

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

D.L. Starr Enterprises, Inc.
Diede Construction, Inc.

Case Nos.: **20-0389-PWH**
20-0410-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Diede Construction, Inc. and affected subcontractor D.L. Starr Enterprises, Inc. each submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued on November 12, 2020, by the Division of Labor Standards Enforcement (DLSE) with respect to the work performed on the Valley Springs Health & Wellness Center (Project) for the Mark Twain Health Care District (Awarding Body), in Calaveras County. The Assessment determined that \$3,120.00 in statutory penalties were due under Labor Code section 1777.7.¹

A Hearing on the Merits (HOM) occurred on September 29, 2021 before Hearing Officer Michael Drayton. David Cross appeared for DLSE; Stephen McCutcheon of Cook Brown, LLP, appeared for the Requesting Party and prime contractor, Diede Construction, Inc. (Diede); and, Don Starr, President of D.L. Star Enterprises, Inc. (Starr) appeared for Requesting Party and affected subcontractor Starr. Prior to the HOM, the parties filed with the Hearing Officer stipulations of fact, stipulated issues to be determined, and stipulated documentary evidence. At the HOM, the Hearing Officer read into the record the stipulated facts and stipulated issues. The parties stipulated that those were all facts and issues necessary for a decision. The stipulated facts and

¹ All further statutory references are to the California Labor Code.

stipulated exhibits were admitted into evidence.² Following post hearing briefing, the matter was submitted on November 10, 2021.

Prior to the hearing, the parties stipulated to the following:

- The work subject to the Civil Wage and Penalty Assessment was subject to prevailing wage and apprenticeship requirements.
- DLSE served the Assessment timely.
- Diede and Starr filed the Requests for Review timely.
- The Labor Commissioner made its investigative file available to the contractors timely.

The parties stipulated that the issues to be determined were:

- Whether Starr violated apprenticeship requirements by requesting apprentices to report on a non-working day.
- Whether Starr failed to timely request dispatch of apprentices for all employed crafts.
- Whether Starr failed to employ sufficient registered apprentices on the project.
- Whether the affirmative defense outlined in California Code of Regulations, title 8, section 230.1, subdivision (a) applied to Starr.
- Whether Starr is liable for penalties under section 1777.7.
- Whether Diede met the safe harbor provisions under section 1777.7, subdivision (e).
- Whether Diede is liable for penalties under section 1777.7.
- Whether the Labor Commissioner abused her discretion in setting the penalty rate for the assessment.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, and the contractors failed to carry their burden of

² Neither Starr nor Diede provided to the Hearing Officer Exhibit 18 ("D.L. Starr Enterprises, Inc. Statement of Compliance forms") on the filed stipulated list of exhibits, although Diede was allowed by stipulation until close of business (5 p.m.) on September 30, 2021 to submit the exhibit.

proving that the bases for the Assessment were incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a) and (b).) Accordingly, the Director issues this Decision affirming the Assessment.

FACTS

1. On May 25, 2018, the Awarding Body first published an advertisement to bid for the project.
2. The advertisement to bid stated: "Attention is directed to the provisions of section 1777.5 and 1777.6 of the Labor Code of the State of California, concerning employment of apprentices by the Contractor or any Subcontractor under him."
3. On August 22, 2018, Diede entered into a contract with the Awarding Body for construction of the Valley Springs Healthcare Facility, located at Vista Del Lago West, Valley Springs, California 95252.
4. The prime contract stated in section 37.8 at page 71: "Contractor agrees to comply with all provisions of the law regarding employment of apprentices."
5. Diede entered into a subcontract with Starr for performance of plastering work on the project.
6. The subcontract between Diede and Starr disclosed that the project was subject to the prevailing wage law, included copies of Labor Code sections 1771, 1775, 1776, 1777.5, 1813, and 1815, and required the work to be performed in accordance with the prime contract.
7. Starr worked on the project between March 7, 2019 and July 1, 2019.
8. Starr employed workers in the craft of Drywall Installer/Lather for 415 hours on the project.
9. Starr employed workers in the craft of Plaster for 724.5 hours on the project.
10. Starr sent a Public Works Contract Award Information DAS 140 form for the project dated October 15, 2018 to the Carpenters Training Committee For

Northern California, checking box 3, which states "We will employ and train apprentices in accordance with the California Apprenticeship Council regulations, including section 230.1(c) which requires that a apprentices employed in public projects can only be assigned to perform work in the craft or trade to which the apprentice is registered and the apprentice must at all times work with or under the direct supervision of journeyman/men." The estimated number of journeyperson hours listed was 312, and the estimated number of Latherer apprentice hours was 62.4.

11. On October 15, 2018, Starr submitted a Request For Dispatch of An Apprentice - DAS 142 form to the Carpenters Training Committee For Northern California, requesting dispatch of one Latherer apprentice on November 5, 2018 to report to Donald Star at 2320 Downar Way, #5, Sacramento, CA 95838.
12. The first day Starr employed a journeyperson Drywall Installer/Lather on the project was March 7, 2019.
13. Starr sent a Public Works Contract Award Information DAS 140 form for the Project dated October 15, 2018 to the Northern California Plasterers Joint Apprenticeship Training Committee, checking box 3, which states: "We will employ and train and apprentices in accordance with the California Apprenticeship Council regulations, including section 230.1(c), which requires that apprentices employed on public projects can only be assigned to perform work in the craft or trade to which the apprentice is registered and that all of apprentices must at all times work with or under the direct supervision of a journey man/men." The estimated number of journeyperson hours listed was 544, and the estimated number of Plasterer apprentice hours was 108.80.
14. On October 15, 2018, Starr submitted a Request For Dispatch of An Apprentice - DAS 142 form to the Northern California Plasters Joint Apprenticeship And Training Committee, requesting dispatch of one

Plasterer apprentice on November 5, 2018 to report to Donald Star at 2320 Downar Way #5, Sacramento, California 95838.

15. The first day Starr employed a journeyman Plasterer on the project was April 28, 2019.
16. Starr did not employ any apprentices on the project.
17. No apprentices were dispatched to Starr.
18. Upon conclusion of the project, Diede required Starr to execute an affidavit under penalty of perjury, confirming compliance with prevailing wage laws.
19. Following issuance of the Assessment, Diede withheld sufficient funds from Starr to satisfy the Assessment.
20. Pursuant to Labor Code section 1777.7, DLSE assessed a penalty of \$80 per day for 39 working days, a total of \$3,120.00.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects and the employment of apprentices. The purpose of the CPWL was summarized by the California Supreme Court as follows:

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); see also *Lusardi*, at p. 985.)

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment ...” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (§ 1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Starr Failed to Employ Apprentices In Violation of Section 1777.5.

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require contractors to employ apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship committees that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs, tit. 8, § 230, subd. (a).) Whether the contractor uses form DAS 140 or prepares its own written notice, the contract award information must include among other things the following: the exact location of the public work; the expected start date of the work; the number of apprentices to be employed; and, the approximate dates apprentices will be employed.³ Once contractors

³ This notice allows the apprentice committee to better coordinate the apprentice workforce for future assignments.

commence work, if they “are not already employing sufficient registered apprentices...to comply with the one-to-five ration [they] must request the dispatch of required apprentices from the apprenticeship committees...” (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) DAS has prepared form DAS 142 that a contractor may use to request dispatch of apprentices. Thus, to ensure compliance with the law, the regulations provide for a method of first informing applicable apprenticeship committees of the anticipated need for apprentices for a project, and second—separately—to request from applicable apprenticeship committees the dispatch of the number of requested apprentices when they are actually needed on the project.

The law takes into account discreet instances where a contractor is unable to employ apprentices in sufficient numbers. The regulations provide for the scenario where apprenticeship committees do not dispatch apprentices upon request:

[I]f in response to a written request no apprenticeship committee dispatches, or agrees to dispatch during the period of the public works project any apprentice to a contractor . . . within 72 hours of such request . . . the contractor shall not be considered in violation of this section as a result of such failure to employ apprentices for the remainder of the project provided that the contractor made the request in enough time to meet the above-stated ratio.

(Cal. Code Regs., tit. 8, § 230.1, subd. (a).) Therefore, if through no fault of their own, contractors are unable to employ apprentices in the 1:5 ratio, they will not be found in violation of the law.

Here, Starr admitted not employing apprentices on the Project. Starr claimed, however, it complied with the provisions for the request for dispatch of apprentices and that the applicable apprentice committees did not dispatch apprentices so it should not be considered in violation of the law. The claim is unavailing in light of the purpose of the law and the facts of the case.

The purpose of the law is to ensure that contractors employ apprentices on public works. If a contractor on a public works project, “employs workers in any

apprenticeable craft or trade, the contractor *shall* employ apprentices in at least the ratio set forth in this section [1:5]... (§ 1777.5, subd. (d) (emphasis added).) The purpose of the two-step procedure of submitting contract award information to apprentice committees and requesting the dispatch of apprentices from apprentice committees is to facilitate the required employment of apprentices. The legislature emphasized the importance of compliance with the law by establishing civil penalties for noncompliance (§ 1777.7) as well as debarment (§ 1777.1). (See *GRFCO Inc. v. Superior Court* (2023) 89 Cal.App.5th 1295, 1301-1302.)

The facts demonstrate that Starr failed to comply with the law. Starr worked on the project between March 7, 2019 and July 1, 2019. It employed workers in the craft of Drywall Installer/Lather for 415 hours and employed workers in the craft of Plaster for 724.5 hours on the project. The first day Starr employed a journeyman Drywall Installer/Lather on the project was March 7, 2019. The first day Starr employed a journeyman Plasterer on the project was April 28, 2019. Starr did not employ any apprentices on the Project and thereby failed to satisfy the one-to-five ratio.

Starr did not satisfy the “safe harbor” provision found in regulation 230.1, subdivision (a) because it did not request dispatch of apprentices when it needed them. The regulation requires contractors to employ apprentices “during the performance of a public work project.” (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Starr began performance on the Project on March 7, 2019. However, after Starr commenced work, employed journeymen, and knew that it did not have sufficient registered apprentices to comply with the one-to-five ratio, it failed to request the dispatch of required apprentices from the apprenticeship committees in an attempt to meet the ratio anytime during its performance on the Project through July 1, 2019. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Thus, Starr violated the law.

Starr contends that under a literal reading of section 230.1, subdivision (a), it is entitled to the benefit of the regulation’s “safe harbor” protection. Starr misreads the law. Starr sent a Request for Dispatch of Apprentice—DAS 142 Form to both the applicable Carpenters Training Committee and the applicable Plasters Joint

Apprenticeship and Training Committee on or about October 15, 2018 for one apprentice from each craft to appear at its office on November 5, 2018, more than 72 hours in advance. However, the apprentices were not required that day because no work was being performed on the Project. The start date of Starr's work on the Project was March 7, four months later. A request for dispatch of apprentices for a date when performance of a public work project is not ongoing is ineffective. (§ 1777.5; Cal. Code Regs, tit. 8, § 230.1, subd. (a); *GRFCO Inc., supra*, 89 Cal.App.5th at p. 1302.) To come within the "safe harbor" provision, Starr had to send new DAS 142 forms with the new start date for each craft.

The statutory and regulatory scheme requires that a contractor act in good faith to seek out apprentices for employment on a public works project while the project is ongoing in order to gain the protection afforded by the "safe harbor." To sit back and rely on a notification and dispatch process that was premised on an incorrect start date of November 5, 2018, rather than to request dispatch when the apprentices were needed to do actual work and receive training in March and April 2019, does not demonstrate a good faith intent or effort to comply with the law. Nor is the requirement to send a new request with the actual start date onerous or unreasonable.

The Penalty for Noncompliance.

If a contractor knowingly violates section 1777.5 a civil penalty is imposed under section 1777.7 in an amount not exceeding \$100.00 for each full calendar day of noncompliance. (§ 1777.7, subd. (a)(1).) The phrase "knowingly violated Section 1777.5" was defined by regulation, section 231, subdivision (h), at the time as follows:

For purposes of Labor Code Section 1777.7, a contractor knowingly violates Labor Code Section 1777.5 if the contractor knew or should have known of the requirements of that Section and fails to comply, unless the failure to comply was due to circumstances beyond the contractor's control. There is an irrebuttable presumption that a contractor knew or should have known of the requirements of Section 1777.5 if the contractor had previously been found to have violated that Section, or the contract and/or bid documents notified the contractor of the obligation to comply with Labor Code provisions applicable to public works projects.

(Cal. Code Regs., tit. 8, former § 231, subd. (h), repealed Oct. 1, 2021 (emphasis added).) In determining the penalty amount, the Labor Commissioner is to consider all of the following circumstances under section 1777.7, subdivision (b):

- (1) Whether the violation was intentional.
- (2) Whether the party has committed other violations of Section 1777.5.
- (3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.
- (4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.
- (5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs.

The Labor Commissioner's determination of the amount of the penalty, however, is reviewable only for abuse of discretion. (§ 1777.7, subd. (d).) A contractor or subcontractor has the burden of proof with respect to the penalty, namely, that the Labor Commissioner abused discretion in determining that a penalty was due or in determining the amount of the penalty. (Cal. Code Regs., tit. 8, § 17250.)

In this case, DLSE based section 1777.7 penalties on Starr's failure to submit request for dispatch of apprentices to the two applicable apprenticeship committees for Drywall Installer/Lather and Plasterer during the time Starr was working on the Project as required by section 1777.5, and regulation 230.1, subdivision (a). DLSE imposed a mitigated penalty rate of \$80.00 (down from \$100.00) for each of 39 days of noncompliance, based on the 39 days that journey persons worked on the Project. DLSE found that the violation was intentional, resulted in lost opportunities for apprentices, and otherwise harmed apprentices or apprenticeship programs.

Starr knew of the apprenticeship requirements of section 1777.5. The subcontract between Diede and Starr disclosed that the project was subject to the

prevailing wage law, and included copies of specific Labor Code provisions including section 1777.5. Starr acknowledged in its briefing working on public works projects in the past and employing apprentices. Further, Starr used the DAS 140 and 142 forms. Thus, the irrebuttable presumption of regulation 231, subdivision (h) applies. Starr knowingly violated section 1777.5 because it knew or should have known of the requirements of section 1777.5, failed to comply with the requirements, and the failure to comply was not due to circumstances beyond its control. Further, Starr failed to show that the Labor Commissioner abused her discretion in assessing \$80.00 per violation. Accordingly, as determined by DLSE and specified in the Assessment, Starr is liable for 1777.7 penalties of \$80.00 per violation for 39 days, for a total amount of \$3,120.00.

Diede and Starr Are Jointly and Severally Liable for the Penalties Assessed Under Section 1777.7.

The prime contractor and the subcontractor are jointly and severally liable for penalties under section 1777.7. (See § 1743, subd. (a); *Violante v. Southwest Communities Dev't and Const. Co.* (2006) 138 Cal.App.4th 972, 979.) The prime contractor can avoid liability if it proves it was ignorant of the subcontractor's failure to comply with the provisions of section 1777.5, and that it met all of the following four specific requirements:

- (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
- (2) The contractor shall continually monitor a subcontractor's use of apprentices required to be employed on the public works project pursuant to subdivision (d) of section 1777.5, including, but not limited to, periodic review of the certified payroll of the subcontractor.
- (3) Upon becoming aware of a failure of the subcontractor to employ the

required number of apprentices, the contractor shall take correction action, including, but not limited to, retaining funds due the subcontractor, for work performed on the public works project until the failure is corrected.

- (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain a declaration signed under penalty of perjury from the subcontractor that the subcontractor has employed the required number of apprentices on the public works project.

(§ 1777.7, subd. (e).) Diede admitted it did not obtain a declaration signed under penalty of perjury from Starr that it employed the required number of apprentices on the Project, prior to making final payment to Starr. The record does not include evidence that Diede continually monitored Starr's use of apprentices required to be employed on the Project, such as by conducting periodic review of Starr's certified payroll. Since Diede did not meet all four requirements of subdivision (e), it may not avail itself of the protection—the safe harbor—from liability the section affords.

Based on the foregoing, the Director makes the following findings and order:

FINDINGS AND ORDER

1. The Project was a public work subject to the employment of apprentices.
2. The Civil Wage and Penalty Assessment was served timely by DLSE in accordance with section 1741.
3. Affected Contractor Diede Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. Affected Subcontractor D.L. Starr Enterprises, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
5. DLSE made available to Starr and Diede its enforcement file timely.

6. D.L. Starr Enterprises, Inc. was not excused from the requirement to employ apprentices on the Project.
7. There was one applicable apprentice committee in the geographic area of the Project for the craft of Drywall Installer/Lather, namely, the Carpenters Training Committee for Northern California.
8. There was one applicable apprentice committee in the geographic area of the Project for the craft of Plasterer, namely, the Northern California Plasterers Joint Apprenticeship and Training Committee.
9. D.L. Starr Enterprises, Inc. failed to properly request dispatch of Drywall Installer/Lather apprentices from the Carpenters Training Committee for Northern California.
10. D.L. Starr Enterprises, Inc. failed to properly request dispatch of Plasterer apprentices from the Northern California Plasterers Joint Apprenticeship and Training Committee.
11. D.L. Starr Enterprises, Inc. violated section 1777.5 by failing to employ apprentices in the crafts of Drywall Installer/Lather and Plasterer on the Project in the minimum ratio required by the law.
12. D.L. Starr Enterprises, Inc. knowingly violated section 1777.5.
13. The Labor Commissioner did not abuse discretion in setting section 1777.7 penalties at the rate of \$80.00 per violation for 39 violations, and such penalties are due from D.L. Starr Enterprises, Inc. in the amount of \$3,120.00.
14. Diede Construction, Inc. did not comply with section 1777.7, subdivision (e) and is therefore jointly and severally liable for penalties under section 1777.7 in the assessed penalty amount of \$3120.00.

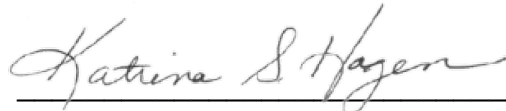
15. The amount found due under the Assessment is as follows:

Basis of the Assessment	Amount
Penalties under section 1777.7	\$3120.00
TOTAL:	\$3120.00

ORDER

The Civil Wage and Penalty Assessment is affirmed 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: 12/19/2023



Katrina S. Hagen, Director
California Department of Industrial Relations