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**IN THE OFFICE OF THE CITY ADMINISTRATOR
CITY AND COUNTY OF SAN FRANCISCO**

In the Matter of:

CHIANG C.M. CONSTRUCTION, INC.,

Petitioner,

**Contesting the Assessments of Forfeiture
by the Department of Public Works and the
Office of Labor Standards Enforcement.**

Hearings: October 8, 2003 and
November 3, 2003

DECISION

INTRODUCTION

This case involves the request for hearing by petitioner Chiang C.M. Construction Inc., also known as C.M. Construction (CM) contesting the wage assessment, with penalties, and forfeiture of certain payments, which CM claims it is owed under the Martin Luther King Jr. Pool and Fire Station 32 public works projects in the City and County of San Francisco, California. The assessment and forfeiture by the San Francisco Department of Public Works, Bureau of Construction Management (DPW) and the Office of Labor Standards Enforcement (OLSE) were for alleged non-compliance with prevailing wage requirements by CM and some of its subcontractors, Jin Construction and Electric, Golden Gate Painting, J & J Sheetmetal and Orson Mechanical.

On September 4, 2003, William Lee, the City Administrator for the City and County of San Francisco, duly appointed Michael J. Berg as the Hearing Officer to conduct hearings on the assessment, penalties and forfeiture imposed on CM pursuant

1 to Chapter 6, Section 6.22(E)(8)(c) of the San Francisco Administrative Code.

2 Hearings were held in this case on October 8, 2003 and November 3, 2003
3 William C. Last, appeared as the attorney for petitioner C.M. Construction, and San
4 Francisco City Attorney Dennis J. Herrera, by Deputy City Attorney Sheryl Bregman,
5 appeared as the attorney for the Department of Public Works and the Office of Labor
6 Standards Enforcement. At the hearing, the parties had full opportunity to present
7 relevant evidence and argument, and the witnesses called by the parties testified
8 under oath. The Hearing Officer considered all the evidence submitted and considered
9 the parties' pre-hearing and post-hearing submissions.

10 During the hearings, the parties stipulated to bifurcate from the hearings that
11 portion of the assessments, penalties and forfeitures attributed to CM's
12 subcontractor, Jin Construction and Electric (Jin). As a result of the parties'
13 stipulation, the parties did not litigate the alleged failure by Jin to pay prevailing wages
14 on either the Martin Luther King, Jr. Pool project or the Fire Station 32 project. No
15 evidence was considered by the Hearing Officer concerning Jin's alleged failure to pay
16 prevailing wages or concerning CM's alleged liability for Jin's alleged conduct on both
17 projects.

18 On December 3, 2003, after the hearings, C.M. Construction, hereinafter "CM,"
19 submitted a closing letter brief enumerating the "Issues in Dispute" as follows:

20 "1. C.M. disputes the OLSE's [Office of Labor Standards Enforcement]
21 allegation that C.M. misclassified Adrian Sheppard and failed to pay for purported
22 Saturday overtime;

23 2. C.M. disputes the amount of the penalty and the levy of an assessment in
24 any amount against C.M. for its subcontractors' prevailing wages violations, including
25 but not limited to the MLKJP [Martin Luther King Pool] and SFFD [San Francisco Fire
26 Department] No. 32;

27 3. C.M. contends that the assessments are barred by the statute of limitations
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1 and laches;

2 4. C.M. disputes that it is joint and severally liable for assessments made
3 against its subcontractors for back wages;

4 5. C.M. disputes the City's retroactive enforcement of amendments to the San
5 Francisco Administrative Code that were enacted and effective long after C.M. entered
6 into the prime contracts for the projects at issue, and long after the acts which are
7 subject of assessment occurred;

8 6. C.M. disputes OLSE's right to enforce any aspect of C.M.'s prime contracts
9 since they were executed prior to the establishment of the OLSE related amendments
10 to the Administrative Code; and

11 7. CM's disputes the City's right to withhold payments from C.M. in light of the
12 City's statutory obligation to make prompt payments."

13 CM's letter brief also seeks to incorporate by reference defenses raised by Jin's
14 attorney in letters to "City representatives," including: "(1) The penalty provisions in
15 6.22 at seq. of the Administrative Code violate due process clauses and are also
16 impermissible penalties; (2) 6.22 at seq. of Administrative Code is unenforceable since
17 it is vague and ambiguous so as to deprive Jin and CM of their constitutional rights of
18 due process; (3) The assessments are unenforceable as a matter of law under the
19 constitution since 6.22 at seq. of Administrative Code does not afford Jin and CM a
20 fair and impartial hearing; and (4) The assessments are unenforceable as a matter of
21 law because section 6.22 at seq. of Administrative Code is unconstitutional because it
22 has been enforced in a selective and discriminatory manner." (CM Exhibit 24)

23 On December 17, 2003, after the hearings, OLSE submitted a closing letter
24 brief in response to CM's brief, which sets forth the amounts now claimed to be due
25 from CM after payment by CM of \$2,000.00 to a CM employee and receipt of
26 additional documents from CM's subcontractor Orson Mechanical. The current
27 amounts claimed to be due are back wages of \$10,580.40 and penalties of
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1 \$16,850.00 (337 days x \$50.00 per day) for a total claimed liability of \$27,430.40.

2 On December 24, 2003, CM submitted a reply brief responding to OLSE's letter
3 brief.

4 **SUMMARY OF EVIDENCE**

5 1. On July 21, 1999 CM entered into a written contract with the City and
6 County of San Francisco, hereinafter "the City," to act as the general contractor for
7 the construction of a public works project, Specification No. 1042HR, the Martin
8 Luther King, Jr. (MLKJ) Pool, for a contract price of \$6,356,196.00. (CM Exhibit 5)
9 The contract provided in part that CM shall:

10 forfeit, as a penalty, to the City and County of San Francisco, twenty-five
11 dollars (\$25.00) for each laborer, workman, or mechanic employed in the
12 execution of this contract, by [CM], or by any subcontractor under said
13 party [CM], upon the work in this contract specified for each calendar day
14 during which such each laborer, workman, or mechanic is required or
permitted to labor more than eight hours in violation of the provisions of
Sections 1810 to 1815, inclusive, of the State Labor Code.

15 3. Addendum No. 1 to the MLKJ Pool contract documents, dated May 14,
16 1999 and received by CM on May 25, 1999, before the MLKJ Pool contract was
17 signed, added Section 00822. Section 00822 provided in part at subsection 1.4 B:

18 Contractor shall, as a penalty to the City, forfeit \$50.00 for each
19 calendar day, or portion thereof, for each worker paid less than the
20 prevailing rates as determined by the Director of Industrial
21 Relations for such work or craft in which worker is employed for
any public work done under the Contract by Contractor or any of
its subcontractors.

22 (OLSE Exhibit 35)

23 CM stipulated at the hearing that Addendum 1 was part of the MLKJ Pool contract
24 and was added to the contract before CM signed the contract on July 21, 1999.
25

26 4. Also part of the MLKJ Pool contract were certain "General Conditions."
27 Each of the parties introduced only partial copies of the General Conditions. (OLSE
28

1 Exhibit 34; CM Exhibit 6) Section 13.01 of the General Conditions states:

2 A. The Contractor shall keep himself fully informed of the Charter,
3 Ordinances and regulations of the City, and of all Federal and State laws
4 and orders of any properly constituted authority in any manner affecting
5 this contract, the performance of the Work or those persons engaged
6 therein.

7 (OLSE Exhibit 34, General Conditions, pg. 00700-66)

8 Section 13.04 of the General Conditions states:

9 A. Duties and obligations imposed by the Contract Documents and rights
10 and remedies available thereunder shall be in addition to and not a
11 limitation of duties, obligations, rights and remedies otherwise imposed or
12 available by law.

13 (OLSE Exhibit 34, General Conditions, pg. 00700-67)

14 Sections 9.07 A and D of the General Conditions state in pertinent part:

15 A. Whenever, in the opinion of the City, the Work or any part thereof is in a
16 condition suitable for use, and the best interest of the City requires such
17 use, the City may take possession of, connect to, open for public use, or
18 use the Work or a part thereof. The use by the City of the Work or part
19 thereof shall in no case be contrasted as constituting completion of the
20 Work. Such use shall neither relieve the Contractor of any of its
21 responsibilities under the contract, nor act as a waiver by the City of any
22 of the conditions thereof.

23 D. Unless otherwise agreed upon, partial occupancy or use of a portion or
24 portions of the Work shall not constitute acceptance of Work not
25 complying with the requirements of the Contract Documents.

26 (CM Exhibit 6, General Conditions, pg. 00700-652)

27 Sections 9.08 A and B of the General Conditions state in pertinent part:

28 A. Completion is the stage when the City finds the Work acceptable under
the Contract Documents and the Contract is fully performed, with the
exception of Building Commission, which may be performed after
completion as described in the Contract Documents.

1 B. ...When the Work is complete, the City shall prepare a Certificate of
2 Completion which shall establish the date of Completion.

3 (CM Exhibit 6, General Conditions, pgs. 00700-52-53)

4 5. As part of its contract bid for the MLKJ Pool, CM also signed a
5 statement that CM had read Charter Section 7.204 and Administrative Code Sections
6 6.33, 6.35, 6.39, 6.40, 6.41, 6.42 and 6.45, and that CM agreed to pay its workers
7 the highest general prevailing wage. The bid statement signed by CM provided in
8 part:

9 I will comply with the requirement that any person performing labor or
10 rendering service under a contract for any public work or improvement shall
11 be paid not less than the highest general prevailing rate of wages in private
12 employment for similar work. I am aware that non-compliance with such
13 wage provision may void said contract, shall result in a forfeiture to the City
14 and County of San Francisco of twenty-five dollars (\$25.00) per day for
15 each person not receiving the required wage...

16 I further attest by my signature hereto, that I shall require from all my sub-
17 contractors that they acknowledge having read Charter Section 7.204 and
18 Administrative Code Sections 6.33, 6.35, 6.39, 6.40, 6.41, 6.42 and 6.45
19 and that they will comply with the same requirements under this contract.

20 (CM Exhibit 4)

21 Chapter 6 of the San Francisco Administrative Code section 6.42 provided:

22 Any contractor or subcontractor who shall fail or neglect to pay to the
23 several persons who shall perform labor under any contract, subcontract
24 or other arrangement on any public work or improvement specified in
25 Section 6.35 of this Chapter the highest general prevailing rate of wages
26 as fixed by the Board of Supervisors under authority of this Chapter, shall
27 forfeit; and, in the case of any subcontractor so failing or neglecting to pay
28 said wage, the original contractor and the subcontractor shall jointly and
severally forfeit to the City and County of San Francisco the sum of \$25
per day for each laborer, workman or mechanic employed for each
calendar day or portion thereof, while they shall be so employed and not
paid said highest general prevailing rate of wages.

It shall be the duty of the officer, board or commission under whose
jurisdiction said public work or improvement is being carried on, made or
constructed, when certifying to the Controller any payment which may
become due under said contract, to deduct from said payment or

1 payments the total amount of said forfeiture provided for in this Section.
2 The Controller, in issuing any warrant for any such payment, shall deduct
3 from the amount which would otherwise be due on said payment or
4 payments the amount of said forfeiture or forfeitures as so certified.

5 6. After CM signed the July 21, 1999 MLKJ Pool contract, Chapter 6 of the
6 San Francisco Administrative Code was amended. Effective November 24, 1999,
7 Ordinance 286-99 deleted former section 6.42 and adopted a new penalty and
8 forfeiture section renumbered as section 6.22(E)(7)(a) and (b), which was
9 substantially identical to the penalty language in former section 6.42. (Ordinance No.
10 286-99, file No. 991645, section 6.22(E)(7)(a), Chapter 6, San Francisco
11 administrative code, passed by the Board of supervisors on October 25, 1999).

12 7. Effective November 9, 2000, Chapter 6 was amended again. Ordinance
13 237-00 amended section 6.22(E)(7)(a) by increasing the daily penalty from \$25.00 to
14 \$50.00 per day for failing to pay the highest general prevailing wage to workers
15 employed on a public work or improvement. The pertinent amendments (additions and
16 deletions) provided:

17
18 **(a) Penalty and Forfeiture.** Any contractor or subcontractor who shall
19 fail or neglect to pay to the several persons who shall perform labor under
20 any contract, subcontract or other arrangement on any public work or
21 improvement as defined in this Chapter the highest general prevailing rate of
22 wages as fixed by the Board of Supervisors under authority of this Chapter,
23 shall forfeit; and, in the case of any subcontractor so failing or neglecting to
24 pay said wage, the original contractor and the subcontractor shall jointly
25 and severally forfeit to the City and County of San Francisco the sum of \$50
26 \$25 per day for each laborer, workman or mechanic employed for each
27 calendar day or portion thereof, while they shall be so employed and not
28 paid said highest general prevailing rate of wages, and in addition shall be
subject to the penalties set forth in Article V of this Chapter, including
debarment.

(Ordinance No. 237-00, file No. 001207, section 6.22(E)(7)(a), Chapter 6, San
Francisco Administrative Code, passed by the Board of Supervisors on October 10,

1 2000)

2 Ordinance No. 237-00 also added new section 6.24, which created in the San
3 Francisco Department of Administrative Services the Office of Labor Standards
4 Enforcement (OLSE) and granted OLSE authority to ensure compliance with the
5 prevailing wage requirements imposed by the Charter and Chapter 6 of the
6 Administrative Code.
7

8 8. Effective November 6, 2002, Chapter 6 was amended again by
9 Ordinance 208-02, that, among other non-pertinent changes, renumbered section
10 6.22(E)(7)(a) to section 6.22(E)(8)(a) and (1) amended the section by increasing the
11 forfeited amount to include back wages, (2) amended section 6.22(E)(8)(b) to permit
12 OLSE, as well as the department having jurisdiction over the public work, upon written
13 notice to the contractor identifying the grounds for forfeiture, to certify to the
14 Controller a forfeiture and (3) added section 6.22(E)(8)(c) authorizing a contractor
15 or subcontractor who disagrees with a forfeiture to request a hearing before the City
16 Administrator or his/her designee within fifteen working days of the date of the
17 notification in section 6.22(E)(8)(b). The pertinent amendments (additions and
18 deletions) provided:
19
20

21 (a) Penalty and Forfeiture. Any contractor or subcontractor who shall fail
22 or neglect to pay to the several persons who shall perform labor under any
23 contract, subcontract or other arrangement on any public work or
24 improvement as defined in this Chapter the highest general prevailing rate of
25 wages as fixed by the Board of Supervisors under authority of this Chapter,
26 shall forfeit; and, in the case of any subcontractor so failing or neglecting to
27 pay said wage, the original contractor and the subcontractor shall jointly
28 and severally forfeit to the City and County of San Francisco back wages
due plus the penal sum of \$50 per day for each laborer, workman or
mechanic employed for each calendar day or portion thereof, while they
shall be so employed and not paid said highest general prevailing rate of
wages, and in addition shall be subject to the penalties set forth in Article V

1 of this Chapter, including debarment.

2 (b) Enforcement. It shall be the duty of the officer, board or commission
3 under whose jurisdiction said public work or improvement is being carried
4 on, made or constructed, when certifying to the Controller any payment
5 which may become due under said contract, to deduct from said payment
6 or payments the total amount of said forfeiture provided for in this
7 subsection. In doing so, the department head must also notify in writing the
8 Labor Standards Enforcement Officer of his/her action. The Labor
9 Standards Enforcement Officer may also, upon written notice to the
10 department head who is responsible for the project, certify to the Controller
11 any forfeiture(s) to deduct from any payment as provided for in this
12 subsection. Certification of forfeitures under this subsection shall be made
13 only upon an investigation by the responsible department head or the Labor
14 Standards Enforcement Officer and upon written notice to the contractor
15 identifying the grounds for the forfeiture or forfeitures. The Controller, in
16 issuing any warrant for any such payment, shall deduct from the amount
17 which would otherwise be due on said payment or payments the amount of
18 said forfeiture or forfeitures as so certified.

19 (c) Recourse. If the contractor or subcontractor disagrees with the
20 forfeiture as so provided in the foregoing subparagraph (b), then within
21 fifteen working days of the date of the notification as provided for above,
22 the contractor or subcontractor may request a hearing before the City
23 Administrator. The City Administrator, or his/her designee, shall consider the
24 evidence provided by the contractor or subcontractor and the responsible
25 department head and/or the Labor Standards Enforcement Officer. The
26 hearing shall occur within forty-five days of the request, unless all parties
27 agree to an extended period. The determination of the City Administrator,
28 or his/her designee, shall be final. The contractor or subcontractor may
appeal such determination only by action at law for breach of contract.

20 (Ordinance No. 208-02, file No. 021221, section 6.22(E)(8)(a), Chapter 6, San
21 Francisco Administrative Code, passed by the Board of Supervisors on October 7,
22 2002)

22 Ordinance No. 208-02 also amended section 6.24 to authorizing OLSE to seek all of
23 the penalties imposed by Chapter 6 for failure to pay prevailing wages.

24 9. On May 25, 2001, CM entered into a written contract with the the City
25 to act as the general contractor for the construction of a public works project,
26 Specification No. 5474A (Re-bid), SFFD Station No. 32 Renovation, for a contract
27 price of \$1,168,275.00. (CM Exhibit 22)

1 10. On August 29, 2001, CM notified the Bureau of Construction
2 Management, a department within the City's Department of Public Works, that the
3 MLKJ Pool project was substantially complete. (CM Exhibit 25) DPW was the City
4 department that had jurisdiction over the MLKJ Pool project. The August 29, 2001
5 letter acknowledges that CM was still performing punch list work at the job site. CM's
6 project manager, Rob Ho testified that the parties were still negotiating change
7 orders and extensions of time for the project as of the date of the instant hearings.
8 On August 29, 2001, the project was not completed or accepted as complete by the
9 City.

10 11. On or about September 4, 2001, CM provided keys for the MLKJ Pool to
11 the Bureau of Construction Management so that they could take possession of the
12 project. (CM Exhibit 24) Although, the City accepted the keys and began to use the
13 MLKJ Pool, CM did not establish that the City had accepted the MLKJ Pool as
14 complete. Mr. Ho testified that after September 2001, CM was still performing punch
15 list work on the project. At that time the keys were delivered, the project was not
16 completed or accepted as complete by the City.

17 12. No evidence was submitted that a valid notice of completion for the
18 MLKJ Pool project was recorded in the San Francisco County Recorder's Office. Final
19 payment on the MLKJ Pool contract had not been made to CM by the City as of the
20 date of the instant hearings.

21 13. On January 2, 2002, pursuant to Administrative Code Section 6.22(E),
22 DPW assessed CM and withheld payment of \$41,026.49 from the MLKJ Pool project
23 for back wage violations and penalties regarding CM's own workers. (OLSE Exhibit 5)
24 The assessment consisted of back wages of \$3,959.80 owed to eight of CM's
25 workers for non-payment of Saturday overtime with \$4,850.00 in penalties (\$50.00
26 per day x 97 days), back wages of \$13,060.19 owed to four of CM's carpenters for
27 non-payment of prevailing wage with \$7,700.00 in penalties (\$50.00 per day x 154
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1 days), back wages of \$2,241.46 for a CM apprentice for misclassification of an
 2 apprentice with \$600.00 in penalties (\$50.00 x 12 days) and back wages of
 3 \$3,864.64 owed to CM laborer Adrian Sheppard for misclassification of laborer with
 4 \$4,750.00 in penalties (\$50.00 per day x 95 days). The assessment January 2, 2002
 5 letter advised CM: "If you do not agree with the assessments or determinations we
 6 have made in this letter, you may request a hearing by submitting a written objection
 7 within 30 days of the date of this letter. The request for hearing must contain the
 8 grounds for objection and any supporting documents."

9 14. On February 6, 2002, more than 30 days from the January 2, 2002
 10 assessment letter, CM objected in writing to each back wage assessment and to the
 11 daily penalties assessed. (OLSE Exhibit 6) In the February 6, 2002 letter, CM described
 12 Adrian Sheppard's duties as:

13 "cleanup of jobsite, cleanup of formwork material for reuse and the
 14 scraping of silicone residue from the concrete walls. Occasionally, he tended
 15 to the carpenters on-site when they were building formwork. Mr. Sheppard
 16 also performed some formwork stripping at the new concrete foundation
 for approximately 3 weeks when first started working for C.M.
 Construction."

17 (OLSE Exhibit 6, pg. 3)

18 CM did not request a hearing in their February 6, 2002 letter.

19 15. On March 26, 2002, OLSE and CM met regarding the assessment of CM's
 20 workers. In the meeting, OLSE agreed to reduce the amount of the assessment. (OLSE
 21 Exhibit 28)

22 16. On April 19, 2002, CM wrote to DPW disputing the MLKJ Pool assessment
 23 for overtime work on Saturdays and disputed the laborer 3 classification of its
 24 employee Adrian Sheppard. (OLSE Exhibit 11) The letter requested that the amount of
 25 the MLKJ Pool assessment be reconsidered.

26 17. On May 14, 2002, after receiving additional documentation from CM and
 27 meeting with CM, DPW and OLSE advised CM that no back wages/penalties were due
 28

1 for CM's carpenters or for apprentice Ailu Saillele. (OLSE Exhibit 10) DPW/OLSE's
2 previous assessment letter on January 2, 2002 had claimed carpenter back
3 wages/penalties totaling \$20,760.19 and back wages/penalties for apprentice Saillele
4 totaling \$2,841.86. (OLSE Exhibit 5)

5 18. The May 14, 2002 assessment letter also reduced the back
6 wages/penalties claimed in the January 2, 2002 letter for laborer Adrian Sheppard to
7 \$3,282.16, a reduction of \$582.48. (OLSE Exhibit 10) The May 14, 2002 assessment
8 letter increased the penalty amount for Adrian Sheppard by \$50.00 from \$4,750.00
9 (\$50.00 x 95 days) to \$4,800.00 (\$50.00 x 96 days). DPW/OLSE did not change the
10 \$8,809.80 back wages/penalties for unpaid Saturday overtime work. As a result of
11 the May 14, 2002 assessment letter, the total assessment for CM's work force was
12 reduced from \$41,026.49 to \$16,891.96 (\$8,809.80 for Saturday overtime and
13 \$8,082.16 for Adrian Sheppard). The May 14, 2002 assessment letter advised CM,
14 "Contemporaneously with this letter, DPW will instruct the City Controller to withhold
15 the \$16,892.54 assessment, in accordance with San Francisco Administrative Code
16 section 6.22(E). This decision is final."

17 19. On July 22, 2002 DPW/OLSE granted, in part, CM's request to
18 reformulate the hours worked by Adrian Sheppard. (OLSE Exhibit 12) CM claimed that
19 Mr. Sheppard was properly classified and paid by CM as a Laborer 4 worker because
20 his work was clean up work only. DPW/OLSE agreed to allow 10% of Mr. Sheppard's
21 hours to be reclassified at the Laborer 4 rate, which reduced Mr. Sheppard's back
22 wage assessment from \$3,282.16 to \$2,739.51 and reduced the penalty assessment
23 from \$4,800.00 (\$50.00 per day x 96 days) to \$4,200.00 (\$50.00 per day x 84
24 days). As a result of DPW/OLSE's adjustment, the total assessment against CM was
25 reduced from \$16,891.96 to \$15,749.31 (\$8,809.80 for Saturday overtime and
26 \$6,939.51 for Adrian Sheppard). The July 22, 2002 letter advised CM that the
27 \$15,749.31 assessment was final.

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"The parties to this agreement agree that the Group 4 classification in the agreement is intended to be utilized only in all final cleanup work of debris, grounds and building including but not limited to street cleaners... The Group 4 classification is a cleanup classification and shall not be utilized to undermine, modify or change any of the current and traditional classifications currently utilized under the scope of this agreement..."(emphasis added.)

(OLSE Exhibit 9, pgs. 10-11)

23. On March 21, 2003, after Mr. Sheppard's work on the MLKJ Pool project had ended, DIR issued a correction to the DIR's description for Group 4 laborer:

"IMPORTANT NOTICE TO AWARDING BODIES & ALL INTERESTED PARTIES REGARDING A CORRECTION TO THE DIRECTOR'S GENERAL PREVAILING WAGE DETERMINATIONS.

The word **final** was inadvertently omitted from the following Group 4 classification: 'All cleanup work of debris, grounds and building including but not limited to street cleaners.' (emphasis original.)

The following is the correct Group 4 classification: All final cleanup work of debris, grounds and buildings, including but not limited to street cleaners.

Aside from this correction, everything else remains unchanged in the above referenced determinations."

(CM Exhibit 18)

24. On September 17, 2002, CM wrote to DPW/OLSE contending that Adrian Sheppard was properly classified as a group 4 laborer and that CM's employees' work on Saturdays was necessitated by inclement weather during the week. (OLSE Exhibit 3) CM further advised DPW/OLSE that as of August 2, 2002, Adrian Sheppard had settled and released CM from all wage and employment claims. CM enclosed a typed letter, dated August 2, 2002, signed by Adrian Sheppard, which also contained a handwritten interlineation and three hand lined-out words. The letter stated:

"To Whom It May Concern:

I, Adrian Sheppard, was previously employed by CM. Construction as a laborer on the Martin Luther King, Jr. Pool (Contract #1042R) located in

1 San Francisco, California. A dispute later arose between the parties as to
2 whether I should have been paid additional wages in connection with my
3 work on the Project and whether I was misclassified as a [Laborer Group 4
4 rather than*] Laborer Group 3 [, ~~rather than a**~~] Carpenter or Operating
5 Engineer for wage rate purposes. I and C.M. Construction have fully and
6 satisfactorily settled the dispute, and I have no further claims against C. M.
7 Construction.

* handwritten interlineation.

** crossed out words.

8 (OLSE Exhibit 3, attachment 2)

9 25. At the hearing, Adrian Sheppard testified credibly that the handwritten
10 addition to the August 2, 2002 letter, "Laborer Group 4 rather than", and the
11 crossed out words "rather than a", were not part of the document when he signed it.
12 Mr. Sheppard also testified credibly that he signed the document because he needed
13 the money, but felt that he was still owed more money from CM. CM paid Mr.
14 Sheppard \$2,000.00 for executing the document.

15 26. Mr. Sheppard further testified credibly that he was paid four different
16 rates during the seven to nine months he worked for CM on the MLKJ Pool project,
17 and the last rate paid was \$23.02 per hour. OLSE provided a declaration under
18 penalty of perjury signed by Mr. Sheppard on November 17, 2001 describing Mr.
19 Sheppard's work on the MLKJ Pool project from June 26, 2000 through February 8,
20 2001. (OLSE Exhibit 1) Mr. Sheppard testified credibly that his declaration was true
21 and correct. Mr. Sheppard's declaration provided in part:

22 "I did different types of work at the pool. One type of work was stripping
23 forms and the snapping ties. Sometimes I operated a lift to perform this
24 work. After I stripped the forms I would remove the nails, clean the wood,
25 and stack it to be re-used. During the time I performed this type of work I
26 should have been classified and paid the wage rate for a general laborer
27 (group 3). I estimate that I performed this type of work for 432.5 hours....

28 I did a little clean-up work around the jobsite but not very much. I used to
be a clean-up laborer on a project at the airport and then I went to school
to become a general laborer. A clean-up laborer is only supposed to clean
up debris and use a push broom. A clean-up laborer doesn't use any tools.

1 Most the work I did at the pool was that of a general laborer."

2 (OLSE Exhibit 1)

3 Mr. Sheppard's declaration further stated that he worked as a carpenter setting
4 forms using 4' x 8' sheets of plywood and nailing the forms to tie rods while working
5 with the carpenter crew. In his declaration, Mr. Sheppard estimated that he worked
6 on forms for 140 hours.

7 27. In addition to his declaration, Mr. Sheppard testified credibly that he
8 spent approximately three months cutting, nailing and building forms. Mr. Sheppard
9 testified that he spent approximately one month cleaning up, which included picking up
10 and stacking tie rods, and that throughout the project he cleaned concrete from
11 wooden forms. All of Mr. Sheppard's work on the MLKJ Pool project was completed in
12 February 2001 before the March 21, 2003 DIR correction, which added "final" to the
13 clean-up description for Group 4 laborer.

14 28. On April 11, 2003, pursuant to Administrative Code Section 6.22(E),
15 OLSE and the San Francisco Department of Public Works, Bureau of Construction
16 Management assessed CM and withheld payment of \$83,035.29 from the SFFD
17 Station #32 project for back wage violations and penalties by CM's subcontractor Jin
18 Construction and Electric Co., hereinafter "Jin." (CM Exhibit 26) CM received notice of
19 the assessment and forfeiture on April 15, 2003. (CM Exhibit 26) The assessment
20 letter advised CM, "If you disagree with the assessment or determinations we have
21 made in this letter, you or your subcontractor may request a hearing by submitting a
22 written objection within 15 days of the date of this letter."

23 29. On April 25, 2003, within 15 days of the April 11, 2003 assessment and
24 forfeiture, Jin notified OLSE and DPW in writing that it contested the assessment and
25 forfeiture and requested a hearing. (CM Exhibit 27) CM did not notify OLSE or DPW
26 that CM disagreed with the assessment. CM did not request a hearing.

27 30. On May 27, 2003, pursuant to Administrative Code Section 6.22(E),
28

1 OLSE and DPW assessed CM and withheld payment of \$245,983.95 from the MLKJ
2 Pool project for back wage violations and penalties by CM's subcontractors Jin
3 (\$231,355.38), Golden Gate Painting, hereinafter "Golden," (\$10,837.36), J & J Sheet
4 Metal, hereinafter "J&J," (\$2,462.08) and Orson Mechanical, hereinafter "Orson,"
5 (\$1,329.13). (CM Exhibit 25)

6 31. Subsequent to the May 27, 2003 assessment, CM requested a hearing
7 pursuant to San Francisco Administrative Code Section 6.22(E)(8)(c). Neither CM or
8 OLSE submitted a copy of CM's hearing request. However, the City Administrator's
9 appointment letter of the undersigned Hearing Officer stated that the City
10 Administrator had received an Administrative Code Section 6.22(E)(8)(c) request for
11 an administrative hearing from CM. (Hearing Officer Exhibit 2) OLSE has not raised any
12 objections to the timeliness or the content of CM's appeal of the May 27, 2003
13 assessment.

14 32. Donna Levitt, a labor enforcement officer at OLSE, testified that OLSE is
15 part of the San Francisco City Office of Contract Administration. Ms. Levitt testified
16 that she reviewed the certified payroll records submitted by CM, Golden, J&J and
17 Orson, interviewed staff from the Department of Public Works, who were familiar with
18 the MLKJ Pool project, met with CM's employee, Adrian Sheppard, and met with CM's
19 representatives. Ms. Levitt testified credibly that OLSE prepared the audits and
20 assessments of CM and the named subcontractors based on their certified payroll
21 records, her interviews and discussions with CM and its subcontractors and the
22 prevailing wage rates for craft and classification of worker adopted by the City of
23 San Francisco. The audits for CM and each of the named subcontractors, including the
24 audit methodology, supporting documents, legal authority and certified payroll
25 records were admitted into evidence at the hearings. (OLSE Exhibits 36-43) The audits
26 found that CM and the named subcontractors owed:

1	<u>CONTRACTOR</u>	<u>BACKWAGES</u>	<u>PENALTIES</u>
2	C.M. CONSTRUCTION	\$4,877.30	\$9,050.00 (181 days x \$50.00 day)
	GOLDEN GATE PAINTING	\$4,898.72	\$5,750.00 (115 days x \$50.00 day)
3	J&J SHEETMETAL	\$735.13	\$1,500.00 (30 days x \$50.00 day)
	ORSON MECHANICAL	\$736.33	\$550.00 (11 days x \$50.00 day)
4			
	SUBTOTAL	\$11,047.48	\$16,850.00
5			
	TOTAL BACKWAGES AND PENALTIES	\$27,897.48	

6 The audit for CM reduced the amount sought in earlier assessments by \$22.00 for a
7 clerical error and \$2,000.00 credited for the amount paid to Mr. Sheppard after the
8 final assessment was made. The audit amounts do not include amounts assessed
9 against Jin because of the parties' stipulation to remove claims involving Jin from
10 these hearings.

11 33. After the hearings, OLSE submitted a revised audit assessment claiming
12 the following amounts to be due:
13

14	<u>CONTRACTOR</u>	<u>BACKWAGES</u>	<u>PENALTIES</u>
15	C.M. CONSTRUCTION	\$4,877.30	\$9,050.00 (181 days x \$50.00 day)
	GOLDEN GATE PAINTING	\$4,898.72	\$5,750.00 (115 days x \$50.00 day)
16	J&J SHEETMETAL	\$962.08	\$1,500.00 (30 days x \$50.00 day)
	ORSON MECHANICAL	\$42.30	\$550.00 (11 days x \$50.00 day)
17			
	SUBTOTAL	\$10,580.40	\$16,850.00
18			
	TOTAL BACKWAGES AND PENALTIES	\$27,430.40	

19 (OLSE Post-hearing Brief, pg. 3)
20

21 The post-hearing revision reduces the amount of back wages due from Orson based
22 on additional documents provided to OLSE by Orson on or about the date of the
23 hearings. The post-hearing revision increased the amount of back wages owed for J&J
24 from \$735.13 to \$962.08 without any explanation.

25 34. Ms. Levitt testified credibly that Mr. Sheppard was misclassified and paid
26 by CM as a Laborer 4 worker, one who cleans up debris, grounds and building, instead
27 of being classified and paid as a Laborer 3 worker, a general construction laborer.

28 Ms. Levitt testified that the assessment for Mr. Sheppard was based on 90% of his

1 hours worked as a Laborer 3 construction laborer and 10% of his hours worked as a
2 Laborer 4 clean-up laborer. OLSE's classification of Mr. Sheppard as a Laborer 3 was
3 based on Mr. Sheppard's description of his duties and CM's description of Mr.
4 Sheppard's duties in a February 6, 2002 letter to OLSE. CM described Mr. Sheppard's
5 duties as including,

6 "...clean up of formwork material for reuse and the scraping of silicone
7 residue from concrete walls. Occasionally, he tended to the carpenters
8 on-site when they were building formwork. Mr. Sheppard also performed
9 some formwork stripping at the new concrete foundation..."

9 (OLSE Exhibit 6, pg. 3)

10 35. Ms. Levitt testified that OLSE advised CM that the Group 4
11 Laborer (clean-up classification) is limited to final clean up of debris, grounds
12 and building and that the Group 4 Laborer classification is not intended to be
13 utilized in the performance of form stripping, cleaning and oiling and moving to
14 the next point of erection. (OLSE Exhibit 10) OLSE determined that the
15 majority of the work performed by Mr. Sheppard was within the scope of
16 work defined as Group 3 General Laborer, not the final clean up work of the
17 Group 4 Laborer. OLSE determined that the rate difference between Group 3
18 Laborer and Group 4 Laborer was \$4.59 per hour. CM did not dispute the
19 rate difference between the two laborer groups. Ms. Levitt also testified that
20 OLSE determined from CM's certified payroll records that CM paid fifteen other
21 workers as Group 4 clean-up laborers during the project.

22 36. Ms. Levitt testified credibly that during the MLKJ Pool project CM
23 had its work force work on twenty-seven Saturdays, but only paid the
24 workers a straight time hourly rate rather than the required overtime rate.
25 Ms. Levitt further testified that OLSE used CM's certified payroll records from
26 the MLKJ Pool project to prepare a chart of CM's Saturday work. (OLSE
27 Exhibit 16 & 17) The chart listed the five-day workweek preceding the
28

1 Saturday work, and listed the weather conditions for those days worked by
2 CM.

3 37. Ms. Levitt testified that the general prevailing wage determination for
4 CM's workers on the MLKJ Pool project required CM to pay overtime rates for work
5 on Saturdays, except if the job is shut down during the normal work week due to
6 inclement weather. In that case, straight-time rates may be paid for Saturday work.
7 The Saturday rate exception in the wage determination provides:

8 "Saturdays in the same work week may be worked at straight-time if
9 job is shut down during the normal work week due to inclement
10 weather, major mechanical breakdown or lack of materials beyond the
control of the employer."

11 (OLSE Exhibit 8)

12 Title 8 of the California Code of Regulations Section 16200(a)(3)(F) also provides in
13 pertinent part:

14 "Overtime will be paid as indicated in the wage determination....Exception
15 3: If the awarding body determines that work cannot be performed
16 during normal business hours or work is necessary at off hours to avoid
17 danger to life or property, no overtime is required for the first eight
hours in any one calendar day, and 40 hours during any one calendar
week."

18 (OLSE Exhibit 24)

19 38 Ms. Levitt testified credibly that the inclement weather exception allowing
20 straight-time wages on Saturdays did not apply to CM because based on CM's
21 certified payroll records, the jobsite was never shut down during a normal work week
22 for any reason. Ms. Levitt testified that CM's laborers were entitled to be paid
23 overtime wages on Saturdays rather than straight-time wages. The Saturday work
24 chart compiled from CM certified records and the daily project diaries support Ms.
25 Levitt's testimony. The MLKJ Pool jobsite was not shut down during the work-weeks
26 prior to the Saturdays worked by CM's laborers. (OLSE Exhibit 16; OLSE Exhibit 22)
27 Furthermore, the City and Ms. Levitt advised CM in writing on October 21, 2002,
28

1 "There are no notes in the inspector's dally reports that indicate that workers were
2 unable to work because of inclement weather during the weeks in question. There were
3 no time extensions on the project because of time lost because of inclement weather
4 during the weeks in question. The responsibility to maintain a safe worksite is your
5 responsibility and is not cause for the waiver of overtime requirements." (OLSE Exhibit
6 14, pg. 2) Ms. Levitt further testified credibly that the City did not require CM to
7 work on Saturdays at any time during the MLKJ Pool project.

8 39. OLSE established that CM was six weeks behind schedule on the job in
9 December 1999. (OLSE Exhibit 19) As a result of the schedule delays, on January 20,
10 2000, the City advised CM in writing:

11 "After reviewing the update schedule and the look ahead schedule, the
12 project is in delay for a subcontractorstantial [period] of time. With the
13 up-coming inclement weather and to facillitate the project to complete on
14 time, you are allowed to work on weekend provided that there is no
15 extra cost to the City." (emphasis orig.)

16 Ms. Levitt testified that the January 20, 2000 letter did not require CM to work on
17 Saturdays, which would have exempted CM from having to pay overtime wages for
18 Saturday work, but instead, simply gave CM permission to work on Saturdays if CM
19 elected to work on Saturdays. Therefore, CM was not exempt from paying overtime
20 wages for Saturday work.

21 40. Ms. Levitt also testified that with the exception of Jin, CM's
22 subcontractors did not appeal OLSE's May 27, 2003 assessment and forfeiture.
(OLSE Exhibit 25; CM Exhibit 3)

23 41. Mary Marzotto testified that she has been employed as a contract
24 compliance officer for OLSE for two and a half years and had also been employed for
25 eighteen years as a senior public works investigator. Ms. Marzotto testified credibly
26 to the mode and method of preparation of the audits. The audits of CM and its
27 subcontractors were based in part on certified payroll records from CM and its
28 subcontractors, canceled checks, fringe benefit statements, interviews and

1 statements by employees of CM and employees of CM's subcontractors and wage
2 determination classifications by the Department of Industrial Relations. The audits, the
3 audit methodology and supporting certified payroll records for the assessment of CM
4 and subcontractors GG, J&J and Orson were submitted. (OLSE Exhibits 39-43) The
5 audits and audit methodology support the final assessed amount set forth in OLSE's
6 closing brief.

7 42. Ms. Marzotto also testified that she was involved in all of the subject
8 audits except for the audit of Jin, which is not part of this hearing. Ms. Marzotto
9 testified credibly that J&J was assessed primarily because J&J was underpaying the
10 prevailing wage rate for its workers and was not paying overtime after its sheet
11 metal workers worked seven hours each day as set forth in OLSE's determination.
12 (OLSE Exhibit 42) Ms. Marzotto testified credibly that GG was assessed primarily
13 because it was underpaying the prevailing wage rate for painters, misclassifying
14 painters as apprentices and laborers as set forth in OLSE's determination. (OLSE
15 Exhibit 41) Ms. Marzotto testified credibly that Orson was assessed primarily because
16 it was not paying the proper Saturday rate or paying the proper holiday rate as set
17 forth in OLSE's determination. (OLSE Exhibit 43) Ms. Marzotto also testified that just
18 prior to the hearings she received additional evidence of payments from Orson, which
19 are reflected in the adjusted amounts set forth in OLSE's closing brief.

20 43. In rebuttal to OLSE's evidence, Robert Ho, CM's project manager and
21 superintendent for the MLKJ Pool project, testified on CM's behalf. Mr. Ho testified
22 credibly that he was on the MLKJ Pool project every day, and that he maintained the
23 certified payroll records that were the basis of OLSE's audit. Mr. Ho testified that at
24 the beginning and end of each day he listed CM's employees and subcontractors that
25 were on the jobsite for that day.

26 44. Mr. Ho testified that Frankie Chung, a CM employee, supervised Adrian
27 Sheppard on the MLKJ Pool project. Mr. Ho also testified that he saw Mr. Sheppard
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1 removing residue from concrete walls, cleaning forms, doing clean up and removing
 2 silicone caulking from forms by using a lift to reach the silicone caulking. Mr. Ho
 3 testified that he did not see Mr. Sheppard using any power tools on the job. Mr. Ho
 4 testified that CM classified Mr. Sheppard as a Group 4 clean up laborer based on the
 5 1999 DIR wage determination. (CM Exhibit 17; OLSE Exhibit 8) Mr. Ho also testified
 6 that he was unaware that the word "final" had been eliminated in error from the DIR
 7 wage determination for Laborer 4.

8 45. Mr. Ho testified that the handwritten additions and changes to the
 9 August 2, 2002 settlement letter, which were added after Mr. Sheppard signed the
 10 statement, were in Mr. Ho's handwriting. (OLSE Exhibit 3, attachment 2)

11 46. Mr. Ho testified that during the project weather conditions included
 12 heavy winds in the afternoon, rain and early morning fog. On some days, areas on the
 13 roof, including the flashing, were slippery until after lunch. On the days of high winds,
 14 the wind interfered with lifting or carrying large objects, such as plywood and sheet
 15 metal panels. Mr. Ho testified that because of these weather conditions the
 16 carpenters, who were the subject of the OLSE assessment, were shifted to other non-
 17 critical activities or were sent home.

18 47. Mr. Ho further testified that on inclement weather days he discussed the
 19 unsafe conditions with Sherman Yu, the City's resident engineer. CM submitted six
 20 memos written by Mr. Ho to Ray Shia, the City's construction manager on six different
 21 Fridays during the project. (CM Exhibit 1) The May 19, 2000 memo provides in
 22 pertinent part:

23 "This memo is to confirm our conversation with the City yesterday
 24 afternoon 5/18/00 and this afternoon 5/19/00. We all agreed that
 25 formwork needed to be stopped during the afternoon because the jobsite
 got extremely windy and the formwork became dangerous to perform.

26 In order to stay on schedule, we will need to resume formwork tomorrow
 27 morning Saturday 5/20/00. You informed us that this was acceptable."
 28

1 The July 14, 2000 memo is substantially the same, but refers to formwork stripping
2 that will resume on Saturday 7/15/00. The March 16, 2001 memo is substantially the
3 same, but refers to installation of sheetmetal plates at the Natatorium roof perimeter
4 that will resume on Saturday 3/17/01. The March 30, 2001 is substantially the same,
5 but refers to installation of the waterproofing membrane at the Natatorium roof
6 perimeter that will start on Saturday 3/31/01. The May 11, 2001 memo is
7 substantially the same, but refers to framing of the mansard roof that will resume on
8 Saturday 5/12/01. The May 25, 2001 memo is substantially the same, but refers to
9 parapet coping work that will resume on Saturday 5/26/01. (CM Exhibit 1)

10 48. CM also submitted a September 30, 2002 memorandum from Raymond
11 Shia to Mr. Ho that acknowledges that Sherman Yu, the Resident Engineer for the
12 MLKJ Pool project, had discussions with Mr. Ho "regarding the safety issues during the
13 construction. And agreed that you should not proceed or continue performing certain
14 types of work during times of inclement weather." (CM Exhibit 2)

15 49. On cross-examination, Mr. Ho testified that he believed that the City
16 directed CM to work on Saturdays and he believed that his memoranda to the city's
17 construction manager confirmed this understanding. Mr. Ho testified that because of
18 the inclement weather he redeployed forces, sent workers home and was required to
19 shut down the entire jobsite. However, Mr. Ho did not know of any record that the
20 entire project was shut down due to inclement weather. CM did not notify the city
21 that the entire jobsite was shut down due to inclement weather. Mr. Ho testified that
22 as of the date of the hearings, no written change orders or extensions of time have
23 been issued by the City directing CM to work on Saturdays.

24 50. Mr. Ho further testified that in September 2001, which was after
25 possession of the MLKJ Pool was delivered to the City, CM was performing punchlist
26 work on the project. CM has not received final payment for the MLKJ Pool project,
27 and CM and the City are still negotiating change orders and time extensions under the
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1 contract.

2 51. Frankie Chung, CM's project foreman, testified credibly that he was at
3 the MLKJ Pool project every day, and that he supervised Adrian Sheppard and seven
4 or eight other laborers and carpenters. Mr. Chung testified that Mr. Sheppard cleaned
5 up material, formwork, concrete walls, and debris at the jobsite on a continuous basis
6 and removed nails from formwork. Mr. Chung testified that he did not see Mr.
7 Sheppard using any power tools, although power tools were available in a storage
8 shed at the jobsite. Mr. Chung testified credibly that Mr. Sheppard also worked with
9 two carpenters working at the jobsite who gave instructions to and directed Mr.
10 Sheppard when Mr. Sheppard was working with them.

11 52. Mr. Chung testified credibly that CM's work was affected by wind, rain,
12 and fog, which at times made conditions unsafe to work. Mr. Chung testified that
13 sometimes carpenters were sent home because of wind, rain, and fog and sometimes
14 they were not sent home if there was other work for them to do. Although Mr. Chung
15 testified that the entire job was shut down because of inclement weather and all
16 workers were sent home, Mr. Chung was unable to identify the date or dates that the
17 entire job was shut down. The project diaries kept by Sherman Yu and the summary
18 of CM's daily work on the project refute Mr. Chung's testimony that the entire job was
19 shut down. (OLSE Exhibits 22 & 16) CM did not submit any evidence that would
20 support Mr. Chung's testimony that the entire MLKJ Pool job was shut down on any
21 given day due to inclement weather.

22 53. OLSE submitted notes of a November 1, 2001 telephone conversation
23 between Mary Marzotto, the OLSE contract compliance officer who prepared the
24 audits, and Sherman Yu, the Resident Engineer for the MLKJ Pool. (OLSE Exhibit 27)
25 The notes reflect that Mr. Yu stated that Adrian Sheppard was a general laborer,
26 who did a lot of form removal, hauled material and used a boom lift or cherry picker
27 lift to put in forms, remove forms and remove snap ties, hole by hole. (OLSE Exhibit
28

1 27)

2 54. James Haugabook, the owner of Golden Gate Painting, testified credibly
3 that he did not dispute OLSE's assessment of GG, except for the portion of the
4 assessment for Sharmaine Eskridge, who was paid by GG as a painter's apprentice
5 for two weeks in March 2001, and Clifford Edwards, who was paid by GG as a
6 laborer. Mr. Haugabook testified that he hired and paid Ms. Eskridge as a painter's
7 apprentice because she told him she was a painter's apprentice and because he called
8 the painter's union, and was told by the dispatcher that Ms. Eskridge was a painter's
9 apprentice. Mr. Haugabook further testified that he hired and paid Mr. Edwards as a
10 laborer to clean up paint overspray that occurred during a three-month period before
11 Mr. Edwards was hired.

12 55. On cross-examination, Mr. Haugabook testified that he did not receive
13 written confirmation from the painter's union that Ms. Eskridge's was a painter's
14 apprentice, and he did not receive any documentation from Ms. Eskridge that she was
15 a painter's apprentice. OLSE submitted a letter dated December 19, 2002 from the
16 California Department of Industrial Relations, Division of Apprenticeship Standards
17 (DAS), to OLSE stating that Charmaine [sic] Eskridge, identified by her social security
18 number, "is a registered apprentice with the roofers and waterproofing JATC. She
19 entered the program on 1/26/01." (OLSE Exhibit 41, pg. 62) Ms. Eskridge was not
20 entered in a painter's apprentice program during the time she worked on the MLKJ
21 Pool project. Although DAS identified Ms. Eskridge with a different spelling for her first
22 name than the spelling used by both GG in its certified payroll records and by OLSE in
23 its audit, the social security number given by DAS matches the social security number
24 for Ms. Eskridge in GG's certified payroll records. Neither party disputed Ms.
25 Eskridge's identity. (OLSE Exhibit 41, pg. 31)

26 56. On further cross-examination, Mr. Haugabook testified that clean up of
27 overspray was within the scope of work for a painter, but that it was nonsense to
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1 waste a painter on cleaning up overspray, which was the reason, in Mr. Haugabook's
2 judgment, that he classified Mr. Edwards as a laborer. Mr. Haugabook did not dispute
3 OLSE's audit methodology, except for OLSE's classification of Ms. Eskridge as a
4 painter rather than an apprentice and OLSE's classification of Mr. Edwards as a
5 painter rather than a laborer.

6 **FINDINGS OF HEARING OFFICER**

7
8 **I. THE 2003 ASSESSMENT/FORFEITURE—CM'S SUBCONTRACTORS.**

9 **1. CM's subcontractors Golden Gate, J&J and Orson failed to**
10 **pay prevailing wages to their workers during work on the MLKJ**
11 **Pool project.**

12 OLSE established that CM's subcontractors Golden Gate, J&J and Orson
13 failed to pay prevailing wages to their workers during the MLKJ Pool project. The
14 evidence used by OLSE to prove the violations by CM's subcontractors included,
15 but was not limited to, the hearing testimony of OLSE representatives, meetings
16 between OLSE and Golden Gate, J&J and Orson, assessments of CM's
17 subcontractors, DIR wage determinations, resolutions adopting the wage
18 determinations, certified payroll records of the subcontractors, OLSE audits and
19 supporting audit methodologies, project diaries and other documents used by
20 OLSE to prepare the audits and calculate the assessments. (OLSE Exhibits 4, 22,
21 25, 26, 36-43)

22
23 CM and Golden Gate did not dispute the audit methodology used to
24 calculate the back wages and penalties, except for OLSE's classification of
25 Sharmaine Eskridge as a painter rather than as an apprentice (\$1,540.00 back
26 wages and \$400.00 penalties [\$50 per day x 8 days]) and OLSE's classification
27 of Cliff Edwards as a painter rather than a laborer (\$1,055.52 back wages and
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\$500.00 penalties [\$50 per day x 10 days]).

At the hearings, CM and Golden Gate contended that Sharmaine Eskridge was properly classified as a painter's apprentice because James Haugabook, the owner of Golden Gate, was told by Ms. Eskridge and a union dispatcher that Ms. Eskridge was a painter's apprentice at the time she was hired. This contention is rejected. Mr. Haugabook failed to obtain any written documentation from the union or from Ms. Eskridge that she was a painter's apprentice. Furthermore, Mr. Haugabook failed to contact the California Division of Apprenticeship Standards (DAS) to verify Ms. Eskridge's status. OLSE established by a letter from DAS that Ms. Eskridge was not enrolled in a painter's apprentice program. (OLSE Exhibit 41)

CM and Golden Gate also contended that Cliff Edwards was a laborer and not a painter because he only cleaned up paint overspray. This contention is rejected. CM and Golden Gate failed to prove that clean up of paint overspray was in the scope of work for a laborer rather than in the scope of work for a painter.

~~CM did not dispute the amount of OLSE's final determination or the audit methodology used to calculate the back wages and penalties owed for J&J or for Orson.~~

Therefore, based on the evidence, the undersigned Hearing Officer finds that CM's subcontractors Golden Gate, J&J and Orson failed to pay prevailing wages to its workers on the MLKJ Pool project in the amounts set forth above.

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2. CM is liable under the contract for a \$50.00 per day penalty for each worker employed by its subcontractors paid less than the prevailing wage on the MLKJ Pool project.

Addendum 1 to the MLKJ Pool contract documents issued on May 14, 1999 and received by CM on May 25, 1999 added section 00822 as part of the contract. (OLSE Exhibit 34) Subsection 1.4 B of section 00822 imposed a \$50.00 penalty per calendar day, or portion thereof, on CM for each worker employed by CM or its subcontractors paid less than the prevailing wage. (OLSE Exhibit 35) It was undisputed by CM that Addendum 1 was added to the contract documents before CM signed the contract on July 21, 1999. Therefore, the MLKJ Pool contract expressly imposed on CM \$50.00 per day penalties for each worker employed by CM or its subcontractors who were not paid the prevailing wage on the MLKJ project.

CM contends that the \$50.00 per day penalty in Addendum 1 creates an internal conflict with the signed contract, which sets the penalty at \$25.00 per day. (CM Closing Brief, pg. 15) CM further contends that this discrepancy must be resolved in favor of the signed contract because the contract General Conditions provide that the signed contract prevails over addenda in case of discrepancy or ambiguity. CM's contention is without merit.

The July 21, 1999 signed contract provides that CM shall forfeit a \$25.00 per day penalty for each laborer, workman, or mechanic employed by CM or its subcontractors required or permitted to labor more than eight hours in violation Labor Code Sections 1810 to 1815. (CM Exhibit 5) However, Addendum 1 imposed a \$50.00 per day penalty, on CM for each worker paid less than the prevailing wage. (OLSE Exhibit 35) Accordingly, there is no discrepancy or ambiguity in the contract documents because the different penalty amounts are for different violations, i.e. a \$25.00 per day penalty for requiring or permitting workers to labor more than eight hours in one day and a \$50.00 per day penalty for paying less than the prevailing wage.

1 CM alleges that a "1999" Board of Supervisors Resolution "1026-96" was the
 2 basis for the penalty increase in Addendum 1. (CM Closing brief, pg. 15) CM argues
 3 that the increase is ineffective because a Board resolution is not law. CM did not
 4 submit a copy of Resolution No. 1026-96, which is the basis of its argument. The
 5 Hearing Officer located Resolution No. 1026-96, which was passed in 1996, not 1999,
 6 and Resolution No. 1026-99, which was passed in 1999. (Resolution No. 1026-96, File
 7 No. 273-96-1, adopted on November 4, 1996; Resolution No. 1026-99, File No.
 8 992029, adopted November 8, 1999) Neither resolution is relevant here. Resolution
 9 No. 1026-96 reaffirmed the sister city relationship between San Francisco and the City
 10 of Assisi, Italy. Resolution No. 1026-99 appointed members to the City-wide
 11 Alcoholism Advisory board.

12 Based on the evidence, the undersigned Hearing Officer finds that CM is
 13 contractually liable for penalties of \$50.00 per day, or portion thereof, incurred by
 14 CM's subcontractors Golden Gate, J&J and Orson for failing to pay prevailing wages
 15 to its workers on the MLKJ Pool project as follows:

- 16 1. Golden Gate: \$5,750.00 (\$50.00 per day x 115 days);
- 17 2. J&J: \$1,500.00 (\$50.00 per day x 30 days); and
- 18 3. Orson: ~~\$550.00~~ (\$50.00 per day x 11 days).
- 19
- 20 Total Penalties \$7,800.00

21 3. CM is not liable under the MLKJ Pool contract or under
 22 Chapter 6 of the San Francisco Administrative Code for unpaid
 23 back wages owed by its subcontractors Golden Gate, J&J and
 24 Orson.

25 CM contends that CM is not liable under the MLKJ Pool contract or under
 26 Chapter 6 of the San Francisco Administrative Code for the unpaid back wages
 27 owed by its subcontractors Golden Gate, J&J and Orson. (CM Closing Brief, pg. 9;
 28

1 CM Reply Brief, pg. 2) CM's contention has merit.

2 As set forth above, Addendum 1 of the MLKJ Pool contract imposes on CM
3 a \$50.00 per day penalty for each day that CM's subcontractors did not pay the
4 prevailing wages to its workers on the public works project. (OLSE Exhibit 35)
5 However, as recognized by OLSE in its closing brief, the MLKJ Pool contract does
6 not expressly identify subcontractors' unpaid back wages as part of the
7 forfeiture for which CM is liable. (OLSE Closing Brief, pg.11) Even though OLSE
8 established that CM's subcontractors owe some of its workers back wages for
9 prevailing wage violations, the MLKJ Pool contract does not make CM liable for the
10 back wages owed by its subcontractors.
11

12 OLSE correctly argues that the Charter, the Administrative Code, the
13 California Labor Code and the MLKJ contract all require that CM pay its workers
14 prevailing wages and require CM's subcontractors to do the same. However,
15 OLSE does not prove that under the MLKJ contract CM is liable for more than the
16 \$50.00 per day penalty if CM's subcontractors violate the prevailing wage law.
17

18 OLSE also failed to prove that CM is liable under Section 6.22(E) for back
19 wage penalties of its subcontractors. Prior to the passage of Ordinance No.
20 208-02, effective on November 7, 2002, which amended and renumbered section
21 6.22(E)(7)(a), Chapter 6 of the San Francisco Administrative Code did not
22 impose liability on a contractor for the unpaid back wages owed by its
23 subcontractors arising out of the subcontractors' prevailing wages violations. (SF
24 Admin. Code section 6.42 and 6.22(E)(7)(a)) The amendment to section 6.22(E)
25 by Ordinance No. 208-02 added, for the first time, "back wages due" as an
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1 additional penalty for which the public works contractor was liable if its
2 subcontractors failed to pay the highest general prevailing wages. (Section
3 6.22(E)(8)(a))

4 CM correctly argues that the amendment to section 6.22(E) by Ordinance
5 No. 208-02 establishing the contractor's joint and several liability for the
6 subcontractors unpaid back wages should not be applied retroactive to CM's
7 contract, which was entered into before the amendment was passed. (CM Closing
8 Brief, pgs. 9-10; CM Reply Brief, pg. 2) Statutes are presumed to operate
9 prospectively. Evangelatos v. Superior Court (1988) 44 Cal.3d 188, 1208. A
10 statute will generally not be applied retroactively unless it is very clear from
11 extrinsic sources that the Legislature must have intended a retroactive
12 application. (citations). Myers v. Philip Morris Companies, Inc. (2002) 28 Cal.4th
13 828, 841. Where a statute contains no such expressed command, the statute will
14 not be given retroactive effect if it increases a party's liabilities for past conduct.
15 Rather, in such cases, the law in effect at the time the contract is entered into is
16 the law that will be applied. Wienholz v. Kaiser Foundation Hospitals (1989) 217
17 Cal.App.3d 1501, 1507-1508. In this case, nothing in the language of amended
18 section 6.22(E)(8)(a) indicates that the Board of Supervisors intended the new
19 penalty, contractor liability for unpaid back wages owed by its subcontractors,
20 to be retroactive in effect. OLSE does not contend that the amendments to
21 6.22(E), including Ordinance No. 208-02, were intended to be retroactive. Since
22 the amendment to section 6.22(E)(8)(a) increased CM's liability in the form of a
23 new back wage penalty for CM's subcontractors, the new back wage penalty

1 cannot be imposed on CM for its subcontractors' prevailing wage violations on
2 the MLKJ Pool project.

3 Therefore, based on the evidence, the undersigned Hearing Officer finds
4 that CM is not liable under either the contract or under Chapter 6 the San
5 Francisco Administrative Code for unpaid back wages owed by its
6 subcontractors Golden Gate, J&J and Orson for work on the MLKJ Pool project.
7

8 **4. The assessments by DPW/OLSE of CM and CM's**
9 **subcontractors for the MLKJ Pool project were timely.**

10 CM contends that since the City took occupancy of the MLKJ Pool project not
11 later than October 2001, the acceptance of occupancy constituted completion of the
12 project. As a result, CM argues, the assessments in April and May 2003 against CM
13 for its subcontractors' violations are untimely and barred because the City
14 (DPW/OLSE) failed to comply with the 180 day filing requirement of Labor Code
15 section 1741. (CM Closing Brief, pgs. 12-13) CM's contention is without merit
16

17 CM cites section 1.03 A. 13 of the "definitions section" of the contract General
18 Conditions as authority that "completion" is acceptance of the work. (CM Exhibit 6,
19 pg. 00700-2) Section 1.03 A. 13 defines completion as: "Completion: The stage when
20 the City finds the Work acceptable under the Contract Documents and the Contract is
21 fully performed." The evidence, including testimony from CM's project manager Rob
22 Ho, established that when the keys to the MLKJ Pool were given to the City, the City
23 did not find the work acceptable under the contract and required additional punchlist
24 work to be done by CM. Moreover, sections 9.07 A and D of the General Conditions
25 specifically provide in part: "A. ...The use by the City of the Work or part thereof shall
26 in no case be construed as constituting completion of the work., D. Unless otherwise
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1 agreed upon, partial occupancy or use of a portion of the Work shall not constitute
2 acceptance of the Work not complying with the requirements of the Contract
3 Documents." Therefore, CM failed to prove that acceptance of the keys by the City
4 Code constituted completion of the MLKJ Pool project.

5
6 CM further argues that Labor Code section 1741 applies in this case. However,
7 CM cites no authority for this proposition. Section 1741 provides in pertinent part:

8 "The assessment shall be served not later than 180 days after the filing of
9 a valid notice of completion in the office of the county recorder in each
10 county in which the public work or some part thereof was performed, or
11 not later than 180 days after acceptance of the public work, whichever
12 occurs last. However, if the assessment is served after the expiration of
13 this 180-day period, but before the expiration of an additional 180 days,
and the awarding body has not yet made full payment to the contractor,
the assessment is valid up to the amount of the funds retained." (emphasis
added.)

14 CM's closing brief acknowledges that "the SF Administrative Code does not contain
15 any statutes of limitations applicable to the OLSE activities." (CM Closing Brief, pg. 13)
16 Even assuming, arguendo, that the limitations period in section 1741 applies in this
17 case, the DPW/OLSE assessments were timely. Section 1741 allows 180 days after
18 the later of either the acceptance of the work or the filing of the notice of completion,
19 and allows an additional 180 days if final payment has not been made. It was
20 undisputed by the parties that the City took possession of the MLKJ Pool not later
21 than October 2001. After possession was delivered to the City, CM continued to do
22 punchlist work on the project. There was no evidence that the City had accepted the
23 project as complete at that time. Furthermore, at the time of the hearings, final
24 payment had not been made because CM and the City were still negotiating change
25 orders and extensions of time under the contract. There was no evidence that a
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1 notice of final completion was recorded in San Francisco County. Even assuming that
2 the City's possession constituted acceptance of the work, the 180 day period has not
3 yet commenced because a notice of completion, the later of the two events in section
4 1741 triggering commencement of the limitation period, has not been recorded.
5 Therefore, the DPW/OLSE assessments were timely under section 1741.
6

7 CM further contends that Civil Code section 3086 applies here and sets the
8 date of completion as the date the owner occupies or uses the work of improvement.
9 CM's reliance on section 3086 is incorrect. Use or occupation of the work of
10 improvement by the owner applies only to completion in *private* works of
11 improvement not to *public* works of improvement, which require acceptance by the
12 public entity. (Civil Code section 3086)
13

14 CM also argues that the assessments are untimely because they violate the
15 one-year statute of limitations for an action based upon a statute for a penalty or
16 forfeiture set forth in Code of Civil Procedure section 340. (CM Closing Brief, pgs. 11 &
17 14) This argument is rejected. The limitation period in CCP section 340 does not apply
18 here because the DPW/OLSE assessments do not constitute "actions" under the Code
19 of Civil Procedure. CCP section 22 defines an action as "an ordinary proceeding in a
20 court of justice by which one party prosecutes another for the declaration,
21 enforcement, or protection of a right, the redress or prevention of a wrong, or the
22 punishment of a public offense." DPW/OLSE did not file any proceeding in a court of
23 justice, and therefore the assessments are not "actions" within the meaning of CCP
24 section 340. The authorities cited in CM's brief do not refute the "action in court"
25 requirement for application of CCP section 340.
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1 CM also contends that assessments are barred because neither the City nor
2 OLSE gave CM any notice of the enactment of local ordinances imposing liability on CM
3 for unpaid back wages and penalties incurred by CM's subcontractors. (CM Closing
4 Brief, pgs. 11-12) CM's contention is without merit. CM fails to cite any authority that
5 imposes on the City, DPW or OLSE a duty to inform CM of ordinances adopted by the
6 City. Furthermore, CM agreed in General Conditions of the MLKJ Pool contract that CM
7 shall keep itself "fully informed of the Charter, Ordinances and regulations of the City,
8 and of all Federal and State laws and orders of any properly constituted authority in
9 any manner affecting this contract, the performance of the Work or those persons
10 engaged therein." (General Conditions, section 13.01, OLSE Exhibit 34)

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13 **5. The assessments by DPW/OLSE of CM and CM's**
14 **subcontractors on the MLKJ Pool project are not barred**
15 **by the equitable doctrine of laches.**

16 CM argues that the equitable doctrine of laches bars the assessments of CM
17 and its subcontractors because OLSE unreasonably delayed notifying CM of the wage
18 and penalty assessment of its subcontractors to the prejudice of CM. (CM Closing
19 Brief, pgs. 13-14) CM's cited authorities correctly state that the defense of laches
20 requires unreasonable delay plus either acquiescence in the act which plaintiff
21 complains or prejudice to the defendant resulting from the delay. Johnson v. City of
22 Loma Linda (2000) 24 Cal.4th 61, 68. In Johnson, the plaintiff's delay was in excess of
23 three years, more than eighteen months before filing a writ of administrative mandate
24 in Superior Court and then another eighteen months before setting the case for
25 hearing. The Court of Appeal upheld the trial court's ruling that the doctrine of laches
26 barred consideration of plaintiff's writ of mandate. *Id.*

1 In this case, CM alleges that OLSE delayed two years before assessing CM and
2 its subcontractors. However, CM failed to prove any unreasonable delay by DPW or
3 OLSE in assessing CM. On September 27, 2001, OLSE received a complaint that a CM
4 employee was not paid the prevailing wage on the MLKJ Pool project. (OLSE Exhibit 4)
5 On May 14, 2002, eight months later, DPW/OLSE issued the assessment of CM for its
6 own workforce after conducting an investigation, obtaining a declaration from CM
7 employee Adrian Sheppard, meeting with C.M. Chiang, a principal of CM, exchanging
8 letters with CM and completing an audit of CM's certified payroll records. (OLSE
9 Exhibits 4 & 10) On December 4, 2002, OLSE received three complaints from the
10 California Department of Industrial Relations regarding subcontractors of CM not
11 paying prevailing wages. (OLSE Exhibit 4) On May 27, 2003, five months later,
12 DPW/OLSE issued the assessment of CM for its subcontractors after conducting an
13 investigation, meeting with four of CM's subcontractors, including employees of Jin,
14 exchanging letters with the subcontractors and completing an audit of the four
15 subcontractors' certified payroll records (OLSE Exhibits 4 & 10) OLSE proved through
16 the testimony of Ms. Levitt and the chronology of the audits prepared by OLSE that
17 there was neither delay nor unreasonable delay in investigating the complaints,
18 completing the audits and assessing CM and its subcontractors.
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22 In its reply brief, CM alleges that the OLSE investigations continued for over one
23 year before CM was notified, asked to participate in the investigation or attend
24 meetings with the subcontractors. (CM Reply Brief, pg. 6) CM's allegations are refuted
25 by Ms. Levitt's audit chronology. The audit noted on January 16, 2003 "OLSE/DPW
26 met [Golden Gate Painting, J & J Sheet Metal, and Orson Mechanical]. (Although CM
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1 Chlang arranged the meeting, they [CM] decided not to attend.)..." (OLSE Exhibit 4)
2 CM knew about the investigation of its subcontractors in January 2003, but elected
3 not to attend the investigatory meeting, which CM arranged.

4 As part of CM's reply brief, CM contends that OLSE breached the covenant of
5 good faith and fair dealing implied in the MLKJ Pool contract by choosing intentionally
6 not to inform or involve CM in the investigation of CM's subcontractors. This
7 contention is without merit. CM failed to establish that OLSE owed CM any implied duty
8 of good faith and fair dealing under the contract because OLSE was not a signatory
9 to the contract. Moreover, Ms. Levitt's audit chronology refutes CM's allegations that
10 OLSE failed to inform CM of the investigation.

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13 **6. Prompt payment laws do not limit enforcement of the
prevailing wage laws.**

14 CM alleges that State and local prompt payment laws require CM to promptly
15 pay its subcontractors progress payments as CM receives the payments. (CM Closing
16 Brief, pg. 14) Because CM promptly paid its subcontractors, CM argues, it is
17 fundamentally unfair to assess CM for prevailing wage penalties arising out of the
18 subcontractors' failures to pay its workers prevailing wages. CM fails to cite any
19 authority holding that a contractor's compliance with prompt payment laws excuses
20 or abrogates the contractor's liability for failures by its subcontractors to pay
21 prevailing wages on a public works project. No evidence was offered that indemnity
22 and/or breach of contract causes of action available to CM against its
23 subcontractors for the prevailing wage penalties have been limited in any way.
24 Furthermore, Labor Code section 1729 authorizes CM to recover from its
25 subcontractors the amount of penalties forfeited because of the subcontractors'
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1 prevailing wage violations. Accordingly, CM's argument is rejected.

2 **II. THE 2002 ASSESSMENT/FORFEITURE—CM'S OWN WORK FORCE.**

3 **1. CM is liable for back wages and \$50.00 per day penalties for**
4 **its own work force.**

5 CM is liable for back wages and \$50.00 per day penalties for its own work
6 force for two reasons: (1) the January 2, 2002 assessment/forfeiture was final in
7 2002 and (2) CM did not pay Adrian Sheppard prevailing wages and did not pay
8 required Saturday overtime.

9 **A. The January 2, 2002 assessment/forfeiture was final.**

10 On January 2, 2002, DPW and OLSE issued CM an assessment/forfeiture for
11 prevailing wage violations for CM's own work force. (OLSE Exhibit 5) The notice
12 provided that the assessment/forfeiture was final thirty days from the date of the
13 January 2, 2002 assessment/forfeiture letter. CM did not file its objections to the
14 January 2, 2002 assessment/forfeiture letter until February 6, 2002, more than thirty
15 days after January 2, 2002. (OLSE Exhibit 6) Therefore, CM's objections were
16 untimely, and the January 2, 2002 assessment/forfeiture for CM's own work force
17 was final on February 2, 2002.

18 On July 22, 2002, DPW and OLSE issued CM a revised assessment/forfeiture in
19 the amount of \$15,749.31 (\$8,809.80 for Saturday overtime and \$6,939.51 for
20 Adrian Sheppard), which was a reduction of the amounts claimed on January 2, 2002.
21 (OLSE Exhibit 12) The revised assessment/forfeiture advised CM that the decision on
22 the revised amount was final. Although CM continued to have discussions with OLSE
23 disputing its liability, the July 22, 2002 assessment/forfeiture amount remained the
24 same. Subsequent payments by CM to its employee Adrian Sheppard because of the
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1 assessment and a minor, \$22.01 clerical error by OLSE, reduced the total amount
2 owed by CM to \$15,727.30. (OLSE Exhibit 40)

3 At the time of the July 22, 2002 assessment/forfeiture, an administrative
4 hearing procedure was not available to CM because the Ordinance creating the right
5 to an administrative hearing had not yet been adopted. Administrative Code section
6 6.22(E)(8)(o) became law as part of Ordinance No. 208-02 on November 8, 2002,
7 thirty days after it was passed. (Charter section 2.105) Section 6.22(E)(8)(c)
8 authorizes a contractor, who disagrees with an OLSE forfeiture, to request an
9 administrative hearing before the City Administrator, provided the request is made
10 within fifteen working days of the date of the notification of the forfeiture. CM
11 correctly points out in its closing brief that Ordinance No. 208-02 is not retroactive.
12 Therefore, at the time of the July 2002 final assessment/forfeiture by DPW/OLSE for
13 prevailing wage violations for CM's own work force, no administrative hearing remedy
14 was available to CM. Accordingly, CM is not entitled to an administrative determination
15 on the validity of assessment/forfeiture for CM's own work force as part of this
16 hearing.
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20 CM contends that it has an absolute due process right to "appeal" the
21 assessment relating to its own work force. (CM Reply Brief, pg. 4) However, the
22 administrative hearing under 6.22(E)(8)(c) is not an appeal. CM is correct that it has
23 certain due process rights regarding the assessment. CM has the due process right
24 to bring a breach of contract action to challenge the assessment/forfeiture. Lujan v.
25 G&G Fire Sprinklers (2001, rehearing den. 6/11/01) 532 U.S. 189, 121 S.Ct. 1446,
26 1448-51. Therefore, CM was not entitled to "appeal" the July 2002 assessment for
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1 CM's own work force by an administrative hearing, but CM can pursue a breach of
2 contract action to preserve CM's due process rights. To the extent that CM claims
3 any other due process violations arising out of the assessments and forfeitures, those
4 claims are rejected. *Id.*; Section 6.22(E)(8)(c).

5
6 CM further contends that OLSE is barred from objecting to the timeliness of
7 CM's request for an administrative hearing because OLSE presented evidence at the
8 administrative hearing concerning the assessment for CM's work force. (CM Reply
9 Brief, pg. 4) The authorities cited by CM are unavailing because they relate to waivers
10 of affirmative defenses for failure to plead the defenses in an answer. In this case, no
11 pleadings with affirmative defenses were required for the administrative hearing.
12 Moreover, OLSE made it clear at hearings that CM was not entitled to an
13 administrative hearing regarding the assessment/forfeiture for CM's own work force.
14 In OLSE's opening statement, OLSE argued that CM was not entitled to an
15 administrative hearing for the assessment/forfeiture for CM's own work force, and
16 OLSE cited the *Lujan* case, *supra*, in support of that argument. Ms. Levitt also
17 testified that CM's request for a hearing regarding its own work force was untimely.
18 Therefore, no waiver by OLSE occurred.

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21 CM also argues that the assessments are invalid because OLSE's statutory
22 authority to assess CM was not created until Chapter 6 was amended in 2000
23 and 2002, after CM signed the MLKJ Pool contract in 1999. CM's argument is
24 rejected. The July 2002 assessment for CM's work force and the May 2003
25 assessment for CM's subcontractors were made jointly by OLSE and DPW, the
26 City department that had jurisdiction over the MLKJ Pool project. (OLSE Exhibits
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1 12 & 25) DPW, and subsequently OLSE, had authority to assess CM for prevailing
2 wage violations. (Prior Admin. Code section 6.42; Prior Admin. Code section
3 6.22(E)(7)(b); Admin. Code section 6.24)

4 Therefore, the undersigned Hearing Officer finds that the January 2, 2002
5 assessment and forfeiture for CM's own work force was final in 2002, and CM is
6 not entitled to an administrative determination under section 6.22(E)(8)(c).

7
8 **B. Adrian Sheppard.**

9 OLSE established that the assessment and forfeiture for back wages and
10 \$50.00 per day penalties for Adrian Sheppard was proper. CM agreed in the
11 MLKJ Pool contract to pay its workers the prevailing wage. The contract also
12 obligated CM to pay \$50.00 per day penalties for prevailing wage violations. (see
13 section I., 2 above.)
14

15 OLSE proved that Adrian Sheppard worked on the MLKJ Pool project as a
16 construction laborer, Group 3, not as a clean-up laborer, Group 4, and proved
17 that Mr. Sheppard was improperly paid the Group 4 rate. Although CM could not
18 be held to the "final" clean-up standard for Mr. Sheppard's Group 4 work, OLSE
19 established that Mr. Sheppard out and built forms, set forms and worked with
20 the carpenters on the job, which was Group 3 work. Mr. Sheppard testified
21 credibly that he worked as a Group 3 laborer more than just the three-week
22 period alleged by CM. Mr. Chung's testimony that Mr. Sheppard worked with the
23 carpenters, and CM's correspondence to OLSE describing Mr. Sheppard's
24 activities, both support Mr. Sheppard's testimony.
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27 Therefore, the undersigned Hearing Officer finds that the DPW/OLSE proved
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1 that the July 2002 assessment/forfeiture for back wages and \$50.00 per day
2 penalties for Adrian Sheppard was proper and the amount assessed correct.

3 **C. Saturday overtime.**

4 OLSE proved that CM was required to pay overtime on all Saturdays that
5 CM's work force worked on the MLKJ Pool project. CM failed to prove that there
6 was a complete shut down of the job due to inclement weather and failed to
7 prove that the City required CM to work on Saturdays. The job diaries refute Mr.
8 Ho's testimony that the entire job was shut down and all the workers were sent
9 home. Moreover, Mr. Ho was unable to identify which days the entire job was
10 allegedly shut down. CM also failed to prove that the City required CM to work on
11 Saturdays. Mr. Ho's memoranda do not establish that the City required CM to
12 work on Saturdays. CM's reliance on exception 3 in Title 8 of the Cal. Code of
13 Regulations section 16200(a)(3)(F) is misplaced. (CM Exhibit 20) The exception to
14 paying overtime rates applies "if the awarding body determines that work cannot
15 be performed during normal business hours or work is necessary at off hours to
16 avoid danger to life or property..." Based on the evidence submitted by CM, CM
17 failed to prove that the "awarding body" made the required determination.
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21 Therefore, the undersigned Hearing Officer finds that the DPW/OLSE proved
22 that the July 2002 assessment/forfeiture for back wages and \$50.00 per day
23 penalties for CM's failure to pay Saturday overtime wages was proper and the
24 amount assessed correct.

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D. The findings and responses to CM's arguments set forth above in sections I. 4-6 are incorporated in this section II.

The Hearing Officer's findings and responses to CM's arguments set forth above in sections I., 4-6, are incorporated in this section II. as though fully set forth herein.

III. NO DETERMINATION IS MADE REGARDING JIN.

1. No determination is made regarding Jin's alleged prevailing wage violations and penalties on the MLKJ Pool and the SFFD 32 projects, CM's alleged liability for Jin's alleged violations, the timeliness of CM or Jin's request for hearing and/or CM's alleged hearing waiver,

CM seeks to include as part of its arguments its objections to the SFFD 32 contract assessment and forfeiture. (CM Closing Brief, pgs. 3, 7-8 & 11-12) However, the April 11, 2003, OLSE/DPW assessment and forfeiture under the SFFD 32 contract related only to alleged prevailing wage violations of CM's subcontractor, Jin. (OLSE Exhibit 20) The parties stipulated at the commencement of these hearings that the alleged prevailing wage violations of Jin, and any alleged liability of CM for those alleged violations, were bifurcated from the issues raised in these hearings. Accordingly, the Hearing Officer makes no determination regarding the liability of CM or Jin for alleged prevailing wage violations by Jin occurring in performance of the SFFD 32 contract or the MLKJ Pool contract.

OLSE contended in its closing brief that CM waived its right to appeal the CM/Jin SFFD 32 assessment because CM did not request a hearing within the fifteen working day time limit set forth in Administrative Code section 6.22(E)(8)(a). (OLSE Closing Brief, pg. 3) CM countered that there was no waiver because Jin requested a

1 hearing within the fifteen-day time limit. (CM Reply Brief, pg. 3) As set forth above, the
 2 SFFD 32 assessment relates only to alleged violations by Jin, including CM's alleged
 3 liability for Jin's alleged violations, which the parties stipulated were bifurcated from
 4 the issues raised in these hearings. Accordingly, the Hearing Officer makes no
 5 determination regarding the timeliness of Jin's request for hearing or the alleged
 6 waiver of hearing by CM for failing to request a hearing within the required fifteen-day
 7 limitation period.

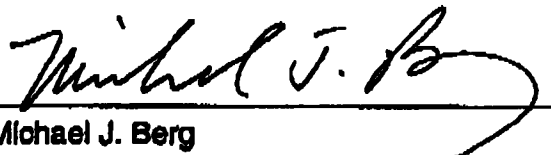
9 **SUMMARY OF HEARING OFFICER'S FINDING**

10 CM is liable for back wages and \$50.00 per day penalties assessed and
 11 forfeited by DPW/OLSE in 2002 for prevailing wage violations involving CM's own work
 12 force on the MLKJ Pool project. The assessment/forfeiture is final, and CM is not
 13 entitled to an administrative hearing under Administrative Code section 6.22(E)(8)(c)
 14 on the amount forfeited. The total amount due for CM's own work force is \$4,677.30
 15 in back wages and \$9,050.00 in penalties (181 days x \$50.00 per day).

17 CM is also liable for \$50.00 per day penalties assessed and forfeited by
 18 DPW/OLSE on May 14, 2003 against its subcontractors Golden Gate, J&J and Orson
 19 for prevailing wage violations on the MLKJ Pool project. The total amount of the
 20 penalties due is \$7,800.00.

22 CM is not liable for back wages assessed and forfeited by DPW/OLSE on May
 23 14, 2003 against CM's subcontractors Golden Gate, J&J and Orson.

26 Dated: March 5, 2004


 Michael J. Berg
 Hearing Officer

28

PROOF OF SERVICE

I, QIU FANG CHEN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, San Francisco, CA 94102.

On March 5, 2004, I served the attached:

Hearing Officer Michael Berg's Decision on C.M. Construction, Inc. case

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

**William C. Last
LAST & FAORO
120 North El Camino Real
San Mateo, CA 94401-2705
Counsel for C.M. Construction**

Fax: (650) 696-8365

**Sheryl Bregman, Deputy City Attorney
San Francisco City Attorney's Office,
Construction Team
Fox Plaza, 1390 Market Street, 5th Floor
San Francisco, CA 94102-5408
Counsel for City and County of San Francisco
Office of Labor Standards Enforcement and
Department of Public Works**

Fax: (415) 255-0733

**Donna Levitt, Manager
The Office of Labor Standards Enforcement
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4698**

Fax: (415) 554-6291

and served the named document in the manner indicated below:

BY MAIL: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 325, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

BY PERSONAL SERVICE. I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

BY EXPRESS SERVICES OVERNITE: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

BY FACSIMILE: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415) 554-4747/(415) 554-4699. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed March 5, 2004, at San Francisco, California.



QIU FANG CHEN

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