

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**GRS Colorado, Inc. F/K/A  
CEI West Roofing, Inc.**

Case No. 06-0204-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR**

Affected subcontractor GRS Colorado, Inc., formerly known as CEI West Roofing, Inc. ("CEI"), 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 CEI on the California Public Employees' Retirement System ("CalPERS") Headquarters Expansion (the "Project"). A telephonic Hearing on the Merits occurred on April 24, 2007, before Hearing Officer Nathan D. Schmidt. Deborah E. G. Wilder appeared for GRS, and David D. Cross appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this decision dismissing the Assessment in full.

**SUMMARY OF FACTS**

This case arises out of a subcontract for the installation of manufactured roof panels at the CalPERS headquarters building in Sacramento County. The specific question presented is whether the workers who performed this work were entitled to be paid not less than the prevailing rate for the classification of Sheet Metal Worker or whether they could be paid the lesser rate for the classification of Roofer without violating prevailing wage requirements.

The parties' stipulated facts are set forth verbatim:

"1. The work subject to the Civil Wage and Penalty Assessment was performed on a public work known as CalPERS headquarters located in downtown Sacramento, California.

"2. The project was located in Sacramento County.

"3. The project title was CalPERS Headquarters Expansion, Bid Package 3- Building and Site Improvements ('Project').

"4. CalPERS first advertised the Project for bid on or about August 20, 2002.

"5. The scope of the work for Roofers in Sacramento County according to the 2002-1 determination published by the DIR includes: 'All metal roofing covered by a C-14 State Contractor's License.' (Exhibit A)

"6. At the time that this project was advertised for bid, the Contractor's State License Board contained notices on its website regarding the C-14 (metal roofing), C-39 (roofing), and C-43 (sheet metal) license classifications. Such notice provided that the C-14 license classification was discontinued and that any contractor who held a C-14 license and a C-39 license could now perform the work previously covered by C-14 under the C-39 license. Likewise a contractor who held only a C-14 and a C-43 license could now perform the previous scope of work from the C-14 license under the C-43 license. However, any contractor who only held a C-14 license would be granted a C-39 license. (Exhibit B) CEI West held a C-14 license as well as a C-39 license. (Exhibit C)

"7. CEI West will make an offer of proof that Michael McClain, then Vice President of CEI West Roofing will testify that he and/or his staff checked the DIR website for the applicable scope of work for Roofers in Sacramento County. Upon seeing that the scope of work allowed roofing contractors to perform metal roofing work covered by a C-14 license, the decision was made to bid the project and pay roofers prevailing wages.

"8. The General Contractor, Hensel Phelps, entered into a subcontract with CEI West Roofing, Inc. ('CEI') for installation of manufactured roof panels at the Project.

"9. The roof panels were described in the contract as 'Protective Roof Cover for West Building and East Building located over air handling units' (Exhibit 1).

"10. The specifications for the project included the provisions for installing the roofing and protective equipment panels under a section designated as 'Manufactured Roof Panels Section 07411 Page 1-6.' (Exhibit D)

"11. The scope of work for roofing on this project included the installation of manufactured (metal) roofing system on the building. In addition to the installation of the roof it-

self, the specifications called for manufactured panels to be installed over the air handling units to prevent rain, water and other elements from reaching the air handling units. The DLSE contends that the metal panels do not waterproof and water-seal the roofs on the building. CEI West contends that the metal panels are an integral part of the entire roofing system installed on the building and protect the air handling system from the elements.

"12. Paul Broyles wrote to John Rea on September 15, 2004, asking for a classification determination. In the letter, he states that he had spoken with Mr. Morgan Nolde (a representative of Roofer's Local #81) and states that the Roofers did not claim the work for the installation of this protective panel. (Exhibit E)

"13. On November 17, 2004, Mr. Rea issued a ruling 'based on the information provided' by Mr. Broyles, that the work described was covered by sheet metal prevailing wages. (Exhibit F)

"14. On November 26, 2004, Morgan Nolde wrote a letter to John Rea to contest that ruling, stating that Mr. Broyles misrepresented the situation and the Roofers do claim the work in question. (Exhibit G)

"15. Work began on the Project on January 8, 2003.

"16. CEI classified its employees under the roofer classification for work performed on the Project.

"17. On or about December 16, 2005, Julia Sidhu with the Division of Labor Standards Enforcement ('Sidhu') commenced her investigation of alleged violations of the California Prevailing Wage Law.

"18. Sidhu reviewed multiple documents, including:

- a) Scope of Work Provisions for Sheet Metal Worker, 166-162-1 (Exhibit 2);
- b) Scope of Work Provision for Roofer, 232-81-3 (Exhibit 3);
- c) Prevailing Wage Determination SAC-2002-1, and footnotes thereto (Exhibit 4);
- d) Contractors State License Board definition of scope of work of roofing and sheet metal contractor (839.39 CCR) (Exhibit 5); and
- e) Certified payroll for CEI (Exhibit 6).

“19. Sidhu also inspected the Project on October 12, 2006, and took photographs of the roof panels (Exhibit 7).

“20. Sidhu prepared an audit showing wages claimed by the DLSE to be due. (Exhibit 11)

“21. Sidhu submitted a Labor Code section 1775 Penalty Review to Senior Deputy Tracy Maulden on October 23, 2006, alleging that the correct prevailing wage rate was that specified for sheet metal work, that unpaid wages were owed in the amount of \$16,979.39, and penalties were owed in the amount of \$9,150.00. The Penalty Review was approved by Senior Deputy Labor Commissioner Maulden on October 24, 2006 (Exhibit 8).

“22. On October 27, 2006, Sidhu issued a timely Civil Wage and Penalty Assessment claiming unpaid wages in the amount of \$16,979.38 and penalties in the amount of \$9,150.00 (Exhibit 9).

“23. On October 31, 2006, CEI filed a timely Request for Review, stating that the correct name of the subcontractor is GRS Colorado, Inc., f/k/a CEI West Roofing, Inc., and alleging the correct classification for the subject work is Roofer (Exhibit 10).

“24. Sidhu issued an amended audit reflecting a corrected (lower) number of overtime hours for worker Pablo Gaytan (Exhibit 11).

“25. DLSE stipulates that no wages are due if the Roofer classification applies for the work performed by the affected workers on the Project.

“26. The DIR/DLSE issued a specific prevailing wage determination for the installation of metal roofing in November 2006 covering Sacramento County. (Exhibit H)

“27. CEI West asks that the hearing officer take judicial notice of the ruling issued on March 30, 2007 dismissing all claims against CEI West Roofing relating to the payment of roofers wages (as opposed to sheet metal workers wages) in Sacramento County. (Exhibit D)”<sup>1</sup>

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<sup>1</sup> While the former Acting Director’s Decision in case numbers 04-0276-PWH and 05-0010-PWH involves the same subcontractor and enforcing agency, it did not arise from the same facts as the present case, nor was it designated precedential. As such it is not controlling and does not play a role in this decision. The Director takes official notice only of its existence. See, Govt. Code, § 11425.10, subd. (a)(7).

## DISCUSSION

Labor Code section 1720 and following<sup>2</sup> 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.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 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 Labor Code 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).)

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<sup>2</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

CEI Was Not Required To Pay The Prevailing Rate For Sheet Metal Workers For The Work Performed On The CalPERS Headquarters Expansion Project In Light Of The Information Publicly Available From DIR.

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. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate 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, 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.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In this case, the sole request for a determination under section 1773.4 was submitted by Paul Broyles, on behalf of Sheet Metal Workers Local 162, on September 15, 2004, more than two years after the project had been advertised for bid, and far beyond the 20 day statutory deadline for making such requests. In the absence of a timely petition under section 1773.4, the contractors and subcontractors were bound to pay the prevailing rate of pay, as determined

and published by the Director, as of the bid advertisement date.<sup>3</sup> [*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.]

On the bid advertisement date, the scope of work provision relating to SAC-2001-2 for Roofer provided that coverage included work involving “All metal roofing covered by a C-14 State Contractor’s License” and for Sheet Metal Worker provided that coverage included “...all metal roofing, gutters, downspout and related metal flashing....” The C-14 specialty classification was eliminated in 1998. 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. [Cal. Code Regs., tit. 16, § 832.14.] It seems evident therefore that, for scope of work purposes, a C-14 and C-39 license are interchangeable and that both cover the installation of metal roofing.

DLSE contends that the work done by CEI does not fall under the Roofer scope of work because the metal roofing panels that CEI installed “are not the roof of the building but rather a shelter or protective shield installed over the air handling units on top of the roof.” In support of its position, DLSE cites the Contractors State License Board (“CSLB”) regulation defining a roofing contractor holding a C-39 license:

A roofing contractor installs products and repairs surfaces that seal, waterproof and weatherproof structures. This work is performed to prevent water or its derivatives, compounds or solids from penetrating such protection and gaining access to material or space beyond. . . . [Cal. Code Regs., tit. 16, § 832.39.]

DLSE argues that, because the sides of the “protective roof cover” installed by CEI are open, the metal roofing panels “do not prevent water from gaining access to the surface underneath” and thus the work does not fall under the Roofer classification.

While it is the Director’s responsibility to define scopes of work and set prevailing wages for crafts, classifications and types of work that might be employed in public works, the awarding body is “responsible in the call for bids [to determine] what ‘category of worker’

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<sup>3</sup> Reliance on the former Acting Director’s post-bid determination of November 17, 2004, would be a retroactive enforcement of a project specific opinion contrary to Labor Code section 1773.6. CEI’s ultimate liability must be based on the information publicly available at the time of the bid advertisement. See Lab. Code, § 1773.6; Cal. Code Regs., tit. 8, § 16204((a)(4).

is required.” (*Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473.) DLSE’s argument, however, is the “sort of delicate line-drawing [that] goes far beyond the task of determining ‘general prevailing wages’ by ‘craft, classification or type of workman.’” (*Ibid.*)

CalPERS’ specifications for the Project consistently refer to the work done by CEI in terms that a reasonable subcontractor bidding on the Project could read as a metal roofing project falling within the scope of work for Roofers: the material to be installed was “manufactured roof panels” which were to constitute a “protective roof cover;” the installer qualifications called for a contractor with expertise in “metal roof panel projects;” the roof of the building as a whole was also a “manufactured (metal) roofing system;” and, ultimately, the general contractor on the Project hired CEI, a roofing subcontractor with only a C-39 license, to do the work. The issue here is whether CEI could reasonably have read the project specifications for the work that it did on the Project as falling under the Roofer scope of work that was in effect at the time of bid. I find that they could.

DLSE’s argument that the installation of roofing on open sided structures is not roofer’s work under the CSLB regulation describing the work of a C-39 roofing contractor is not compelling. (*See* Cal. Code Regs., tit. 16, § 832.39.) Section 832.39 of the CSLB regulations refers to sealing, waterproofing and weatherproofing structures. This section does not exclude someone who puts a waterproof roof on an open sided structure from being classified as a roofer. In this case, the parties stipulated that the purpose of the “protective roof cover” installed by CEI was to “prevent rain, water and other elements from reaching the air handling units.” Because the “protective roof cover” installed by CEI protects the air handling units from direct intrusion by water and other elements from above, the normal purpose of a roof, it clearly provides the degree of weatherproofing intended by the Project’s designer and is arguably within the scope of CEI’s C-39 license as defined by the CSLB.

Consequently, because CEI paid the prevailing wages specified for the Roofer classification, and the scope of work provisions for that classification encompassed metal roofing, it did not violate its statutory obligation to pay prevailing wages.



All Other Issues Are Moot.

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

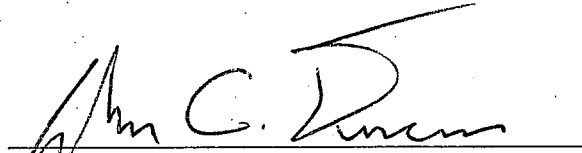
**FINDINGS**

1. Affected subcontractor GRS Colorado, Inc., formerly known as CEI West Roofing, Inc., timely requested review of a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to the CalPERS Headquarters Expansion in Sacramento, California.
2. The Assessment was issued timely.
3. CEI could reasonably rely on the published determination that the applicable prevailing rate of wage for the installation of manufactured roofing panels on this project was the prevailing wage rate for either a Roofer or for a Sheet Metal Worker (HVAC), as set forth in Prevailing Wage Determination SAC-2001-2.
3. CEI did not fail to pay its workers at least the prevailing wage, as it paid its employees the Roofer 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: 1/25/08

  
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John C. Duncan  
Director of Industrial Relations