

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Sierra Landscape Company, Inc.

Case No. 12-0013-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Sierra Landscape Company, Inc. (Sierra) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Pacific Electric Trails Phase IV project (Project) performed for the City of Rancho Cucamonga (City) in the County of San Bernardino. The Assessment determined that \$25,845.50 in unpaid prevailing wages and statutory penalties was due. Pursuant to written notice, a Hearing on the Merits was held on May 21, 2012, in Los Angeles, California, before Hearing Officer Harold L. Jackson. David Bell appeared for DLSE. There was no appearance for Sierra, which similarly did not appear for the three scheduled prehearing conferences. Sierra's telephone number was inoperable and Sierra provided no other telephone number.

The issues for decision are:

- Whether the Assessment correctly found that Sierra failed to report and pay the required prevailing wages for all straight time worked on the Project by its workers;
- Whether the Assessment correctly found that workers performed work using heavy equipment, thereby entitling them to be paid the prevailing wage rate for Teamster, Landscape Operating Engineer, or Operating Engineer; and
- Whether Sierra has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1.¹

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

The Director finds that Sierra has failed to carry its burden of proving that the basis of the Assessment was incorrect. Sierra has also failed to carry its burden of proving grounds for waiver of liquidated damages. Therefore, the Director affirms the Assessment in its entirety.

Facts

Failure to Appear: According to the Request for Review filed by Erin Meyer of Sierra, Sierra's telephone number is (760) 328-8900 and Sierra's mailing address is 73-771 Dinah Shore Drive, Suite 200, Palm Desert, CA 92211. On February 7, 2012, and February 14, 2012, notices of prehearing conference were mailed to Sierra at that address, giving Sierra notice that the hearing officer would be conducting a telephone prehearing conference on March 6, 2012. On that date, when the Hearing Officer attempted to contact Sierra at Sierra's telephone number, the call to Sierra's telephone number was automatically disconnected without an answer after one ring. Subsequent attempts to reach a representative of Sierra for prehearing conferences on April 2, 2012, and April 24, 2012, were also unavailing. The Hearing Officer proceeded to conduct the Hearing on the Merits on May 21, 2012, pursuant to notice for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). Sierra did not appear at the Hearing on the Merits. DLSE's evidentiary exhibits were admitted into evidence without objections and the matter was submitted on the evidentiary record based on the testimony of DLSE's Deputy Labor Commissioner, Jessica Kaiser (Kaiser).

Assessment: The facts stated below are based on Exhibits 1 through 16 submitted by DLSE, including the Assessment and other documents in the Hearing Officer's file.

On or about May 12, 2009, City advertised the Project for bid for landscape work and on August 5, 2009, awarded the contract to Southwest Construction Co., Inc. (Southwest). Southwest subcontracted with Sierra to complete the landscape and place decomposed granite for a multipurpose trail. Ten workers performed work for Sierra under the contract between March 3, 2010 and July 12, 2010. The applicable prevailing wage determinations in effect on the bid advertisement date are: (1) SC-102-X-14-2009-1 (Landscape/Irrigation Laborer and Landscape/Irrigation Tender), which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; (2) SC-23-102-2-2008-1 (Laborer and

Related Classification), with the applicable job classification being Laborer Group 1; (3) SC-23-63-2-2008-2 (Operating Engineer), with the applicable job classification being Operating Engineer Group 4, which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; (4) SC-63-12-33-2009-1 (Landscape Operating Engineer), which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; and (5) SC-23-261-2-2008-1 (Teamster), with the applicable job classification being Teamster Group 3.

Based on Sierra's certified payroll records (CPRs) and daily logs, Southwest equipment use records, and employee questionnaires, the Assessment found that Sierra failed to pay the required prevailing wages to seven workers employed on the Project by: paying them as lower-paid classifications such as Landscape/Irrigation Tender or Landscape/Irrigation Laborer when they were performing the work of a Teamster, Landscape Operating Engineer, or Operating Engineer; paying them as Landscape/Irrigation Tender when they were performing the work of Landscape/Irrigation Laborer; failing to pay predetermined increases, and failing to make the fringe benefit contributions required by the applicable prevailing wage determinations for the affected workers. The Assessment found a total of \$16,634.50 in underpaid prevailing wages. Penalties were assessed under section 1775 in the maximum amount of \$50.00 per violation for 184 violations, totaling \$9,200.00.

DLSE determined that the maximum penalty under section 1775 was warranted by its findings that: Sierra ignored the request from the prime contractor, Southwest, for Sierra to pay appropriately; Sierra kept daily logs showing Operating Engineer hours that were not reported on its CPRs; and Sierra had a prior prevailing wage violation.

Kaiser testified that she prepared the Assessment and the supporting audit worksheets, determining that \$16,634.50 in wages were unpaid to seven workers on Sierra's contract with City. Kaiser identified Sierra's daily logs showing use of trencher, water truck, compaction roller, mini-excavator, backhoe and skiploader; Sierra's CPRs; Southwest's record of equipment usage; the applicable prevailing wage determinations; and the completed questionnaire of one employee as support for the Assessment. Kaiser further testified that the Assessment was properly served on Sierra on January 3, 2012, that Sierra submitted a timely request for review

on January 10, 2012, and that DLSE provided Sierra with a reasonable opportunity to review DLSE's evidence.

Discussion

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

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review "shall be commenced within 90 days" and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) If the contractor "demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment...", the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages." (§ 1742.1, subd. (a).) As well, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).)

In this case, the record established the basis for the Assessment. DLSE presented evidence that Assessment was properly served on Sierra and that DLSE provided Sierra with a reasonable opportunity to review the evidence to be used at the hearing. DLSE presented evidence that seven of the workers, at times, performed work using a trencher, water truck, compaction roller, mini-excavator, backhoe and skiploader, requiring application of the Teamster, Landscape Operating Engineer, or Operating Engineer prevailing wage determinations,. That evidence justifies DLSE in reclassifying the workers from Landscape/Irrigation Tender or Landscape/Irrigation Laborer to Teamster, Landscape Operating Engineer, or Operating Engineer for the relevant hours. DLSE also presented evidence that the seven workers, at times, performed work of a Landscape/Irrigation Laborer. That evidence, too, justifies DLSE in reclassifying the workers from Landscape/Irrigation Tender to Landscape/Irrigation Laborer for the relevant hours. DLSE presented further evidence that Sierra ignored Southwest's request to pay the proper prevailing wage rate and it had a previous prevailing wage violation.

Accordingly, DLSE's evidence constitutes *prima facie* support for the Assessment. Sierra, in turn, presented no evidence to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, the Assessment is affirmed in its entirety and liquidated damages are due in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor Sierra Landscape Company, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Sierra underpaid its employees on the Project in the aggregate amount of \$16,634.50.
3. Penalties under section 1775 are due in the amount of \$9,200.00 for 184 violations at the maximum rate of \$50.00 per violation.
4. Liquidated damages are due in the amount of \$ 16,634.50 and are not subject to waiver under section 1742.1, subdivision (a).

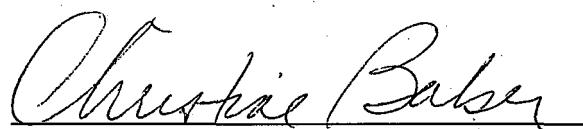
5. The amounts found remaining due in the Assessment, as affirmed by this Decision, are as follows:

Wages:	\$ 16,634.50
Penalties under section 1775, subdivision (a):	\$ 9,200.00
Liquidated damages:	\$ 16,634.50
TOTAL	\$42,469.00

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed in full 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: 6/11/2012



Christine Baker
Director of Industrial Relations