STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Bowen Engineering and Environmental Case No. **18-0238-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Bowen Engineering and Environmental (Bowen Engineering) submitted a Request for Review of a Civil Wage and Penalty Assessment issued on July 13, 2018, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Bowen Engineering performed for the Wasco Union High School District in Kern County (School District) in connection with the Columbo Construction – Student Services Phase VI Project (Project). The Civil Wage and Penalty Assessment, as amended on May 19, 2020 (Assessment), determined that $15,632.99 in unpaid prevailing wages and penalties under Labor Code sections 1775,[1] 1776, 1777.7, and 1813, respectively, were due.[2]

The matter was assigned to Hearing Officer Jessica Pirrone. In lieu of a Hearing on the Merits, the parties filed briefs setting forth their arguments and a joint set of stipulated facts, issues and exhibits. Lance A. Grucela appeared as counsel for DLSE and Dennis P. Cook appeared as counsel for Bowen Engineering. After the parties filed briefs, the matter was deemed submitted as of December 27, 2019.

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

[2] After issuing the Assessment, DLSE amended it twice. The second amended audit, dated May 19, 2020, reduced the claim for unpaid wages from $13,854.20 to $9,007.99 and reduced the claim for penalties under sections 1775 and 1813 to $9,750.00. DLSE and Bowen Engineering filed a stipulated motion to amend the Assessment downward in accordance with the second amended audit, which the Hearing Officer granted on December 27, 1919.

The issues for decision as stipulated by the parties are as follows:

1. Whether the Assessment correctly found that the workers Bowen Engineering classified as Asbestos Worker, Heat and Frost Insulator: Hazardous Materials Handler Mechanic should have been classified as Asbestos and Lead Abatement (Laborer).
2. Whether the Assessment correctly found that Bowen Engineering is liable for penalties under section 1775.
3. Whether the Labor Commissioner abused her discretion in setting section 1775 penalties at the mitigated rate of $100.00 per violation.
4. Whether the Assessment correctly found that Bowen Engineering is liable for penalties under section 1813.
5. Whether the Assessment correctly found that Bowen Engineering failed to comply with the apprenticeship requirements of section 1777.5.
6. Whether the Labor Commissioner abused her discretion in setting section 1777.7 penalties at the rate of $50.00 per violation.
7. Whether Bowen Engineering is liable for liquidated damages under section 1742.1 in an amount equal to the unpaid wages.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of providing prima facie support for the Assessment, but Bowen Engineering carried its burden of proving the basis for the Assessment was incorrect, for the most part. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying the Assessment.

FACTS

The parties' stipulations are as follows:

1. The work subject to the Assessment was performed on a public work and required the employment of apprentices in certain classifications and the payment of prevailing wages under the California Prevailing Wage Law, sections 1720 et seq.

2. The Assessment was timely served by DLSE.
3. The Request for Review was timely filed by Bowen Engineering.
4. The DLSE enforcement file was requested and produced in a timely fashion.
5. No back wages have been paid nor has a deposit been made with the Department of Industrial Relations as a result of the Assessment.
6. The exhibits, as described in the parties' First Amended Joint Exhibit List, are admitted in this proceeding without objection.
7. On June 28, 2016, the School District first published a Notice Inviting Bids for the Project.
8. On September 16, 2016, Bowen Engineering entered into a contract with the School District for Selective Demolition (Bid Package No. 02-41-00) in the amount of $106,400.00 and Site Demolition and Earthwork (Bid Package No. 31-20-00) in the amount of $123,600.00.
9. The work at issue, as described in Bid Package Number 02-41-00, involved "[a]sbestos removal from floor tiles, asbestos removal from light panels, scrape loose and peeling paint, removal of asbestos from bathroom ceramic tiles, flooring and from [*sic*] fire doors." (Joint Exhibit No. 1, p. 6)
10. The work at issue, as described in Section 5 of Bowen's Site Specific Work Plan dated October 27, 2016, involved "[r]emov[ing] vinyl asbestos tile, mastic, fire doors and asbestos roofing . . . Remov[ing] sinks and ceramic tile baseboard . . . [and] Scraping loose and peeling paint." (Joint Exhibit No. 35, pp. 2-4.)
11. The work Bowen Engineering performed included site mobilization, soft demolition, and decontamination station set up. The work did not include mold demolition or remediation.

12. The equipment Bowen Engineering used to perform the work at issue, as described in Section 4 of Bowen's Site Specific Work Plan dated October 27, 2016, includes: "Poly sheeting, plastic bags, duct tape, lead warning signs, spray adhesive, PPE, HEPA vacuums, detergent, 22P encapsulant, paint primer, leather and latex work gloves, hammers, wrecking bars, pry bars, screwdrivers, electrical water sprayers, decontamination units, negative air units."
13. The certified payroll reports Bowen Engineering submitted accurately reflect the hours worked by, and amounts Bowen Engineering paid to, its employees on the Project.
14. Bowen Engineering paid the workers on the assessment at the prevailing wage rate for Asbestos Worker, Heat and Frost Insulator: Hazardous Materials Handler Mechanic (HMH Mechanic), as set forth in Prevailing Wage Determination (PWD) SC-3-5-3-2015-1.[3] The PWD for HMH Mechanic adopts the wage rates of the 2014-2017 Master Labor Agreement between Southern California Chapter, Western Insulation Contractors Association and Local No. 5, International Association of Heat and Frost Insulators and Allied Workers.
15. The credit DLSE provided to Bowen Engineering for payment of the base hourly rate in the 2nd Revised Public Works Audit (2nd Revised Audit) (Joint Exhibit No. 4)[4] is correct for all workers.

[3] Joint Exhibit Number 12 includes the general prevailing wage rates determined by the Director for two classifications listed under the craft of Asbestos Worker, Heat and Frost Insulator. The two classifications are Asbestos Worker, Heat and Frost Insulator: Mechanic (Mechanic) and HMH Mechanic. The Mechanic and HMH Mechanic classifications have separate scopes of work. However, only the HMH Mechanic classification is at issue.

[4] When the Exhibits were originally offered, Joint Exhibit Number 4 was an earlier, 12-page version of the audit, which was stamped with page numbers "DLSE EXHIBITS – 000033 – 44." At the parties' request, the Hearing Officer replaced the original Exhibit 4 with a new Joint Exhibit Number 4 based on the revised audit dated May 19, 2019.

16. The 2nd Revised Audit utilized the correct PWD for the Asbestos and Lead Abatement (Laborer) (ALA Laborer) classification (SC-102-882-1-2015-1).[5]
17. The calculations set forth in the 2nd Revised Public Works Audit Summary are mathematically correct, and there is no dispute that the amounts listed in the columns headed "Total Wages Paid," "Prevailing Wage Requirements Total Wages," and "Amount Owing and Unpaid" accurately reflect the amounts paid by Bowen Engineering and the underpayments which exist if the required prevailing wage rate is the rate for ALA Laborer.
18. Between November 16, 2016, and December 22, 2016, Bowen employed journeyperson Laborers for a total of 116 hours, as summarized in Joint Exhibit Number 5.
19. Bowen did not send a DAS form 142 or equivalent to the applicable apprenticeship committee for the Laborer classification until October 3, 2017. (Joint Exhibit No. 31.)
20. Based on stipulated facts numbers 18 through 19, and pursuant to section 1777.7, DLSE assessed a penalty of $50.00 per day, which was half of the statutory maximum penalty rate at the time, for 11 days for a total amount of $550.00.

The Prevailing Wage Rate Determinations.[6]

1. Asbestos Worker, Heat and Frost Insulator.

The craft of Asbestos Worker, Heat and Frost Insulator contains the classification HMH Mechanic (SC 3-5-3-2015-1). It also contains the classification

[6] It is not necessary to present the Laborer PWD or its scope of work because the parties do not dispute that: the Laborer craft is apprenticeable; no Laborer journeyperson wages are due under the Assessment; between November 16, 2016, and December 22, 2016, journeyperson Laborers worked 116 hours; Bowen submitted one request for dispatch of apprentices dated October 3, 2017, seeking one Laborer apprentice on October 16, 2017; and there were no Laborer apprentices on the job.

Mechanic, which has its own pay rates and scope of work. However, neither party contends the Mechanic classification applied to the work in this case. The basic hourly rate for HMH Mechanic (excluding fringe benefits) is $19.69.

Bowen Engineering classified its workers who are at issue in the Assessment as HMH Mechanic. The HMH Mechanic scope of work, as relevant to asbestos abatement work, provides as follows:

> MAINTENANCE ADDENDUM
>
> 1. This Addendum covers the terms and conditions of employment of all employees engaged in asbestos . . . abatement, hazardous waste cleanup and/or stabilization, . . . sweeping, insulation maintenance, manufacturing, foam application, and oil field work.
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> 2. Insulation maintenance is defined as any industrial insulation work consisting of repair or maintenance character on Mechanical Systems . . . .

2. Asbestos Lead Abatement (Laborer) (SC-102-882-1-2015-1).

The basic hourly rate for ALA Laborer (excluding fringe benefits) is $31.88. The scope of work provides, in relevant part, as follows:

> The work covered by this agreement is asbestos and toxic waste abatement, and methane/liquid boot installation and repair including the following tasks performed in conjunction with asbestos and toxic waste abatement: site mobilization, initial site cleanup, site preparation including soft demolition, mold remediation, removal of asbestos-containing material and toxic waste (including lead abatement and any other toxic materials) by hand or with equipment or machinery, scaffolding, fabrication or (*sic*) temporary wooden barriers, assembly of decontamination stations, and any other tasks which the Contractor may direct in connection with this work.
>
> (c) Soft demolition is defined as the operation of compressed air or electrical powered small hand tools and general labor during demolition performed in conjunction with asbestos or toxic waste abatement.

Bowen Engineering contends and, were a Hearing on the Merits held, would present testimony and argument that it correctly classified its workers as HMH Mechanic based on the scope of work for this classification and that it owes no additional wages. Bowen Engineering also contends, and were a Hearing on the Merits held, would present testimony that in DLSE case numbers 40-53267 and 40-53919, DLSE investigative cases in which the scope of work was the removal of asbestos and lead-containing building materials from walls, floors and ceilings, the DLSE investigator notified Bowen Engineering that she found no violations.

As to the apprenticeship issues, Bowen Engineering contends that it was excused from submitting its request for dispatch of apprentices using DAS form 142 or its equivalent until October 3, 2017, as described in stipulation numbers 18 through 20, because it had entered into two contracts (Bid Package No. 02-41-00 and Bid Package No. 31-20-00). Bowen Engineering contends that since the employment of apprentices on the first contract (Bid Package No. 02-41-00) would not have generated meaningful employment for apprentices, it submitted DAS form 142 on the second contract where more Laborer hours were performed. Bowen Engineering further contends that submitting DAS form 142 on Bid Package No. 31-20-00 when Laborer apprentices would have been able to work meaningful work hours was in compliance with section 1777.5.

DLSE contends and, were a Hearing on the Merits held, would present testimony and argument that the workers on the Project who were removing asbestos from walls and ceilings during demolition of a building were required to be paid the minimum prevailing wage rate of the ALA Laborer classification. DLSE further contends that, Bowen did not comply with its obligations to request dispatch of apprentices during the period that Laborer journeypersons worked on the Project from November 16, 2016, to December 22, 2016, because Bowen Engineering did not request the dispatch of apprentices until October 3, 2017. Further, Bowen offered no evidence that Bowen employed journey level Laborers on or after October 16, 2017, or that such Laborers worked any specific number of hours before the end of the Project.

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 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 wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days following 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 or subcontractor may appeal the 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 presenting 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 reasons set forth below, the Director finds that the DLSE presented prima facie support for the Assessment, and, with one exception, Bowen Engineering carried its burden to prove the basis for the Assessment is incorrect. In particular, the Director finds that Bowen properly classified its workers, rendering moot the issues of underpayment of wages, statutory penalties, and liquidated damages. However, Bowen failed to carry its burden to show an abuse of discretion in the assessment of penalties under section 1777.7.

Bowen Engineering Did Not Misclassify Its Workers as HMH Mechanics.

The single prevailing rate of pay for a given "craft, classification, or type of work" is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1082) (*Sheet Metal Workers*). The Director determines these rates and publishes general wage determinations (i.e., a PWD) to inform all interested parties and the public of the applicable wage rates for each type of worker that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 [*Ericsson*].) In the unusual circumstance when the advisory scopes of work for two prevailing rates overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work. (*Sheet*

Metal Workers, supra, 153 Cal.App.4th at p. 1082.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (See § 1773.2, and *Ericsson*, *supra*, 221 Cal.App.3d at p. 119.) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (See *Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by § 1773.4].) In the absence of a timely petition under section 1773.4, the contractor and subcontractors are bound to pay the prevailing rate of pay, as determined and published by the Director as of the bid advertisement date. (*Sheet Metal Workers, supra,* 153 Cal.App.4th at pp. 1084-1085.)

In this case, the School District sought bid proposals for asbestos abatement and paint removal inside buildings. According to the bid package, the work at issue involved "[a]sbestos removal from floor tiles, asbestos removal from light panels, scrape loose and peeling paint, removal of asbestos from bathroom ceramic tiles, flooring and from [*sic*] fire doors." (Joint Exhibit No. 1, p. 6.) The Site Specific Work plan also focuses on asbestos removal, and includes incidental or additional work such as "Remov[ing] sinks and ceramic tile baseboard… [and] Scraping loose and peeling paint." (Joint Exhibit No. 35, pp. 2-4.) No evidence discloses that the School District specified any particular prevailing wage rate for that work and Bowen Engineering submitted no section 1773.4 petition for this Project. Instead, Bowen Engineering selected the published HMH Mechanic PWD for the prevailing wage rate to pay its workers on the Project.

As of the bid advertisement date, the scope of work for the HMH Mechanic PWD broadly states that HMH Mechanic workers engage in "asbestos … abatement,

hazardous waste cleanup and/or stabilization, . . . sweeping, insulation maintenance, manufacturing, foam application, and oil field work." The scope of work for the applicable ALA Laborer PWD specifies that the work of the ALA Laborer includes "asbestos and toxic waste abatement, . . . removal of asbestos-containing material and toxic waste (including lead abatement and any other toxic materials)…." Both rate determinations, then, include work of asbestos abatement.

The HMH Mechanic scope of work uses no qualifying language to restrict or modify the phrases "asbestos abatement" and "hazardous waste cleanup." The phrases appear in a separate paragraph from the provision in the scope of work that describes other covered work to include "insulation maintenance," described to be "industrial insulation work consisting of repair or maintenance character on Mechanical Systems." Nothing in the HMH Mechanic scope of work confines asbestos abatement to work only on insulation or mechanical systems, subjects mentioned in the separate paragraph. Likewise, nothing in the HMH Mechanic scope of work places asbestos abatement on ceilings, walls, and floors out of bounds for that classification.

Nor does that scope of work confine asbestos abatement work to situations where maintenance is being conducted. The two paragraphs do appear under the rubric "Maintenance Addendum." But that title does not counteract the meaning and import of the substantive provisions of the scope of work. The asbestos abatement and hazardous waste cleanup work functions listed in the HMH Mechanic scope of work stand on their own and directly apply to the work done in the Project, including the paint-scraping work, which logically would produce hazardous waste to clean up.[7]

Further, the HMH Mechanic classification is neither a subtrade of nor subordinate to an "Insulator" classification. As DLSE notes, two PWDs, one for Mechanic and one for HMH Mechanic, are presented in one DIR wage determination for the craft of "Asbestos Worker, Heat and Frost Insulator." But no separate rates of pay and no

[7] Neither party argues that the work functions of paint-scraping and removal of sinks and ceramic tile baseboards after removing asbestos material should be assigned to any PWD other than the two PWDs the parties presented in the Hearing as contenders for the work in question: the HMH Mechanic PWD and the ALA Laborer PWD.

separate scope of work exist for a classification of "Asbestos Worker, Heat and Frost Insulator" per se. Instead, the craft contains two separate classifications, neither dependent on the other, with their own rates of pay and scopes of work. The placement of the HMH Mechanic PWD within the Asbestos Worker, Heat and Frost Insulator craft does not signify that the HMH Mechanic performs work only in the context of insulation work.

As with the HMH Mechanic scope of work, the ALA Laborer scope of work directly encompasses the asbestos abatement work in the Project. With scopes of work from two distinct classifications encompassing the work at issue, an overlap was created. In that circumstance, a contractor can choose which classification and which prevailing wage determination to use. The parties stipulated that Bowen Engineering paid the prevailing wage rates required for the HMH Mechanic classification. Because the scope of work for HMH Mechanic encompasses the work on the Project, Bowen Engineering did not violate its statutory duty to pay prevailing wage rates and there are no unpaid prevailing wages due.[8]

The Issues of Penalties Under Section 1775, Penalties Under Section 1813, and Liquidated Damages Are Moot.

In light of the analysis, *ante*, the issues of penalties under section 1775, and liquidated damages are moot. The issue of penalties under section 1813 is also moot because the sole basis for the penalty was that overtime work was not paid at ALA Laborer rates given the contention that the ALA Laborer classification applied to the work. That contention has not been accepted, which renders moot the issue of overtime penalties.

The Assessment Correctly Found That Bowen Engineering Failed to Meet the Requirements for Employment of Apprentices on the Project.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are

[8] DLSE also contends that an agreement between two international labor unions representing the two classifications at issue is arguably incorporated by reference into the scopes of work for the two classifications. Nothing in the scopes of work validates that contention

further addressed in regulations promulgated by the California Apprenticeship Council. (California Code of Regulations, title 8, sections 227 to 232.70.)[9]

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). In this regard, section 1777.5, subdivision (g) provides:

> The ratio of work performed by apprentices to journey[persons] employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where the contractor agrees to be bound by those standards, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journey[person] work.

The governing regulation as to this 1:5 ratio of apprentice hours to journeyperson hours is section 230.1, subdivision (a), which states in relevant part:

> Contractors, as defined in Section 228 to include general, prime, specialty or subcontractor, shall employ registered apprentice(s), as defined by Labor Code Section 3077, during the performance of a public work project in accordance with the required 1 hour of work performed by an a apprentice for every five hours of labor performed by a journey[person, unless covered by one of the exemptions enumerated in Labor Code Section 1777.5 or this subchapter. Unless an exemption has been granted, the contractor shall employ apprentices for the number of hours computed above before the end of the contract. . . .

However, 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, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).)

According to that regulation, a contractor properly requests the dispatch of apprentices by doing the following:

> …[r]equest the dispatch of required apprentices from the apprenticeship committees providing training in the applicable craft or trade and whose

[9] All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

> geographic area of operation includes the site of the public work by giving the committee written notice of at least 72 hours (excluding Saturdays, Sundays, and holidays) before the date on which one or more apprentices are required. If the apprenticeship committee from which apprentice dispatch(es) are requested does not dispatch apprentices as requested, the contractor must request apprentice dispatch(es) from another committee providing training in the applicable craft or trade in the geographic area of the site of the public work, and must request apprentice dispatch(es) from each such committee either consecutively or simultaneously, until the contractor has requested apprentice dispatch(es) from each such committee in the geographic area. All requests for dispatch of apprentices shall be in writing, sent by first class mail, facsimile or email.

(§ 230.1, subd. (a).) DAS has prepared a form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees.

Prior to requesting the dispatch of apprentices, the regulations require contractors to alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed. The applicable regulation provides, in relevant part, as follows:

> Contractors shall provide contract award information to the apprenticeship committee for each applicable apprenticeable craft or trade in the area of the site of the public works project that has approved the contractor to train apprentices. Contractors who are not already approved to train by an apprenticeship program sponsor shall provide contact award information to all of the applicable apprenticeship committees whose geographic area of operation includes the area of the public works project. The contract award information shall be in writing and may be a DAS Form 140 Public Works Contract Award Information. The information shall be provided to the applicable committee within ten (10) days of the date of the execution of the prime contract or subcontract, but in no event later than the first day in which the contractor has workers employed upon the public work. …

(Cal§ 230.1, subd. (a).) Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

"The determination of the Labor Commissioner as to the amount of the penalty imposed under subdivisions (a) and (b) shall be reviewable only for an abuse of discretion." (§ 1777.7, subd. (d).) A contractor or subcontractor has the same burden

of proof with respect to the penalty determination as to the wage assessment, namely, the affected contractor has the burden of proving that the basis for assessment is incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

The record demonstrates that Bowen Engineering violated the apprenticeship requirements by failing to request dispatch of apprentices from the applicable apprenticeship committees for the craft of Laborer in the geographic area of the Project and failing to employ Laborer apprentices in the 1:5 apprentice to journeyperson ratio. (§§ 230, subd (a), 230.1, subd. (a).) Between November 16, 2016, and December 22, 2016, journey level Laborers performed 116 hours of work over 11 calendar days on the Project, and under the 1:5 ratio, 23 hours of Laborer apprentices were required. However, no apprentice Laborer performed work on the Project during that period; and Bowen Engineering did not seek the dispatch of Laborer apprentices 72 hours in advance of the date they were required.

Bowen Engineering argues that it is in compliance with the apprenticeship requirements because (1) if it had requested dispatch of apprentices for the period at issue, it would have only resulted in 23 hours of apprenticeship hours, and (2) it did comply with its obligations to seek the dispatch of Laborer apprentices for the second contract of the Project involving more "meaningful employment for apprentices." Bowen Engineering does not, however, offer any legal or factual support for its assertions.

Nowhere in the applicable law does it say that a contractor is excused from the requirement to request the dispatch of apprentices if the contractor determines that the project would not offer "meaningful employment" for apprentices. Legal support exists for the proposition that Bowen could have complied with its obligation to employ apprentices, if it showed that it not only requested dispatch in October 2017, but that following its request for dispatch in October 2017, there were sufficient journeyperson Laborer hours such that were apprentices dispatched, the required ratio could have been met by the end of the Project. But, Bowen did not offer any evidence of the number of journeyperson Laborer hours after its October 2017 request for dispatch.

Hence, it cannot be concluded that the required 1:5 ratio could have been met had an apprentice dispatch been made. As a result, Bowen Engineering cannot avail itself of the exemption from the requirement to employ apprentices in the proper ratio. (See § 230.1, subd. (a).)

Accordingly, the Assessment's finding that Bowen Engineering violated section 1777.5 is affirmed.

The Labor Commissioner Did Not Abuse Her Discretion in Setting section 1777.7 Penalties at $50.00 per Violation.

If a contractor "knowingly violate[s] Section 1777.5" a civil penalty is imposed under section 1777.7. As it existed on the date of the bid advertisement (June 28, 2016), section 1777.7 provides, in relevant part:

> (a) (1) If the Labor Commissioner or his or her designee determines after an investigation that a contractor or subcontractor knowingly violated Section 1777.5, the contractor and any subcontractor responsible for the violation shall forfeit, as a civil penalty to the state or political subdivision on whose behalf the contract is made or awarded, not more than one hundred dollars ($100) for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. …

(§ 1777.7, subd. (a)(1).) The phrase quoted above -- "knowingly violated Section 1777.5" -- is defined by the 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.

Bowen Engineering "knowingly violated" the requirement of the 1:5 ratio of apprentice hours to journeyperson hours for the craft of Laborer and failed to comply with the requirements for requesting dispatch of apprentices for that craft. Bowen Engineering argues that it should be excused from complying with the apprenticeship laws in this instance given that only 23 hours of apprenticeship training hours were lost and it did comply with the apprenticeship laws later in the Project. Bowen

Engineering's argument reflects a tacit admission that it knew the applicable requirements. Since Bowen Engineering knowingly violated the law, a penalty should be imposed under section 1777.7, subdivision (a), for each full calendar day of noncompliance.

While the maximum penalty is $100.00 per violation, here, DLSE imposed a mitigated penalty rate of $50.00 for 11 violations of the 1:5 ratio requirement, based on the 11 full calendar days on which journey level Laborers performed the 116 hours of work on the Project. In determining the penalty rate, the Labor Commissioner considered the loss of apprenticeship training opportunities for apprentices and Bowen Engineering's violation history.[10] Bowen Engineering has not shown the Labor Commissioner abused her discretion in selecting the penalty rate. (§ 1777.7, subd (d).) Accordingly, the assessment of penalties at the rate of $50.00 for each of 11 violations for a total amount of $550.00 is affirmed.

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

FINDINGS AND ORDER

1. Affected contractor Bowen Engineering and Environmental filed a timely Request for Review from a timely Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Bowen Engineering and Environmental paid the correct prevailing wage rates and no unpaid prevailing wages are due.
3. The Assessment correctly found that Bowen Engineering and Environmental failed to comply with the laws governing employment of apprentices on public works projects.
4. The Labor Commissioner did not abuse her discretion in assessing $550.00 in penalties under section 1777.7 at the mitigated rate of $50.00 per violation for 11 violations.

[10] According to the July 12, 2018 Penalty Review, DLSE had previously issued an assessment against Bowen Engineering in 2007.

5. All other issues are moot.
6. The amounts found remaining due from Bowen Engineering and Environmental, as affirmed and modified by this Decision, are as follows:

Category	**Amount Due**
Penalties under section 1777.7	$550.00
TOTAL	**$550.00**

The Civil Wage and Penalty Assessment is affirmed as modified, 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: 11/13/2020

Katrina S. Hagen
Director
Department of Industrial Relations