

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Embree Construction Group, Inc. and  
Truitt Oilfield Maintenance Corporation**

Case No. 15-0468-PWH

From Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor Embree Construction Group, Inc. (Embree) and affected subcontractor Truitt Oilfield Maintenance Corporation (Truitt) submitted a timely joint request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on December 2, 2015, with respect to the work known as the Dollar General – Highway 108 and School Street Project (Project). The Assessment found that Truitt failed to submit payroll records to DLSE upon written request and determined that \$28,500.00 in statutory penalties under Labor Code section 1776 was due.<sup>1</sup> A Hearing on the Merits was conducted on December 19, 2016, in Bakersfield, California, before Hearing Officer Gayle T. Oshima. Thomas Kovacich appeared for Embree and Truitt, and David Cross appeared for DLSE. The matter was submitted for decision after post-trial briefing on February 3, 2017.

The issues for decision are:

- Is the work performed by Truitt as required under the California Department of Transportation (Caltrans) encroachment permit a public work under Streets and Highways Code section 670.1, subdivision (c) subject to prevailing wage requirements?
- Is Truitt exempt from prevailing wage requirements under Streets and Highways Code section 670.1, subdivision (c)?
- Is Truitt liable for penalties under section 1776?<sup>2</sup>

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

<sup>2</sup> Under the wording of section 1776, subdivision (h), Embree, as the prime contractor, is not liable for Truitt's non-production of certified payroll records. The Assessment imposed section 1776 liability on

The Director finds that the work performed by Truitt as required by the encroachment permit is not a public work and, therefore, is not subject to prevailing wage requirements under Streets and Highways section 670.1, subdivision (c). Therefore, the Director of Industrial Relations issues this Decision dismissing the Assessment.

## FACTS

On August 21, 2015, the Foundation for Fair Contracting filed a public complaint with DLSE regarding the Project on Highway 108 and School Street in Oakdale, California. The complaint alleged that Embree and Truitt violated Streets and Highways Code section 670.1 by failing to pay prevailing wages on the Project.

Before the Project, the property was a residential home with an existing driveway. Embree was the general contractor for building and developing a new Dollar General Store on the property located at Highway 108 and School Street. Truitt was awarded the subcontract to do the concrete work, including laying the sidewalks, flat work for the trash enclosures and gates, foundation, curb and gutter work, and putting in the new driveway. Truitt represented that no public funds were used for the Project and DLSE did not dispute that representation.

Because the Project included the construction of utility connections, a sidewalk, curbs and gutters, and a widened new commercial driveway along Highway 108, Embree applied for a Caltrans Encroachment Permit (Permit) on October 14, 2014. Truitt laid out the concrete sidewalks that abutted Highway 108 and installed a new commercial driveway, including tying in portions of the new curb and gutter with Highway 108, among other things. Five feet of each side of the new driveway (the wings) and the curb and gutter, along with the approach of the driveway were installed in order to be tied into the existing gutter and roadway. Ty Dowding, Project Manager of Embree, testified that they also performed work to connect utility lines from the property to the main lines in the highway.

Caltrans approved the Permit on February 6, 2015. Under the Permit Embree was to:

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Truitt alone. Consequently, this Decision addresses Truitt's liability alone, notwithstanding the fact that Embree joined Truitt's request for review.

Install a new commercial driveway along the southerly side of State Route (SR) 108 located at the southeast corner of SR 108/School Avenue intersection in the City of Oakdale. Work includes curb, gutter, sidewalk, parking striping, and water, fire, and sewer utility connections. All work shall conform to the approved plans and as per Caltrans Standard Specifications 2010. Traffic control shall be done as per attached lane closure chart.

By certified mail deposited on September 16, 2015, DLSE sent a Request for Payroll Records (Request) to Truitt at its address of record, P.O. Box 45066, Bakersfield, California 93388, along with a Notice of Investigation, Statement of Employer Payments, and Notice of Apprenticeship Compliance. In the same mailing, although Embree was the prime contractor, DLSE sent Embree as awarding body at its address of record, 4747 Williams Dr., Georgetown, Texas 78628 the Notice of Investigation, Request for Information, and Notice of Apprenticeship Compliance sent to Truitt. The Request to Truitt asked for copies of certified payroll information for all workers it employed. Enclosed with the Request was a form for the subcontractor's use in certifying under penalty of perjury that the submitted records were true, full and correct copies of originals that depict the payroll records of the actual disbursements to the workers. The Request specified that failure to provide the Certified Payroll Records (CPRs) within 10 working days of receipt of the request would subject Truitt to a penalty of \$100.00 per calendar day or a portion thereof for each worker until the records are received, citing section 1776, subdivision (h).

On December 2, 2015, because DLSE had not received the requested documents, DLSE again sent Truitt the Request, along with a Notice of Impending Debarment. The Notice of Impending Debarment stated that if the CPRs were not provided to DLSE within 30 days, Truitt would be subject to debarment under section 1777.1.

Also on December 2, 2015, DLSE issued an Assessment and served it on Truitt and Embree by certified and first class mail. The Assessment imposed a penalty on Truitt of \$28,500.00 for failure to provide payroll records within ten days as required by subdivision (a) of section 1776—from October 7, 2015, (ten working days after Truitt received the Request<sup>3</sup>) to

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<sup>3</sup> In a letter to the DLSE dated October 1, 2015, Truitt acknowledged receipt of the Notice of Investigation, and, presumably, the other documents contained in the packet, on September 22, 2015.

and including December 2, 2015, (for 57 days) at \$500.00 per day (for five workers at \$100 per day). DLSE determined the number of workers based on the number appearing in photographs of the active work site provided to DLSE by the Foundation for Fair Contracting. Truitt's Project Manager, Jerry Laurita, testified at the hearing that three to five Truitt workers worked on the Project. No wages or other penalties were assessed against Truitt or Embree. As of the date of the hearing, Truitt had not provided the CPRs to DLSE.

Truitt, joined by Embree, timely filed a request for review of the Assessment on or about December 8, 2015. Truitt contends that DLSE does not have jurisdiction to issue an Assessment in that the Project is not a public work subject to the Prevailing Wage Law because the Project was funded solely with private monies. Truitt also argues that Streets and Highways Code section 670.1 exempts the Project from application of the Prevailing Wage Law. Extensive testimony and examination took place regarding the numerous photographs that showed the work undertaken by Embree and Truitt. Photographs from Google Maps showing the finished Project were also examined and discussed. In those photographs, a new school crossing sign was seen in the sidewalk in front of the Project. Dowding and Laurita testified that they did not install the school crossing sign. They testified that Truitt was responsible for all the concrete work on the Project, including installing the new driveway and related curb and gutter work, among other things. Nothing was presented as to Caltrans' opinion whether the work was a public work and, if so, whether it was exempt from prevailing wages. Dowding, however, testified that Caltrans did not accept the work into the highway system and DLSE did not rebut this testimony.

## DISCUSSION

Section 1720 and following set forth a framework for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts. "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 (*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 *Lusardi, supra*, at p. 985.)

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who must keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) Section 1776, subdivision (d) requires a contractor and subcontractor to provide its CPRs within ten days after a written request of the DLSE. Subdivision (h) assesses a penalty of \$100.00 per day for each day the contractor or subcontractor fails to comply with such a request within the initial 10-day period, but that subdivision also provides that a contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.<sup>4</sup>

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 the assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

Under the terms of Streets and Highways Code section 670.1, subdivision (c), road work performed under a Caltrans permit for acceptance into the state highway system is deemed to be a public work subject to prevailing wage requirements unless exempted under the terms of the statute. The entirety of Streets and Highways Code section 670.1 reads:

- a) The department may issue a permit to the owner or developer of property adjacent to or near a state highway to construct, alter, repair, or improve any portion of the highway for the purpose of improving local traffic access, if the improvements to the highway are required as part of, or as a condition to, the development of property and the improvements are accepted by the department.

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<sup>4</sup> Section 1776, subdivision (h) specifies that the contractor or subcontractor has “ten days” from the date of receipt in order to comply with the request. The statutory language does not provide for “ten working days” from the date of receipt. However, DLSE’s Request specified “ten working days,” thereby giving Trutt that period of time within which to respond because “days” means “calendar days” unless otherwise specified. (Cal. Code Regs., tit. 8, § 16000.)

- b) The permit may be issued only if the work within the highway right-of-way is to be performed in accordance with plans and specifications approved by the department and the department reserves the right to inspect and accept the work as complying with the approved plans and specifications.
- c) All road, bridge, street lighting, or installation of signal work performed under a permit issued pursuant to this section for acceptance into the state highway system, except work performed solely to allow private encroachments onto the state highway or for utility or drainage encroachments within the state highway, are public works for purposes of Part 7 (commencing with Section 1720) of Division 2 of the Labor Code.

The issues in this case, then, begin with whether the work under the permit is a public work, and if so, whether it qualifies for the exemption under subdivision (c).

Truitt contends the Project is not a public work because no public funds were used and because no changes or improvements have been made to Highway 108. Truitt also argues that, even if it is a public work, the statutory exemptions apply because the driveway is a private right of way for customers of the Dollar General Store and the utility work is exempt as an encroachment within the state highway. DLSE contends that the commercial driveway and related curb and gutter work is a public work and the utility work exemption does not apply because the work was not solely for utility or drainage encroachments.

The driveway, sidewalk, curb, gutter, and utility work under the Permit do not constitute public work. No evidence shows that the work was done to be accepted into the highway system within the meaning of Streets and Highways section 670.1, subdivision (c). Indeed, Dowding testified without rebuttal that Caltrans did not accept the work into the highway system. Therefore, the work cannot be deemed a public work. Truitt is mistaken that the lack of public funds translates into a finding of no public work. (See, e.g., *Azusa Land Partners v. Department of Industrial Relations* (2010) 191 Cal.App.4<sup>th</sup> 1, 19-20 [referring to work for an improvement district as public work despite no requirement that the district pay for the work performed on its behalf].) Nonetheless, the limited nature of the work and the evidence that Caltrans did not accept the work into the highway system here lead to the conclusion that no public work is implicated on the Project.

Both Truitt and DLSE cite two of the Director's past public work coverage



determinations to argue how the exemptions under the applicable statute would apply here. The exemption analysis in this case, however, need not be reached because the threshold issue whether the Project is a public work disposes of the matter. Nonetheless, by their own terms the cited determinations only verify the conclusion reached that no public work is implicated here.<sup>5</sup> In Public Work Case No. 2009-041, *Highway 132 and Dakota Avenue Intersection Upgrades, County of Stanislaus* (January 12, 2010) (*Dakota Avenue Intersection*), an almond grower/owner co-op expanded operations by building a larger plant. As a condition of granting the approval to expand the facilities, the county required that the highway intersection itself be upgraded, which in turn, required an encroachment permit from Caltrans. The scope of the permit included the “Upgrade [of] the intersection of State 132 and Dakota Avenue by widening to accommodate acceleration and deceleration lanes....” While the determination focused on whether the improvement work was exempt under subdivision (c) of Streets and Highways Code section 670.1, the exemption analysis could be reached because the Director had concluded that the work entailed a public work. As seen in the determination, the project entailed work improving the public highway itself, work that “...lengthened th[e] lanes and prepared the intersection for the installation of signals to be undertaken at a later date.” The factual recitations in *Dakota Avenue Intersection* also show a date certain that Caltrans accepted the work into the highway system. In contrast, the work here as described in the Caltrans permit was to “Install a new commercial driveway along the southerly side of State Route (SR) 108... curb, gutter, sidewalk, parking striping, and water, fire, and sewer utility connections.” The permit did not contemplate upgrading Highway 108 itself, its intersection with School Road, or improvements to turn lanes. Instead, it addressed improvements that merely abutted Highway 108. Further, as stated above, the unrebutted evidence is that Caltrans did not accept the work “into the highway system” within the meaning of Streets and Highway section 670.1, subdivision (c).

Similarly, in Public Work Case No. 2003-024, *Highway 41 Road Widening, Coarsegold, California* (September 18, 2003) (*Coarsegold*), the subcontract at issue was for expansion of the public highway. Under an agreement with the county board of supervisors and as a condition of developing the property, the highway was widened, right and left turn lanes and eight-foot

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<sup>5</sup> Public works coverage determinations of the Director are not precedential. However, they may be instructive on a particular point or area of the law

shoulders added on both sides of the road, and new traffic signals were to be installed, among other work, for access to a road leading to a casino. The work was performed under an encroachment permit from Caltrans, “to be inspected and approved [by Caltrans] before it may be accepted into the state highway system.” Because the permit was “for the Highway 41 widening, which will be accepted into the highway system,” the determination found the work was a public work under Streets and Highways Code section 670.1, subdivision (c). Unlike the situation in *Coarsegold*, no widening of Highway 108 occurred here, no new turn lanes were added, and the only evidence was that Caltrans did not accept the work into the state highway system. The evidence did suggest that elements adjacent to State Route 108--the widened driveway for better ingress and egress for the Dollar General Store and curbs and gutters -- were somehow “tied into” the highway. Yet, that evidence cannot substitute for proof that Caltrans accepted the work into the highway system.

Because the new driveway, curb, gutter, utility, and related work are not a public work, it is not necessary to explore whether the work is otherwise exempt under the exception in Streets and Highway section 670.1, subdivision (c) for work “solely to allow private encroachments onto the state highway or for utility or drainage encroachments within the state highway.” Likewise, it is not necessary to discuss whether DLSE’s penalty assessment under section 1776 is appropriate.

### FINDINGS

1. The Project is not a public work under Streets and Highways Code section 670.1.
2. DLSE’s assessment of penalties against Truitt under section 1776, subdivision (h) for its failure to provide certified payroll records to DLSE within 10 days of DLSE’s request is dismissed.

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**ORDER**

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

Dated: 12/12/2017



Christine Baker  
Director of Industrial Relations