

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Icon West, Inc.

Case Nos. 11-0237-PWH;

United Shotcrete, Inc.

11-0272-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Icon West, Inc. (Icon) and affected subcontractor United Shotcrete, Inc. (United) each 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 Parking Structure #2 Seismic Retrofit Project (Project) performed for the City of Santa Monica-Civil Engineering Division in Los Angeles County. The Assessment determined that United was liable for \$201,977.46 in unpaid prevailing wages, \$54,800 in statutory penalties and \$4,466.36 in unpaid training fund contributions. Before the Hearing on the Merits, DLSE moved to amend the Assessment downward to claim \$166,516.98 in unpaid wages, \$54,925.00 in penalties and \$4,742.77 in training fund contributions. The Hearing on the Merits was held on March 8, 2012, in Los Angeles, California, before Hearing Officer Jessica L. Pirrone. David Cross appeared for DLSE. Bruce D. Rudman appeared for Icon. There was no appearance for United. At the Hearing, DLSE's motion to amend the Assessment was granted. Icon entered stipulations with DLSE regarding Icon's liability for liquidated damages and Labor Code section 1775 penalties, reached a settlement with DLSE regarding all other issues, and withdrew its Request for Review.¹ DLSE proceeded with its case against United. Now, based on unrebutted evidence showing that United failed to pay the required

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

prevailing wages to its workers, the Director of Industrial Relations affirms the Amended Assessment against United.

FACTS

Failure to Appear: Enrique Robles, President of United, filed a Request for Review of the Assessment dated November 3, 2011, indicating United's telephone number as (661) 510-8125 and its mailing address as 29227 Rangewood Road, Castaic, California, 91384. A Notice of Prehearing Conference was mailed to United at this address, giving United notice that the Hearing Officer would be conducting a telephonic Prehearing Conference on December 15, 2011.² As the Minutes of the December 15, 2011, Prehearing Conference reflect, Robles appeared on behalf of United and the Prehearing Conference was continued to January 20, 2012 at 2:00 p.m. Additionally, during the Prehearing Conference, it was discussed that there had been a previous Prehearing Conference with Icon, the Minutes of which had been served on United, in which the matter was set for a Hearing on the Merits.

At the January 20, 2012, Prehearing Conference, the Hearing Officer attempted to call Robles at the number he provided twice, but there was no answer. Because it was not possible to reach Robles, the Prehearing Conference proceeded without United. At the Prehearing Conference, DLSE and Icon reported that they had made substantial progress toward settlement and requested that the January 30, 2012, Hearing on the Merits be converted to a Settlement Conference. The request was granted and Minutes so indicating were served on all of the parties, including United.

At the January 30, 2012, Settlement Conference, there was no appearance by United. DLSE and Icon reported that they had significantly narrowed, but had not resolved, all of the issues. Minutes of the January 30, 2012, Settlement Conference were served on all of the parties stating that a further Prehearing Conference was set for February 13, 2012, and a Hearing on the Merits was set for March 8, 2012.

²This was the first such notice sent to United and the second sent to Icon. Icon filed its Request for Review on September 13, 2011, and had its first Prehearing Conference on November 2, 2011. The Minutes of the November 2, 2011, Prehearing Conference, which were served on United, reflect that the matter was set for a further Prehearing Conference on December 15, 2011, and a Hearing on the Merits on January 30, 2012.

At the February 13, 2012, Prehearing Conference, the Hearing Officer again called Robles at the number he provided, but there was no answer. Robles also failed to appear for the March 8, 2012, Hearing on the Merits. Prior to going on the record, Icon and DLSE stipulated that Icon had satisfied the requirements to escape joint and several liability for section 1775 penalties under section 1775, subdivision (b), and that Icon had satisfied the requirements for waiver of liquidated damages under section 1742.1, subdivision (b) by posting an undertaking in the full amount of the Assessment with the Department of Industrial Relations within 60 days after service of the Assessment. Icon reached a settlement with DLSE regarding all other issues and withdrew its Request for Review. The Hearing Officer proceeded to conduct the Hearing on the Merits in United's absence for the purpose of formulating a recommended decision, as to United only, as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection, and the matter was submitted on the evidentiary record based on the testimony of DLSE's investigator, Monica Curi.

Amended Assessment: The facts stated below are based on DLSE's Exhibits 1 through 43, the other documents in the Hearing Officer's file, and the evidence offered at the Hearing.

In the Summer of 2010,³ Icon and United entered into a contract which provided, among other things, that United would furnish and install concrete shotcrete and concrete infill shearwall pursuant to the Project's plans and specifications. The Amended Assessment identifies thirty-two workers who were not paid the prevailing wage for work performed at various times between July 17, 2010 and May 26, 2012. The applicable prevailing wage determinations are: (1) SC-23-102-2010-1 (General Prevailing Wage Determination for several Southern California counties, including Los Angeles County for Laborer and Related Classifications), as to twenty-seven of the workers, and (2) SC-23-2-2009-1 (General Prevailing Wage Determination for several Southern California counties, including Los Angeles County for Cement Mason), as to five of the workers.

³ The contract between Icon and United is not dated. The first page of the contract states that it is dated "June _____." Bernard Ashkar signed on behalf of Icon on August 3, 2010 and Ernesto Robles signed on behalf of United on July 20, 2010.

Based on DLSE's exhibits and evidence offered at trial, United failed to pay the required prevailing wage to its workers employed on the Project by failing to properly classify the workers and failing to pay them the proper rate. United also failed to pay training fund contributions as required by the applicable prevailing wage determinations. The total wages due are \$166,516.98. The total training fund contributions due are \$4,742.77.⁴

DLSE assessed \$50,200.00 in penalties under section 1775, at the maximum rate of \$50.00 per violation, for 1,004 instances of failure to pay the applicable prevailing wages. DLSE also assessed \$4,725.00 in penalties under section 1813 for 189 instances of failure to pay the proper overtime rate.

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), and *see 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 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. Section 1776, subdivision (g) prescribes a fixed penalty of \$25.00 for each calendar day for each worker when a contractor fails to timely provide certified payroll records within 10 days after a request by DLSE. Section 1742.1, subdivision (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 the service of a Civil Wage and Penalty Assessment.

When DLSE determines that a violation of the prevailing wage laws has occurred, a

⁴ Pursuant to the settlement between DLSE and Icon, Icon agreed to pay the prevailing wages, training funds and 1813 penalties found owing under the Amended Assessment.

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.

If there is a finding that wages are due, the contractor is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the assessment under section 1742.1, subdivision (a), unless the Director waives liquidated damages or the full amount of the assessment is deposited with the Department pursuant to section 1742.1, subdivision (b):

Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment . . . , including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment . . . , for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

The contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (*Ibid.*) In this case, the record establishes the basis for the Amended Assessment and United presented no evidence to disprove the basis for the Amended Assessment. Accordingly, the Amended Assessment is affirmed in its entirety. As discussed above, however, DLSE stipulates that Icon met the requirements to avoid liquidated damages under section 1742.1 subdivision (b) by timely posting an undertaking in the full amount of the Assessment. The resulting waiver of liquidated damages extends to United.

FINDINGS AND ORDER

1. Affected contractor United Shotcrete, Inc., filed a timely Request for Review from the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Unpaid wages are due in the amount of \$166,516.98.
3. Unpaid training fund contributions are due in the amount of \$4,742.77.
4. In light of Findings 2 and 3, above, United underpaid its employees on the Project in the aggregate amount of \$171,259.75.
5. Penalties under section 1775 are due in the amount of \$50,200.00 for 1,004 violations at the maximum rate of \$50.00 per violation.
6. Penalties under section 1813 are due in the amount of \$4,725.00 for 189 violations.
7. United is not liable for liquidated damages based on evidence that Icon met the requirements of section 1742.1, subdivision (b) and the stipulation between DLSE and Icon to that effect.

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

Wages Due:	\$166,516.98
Training Fund Contributions Due:	\$4,742.77
Penalties under section 1775, subdivision (a):	\$50,200.00
Penalties under section 1813:	\$4,725.00
TOTAL:	\$226,184.75

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

The Amended 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: 7/2/2012


 Christine Baker
 Director of Industrial Relations