

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

River Partners

Case No. 11-0027-PWH

[Request for Review of DLSE
Case No. 40-24893/273]

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor River Partners submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued and served by the Division of Labor Standards Enforcement (DLSE) on December 14, 2010, with respect to Habitat Restoration for the Colusa State Restoration Area (Restoration Project) in Sacramento County. The Assessment determined that \$133,275.25 in wages, including training fund contributions, and \$28,670.00 in statutory penalties was due. The matter was assigned to Hearing Officer A. Roger Jeanson. On December 1, 2011, DLSE issued a revised Audit which assessed River Partners \$121,808.45 in unpaid wages, including training funds contributions, and \$28,670.00 in statutory penalties.

At the initial Prehearing Conference, River Partners raised the threshold issue of whether the Restoration Project is subject to California's prevailing wage requirements. After briefs were submitted by the parties on this issue, the Hearing Officer determined that the coverage issue would be decided by the Director in this proceeding. In lieu of a hearing on the merits, the parties have submitted a Stipulation of Undisputed Facts and Agreed Exhibits. Additional Exhibits were thereafter received in evidence by agreement of the parties. The matter was submitted for decision after further briefing.

The issues for decision are:

- Whether the Restoration Project is a public work subject to the California Prevailing Wage Laws (CPWL).¹
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775² at the mitigated rate of \$40.00 per violation.³
- Whether River Partners is liable for liquidated damages under section 1742.1.

The Director finds that the Restoration Project is a public work subject to prevailing wage requirements and that River Partners has failed to carry its burden of proving that the basis of the Assessment was incorrect or that DLSE abused its discretion in assessing penalties under section 1775 at the mitigated rate of \$40.00 per violation. Therefore, the Director issues this Decision affirming the Assessment. Because River Partners timely deposited an undertaking in the full amount of the Assessment pursuant to section 1742.1, subdivision (b), River Partners is not liable for liquidated damages.

FACTS

The parties have stipulated to the following undisputed facts:

1. River Partners is a nonprofit corporation founded in 1988 with the mission of restoring and preserving the vanishing riparian habitat of California's Central Valley by implementing large scale habitat restoration projects along streams and rivers.
2. On September 30, 2008, the Department of Water Resources (DWR) entered into a Contract with River Partners for Habitat Restoration for the Colusa State Recreation Area (Contract).⁴

¹ River Partners does not challenge the wage classifications or wage rates that DLSE uses as the basis of the Assessment or the amount of unpaid wages and training funds assessed in the revised Audit.

² All further statutory references are to the California Labor Code unless otherwise indicated.

³ River Partners does not challenge penalties assessed under section 1813.

⁴ Identification of the agreed Exhibits by the number assigned to them is omitted.

3. F. Thomas Griggs, Ph.D., Senior Restoration Ecologist at River Partners and the Riparian Habitat Joint Venture (RHJV), has issued the California Riparian Habitat Restoration Handbook (Handbook). The Handbook explains all aspects of a riparian restoration project, including a description of the ecological river processes and the procedures for site specific restoration.⁵
4. On December 14, DLSE issued a Civil Wage and Penalty Assessment, Case No. 40-24893/273, assessing River Partners the sum of \$133,275.25 in wages (including training funds contributions) plus the sum of \$28,670.00 in penalties, for its alleged failure to pay the applicable prevailing wages for work performed on the Restoration Project.
5. In assessing the penalties under Labor Code section 1775 in the Assessment, DLSE exercised its statutory discretion and mitigated the penalties from the maximum rate to \$40.00 per violation.
6. River Partners does not have a prior record of failing to meet prevailing wage obligations.
7. On January 26, 2011, River Partners requested a review of the Assessment in accordance with Labor Code section 1742.
8. On February 15, 2011, River Partners posted a Surety Bond in the amount of the wages and penalties indicated in the Assessment, pursuant to California Labor Code section 1742.1.
9. The Surety Bond was posted pursuant to the directive of the Director of the Department of Industrial Relations.
10. On March 29, 2011, the parties appeared for a prehearing conference where both sides agreed to submit written briefs regarding the issue of coverage determination.
11. On May 6, 2011, River Partners filed a position statement with Hearing Officer A. Roger Jeanson, setting forth facts and argument in support of its position that the riparian restoration work, insofar as it primarily involved the planting and re-planting

⁵ Two Handbooks were admitted in evidence. One is dated September 2008 and the other July 2009.

of native plants and trees as well as plant monitoring, is not covered work within the meaning of Labor Code section 1720(a)(1).

12. On June 6, 2011, DLSE filed a Brief on coverage in response to River Partners' position statement.
13. On July 12, 2011, Hearing Officer A. Roger Jeanson issued an order that the issue of coverage determination would be decided by the Director.
14. On December 1, 2011, DLSE issued a revised Audit based on additional information provided by River Partners, assessing River Partners the sum of \$121,808.45 in wages (including training funds contributions) and the sum of \$28,670.00 in penalties for its alleged failure to pay the applicable prevailing wages in the event it is determined that the Restoration Project is a public work as defined by Labor Code section 1720, et. seq.

Other relevant facts in the record are set forth below.

The Colusa State Recreation Area (SRA) is a compensatory mitigation site for the Tisdale Bypass Channel Rehabilitation Project in Sutter County. The Restoration Project involves the restoration of 85.5 acres of forested riparian habitat on SRA land that is currently used for agricultural crops. As described in the Riparian Habitat Mitigation and Monitoring Plan (RHMMP) prepared by DWR (at page 12):

The [Restoration] Project will restore riparian habitat within a floodplain of the Sacramento River and replace valuable functions and values lost during the sediment removal project. Restoring complex riparian habitat in the Sacramento River Floodplain will improve habitat for fish and wildlife. Additionally, as the riparian forests develop, large woody debris and other organic inputs will be deposited during flood flows, providing food and cover for critical life stages of anadromous fish and the invertebrates they feed upon.

The RHMMP provides that the mitigation site will be restored with a Great Valley cottonwood riparian forest and a Great Valley mixed riparian forest, which will require the planting of approximately 32,000 nursery plants and 1,400 pounds of seed.

The Contract describes the work to be performed over the approximately three-year term of the Contract to include the following: clearing, installation above and below-ground of a sprinkler irrigation system, planting, seeding, plant establishment, electrical, monitoring, and maintenance.

Clearing consists of “the removal of approved trees, shrubs, brush, grass, weeds, vegetation, debris, downed timber, branches, rubbish and other obstructions in, on or above the ground surface.” (Contract, p. 02230-1.) Seeding involves using a disc, spring tooth harrow or other approved devise to scarify the ground to a minimum depth of 6 inches (Contract, p. 02925-3). The “community types” of vegetation to be planted are Grassland, Valley Oak Savanna, Mixed Riparian Forest, and Cottonwood Riparian Forest.⁶ Plant establishment includes maintaining plants, watering, weeding, and plant replacement. Maintenance is continuous from the time each plant is installed through the Contract period and includes “watering, weeding, pesticide spraying, pruning, straightening, adjusting, repairing, and other necessary operations to ensure each plant is maintained in a healthy growing condition.” (Contract, p. 02930-11.)

In the Handbook, River Partners describes the flow process for implementing a habitat restoration plan as follows:

Implementation of Restoration Plan
– Field Preparation, Planting, Irrigation, Weed Control, Monitoring
(Maintenance & Monitoring for 3 years).⁷

The Notice to Contractors advertising the Project for bid provides that the wage rates to be paid for the Project are those established by the Director of Industrial Relations pursuant to sections 1770 through 1773.8 of the California Labor Code. (Contract, p. 00002-2). The Contract requires the payment of prevailing wages. In relevant part, it states as follows:

⁶ The following plant species will be planted in the mixed riparian forest: sycamore, cottonwood, valley oak, box elder, Oregon ash, sandbar willow, goodding’s willow, red willow, arroyo willow, shining willow, white alder, rose, poison oak, coyote brush and blackberry. (Contract, Appendix II, p. II-3.)

⁷ California Habitat Restoration Handbook, July 2009, page 19.

4. WAGE REQUIREMENTS

A. General Contractor shall comply with prevailing wage Requirements and shall be subject to restrictions and penalties in accordance with Sections 1770 et. seq. of the Labor Code. (Contract, p. 00703.)

Appendix 1 of the Contract sets forth a "Sample Calculation" of prevailing wages and benefits, including training fund payments, for Laborer and Operator classifications. The sample calculation is "for information only and does not represent the actual classifications, hourly rates, benefits, and labor surcharge for this project."

DISCUSSION

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

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

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [citations omitted] (*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 an 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 Restoration Project Is A Public Work Subject To The California Prevailing Wage Laws.

Labor Code section 1771 generally requires the payment of prevailing wages to all workers employed on public works. Public work is defined in section 1720, subdivision (a) (1) to mean: “Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds”

Under section 1771, public work includes work performed under “contracts let for maintenance work.” Section 16000 of title 8 of the California Code of Regulations (Section 16000) defines maintenance in relevant part to include:

(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.

* * *

Section 1772 provides that “[w]orkers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.” Finally, under section 1774, such contractors and subcontractors “shall pay not less than the specified prevailing rates of wages to all work[ers] employed in the execution of the contract.”

It is not disputed that the work is done under contract or that it is paid for out of public funds within the meaning of section 1720, subdivision (a). At issue is whether the work is public work subject to the payment of prevailing wages. River Partners argues that it is not and offers two grounds to support its argument that the Restoration Project is not subject to the CPWL: (1) that it is exempt pursuant to Fish and Game Code section 1501.5 (section 1501.5); and (2) that the work performed is not "construction, alteration, or repair" work under section 1720, subdivision (a).

Section 1501.5 states in relevant part as follows:

- (a) The department⁸ may enter into contracts for fish and wildlife habitat preservation, restoration, and enhancement with public and private entities whenever the department finds that the contracts will assist in meeting the department's duty to preserve, protect, and restore fish and wildlife.
- (b) The department may grant funds for fish and wildlife habitat preservation, restoration and enhancement to public agencies, Indian tribes, and nonprofit entities whenever the department finds that the grants will assist it in meeting its duty to preserve, protect and restore fish and wildlife.
- (c) Contracts authorized under this section are contracts for services and are governed by Article 4 (commencing with Section 10335) of Chapter 2 of Division 2 of the Public contract Code. No work under this section is public work or a public improvement, and is not subject to Chapter 1 (commencing with section 1720) of Part 7 of Division 2 of the Labor Code.
- (d) This section does not apply to contracts for any of the following:

* * *

- (5) Any project requiring engineered design or certified by a registered engineer.
- (6) Any contract, except contracts with public agencies, nonprofit organizations, or Indian tribes that exceed fifty thousand dollars (\$50,000) in cost, excluding the cost for gravel, for fish and wildlife habitat preservation, restoration, and enhancement for any one of the following:

- (A) Fish screens, weirs, and ladders.
- (B) Drainage or other watershed improvements.
- (C) Gravel and rock removal or placement.
- (D) Irrigation and water distribution systems.
- (E) Earthwork and grading.
- (F) Fencing.

⁸ "Department" is the Department of Fish and Game. (Fish & G. Code § 700.)

- (G) Planting trees or other habitat.
- (H) Construction of temporary storage buildings.

River Partners' reliance on section 1501.5 is misplaced. By its terms, the section applies only to work under that section, that is, work done under contracts entered into by the Department of Fish and Game. The Contract in this case is between River Partners and the Department of Water Resources. River Partners bases its argument on its claim that the Contract incorporates the "California Department of Fish and Game 1602 Streambed Agreement" (Streambed Agreement). However, the Contract merely states that DWR will get a permit (presumably from the Department of Fish and Game) for this work and that the Contractor (in this case, River Partners) will comply with the provisions of the Streambed Agreement.⁹ Even if the provisions of the Streambed Agreement are thereby incorporated into the Contract, it does not transform the Contract between DWR and River Partners into one between the Department of Fish and Game and River Partners.¹⁰ Thus, an essential condition for the application of section 1501.5 is not present here.

Further, subdivision (c) (1) provides that Section 1501.5 does not apply to "Any project requiring engineered design *or* certification by a registered engineer." (Italics added.)¹¹ River Partners argues that this exception does not apply because there is no evidence that design or certification of the Restoration Project by a registered engineer is "required."¹² However, the Contract itself shows otherwise. First, the Contract states

⁹ The Streambed Agreement offered in evidence by River Partners is not signed by River Partners.

¹⁰ The Streambed Agreement itself provides that, "The decision to proceed with the [Restoration Project] is the sole responsibility of DWR, and is not required by this agreement. It is agreed that all liability and/or incurred costs related to or arising out of *DWR's project* and the fish and wildlife protective conditions of this agreement, remain the sole responsibility of DWR." (Italics added.)

¹¹ The Merriam-Webster on-line dictionary defines "certification" in part as "the act of certifying: the state of being certified" and "certify" in relevant part as "to attest authoritatively: as (a) confirm, (b) to present in formal communication, or (c) to attest as being true or as represented or as meeting a standard ..." As shown below, the Contract clearly provides that a registered Engineer will attest in writing that the alteration work meets the Contract specifications, which were developed by registered engineers in accordance with guidelines established by the U. S Army Corps of Engineers.

¹² River Partners argues that the RHMMP was prepared by an Environmental Scientist and does not reference a requirement for engineered design or certification by an engineer. However, the RHMMP itself

that the technical information for the specifications for the Project have been prepared by or under the direction of Civil, Mechanical, and Electrical engineers, and the specifications have been prepared by or under the direction of a registered engineer, James Veres (Contract, p. 00007-1), who is also the Contract Coordinator (Contract, p. 0002-2). All work performed by River Partners under the contract must be done "to the satisfaction of the Engineer," whose authority specifically includes "decid[ing] questions as to interpretation and fulfillment of contract requirements, and the prosecution, progress, quality, and acceptability of work." (Contract, p. 00704-1.) The Engineer must approve the contractor's schedule of work (Contract, p. 01311-1, 3.) and working drawings and data (Contract, p. 01330-4). Plant installation and plant establishment must be accepted in writing by the Engineer (Contract, pp. 02930-4, 02940-3). Plant material must be replaced that does not meet mortality standards established by the Engineer. (Contract, p. 02940-7.) After plant establishment and cleanup have been completed to the satisfaction of the Engineer, and the Engineer has conducted the "final inspection," the Engineer must issue a written "Acceptance of Establishment Period," which constitutes "Completion of the Establishment Period." (Contract, p. 02940-3.) Accordingly, I find that the Restoration Project does require an engineered design and/or certification by a registered engineer and that, for this additional reason, section 1501.5 is not applicable to the Restoration Project pursuant to subdivision (d) (5).¹³

states that "DWR has prepared this RHMP pursuant to the U.S. Army Corps of Engineers, Sacramento District's (Corps) habitat mitigation, and proposed guidelines (U.S. Army Corps of Engineers 2004)." (RHMP, p. i.) The RHMP also provides at page 26 that as-built drawings will be provided by the Corps and that the annual monitoring reports for the Project must "show the Corps' Mitigation and Monitoring permit/file number" and "follow the Monitoring Report Outline set forth in the Corps' Mitigation and Monitoring Proposal Guidelines ..."

¹³ Because I find that the Restoration Project is not subject to section 1501.5 for the reasons stated, it is not necessary to reach DLSE's argument that section 1501.5 applies only to service contracts as defined in Public Contract section 10335.5 or that Fish and Game Code section 1350 applies to this Project. While it does not change the finding that section 1501.5 does not apply to the Project, I reject DLSE's argument that subdivision (d) (6) exempts the Project from the coverage of section 1501.5. Subdivision (d) (6) exempts certain contracts that exceed \$50,000. River Partners is a non-profit organization. Where it is otherwise applicable, section 1501.5 applies to contracts with non-profit organizations that exceed \$50,000 in cost, as DLSE appears to acknowledge in its Supplemental Reply Brief.

River Partner also argues that habitat restoration is not “construction, alteration, or repair” work “as defined by the Director and the California Labor Code.” However, the Director has found that work similar to that performed as part of the Restoration Project is public work.¹⁴ In *Request for Proposals: Planting, Operation, Maintenance and Monitoring of Owens Lake Southern Zones Managed Vegetation Project*, PW Case No. 2002-096 (January 4, 2006), the Director determined that the transplantation of salt grass plugs as part of a soil reclamation project, which involved “preparation of the planting area ... as well as digging of the soil in the planting of the salt grass plugs,” was alteration work under section 1720, subdivision (a) (1). In that same case, the Director found that the related inspection, monitoring and testing work was covered under sections 1771, 1772 and 1774. In a recent case involving River Partners, the Director in *Ecosystem Restoration and Flood Attenuation Project, San Joaquin River*, PW Case No. 2009-055 (October 5, 2010) (*Ecosystem Restoration Project*) found that the planting of trees, shrubs and native grass as part of a project to create 633 acres of restored riparian habitat was alteration work under section 1720, subdivision (a) (1) “because it is modifying a particular characteristic of land.” See also *Howe Creek Ranch Habitat Restoration Project*, PW Case no. 1004-050 (October 19, 2005), in which the Director found that the work of planting trees was alteration work, as it would modify a characteristic of the land by “creating an area of trees where previously there was none.”¹⁵

The case authority underpinning each of the above coverage decisions is *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, in which the court interpreted “alteration” as used in section 1720. The court held that, “to ‘alter’ is merely to modify without changing into something else,” and that term applies “to a changed condition of the

¹⁴ Coverage determinations of the Director are not precedential. However, they may be instructive on a particular point or area of the law.

¹⁵ River Partners’ argument that section 1720, subdivision (a) does not expressly identify “habitat restoration work” as work covered by the CPWL is without merit. To take only one example, the statute does not expressly identify laborers work as covered work but there is no question that laborers work done as part of a public works construction project is covered work. Similarly, habitat restoration work performed as part of a public works alteration project is covered work.

surface or the below-surface.” (Id., at p. 756.) Webster’s Third New International Dictionary (2002) at page 63 also defines “alter” as “to cause to become different in some particular characteristic (as measure, dimension, course, arrangement, or inclination) without changing into something else.”

Clearly, the Restoration Project involves changing a characteristic of the land on which existing brush, trees, and other vegetation will be removed and approximately 32,000 nursery plants and 1,400 pounds of seed will be planted. Land that is currently used for agricultural crops will be supplanted with grassland and forests of cottonwood, sycamore, and valley oak trees, among other species. With the addition of large forested areas, the appearance of the land will be dramatically changed, which River Partners acknowledges is a characteristic of land (“a feature ... that makes ... something recognizable”). (River Partners’ Opening Hearing Brief, p. 6.)

Moreover, to apply the definition of “restore” as River Partners would define it – “to bring something back to an earlier and better condition”¹⁶ – clearly encompasses the Project, which is designed to change the current characteristics of the land by returning them to a prior natural condition through the removal of existing vegetation and planting of native plant species. In this same vein, federal law defines “habitat restoration” to mean “the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning the majority of natural functions to the lost or degraded habitat” and includes, as here, “an activity conducted to return a project site, to the maximum extent practicable, to the ecological condition that existed prior to the loss or degradation ...” (16 U.S.C. § 3772 (5) (A), (B) (i).) Plainly, to manipulate the physical, chemical, or biological characteristics of the site involves changing the characteristics of the land.¹⁷

¹⁶ River Partners’ Opening Hearing Brief, page 6.

¹⁷ River Partners’ reliance on *Proposition 40 Watershed and Fuels Community Assistance Grants Program*, PW Case No. 2006-010 (August 24, 2006) is misplaced. The fuel reduction programs in that case were not designed to change a characteristic of the land but merely to reduce fire hazard. The land otherwise was left as it was, either residential or wooded.

Based on the foregoing, I conclude that the Restoration Project is a public works project and the Contract is for public work, namely, alteration work designed to restore the native habitat of the Colusa State Restoration Area. Pursuant to section 1772, workers employed by River Partners, or its subcontractors, “in the execution of” the Contract are “deemed to be employed upon public work” and subject to prevailing wage requirements.

In *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742 (*Williams*), the court held that “the use of ‘execution’ in the phrase ‘in the execution of any contract for public work,’ plainly means the carrying out and completion of all provisions of the contract.” (156 Cal.App.4th. at p. 750.) The specific issue in *Williams* was whether off-site hauling was covered work as part of a public works construction project. The court held that the important determinant of whether work is covered by the CPWL is the role the work plays “in the performance or ‘execution’ of the public works contract.” (156 Cal.App.4th at 752.) Factors considered by the court in making this determination included: “whether the [off-haul work] was required to carry out a term of the public works contract; whether the work was performed on the site or another site integrally connected to the project site; whether the work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.” (*Ibid.*)

In this case, the clearing, installation of a sprinkler irrigation system, planting, seeding, plant establishment, electrical, maintenance, and monitoring work is all work required of River Partners by the Contract. All such work was performed on-site, was necessary to accomplish or to fulfill the Contract, and was integral to River Partners’ performance or “execution” of the public works contract. Accordingly, the work is subject to prevailing wage requirements. The maintenance work also is covered under section 1771. See *Reliable Tree Experts v. Baker* (2011) 200 Cal.App4th 785, 795-796 and *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4th 1, 8-9.¹⁸

¹⁸ Installation of the irrigation system would also be covered as “installation” under section 1720, subdivision (a).

DLSE Did Not Abuse Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Mitigated Rate of \$40.00 Per Violation.

Section 1775, subdivision (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 . . . 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 . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . 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 thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[]

Section 1775, subdivision (a) (2) grants DLSE the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation. The statute establishes minimum penalties; however, it does not require that penalties be set at the minimum. For example, if the failure to pay prevailing wage rates is “willful,” the penalty is not \$30.00 per violation but “may not be less” than \$30.00. 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 DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty.” (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

The 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 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.)

Here, DLSE exercised its discretion in reducing the penalty to \$40.00 based on the fact that River Partners had no prior assessments for failing to pay prevailing wages.¹⁹ River Partners argues that, in the event the Project is found by the Director to be a public work, DLSE abused its discretion assessing a penalty at \$40.00 per violation because it has no prior record of failing to meet prevailing wage obligations, the failure to pay prevailing wages was a “good faith mistake” which, because River Partners has posted a bond, will be “immediately corrected” if violations are found, and that the failure to pay was not willful.

However, the “good faith mistake” factor is clearly intended to apply in a situation where a contractor acknowledges the mistake and “promptly and voluntarily” corrects the “error” when brought to its attention. That is not the case here. The proper prevailing wage rates in this case remain unpaid two-and-one-half years after the Assessment was served on River Partners. Moreover, the statutory purpose for filing a bond is not to “promptly and voluntarily” correct an “error” in failing to pay the proper rate of per diem wages, but to avoid liquidated damages.

¹⁹ DLSE’s Hearing Reply Brief, page 14.

There is substantial evidence on which DLSE could determine that the failure to pay prevailing wage rates was “willful.” River Partners clearly “knew or should have known” that wage rates to be paid were the prevailing wage rates established by the Director of Industrial Relations. All prospective bidders were so advised by DWR when the Project was advertised for bid. Moreover, the Contract requires that prevailing wage rates be paid and contains a “sample calculation” showing how they are to be determined. River Partners’ argument that “it is reasonable to presume that [it] was unaware of any wage underpayments” has no support in the record. There are no facts whatsoever from which any such assumption or inference might be drawn.

Accordingly, I find that River Partners has not met its burden of showing that DLSE abused its discretion in assessing the amount of penalties at \$40.00 per violation.

In the alternative, River Partners argues that the penalty should be waived “under broader equity principles,” citing *Quality Plumbing*, Case No. 09-0090 PWH (March 3, 2011) and *Lusardi*, supra, 1 Cal.4th at 996. In each of those cases, equitable relief was granted where the contractor relied to its detriment on representations made by the awarding body. There is no such evidence here. The facts of this case are materially different and do not warrant equitable relief. DWR advised all bidders for the Restoration Project that it was a prevailing wage job. The Contract requires the payment of prevailing wage rates. There is no inequity in holding River Partners liable for what it contracted to do.

River Partners suggests that somehow “the nature of the work” should be considered as a factor in granting it equitable relief from section 1775 penalties. The Director decided *Ecosystem Restoration Project* in 2010 while River Partners was performing work under the Contract. In that case, the Director found that habitat restoration work similar to that being performed by River Partners as part of the Restoration Project was subject to prevailing wage requirements. River Partners did not appeal or otherwise challenge that determination. There is nothing inequitable in finding that the same or similar work is covered work here.

Finally, River Partners argues that no penalties should be assessed because it had “an honest good faith belief” the Restoration Project was not a public work. I have found the Project to be a public work. Thus, though an “honest good faith belief” to the contrary might be relevant on the issue of waiver of liquidated damages under section 1742.1, subdivision (a), it is not relevant to the issue of penalties under section 1775, which requires the forfeiture of penalties “for each day, or portion thereof, for each worker paid less than the prevailing wage rates ...for the work or craft in which the worker is employed for any public work under the contract ...”

River Partners Is Not liable For Liquidated Damages Under Section 1742.1

Section 1742.1, subdivision (a) provides in pertinent part as follows:

After 60 days following the service of ... a notice of withholding under subdivision (a) of Section 1771.6, 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 ... the notice 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 ... the notice with respect to a portion of the unpaid wages covered by the ... the notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Section 1742.1, subdivision (b), however, provides a safe harbor from liquidated damages when the full amount of the assessment is deposited with the Department:

Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment ... , including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment ... , for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

The parties have stipulated that River Partners posted a surety bond pursuant to section 1742.1 on February 15, 2011, and that such was done “pursuant to the directive of

the Director of the Department of Industrial Relations” in the amount of the wages and penalties indicated in the Assessment. DLSE argues that this does not absolve River Partners from liability for liquidated damages because: (1) the statute does not authorize posting a bond in lieu of a cash deposit; and (2) the bond was not timely posted.

On the first point, it is true that the statute speaks in terms of the deposit of “funds.” However, as the parties have stipulated, the Chief Deputy Director issued memoranda in February and March 2009 which provide that, to avoid liability for liquidated damages under section 1742.1, a contractor may, in lieu of a cash deposit, “post an undertaking with the Department in the full amount of the [assessment]” (Exhibit 6.) In addition, the Assessment itself states in relevant part that, “[i]n lieu of a cash deposit [under section 1742.1(b)], the contractor may post an undertaking in full amount of the [assessment].” The memoranda and Assessment set forth certain conditions that must be set forth in the undertaking. The surety bond posted by River Partners meets those conditions.

Under these circumstances, it would be inequitable to find a contractor liable for liquidated damages for failing to make a cash deposit where, as here, the contractor has posted an undertaking which the Director and DLSE have expressly stated they would accept as sufficient to meet the requirements of section 1742.1, subdivision (b), in lieu of a cash deposit.²⁰ Accordingly, I find that the surety bond posted by River Partners is acceptable in lieu of a cash deposit.

There remains the question of whether the surety bond was timely filed. Section 1742.1, subdivision (b) provides that the full amount of the assessment, including penalties, must be deposited within 60 days of service of the assessment. In this case, the Assessment was served by mail on December 14, 2011. River Partners posted the surety bond on February 15, 2011, 63 days after the Assessment was served. DLSE argues that since the 60th day falls on a Saturday [*sic*], the last day to timely file the surety bond was

²⁰ River Partners also notes that in a Public Works Manual (May 2009) published by DLSE, it states in Section 4.8.4 at page 53 under “Liquidated Damages” that “[i]n lieu of a cash deposit, the contractor may post an undertaking with DIR in the full amount of the [assessment] or Notice to Withhold Contract Payments.”

February 12, 2011.²¹ However, DLSE fails to take into account Code of Civil Procedure (CCP) section 1013 (a), which provides that service by mail is “complete at the time of deposit,” but also provides that “any period of notice and any right or duty to do any act or make any response within any period or on date certain after service of the document, which time period is established by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California.” This provision in CCP section 1013 is expressly adopted in California Code of Regulations, section 17203, subdivision (c), which is applicable to this proceeding.

In further support of its position, DLSE argues that it would be contrary to section 1742, subdivision (a) to allow an affected contractor more than 60 days to post a cash deposit or undertaking. Section 1742, subdivision (a) gives the contractor 60 days after service of an assessment to file a written request for review. If the contractor fails to do so, the assessment becomes final. Thus, DLSE argues, if the assessment has become final and, therefore, enforceable, “it would be illogical” to allow the filing of an undertaking after the assessment is final because the liquidated damages are incurred when the assessment becomes final. The flaw in DLSE’s argument is that section 1741, subdivision (b), provides that service of the assessment “shall be completed pursuant to Section 1013 of the Code of Civil Procedure ...” Thus, where, as here, service is by mail to an address within California, the affected contractor has 65 days to request review before the assessment becomes final, the same time period within which a cash deposit or undertaking must be posted.

Thus, River Partners has made a timely deposit of the full amount of the Assessment pursuant to section 1742.1, subdivision (b). Accordingly, River Partners has no liability for liquidated damages on the Restoration Project.

FINDINGS

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

²¹ In fact, the 60th day falls on a Sunday, February 12, 2011. Under DLSE’s analysis, to be timely, the bond would have to have been posted by February 13, 2011.

2. The Restoration Project is a public work subject to the California prevailing wage laws.

3. The affected workers on the Project were not paid at least the prevailing wage rates for work performed in execution of the public works contract between River Partners and the Department of Water Resources.

4. River Partners owes the affected workers unpaid wages in the amount of \$120,002.61.

5. River Partners owes \$1,805.84 to satisfy its obligation to pay training fund contributions for the Project.

6. River Partners has failed to meet its burden of showing that DLSE abused its discretion in assessing penalties under Labor Code section 1775 at the mitigated rate of \$40.00 per violation, and the resulting total penalty of \$25,920.00 as assessed is affirmed.

7. Penalties under section 1813 at the rate of \$25.00 per violation are due for 110 violations on the Project, for a total of \$2,750.00 in penalties.

8. River Partners timely posted a surety bond with the Department of Industrial Relations in the full amount of the Assessment pursuant to section 1742.1, subdivision (b). River Partners therefore has no liability for liquidated damages under section 1742.1, subdivision (a).

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

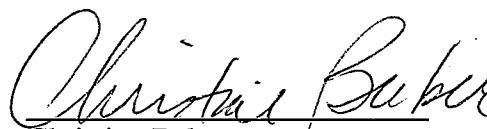
Wages Due:	\$120,002.61
Training Fund Contributions Due:	\$1,805.84
Penalties under section 1775, subdivision (a):	\$25,920.00
Penalties under section 1813:	\$2,750.00
Liquidated Damages:	\$0.00
TOTAL:	\$150,478.45

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

ORDER

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

Dated: 07.03.12


Christine Baker
Director of Industrial Relations