

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Blue Pacific Engineering & Construction Case No. 17-0165-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Blue Pacific Engineering & Construction (Blue Pacific) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued on April 10, 2017, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Blue Pacific performed for the Grossmont-Cuyamaca Community College District (College District or Awarding Body) in connection with the Grossmont College Tolerant Landscape Phase 2 project (Project) located in San Diego County. The Assessment determined that Blue Pacific owed \$37,589.77 in unpaid prevailing wages, training fund contributions, and statutory penalties. A Hearing on the Merits was set for July 12, 2018, in San Diego, California, before Hearing Officer Douglas P. Elliott. However, on July 11, 2018, the parties stipulated to brief the legal issues in dispute in lieu of a hearing. The parties further stipulated to the admission of exhibits submitted by both sides. Accordingly, this Decision finds that DLSE Exhibit Numbers 1 through 27 and Blue Pacific Exhibits A through N are admitted into evidence.

James C. Danaher appeared as counsel for Blue Pacific and Sotivear Sim appeared as counsel for DLSE.

The parties stipulated as follows:

- The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and the employment of apprentices under the California Prevailing Wage Law, Labor Code

sections 1720 – 1861;¹

- The Assessment was timely under section 1741;
- The Request for Review was timely;
- The Enforcement File was timely made available; and
- No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment under section 1742.1.

The issues for decision are:

- Whether the correct prevailing wage classifications were used in the audit.
- Whether all workers were classified correctly in the certified payroll records (CPRs).
- Whether all required training fund contributions were paid to an approved apprenticeship program or the California Apprenticeship Council.
- Whether the required overtime rate was paid for all overtime hours worked.
- Whether Blue Pacific provided the required contract award information to the applicable apprenticeship committees within ten days of the date of execution of the prime contract and no later than the first day Blue Pacific had workers on the Project.
- Whether Blue Pacific properly requested the dispatch of apprentices for all employed crafts.
- Whether Blue Pacific employed apprentices in the proper ratio on the Project.
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the mitigated rate of \$80.00 per violation.
- Whether Blue Pacific is liable for section 1813 penalties.
- Whether Blue Pacific has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

¹ All subsequent section references are to the California Labor Code, unless otherwise specified.

For the reasons set forth below, the Director finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the Assessment, in part, and Blue Pacific thereafter failed to carry its burden of proving that the basis of the Assessment was incorrect, except as otherwise stated herein. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming but modifying in part the Assessment.

FACTS

The Project.

The Awarding Body advertised the Project for bid on October 16, 2013. The Project involved the installation of drought-tolerant landscaping at the College District in order to reduce irrigation requirements, to provide classroom teaching aids with native garden pods and beautification of entry areas and a bus stop with upgraded lighting, hardscape, landscape and native garden area. Blue Pacific was awarded the Project and, on December 31, 2013, entered into a contract to perform the work (the Contract). The Contract directed Blue Pacific to pay the applicable prevailing wage rates, cited the relevant Labor Code sections, advised that the Director's determinations of prevailing wage rates were open to inspection at the Awarding Body, and set forth the requirements for submitting CPRs.

Blue Pacific employees worked on the Project from January 10, 2014, to September 14, 2014, in the City of El Cajon. On October 27, 2014, a Notice of Completion was recorded with the San Diego County Recorder indicating that work on the Project was completed on October 20, 2014.

The Assessment.

The Assessment found that Blue Pacific misclassified and paid several workers at the Groundsperson rate for work that should have been classified and paid at the higher Landscape/Irrigation Laborer (Landscape Laborer) rate. The Assessment also found that, near the Project's end date and retroactively, Blue Pacific improperly

reclassified as Landscape Laborer certain workers who it originally classified and paid at the Cement Mason rate. Additionally, the Assessment found that Blue Pacific failed to submit Division of Apprenticeship Standard forms DAS 140 and DAS 142 for the trade of Cement Mason; failed to hire apprentices for the appropriate trades of Cement Mason and Laborer; and did not pay the required training fund contributions.

Altogether, the Assessment found that Blue Pacific underpaid the required prevailing wages and training fund contributions in the amount of \$10,199.77. Penalties were assessed under section 1775 in the mitigated amount of \$80.00 per violation for 279 violations, in a total amount of \$23,040.00, and under section 1813 in the amount of \$25.00 per violation for two violations, totaling \$50.00. Penalties were also assessed under section 1777.7 in the mitigated amount of \$50.00 per day for 87 days, totaling \$4,350.00.

DLSE stated in its brief, however:

On July 12, 2018, upon the review of additional evidence DLSE amended the CWPA downward (See Exhibit 27). The amended CWPA claims gross wages in the amount of \$5,937.66, and combined penalties pursuant to Labor Code sections 1775 and 1813 in the amount of \$2,825.00, penalties pursuant to Labor Code section 1777.7 in the amount of \$4,350, and training funds in the amount of \$78.38.

DLSE Exhibit Number 27 is a revised audit reflecting the amounts stated in its brief. Accordingly, DLSE's statement is taken as a motion to amend the Assessment downward pursuant to title 8, California Code of Regulations, section 17226. There being no opposition and it appearing that no party's substantial substantive rights would be forfeited, this Decision grants the motion to amend.

Applicable Prevailing Wage Determinations (PWDs).

Set forth below are the three relevant PWDs and scopes of work that were in effect on the bid advertisement date.

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1. Cement Mason Engineering Construction for San Diego County (SD-23-203-3-2013-1) (Cement Mason PWD).²

DLSE did not introduce the applicable scope of work provision for this classification, and instead introduced a scope of work provision for Cement Mason in eleven Southern California counties, none of which is San Diego County. Blue Pacific did introduce the scope of work provision for Cement Mason Engineering Construction in San Diego County. It provides in full as follows:

- A. This Agreement shall apply only to construction jobsite work performed by the signatory Employer with its own forces in conjunction with the construction, alteration, modification, improvement, or repair, in whole or in part, of a building, structure, or other jobsite construction work within the recognized jurisdiction of the union and shall not include any other jobsite construction industry work. Jobsite is defined as an area within which construction work is being performed, the boundaries for which are the same as those boundaries delineated in the specifications for the job or project which may include such references as right-of-way, parcel, subdivision map, dedicated street or lot. In the case of subdivisions or planned unit development where construction phases are stipulated by construction contracts, jobsite will mean only that area covered by phases or units currently under construction and under the Employer's control as further defined in Section 7(A) of this Agreement.

- B. Repair and maintenance of equipment is specifically excluded from the coverage of this Agreement. This Agreement shall not apply to the layout and distribution of materials. At the discretion of the Employer, employees covered by this Agreement shall perform work traditionally accompanied by other trades, where necessary for the practicable completion of the work. (Emphasis in original.)

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² The basic hourly rate provided in the Cement Mason PWD for work performed through June 15, 2014, is \$26.57, the combined fringe benefits are \$17.38 per hour, and the training fund contribution rate is \$0.50 per hour, for a total of \$44.45 for each straight-time hour. A predetermined increase effective June 16, 2014, raised the fringe benefit (pension) rate by \$1.10, resulting in a total hourly wage of \$45.55 per hour.

2. Landscape/Irrigation Laborer for San Diego County (SD-102-X-14-2013-2); Landscape/Irrigation Tender for San Diego County (SD-102-X-14-2013-2B) (jointly, Landscape Laborer PWD).³

The scope of work provision for the Landscape Laborer PWD provides, in relevant part:

The landscape industry is defined as follows: Decorative landscaping, such as decorative walls, pools, ponds, reflecting units, lighting displays low voltage, handgrade landscaped areas, tractor grade landscaped areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation, backfill trenches, asphalt, plant shrubs, trees, vines, set boulders, seed lawns, lay sod; hydro seed; use ground covers such as flatted plant materials; rock rip rap, colored rock, crushed rock, pea gravel, and any other landscapable ground covers; installation of header boards and cement mowing edges; soil preparation such as wood shavings, fertilizers, organic, chemical or synthetic; top dress ground cover areas with bark or any wood residual or other specified top dressing, operation of any equipment, as directed by the Contractor, for the installation of landscaping and irrigation work.

In addition to the above paragraph, the work covered by this Agreement shall include, but not be limited to:

. . . .

All plant establishment work

All work in connection with traffic control, including but not limited to flagging, signaling, assisting in the moving and installation of barriers and barricades, safety borders and all equipment[.]

The scope of work for the Landscape Tender portion of the Landscape Laborer

³ The Landscape Laborer PWD and Landscape Tender PWD appear under one heading, Landscape/Irrigation Laborer/Tender, but different rates of pay apply. Landscape Tenders assist Landscape Laborers in a manner and ratio specified in the scope of work for Landscape Tenders. The basic hourly rate for Landscape Laborers for work performed through July 31, 2014, is \$27.55, the combined fringe benefits are \$16.82 per hour, and the training fund contribution rate is \$0.64 per hour, for a total of \$45.01 for each straight-time hour. A predetermined increase effective August 1, 2014, added \$1.25 to the basic hourly wage, bringing it to \$28.80; \$0.50 to combined fringe benefits, bringing them to \$17.32; and no increase to the training fund contribution rate resulting in a total of \$46.76. The basic hourly rate for Landscape Tender is \$11.64, the combined fringe benefits are \$4.42 per hour, and there is no training fund contribution, for a total of \$16.06 for each straight-time hour. There was no predetermined increase for the Tender classification.

PWD provides, in relevant part:

Tenders may only perform the following work on landscape/irrigation projects:

Assisting the Landscape Laborer with the wire installation, unloading of materials, distribution of pipe, stacking of sprinkler heads and risers, the setting of valve boxes and thrust block, both precast and poured in place, cleaning and backfilling trenches with a shovel, cleanup and watering during construction and all other landscaping, planting and all work involved in laying and installation of landscape irrigation systems.

* * *

3. Tree Trimmer (Line Clearance) for San Diego County (C-TT-61-465-5-2010-1 (Tree Trimmer PWD)).

The Tree Trimmer PWD includes the classifications Tree Trimmer and Grounds[person]. The scope of work provision for Tree Trimmer (High Voltage Line Clearance) includes three pages defining the work.

The second page of the scope of work for that PWD states:

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408.664-101 TREE TRIMMER (tel. & tel.; utilities) alternate titles: tree trimmer, line clearance; tree-trimming-line technician.

Trims trees to clear right-of-way for communications lines and electric power lines to minimize storm and short-circuit hazards: Climbs trees to reach branches interfering with wires and transmission towers, using climbing equipment. Prunes treetops, using saws or pruning shears. Repairs trees damaged by storm or lightning by trimming jagged stumps and painting them to prevent bleeding of sap. Removes broken limbs from wires, using hooked extension pole. Fells trees interfering with power service, using chain saw (portable power saw). May work from bucket of extended truck boom to reach limbs.

The third page of the scope of work for Tree Trimmer states in part:

37-3013.00 – Tree Trimmers and Pruners
Cut away dead or excess branches from trees or shrubs to maintain right-of-way for roads, sidewalks, or utilities, or to improve appearance, health,

and value of tree. Prune or treat trees or shrubs using handsaws, pruning hooks, sheers, and clippers. May use truck-mounted lifts and power pruners. May fill cavities in trees to promote healing and prevent deterioration.

DLSE's Reclassification of Groundspersons to Landscape Laborers.

Blue Pacific's CPRs classified the following five workers as "Groundsperson Thereafter" for the weeks ending February 2, 2014, and February 9, 2014, the first two weeks workers were employed on the Project: Brian Arriola Madrid, Jorge L. Arriola Reyes, Steven Arriola, Octavio Vicencio, and Noe Vicencio-Arzeta. Blue Pacific paid these workers a total hourly rate of \$16.60 per hour, which is slightly more than the \$16.32 specified in the Tree Trimmer PWD.⁴ The Project Inspector's Daily Reports describe the work performed by these workers with such terms as "[g]rubbing at entry slope" (DLSE Exhibit No. 5, p. 0079), "[i]nstalling waddles [*sic*] at entry slope" (*id.* at 0082), "[b]eginning to remove trees in areas 4 & 5" (*id.* at 0083), "[r]emoving grass in areas 4 & 5" (*id.* at 0084), "[e]ntry slope installing erosion control" (*id.* at 0085), "[r]emoval of surface roots in areas 4, 5, and 6" (*id.* at 0088), "[p]refab of sprinkler system for west slope" (*id.* at 0089), and: "Remove trees and clear old landscaping in the central location of the campus. Move fencing around and install SWPP at various locations per the contract documents" (*id.* at 0090.)

The Assessment found that these workers were misclassified as Groundspersons, and upgraded them to Landscape Laborers on the days in question. The amended Assessment found that the workers in question were underpaid by the amounts shown in the table below, for the straight time and overtime hours listed:

<u>Worker</u>	<u>S.T. Hours</u>	<u>O.T. Hours</u>	<u>Amount Owing</u>
B. Madrid	32.5	4	\$1,040.23
J. Reyes	32.5	4	\$1,040.23
S. Arriola	35.5	4	\$1,123.54

⁴ The Tree Trimmer PWD lists two total hourly rates for "Groundsman": \$14.93 for "1st year" and \$16.32 "[t]hereafter." Thus, the rate "[t]hereafter" appears to apply to workers who have been employed in the classification for more than one year.

N. Vicencio-Arzeta	40.0	0	\$1,110.80
O. Vicencio	<u>0.0</u>	<u>5</u>	<u>\$ 172.13</u>
Totals	140.5	17	\$4,486.93

DLSE Reclassification Based on Violation of Ratio of Landscape Laborers to Landscape Tenders.

DLSE asserts in its brief that Blue Pacific occasionally paid workers as Landscape Tenders when they should have been classified as Landscape Laborers, as follows:

The majority of Blue Pacific’s workforce was classified as Landscape Irrigation Laborer and Tender. The classification has a strict ratio of Laborers or Apprentices and Tenders that must be followed. Footnote C of the Landscape Irrigation Laborer prevailing wage determination provides that the first employee on the jobsite shall be a Landscape Irrigation Laborer, the second employee on the jobsite must be an apprentice or a Landscape Irrigation Laborer; and the third and fourth employees may be Tenders (See DLSE Exhibit [No.] 16, Page no. 211). There are instances in the DLSE audit where a Landscape Irrigation Tender was upgraded to a Landscape Irrigation Laborer because the contractor was working out of ratio for that particular day (See DLSE Exhibit [No.] 21, Page no. 408, 410, 414).

DLSE Exhibit Number 21 is Blue Pacific’s CPRs. Pages 408, 410 and 414 of that exhibit are the CPRs for the weeks ending May 18, 2014, May 25, 2014, and June 8, 2014, respectively. They show that two workers, Roman Mendoza and Eleazar Sanchez, were paid as Tenders on May 13, 15, 22 and 23, and June 5, 2014. No Landscape Laborers are listed as working on those dates. On June 6, 2014, Mendoza and Sanchez are each shown as being paid for four hours at the Landscape Laborer rate and four hours at the Tender rate. Again, no other Landscape Laborers are shown as working on that date.

DLSE’s revised audit summarizes the total amounts paid and owing to each employee for all hours worked on the Project. (DLSE Exhibit No. 27.) For Sanchez, it shows \$711.99 as the amount owing and unpaid. For Mendoza, it shows no amount owing and unpaid. The audit summary is followed by individual audit worksheets

(Individual Worksheets) for each employee showing daily hours worked and weekly amounts paid and owing. The Individual Worksheets for both Mendoza and Sanchez show zero wages due and owing for each week, and for their entire time on the Project.⁵ Similarly, the summary worksheet lists \$738.76 as the amount owing and unpaid to Marco A. Tenicio-Salas, whose classification is listed as "L/I Tender." The Individual Worksheet for Tenicio-Salas shows \$762.22 as the "Total Wages Paid" and \$738.76 as the "Total Wages Required" for the six days he worked, and shows zero wages due and owing.

DLSE's Reclassification of Landscape Laborer to Cement Mason.

The Project included construction of low, curved concrete walls, characterized by Blue Pacific as "decorative walls," and by DLSE as "seating walls." The Project Inspector's Daily Reports (Inspector's Reports, DLSE Exhibit No. 5) refer to these as "concrete seat walls," and in the "Trade" column, the Inspector's Reports indicate the work as either "Concrete" or "Masonry." For example, the Inspector's Report for March 12, 2014, remarks: "Concrete form setters beginning to set forms for a sample section of seat walls."⁶ Similarly, the Inspector's Report for March 19, 2014, states that concrete workers were "[s]etting forms and pouring seat wall sample #2."

Blue Pacific's CPRs initially classified five workers engaged in building the walls as Cement Masons: Robert Diaz, Fernando Hernandez, Gilbert Pacheco, Jose Pacheco, and Gilbert Valadez. Blue Pacific paid these workers the rate specified in the Cement Mason PWD. The classification of these workers was the subject of a letter dated August 26, 2014, from Blue Pacific to Gafcon, Inc. (Gafcon), a company retained by the

⁵ The summary worksheet also attributes a single section 1813 overtime penalty of \$25.00 to Sanchez, but no such violation or penalty is documented anywhere on the Individual Worksheet for him. The columns "Penalties 1813" and "No. of Violations" each show nothing but zeros.

⁶ The Inspector's Report for March 14, 2014, remarks: "Removing forms from concrete wall seat sample. Sample needs to be redone. Not Acceptable workmanship." This appears to have been a recurring problem. The Inspector's Report for March 27, 2014, remarks: "Architect rejected seat wall concrete sample pour #3." The Inspector's Report for April 3, 2014, remarks: "Architect informed superintendent [sic] Charlie Elihu that sample #4 needs to be done, and forming of concrete seat wall in area #5 was not up to standards. A high caliber concrete form setter and finishers may be required to complete concrete seat walls to match existing seat walls."

Awarding Body to assist in the enforcement of its labor compliance program. The letter stated in part:

Researching a Complaint from the Center for Contract Compliance regarding DAS 140s, DAS 142s, and Apprentices for Cement Masons and Laborers: Engineering on the above-named project ... exposed an error in our payroll regarding the use of pay classifications of Cement Mason and Laborer: Engineering trades. This Project is a "Landscaping" project which included a decorative wall made of cement (included in the Scope of Landscaping/Irrigation Laborer attached herein); therefore, the trades of Cement Mason and Laborer: Engineering were used in error and any payroll [*sic*] involving payment under those trades have been corrected to reflect Landscape/Irrigation Laborer. In light of this, no DAS 140s, DAS 142s, or apprentices were required for the trades of Cement Mason or Laborer: Engineering for this project.

. . .
A total of 440 Landscape/Irrigation Laborer hours were paid as Cement Masons. Of those hours, 327 were underpaid; therefore, corrective checks have been issued to the employees. A Corrective Certified Payroll #30, showing the payment adjustments 327 hours is attached along with, a spreadsheet showing days and hours and original CPR affected, copies of the check stubs, and signed 'Affidavits of Money Paid' for each employee. The remaining 113 hours of Landscape/Irrigation labeled incorrectly as Cement Mason Trade were not underpaid; therefore, corrections were made directly to the affected Certified Payrolls and paystubs

DLSE's investigator, Industrial Relations Representative Puniloa Chavira, concluded that Blue Pacific's original classification of the workers as Cement Masons was correct, explaining in her Penalty Review (DLSE Exhibit No. 3):

Contractor stated in his letter that the project was a 'Landscaping' project which included a decorative wall made of cement. This he stated was included in the Scope of Landscape/Irrigation Laborer and therefore, the classifications of Cement Mason and Laborer Engineering were used in error by their payroll. The scope of work for Landscape/Irrigation Laborer does state 'decorative wall' but it does not indicated [*sic*] that the wall can be cement. In my conversation with Stephen Gallacher, the Inspector on the project, he states that the 'decorative' wall that was built on the project required a Cement Mason. He is willing to testify in support of his report. In addition, I was provided pictures by Marty Glaske of GAFCON Inc. that showed a long curving cement wall approximately 2 feet high,

with cement caps and light fixtures installed into the decorative wall. I am in agreement with Stephen Gallaher [*sic*] in his assessment that the decorative wall was built by a Cement Mason. Therefore, I find that the contractor failed to submit DAS 140 & DAS 142 to the applicable committees for the classification of Cement Mason.

Because the prevailing wage rate for Landscape Laborer is higher than that for Cement Mason, the Assessment, as amended, did not find Blue Pacific liable for unpaid wages or penalties with regard to this issue. However, as discussed below, it did assess penalties under section 1777.7 for failure to request and employ Cement Mason apprentices.

Underpayment of Training Fund Contributions.

The original Assessment found that Blue Pacific had underpaid the required training fund contributions by \$1,333.28. The amended Assessment reduced this amount to only \$78.38. The revised audit on which the amended Assessment was based shows training fund contributions owed for most of Blue Pacific's workers on the Project. The audit summary worksheet sets forth the training fund contributions owed for each employee, but does not provide a total of these amounts, which add up to \$1,390.54. The summary worksheet does, however, have a line item called "Balance Brought forward from audit 3 Summary," with "-1312.16" entered in the Training Fund column. Below that is a balance of \$78.38. The record does not include documentation of training fund contributions made by Blue Pacific, nor did DLSE provide evidence explaining the apparent credit of \$1,312.16. Aside from DLSE's recitation of the amount assessed, neither party addressed the issue of training fund contributions in its briefs.

Applicable Apprenticeship Committees in the Geographic Area.

According to DLSE's Penalty Review (DLSE Exhibit No. 3) there were several apprenticeship committees in the geographic area of the Project in the trades of Landscape Laborer, "Landscape Operator (*sic*) Engineer," Cement Mason, Driver, and Laborer. The applicable apprenticeship committees for Cement Masons were: San

Diego County Cement Masons J.A.C., San Diego Associated General Contractors J.A.C.; and Southern California Laborers Cement Mason J.A.C.

Notice of Contract Award Information.

Blue Pacific began work on the Project on January 27, 2014, according to Blue Pacific's CPRs. Blue Pacific provided DLSE with copies of notices of contract award information form (DAS 140) dated January 27, 2014, which were faxed on that date to the Southern California Laborers Landscape and Irrigation Fitter J.A.C. (Landscape Laborer/Tender J.A.C.), Associated General Contractors of San Diego, Inc. Construction Equipment Operator U.A.C. and Southern California Operating Engineers J.A.C. (Landscape Operating Engineer J.A.C.). On or about February 10, 2014, Blue Pacific sent additional DAS 140 forms to the Laborers Southern California J.A.C. and the San Diego Associated General Contractors J.A.C. for the Laborer – Engineering classification. (Blue Pacific Exhibit No. G, DLSE Exhibit No. 3, 22.) There were no notices sent to apprenticeship committees for the Cement Mason craft.

Request for Dispatch of Apprentices.

On January 27, 2014, Blue Pacific sent requests for the dispatch of apprentices (utilizing form DAS 142) to the Landscape Laborer/Tender J.A.C., and Landscape Operating Engineer J.A.C. Each request was for one apprentice needed as of February 3, 2014. (Blue Pacific Exhibit G.) Blue Pacific did not request the dispatch of Cement Mason apprentices.

Assessment of Statutory Penalties.

DLSE's Penalty Review did not cite any prior violations by Blue Pacific. The investigator made the following recommendation:

Based on my findings, this contractor had performed several public works projects prior to this project. Therefore, I find it not believable that they were not aware of the required documentations needed before starting work on a prevailing wage project. The contractor's own documentation on their Daily Job Report supported the Inspector's Daily Report. Although the contractor was forthcoming on some of the information, they were not completely honest in admitting their errors. Because the contractor has done other public works projects and was aware of the

procedure for public works jobs, I [am] of the opinion that they were negligent in submitting the required apprentice forms. In addition, this contractor attempted to confuse issues by amending their payroll records and re-classified workers to avoid admitting not paying the required prevailing wage law. However, the errors found in my investigation did not result in a substantial amount of wages outstanding. Therefore, I will recommend that the applicable penalties should be mitigated.

Penalties were assessed under section 1775 for 279 violations at the mitigated rate of \$80.00 per violation, for a total of \$23,040.00.⁷ The amended Assessment reduced the total section 1775 penalties to \$2,800.00, but did not state the total number of violations. The amended Assessment also included a single section 1813 violation, resulting in a statutory penalty of \$25.00.⁸ Penalties were also initially assessed under section 1777.7 for 87 violations at the mitigated rate of \$50.00 per violation, for a total of \$4,350.00, and were unchanged in the amended Assessment. In the Penalty Review, the DLSE investigator explained the basis for finding 87 violations as follows:

The contractor violated Labor Code 1777.7 for failure to submit a DAS 140 for the trade Cement Mason [as] required by law. The 1st day a Cement Mason was on the job was 3/13/14 and the last day was 6/8/14, for a total of 87 penalty days. The contractor also failed to submit DAS 142 which is a ratio violation under Labor Code 1777.5, since the Cement Masons worked a total of 312 hours, with a minimum 62 required hours ... for an apprentice. (DLSE Exhibit No. 3 at p. 59.)

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

⁷ This appears to be a mathematical error on the part of DLSE. At the rate of \$80.00 per violation, 279 violations would result in a total of \$22,320.00.

⁸ The Penalty Review listed two section 1813 violations, but no penalty under that section is reflected in the original Assessment.

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*)). 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); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742,

subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

Additionally, employers on public works must keep accurate payroll records, recording, among other information, 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.)

In this case, for the reasons detailed below, the Director determines that, based on the totality of the evidence presented, and except as otherwise noted, DLSE met its initial burden of presenting prima facie support for the Assessment, and that Blue Pacific failed to meet its burden to prove the basis of the Assessment was incorrect.

Blue Pacific Misclassified Five Workers as Groundspersons and as a Result Failed to Pay the Proper Prevailing Wage Rate.

The Assessment found that Blue Pacific had misclassified five workers - Madrid, Reyes, Arriola, Vicencio-Arzeta and Vicencio - as Groundspersons, and upgraded them to Landscape Laborers. DLSE contends as follows:

The Groundsperson Thereafter on this project performed the work on grubbing the entry slope, installing waddles [*sic*], removing trees, removing grass, installing erosion control, removing planting, removal of surface roots, and clearing old landscaping. The Groundsperson Thereafter is found in the Tree Trimmer (line clearance) classification which is a craft where workers are employed to climb trees to clear branches near electrical lines. The Tree Trimmer classification also includes the Groundsperson Thereafter as the individual who is working on the ground in conjunction with the Tree Trimmer to clear debris created by the Tree Trimmer. Here, the classification was inappropriate because this was a new construction which did not involve trimming of trees. Additionally, the Groundsperson Thereafter classification is not appropriate where there are no Tree Trimmers employed. DLSE upgraded ... the Groundsperson Thereafter to Landscape Irrigation Laborers because the work performed by the workers was clearly within the Landscape Irrigation Laborer scope of work.

(DLSE brief at p. 4.)

Blue Pacific argues that the Groundsperson classification was appropriate because there is nothing in either the Tree Trimmer PWD or scope of work that “requires the presence of a Tree Trimmer when a Grounds[person] is present on the Project.” (Blue Pacific brief at p. 7.). It continues:

Clearly, the Scope of Work Provision only focuses on what work and skills fall under the classification. That leaves the Prevailing Wage Determination as the final arbiter of the issue. And the Prevailing Wage Determination only shows different rates of pay for the two categories. Unlike a Landscape/Irrigation Laborer and a Landscape/Irrigation Tender wherein the PWD specifically states there must be a Laborer on the job site before there can be a Tender, there is no such language on [*sic*] Tree Trimmer/Grounds Person Prevailing Wage Determination.

DLSE alleges that Grounds Person is a subcategory of Tree Trimmer and thus cannot be a standalone classification. This is not the case. Tree Trimmer and Grounds [Person] are two standalone categories under the craft Tree Trimmer (Line Clearance). ... But even if it were true that Grounds [Person] is a subcategory of Tree Trimmer, there are no rules of application for the use of a subcategory found in the Labor Code, the PWD or the Scope of Work Provisions. DLSE should not be allowed to read into unambiguous statutes and regulations a rule that does not exist.

(Blue Pacific brief at p. 7, footnote and citation omitted.)

Finally, Blue Pacific argues that its use of the Groundsperson classification was tacitly approved by Gafcon: “Gafcon cleared Blue Pacific at the conclusion of this Project with no outstanding issues. If BP had acted improperly in its use of the Grounds Person classification, Gafcon would have disallowed it.” (Blue Pacific brief at pp. 7-8.)

Notwithstanding the parties’ arguments, the issue at hand does not turn on the question of whether a Groundsperson may ever be employed without the presence of a Tree Trimmer. Rather, the question is whether the use of *any* classification specified in the Tree Trimmer (Line Clearance) PWD was appropriate for this Project. The very title of the PWD references the clearing of utility lines. The related scope of work underscores that the context of the work falling under this determination is the maintenance of utility lines and/or other types of right-of-way free of tree branches

and/or other vegetation. Such work is critical for the avoidance of fires, power outages and other hazards.

DLSE correctly argues that this Project does not entail such work; rather it is a landscaping project squarely within the parameters of the Landscape Laborer/Landscape Tender scope of work, and the tasks in question were intrinsic to the landscaping PWD. Blue Pacific's argument that Gafcon did not object to its use the Groundsperson classification is immaterial. The record contains no evidence of scrutiny by Gafcon of that issue. More to the point, section 1741 vests in DLSE responsibility for determining prevailing wage violations, subject to review by the Director under section 1742. Blue Pacific cites no authority for deferring to the Awarding Body or its agents when DLSE or the Director performs their statutory responsibilities.

With regard to its reclassification of work from Groundsperson to Landscape Laborer, DLSE produced evidence showing prima facie support for the Assessment. Under section 1742, subdivision (b), Blue Pacific had the burden of proving by a preponderance of evidence that the basis for the Assessment is incorrect. For the reasons discussed above, Blue Pacific has not met that burden. Accordingly, the Assessment must be affirmed as to this reclassification of the five workers in question, which results in an underpayment of prevailing wages in the amount of \$4,486.93.

DLSE Has Failed to Adequately Document Amounts Owing by Blue Pacific for Landscape Laborer to Tender Ratio Violations.

Citing Blue Pacific's CPRs, DLSE showed that on several occasions, Blue Pacific misclassified and paid workers as Landscape Tenders when they should have been paid as Landscape Laborers pursuant to the ratio requirement of the Landscape Laborer PWD. However, DLSE's revised audit fails to document amounts owed by Blue Pacific due to such violations. In every instance, the applicable Individual Worksheets show no wages due and owing. The evidence presented by DLSE is thus inconsistent and inadequate to support a finding that DLSE carried its burden of producing evidence that provides prima facie support for the Assessment as to Blue Pacific's liability for ratio violations. (Cal. Code Regs. tit. 8, § 17250, subd. (a).) On that basis, the Assessment

must be modified accordingly, reducing the assessed wages from \$5,937.66 to \$4,486.93, which represents the wages owed to the workers misclassified as Groundspersons.

No Evidence Supports the Assessment as to DLSE's Reclassification of Landscape Laborers to Cement Masons.

Blue Pacific contends that:

For San Diego County, there is no overlap or ambiguity in the Scope of Work Provisions between what tasks are allocated to Cement Masons and what tasks are allocated to Landscape/Irrigation Laborers. *Only* the Scope of Work provision for Landscape/Irrigation Laborers includes the construction of a Decorative Wall.

(Blue Pacific brief at 2, emphasis and capitalization in the original.)

DLSE disagrees:

The Landscape Irrigation Laborers scope of work provision does not cover the cement work being performed by these workers. The construction of a concrete structure whether it be a building, sidewalk, walkway or wall is strictly within the scope of work of the Cement Mason.

Blue Pacific incorrectly relies on a section of the Landscape Irrigation Laborer scope of work that describes a decorative wall. However, a decorative wall in the scope does not ... mention cement as a material that can be handled by a Landscape Irrigation Laborer.

(DLSE brief at p. 5.)

DLSE's argument that the concrete wall work fell "strictly" within the scope of work for Cement Masons is not supported by evidence. DLSE did not submit as an exhibit the scope of work for Cement Masons for San Diego County. While Blue Pacific cured DLSE's omission by submitting that scope of work as its own exhibit, the language therein is too general to offer the necessary support for DLSE's position. In relevant part the scope of work states that the work includes "Construction ... of a building, [or] structure...." Also, the title of the craft, "Cement Mason," logically signifies that the covered work involves cement and concrete, among other materials commonly used by Cement Masons in the

construction industry. The Cement Mason scope of work, however, does not discuss the construction of walls or the construction tools and processes such work would entail. While the Penalty Review attributes to the inspector, Stephen Gallacher, the opinion that construction of the walls required a Cement Mason, that opinion is too conclusory to be probative.

Further, DLSE presented no testimony – from any worker or an inspector on the Project – as to the tools and processes that were used to construct the decorative wall or the custom and practice in the construction industry for wall construction on a landscaping job. The sole DLSE exhibit supporting a conclusion that the wall construction is exclusively the work of Cement Masons is the double hearsay statement in the Penalty Review that an inspector on the job gave DLSE a opinion that the decorative wall work “required a Cement Mason.”

The scope of work for the Landscape Laborer PWD specifically includes construction of “decorative walls.” When the scopes of work for two prevailing rate determinations overlap, a conflict is created because no single prevailing rate clearly applies to the work in issue. In this limited situation, a contractor may pay either of the applicable prevailing wage rates for the work.

For these reasons, as to the reclassification from Landscape Laborers to Cement Mason, DLSE presented evidence that the wall work was that of a Cement Mason sufficient to give prima facie support for the Assessment, but Blue Pacific carried its burden to prove the Assessment was incorrect in that, based on the record presented at the Hearing, the work in question was properly paid at Landscape Laborer rates. (Cal. Code Regs. tit. 8, § 17250, subs. (a), (b).) However, because Blue Pacific satisfied its statutory obligation by paying more than Cement Mason rates, DLSE did not find unpaid wages based on reclassification to Cement Masons and, therefore, the amended Assessment need not be modified with respect to this issue.

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DLSE Has Failed to Adequately Document Amounts Blue Pacific Owes for Unpaid Training Fund Contributions.

The amended Assessment found that Blue Pacific had underpaid the required training fund contributions by \$78.38, a substantial reduction from the \$1,333.28 found in the original Assessment. The only evidence submitted by DLSE in support of the amended Assessment is the revised audit worksheets, which show \$1,390.54 in training funds owed on behalf of various workers, but an unexplained credit of \$1,312.16 reducing the total to only \$78.38. DLSE submitted no evidence showing what training fund contributions Blue Pacific had made, much less the identity of the workers with whom the contributions were associated. Neither party argued this issue in its brief.

On this record, it is impossible to determine what amount, if any, Blue Pacific owes in unpaid training fund contributions. Accordingly, DLSE has failed to make a prima facie case on this issue, and the amended Assessment must be modified to eliminate the unpaid training funds contributions.

DLSE's Penalty Assessment Under Section 1775.

Former section 1775, subdivision (a), as it read at the time the District advertised for bids on the Project, 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 two hundred dollars (\$200) 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 forty dollars (\$40) . . . 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 eighty dollars (\$80) . . . 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 one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[9]

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or 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 Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

⁹ The citation in section 1775 to section 1777.1, subdivision (c) is mistaken. The correct reference is to section 1777.1, subdivision (d). As it existed on the bid advertisement date, subdivision (d) 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."

DLSE assessed section 1775 penalties at the mitigated rate of \$80.00. This was in keeping with Blue Pacific's lack of a record of prior violations, tempered by the recommendation of the investigator based on the contractor not being "completely honest" in admitting its errors, among other considerations. (Penalty Review, DLSE Exhibit No. 3.)

The burden was on Blue Pacific to prove that DLSE abused its discretion in setting the penalty amount under section 1775. Blue Pacific essentially disputed that it had misclassified workers and underpaid them. However, Blue Pacific did not satisfy its burden of proving that the amended Assessment was incorrect as to all such workers. Nor did Blue Pacific introduce evidence of abuse of discretion by DLSE as to the penalty. Notably, Blue Pacific did not establish that its failure to pay the correct rates was a good faith mistake, or that the error was promptly and voluntarily corrected when brought to its attention.

The Labor Commissioner reduced the penalty proposed by the deputy from the maximum \$200.00 per violation to \$80.00 per violation, a 60 percent reduction. Blue Pacific has not shown an abuse of discretion as to the penalty rate and, accordingly, the assessment of penalties at the rate of \$80.00 is affirmed.

This Decision, however, reduces the total number of assessed violations to take into account modifications to the Assessment set forth herein, including the finding that DLSE failed to carry its burden of producing evidence that provides prima facie support for the Assessment as Landscape Laborer to Tender ratio violations and for the reclassification to Cement Mason. The revised audit worksheet lists section 1775 penalties of \$400.00 for Eleazar Sanchez and \$480.00 for Marco A. Tenorio-Salas, representing five and six violations respectively. Yet, the detailed Investigation Worksheets for those workers show no violations and no penalties assessed on any date. Accordingly, eleven instances of penalty assessment at \$80.00 per violation are removed from the total number of violations listed in the Assessment, reducing the total penalty assessment by \$880.00. After that reduction, 24 violations remain at the rate of \$80.00 per violation, for a total amount of \$1,920.00 due in section 1775 penalties.

DLSE's Penalty Assessment Under Section 1813.

Section 1813 provides in pertinent part:

The contractor or 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) for each worker employed in the execution of the contract by the respective contractor or subcontractor 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.

Thus, the contractor is liable for section 1813 penalties whenever it fails to pay the overtime rate as required in the applicable PWD. The amended Assessment found that Blue Pacific was liable for \$25.00 in section 1813 penalties for one violation, attributed to hours worked by Eleazar Sanchez. As with the section 1775 penalties, the detailed Individual Worksheets for Sanchez show no section 1813 violations or penalties for any date.

While section 1813 provides no discretion as to the penalty rate, the Assessment must nonetheless be modified in instances where the facts do not support a finding of a section 1813 violation. Here, there is no evidence in the record to support the amended Assessment's finding of an overtime violation. Accordingly, the Assessment must be modified by reducing the section 1813 penalties by \$25.00, resulting in zero section 1813 penalties.

Blue Pacific Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages upon the contractor, essentially a doubling of the unpaid wages. It provides in part:

After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , 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 Assessment . . . 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.

At the time the Assessment was issued, the statutory scheme regarding liquidated damages provided contractors three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the CWPA on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages “that still remain unpaid” 60 days following service of the CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

There shall be no liability for liquidated damages if the full amount of the assessment..., including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment..., for the department to hold in escrow pending administrative and judicial review.

Lastly, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties, and instead ask the Director to exercise her discretion to waive liquidated damages under the following portion of section 1742.1:

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

((Former) §1742.1, subd. (a).)

In this case, Blue Pacific did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and statutory penalties. That leaves the question whether Blue Pacific has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Assessment as a basis for the Director's discretionary waiver of liquidated damages.¹⁰ The Director finds insufficient grounds for a discretionary waiver of liquidated damages.

The unpaid wages for which Blue Pacific is found liable herein all stem from its misclassification of five Landscape Laborers as Groundspersons early in the Project. As a landscape contractor with prior public works experience, and one that used Landscape Laborers extensively on the Project, Blue Pacific knew or should have known that the tasks in question were the work of Landscape Laborers, and not that of Groundspersons, a classification associated with maintaining utility lines and rights of way, not landscaping. Yet Blue Pacific has insisted in this proceeding that its use of the Groundsperson classification was appropriate, even though the Tree Trimmer scope of work provision (which includes Groundsperson) provides no support for that claim. It is not plausible that Blue Pacific had a reasonable basis on which to claim that aspect of the Assessment was erroneous. Based on the foregoing, the undersigned exercises her discretion not to waive liquidated damages with respect to the prevailing wages found

¹⁰ On June 27, 2017 (after service of the Assessment on April 10, 2017, and 60 days had expired), the Director's discretionary waiver power was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Sen. Bill 96) (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the Assessment was issued allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor's decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the Assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

due in this Decision. Accordingly, liquidated damages are due in the aggregate amount of \$4,476.93, as provided in the Findings, *post*.

Apprenticeship Violations.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. (California Code of Regulations, title 8, sections 227 to 232.70.)¹¹

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case). (§ 1777.5, subd. (g); § 230.1, subd. (a).)

Also, a contractor shall not be considered in violation of the regulation if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project. Further, prior to requesting the dispatch of apprentices, the regulation, section 230, subdivision (a), provides that contractors should alert apprenticeship programs to the fact that they have been awarded a public works contract at which apprentices may be employed.

When DLSE determines that a violation of the apprenticeship laws has occurred, "... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5." ((Former) § 1777.7, subd. (c)(2)(B), as it existed on the date of the bid advertisement for the Project, October 16, 2013.)

The Record Does Not Support the Assessment's Finding that Blue Pacific Failed to Employ Cement Mason Apprentices.

The sole basis for DLSE's finding that Blue Pacific violated section 1777.5 and was therefore liable for penalties under section 1777.7 is DLSE's reclassification of Blue

¹¹ All further references to the apprenticeship regulations are to the California Code of Regulations, title 8.

Pacific workers from Landscape Laborers to Cement Masons. As stated, *ante*, DLSE failed to show that the concrete wall work fell within the scope of work for Cement Masons. For that reason, DLSE failed to carry its burden of producing evidence that provides prima facie support for the Assessment as to both the reclassification from Landscape Laborers to Cement Mason, and Blue Pacific's violation of the requirement to comply with apprentice requirements as to the craft of Cement Mason. (Cal. Code Regs. tit. 8, § 17250, subd. (a).) With no prima facie showing of violation of apprentice requirements, Blue Pacific's burden to show the Assessment was incorrect as to apprentice violations did not arise, and penalties found under section 1777.7 cannot be adopted. (See Cal. Code Regs. tit. 8, § 232.50, subd. (a).)

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Blue Pacific Engineering & Construction filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE timely made available to Blue Pacific Engineering & Construction its enforcement file.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Brian Madrid, Jorge Reyes, Steven Arriola, Noe Vicencio-Arzeta, and Octavio Vicencio performed work in San Diego County during the pendency of the Project, were misclassified as Groundspersons when they should have been classified as Landscape/Irrigation Laborers, and were entitled to be paid the journeyman rate for Landscape/Irrigation Laborer for that work.

7. DLSE failed to carry its burden of producing evidence that provides prima facie support for the Assessment as to misclassification of Landscape Laborers as Landscape Tenders.
8. DLSE failed to carry its burden of producing evidence that provides prima facie support for the Assessment as to the reclassification from Landscape Laborer to Cement Mason.
9. In light of findings through 6 through 8 above, Blue Pacific Engineering & Construction underpaid its employees on the Project in the aggregate amount of \$4,486.93.
10. Blue Pacific Engineering & Construction did not fail to pay any worker the prevailing overtime rate for work performed. Accordingly, no statutory penalties under section 1813 are due from Blue Pacific Engineering & Construction.
11. DLSE failed to carry its burden of producing evidence that provides prima facie support for the Assessment as to failure to pay required training fund contributions.
12. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$80.00 per violation. However, the resulting total penalty must be modified to \$1,920.00, based on lack of evidence of underpayment of prevailing wages, as specified.
13. The unpaid wages found in Finding No. 9 remained due and owing more than 60 days following issuance of the Assessment, and Blue Pacific Engineering & Construction had no substantial grounds to appeal the Assessment as to the wages found due and unpaid. Accordingly, Blue Pacific Engineering & Construction is liable for an additional amount of liquidated damages under section 1742.1 in the amount of \$4,486.93.
14. Blue Pacific Engineering & Construction was not obligated to comply with apprentice requirements as to the classification of Cement Mason.

15. The amount found due in the Assessment is modified and affirmed by this Decision are as follows:

Wages Due:	\$ 4,486.93
Training Fund Contributions:	\$ 0.00
Penalties under section 1775, subdivision (a):	\$ 1,920.00
Liquidated damages:	\$ 4,486.93
Penalties under section 1777.7:	\$ 0.00
TOTAL:	\$10,893.86

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

The Civil Wage and Penalty Assessment, as amended, is affirmed in part and modified 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.

Dated: 06-09-2020

/S/ Katrina S. Hagen 

Katrina S. Hagen
Director, Department of Industrial Relations