

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

AEKO Consulting, a California Corporation

Case No. 15-0259-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

AEKO Consulting (AEKO), a subcontractor on the Oakland Street Light Conversion LED Project (Project) in the City of Oakland, submitted a Request for Review of the Civil Wage and Penalty Assessment (Assessment) in Case Number 15-0259-PWH, issued by the Division of Labor Standards Enforcement (DLSE) arising from AEKO's work on the Project. DLSE moved to dismiss AEKO's Request for Review of the Assessment, asserting that AEKO failed to file its Request for Review within 60 days after service of the Assessment as required by Labor Code section 1742(a) and Rule 22 [Cal. Code Regs., tit. 8, section 17222(a).] The appointed Hearing Officer, Gayle T. Oshima, served an Order to Show Cause whether this matter should be dismissed for untimeliness, to which AEKO responded.

AEKO claims that its Request for Review was timely because of AEKO's mistaken belief that a telephone call to the Deputy Labor Commissioner subsequent to service of the Assessment, and emails apparently sent out on May 1, 2015 and May 12, 2015 would be sufficient to "file" its Request for Review.

For the reasons below, I find that the time limit for requesting review of an Assessment is jurisdictional and accordingly, AEKO's Request for Review of the Assessment must be dismissed.

FACTS

On April 27, 2015, DLSE issued the Assessment against AEKO based on

AEKO's failure to comply with the Labor Code's prevailing wage requirements with respect to the Project.¹

The Assessment contained a statement directing the affected contractor or subcontractor to send a written Request for Review to the Labor Commissioner – State of California, Civil Wage and Penalty Assessment Review Office, PO Box 255809, 2801 Arden Way, Sacramento, CA 95825 within 60 days after service of the assessment. The Assessment also contained a statement which warned the contractor or subcontractor that “[f]ailure...to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontract, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and a surety on a bond.”

AEKO's Request for Review of the Assessment, dated July 27, 2015, postmarked July 31, 2015,² and received by DLSE on August 4, 2015, states the following:

This is a follow up to my several requests to you for a hearing on the above-referenced case. You may recall that we had discussed this and you asked me for additional information which I have forwarded to you. Unfortunately, you have not acknowledged the receipt of any of my communication [sic] though my email notification shows you have read them. I am reiterating my request for a review of all the assessments because we feel the suggested labor categories are wrong for the non-electricians and it appears that the payments for training to ABC were not taken into consideration for all the employees. It is out strong position that we do not owe deserve [sic] any of the assessed charges.

At the telephonic Prehearing Conference held on September 21, 2015, the attorney for DLSE gave notice that he would file a motion to dismiss AEKO's request for review as untimely by September 25, 2015. The parties had until October 9, 2015, to brief the issue of timeliness. On September 25, 2015, DLSE filed their motion to

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

² California Code of Regulations, title 8, section 17203, subdivision (b) states in relevant part that “Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid.”

dismiss; on the same day, AEKO filed a letter opposing the motion.

In the September 25, 2015, letter, AEKO claims that AEKO's representative called the Deputy Labor Commissioner on April 29, 2015 to discuss the case and to request the opportunity to review the evidence on which the DLSE based its assessment. AEKO also asserts that on May 1, 2015, and May 12, 2015, it sent emails to the Deputy Labor Commissioner about reviewing the evidence. AEKO further asserts that because it did not receive the evidence requested, the representative called the Deputy Labor Commissioner on May 14, 2015. AEKO asserts that it did not "...receive any follow up communication" and sent another email on July 16, 2015. Because AEKO did not receive any communication, AEKO then sent the Request for Review dated July 27, 2015.

On October 12, 2015, the appointed Hearing Officer, Gayle T. Oshima, served an Order to Show Cause (Order) why AEKO's Request for Review of Assessment should not be dismissed for untimeliness. AEKO responded and DLSE replied.

On October 29, 2015, AEKO also provided copies of the emails to the Deputy Labor Commissioner on May 1, 2015, and May 12, 2015. The emails were marked "undeliverable." AEKO also provided a copy of the email to the Deputy Labor Commissioner on July 7, 2015, but not of an email dated July 16, 2015. The July 7, 2015, email states that a Request for Review was communicated on May 13, 2015.

A hearing on the Order was set for November 9, 2015. Attorneys for DLSE and for Platte River Insurance Company, Surety for Amland Corporation appeared for the telephonic hearing on the Order. Mr. Gboyega Aladegbami, representative for AEKO did not appear.

DISCUSSION

Section 1742, subdivision (a) provides that an affected contractor or subcontractor may request review of a civil wage and penalty assessment within 60 days of service of

the assessment.³ If no hearing is requested within this period, “the assessment shall become final.” (§1742, subd. (a).) California Code of Regulations, title 8, section 17222, subdivision (a), restates the 60-day filing requirement and expressly provides that “Failure to request review within 60 days shall result in the Assessment ... becoming final and not subject to further review under these Rules.” Subdivision (b) of section 17222 requires the request for review “be transmitted to the office of the Enforcing Agency designated on the Assessment . . . from which review is sought” and subdivision (c) deems a request for review to be filed on the date of mailing. California Code of Regulations, title 8, section 17227 authorizes the Director to dismiss a request for review that is untimely under the statute.

Therefore, under section 1742, subdivision (a), and California Code of Regulations, title 8, section 17222, subdivisions (a) through (c), AEKO’s Request for Review of the Assessment needed to be served by mail on the Labor Commissioner’s Sacramento address no later than July 1, 2015, the last day on which AEKO could have timely requested review. The Assessment became final on July 1, 2015, the 65th day after it was served. AEKO did not file its Request for Review until July 27, 2015. Because service of a valid request for review can only be by mail on the address specified in the Assessment, AEKO’s purported emails and telephone calls to the Deputy Labor Commissioner, whether received or not, cannot constitute requests for review. Under the plain language of section 1742, subdivision (a), the Director is without jurisdiction to proceed on AEKO’s untimely Requests for Review of the Assessment. (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831.) Where a statute sets out a duty and a consequence for the failure to act in conformity, that statute is said to be “mandatory.” (*California Correctional and Peace Officers Association v. State Personnel Board*

³ Since section 1741, subdivision (a) requires that service of the assessment be completed by mail “pursuant to Section 1013 of the Code of Civil Procedure,” the time extension rules of Code of Civil Procedure section 1013 are taken into account, thus giving an in-state contractor or subcontractor 65 days from the date of mailing of the assessment to file a request for review. (See Cal. Code Regs., tit 8, § 17203, subd. (a).)

(“CCPOA”) (1995) 10 Cal. 4th 1133). (See also *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540.)

Had AEKO filed a timely request for review, it would have forestalled the finality of the Assessment and would have vested the Director with jurisdiction to conduct a hearing. However, since the time has passed, there is no jurisdiction to proceed because the Assessment has become final.

FINDINGS

1. AEKO did not timely request review of the April 27, 2015 Assessment of Civil Penalty.
2. The Assessment became a final order on July 1, 2015.
3. The Director has no jurisdiction to proceed on AEKO’s untimely Request for Review of the Assessment.

ORDER

AEKO Consulting’s Request for Review in Case Number 15-0259-PWH is dismissed as untimely as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 12/11/2015


Christine Baker
Director of Industrial Relations