

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

2K Roofing, LLC

Case No. 14-0312-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor 2K Roofing, LLC (2K Roofing) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Jane Lathrop Stanford Middle School Modernization and New Construction (Project) performed for the Palo Alto Unified School District (District) in the County of Santa Clara. The Assessment determined that 2K Roofing owed \$127,566.31 in unpaid prevailing wages, \$2,877.30 in unpaid training fund contributions, \$55,400.00 in penalties under Labor Code section 1775, subdivision (a), and \$2,150.00 in penalties under Labor Code section 1813.¹ On or about November 10, 2014, DLSE made a motion to amend the Assessment downward to \$101,198.70 in unpaid prevailing wages, \$2,895.56 in unpaid training fund contributions, \$55,200.00 in penalties under section 1775 and \$2,150.00 in penalties under section 1813.² On December 2, 2014, the Hearing Officer Kumani Armstrong granted the motion to amend the Assessment (Amended Assessment).

A Hearing on the Merits was held on August 20, 2015, in Oakland, California, before Hearing Officer Ed Kunnes. Galina Velikovich appeared for DLSE. Erika Ibaibariaga appeared by telephone as the representative of 2K Roofing.³ The parties consented to a

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

² The Amended Assessment affected primarily workers employed in the Roofer, Kettleman classification.

³ 2K Roofing is a revoked Nevada limited liability company. California applies the law of the state of incorporation to determine its legal existence. *Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App. 4th 1119, 1127. Nevada

telephone appearance by Ibaibarriaga on behalf of 2K Roofing. Ibaibarriaga had worked under her father, Guillermo Ibaibarriaga, a member and principal of 2K Roofing.

Although DLSE agreed to Ibaibarriaga's appearance by phone, DLSE objected to Ibaibarriaga's representation of 2K Roofing because Ibaibarriaga had not used the Authorization for Representation by Non-Attorney to obtain authorization for representation by any non-attorney who is not an owner, officer or managing agent of that Party. (Rule 9 [Cal. Code Regs., tit. 8, §17209, subd. (a)].) Ibaibarriaga had appeared at prehearing conferences as 2K Roofing's representative on this matter and had appeared as 2K Roofing's representative at a Hearing on the Merits approximately seven weeks prior concerning a different DLSE assessment.⁴ DLSE had made no objection to Ibaibarriaga representation of 2K Roofing until the day of the Hearing on the Merits. The Hearing Officer overruled the objection on the ground that there was no prejudice to DLSE and on the ground that sustaining such object would have denied 2K Roofing due process. The matter was submitted for decision on August 20, 2015.

At trial, the parties stipulated to the issue for decision as follows:

- Is 2K Roofing liable for penalties under section 1775?

DLSE stated at the Hearing on the Merits that the prime contractor, Sausal Corporation (Sausal), had paid all prevailing wages and training fund contributions assessed against 2K Roofing for the Project, leaving only the assessment of penalties under section 1775 in issue. This Decision addresses all amounts assessed for the purpose of reviewing the penalty rate under section 1775 and establishing the number of violations.

For the reasons stated below, the Director finds that 2K Roofing failed to carry its burden to prove that the basis of the Amended Assessment was incorrect. Accordingly, the Director affirms the Amended Assessment in the amount of \$55,200.00 for section 1775 penalties.

FACTS

The following witnesses testified at the Hearing on the Merits: Deputy Labor Commissioner Jerry McClain and Ibaibarriaga. The facts stated below are based on the

law, as opposed to California law, allows a revoked corporation to sue and defend. *AA Primo Builder, LLC v. Washington* (2010) 245 P.3d 1190, 1195.

⁴ Case number 14-0375-PWH.

testimony of the witnesses, the documentary evidence submitted by the parties and the other documents in the Hearing Officer's file.

The District advertised the Project for bid on April 6, 2012, and April 13, 2012, and subsequently awarded the contract to Sausal Corporation. Sausal Corporation subcontracted with 2K Roofing to perform roofing work on the Project. 2K Roofing performed roofing work in Palo Alto, California on the Project from September 27, 2012 to August 2, 2013. 2K Roofing employed 25 workers on the Project, most of whom came from Nevada.

In response to a complaint by six 2K Roofing workers, McClain conducted an investigation in which he reviewed 2K Roofing's Certified Payroll Records (CPRs), obtained questionnaires from workers and interviewed several workers on the Project. On numerous occasions, workers reportedly worked eight hours, or more, per day but the CPRs reported those workers as only working a few hours on those days. The workers also reported working overtime and double time for which the CPRs did not account.

The applicable prevailing wage determination (PWD) is STC-2012-1 (General PWD for Santa Clara County) and the applicable job classifications for all affected workers were Sheet Metal Worker, Bitumastic, Enameler, Coal Tar, Pitch and Mastic Worker (Bitumastic), and Roofer, Kettleman. The applicable total hourly rates for those classifications were \$81.14, \$50.13, and \$48.13, respectively. The applicable travel and subsistence provisions for Roofer, Kettleman and Bitumastic (collectively Roofers) required 2K Roofing to pay a \$25.00 per day meal allowance and to reimburse actual lodging costs as demonstrated by receipts.

Based on his review of 2K Roofing's CPRs, McClain determined that 2K Roofing had paid less than the required prevailing wage rates, approximately \$25.00 an hour, to the workers classified as Roofers on the Project. 2K Roofing's CPRs also showed that the Roofers did not receive the full travel and subsistence pay for the Project based on 2K Roofing's business address in Reno, Nevada. Generally, McClain found that 2K Roofing shorted its Roofers by \$5.00 for the daily meal allowance and did not consistently reimburse them for their lodging costs. Finally, the California Apprenticeship Council certified that 2K Roofing did not pay any training fund contributions for the Project.

In addition, based on the complaint, completed questionnaires and interviews, McClain found that 2K Roofing had failed to report Jesus Flores, Jesus Gomez, Jesus Rivera, Ramon Salazar, and Sergio Santillano on its CPRs. These five workers all stated that they worked as Roofers on the Project and came from Salinas, California. After speaking to these workers, McClain concluded that Rene Salazar had brought them to work on the Project at the request of 2K Roofing. Salazar informed McClain that he had received a lump sum payment from 2K Roofing which was to be divided between him and these other workers at an hourly rate significantly below the required prevailing wage.

As a result of his investigation, McClain concluded that 2K Roofing had shaved the hours reported for its workers on its CPRs, had failed to report all of the workers who worked on the Project, and had failed to pay the required prevailing wages, overtime, travel and subsistence pay, and training fund contributions. In all, the Amended Assessment found that 2K Roofing had underpaid its workers a total of \$101,198.70, in prevailing wages and travel and subsistence, and failed to pay training fund contributions totaling \$2,895.56. These violations constituted a total of 276 violations under section 1775, subdivision (a). Senior Deputy Labor Commissioner, Christopher Kim, determined that these violations were willful and assessed the maximum penalty of \$200.00 per violation, totaling \$55,200.00.

Ibaibarriga testified that 2K Roofing did not intentionally under pay any wages, although she provided no explanation or documentation to support her statement. Additionally, Ibaibarriga stated that all hours were reported by workers on a key tab which they held in their possession and all the CPRs and paychecks were computerized. Ibaibarriga offered no exhibits into evidence.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. 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, too *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. At the hearing the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).) Accordingly, DLSE's evidence constitutes prima facie support for an assessment.

DLSE provided evidence, both through testimony and exhibits, that 2K Roofing failed to report all workers who worked on the Project, failed to report all hours worked on the Project, and failed to fully compensate its workers for all hours actually worked on the Project. 2K Roofing also failed to fully compensate its workers for travel and subsistence and overtime. Additionally, 2K Roofing paid nothing to the applicable training fund.

Employers on public works must keep accurate payroll records, recording, among other things, 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.) DLSE proved that 2K Roofing failed to keep accurate CPRs in violation of section 1776.

In response to DLSE's evidence, 2K Roofing stated only that it did not intend to under pay its employees and that it had a computerized system to track its workers' hours. This response was insufficient to rebut DLSE's evidence that the CPRs were deficient with regard to reporting the total number of workers at the jobsite and the total hours worked. DLSE's evidence showed that 2K Roofing arranged for payment of the five unreported workers separate and apart from 2K Roofing's payroll system established for the other workers. That is, as stated above, Salazar received payment from 2K Roofing to be divided between him and these other

unreported workers. Thus, whatever mechanism 2K Roofing put into place to report workers' hours was not relevant to refute the presence of the intentionally unreported workers.

DLSE provided evidence both through testimony and exhibits that 2K Roofing failed to pay its workers the prevailing wage rates for the applicable trades, including a failure to pay the required training fund contributions and failure to fully compensate the affected Roofers for travel and subsistence. At the hearing on the merits, 2K Roofing did nothing to rebut or explain these failures. None of 2K Roofing's testimony rebutted the DLSE contention that 2K Roofing did not pay the required prevailing wage rates to the Roofers both in terms of hours and wage rate. 2K Roofing has therefore failed to satisfy its burden to disprove the basis of the Amended Assessment.

DLSE Properly Assessed Penalties Under Section 1775 At The Maximum Rate Of \$200.00 Per Violation.

Section 1775, subdivision (a), states in relevant part:

(a)(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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless 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) The penalty may not be less than eighty dollars (\$80) for each calendar

day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or 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) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.⁵

(C) If the amount due under this section is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to this section.

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

(E) 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 shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

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 in all cases. 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." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

The Director's review of DLSE's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ..." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [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.

⁵ Section 1777.1, subdivision (e) 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 deliberately refuses to comply with its provisions."

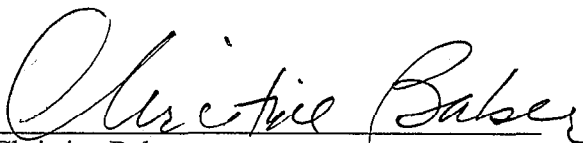
The record shows that DLSE assessed penalties under section 1775 at the maximum rate of \$200.00 per violation based on its determination that 2K Roofing's violations had been willful. 2K Roofing has offered no evidence or argument to show that DLSE abused its discretion in assessing penalties at the maximum rate and the violations appear to have been willful. Penalties under section 1775 are therefore affirmed against 2K Roofing for 276 violations on the Project, totaling \$55,200.00 in penalties.

FINDINGS AND ORDER

1. Affected subcontractor 2K Roofing filed a timely Request for Review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. The Labor Commissioner did not abuse her discretion in approving section 1775, subdivision (a) penalties at the maximum rate of \$200.00 per violation. Penalties under section 1775 are therefore affirmed against 2K Roofing in the aggregate amount of \$55,200.00 for 276 violations on the Project.

The Amended Civil Wage and Penalty Assessment is affirmed in full as set forth above. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 10/23/2015


Christine Baker
Director of Industrial Relations