

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Crush Materials Corporation

Case No. 20-0301-PWH

From a Notice of Withholding of Contract Payments issued by:

Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Crush Materials Corporation (Crush) submitted a request for review of a Notice of Withholding of Contract Payments (Notice) issued by the Department of Transportation (Caltrans) on May 7, 2020, with respect to work performed by Crush on the Emergency Force Account Agreement for Slab Replacement for Caltrans (Awarding Body) in Riverside County. The Notice determined that \$2,530.66 was due in unpaid wages and training fund contributions, and \$1,060 was due in statutory penalties.

A Hearing on the Merits occurred on February 9, 2021, before Hearing Officer Steven A. McGinty. Jidi Wong appeared as counsel for Caltrans. There was no appearance by Crush. Diane Huynh, Risk Case Administrator for Caltrans Division of Construction, Audit Office (Caltrans Investigator), testified in support of the Notice.¹ The Hearing Officer submitted the matter for decision on February 26, 2021.

The issues for decision are as follows:

- Whether the Project was a public work subject to the payment of prevailing wages.
- Whether Caltrans served the Notice timely.
- Whether Crush filed the Request for Review timely.
- Whether Caltrans made available its enforcement file timely.
- Whether Crush paid wages or made a deposit with the Department of Industrial Relations as a result of the issuance of the Notice.

¹ The Hearing Officer admitted into evidence Caltrans' Exhibit Nos. 1-15.

- Whether Crush paid the required prevailing wages to workers on the project.
- Whether Crush paid the required overtime premium rates to workers on the project.
- Whether Crush paid the required training fund contributions for all hours worked on the project.
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to Labor Code section 1775.²
- Whether the Labor Commissioner abused her discretion in assessing penalties pursuant to section 1813.

For the reasons set forth below, the Director of Industrial Relations finds that Caltrans served the Notice untimely. Accordingly, the Director issues this Decision dismissing the Notice. All other issues are moot.

FACTS

Failure to appear.

On September 14, 2020, a Notice of Appointment of Hearing Officer and Notice of Prehearing Conference issued notifying the parties that a Prehearing Conference would be held on October 5, 2020, at 2:30 p.m. by conference telephone call. On September 22, 2020, bankruptcy counsel for Crush wrote to the Hearing Officer notifying the Hearing Officer that Crush had filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code on August 24, 2020. Counsel asked the Hearing Officer to confirm that the Hearing Officer would not conduct a hearing on October 5, 2020, given the automatic stay in bankruptcy. On September 29, 2020, the Hearing Officer issued a Notice that the Prehearing Conference remained on calendar. The Hearing Officer wrote in the Notice in part as follows:

United States Code section 362(b)(4) indicates that there is no automatic stay in a bankruptcy proceeding where a government unit

² All further statutory references are to the California Labor Code unless specified otherwise.

seeks to enforce its police or regulatory power. Thus, the Prehearing Conference scheduled for October 5, 2020 at 2:30 p.m. remains on calendar.

On October 5, 2020, the Hearing Officer held a telephonic Prehearing Conference. Jidi Wong, Pat Maloney, Kimberly Olson, and Diane Huynh appeared for Caltrans. No appearance was made by the Requesting Party. The Prehearing Conference was continued to November 9, 2020, at 4:00 p.m. for the Requesting Party to appear.

On November 9, 2020, Jidi Wong, Pat Maloney, and Kimberly Olson appeared for Caltrans. There was no appearance for the Requesting Party. Subsequently, the Hearing Officer issued an Order Setting the Hearing on the Merits for February 9, 2021, at 10:00 a.m. The Order included a notice to the Requesting Party warning them that as follows:

NOTICE TO THE REQUESTING PARTY CRUSH MATERIALS CORP.:

Your rights may be adversely affected by your failure to appear and contest the Notice of Withholding of Contract Payments issued against you. The Hearing Officer is authorized under Rule 46 to proceed with the hearing in the absence of a Party and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn by an absence of proof by the non-appearing Party.

The Order issued January 14, 2021. No one appeared for Crush at the Hearing on the Merits. The Hearing Officer proceeded under Rule 46. After the Hearing on the Merits, the Hearing Officer issued Minutes of Hearing on the Merits and Notice of Intention to Submit the Matter for Decision. The Notice indicated that Crush had 10 days from the date of service of the Notice to show good cause why the matter should not be submitted. Crush failed to respond to the Notice, and the Hearing Officer submitted the matter on February 26, 2021.

The Project.

The Project was for the repair and restoration of concrete slabs on Interstate 10 in Riverside County that had experienced structural failure. (Exhibit No. 4, p. 139.) The scope of work included slab replacement, potential base work, and pavement deflection. The estimated cost was \$300,000. (*Ibid.*) Because of the emergency nature of the matter, Caltrans entered into a no-bid contract with prime contractor

J. McLoughlin Engineering Co., Inc., on June 20, 2018. (*Id.* at p. 141.) Crush, a subcontractor, provided rapid set cement to the Project site using volumetric trucks. (Exhibit No. 10, pp. 253-254.) Crush had workers on the Project on Thursday, July 26, 2018. (Exhibit No. 6, pp. 221-222.) Crushed used the following classifications for its workers: Operating Engineer, Group 8; Teamster, Group 5; and Laborer, Group 1. (*Ibid.*) Caltrans accepted the Project on October 25, 2018. (Exhibit No. 2, p. 127.)

The Investigation.

Caltrans began an investigation based on an employee complaint of being misclassified and underpaid prevailing wage. (Exhibit No. 2, p. 128.) Crush provided Caltrans with records requested including certified payroll records, foreman's logs with employee names and work hours, employee timecards, fringe benefit statement, and invoices for materials. (*Ibid.*) Caltrans reclassified all workers to Operating Engineer, Group 6 for all hours worked.³ As a result of the reclassification, all employees were due wages. (Exhibit No. 1.) The Caltrans Investigator testified that during a conversation with the principal of Crush, Christine Rush, Rush indicated that she believed that the time when workers were entitled to payment of prevailing wages was when they were pouring the concrete only. Further, that the time the workers were in the staging area waiting to be called to the freeway was not time that needed to be compensated at the prevailing wage rate.

On April 6, 2020, Caltrans submitted a Request for Forfeiture to the Labor Commissioner. (Exhibit No. 2, p. 127.) Caltrans requested a total forfeiture of \$3,590.66, consisting of \$2,515.65 in wages, \$15.01 in training fund contributions, \$960 in section 1775 penalties, and \$100 in section 1813 penalties. (*Id.* at p. 128.) The Labor Commissioner approved the Request for Forfeiture on April 8, 2020. (*Id.* at p. 126.)

³ The General Prevailing Wage Determination for Operating Engineer, SC-23-63-2-2017-1, lists Volume Mixer Operator under Group 6. (Exhibit No. 5, p 169.)

The Notice.

The Caltrans Investigator testified that she was involved in preparing the Notice. Caltrans served the Notice on May 7, 2020. (Exhibit No. 3., pp. 132-136.) Crush filed a Request for Review on July 1, 2020.⁴ In the Request for Review, Crush raised the issue of the timeliness of the Notice among other issues.

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 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*).) Caltrans 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, supra*, at p. 985.)

Contractors and subcontractors who fail to pay the correct prevailing wage to workers on public works projects, are required to pay the difference between the correct prevailing wage and the amount they paid to the workers. (§ 1775, subd.

⁴ The Request for Review was attached to the Transmittal filed by Caltrans with the Office of the Director—Legal Unit pursuant to Rule 23 [Cal. Code Regs., tit. 8, § 17223] and is part of the Hearing Officer’s file.

(a)(2)(E).) In addition, section 1775, subdivision (a) prescribes penalties for failing to pay the correct prevailing wage rate, and section 1813 prescribes penalties for failing to pay the correct overtime prevailing wage rate.

When after investigation, Caltrans determines that a violation of the prevailing wage laws has occurred, it must seek approval from the Labor Commissioner to withhold contract payments. (Cal. Code Regs., tit. 8, § 16435.5, subd. (d).) Caltrans must prepare a file or report as part of its request for approval of forfeitures.⁵ (Cal. Code Regs., tit. 8, § 16437, subd. (a).) "The file or report shall be served on the Labor Commissioner as soon as practicable after the violation has been discovered, . . . but in no event not less than 30 days before the expiration of the limitations period set forth in Labor Code Section 1741." (Cal. Code Regs., tit. 8, § 16437, subd. (b).) Following a decision by the Labor Commissioner to affirm or modify the forfeiture (Cal. Code Regs., tit. 8, § 16437, subd. (d)), Caltrans issues a written notice of the withholding of contract payments pursuant to section 1771.6. An affected contractor or subcontractor may appeal the notice by filing a request for review under section 1742. (See section 1771.6, subd. (b).)

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 conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the Notice. (*Ibid.*)

Section 1741, Subdivision (a) Sets Forth the Limitation Period.

Section 1741, subdivision (a) is the statute of limitations for service of the notice of withholding of contract payments. The statute provides that if the Labor Commissioner or his or her designee—in this matter Caltrans—determines after an

⁵ "Forfeitures" is defined "as the amount of wages, penalties, and forfeitures assessed by the Labor Compliance Program and proposed to be withheld pursuant to Labor Code section 1771.6(a) and includes the following: (1) the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate by the contractor or subcontractor; and (2) penalties assessed under Labor Code Sections 1775, 1776 and 1813." (Cal. Code Regs., tit. 8, § 16436, subd. (a).)

investigation that there has been a violation of the CPWL, then the notice of withholding of contract payments “shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.”

The Statute of Limitations Began to Run on October 25, 2018.

Caltrans accepted the Project on October 25, 2018. It provided no evidence of having recorded a valid notice of completion. Thus, it must be assumed that acceptance of the public work occurred last. Therefore, the 18-month limitations period began to run on October 25, 2018.

The Notice Was Not Served Timely.

As stated above, the 18-month statute of limitations set forth in section 1741, subdivision (a) began to run on October 25, 2018. The 18-month period ran out April 26, 2020. Caltrans did not serve the Notice until May 7, 2020. Therefore, the Notice was not served timely and must be dismissed.

All Other Issues are Moot.

In view of the determination that Caltrans failed to serve the Notice timely, all other issues are moot. Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. Caltrans served the Notice untimely under Labor Code section 1741, subdivision (a).
2. All other issues are moot.

The Notice of Withholding of Contract Payments is dismissed as untimely. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties

Dated: 9/3/2026

A handwritten signature in black ink, appearing to read "Jennifer Osborn", written over a horizontal line.

Jennifer Osborn, Director
California Department of Industrial Relations