cement Mason.

Training Fund Contributions.

The Assessment determined that Alvand failed to make all of the required training fund contributions for work performed on the Project. Anderson testified that in her audit, she calculated the total amount of training funds due to be $302.10, and then credited Alvand for $172.37 it paid to the California Apprenticeship Council. This left a balance of $129.73 owed by Alvand. Anderson testified that Alvand did not make sufficient training fund contributions even if unreported hours were excluded from the calculation.

Alvand maintains that it paid all training fund contributions due. Ashtari stated in Alvand's post-hearing letter brief that "I have emailed the cancelled checks and the bank statements to confirm the Training fund have [*sic*] been paid in full." However, Alvand did not submit cancelled checks or bank statements at the Hearing.

Apprenticeship Issues.

The Assessment determined that Alvand employed workers in Iron Worker, Laborer, Carpenter, Cement Mason, Operating Engineer, Electrician, and Plasterer classifications, but did not employ any apprentices. Further, Alvand did not submit

contract award information to any of the applicable apprenticeship committees, as required by California Code of Regulations, title 8, section 230, subdivision (a).

Ashtari acknowledged in his testimony that he had not submitted the contract award information, requested the dispatch of apprentices, or employed apprentices. He testified that it would have been impractical to employ apprentices on such a small project, and that some of the work was change order work beyond the scope of the Contract. He requested that penalties be assessed only for the 35 days that Alvand worked on the job site, and not the entire 121-day period between the first day and the last day of the Project.

Discussion

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL 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 see *Lusardi,* at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling

of unpaid wages, if unpaid prevailing wages are not paid within sixty days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment 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).)

Additionally, employers on public works must keep accurate payroll records, recording, among other information, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App. 5th 1072, 1079 ["'[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work

performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.'"], citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687–688, 66 S.Ct. 1187; see also *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727; *In re Gooden Construction Corp.* (U.S. Dept. of Labor Wage Appeals Board 1986) 28 WH Cases 45 (BNA) [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, for the reasons detailed below, the Hearing Officer determined based on the totality of the evidence presented at the Hearing that the record established a proper basis for the Assessment, except as discussed below.

Alvand Failed to Report All Hours Worked by Some Workers.

Anderson testified that her finding that Alvand underreported the hours worked by four workers was based on a review and comparison of the workers' time sheets, Alvand's CPRs, and the Progress Reports. Grabowski testified that he accurately reported construction activities on the Progress Reports as one of his job duties. The reports are, for the most part, detailed and thorough. Although Ashtari disputed the accuracy of some of these reports, he testified that Grabowski was not being deliberately inaccurate and was "a very honest guy." The four workers at issue in the Assessment's finding of underreported hours were Valenzuela, Kearns, Mendoza, and Rios. In order to analyze DLSE's finding of underreporting of hours, the testimony and documentary evidence regarding each of these workers must be individually reviewed. As will be seen, Alvand carried its burden to prove the Assessment was incorrect in some respects. (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, §1742, subd. (b)).

Valenzuela was the only worker called as a witness by DLSE. He testified that he had checked his time sheets and he had been paid for all hours he worked. This testimony is inconsistent with Anderson's audit, which found that Valenzuela had not

been paid for 60 hours of work done on the following dates: four hours on each of February 10, 11, and 12, 2014, and eight hours on each of February 13, 14, 18, 19 and 20, 2014, and March 20, 2014. Anderson testified that her audit reached this conclusion based on the fact that the Progress Reports showed one or more Laborers on the Project site on those dates, but that no Laborers were reported in the CPRs for those dates. She credited the hours to Valenzuela because he had worked on the Project the previous week.

The CPRs show that Valenzuela worked 32 hours during the week ending January 12, 2014, and did not work again on the Project until Friday, February 7, 2014, when he worked five hours. The CPRs next report Valenzuela working four hours on February 21, 2014, and never after that. Given these facts, and Valenzuela's unambiguous testimony that he was paid for all hours he had worked on the Project, DLSE's inference that he worked, without compensation, eight additional days in February and one additional day in March, cannot be accepted.

There is also reason to question the accuracy of the worker counts on the Progress Reports for some of the days. It was Grabowski's standard practice to note not only the number of workers for each classification for each contractor on the Project site, but also the activities being performed. For February 10, 11 and 12, he noted that Alvand had one Laborer and one Electrician working. Under "Construction Activities," he described the work being done by subcontractors on those dates, but listed none for Alvand. With Grabowski's standard practice in mind, the omission cannot be accepted as inadvertent, especially where the Daily Reports list only electrical work being done on those dates.

There is one other discrepancy with regard to Valenzuela. Anderson credited him with eight unpaid hours worked on March 20, 2014, but the Progress Report for that date notes that Alvand had left the Project site prior to Grabowski's arrival at 1:30 p.m. Given the starting time of 7:00 a.m., Valenzuela could not have worked eight hours on that date, even if one were to discount his own testimony that he was paid for all the hours he worked.

Taking the record as a whole, the preponderance of the evidence shows that Alvand has carried its burden of proving that the audit incorrectly found that Valenzuela was not paid for 60 hours of work performed. Accordingly, the Assessment must be modified to reduce the amount of unpaid wages for those 60 hours over the nine days in question, which, at the Engineering Laborer PWD rate of $45.07 per hour, reduces the underpaid wages found in the Assessment by $2,704.20.

Kearns worked only two days on the Project and was paid for ten hours: eight hours on January 7, 2014, and two hours on January 8, 2014. DLSE credited him with an additional six unreported hours on January 8, apparently based solely on Grabowski's head count of two Laborers and one Electrician for that date. Kearns's time sheet shows him working only from 7:00 a.m. to 9:00 a.m. on that date. The Progress Reports provide simple head counts, but generally do not state the number of hours each worker put in. The CPRs, on the other hand, show numerous instances of workers working partial days. DLSE's assumption that Kearns worked a full day on January 8, 2014, appears to be unsupported by any evidence in the record. Based on Kearns' time sheet and the related CPR, the preponderance of the evidence shows that Alvand has carried its burden of proving that the Assessment incorrectly included six additional hours for Kearns on January 8, when in fact he worked only two hours on that date. Therefore, the Assessment must be modified to eliminate the six allegedly unreported hours on one day credited to Kearns, which, at the Engineering Laborer PWD rate of $45.07 per hour, reduces the underpaid wages found in the Assessment by $270.42.

Mendoza was paid for 39 regular hours and one overtime hour, according to the CPRs. DLSE credited him with an additional eight regular hours on November 19, 2013, and eight overtime hours and one double time hour on January 25, 2014, a Saturday. Grabowski's first Progress Report for the Project is dated November 19, 2013, and lists one superintendent (Ashtari) and two Laborers under "Work Force." Under "Construction Activities," the report states: "Alvand Construction performed the following construction activities today: Layed out [*sic*] and saw cut asphalt/concrete pavement for installation of the column footings for the monorail lines A/4, 5 & 6 and B/4, 5 & 6. After saw cutting the area was cleared of the tailings from the saw cutting

process." Since the CPR showed no workers on that date, in the Assessment DLSE credited Mendoza and Rios with eight hours each.

The Daily Report for November 19, 2013, lists only Ashtari working for Alvand, and indicates that a subcontractor identified as "Ray-Max" was performing "saw cutting AC for footings." Ashtari testified that this work was not done by Alvand employees, and that Alvand had no workers on site that day. On at least two other dates, January 23 and 24, 2014, the Progress Reports state that subcontractor Ray-Max Concrete Cutting (Ray-Max) was on the Project site doing concrete cutting work. That reference establishes that Alvand did, in fact, subcontract concrete cutting to Ray-Max, which, in turn, supports an inference that Grabowski likely had the mistaken belief that Ray-Max's workers were employed by Alvand on November 19, 2013. Accordingly, the preponderance of the evidence shows that Alvand has carried its burden of proving that the Assessment incorrectly credited eight Laborer hours to Mendoza for that one date, which, at the Engineering Laborer PWD rate of $45.07 per hour, reduces the underpaid wages found in the Assessment by $360.56.

With regard to the nine unreported hours credited to Mendoza on January 25, 2014, the Progress Report lists one Superintendent, one Laborer and one Laborer/Cement Finisher. The Daily Report for that date lists one Laborer and one Cement Mason, each working nine hours. However, the CPR does not show any Laborer working that day. Thus Alvand's own records support the Assessment's finding of nine unreported Laborer hours credited to Mendoza on that date. The preponderance of the evidence shows that Alvand has not carried its burden of proving that the Assessment was incorrect in that respect.

Rios worked a total of 28 regular hours, eight overtime hours and one double time hour on the Project, according to the CPRs. DLSE credited him with 40 additional, unreported hours. Eight of these unreported hours were for the cement cutting work on November 19, 2013, that was actually done by employees of subcontractor Ray-Max, as discussed *ante*. Accordingly, as with Mendoza, the underpayment of wages found in the Assessment is reduced by $360.56 for that date. DLSE also credited Rios with eight

unreported hours as an Operating Engineer on January 23, 2014, and again on January 24, 2014. The Progress Report for those two days counted one Laborer and one Operator (presumably, Operating Engineer) for each of those dates. The Daily Report for January 23, 2014, shows three Operator hours and 13 Laborer hours; and the Daily Report for January 24, 2014, shows four Operator hours and 12 Laborer hours. For both days, those numbers would indicate one full-time Laborer and one worker split between Laborer and Operator. The CPR shows that the latter worker is Mendoza. However, no one else is listed in the CPR as a Laborer on those days. Thus, the preponderance of evidence shows that Alvand did not carry its burden to prove that DLSE's decision to credit Rios with eight underreported hours for each of those dates was incorrect. Based on the evidence including the Progress Reports, however, those 16 underreported hours should have been calculated at the Engineering Laborer rate of $45.07 per hour, not the Operating Engineer rate of $59.16 per hour. Accordingly, the underpayment of wages found in the Assessment is reduced by $225.44, the difference in the two rates for the 16 hours.

DLSE also credited Rios with eight unreported hours as a Laborer on February 18, 2014, and again on February 21, 2014. The Progress Reports counted two Laborers on each date. The CPR lists no Laborer on February 18, 2014, but reports one worker (Yepiz) misclassified as "Fence." The CPR lists one other Laborer, Valenzuela, working four hours on February 21, 2014. With no time sheet, daily report, or other evidence to disprove the Assessment as to the added hours for Rios on February 18 and 21, Alvand has not met its burden of proving that head counts in the Progress Reports for those dates were erroneous. Thus, the preponderance of evidence shows that Alvand did not carry its burden to prove that DLSE's decision to credit Rios with 16 more underreported hours for February 18 and 21 was incorrect, and the Assessment is affirmed in that regard.

Overall, then, based on the prima facie evidence submitted by DLSE, as well as the evidence submitted by Alvand, which was sufficient to prove that the Assessment was

incorrect in some, but not all, respects, the Assessment of underpaid wages, based on the underreporting of hours, is reduced by a total of $3,921.18 and otherwise affirmed.[6]

Alvand Misclassified Certain Workers and Did Not Pay the Correct Rate Under the Applicable Determinations.

DLSE presented evidence that Alvand paid Rios at the Cement Mason rate when the work required Carpenter rates. The scope of work for the Carpenter-Engineering PWD provided the only description that matched the form work being done ("prefabrication or construction of forms for: footings, foundations, slabs, walls, suspended slabs or columns, for structures of all descriptions ...."). That Ashtari regarded Rios as a "cement guy" adds nothing of evidentiary value to the question of whether the Cement Mason PWD applies. The Cement Mason PWD itself contains no definitive scope of work that matches the work function in question. Rather, the determination is phrased so generally that it could potentially describe all work on a construction site, and accordingly, it cannot be accepted as determinative here in the face of the specific wording in the Carpenter Engineering scope of work. Moreover, the Cement Mason PWD scope states that it "shall not include any other jobsite construction industry work." Based on a preponderance of evidence, Alvand did not carry its burden to prove that DLSE's decision to classify the 32 hours Rios worked on December 9, 10, 13, and 20, 2014, as Carpenter Engineering work was incorrect.

The Assessment included unpaid prevailing wages owed to workers Valenzuela, Kearns, Mendoza and Rios on the grounds that the workers were misclassified as Laborers, when in fact, based on the type of work they were actually performing, DLSE presented evidence that they should actually be classified as Engineering Laborers and, as to Rios at one point, Operating Engineer.

As noted *ante*, the scope of work provision for this classification and prevailing wage determination includes "[a]ll work involved in the construction, replacement,

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[6] Alvand did not rebut the Assessment's finding that worker Mike LaBarre was underpaid by a total of $6.05.

alteration or modification of all rail lines, … or any structure part of or appurtenant to such facilities ….” It is undisputed that the Project entailed construction of an overhead monorail system. Based on the evidence of record, then, the work falls squarely within the Engineering Laborer scope of work.

That conclusion is buttressed by the evidence on the requirements of the Contract. It is undisputed that the District required all bidders on the Project to hold a General Engineering Contractor (Class A) license. Business and Professions Code section 7056 defines this class of contractor as follows:

> A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control … dams and hydroelectric projects, levees, river control and reclamation works[,] … sewers and sewage disposal plants and systems … pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances[,] … powerhouses, powerplants and other utility plants and installations[,] … excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above-mentioned fixed works.

In contrast, Business and Professions Code section 7057 defines General Building Contractor (Class) B as follows:

> (a) Except as provided in this section, a general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.
>
> ***
>
> (b) A general building contractor may take a prime contract or a subcontract for a framing or carpentry project. However, a general building contractor shall not take a prime contract for any project involving trades other than framing or carpentry unless the prime contract requires at least two unrelated building trades or crafts other than framing or carpentry, or unless the general building contractor holds the appropriate license classification or

> subcontracts with an appropriately licensed contractor to perform the work.

Ashtari's explanation that he understood "working inside a building" to mean "building construction" as a reason for Alvand not paying the higher rate found by the Assessment does not comport with the scope of work for Engineering Laborer PWD, nor does it comport with the above-stated statutory definition for a General Engineering Contractor (Class A) license. Alvand did not introduce any evidence to support Ashtari's purported understanding, and the record contains none. Ashtari further stated that he did not feel that he was being "unethical" in paying the lower Laborer rate. The CPWL, however, requires workers to be paid the correct rate, regardless of their employer's good intentions or possible good faith mistakes.

Therefore, DLSE presented prima facie evidence supporting the correctness of the Assessment on the classification issue, and Alvand failed to meet its burden of proving that the Assessment was incorrect in requiring that Laborers be paid the Engineering Laborer PWD rate. Accordingly, Alvand underpaid the workers performing work properly classified under the Engineering Laborer PWD, Valenzuela, Kearns, Mendoza and Rios, at less than the required Engineering Laborer rate by $2.80 per hour, as the Assessment found.

DLSE also presented prima facie evidence supporting the correctness of the finding in the Assessment that Alvand occasionally misclassified other workers, including by paying Yepiz at a rate not found in any applicable prevailing rate determination of record, and Rios at the rate of $43.35, and subsequently $44.45, when, based on the type of work they were actually performing, DLSE's evidence demonstrated that they should actually have been classified as Iron Worker and Carpenter Engineering, respectively. These other misclassifications and related unpaid wages included in the Assessment were not challenged in any specific detail by Alvand at the Hearing. In that regard Alvand failed to carry its burden of proving that the Assessment was incorrect with respect to these additional workers who were misclassified, and accordingly, the Assessment is affirmed in this respect and on these issues

Alvand Underpaid Training Fund Contributions.

Section 1777.5, subdivision (m)(l), requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards, as follows:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

Anderson testified that she calculated the total amount of training fund contributions required of Alvand to be $302.10, and that she credited Alvand for the $172.37 that the California Apprenticeship Council's records show Alvand paid. This left an unpaid balance of $129.73.

Although Alvand maintains that it has paid all training fund contributions due, it presented no evidence of this contention. Thus, it has not carried its burden of proving the Assessment incorrect on this point. However, this Decision's modification of the Assessment to remove the 60 unreported hours credited to Valenzuela, six hours credited to Kearns, eight hours credited to Mendoza, and eight hours credited to Rios on November 19, 2013, as noted, results in the reduction of training funds found due in the Assessment ($129.73) by the amount of $52.48 (accounting for the $0.64 hourly amount for 82 hours due as training fund contributions under the Engineering Laborer PWD). There is an additional reduction of $2.56, representing the difference between the assessed Operating Engineer hourly training fund amount of $0.80 and the $0.64 hourly training fund amount for Engineering Laborer, for 16 hours for Rios on January 23-24, 2014. This leaves a modified unpaid balance of $74.69.

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Alvand Is Liable for Liquidated Damages.

Section 1742.1 provides for the imposition of liquidated damages when an assessment for unpaid prevailing wages is issued, essentially a doubling of the wages, if the wages are neither paid to the workers nor deposited with the Department within 60 days of issuance of the assessment. On the date the Assessment in this matter was issued, October 28, 2015, former section 1742.1, subdivision (a) read, in part:

> After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she *had substantial grounds for appealing the assessment* . . . with respect to a portion of the unpaid wages covered by the assessment . . . , *the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.*

((Former) § 1742, subd. (a), emphasis added.)[7] Section 1742.1, subdivision (b), further provides:

> [T]here shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties has been deposited with the Department of lndustrial Relations within 60 days following service of the assessment or notice, for the department to hold in escrow pending administrative and judicial review.

(§ 1742.1, subd. (b).)

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[7] On June 27, 2017, the Director's authority to waive liquidated damages in his or her discretion was deleted by legislative amendment from section 1742.1. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].) Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the Legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Here, there was no expression of legislative intent that SB 96 apply retroactively to pending cases. (Accord, *Kizer v. Hannah* (1989) 48 Cal.3d 1, 7, "A statute is retroactive if it substantially changes the legal effect of past events.") Accordingly, the prior version of section 1742.1 in effect on the date the Assessment was issued in this matter, will be applied.

In this case, there is no evidence that Alvand paid any of the back wages to any of its workers within 60 days following service of the Assessment; nor is there evidence that Alvand deposited the amount of the Assessment, or any part thereof, with the Department of Industrial Relations. Accordingly, absent a discretionary waiver by the Director, Alvand is liable for liquidated damages in an amount equal to the unpaid prevailing wages due. Alvand's eligibility for a waiver of the liquidated damages depends on whether it had "substantial grounds for appealing the . . . notice with respect to a portion of the unpaid wages covered by the . . . notice." ((former) § 1742.1, subd. (a).)

Here, although this Decision finds that some portions of the Assessment were not supported by the evidence, it is also apparent that Alvand had no substantial grounds for appealing other aspects of the Assessment, or for taking the positions that it did with respect to the classification of some of the workers on the Project. Alvand presented no evidence that the Assessment was incorrect in finding that rates under the Engineering Laborer PWD, Operating Engineer PWD, Iron Worker PWD, and Carpenter Engineering PWD were required for the Project. As to Engineering Laborer work, Ashtari's testimony that he used lower rates associated with a lower paid Laborer classification because the work was performed "in a building" does not constitute substantial grounds, given DLSE's evidence that the Project required Engineering Laborer work. Similarly, Alvand failed to demonstrate substantial grounds for appealing the Assessment with respect to the misclassification of employees performing the work of Iron Worker and Carpenter Engineering. For example, it provided no evidence to justify using the classification "fence" for Yepiz when he was performing Iron Worker tasks, or for misclassifying Rios even after Grabowski called the issue to Ashtari's attention.

Based on the foregoing, the undersigned exercises her discretion not to waive liquidated damages with respect to the unpaid prevailing wages due. Accordingly, liquidated damages are assessed in the amount of $2,041.53.

The Labor Commissioner Did Not Abuse Her Discretion In Assessing Section 1775 Penalties.

Section 1775, subdivision (a), as it read at the time the Project was bid,

states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars ($200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than forty dollars ($40) . . . unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) The penalty may not be less than eighty dollars ($80) . . . if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than one hundred twenty ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[8]

[8] The reference to section1777.1, subdivision (c), is a typographical error in the statute. The correct subdivision of section 1777.1 is subdivision (e), which defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the

The Labor Commissioner's determination as to the amount of penalty is reviewable only for abuse of discretion. (§ 1775, subd. (a)(2)(D).) This is an inquiry as to whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ...." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his/her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE presented evidence that it considered the required statutory factors in setting the penalty rate. In particular, it considered the fact that Alvand did not promptly and voluntarily correct its errors when they were brought to its attention. Nonetheless, DLSE mitigated the penalty to the $80.00 rate. Alvand disputed that it had misclassified its workers, yet provided insufficient evidence to conclude they had not been misclassified. Nor did Alvand present any relevant evidence that the Labor Commissioner abused her discretion in assessing penalties under section 1775.

The Assessment found Alvand liable for section 1775 penalties totaling $5,120.00. However, this amount includes penalties for twelve days the Assessment credited Valenzuela, Kearns, Rios and Mendoza with unreported hours worked. Since this Decision finds that those workers did not work unreported hours on the days in question, the total section 1775 penalties must be reduced by $960.00, leaving a modified total of $4,160.00.

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public works law and deliberately fails or refuses to comply with its provisions."

Alvand Is Liable For Section 1813 Penalties.

Section 1813 states, in relevant part, as follows:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1 1/2 times the basic rate of pay.

The record establishes that Alvand violated section 1815 by paying less than the required prevailing overtime wage rate for three violations. Alvand submitted no evidence to the contrary. 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. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed against Alvand in the amount of $75.00 for three violations.

Alvand Failed to Employ Apprentices in the Required 1 to 5 Ratio of Apprentices to Journeymen in the Crafts for Iron Worker, Laborer, Carpenter, Cement Mason, Operating Engineer, Electrician, and Plasterer.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council and enforced by DLSE. (See Cal. Code Regs., tit. 8, §§ 227 to 232.70.)[9]

[9] All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).) However, a contractor is not in violation of the regulation if it has properly requested the dispatch of apprentices, and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) The Division of Apprenticeship Standards (DAS) has prepared a form (DAS 142) that a contractor may use to request dispatch of apprentices from apprenticeship committees.

Contractors are also required to notify apprenticeship committees when a public works contract has been awarded. DAS has also prepared a form for this purpose (DAS 140), which a contractor may use to notify apprenticeship committees for each apprenticeable craft in the area of the site of the project. The required information must be provided to the applicable committee within ten days of the date of the execution of the prime contract or subcontract, "but in no event later than the first day in which the contractor has workers employed upon the public work." (§ 230.1, subd. (a).)

Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices for specified dates and with sufficient notice.

When DLSE determines that a violation of the apprenticeship laws has occurred, "… the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." (§ 1777.7, subd. (c)(2)(B).)[10]

Here, DLSE presented prima facie evidence that Iron Worker, Laborer, Carpenter, Cement Mason, Operating Engineer, Electrician, and Plasterer classifications were apprenticeable crafts at issue in this matter and that Alvand

[10] Section 1777.7 was amended, effective January 1, 2015. (See stats. 2014, ch. 297, § 3.) For purposes of this Decision, the Director has applied the language of section 1777.7 that was in effect at the time the Project was advertised for bid (June 2013).

employed no apprentices on the Project. Alvand did not carry its burden of providing evidence of compliance with the 1:5 ratio of apprentices to journeymen on the Project. Accordingly, the record establishes that Alvand violated section 1777.5 and the related regulations, California Code of Regulations, title 8, sections 230 and 230.1, in failing to employ apprentices in the required ratio.

Alvand Failed to Properly Notify the Applicable Committees of Contract Award Information and Failed To Properly Request the Dispatch of Apprentices in Seven Classifications.

DLSE established that there were applicable apprenticeship committees for the aforementioned crafts in the geographic area of the Project and that Alvand sent no contract award information to any committee. In response, Alvand admits that it "inadvertently forgot to submit the [DAS 140] for this project." By that admission Alvand fails to carry its burden to prove compliance. (§ 1777.7, subd. (c)(2)(B).

Alvand Failed to Request Dispatch of Apprentices in the Crafts of Iron Worker, Laborer, Carpenter, Cement Mason, Operating Engineer, Electrician, and Plasterer.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (§ 230.1, subd. (a).) DLSE submitted prima facie evidence showing that Alvand had journeymen in apprenticeable crafts of Iron Worker, Laborer, Carpenter, Cement Mason, Operating Engineer, Electrician, and Plasterer working on the Project at various times from November 19, 2013, through March 20, 2014, totaling 389 hours over 121 days, yet Alvand failed to submit any dispatch requests (DAS 142) to the relevant apprenticeship programs. Accordingly, Alvand failed to carry its burden of proving that the basis for the Assessment was incorrect as to Alvand's failure to request dispatch of apprentices.

Alvand Is Liable for Payment of Penalties.

If a contractor knowingly violates section 1777.5, a civil penalty is imposed under section 1777.7. Here, DLSE assessed a penalty against Alvand under the following portion of former section 1777.7, subdivision (a)(1):

> A contractor or subcontractor that is determined by the Labor Commissioner to have knowingly violated Section 1777.5 shall forfeit as

> a civil penalty an amount not exceeding one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation.... A contractor or subcontractor that knowingly commits a second or subsequent violation of section 1777.5 within a three-year period, where the noncompliance results in apprenticeship training not being provided as required by this chapter, shall forfeit as a civil penalty the sum of not more than three hundred dollars ($300) for each full calendar day of noncompliance....

The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by a regulation, section 231, subdivision (h), as follows:

> For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects

In the Assessment, Alvand was determined to be in violation of section 1777.5 for 121 days and was assessed a penalty at the mitigated rate of $40.00 per day for a total penalty amount of $4,840.00.

To analyze whether the penalty is correctly calculated, under the version of section 1777.7 applicable to this case, the Director decides the appropriate penalty de novo.[11] In setting the penalty, the Director considers all of the following circumstances (which also guide DLSE's Assessment):

(A) Whether the violation was intentional,

(B) Whether the party has committed other violations of Section 1777.5,

(C) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation,

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[11] As noted *ante*, section 1777.7 was amended effective January 1, 2015. Under former section 1777.7, subdivision (f)(2) that applies in this case, the statute provided for the Director to review the Assessment's penalty de novo

(D) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices,

(E) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (f)(l) and (2).)

Here, the evidentiary record establishes the basis for the Assessment and Alvand's liability under sections 1777.5 and 1777.7 and the implementing regulations. Alvand did not hire any apprentices for the Project; nor did it attempt to obtain apprentices by sending a DAS 140 and DAS 142 to the applicable apprenticeship committees. Alvand's violations were "knowing" violations under the irrebuttable presumption quoted above: the Notice Inviting Bids expressly notified Alvand of its obligation to comply with the Labor Code provisions applicable to public works projects, including the employment of apprentices. Alvand failed to prove the basis of the Assessment was incorrect, and admitted that it "inadvertently forgot" to send the required forms. Ashtari testified that it would have been impractical to employ apprentices on such a small project, yet the Labor Code contains no exemption from apprentice requirements on small projects.

Applying the de novo standard for this case, factor "A" would suggest a penalty rate on the higher end. DLSE submitted evidence to justify finding that Alvand's violations of the apprentice requirements were intentional. Both the Notice Inviting Bids and the General Conditions of the Contract put Alvand on notice that it was required to employ apprentices. The applicable prevailing wage determinations stated that the relevant crafts were apprenticeable, and the Department of Industrial Relations website clearly identified the apprenticeship committees for the respective crafts in the geographic area of the Project. Alvand did not bear its burden of proving by a preponderance of the evidence that the violations were not intentional.

As to the de novo review factors "D" and "E," DLSE's evidence established that Alvand's journeymen worked 389 hours on the Project. Applying the five-to-one ratio, Alvand's violations of the apprentice requirements deprived apprentices of 78 hours of paid on-the-job training and deprived the relevant apprenticeship committees of the opportunity to provide that on-the-job training to the apprentices in their programs.

While this amounts to approximately two weeks of lost apprenticeship hours, it is a relatively small number of hours in relation to overall apprenticeship opportunities.

Factor "C" is neutral in this case. DLSE's evidence shows that DLSE did not notify Alvand of its violations until three months or more after Alvand's work on the Project ceased. Hence, Alvand had no opportunity to voluntarily remedy the violations after receiving notice.

Factor "B" unambiguously supports a penalty rate of less than $100.00. DLSE acknowledged that Alvand had no prior history of apprenticeship violations. This lack of prior violations served as DLSE's basis for mitigating Alvand's penalty rate to $40.00.

Overall, based on a de novo review of the five factors above and in light of the evidence as a whole in this case, the Director finds that a penalty rate of $40.00 is appropriate, and accordingly the Assessment is affirmed in this respect.

The Progress Reports disclose that Alvand employed journeyman workers on the Project starting from November 19, 2013, off and on through March 20, 2014. Based on that time period, DLSE assessed penalty for violation of apprenticeship requirements for the period of 121 days.

Alvand contends that penalties should be assessed only for the 37 days on which it worked on the Project, of which nine days were for change order work. Alvand argues that assessing penalties for 121 days is unduly harsh. DLSE points out that the applicable regulation permitted it to assess the penalty from the first day Alvand's journeymen worked on the Project to the filing of the Notice of Completion on June 3, 2014. By using the end date of March 20, 2014, the final day Alvand's journeymen worked on the Project, DLSE assessed the penalty for substantially fewer days that were authorized by the regulation. (Cal. Code Regs., tit. 8, § 230, subd(a) ["Failure to provide contract award information … shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed … for the purpose of determining the accrual of penalties …"].) Moreover, Alvand has not shown legal basis for excluding days spent on change order work.

DLSE's penalty calculation, however, was based on the premise that the first day Alvand had workers employed upon the Project was Tuesday, November 19, 2013. As discussed above, the only workers on the Project that day were employed by a subcontractor, not by Alvand. The CPRs show that the first day Alvand workers were on the Project was the following Monday, November 25, 2013, and the Progress Reports show no workers on the six intervening days. Accordingly, on de novo review, the Assessment is modified to reduce the section 1777.7 penalty by $240.00, representing a reduction of the 121 penalty days by six days at the $40.00 per day rate. As a result, the total section 1777.7 penalty is $4,600.00.

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

FINDINGS AND ORDER

1. Affected contractor Alvand Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Alvand Construction, Inc. underpaid seven employees on the Project in the aggregate amount of $1,966.84.
3. Penalties under Labor Code section 1775 are due in the amount of $4,160.00 for 52 violations at the rate of $80.00 per violation.
4. Penalties under Labor Code section 1813 are due in the amount of $75.00 at the rate of $25.00 per calendar day for two affected employees.
5. Alvand Construction, Inc. did not make the required contributions to the applicable training funds for seven employees on the Project in the aggregate amount of $74.69.
6. Liquidated damages are due in the amount of $2,041.53, and are not subject to waiver under Labor Code section 1742.1, subdivision (a).
7. Alvand Construction, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230, subdivision (a) by not issuing public works contract award information in a DAS Form 140 or its equivalent to the applicable apprenticeship committees in the

geographic area of the Project site for the apprenticeable crafts of Laborer, Operating Engineer, Cement Mason, Inside Wireman, Plasterer, Iron Worker, and Carpenter.

8. Alvand Construction, Inc. knowingly violated Labor Code section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a) by: (1) not issuing a request for dispatch of apprentices in a DAS Form 142 or its equivalent to the applicable apprenticeship committee for the crafts of Laborer, Operating Engineer, Cement Mason, Inside Wireman, Plasterer, Iron Worker, and Carpenter, in the geographic area of the Project site; and (2) not employing on the Project apprentices in the above crafts in the ratio of one hour of apprentice work for every five hours of journeyman work.

9. Alvand Construction, Inc. is liable for an aggregate penalty under Labor Code section 1777.7 in the sum of $4,600.00, computed at $40.00 per day for the 115 days from November 25, 2013, to March 20, 2014.

10. The amounts found due in the Assessment, as modified by this Decision, are as follows:

Wages:	$ 1,966.84
Training Fund:	$74.69
Penalties under section 1775, subdivision (a):	$ 4,160.00
Penalties under section 1813:	$75.00
Liquidated damages:	$2,041.53
Penalties under section 1777.7	$4,600.00
TOTAL	**$12,918.06**

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

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

Dated: March 14, 2019

Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[12]

[12] See Government Code sections 7, 11200.4.