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

PURCHASING DEPARTMENT
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4 In the Matter of:

5 Resource and Design, Inc./ Marinship /
6 Swiftlift,

7 Appellants,

8 Appealing the Assessment of Forfeiture
9 By the Office of Labor Standards
10 Enforcement

Hearing:

March 11, 2005

AMENDED DECISION

11 This case is a hearing regarding an assessment of forfeiture, including penalties, by the
12 San Francisco Office of Labor Standards Enforcement (the "OLSE") against Resource and
13 Design, Inc. (RDI), Swiftlift Contractors (Swiftlift) and Marinship Construction, Inc
14 (Marinship), with respect to payment of prevailing wages for work on San Francisco
15 International Airport (SFIA) Contract No 3842 R (the "Contract") for the public work known as
16 SFIA Carpet Replacement – Terminal 3 (the "Project"). The scope of work for this contract was
17 the replacement of carpet at Boarding Areas E and F. RDI was the prime contractor on the
18 Project, and had no workers on the site. RDI subcontracted the Project to Golden State Carpet
19 and Marinship Golden State Carpet subcontracted a portion of the work to Swiftlift. OLSE
20 assessed the forfeiture and penalties for misclassification of workers by Marinship and Swiftlift,
21 failure to pay Sunday and Overtime rates (Swiftlift and Marinship), and failure to make required
22 payments to the apprenticeship training fund (Marinship), as required by San Francisco Charter
23 section A7 204, the San Francisco Administrative Code section 6.22(E), and the Project contract.
24 RDI requested a hearing under Administrative Code section 6 22(E)(8)(a)

25 On March 11, 2005, City Administrator Bill Lee heard testimony and argument, and
26 received documentary evidence concerning this matter Witnesses called by the parties testified
27 under oath Michael Abbasi, RDI President, appeared on behalf of appellant RDI. Deputy City
28

1 Attorney Sheryl Bregman appeared as attorney for OLSE. At the hearing, the parties had a full
2 opportunity to present relevant evidence and argument. The parties also submitted pre- and post-
3 hearing argument. After consideration of all of the evidence and argument submitted by the
4 parties, the Hearing Officer issues this Decision.

5 **Summary of Decision**

6 The Hearing Officer confirms the forfeiture of backwages, training fund contributions
7 and penalties as assessed by OLSE. OLSE established at the hearing that Swiftlift and Marinship
8 failed to pay certain of its workers the proper prevailing rate of wage for the type of work
9 performed. Swiftlift improperly classified its workers as Floor Preparation Workers. Marinship
10 improperly classified its workers as Laborer Group 3. Marinship also failed to make required
11 payments to the apprenticeship training fund. All of the workers on the Project should have been
12 classified as Carpet Layers. Accordingly, the Hearing Officer finds that the OLSE properly
13 assessed backwages and penalties against RDI in the amount of \$22,197.97, consisting of back
14 wages, training fund contributions, and associated penalties.

15 **Issues Presented**

- 16 1. Did OLSE establish that Swiftlift improperly classified as Floor Preparation
17 Workers employees who were performing the work of Carpet Layer?
- 18 2. Did OLSE establish that Marinship improperly classified as Group 3 laborers
19 workers who were performing the work of Carpet Layer?
- 20 3. Did OLSE establish that additional amounts were due for overtime and Sunday
21 work, and that required payments to the apprenticeship training fund were not made?

22 **Procedural Background**

23 This matter arises out of RDI's performance of San Francisco International Airport
24 (SFIA) Contract No 3842 R (the "Contract") for the public work known as SFIA Carpet
25 Replacement -- Terminal 3 (the "Project"). The Contract requires that RDI and its subcontractors
26 pay workers on the Project the highest general prevailing wages for the types of work performed,
27 in accordance with local and state law
28

1 The Project involved removal and disposal of existing carpet, carpet base and wall carpet,
2 and installation of new carpet. Bidders were required to hold a C-15 Flooring and Floor
3 Covering license The Contractor's State License Board issues specialty "C" licenses to
4 contractors whose principal contracting business involves the use of specialized building trades
5 or crafts

6 In the recent past, RDI has performed three similar carpet replacement contracts at SFIA
7 For each contract, RDI and its subcontractors used similar classifications of workers as used on
8 this Project

9 Beginning March 4, 2003, the City, through SFIA, published advertisements for bids on
10 the Contract. On April 24, 2003, OLSE attended the pre-bid conference for the Project. RDI
11 could have attended this meeting, but did not do so OLSE presented an informational flyer and
12 other verbal information concerning the classification of workers on the Project. At the pre-bid
13 conference and at later pre-construction meetings, OLSE advised that all workers on the Project
14 should be paid not less than the prevailing wage for a carpet layer.

15 On or about May 2003, SFIA awarded the Contract to RDI

16 On November 14, 2003, OLSE attended the pre-construction meeting for the Project with
17 RDI. Michael Abbassi of RDI, Michael Hanson of Golden State Carpet, and Dirk Johnson of
18 Marinship attended the meeting. Dave Figueroa, a service representative for Local 12, Carpet,
19 Linoleum and Soft Floor Layers, also attended. Figueroa told the contractors that all of the work
20 under the contract was in the scope of work of the carpet layer. He also advised that the Floor
21 Covering Handler could not be used to perform the removal of carpet After the meeting, OLSE
22 representative Mary Marzotto and Figueroa told Dirk Johnson that Marinship could use
23 apprentice Carpet Layers but not Laborers to perform the removal of carpet, and that the rate of
24 pay for apprentice Carpet Layer is lower than the Laborer rate

25 On December 3, 2004, the SFIA Facilities Manager, Josephine Bower called OLSE to
26 confirm – at the request of Mr Abbassi – the classification and wage rate for employees
27 performing carpet demolition Labor Standards Enforcement Officer Donna Levitt told Bower
28 that the rate should be not less than that of a carpet layer On December 4, 2003, Michael

1 Hanson called Bower to inquire about the classification and wage rate for employees who
2 remove carpet by machine. Bower referred Hanson to OLSE for clarification. Hanson did not
3 contact OLSE.

4 On January 12, 2004, OLSE received a complaint from Carpet Layers Local 12.

5 On January 29, 2004, OLSE met with Michael Abbassi of RDI and Dirk Johnson of
6 Marinship to discuss prevailing wage violations. On February 1, and February 13, 2004, OLSE
7 discussed proper wage rates with Michael Hanson of Golden State Carpet

8 On February 12, 2004, OLSE discussed the scope of work of a carpet layer with Ted
9 Waggoner, service representative of Carpet Layers Local 12.

10 On June 15, 2004, OLSE contacted Laborers Trust Fund field Collector, Dan Cheney, to
11 confirm information about Marinship's non-payment of fringe benefit contributions.

12 On October 15, 2004, OLSE issued a joint assessment with SFIA for \$22,197.97

13 OLSE discussed the audit and findings with Abbassi on November 11, and December 9,
14 2004. Subsequently, RDI requested a hearing before the City Administrator

15 On March 11, 2005, the OLSE, RDI, Swiftlift and Marinship appeared before the
16 Hearing Officer for this hearing.

17 At the hearing, the Hearing Officer admitted into the record documentary evidence
18 submitted by RDI and OLSE. The Hearing Officer also heard the testimony of Michael Abbassi,
19 Derek Smith, Michael Hanson, Rob Adamson, Donna Levitt, Dave Figueroa, and Mary
20 Marzotto.

22 Legal Standards

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

25 A7.204. CONTRACTOR'S WORKING CONDITIONS

26 Every contract for any public work or improvement to be
27 performed at the expense of the city and county . . . whether such work is
28 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:

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

3 San Francisco Administrative Code section 6 22(E) also requires the payment of
4 prevailing rates of wage by all public work contractors and subcontractors. The definition of the
5 prevailing wage rate includes overtime and holiday work (S F. Admin. Code §6 1(H); Cal
6 Labor Code §1815.) Contractors and subcontractors must also satisfy apprenticeship training
7 requirements. (Admin. Code § 6.22(O).) Certified payrolls must conform to the adopted rate of
8 wage for each classification and "the classification set forth for each employee [must] conform
9 with the work performed." (Admin Code § 6 22(E)(6) [emphasis added].)

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

18 Labor Code section 1773 authorizes the DIR to fix the rate for "each craft, classification
19 or type of work " The Court of Appeal upheld the DIR's authority to establish wage rates for
20 each craft and classification in *Winzler & Kelly v. Department of Industrial Relations* (1981) 121
21 Cal App.3d 120, 128. The Court upheld the long-standing rule that the determination of the
22 classification or type of work covered is an essential step in the wage determination process.
23 This requirement is also consistent with California Department of Labor Standards Enforcement
24 policy and Federal wage determinations In its Public Works Manual, the California Department
25 of Labor Standards Enforcement advises.

26 Employees must be paid the prevailing wage for each type or
27 classification of work they perform If the employee drives a three-axle
28 dump truck 4 hours, and then works as a laborer 4 hours, his classification
would be (1) Teamster (Truck Driver) and (2) Laborer. Separate rates
must be used for each If, however, a worker performs work in a

1 particular craft but also does incidental work which arguably could be
2 classified as a different craft, the worker is to be paid at the rate of the
3 primary craft unless the incidental work is done at a higher paying craft.
4 As noted in the case of *In Re Corley* 23 WH 1071 (1978) "Even though
5 some work of a pipefitter is like that of a laborer when the same work is
6 done by a pipefitter as a small or large part of his whole assigned task on
7 any given job, it is the work of a pipefitter, not that of a laborer."

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

19 OLSE is charged with ensuring that "public work contractors comply with the prevailing
20 wage requirements and other standards imposed by the Charter, this Administrative Code and
21 State and/or Federal Law on public work contractors." (Admin. Code § 6.24(A).)

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

23 Any contractor or subcontractor who shall fail or neglect to pay to the
24 several persons who shall perform labor under any contract, subcontract or
25 other arrangement on any public work . . . [under] this Chapter the highest
26 general prevailing rate of wages . . . shall forfeit . . . back wages due plus
27 the penal sum of \$50 per day for each laborer, workman or mechanic
28 employed for each calendar day or portion thereof . .

(Admin. Code § 6.22(E)(8)(a) [emphasis added].) A contractor forfeits underpaid wages and
associated penalties effective the moment of the violation, irrespective of when the violation is
discovered. (*East Quincy Services District v General Accident Insurance Company of America*
(2001) 88 Cal.App 4th 239, 245, quoting *J & K Painting Co v. Bradshaw* (1996) 45 Cal App.4th

1 1394, 1404-1405) The contracting department and the Office of Labor Standards Enforcement
2 are charged with enforcing the prevailing wage requirements (Admin. Code § 6.24(A))

3 A contractor who disagrees with an assessment by the Office of Labor Standards
4 Enforcement may request, within 15 days, a hearing before the City Administrator. (Admin.
5 Code § 6 22(E)(8)(c).) The decision of the City Administrator shall be final. (Admin. Code §
6 6 22(E)(8)(c))

7 **Factual Findings**

8 Based on the documentary and testamentary evidence presented, the Hearing Officer
9 makes the following findings of fact

10 **Notice/Estoppel**

11 As a preliminary matter, RDI claims that the City is estopped by its prior conduct from
12 applying the Carpet Layer wage rate to the disputed work on this Project, or, at the very least,
13 that RDI should be excused from complying with that rate because it did not have actual notice
14 of the City's intent to apply it here. The Hearing Officer finds no merit to these contentions.

15 RDI apparently bid on the Project intending to use the Floor Preparation Worker and
16 Floor Covering Handler rate of pay, and did not discover OLSE's interpretation of the prevailing
17 wage requirement until it was too late to change its price. RDI claims that because it has used
18 the Floor Preparation Worker wage rate without objection on other SFIA contracts, the City
19 should not be allowed to enforce a different requirement here, or, at the very least, the City is
20 under a heightened obligation to notify RDI of its view of the prevailing wage requirement
21 before submission of the bids

22 But even assuming that the City failed to address prevailing wage violations in past
23 contracts, that does not excuse the contractor from paying its workers appropriate wages on this
24 Project. And OLSE did provide advance notice of wage requirements to all interested
25 contractors at the pre-bid conference. RDI had an opportunity to discover what the requirement
26 was on the Project before it submitted its bid, but it chose not to attend the conference.
27 Accordingly, the City is not estopped from enforcing the prevailing wage requirement, and RDI
28 is not excused due to lack of notice of what the specific requirement would be

1 **Misclassification of Carpet Layers by Swiftlift**

2 Swiftlift used a mechanical scrapping device to remove the old carpet from the floor
3 Swiftlift paid its workers as Floor Preparation Workers.

4 Based on the scopes of work published by the California Department of Industrial
5 Relations (the "DIR"), the OLSE determined that Swiftlift misclassified these workers as Floor
6 Preparation Workers, and that the proper classification for such workers was Carpet Layer

7 According to the DIR-published scope of work for the Carpet, Linoleum, and Soft Floor
8 Layer trade, that craft includes "all work including and related to the installation of . . . carpet,"
9 including the "preparatory removal of floor covering, wall covering, adhesive and
10 underlayment " The craft includes two sub-classifications: (1) Floor Preparation Worker, which
11 performs work limited to "floor sealing, moisture vapor emissions sealing/barrier installation,
12 leveling and deck preparation" and (2) Floor Covering Handler, which "may pickup, deliver,
13 handle material utilized by employers, pickup and deliver shop tools, sweep floor, clean floor
14 coverings, remove debris after completion of installation, and place materials on the job site, but
15 may not work with the tools of the trade."

16 The testimony of Dave Figueroa and Michael Hanson both support the conclusion that
17 the Carpet Layer rate of wages is normally applied to all carpet installation tasks, beginning with
18 removal of the existing carpet through installation and clean-up of the new carpet The
19 testimony of Figueroa and Hanson supports the conclusion that Floor Preparation Worker is a
20 narrow sub-classification that does not describe the work performed by Swiftlift on this Project

21 RDI and Swiftlift contend that Swiftlift's mechanized process does not fit within the
22 description of Carpet Layer, Floor Preparation Worker, or Floor Covering Handler. Swiftlift
23 acknowledges that the work the employees performed does not fit within the description of Floor
24 Preparation Worker, because the workers performed no sealing, leveling or deck preparation
25 work Swiftlift defends the use of the sub-classification by saying that its mechanized carpet-
26 removal equipment is not a traditional tool of the Carpet Layer trade, and Floor Preparation
27 Worker is the "closest" classification.

1 The Hearing Officer disagrees. The DIR classification describes the Carpet Layer
2 classification as including "*all work* including and related to the installation of . . . carpet,"
3 including the "*preparatory removal of floor covering*, wall covering, adhesive and
4 underlayment " (Emphasis added.) The use of new or different tools to perform a function does
5 not justify use of a different classification than the one that traditionally performs the function.
6 Even Hansen acknowledged that Golden State normally pays workers the Carpet Layer rate to
7 remove carpet.

8 Accordingly, the Hearing Officer finds that Swiftlift misclassified workers as Floor
9 Preparation Workers; workers who performed removal of carpet must be paid at the Carpet
10 Layer rate. OLSE properly assessed the difference between the rate paid for Floor Preparation
11 Worker and Carpet Layer.

12 **Misclassification of Carpet Layers by Marinship**

13 Marinship paid workers at the Laborer Group 3 rate to remove and dispose of old carpet.

14 The OLSE determined that Carpet Layer was the proper classification for this work, and
15 assessed the difference between the rate paid for Laborer Group 3 and Carpet Layer.

16 The scope of work published by the DIR describes the work performed by Carpet Layer
17 as "*all work including and related to the installation of . . . carpet*," including the "*preparatory*
18 *removal of floor covering* " The work of the Floor Covering Handler classification includes the
19 following work. "*pickup, deliver, handle material utilized by employers, pickup and deliver shop*
20 *tools, sweep floor, clean floor coverings, remove debris after completion of installation, and*
21 *place materials on the job site, but may not work with the tools of the trade.*" The testimony of
22 Dave Figueroa confirms that the Carpet Layer rate of wages is normally applied to all carpet
23 installation tasks, beginning with removal of the existing carpet through installation and clean-up
24 of the new carpet

25 RDI contends that the wage rate for Laborer Group 3 is similar to that of Floor Covering
26 Handler, which would have been an appropriate classification to use for carrying away and
27 disposing of old carpet in preparation for the installation of the new carpet The Hearing Officer
28 disagrees The Carpet Layer class is responsible for the removal of old carpet in preparation for

1 installation of new carpet The evidence showed that Marinship employees did some demolition
2 and removal work using traditional tools of the trade, in addition to carrying old carpet to the
3 dumpster The Floor Covering Handler is limited to pick up and delivery of materials to the site,
4 and removal of debris after installation

5 Accordingly, the Hearing Officer finds that Marinship misclassified workers as Laborer.
6 Group 3, workers who removed old carpet must be paid at the Carpet Layer rate

7 Sunday & Overtime Rates

8 Based on the certified payroll records ("CPRs"), OLSE determined that Marinship and
9 Swiftlift failed to pay Sunday rates and required overtime. RDI did not raise any issue regarding
10 these assessments in its prehearing statement. At the hearing and in its post-hearing statement,
11 however, RDI claimed that the Sunday hours were primarily worked on Monday, and that the
12 overtime day was a reporting error.

13 It is the responsibility of the contractor to submit accurate and complete CPRs.
14 Moreover, there is insufficient competent evidence in the record to support RDI's contention that
15 some of the information on the CPRs was inaccurate and should be discounted for the purpose of
16 prevailing wage requirements Accordingly, the Hearing Officer confirms OLSE's assessments
17 related to Sunday and overtime work

18 Training Fund Contribution

19 OLSE found that Marinship failed to make required payments to the apprenticeship
20 training fund RDI and Marinship apparently agreed with this assessment, and have now
21 submitted evidence of payment to the fund OLSE is ordered to review the payment of funds and
22 credit RDI as appropriate Assessments of penalties for late payment, if any, shall stand

23 Summary of Decision

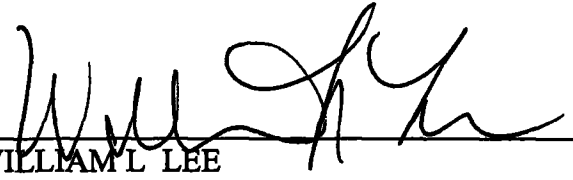
24 For all of the above reasons stated above, RDI shall forfeit to the City and County of San
25 Francisco the amount of \$22,197.97, minus payments made as required to the apprenticeship
26 training fund, from its contract balance on San Francisco International Airport Contract No 3842
27 R for the public work known as SFIA Carpet Replacement – Terminal 3 The OLSE shall
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1 distribute such funds in accordance with San Francisco Administrative Code section

2 6.22(E)(8)(d)

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Dated: 5/12, 2005



WILLIAM L LEE
City Administrator

1 **PROOF OF SERVICE**

2 I, MARY GO, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 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

5 On May 13, 2005, I served the attached

6 **HEARING OFFICER'S AMENDED DECISION**

7 (In the Matter of Resource and Design, Inc /Marinship/Swiftlift, Appellants, Appealing
8 the Assessment of Forfeiture by the Office of Labor Standards Enforcement)

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

11 **Michael Abbassi**
12 **Resource and Design, Inc.**
13 **272 Main Street**
14 **San Francisco, CA 94105**

15 **Fax: (415) 777-0941**

Sheryl Bregman
Deputy City Attorney
San Francisco City Attorney's Office
Construction Team
Fox Plaza, 1390 Market Street, 5th Floor
San Francisco, California 94102-3408
Counsel to OLSE

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

16 and served the named document in the manner indicated below.

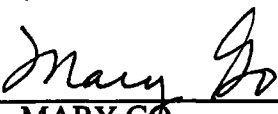
17 **BY MAIL** I caused true and correct copies of the above documents, by following ordinary business
18 practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office
19 of San Francisco, City Hall, 1 Dr Carlton B Goodlett Place, Suite 325, City and County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

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

26 **BY FACSIMILE** I caused a copy(ies) of such document(s) to be transmitted via facsimile machine
27 The fax number of the machine from which the document was transmitted was (415) 554-4747/(415) 554-
28 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

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

2 Executed May 13, 2005, San Francisco, California

3 
4 _____
MARY GO