STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Vailston Company

Case No. 17-0484-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Vailston Company (Vailston) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 28, 2017, with respect to the Bulb-Outs at Second Street and Orange Avenue Project (Project) performed for the City of Coronado (City) in San Diego County. The Assessment determined that $25,846.60 in unpaid prevailing wages and statutory penalties were due. These included penalties against Vailston under Labor Code sections 1775 and 1813,[1] as well as penalties assessed under section 1777.7 for apprenticeship violations.

A Hearing on the Merits was held on May 2, 2019, in Los Angeles, California before Hearing Officer Howard Wien. Lance A. Grucela appeared as counsel for DLSE. There was no appearance by or on behalf of Vailston. DLSE Industrial Relations Representative Selene Barillas testified in support of the Assessment.

The issues presented for decision are:

- Was the Assessment timely?

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

- Did the Assessment correctly find that Vailston failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers?
- Did Vailston provide contract award information to the applicable apprenticeship committees for the craft of Operating Engineer?
- Did Vailston provide contract award information to the applicable apprenticeship committees and request dispatch of apprentices for the crafts of Cement Engineering and Laborer Engineering, and did Vailston employ Cement Engineering apprentices and Laborer Engineering apprentices on the Project in the minimum ratio required by section 1777.5?
- Is Vailston liable for penalties under sections 1775, 1813 and 1777.7, and did DLSE apply the correct penalty rates?
- Is Vailston liable for liquidated damages?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, except as specified below. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) Accordingly, the Director issues this Decision affirming the Assessment, except as modified in part, as specified.

FACTS

The facts stated below are based on DLSE's exhibits admitted into evidence, other documents in the Hearing Officer's file, and the testimony of Industrial Relations Representative Barillas.

Failure to Appear.

Vailston's Request for Review of the Assessment was filed by its President Nate Johnston. Prior to the Hearing on the Merits, the Hearing Officer conducted four noticed prehearing conferences. Neither Nate Johnston nor anyone else appeared for Vailston in any of those prehearing conferences.

On May 2, 2019, no representative of Vailston appeared at the duly noticed

Hearing on the Merits. At the designated time for the Hearing to commence, the Hearing Officer phoned Johnston, but no one answered. A recorded message stated that the phone line was disconnected and no longer in service.

The Hearing Officer proceeded to conduct the Hearing on the Merits as noticed and scheduled to formulate a recommended decision as warranted by the evidence. (See Cal. Code Regs., tit. 8, § 17246, subd. (a) ["Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party's absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party"].) DLSE's Exhibit Numbers 1 through 27 were admitted into evidence without objection[2] and the matter was submitted for decision.

The Assessment.

On November 25, 2015, the City advertised an invitation to accept bids for the Project. Vailston, as the general contractor, entered into a public works contract with the City to complete the Project. The Project consisted of constructing four new bulb-outs and four pedestrian ramp replacements at a street intersection. Bulb-outs are an extension of the curb that bulbs outs into the street to slow traffic. This work required removal and replacement of street paving, curbs, gutters and sidewalks.

Vailston prepared certified payroll records (CPRs) for the Project. The CPRs show that Vailston's first day of work on the Project was February 22, 2016, and the final day was June 28, 2016.

DLSE's audit found unpaid prevailing wages in the amount of $2,516.60. The audit was based upon Barillas' findings as follows:

1. Vailston misclassified ten journeymen as Laborer Building workers. The correct classification was Laborer Engineering, for which the prevailing wage rate was greater.[3] The audit credited Vailston with all wage payments stated in the CPRs.

[2] DLSE withdrew Exhibit numbers 4, 8, and 16; accordingly, they were not admitted.

[3] The CPRs solely stated the word "Laborer" in classifying these workers, not "Laborer Building". The CPRs, however, unequivocally classify these workers as Laborer Building by stating payment of the basic hourly wage and fringe benefits required by the Laborer Building prevailing wage determination, rather

2. One of the ten journeymen above, Hector Loya, worked eight hours on a Saturday, for which Vailston failed to pay the required 1-1/2 times basic wage rate for Saturday work.

3. One apprentice, Bryan Velez, was misclassified as Apprentice Laborer Building, when the correct classification was Apprentice Laborer Engineering, for which the prevailing wage rate was greater. Additionally, for 61 hours of the total 134 hours that Velez worked, there was no Laborer Engineering journeyman on site to supervise him. Based on the lack of a journeyman, the audit upgraded him to Journeyman Laborer Engineering. (See § 1777.5, subd. (c)(2) and Cal. Code Regs., tit. 8, § 230.1 subd. (c).) The audit credited Vailston with all wage payments to Velez stated in the CPRs.

4. Vailston paid fringe benefits to applicable trust funds and programs. Barillas obtained the records from those trust funds and programs and determined that Vailston underpaid fringe benefits for the 11 workers described above, plus six Cement Engineering journeymen and one Operating Engineer journeyman.

Based upon the bid advertisement date of November 25, 2015, the following are the relevant prevailing wage determinations (PWDs) applicable to the Project, from which Barillas obtained the prevailing wage rates (consisting of the basic hourly wage rate plus hourly fringe benefits) for the classifications at issue:

- Laborer: Engineering Construction: SD-23-102-3-2015-1 (Laborer Engineering PWD).
- Laborer: Building Construction: SD-23-102-4-2015-1 (Laborer Building PWD).
- Cement Mason Engineering Construction: SD-23-203-3-2015-1 (Cement Engineering PWD).
- Operating Engineer: SD-23-63-3-2015-1 (Operating Engineer PWD).

As to the upgrade of ten journeymen and one apprentice from Laborer Building to Laborer Engineering, Barillas testified that she based the upgrade on evidence that

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than the higher basic hourly wage rate and fringe benefits required by the Laborer Engineering prevailing wage determination, addressed *post*.

the work performed by these workers was encompassed within the scope of work of Laborer Engineering rather than Laborer Building. The City's bid advertisement stated that the contractor for the Project must have a Class A contractor's license, which Barillas knew was not a license for building contractors. The City's description of the Project in its bid invitation documents showed that the Project was not for the construction, remodel or renovation of any building or other structure, but instead consisted solely of work on streets, curbs, gutters and sidewalks. Barillas knew that the Class A license information from the California Contractors State License Board (CSLB) states that the Class A license is for "General Engineering Contractor," and further states the license is for contractors whose principal contracting business "is in connection with fixed works requiring specialized engineering knowledge and skill, including . . . highways, streets and roads, …." The Class A license contrasts with Class B license, for which CSLB states the license is for "General Building Contractor," and further states the Class B license is for contractors whose principal contracting business "is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of at least two unrelated building trades or crafts …"

Although Barillas did not use the scopes of work for the respective crafts in preparing her audit, those scopes of work were admitted into evidence as exhibits at the Hearing and fully establish that the proper classification of the 11 workers was Laborer Engineering. The respective scopes of work for the Laborer Engineering PWD and Laborer Building PWD use virtually identical language in stating that "street work" is included. However, the first page of each scope of work is a September 18, 2013 "Memorandum of Agreement" that states the Labor-*Building* Master Labor Agreement covers all work in construction of Type 1 through 5 *buildings*, and the Laborer-*Engineering* Master Labor Agreement covers all other construction work.

Barillas' investigation found evidence supporting each of the additional bases for the audit of unpaid prevailing wages discussed, *ante*: (1) as to the upgrading of Laborer Building apprentice Velez to Laborer Engineering journeyman for 61 hours of

work, the CPRs showed that no Laborer Engineering journeyman was on the jobsite for those 61 hours; (2) the CPRs showed that Vailston failed to pay the required 1-1/2 times basic hourly rate to Loya for his eight hours of work on a Saturday; and (3) as to Vailston's underpayment of fringe benefits for 18 workers, Barillas obtained payment records from the trust funds and programs establishing the underpayment.

In total, there were 140 worker-days that Vailston underpaid prevailing wages. DLSE assessed $15,400.00 in penalties under section 1775 at the rate of $110.00 for each of those violations.

As to the audit's imposition of section 1813 penalties totaling $250.00, Barillas based the audit upon the CPRs showing that Vailston failed to pay the required overtime rate for ten worker-days in which the work exceeded eight hours per day: two days for Carlos A. Quevedo, three days for Joaquin Sanchez, two days for Jorge J. Beltran, one day for Juan R. Garcia, and two days for Carlos V. Quevedo.

Barillas testified she further investigated whether Vailston complied with statutory apprentice requirements under section 1777.5. Barillas determined that Vailston did not comply with those requirements for all three trades of Operating Engineer, Laborer Engineering and Cement Engineering.

As to Operating Engineer, Barillas testified that this craft was exempt from the requirement of employing apprentices at the ratio of one apprentice hour for every five journeyman hours. However, Barillas still considered Vailston to be required to submit notice of contract award information (in a form DAS 140 or equivalent) to the two applicable apprenticeship committees for that craft. Vailston did not do so. Barillas calculated the section 1777.7 penalty period for this alleged violation as 127 days. This period commenced February 23, 2016, the day after the first day Vailston had a journeyman Operating Engineer on the Project. It ended June 28, 2016, the last day Vailston had any journeyman working on the Project.

As to Laborer Engineering, Vailston did not timely submit requests for dispatch of apprentice in a form DAS 142 or equivalent to the two applicable apprenticeship committees for that craft, and failed to employ apprentices in the required 1:5 ratio. Barillas imposed one day of penalty for failure to issue the form DAS 142 or equivalent,

and failure to satisfy the 1:5 ratio: February 22, 2016. This was the first day Vailston had a Laborer Engineering journeyman working on the Project.[4] Thus Barillas' audit as to the crafts of Operating Engineer and Laborer Engineering resulted in imposition of a section 1777.7 penalty for the entire 128-day period that Vailston worked on the Project, February 22, 2016 to June 28. 2016.

As to Cement Engineering, Vailston did not submit a form DAS 140 or equivalent to the two applicable apprenticeship committees for that craft. Vailston also did not submit a request for dispatch of apprentice in a form DAS 142 or equivalent, and did not employ any Cement Engineering apprentices on the Project. The penalty period for the failure to submit the DAS 140 would have been 118 days – i.e., shorter than the 127-day period for apprentice violations relative to the Operating Engineer craft, as stated above. Since Barillas imposed a penalty for 128 days based upon the violations associated with the crafts of Operating Engineer and Laborer Engineering, Barillas did not assess any penalty for apprentice violations relative to the craft of Cement Engineering.

DLSE assessed the section 1777.7 penalty at the rate of $60.00 per day, totaling $7,680.00 for the 128-day period.

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

[4] Barillas limited this penalty to one day in recognition of the 127 penalty days for the DAS 140 violation pertaining to the Operating Engineer craft and in order to avoid imposing double penalties.

> 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 received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of $25.00 per day per worker per violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

In general, and unless an exemption applies, 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 journeymen in the applicable craft or trade. (§ 1777.5, subd. (d); Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio of apprentice to journeyman 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. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, DAS 142, which a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship requirements, 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, 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).)

The Assessment Was Timely.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a), which has been in effect without amendment since January 1, 2014. (Stats. 2013, ch. 792, § 1, eff. Jan. 1, 2014).[5] It states in relevant part:

The assessment shall be served not later than 18 months after the filing

[5] For most purposes on a public works project, the bid advertisement date determines the applicable Labor Code sections and applicable sections of the California Code of Regulations, title 8. As stated above, the bid advertisement date of this Project was November 25, 2015.

> 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.

In this case, the City's notice of completion was recorded in the San Diego County Recorder's office on July 27, 2016. It states that the Project was completed on June 29, 2016. Having been recorded more than 15 days from completion, the notice of completion was invalid, and did not commence the running of the 18-month limitations period. (See Civ. Code, § 9204.) However, DLSE presented prima facie evidence that the City accepted the Project on July 19, 2016, by action of the City Council that day. The 18-month limitations period thus commenced running on that date, and did not end until January 19, 2018. DLSE served the Assessment on December 28, 2017. Accordingly, the Assessment was timely.

Vailston Failed to Pay the Required Prevailing Wages.

DLSE presented prima facie evidence that Vailston underpaid its workers on the Project in the aggregate sum of $2,516.60 by: (1) misclassifying ten Laborer Engineering journeymen at the lower prevailing wage classification of Laborer Building; (2) failing to pay one of the above journeymen, Loya, the required 1-1/2 times basic wage rate for work on one Saturday; (3) misclassifying worker Velez as Laborer Building apprentice when the correct classification was Laborer Engineering journeyman; and (4) underpaying fringe benefits for 18 workers. Vailston presented no evidence to carry its burden to disprove the basis for, or the accuracy of, this determination. Vailston is liable for payment of prevailing wages in the aggregate sum of $2,516.60. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

DLSE's Penalty Assessment Under Section 1775 Is Affirmed.

Section 1775, subdivision (a)(1) states:

> 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 ....

Section 1775, subdivision (a)(2)(D), provides that the Labor Commissioner's determination as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion 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.)

DLSE presented prima facie evidence that Vailston failed to pay the required prevailing wages on 140 worker-days, and DLSE's selection of the $110.00 penalty rate is not an abuse of discretion. Vailston presented no evidence to carry its burden to disprove the basis for, or the accuracy of, this determination. DLSE's evidence supporting the imposition of the $110.00 penalty rate includes the following:

1. The City's bid advertisement and Notice Inviting Bids put Vailston on notice that it must pay the prevailing wage rates, by stating: "In accordance with the California Labor Code, the Contractor must pay not less than prevailing wage rates as determined by the Director of Industrial Relations for all work done under this contract."

2. The City's description of the Project and express requirement that Vailston have a Class A license – i.e., the "General Engineering Contractor" license, rather than the Class B "General Building Contractor" license – put Vailston on notice that this was not a contract for building a structure. The scopes of work for Laborer Building and Laborer Engineering were both available on the Department's website, so Vailston knew or should have known that the Laborer work on the Project was properly classified as Laborer Engineering rather than Laborer Building.

3. Moreover, the CPRs show that Vailston correctly paid its Cement Masons at the Cement Engineering rate rather than the lesser Cement Building rate (see Cement Mason Building Construction PWD, SD-23-203-3-2015-1A, DLSE Exhibit No. 12). By inference, Vailston knew, or reasonably should have known, that in choosing the

correct classification for its Laborers, the Engineering classification was correct and the Building classification was incorrect both for cement mason and laborer work.

4. Further, DLSE's evidence and Barillas' testimony established that on August 26, 2015, approximately three months before the bid advertisement date for this Project, DLSE sent Vailston a demand letter asserting that Vailston had failed to pay prevailing wages to its workers on a prior project. Barillas testified that DLSE at times sends demand letters to contractors two or three weeks before issuing CWPAs in an attempt to get a settlement. The August 2015 demand letter on the prior project asserted unpaid wages and 1775 penalties at rate of $20.00 per violation. Vailston settled the demand on the prior project, and no civil wage and penalty assessment issued. The prior demand and settlement, however, establish Vailston's knowledge of prevailing wage obligations, and by extension, the reasonableness of the penalty rate in this case.

Accordingly, Vailston is liable for section 1775 penalties in the sum of $15,400.00 calculated at the $110.00 penalty rate for a total of 140 worker-days in which the prevailing rate was not paid.

Vailston Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages on 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, as applicable to this case, provides 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 two alternative means required the contractor to

make key decisions within 60 days of the service of the civil wage penalty assessment upon the contractor.

Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor could entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.[6]

Here, no evidence shows Vailston paid any back wages to the workers in response to the Assessment or deposited with DIR the assessed wages and statutory penalties. Accordingly, Vailston is liable for liquidated damages in the amount of the underpaid prevailing wages, $2,516.60.

Section 1813 Statutory Penalty Is Affirmed.

The record establishes that Vailston paid less than the required prevailing overtime wage rate for ten worker-days in which the workers exceeded eight hours of work per day. Vailston failed to prove the basis for the penalty was incorrect. Accordingly, the section 1813 statutory penalty of $250.00 is affirmed.

Vailston Violated Apprentice Requirements, But the Violation Days Were Fewer than Stated in the Audit.

As stated above, DLSE premised its imposition of the section 1777.7 penalty upon Vailston's conduct with respect to the crafts of Operating Engineer and Laborer Engineering, but not Cement Engineering. All three crafts are apprenticeable under their respective PWDs. The resulting penalty assessed by DLSE was for all 128 days that Vailston worked on the Project.

[6] Prior to June 27, 2017, section 1742.1 provided a third means to avert liability for liquidated damages: the Director had discretionary ability to waive liquidated damages under certain circumstances. On June 27, 2017, before issuance of the Assessment, the Director's discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].) Accordingly, the Director has no such discretionary ability in this case.

Of the 128 penalty days, 127 were assessed for Vailston's failure to submit forms DAS 140 (or equivalent) to the applicable apprenticeship committees for the craft of Operating Engineer. As acknowledged by DLSE at the Hearing, however, the craft of Operating Engineer was exempt from the 1:5 ratio requirement for employing apprentices. (See Lab. Code, § 1777.5 re: exemptions.) In light of that exemption, DLSE made no showing as to why Vailston was nevertheless obligated to submit the DAS 140 to Operating Engineer apprenticeship committees. Accordingly, this Decision finds that Vailston did not violate the requirement to issue forms DAS 140 to the applicable apprenticeship committees for the craft of Operating Engineer.

DLSE's audit, however, also determined that Vailston failed to submit forms DAS 140 to the applicable apprenticeship committees for the craft of Cement Engineering. For this violation, DLSE determined the penalty period consisted of 118 days, commencing on March 3, 2016, the day after the first day Vailston had Cement Engineering journeymen working on the Project, and ending on June 28, 2016, the last day Vailston had any journeyman working on the Project.[7] DLSE did not include that 118-day penalty in the Assessment because it was shorter than the 127-day period for the craft of Operating Engineer stated above. Since this Decision disallows the 127-day period, as held above, this Decision affirms the penalty period of 118 days for the craft of Cement Engineering. For that craft, Vailston violated California Code of Regulations, title 8, section 230, subdivision (a), by failing to issue DAS 140 forms or their equivalents to the applicable apprenticeship committees.[8]

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[7] DLSE also determined that for the craft of Cement Engineering, Vailston violated the requirements on issuing forms DAS 142 and hiring apprentices in the 1:5 ratio. However, the penalty period for those violations would be computed upon the days of journeyman work in that craft, which would be shorter than the 118-day period for violation of the DAS 140 requirement.

[8] The regulation states that contract award information shall be provided to the applicable apprenticeship committees no "later than the first day in which the contractor has workers employed upon the public work." It further states:

> 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 penalties under Labor Code Section 1777.7.

(Cal. Code. Regs., tit. 8, § 230, subd. (a).) Applying this regulation to a failure to notify Cement

Further, DLSE's audit imposed a one-day statutory penalty for Vailston's violation of section 1777.5 and California Code of Regulations, title 8, section 230.1, subdivision (a), requiring that it employ apprentices in the craft of Laborer Engineering in the ratio of one hour of apprentice work for five hours of journeyman work, and issue forms DAS 142 to the applicable apprenticeship committees. That one day was February 22, 2016, which was the first day Vailston had a Labor Engineering journeyman working on the Project. Accordingly, this Decision affirms DLSE's determination of this one-day penalty for the craft of Laborer Engineering.

Accordingly, Vailston is liable for a section 1777.7 penalty for a total of 119 violation days.

Vailston Is Liable for a Modified Penalty Under Section 1777.7.

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).) A contractor "knowingly" violates 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. (Cal. Code Regs., tit. 8, § 231, subd. (h). DLSE's determination of the amount of the penalty is reviewable only for an abuse of discretion. (§ 1777.7, subd. (d).) Here, the Assessment set the section 1777.7 penalty at the rate of $60.00 per penalty day.

DLSE provided prima facie evidence that Vailston's violation of the apprenticeship requirements was made knowingly, and the violations were not due to circumstances beyond its control. Vailston knew or should have known of its apprenticeship obligations. As addressed *ante*, Vailston paid a settlement of DLSE's demand letter regarding another project three months before the bid advertisement date of the present Project. This included a settlement of a section 1777.7 penalty. DLSE's demand letter stated a section 1777.7 penalty of $100.00 per violation. Vailston

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Engineering apprenticeship committees in this case could result in a penalty period of 147 days, from March 3, 2016, which was the day after the first day Vailston had workers in that craft employed upon the project, to the filing of the notice of completion on July 27, 2016. Given that DLSE only assessed the penalty for 118 days, however, this Decision will not impose a higher penalty.

paid the section 1777.7 penalty (at a reduced rate of $60.00 per violation). This is prima facie evidence that Vailston knowingly failed to comply with the apprenticeship requirements on this Project. There was no evidence that the violations were due to circumstances beyond Vailston's control. Not having appeared, Vailston did not show the penalty rate constituted an abuse of discretion. Given these considerations, Vailston is liable for modified section 1777.7 penalties in the total sum of $7,140.00, calculated at the rate of $60.00 for 119 violations.

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

FINDINGS AND ORDER

1. DLSE timely issued the Civil Wage and Penalty Assessment.

2. Vailston Company underpaid its workers $2,516.60 in prevailing wages.

3. Penalties under section 1775 are due from Vailston Company in the amount of $15,400.00 for 140 violations at the rate of $110.00 per violation.

4. Liquidated damages are due from Vailston Company in the full amount of the unpaid wages, $2,516.60.

5. Penalties under section 1813 are due from Vailston Company in the amount of $250.00.

6. Penalties under section 1777.7 are due from Vailston Company in the amount of $7,140.00.

7. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Wages Due:	$2,516.00
Penalties under section 1775, subdivision (a):	$15,400.00
Penalties under section 1813:	$250.00
Liquidated damages:	$2,516.60
Penalties under section 1777.7:	$7,140.00
TOTAL:	**$27,823.20**

In addition, interest is due from Vailston Company and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is modified and affirmed 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: December 24, 2019

/S/ *Victoria Hassid*
Victoria Hassid
Chief Deputy Director
Department of Industrial Relations[9]

[9] See Government Code sections 7, 11200.4.