

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA
City Attorney

MOLLY STUMP
Deputy City Attorney

DIRECT DIAL: (415) 554-4651
E-MAIL: marie.blits@sfgov.org

FACSIMILE MESSAGE
December 13, 2004

TO:	PHONE:	FAX:
Edmund K. Yip, President King C. Electric, Inc.	(415) 752-8182	(415) 752-1052
Sheryl Bregman, Deputy City Attorney San Francisco City Attorney's Office, Construction Team <i>Counsel for City and County of San Francisco Office of Labor Standards Enforcement and Department of Public Works</i>	(415) 554-4226	(415) 255-0733
cc: Donna Levitt, Manager City and County of San Francisco Office of Labor Standards Enforcement	(415) 554-6239	(415) 554-6291
FROM:	PHONE:	FAX:
Hearing Officer William L. Lee By Molly Stump, Deputy City Attorney San Francisco City Attorney's Office Government Team, <i>Counsel and Clerk to the Hearing Officer</i>	(415) 554-4628	(415) 554-4747

MESSAGE RE: Request by King C. Electric, Inc. in the matter of the Panhandle Pathway Lighting Improvement & Lincoln/3rd Ave/Kezar Improvements, Specification No. 0383J, for an administrative review hearing on the determination of forfeiture and penalties for failure to pay prevailing wages made by the City and County of San Francisco Office of Labor Enforcement Standards and Department of Public Works

Please see the attached Hearing Officer's Decision in the case of King C. Electric.

We are transmitting a total of 15 pages, including this cover sheet. If you did not receive all of the page or there is another problem, please call me or Secretary Van Pittsenbargar at (415) 554-4687.

CONFIDENTIALITY NOTE: THIS AND ANY ACCOMPANYING PAGES CONTAIN INFORMATION FROM THE SAN FRANCISCO CITY ATTORNEY'S OFFICE WHICH IS CONFIDENTIAL AND PRIVILEGED. THE INFORMATION IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, THEN BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THE ACCOMPANYING DOCUMENT (OR THE INFORMATION CONTAINED IN IT) IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE TRANSMISSION IN ERROR, PLEASE NOTIFY OUR OFFICES IMMEDIATELY SO THAT WE CAN ARRANGE FOR RETRIEVAL AT NO COST TO YOU.

CITY HALL ROOM 234 • 1 DR. CARLTON B. GOODLETT PLACE • SAN FRANCISCO, CALIFORNIA 94102-4682

RECEPTION: (415) 554-4700 • FACSIMILE: (415) 554-4747

n:\govern\unblis\ing-aler\cases\king\121304pr fax

DEC-13-2004 13:43 SF CITY ATTORNEY'S OFFICE 413 334 4747 FILE 10

1
2
3
4
5
6
7
8
9
10
11

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

12
13
14
15
16
17
18
19
20
21
22

In the Matter of:

KING C. ELECTRIC, INC.,

Appellant,

Appealing the Assessment of Forfeiture
By the Office of Labor Standards
Enforcement

Hearings:

February 11, 2004 and February 27, 2004

DECISION

23
24
25
26
27
28

This case is a hearing regarding an assessment of forfeiture, including penalties, by the San Francisco Office of Labor Standards Enforcement (the "OLSE") against King C. Electric, Inc. ("King C."), with respect to payment of prevailing wages for work on San Francisco Department of Public Works Contract No. 0383 J (the "Contract") for the public work known as the Panhandle Pathway Lighting Improvement & Lincoln/3rd Avenue/Kezar Improvement Project. OLSE assessed the forfeiture and penalties for misclassification of Laborers, failure to pay the holiday rate for work on Presidents' Day, underreporting work hours on its Certified Payroll Records, and failure to make mandatory contributions to the Training Fund, as required by the San Francisco Charter section A7.204, the San Francisco Administrative Code section 6.22(E), and the Project contract. King C. requested a hearing under Administrative Code section 6.22(E)(8)(a).

On February 11, 2004 and February 27, 2004, City Administrator Bill Lee heard testimony and argument, and received documentary evidence concerning this matter. Witnesses called by the parties testified under oath. Edmund Yip, President of King C., appeared on behalf of appellant King C. Deputy City Attorney Sheryl Bregman appeared as attorney for OLSE. At the hearing, the parties had a full opportunity to present relevant evidence and argument. The

1 parties also submitted pre- and post-hearing argument.¹ After consideration of all of the
 2 evidence and argument submitted by the parties, the Hearing Officer issues this Decision.

3 **Summary of Decision**

4 The Hearing Officer confirms the forfeiture of back wages, training fund contributions
 5 and penalties as assessed by OLSE. OLSE established at the hearing that King C. failed to pay
 6 certain of its workers the proper prevailing rate of wage for the type of work performed. King C.
 7 improperly classified certain work as the work of Laborers. King C. also underreported hours in
 8 its Certified Payroll Records ("CPRs"), failed to pay the proper rate for holiday work, and failed
 9 to pay certain required training fund contributions. Accordingly, the Hearing Officer finds that
 10 the OLSE properly assessed back wages and penalties against King C. in the amount of
 11 \$34,443.57, consisting of back wages of \$24,435.82, training fund contributions of \$1,607.75,
 12 and penalties of \$8,400.00.

13 **Issues Presented**

- 14 1. Did OLSE establish that King C. improperly classified as Laborers (Foremen,
 15 Group 3, and Group 5 Entry Level) workers who were performing the work of Electricians?
- 16 2. Did OLSE establish that King C. underreported hours in its Certified Pay Rolls?
- 17 3. Did OLSE establish that King C. failed to pay the holiday rate that was required
 18 for work on Presidents' Day?
- 19 4. Did OLSE establish that King C. failed to make mandatory Training Fund
 20 contributions?

21 **Factual and Procedural Background**

22 This matter arises out of King C.'s performance under San Francisco Department of
 23 Public Works Contract No. 0383 J (the "Contract") for the public work known as the Panhandle
 24 Pathway Lighting Improvement & Lincoln/3rd Avenue/Kezar Improvement Project. The
 25

26 ¹ OLSE objects to a chart included in proposed findings submitted by King C., on the
 27 ground that it is new evidence not presented at the hearing. King C. responds that the chart is not
 28 evidence, but rather an illustration supporting its proposed findings.

1 and Hai Men Zhu as the employees who performed most of the electrical work. By letter dated
2 July 16, 2003, OLSE requested documents and information from King C., including daily time
3 cards or superintendent reports to confirm the type of work reported on the City's Inspector
4 Reports. King C. responded that it had no daily reports for the Project.

5 On October 20, 2003, OLSE and DPW issued a joint assessment against the Contract
6 balance for back wages and penalties. By letter dated November 20, 2003, Yip requested a
7 hearing with the City Administrator and outlined several objections to the assessment.

8 On December 9, 2003, OLSE met with Yip to review the documents used by OLSE to
9 reclassify employees. In its audit, OLSE relied on the DPW Inspector Reports showing the dates
10 electrical work was performed. OLSE could not rely on any records provided by King C.
11 because King C.'s CPRs showed no hours at the Electrician: Inside Wireman rate and because
12 Yip advised OLSE that King C. maintained no daily records. At the December 9 meeting, Yip
13 said that he could provide daily work reports to support his claim that fewer hours were worked
14 performing electrical work than was assessed by OLSE in its audit.

15 King C.'s CPRs show that work was performed by 12 different employees on the Project.
16 On January 21, 2004, OLSE received from King C. handwritten notes that King C. claimed
17 showed the work performed by two of those employees.² OLSE had the documents translated
18 from Chinese to English. On February 3, 2004, based on the reports provided, OLSE issued an
19 amendment to its final determination that reduced the back wages owed.

20 The OLSE final determination was: \$24,435.82 in back wages, \$8,400.00 in penalties,
21 and \$1,607.75 in training fund contributions, for a total assessment of \$34,443.57.

22 At the hearing on this matter, the Hearing Officer admitted into the record King C.'s
23 exhibits A, B, B.1 and B.2 and OLSE's Exhibits A, B, C.1 through C.43. The Hearing Officer
24 heard the testimony of Donna Levitt, Mike Slyter and Daniel Curtin for OLSE, and Edmund Yip
25 and Paul Lam for King C.

26
27 ² King C. did not provide records that showed the type of work performed by the other 10
28 employees.

Legal Standards

The San Francisco Charter mandates the payment of prevailing wages on public work projects:

A7.204. CONTRACTOR'S WORKING CONDITIONS

Every contract for any public work or improvement to be performed at the expense of the city and county . . . whether such work is to be done directly under contract awarded, or indirectly by or under subcontract, subpartnership, day labor, station work, piece work, or any other arrangement whatsoever, must provide:

... (b) that any person performing labor thereunder shall be paid not less than the highest general prevailing rate of wages in private employment for similar work

San Francisco Administrative Code section 6.22(E) also requires the payment of prevailing rates of wage by all public work contractors and subcontractors. The definition of the prevailing wage rate includes overtime and holiday work. (S.F. Admin. Code §6.1(H); Cal. Labor Code §1815.) Certified payrolls must conform to the adopted rate of wage for each classification and "the classification set forth for each employee [must] conform with the work performed." (Admin. Code §6.22(E)(6).)

Trade classifications are the basis for determining the appropriate prevailing wage. "The prevailing wage . . . is the highest general prevailing rate of wage plus 'per diem wages' and wages paid for overtime and holiday work paid in private employment in the City and County of San Francisco *for the various crafts and kinds of labor* employed in the performance of any public work or improvement under this Chapter." (Admin. Code §6.1(H) [emphasis added].) Historically, the Board of Supervisors has used both the trade classifications and the wage rate data generated by the California Department of Industrial Relations ("DIR") to set the prevailing wages that are required by the San Francisco Charter and Administrative Code.

Labor Code section 1773 authorizes the DIR to fix the rate for "each craft, classification or type of work." The Court of Appeal upheld the DIR's authority to establish wage rates for each craft and classification in *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal App.3d 120, 128. The Court upheld the long-standing rule that the determination of the classification or type of work covered is an essential step in the wage determination process.

1 This requirement is also consistent with California Department of Labor Standards Enforcement
2 policy and Federal wage determinations. In its Public Works Manual, the California Department
3 of Labor Standards Enforcement advises:

4 Employees must be paid the prevailing wage for each type or
5 classification of work they perform. If the employee drives a three-axle
6 dump truck 4 hours, and then works as a laborer 4 hours, his classification
7 would be (1) Teamster (Truck Driver) and (2) Laborer. Separate rates
8 must be used for each. If, however, a worker performs work in a
9 particular craft but also does incidental work which arguably could be
10 classified as a different craft, the worker is to be paid at the rate of the
primary craft unless the incidental work is done at a higher paying craft.
As noted in the case of *In Re Corley* 23 WH 1071 (1978) "Even though
some work of a pipefitter is like that of a laborer when the same work is
done by a pipefitter as a small or large part of his whole assigned task on
any given job, it is the work of a pipefitter, not that of a laborer."

11 (DLSE Public Works Manual, pp. 55-56.) The United States Department of Labor has likewise
12 determined that, "... If a construction contractor who is not bound by classifications of work at
13 which the majority of employees in the area are working is free to classify or reclassify, grade or
14 subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates,
15 take almost any job away from the group of contractors and the employees who work for them
16 who have established the locality wage standard." (*In re Fry Brothers*, 128 WAB Ruling 76-6, at
17 p. 17.) The court further stated that, "if either the awarding body or a contractor could define or
18 redefine the parameters of work to be done by the various classification of workers, there would
19 be little left of the California prevailing wage laws. Awarding bodies and contractors would
20 simply redefine the scope of work covered by the least costly classification notwithstanding the
21 scope of work for such workers in the locality." (*Ibid.*)

22 Contractors must also comply with apprenticeship training requirements. The
23 Administrative Code provides:

24 All construction contracts awarded under this Chapter shall require the
25 Contractor to comply with the requirements of the State Apprenticeship
26 Program ... and shall require the Contractor to include in its subcontracts
the obligation for subcontractors to comply with the requirements of the
State Apprenticeship Program.

27 (Admin. Code § 6.22(O).) The OLSE is charged with enforcing apprenticeship training
28 contributions. (Admin. Code § 6.24.)

1 Failure to pay the prevailing wage rates results in a mandatory assessment of penalties:

2 Any contractor or subcontractor who shall fail or neglect to pay to the
3 several persons who shall perform labor under any contract, subcontract or
4 other arrangement on any public work . . . [under] this Chapter the highest
5 general prevailing rate of wages . . . shall forfeit . . . 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 . . .

6 (Admin. Code, §6.22(E)(8)(a) [emphasis added].) A contractor forfeits underpaid wages and
7 associated penalties effective the moment of the violation, irrespective of when the violation is
8 discovered. (*East Quincy Services District v. General Accident Insurance Company of America*
9 (2001) 88 Cal.App.4th 239, 245, quoting *J & K Painting Co. v. Bradshaw* (1996) 45 Cal.App.4th
10 1394, 1404-1405.) The contracting department and the Office of Labor Standards Enforcement
11 are charged with enforcing the prevailing wage requirements. (Admin. Code § 6.24(A).)

12 A contractor who disagrees with an assessment by the Office of Labor Standards
13 Enforcement may request, within 15 days, a hearing before the City Administrator. (Admin.
14 Code § 6.22(E)(8)(c).) The decision of the City Administrator shall be final. (Admin. Code §
15 6.22(E)(8)(c).)

16 **Factual Findings**

17 Based on the documentary and testamentary evidence presented, the Hearing Officer
18 makes the following findings of fact:

19 **Misclassification of Electricians as Laborers.**

20 Based on the scopes of work published by the California Department of Industrial
21 Relations ("DIR"), the OLSE determined that King C. misclassified as Laborers the work of two
22 employees which should have been classified primarily as Electrician: Inside Wireman. OLSE
23 assessed the difference between the rate paid for Laborer and Electrician: Inside Wireman for
24 certain hours worked by the two employees. At the hearing, King C. contended that Laborer was
25 the correct classification for the work performed, and also contests the number of hours OLSE
26 assigned to electrical work. In its proposed findings, King C. appears to concede that some
27 Inside Wireman hours are appropriate, but argues that the number of hours assessed.
28

1 King C. is an electrical contractor that carries a C-10 specialty license for electrical work,
2 and regularly performs electrical work. The Project required King C. to perform extensive
3 electrical work.

4 The scope of work for Electrician: Inside Wireman defined the covered electrical work to
5 include "handling, installing, or moving of all related materials and equipment from the first
6 point of delivery at the jobsite through the final installation, and the dismantling and removing of
7 electrical material from the jobsite" It also includes the activation of cell systems including
8 ". . . bending, drilling and shaping of all metal brackets, supports, fittings and other fabrication
9 that are specific parts of the installation of the electrical work and equipment on the jobsite."
10 This scope also covers the installation, maintenance, relocation and removal of all temporary
11 wiring and equipment at the jobsite for signal, light, heat or power, and running tests or
12 performance tests on any electrical installation or equipment that is a part of any work or jobsite.

13 DIR has also issued a rate of pay determination for a similar electrical project. The
14 determination, dated April 11, 2003, was effective for projects bid in November 2001. DIR
15 determined that for work involving

16 installing/modifying/removing traffic signals and safety lighting systems,
17 • installing foundations, painting, protection of existing utilities and
18 appurtenances, mast arms, installing pole standards, installing luminaires,
19 lamps, conduits as needed, pull boxes, conductors, fused splice
20 connectors, painting, existing and relocating poles, circuitry bonding and
21 grounding, services numbering, excavating, and relocation of utility lines .
22 . . [and]

23 Conduit, Loop Detector Protection and Installation, Pull Boxes, Binding
24 and Grounding, Conductors and Wiring, Interconnect, Signal Faces, and
25 Signal Heads, Signal Standards, Pedestrian Signals and Pushbuttons, and
26 Audible Pedestrian Signals,

27 the minimum rate of pay was that of the Electrician: Inside Wireman.

28 The Project scope of work included the installation of approximately 72 new light poles,
luminaires, photoelectric controls and foundations, over 8,600 linear feet of electrical conduit, 77
pull boxes, wiring (often a hour-wire pull) in 8,600 linear feet of conduit, 3 new service panels,
73 grounding rods, 73 bulbs and 73 fuse boxes. King C. did not use a subcontractor to perform
any of this work.

1 OLSE tried to obtain information and documentation from King C. to determine the
2 actual number of hours that electrical work was performed by all King C. employees working on
3 the Project. King C. did not make records available. Therefore, in its audit, OLSE used the
4 Inspector's reports, which were the only work records available, to reach a reasonable estimate of
5 the electrical hours worked. Based on Edmond Yip's statements, OLSE assigned the electrical
6 hours to Zen Min Huang and Hai Men Zhu.

7 OLSE used the following methodology in determining which hours should be reclassified
8 as Electrician: Inside Wireman: (1) OLSE reclassified Zen Min Huang and Hai Men Zhu's hours
9 from Laborer to Inside Wireman on days when the CPRs should only Huang and Zhu working
10 and the Inspector Reports show only electrical work performed; (2) OLSE reclassified only Zen
11 Min Huang's hours from Laborer to Inside Wireman on days when the CPRs showed only Zen
12 Min Huang and Hai Men Zhu working and the Inspector Reports show electrical and trenching
13 work being performed; and (3) OLSE reclassified Zen Min Huang and Hai Men Zhu's hours
14 from Laborer to Insider Wireman on days when the CPRs showed that three or more laborers
15 performed work and the inspector reports show that electrical work and non-electrical work
16 (excavating, trenching and concrete) was also performed. In these instances when Huan and Zhu
17 worked with a larger crew, the OLSE assigned to them the electrician hours because other
18 Laborers were on site to perform the actual Laborer duties.

19 Using this process, the OLSE determined that 687 hours were the total number of hours
20 that King C. should have paid its workers' wages at the rate for Electrician: Inside Wireman.
21 OLSE checked its determination against the estimated labor hours for electrical work from
22 another contractor who had bid on the Project. The bidder estimated the total number of hours
23 for electrical work on the Project at 859 hours. The OLSE's expert witness, Daniel Curtin,
24 testified that the OLSE's audit methodology was reasonable.

25 King C. raises two challenges. First, King C. contends that the laying of underground
26 PVC electrical conduit could be paid at the prevailing wage rate for a Laborer. But King C.
27 failed to provide any evidence or documentation to show that the laying of PVC electrical
28 conduit is in the scope of work for Laborers published by the DIR. The following documents

1 establish that the this work is in the scope of work of Electrician: Inside Wireman and is not in
2 the scope of work of Laborer:

- 3 • the DIR scope of work for Electricians;
- 4 • the DIR scope of work for Laborers; and
- 5 • the DIR rate of pay determination clarifying that, for similar work on traffic
6 signal projects, including the laying of conduit, the wage rate is that of
7 Electrician: Inside Wireman.

8 The testimony of Daniel Curtin, former Chief Deputy Director of the DIR, also establishes that
9 the laying of PVC electrical conduit is in the scope of work for Electricians.

10 Second, even if the PVC electrical conduit work should be paid at the Electrician wage
11 rate, King C. claims that its workers only performed such work for one hour per day. In support
12 of this claim, King C. offered notes on the work of two employees and the testimony of Paul
13 Lam.

14 When OLSE initially sought daily time records, King C. stated that it had none. King C.
15 did not provide any time records until January 21, 2003, three and one-half months after the
16 OLSE investigation and audit were complete and the assessment was issued. At that time, King
17 C. provided limited notes regarding two of the 12 employees who worked on the Project: Zen
18 Min Huang and Hai Men Zhu. Edmond Yip testified that someone from his office wrote the
19 notes from the workers' records. The notes did not break out the number of hours that the two
20 employees spent on each type of task. The notes also do not reflect all of the electrical work
21 performed on the Project. For example, the notes do not show any notations for the installation
22 of fuses, ground rods or power-up testing, all electrical work performed on the Project. Although
23 the notes were brought forward at a late date and were incomplete, OLSE used them to revise its
24 determination and reduce the back wages assessed.

25 King C. called Paul Lam to support its claim that laying conduit was performed for only
26 one hour per day. Lam, however, testified that he was not employed by King C. during the time
27 that conduit was laid on the project. His testimony showed that he had no direct knowledge of
28 the actual time spent laying conduit on the Project or who actually performed this work.

1 DPW Inspector Mike Slyter testified that the installation of conduit was performed
2 simultaneously with trenching, and that it is impossible to parse out only a single hour of conduit
3 installation in the course of a day. OLSE presented as evidence Slyter's daily and weekly reports
4 to establish that the installation of conduit frequently was not the only electrical work that was
5 performed on any given day. King C.'s notes are consistent with this conclusion. King C.'s notes
6 list many days on which, in addition to laying conduit, Huang and Zhu performed other tasks,
7 including other types of electrical work.

8 Accordingly, the Hearing Officer finds that King C. misclassified as Laborers workers
9 who should have been paid at the Electrician: Inside Wireman rate. OLSE established by DPW
10 contract documents, testimony, inspector reports, and other evidence such as an estimate of an
11 electrical contractor, that King C.'s workers performed electrical work. In its audit, OLSE made
12 the best use of the limited documentation available, and made appropriate assumptions where no
13 documentation was provided. The Hearing Officer finds that the OLSE audit and assessment
14 was conservative, fair and reasonable, and that the number of hours reclassified as Inside
15 Wireman was appropriate.

16 **Underreporting of Workers.**

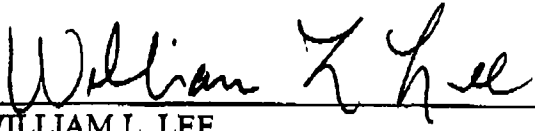
17 The OLSE determined that King C. underreported hours in its CPRs. The OLSE reached
18 this determination based on discrepancies between the number of workers King C. reported in its
19 CPRs and the number of workers the City's Inspector reported in his Daily Reports. OLSE
20 assessed additional hours consistent with the Inspectors reports.

21 On January 22, 2003 and January 23, 2003, the Inspector's Daily Reports show that five
22 King C. employees were trenching and installing conduit. King C.'s CPRs reported only three
23 Laborers: Heung Y. Yu, Ming Y. Huang, and Jon T. Yu, each working 7 hours per day. In the
24 audit, OLSE included Zen Min Huang and Hai Men Zhu on these two days for seven hours at the
25 rate for Electrician: Inside Wireman. On February 14, 2003, the Inspector's Daily Report shows
26 that two King C. employees performed trenching work and installed conduit. King C.'s CPRs
27 showed no employees that day. In the audit, OLSE assessed seven hours wages for Zen Min
28

N. J. A. VAN DER VLIET ET AL.

1 The OLSE shall distribute such funds in accordance with San Francisco Administrative
2 Code section 6.22(E)(8)(d).

3
4 Dated: 12/13/05

5
6 
7 WILLIAM L. LEE
8 City Administrator
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, VAN PITTSBARGAR, 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, 1 Dr. Carlton B. Goodlett Place, City Hall, Room 234, San Francisco, CA 94102-4682.

On December 13, 2004 I served the attached:

HEARING OFFICER'S DECISION

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

**Edmond Yip, President
King C. Electric, Inc.
3446 Balboa Street
San Francisco, CA 94121
Fax No.: (415) 752-1052**

Sheryl Bregman
Deputy City Attorney, Construction Team
San Francisco City Attorney's Office,
Fox Plaza, 1390 Market Street, 5th Floor
San Francisco, California 94102-5408
Counsel to OLSE
Fax No.: (415) 255-0733

Donna Levitt
The Office of Labor Standards Enforcement
1 Dr. Carlton B. Goodlett Place
City Hall, Room 430
San Francisco, CA 94102
Fax No.: (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, Fox Plaza Building, 1390 Market Street, 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 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. 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 December 13, 2004 at San Francisco, California.

Van Pittsenbarger
VAN PITTSENBARGER