

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Clark & Sullivan Builders, Inc.

Case No. 06-0158-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

Affected contractor Clark & Sullivan Builders, Inc. ("C&S") submitted 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 work performed by C&S on the Folsom Lake College Industrial Facility Phase 1B ("the Project") in Sacramento County. The Assessment, which issued on August 25, 2006, determined there was \$218,108.43 in unpaid prevailing wages and statutory penalties. A Hearing on the Merits occurred on July 26, 2007, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Ronald W. Brown appeared for C&S, and David D. Cross appeared for DLSE. After the conclusion of post-hearing briefing, the Hearing Officer determined that the record was insufficient to make a determination on the sole disputed issue of the total base bid project value. The Hearing Officer therefore vacated submission of the matter and took additional evidence at a Further Hearing on the Merits on April 2, 2008, in San Francisco, California. For the reasons set forth below, the Director of Industrial Relations issues this decision dismissing the Assessment in full.

SUMMARY OF FACTS

The only issue is whether C&S was required under the applicable prevailing wage determination to pay a higher rate for its carpenters. Prevailing Wage Determination Number NC-23-31-1-2002-1 ("the PWD") prescribes the prevailing wages for carpenters employed on the Project. It specifies three area prevailing wage rates: Area 1, which has the highest prevailing wage rates, includes predominately San Francisco Bay Area counties, and Area 3,

which has the lowest prevailing wage rates, includes Sacramento County where the Project is located. DLSE stipulated at trial that no unpaid prevailing wages or penalties are due if the Area 3 rate applied to the Project.

Footnote "i" of the PWD modifies the prevailing wage rates applicable to large projects in Areas 2 and 3, stating:

For total base bid project value of \$25 million or more, wages and fringe benefits shall be those prescribed for AREA 1. Where there is a published or advertised estimate of the construction costs for a project, such estimate shall determine "the total base bid project value," for purposes of the twenty-five [*sic*] (\$25,000,000) threshold.

The principal question to be answered is whether the "total base bid project value" of the Project, as defined by the PWD, was \$25 million or more.

The essential facts of the case are undisputed.

In early March 2003, the Los Rios Community College District ("LRCCD") published a Notice to Contractors ("Public Notice") soliciting bids on the Project. The scope of work for the Project was described as follows:

The work shall consist of, but not [*sic*] limited to, an approximate 30,000 GSF addition to the existing Folsom Lake College Learning Resource Center/Student Services facility; an approximate 2,800 GSF new Central Plant facility, and an approximate 70,000 GSF new two-story multi-use educational facility, including but not limited to, chemistry labs, biology labs, interdisciplinary labs, classrooms, lecture areas, staff and student work rooms, and faculty offices. The project will include associated parking and site improvements, including a new 4-way signalized intersection at East Bidwell, as permitted through the City of Folsom.

The Public Notice stated that "[t]he estimated construction cost of this project is \$24,500,000.00." Potential bidders were also informed that:

The bid award, if awarded, will be pursuant to California Contract Code Section 20103.8 (a) [*sic*] the lowest bid shall be the lowest bid price on the **base contract** without consideration of the prices on the additive or deductive items. [Emphasis in original.]

LRCCD issued Bid Addendum Number One ("Addendum One") on March 14, 2003, which, in part, revised the estimated construction cost on the Project as follows:

The estimated construction cost for the state-funded portion of this project is \$24,500,000.00.

The estimated construction cost for the district-funded Additive Alternate No. 1 and Additive Alternate No. 2 combined is \$1,770,000.00.

Section 01030 of the Project Specifications, entitled "Alternates," defines "alternate" as follows:

An alternate is an amount proposed by bidders and stated on the Bid Form, for certain work defined in the Bidding Requirements that may be added to or deducted from the Base Bid amount if the Owner decides to accept a corresponding change in either the amount of construction to be completed, or in the products, materials, equipment, systems, or installation methods described in the Contract Documents.

The Project Specifications informed bidders that notification as to "whether alternates have been accepted, rejected or deferred for later consideration" would take place "immediately following the award of the Contract."

In summary, Additive Alternates 1 and 2, as described in the Project Specifications Schedule of Alternates, included the potential completion of a perimeter road around the Project and the improvement of two parking lots in addition to the existing parking lots that had been constructed in an earlier phase of the Project and parking related improvements that were included in the base bid.

LRCCD awarded a contract for the Project to C&S on June 23, 2003, based on a bid of \$26,910,000.00. The Notice of Award was for a contract amount of \$28,212,000.00 and stated that the contract included "LRCCD Additive Alternate No. 1 and Deductive Alternate No. 3."

On September 10, 2004, Patricia M. Gates wrote to the Division of Labor Statistics and Research ("DLSR"), on behalf of the Carpenters Union, requesting the appropriate rate of pay for carpenters on the Project. Maria Robbins, Deputy Chief of DLSR, responded to the Gates letter on November 3, 2004, as follows:¹

¹ The letter was admitted into evidence, but its contents are hearsay as to any facts contained in the letter. Hearsay is admissible in these proceedings but may not be the sole basis for a finding of fact. (Cal. Code Regs., tit. 8, § (d).)

In your letter, you stated that the initial estimated construction cost for this project is \$24.5 million which was noted on the Los Rios Community College District's Public Notice – Notice to Contractors – Bid #979. However, the district issued Addendum No. 1 on March 14, 2003 . . . which revised the estimated construction cost for the state-funded portion of the project to \$24,500,000 *plus* the estimated construction costs for the district-funded Additive Alternative Nos. 1 and 2 at \$1,770,000. The Addendum No. 1 included funds for the parking lot which was included in the description of the project in the Public Notice – Notice to Contractors – Bid #979. There were four addenda issued for this project prior to the closing of bids and all contractors were aware that these additive alternatives were to be included in their bid submittals.

Please note that the work on the addenda of the project does not exclude these construction costs from the total construction costs. Therefore the total construction costs will include the funds noted on Addendum 1 bringing the estimated total cost to \$26,270,000 and shall be the project value used as the “total base bid project value” in determining the minimum rate of pay for the crafts of the Carpenter and Drywall Installer/Lather on this project. Sacramento County falls within Area 3 in the determinations for the Carpenter and Drywall Installer/Lather in Northern California, but because the \$26,270,000 value of this project exceeds the \$25 million threshold, the rates as prescribed in Area 1 shall apply. [Emphasis in original.]

In formulating the opinion expressed in her response to Gates, Robbins reviewed the Public Notice, the addenda issued by LRCCD, the PWD and a summary memorandum from a staff research program specialist who had reviewed the facts of the case. Robbins testified that she had determined that the additional \$1,770,000.00 estimated by LRCCD as the cost for Additive Alternates 1 and 2 should have been included in the Project's total base bid project value because it was her understanding that the additive alternates included the 4-way signalized intersection and parking improvements that were mandatory elements of the base bid as described in the Public Notice.

The Overall Site Plan (“Site Plan”) for the Project, which was produced at the April 2, 2008, hearing, delineates the boundaries of the work proposed in the two Additive Alternates and establishes that the four-way traffic signal and intersection that was listed as part of the base project in the Public Notice, and which Robbins had been informed was included in one of the Additive Alternates, was not included as part of either Additive Alternate. Rather, the Project Specifications and the Site Plan demonstrate that the work proposed in the two Additive Alternates consisted entirely of an additional perimeter roadway and additional parking areas that were not part of the Public Notice's description of the work.

LRCCD recorded the Notice of Completion for the Project on March 8, 2006, with a stated completion date of March 2, 2006.²

DISCUSSION

Labor Code 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.³ Specifically:

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.

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

Section 1775(a) requires, among other things, that contractors and subcontractors pay 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.

² Prior to the Hearing on the Merits, C&S moved for dismissal of the Assessment on the basis that it was not timely served, arguing that the Project had actually been completed in July 2005 when occupancy began; therefore, the Notice of Completion was invalid. The Hearing Officer denied the motion to dismiss without prejudice on March 20, 2007, finding that the Assessment was served within 180 days after filing of the Notice of Completion, as required by Labor Code section 1741 and that the evidence submitted by C&S was insufficient to establish an earlier acceptance date for the Project. This issue was not included in the pretrial Joint Statement of Issues submitted by the parties, nor did C&S renew its motion or produce additional evidence regarding acceptance of the Project at trial. The issue of timeliness of the Assessment is therefore deemed waived. Further, there is no evidence to find that the Notice of Completion was invalid. Therefore, even on the merits, the Assessment was timely.

³ All further statutory references are to the California Labor Code, unless otherwise indicated.

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.”

The “Total Base Bid Project Value” Of The Project Was Under \$25 Million And C&S Has Satisfied Its Prevailing Wage Obligations On The Project.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines these rates and publishes general wage determinations such as NC-23-31-1-2002-1 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.)

Pursuant to footnote “i” of the PWD, the applicable prevailing wage rate for the Project was determined by the “total base bid project value.” If the total base bid project value was \$25 million or greater, the higher Area 1 rate applied. If it was under \$25 million, however, the normal Area 3 rate remained in effect. By the plain meaning of the PWD’s definition of “total base bid project value” the awarding body’s estimated construction cost controls “[w]here there is a published or advertised estimate of the construction costs for a project, such estimate **shall** determine ‘the total base bid project value,’ for purposes of the twenty-five (\$25,000,000) threshold.” [Emphasis added.] Therefore, LRCCD’s \$24.5 million estimate is the definitive total base bid project value absent extrinsic evidence that the estimate did not include mandatory elements of the bid.

Robbins based her opinion on an understanding that the cost of mandatory elements of the base bid, a four-way traffic signal and intersection and parking improvements, were included in the estimated cost of the two district funded Additive Alternates announced in Addendum One. On that basis, she concluded that that additional \$1,770,000.00 estimated by

LRCCD as the combined cost for Additive Alternates 1 and 2 should be included in the total base bid project value, triggering the higher Area 1 rate for the Project. Therefore, rather than simply asking for bids on additional work that might or might not ultimately be included in the Project, Robbins interpreted Addendum One as constituting notice of an increase to the estimated construction costs of work that was already part of the Project as originally noticed.

Relying on Robbins' analysis, DLSE contends that the estimated total base bid project value of the Project was in excess of \$25,000,000, triggering the higher Area 1 rate, because Addendum One estimated additional costs of \$1,770,000 to be funded by LRCCD. This brought the total estimated cost for the Project to \$26,770,000. The record does not support DLSE's position, however, as the Project's specifications and drawings make it clear that the work included in Additive Alternates 1 and 2 were optional additions to the Project and did not include any mandatory elements of the base bid.

Thus, there is no extrinsic evidence to justify not following the plain meaning of the PWD. Footnote "i" of the PWD explicitly states that "[w]here there is a published or advertised estimate of the construction costs for a project, such estimate shall determine 'the total base bid project value,'" for purposes of the \$25,000,000 threshold. LRCCD's bid notice stated an estimated construction cost of \$24,500,000. Under the plain language of the PWD, the total base bid project value of the Project was \$24,500,000, and the Area 3 rate applied.

As an alternative, DLSE contends that C&S knew or should have known that the total base bid project value of the Project was in excess of \$25,000,000, because its successful low bid on the Project was over the threshold. In essence, DLSE is attempting to tie the threshold "total base bid project value" to the actual cost of the project. This argument is contrary to the plain language of footnote "i," which states unequivocally that the published **estimate** of construction costs is determinative for purposes of the \$25,000,000 threshold. DLSE's proposed standard also makes little sense as it would inject excessive uncertainty into the bidding process, because contactors bidding on a public work could never be certain of the applicable prevailing wage rate.

All Other Issues Are Moot

In light of the determination above, all other issues are moot and need not be decided.

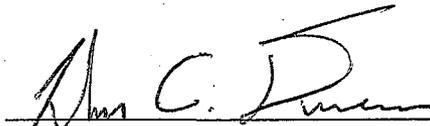
FINDINGS

1. Affected contractor Clark & Sullivan Builders, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. The "total base bid project value" of the Project was \$24.5 million, requiring carpenters on the project to be paid at the local rate for Sacramento County pursuant to Prevailing Wage Determination NC-23-31-1-2002-1.
3. C&S fully satisfied its prevailing wage obligations to the carpenters on the Project at the applicable Area 3 wage rate.
4. All other issues are moot.

ORDER

The Civil Wage and Penalty Assessment is dismissed. The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 6/11/08



John C. Duncan
Director of Industrial Relations