

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**CLP Resources, Inc.
SolarCity Corporation**

Case Nos. **12-330-PWH
12-367-PWH**

From a Civil Wage and Penalty Assessment issued
by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

I have read the Application for Reconsideration filed by the Division of Labor Standards Enforcement (“DLSE”) on June 21, 2013, under Rule 61, subdivision (a) (8 C.C.R. § 17261, subd. (a)) providing that “the Director may reconsider or modify a decision issued under Rule 60 [Section 17260] above for the purpose of correcting any error therein.” I have also read the Opposition to DLSE’s Request for Reconsideration filed June 26, 2013, by one of the requesting parties in these consolidated cases, SolarCity Corporation.

The Decision of the Director, addressing the single issue of whether DLSE’s Civil Wage and Penalty Assessment should be dismissed as untimely, issued June 13, 2013. Prior to the Decision, the parties had been permitted to file briefs and evidence supporting their respective positions. In its Application for Reconsideration, DLSE raises entirely new legal theories and arguments, and also submits new evidence. These legal theories and additional evidence could have been raised before the matter was submitted for decision as of February 20, 2013. Having failed to do so, DLSE cannot avail itself of Rule 61 to re-open the record and present new and different arguments under the guise of asking for the correction of error.

Based on my review of the arguments made by the parties and the record as it existed on February 20, 2013, DLSE has not shown any error in the Decision of the Director, and I find no grounds for reconsideration of the Decision. Accordingly, DLSE’s Motion for Reconsideration is denied.

Dated: 7/1/2013

A handwritten signature in cursive script that reads "Christine Baker". The signature is written in black ink and is positioned above a horizontal line.

Christine Baker
Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**CLP Resources, Inc. and
SolarCity Corporation**

Case Nos.: **12-0330-PWH
12-0367-PWH**

DLSE Case Nos: 40-30790/131, 40-30793/131,
40-30803/131, 40-30809/131

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Prime contractor SolarCity (SolarCity) Corporation and subcontractor CLP Resources, Inc. (CLP) each requested review from a Civil Wage and Penalty Assessment (CWPA) issued by the Division of Labor Standards Enforcement (DLSE) on September 25, 2012, and served by DLSE on September 27, 2012. The CWPA encompassed work done at what are alleged to be public works projects at the Gifford C. Cole Middle School, Columbia Elementary School, East Side Elementary School, and Tierra Bonita Elementary School in the City of Lancaster. Both SolarCity and CLP moved to set aside the Assessment on the ground that DLSE failed to serve the Assessment within 180 days after acceptance of the work as required by Labor Code section 1741, subdivision (a).¹

The appointed Hearing Officer, John J. Korbol, issued an Order to Show Cause whether the CWPA should be set aside as untimely served by DLSE. Evidence and legal argument were submitted by SolarCity and DLSE.

For the reasons below, SolarCity's and CLP's joint motion to dismiss the CWPA as untimely is GRANTED and the Director issues this Decision dismissing the CWPA in its entirety.

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

FACTS

SolarCity was the prime contractor, and CLP the subcontractor, on a project that involved the installation of solar power systems at four public schools within the City of Lancaster: Gifford C. Cole Middle School, Tierra Bonita Elementary School, Columbia Elementary School, and Eastside Elementary School. For each of the four schools, the work performed in installing the solar power system was pursuant to a separate power purchase agreement (PPA) between SolarCity and the City of Lancaster. Each of the four substantively similar PPAs obligates the City of Lancaster to purchase the electrical power to be generated by the solar power systems installed by SolarCity. Under the PPAs, SolarCity would install, own, and operate the solar power systems at the four sites that are the subject of the CWPA. The parties to the PPAs denominated them as "service contracts" and disclaimed an obligation to pay prevailing wage rates.²

The City of Lancaster hired engineer James S. Shelton to inspect each of the four solar power systems to determine when and whether they were ready for activation and in compliance with regulatory standards. When Mr. Shelton was satisfied that with the readiness of each solar power system, he drafted a Letter of Release (LOR) to that effect, addressed to Southern California Edison (SCE). In turn, SCE would issue a Permission to Operate (PTO) letter to the relevant school district, giving them approval to activate the solar power system and interconnect with the SCE electrical grid.

The last of the four LORs for the four schools covered by the CWPA was issued by Mr. Shelton, for Eastside Elementary School, dated December 19, 2011. The last PTO from SCE, also with regard to Eastside Elementary School, was dated January 4, 2012.

The City of Lancaster has never filed a Notice of Completion with regard to any of the work done on this project by SolarCity or CLP, and has no intention of doing so.

² Because the sole issue presented by the requesting parties' motion is the timeliness of the CWPA, this Decision will not address the threshold issue of whether the projects that are the subject of the CWPA were in fact public works requiring the payment of prevailing wages.

DLSE served the CWPA by mail on September 27, 2012. The CWPA alleges that the workers employed on the project were underpaid by \$391,275.23. DLSE also assessed penalties in the sum of \$52,795.00. SolarCity's and CLP's timely requests for review followed.

DISCUSSION

Labor Code section 1741, subdivision (a) provides that: "The assessment shall be served not later than 180 days after the filing of a notice of completion . . . or not later than 180 days after acceptance of the public work, whichever is last. However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the Awarding Body has not yet made full payment to the contractor, the assessment is valid up to the amount of the funds retained."³

DLSE contends that since there has been no notice of completion recorded by the City of Lancaster (the Awarding Body identified by DLSE in the CWPA), neither the 180-day or 360-day time limits of Labor Code section 1741, subdivision (a) were triggered. Since neither time limit applies, according to DLSE the CWPA should be considered timely and the matter should proceed to a Hearing on the Merits for the full amount specified in the CWPA.

SolarCity and CLP contend that while there has been no notice of completion, the issuance of the LORs and PTOs constitutes the formal "acceptance" of the work performed to install the four solar power systems at issue here. SolarCity and CLP further contend that DLSE's 180-day time limit for service of the CWPA expired, at the latest, 180 days following the January 4, 2012 date of the last PTO from SCE, or July 2, 2012. Since the CWPA was served nearly three months following this date, SolarCity and CLP assert that 180-day statute of limitations in Labor Code section 1741, subdivision (a) had run before the CWPA was served, and therefore the CWPA should be dismissed as having been untimely served.

DLSE responds to this argument by pointing out that the City of Lancaster's Charter vests governing authority in the Mayor and City Council, and argues that there is no evidence that the Mayor and City Council accepted the solar power systems as having been completed.

³ In his declaration dated February 20, 2013, Jason Caudle, the Deputy City Manager of the City of Lancaster, declares that the City of Lancaster has not retained any funds in connection with this project. This assertion is un rebutted and will be accepted as fact.

In rebuttal, SolarCity argues that the City of Lancaster effectively delegated its authority to accept the work to Mr. Shelton, the engineer hired by the City of Lancaster as its inspector. SolarCity also points to a declaration of the City of Lancaster's Deputy City Manager, Jason Caudle. Mr. Caudle attests that the City of Lancaster intended the issuance of the LORs by Mr. Shelton to constitute acceptance of the work by the City of Lancaster. SolarCity also urges reliance upon the decision in *Kray Cabling Company, Inc. v. County of Contra Costa et al.* (1995) 39 Cal.App.4th 158. In that case, the court held that DLSE was barred from pursuing an enforcement action against the contractor by the 90-day statute of limitations (in effect at the time) following acceptance of a computer installation project as complete by the County's inspector, even though the County had never filed a Notice of Completion.

SolarCity and CLP have met their burden of proof. There has not been, nor will there ever be, a Notice of Completion for the project at issue here. Thus, the first prong of Labor Code section 1741, subdivision (a) does not apply. As to the second prong, the evidence indicates that the City of Lancaster delegated the authority to accept the project to its engineer, Mr. Shelton. Mr. Shelton indicated his acceptance by issuing an LOR for each of the four school sites involved. The date of the last LOR was December 19, 2011, over nine months before service of the CWPA. Even if the facts are construed more favorably toward DLSE, and the acceptance of the project is understood to have occurred with the last PTO from SCE, it was issued January 4, 2012, and the CWPA was not served until almost nine months after that.

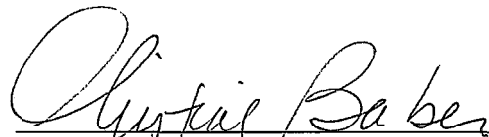
FINDINGS AND ORDER

1. The City of Lancaster has not recorded a Notice of Completion for this project and does not intend to do so.
2. The power to accept the project on behalf of the City of Lancaster was delegated to the engineer hired by the City of Lancaster to inspect the project, James S. Shelton.
3. Mr. Shelton inspected the project as directed by the City of Lancaster, and indicated that each of the four components of the project was complete by drafting a Letter of Release for each of the four sites, and sending each Letter of Release to Southern California Edison.

4. The date of the first three Letters of Release prepared by Mr. Shelton was November 10, 2011. The date of the last Letter of Release was December 19, 2011.
5. Taken together, the Letters of Release by Mr. Shelton constituted an acceptance of the work on behalf of the City of Lancaster under Labor Code section 1741, subdivision (a). The date of acceptance was December 19, 2011.
6. The CWPA was served September 27, 2012.
7. The date of the service of the CWPA was 283 days after the City of Lancaster accepted the work.
8. No funds have been retained by the City of Lancaster.

Based on these findings, **IT IS ORDERED** that the joint motion by SolarCity Corporation and CLP Resources, Inc. to dismiss the Civil Wage and Penalty Assessment as having been untimely served beyond the 180-day time limit provided by Labor Code section 1741, subdivision (a) is **GRANTED**. Accordingly, the Civil Wage and Penalty Assessment is dismissed in its entirety.

Dated: 6/13/2013



Christine Baker
Director of Industrial Relations