STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

First Sealord Surety, Inc. Case No.: **10-0301-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

First Sealord Surety, Inc. (First Sealord), surety for the affected contractor, UST Development, Inc, (UST) submitted a timely request for review on its own behalf of the Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) with respect to the Wilson Avenue Landscaping and Trail – Carnelian Avenue to East of Carnelian Avenue Project (Project) in San Bernardino County. The Assessment determined that $35,823.91 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on August 15, 2011, in Los Angeles, California, before Hearing Officer Douglas P. Elliott. Matthew R. Hicks appeared for First Sealord, and David Bell appeared for DLSE. The matter was submitted for decision on September 27, 2011.

The issues for decision are:

- Whether UST's filing for Chapter 11 bankruptcy protection automatically stayed DLSE's enforcement actions.
- Whether First Sealord has standing to request review on its own behalf as surety.
- Whether DLSE's investigation was adequate.
- Whether the Assessment correctly found that UST had failed to report and pay the

required prevailing wages for all hours worked on the Project by the affected workers.

- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.
- Whether UST failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether there has been a demonstration of substantial grounds for appealing the Assessment such that there is an entitlement to a waiver of liquidated damages.

The Director finds that UST's bankruptcy does not bar this action because it is the exercise of the state's police powers and that First Sealord did not have standing to file this Request for Review. The Request for Review is therefore dismissed and the Assessment is affirmed by operation of law. (§ 1742, subd. (a).)

FACTS

The City of Rancho Cucamonga (City) advertised the Project for bid on May 12, 2009, for "clearing & grubbing, removal of sidewalk and handicapped access ramp, weed control and crack seal, tree removal, palm tree removal, asphalt concrete overlay, wheel chair ramp, planting shrubs & trees, irrigation system, boulders, traffic stripping, traffic control & pavement markers. UST's employees worked on the Project until approximately May 10, 2011.

One worker, Omar Correra, complained to DLSE that he was not paid the proper prevailing wage; Correra submitted calendars he prepared of the days and hours he worked. Deputy Labor Commissioner Rachel Farmer attempted to contact UST without success. Farmer tried to telephone UST at the number listed on the website of the Contractors State License Board (CSLB). The number she found was a fax number so she could not leave a message. Farmer contacted City to obtain Certified Payroll Records (CPR) for the Project. These records listed each worker employed on the Project, including the worker's pay classification, hours of work each day, and total payment of prevailing wages.

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

For all the employees other than Correra, Farmer relied on the CPRs and determined that UST had failed to pay the proper prevailing wage and overtime rates for each classification UST reported. The two primary errors by UST were not paying for a predetermined pay increase listed in the various prevailing wage determinations (PWD) and not paying the proper overtime rate for work performed over eight hours in a day.

As to Correra, Farmer compared the hours on the CPRs and on Correra's calendar. Where Correra's calendar reported more hours in a day, she relied on the calendar. Otherwise, Farmer used the hours reported on the CPR. As to the amounts paid Correra, Farmer relied on pay stubs submitted by Correra. She did so in part because, on at least one occasion, Correra was paid with a check that was returned for insufficient funds. There was no evidence that UST kept contemporaneous, accurate time records for work on the Project.

Farmer was presented at the hearing with a Stop Notice signed by Correra that claimed he was entitled to more wages for his work and had been paid more in wages than he reported to Farmer. The total claimed unpaid wages in the Stop Notice was greater than the unpaid wages Farmer determined were due. Farmer had not seen the document previously nor confirmed how the amounts were calculated.

Farmer was also presented with three exhibits from First Sealord: the deposition of Correra in a civil case apparently trying to be paid for work from UST and two declarations in lieu of testimony from inspectors on the Project, each of whom state that they were not on the Project site full time or even all day on any work day. Each declarant states that UST employees did not work ten hours in a day. DLSE objected to all three exhibits, and the Hearing Officer deferred ruling until this Decision.[2]

First Sealord submitted a Voluntary Petition for Chapter 11 bankruptcy relief filed by UST on March 5, 2010, after the hearing concluded. There was no evidence of the status of the bankruptcy estate at the time DLSE issued the Assessment, the time the hearing on the merits

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[2] DLSE's objections to the exhibits are sustained, and all three exhibits are excluded from evidence. The deposition transcript is hearsay evidence and no exception exists for its admission. (See Evid. Code, §§ 1220 [admission], 1292 [prior testimony by non party].) The declarations were submitted in lieu of testimony under Rule 34 (Cal. Code Regs, tit. 8, § 17234) to which DLSE timely objected. The witnesses did not testify, and the declarations are not otherwise admissible.

occurred or the bankruptcy's current status.[3] First Sealord did not submit evidence whether DLSE was given notice of the bankruptcy petition at any time prior to the hearing.

The Assessment: DLSE served the Assessment on September 15, 2010. The Assessment found that UST violated "Labor Code Sections 1771, 1774 for failing to pay prevailing wages to workers performing work in the scope of Inside Wireman, Operating Engineer, Laborer & Landscape Irrigation Laborers as provided in the General Prevailing Wage Determination made by the Director of Industrial Relations for work of a similar nature performed in San Bernardino County. Failure to pay overtime and failure to pay training as required. Penalties assessed pursuant to Labor Code Section 1775 at $50.00 per violation and Labor Code Section 1813." The Assessment found a total of $24,698.91 in underpaid prevailing wages, including $1,181.41 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of $50.00 per violation for 177 violations, totaling $8,850.00. DLSE determined that the maximum penalty was warranted because there were multiple complaints against UST, there was no response from UST at its phone number listed with the CSLB, and there was no prompt payment of the underpaid wages. In addition, penalties were assessed under section 1813 for 105 overtime violations, at the statutory rate of $25.00 per violation, totaling $2,625.00.

First Sealord submitted a request for review on November 2, 2010, requesting review on its own behalf. First Sealord attached a copy of the payment bond (Payment Bond) it issued to UST for the Project along with an unexecuted power of attorney, marked prominently with the words "unauthorized copy." UST did not seek review, and the Assessment is final as to it. (§ 1742, subd. (a).)

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. Prevailing wages are minimum labor standards. (*Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 612.)

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[3] First Sealord submitted the petition by way of a request for judicial notice under the Evidence Code rather than pursuant to Rule 45 (Official Notice, Cal. Code Regs., tit. 8, § 17245.) after the hearing on the merits concluded. DLSE had the opportunity to object in its Opposition Brief and did not. Having no objection, Official Notice will be

> The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*] (*Lusardi*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra.*)

> The duty to pay prevailing wages is mandated by statute and is enforceable independent of an express contractual agreement. Thus, while the obligation to pay prevailing wages arises from an employment relationship which gives rise to contractual obligations and claims the duty to pay the prevailing wage is statutory.

Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765, 779 (citations omitted). This means there are two possible ways of recouping unpaid prevailing wages: one is an action by DLSE that enforces the statutory obligation to pay prevailing wages as part of its law enforcement function; the other is a private action by workers. This case is the former.

When DLSE determines that a contractor or subcontractor has violated Division 2, Part 7, Chapter 1 of the Labor Code (commencing with section 1720), it issues a civil wage and penalty assessment against the affected "contractor or subcontractor." (§ 1741, subd. (a).) At the same time, DLSE serves the surety with a copy of the assessment if the identity of the surety can be determined. (*Ibid.*) The assessment shall advise "the contractor or subcontractor of the procedure for obtaining review of the assessment." (*Ibid.*) The assessment issued by DLSE is its determination of the nature and extent of a contractor's or subcontractor's violation of statute.

An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he

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taken of Exhibit 1 of First Sealord's Request to Take Judicial Notice.

contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." This review proceeding is the exclusive administrative remedy by which to challenge DLSE's assessment: "This section shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter ..." (§ 1742, subd. (g).) Thus, the procedure fixes the amount of liability, if any, for a violation of Division 2, Part 7, Chapter 1 of the Labor Code (commencing with section 1720). It is not a collection action.

Historically, the primary method for collecting unpaid prevailing wages and penalties has been from the bodies awarding the public works contract, assuming the awarding bodies have withheld sufficient funds. (See § 1727, subd. (a).) An assessment that has become final is immediately payable by the awarding body. (§ 1742, subd. (f).) No judgment is necessary. (*DLSE v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 577-578 *(Davis Moreno)* ["To appreciate the legislative intent and policy considerations behind section 1742, particularly subdivision (d), it is instructive to examine the predecessor statutes ...."])

Collection directly against contractors and subcontractors is also a process that begins after the assessment or the director's decision has become final. An assessment for which review is not sought becomes final 60 days after service. (§ 1742, subd. (a).) An assessment for which review is sought by an affected contractor or subcontractor becomes final 45 days after the Director's decision is issued. (§ 1742, subd. (c).) Such a final order on the assessment may be filed with a county clerk and then becomes a collectible judgment. Contractors and subcontractors are jointly and severally liable for this judgment. (§ 1743, subd. (a).) Sureties are treated differently: "A final order under this chapter or a judgment thereon shall be binding, with respect to the amount found to be due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond." (§1743, subd (d).)

UST's Bankruptcy Petition Does Not Bar DLSE's Enforcement Proceedings.

First Sealord argues that UST's bankruptcy filing automatically stayed DLSE's enforcement proceedings. As noted above, First Sealord failed to present evidence that the automatic stay still applied on September 15, 2010, when the Assessment was issued or that DLSE knew of the stay at any time prior to the hearing. Thus, First Sealord has failed to prove

the facts necessary to find that the Assessment was issued in violation of the automatic stay,

Assuming that the automatic stay in UST's bankruptcy estate was in effect at the time of the issuance of the Assessment, First Sealord argues that the proceeding is void under *In Re Schwartz* (9th Cir. 1992) 954 F.2d 569 [IRS tax lien violates automatic stay]. DLSE's response is that the automatic stay does not apply to enforcement actions against non-bankrupt guarantors or sureties. (*Boucher v. Shaw* (9th Cir. 2009) 572 F.3d 1087, *Chugash Forest Products, Inc. v. Northern Stevedoring & Handling Corp.* (9th Cir. 1993) 23 F.3d 241.) These arguments demonstrate a fundamental misunderstanding of this proceeding. It is well settled that actions in violation of an automatic stay are void. (*Schwartz, supra*, 854 F.2d at p. 572.) *Schwartz* and the other authorities cited by First Sealord only address the question of enforcement of a debt by a government agency against a debtor. DLSE's authorities only address when a proceeding that is a collection action against a third party non-bankrupt party is permissible. Both First Sealord's and DLSE's authority on the automatic stay's applicability are inapposite.

These procedures are exempt from UST's automatic stay because the Assessment is an exercise of DLSE's police powers to enforce California's prevailing wage statute. (*Ante.*) This proceeding is thus exempt under section 362(b)(4) of title 11 of the United States Code. (*N.L.R.B. v. Continental Hagen Corp.* (9th Cir. 1991) 932 F.2d 828, *Eddleman v. U.S. Dept. of Labor* (10th Cir. 1991) 923 F.2d 782.) The question of actual collection from UST or First Sealord is not within the Director's jurisdiction and need not be addressed here. For these reasons (both factual and legal), there is no bar to the Director determining UST's statutory liability.

First Sealord Does Not Have Independent Standing To Seek Review. Therefore, Review Must Be Dismissed.

The hearing officer raised *sua sponte* the question whether First Sealord has standing to request review in its capacity as a surety in light of the language in section 1742, subdivision (a), that "[a]n affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter ...." First Sealord argues that general principles of due process under the fifth amendment to the United State Constitution (and state equivalent) require that it have a remedy by which to challenge an assessment before it is jointly and severally liable for a contractor's failure to pay prevailing wages. (see, §§ 1742.1, 1743.) The issue is more

complicated largely because due process is a flexible concept, without fixed content. (*Cafeteria & Restaurant Workers v. McElroy* (1961) 367 U.S. 886, 895.)

Section 1742, subdivisions (a) and (e), clearly expresses the legislature's intent to create an administrative review process that is both the exclusive remedy by which to challenge an assessment and is limited to "the affected contractor or subcontractor". Where a statute is not ambiguous, it is presumed that the Legislature meant what it said; and the plain meaning of the statute governs. (*Pacific Lumber Company v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 934.). Limiting review to "affected contractor or subcontractor" is consistent with the limitation that the assessment may be issued only against a contractor or subcontractor in section 1741, subdivision (a).[4]

Just as a judicial officer would have to consider section 1742, subdivision (a), to be constitutional (and so construed it if at all possible), the Director assumes the legislature's chosen process to challenge assessments meets fifth amendment due process standards. (*Walnut Creek Manor v. Fair Employment and Housing Commission* (1991) 54 Cal.3d 245, 271.) First Sealord bears the burden proving that section 1742, subdivision (a), fails to pass constitutional muster. (*Tobe v. City Of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

The only case on which First Sealord relies is *California Gillnetters Assn v. Dept. of Fish and Game* (1995) 39 Cal.App.4th 1145 (*California Gillnetters*) for the proposition that its due process rights would be violated were First Sealord not to have standing. *California Gillnetters* was a challenge to a ballot proposition's elimination of fishing with gillnets; the case did not concern any form of administrative adjudication. The Court in *California Gillnetters* described the plaintiffs' due process claim as unclear and simply reiterated the general principal that "[t]he guarantee of procedural due process applies when a person's liberty or property interests may be curtailed by an adjudicatory or quasi-adjudicatory action." (*Id.*, at p. 1160.)

First Sealord argues that the statute's plain language, which excludes sureties from seeking review on their own, deprives sureties of due process before their bonds are the subject of collection. According to First Sealord, the only way to preserve the statute's constitutionality is to interpret section 1742, subdivision (a), to include the word "surety." To reach this result,

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[4] Sureties have the right to intervene in a request for review once one has been filed by an affected contractor or subcontractor. (Cal. Code Regs. tit. 8, §17208.)

First Sealord has to prove both that its property interest is adversely affected and that the statute's infirmity can only be cured by adding words to the section 1742 that the Legislature chose not to add. First Sealord cannot meet this burden because it likely does not have a property interest and, even if it does have a property interest, it has adequate remedies to protect its property.

First, it is questionable whether First Sealord's has its own property interest simply because it might be liable for UST's violation. "A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." (Civ. Code, § 2787.) Civil Code sections 2807 and 2808 create surety liability for a principal's default.[5] There is no independent right to contest the principal's debt; a surety's liability is co-extensive with its principal's to the limits of the bond. (*Lumbermens Mutual Casualty Co. v. Agency Rent–A–Car, Inc.* (1982) 128 Cal.App.3d 764, 769–770; See *Wm. R. Clarke v. Safeco Insurance Company of America* (1997) 15 Cal.4th 882.) There is no automatic right to assert an independent defense apart from the principal's as the obligation to perform is the principal's. (Civil Code section 2832; *Schmitt v. Insurance Company of North America* (1991) 230 Cal.App.3d 245, 258.)

Civil Code section 3248 requires that a payment bond on a public work guarantee the wages of laborers. (See Civ. Code, § 3110.) Labor Code section 1743, subdivision (d), does not create any additional liability on a surety than already exists; this section merely fixes the amount of the debt that the Civil Code and the Payment Bond automatically create. If the principal chooses not to contest a claim and allows it to go to default, First Sealord has shown no property infringement by denying it an independent remedy. (*Liton General Engineering Contractor v. United Pacific Insurance* (1993) 16 Cal.App.4th 577 [Surety had no right to contest subcontractor's claim for attorneys fees after arbitration with contractor resulted in award to subcontractor.].) First Sealord has not cited any authority that shows a surety has more rights than its principal.

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[5] The Civil Code provisions described here are mirrored in First Sealord's contractual obligations to UST, as seen in the Payment Bond attached to First Sealord's request for review.

Even if First Sealord has some property interest upon UST's default, it has adequate remedies under existing law and thus access to due process. In a closely analogous case, the United States Supreme Court held that the ability to challenge a prevailing wage withholding through assignment or by other contractual means is sufficient due process protection. (*Lujan v. G & G Fire Sprinkler* (2001) 532 U.S. 189 (*Lujan*).) In *Lujan*, the Court examined the former system for enforcing the state's prevailing wage statute insofar as subcontractors had no direct right to challenge an awarding body's withholding of contract payments from the contractor. (See *Davis Moreno, supra,* 193 Cal.App. at pp. 577-578.) The Ninth Circuit had held that the lack of an explicit right for subcontractors to directly challenge such withholding was a violation of the due process clause. Weighing heavily in the Ninth Circuit's decision were two factors: the contractor's remedy was the exclusive way by which to challenge the awarding body's withholding and the subcontractor's only remedy, obtaining an assignment of the contractor's right, was not automatically available.

The Supreme Court reversed. The Court held that the former statute was not constitutionally defective because the subcontractor arguably had remedies available to it to obtain the money it claimed was owed. (*J & K Painting v. Bradshaw* (1996) 4 Cal.App.4th 1394.) The record showed that most of the time, contractors assigned their rights to challenge a withholding of contract payments; there was no showing that G & G Fire Sprinkler had tried and failed to obtain such an assignment. Even if an assignment were not available, the subcontractor continued to have a civil remedy against the contractor for breach of the underlying construction subcontract. (*Lujan, supra*, 532 U.S. at pp. 197-198.) Thus, the subcontractor might not have the remedy it wanted, but it had remedies available that could result in relief.

The same applies here. Sureties routinely insist on assignments of the insured's rights and obligations before issuing payment bonds, as seen in the "unauthorized copy" of such an assignment attached to First Sealord's request for review. In *East Quincy Service District v. General Accident Insurance Company of America* (2001) 88 Cal.App.4th 239, the surety on a public works payment bond took over the construction contract for a defaulting contractor. The surety then claimed a right to the retention being held by the awarding body. The Court held that the surety had stepped into shoes of the contractor and therefore had a right to challenge the withholding. However, by stepping into the shoes of the contractor, the surety became liable for

statutory penalties, for which sureties are not normally liable. (*Dept. of Industrial Relations v. Fidelity Roof Co.* (1997) 60 Cal.App.4th 411, 423-425.)

Similarly, sureties have contractual remedies against their insureds for any damages for which the sureties have to pay. (*Schmitt v. Insurance Company of North America, supra,* 230 Cal.App.3d at p. 257.) Since First Sealord's attack on standing is a facial attack, it does not matter that First Sealord might not in fact be able to collect from UST because of UST's bankruptcy. (Civ. Code, § 2808.)

First Sealord had a choice when UST failed to file its own request for review. It could have followed the Civil Code's assignment of payment responsibility on UST's default, or it could have stepped into the shoes of UST and challenged the Assessment. These remedies, almost identical to the ones described in *Lujan* are sufficient to show that the statutory scheme meets minimal constitutional standards. Thus, First Sealord would not be deprived of any property right without due process by limiting standing to the plain meaning of the statute. It continues to have a contractual remedy against UST, although possibly affected by the bankruptcy petition. While sureties may have redress under other chapters of the California codes, the provisions of Division 2, Part 7, Chapter 1 of the Labor Code (commencing with section 1720) are not available to a surety acting on its own.

FINDINGS

1. First Sealord filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Affected Contractor, UST Inc. filed a petition for bankruptcy on March 5, 2010. The resulting automatic stay did not prevent DLSE from issuing its CWPA due to the exemption in section 362(b)(4) of title 11 of the United States Code.

3. First Sealord did not have standing to seek review as surety since review is limited to the "affected contractor or subcontractor."

4. Since no request review was filed by an "affected contractor or subcontractor" within the statutory time period, this proceeding is dismissed. The CWPA as issued is final.

ORDER

The request for review filed by First Sealord is dismissed. The Civil Wage and Penalty Assessment is final.

Dated: 12/23/2011

Christine L. Baker
Director of Industrial Relations