STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of

Sterling Roofing Inc. Case No. 03-0153-PWH

From the Notice of Withhold issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

PROCEDURAL HISTORY

On February 17, 2004, the Division of Labor Standards Enforcement ("Division") issued a Civil Wage and Penalty Assessment ("Assessment") against Sterling Roofing Inc. ("Sterling"). In the Assessment, the Division determined that Sterling had used an improper wage classification for Roofer instead of the prevailing wage rate for Sheet Metal Worker resulting in the underpayment of wages, and that Sterling was liable for penalties under Labor Code sections 1775 and 1813 for failing to pay the correct prevailing wage. For the reasons set forth below, the Assessment is dismissed. The appointed Hearing Officer, Frank Nelson Adkins conducted several pre-hearing conferences. Thomas Fredericks represented the Division, and Kent B. Seitzinger represented Sterling.

By agreement of the parties, the matter was submitted upon a stipulated factual record. Post-hearing briefs and reply briefs were filed by each party. The last brief was received by the Hearing Officer on or about September 13, 2004, and the matter was deemed submitted on that date.

The record, however, was reopened by Order Vacating Submission dated November 23, 2004. The November 23, 2004, Order requested submissions from the parties responsive to the Hearing Officer's inquiry: "How was the request for the area practices investigation referenced in

joint Exhibit "4" (October 16, 2002, letter from Acting Director Chuck Cake to Randy Young, Sheet Metal Workers Local 162) initiated? Specifically, did the request purport to initiate the process set forth in Labor Code section 1773.4 and governing regulations? If so, were the procedures set forth in Labor Code section 1773.4 and governing regulations followed?"

The parties submitted their joint response on January 7, 2005.[1]

SUMMARY OF EVIDENCE

The facts are undisputed. The Stipulated Factual Record as agreed to by the parties on or about July 28, 2004, is as follows (references to the exhibits attached to the Stipulated Factual Record are admitted):[2]

1. The Civil Wage and Penalty Assessment ("CWPA") dated February 17, 2004, including the Public Records Audit Worksheet (Summary) was timely served.

2. The DLSE has prepared a Revised Public Works Audit Worksheet (Revised Summary) which reduces the amounts alleged to be due and owing. The parties hereby agree that the Revised Summary replaces the original summary.

3. A letter dated February 26, 2004, is the Request for Review was timely filed on behalf of Sterling Roofing, Inc. ("Sterling").

4. The project known as the New Woodland High School identified in the CWPA was a public work within the meaning of Labor Code section 1720.

5. The calculations set forth in the Revised Public Works Audit Worksheet (Summary) are mathematically correct, and there is no dispute that the amounts listed in the

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[1] The time frames within which to commence a hearing as well as for issuance of a decision under Labor Code § 1742 are directory in nature. (See *California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133.)

[2] The recitation of the stipulated factual record is quoted from the parties' submission.

columns headed "Total Wages Paid"; "Prevailing Wage Requirements Total Wages"; Amount Owing and Unpaid"; "Training Fund", accurately reflect the amounts paid by Sterling and the deficiencies which exist if the required prevailing wage rate is the rate for the classification of Sheet Metal Worker as set forth in Prevailing Wage Determination YOL-2001-2.[3]

6. The bid advertisement date for the New Woodland High School project was September 10, 2001.

7. Acting Director of Industrial Relations Chuck Cake, by letter dated October 16, 2002, determined that the minimum rate of pay for the installation of rain gutters, metal flashing, and standing seam metal roofing on the New Woodland High School project was not less than that paid to a Sheet Metal Worker.

8. By facsimile transmission dated November 7, 2002, Sterling was provided with a copy of Acting Director Cake's October 16, 2002, letter.

9. The work performed by Sterling's employees on the project did not commence until after Sterling had been provided with a copy of Acting Director Cake's October 16, 2002, letter.

10. The first page of a form entitled "Amended Labor Code section 1775 Penalty Review" was executed by DLSE Sr. Deputy Labor Commissioner Joe Romanazzi on February 17, 2004.

11.[4] In response to the Order Vacating Submission of November 23, 2004, the parties on January 7, 2005, jointly submitted a letter of September 26, 2001, from Randy Young, Union Organizer on letterhead for Local Union No, 162 of the Sheet Metal Workers International Association to Steve Smith, Director of the Department of Industrial Relations. The September 26, 2001, letter requested "...a review and determination as to the proper wage rate for the Installation of Rain Gutter, Metal Flashing and Standing Seam Sheet Metal Roof." By that same joint submission of January 7, 2005, the parties represented that they did not have any

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[3] Rather than the classification of Roofer used by Sterling and also set forth in Prevailing Wage Determination YOL-2001-2.

[4] Paragraph "11" was not part of the parties' original submission of July 28, 2004.

information as to the process followed by Acting Director Chuck Cake in responding to the September 26, 2001, request.

DISCUSSION

Labor Code section 1720[5] and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

> 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.
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> *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, at 987 [citations omitted].

The Division 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(a), and *see Lusardi, supra.*

Section 1775(a) requires, among other things that contractors and subcontractors make up the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 service of a civil wage and penalty assessment under section 1741.

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, the Division issues a civil wage and penalty assessment, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal "[t]he contractor or subcontractor shall have the burden of proving that the basis for the

civil wage and penalty assessment is incorrect." Lab. Code, §1742(b).

The prevailing rate of pay for a given craft, classification, or type of work, is something that the Director of Industrial Relations determines in accordance with the standards set forth in section 1773. It is the single rate that may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. Lab. Code, §§1773 and 1773.9, and *see, California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651. The Director determines these rates and publishes general wage determinations such as SAC 2002-1 to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. Lab. Code, § 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.

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. *See*, Lab. Code, §1773.2 and *Ericsson, supra*. 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.

Sterling Roofing Was Not Required To Pay The Sheet Metal Worker Prevailing Wage Rate.

The issue in this case is what is the effect of the Acting Director's post bid-advertisement-date determination of October 16, 2002, that the classification, and hence prevailing wage rate, for the installation of rain gutters, metal flashing, and standing seam metal roofing was not less than that paid to a sheet metal worker?

At the time of the bid advertisement date, there were prevailing wage determinations specifying the prevailing rate of pay for Sheet Metal Worker and Roofer. The applicable Prevailing Wage Determination was YOL-2001-2. That determination provided for rates for "Roofer" as well as "Sheet Metal Worker." The scope of work provisions relating to YOL-2001-

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[5] All further statutory reference is to the California Labor Code, unless otherwise indicated.

2 for Roofer provided that coverage included work involving "All metal roofing covered by a C-14 State Contractor's License." The scope of work provisions for "Sheet Metal Worker" also provided for coverage which included "...all metal roofing, gutters, downspout and related metal flashing...." Because Sterling paid the prevailing wages specified for the Roofer classification and the scope of work provisions encompassed metal roofing, it did not violate its statutory obligation to pay prevailing wages, even though the scope of work overlapped with some of the provisions of the Sheet Metal scope of work provisions, unless the subsequent area practice determination was effective. The C-14 specialty classification was eliminated in 1998. Under Division 8, of title 16, Article 3 of the California Code of Regulations, the work encompassed by the C-14 class (metal roofing systems) was subsumed within both the Roofer class (C-39) and the Sheet Metal class (C-43). A contractor who possessed only a C-14 license automatically possessed a C-39 license. It seems evident therefore that for scope of work purposes, a C-14 and C-39 license are interchangeable.

The question then becomes is the retroactive application of the October 16, 2002, determination and area practices investigation justified in this case?

The October 16, 2002, determination, and area practices investigation upon which it is based, is consistent with the authority to determine the prevailing rates of pay in a given locality under section 1773. In the context of determining the general prevailing rate of per diem wages, however, section 1773.6 provides that the determination "...shall not be effective as to any contract for which the notice to bidders has been published." Under California Code of Regulations, title 8, section 16204 (a)(1) and (a)(4) "determinations issued will be effective ten (10) days after issuance..." and that determinations modified "...on the basis of information contained in copies of collective bargaining agreements filed with the Department shall not be effective as to any project in which a call for bids takes place less than 30 days after the filing of the agreement."

Based upon these provisions, there is recognition that, with respect to the general prevailing rate of per diem wages, a determination will not change the required rates of pay on projects already subject to the bidding process.

In addition, the request for a project specific determination is subject to the procedures and time limits prescribed by section 1773.4. Here there was no evidence of compliance with section 1773.4. Section 1773.4 in relevant part provides that:

> Within two days, thereafter [filing of verified petition to review a determination], a copy of such petition shall be filed with the awarding body.... The Director of Industrial Relations or his authorized. representative shall, upon notice to the petitioner, the awarding body and such other persons as he deems proper, including the recognized collective bargaining representatives for the particular crafts, classifications or types of work involved, institute an investigation or hold a hearing. Within 20 days after the filing of such petition, or within such longer period as agreed upon by the director, the awarding body, and all the interested parties, he shall make a determination and transmit the same in writing to the awarding body and to the interested parties.

At a foundational minimum, the process by which that determination was reached must have complied with section 1773.4. It is necessary to prove not only that the petition was timely but also that the petition was filed with the awarding body. Here, there was no proof of procedural compliance with section 1773.4 with respect to filing the petition with the awarding body. Hence, the determination resulting from that process over a year later cannot bind Sterling. If there had been compliance with section 1773.4, then the awarding body and contractor would have had the right to re-bid the work. Lab. Code, § 1773.4, 2d par.

The argument for holding the contractor to the higher of two published rates is similar to the argument rejected in *Ericsson.* That case rejected the argument that a contractor has the ability to pay a lower rate than those published as prevailing when a different rate had been given as a special determination for another project, but not yet published as generally prevailing by the time of bid advertisement. The court held that such contractors are instead on notice of the required published rate. (*Ericsson, supra*, 221 Cal.App.3d at 125). Here there were **two** published rates both of which on their face could be used, and one of which was paid. The Division's argument for the higher rate rests on a special determination, which neither was published nor even existed at the time of bid, as requiring the higher of the two published rates to be paid. The existence of an official letter to private parties specifying a choice of a rate between the two published, but which was neither published by DIR nor delivered as a special

determination for this project, does not control this case under the *Ericsson* principles.

To sum up the evidence in this case, the published prevailing wage determinations for both Roofer and Sheet Metal Worker contained scopes of work that provided for the installation of metal roofs; the CSLB allowed the installation of metal roofs by either licensed roofer or licensed sheet metal contractors; and none of the parties listed in section 1773.4 properly requested clarification from DIR for this project.[6] In this circumstance, the contractor cannot be penalized for paying a published rate as "this sort of delicate line-drawing goes far beyond the task of determining 'general prevailing wages' by 'craft, classification or type of workman.'" *Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473.

In this factual context, Sterling should not be penalized for its reliance on the facts as they existed on the bid advertisement date since it was not afforded the right to submit a new bid after the October 16, 2002, letter. Sterling is entitled to rely upon the express guidance provided by the published general determinations.

Accordingly, the Assessment against Sterling must be dismissed.

FINDINGS

1. The bid advertisement date for the New Woodland High School Project was September 10, 2001.
2. The New Woodland High School Project was a public works project requiring the payment of prevailing wages.
3. As of the bid advertisement date an applicable classification and wage rate for the New Woodland High School Project relevant to Sterling was that of Roofer.

[6] While the Labor Code provides that DIR will publish prevailing per diem wages for the necessary "craft, classification and type of worker," there is no such obligation to publish rates for task in which a type of worker might engage. Nowhere is there recognized a craft or classification of "metal roofer." As the CSLB licensing regulations show, nor is there just one type of contractor devoted to installation of metal roofing.

4. The applicable General Prevailing Wage Determination YOL-2001-2 authorized use of the prevailing wage rate for Roofer or for Sheet Metal Worker (HVAC) for the Project

5. Sterling Roofing did not fail to pay its workers at least the prevailing wage rate.

6. All other issues are moot.

ORDER

Therefore, the assessment is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 28 March 07

John M. Rea
Acting Director of Industrial Relations