STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Solpac, Inc., dba Soltek Pacific

Case No. 11-0182-PWH

From a Notice of Withholding issued by:

San Diego Unified School District

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Solpac, Inc., dba Soltek Pacific (Soltek) submitted a timely request for review of the Notice of Withholding (Notice) issued by the San Diego Unified School District (District) with respect to work performed by subcontractor Rainbow Steel, Inc. (Rainbow) on the New Classroom Building at Point Loma High School Project (Project) in San Diego County. The Notice determined that $10,528.00 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on October 3, 2011, and October 20, 2011, in San Diego, California, before Hearing Officer Douglas P. Elliott. A. Kendall Wood appeared for Soltek, Thomas W. Kovacich appeared for the District, and Daryl C. Idler appeared for Rainbow in its capacity as an interested person. The matter was submitted for decision on November 11, 2011.

The issues for decision are:

- Whether the Notice correctly found that Rainbow had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether the District abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.

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

- Whether Soltek is jointly and severally liable with Rainbow for penalties assessed under section 1775 for violations by Rainbow.
- Whether Rainbow failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether Soltek has demonstrated substantial grounds for appealing the Notice, entitling it to a waiver of liquidated damages.

The Acting Director finds that Soltek has disproven the basis of the Notice as to workers allegedly unreported on certain days, but has failed to disprove the basis of the Notice as to unreported workers on three remaining days. Therefore, the Acting Director issues this Decision affirming and modifying the Notice. Soltek has also established that the District abused its discretion in assessing penalties under section 1775, subdivision (a) at the rate of $50.00 per violation. Therefore, the Acting Director of Industrial Relations modifies the Notice and remands it for the redetermination of penalties under section 1775, subdivision (a). Soltek has not established that it is entitled to relief from penalties under section 1775, subdivision (b) and remains jointly and severally liable for the penalties assessed upon Rainbow under section 1775. Soltek has proven the existence of grounds for a waiver of liquidated damages pursuant to section 1742.1, subdivision (b), and Soltek and Rainbow are not liable for liquidated damages.

FACTS

The District advertised the Project for bid on June 9, 2009, and awarded the contract to Soltek on August 4, 2009. Soltek subcontracted with Rainbow on September 21, 2009, to "Provide all labor, materials, equipment and incidentals as may be required to complete the Structural Steel work" required for the Project. Rainbow's employees worked on the Project from approximately January 28, 2010, through January 17, 2011.

Applicable Prevailing Wage Determination (PWD): The following applicable PWD and scope of work was in effect on the bid advertisement date:

Iron Worker (C-20-X-1-2008-2): This is the rate used in the Notice for all work at issue. The Iron Worker PWD contains a predetermined pay rate increase that went into

effect before the beginning of work on the Project.[2]

The Notice: The District served the Notice on May 2, 2011. The Notice found that Rainbow: failed to report all of its employees performing work on the Project on its CPRs, failed to pay the required prevailing wages, and failed to provide proof of fringe benefit payments. The Notice found a total of $9,378.00 in unpaid prevailing wages. Penalties were assessed under section 1775 in the amount of $50.00 per violation for 21 violations, totaling $1,050.00. The District determined that the maximum penalty was warranted by its findings that the contractor did not provide adequate proof that any violations were caused by a good faith mistake. In addition, penalties were assessed under section 1813 for four overtime violations, at the statutory rate of $25.00 per violation, totaling $100.00.

On the first day of the hearing, Rainbow provided the District with proof of fringe benefit payments, leaving only the issue of unreported employees and related penalties and liquidated damages.

Unreported Workers: The District found that Rainbow failed to report and pay certain unidentified employees for work done on the following dates in 2010: March 16, 17, 23 and 31; April 6, 14, 15, 23[3] and 27; May 18 and 27; June 17 and 24; and August 25. Two unidentified employees were found to have worked on March 23, April 14 and May 18, and three unidentified employees were found to have worked on June 17. One unidentified employee was found to have worked on each of the remaining dates. In all instances, the District estimated that the unidentified workers worked eight hours per day.

District witnesses Graham Champion and Pamela Tipp testified that the District determined that there were unreported workers by comparing the CPRs with the Project Inspector Daily Log. Thus, the District's findings were based on "head counts" recorded

[2] Throughout the relevant time period, the prevailing hourly wage due under the Iron Worker PWD was $57.31, comprised of a base rate, benefits and a training fund contribution of $0.87. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

[3] The District acknowledged in its post-hearing brief that its finding of an unreported worker on April 23 was in error. In fact, the CPR for that date shows three workers, while the Inspector of Record only counted two.

by the Inspector of Record on the Project, Paul Carlton. Carlton testified that he was employed by a private inspection company which had a contract with Harris-Turner, which in turn had a contract with the District. Carlton testified that his duties as Inspector of Record were to oversee all aspects of construction on an ongoing basis. He was provided a trailer on the school grounds, on the opposite side of the campus from the Project site. He was either on the jobsite or in the trailer at all times when construction was going on.

Carlton testified that he would obtain a "head count" each day for Soltek and for each of the other subcontractors on the site that day. He generally would ask the supervisor for the subcontractor how many workers were present, but if the supervisor was unavailable, he would do his own count. He did not specify which method he used for any of the days in question. There was no set time for Carlton to obtain the counts. They could occur any time during the day, but he tried to do a count by 2:00 or 2:30 if he did not already have the information. He would typically record the counts in his notebook and, at the end of the day, would enter them on the Project Daily Inspector's Log form, in a column headed "Estim. # of workers." Carlton kept the log on his computer, and would upload it to the District's server every Monday.

On cross-examination, Carlton acknowledged the possibility of error in the head counts: "I'm never going to sit here and say that I am perfect, that my dailies are one hundred percent accurate. I mean, I can make a mistake." When he learned that money was being withheld as a result of the discrepancies between his reports and the CPRs, he was surprised and concerned. He acknowledged that the head counts were "at the bottom of my duties." He further acknowledged that the numbers were estimates, and that "it says so on the form."

On cross-examination, Carlton was asked about two dates on which Rainbow's CPRs listed one more employee than his head count indicated. This may have been due to a worker being present part of the day, but not when the head count was done. Carlton testified that he did not include drivers making deliveries when he did his own counts, but

when he asked a supervisor for a count, he did not specify whether or not they should include drivers.

Soltek witness Bob Williams testified that he was the superintendant on the Project, and that he had conversed with Carlton on the first day of the hearing. He testified that Carlton had said, "hope they are not going to use my reports ... they are estimates of manpower only." Williams further testified that Rainbow employees tended to work odd hours and short days, and that he was "on them about that."

Soltek witness Sonya Mancilla testified that she was Project Manager for Soltek, handling the financial and business aspects of the Project. She testified that she spoke with Carlton regarding the fact that the District was using his daily reports against Soltek and Rainbow, and Carlton stated: "My dailies are estimates ... they can't do that."

Rainbow president and co-owner Henry Gamboa testified that he is solely responsible for the daily assignment of his workers for the various projects Rainbow is working on; that he personally assigned Rainbow workers to the Project, and that the only Rainbow employees on the jobsite, other than himself or an occasional delivery driver, were those listed in the Rainbow CPRs. He further testified that at no time during the time Rainbow had workers on the Project was he informed of an allegation that "phantom" or "underreported" workers were on the job. He testified that Rainbow has a GPS system for tracking the whereabouts of employees throughout the day. He signed, under penalty of perjury, the CPRs that were prepared by Angela Markin, a 12-year Rainbow employee responsible for accounting, billing and contract management and administration.

On cross-examination, Gamboa testified that Rainbow has done about twenty prevailing wage jobs, and that he is familiar with CPRs. He acknowledged that he did not personally prepare the CPRs or independently verify their contents before signing them.

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. 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*] (*Lusardi*).) An Awarding Body like the District 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 *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. 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 service of a Notice of Withholding under section 1776.1.

When the District determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1771.6. An affected contractor or subcontractor may appeal the Notice of Withholding by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect."

The Affected Workers Are Entitled To Receive Prevailing Wages For Their Documented Work On The Project.

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688 [rule for estimate-based overtime claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for a Notice is incorrect.

With respect to most of the dates in question, Soltek has proven by a preponderance of the evidence that the basis for the Notice is incorrect. The sole evidence in support of the Notice is the discrepancies between Carlton's daily log and the CPRs. Carlton acknowledged that his head counts were estimates, and they are designated as such on the form. He further acknowledged the possibility of error on his part. There is further uncertainty due to the fact that he often simply recorded the numbers he was given by the supervisor, who he did not advise whether or not to count delivery drivers. On the dates for which the dispute is simply over how many workers Rainbow had on the job, the CPRs, signed under penalty of perjury, are more persuasive evidence than Carlton's daily logs.

The analysis becomes more complicated, however, with respect to four dates on which Carlton recorded Rainbow workers on the site, and the CPRs do not show any work being done. This is so in part because Carlton's logs not only report the number of workers, but also describe the work he observed them doing.

Carlton's log shows two Rainbow workers on May 18, while Rainbow did not submit any CPRs for the entire week. Carlton reported that Rainbow's workers were "[i]nstalling stair #2." He also remarked: "Rainbow steel requested a welding inspector for today, but did not show up." Carlton testified that he meant by this that Rainbow had no welder present that day. Thus, Rainbow did no welding to be inspected, but simply worked on the installation of the stairs. The fact that Carlton not only reported two Rainbow workers present, but actually observed work being done by them is sufficient to establish by a preponderance of the evidence that Rainbow had two workers on the site on May 18, and erroneously failed to submit a CPR for that date.

Carlton's log shows three Rainbow workers on June 17, while Rainbow submitted a Statement of Non-Performance stating that it had no workers on the construction site that week. Carlton observed the Rainbow workers doing the following work: "Field measure for bridge fabrication." Again, Carlton's observation of Rainbow workers actually performing work establishes by a preponderance of the evidence that such workers were present.

Carlton's log shows one Rainbow worker on June 24, while Rainbow's CPR shows no work being done that day. Carlton noted that the Rainbow worker was "Installing plates for window screens." However, it is striking that Carlton's log for June 24 is identical in nearly every respect to his log for June 23. For both dates he stated the weather was "clear" with temperatures in the sixties. The lists of contractors and the number of workers for each were identical for both dates. The work performed by each subcontractor was also identical for both dates; i.e., the one Rainbow worker was also noted to be "Installing plates for window screens." The only details that differ on the two log sheets are the work done by Soltek and the inspector's remarks, which did not pertain to Rainbow on either date. It appears likely that Carlton simply copied the information

from June 23 onto the log for June 24. For this reason, the log for June 24 is not substantial evidence that a Rainbow worker was actually on site that day.

Finally, Carlton's log shows one Rainbow worker on August 25, while Rainbow's CPR shows no work being done that day. Carlton noted that the worker "Installed bent plate at bridge." Again Carlton's observation of a Rainbow worker actually doing work on the site establishes by a preponderance of the evidence that one Rainbow worker was present on August 25.

In sum, Soltek has met its burden of proving that the basis of the Notice is incorrect with respect to all dates in dispute except May 18, June 17, and August 25. The preponderance of the evidence support the findings of the Notice that Rainbow failed to report two workers for eight hours each on May 18, three workers for eight hours each on June 17, and one worker for eight hours on August 25.

The District's Penalty Assessment Under Section 1775 Constitutes An Abuse Of Discretion.

Section 1775, subdivision (a) states in relevant part:

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[4]

The Acting Director's review of the District's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Acting Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the District abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

Champion testified that the District's investigation was initiated in response to a complaint by a third party, C.A.N.D.O. Contract Compliance (C.A.N.D.O.), that Rainbow was paying the wrong hourly rate for ironworkers. The Notice states with regard to section 1775 penalties:

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[4] Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."

> The contractor was notified by mail, on June 18, 2010, that complaint(s) by C.A.N.D.O. Contract Compliance had been field. Documents were submitted by the prime contractor, SOLPAC, Inc. dba Soltek Pacific, and the subcontractor, Rainbow Steel, Inc. The investigation was completed and a meeting was scheduled on November 15, 2010 to discuss documents to be submitted and to provide an opportunity for the contractor and/or subcontractor to explain why the investigation results were in error and that either no violations occurred, or that violations were caused by a good faith mistake and promptly corrected when brought to the contractor and/or subcontractor's attention. The contractor did not provide adequate proof to the LCP that any violation which may have occurred, were caused by a good faith mistake. To date, neither party has corrected the identified violations addressed in the LCP audit. Therefore, pursuant to the recommend [sic] penalties based on Labor Code 1775, The District is penalizing the contractor fifty dollars ($50.00) for each calendar day, or portion thereof, for each worker.

The violations alleged by C.A.N.D.O. were not the same violations at issue in the hearing. Even assuming that Rainbow and Soltek were given adequate opportunity to show that workers were unreported due to good faith mistake, and that they were given sufficient opportunity to promptly correct such mistakes, this is not the only factor that must be considered in assessing section 1775 penalties. The statute also requires consideration of whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations, as required by section 1775. There is no evidence that the District considered this factor.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate. Soltek has shown that the District abused its discretion by failing to consider the required statutory factors to assess penalties under section 1775 at the maximum rate. Because the discretion to set penalties under that section is committed to the Labor Commissioner, this part of the Assessment must be vacated and remanded for redetermination of the penalties in light of the appropriate factors and the other findings in this Decision.

Soltek And Rainbow Are Jointly And Severally Liable For The Penalties Assessed Under Section 1775.

The affected contractor and subcontractor are jointly and severally liable for penalties under section 1775 unless the contractor can prove it was ignorant of a subcontractor's prevailing wage obligations and that it met four specific requirements:

> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
>
> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
>
> (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(§1775, subd. (b).)

Soltek argues that it produced evidence to prove each of the four statutory factors. The District argues that the statute's safe harbor provisions require that Soltek monitor the payment of prevailing wages, and upon becoming aware of Rainbow's failure to pay prevailing wages, to take appropriate action. Soltek presented testimony from its Project Manager, Sonya Mancilla, and its Project Administrative Assistant, Felicia Herrera, regarding the review process they followed during the courts of the Project. As argued by the District, however, Soltek has not established that it had sufficient controls in place to confirm the accuracy of Rainbow's CPRs. At best, Soltek simply collected the CPRs and the underlying daily reports, but did nothing to independently verify their accuracy.

The District has the stronger argument. If Soltek had adequately monitored Rainbow's compliance, it is inconceivable that Soltek would have failed to detect the fact that Rainbow had workers on site on days when Rainbow reported none. Therefore, the record shows that Soltek failed to satisfy the requirements of section 1775, subdivision (b)(2).

Because Soltek has not established that it complied with all four requirements, it is not entitled to relief from penalties under section 1775, subdivision (b). Consequently, Soltek remains jointly and severally liable for the penalties assessed against Rainbow under section 1775.

> No Workers Were Underpaid For Overtime Hours Worked On The Project, And Therefore No Section 1813 Penalties May Be Assessed.
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> Section 1813 states, in pertinent part, as follows:
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> "The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article." ...
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> Section 1815 states in full as follows:
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> "Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay."

The record does not establishes that Rainbow violated section 1815 by paying less than the required prevailing overtime wage rate for any of the dates at issue. Accordingly, there is no basis for assessment of penalties under section 1813, and that portion of the Notice must be dismissed.

Soltek and Rainbow Are Not Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of . . . a Notice of Withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If . . . the 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.
>
> Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing . . . the notice with respect to a portion of the unpaid wages covered by . . . the notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Acting Director, Soltek and Rainbow are liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is partially tied to Soltek's position on the merits and specifically whether, within the 60 day period after service of the Notice, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

At the beginning of the hearing, the District dropped all of its claims except for those concerning the unreported workers. With regard to that issue, Soltek has prevailed in the majority of instances. Consequently, Soltek has demonstrated substantial grounds for appealing the Notice and liability for liquidated damages is waived.

FINDINGS

1. Affected contractor Soltek filed a timely Request for Review of the Notice of Withholding issued by the District with respect to the Project.

2. Rainbow failed to report on its CPRs pay to certain of its workers of at least the prevailing wage for the disputed work on May 18, June 17, and August 25, 2010. The portions of the Notice assessing Rainbow for failing to report and pay 2

workers for 8 hours each on May 18, 3 workers for 8 hours each on June 17, and 1 worker for 8 hours on August 25, are therefore affirmed. Rainbow underpaid its workers for their work on the Project in the aggregate amount of $2,709.12, comprising six violations of section 1775 and zero violations of section 1813.

3. Rainbow failed to make training fund contributions for the workers described in Finding 2 above, and is liable for 48 hours of training fund contributions at the rate of $.87 per hour, in the aggregate amount of $41.76.

4. In light of Findings 2 and 3, above, Rainbow underpaid its employees on the Project in the aggregate amount of $2,750.88, including unpaid training fund contributions and fringe benefits.

5. The District abused its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of $50.00 per violation. The assessment of $1,050.00 in penalties under section 1775, subdivision (a) must therefore be vacated and remanded to the District for redetermination in light of appropriate factors and the other findings in this Decision. Soltek has not demonstrated that it is entitled to relief from penalties under section 1775, subdivision (b) and therefore remains jointly and severally liable for the penalties assessed upon Rainbow on under section 1775.

6. No penalties under section 1813 are due.

7. Soltek has demonstrated that it had substantial grounds for appealing the Notice, thereby entitling it to a waiver of liquidated damages under section 1742.1, subdivision (a). Soltek and Rainbow therefore have no liability for liquidated damages under section 1742.1, subdivision (a).

8. The amounts found remaining due in the Notice as modified and affirmed by this Decision are as follows:

Wages Due:	$ 2,709.12
Training Fund Contributions Due:	$ 41.76
Penalties under section 1775, subdivision (a):	Remanded

Penalties under section 1813:	$ 0.00
Liquidated Damages:	$ 0.00
TOTAL:	**$ 2,750.88**

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

The Notice of Withholding is affirmed in part, modified in part, and vacated and remanded in part 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.

As to all issues decided here, the Decision is final. With respect to the remanded portion of this Decision only, the District shall have 60 days from the date of service of this Decision to issue a new penalty assessment under section 1775, subdivision (a). Should the District issue a new penalty assessment, Soltek shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

Dated: 12/05/2011

Christine Baker
Acting Director of Industrial Relations