STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Minako America Corp. dba Minco Construction Case No. 14-0572-PWH

From Determinations of Civil Penalty issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

I have read the Request for Reconsideration filed by the Division of Labor Standards Enforcement (DLSE) on February 23, 2016, under California Code of Regulations, title 8, section 17261, subdivision (a) (hereafter Rule 61), 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 February 29, 2016, by the requesting party Minako America Corp. dba Minco Construction.

The Decision of the Director, addressing the single issue of whether DLSE's Civil Wage and Penalty Assessment should be dismissed as untimely, issued February 18, 2016. Prior to the Decision, the parties were permitted to file post-hearing briefs supporting their respective positions, and DLSE filed its post-hearing brief on June 22, 2015. In its Request for Reconsideration, DLSE raises entirely new legal theories and arguments. These legal theories and arguments could have been raised before the matter was submitted for decision as of June 22, 2015. 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 June 22, 2015, 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 Request for Reconsideration is denied.

Dated: 3/4/2016

Christine Baker
Director of Industrial Relations

STATE OF CALIFORNIA

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DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Minako America Corp. dba Minco Construction (Minco) 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 the work of improvement known as the Job Order Contract 1026 – Various Locations (Project) performed for the Los Angeles County Department of Public Works (County) in the County of Los Angeles. The Assessment determined that Minco had violated Labor Code section 1776[1] and assessed an aggregate penalty of $128,000.00 under section 1776, subdivision (h).

A Hearing on the Merits was held on May 7, 2015, in Los Angeles, California, before Hearing Officer Howard Wien. Max D. Norris appeared as counsel for DLSE. Thomas W. Kovacich appeared as counsel for Minco.

The issues for decision are:

1. Whether Minco violated section 1776 by failing to timely provide Certified Payroll Records (CPRs) requested by DLSE.
2. Whether the Assessment appropriately assessed an aggregate penalty of $128,000.00 under section 1776, subdivision (h).

In this decision, the Director finds that the Assessment was served untimely under section 1741, subdivision (a) (hereafter section 1741(a)). Accordingly, the Director dismisses the Assessment.

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

FACTS

DLSE issued the Assessment on August 19, 2014. The Assessment assessed penalties under section 1776, subdivision (h) for Minco's alleged violation of section 1776 by failing to provide CPRs requested by DLSE. The penalties were assessed from June 10, 2014, through August 12, 2014, at the rate of $100.00 per day for 64 days and 20 employees, resulting in an aggregate penalty of $128,000.00. The Assessment further stated that the penalty will continue to accrue until strict compliance is effectuated or the CPRs are received by DLSE.

Minco submitted a timely request for review from the Assessment asserting, among other matters, that the Assessment was untimely under section 1741(a), which required that the Assessment be served within 18 months from the acceptance of the project or 18 months from the recordation of a valid notice of completion, whichever occurred last.[2]

On January 16, 2015, Minco applied for an Order to Show Cause (OSC) why the Assessment should not be dismissed as untimely under California Code of Regulations, title 8, section 17227 (hereafter Rule 27). On January 22, 2015, the Hearing Officer issued the OSC. Minco and DLSE presented evidence on the issue of timeliness. On April 8, 2015, the Hearing Officer issued an Order under Rule 27 subdivision (c) reserving the timelines issue for further consideration and determination in connection with the hearing on the merits. The Hearing Officer so ordered because of his desire to have the fullest possible record on the issue.

DLSE presented its case, with testimony given by DLSE's single witness Sandi Fortner-Howard, Management Services Technician (Howard). DLSE rested. Minco then moved for dismissal of the Assessment on two alternative grounds: (1) DLSE had the burden of providing prima facie evidence the Assessment was timely, under California Code of Regulations, title 8,

[2] Minco asserted that the limitations period was 180 days, the period stated in section 1741(a) in effect until January 1, 2014. DLSE asserted that the limitations period was 18 months, the period stated in section 1741(a) effective on and after January 1, 2014. This Decision need not decide which limitations period is applicable because, as fully addressed below, the Assessment was not served until over 27 months after the limitations period commenced running.

section 17250 (hereafter Rule 50), which incorporates California Code of Regulations, title 8, section 17220 (hereafter Rule 20), but DLSE failed to present such prima facie evidence; and (2) DLSE had the burden of proving the timeliness of the Assessment, and DLSE failed to meet that burden. Argument was heard from Mr. Kovacich and Mr. Norris on this motion. The Hearing Officer ruled as follows: (1) the motion is denied in its entirety without prejudice; (2) the parties may address the motion in their post-hearing briefs); (3) the hearing officer's recommended Decision to the Director will state the hearing officer's decision on this motion.

Minco then presented its defense, with testimony given by Minco's two witnesses: Bassem Riad, Project Manager (Riad), and Magdy Girgis, Controller (Magdy). Minco then rested.

The case was submitted for decision on June 22, 2015, upon receipt of the parties' post-hearing briefs.

Minco's Witness:

The testimony on behalf of Minco that is relevant to this Decision was solely the testimony of Riad who testified as follows.

Riad was the Project Manager responsible for the Project from the beginning to the end. Riad testified -- both from his recollection and with Minco's exhibits admitted into evidence -- that the Project was a job order contract under which the County had no obligation whatsoever to order any work from Minco, but if the County ordered work, it would do so by issuing a job order to Minco. The contract term was limited to one year, so the contract ended on October 31, 2011 or until the maximum amount of orders allowed under the contract ($4.2 million) was incurred – whichever occurred first.

Under this job order contract, the County issued 21 work orders to Minco. The last work performed by Minco was on the San Gabriel River Bicycle Trail project (Bike Trail). The final two work orders were JOC 1026-011.00 and JOC 1026-011.01 for the Bike Trail. Minco completed its work on those two work orders on February 25, 2012, and thereafter did not

perform any further work under the job order contract. Minco received full payment from the County for all work that Minco performed under the job order contract by May 7, 2012. Although the County never provided Minco a notice of acceptance of all the work that Minco performed under the job order contract, the County did provide Minco a notice of acceptance of the work Minco performed under those final two works orders for the Bike Trail -- stating the acceptance date of April 24, 2012.

Riad's receipt of this notice of acceptance occurred as follows. When Riad received the Assessment from DLSE, he contacted the County because he believed the Assessment was untimely. In response, he received from the County copies of the signed Resolution by the Assistant Deputy Director dated April 24, 2012, stating acceptance of the last two work orders under the job order contract, which were the two work orders for the Bike Trail. This Resolution stated: "Accept the contract work completed by Minco Construction, Work Order Nos. 1026-011.00 and 1026-011.01 with a total contract amount of $665,432.57." The Resolution further provided for approval of the release of all money to Minco for the two work orders including release of retention. It stated: "The construction project was completed in accordance with the Job Order Contract and specifications attached are the Contractor's Certificate of Compliance and the Contract Evaluation Form." It further stated: "Authority for this action is delegated to the director of Public Works under section 2-18.050 of the County Code." It was signed by James Sparks, Assistant Deputy Director. Minco received the document directly from the County on January 27, 2015.

DLSE's Witness:

The testimony of DLSE's witness Sandi Fortner-Howard relevant to this decision was as follows. Fortner-Howard knew the Notice of Completion of the Project was recorded on December 16, 2013, and she knew this Notice of Completion stated that the Project was completed on November 13, 2013. She had no other knowledge regarding any acceptance of the Project by the County.

DISCUSSION

Under Rule 50 and Rule 20, DLSE Did Not Have Any Burden To Provide Prima Facie Evidence That The Assessment Was Timely.

Section 1741(a) – effective as of January 1, 2014 – states in relevant part regarding the deadline for DLSE to serve the Assessment:

> The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

When DLSE rested its case, Minco moved for dismissal of the Assessment under Rule 50 on the ground that DLSE had failed to present prima facie evidence that the Assessment was served timely. The relevant subdivisions of Rule 50 read as follows:

> (a) The Enforcing Agency has the burden of coming forward with evidence that the Affected Contractor or Subcontractor (1) was served with an Assessment or Notice of Withholding of Contract Payments in accordance with Rule 20 [Section 17220]; (2) was provided a reasonable opportunity to review evidence to be utilized at the hearing in accordance with Rule 24 [Section 17224]; and (3) that such evidence provides prima facie support for the Assessment or Withholding of Contract Payments.
>
> (b) If the Enforcing Agency meets its initial burden under (a), the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment or for the Withholding of Contract Payments is incorrect.
> [¶] ... [¶]
>
> (d) All burden of proof and burdens of producing evidence shall be construed in a manner consistent with relevant sections of the Evidence Code, and the quantum of proof required to establish the existence or non-existence of any fact shall be by a preponderance of the evidence, unless a higher standard is prescribed by law.

Rule 50, subdivision (a) quoted above expressly incorporates Rule 20. Rule 20 states detailed requirements regarding the persons upon whom the Assessment must be served, the manner of service that is required, and the required contents of the Assessment.

DLSE did not dispute Minco's contention that Rule 50 and Rule 20 required DLSE to present prima facie evidence that the Assessment was timely served. Further, DLSE conceded that: (1) DLSE's sole evidence of the alleged timeliness of the Assessment was the Notice of Completion recorded on December 16, 2013, stating a completion date of November 13, 2013; (2) this Notice of Completion was invalid because it was recorded more than 15 days after the stated date of completion (the invalidity of the Notice of Completion is discussed further, *infra*, p. 9.); and (3) as stated by the plain language of section 1741(a), the filing of the invalid Notice of Completion did not commence the limitations period under Labor Code section 1741(a). Instead, DLSE relied on the alternative provision of section 1741(a): the limitations period commenced with the "acceptance of the public work." DLSE asserted that although the Notice of Completion was invalid, it nevertheless constituted prima facie evidence that this acceptance occurred either December 16, 2013, (when the Notice of Completion was filed) or November 13, 2013 (the date of completion stated in the Notice of Completion).

Despite DLSE's concurrence with Minco that Rule 50 and Rule 20 required DLSE to present prima facie evidence the Assessment was timely, the Director concludes there is no such requirement. Rule 50, subdivision (a) provides that DLSE had the burden of coming forward with evidence that Minco was served with an Assessment in accordance with Rule 20. However, both Rule 50 and Rule 20 are entirely silent regarding timeliness of the Assessment. The absence of any language regarding timeliness of the Assessment is particularly striking in Rule 20, given the lengthy detailed requirements for Assessments contained therein. Further, there are no other Rules that impose upon DLSE a requirement to present prima facie evidence of timeliness of the Assessment.

Rule 27 further supports the conclusion of this Decision that the Rules do not require DLSE to present prima facie evidence of timeliness of the Assessment. Rule 27 provides any party (or the hearing officer on his own motion) the opportunity to obtain an early decision on whether an assessment is untimely, based upon a record presented by the parties under penalty of perjury. So a contractor who believes that DLSE has not disclosed prima facie evidence of the

timeliness of the assessment can use Rule 27 to put DLSE's "feet to the fire" on this issue. Rule 27 states:

> (a) Upon the application of any Party or upon his or her own motion, the appointed Hearing Officer may issue an Order to Show Cause why an Assessment, a Withholding of Contract Payments, or a Request for Review should not be dismissed as untimely under the relevant statute.
>
> (b) An Order to Show Cause issued under subpart (a) of this Rule shall be served on all Parties who have appeared or been served with any prior notice in the matter and shall provide the Parties with at least 10 days to respond in writing to the Order to Show Cause and an additional 5 days following the service of such responses to reply to any submission by any other Party. Evidence submitted in support or opposition to an Order to Show Cause shall be by affidavit or declaration under penalty of perjury. There shall be no oral hearing on an Order to Show Cause issued under this Rule unless requested by a Party or by the Hearing Officer.
>
> (c) After the time for submitting responses and replies to the Order to Show Cause has passed or after the oral hearing, if any, the Hearing Officer may do one of the following: (1) recommend that the Director issue a decision setting aside the Assessment or Withholding of Contract Payments or dismissing the Request for Review as untimely under the statute; (2) find the Assessment, Withholding, or Request for Review timely and direct that the matter proceed to hearing on the merits; or (3) reserve the timeliness issue for further consideration and determination in connection with the hearing on the merits.
>
> (d) A decision by the Director which sets asides an Assessment or Withholding of Contract Payments or which dismisses a Request for Review as untimely shall be subject to reconsideration and to judicial review in the same manner as any other Final Order or Decision of the Director. A determination by the Hearing Officer that the Assessment, Withholding, or Request for Review was timely or that the timeliness issue should be reserved for further consideration and determination in connection with the hearing on the merits shall not be subject to appeal or review except as part of any reconsideration or appeal from the Decision of the Director made after the hearing on the merits.

Thus the issue of timeliness of the Assessment is <u>not</u> to be decided by the relatively insignificant test of whether DLSE presented prima facie evidence of timeliness, but instead is to be decided

upon a full consideration of all evidence presented by all the parties on the timeliness issue, under penalty of perjury.[3]

Accordingly, Minco's motion to dismiss the Assessment under Rule 50 and Rule 20 -- on the ground DLSE failed to present prima facie evidence the Assessment was untimely -- is denied.

DLSE Did Not Have the Burden of Proving the Assessment Was Timely. Minco Had the Burden of Proving the Assessment was Untimely.

The assertion that the document constituting the complaint – in this case, the Assessment – was served untimely constitutes a statute of limitations defense. The statute of limitations is an affirmative defense and its elements must be proved by the party asserting it. (*Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1310.) Accordingly, Minco's motion to dismiss the Assessment on the ground DLSE failed to prove the timeliness of the Assessment is without merit and is denied. The burden of proof on this issue resides with Minco.

The Record Establishes that Minco Met Its Burden of Proving the Assessment was Untimely Under Section 1741(a).

As stated above, DLSE conceded that the Notice of Completion was invalid and therefore it did not commence the limitations period under section 1741(a). However, to put this issue completely to rest, this Decision will briefly address it. Under Civil Code section 9204, "[a] public entity may record a notice of completion on or within 15 days after the date of completion of a work of improvement," and the notice of completion "shall ... include the date of completion." There are two ways this statute makes clear that a notice of completion recorded more than 15 days after the date of completion is

[3] Here, Minco did apply for such an Order to Show Cause, Minco and DLSE presented evidence on the issue of timeliness, and the Hearing Officer exercised his discretion under Rule 27, subdivision (c) to reserve the timelines issue for further consideration and determination in connection with the hearing on the merits. The Hearing Officer exercised this discretion because of his desire to have the fullest possible record on the issue.

invalid. First, as quoted above, the statute expressly does not permit recordation of a notice of completion more than 15 days after the date of completion. Second, the statute states that if the notice of completion states an erroneous date of completion, the notice is still effective only if "the true date of completion is 15 days or less before the date of recordation of the notice." (*Id.*)

Here, the Notice of Completion stated that the Project was completed on November 13, 2013, and there was no evidence disputing this completion date. The Notice of Completion was filed 33 days later, on December 16, 2013. Accordingly, the Notice of Completion was invalid and did not commence the running of the limitations period under section 1741(a).

Since there was no filing of a valid Notice of Completion, a determination must be made under section 1741(a) as to the date of the acceptance of the Project. Minco contends the acceptance occurred on April 24, 2012, which was the date the County stated it accepted the last job Minco performed under the job order contract. In contrast, DLSE contends that the acceptance occurred either on the date the invalid Notice of Completion was recorded (December 16, 2013), or the completion date stated in the invalid Notice of Completion (November 13, 2013).

DLSE is wrong in both of its assertions. First, recordation of the invalid Notice of Completion cannot constitute "acceptance" because such a decision would directly contravene the requirement of section 1741(a) that recordation of a notice of completion can start the clock on the limitations period only if the notice of completion is valid. Second, the completion date stated in the Notice of Completion cannot constitute acceptance because there is no authority -- and no evidence in this case -- that the completion date stated in the invalid Notice of Completion constitutes acceptance. DLSE asserts in its post-hearing brief that the completion date in the Notice of Completion establishes "acceptance" under Civil Code section 9200 because that statute makes the terms "acceptance" and "completion" nearly "interchangeable." This assertion is incorrect. Section 9200 states in relevant part:

> For the purposes of this title, completion of a work of improvement occurs at the earliest of the following times: (a) Acceptance of the work of improvement by

the public entity, (b) Cessation of labor on the work of improvement for a continuous period of 60 days.

This statute is merely a statement of when "completion" of a work of improvement occurs; it is not a statement, nor a definition, of when "acceptance" of the work of improvement occurs.

Section 1741(a) does not define what constitutes "acceptance of the public work." However, case law provides a definition applicable to the facts of this case, in which Minco bases its statute of limitations defense upon a formal notice issued by the County stating an unconditional and complete acceptance of the final job performed by Minco under the job order contract: "Formal acceptance has been defined as that date at which someone with authority to accept does accept unconditionally and completely." (*Madonna v. State of California* (1957), 151 Cal.App.2d 836, 840.)

The record -- including the following uncontroverted facts -- establishes that the acceptance date of the Project was April 24, 2012. The Project was a job order contract under which the County had no obligation whatsoever to order any work from Minco, but if the County ordered work, it would do so by issuing a job order to Minco. The contract term was limited to one year, so the contract ended on October 31, 2011 or until the maximum amount of orders allowed under the contract ($4.2 million) was incurred – whichever occurred first. Under this contract, the County issued 21 work orders to Minco. The final two work orders were JOC 1026-011.00 and JOC 1026-011.01 for the Bike Trail. Minco completed its work on those two work orders on February 25, 2012 and thereafter did not perform any further work under the job order contract. Minco received full payment from the County for all work that Minco performed under the job order contract by May 7, 2012. Although the County never provided Minco a notice of acceptance of all the work that Minco performed under the job order contract, the County did provide Minco a notice of acceptance of the final work Minco performed under the job order contract: the work on the Bike Trail under the final two works orders, JOC 1026-011.00 and JOC 1026-011.01. This notice was issued by a person in authority with the County, who had authority to issue the notice. This notice stated the acceptance date of April 24, 2012.

The Assessment was served on August 19, 2014, over 27 months later. Accordingly, under Labor Code section 1741(a) the Assessment was time-barred.

The Director is mindful that the County's notice stating the acceptance date of April 24, 2012, was not received by Minco until January 27, 2015 – after the Assessment was issued and after Minco made inquiry to the County as described in the testimony of Riad described above. DLSE also did not know of that notice of acceptance until after January 27, 2015 – many months after the limitations period had expired. However, under section 1741(a), DLSE's lack of knowledge does not extend or toll the limitations period. Under the facts of this case, the limitations period had run before the Assessment was served.

FINDING

The Assessment was served untimely under Labor Code section 1741, subdivision (a).

ORDER

The Assessment is dismissed as untimely. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 2/17/2016

Christine Baker
Director of Industrial Relations