

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Sierra Nevada Stucco

Case No. 14-0192-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Sierra Nevada Stucco (Sierra), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) regarding the Mission San Jose High School Special Education Classroom Wing project (Project) performed for the Fremont Unified School District (District) in Alameda County. The Assessment determined that \$94,273.01 in unpaid prevailing wages and statutory penalties was due. A telephonic hearing on the merits was held on December 8, 2014, before Hearing Officer Nathan D. Schmidt. Galina Velikovich appeared for DLSE. Sierra failed to appear at hearing. Now, based on un rebutted evidence showing that Sierra failed to pay the required prevailing wages to its workers, the Director of Industrial Relations affirms the Assessment.

Facts

The prime contractor for the Project, D. L. Falk Construction, Inc. (Falk), did not request review of the Assessment, but at the last Prehearing Conference, held on November 14, 2014, Ms. Velikovich informed the Hearing Officer that Falk and DLSE had settled the assessed unpaid wages, training funds and Labor Code section 1813 penalties for underpaid overtime in full.¹ The sole remaining issues for hearing are the assessment of penalties against Sierra under section 1775 and liquidated damages under section 1742.1, subdivision (a.).

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

Failure to Appear: At the last Prehearing Conference, Erika Ibaibarraiga, who had been appearing for Sierra up to that point, informed the Hearing Officer that she was no longer employed by Sierra and that the business was closed. Ibaibarraiga told the Hearing Officer that neither she nor any other representative would be appearing for Sierra at the Hearing on the Merits. The case proceeded in Sierra's absence and the Hearing Officer recommended a decision based on the evidence presented pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

DLSE's evidentiary exhibits 1-18 were admitted into evidence without objection. Jerry McClain testified on behalf of DLSE.

Assessment: The facts stated below are based on Exhibits 1-18 submitted by DLSE, the Assessment, testimony presented at trial, and any other documents in the Hearing Officer's file.

On or about October 25, 2012, Falk entered into a public works contract with the District regarding the Project. On or about January 24, 2013, Falk subcontracted with Sierra to perform stucco work on the Project. The applicable prevailing wage determinations are NC-31-X-16-2012-2 and ALA-2012-2, and the applicable job classifications for all affected workers are Dry-wall Installer and Plasterer.

DLSE assessed \$25,080.00 in penalties under section 1775, at the mitigated rate of \$120.00 per violation, for 209 instances of failure to pay the applicable prevailing wage rates. DLSE submitted a revised audit on the day of hearing that reduced the assessed unpaid wages from \$66,296.03 to \$58,293.10.

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." (Lab. Code § 90.5, subd. (a), and *see Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcon-

tractors pay the difference to workers who received less than the prevailing rate and also pre-scribes penalties for failing to pay the prevailing rate. Section 1813 prescribes 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.

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 or subcontractor may appeal that assessment by filing a Request for Review under section 1742. The contractor or subcontractor "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 Sierra presented no evidence to disprove the basis for the Assessment or to support a waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, the Assessment is affirmed in its entirety.

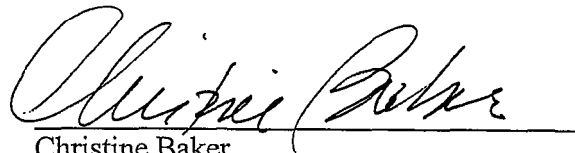
FINDINGS AND ORDER

1. Affected subcontractor Sierra filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Penalties under section 1775 are due in the amount of \$25,080.00 for 209 violations at the rate of \$120.00 per violation.
3. The assessed prevailing wages were not paid within 60 days after service of the Assessment and liquidated damages are therefore due in the amount of \$58,293.10 and are not subject to waiver under section 1742.1, subdivision (a).
4. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Penalties under section 1775, subdivision (a):	\$25,080.00
Liquidated damages:	<u>\$58,293.10</u>
TOTAL:	\$83,373.10

The Civil Wage and Penalty Assessment is affirmed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 4/28/2015



Christine Baker
Director of Industrial Relations