STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

KB Engineering, Inc. and LTD Construction Services GP dba Walton Construction Services

Case Nos. 15-0229-PWH and 15-0256-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor KB Engineering, Inc. ("KB") and affected prime contractor LTD Construction Services GP dba Walton Construction Services ("Walton") submitted timely requests for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on June 25, 2015, with respect to work performed on the Sol y Luna Apartments ("Project") in Los Angeles, California. As the parties proposed, the sole issues for decision at this time are whether, and to what extent, residential prevailing wage rates can be used in the construction of the Project without violating prevailing wage requirements. All other issues were reserved for hearing at a later date. The hearing on the limited issues was conducted by Hearing Officer Douglas P. Elliott on June 21, 2016. Thomas W. Kovacich appeared for both Requesting Parties, and David D. Cross appeared for DLSE. The matter was submitted for decision at the conclusion of briefing on July 11, 2016.

The Director finds that Requesting Parties have carried their burden of proving that the basis of the Assessment was incorrect as to the prevailing wage rate to apply. Therefore, the Director issues this Decision modifying the Assessment in part and remanding the matter for further proceedings consistent with this Decision.

FACTS

In March 2013, Walton entered into a construction contract (Contract) with owner Sol y Luna, L.P., which defined the Project as follows:

> The Project consists of the construction of a five story, 53-unit affordable residential apartment building on an approximate 27,212 square foot site. The 53-unit project includes fifteen 1-bedroom units, sixteen 2-bedroom units and twenty-two 3-bedroom units, as well as ground floor service, community and retail space. The Project also provides 31 ground floor and 49 subterranean parking spaces.

Section 15.6.4.2 of the contract provided in part:

> The Contractor shall cause Subcontractors to pay prevailing wages in the construction of the Project as those wages are determined pursuant to Labor Code Sections 1777.3 et seq., to employ apprentices as required by Labor Code sections 1777.5 et seq., and the implementing regulations of the Department of Industrial Relations and comply with the other applicable provisions of Labor Code Sections 1720 et seq., 1777.5 et seq., and the implementing regulations of the Department of Industrial Relations."[1]

Attached to the Contract as Exhibit G was a letter from the awarding body, CRA/LA, A Designated Local Agency (CRA/LA), stating: "Enclose [*sic*] herewith is a copy of State of California Wage Determination No. LOS 20012-2 (Commercial), R-23-31-2-2011-1 (Residential). The applicable wage determination(s) to utilize for bidding and construction purposes on the subject Development (*sic*)." Another determination attached to the Contract was the one for Residential Laborer, which stated in part: "Pursuant to the California Code of Regulations Section 16001(d), residential projects consist of single family homes and apartments up to and including four stories. This residential determination applies only to the residential portion of the project meeting this definition. Construction of any structures or ancillary facilities on the project that does not meet this definition requires payment of the general commercial prevailing wage rates." The Residential Plumber determination and several other

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

residential determinations with identical language to that quoted above from the Residential Laborer determination were likewise attached to the Contract.

Deputy Labor Commissioner Ken Mayorga testified that in preparing the Assessment, he concluded that commercial rates applied to the entire Project. He based this conclusion on the above language in the residential determinations and the language in the contract describing the Project as a five-story building. Mayorga did not visit the Project site.

Worker Adolfo Gutierrez testified that he worked for KB as a plumber on the Project. He worked on the ground floor, which consisted of parking, public restrooms, and space for retail. Four floors of residential units were built on top of the ground floor. The parties stipulated that Gutierrez worked 1365 hours of straight time and 15 hours of overtime, and was paid $30.00 per hour, as listed in the DLSE audit.

Requesting Parties presented the testimony Kimberly Brittain from KB and Lee Jackson from Walton. They testified that they relied on Exhibit G to the Contract in bidding the Project. CRA/LA's letter dated November 8, 2012, states in part:

> Additionally, please be advised that the issued applicable State Residential Wage Determination contains only (12) trade/crafts that residential wages rates apply [*sic*]. All other trades/crafts must be compensated at the commercial wage rate contained in the LOS-2012-2 issued on the Development.
>
> Important Notice: All parties are being officially advised that the Residential Wage Rate trade/crafts apply ONLY to the residential portion of the Development meeting that definition. Construction of any structure or ancillary facilities i.e. (Community Center) [*sic*] that does not meet this definition requires the payment of wages at the General Commercial wage rate contained under LOS-2012-2 on the Development.

CRA/LA required KB to attend a preconstruction/orientation meeting in which the rates were reviewed. Brittain testified that during the Project construction, Certified Payroll Records were submitted and interviews conducted by representatives of CRA/LA. At no time prior to the issuance of the Assessment did anyone claim that the residential rates did not apply to the scope of work performed by KB, which entailed the rough and finish plumbing on the Project.

Jackson, a part owner of Walton, testified that the face page of the plans and specifications of the Project accurately described it as a "53-unit apartment building, 51 affordable and two managers. Four stories of type V(A) with one ground level parking and retail and one subterranean level of parking." The plans describe the number of bedrooms on each of the first through fourth floors of the building. Each apartment unit is self-contained with its own kitchen and bathroom.

Jackson additionally testified that the parking requirements were in accordance with the City Code. Eighty parking spaces were provided, of which 67 were for the exclusive use of residents. The second level of parking was entirely subterranean and was to be utilized exclusively by residents. The first level of parking was partially below grade. On this level was the entrance to the building with a lobby and elevator access, along with the community center and open space to be utilized in the future. This open area was considered a "gray space" in that Walton did not make any improvements to the area and left it as a shell. KB's only involvement in this area related to installing stubouts of plumbing for future construction.

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 (*Lusardi*) [citations omitted].) 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, supra*, at p. 985.)

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 Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment 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 civil wage and penalty Assessment is incorrect."

The Labor Code does not define residential projects. Title 8, California Code of Regulations section 16001, subdivision (d) specifies that: "Residential projects consisting of single family homes and apartments up to and including four stories are subject to payment of prevailing wages when paid for in whole or in part out of public funds, including federally-funded or assisted residential projects controlled or carried out by an awarding body." Subdivision (e) of that section defines commercial projects as: "All non-residential construction projects including new work, additions, alteration, reconstruction and repairs. Includes residential projects over four stories."

On January 26, 2009, the Department published an "Important Notice to Awarding Bodies and Interested Parties Regarding Prevailing Wage Determinations for Residential Projects" (Important Notice). It states in pertinent part:

> As defined under the California Code of Regulations Section 16001(d), residential projects consist of single-family homes and apartments up to and including four stories. The residential determinations will apply only to the residential portion of the

> project meeting this definition. Construction of any structures or ancillary facilities on the project that does not meet this definition requires the payment of the general prevailing wage rates found in the Director's General Prevailing Wage Determinations. (Emphasis in original.)[2]

Based on the Contract's characterization of the Project as a five-story apartment building and the language of the residential determinations and Important Notice, DLSE argues that the total Project exceeds four stories, and therefore residential rates cannot be used.

Requesting Parties note that there is a lack of law defining residential projects under the California Prevailing Wage Law. They quote *Sheet Metal Workers Local 104 v. Duncan* (2014) 229 Cal.App.4th 194, 211, for the proposition that "unless the Davis-Bacon Act is fundamentally inconsistent with the portions of the prevailing wage law that one seeks to interpret, the approach taken under the Davis-Bacon Act may provide useful guidance." Requesting parties further note that under the Davis-Bacon and related Act (DBRA), residential construction is defined as those projects involving construction, alteration, or repair of single-family houses or apartment buildings of no more than four stories in height. The definition includes all incidental items such as site work, parking areas, utilities, streets, and sidewalks unless there is an established area of practice to the contrary. (See Letter No. LR-96-03, DOL All Agency Memoranda [All Agency Letter].)[3]

The All Agency Letter provides guidance for federal projects as to identifying the character of the work (e.g., building, residential, heavy, and highway) for the purposes of applying Davis-Bacon wage determinations. A project will usually fit into one of the four categories, but if a project has a combination of categories, a determination must be made as to whether multiple wage determinations are applicable. The All Agency Letter provides for the use of the term "incidental" to determine whether the project fits into a single construction category. Incidental items do not alter the overall character of the project, but are installed for

[2] DLSE requested that official notice be taken of the Important Notice, which was admitted as DLSE Exhibit 10. Without objection, official notice was taken pursuant to Rule 45.

[3] Pursuant to notice under Rule 45, official notice is taken of the All Agency Letter, which was attached to Requesting Parties' post-hearing brief.

the purpose of a total project to which they relate in function. Incidental items are subject to the same wage schedule as applies to the overall project. The All Agency letter provides that: "[I]n addition to 'incidental' relative to function, ... 'incidental' is also relative to cost. The DOL uses an amount less than twenty percent of the project cost as a rough guide for what is 'incidental' in relation to the overall cost, which *would not* warrant a multiple schedule." (Emphasis in original.)

Thus, say Requesting Parties, under DBRA, the primary component determining the character of the project and the type of wage schedule that applies is the fact that the project is residential. Requesting Parties quote the All Agency Letter, where it states "Elements such as site work, parking areas, etc. are *incidental* in that their purpose is to support the housing. Other items which may be incidental to housing construction include swimming pools, community buildings, storage sheds, carports and on-site management offices. However, such items constructed alone, without accompanying housing construction, would be the primary component, and, accordingly, the character of the project and the type of wage schedule that applies would be determined on that item alone." (All Agency Letter at p.2.)

Applying this approach to the instant Project, Requesting Parties contend the nonresidential areas on the lower levels of the instant Project were incidental to the overall character of the Project as residential. Therefore, Requesting Parties argue, residential rates should be determined to be applicable to the entire Project, or alternatively, commercial rates should apply only to the nonresidential areas.

The problem with applying the Davis-Bacon approach in this case is that it is inconsistent with the applicable regulation and the Department's interpretation of it, as stated in the Important Notice and the residential wage determinations themselves, which basically quote the regulation ("residential projects consist of single-family homes and apartments up to and including four stories.") California does not treat nonresidential portions of a residential project as merely incidental, as done under Davis-Bacon. Rather, in the language of the Important Notice: "The residential determinations will apply only to the residential portion of the project meeting this definition. Construction of any structures or ancillary facilities on the project that does not meet this definition requires the payment of the general prevailing wage rates found in the Director's

General Prevailing Wage Determinations." "Ancillary facilities" under the Important Notice are analogous to the "incidental" items under the federal All Agency Letter. The Important Notice, then, clearly deviates from the Davis-Bacon approach. Therefore, Requesting Parties' argument that residential rates should be determined to be applicable to the entire Project must be rejected.

At the same time, the Important Notice is problematic for DLSE's position, which is based on the Contract's characterization of the Project as a five-story apartment building. A sentence in the Important Notice states: "As defined under the California Code of Regulations Section 16001(d), residential projects consist of single-family homes and *apartments up to and including four stories."* (Emphasis supplied.) Four stories of apartments are not necessarily the same as a four story apartment building. The Important Notice contemplates that up to four stories of apartments are eligible for residential rates, but that commercial rates must be paid for the construction of ancillary facilities or "residential projects over four stories." This is consistent with the instructions given by the Awarding Body. A stand-alone four-story apartment building would clearly be eligible for residential rates, but a separate parking facility for the apartments would require commercial rates. There is nothing in the record indicating that the result should be different if the four stories of apartments and the parking garage are under the same roof.

Further, the grouping of "single family homes" with "apartments up to and including four stories" in the regulation and Important Notice suggest that smaller residential projects are treated the same and allowed to apply residential prevailing wage rates, which commonly are lower than the prevailing wage rates on commercial projects. In a way the provision of residential rates tends to facilitate smaller residential construction. That the parking garage in this case served to physically heighten the level of the four stories of apartments in the context of the building does not increase the size or number of residential apartments beyond the four stories that constitute the smaller residential projects addressed in the regulation. While five stories of apartments would prevent application of residential rates, that is not the case here.

Similarly, the wording of the regulation at section 16001, subdivision (e) does not resolve the issue in DLSE's favor. That subdivision provides for commercial prevailing wage rates for "residential projects over four stories." The language of subdivision (e) must be read in context

with subdivision (d) of section 16001, keeping in mind the purpose and effect of the regulation. The effect of subdivision (d) is to allow smaller residential projects up to and including four stories to be built with residential prevailing wage rate. Whether or not the parking elements of the Project increase the height of the building to five stories overall, only four stories of apartments are being constructed. Therefore, the Project does not qualify as a "residential project[] over four stories" as contemplated by section 16001, subdivision (e).

Accordingly, Requesting Parties have met their burden of proving that the Assessment incorrectly required that commercial rates be paid for the entire project. I find that the four stories of apartments were eligible for residential rates, while commercial rates must be paid for the construction of the two levels beneath the apartments.

FINDINGS

1. Affected subcontractor KB Engineering, Inc. and affected prime contractor LTD Construction Services GP dba Walton Construction Services timely requested review of the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Sol y Luna Project in Los Angeles, California.

2. The Assessment was issued timely.

3. KB was entitled to pay its workers at residential rates for construction of the four stories of apartments, but was required to pay commercial rates for construction of the ancillary facilities beneath the apartments. The Assessment is therefore modified to the extent it required payment of commercial rates for the entire project.

ORDER

The Civil Wage and Penalty Assessment is modified as set forth in the above Findings. The matter is remanded for further proceedings consistent with this Decision. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 7-14-17

Christine Baker
Director of Industrial Relations