

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Sieesa Global, Inc.**

**Case No. 17-0039-PWH**

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Abengoa Transmission & Infrastructure, LLC (Abengoa) and subcontractor Sieesa Global, Inc. (Sieesa Global) submitted timely requests for review of the Civil Wage and Penalty Assessment (Assessment) issued on December 30, 2016, by Division of Labor Standards Enforcement (DLSE) with respect to the IID Path 42 Transmission System Upgrade Project (Project) in Imperial and Riverside Counties. The Assessment determined that the following amounts were due: \$77,394.53 in unpaid prevailing wages and training funds, \$93,875.00 in statutory penalties under Labor Code sections 1775 and 1813,<sup>1</sup> and \$12,840.00 in statutory penalties under section 1777.7. DLSE and Abengoa settled the issues in Abengoa's separate request for review, Case No. 17-0082 PWH, and Abengoa withdrew its request for review. The settlement also resolved the issues of unpaid prevailing wages and unpaid training fund contributions in this matter, Case No. 17-0039-PWH, leaving at issue only Sieesa Global's liability for liquidated damages and statutory penalties under sections 1775, 1813 and 1777.7.

A Hearing on the Merits commenced on October 17, 2017, before Hearing Officer John J. Korbol. Lori M. Porter appeared for Sieesa Global, and Sotivear Sim appeared for DLSE. In a letter to the Department and the parties dated February 2, 2018, Porter gave notice she would no longer be participating in further litigation due to Sieesa Global having "been suspended pending involuntary administrative dissolution." Further Hearings were

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<sup>1</sup> All further section references are to the California Labor Code, unless otherwise specified.

conducted on February 7, 2018, and August 3, 2018, in Long Beach, California, with written notice having been duly served to the mailing address of record for Sieesa Global's CEO and President, Ben Mistiuk. On those dates, neither Mistiuk nor any other person appeared on behalf of Sieesa Global.

After settlements entered into by DLSE, Abengoa, and two sureties, the only issues remaining for resolution in this matter were Sieesa Global's liability for \$44,240.00 in statutory penalties under section 1775, \$275.00 in statutory penalties under section 1813, \$8,560.00 in statutory penalties under section 1777.7, and liquidated damages in the amount of \$50,372.14.

The Hearing Officer proceeded to conduct the Hearing on the Merits in Sieesa Global's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record. Sieesa Global filed no motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b). The Hearing was concluded and the matter was submitted for decision.

The issues for decision are:

- Did Sieesa Global pay the required prevailing wages for all hours worked on the Project by the affected workers?
- Did DLSE properly assess penalties under section 1775?
- Did Sieesa Global fail to pay the required prevailing wage rates for overtime work for penalties under section 1813?
- Did DLSE properly assess penalties under section 1777.7?
- Is Sieesa Global entitled to a waiver of liquidated damages?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, and that Sieesa Global failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a),

(b.) Accordingly, the Director issues this Decision affirming the Assessment, with modifications as addressed below.

### **FACTS**

The facts stated below are based on DLSE Exhibit Numbers 1-6, 9, 11, and 14-29, and the testimony of Mario Jimenez, Baltazar Paramo, Raul Leon, Ezequiel Gastulum Guzman, and Julio Jimenez (five workers employed by Sieesa Global on the Project), as well as Deputy Labor Commissioner Alfredo Roman.

#### The Assessment

On July 19, 2012, the Imperial Irrigation District advertised for bids on the Project. Abengoa was awarded the prime contract. On September 9, 2013, Abengoa contracted with Sieesa Global to perform electro mechanical work to upgrade a Coachella Valley electrical substation. Thirteen workers employed by Sieesa Global performed work on the Project, and workers were on the job site October 13, 2013 through September 14, 2014. The Project was completed on June 30, 2015.

According to Sieesa Global's certified payroll records, its workers were classified as either Inside Wireman Technician or Laborer. In reality, the tasks described by the workers themselves come within the scopes of work for either Electrical Utility Lineman or Groundman. The prevailing wage determination (PWD) and scopes of work in effect on the bid advertisement date for both of these crafts are encompassed by the PWD for Electrical Utility Lineman (C-61-X-3-2011-1) (Utility Lineman PWD). Thus, the Assessment found that the listed workers had been misclassified and underpaid. The Assessment found section 1775 penalties were due based on 368 days on which the workers were underpaid prevailing wages. In addition, the Assessment found that Sieesa Global failed to comply with the requirements to hire apprentices for the craft of Utility Lineman for a period of 214 days, the number of days for which Utility Lineman journeymen worked on the Project.<sup>2</sup>

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<sup>2</sup> The Electrical Utility Lineman classification applicable to this Project is an apprenticeable craft.

## DISCUSSION

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

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) and see *Lusardi*, at p. 985.)

Section 1775, subdivision (a) requires, among other provisions, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate, and prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation when the Labor Commissioner determines that mitigation is inappropriate.

Section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. The Labor Commissioner does not have discretion to reduce the amount of this penalty, nor does the Director have authority to limit, reduce, or waive the penalty.

In general, and unless an exemption applies, 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 journeymen in the applicable craft or trade. (Cal. Code Regs. tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared a form DAS 140, that a contractor may use to submit contract award information to an applicable apprenticeship committee (Cal. Code Regs. tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship requirements, 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. 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).)

Sieesa Global Failed to Pay the Required Prevailing Wage Rate.

Here, based on the cumulative, consistent, and uncontradicted testimony of five workers, the nature of the Project, and the scope of work described in the Utility Lineman PWD, DLSE met its burden to present prima facie support for the Assessment. DLSE's evidence establishes that Sieesa Global misclassified workers and failed to pay some of the workers for overtime hours at the correct wage rate. DLSE calculated the underpayment of wages applying the correct prevailing wage rate, after giving credit for wages actually paid to the workers. Sieesa Global presented no evidence to carry its burden to disprove the basis for, or the accuracy of, the Assessment. Ordinarily, Sieesa Global would be liable for payment of prevailing wages in the aggregate sum of \$50,372.14. With liability for unpaid wages having been resolved by the settlement among the other parties involved with the Project, the dollar figure for unpaid wages stated in the Assessment is no longer due, but provides the basis for the award of liquidated damages.

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a)(2)(B)(iii) states that the penalty for failure to pay the required prevailing wage rates may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1.<sup>3</sup> Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion 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.)

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<sup>3</sup> Former section 1777.1, subdivision (c), as it existed from 2012 to 2014 (including on the bid advertisement date for this Project), 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."

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 DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd.(c).)

DLSE assessed section 1775 penalties at the rate of \$120.00 based on Sieesa Global’s deliberate and systematic misclassification and underpayment of its workers in 368 instances.<sup>4</sup> The burden was on Sieesa Global to prove that DLSE abused its discretion in setting the penalty amount at the rate of \$120.00 per violation. Sieesa Global failed to carry that burden and the penalty assessment will be affirmed.

Sieesa Global violated Apprenticeship Requirements.

DLSE established in its prima facie case that Sieesa Global failed to submit contract award information to apprenticeship programs that could have supplied lineman or groundman apprentices, and further failed to request dispatch of such apprentices. Ultimately, Sieesa Global failed to employ any apprentices on the Project. Sieesa Global did not rebut the evidence. Hence, it is concluded that Sieesa Global violated section 1777.5, subdivisions (e) and (g) and the applicable regulation, section 230, for its failure to employ sufficient apprentices to meet the required 1:5 apprentice to journeyman ratio for the craft of Electrical Utility Lineman.

At the Hearing, DLSE was seeking a \$60.00 per day penalty for 142 days of apprenticeship violations.<sup>5</sup> Based on the record, Sieesa Global knowingly violated the requirement of a 1:5 ratio of apprentice hours to journeyman hours for apprentices. Sieesa Global failed to notify apprentice committees or request the dispatch of apprentices. The record provides no reason for these failures to follow the law. As a matter of de novo

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<sup>4</sup> The 368 violations multiplied by the \$120.00 penalty rate equals \$44,160.00. The dollar figure for section 1775 penalties given to the Hearing Officer at the Hearing, \$44,240.00, is not divisible by \$120.00. Therefore, this Decision will use the slightly lower dollar figure.

<sup>5</sup> While the Assessment indicated 214 days of apprenticeship violations, after the settlement of Abengoa’s request for review, only 142 days of violations remained at issue in this case. At the third day of Hearing, DLSE gave the Hearing Officer the dollar figure of \$8,560.00 as the total penalty under section 1777.7. However, \$8,560.00 is not divisible by \$60.00; 142 days of apprenticeship violations at the penalty rate of \$60.00 per day yields a total penalty of \$8,520.00. This Decision will use the smaller dollar figure.

review of the apprenticeship penalty as provided in section 1777.7, subdivision (f)(2), as it existed on the July 2012 date of the bid advertisement for the Project, the penalty rate of \$60.00 per day for a total of \$8,520.00 is affirmed.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

The record establishes that Sieesa Global violated section 1815 by paying less than the required prevailing overtime wage rate for eleven hours of overtime worked on the Project. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed in the amount of \$275.00 for the eleven violations.

Sieesa Global is Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wage, if those wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment, the contractor deposits into escrow with the Department the full amount of the assessment of unpaid wages, plus the statutory penalties under section 1775. In addition, in December of 2016 when the Assessment was issued in this matter (as well as in May of 2017 when the amended Assessment was issued), (former) section 1742.1 allowed the Director to exercise his or her discretion to waive the liquidated damages if the contractor demonstrated that he or she had substantial grounds to appeal the assessment.<sup>6</sup>

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<sup>6</sup> On June 27, 2017, subsequent to the issuance of the Assessment and the filing of the Request for Review in this case, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (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 civil wage and penalty assessment was issued (in 2016) 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).



Here, no evidence shows that Sieesa Global paid any back wages to the workers in response to the Assessment or deposited with the Department the assessed wages and section 1775 and section 1777.7 statutory penalties. Further, Sieesa Global presented no evidence or argument that it had substantial grounds for appealing the Assessment. Accordingly, the Director does not waive payment of the liquidated damages, and Sieesa Global is liable for liquidated damages in the amount of the underpaid prevailing wages, \$50,372.14.

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

### FINDINGS

1. Affected subcontractor Sieesa Global, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Sieesa Global underpaid its workers \$50,372.14 in prevailing wages (although these wages are no longer due as a result of settlements among other parties).
3. Penalties under section 1775 are due from Sieesa Global, Inc. in the amount of \$44,160.00 for 368 violations at the rate of \$120.00 per violation.
4. Penalties under section 1813 are due from Sieesa Global, Inc. in the amount of \$275.00 for eleven violations at the rate of \$25.00 per violation.
5. Penalties under section 1777.7 are due from Sieesa Global, Inc. in the amount of \$8,520.00 for 142 violations at the rate of \$60.00 per violation.
6. Because none of the unpaid wages were paid within 60 days after service of the Assessment, liquidated damages are due from Sieesa Global, Inc. in the full amount of unpaid wages, \$50,372.14.
7. The amounts found remaining due in the Assessment as modified and affirmed by this Decision are as follows:

Penalties under section 1775, subdivision (a):	\$44,160.00
Penalties under section 1777.7:	\$8,520.00

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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.

Penalties under section 1813:	\$275.00
Liquidated Damages:	\$50,372.14
<b>TOTAL:</b>	<b>\$103,327.14</b>

**ORDER**

The Civil Wage and Penalty Assessment is affirmed and modified 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: March 14, 2019



Victoria Hassid  
Chief Deputy Director,  
Department of Industrial Relations<sup>7</sup>

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<sup>7</sup> See Government Code sections 7, 11200.4.