STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Tobo Construction, Inc.	Case Nos. 19-0209-PWH
Mega Air Co., Inc.	19-0317-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Tobo Construction, Inc. (Tobo) and affected subcontractor Mega Air Co., Inc. (Mega) submitted timely Requests for Review of a Civil Wage and Penalty Assessment (Assessment) issued on March 13, 2019, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Mega performed for the University of California, Los Angeles (UCLA or Awarding Body) in connection with the 10889 Wilshire Building-Floors 10-16 Telecom and Building Improvements (Project) located in Los Angeles County. The Assessment determined that Mega owed $148,059.35 in unpaid prevailing wages, training fund contributions, and statutory penalties. Pursuant to notice, a Hearing on the Merits was conducted on June 24 and July 21, 2021, via Webex Video Conference before Hearing Officer Steven A. McGinty. Lance A. Grucela appeared as counsel for DLSE; Jae Il Bae appeared for Mega; there was no appearance by Tobo. Pursuant to California Code of Regulations, title 8, section 17246, subdivision (a), the Hearing on the Merits proceeded. DLSE Deputy Labor Commissioner Christopher Hightower testified in support of the Assessment. Tobo did not file a motion seeking relief from its nonappearance as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

At the beginning of the Hearing on the Merits, the parties appearing stipulated as follows:

- The Requests for Review were timely;
- No wages were paid or deposited with the Department of Industrial Relations

as a result of the Assessment under Labor Code section 1742.1. [1]

At the beginning of the Hearing on the Merits, the parties appearing stipulated that the following were the issues for decision:

- Whether the Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
- Whether the Assessment was timely served by DLSE in accordance with section 1741.
- Whether DLSE timely made available to the requesting parties its enforcement file.
- Whether Mega under-reported hours worked on its Certified Payroll Records (CPR).
- Whether Mega paid its employees for all hours worked on the Project.
- Whether Mega timely paid its employees the correct prevailing wage rates for all hours worked on the Project.
- Whether Mega paid all required training fund contributions for the Project.
- Whether Mega is liable for penalties assessed pursuant to sections 1775 and 1813.
- Whether Mega is liable for liquidated damages for unpaid wages found due and owing.
- Whether Mega submitted contract award information to all applicable apprenticeship committees for the classification Sheet Metal Worker in a timely and sufficient manner, as required by section 1777.5, and California Code of Regulations, title 8, section 230.
- Whether Mega employed apprentices in the required minimum ratio of apprentices to journeypersons required by section 1777.5 for the classification Sheet Metal Worker on this Project.
- Whether Mega is liable for penalties assessed pursuant to section 1777.7.

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

- Whether Tobo is jointly and severally liable for unpaid wages, unpaid training fund contributions, liquidated damages, and penalties assessed under sections 1775, 1813 and 1777.7.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence at the hearing that provided prima facie support for the Assessment. The Director also finds that Mega and Tobo failed to carry their burden of proving that the basis of the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment.

FACTS

Failure to Appear.

By letter dated May 10, 2019, the law firm of Hunt Ortmann Palffy Nieves Darling & Mah (Hunt Ortmann) stated their representation of both requesting parties, and requested review of the Assessment on behalf of both requesting parties. An initial Prehearing Conference was set for August 5, 2019, and was continued to October 7, 2019, upon the joint request of the parties. The parties appeared for the initial prehearing conference on that date, advised the Hearing Officer of their intentions to meet for an informal settlement conference on October 25, 2020, jointly requested a continuance for that purpose, and waived the statutory 90-day hearing requirement. Accordingly, the Hearing Officer ordered the Prehearing Conference continued to January 6, 2020.

On January 3, 2020, Hunt Ortmann sent a letter via fax to the Hearing Officer informing him of their withdrawal as counsel of record for both requesting parties. The letter further stated:

> All future communications should be directed to
>
> Mr. Jimi Chae
> 30225 Rhone Drive
> Rancho Palos Verdes, CA 90275

At the Prehearing Conference on January 6, 2020, there was no appearance for

either requesting party. Accordingly, the Hearing Officer ordered a continuance until March 9, 2020. The Minutes of Prehearing Conference and Order Continuing Prehearing Conference included the following Notice to the Requesting Party Tobo Construction, Inc., in bold font:

> Your rights may be adversely affected by your failure to appear and contest the Civil Wage and Penalty Assessment issued against you. The Hearing Officer is authorized to proceed with the hearing in the absence of a Party and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn by an absence of proof by the non-appearing Party.

At the Prehearing Conference on March 9, 2020, there was again no appearance by Tobo. Jae Il Bae appeared on behalf of Mega, and stated that he did not have a copy of the DLSE file, and the conference was continued to April 6, 2020, to allow him time to obtain it. The Minutes again included the above notice to Tobo.

A series of continuances ensued, for reasons related to the COVID-19 pandemic and street protests, and the next Prehearing Conference was held on November 9, 2020. Neither requesting party appeared, and the Minutes included the above notice, directed to both requesting parties.

On January 26, 2021, the Hearing Officer issued an Order Setting Date and Time of Hearing on the Merits, setting the hearing for April 15, 2021. The notice regarding failure to appear was again included, directed to both requesting parties. At the Hearing on the Merits on April 15, 2021, there was again no appearance for Tobo. DLSE appeared, and Mr. Bae appeared for Mega. Mr. Bae notified the Hearing Officer that he was unable to appear for a lengthy hearing, due to side effects from a COVID-19 vaccination received the day before. Over the objection of DLSE, the Hearing Officer granted Mega's request for a continuance and ordered the Hearing continued to June 24, 2021. The Minutes of Hearing on the Merits and Order Continuing Hearing on the Merits again included the notice to Tobo regarding the consequences of failure to appear.

At the Hearing on the Merits on June 24, 2021, DLSE and Mega again appeared, and Tobo again failed to appear. The Hearing proceeded in the absence of Tobo.

Thus, Tobo was notified on at least five separate occasions of the potential consequences of its failure to appear. Each of the documents containing these notices was served by first class mail on Tobo's agent for service of process,[2] Jimi Chae, at the address provided by Tobo's former attorneys, and was additionally served on Mr. Chae via email. Each of the documents was additionally served by first class mail on Tobo's CEO/president,[3] Monica Shiun Oh, and Misa Tang, at Tobo's address of record in Torrance, California.

The Project.

UCLA advertised the Project for bids on June 23, 2017. [4] The Advertisement for Bids [5] includes the following Description of Work:

> The Work of this Project consists of construction of (5) data telecom rooms, electrical closets and bathroom shell spaces on Floors 10 through 15 at 10889 Wilshire Boulevard. The scope also includes: connection to existing MEP services including at electrical room at below-grade Tower parking area; connection to existing chilled water service for mechanical equipment; plumbing risers and limited pathways for cabling infrastructure; provide abatement as needed to install all work.

The prime contract was awarded to Tobo, which entered into a contract with UCLA dated August 29, 2017. [6] Mega entered into a subcontract [7] with Tobo to perform the heating, ventilation and air conditioning (HVAC) work on the Project.

The Advertisement for Bids included a prevailing wage provision that stated in part:

> Contractor shall comply and ensure that all Subcontractors comply with prevailing wage law pursuant to the State of California Labor Code, including but not limited to Sections 1770, 1771, 1771.1, 1772, 1773, 1773.1, 1774, 1775, 1776, 1777.5 and 1777.6 of the State of California Labor Code. Compliance with these sections is required by this Contract. The Work under this Contract is subject to compliance monitoring and

[2] See DLSE Exhibit No. 25, California Secretary of State Entity Details for Tobo Construction, Inc.
[3] See DLSE Exhibit No. 26, Contractors State License Board details for License Number 758012.
[4] DLSE Exhibit No. 22, at p. 311.
[5] DLSE Exhibit No. 21, at p. 296.
[6] DLSE Exhibit No. 22, at pp. 299-303.
[7] *Id.*, at pp. 304-323.

enforcement by the State of California Department of Industrial Relations.[8]

Mega's subcontract with Tobo included the following provisions:

> 13.2 Subcontractor shall comply with and agrees to be bound by all applicable federal, state and local laws and regulations, including, but not limited to, all provisions of … the California Labor Code …. Upon request, Subcontractor shall submit certified payroll records to Contractor no later than three (3) working days after labor has been paid. The provisions of California Labor Code Section 1771, 1775, 1776, 1777.5, 1813 and 1815 attached hereto are incorporated into this subcontract when payment of prevailing wages is required by contract or law, and Subcontractor agrees to comply with these provisions and all interpretations thereof by the Director of the Department of Industrial Relations insofar as they are applicable to Subcontractor on this project. Subcontractor also shall comply with all laws and regulations regarding the use of apprentices and shall utilize apprentices in the legally required ration for all work on the Project. Subcontractor shall submit forms DAS-140 and DAS-142 to the proper persons in timely manner.
>
> 13.3 Prior to making final payment to Subcontractor, as a condition precedent, the Subcontractor must provide to Contractor an affidavit signed under penalty of perjury that Subcontractor has paid the correct prevailing wage rate to its employees pursuant to the Labor Code.[9]

Mega employees worked on the Project from October 24, 2017, through May 7, 2018, in the City of Los Angeles. On June 27, 2018, the Awarding Body executed a Notice of Completion stating that work on the Project was completed on that date. On June 28, 2018, the Awarding Body filed the Notice of Completion with the Los Angeles County Recorder.

The Assessment.

DLSE served the Assessment by ordinary first class mail and by certified mail upon Tobo's agent for service of process, Jimi Chai, and upon Mega's agent for service of process, Jae Il Bae, on March 13, 2019. The Assessment found that Mega did the following: failed to pay prevailing wages to Sheet Metal Workers; failed to report all hours worked; and failed to pay all required training fund contributions. It further found

[8] DLSE Exhibit No. 21, at p. 298.
[9] DLSE Exhibit No. 22, at p. 310.

that Mega failed to meet apprenticeship requirements by failing to submit Contract Award Information (DAS 140) to all applicable committees for Sheet Metal Workers, and failed to meet the required minimum ratio for apprentices to journeypersons for Sheet Metal Workers.

The Assessment found that Mega underpaid the required prevailing wages and training fund contributions in the amount of $90,774.35. Penalties were assessed under section 1775 in the mitigated amount of $180.00 per violation for 231 violations, in a total amount of $41,580.00, and under section 1813 in the total amount of $25.00 for one violation. Penalties were also assessed under section 1777.7 in the mitigated amount of $80.00 per day for 196 days, totaling $15,680.00.

The Enforcement File.

A Request for Review on behalf of Tobo and Mega, dated May 10, 2019, was received by DLSE on May 13, 2019. On May 17,2019, 2021, DLSE served upon counsel for Tobo and Mega a "Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742(b)." The Notice stated in part: "In accordance with Labor Code section 1742(b), this notice provides you with an opportunity to review evidence to be utilized by the DLSE at the hearing on the Request for Review, and the procedures for reviewing such evidence." It concluded by stating that the procedure to exercise the opportunity to review evidence was to transmit an attached Request to Review Evidence to DLSE at a specified address within five calendar days.[10]

DLSE's investigative notes include the following entry for May 22, 2019: "Notice of Transmittal from L.B. office with Notice of Opp. to Review Evidence from Emily A. Kromke of Hunt Ortmann Palffy Nieves Darling & Mah of Pasadena, CA representing Tobo Construction and Mega Air Co. was received today; forward to CH. VGK/727" The next entry, dated May 23, 2019, states: "Emailed contractors attorney regarding date for copy service to come and copy investigative file. CH716" (DLSE

[10] A copy of the Notice and Proof of Service is in the Hearing Officer's file. DLSE transmitted the documents to the Lead Hearing Officer along with the Request for Review and other pertinent documents. The Director takes official notice of the Notice and Proof of Service and their content pursuant to California Code of Regulations, title 8, section 17245.

Exhibit No. 29, at p. 342.) Hightower testified that his practice upon receiving a request for review was to contact the requesting party's attorney to make arrangements for the file to be copied, and that counsel for Tobo and Mega did, in fact, obtain a copy of the file in this case.

The Hearing on the Merits.

Prior to the commencement of testimony, the parties appearing stipulated to the admission of DLSE Exhibit numbers 1 through 30, and said exhibits were therefore admitted into evidence.

DLSE called as a witness Christopher Hightower. He testified that he was employed by DLSE as a Deputy Labor Commissioner I, and that his duties entailed investigating complaints of labor law violations on public works projects. Hightower was assigned a complaint from Public Works Contract Compliance, alleging apprenticeship and training fund violations by Mega on this Project. (DLSE Exhibit No. 6.) Hightower testified that he conducted the investigation that resulted in the Assessment at issue. His investigation included obtaining documents from the Awarding Body and Mega, sending questionnaires to workers, interviewing the two workers who returned completed questionnaires, and obtaining affidavits from those workers. Hightower identified various DLSE exhibits and testified regarding their contents. He was cross-examined by Mega.

Mega called as its only witness Jae Il Bae, who did not contradict Hightower's testimony. Mega did not introduce any documentary evidence.

The matter was submitted at the conclusion of testimony on July 21, 2021.

Applicable Prevailing Wage Determinations (PWDs).

Set forth below are the two relevant PWDs and that were in effect on the date the Project was advertised for bids:

1. Sheet Metal Worker for Los Angeles County (LOS-2017-1). The basic hourly rate for this classification for work performed through June 30, 2017, was $41.86, the combined fringe benefits were $16.73 per hour, and the training fund contribution rate was $0.82 per hour, for a total of $69.41 for each

straight-time hour. A predetermined increase effective July 1, 2017, brought the basic hourly rate to $42.78, and the total straight-time hourly rate to $70.61.

2. Sheet Metal Worker (HVAC) Apprentice Rates for Inyo, Los Angeles (Portions South of a Straight Line Drawn Through Gorman and Big Pines), Mono, Orange, Riverside and San Bernardino Counties (2017-1). Effective July 1, 2017, for Second Period Apprentice, the basic hourly rate was $16.74, benefit contributions were $11.07, training fund contributions were $0.82, and other hourly payments were $0.65, for a total hourly rate of $29.28. For Sixth Period Apprentice, the basic hourly rate was $25.79, benefit contributions were $16.01, training fund contributions were $0.82, and other hourly payments were $0.65, for a total hourly rate of $44.27. For Ninth Period Apprentice, the basic hourly rate was $31.81, benefit contributions were $16.65, training fund contributions were $0.82, and other hourly payments were $0.65, for a total hourly rate of $49.93.

Underpayment of Wages and Underreporting of Hours Worked.

The Assessment found that Mega underpaid workers for their work on the Project. This was primarily due to Mega's failure to pay the correct prevailing wage rate required by the PWD for Sheet Metal Worker, as well as its failure to pay for all hours worked. Mega's CPRs consistently reported payment to Sheet Metal Workers of a basic hourly rate of $71.41. (DLSE Exhibit No. 8, pp. 80-143.) However, the two workers interviewed by Hightower reported being paid at far lower rates, and provided paycheck stubs documenting the rates paid and showing that they worked hours not reported on the CPRs.

Hightower testified that after being assigned the complaint to investigate, he obtained CPRs from Mega, and sent questionnaires to the employees identified in the CPRs. In the Penalty Review, he reported:

> Employee questionnaires were sent out on 10/29/18. Responses from Jae Jung and Federico Bonilla were received. Jae Jung indicated that he was only paid $22 per hour on the project. He provided copies of paycheck

> stubs and a list of dates that he worked on the project. Federico indicated on his questionnaire that he was paid $14 per hour. I contacted both workers and set up times to interview them in person.

(DLSE Exhibit No. 1, at p. 6.)

Hightower interviewed worker Jae Man Jung on December 4, 2018, and January 28, 2019. He summarized the initial interview, conducted with the assistance of interpreter See-Young Lee, as follows:

> Mr. Jung no longer works for the company, but did HVAC and sheet metal work for the contractor. Mr. Jung indicates that he was paid $22 per hour by the contractor, and sometimes 2 weeks were combined and paid as if they were one week. Mr. Jung never received any benefits or pension with the company. Mr. Jung said that most days he and Federico worked on the project, and during a period of time also worked the graveyard shift to complete work. They also worked overtime and were paid at the regular rate of pay and were sometimes paid in cash. If Federico was not available, the contractor would hire other day workers who are not reported on the CPRs. Mr. Jung signed an affidavit and provided a written list of days worked and the time that was worked on those days.

(DLSE Exhibit No. 1, at p. 6.)

Jung's sworn affidavit attested that he was paid $22.00 per hour for his work on the Project.[11] He also submitted calendar pages showing that he worked eight hours per day on the Project most weekdays between October 4, 2017, and May 8, 2018. Additionally, he submitted paycheck stubs from Mega showing that he was regularly paid $880.00 per week for 40 hours of work. (DLSE Exhibit No. 4.)

Hightower interviewed worker Federico Bonilla on January 3, 2019. He summarized the interview as follows:

> He is still employed with the company. He described the work that he did and the tools used. He said that he worked with Jae Jung almost every day on the project. He worked regularly about 40 hours per week and was paid $14 per hour. He worked on both parts of the project at the UCLA

[11] On March 25, 2021, DLSE served upon the Requesting Parties a Notice of Reliance on Evidence by Affidavit or Declaration, stating that the affidavits of Jae M. Jung and Federico Bonilla would be introduced into evidence at the Hearing on the Merits, and that Requesting Parties needed to notify the DLSE attorney no later than April 5, 2021, if they wished to cross-examine the declarants. No such notification was submitted, and pursuant to Rule 34 [Cal. Code Regs., tit. 8, § 17234] the affidavits were therefore admissible. Pursuant to stipulation, they and the accompanying documents were admitted into evidence.

> Wilshire building. He worked from October 2017 to June 2018 and from July 2018 to November 2018 on the second part of the project. He filled out an affidavit and calendar.

(DLSE Exhibit No. 1, at p. 6.)

Bonilla's affidavit attested that he was paid $14.00 per hour for his work on the Project. He also submitted calendar pages showing that he worked eight hours per day on the Project most weekdays between October 26, 2017, and May 31, 2018. Additionally, he submitted paycheck stubs from Mega showing that he was regularly paid $560.00 per week for 40 hours of work. (DLSE Exhibit No. 5.)

On October 29, 2018, Hightower sent Mega a request for further information, noting that the CPRs provided by Mega on October 17, 2018, failed to include "[s]igned statements of compliance with an original ink signature," and requested submission of those statements. (DLSE Exhibit No. 11, at p. 162.) It further requested copies of "all paycheck stubs and canceled checks made to all workers employed on the project." (*Ibid.)*

In response, Mega submitted paycheck stubs that in most cases failed to show the number of hours worked or the rate of pay. (DLSE Exhibit No. 12.) On December 10, 2018, Hightower sent an email to Mega stating: "Please explain why all the number hours [sic] worked and rates of pay are blank on the pay check stubs except for one." The same day, Mega responded: "[I] asked the accounting person, and was told she does not write those info [sic] on the check stubs, and all employed are aware of their hours and rates." (DLSE Exhibit No. 13, at p. 241.)

On January 10, 2019, Hightower sent Mega a second request for further information, requesting "[c]opies of all timecards/time sheets for all projects workers were employed on private and public during the duration of the project under investigation. (DLSE Exhibit No. 14, at p. 246.) The same day, Hightower telephoned Bonilla to inquire as to whether he remembered signing all the timesheets. Bonilla responded that Mega would sign them for employees or just instruct them to sign even if they were incorrect. (DLSE Exhibit No. 1, at p. 6.)

On January 28, 2019, Hightower met again with Jung, along with his daughter, Jennifer Jung, who translated. She provided a statement declaring that her father said he remembered signing time sheets a few times, but that the timesheets provided by the employer do not bear his signature, and that the times reported on the timesheets do not match the hours reported on the pay stubs. She further stated that she witnessed her father leaving home around 5:00-530 a.m. every time he went to work. (DLSE Exhibit No. 4, at p. 47.)

Hightower stated in the Penalty Review that at the meeting on January 28, 2019:

> Jae Jung provided his ID and a DMV print out in which he signed and the signature differs from the signatures on the time sheets. Jae Jung's original affidavit, DMV document, ID and signature on the affidavit by his daughter are all consistent and do not match the signatures on the time-sheets.… Jae Jung brought all his paycheck stubs and the hours reported on the time sheet do not match the hours paid on the paycheck stub. The contractor paid for 40 hours per week, but indicated that Jae would only work 6 hours per day. Jae would have had to work 8 hours 5 days a week in order to be paid for a straight 40 hour [sic] work week [sic].

(DLSE Exhibit No. 1, at pp. 6-7.)

Hightower determined Mega's payroll records to be unreliable, explaining in the Penalty Review:

> The payroll records provided by the contractor were deemed unreliable due to several inconsistencies. The first was that the contractor reported the owner and vice president almost every day on the project, but according to workers interviewed this was un-true [sic]. The contractor submitted copies of paycheck stubs on 12/10/18, which failed to contain the number of hours worked and the rate of pay for employees. …
>
> On 1/10/19, the contractor submitted new copies of paycheck stubs. The paycheck stubs would list the number of hours the contractor reported on the CPR's at the full prevailing wage rate. The contractor listed regular hours worked at a regular rate of pay to come up with the reported gross wages paid. … The amended paycheck stubs … did not have any back-up documentation or proof that the exact hours were worked on other projects shown on the paycheck stubs. The employees did not clock in and out of a time clock, so it is unlikely that hours such as 13.80, 7.16, 1.54, 1.12, and other exact … hours reported were actually worked or recorded by the contractor on a time keeping machine.

(DLSE Exhibit No. 1, at p. 7.)

Hightower's hearing testimony was consistent with the statements he made in the Penalty review. He explained that in performing his audit, he credited Jung and Bonilla with the hours they indicated on their calendars, since those hours were corroborated by the paycheck stubs they provided. Lacking such documentation for the remaining Sheet Metal Workers on the Project, Hightower credited them only with the hours reported on the CPRs. However, for purposes of determining their rates of pay, he assumed they had worked the same 40-hour weeks as Jung and Bonilla, and divided their gross weekly pay by 40 hours. Consequently, while Mega was found to have underpaid those workers, it accrued penalties only for the days it reported them to have worked.

Additionally, the Assessment determined that Mega had failed to pay the correct prevailing wage rates to the three Sheet Metal Worker Apprentices it employed on the Project. Hightower testified that he was able to make this determination on the basis of the records provided by Mega, which included paycheck stubs that provided the rates of pay for the apprentices.

Mega produced no evidence that the Assessment was incorrect with regard to the underpayments found therein.

As set forth on DLSE's Public Works Audit Worksheet (DLSE Exhibit No. 3, p. 24) the Assessment found that the workers in question were underpaid by the amounts shown in the table below, for the straight time and overtime hours listed:[12]

Worker	**S.T. Hours**	**O.T. Hours**	**Amount Owing**
Federico Bonilla	776.0	0	$43,293.04
Wan Kim	164.0	0	$ 0.00
Jorge Rocha	40.0	0	$ 1,991.60
Ismael Rodriguez	31.0	0	$ 1,672.49
Jae Man Jung	744.0	8	$36,285.20

[12] All of the workers listed were classified as Sheet Metal Workers, except for the following three: Claud Keech (2nd Apprentice Sheet Metal Worker), Anthonie Alvarez (6th Apprentice Sheet Metal Worker), and Pedro Ibarra (9th Apprentice Sheet Metal Worker).

Worker	S.T. Hours	O.T. Hours	Amount Owing
Jose Arriaga	12.0	0	$ 657.48
Jae Yang Kim	40.0	0	$ 1,951.60
Gabriel Ramos	6.0	0	$ 328.74
Gilberto Vizcaino	6.0	0	$ 346.74
Claud Keech	15.0	0	$ 318.48
Anthonie Alvarez	24.0	0	$ 385.68
Si Kim	58.0	0	$ 2,788.24
Pedro Ibarra	6.0	0	$ 99.60
Jae Bae	134.0	0	$ 0.00
Total Amount Owing and Unpaid			**$90,118.89**

Underpayment of Training Fund Contributions.

In the course of its investigation, DLSE obtained certification from the California Apprenticeship Council (CAC) that it had received from Mega training fund contributions totaling $791.84 for this Project. (DLSE Exhibit No. 10, at pp. 160-161.) DLSE additionally obtained copies of checks from Mega to CAC documenting those contributions. (DLSE Exhibit No. 9, at pp. 144-152.) The Assessment found that Mega had underpaid the required training fund contributions by $655.46. Hightower explained in the Penalty Review:

> Mega … failed to pay the correct amount of training funds for hours worked due to under-reporting of hours. Due to the hours reported by the employees and on the calendars provided, the contractor owes training funds for hours that were worked and not reported. The contractor paid $791.84 in training funds and still owes an additional $655.46.

(DLSE Exhibit No. 1, at p. 9.)

The two workers found by the Assessment to have under-reported hours were Federico Bonilla and Jae Man Jong. Thus, the training fund contributions found to be owing and unpaid are attributable to the unreported hours for those two workers. Mega disputed the finding that it had underreported hours for those workers, but presented no testimony or documentary evidence regarding its training fund contributions.

Applicable Apprenticeship Committees in the Geographic Area.

According to DLSE's Penalty Review (DLSE Exhibit No. 1), there were three apprenticeship committee in the geographic area of the Project for the trade of Sheet Metal Worker: Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Sheet Metal U.A.C.; Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C.; and Southern California Sheet Metal J.A.T.C. Hightower testified that he obtained this information by searching the DAS public works apprenticeship database for Sheet Metal Worker apprenticeship committees serving Los Angeles County.

Notice of Contract Award Information.

Mega began work on the Project on October 23, 2017, according to Mega's CPRs. It provided DLSE with a copy of a notice of contract award information forms (DAS 140), faxed on September 25, 2017, to the Southern California Chapter of Associated Builders and Contractors, Inc. Sheet Metal U.A.C. (DLSE Exhibit No. 18, at p. 268.) Additionally, Hightower received a letter from the Southern California Sheet Metal J.A.T.C. confirming that it had received a DAS 140 form for the Project from Mega. (DLSE Exhibit No. 20 at p. 295.)

The Assessment found that Mega did not submit a DAS 140 to the Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C. (DLSE Exhibit No. 1, at pp. 5, 9.) Mega does not dispute this finding. Rather, in his cross-examination of Hightower, Bae maintained that he telephoned that committee, and was told not to submit the form because it did not dispatch apprentices to the geographic area of the Project.

Request for Dispatch of Apprentices.

On January 8, 2018, Mega faxed a DAS 142 to the Southern California Sheet Metal J.A.T.C., requesting one apprentice to report for work on the Project on January 11, 2018. The form is marked "CANCELLED." On January 22, 2018, Mega faxed another DAS 142 to the same committee, marked "Revised," and requesting one apprentice to report for work on the Project on January 24, 2018. (DLSE Exhibit No. 18, at pp. 274,

278.) In a letter dated July 10, 2018, the committee acknowledged that it had received a DAS Form 142 from Mega, and that the dispatch was fulfilled. (DLSE Exhibit No. 20, at p. 295.)

The Assessment credited Mega with submitting a DAS 142 to the Southern California Sheet Metal J.A.T.C. on January 8, 2018, but found that it had failed to submit that form to either of the other two applicable committees. (DLSE Exhibit No. 1, at pp. 5, 9.) Mega does not dispute these findings. In his cross-examination of Hightower, Bae asserted that he did not send a DAS 142 to the ABC Committee because it said it could not dispatch apprentice "because they are not part of the union, union shop."

Minimum Ratio Requirement.

The Assessment found that Mega had failed to employ apprentices on the Project at the minimum ratio of apprentices to journeypersons. As explained by Hightower in the Penalty Review:

> Pursuant to Labor Code section 1777.5(d), if the contractor … in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, the contractor shall employ apprentices in at least the ratio of one hour of apprentice work for every five hours of journey[person] work.
> Mega … failed to meet the 20% required ratio for hired Sheet Metal Worker apprentices. The Certified Payroll Records had 38 apprentice hours reported during the project. Based on the hours reported by the contractor and additional hours reported by the employees the amount of apprentice hours required was 121. The contractor worked a total of 69 days on the project and is subject to penalties authorized by the Labor Code [for 69 violations].

(DLSE Exhibit No. 1, at p. 9.) Mega offered no testimony or documentary evidence that it had met the required ratio.

Assessment of Statutory Penalties.

In the "Conclusions & Recommendations" section of the Penalty Review, Hightower summarized the allegations of the complaint and the violations found in his investigation. He then stated:

> In addition to these violations, the contractor submit[ted] in-accurate and fraudulent documents on three separate occasions during the investigation. The contractor has three CWPA's issued against them in the last 3 years, and an additional 5 CWPA's issued to them dating back to 2013. The contractor is aware of the prevailing wage laws and has been assessed wages in addition to 1775 and 1777.5 penalties multiple times. The contractor continues to blatantly disregard the prevailing wage laws and prior assessments. Penalties recommended to be assessed at the maximum amount allowed due to multiple willful violations and attempt to willfully mislead the DLSE during its investigation.

(DLSE Exhibit No. 1, p. 10.)

Penalties were assessed under section 1775 for 231 violations at the rate of $180.00 per violation, for a total of $41,580.00. (*Id.* at p. 2.) The Assessment also included one section 1813 violation, resulting in a statutory penalty of $25.00. Finally, penalties were assessed under section 1777.7 for 196 violations at the rate of $80.00 per violation, for a total of $15,680.00. (*Id.* at pp 1-2.) In the Penalty Review, Hightower explained the basis of the section 1777.7 violations as follows:

> Upon review of the Certified Payroll Records, Mega Air Co., Inc. failed to submit the DAS 140 and DAS 142 in a timely manner to all approved apprentice committees. The first day a journeyman began work was on 10/23/17 and the contractor failed to submit the DAS 140 and DAS 142 by this date. The DAS 140 was only submitted to two of the three committees, and the DAS 142 was only sent to one committee. The 69 day [sic] ratio violation penalty will be included with the DAS 140/142 penalties, but only one penalty per day will be assessed. The penalty calculation of 1777.7 is based on the DAS 140 violation, which begins on the 2nd day after the 1st journeyman's working day, and ended on the last day a journeyman worked on the project. The penalty accrual began on 10/24/17 and ended on 5/6/18 totaling 196 calendar days.

(*Id.* at p. 9.)

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 projects. The purpose of the CPWL was summarized by the California Supreme Court in

one case 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, if unpaid prevailing wages are not paid 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.)

When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App. 5th 1072, 1079 ["'[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.'"], citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687 688, 66 S.Ct. 1187; see also *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726 727; *In re Gooden Construction Corp.* (U.S. Dept. of Labor Wage Appeals Board 1986) 28 WH Cases 45 (BNA) [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, for the reasons detailed below, the Director determines that, based on the totality of the evidence presented, DLSE met its initial burden of presenting prima facie support for the Assessment, and that Tobo and Mega failed to meet their burden to prove the basis of the Assessment was incorrect.

The Assessment was timely served by DLSE in accordance with section 1741.

Section 1741, subdivision (a) provides in pertinent part:

> The assessment shall be served no later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last. Service of the assessment shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first class and certified mail to the contractor, subcontractor, and awarding body.

DLSE established that the Awarding Body filed a Notice of Completion with the Los Angeles County Recorder on June 28, 2018. The Notice stated that the Project was completed on June 27, 2018. (DLSE Exhibit No. 23.) DLSE further established that the Assessment was served on Tobo, Mega, and the other appropriate parties by first class and certified mail on March 13, 2019.

California Civil Code section 8182, subdivision (a) provides: "An owner may record a notice of completion on or within 15 days after the date of completion of a work of improvement." Here the Notice of Completion was filed within 15 days after the stated date of completion, and was therefore valid. The Assessment was served within nine months of that date, and was thus timely under section 1741.

DLSE timely made available to Tobo and Mega its enforcement file.

Section 1742, subdivision (b) provides in pertinent part: "The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of a written request for a hearing." California Code of Regulations. title 8, section 17224 provides in pertinent part:

> (a) Within ten (10) days following its receipt of a Request for Review, the Enforcing Agency shall also notify the Affected Contractor or Subcontractor of its opportunity and the procedures for reviewing

> evidence to be utilized by the Enforcing Agency at the hearing on the Request for Review.
>
> (b) An Enforcing Agency shall be deemed to have provided the opportunity to review evidence required by this Rule if it (1) gives the Affected Contractor or Subcontractor the option, at the Affected Contractor or Subcontractor's own expense, to either (A) obtain copies of all such evidence through a commercial copying service or (B) inspect and copy such evidence at the office of the Enforcing Agency during normal business hours; or if (2) the Enforcing Agency at its own expense forwards copies of all such evidence to the Affected Contractor or Subcontractor.

Here the Request for Review on behalf of Tobo and Mega, dated May 10, 2019, was received by DLSE on May 13, 2019. On May 17, 2019, DLSE served counsel for Tobo and Mega with the Notice of Opportunity to Review Evidence Pursuant to Labor Code Section 1742, subdivision (b). DLSE's investigative notes indicate that counsel responded, apparently to arrange for a copy service to copy the file, and that DLSE received her response on May 22, 2019. The following day, Hightower emailed her "regarding date for copy service to come and copy investigative file." (DLSE Exhibit No. 29, at p. 342.) Hightower testified that counsel for Tobo and Mega did, in fact, obtain a copy of the file in this case. Accordingly, in the absence of any evidence to the contrary, it must be concluded that DSLE satisfied its obligations under section 1742 and the above regulation.

Mega Failed to Pay the Proper Prevailing Wage Rate to Sheet Metal Workers and Apprentices.

The Assessment found that throughout the Project, Mega consistently underpaid Sheet Metal Workers, and that it failed to accurately report all hours worked by Federico Bonilla and Jae Man Jung. These findings were amply supported by the evidence presented by DLSE, including evidence obtained from Bonilla and Jung showing that Mega's CPRs were inaccurate and incomplete. The Assessment further found, based on the records provided by Mega, that three Sheet Metal Worker Apprentices were underpaid for their work on the Project.

DLSE carried its initial burden of producing evidence that provides prima facie support for the Assessment. Thus, the burden was on Mega to prove that the basis for

the Assessment was incorrect. Mega failed to produce any evidence that the Assessment was incorrect with regard to the underpayment of wages. Mega was given the opportunity to present witness testimony, and Jae Il Bae testified as its only witness. Despite repeated invitations by the Hearing Officer to respond to Hightower's testimony as to the violations he found, Bae declined to do so. Accordingly, the Assessment must be affirmed as to underpayment of wages and unreported hours worked.

DLSE Has Established that Mega is Liable for Unpaid Training Fund Contributions.

The Assessment found that Mega had underpaid the required training fund contributions by $655.46. DLSE's evidence established that the required contributions for Sheet Metal Workers on the Project totaled $1,447.30, and that Mega paid contributions to the CAC in the amount of $791.84. The underpayment found in the Assessment was due to unreported hours found to have been worked by Federico Bonilla and Jae Man Jong. DLSE applied the full amount of the CAC payments as a credit against the aggregate required training fund contributions, reducing $1,447.30 by $791.84 to produce net unpaid contributions of $655.46. Mega provided no evidence to rebut DLSE's evidence, and thus failed to meet its burden of proving the Assessment incorrect in this respect. Accordingly, the Assessment is affirmed as to unpaid training fund contributions.

DLSE's Penalty Assessment Under Section 1775.

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 two hundred dollars ($200) 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 forty dollars ($40) . . . 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 eighty dollars ($80) . . . 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 one hundred twenty dollars ($120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[13]

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action … is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107**.)**

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

[13] The citation in section 1775 to section 1777.1, subdivision (c) is mistaken. Section 1777.1, subdivision (e), as it existed on the contract date, defines willful violation. A willful violation is one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or deliberately refuses to comply with its provisions."

DLSE assessed section 1775 penalties at the mitigated rate of $180.00. This was in keeping with the nature of Mega's violations (Penalty Review, DLSE Exhibit No. 1.), and evidence that they were willful as defined by section 1777.1, subdivision (e).

The burden was on Mega to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Here the Labor Commissioner reduced the penalty from the maximum $200.00 per violation recommended by Hightower to $180.00 per violation, a ten percent reduction. Mega failed to establish that the Labor Commissioner abused her discretion in assessing section 1775 penalties at $180.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Mega is liable for 17775 penalties at $180.00 per violation for 231 violations, for a total amount of $41,580.00.

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 Mega was liable for $25.00 in section 1813 penalties for a single violation, attributed to hours worked by Jae Man Jung, but not reported on the CPR. The Public Works Investigation Worksheets for Jung document that the penalty was assessed unpaid overtime worked on Monday, April 23, 2018. (DLSE Exhibit No. 3, at p.33.) The calendar completed by Jung shows that he worked 16 hours on that date. (DLSE Exhibit No. 30, at p. 343.) Mega's CPR for the week ending April 29, 2018, report only 12 hours worked by Jung that week, and no hours worked on April 23, 2018. (DLSE Exhibit No. 8, at p. 134.) The CPR is contradicted by the paycheck stub for the same week provided to Hightower by

Jung. The stub shows that he was paid $880.00 for 40 hours of work that week. (DLSE Exhibit No. 4, at p. 53.)

Section 1813 provides no discretion as to the penalty rate, and DLSE has demonstrated that the penalty assessed was for an actual overtime violation. Mega has not met its burden of proving that the Assessment was incorrect with regard to section 1813 penalties. Accordingly, the Assessment must be affirmed in this regard.

Mega Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages upon the contractor, essentially a doubling of the unpaid wages. It provides in part:

> After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , 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 Assessment . . . 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.

The statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages,

plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), states in this regard:

> [T]here 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 of the service of the assessment…, for the department to hold in escrow pending administrative and judicial review.

In this case, Mega did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and statutory penalties. Therefore, under the express language of section 1742.1, Mega is liable for liquidated damages in the full amount of the unpaid wages found herein. Accordingly, liquidated damages are due in the aggregate amount of $90,774.35, as provided in the Findings, *post*.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (Cal. Code Regs., tit. 8, §§ 227 to 232.70.)

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) A contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project.

Contractors are also required to notify apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. (§ 1777.5, subd. (e); Cal. Code Regs., tit. 8, § 230, subd. (a).) The Division of Apprenticeship Standards has prepared a form for this purpose (DAS 140), which a contractor may use to notify all apprenticeship programs for each apprenticeable craft

in the area of the site of the Project. The required information must be provided to the applicable committees within ten days of the execution of the prime contractor subcontract, "but in no event no later than the first day in which the contractor has workers employed on the public work." (Cal. Code Regs., tit. 8, § 230, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities for training and work, and to request dispatch of apprentices for specified dates with sufficient notice. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

There Were Three Applicable Committees in the Geographic Area.

DLSE established that there were three applicable apprenticeship committees for Sheet Metal Worker in the geographic area of the Project. Mega offered no evidence to the contrary.

Mega Failed to Properly Notify All of the Applicable Committees of Contract Award Information.

DLSE established that Mega failed to notify one of the applicable committees, Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C., of contract award information. Mega offered no testimony or documentary evidence to the contrary. Rather, in the course of cross-examining Hightower, Bae made unsworn representations that the committee in question had instructed him not to submit the DAS 140 to it. Since Bae was not testifying under oath at that point, his representations were uncorroborated double hearsay, and he did not provide either the date or the identity of the person he claimed to have spoken with. In any event, apprenticeship committees have no legal authority to excuse compliance with the Labor Code's DAS 140 requirement. Accordingly, Mega has not met its burden of proving that the Assessment was incorrect in finding that it failed to notify all applicable apprentice committees of its public works contract and thereby violated section 1777.5, subdivision (e) and the applicable regulation, section 230, subdivision (a).

Mega Failed to Request of All Applicable Committees the Dispatch of A Sheet Metal Apprentice.

All requests for dispatch of apprentices must be in writing and provide at least 72 hours' notice of the date on which one or more apprentices are required. (Cal. Code

Regs., tit. 8, § 230.1, subd. (a).) DLSE established that Mega made no such request of two of the three applicable committees. Mega produced no evidence that it complied with the above regulation in this respect, and accordingly failed to meet its burden of proving the Assessment incorrect.

Mega Failed to Employ Sheet Metal Worker Apprentices in the Required Ratio.

Sheet Metal Worker was the apprenticeable craft at issue in this matter. DLSE introduced evidence showing that while Sheet Metal Workers began work on the Project on October 24, 2017, Mega did not request a Sheet Metal Worker apprentice until January 8, 2018, with a requested report date of January 11, 2018. By the conclusion of its work on the Project, Mega had employed journeyperson Sheet Metal Workers for 609 hours. Thus, to meet the one to five ratio, Mega was required to Sheet Metal Worker apprentices for a total of 121.8 hours. Mega employed Sheet Metal Worker apprentices for only 38 hours. Accordingly, the record establishes that Mega violated section 1777.5 and the related regulation, section 230.1, in its failure to meet the required one to five apprentice to journeyperson hour ratios.

The Penalty for Noncompliance.

If a contractor knowingly violates Section 1777.5 a civil penalty is imposed under section 1777.7 in an amount not exceeding $100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase "knowingly violated Section 1777.5" is defined by regulation, section 231, subdivision (h), as follows:

> For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects.

In determining the penalty amount, the Labor Commissioner is to consider all of the following circumstances:

(1) Whether the violation was intentional.

(2) Whether the party has committed other violations of Section 1777.5.

(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

(§ 1777.7, subd. (b).) The Labor Commissioner's determination of the amount of the penalty, however, is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the burden of proof with respect to the penalty, namely, that the Labor Commissioner abused discretion in determining that a penalty was due of in the amount of the penalty. (Cal. Code Regs., tit. 8, § 17250.)

In this case, DLSE based section 1777.7 penalties on Mega's failure to submit contract award information as required by section 1777.5, subdivision (e), and section 230, subdivision (a) of the applicable regulations. Section 230, subdivision (a) states as follows:

> Failure to provide contract award information, which is known by the awarded contractor, shall be deemed to be a continuing violation for the duration of the contract, ending when a Notice of Completion is filed by the awarding body, for the purpose of determining the accrual of the penalties under Labor Code Section 1777.7

Thus, per the regulation, a failure to provide contract award information is a violation that runs throughout the duration of the contract. DLSE imposed a mitigated penalty rate of $80.00 for each of 196 days of noncompliance, based on the period from the day on which the DAS 140 notice was required to be given through the last day Mega worked on the Project. (These penalties were assessed on the basis of Mega's failure to notify all applicable committees; no additional penalties were assessed for the additional section 1777.5 violations found.)

By sending a DAS 140 to two of the three applicable committees, and a DAS 142 to one of the three, Mega demonstrated that it knew or should have known of the requirements of section 1777.5, and thus its violations were "knowing" under the definition quoted, *ante*. DLSE established that Mega's violations resulted in lost training

opportunities for apprentices and otherwise harmed apprentices and apprenticeship programs. At the same time, DLSE took into consideration that Mega had a record of previous violations of section 1777.5, and previous assessments of section 1777.7 penalties. On these facts, DLSE arguably would have been justified in setting the penalty rate at the maximum of $100.00, as Hightower recommended; yet the Labor Commissioner reduced that rate by twenty percent.

Mega failed to establish that the Labor Commissioner abused her discretion in assessing section 1777.7 penalties at the rate of $80.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Mega is liable for 1777.7 penalties at $80.00 per violation for 196 days, for a total amount of $15,680.00.

Tobo is Jointly and Severally Liable for the Wages and Penalties Found Due and Owing Herein.

Section 1743, subdivision (a), provides in part that "[t]he 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." A safe harbor protecting a prime contractor from liability for penalties imposed for a subcontractor's violations exists in sections 1775, subdivision (b) and 1777.7, subdivision (e). To avail itself of the safe harbor, a prime contractor has the burden of proving that the detailed statutory requirements in those two sections were met. Since Tobo failed to appear at the Hearing on the Merits and the Prehearing Conferences, it made no such evidentiary showing. Pursuant to section 1743, subdivision (a), Tobo and Mega have joint and several liability for payment of all amounts due pursuant to a final order. Accordingly, Tobo is found to be jointly and severally liable with Mega for all amounts found due under the Assessment.

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 prime contractor Tobo Construction, Inc. and affected subcontractor Mega Air Co., 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 available to Tobo Construction, Inc. and Mega Air Co., Inc. its enforcement file.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Mega Air Co., Inc. underpaid workers performing the work of Sheet Metal Worker by paying them less than the rates specified in the applicable PWD for that classification.
7. Mega Air Co., Inc. underpaid workers performing the work of Sheet Metal Worker Apprentice by paying them less than the rates specified in the applicable PWD for that classification.
8. Mega Air Co., Inc. underreported the hours worked by at least two workers in its Certified Payroll Records.
9. Mega Air Co., Inc. failed to pay workers Federico Bonilla and Jae Man Jung for all hours worked.
10. In light of findings 6 through 9 above, Mega Air, Inc. underpaid its employees on the Project in the aggregate amount of $90,118.89.
11. On one occasion, Mega Air Co., Inc. failed to pay a worker the prevailing overtime rate for work performed. Accordingly, statutory penalties under section 1813 are due from Mega Air Co., Inc. in the amount of $25.00.
12. Mega Air Co., Inc. failed to pay $655.46 in required training fund contributions.
13. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775 at the rate of $180.00 per violation for 231 violations in the aggregate sum of $41,580.00.

14. Mega Air Co., Inc. is liable for liquidated damages in the full amount of the unpaid wages, which is $90,118.89.
15. There were three applicable apprenticeship committees in the geographic area of the Project in the craft of Sheet Metal Worker: Southern California Chapter of Associated Builders and Contractors, Inc. (ABC) Sheet Metal U.A.C.; Kern & Northern Los Angeles Counties Air Conditioning and Sheet Metal Workers J.A.T.C.; and Southern California Sheet Metal J.A.T.C.
16. Mega Air Co., Inc. failed to issue a Notice of Contract Award Information to one of the applicable apprenticeship committees for the craft of Sheet Metal Worker.
17. Mega Air Co., Inc. failed to properly request dispatch of Sheet Metal Worker apprentices from two of the three applicable apprenticeship committees in the geographic area of the Project, and it was not excused from the requirement to employ apprentices under Labor Code section 1777.7.
18. Mega Air Co., Inc. violated section 1777.5 by failing to employ apprentices in the craft of Sheet Metal Worker on the Project in the minimum ratio required by the law.
19. The Labor Commissioner did not abuse her discretion in setting section 1777.7 penalties at the rate of $80.00 per violation for 196 violations, and such penalties are due from Mega Air Co., Inc. in the amount of $15,680.00.
20. As prime contractor on the Project, Tobo Construction, Inc. is jointly and severally liable for the wages and penalties found due and owing by Mega Air Co., Inc.
21. The amount found due in the Assessment is affirmed in full by this Decision as follows:

Basis of the Assessment	Amount
Wages Due:	$ 90,118.89
Training Fund Contributions:	$ 655.46
Penalties under section 1775:	$ 41,580.00
Penalties under section 1813	$ 25.00
Liquidated damages:	$ 90,118.89
Penalties under section 1777.7:	$ 15,680.00
TOTAL:	**$238,178.24**

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

The Civil Wage and Penalty Assessment is affirmed in full 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: 7-20-2022

Katrina S. Hagen

Katrina S. Hagen, Director
California Department of Industrial Relations