

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request For Review of  
Hallmark Painting, Inc.

Case No. 05-0163-PWH

From the Notice of Withhold issued by:  
San Diego Unified School District

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**DECISION OF THE DIRECTOR**

**INTRODUCTION**

On August 30, 2005, affected subcontractor, Hallmark Painting, Inc. ("Hallmark"), requested review from a July 18, 2005, Notice of Withholding of Contract Payments ("Notice of Withhold") issued by the San Diego Unified School District ("SDUSD") regarding the Oak Park Elementary School/Gompers Secondary Modernization, Addition and Expansion, and Logan Elementary School Lunch Shelter Project number C-6655 ("Project").<sup>1</sup> The Assessment determined that Hallmark was liable for \$136,593.33 in prevailing wages, \$26,800.00 in penalties under Labor Code Section 1775, \$600.00 in penalties under Labor Code Section 1813, and up to an additional \$136,593.33 in liquidated damages under Labor Code Section 1742.1(a). Affected contractor, C.E. Wylie Construction Co. ("Wylie") filed a separate Request for Review of the Notice of Withhold, which was assigned case number 05-0148 PWH and the two cases were ordered to proceed in tandem before one hearing officer. Greg A. McAtee represented Hallmark, Chad Wischuk, Esq. represented Wylie. Alexis Gutierrez represented SDUSD.

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<sup>1</sup> SDUSD recorded Acceptance of the Project with the County Recorder on August 2, 2005; at the time \$365,100.00 were held in retention.

## PROCEDURAL HISTORY

On April 11, 2006, and prior to commencement of a Hearing on the Merits, Hallmark, and its principal, Gul Erel filed for Chapter 7 bankruptcy protection. On June 15, 2006, the Hearing Officer held that no automatic stay in bankruptcy barred the proceeding under Title 11, United States Code section 362(b)(4). Wylie removed these matters to the Bankruptcy Court; however, the matter was remanded for further hearing by the Bankruptcy Court. Throughout, notices setting the Hearing on the Merits were served on all parties, including on Hallmark and its bankruptcy counsel. The dates set for hearing on the merits were continued several times; however, no one representing Hallmark responded in any manner. Eventually, the Hearing on the Merits was set for May 28, 2007. The same day Wylie and SDUSD advised that a settlement had been reached between SDUSD and Wylie. The Hearing Officer issued an Order to Show Cause (OSC) as to why Hallmark's request for review should not be held in default pursuant to Rule 46(a) [tit. 8, California Code of Regulations 17246(a)]. A telephonic Hearing on the Order to Show Cause was set for June 22, 2007. SDUSD filed and served its written Motion Supporting its *prima facie* case on June 11, 2007. No written or oral response was made by Hallmark since issuance of the OSC. On June 22, 2007, the Hearing Officer attempted to conduct a telephonic hearing; Alexis Gutierrez appeared for SDUSD and no one appeared for Hallmark. The matter was ordered submitted.

Thereafter, the Hearing Officer observed that different addresses for Hallmark and Gul Erel are listed on the bankruptcy case dockets, and also that a different trustee, Mr. David Skelton, was assigned to the Gul Erel/Hallmark Chapter 13 bankruptcy. Therefore, on June 25, 2007, the Hearing Officer vacated the submission and re-served on all parties at the addresses listed on the bankruptcy records. Responses from Hallmark were due July 13, 2007. No response has been made by Hallmark, Erel, their counsel, or the Trustee.

## EVIDENCE

In response to the Hearing Officer's Order to Show Cause, SDUSD submitted its Motion Supporting its *prima facie* case with exhibits A through J. The exhibits were admitted without objection. The Hearing Officer also takes official notice of the content of the files for cases 05-

0148 PWH and 05-0163 PWH. Through this evidence SDUSD established that it operates a labor compliance program pursuant to Labor Code section 1771.5 and determined that during the period May 2003 through January 2005, Hallmark failed to pay the prevailing wage rate to eight identified painters and three identified apprentice painters, in addition to having utilized many unidentified day laborers. SDUSD established that Hallmark under-reported over 300 man days; failed to properly record the employee's actual rate of pay; failed to maintain timecards; failed to properly record the actual amount of hours worked, failed to maintain records for persons employed by Hallmark on the Project; engaged in suspicious conduct with regard to payroll information and, provided false certified payroll records. As a result of its extensive investigation SDUSD withheld money on this and many other SDUSD projects that Hallmark performed as a subcontractor with various prime contractors. SDUSD demonstrated that workers for subcontractor Hallmark made consistent and numerous complaints of essentially the same nature for their work on multiple Hallmark projects with SDUSD.

### ANALYSIS

Labor Code sections 1720<sup>2</sup> and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

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].)*

An Awarding Body with a labor compliance program such as SDUSD enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers

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<sup>2</sup> All further unspecified sections refer to the Labor Code.

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(a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 service of a notice of withholding under section 1741.

Rule 46(a) [Cal. Code Regs, tit. 8, section 17246(a)] allows the Hearing Officer to proceed if a party fails to appear, and to draw inferences from the absence of proof by the non-appearing party. Here, Hallmark has chosen to stop defending and the parties must proceed. In this case the subcontractor has the burden of proving that the basis for the Notice of Withhold is incorrect.<sup>3</sup>

Rule 50(a) requires SDUSD to establish a *prima facie* case for the withholding of contract payments. Once it has done so, the burden shifts to contractor or subcontractor to prove that "the basis for the [withholding of contract payments] is incorrect." (§1742(b), Rule 50(b).)

In this case SDUSD has provided sufficient evidence to justify its Notice. Hallmark has failed to present any evidence to disprove the wages or penalties assessed.

Liquidated Damages: Labor Code section 1742.1(a) provides in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under section 1741 ... the affected ... subcontractor ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the ... subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.

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<sup>3</sup> See Labor Code section 1771.6(b) that applies Labor Code 1742 to the process of Notices of Withhold.

Hallmark failed to pay any of the assessed wages within sixty days after service of the Notice of Withhold; none were paid thereafter. Liquidated damages are imposed by operation of law under Labor Code section 1742.1(a) based on the failure to pay timely the assessed wages and are not part of the Notice of Withhold itself. They are an additional liability that may be affirmed or waived by the Director in these proceedings. Here, the record discloses no basis for waiving the liquidated damages, and accordingly they are found due and payable in the amount of \$136,593.33. *See*, Rule 51 [Cal. Code Regs. tit. 8, section 17251].<sup>4</sup>

### FINDINGS

1. SDUSD's July 18, 2005 Notice of Withhold served on Hallmark Painting, Inc. was timely.
2. Affected subcontractor Hallmark Painting, Inc. filed a timely Request For Review from a Notice of Withholding of Contract Payments issued by the San Diego Unified School District but thereafter failed to prosecute its request for review of that Notice of Withhold.
3. Pursuant to Labor Code sections 1741 and 1771.6(d), Hallmark's liability under the Notice of Withholding of Contract Payments back wages in the amount of \$136,593.33 has been established by SDUSD.
4. Penalties pursuant to Labor Code section 1775(a) for failing to pay prevailing wages are not an abuse of discretion and hence are affirmed in the amount of \$26,800.00.
5. The penalties under section 1813 in the amount of \$600.00 are affirmed for the Project.
6. Liquidated damages are awarded in the amount of \$ 136,593.33 pursuant to Labor Code section 1742.1.

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<sup>4</sup> Rule 51(b) [Cal. Code Regs., tit 8, section 17251(b)] states as follows: To demonstrate "substantial grounds for believing the Assessment or Notice to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment or Notice was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment or Notice.

7. The amounts found due in the Notice of Withholding of Contract Payments as affirmed by this Decision are as follows:

Back Wages	\$136,593.33
Penalties for failure to pay prevailing wage	\$ 26,800.00
Penalties for failure to pay overtime	\$ 600.00
Liquidated Damages under Labor Code Section 1742.1	<u>\$ 136,593.33</u>
<b>TOTAL</b>	<b><u>\$ 300,586.66</u></b>

**ORDER**

Therefore, the Request For Review is DENIED, and the Notice of Withhold is AFFIRMED. The Hearing Officer shall issue a Notice of the Findings which shall be served with the Decision on the parties.

Dated: 9/14/07

  
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John C. Duncan  
Director of Industrial Relations