

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Vector Resources, Inc.

Case No. 13-0140-PWH

From a Notice of Temporary Withholding of Contract
Payments issued by:

**Labor Compliance Program, San Diego Unified
School District**

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Vector Resources, Inc. (Vector) submitted a request for review of the Notice of Temporary Withholding of Contract Payments Due to Delinquent or Inadequate Payroll Records (Notice) issued by Labor Compliance Program, San Diego Unified School District (LCP) with respect to the Specified Proposition "S" School Sites (Project) in San Diego County. The Notice determined that \$2,551,627.28 in estimated contract payments due Vector were being withheld. An Expedited Hearing on the Merits was conducted on May 9, 2013, in San Diego, California, before Hearing Officer Harold L. Jackson. Richard M. Freeman and Robyn Willett appeared for Vector and Tyree K. Dorward and Hannah Schartiger appeared for LCP. The matter was submitted for decision on May 9, 2013.

The issues for decision are:

- Whether Vector submitted delinquent or inadequate payroll records for all hours worked on the Project by the affected workers.
- Whether LCP has exceeded its authority under Labor Code section 1771.5, subdivision (b)(5)¹ and California Code of Regulations, title 8, section 16435.

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

The Director finds that Vector has carried its burden of proving that the basis of the Notice was incorrect in that it did not submit inadequate payroll records and that the LCP exceeded its authority in issuing the Notice. Therefore, the Director issues this Decision dismissing the Notice.

FACTS

The San Diego Unified School District (SDUSD) advertised the Project for bid in November 2008 and awarded the contract to Vector. Vector and SDUSD entered a contract (Contract) on February 10, 2009, to design and install communications technology upgrades consisting of local area network electronic components and pathways for specified middle, high, and elementary schools under Proposition S. The Contract provided that Vector would furnish services pursuant to the California Multiple Award Schedule (CMAS), incorporating five CMAS contracts, in accordance with Public Contract Code section 12100.7, *et seq.*² Contract amendments were entered on April 15, 2011, and December 13, 2011, for the respective purposes of replacing two expired CMAS contracts and extending the Contract for two years. Under the Contract, the Awarding Body issued Notices to Proceed (NTPs) for increments of work. Vector's employees have been working on the Project at more than one school from February 2009 through the present.

The Notice: LCP issued the Notice on February 26, 2013. LCP believed that given its statutory obligation to verify compliance with the prevailing wage law, it had no alternative but to temporarily withhold contract payments since, during an audit, it became aware of potential violations and was unable to resolve the issues with Vector. The Notice announced that pursuant to Labor Code section 1771.5, subdivision (b)(5) and California Code of Regulations, title 8, section 16435, contract payments in the amount of \$2,551,627.28 were being withheld due to delinquent or inadequate payroll records for

² CMAS as administered by the California Department of General Services (DGS) offers to public agencies like SDUSD a variety of information technology products and services at standard contract terms, conditions and prices which have been assessed to be fair, reasonable, and competitive. (Pub. Contract Code § 12100, *et seq.*)

multiple employees working in the weeks ending July 31, 2011 through August 5, 2012. The Notice identified four areas of payroll discrepancies on Vector's certified payroll records (CPRs):

1. Misclassification and underpayments for Sound and Signal Technicians (SSTs) performing work listed under the scope of work for Inside Wireman;
2. Payrolls listing multiple classifications per employee per payroll, not distinguishing between classification, hours, and wages;
3. Check numbers not matching payroll; and
4. No Operating Engineer classification being reported on CPRs for each week commencing February 10, 2009, through August 5, 2011, when trenching work was reported.

The audit supporting the Notice found underpayment of wages in the amount of \$1,936,392.96 and penalties, presumably under section 1775, in the amount of \$615,234.31. Underpayment of fringe benefits is also reflected in the audit.

The Notice alleges that Vector's payroll records are inadequate, not that they are delinquent or uncertified. As to the first issue of inadequacy, Graham Champion, LCP's Labor Compliance and Construction Contracts Supervisor, testified that Vector's CPRs showed workers in the SST classification, but the workers are pulling wire and should be listed as Inside Wireman.³ Because the workers are not listed as Inside Wireman, on their face the CPRs are inaccurate, and, hence, inadequate.

As to LCP's second issue of inadequacy, LCP's written explanation states that from its standpoint there are three relevant dates for the purpose of determining the applicable prevailing wage determination (PWDs): the February 2009 date of the Contract, the April 2011 amendment to the Contract, and the December 2011 amendment to the Contract. SDUSD authorized Vector's work by issuing NTPs, which direct Vector to proceed on certain scopes of work, typically at a given school. For work authorized.

³ The audit noted that SSTs should be classified as Inside Wireman based on timecards showing the tasks of "pulling horizontal cable," "pull backbone fiber mm," and "install pull boxes."

during the Contract's initial period from February 10, 2009 through April 11, 2011, LCP would apply the 2008-2 PWD.⁴ For work authorized during the period of the first amendment to the Contract, April 12, 2011 through December 12, 2011, LCP would apply the 2011-1 PWD. For work during the period of the second amendment to the Contract, December 13, 2011, through February 9, 2014, LCP would apply the 2011-2 PWD. LCP states the CPRs are inadequate because they do not indicate how many hours each employee has worked under the separate NTPs. Champion testified there could be two PWDs that apply to a given employee in a given week for work under separate NTPs. LCP's position is that for accuracy of payroll, Vector should identify on a separate line on employee timecards which NTP is associated with specific hours to allow LCP to verify if the proper PWD has been applied.

Vector responds that only one applicable PWD applies, the one in effect on the bid advertisement date, known as the benchmark date. Nevertheless, Administration Department Manager Jennifer Sinnott testified that Vector has provided LCP with all the information necessary to identify the applicable NTP, as shown by LCP's audit. According to Sinnott, even though the NTPs were not broken out on time cards, the LCP has the school location numbers to correlate the time worked to a NTP to identify the applicable PWD. Sinnott stated Vector provided back-up information for the CPRs, including direct deposit documents, reports for fringe benefits, cancelled checks, and daily time logs.

As to the third issue of inadequacy, LCP's written explanation states the standard CPR form includes a requirement that the contractor list the check number for the payments of wages in order for the LCP to verify receipt of payment. LCP states that for direct deposit transactions of wage payments, no check number exists and Vector included in its CPRs either a "phantom" number or no number at all. Vector has

⁴ Owing to the fact that this is not a hearing on the merits of a notice of withholding contract payments, but an expedited hearing on a notice of temporary withholding of contract payments, neither party introduced the PWDs into evidence. From the audit and other exhibits, the relevant classifications in this dispute appear to include SST, Inside Wireman, Painter, and Operating Engineer.

produced bank documents depicting itemized payments outgoing to employees, but those documents do not indicate a transaction number to confirm receipt by each employee.

LCP auditor Josh Harris testified that the phantom numbers affect LCP's ability to verify payment using third party documentation, as could be done with a cancelled check. However, Harris agreed that employees have been asked and did not deny receipt of their wages, and that Vector provided substantially enough information to show that employees were paid as indicated on CPRs. Still, Harris maintained that LCP was unable to correlate payment to the CPRs because to do so involves looking at four different documents and the absence of a check number and use of the phantom number meant the CPRs were inaccurate.

Sinnott testified that Vector's use of phantom numbers for direct deposits was done at LCP's request because no check numbers exist when employees elect direct deposit. Sinnott identified both bank and Vector documents that were submitted to LCP to enable it to verify that Vector's employees actually received the stated amounts via direct deposits.

As to the fourth and final issue of inadequacy, LCP's written statement indicates that Vector employee time cards show employees potentially performed trenching work, for which they should have been classified as Operating Engineers. Because the Vector CPRs do not show employees classified as Operating Engineers, the CPRs were inadequate. In response, Vector witness Sinnott testified that no Vector employees performed the trenching work. That work was done by a subcontractor's employees. The subcontractor's payroll records were submitted to LCP as corroboration. LCP did not rebut this evidence.

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)*.) Prevailing wage requirements are enforced 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.*)

Awarding bodies have been encouraged to adopt and enforce a labor compliance program approved by the Department of Industrial Relations as a method of meeting their obligation of assuring compliance with payment of the prevailing wage on their public works project. While changes in the statutory authorization for labor compliance programs have occurred in recent years (see AB 436 [stats. 2011, ch. 378] and SB 9 X2 [stats. 2009, ch. 7]), LCP is required to enforce the payment of prevailing wages as would the Labor Commissioner. (Cal. Code Regs., tit. 8, §16434, subd. (c)(2).)

Section 1771.5, subdivision (b)(4) states that an “awarding body shall review, and if appropriate, audit payroll records [of a contractor and subcontractor] to verify compliance” with the prevailing wage law. Section 1771.5, subdivision (b)(5) provides that the “awarding body shall withhold contract payments when payroll records are delinquent or inadequate.” The withholding of contract payments under section 1771.5, subdivision (b)(5) “does not require the prior approval of the Labor Commissioner.” (Cal. Code Regs., tit. 8, §16435, subd. (e).)

The notice of withholding is reviewable at a hearing under section 1742 in the same manner as if the notice of the withholding was a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement (DLSE). (§ 1771.6, subd. (b).) However, the hearing is expedited and “limited to the issue of whether the records are

delinquent or inadequate or the Labor Compliance Program has exceeded its authority under this section.” (Cal. Code Regs., tit. 8, §16435, subd. (f).) Since review is done pursuant to section 1742, the contractor bears the burden of proof on the issue at the expedited hearing. (See § 1742, subd. (b) [“The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect”].)

Section 1771.5, subdivision (b)(6) provides a different ground for a withholding of contract payments in cases involving a labor compliance program as the enforcing agency, whereby the “awarding body shall withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.” The withholding of contract payments on this ground requires the prior approval of DLSE if the amount to be withheld is \$1,000 or more. In the approval process, DLSE affirms, rejects, or modifies the “forfeiture” in whole or in part as to the wages and penalties due. (Cal. Code Regs., tit. 8, §§ 16436, subd. (c) and 16437, subs. (a) and (d).) A notice of withholding under section 1771.5, subdivision (b)(6), as approved by DLSE, is reviewable under section 1742 and DLSE may intervene to represent the awarding body. (§ 1771.6, subd. (b); Cal. Code Regs., tit. 8, §§ 16439, subs. (a) and (b).) The section 1742 hearing on review of the notice of withholding under section 1771.5, subdivision (b)(6) can address the difference between amounts paid and the correct general prevailing wage rate due workers in the classification, the difference between amounts paid and correct amounts of fringe payments, the amounts of unpaid apprenticeship training contributions, and estimated penalties under sections 1775, 1776, and 1813. (Cal. Code Regs., tit. 8, §§ 16435.5, subs. (c).)

Section 1776, subdivision (a) describes the payroll records each contractor and subcontractor are required keep. The requirement is to:

keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in

connection with the public work. Each payroll record shall contain or be verified by a written declaration that is made under penalty of perjury, stating both of the following: (1) The information contained in the payroll record is true and correct. (2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

The payroll records shall be certified and shall also contain or be verified by a written declaration under penalty of perjury that the information in the record is true and correct. (§ 1776, subs. (a)(1) and (b).)

Section 16435, subdivision (d) of title 8, California Code of Regulations, defines "Inadequate payroll records" to mean any one of the following:

- (1) A record lacking any of the information required by Labor Code Section 1776;
- (2) A record which contains all of the required information but is not certified, or is certified by someone who is not an agent of the contractor or subcontractor;
- (3) A record remaining uncorrected for one payroll period after the Labor Compliance Program has given the contractor or subcontractor notice of inaccuracies detected by audit or record review. However, prompt correction will stop any duty to withhold if such inaccuracies do not amount to one (1) percent of the entire Certified Weekly Payroll in dollar value and do not affect more than half the persons listed as workers

Assuming that Vector bears the burden of proof to show the basis for the Notice is incorrect, Vector has carried that burden. The only reason given on the Notice is inadequate payroll records. Delinquent records, lack of certification, and lack of declaration were not given as reasons. The regulatory definition of "inadequate payroll records" is "lacking any of the information required" by section 1776. (Cal. Code Regs., tit. 8, § 16435, subd. (d)(1).) Section 1776, subdivision (a), in turn, required Vector to keep "accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid" to the employees. (Cal. Code Regs., tit. 8, § 16435, subd. (d)(1);

§ 1776, subd. (a).) LCP identifies no documents listed in section 1776 that have not been produced by Vector. Vector presented testimony and samples of the documents that, in six boxes, include all names of employees on the Project, and their social security numbers, work classifications, straight time and overtime hours, and actual per diem wages paid. LCP did not rebut that evidence.

LCP's argument is that the produced documents amount to "inadequate payroll records" justifying the Notice because section 1776, subdivision (a) uses "accurate payroll records" as a preface to the list of specific information required to be kept and produced on payroll records after an LCP request. Under that theory LCP asserts the records are not accurate for purposes of the Notice when on their face (a) they do not show the Inside Wireman and Operating Engineer classifications LCP asserts should apply; (b) they do not identify how many hours each employee worked under each NTP issued by the Awarding Body which, in LCP's view, establishes the benchmark date for determining which PWD applies; and (c) they do not contain check numbers for employees who elected wage payment by direct deposit where check numbers are non-existent.⁵

A problem exists with LCP's theory that inadequacy of payroll records under section 1771.5, subdivision (b)(5) can be based on perceived misclassification and absence of NTPs on timecards. Allowing LCP to use these issues as basis for finding inadequate records would inject into an expedited, limited hearing substance that is potentially and more properly heard in review of a notice of withholding under section 1771.5, subdivision (b)(6), which accommodates a broader review. (Cal. Code Regs., tit. 8, § 16435.5, subd. (c) ["amount equal to the underpayment" as used in a withholding under section 1771.5, subdivision (b)(6) includes the difference between amounts paid and the "correct" general prevailing wage rate due workers in the classification].) It would transform a simple hearing on whether the information necessary to conduct an

⁵ Typically, the correct prevailing rate of pay, as determined and published by the Director, is that in effect as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1083-1084.) LCP, however, said it was unprepared in the context of the expedited hearing to put on evidence that the NTP dates dictated the correct prevailing rate of pay. Therefore, a finding on the benchmark date issue is reserved for a future hearing on a notice of withholding of contract payments, should one take place.

audit has been submitted into a more complex hearing on whether the facts on the ground bear out the rates and classification used by Vector. In doing so, the statutory intent for a limited scope of an expedited hearing would be subverted and duplicative hearings could occur in the event a withholding under section 1771.5, subdivision (b)(6) is later reviewed.

Further, the basis for a notice of withholding under section 1771.5, subdivision (b)(6) is that, after investigation, it is established that underpayment has occurred. Prior DLSE approval of the notice is required, with DLSE affirming, rejecting, or modifying the withholding in whole or in part as to both wages and penalties being found due. (Cal. Code Regs., tit. 8, §§ 16436, subd. (c) and 16437, subds. (a) and (d).) In contrast, a notice of temporary withholding under section 1771.5, subdivision (b)(5) based on delinquent or inadequate records does not require the prior approval of DLSE. (Cal. Code Regs., tit. 8, §16435, subd. (e).) Because a notice of withholding under section 1771.5, subdivision (b)(6) involves many more issues than inadequate payroll records, DLSE provides an important check on the work of a labor compliance program, which often has considerably less experience in prevailing wage enforcement than does DLSE. In hearings after DLSE approval of notices of withholding, DLSE may intervene to represent the awarding body, providing a further check on the withholding process. (Cal. Code Regs., tit. 8, §§ 16439, subd. (b).) Hearings on the two types of withholding have distinctive features. However sincere and well-intentioned LCP may be in seeking misclassification and other information to complete its audit, to allow misclassification of Inside Wireman and Operating Engineer and the lack of identification of NTPs to form a basis on which to find the produced records inaccurate impermissibly blends the two procedures.

A second problem with LCP's theory is that it treats the phrase "accurate payroll records" as a separate category of information to be produced in addition to the list of specific information required by section 1776. Under the principle of *ejusdem generis*, general words are construed to embrace only things similar in nature to those enumerated by the specific words. (*International Federation of Professional and Technical*

Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 342 [doctrine of *ejusdem generis* “presumes that if the Legislature intends a general word to be used in its unrestricted sense, it does not also offer as examples peculiar things or classes of things since those descriptions then would be surplusage”][internal quotation marks and citations omitted].) Section 1776’s general phrase “accurate payroll records” immediately precedes the list of specific types of information called for, and it cannot be construed to embrace other things that are not similar in nature to the enumerated list.

As applied here, the principle means that LCP cannot use its claim that payroll is inaccurate because the wrong classifications are used, non-existent check numbers are missing in instances of payroll direct deposit, or NTPs are omitted from timecards, because that information is not similar to the specific categories of information listed in section 1776, all of which have been produced. Nor is “accurate payroll records” a separate catch-all category encompassing classifications not used, NTP dates, or non-existence check numbers.

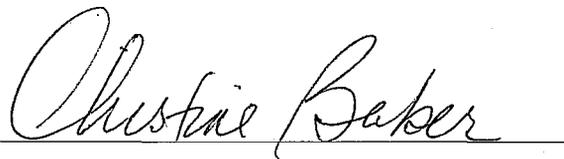
FINDINGS

1. The Notice was incorrect in that Vector did not submit delinquent or inadequate payroll records for all hours worked on the Project by the affected workers.
2. LCP exceeded its authority under Labor Code section 1771.5, subdivision (b)(5) and California Code of Regulations, title 8, section 16435 in issuing the Notice.
3. The Notice of Temporary Withholding of Contract Payments should be dismissed.

ORDER

The Notice of Temporary Withholding of Contract Payments is dismissed 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: 6/14/2013

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