

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Construction Management General  
Engineering, Inc.**

Case No. 12-0326-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR**

Affected subcontractor Construction Management General Engineering, Inc. (CMGE), made a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Casa Roble High School – Weight Room Building Expansion (Project) performed for the San Juan Unified School District (SJUSD) in Sacramento County. The Assessment determined that \$11,297.85 in unpaid prevailing wages, fringe benefits and training funds, and \$11,680.00 in statutory penalties were due. The affected contractor, S. W. Allen Construction, Inc. (S. W. Allen), did not request review of the Assessment but deposited the full amount of the Assessment with the Department of Industrial Relations (DIR) pursuant to Labor Code section 1742.1, subdivision (b).<sup>1</sup> A Hearing on the Merits was held on May 21, 2013, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Galina Velikovich appeared for DLSE. There was no appearance for CMGE. Now, based on un rebutted evidence showing that CMGE failed to pay the required prevailing wages and training funds, the Director of Industrial Relations affirms the Assessment.

**Facts**

Failure to Appear: Roderick MacKenzie filed a Request for Review of the Assessment as counsel for CMGE and appeared telephonically on CMGE's behalf at the Prehearing Conference on April 15, 2013, when this case was set for trial. At the Prehearing Conference, MacKenzie informed the Hearing Officer that CMGE's principal, Robert Bergthold, had failed to respond to

---

<sup>1</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

either telephone messages or written correspondence since early February 2013. MacKenzie withdrew as counsel for CMGE by letter addressed to both the Hearing Officer and then counsel for DLSE, David Cross, dated April 17, 2013. MacKenzie sent copies of his withdrawal to both Bergthold and CMGE along with a copy of the minutes of the Prehearing Conference and order setting the Hearing on the Merits for May 21, 2013. DLSE subsequently served its witness and exhibit lists and a proposed joint statement of issues on "Construction Management General Engineering, Inc., Attn.: Robert Bergthold." CMGE submitted neither witness nor exhibit lists and did not respond to DLSE's proposed joint statement of issues.

There was no appearance for CMGE on the day of the Hearing on the Merits. The Hearing Officer proceeded to conduct the Hearing in CMGE's absence for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection, and the matter was submitted on the evidentiary record, including the testimony of DLSE's auditor, Jerry McClain, and one of CMGE's workers on the Project, Dallas Eugene King.

Assessment: The facts stated below are based on Exhibits 1 through 22 submitted by DLSE, other documents in the Hearing Officer's file, and the testimony at the Hearing.

On or about April 11, 2011, SJUSD advertised the Project for bid. SJUSD contracted with S. W. Allen as the prime contractor for the Project. S. W. Allen subcontracted with CMGE to perform demolition, excavation, grading and site work, including asphalt, underground plumbing and concrete finish work. CMGE workers performed work on the Project from approximately June 29, 2011 to January 25, 2012.

King and another CMGE worker, Daniel Rupe, both submitted complaints to DLSE alleging that CMGE had failed to pay them the required prevailing wages on the Project. King and Rupe's complaints precipitated an investigation which led to the Assessment. DLSE served the Assessment on October 1, 2012, and MacKenzie timely request review on CMGE's behalf on October 16, 2012.

The Assessment and attached audit worksheets reflect an underpayment of prevailing wages to 14 workers who worked in five separate classifications.<sup>2</sup> The underpayments appear to have resulted from a combination of misclassification of workers as laborers when they were performing work within the scope of other crafts, failure to pay the correct prevailing wage rate to workers who were correctly classified, failure to report and pay all hours of work and failure to make training fund contributions.

Based on the un rebutted evidence and testimony regarding the nature of the work performed, the number of hours worked, and the amount paid, the record shows that CMGE failed to pay the required prevailing wages. There is no evidence that CMGE paid training fund contributions as required by the applicable prevailing wage determinations. In addition, DLSE assessed \$10,680.00 in penalties under section 1775 for 356 instances of failure to pay the applicable prevailing wages. Penalties under section 1775 were assessed at the mitigated rate of \$30.00 per violation based on DLSE's finding that the violations were willful. DLSE also assessed \$1,000.00 in penalties under section 1813 for 40 instances of failure to pay the proper overtime rate. As noted above, the record shows that the affected contractor, S. W. Allen made a timely deposit of the full amount of the Assessment with DIR pursuant to section 1742.1, subdivision (b) entitling both it and CMGE to a waiver of liquidated damages.

### Discussion

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. 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 *see Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775 requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for

---

<sup>2</sup> The applicable prevailing wages determinations (PWDs) are: Laborer (NC-23-102-1-2011-1), Cement Mason (NC-23-203-1-2010-1), Operating Engineer (NC-23-63-1-2010-1), Teamster (NC-23-261-1-2011-1), and General Prevailing Wage Determination for Sacramento County (SAC-2011-1) for the craft of Plumber – Underground Utility Pipefitter.

failing to pay the prevailing rate. During the relevant period, under section 1775, the penalty was a maximum of \$50 for each calendar day for each worker paid less than the prevailing wage. The penalty is a minimum of \$30 for each calendar day for each worker paid less than the prevailing wage where it is determined that the violation is willful.

During the relevant period, Section 1813 prescribed a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due.

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. Alternatively, an affected contractor, subcontractor or surety can escape liquidated damages by depositing the full amount of the Assessment with DIR under section 1742.1, subdivision (b).

When DLSE determines that a violation of the prevailing wage laws has occurred, 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. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review shall be conducted and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing.

The contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) In this case, the record establishes the basis for the Assessment and CMGE has presented no evidence to disprove the basis for the Assessment. Accordingly, the Assessment is affirmed. Because S. W. Allen made a timely deposit of the amount of the Assessment with DIR pursuant to section 1742.1, subdivision (b), neither it nor CMGE are liable for liquidated damages.

### **FINDINGS AND ORDER**

1. Affected subcontractor Construction Management General Engineering, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Unpaid wages are due in the amount of \$9,919.55.

3. Unpaid training fund contributions are due in the amount of \$1,378.30.
4. Affected contractor S. W. Allen Construction, Inc., timely deposited with the Department of Industrial Relations, the full amount of the Assessment, including penalties and both it and CMGE are therefore excused from liquidated damages under section 1742.1, subdivision (b).
5. Penalties under section 1775 are due in the amount of \$10,680.00 for 356 violations.
6. Penalties under section 1813 are due in the amount of \$1,000.00 for 40 violations.
7. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	\$9,919.55
Training Fund Contributions Due:	\$1,378.30
Penalties under section 1775, subdivision (a):	\$10,680.00
Penalties under section 1813:	\$1,000.00
Liquidated Damages under section 1742.1, subdivision (a):	\$0.00
<b>TOTAL:</b>	<b>\$22,977.85</b>

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is 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: 5/29/2013

  
 Christine Baker  
 Director of Industrial Relations