STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

J.D. DIFFENBAUGH, INC.	Case Nos.: 10-0349-PWH, 10-0350 PWH, 10-351-PWH, 10-352-PWH, 10-353-PWH, 10-354-PWH, 10-355-PWH, 10-356-PWH, 10-357-PWH, 10-358-PWH, 10-359-PWH, 10-360-PWH, 10-361-PWH, 10-362-PWH, 10-363-PWH, 10-364-PWH, 10-365-PWH, 10-366-PWH, 10-367-PWH, 10-368-PWH, 10-369-PWH, 10-370-PWH, 10-371-PWH, 10-372-PWH, 10-373-PWH, 10-374-PWH, 10-375-PWH, 10-376-PWH, 10-377-PWH, 10-378-PWH, 10-379-PWH, 10-380-PWH, 11-0003-PWH, 11-0004-PWH, 11-0005-PWH, 11-0006-PWH, 11-0007-PWH, 11-0008-PWH, 11-0009-PWH
B & G Sheet Metal, Inc.	10-0295-PWH
Capital Drywall	10-0339-PWH
Dynamic Heating and Air of California, Inc.	10-0311-PWH
Hi Tech Gypsum, Inc.	10-0298-PWH
Leonard Roofing, Inc.	10-0333-PWH
Pacific Production Plumbing	10-0305-PWH
Paver Décor Masonry, Inc.	10-0334-PWH
SCS Flooring Systems	10-0335-PWH
OJ Insulation, LP	10-0336-PWH
Heider Engineering Services, Inc.	10-0302-PWH
Stillson Fireplaces	10-0338-PWH
Three Wire Electric, Inc.	10-0313-PWH
X-Act Finish & Trim, Inc.	10-0337-PWH
West Coast Countertops, Inc.	10-0343-PWH
West Coast Painting	10-0340-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor J. D. Diffenbaugh, Inc. (Diffenbaugh) and its affected subcontractors (collectively, Requesting Parties) submitted timely requests for review of the above-referenced Civil Wage and Penalty Assessments (Assessments) issued by Division of Labor Standards Enforcement (DLSE) with respect to the Vista Del Sol Affordable Housing Project (Project) in San Bernardino County. On February 2, 2011, Diffenbaugh filed a Motion to Consolidate and Stay the cases arising out of the Project on the basis of common issues and the pendency of a petition for writ of mandate brought by Housing Partners I, Inc. (HPI), wherein HPI contended the Project was not a public work within the meaning of Labor Code section 1720 et seq.[1] On April 14, 2011, Diffenbaugh also filed a Motion to Dismiss the Civil Wage and Penalty Assessments under California Code of Regulations, title 8, section 17227, on the basis that they were untimely served under section 1741, subdivision (a). Affected subcontractors OJ Insulation, Inc., Three-Wire Electric, Inc., and West Coast Countertops, Inc. joined in the Motion. At the instruction of the assigned Hearing Officer, the parties conferred as to whether resolution of the timeliness issue should be bifurcated and proceed notwithstanding the pending writ proceeding and Diffenbaugh's motion for a stay. DLSE, Diffenbaugh, and a majority of the subcontractors, subsequently notified the Hearing Officer of their agreement that the Motion to Dismiss and issue of timeliness should not be bifurcated, and that the parties requested a single hearing on all issues after the resolution of the writ proceedings. No affected contractor or subcontractor objected to a stay of the proceedings. Accordingly, the assigned Hearing Officer stayed all matters, including the Motion to Dismiss, pending resolution of the writ proceedings.

On June 15, 2012, the Court of Appeal issued a published decision holding that the Project was a public work.[2] At the request of Diffenbaugh and DLSE, the requests for review were placed back on calendar for a further Prehearing Conference scheduled for November 9, 2012. At a continued Prehearing Conference, the Hearing Officer

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

[2] *Housing Partners I, Inc. v. Duncan* (2012) 206 Cal.App.4th 1335 (*Housing Partners I*).

determined that, in light of the previously-filed and still pending Motion to Dismiss, testimony on the Motion would be taken in an initial Hearing on the Merits addressed solely to the question whether the Assessments were timely served.

The duly-noticed Hearing took place via telephone on March 7, 2013, before Hearing Officer Nathan Schmidt. David Cross appeared as counsel for DLSE and Thomas Kovacich appeared as counsel for Diffenbaugh and HPI, which had intervened as an interested person in the cases.[3] Laura Macneel appeared as counsel for West Coast Countertops, Inc., and Scott Lane appeared as counsel for SCS Flooring Systems. Testimony was presented at the Hearing by Diffenbaugh Project Manager John Murray and HPI Board of Directors Secretary-Treasurer Susan Benner. No witness testified for DLSE. The declarations and exhibits attached to Requesting Parties' Motion to Dismiss and DLSE's opposition to the motion are hereby accepted into evidence, with all objections thereto overruled.

For the reasons set forth below, the Director finds that the Assessments issued in this matter were untimely under section 1741, subdivision (a), as in effect at that time, because HPI accepted the work more than 180 days before service of the Assessments. Accordingly, Requesting Parties are subject to no liability for the prevailing wages or penalties and the Assessments are dismissed.

Facts

Procedural History.

Pursuant to a request for a coverage determination submitted to the Director of Industrial Relations under Labor Code section 1773.5, on November 2, 2009, the Director found the Project was a public work. On April 23, 2010, the Director affirmed his determination on administrative appeal. Project owner HPI responded on June 7, 2010 by filing a petition for a writ of traditional mandate pursuant to Code of Civil Procedure section 1085 in the Superior Court of California, County of San Bernardino. On November 23, 2010, the Superior Court decided that the Project was a public work. On

[3] See California Code of Regulations, title 8, section 17208, subdivision (d).

December 9, 2010, HPI filed an appeal of that decision. The Court of Appeal ultimately agreed with the Director and the Superior Court that the Project was a public work, issuing a published decision on June 12, 2012. (See *Housing Partners I, supra,* 206 Cal.App.4th at pp. 1345 - 1348.).

Briefly, the Director addresses the subsequent excessive delay that occurred in this matter, following the conclusion of the appellate proceedings. Following remittitur, the case was returned to the Office of the Director for further proceedings. In the interim, however, the previously assigned Hearing Officer had retired, requiring re-assignment. In the process, substantial delay occurred, followed by further staffing changes when the re-assigned Hearing Officer also left his position, again necessitating re-assignment and resulting in yet further delays, followed by further staffing changes and further delays. The delays that occurred in this matter following conclusion of the Hearing were unusual, unfortunate and regrettable; the Office of the Director apologizes to all parties.

The Contract.

On April 24, 2008, the Housing Authority of the County of San Bernardino (Housing Authority) advertised the Project for bid. On September 24, 2008, HPI contracted with Diffenbaugh for the construction of a 71-unit, low income, senior citizen rental housing development in Redlands, California (the Contract, Requesting Parties Exhibit D). An addendum to the Housing Authority's invitation for bids states that neither federal nor state prevailing wage requirements apply to the Project because "there are no direct federal or State funds for this project." (Exhibit B to Declaration of Susan Benner, addendum No. 3, p. 1.) The Housing Authority maintained its position that prevailing wages were not required when questioned in a pre-bid conference. As a result of that conference, the Housing Authority stated: "All funding has been structured so as to ensure that there will be 'no payment out of public funds' for this project which

otherwise would implicate prevailing wage per Labor Code Section 1720." (*Id*. at p. 11.)[4]

The Contract provided for monthly application by Diffenbaugh for progress payments by HPI, less a retainage of ten percent (10%). Upon substantial completion of the work, the progress payment was to increase so that the total payments would reach the full amount of the Contract, less amounts the Project architect determined were needed for incomplete work, retainage applicable to such work, and unsettled claims. (Requesting Parties Exhibit D, § 5.1.7.) After progress payments allocable to completed work, a final payment for the entire unpaid balance of the Contract sum was to made by HPI when Diffenbaugh had fully performed the Contract, except for its responsibility to correct work at its own expense during a warranty period. (Requesting Parties Exhibit D, § 5.2.1.)

The Contract defined "substantial completion" as "the stage at which the work, or designated portion thereof, is sufficiently complete in accordance with the Contract such that HPI can occupy or utilize the work for its intended use." (Requesting Parties Exhibit D, § 9.8.1, General Conditions of the Contract for Construction.)[5] Per the Contract, when Diffenbaugh considered the work, or a portion thereof, to be substantially complete, it was to prepare and submit to the architect a comprehensive list of items (i.e., the punch list) to be completed or corrected prior to final payment. (Requesting Parties Exhibit D, § 9.8.2.) Upon receipt of the punch list, the architect was to inspect the construction to determine if the work or designated portion was substantially complete. If the inspection disclosed any item, whether on the punch list or not, which was not sufficiently complete such that HPI could occupy or utilize the space for its intended use, before issuance of the certificate of substantial completion, Diffenbaugh was to complete or correct such item upon notification by the architect. (Requesting Parties Exhibit D, § 9.8.3.) When the

[4] The Housing Authority's view that the no public funds paid for the Project within the meaning of section 1720 was rejected by the court in *Housing Partners I, supra,* 206 Cal.App.4th at pp. 1341, 1345, which cites loans from three different public agencies.

[5] Unless otherwise indicated, all further references to sections of the Contract are to sections in the Contract's General Conditions, which are considered part of the Contract. (Requesting Parties Exhibit D, § 8.1.7.)

architect considered the work, or designated portion thereof, substantially complete, the architect was to prepare a certificate of substantial completion, which established responsibilities of HPI and Diffenbaugh for security, maintenance, heat, utilities, damage to the work, and insurance. The date of the certificate of substantial completion fixed the time within which Diffenbaugh had to finish all items on the punch list. (Requesting Parties Exhibit D, § 9.8.4.) Required warranties commenced on the date of substantial completion of the work, or designated portion thereof, unless otherwise provided in the certificate of substantial completion. The architect was to submit the certificate of substantial completion to HPI and Diffenbaugh for their written acceptance of the responsibilities assigned to them in the certificate. Thereafter, HPI's payment of the retainage was to be adjusted for work that was incomplete or not in accordance with the requirements of the Contract. (Requesting Parties Exhibit D, § 9.8.5.) Also, when the work was ready for final inspection and acceptance, and upon receipt of a final application for payment, the architect was to inspect the work and, when the architect found the work acceptable and the Contract fully performed, the architect was to issue a final certificate for payment. (Requesting Parties Exhibit D, § 9.10.1.)

The Progress Payments and Work Completion.

On February 28, 2010, Diffenbaugh applied to HPI for payment of $296.214.00 for work done in the month of February. (Requesting Parties Exhibit G.) The architect signed the certificate for payment on March 5, 2010, and, as HPI Secretary-Treasurer Benner testified, HPI approved the charges on March 8, 2010. The pay application represented the point where "100%" of the work had been completed. (See Requesting Parties Exhibit G, "schedule of values.") That the work on the Project was considered complete by February 28, 2010, is confirmed by Diffenbaugh's next pay application, covering the work period ending March 31, 2010. That application indicated no item of work left to be completed. (Requesting Parties Exhibit H.) With the March pay application, Diffenbaugh sought release of one-half the retainage, not a payment for any specific item of completed work.

Project Manager Murray testified that the Project architect prepared multi-page "pictorials" dated February 25 and 28, 2010, and March 2 and 3, 2010, and listed items

needing completion, cleaning, repair, and correction. (Requesting Parties Exhibits O - T.) On March 1, 2010, the Project architect signed a certificate of substantial completion. (Requesting Parties Exhibit E.) While section 5.1.7 of the Contract provided that the progress payment due upon substantial completion would be reduced to the extent of any incomplete work, Benner and Murray signed the certificate of substantial completion on April 1, 2010, and no reduction of the last progress payment occurred. (Requesting Parties Exhibits E and G.)

Benner testified that on April 1, 2010, HPI accepted the Project as complete. By that point, HPI had accepted responsibility for security, maintenance, heat, utilities, and insurance for the Project buildings. (See Requesting Parties Exhibits I, J, L, and M.) The certificate of substantial completion itself confirms that April 1 was the date of HPI's acceptance. The words "Complete project" appear where the certificate calls for the "project or portion" designated for "partial occupancy or use." (Requesting Parties Exhibit E.) The City of Redlands issued certificates of occupancy to HPI on April 15 and 19, 2010. (Requesting Parties Exhibit N.)

The certificate of substantial completion also referred to a "list of items to be completed or corrected" that is attached to the certificate. The certificate, however, also reads "Cost estimate of Work that is incomplete or defective: $0.00." (Requesting Parties Exhibit E.) No party submitted evidence at the Hearing as to the date on which Diffenbaugh finished all items on the punch list attached to the certificate of substantial completion, or the fact or date of any final inspection. Benner testified that the punch list items were minor "pick-up" items to do after HPI's acceptance of the Project and did not prevent HPI from taking possession.

Pictorials by the Project architect depict the punch list of items for completion, mostly consisting of minor items to clean, repair, and correct. The pictorials bear several dates from February 25, 2010, to April 14, 2010. (Requesting Parties Exhibits O – T.) Murray testified that the majority of the items on the punch list were completed by April 1. DLSE presented evidence that subcontractors had worked on the Project after April 1, 2010. (DLSE Exhibit No. 1.) Murray testified, however, that by April 1, 2010, all subcontractors had completed their scopes of work under the Contract. He described the

post-April 1 work as minor maintenance, repair, and warranty work mostly consisting of clean up, patch, and touch up work done as "customer service."

On April 15, 2010, and April 19, 2010, the City of Redland issued five Certificates of Occupancy covering the separate buildings of the Project. (Requesting Parties Exhibit N.) The retainage amount that HPI held back from payment to Diffenbaugh totaled $861,234.00. (Requesting Parties Exhibits G, H.) Benner testified that on behalf of HPI, on April 20, 2010, she authorized payment of half the retainage. Murray testified that the other part of the retainage was released several months later.

The Assessments were dated and served on Requesting Parties variously from September 30, 2010, to October 20, 2010.

Discussion

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction 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), and *Lusardi* at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors

and subcontractors pay the difference to workers who received less than the prevailing wage rate; section 1775, subdivision (a), also prescribes penalties for failing to pay the prevailing wage rate. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation when the Labor Commissioner determines that mitigation is inappropriate.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (the CWPA), the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship and/or certified payroll records requirements, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 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).)

In this case, for the following reasons, the Director finds that the Assessments were not timely served on Requesting Parties, rendering moot the issues of underpayment

of wages, statutory penalties and liquidated damages.

The Assessments Were Untimely Based on the Acceptance Date.

Former section 1741, subdivision (a), as it existed on the date of the Contract, states, in relevant part:

> [T]he assessment shall be served not later than 180 days 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 180 days after acceptance of the public work, whichever occurs last.[6]

The assertion that an assessment is untimely under section 1741 is an affirmative defense. The burden of proof on that defense is assigned to the party asserting it. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.)

Requesting Parties argue that DLSE has the burden of proof that the Assessments were timely under section 1741, citing California Code of Regulations, title 8, sections 17220 and 17250.[7] Those regulations, however, do not require DLSE to present prima facie evidence that the Assessment was timely. Section 17250, subdivision (a), provides that DLSE has the initial burden of coming forward with evidence that an assessment was served with an in accordance with section 17220. That section, in turn, provides the required elements for an assessment, including description of the nature of the violation and basis for the assessment, and the amount of wages, penalties, and liquidated damages determined to be due. Both sections 17220 and 17250 are silent regarding timeliness of

[6] Effective January 1, 2014, section 1741, subdivision (a), was revised to change the limitations period from 180 days to 18 months. (Stats. 2013, ch. 792, § 1.) Legislative enactments are to be construed prospectively rather than retroactively, unless the Legislature expresses its intent otherwise. *(Elsner v. Ueveges* (2004) 34 Cal.4th 915, 936.) If the Legislature extends a period of limitations, any matter not already barred is subject to the new period of limitations. (*Quarry v. Doe I* (2012), 53 Cal.4th 945, 955-960 (*Quarry); Mudd v. McColgan* (1947) 30 Cal.2d 463.) In this case, all relevant dates, including the dates the Assessments were issued, occurred in 2010, more than three years prior to the amendment to section 1741. Further, under both the DLSE's and Requesting Parties' positions as to the date on which the statute of limitations commenced running for purposes of this matter, that limitations period would have run long before the January 1, 2014 effective date for the amended section 1741. Accordingly, the former section 1741, subdivision (a), applies.

[7] All further regulatory references are to the California Code of Regulations, title 8.

the assessment. Consequently, the burden to prove that the Assessments were untimely rests with Requesting Parties.

The accrual of the 180-day limitations period in section 1741 begins with the later of the recording of a valid notice of completion or the acceptance of the public work. In this case, no party contends a valid notice of completion was ever recorded in San Bernardino County, the county of the Project. Because this event did not occur, the relevant question is the date on which the Project was accepted. (See *Department of Industrial Relations v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411, 418.) No party submitted financing or other documents for the Project disclosing an acceptance of the public work by any of the three public agencies that provided loans of public funds, including the Housing Authority which issued the invitation for bids.[8] Nor did any party submit evidence of a retention of contract amounts by a public agency that might suggest a role as an awarding body. In fact, Requesting Parties argued that the Project must be considered a private work with no formal acceptance procedure by any public entity built into or required for the Project. Accordingly, Requesting Parties argue that the April 1, 2010 date of the certificate of substantial completion signed by HPI and Diffenbaugh constitutes the date of acceptance within the meaning of section 1741. Although the decision in *Housing Partners I* establishes that the Project was a public work, and forecloses the Requesting Parties' argument that it was a private work, the language of section 1741 does not require that "the acceptance of the public work" be by a public agency. Thus, acceptance may be determined, as Requesting Parties' argue, based on the circumstances and evidence applicable to the Project, including as to when a Project was accepted by an owner or developer other than a public agency, if and as applicable. (§ 1741, subd. (a).)

For its part, DLSE argued that the two dates of the City of Redland's five Certificates of Occupancy (April 15, 2010, and April 19, 2010) constitute the date of

[8] Loans for the Project were provided by three separate public agencies: City of Redlands Redevelopment Authority, the County of San Bernardino, and the Housing Authority. (See *Housing Partners I, supra,* 206 Cal.App.4th at p. 1341.)

acceptance. A certificate of occupancy, however, does not establish the date of acceptance of a public work under section 1741. (See, e.g., *Howard A. Deason & Co. v. Costa Tierra Ltd*. (1969) 2 Cal.App.3d 742, 750, 751 (*Deason*) ["Routine inspections and approvals prior to commencement and during the progress of the work of improvement, as required by the subdivision ordinance and the building code, are not equivalent to a requirement of acceptance of the entire project by the governmental authority…"]; *In re El Dorado Improvement Corporation* (9th Cir. 2003) 335 F.3d 835, 839-40 (*El Dorado)* [the phrase "subject to acceptance" in the statute should "not be equated with ... the issuance of certificates of occupancy"].)[9]

DLSE alternatively contends the Project was not subject to acceptance by a public entity, and, therefore, the "acceptance" prong of section 1741 does not apply at all. Instead, DLSE relies on *Fidelity Roof* to contend that completion alone marks the accrual of the limitations period. Based on that view, DLSE argues that the post-April 1, 2010 work on the Project extends the completion date to the date of the City of Redlands' certificates of occupancy, thereby making the Assessments timely. Again, this argument must be rejected, based on the plain language of section 1741, which refers to "acceptance" of the public work, not "completion."

As noted, in public work projects, the date of acceptance of the work for purposes of the accrual of the limitations period turns on the later of the date of a valid notice of completion and the date of acceptance of the public work. (§ 1741, subd. (a); *Fidelity Roof, supra,* 60 Cal.App.4th at p. 417 ["…DLSE must bring its action within 90 days of

[9] The acceptances of work at issue in *Deason* and *El Dorado* arose in the context of mechanic's liens under former Civil Code section 3086, as applicable to private development projects. At times, private projects contain civic improvements such as sidewalks and sewers subject to approvals by public permitting authorities. (See *El Dorado, supra,* 335 F.3d at p. 838.) "A mechanic's lien is the procedural vehicle for obtaining payment of a debt owed by a property owner for the performance of labor or for the furnishing of materials used in construction. ([Former] Civ. Code §§ 3109-3154.) Mechanics' liens are not applicable to the performance of public work." (*Department of Industrial Relations v. Fidelity Roof Company* (1997) 60 Cal.App.4th 411, 418 (*Fidelity Roof*).) Former Civil Code section 3086 as to private construction was superseded by Civil Code section 8180, subdivision (d). (Stats. 2010, ch. 697, § 20, eff. Jan. 1, 2011.) Still, the logic of *Deason* and *El Dorado* that the approvals represented by certificates of occupancy do not constitute "acceptance" of a public work of improvement applies equally here. Granting a permit for occupancy may entail a narrower scope of review than does acceptance of completed public work.

the recording of a valid notice of completion or 90 days of the awarding body's acceptance of the public work as complete, whichever occurs last.)[10] Under *Fidelity Roof*, and under the version of section 1741 in effect for the Project, completion of a project does not serve as the accrual date. Accepting DLSE's suggestion that, absent a valid notice of completion, bare "completion" of the Project should mark the accrual date for the 180-day period would ignore the acceptance prong of section 1741 and impermissibly rewrite the statute. "'A court may not rewrite a statute, either by inserting or omitting language, to make it conform to a presumed intent that is not expressed.'" (*Reliable Tree Experts v. Baker* (2011) 200 Cal.App.4th 785, 796, quoting *Cornette v. Dep't. of Transportation* (2001) 26 Cal.4th 63, 73-74.) Further, the court in *Fidelity Roof* rejected a similar argument made by DLSE in that case to the effect that if a valid notice of completion was never filed, then the limitations period never commenced and never expired. (*Fidelity Roof, supra,* 60 Cal.App.4th at p. 418.) Likewise here, DLSE argued that because no public agency ever accepted the public work, the limitations period either never commenced, or should be determined alternatively by the date of imputed final completion. Again, however, this interpretation is contrary to the plain language of section 1741, which refers simply to "acceptance of the public work." There is no language requiring that the "acceptance" be done by a public agency, and it cannot have been the Legislature's intent that the limitations period would simply not commence in cases where there is no acceptance by a public agency. (*Fidelity Roof, supra,* at p. 418.)

As noted, because no public agency accepted the work, Requesting Parties argued the only entity that could accept Diffenbaugh's work for purposes of section 1741 was

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[10] To be valid a notice of completion must occur within 15 days of actual completion. (See *Fidelity Roof, supra*, 60 Cal.App.4th at p. 418) [under former Civ. Code § 3093, a "valid" notice of completion meant one filed within ten days of acceptance of a public works project by a public entity].) The law superseding former Civil Code section 3093 provides that a valid notice of completion is one filed within 15 days of acceptance. (Civ. Code § 8182.) The facts in *Fidelity Roof* took place before the system of civil wage and penalty assessments was adopted in 2000 with the enactment of section 1741. (See stats. 2000, ch. 954, § 9 [Assem. Bill 1646], eff. July 1, 2001.). At the time of *Fidelity Roof,* the enforcement scheme required DLSE to file a lawsuit under former section 1775 to recover underpaid prevailing wages and penalties from a contractor. The accrual language for an assessment under current section 1741 mirrors the language for a DLSE action under former section 1775.

the owner of the Project, HPI.[11] This argument is consistent with both the evidentiary record as to this Project and the plain language of section 1741.

Accordingly, given that acceptance of the public work by HPI is the measure, the next question is what qualifies as an acceptance. The older cases address the topic, but in a way that offers little guidance for this case. Oft-cited cases hold that "[i]t is not necessary that the acceptance be embodied in a formal resolution" (*Madonna v. State of California* (1957) l51 Cal.App.2d 836, 840), and "[f]ormal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely." (*Id*., citing *Graybar Electric Co. v. Manufacturers Casualty Co.* (1956) 21 N.J. 517.) In *Madonna,* the acceptance of a project was done by an awarding body in the context of a 90-day period for filing a contractor's suit to recover from the awarding body the sum withheld as penalties per DLSE's request.[12] The acceptance occurred when, in writing, the state public works director approved the recommended acceptance of work by the state highway engineer. (*Madonna, supra,* l51 Cal.App.2d at p. 839.) The awarding body's acceptance in *Fidelity Roof* took place via a resolution passed by the public school district as awarding body. (*Fidelity Roof*, *supra*, 60 Cal.App.4th at p. 417 & fn. 8.)

In this case, ample evidence supports HPI's assertion that its acceptance of the public work for purposes of section 1741 occurred on April 1, 2010. Benner's testimony, Murray's testimony, the last two pay applications of record (Requesting Parties Exhibits G and H), and the certificate of substantial completion approved by HPI on April 1, 2010 (Requesting Parties Exhibit E), all demonstrate that HPI accepted the "complete project" April 1. Three weeks before April 1, a pay application, signed by Diffenbaugh and approved by HPI on March 8, 2010, discloses that each itemized of work was considered "100%" complete by the February 28, 2010 end of the work period. (Requesting Parties Exhibit G.) The next pay application dated April 12, 2010, contains no Diffenbaugh

[11] In the July 14, 2001 minutes of a Prehearing Conferences, the Hearing Officer indicated he would request Diffenbaugh to present the financing documents at the Hearing. At the Hearing, the parties presented no financial documents from any of the entities that provided public funds to the Project.

[12] Former section 1730 required transfer of sums withheld to the State Treasurer within 90 days after completion and "formal acceptance."

request for payment for additional work done in the period, but only a request for release of one-half the retainage. (Requesting Parties Exhibit H.)

While section 5.1.7 of the Contract provides that, upon substantial completion of the work, progress payments are reduced in the amount necessary to pay for any incomplete work, no reduction in payment appears on the certificate of substantial completion dated April 1, 2010. (Requesting Parties Exhibit E.) The label of the April 1 document may suggest the work was only substantially complete. Given the actual contents of the certificate, however, and the fact that the last payment HPI made for any work, aside from release of retainages, pertained to 100% of the work, the evidence as a whole compels the conclusion that HPI accepted the work on April 1, 2010, as asserted by Requesting Parties.

Under the 180-day limitations period under the statute, then, the Assessments must have been served by September 28, 2010, in order to be considered timely. Since service of all the Assessments occurred from September 30, 2010, to October 20, 2010, the Assessments were served between two to 20 days after the expiration of the 180-day period. (Former § 1741, subd. (a).)

Section 9.10.1 of the Contract does contemplate a final inspection by the architect. It also states that, upon receipt of the contractor's final application for payment, the architect determines whether the Contract is fully performed and issues a final certificate for payment. In the Hearing, however, the parties presented no evidence as to whether those steps ever took place. The lack of evidence likely stems from the fact that the pay application approved on March 8, 2010, pertained to 100% of the work, and no further payment occurred, except for the release of retainages. (Requesting Parties Exhibit H.) Notwithstanding the label of the certificate of substantial completion, the Project was not merely "substantially complete" as of April 1, 2010. It was accepted by HPI as 100% complete as of that date. No evidence in the record supports any later date as an accurate date of acceptance.

DLSE asserts that work continued on the Project after April 1, 2010, and those circumstances extend the accrual date for service of the Assessments for purposes of enforcement under section 1741. DLSE relies on evidence, including subcontractor

payroll records, architect punch lists dated before and after April 1, 2010, and the summaries of the items to be cleaned, touched-up, and repaired after April 1, with some work to be done by subcontractors after April 14, 2010. That evidence does not rebut HPI's showing that the majority of the items on the punch list were completed by April 1, 2010. It also does not rebut HPI's showing that the post-April 1 work constituted minor maintenance and repair, clean up, touch-up, and warranty work, work falling under the rubric of "customer service" that does not, and did not, delay HPI's acceptance of the public work.

The question of the accrual of the 180-day limitations period turns on the date of acceptance of the public work, not on the date of completion of the minor repair, clean up, and touch-up work done after the Project was accepted. It may be that prevailing wages would be due for the minor work left on the punch lists to be performed after April 1. As of April 1, 2010, however, HPI had fully paid Diffenbaugh for the work under the Contract, except for retainages; all subcontractors had completed their scopes of work; and HPI was entitled to possession. Nor do the dates for payment of retainages affect the accrual date for the Assessments. Under the language of section 1741, the accrual date begins on acceptance, not on the release of retainages.

The private acceptance of a public work, notice of which may not be filed in public record or otherwise communicated to DLSE, could arguably impact DLSE's enforcement ability. Yet, as the court observed in *Kray Cabling Company, Inc. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1591 (*Kray Cabling*), "The only solution to the DLSE's complaint [about DLSE's lack of notice of an awarding body's acceptance of public work] is to seek assistance from the Legislature." Moreover, as noted, subsequent to the Project in this matter, the Legislature has already addressed the potential enforcement problem mentioned in *Kray Cabling* by extending the limitations period for civil wage and penalty assessments from 180 days to 18 months and by adopting section 1741.1, which provides a mechanism for the tolling of the limitations period until DLSE's request to an awarding body for documentation on work acceptance is satisfied. (Stats. 2013, ch. 792, § 1 [Assem. Bill 1336]; stats. 2013, ch.780, § 2 [Sen. Bill 377].)

Based on the totality of evidence, the Director finds that finds the Assessments were untimely served on the Requesting Parties. This finding renders moot the issues of underpayment of wages, statutory penalties and liquidated damages. This may seem an incongruous result given the lengthy stay of this matter pending the writ proceeding on the question of whether the Project was a public work, but the Director is required to apply the terms of the applicable law as written.

Accordingly, the Director makes the following findings:

FINDINGS

The Civil Wage and Penalty Assessments were untimely served on Requesting Parties.

ORDER

Because the Civil Wage and Penalty Assessments were untimely served, they are hereby dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: March 14, 2019

Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[13]

[13] See Government Code sections 7, 11200.4.