STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the matter of the Request for Review of:

Crossroads Diversified Services, Inc Case No. 10-0324-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Crossroads Facilities Services, Inc.[1] (Crossroads) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment)[2] in the amount of $19,656.55 in unpaid wages and penalties issued by the Division of Labor Standards Enforcement (DLSE) on November 2, 2010, with respect to work performed by Crossroads for the Napa Valley Unified School District (District). The work consists of refinishing 10 gymnasium floors (Project). A Hearing on the Merits occurred on April 20, 2011, in Sacramento, California, before Hearing Officer A. Roger Jeanson. Shaye Harrington appeared for Crossroads and Ramon Yuen-Garcia appeared for DLSE. The parties submitted post-Hearing briefs, and the matter was deemed submitted on June 3, 2011. The submission was vacated by order dated July 5, 2011, for the purpose of taking testimony from Lola Beavers, who determined the amount of penalty under Labor Code section 1775.[3] Ms. Beavers testified at a telephonic hearing on October 4, 2011, and the matter was submitted that day.

---

[1] The parties stipulated at the Hearing that the correct identity of the affected contractor/employer is Crossroads Facilities Services, Inc. and that the work at issue was done under its license.

[2] DLSE also issued and served on November 5, 2010, a First Amended Civil Wage And Penalty Assessment (Amended Assessment) of even date. It was stipulated at the Hearing that there is no substantive difference between the Assessment and the Amended Assessment.

[3] All further statutory references are to the California Labor Code unless otherwise specified.

The issues for decision are:

- Whether the work is subject to the payment of prevailing wages under section 1771 because it is "maintenance work".
- Whether the Assessment incorrectly found that the prevailing wage rate for the Project was carpenters.
- Whether DLSE abused its discretion in assessing penalties under section 1775, subdivision (a).
- Whether Crossroads is liable for penalties under section 1813 for failing to pay the proper overtime rate of pay.
- Whether Crossroads is liable for liquidated damages under section 1742.1, subdivision (a).

The Acting Director finds that the work at issue is maintenance work subject to the California prevailing wage laws (CPWL) and that Crossroads has failed to meet its burden of showing that the work comes within the janitorial or custodial exception.[4] The Acting Director further finds that Crossroads has failed to meet its burden of showing that carpenter is not the proper classification for the work or that DLSE has abused its discretion in assessing penalties under section 1775, subdivision (a). Therefore, the Acting Director issues this Decision affirming the Assessment. Crossroads is not liable for liquidated damages as it timely deposited a check in the full amount of the Assessment, including penalties, pursuant to section 1742.1, subdivision (b).

SUMMARY OF FACTS

On May 24, 2010, the District submitted a memorandum to three prospective contractors, including Crossroads, soliciting bids for a work of improvement known as the 2010 Gym Floor Refinishing. The work involved refinishing 10 school gymnasium floors. Crossroads submitted its bid on June 5, 2010, describing the scope of work as follows:

Screen Floor Surfaces With 100, 120 Grit Screen and SPP Pads.

[4] Because the refinishing work is maintenance work, it is not necessary to decide whether the work also constitutes "alteration" under section 1720, subdivision (a), as DLSE argues in its Post-Hearing Brief.

Fill and Sand 10' Gouge at Napa High School Large Gym.[5]
Remove All Debris And Dust.
Apply Coat Hillyard Basecoat Sealer Over Entire Floor Surfaces.
Apply One Coat Hillyard 1907 Oil Modified Waterborne Finish To 3-Point Line Areas.
Apply One Coat Hillyard 1907 Oil Modified Waterborne Finish Over Entire Floor Surfaces.
Allow Four Days For Drying And Curing Before Activity Is Resumed.

DLSE contends that the work falls within the scope of work for carpenter (Prevailing Wage Determination (PWD) NC-23-31-1-2010-1 for Carpenters and Related Trades), which includes "all types of wood flooring of any size, shape, or pattern, in all its branches and phrases including pre-finished wood and hardwood products, such as nailing, filling, laying, stripping, tongue and groove, underlayment, blocks-mastic work, sanding, edging, staining, finishing, basing, application of shellac, varnishes, sealers, waxing and related work."

Crossroads argues that if the work is covered by the CPWL, it either does not fall within any current work classification or, in any event, does not fall within the carpenter classification. Crossroads presented no alternative published PWD that might apply.

In a pre-bid conference, the prospective bidders, including Crossroads, were told by District that this would be a prevailing wage job. The bidders were not told what the prevailing wage rate was for the project or what classification of work applied.

Since District did not specify the applicable prevailing wage rate, Lawrence White, Crossroads' operations manager, understood that he had to investigate to determine the appropriate wage and work classification. Prior to submitting Crossroads' bid, White had his assistant contact District's payroll department to obtain this information. District referred the company to its website and to the salary schedules and position titles for District's classified employees. Based on White's experience with gym refinishing work for Crossroads, and previously, for school districts, he chose the work classification and wage rate from these schedules, specifically, the "day custodian" classification and custodian rate of pay. White did not check the website of the Division

[5] Underlining in original.

of Labor Statistics and Research (DLSR) for the published prevailing wage rate determinations of the Director of Industrial Relations (Director). [6]

Crossroads was advised by letter from District dated June 8, 2010, that it had submitted the "low quotes" and was chosen to do the work. In that same letter, District stated, "as a reminder, these are prevailing wage projects and while we do not require certified payrolls, our history has been that these could be asked for and/or challenged by other agencies."

Crossroads' sales manager, Patrick Campbell, described "what floor finishing entails":

> Sure. ... *the reason that they're refinished on a yearly basis is to save the floor*. So, what we do is we will go in – normally the school district with their custodial people will remove ... chairs, tables, whatever. So we go in the first thing we do is – then we sweep the floor to get all loose debris off. Then, we will have people with scrapers that will go around and scrap off the gum that has accumulated. Then also on the corners and on the sidewalls finish – will have a ... way of building up so we have to scrape those off too. Okay, so once we get the scraping done then we will screen the floor which screening the floor is a floor machine, side to side action and we put a 120 grit screen, normally, on the machine so that we are screening the whole floor to take off like the top surface to prepare the floor to receive the finish. So after we screen the whole floor then we do what we call 'tacking' and that's to remove all dirt and debris. ... Once that is completed, then we will let the floor dry out and then it is ready to receive the finish. So ... the finish is then applied with a weighted T-bar. A T-bar weights about 7-8 pounds, attached to a handle. ... we have one of the people with a bucket pour a line of the finish so if this was the gym floor right here, the one individual would pour the line, the product and then we come with the weighted T-bar to apply it and then we go back and forth, back and forth, back and forth. ...so ... when it's required by the school district that we apply two coats then we have to let the first coat dry, which will take anywhere from a 2-3 hour time limit. Then we come back and put on the second coat. Then when the second coat is applied, ...

[6] The wage rates for District's classified employees are not set by the Director pursuant to section 1773 and District's employees are not subject to the CPWL under section 1771, which "is not applicable to work carried out by a public agency with its own forces."

curing and drying ... will take between 72 hours, could be up to 4-5 days. (Italics added.)[7]

The refinishing work in question was performed in July 2010. It was not done under a contract between District and Crossroads. Instead, Crossroads submitted invoices to District for each of the ten schools at which it performed the work.

Sometime in July 2010, DLSE received a complaint concerning the Project. Deputy Labor Commissioner Amie Bergin investigated and concluded that the refinishing work fell within the scope of work for carpenter and that the proper prevailing wage rate for the work was as set forth in PWD NC-23-31-1-2010-1 with a pre-determined increase in the prevailing wage effective July 1, 2010. She issued and served the Assessment on November 2, 2010, using Crossroads' certified payroll records to determine the hours worked by and wages paid to Crossroads' employees for work performed on the Project.

Crossroads filed its Request for Review on or about November 23, 2010. On or about December 6, 2010, Crossroads deposited with DIR's Cashiering Unit pursuant to section 1742.1, subdivision (b), a check in the full amount of the Assessment, including penalties.

DISCUSSION

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

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

[7] Crossroads' witnesses agreed that this accurately describes the refinishing work done for District.

(*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.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. 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 contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect."

The Refinishing Work is Covered by the CPWL

Section 1771 provides:

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

"Maintenance" is defined in California Code of Regulations, title 8, section 16000 in relevant part as:

Maintenance. Includes:

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

(2) Carpentry, electrical, plumbing, glazing, [touchup painting,] and other craftwork designed to preserve the publicly owned or publically operated facility in a safe, efficient and continuously usable condition for which it was intended, including repairs, cleaning and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.

Janitorial work is excluded from the definition of maintenance:

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

It is DLSE's principal position that the gymnasium floor refinishing work is "maintenance work" under section 1771. Crossroads argues that the work is "janitorial or custodial" and, therefore, is excluded from the definition of maintenance. Crossroads has failed to meet its burden of proof.

To "preserve" something means to "keep [it] from harm, damage, ... etc.; protect; save" or "to keep up; carry on; maintain." To "protect" something means "to shield from injury, danger or loss; guard; defend." To "keep" means "to maintain in good order or condition." (Webster's New World Dict. (3d college ed. 1988).)

The application of two new coats of shellac is clearly intended to preserve the gymnasium floor, to protect it from damage, and to maintain the floor in a condition that it may be used for its intended purpose, whether that be as a site for a sporting event, assembly, or school luncheon. As Campbell testified, the work of removing the top finish coat from the floor and replacing it with new base and finish coats is done on a recurring basis, annually, and is done "to save the floor." Thus, the gymnasium refinishing work here clearly entails "maintenance work."

In support of its position that the work is janitorial in nature, Crossroads cites *City of Santa Clarita Street Sweeping* (2005) PW Case No. 2005-007. Public works coverage

determinations are not precedential decisions under Government Code section 11425.60. However, the Director strives for consistency where the facts are the same. Here, the facts are materially different. In *City of Santa Clarita Street Sweeping*, the work involved cleaning the streets of debris for aesthetic purposes not to save or protect the streets from harm or damage. By contrast, the refinishing work here involved sanding, scraping, and the application of shellac, which is clearly done to provide a protective coating which saves and preserves the wood floor. Thus, Crossroads has failed to meet its burden of showing that the refinishing work falls within the janitorial or custodial exception to the prevailing wage requirements in section 1771.

Crossroads Has Failed To Show That The Refinishing Work Does Not Fall Within the Scope Of Work For Carpenter

The prevailing rate of pay for a given "craft, classification, or type of work" is determined by the Director in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to the most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (Sections 1773, 1773.9, and see *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations such as for Carpenter and Related Trades to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work." (§ 1773.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. The contractor is obligated to pay the workers prevailing wages even where, as here, the awarding body fails to specify the relevant worker classification or wage rate. As stated by the court in *Sheet Metal Workers International Assn., Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071 at 1075:

> The prevailing rates vary depending on where the work is done, the type of work, and the time when the work is advertised for bid. *Contractors and subcontractors are deemed to have constructive notice of the prevailing wage rates, even if the awarding body fails to specify the*

relevant worker classifications in the contracts. (See *Division of Lab. Std. Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 125-127, 270 Cal.Rptr. 75); see also *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 986-988, 4 Cal.Rptr.2d 837, 824 P.2d 643.) Prevailing rates and related scope of work provisions for the affected craft, classification or type of worker are regularly posted on the DIR's Web site by its Division of Labor Statistics and Research (DLSR). (Italics added.)

Crossroads presents no alternative published prevailing wage rate that might apply. Given that Crossroads has the burden on proving that the wage rate used as a basis for the Assessment is incorrect, its failure to prove an alternative, lower rate is fatal.

As Crossroads has failed to meet its burden of proving the basis for the Assessment to be incorrect, the assessment of $18,131.55 in unpaid wages is affirmed.

The Penalty Assessment Under Section 1775 Is Appropriate

Section 1775(a) 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 fifty dollars ($50) 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 ten dollars ($10) ... unless the failure of the contractor ... 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... subcontractor.
(ii) The penalty may not be less than twenty dollars ($20) ... if the contractor ... 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 thirty dollars ($30) ... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[8]

The Acting Director's review of DLSE's determination is limited to an inquiry into 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 Acting Director is not free to substitute her own judgment "because in [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 LCP abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

Bergin testified that she determined Crossroads has no history of prevailing wage violations and that she presented her case to her supervisor, Lola Beavers, for determination of the penalty.[9] Beavers testified that she considered the statutory factors specified above and determined the penalty to be $30.00 per violation. She concluded that Crossroads failure to pay the correct prevailing wage was not a good faith mistake on the grounds that it was aware the job was a prevailing wage job but failed to check the DLSR website for a published PWD of the Director. She did not feel Crossroads should be excused for not knowing the law. Beavers noted that the error still had not been corrected as the correct prevailing wages still have not been paid. She mitigated the penalty from $50.00 because Crossroads had no prior violations.

---

[8] Section 1777.1, subdivision (c) 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 public works law and deliberately fails or refuses to comply with its provisions."

[9]

Though there is evidence in the record showing that Crossroads attempted to contact District to determine a proper prevailing wage, the determination by DLSE that the failure to pay the correct per diem wage was not a "good faith mistake" is supported by evidence and is neither arbitrary no capricious. Crossroads has failed to meet its burden of showing that DLSE abused its discretion in determining the amount of the penalty.

DLSE Properly Assessed Penalties Under Labor Code Section 1813

Section 1813 states 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 ($25.00) for each worker employed in the execution of the contract by the ... contractor ... 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. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. ...

Unlike under section 1775, there is no discretion in setting penalty rates under section 1813.

DLSE assessed penalties against Crossroads under section 1813 in the amount of $625.00 for failure to pay the proper overtime rates of pay. Crossroads does not challenge the manner in which the penalties were calculated. Crossroads argues that it is not liable for the penalties because District failed to include the above stipulation in the contract. Crossroads cites no authority in support of its position. There is nothing in the statute that evidences any legislative intent to invalidate an assessment where the stipulation is not included in the contract. The Acting Director cannot read such a provision into the statute. The assessment for failure to pay overtime rates is affirmed.

Crossroads Is Not Liable For Liquidated Damages

There is no dispute that Crossroads timely deposited with DIR the full amount of the Assessment, including penalties, within 60 days following service of the Assessment. Accordingly, pursuant to section 1742.1, it is not liable for liquidated damages.

FINDINGS

1. Affected contractor Crossroads Facilities Services, Inc. (Crossroads) filed a timely request for review of a Civil Wage and Penalty Assessment (Assessment).

2. Crossroads was the low bidder on a public works project, 2010 Gym Floor Refinishing, for the Napa Valley Unified School District (District).

3. The work consists of refinishing ten gymnasium floors. In a pre-bid conference and again after it was chosen to perform the work, Crossroads was advised by District that the project required the payment of prevailing wages. District did not advise Crossroads what the prevailing wage was for the project or the classification of work that applied.

4. The refinishing work is "maintenance work" under section 1771; it does not fall within the exception for janitorial or custodial work. As such, it is subject to the California prevailing wage laws (CPWL).

5. Crossroads did not meet its burden of showing that DLSE incorrectly determined that the refinishing work falls within the scope of work for carpenter and that the prevailing wage is the rate established by the Director for that work in prevailing wage determination NC-23-31-1-2010-1.

6. Crossroads has failed to meet its burden of showing that the work was not subject to the CPWL or that the basis for the wage assessment is incorrect.

7. Crossroads has not met its burden of showing that DLSE abused its discretion in assessing penalties under section 1775, subdivision (a) at the rate of $30.00 per violation, and the resulting total penalty of $900.00 for 30 violations is confirmed.

8. DLSE properly assessed penalties against Crossroads under section 1813 for its failure to pay the proper overtime wage rates.

9. The amount found due on the Assessment as affirmed by this Decision is as follows:

Wages due:	$18,131.55
Penalties assessed under section 1775:	$900.00
Penalties assessed under section 1813:	$625.00
TOTAL:	$19,656.55

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

ORDER

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

Dated: 10/20/2011

Christine Baker
Acting Director of Industrial Relations