

1 CITY AND COUNTY OF SAN FRANCISCO

2 OFFICE OF THE CONTROLLER

3 Before Hearing Officer Christopher D. Burdick, Esq.

4 under

5 San Francisco Administrative Code Section 6.22(E) (8) (b)

6 In the Matter of the Appeal of

7 Kim's Flooring, Inc.,

8 a Subcontractor,

9 Involving its Subcontract with CM Chiang
10 Construction, Inc., A General Contractor, from a
11 Forfeiture Determination by the City and
12 County of San Francisco Office of Labor
Standards Enforcement

**HEARING OFFICER'S
FINDINGS AND
DETERMINATION**

Hearing: March 8, 2010
Time: 9:30 a.m.
Location: City Hall
Contract: No. 6724A(R), MTA
(1SVN) 1SVN 6th Floor and
Basement Floor Tenant
Improvements

13
14 **INTRODUCTION**

15 On March 8, 2010, hearing was held before Hearing Officer Christopher D. Burdick,
16 Esq., on the appeal of Kim's Flooring, Inc. ("Kim") from a determination by the San Francisco
17 Office of Labor Standards Enforcement (the "OLSE"), concerning a dispute over the payment of
18 prevailing wages under Department of Public Works ("DPW") Contract No.6724A(R) (the
19 "Contract") for the public work known as MTA (1 SVN) 6th Floor and Basement Tenant
20 Improvements (the "Project"). Mr. Kam Leung and Mr. Ken Liang of Kim's appeared on behalf
21 of their company and employer, Kim. Deputy City Attorney Sheryl L. Bregman, Esq., appeared
on behalf of the OLSE.

22 Hearing Officer Burdick took testimony, both oral and documentary, under oath, as
23 described hereinafter; exhibits were entered into evidence; and, at the conclusion of the
24 evidentiary hearing, the parties made brief oral arguments. The Hearing Officer suggested that
25 the parties might submit post-hearing Proposed Findings and Conclusions, and OLSE did so –
26 Kim declined and submitted only a single-page letter reiterating its basic arguments.

1 The Hearing Officer has considered the pre- and post-hearing statements and
2 documentary evidence submitted by both parties, and the testimony and arguments presented at
3 the hearing to reach the following findings and determination. The Hearing Officer now issues
4 these Findings and Determination, in conformity with San Francisco Administrative Code
5 section 6.22E (8) (c) (v).

6 **I**

7 **Issue Presented**

8 Did OLSE properly determine that Kim misclassified its workers as Floor
9 Covering Handlers when they were performing the work of Soft Floor
10 Layers? If so, what remedy, if any, including possible fines and penalties,
11 should be imposed for any such misclassification?

12 **II**

13 **Discussion**

14 **A. The Kim Project and Scope of Work**

15 On October 1, 2008, the Department of Public Works ("DPW") awarded a Contract for
16 new flooring in the subject Project area, the entire 6th floor of 1 South Van Ness to CM Chiang
17 Construction, Inc ("CM Chiang"). Kim was an authorized subcontractor to CM Chiang
18 Construction, Inc., on the Project. On November 12, 2008, the OLSE attended the pre-
19 construction meeting for the Project and emphasized to its contractors and their subcontractors,
20 including Chiang (but not Kim, who were not present) the importance of proper classification for
21 the type of work required under the Contract.

22 On June 11, 2009, on another project involving the very same type of flooring work, the
23 so-called Portola Branch Library Project, OLSE discussed the need for proper classification and
24 wage rates with Mr. Liang of Kim, who had classified the same workers as both Handlers and
25 Layers for work on the same days, the very issue involved here. It was OLSE's investigation of
26 this Project that prompted it to go back to Kim's work on the South Van Ness Project to see if
27 Kim had engaged in the same reporting and payment practices.

28 Kim's scope of work on this simple carpeting Project was to install new soft flooring
(carpet tile, cork, and rubber flooring) throughout the Project area, the entire 6th floor of 1 South
Van Ness. To prepare its work space, Kim was required to clear the areas of debris or used
materials; move (as needed) and keep on-site the old flooring (which, it appears, was not that old

1 and which the tenant [Muni] wanted to keep and reuse); scrape old, cruddy, excess glue or other
2 sealant off of the exposed floor, so it could lay its new material; lay that new “flooring”; and then
3 clean up its own debris. Kim did **not** remove the existing carpet, rug or other flooring¹ – that
4 removal work was done by another contractor, although Kim did have to scrape off old glue or
5 other adhesives left behind from the old coverings.

6 During its work, Kim received deliveries of needed materials at the site, which materials
7 Kim workers brought up to the 6th floor by the building’s overloaded, and over-used, single
8 freight elevator. At the end of a typical work day, Kim was required to clean up its materials and
9 tools.

10 Kim employed four workers on the Project: Paul Lee, Danny Liang, Geoffrey Lin, and
11 Zhi Ma. In its certified payrolls, Kim classified each of these very same four workers, every day,
12 for a few daily hours as a Floor Covering Handler and for more hours as a Soft Floor Layer.
13 Needless to say (or we would not be here), “Floor Covering Handler” is a lower paying
14 classification. Soft Floor Layer is a higher paid classification. Kim (a “thrifty” contractor,
15 indeed) did all it could to classify its workers to the lower-paying class. This was not to the
16 liking of OLSE (nor of the ever-vigilant Union District Council, which dogs OLSE’s feet and
17 keeps very close track indeed [as well it should] of who does what on which City/MTA /OLSE
18 project).

19 In total, Kim classified 33% of all the hours worked on the project by its four daily
20 laborers as (the lower-paying) Floor Covering Handler and the balance as (the far-higher paying)
21 Soft Floor Layer. On December 8, 2009, OLSE determined that the most appropriate ratio of
22 time for Kim's workers performing as Floor Covering Handle would not be 33% but would be,
23 instead, approximately 10% of their time overall. In its audit, OLSE accepted Kim’s
24 classification of work as a Floor Covering Handler only for those hours where the on-site DPW
25 Inspector had concluded that the workers were involved in receiving initial deliveries of flooring
26 materials and the final non-skilled work of removing debris after installation. And so OLSE
27

28

¹ Kim claimed in its timesheets and reports that it did so, but the on-site DPW Inspector personally observed the
other contractor doing its job and saw Kim people only scraping off old glue and adhesives, all work well within the
scope of Soft Floor Layer.

1 issued on December 8 its Notice and Certification of Forfeiture, in the amount of \$6,210.64 in
2 wages and penalties of \$5,650.00, a total of \$11,860.64.

3 The relevant DIR published "scope of work" here covers the Carpet Linoleum craft
4 jurisdiction and involves all work, "... including and related to the installation of resilient floor,
5 wall and ceiling material commonly referred to as carpet, linoleum, vinyl, rubber, cork, asphalt,
6 vinyl composite mastipave, synethetic grass, prefinished hardwood, laminates, engineered wood,
7 all applications of pre-finished and laminate floors...including preparatory removal of floor
8 covering, wall covering, adhesive and underlayments . . ." There are two sub-classifications
9 within the craft of Carpet, Linoleum and Soft Floor Layer: Floor Covering Handler and the Floor
10 Covering Handler Trainee. The higher paid classification of Soft Floor Layer (journey-level
11 workers and apprentices) performs the craft's work.

12 The DIR Scope of Work for the classification of Soft Floor Layer provides as follows:

13 By way of illustration and not limitation, the jurisdiction applies to all work
14 including and related to the installation of resilient floor, wall and ceiling
15 materials commonly referred to as carpet ...

16 Installation on floors, walls, ceiling, stairs ...

17 Measuring, cutting, fabrication, packaging, pickup, delivery and handling of
18 materials and tools...

19 Preparatory removal of floor covering ... [and] sanding, patching, sealing and
20 priming of the installation surface.

21 Installation of lining felt, carpet, pad, underlayment compositions, leveling
22 compounds, or any material used as a base for the finished surface.

23 The DIR Scope of Work for the lower-paid classification of Floor Covering Handler
24 specifies that the work performed by employees in the class is as follows:

25 Floor Covering Handlers whether full or part-time are **considered casual**
26 **and intermittent** and may pickup, deliver, handle material used by
27 employers, pickup and deliver shop tools, sweep floors, clean floor
28 coverings, remove debris after completion of installation and place
materials on the jobsite, but **may not work with the tools of the trade.** ...

DIR Scope, Emphasis added.

OLSE presented evidence through its witnesses that other contractors and industry
professionals use the Floor Covering Handler classification only on a limited basis, for pick-up
and delivery of materials to the site and for removal of debris after installation. OLSE, like DIR,
views "incidental work" (like scraping glue, cleanup, tool removal, etc.) as a necessary,

1 ancillary, everyday component to the craft work of Soft Floor Layer and not as work unique and
2 limited to the separate or lower-wage classification of Floor Handler. (OLSE Public Works
3 Manual, at pp. 55-56.) ² Kim paid its four Soft Floor Layers as such when they did that work,
4 but it also paid the same four workers as Handlers and not on a “casual and intermittent” but on a
5 daily basis. OLSE’s union and City Inspector witnesses testified that, under the DIR Scope and a
6 prior OLSE decision, that Floor Covering Handlers cannot be employed and used on a daily
7 basis as Kim had done. Kim provided no expert evidence to the contrary, simply contending that
8 its use of the Floor Covering Handler rate was appropriate because unskilled labor was required
9 to clear and prepare areas for work.

10 B. State and Federal Standards.

11 In its Public Works Manual, the California Department of Labor Standards Enforcement
12 advises as follows:

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

26 (DLSE Public Works Manual, pp. 55-56; Emphasis added.)

27 The United States Department of Labor has likewise determined that, ". . . If a
28 construction contractor who is not bound by classifications of work at which the majority of

29 _____
30 ² The Hearing Officer views the testimony of the Building Trades’ and Union Council witnesses on these complex
31 subjects with a little skepticism – their self-interest in the outcome in cases involving non-union employers is self-
32 evident. It would be better if OLSE presented such evidence from disinterested expert witnesses, those with no
33 vested interest in the outcome.

1 employees in the area are working is free to classify or reclassify, grade or subgrade traditional
2 craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job
3 away from the group of contractors and the employees who work for them who have established
4 the locality wage standard." (In re Fry Brothers 128 WAB Ruling 76-6, at p. 17.) The Fry Bros.
5 court stated that, "if either the awarding body or a contractor could define or redefine the
6 parameters of work to be done by the various classifications of workers, there would be little left
7 of the California prevailing wage laws. Awarding bodies and contractors would simply redefine
8 the scope of work covered by the least costly classification notwithstanding the scope of work
9 for such workers in the locality." (*Id.*)

10 C. The City Charter and Administrative Code.

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

13 **A7.204. CONTRACTOR'S WORKING CONDITIONS**

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

19 . . .
20 (b) that any person performing labor thereunder shall be paid not
21 less than the highest general prevailing rate of wages in private
22 employment for similar work . . .

23 To implement the Charter mandate, the Board of Supervisors enacted section 6.22(E),
24 *Prevailing Wages*, of Administrative Code, Chapter 6, *Public Works Contracting Policies and*
25 *Procedures*. Section 6.22(E) (1) requires the payment of prevailing rates of wage by all public
26 work contractors and subcontractors. Failure to pay the prevailing wage rates results in a
27 mandatory assessment of penalties, as follows:

28 Any contractor or subcontractor who shall fail or neglect to pay to the
several persons who shall perform labor under any contract, subcontract or
other arrangement on any public work . . . [under] this Chapter the highest
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 . . .

(Administrative Code, §6.22(E) (8) (a))

1 The definition of the prevailing wage rate includes overtime and holiday work
2 (Administrative Code, §6.1(H); California Labor Code §1815). The statutory mission of the
3 OLSE is to "ensure that public work contractors comply with the prevailing wage requirements
4 and other standards imposed by the Charter, this Administrative Code and State and/or Federal
5 Law on public work contractors" (Administrative Code §6.24(A)), a mission consistent with the
6 general policy underlying prevailing wage requirements:

7 The overall purpose of the prevailing wage law . . . is to benefit and
8 protect employees on public works projects. This general objective
9 subsumes within it a number of specific goals: to protect employees from
10 substandard wages that might be paid if contractors could recruit labor
11 from distant cheap-labor areas; to permit union contractors to compete
12 with nonunion contractors; to benefit the public through the superior
13 efficiency of well-paid employees; and to compensate nonpublic
14 employees with higher wages for the absence of job security and
15 employment benefits enjoyed by public employees.

16 (*Lusardi Construction Co. v. Aubry* (1991) 1 Cal.4th 976, 987; citing *Division of Labor*
17 *Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123;
18 *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458.)

19 The determination and identification of proper and accurate trade classifications is
20 fundamental in determining the correct "prevailing wage" or "prevailing rate of wage":

21 The prevailing wage, as used in this [Administrative Code Chapter 6], is the
22 highest general prevailing rate of wage plus 'per diem wages' and wages paid for
23 overtime and holiday work paid in private employment in the City and County of
24 San Francisco *for the various crafts and kinds of labor* employed in the
25 performance of any public work or improvement under this Chapter.

26 (Administrative Code, §6.1 (H). The Supervisors, by adopting the trade classifications
27 established by the Department of Industrial Relations (DIR), sets the prevailing rates by trade
28 classification. (Administrative Code, §6.22(E) (3). Labor Code section 1773 authorizes the DIR
to fix the rate for "each craft, classification or type of work." In *Winzler & Kelly v. Department*
of Industrial Relations (1981) 121 Cal App.3d 120, 128, the Court of Appeal upheld DIR's
authority to establish wage rates for each craft and classification and noted with approval the
long-standing rule that the determination of the classification or type of work covered is an

1 essential step in the wage determination process, a requirement consistent with California
2 Department of Labor Standards Enforcement policy and Federal wage determinations

3
4 **D. Prior OLSE Decisions**

5 In a prior OLSE decision, Hearing Officer Lee in Resource and Design, Inc.
6 (RDI), Swiftlift Contractors (Swiftlift) and Marinship Construction, Inc (Marinship), San
7 Francisco International Airport Contract No. 3842 R (2005) held (persuasively) that the proper
8 work of the Floor Covering Handler classification is limited to pick up and delivery of materials
9 to the site and removal of debris after installation.

10 **III**
11 **Analysis**

12 OLSE witnesses testified that other flooring contractors and industry professionals use
13 the Floor Covering Handler classification only on a limited basis, for pick-up and delivery of
14 materials to the site and removal of debris after installation. Kim, however, paid its workers as
15 Handlers on a daily basis. The OLSE witnesses confirmed that the Floor Covering Handler
16 position should not be used on a daily basis as Kim had done. Kim provided no evidence to the
17 contrary.

18 Kim contended that its use of the Floor Covering Handler rate was appropriate because
19 unskilled labor was appropriate for the simple work of clearing and preparing areas for work.
20 The DLSE, however, views “incidental work” as a necessary and unavoidable component to the
21 craft work and not as the work of a separate or lower-wage classification. (DLSE Public Works
22 Manual, at pp. 55-56.) Moreover, the prior decision of Hearing Officer Lee in Marinship, supra,
23 is persuasive that the Floor Covering Handler classification is limited to pick up and delivery of
24 materials to the site and removal of debris after installation.

25 This is not a case where, for example, Kim employed several workers whose sole duty
26 was to get to the job early, clear up debris, order the worksite, lay out the tools and materials and
27 then leave so that the Soft Floor Layers could arrive at work to find a clean site, ready for them
28 to get right to the task of laying floor. Kim did not do that, and what its four employees did on a
29 daily basis is not different than what a carpenter or plumber does on the job – clean and prepare

1 the site, organize the tools, arrange the materials and get ready for the task of carpentry or
2 plumbing. This type of work is incidental and unavoidable and is always considered part of the
3 craft and trade and not separate work which can be allocated to a lower paying job classification,
4 especially when the same employee is performing the work.³

5 Based upon the foregoing Discussion and Analysis, the Hearing Officer makes the
6 following

7 IV

8 Findings of Fact

9 1) On October 8, 2007, the City and County, through its DPW, advertised for
10 bids on the subject Contract. On September 15, 2008, the OLSE attended the pre-bid
11 conference for the Project and presented its informational flyer.

12 2) On October 1, 2008, the DPW awarded the Contract to CM Chiang
13 Construction, Inc.

14 3) Kim was an authorized subcontractor to CM Chiang on the Project.

15 4) On November 12, 2008, the OLSE attended the pre-construction meeting
16 for the Project and emphasized to its contractors and their subcontractors, including
17 Chiang (but not Kim, who were not present) the importance of proper classification for
18 the type of work required under the Contract.

19 5) Kim's "scope of work" on the Project was to install soft flooring (carpet
20 tile, cork, and rubber flooring) throughout the Project area, the 6th floor of 1 South Van
21 Ness. To prepare its work space, Kim was required to clear areas of any debris or used
22 materials and to scrape excess glue or other matter off of the floor. During its work, Kim
23 received regular deliveries of materials at the site, which Kim workers brought up to the

24 ³ Perhaps a simple civil service analogy would be instructive. The job descriptions for Police Officer and Police
25 Sergeant have substantial overlaps – perhaps 70% of the typical tasks, duties and responsibilities (e.g., patrol, arrest,
26 testifying, dealing with evidence, maintaining the peace, etc., etc.) are identical. But 30% of the descriptions have
27 the distinguishing class characteristics, mainly supervision, training, and evaluation. No one would ever suggest that
28 the City and County could lawfully pay its Sergeants at the lower Officer rate when the Sergeants were doing patrol,
arresting crooks, testifying in court, working at riots, and the like. It is the responsibility and ability to do the higher
work described in the Sergeant class characteristics that entitle the higher pay – the fact that many, many hours are
spent doing the same work as a beat cop is irrelevant in determining what is the "prevailing rate" for a Sergeant.

1 6th floor by the building's single, busy freight elevator. At the end of a typical workday,
2 Kim was required to, and did, clean up its materials and tools.

3 6) To perform the work described in Par. 5, *supra*, Kim regularly employed
4 four workers on the Project -- Paul Lee, Danny Liang, Geoffrey Lin, and Zhi Ma -- each
5 of whom performed some or all of the work described in that Paragraph. In its certified
6 payrolls, Kim classified these workers on every day for some hours as a Floor Covering
7 Handler (a lower paying classification) and for some hours as a Soft Floor Layer (a
8 higher paid classification). Kim classified 33% of the total hours worked on the project
9 as Floor Covering Handler and the balance as Soft Floor Layer.

10 7) On June 11, 2009, OLSE discussed the issue of proper classification and
11 wage rates with Mr. Liang of Kim.

12 8) On December 8, 2009, OLSE determined that the most appropriate ratio of
13 time for Kim's workers performing as Floor Covering Handle would not be 33% but
14 would be, instead, approximately 10% of their time overall, and so OLSE issued on that
15 day its Notice and Certification of Forfeiture, in the amount of \$11,860.64. In its audit,
16 OLSE accepted Kim's classification of work as a Floor Covering Handler only for those
17 hours where the DPW Inspector had concluded that the workers were involved in
18 receiving deliveries of materials and removing debris after installation.

19 9) California Labor Code section 1773 authorizes the California Department
20 of Industrial Relations ("DIR") to fix the rate for "each craft, classification or type of
21 work."

22 10) DIR's published "scope of work" provisions for the Carpet Linoleum craft
23 jurisdiction involves all work, ". . . including and related to the installation of resilient
24 floor, wall and ceiling material commonly referred to as carpet, linoleum, vinyl, rubber,
25 cork, asphalt, vinyl composite mastipave, synethetic grass, prefinished hardwood,
26 laminates, engineered wood, all applications of pre-finished and laminate
27 floors...including preparatory removal of floor covering, wall covering, adhesive and
28 underlayments . . ."

11) The DIR scope of work identifies and recognizes two sub-classifications
within the craft of Carpet, Linoleum and Soft Floor Layer: "Floor Covering Handler"
and "Floor Covering Handler Trainee". The Scope of Work for the classification of

1 Floor Covering Handler specifies that such work is considered "casual and intermittent,"
2 with the limitations that the Handler may pickup, deliver, handle material utilized by
3 employers, pickup and deliver shop tools, sweep floor, clean floor coverings, remove
4 debris after completion of installation, and place materials on the job site, but may not
work with the tools of the trade."

5 12) Under the DIR scope of work, the classification of Soft Floor Layer
6 (journey-level workers and apprentices) performs the craft's work. According to the
7 DIR-published scope of work for the Carpet, Linoleum, and Soft Floor Layer trade,
8 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
11 Worker, which performs work limited to "floor sealing, moisture vapor emissions
12 sealing/barrier installation, leveling and deck preparation," and (2) Floor Covering
13 Handler, which "may pickup, deliver, handle material utilized by employers, pickup
14 and deliver shop tools, sweep floor, clean floor coverings, remove debris after
15 completion of installation, and place materials on the job site, but may not work
16 with the tools of the trade."

17 13) The Soft Floor Carpet Layer rate of wages is normally applied to all carpet
18 installation tasks, beginning with removal of the existing carpet through installation
19 and clean-up of the new carpet. The Floor Handler class is a narrow sub-
20 classification that does not apply to the work performed by Kim on this Project.
21 The DIR classification describes the Carpet Layer classification as including "all
22 work including and related to the installation of . . . carpet," including the
23 "preparatory removal of floor covering, wall covering, adhesive and underlayment.

24 Accordingly, the Hearing Officer finds that Kim misclassified its workers as Floor
25 Handlers and they must be paid at the Soft Floor Carpet Layer rate. OLSE properly
26 assessed the difference between the rate paid for Soft Floor Layer and Floor Covering
27 Handler.

28 Based on the foregoing Findings of Facts, the Hearing Officer makes the following

V

Findings of Law

A) 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 . . .

B) Following the Charter mandate, the San Francisco Board of Supervisors enacted section 6.22(E), *Prevailing Wages*, of San Francisco Administrative Code, Chapter 6, *Public Works Contracting Policies and Procedures*. Section 6.22(E) (1) requires the payment of prevailing rates of wage by all public work contractors and subcontractors. Failure to pay the prevailing wage rates results in a mandatory assessment of penalties, as follows:

Any contractor or subcontractor who shall fail or neglect to pay to the several persons who shall perform labor under any contract, subcontract or other arrangement on any public work . . . [under] this Chapter the highest 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 . . .

(San Francisco Administrative Code, §6.22(E) (8) (a) [emphasis added].) The definition of the prevailing wage rate includes overtime and holiday work (San Francisco Administrative Code, §6.1(H); California Labor Code §1815).

C) The statutory mission of the OLSE is to "ensure that public work contractors comply with the prevailing wage requirements and other standards imposed by the Charter, this Administrative Code and State and/or Federal Law on public work contractors." (San Francisco Administrative Code §6.24(A).) This mission is consistent with the general purpose and policy supporting prevailing wage requirements:

1 The overall purpose of the prevailing wage law . . . is to benefit and
2 protect employees on public works projects. This general objective
3 subsumes within it a number of specific goals: to protect employees from
4 substandard wages that might be paid if contractors could recruit labor
5 from distant cheap-labor areas; to permit union contractors to compete
6 with nonunion contractors; to benefit the public through the superior
7 efficiency of well-paid employees; and to compensate nonpublic
8 employees with higher wages for the absence of job security and
9 employment benefits enjoyed by public employees.

10 (*Lusardi Construction Co. v. Aubry* (1991) 1 Cal.4th 976, 987; citing *Division of Labor*
11 *Standards Enforcement v. Ericsson Information Systems, Inc.* (1990) 221 Cal.App.3d 114, 123;
12 *O.G. Sansone Co. v. Department of Transportation* (1976) 55 Cal.App.3d 434, 458.)

13 D) The determination of trade classifications is inherent in the statutory definition of
14 "prevailing wage" or "prevailing rate of wage": "The prevailing wage, as used in this
15 [Administrative Code Chapter 6], is the highest general prevailing rate of wage plus 'per diem
16 wages' and wages paid for overtime and holiday work paid in private employment in the City
17 and County of San Francisco *for the various crafts and kinds of labor* employed in the
18 performance of any public work or improvement under this Chapter." (San Francisco
19 Administrative Code, §6.1(H) [emphasis added].) The Supervisors, by adopting the trade
20 classifications of the California Department of Industrial Relations, sets the prevailing rates by
21 trade classification. (San Francisco Administrative Code, §6.22(E) (3).)

22 E) Labor Code section 1773 provides the statutory authority for the California
23 Department of Industrial Relations to fix the rate for "each craft, classification or type of work."
24 *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal App.3d 120, 128.

25 F) In its **Public Works Manual**, the Department of Labor Standards Enforcement
26 advises as follows:

27 Employees must be paid the prevailing wage for each type or
28 classification of work they perform. If the employee drives a three-axle
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
particular craft but also does incidental work which arguably could be
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

1 some work of a pipefitter is like that of a laborer when the same work is
2 done by a pipefitter as a small or large part of his whole assigned task on
3 any given job, it is the work of a pipefitter, not that of a laborer."

4 (DLSE Public Works Manual, pp. 55-56.)

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

16 H) The DIR published scope of work provisions for the Carpet Linoleum craft
17 jurisdiction involves all work, "... including and related to the installation of resilient floor, wall
18 and ceiling material commonly referred to as carpet, linoleum, vinyl, rubber, cork, asphalt, vinyl
19 composite mastipave, synethetic grass, prefinished hardwood, laminates, engineered wood, all
20 applications of pre-finished and laminate floors...including preparatory removal of floor
21 covering, wall covering, adhesive and underlayments . . ." The classification of Soft Floor Layer
22 (journey-level workers and apprentices) performs the craft's work.

23 I) The Floor Covering Handler is one of two sub-classifications within the craft of
24 Carpet, Linoleum and Soft Floor Layer, and the DIR Scope of Work for Floor Covering Handler
25 specifies that such work is considered "casual and intermittent," with the limitations that the
26 Handler may pickup, deliver, handle material utilized by employers, pickup and deliver shop
27 tools, sweep floor, clean floor coverings, remove debris after completion of installation, and
28 place materials on the job site, but may not work with the tools of the trade."

1 J) In a previous OLSE Decision dated March 11, 2005, In the Matter of an Appeal
2 by Resource Design, Inc./Marinship/Swiftlift., OLSE Hearing Officer Lee determined that "The
3 Floor Covering Handler is limited to pick up and delivery of materials to the site, and removal of
4 debris after installation."

5 K) Kim misclassified its workers as Handlers when they were performing the work
6 of Soft Floor Layers, and the calculation of OLSE that only 10%, and not 33%, of the daily work
7 of the four Kim employees on the Project was Soft Floor Layer work, is supported by substantial
8 evidence.

9 L) Kim owes wages in the amount of \$6,210.64 to its four workers.

10 M) The penalty imposed by OLSE of \$5,650.00 is mandatory under the
11 Administrative Code and may not be waived or reduced by the Hearing Officer.

12 N) The Forfeiture in the amount of \$6,210.64 in wages and penalties of \$5,650.00, a
13 total of \$11,860.64, is upheld and the appeal of Kim should be denied.

14 Determination

15 Based on the foregoing Discussion, Analysis, Findings of Fact, and the Conclusions of
16 Law, the Hearing Officer hereby **affirms** the OLSE Certification of Forfeiture against CM
17 Construction/Kim's Flooring, Inc., in the amount of \$11,860.64.

18 Dated: April 18, 2010

19 

20 Christopher D. Burdick, Esq.

