STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

W. A. Thomas Company, Inc. Case No. 12-0106-PWH

From a Notice of Withholding of Contract Payments issued by:

Contractor Compliance and Monitoring, Inc.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor W. A. Thomas Company, Inc. (WATCO) submitted a timely request for review of the Notice of Withholding of Contract Payments (Notice) issued by Contractor Compliance & Monitoring, Inc. (CCMI) with respect to the New Wing Addition to McKinley Elementary School in Burlingame, California (Project), County of San Mateo. On January 26, 2012, CCMI issued the Notice for work performed by subcontractor, Big Bears Construction, Inc. (BBCI). The Notice determined that $350.00 in unpaid statutory penalties was due, consisting of $200.00 in Labor Code section 1775[1] penalties and $150.00 in section 1813 penalties. The matter was assigned to Hearing Officer A. Roger Jeanson. At the initial prehearing conference, it was agreed that no back wages are owed, that WATCO does not challenge the imposition of penalties under section 1775, and that the sole issue for which WATCO seeks review is whether a prime contractor is liable for section 1813 penalties for overtime violations committed by its subcontractor.

At the invitation of the Hearing Officer, the Division of Labor Standards Enforcement (DLSE) filed a Notice of Intervention in the case on October 12, 2012, as an interested party pursuant to Title 8, section 17208, subdivision (a), of the California Code

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

of Regulations. In lieu of a hearing on the merits, WATCO and CCMI submitted a Joint Stipulation of Undisputed Facts dated November 7, 2012, and agreed-upon exhibits. In addition, WATCO requested that the Hearing Officer take official notice pursuant to California Evidence Code sections 451 to 454 of legislative history materials regarding sections 1743, 1775, and 1813.[2]

On January 2, 2013, the Hearing Officer advised the parties that he proposed to take official notice of the legislative materials submitted by WATCO pursuant to Rule 45 (Cal. Code Regs., tit. 8, § 17245) and additional legislative materials served on the parties that date. The Hearing Officer gave the parties to January 14, 2013, to show why and the extent to which official notice should or should not be taken. (Rule 45(b); Cal. Code Regs., tit. 8, § 17245, subd. (b).) CCMI submitted a statement that it had no objection. WATCO filed a Notice of Non-Opposition. DLSE did not respond.[3]

The sole issue in contention is whether a prime contractor is liable for section 1813 penalties for overtime violations committed by its subcontractor.

The Director finds that WATCO and BBCI are liable for the section 1775 penalties and that BBCI is liable for the section 1813 penalties. The Director also finds that a prime contractor is not jointly or severally liable under section 1813 for overtime violations committed by its subcontractor. Accordingly, to the extent that the Notice purports to assess 1813 penalties directly against WATCO, WATCO has met its burden of proving that this basis for the assessment is not correct. The Director further finds that the penalties assessed under section 1775 and section 1813 were properly withheld from

[2] Rule 45 (tit. 8, Cal. Code Regs., § 17245, subd. (a) (3) provides in relevant part that a Hearing Officer may take official notice of "any fact which either must or may be judicially noticed by the courts of this state under Evidence Code sections 451 and 452."

[3] Official notice has been taken of the following matters: Senate Committee on Industrial Relations, Analysis of SB1328 (1997-1998 Reg. Sess.) as amended April 23, 1997; Senate Rules Committee, Office of Floor Analysis, SB 1328 (1997-1998 Reg. Sess.) September 11, 1997; Legislative Counsel's Digest of SB 1328 (1997-1998 Reg. Sess.); Assembly Committee on Labor and Employment, Analysis of AB 1448 (2001-2002 Reg. Sess.) April 25, 2001; Legislative Counsel's Digest of AB 1448 (2001-2002 Reg. Sess.); Senate Rules Committee, Office of Senate Floor Analysis, AB 1646 (1999-2000 Reg. Sess.) third reading analysis, August 28, 2000; Legislative Counsel's Digest of AB 1646 (1999-2000 Reg. Sess.); and Senate Judiciary Committee, Analysis of AB 1646 (1999-2000 Reg. Sess.) August 24, 1999.

the retention held by the awarding body, the Burlington Unified School District (District), pursuant to the Notice issued by CCMI. Therefore, the Director of Industrial Relations issues this Decision affirming and modifying the Notice.

FACTS

The parties have stipulated to the following facts:

"1. On or about July 5, 2010, Burlingame Unified School District ('District') entered into an agreement with Prime Contractor W.A. Thomas Company, Inc. ('WATCO') for a New Wing Addition to McKinley Elementary School in Burlingame, California ('Project'). The Agreement did not include a stipulation related to working hours as set forth in California Labor Code section 1813. However, the essential provisions of Labor Code 1813 were included in the Labor Law Checklist distributed at the preconstruction conference and explained to all participants as part of the District's Labor Compliance Program. ...Both WATCO and Big Bears acknowledged their attendance at the meeting and receipt of the information. ...

"2. The Project was a new two story, eight-classroom building for 3rd through 6th grades. ...The Project was a covered public work, subject to prevailing wage requirements.

"3. On or about July 7, 2010, WATCO entered into a subcontract with Big Bears Construction, Inc. ('BBCI') to perform the plumbing portion of the Construction Contract. ...The subcontract did not include copies of Labor Code sections 1771, 1776, 1777.5, 1813 and 1815 as set forth in section 1775(b).

"4. The District contracted with CCMI for the purpose of monitoring labor law compliance for the Project. CCMI conducted a thorough investigation of labor compliance throughout the Project.

"5. As part of its compliance monitoring, CCMI audit [*sic*] certified payroll records for BBCI during the course of the Project. In a written audit report

dated October 21, 2010, CCMI notified BBCI of a prevailing wage underpayment found in their certified payroll reports from July 25, 2010 through August 22, 2010. BBCI corrected the underpayment and subsequently submitted to CCMI copies of the retroactive wage payments made to the employees on December 7, 2010.

"6. CCMI further notified BBCI that there was an apparent overtime violation for three plumbers for the week ending September 12, 2010. These employees appeared to be underpaid because the applicable prevailing wage rate mandates that 'double time' be paid for all work performed after the first two daily overtime hours. In the October 21, 2010 audit report, CCMI notified BBCI that since these three employees worked more than two hours of overtime in a day, they needed to be paid the premium overtime rate for a total of 5.5 hours. BBCI retroactively paid the employees the extra premium rates owed and submitted copies of said payments to CCMI on December 7, 2010. All wage underpayments by BBCI were corrected in the course of the Project due to CCMI's thorough investigation.

"7. Upon completion of the Project, there were no wages owed by subcontractor BBCI. The only unresolved issue was payment of penalties under Labor Code sections 1775 and 1813.

"8. On January 25, 2011, BBCI notified WATCO that due to the company's financial challenges they would no longer be able to complete the work on the Project and asked WATCO to enter into a contract with another plumbing subcontractor to complete the balance of the plumbing work on the Project. BBCI subsequently filed a voluntary Chapter 7 Bankruptcy petition.

"9. On January 26, 2012, CCMI issued a Notice of Withholding of Contract Payments as provided in Labor Code section 1771.5 and 1771.6 for work performed by BBCI. The Notice of Withholding assessed a sum total of

three hundred and fifty dollars ($350.00). ...The parties acknowledge that the Notice of Withholding was timely served.

"10. The Notice of Withholding included two hundred dollars ($200.00) in Labor Code section 1775 penalties and one hundred and fifty dollars ($150.00) in Labor Code section 1813 penalties. The 1775 penalties were reduced from $50.00 per day per worker to $10.00 per day per worker by CCMI and approved by the School District. The section 1813 penalties were assessed for three violations at $50.00 per violation [*sic*].[4] The parties agree that no back wages are due to BBCI employees for work performed on the project.

"11. On March 21, 2012, WATCO sought review of the Notice of Withholding. ...The parties acknowledge that the request for review was timely filed.

"12. In a February 16, 2012 letter, CCMI notified WATCO that the District declined to waive the penalties assessed. CCMI stated: 'Labor Code section 1813 mandates Overtime penalties and there is no option to waive or reduce those, so the $150.00 in Overtime penalties cannot be changed.'...

"13. The enforcing agency's evidence was subsequently made available to WATCO.

"14. A prehearing conference was held by Hearing Officer A. Roger Jeanson on July 18, 2012. The sole issue for which WATCO seeks review is whether prime contractors can be liable for Labor Code section 1813 penalties for overtime violations committed by its subcontractors.

"15. As there are no factual issues in dispute, the parties have jointly agreed to waive their right to a hearing and submit the matter to the Hearing Officer on briefs alone."

[4] The Notice, Exhibit 6, shows that section 1813 penalties were assessed for six violations at the statutory rate of $25.00 per violation.

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*).)

An Awarding Body or Labor Compliance Program like CCMI 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,* at p. 985.) Section 1775, subdivision (a), requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate.

When CCMI determines that a violation of the prevailing wage laws has occurred, a written notice of withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect." Furthermore, as to unpaid wages, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§

1775, subd. (a)(2)(D).)[5]

BBCI Owes Overtime Penalties For BBCI Workers Who Were Underpaid For Overtime Hours Worked On The Project.

Section 1813 states in full 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 respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

Section 1815 states in full as follows:

> Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The record establishes that BBCI violated section 1815 by paying less than the required prevailing overtime wage rate for six violations.[6] Unlike section 1775 above, section 1813 does not give CCMI any discretion to reduce the amount of the penalty, nor

[5] No party argues that CCMI abused its discretion in setting section 1775, subdivision (a) penalties at the rate of $10.00 per violation, which at the time of the prime contract, was the minimum statutory penalty. (Stats. 2003, ch. 849, § 3.) Also, the facts show that the WATCO-BBCI subcontract did not include copies of Labor Code sections 1771, 1776, 1777.5, 1813 and 1815 as set forth in section 1775, subdivision (b). Accordingly, WATCO is liable for the total penalty of $200.00 assessed for 20 violations.

[6] See footnote 4, above.

does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed against BBCI in the amount of $150.00 for six violations.[7]

WATCO Is Neither Jointly Nor Severally Liable For The Penalties Assessed Against BBCI Under Section 1813.

WATCO argues that it cannot be assessed penalties under section 1813 for BBCI's failure to properly pay overtime to its workers employed in the execution of the contract. It argues that the plain meaning of the statute and its legislative history demonstrate a legislative intent to relieve prime contractors of any such penalties assessed against the subcontractor.

CCMI argues that penalties may be assessed under section 1813 against either the prime contractor or subcontractor. It bases its argument for joint and several liability on the language of the statute and "the consistent enforcement" of the statute by the Department in several Decisions of the Director holding the prime contractor "ultimately responsible for both wages and penalties assessed against the subcontractor."[8] In the alternative, CCMI argues that even if the prime contractor is relieved of section 1813 penalties assessed against its subcontractor, the only statutory mechanism by which the awarding body may impose such penalties against the subcontractor is to withhold funds under the prime contract.[9]

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[7] District did not put in its contract with WATCO a stipulation as set forth in section 1813 to the effect that a contractor or subcontractor is liable for overtime penalties. None of the parties has argued that this impacts the decision in this case. CCMI argues it does not. The Director has previously decided in *Crossroads Diversified Services, Inc.*, Case No. 10-0324-PWH (2011), that the failure to include the stipulation does not affect liability because there is nothing in the statute that evidences any legislative intent to invalidate overtime penalties under a civil wage and penalty assessment where the stipulation is not included in the contract. The same reasoning applies here as to the Notice.

[8] In a February 16, 2012 letter to WATCO, Exhibit 5, CCMI states that the contractor and subcontractor are jointly and severally liable under section 1743, subdivision (a).

[9] In response to this latter argument, WATCO concedes that withholding funds "makes perfect sense" with respect to the payment of wages but that penalties, which are designed to punish, should not be withheld from funds that are paid to the prime contractor because to do so would

DLSE argues that prime contractors are jointly and severally liable for section 1813 penalties incurred by the subcontractor under section 1743, subdivision (a), which provides in relevant part that, "The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon."[10] DLSE adds that it is the "long-held" position of the Director to hold prime contractors liable under section 1813 for overtime violations by their subcontractors.

As seen by the arguments of the parties, to answer the issue raised by WATCO involves more than interpreting and applying section 1813 alone; it involves interpreting and applying that section within the statutory scheme of which it is a part.

> Judicial interpretation is not accomplished by examining bits and pieces of a statute, but only after a consideration of all of its parts in order to effectuate the Legislature's intent. In the rare case, widening the analytical aperture brings additional difficulties: Statutory language which seems clear when considered in isolation may in fact be ambiguous or uncertain when considered in context.

(*Azusa Land Partners v. Department of Indus. Relations* (2010) 191 Cal.App.4th 1, 16, citations and internal quotation marks omitted.)

> The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.... ... In determining that intent, we first examine the words of the statute itself....Under the so-called 'plain meaning' rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning....If the language of the statute is clear and unambiguous, there is no need for construction... However, the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose.... If the terms of the statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.... We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would

violate the statutory scheme by punishing the prime contractor for overtime violations committed by its subcontractor.

[10] The "final order" referenced is the order issued by the Director after hearing under section 1742, subdivision (b), as part of her decision, notice of findings, and findings.

> lead to absurd consequences....The legislative purpose will not be sacrificed to a literal construction of any part of the statute.

(*Maryland Cas. Co. v. Andreini & Co. of Southern California* (2000) 81 Cal.App.4th 1413, 1419-1420, citing *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-1516, citations omitted in original; internal quotation marks omitted.)

It is reasonable to conclude, as WATCO does, that the plain meaning of section 1813 is that prime contractors are not liable for overtime penalties assessed against their subcontractors. The Legislature has made "contractors *or* subcontractors" liable for violations "*for each worker employed by the respective* contractor and subcontractor." Nevertheless, the section is not without ambiguity, and, as CCMI and DLSE point out, the Department in prior Decisions has found joint and several liability for overtime penalties assessed against subcontractors. Prior Decisions of the Director, however, give no indication that the issue was expressly raised or decided. In any event, as DLSE also acknowledges, these Decisions do not have precedential effect.

Even if the language of section 1813 were clear in isolation, its application is uncertain in the context of section 1743 and the statutory provisions that permit withholding of funds due the prime contractor where the purpose of the withholding is to enforce section 1813 penalties against the subcontractor. Thus, to determine the legislative intent, it is appropriate to look to the legislative history of the statutory scheme of which the statue is a part. (See, e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 ["The words of [a] statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible"].) *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 39.) Therefore, the Director will take official notice under Rule 45 of the legislative history materials submitted by WATCO and those served by the Hearing Officer on the parties.[11]

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[11] The legislative history materials include Legislative Counsel's Digests, which, though not binding on the courts, are entitled to "great weight." (*Martin v. Pacificare of California* (2011) 198 Cal.App.4th 1390, 1402.)

The full legislative history of section 1813 (added by stats. 1997, ch. 757, § 6 (SB 1328) and amended by stats. 2002, ch. 28 § 3 (AB 1448)) shows that the Legislature intended to relieve prime contractors of liability for penalties imposed against subcontractors for their failure to pay prevailing overtime rates to their workers.

Prior to the enactment of SB 1328 in 1997, existing law imposed on the prime contractor a $50.00 penalty per calendar day for each worker employed on a public works project that was paid less than the prevailing wage rate for work performed for the contractor or for the subcontractor (§ 1775) and a $25 penalty for each worker employed in the execution of a public work by the contractor or subcontractor that was not paid prevailing overtime rates. (§ 1813.) The prime contractor was also liable for a penalty of $25.00 per day per worker for failure to comply with specified requirements to maintain payroll records and to make them available for inspection. (§ 1776.) SB 1328 made each of these penalties applicable to subcontractors.

The Senate Committee on Industrial Relations noted that the purpose of the SB 1328 was "[t]o limit the amount of penalty assessments against prime contractors for sub-contractor violations for failure to pay prevailing wages on public works projects," and, after noting that existing law imposes penalties for the failure to pay the proper wages and fringe benefits or for the non-compliance with maintenance and production of certified payroll records, the Committee analysis concluded that the bill "would relieve the prime contractor of *any* penalties assessed against the sub-contractor. [P]rime contractors would still be liable for any and all wages and benefits due." (Sen. Com. on Industrial Relations, Analysis of SB 1328 (1997-1998 Reg. Sess.) as amended Apr. 23, 1997; emphasis added.) Similarly, the Senate Floor Analysis of SB 1328 states that the bill "provides that the prime contractor is not liable for penalties for a subcontractor's violation of prevailing wage laws." (Sen. Rules Com., Office of Sen. Floor Analysis, AB 1328 (1997-1998 Reg. Sess.) Sept. 11, 1997.)

Under SB 1328, the prime contractor remains liable for the payment of prevailing wages and benefits; however, it is relieved of liability for penalties imposed for the subcontractor's failure to pay prevailing wages to its workers unless the prime contractor had knowledge of the failure or failed to perform certain duties specified in the bill (§

1775, subd. (b)). (See Legis. Counsel's Dig. of SB 1328, ch. 757 (1997-1998 Reg. Sess.) p. 1.) The bill makes the prime contractor or subcontractor subject to a penalty for its failure to produce payroll records within 10 days of a request for the records and expressly provides that the contractor is not liable for the subcontractor's failure to comply. Finally, as noted, the bill makes the prime contractor or subcontractor liable for overtime penalties for workers employed by "the respective contractor or subcontractor" (emphasis added). That this limiting language was intended to relieve the prime contractor of liability for overtime penalties for a subcontractor's failure to pay its workers overtime, to the extent not clear from the words themselves, is supported by the above-cited legislative history and shown clearly by the subsequent legislative history of section 1813.[12]

SB 1328 included a "sunset" provision which provided that the changes made by the bill to sections 1776 and 1813 would be repealed on January 1, 2003. In 2002, the Legislature enacted AB 1448 to avoid this result. As the Assembly Committee on Labor and Employment Analysis of AB 1448 summarized and explained:

> **SUMMARY:** Provides that a prime contractor is not responsible for a violation by a subcontractor on a public works project of specified duties related to certified payroll records *and overtime pay.* A prime contractor would become liable for such actions if two Labor Code sections are permitted to sunset on January 1, 2003.
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> This bill repeals the sunset of those sections. Specifically, this bill:
>
> (1) Repeals the sunset on January 1, 2003, of Labor Code Section 1776, which provides that a contractor is not subject to a penalty assessment due to the failure of a subcontractor to comply with specified duties to prepare, maintain, and provide certified payroll records, for employees on a public works project.
>
> (2) Repeals the sunset on January 1, 2003, of Labor Code Section 1813, which provides that a subcontractor on a public works project is subject to any penalties for failure of the subcontractor to pay overtime to the subcontractor's employees, and the contractor is subject to any penalties for the contractor's employees, *but the*

[12] Where a statute is ambiguous, a subsequent expression of the Legislature as to the intent, though not binding, may be used to determine the effect of a prior act. (*California Employment Stabilization Commission v. Payne* (1947) 31 Cal.2d 210, 213-214).

contractor is not responsible for penalties for the subcontractor's violations.

EXISTING LAW

(1) Provides in Labor Code 1776, that a subcontractor is responsible to maintain and provide for inspection, as specified, certified payroll records for the subcontractor's employees on a public works project. Provides, also, that contractor is responsible to maintain and provide for inspection, as specified, certified payroll records for the contractor's employees on a public works project. The contractor is not responsible for the certified payroll for the subcontractor's employees. This current version of Labor Code Section 1776 will sunset of January 1, 2003. On that date, a former version of this section will become operative, which will make the general contractor responsible for the failure of the subcontractor to meet specified duties related to maintenance, inspection, and filing of the certified payroll records for the subcontractor's employees.

(2) Provides in Labor Code 1813, that a subcontractor is responsible to pay its employees on a public works project overtime, as specified. Provides, also that the general contractor is responsible for such penalties for its employees, *but not for employees of the subcontractor*. This version of Labor Code 1813 will sunset on January 1, 2003. On that date a former version of this section will become operative, which will make the general contractor responsible for penalties for the failure of the subcontractor to pay overtime, as specified.

(Assem. Com. on Labor and Employment, Analysis of AB 1448 (2001-2002 Reg. Sess.) Apr. 25, 2001, pp. 1-2; emphasis added.)

Thus, by repealing the sunset provision in section 1813, the Legislature clearly intended to continue to exempt the prime contractor from penalties assessed against its subcontractor for overtime violations of the subcontractor.[13]

[13] The changes made by AB 1328 to section 1775 were also to sunset on January 1, 2003. The Legislature reenacted the provision regarding prime and subcontractor liability for the non-payment of wages (§ 1775(b)) when it amended section 1775 in 2000 in AB 1646, discussed below.

DLSE argues nevertheless that section 1813 must be construed in light of section 1743, which makes prime contractors liable for "all amounts due" including penalties against the subcontractor under section 1813. However, given the clear legislative history of section 1813, I find that section 1743 does not independently impose joint and several liability on a contractor for penalties assessed against its subcontractor under section 1813.

Section 1743 was enacted as part of Assembly Bill 1646 (Stats. 2000, ch. 954, § 14, operative July 1, 2001). AB 1646 streamlined the procedures for withholding funds from a contractor due to the failure to pay prevailing wages on a public works project. It was intended to cure a potential due process defect in the existing law in response to a decision of the Ninth Circuit Court of Appeals in *G&G Fire Sprinklers, Inc. v. Bradshaw* (9th Cir. 1998) 156 F.3d 893 (judg. vacated and cause remanded, *Bradshaw v. G & G Fire Sprinklers, Inc.* (1999) 526 U.S. 1061), in which the court determined that due process requires a hearing prior to the withholding of funds, or promptly thereafter.[14] (Sen. Rules Com., Off. of Floor Analysis, 3d reading analysis of AB 1646 (1999-2000 Reg. Sess.) Aug. 28, 2000.) AB 1646 retained the existing law requiring an awarding body of a public works contract to withhold payments to the contractor for unpaid wages and penalties, but now upon the issuance of a civil wage and penalty assessment by DLSE (§ 1727, subd. (a)), and added a provision requiring withholding by the contractor in certain circumstances of money due the subcontractor. (§ 1727, subd. (b)). AB 1646 also added a requirement that the awarding body report promptly to the Labor Commissioner any suspected violations of the prevailing wage laws (§ 1726) and a provision that awarding bodies enforcing the prevailing wage laws give notice to contractors and subcontractors of contract payments withheld for wages, penalties, and forfeitures. (§§ 1726 and 1771.6). Finally, AB 1646 gave affected contractors or subcontractors the right to seek review of the assessment or notice of withholding

[14] After remand and another Ninth Circuit decision, the Supreme Court in *Lujan v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189 found no due process violation in California's statutory procedures for withholding payments from subcontractors.

and to a hearing before the Director (§§ 1742(a), (b) and 1771.6(b)). (See Legis. Counsel's Dig. of AB 1646 (1999-2000 Reg. Sess.) filed with Secretary of State Sept. 30, 2000).)

Concerning the "joint and several liability" provision in section 1743, the Senate Judiciary Committee analysis of AB 1646 noted the following:

> The Associated Builders and Contractors have filed a late letter of opposition, 'strongly objecting to the provision that the contractor and subcontractor would be jointly and severally liable for the penalties imposed by AB 1646.'
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> The sponsor asserts that AB 1646 simply makes express what are [*sic*] already the law, citing subdivisions (b) and (d) of Section 1775. They also note that, as in existing law, the prime contractor specifically would not be liable for any penalties unless the prime contractor had knowledge of that failure of the subcontractor to pay the prevailing wage or the contractor failed to follow specified requirements requiring the contractor to require the subcontractor to comply with the prevailing wage law and to monitor for compliance. Thus, they argue, a policy of joint and several liability is soundly based on some act of the contractor in allowing the subcontractor to violate the law.

(Sen. Com. on Judiciary, Analysis of AB 1646, Aug. 24, 1999, p. 7.) Similarly, the Senate Floor Analysis of AB 1646 explained:

> **Existing law**, Labor Code Section 1775 (d), provides that 'the contractor and subcontractor shall be jointly and severally liable in the enforcement action for any wages due,' and specifies that the contractor is liable for collection only after enforcement of all reasonable remedies against the subcontractor has been exhausted. Section 1775(b) makes a contractor liable for penalties for a sub-contractor's violation of the law when the contractor either knows of the subcontractor's violation or fails to follow specified procedures to require the subcontractor to comply with the prevailing wage law and to monitor compliance.
>
> **This bill** would expressly hold a contractor and a subcontractor jointly and severally liable for all amounts due (including penalties) pursuant to a final assessment of the commissioner or a judgment thereon. Like existing law, collection against the contractor could ensue only upon exhaustion of all reasonable remedies against the violating subcontractor. Similarly, a prime contractor would not be liable for the subcontractor's penalties unless the prime contractor knew of its subcontractor's failure to pay prevailing wages or failed

> to comply with the procedures to require and monitor the sub-contractor's compliance.

(Sen. Rules Com., Off. of Sen. Floor Analysis, 3d reading analysis of AB 1646 (1999-2000 Reg. Sess.) Aug. 28, 2000, par. 2.)

Thus, the legislative history of AB 1646 shows that in providing for joint and several liability in section 1743, the Legislature was concerned only with wages and section 1775 penalties for the non-payment of wages found due in an enforcement action. The legislative history cautions against a literal construction of section 1743, which would result in joint and several liability for section 1775 penalties if the order of the Director found such penalties are due under section 1775, subdivision (a), from the subcontractor even though the prime contractor established under section 1775, subdivision (b) that it was not liable for such penalties. This would be contrary to the clear intent of the legislation. The same is true with regard to penalties under section 1813. Nothing in the legislative history of AB 1646 suggests that the Legislature intended to make the prime contractor liable for overtime penalties assessed against its subcontractor in contravention of a statute passed only three years previously (and extended indefinitely two years later) which relieved the prime contractor of liability for such penalties.

Based on the foregoing, I find that WATCO is not liable for overtime penalties assessed against BBCI.

Finally, there must be considered the impact of the withholding provisions. Under section 1727, subdivision (a), the awarding body is required to withhold all amounts necessary to satisfy a civil wage and penalty assessment issued by DLSE. If the awarding body has not retained sufficient funds to satisfy an assessment (or notice of withholding) based on violations of the subcontractor, DLSE may require under section 1727, subdivision (b), that the prime contractor withhold sufficient funds due the subcontractor to satisfy the assessment. Similarly, under section 1771.6, subdivision (a), an awarding body may withhold wages, penalties and forfeitures from contract payments upon notice in writing to the contractor and subcontractor, if applicable.

Thus, withholding funds due under a public works contract is an essential part of the enforcement scheme adopted by the Legislature. AB 1646 was designed to

streamline the procedures for review of a decision to withhold funds by providing an affected contractor or subcontractor the right to a hearing to challenge that decision. (Sen. Rules Com., Off. of Floor Analysis, *supra*, Aug. 28, 2000, p. 2.) There is nothing in the statutory scheme or legislative history to suggest that section 1813 penalties for a subcontractor's violation should not be withheld from contract payments due the prime contractor. Had the Legislature intended that the prime contractor not be subjected to the withholding of funds by the awarding body sufficient to satisfy subcontractor penalties under section 1813, it would have said so. It did not. To the contrary, section 1727 anticipates that funds will be withheld either by the awarding body or by the prime contractor to satisfy assessments based on violations of the subcontractor. This does not constitute a penalty assessed against the prime contractor, as WATCO argues; rather, it is a means of enforcing obligations of the subcontractor by ensuring that funds are available in the event the penalties are confirmed after hearing or in a judgment.

Moreover, as WATCO argues, it must be assumed that when passing a statute, the Legislature "is aware of existing related laws and intends to maintain a consistent body of rules." (*Vieira Enterprises, Inc. v. City of East Palo Alto* (2012) 208 Cal.App.4th 584, 604, internal quotation marks omitted.) When SB 1646 became law, the rules concerning enforcement of prevailing wage laws included section 1729, which states:

> It shall be lawful for any contractor to withhold from any subcontract or under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit of law.

Thus, the Legislature has provided a vehicle to the prime contractor who hired the subcontractor to protect the prime contractor's own interests where funds are withheld by the awarding body on account of the subcontractor's violations after the prime contractor has paid the subcontractor.

Based on the foregoing, I find that District properly withheld contract payments due WATCO pursuant to the Notice issued by CCMI to satisfy both the section 1813 penalties due from BBCI and the 1775 penalties due from BBCI and WATCO.

FINDINGS

1. Affected contractor WATCO filed a timely Request for Review of the Notice of Withholding of Contract Payments issued by CCMI with respect to the Project.
2. There are no wages due for the Project.
3. CCMI did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $10.00 per violation, and the resulting total penalty of $200.00 assessed for 20 violations is affirmed against BBCI and WATCO.
4. Penalties under section 1813 at the rate of $25.00 per violation are due from BBCI for 6 violations on the Project, for a total of $150.00 in penalties.
5. WATCO is not jointly or severally liable for the section 1813 penalties.
6. The amounts found remaining due in the Notice of Withholding of Contract Payments as affirmed by this Decision are as follows:

Penalties under section 1775, subdivision (a):	$200.00
Penalties under section 1813 (against BBCI only):	$150.00
TOTAL:	**$350.00**

ORDER

The Notice of Withholding of Contract Payments is affirmed in part and modified in part 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: 7/25/17

Christine Baker

Christine Baker
Director of Industrial Relations