

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Balfour Beatty Construction, LLC
3-D Enterprises, Inc.

Case No. **16-0286-PWH**
Case No. **16-0294-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor 3-D Enterprises, Inc. (3-D Enterprises) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on June 9, 2016, by the Division of Labor Standards and Enforcement (DLSE) with respect to work 3-D Enterprises performed for the Southwestern Community College District (Awarding Body) in connection with the Southwestern College Central Plant, Fieldhouse and Stadium Improvements project (Project) located in San Diego County. Prime contractor Balfour Beatty Construction, LLC (Balfour Construction) also submitted a timely Request for Review, but entered into a settlement agreement with DLSE. The Assessment determined that 3-D Enterprises owed \$97,537.51 in unpaid prevailing wages, unpaid training fund contributions, and statutory penalties.

A Hearing on the Merits was set for October 23, 2018, before Hearing Officer Douglas P. Elliott. In advance of the Hearing, however, 3-D Enterprises and DLSE agreed to a settlement of all issues except for a discrete legal issue regarding the Landscape Irrigation Laborer and Tender ratio in existence at the time of the Project, and aspects of the Assessment related to that issue. At the

request of the parties, the Hearing Officer vacated the date for the Hearing on the Merits and ordered the submission of legal briefs and a stipulation of facts.

The parties submitted their briefs on or about November 19, 2018. Sotivear Sim appeared as counsel for DLSE; James C. Danaher appeared as counsel for 3-D Enterprises.

Each party also submitted its own exhibits in support of its brief. There being no objection to any exhibit, DLSE Exhibit Numbers 1 through 19 and 3-D Enterprises Exhibits A through P are hereby admitted into evidence.

The parties stipulated as follows:

- The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and the employment of apprentices under the California Prevailing Wage Law, Labor Code sections 1720, et seq.¹
- The Request for Review was timely.
- The Enforcement File was timely made available.
- Balfour Construction deposited \$44,037.51 with the Department of Industrial Relations under section 1742.1.²

The issues presented for decision are:

- Whether 3-D Enterprises met the required Landscape/Irrigation Laborer (Landscape Laborer) to Landscape/Irrigation Tender (Landscape Tender) ratio on the Project
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of \$120.00 per violation.

¹ All subsequent section references are to the California Labor Code, unless otherwise specified.

² 3-D Enterprises did not stipulate to the timeliness of the Assessment, and during the pre-hearing conference process requested an Order to Show Cause (OSC) under the California Code of Regulations, title 8, section 17227 to address the issue. The OSC was granted by the Hearing Officer, and the parties submitted briefs and exhibits in response thereto. On October 2, 2017, the Hearing Officer issued an order finding that Assessment was timely served under sections 1741 and 1741.1 because the statute of limitations was tolled for a period of 154 days due to the Awarding Body's untimely response to DLSE's request for a valid notice of completion or document evidencing the Awarding Body's acceptance of the public work on a particular date.

- Whether 3-D Enterprises is liable for section 1813 penalties.
- Whether 3-D Enterprises has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment, but 3-D Enterprises thereafter carried its burden of proving that the basis of the Assessment was incorrect, except with respect to one issue that was settled by the parties, as specified below. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this Decision nominally affirming the Assessment, but finding amounts owed only as agreed to in settlement by the parties.

FACTS

The Project.

The Awarding Body advertised the Project for bid on April 5, 2012. The Project involved construction of various improvements to the central plant, fieldhouse and stadium at Southwestern College. 3-D Enterprises was awarded the landscape and irrigation work on the Project and entered into a contract to perform the work on July 11, 2012 (Contract). The Contract directs 3-D Enterprises to pay the applicable prevailing wage rates, cites the relevant Labor Code sections, advises that the Director's determinations of prevailing wage rates are open to inspection at the Awarding Body, and sets forth the requirements for submitting certified payroll records (CPRs).

3-D Enterprises employees worked on the Project from March 19, 2013, to September 5, 2014, in the City of Chula Vista. On November 5, 2014, a notice of completion was recorded with the San Diego County Recorder indicating that work on the Project was completed by August 30, 2014.

The Assessment.

The Assessment found that 3-D Enterprises misclassified and paid certain

workers as Landscape Tenders for hours when they should have been classified and paid as Landscape Laborers. Consequently, the Assessment found that 3-D Enterprises failed to properly classify those workers according to work actually performed and failed to pay the required prevailing wage in violation of sections 1771 and 1774. The Assessment further found that 3-D Enterprises failed to pay the required overtime rate in violation of section 1815, and failed to pay training fund contributions in violation of section 1777.5. Additionally, the Assessment found that 3-D Enterprises failed to submit contract award information to applicable apprenticeship programs for Landscape Laborer and Landscape Operating Engineer in violation of section 1777.5, subdivision (e); failed to submit a request for dispatch of apprentices to applicable apprenticeship programs; and failed to comply with the required 1:5 ratio of apprentice-to-journeyperson hours for those classifications.

Altogether, the Assessment found that 3-D Enterprises underpaid the required prevailing wages and training fund contributions in the amount of \$19,592.51. Penalties were assessed under section 1775 in the amount of \$24,120.00, and under section 1813 in the amount of \$325.00. Penalties were assessed under section 1777.7 in the amount of \$53,500.00.

Applicable Prevailing Wage Determinations (PWDs).

The two relevant PWDs in effect on the bid advertisement date are Landscape/Irrigation Laborer for San Diego County (SC-102-X-14-2011-1A) and Landscape/Irrigation Tender for San Diego County (SC-102-X-14-2011-1B).

These two classifications –Landscape/Irrigation Laborer (Landscape Laborer) and Landscape/Irrigation Tender (Landscape Tender) – appear under one craft, Landscape/Irrigation Laborer/Tender, but there are two different determinations giving different rates of pay. The basic hourly rate for Landscape Laborer is \$25.97, the combined fringe benefits are \$15.42 per hour, and the training fund contribution rate is \$0.64 per hour, for a total of \$42.03 for each straight-time hour. The basic hourly rate for Landscape Tender is \$11.38, the

combined fringe benefits are \$4.42 per hour, and there is no training fund contribution, for a total of \$15.80 for each straight-time hour.

Footnote C to the two PWDs provides:

The first employee on the job shall be a Landscape/Irrigation Laborer. The second employee on the jobsite may be a Tender. Thereafter, Tenders may be employed with Landscape/Irrigation Laborers in a 50/50 ratio on each jobsite. However, plant establishment may be performed exclusively by Landscape/Irrigation Tenders without the supervision of a Journey[person].

The scope of work does not further differentiate between Landscape Laborers and Landscape Tenders. It provides:

A. The landscape industry is defined as follows: Decorative landscaping, such as decorative walls, pools, ponds, reflecting units, lighting displays low voltage, handgrade landscaped areas, tractor grade landscaped areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation, backfill trenches, asphalt, plant shrubs, trees, vines, set boulders, seed lawns, lay sod; hydroseed; use ground covers such as flatted plant materials, rock rip rap, colored rock, crushed rock, pea gravel, and any other landscapable ground covers; installation of header boards and cement mowing edges; soil preparation such as wood shavings, fertilizers, organic, chemical or synthetic; top dress ground cover areas with bark or any wood residual or other specified top dressing, operation of any equipment, as directed by the Contractor, for the installation of landscaping and irrigation work.

In addition to the above paragraph, the work covered by this Agreement shall include but not be limited to

1. All work involved in the distribution, laying, and installation of landscaping irrigation pipe, the installation of low voltage automatic irrigation and lawn sprinkler systems, including but not limited to, the installation of automatic controllers, valves, sensors, master control panels, display boards, junction boxes and conductors including all components thereof.

2. Installation of valve boxes, thrust blocks, both precast and poured in place, pipe hangers and supports incidental to the installation of the entire piping system.
3. Start-up testing, flushing, purging, water balancing, placing into operation all piping equipment, fixtures and appurtenances installed under this Agreement.
4. Any line inside a structure which provides water to work covered by this Agreement, including piping for ornamental pools and fountains when done in conjunction with landscaping.
5. All piping for ornamental stream beds, waterways and swimming pools.
6. All temporary irrigation and lawn sprinkler systems.
7. The operation of horizontal directional drills, including operation of drill and electronic tracking device (locator) and related work.
8. The operation of all landscape/irrigation equipment and landscape/irrigation trucks, including the driving of vehicular equipment and the delivery and distribution of materials to and from jobs and in and around all jobsites.
9. All plant establishment work performed under warranty; and if not under warranty, all plant establishment work performed during the period of time designated by the Director of Industrial Relations as subject to the payment of prevailing wage rates on public works projects. Plant establishment may be performed exclusively by Landscape/Irrigation Tenders without the supervision of a Journey[person].
10. Installation and cutting of pavers and paving stone.
11. All work in connection with traffic control, including but not limited to flagging, signaling, assisting in the moving and installation of barriers and barricades, safety borders and all equipment; operation of pilot trucks.

The DLSE's Investigation.

On December 19, 2014, DLSE received a complaint from the Center for Contract Compliance alleging that 3-D Enterprises: (1) failed to provide contract information to applicable apprenticeship programs; (2) failed to request dispatch of apprentices from applicable apprenticeship programs; and (3) failed to employ registered apprentices. DLSE opened an investigation and requested CPRs from 3-D Enterprises, which 3-D Enterprises provided. DLSE also requested CPRs and bid and contract documents from the Awarding Body, which provided them. DLSE sent employee questionnaires to fourteen workers listed on the CPRs, six of which were returned as undeliverable. DLSE's audit was primarily based on the CPRs provided by 3-D Enterprises with respect to days worked, number of hours worked, and rates paid. In response to DLSE's inquiry, the California Apprenticeship Council reported that 3-D Enterprises paid training fund contributions for workers reported as journeypersons. (Penalty Review, DLSE Exhibit No. 3; 3-D Enterprises Exhibit F.)

DLSE served the Assessment on 3-D Enterprises and Balfour Construction by first class and certified mail on June 9, 2016. 3-D Enterprises submitted its Request for Review of the Assessment on July 14, 2016. Balfour Construction submitted its Request for Review on July 5, 2016.

Reclassification from Landscape Tender to Landscape Laborer.

During the course of the Project, 3-D Enterprises employed a number of workers to perform tasks within the scope of work of the Landscape Laborer/Tender PWDs. 3-D Enterprises frequently classified workers as both Landscape Laborers and Landscape Tenders within the same workday. For example, on March 19, 2013, Javier Valdivia and Rigaberto Dimas each worked eight hours. 3-D Enterprises classified both workers as Landscape Laborer for four hours and Landscape Tender for four hours.

The Assessment determined that in every instance when workers were paid as Landscape Tenders, they were misclassified and should have been paid

the prevailing wage for Landscape Laborer. The Assessment reclassified the workers accordingly, and assessed 3-D Enterprises for underpayment of wages in the amount of \$19,088.51. It also assessed \$504.00 in unpaid training fund contributions, which the PWDs require for Landscape Laborers (but not for Landscape Tenders).

DLSE's Calculation of Statutory Penalties.

The Assessment found 3-D Enterprises liable for penalties under section 1775 totaling \$24,120.00, representing 201 violations at the rate of \$120.00 per violation. The Assessment further found 3-D Enterprises liable for penalties under section 1813 totaling \$325.00, representing thirteen overtime violations at the statutory rate of \$25.00 per violation.

The Assessment also found 3-D Enterprises liable for apprenticeship violations and corresponding penalties under section 1777.7 totaling \$53,500.00, representing violations on 535 days at the rate of \$100.00 per day. DLSE represents in its brief, however, that it and 3-D Enterprises have entirely settled the issue of apprenticeship violations, and that 3-D Enterprises has agreed to pay a total of \$3,800.00, for 76 violations at \$50.00 per violation. Accordingly, the issue of apprenticeship violations has been resolved by the parties, and will not be addressed further by this Decision.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The California Supreme Court has summarized the purpose of the CPWL as follows:

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

employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987, citations omitted (*Lusardi*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of unpaid wages) on a contractor who has failed to pay the required prevailing wages within 60 days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

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

In this case, for the reasons detailed below and based on the totality of the evidence, DLSE met its initial burden of presenting prima facie support for the Assessment, but 3-D Enterprises met its burden to prove the basis of the Assessment was incorrect, in part.

3-D Enterprises Complied With the Landscape Laborer-to-Tender Ratio Requirement.

DLSE contends that 3-D Enterprises routinely violated the ratio requirement set forth in the PWDs by splitting the classifications of workers within the same workday. As argued by DLSE in its Brief:

3D cannot meet the ratio requirement by classifying its workers as both a Laborer and a Tender during the same work day. Footnote C is clear that the ratio requirement is based on a unique and distinct employee rather than a ratio of total hours worked. ... The Landscape Irrigation Laborer and Tender scope of work does not distinguish between the roles of a Laborer and a Journey[person]. The only requirement is that a Tender be supervised by a journey[person]. This is an important distinction which provides guidance on how to distinguish between the two classifications. The Tender is a completely different class of worker and it would be inappropriate to transition a worker between the classifications of Tender and Laborer. The Tender classification is appropriate for a worker whose duties are either to assist or to learn under the supervision of a journey[person]. The difference in the prevailing wage rate is also instructive as the Laborer is paid more than double the prevailing rate of a Tender. These distinctions support the notion that the Laborer is a higher skilled worker able to work without supervision.

(DLSE Brief at p. 4.)

3-D Enterprises counters in its Brief:

Contrary to the unsupportable opinion of the DLSE audit team, the PWD sets no restriction on whether a 'second employee' can become the 'first employee' during a work day. And for good reason there is no such restriction. If the first employee were to leave the job early on any given day, then the 'second employee' may (or must) become the 'first employee' for PWD and manning purposes. There is also nothing in the SOW [scope of work] or Public Contract Code that proscribes classifying the same employee as a Laborer at one time and a Tender at another. Indeed, the fact that the plant maintenance period allows for [the] Tender rate to be paid to all employees is proof that the practice of splitting employees between Laborer and Tender is permitted. And even when 3-D lodged an inquiry with the DIR about the propriety of splitting an employee as a Laborer/Tender, it never said it was prohibited. ... Instead, DIR reiterated what was stated in the PWD: that there must always be a Laborer for each Tender on the jobsite. ...

Further, the SOW fails to distinguish what jobs can be performed by Journey[persons] and what jobs can be performed by Tenders. ... It does not even state that a Tender 'assists' a Laborer—another point the DLSE audit team failed to recognize. The only distinction drawn between Laborers and Tenders is found in the relevant PWD and that is the rate of pay—*nothing else*.³

(3-D Enterprises Brief at p.3 (emphasis in original).)

3-D Enterprises has the better argument. DLSE provides no evidence or authority for its assertion that "the ratio requirement is based on a unique and distinct employee." While Footnote C mentions the "first employee on the jobsite" and the "second employee on the jobsite," beyond that there is no reference to individual employees, merely a numerical ratio. The "first employee on the jobsite" is not a job title or even necessarily the first worker chronologically to arrive in in the morning. The plain meaning of the term in the context of the ratio is that if there is only one landscape worker, that worker

³ 3-D Enterprises asserts that DLSE erroneously applied the more restrictive language of the 2013 PWD and scope of work. However, neither party introduced these documents into evidence, and they are not in the record. Accordingly, they may not be considered herein.

must be paid at the Landscape Laborer rate. The fact that the "second employee" may be either a Landscape Laborer or Tender is in conflict with DLSE's "unique and distinct employee" assertion.

DLSE correctly acknowledges that the scope of work does not differentiate between the roles of Landscape Laborer and Landscape Tender, as all work specified may be performed by either classification. DLSE asserts, however, that a Landscape Tender must be supervised by a Landscape Laborer. Footnote C and the scope of work contain no such explicit requirement, but rather merely provide that plant establishment work may be performed exclusively by Landscape Tenders without such supervision. Even assuming an implied requirement that a Landscape Tender otherwise works under the supervision of a Landscape Laborer, there is no prohibition, express or implied, against the employer rotating these roles. Indeed, a contractor might well deem it a sound business practice to do so, in order that more workers can enjoy the higher pay rate accorded Landscape Laborers.

DLSE's argument that a Landscape Laborer is a "higher skilled worker able to work without supervision" suggests that a Landscape Tender is somehow akin to an apprentice. This is plainly not so. There is no requirement that a worker perform a minimum number of hours as a Landscape Tender before becoming a Landscape Laborer. It may be that most of a contractor's workers have comparable levels of skill and experience, and in such circumstances, rotating the classifications may be the fairest approach. Moreover, 3-D Enterprises is correct in stating that if the "first employee" leaves work early, the employer may be obligated to upgrade the "second employee" from Landscape Tender to Landscape Laborer for the remainder of the workday in order to maintain the required ratio. The very nature of the ratio requirement is inconsistent with the notion that the two classifications have distinctly different skill levels. At all times, at least half the workers must be paid as Landscape Laborers regardless of their level of skill and experience.

A comparison of 3-D Enterprises' CPRs (3-D Enterprises Exhibit K) with DLSE's Public Works Investigation Worksheets (DLSE Exhibit No. 2) demonstrates the flaws in DLSE's position. For example, the CPR for the week ending March 29, 2014, shows three workers on the Project. Pedro Salazar was paid for 40 hours as a Landscape Laborer, for eight hours per day, Monday through Friday. Javier Valdivia was paid as a Landscape Laborer for 36 hours, reflecting the same daily hours as Salazar except that Valdivia worked only four hours on Thursday. Amado Dimas worked 40 hours that week, but was paid as a Landscape Laborer for four hours per day, and as a Landscape Tender for the other four hours per day. The Assessment reclassified Dimas as a Landscape Laborer for each of the hours he was paid as a Landscape Tender, and assessed 3-D Enterprises for the difference in wages and training fund contributions, and section 1775 penalties, even though 3-D Enterprises could have paid him as a Landscape Tender for all forty hours without violating the ratio requirement.

The same three workers were the only ones employed on the Project during the week ending April 5, 2014, but all three worked only on Monday day for eight hours. Again, Salazar and Valdivia were paid as Landscape Laborers and Dimas was paid for four hours as a Landscape Laborer and four hours as a Landscape Tender. Again, the Assessment reclassified Dimas as a Landscape Laborer for the hours he was paid as a Landscape Tender, even though 3-D Enterprises could have employed two Landscape Tenders for eight hours that day without violating the ratio requirement.

On the week ending April 12, 2014, the same three workers were the only ones employed on the Project. Salazar was paid as a Landscape Laborer for 39 hours, eight hours each for Monday, Tuesday, Wednesday and Friday, and seven hours on Thursday. Valdivia worked the same hours, and was paid as a Landscape Laborer except for four hours each on Wednesday and Thursday, when he was paid as a Landscape Operating Engineer. Dimas worked the same 39 hours that week, and his time was again split equally between Landscape Laborer and Landscape Tender, except for Monday when he was paid as a

Landscape Operating Engineer for five hours, and as a Landscape Laborer and Landscape Tender for an hour and a half each. Once again, the Assessment reclassified him as a Landscape Laborer for all his Landscape Tender hours, even though there would have been no ratio violation if he had been paid as a Landscape Tender for all hours worked. Further, the Assessment found no violation in the payment of Valdivia and Dimas as Landscape Operating Engineers for partial days, suggesting that DLSE recognizes the legitimacy of splitting of job classifications in some circumstances.

In each of the above examples, Salazar was paid as a Landscape Laborer, and may be regarded as the "first employee on the job" for purposes of the ratio requirement. Under that requirement, the second employee could be either a Landscape Laborer or a Landscape Tender, and thereafter 3-D Enterprises was allowed to employ one Landscape Tender for each Landscape Laborer. Thus, Dimas could be deemed the "second employee" in each instance, and 3-D Enterprises was permitted to pay him as either a Landscape Laborer or a Landscape Tender. Had 3-D Enterprises paid him as a Landscape Tender for all the hours worked during those weeks, there would have been no ratio violation. It would not make sense to find a ratio violation because 3-D Enterprises chose instead to pay him the higher rate as a Landscape Laborer for half his hours.

The preponderance of the evidence supports 3-D Enterprises' contention that at no time did it employ more Landscape Tenders than Landscape Laborers. At all times when there was only one worker on the job site, that worker was always paid as a Landscape Laborer. DLSE has shown no evidence to the contrary. Accordingly, it must be concluded that 3-D Enterprises complied with the ratio requirement at all times, and did not underpay any worker on the basis of misclassification as a Landscape Tender. Accordingly, the Assessment must be modified to eliminate the unpaid prevailing wages in the amount of \$19,088.51.

3-D Enterprises Paid the Required Training Fund Contributions.

The Assessment found that 3-D Enterprises failed to make training fund contributions in a total amount of \$504.00 for this Project. This amount represents contributions not made for those hours that 3-D Enterprises paid workers as Landscape Tenders rather than Landscape Laborer. The PWD requires training fund payments of \$0.64 per hour for Landscape Laborers, but no such payments for Landscape Tenders. Since this Decision finds that 3-D Enterprises correctly classified the workers in question as Landscape Tenders, 3-D Enterprises has no liability for unpaid training fund contributions.

The Issues of Penalties Under Section 1775 and Liquidated Damages Under Section 1742.1 Are Moot.

In light of the analysis as to prevailing wage payments, *ante*, the issues of penalties for underpayment of prevailing wages under section 1775 and liquidated damages under section 1742.1 based on underpayment of wages are moot and need not be addressed.

DLSE's Penalty Assessment Under Section 1813.

Section 1813 provides in pertinent part:

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

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD. The Assessment found that 3-D Enterprises was liable for \$325.00 in section 1813 penalties for 13 violations. DLSE did not address this issue in its brief, but an examination of the Public Works Investigation Worksheets (DLSE Exhibit No. 2) reveals that all of the assessed overtime violations occurred during the week ending July 19, 2014. In each instance, the Worksheets show that 3-D Enterprises paid the worker at

the rate of \$21.49 per hour for all overtime hours. This is the rate prescribed in the PWD for daily and Saturday overtime for Landscape Tenders. Thus, every overtime violation is a consequence of the Assessment's reclassification of Landscape Tenders to Landscape Laborers. Since this Decision finds that the workers were properly classified as Landscape Tenders for the hours in question, there were no overtime violations. Accordingly, the Assessment must be modified to eliminate the section 1813 penalties in the amount of \$325.00.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Balfour Beatty Construction, LLC, and affected subcontractor 3-D Enterprises, Inc., filed timely Requests for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made its enforcement file available to Balfour Beatty Construction, LLC and 3-D Enterprises, Inc..
5. Balfour Beatty Construction, LLC deposited \$44,037.51 with the Department of Industrial Relations as a result of the Assessment.
6. 3-D Enterprises, Inc. routinely classified certain workers as Landscape/Irrigation Laborers for half the hours worked on a given day, and as Landscape/Irrigation Tenders for the remaining hours. On no occasion did this practice result in a violation of the ratio requirement set forth in the applicable prevailing wage determinations. Accordingly, 3-D Enterprises, Inc. has no liability for unpaid wages.
7. 3-D Enterprises, Inc. paid all required training fund contributions. No training fund contributions were required for hours when workers were

properly classified as Landscape Tenders. Accordingly, 3-D Enterprises, Inc. has no liability for unpaid training fund contributions.


8. Because 3-D Enterprises, Inc. did not pay any worker less than the required prevailing wage rate, 3-D Enterprises, Inc. has no liability for section 1775 penalties.
9. Because 3-D Enterprises, Inc. did not underpay any worker the required prevailing wage rate for overtime work, 3-D Enterprises, Inc. has no liability for section 1813 penalties.
10. No wages remained due and owing more than 60 days following issuance of the Assessment. Accordingly, 3-D Enterprises, Inc. is not liable for liquidated damages under section 1742.1.
11. 3-D Enterprises, Inc. and DLSE have agreed that 3-D Enterprises, Inc. will pay the sum of \$3,800.00 in section 1777.7 penalties⁴. In accordance with that agreement, 3-D Enterprises, Inc. is not liable for any additional 1777.7 penalties found in the Assessment.
12. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

Wages due:	\$0.00
Penalties under section 1775(a):	\$0.00
Penalties under section 1813:	\$0.00
Training Fund Contributions:	\$0.00
Liquidated damages:	\$0.00
Penalties under section 1777.7 (by agreement of the Parties)	\$3,800.00
TOTAL:	\$3,800.00

⁴ The \$3,800.00 agreed to in penalties under section 1777.7 is to be reduced according to any payment that has already been made on this amount made by 3-D Enterprises.

The Civil Wage and Penalty Assessment 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: 7/16/20

/s/ Katrina S. Hagen 
Katrina S. Hagen
Director
Department of Industrial Relations