

1 CITY AND COUNTY OF SAN FRANCISCO

2 OFFICE OF THE CITY CONTROLLER

3 Before Hearing Officer Martin Gran

4 In the Matter of:

5 Three Brothers Electrical Contractors, Inc. and  
6 Wickman Development & Construction,

7 And,

8 The San Francisco Office of Labor Standards  
9 Enforcement

**HEARING OFFICER’S FINDINGS AND  
DETERMINATIONS**

Hearing Dates: December 8, 2020 and  
March 22, 2021

Contract: DPW No. 1000008793 (Bayview and  
Tenderloin Police Stations)

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11  
12 **INTRODUCTION**

13 This case involves a Certification of Forfeiture, including penalties, issued by the San  
14 Francisco Office of Labor Standards Enforcement (“OLSE”) against Wickman Development &  
15 Construction (“Wickman”) and Three Brothers Electrical Contractors (“TBE”) (collectively  
16 “Appellants” or “Contractors”) for failure to pay the required prevailing rate of wages for TBE’s  
17 work on the public work known as E.S.E.R. Bond 2014 MEP Package 2-Bayview and  
18 Tenderloin Police Station, San Francisco Department of Public Works (DPW) contract number  
19 1000008793 (“Project”). For the Project, Wickman is the City and County of San Francisco’s  
20 (“City” or “San Francisco”) prime contractor, and TBE is Wickman’s electrical subcontractor.

21 On July 14, 2020, OLSE issued a Notification of Forfeiture and Certification of  
22 Forfeiture under San Francisco Administrative Code section 6.22(e)(8), and supported this  
23 assessment with the fourth iteration of its audit of TBE’s work. OLSE’s audit covers a period  
24 from October 3, 2018, through January 11, 2020. OLSE’s assessment is based on its finding that  
25 TBE underreported the hours of its employees in certified payroll reports (“CPRs”) and  
26 misclassified the vast majority of work performed by its employees as laborers hours rather than

1 electrician or plumbers' hours. OLSE found a total amount owing of \$181,609.20, including  
2 \$129,414.46 in total back wages owed to workers, \$22,194.75 in total back wages/benefits owed  
3 to the Union, and \$30,000.00 in penalties.

4 On July 22, 2020, TBE filed an appeal of OLSE's Certification of Forfeiture with the  
5 Controller's Office and requested a hearing under Administrative Code section 6.22(e)(8)(C).  
6 The Controller's Office also received TBE's appeal letter from Wickman by email on July 21,  
7 2020. Thereafter, the parties met and conferred in compliance with section 6.22(e)(8)(C)(ii);  
8 however, they were unable to resolve the dispute. On September 20, 2020, Wickman requested  
9 that the Controller appoint a hearing officer. By letter dated September 30, 2020, the Controller  
10 appointed the undersigned, Martin Gran, as the Hearing Officer in this matter.

11 By letter dated October 8, 2020, the undersigned set the hearing for Tuesday, November  
12 10, 2020, commencing at 10:00 a.m. The October 8 letter further stated: "Three Brothers and  
13 Wickman shall submit their pre-hearing statement no later than close of business on October 23,  
14 2020, and OLSE shall submit its pre-hearing statement no later than close of business on  
15 November 6, 2020."

16 Appellants subsequently requested a continuance of the hearing date, and, finding good  
17 cause, the undersigned continued the hearing date to December 8, 2020, with the deadlines for  
18 the submission of the pre-hearing statement unchanged. By email dated October 30, 2020,  
19 OLSE requested an extension of time to submit its pre-hearing statement. Finding good cause,  
20 the undersigned extended the deadline for OLSE to submit its pre-hearing statement to October  
21 10, 2020.

22 A first day of hearing in this matter was held on December 8, 2020. The first day of  
23 hearing was held virtually due to COVID-19 Public Health Orders. The following people  
24 appeared: Alex Jones of TBE; Jonathan Wickman and Hugo Gomez of Wickman; Patrick  
25 Mulligan, Robin Ho, and Anna Liu of OLSE; Daniel Tan of San Francisco Public Works; and  
26 David Hobstetter, Deputy City Attorney representing OLSE. At the beginning of the December

1 8 hearing, the undersigned asked the parties if there was an objection to any of the evidence  
2 offered into the record as part of the submission of the pre-hearing statements. No party objected  
3 and the undersigned accepted the evidence into the record. Prior to the conclusion of the  
4 hearing, appellant Contractors requested that the Hearing Office permit a second day of hearing.  
5 Finding good cause, the undersigned granted the request for a second day of hearing, and on  
6 February 17, 2021, informed the parties via email that the second day of hearing would be held  
7 on March 22, 2021.

8 A second day of hearing in this matter was held on March 22, 2021 and was also held  
9 virtually due to COVID-19 Public Health Orders. The following people appeared: Alex Jones of  
10 TBE; Jonathan Wickman of Wickman; Robin Ho, Anna Liu and Patrick Mulligan of OLSE;  
11 Daniel Tan of San Francisco Public Works; and David Hobstetter, Deputy City Attorney  
12 representing OLSE. At the start of the second day of the hearing, Wickman objected on grounds  
13 of lack of notice to witness Daniel Tan's use of photographs to support his testimony. Finding  
14 good cause for accepting the photographs into the record and a lack of evidence of prejudice to  
15 the appellant Contractors, the undersigned accepted the photographs into the record.

16 During the two days of hearing, the parties had a full opportunity to present evidence and  
17 argument. Those who testified, did so under oath. The record closed at the conclusion of the  
18 second day of hearing on March 22, 2021. Both OLSE and Wickman submitted Post-Hearing  
19 Briefs and Proposed Findings of Fact and Conclusions of Law. TBE did not avail itself of the  
20 opportunity to file either document.

21 As explained below, the undersigned finds that Appellants have failed to prove by a  
22 preponderance of the evidence that the basis for the Certification of Forfeiture is incorrect.  
23 Therefore, the undersigned affirms the Certification of Forfeiture with a minor modification to  
24 account for minor clerical errors that OLSE has acknowledged.

1 **STATEMENT OF FACTS**

2 • On April 2, 2018, the San Francisco entered into a written contract with  
3 Wickman for the Project (“Contract”). (OLSE Exhibit 31.) The Contract required Wickman to  
4 construct improvements to mechanical, electrical, and plumbing (“MEP”) equipment and  
5 assemblies for two existing San Francisco Police Department stations: Bayview Station and  
6 Tenderloin Station. (*Id.*) These included the demolition and removal of existing generators and  
7 related control, fuel, and piping systems, as well as the installation of new generators and  
8 related systems. (*Id.*) The contract sum was \$3,582,000. (*Id.*) Article 11 of the Contract’s  
9 General Conditions incorporated by reference the prevailing wage requirements of San  
10 Francisco Administrative Code section 6.22(e), including without limitation requirements that  
11 Wickman “pay to all persons performing labor in and about the Work not less than the highest  
12 general prevailing rate of wages determined as set forth herein for the respective crafts and  
13 employments” and “keep or cause to be kept complete and accurate payroll records for all  
14 persons performing labor in or about the Work.” (OLSE Exhibit 31, General Conditions 11.01.)  
15 Section 11.04 of the General Conditions states that all Work under the Contract is subject to  
16 compliance monitoring and enforcement of prevailing wage requirements by OLSE. (*Id.*) In  
17 addition, Contract section 4.02 likewise provides that, “The latest Wage Rates for Private  
18 Employment on Public Contracts in the City and County of San Francisco, as determined by the  
19 San Francisco Board of Supervisors and the Director of the California Department of Industrial  
20 Relations ... shall be included in the AGREEMENT and are hereby incorporated by  
21 reference...CONTRACTOR shall require any contractor to provide, and shall deliver to the City  
22 every month during any construction period, certified payroll reports with respect to all persons  
23 performing labor in the Provision of the Work.” (OLSE Exhibit 31, section 4.02.) The  
24 penalties for non-compliance with prevailing wage laws are also spelled out in the Contract.  
25 (*Id.* at section 4.03.)  
26

1 • By written agreement dated June 18, 2018, Wickman entered a subcontract with  
2 TBE for a sum of \$955,122. (OLSE Exhibit 30.) Wickman and TBE attached to the  
3 subcontract TBE's scopes of work for each police station, providing for the following inclusions  
4 and exclusions:

5 **Tenderloin Police Station**

6 INCLUDED:

- 7 - Provide and install temp backup power generator
- 8 - Disconnect and remove existing generator as contractors [sic] property
- 9 - Remove existing fuel tank
- 10 - Remove existing ATS and annunciator feeders and conduit to existing start point
- 11 - Remove existing roll-up door starter
- 12 - Provide and install 40 KW generator, 300 gallon fuel tank, ATS, and remote
- 13 - Annunciator panel
- 14 - Provide and install new pad for generator
- 15 - Provide and install new feeders and conduit form new generator to ATS
- 16 - Provide and install new feeders and conduit for new annunciation panel
- 17 - Provide and install panel P3A
- 18 - Provide and install panels VRV and CU2
- 19 - Provide and install new disconnects for HVAC equipment
- 20 - Install new control units provided by others

21 NOT INCLUDED:

- 22 - Permits
- 23 - Removal, storage or disposal of existing fuel
- 24 - Removal of existing generator pad
- 25 - Opening walls and creating a path to bring in new generator
- 26 - Repairing surfaces and walls after generator installation

27 **Bayview Police Station**

28 INCLUDED:

- 29 - Disconnect and remove existing generator as contractors [sic] property
- 30 - Remove existing fuel tank
- 31 - Remove existing ATS and annunciator feeders to existing start point
- 32 - Provide and install transfer pump control panel
- 33 - Provide and install required control wiring
- 34 - Provide and install start up and commishing [sic]
- 35 - Provide and install new feeders and conduit form new generator to ATS
- 36 - Provide and install new feeders and conduit for new annunciation panel
- 37 - Provide and install panel CH-1
- 38 - Provide and install panels AHU
- 39 - Provide and install new disconnects for HVAC equipment
- 40 - Install new control units provided by others

41 NOT INCLUDED:

- Permits
- Removal, storage or disposal of existing fuel
- Removal of existing generator pad
- Opening walls and creating a path to bring in new generator
- Repairing surfaces and walls after generator installation

(OLSE Exhibit 30 at 9-12.) TBE’s subcontract further provided: “This is a prevailing wage project. Please review the original contract to determine the project’s entire requirements. The Sub-Contractor will comply with all requirements or they may be financially responsible for any violations.” (*Id.* at 7.)

- San Francisco issued the Notice to Proceed for the Contract on June 25, 2018.

(OLSE Exhibit 31.) The Project had not yet reached final completion by the time of the second day of hearing. However, Wickman’s Application and Certification for Payment for the period of June 1, 2020 to July 31, 2020, indicates that Wickman has already performed the vast majority of its work under the Contract. (OLSE Exhibit 29.) It provides for a revised contract sum of \$3,963,025.88 and a balance to finish, including retainage, of only \$263,054.34. (*Id.* at 2.) The schedule of values similarly indicates that, as of the date of the document, TBE had already completed most of its work. (*See id.* at 4 (Item Nos. 52 to 61) & 6 (Item Nos. 101 to 112).)

- On January 22, 2020, OLSE received a complaint filed by San Francisco International Brotherhood of Electrical Workers Local 6 (“Local 6”) requesting “appropriate enforcement action against Three Brothers Electrical Contractors for violations of public works mandates” on the Project. (OLSE Exhibit 1.) Local 6 argued that TBE’s work “falls under the prevailing wage classification for the Inside Wireman Electrician,” but that TBE had, *inter alia*, misclassified its workers and failed to pay the proper prevailing wages or overtime rates. OLSE initiated an audit based on the Local 6 complaint.

- On January 23, 2020, OLSE sent TBE (by email and regular mail) a Request for Information (“RFI”) requesting information including the identities of and contact information for workers, copies of original time cards, copies of CPRs, copies of worker paystubs and

1 cancelled payroll checks, documents reflecting payment of benefits, and contractor daily reports  
2 reflecting the work performed. (OLSE Exhibit 2.) Via the RFI, OLSE requested the  
3 information be produced no later than 10 days from date TBE received the letter. It also  
4 included a warning that, “Failure to submit records is subject to penalties, pursuant to San  
5 Francisco Administrative Code Section 6.22(e)(6).” (*Id.*) Administrative Code section  
6 6.22(e)(6) makes clear that contractors and subcontractors must maintain such records and make  
7 them available to OLSE within 10 days of a request and that penalties may be imposed by  
8 OLSE for noncompliance. (*Id.*)

9 • On April 23, 2020, Alex Jones, Jonathan Wickman and others participated in a  
10 conference call with Anna Liu of the OLSE. During that call, Jones promised that he would  
11 review the audit in detail and provide explanations and/or supporting documentation to prove that  
12 his worker(s) did not perform electrical work on specific days by Tuesday, April 28, 2020 at the  
13 latest. He did not meet that deadline. (OLSE Exhibit 16.)

14 • On April 29, 2020, OLSE sent a follow-up email to Mr. Jones, and copying Mr.  
15 Wickman, stating:

16 As discussed during the conference call last Thursday, you were  
17 supposed to send explanations and/or supporting documentations  
18 to me no later than yesterday, April 28th. However, I have not  
19 received any communication or documents from you. Please note  
20 that if I do not receive the documents or explanations from you by  
21 close of business today, April 29, 2020, then OLSE will proceed  
22 with the process of issuing a Notification of Forfeiture (NOF) and  
23 Certification of Forfeiture (COF), and inform the awarding  
24 department to transfer funds from the contract to OLSE, so OLSE  
25 can issue back wages to the workers.

26 (OLSE Exhibit 16.)

• Administrative Code section 6.22(e)(6) requires that contractors performing  
work on a Public Work or Improvement must keep “payrolls and basic records including time  
cards, trust fund forms, apprenticeship agreements, accounting ledgers, tax forms and  
superintendent and foreman daily logs for all trades workers performing work at or for a City

1 Public Work or Improvement” and that “[a]ll such records as described in this section shall at  
2 all times be open to inspection and examination of” the OLSE.

3 • Neither Wickman nor TBE ultimately responded with all of the documents that  
4 OLSE had requested. For instance, TBE never submitted daily logs for its work on the Project,  
5 nor did it turn over paystubs or cancelled checks that could have potentially demonstrated  
6 proper payment to its workers – documents that it had a duty to maintain and produce to OLSE.  
7 (*See*, OLSE Exhibit 27.)

8 • OLSE issued its Audit (iteration 1) on March 24, 2020, finding a total amount  
9 owing for prevailing wage violations of \$195,424.54. (OLSE Exhibit 6.) After further  
10 investigation, OLSE issued Audit (iteration 2) on April 15, 2020, revising the amount owing to  
11 \$175,763.01, and then it issued Audit (iteration 3) on May 28, 2020, revising the amount owing  
12 to \$173,502.54. (OLSE Exhibits 15 & 20.)

13 • On July 14, 2020, OLSE issued its Notice of Forfeiture and Certification of  
14 Forfeiture, supported by Audit No. 4 of TBE’s work. (OLSE Exhibit 27.) OLSE’s Audit  
15 (iteration 4) covers the period from October 3, 2018, through January 11, 2020. It found a total  
16 amount owing of \$181,609.20, which included \$129,414.46 in total back wages owed to  
17 workers, \$22,194.75 in total back benefits owed to the Union, and \$30,000.00 in penalties. The  
18 Certification of Forfeiture describes the basis for OLSE’s assessment and the methodology for  
19 the audit. In relevant part, Certification of Forfeiture described the following with respect to  
20 OLSE’s methodology:

21 The audit covers the period from 10/3/2018 – 1/11/2020. OLSE  
22 used the data that TBE reported onto the CPRs to determine the  
23 hours worked and wages paid to each worker. OLSE then added  
24 the missing dates, workers, and their work hours to the audit based  
25 on the jobsite sign-in sheets and TBE’s self-audit, and then  
26 compared both the base hourly rates and total hourly rates paid by  
TBE with the Electrician and Plumber prevailing wage rates as  
required by the DIR. OLSE provided credits for the workers’ base  
rates as reported on the CPRs. However, OLSE did not give any  
credits to dates that were not reported on the CPRs because TBE  
failed to provide copies of paystubs and cancelled checks to prove  
that workers were paid for their work on these specific dates.



1 (OLSE Exhibit 27.) Based on its review, OLSE concluded that TBE had underreported  
2 worker hours, misclassified workers, and had paid incorrect wages rates to its workers.

3 • In its pre-hearing statement, TBE argued that OLSE’s investigation is based on  
4 an unfounded complaint, that OLSE does not have a “prescribed investigation or complaint  
5 procedure,” and that TBE did not attend the pre-construction meeting for the Project.

6 • In its pre-hearing statement, Wickman argued that, while TBE is Wickman’s  
7 electrical subcontractor, much of TBE’s scope of work is not classifiable as an Electrician for  
8 prevailing wage purposes. Wickman contends that the work of two TBE employees – Alex  
9 Jones and Kevin Robinson – is classifiable as Electrician work. Moreover, Wickman contends  
10 that Alex Jones, as Wickman’s principal, often worked as a project manager, and that only 50  
11 percent of Mr. Jones’s hours are properly classified as Electrician. (That said, neither Wickman  
12 nor TBE offered any evidence substantiating when Mr. Jones acted as a project manager or for  
13 how many hours. In addition, Wickman, in his pre-hearing statement, argued that Wickman-  
14 maintained daily logs that identified TBE’s workers as “electrical” because they worked for an  
15 electrical subcontractor, and not because they were working as electricians; and that the  
16 Project’s sign-in sheets are not a reliable indicator of the hours TBE’s employees worked.

17 • In its pre-hearing statement, OLSE argued, *inter alia*, that the evidence in the  
18 administrative record clearly demonstrates that: (a) Contractor TBE underreported worker hours  
19 in the CPRs; (b) misclassified its workers as laborers and improperly paid roughly 66 percent of  
20 Project hours at a laborer’s rate, even though TBE performed electrical and plumbers work  
21 under an electrical subcontract; and (c) violated Administrative Code section 6.22(e)(6) by  
22 failing to keep and make available to OLSE payroll and basic records, including subcontractor  
23 daily logs, pay stubs, cancelled checks, or other documents that potentially could have  
24 supported TBE’s position in this matter.

25 • During the administrative hearing, the following individuals provided testimony  
26 under oath: Hugo Gomez, Alex Jones, Anna Liu, Patrick Mulligan, Robin Ho, and Daniel Tan.

1           **Testimony of Hugo Gomez**

2           •       Hugo Gomez, superintendent for Wickman, testified on behalf of Wickman. Mr.  
3 Gomez testified that he had worked in the field for 27 years. He stated that for the Project at  
4 issue, he was on site for the majority of time.

5           •       Mr. Gomez testified that he viewed Alex Jones of TBE as a competent individual  
6 and electrician. He further testified that he thinks very highly of Daniel Tan of Public Works  
7 and thinks Mr. Tan is intelligent, but that he believes that Mr. Tan, during times relevant to the  
8 audit, lacked field experience.

9           •       Mr. Gomez testified that he completed daily logs for Wickman. He stated that in  
10 filling out those daily logs, he entered “electrician” for TBE’s employees solely because those  
11 employees worked for an electrical contractor, and not to indicate the specific type of work the  
12 employees were performing. In addition, Mr. Gomez testified that on the daily logs, he  
13 distinguished between apprentices and journeymen, but in doing so, he meant that he viewed the  
14 apprentices as having less experience and responsibility, and not because those workers were, in  
15 fact, apprentices. The Hearing Officer generally found Mr. Gomez’ testimony to be credible  
16 and largely un rebutted. That said, the Hearing Officer makes no finding as to his  
17 characterization regarding Mr. Tan’s field experience. Mr. Tan testified as to his education and  
18 experience and his testimony convinced the Hearing Officer that he possessed the necessary  
19 knowledge and experience to fairly carry out his responsibilities.

20           **Testimony of Alex Jones**

21           •       Alex Jones is the owner of TBE. Mr. Jones represented TBE during the appeal  
22 process. During the hearing, Mr. Jones testified under oath, but also made additional statements  
23 or arguments during the hearing. Mr. Jones argued and/or testified that TBE has complied with  
24 applicable prevailing wage requirements. More specifically, Mr. Jones states that he is the only  
25 worker who should be classified as an electrician and that all other TBE workers performed  
26 laborer scopes of work only. In addition, Mr. Jones states that the documents OLSE relied on as

1 part of the investigation are not reliable for the purposes of determining when TBE performed  
2 covered work. Mr. Jones also makes procedural arguments, stating that the investigation arose  
3 from a union complaint submitted for improper purposes, and that OLSE has proceeded with its  
4 investigation in a manner that conflicts with applicable law. The testimony described in this  
5 paragraph deal with the ultimate issues of this hearing. Based on the weight of the evidence, the  
6 Hearing Officer cannot credit Mr. Jones' assertions that: (a) TBE properly classified it  
7 employees, (b) TBE met its prevailing wage obligations; (c) OLSE improperly investigated  
8 TBE; or (d) OLSE improperly considered certain records.

9         •         Contrary to the requirement of San Francisco Administrative Code Section  
10 6.22(e)(6), Mr. Jones admitted that he did not always keep a daily log documenting the work  
11 performed by TBE employees at each job location. The Hearing Office finds that the testimony  
12 described in this paragraph is credible.

13                 **Testimony of Anna Liu**

14         •         Anna Liu, a Compliance Officer with OLSE and OLSE's lead Compliance  
15 Officer for the audit of TBE's work, testified as to the basis of OLSE's Certification of  
16 Forfeiture. Anna Liu testified that the basis of OLSE's Certification of Forfeiture is that for  
17 OLSE's audit period TBE and Wickman violated the requirements of Administrative Code  
18 section 6.22(e) by failing to report all hours worked in the CPRs and by systematically  
19 misclassifying workers all workers (except for Mr. Jones) as laborers in the hours TBE reported  
20 in the CPRs.

21         •         Ms. Liu explained why OLSE concluded that TBE had failed to fully report  
22 worker hours in the CPRs. Ms. Liu testified that she reviewed payroll and other Project records,  
23 including the CPRs, OLSE's daily sign-in sheets, Public Works' inspector reports, and  
24 Wickman's daily reports. She stated that her review of those documents revealed that on  
25 multiple days, jobsite sign-in sheets, inspector reports, and/or daily reports show that TBE  
26

1 workers performed work, but TBE failed to report any hours for those days in the CPRs. Ms.  
2 Liu testified to the following examples of hours missing from TBE’s CPRs:

3 • **February 6, 2019:** TBE failed to report any hours for this date to the CPRs. The  
4 CPRs show this because the CPRs jump from a report with a week ending date of February 2,  
5 2019, to a report with a week ending date of February 16, 2019, leaving a gap from the week of  
6 February 3 through February 9. (OLSE Exhibit 32 at 7-11.) Other documents indicate that  
7 TBE performed covered work on this day. On this date, Alex Jones signed in 1.5 hours at  
8 Bayview and 2.5 hours at Tenderloin. (OLSE Exhibit 8.) The Public Works Inspector Reports  
9 reflect covered work occurring at each location. The Inspector Report for Bayview Station  
10 states, “No construction activity observed during visit, but per contractor, earlier this morning  
11 installed VAVs in Report Writing Room.” (OLSE Exhibit 7.) The record indicates that “VAV”  
12 stands for Variable Air Volume, and is an electronic control device, meaning this appears to be  
13 covered electrical craft work. The Inspector Report for Tenderloin Station identifies “Three  
14 Brothers Electrical” as having performed eight hours of work with a description of “Disconnect  
15 AC unit on roof.” (OLSE Exhibit 7.) The Wickman Daily Reports are consistent with the  
16 Public Works Inspector Reports, showing electrical work at Bayview and AC unit work at  
17 Tenderloin. (OLSE Exhibit 37.)

18 • **September 6, 2019:** TBE failed to report any hours for this date to the CPRs.  
19 (OLSE Exhibit 32.) Other documents indicate that TBE performed covered work on this day.  
20 On the Sign-In Sheet, four workers signed in, but none signed out. (OLSE Exhibit 8.) The  
21 Public Works Inspector Report for this date at Bayview Station noted four TBE workers  
22 working seven hours each with a description of “Installing conduit & wire supports, begun  
23 pulling wires for AHU-1 in Report Writing Room.” (OLSE Exhibit 7.) The Wickman Daily  
24 Report also identifies four TBE Electrical workers performing “continue power to AH1.”  
25 (OLSE Exhibit 37.)  
26

1           •       **October 29, 2019:** TBE reported two workers for this date. (OLSE Exhibit 32.)  
2 However, other documents indicate that TBE’s workforce that day include three people. On the  
3 Sign-In Sheet, three workers signed in, but they did not provide sign-out times. (OLSE Exhibit  
4 8.) The Public Works Inspector Report for this date noted three workers for TBE at seven hours  
5 each, performing work on the existing generator, temporary generator, and automatic transfer  
6 switch. (OLSE Exhibit 7.) The Wickman Daily Report also identifies three TBE Electrical  
7 workers and describes the work as “pull temp feeds.” (OLSE Exhibit 37.) Thus, TBE’s report  
8 of only two workers on its CPRs appears to be inaccurate, as both the Public Works Inspector  
9 Report and the Wickman Daily Report indicate that three TBE workers were performing trade  
10 work that day.

11           •       Ms. Liu testified that there are numerous additional examples in the  
12 administrative record of TBE failing to report worker hours in the CPRs. She testified that  
13 OLSE’s Exhibit 28 provides examples in which the Public Works Inspector Report and the  
14 Wickman Daily Report identify TBE performing craft work on a specific date, but the CPRs fail  
15 to record the hours; and OLSE’s Exhibit 42 details dates for which the CPRs fail to match the  
16 information TBE provided on the project sign-in sheets.

17           •       Ms. Liu testified that OLSE’s audit concluded that TBE had underreported hours  
18 in the CPRs by a total of 533.1 hours. She further testified that OLSE did not give TBE credit  
19 for these hours because neither TBE nor Wickman provided paystubs or canceled checks to  
20 prove that workers were paid for their work on those specific dates.

21           •       Ms. Liu testified more generally that the contractors had violated the  
22 Administrative Code’s requirement that they make documentation available to OLSE.  
23 Administrative Code section 6.22(e)(6) requires contractors and subcontractors to keep  
24 “payrolls and basic records,” including “daily logs,” and that “[a]ll such records as described in  
25 this section shall at all times be open to inspection and examination of the duly authorized  
26 officers and agents of the City, including representatives of the Office of Labor Standards

1 Enforcement.” Ms. Liu explained that despite multiple requests from OLSE, Contractors  
2 refused to comply with this statutory requirement.

3 • Ms. Liu testified that she made at least six requests to Mr. Jones requesting  
4 information relevant to this matter. The following are excerpts of email exchanges that took  
5 place between Liu and Appellants from April 17, 2020 to June 29, 2020, culminating in Mr.  
6 Jones’ stated refusal to produce the requested documentation. (OLSE Exhibits 26 & 33.)

7 (Note: Mr. Jones, Mr. Wickman and Ms. Liu are all included on each of the emails below):

8 **Anna Liu (4/15/2020):** Copies of paystubs, cancelled checks, and other  
9 supporting documents were due to me on 4/1/20. I granted your request  
10 for an extension until 4/6/20, but to date I have not received any additional  
11 documents or communication from you.

12 **Alex Jones (4/17/2020):** I apologize for the delay in responding, I lost  
13 track of information on the email chain. The question about proving my  
14 innocence has not been answered. Has it been proven that my employees  
15 did electrical work? What was the OLSE Written policy for investigating  
16 anonymous tips?

17 **Jonathan Wickman (4/20/2020):** I think Alex should be responding with  
18 specifics and that could speed things up. But their [sic] are clear issues  
19 with the audit that should be resolved. I just think the means in which  
20 Alex is responding is not the fastest way to clear this up. He does have to  
21 respond to the Audit and is obligated to do so as it is a requirement of our  
22 contract to the City and therefore between 3BE and WD&C.

23 **Anna Liu (4/20/2020):** I agree with you that Alex needs to respond with  
24 specifics. Simply stating that he does not agree with the findings is not  
25 sufficient. As stated multiple times, if Alex disagrees with OLSE’s  
26 findings, then he needs to provide explanations and submit supporting  
documentation(s) to me for review. After reviewing his documents, I will  
revise the audit if warranted. However, I have not received any  
documentations from him to justify revision of my initial audit.

**Anna Liu (4/20/2020):** Thank you for participating in today’s call in an  
effort to resolve the audit. As agreed upon, Alex will review the audit in  
detail ... and provide explanations and/or supporting documentations to  
prove that his worker(s) did not perform electrical work on specific days  
no later than next Tuesday, April 28, 2020.

**Jonathan Wickman (5/4/2020):** Alex – Have you done any of these  
things? [Referring to Jones’ promised documentation well as steps Jones  
could take to settle the matter.]

1 **Anna Liu (5/4/2020):** No, I have not received those documentations. ...  
2 Those documents were due to me on 4/28/20, but to date I have not  
3 received anything from him.

4 **Alex Jones (6/19/2020):** Per our phone conversation: I agreed to provide a  
5 list of tasks each employee performed on a weekly bases [sic] and could  
6 possibly narrow it down to the daily bases [sic]. [Jones also listed six  
7 reasons explaining why he disagreed with the audit.]

8 **Anna Liu (6/19/2020):** As agreed upon, Alex will provide copies of his  
9 weekly reports that identify the duties performed for the subject project no  
10 later than next Wednesday, June 24, 2020.

11 **Anna Liu (6/26/2020):** Alex - What is the status of providing copies of  
12 TBE's daily/weekly reports? You promised to have them available by  
13 Wednesday 6/24/20, but I still haven't received any documents from you.  
14 Please provide them no later than next Wednesday, July 1, 2020. This is  
15 an additional week's time from when you promised they would be made  
16 available.

17 **Alex Jones (6/29/2020):** Anna – I appreciate the extra week, but I've [sic]  
18 **decided against sending any more information.** Everything I've said  
19 has been rejected. I've reviewed your audit and responded. All rejected.  
20 At this point a hearing will best serve to close out this issue. (Excerpts  
21 from OLSE Exhibits 26 & 33, emphasis added.)

22 • Ms. Liu also explained why OLSE concluded that TBE had misclassified its  
23 workers as laborers in the CPRs. Ms. Liu testified that she reviewed TBE's scope of work for  
24 the Project and the Public Works and Wickman daily reports and compared the information in  
25 those documents to the DIR scopes of work for electricians, plumbers and steamfitters, and  
26 laborers.

• Ms. Liu found that TBE's scope of work primarily involved electrical work.  
During her testimony, Ms. Liu highlighted specific text from the California Department of  
Industrial Relations' ("DIR") Electrician scope of work.

• The DIR's published scope of work for Electrician says in relevant part:

Electrical work as covered by this Agreement shall include **the handling, installing, or moving of all related materials and equipment from the first point of delivery at the jobsite through the final installation, and the dismantling and removing of electrical material from the jobsite**, including all work historically performed by Employees covered by this Agreement.

...

1 Also covered under the terms of this Agreement shall be the installation,  
2 maintenance, relocation and removal of all temporary wiring and equipment at a  
3 jobsite for signal, light, heat or power, and running tests or performance tests on  
4 any electrical installation or equipment that is part of any work or jobsite.

5 (OLSE Exhibit 23, emphasis added.)

6 • Ms. Liu testified that she found that a large portion of TBE's work fell within the  
7 DIR's scope of work for Electrician. In particular, she noted that one of TBE's largest scopes  
8 involved the removal/demolition of existing power generators and installation of new  
9 generators.

10 • The subcontract between Wickman and TBE provided for the following  
11 electrical scopes of work:

- 12 - Provide and install temp backup power generator
- 13 - Disconnect and remove existing generator as contractors property
- 14 . . .
- 15 - Remove existing ATS and annunciator feeders and conduit to existing start  
16 point
- 17 . . .
- 18 - Provide and install 40 KW generator, 300 gallon fuel tank, ATS, and remote
- 19 - Annunciator panel
- 20 - Provide and install new pad for generator
- 21 - Provide and install new feeders and conduit form new generator to ATS
- 22 - Provide and install new feeders and conduit for new annunciation panel
- 23 - Provide and install panel P3A
- 24 - Provide and install panels VRV and CU2
- 25 - Provide and install new disconnects for HVAC equipment

26 (OLSE Exhibit 30.)

27 • Ms. Liu also testified that the record, including the Public Works and Wickman  
28 daily reports, indicated that TBE's scope of work included work falling within the DIR's scope  
29 of work for Plumber. The DIR's published scope of work for Plumber says in relevant part that  
30 it covers:

31 (24) all piping for artificial gases, natural gases and holders and equipment . . .  
32 for any and all purposes

33 . . .

34 (32) All piping for power or heating purposes either by water, air, steam, gas,  
35 oil, chemicals or any other method.

36 . . .



1 (40) The laying out and cutting of all holes, chases and channels, the setting and  
2 erection of bolts, inserts, stands, brackets, supports, sleeves, thimbles, hangers,  
3 conduits and boxes used in connection with pipe fitting industry.

4 . . .

5 (42) All pipe transportation lines for gas, oil, gasoline, fluids and liquids, water  
6 aqueducts and water lines and booster stations of every description.

7 (43) all acetylene and arc welding, brazing, lead burning, soldering and wiped  
8 joints

9 (44) laying out, cutting, bending and fabricating of all pipe work of every  
10 description by whatever mode or method

11 . . .

12 (47) The handling and using of all tools and equipment that may be necessary  
13 for the erection and installation of all work and materials used in the pipe fitting  
14 industry.

15 (OLSE Exhibit 23.)

16 • In particular, Ms. Liu testified that the Public Works inspector reports and  
17 Wickman daily reports indicated that TBE's scope of work included fuel vent line work she  
18 concluded fell within the DIR's Plumber scope.

19 • Ms. Liu testified that she did not classify any of TBE's work under the DIR's  
20 Laborer scope. In her testimony, she noted that the evidence available to OLSE – including the  
21 contract documents and daily reports – did not indicate TBE performed any laborer scope of  
22 work. She added that while demolition work, for example, may in many instances be performed  
23 by a laborer, TBE's demolition work on the project involved the removal of *electrical* material,  
24 and the DIR's Electrician scope states this it covers “the dismantling and removing of electrical  
25 material from the jobsite.”

26 • Ms. Liu also explained in her testimony that to the extent an electrician or  
plumber had performed incidental work that a laborer could have performed under other  
circumstances, it did not change that worker's classification to that of laborer. She supported

1 this by citing the DIR's Public Works Manual. The DIR's Public Works Manual states in  
2 relevant part:

3 when a worker performs duties in a higher paying classification (such as a  
4 Pipefitter), the fact that some of the work performed by that same worker is  
5 similar to a type of work in a lower paying classification (such as Laborer  
6 Group 1), when that same work is performed by a Pipefitter (as a small or large  
7 part of his or her whole assigned task on any given job) it is the work of a  
8 Pipefitter, and must be compensated at the higher rate.

9 (OLSE Exhibit 36 at 41.)

10 • Ms. Liu further testified that, based on her finding that all TBE scopes of work  
11 were either electrician or plumber scopes, TBE's classification of its workers on the Project was  
12 clearly wrong. She testified that for the audit period, TBE's CPRs included 3,397.5 total hours.  
13 TBE had classified only approximately 35 percent of its hours as electrician hours (1,168 hours)  
14 and the remaining roughly 65 percent as laborer hours. TBE did not classify any hours as  
15 Plumber's work. Moreover, TBE classified one worker only – TBE's owner, Alex Jones – as  
16 an electrician, and paid all other workers only laborer's rate of wages. Ms. Liu stated that  
17 considering that TBE's contract was an electrical subcontract with plumbing and steamfitting  
18 elements, TBE's classification of its workers was plainly incorrect.

19 • Ms. Liu further testified that she performed additional analyses that OLSE  
20 believes support the conclusion that TBE misclassified its workers. First, Ms. Liu testified that  
21 TBE paid \$101,999.87 in fringe benefits payments to IBEW Local 6 for the period of January  
22 2019 through October 2019. She noted that at a required electrician fringe benefits rate of  
23 \$32.70 per hour, TBE's payment corresponds with 3,119.26 total electrician hours, which  
24 closely aligns with the 3,267.08 hours for the same period OLSE identified in its audit as being  
25 misclassified. Ms. Liu concluded that this shows that TBE agreed – or at least acknowledged –  
26 that its workers were entitled to electricians' prevailing wages.

• The Hearing Officer finds Ms. Liu's testimony described in the above sections to  
be credible, and indeed finds her analysis persuasive. Appellants' payment of over \$100,000 to  
Local 6 is an admission that TBE owed Local 6 payments for back benefits because TBE

1 assigned its employees to do work within the electrical scope of work under DIR  
2 determinations. In its defense, Appellants argue that they were compelled to make this payment  
3 to Local 6 because the union placed a stop payment notice on the Project, thereby threatening  
4 the completion of the Project, as well as TBE's financial future. In other words, Appellants  
5 argue that they paid that that sum to Local 6 even though TBE did not owe Local 6 such  
6 moneys and that TBE properly classified TBE's employees (other than Mr. Jones) as laborers  
7 for the duration of the Project. The Hearing Officer cannot credit Appellants' arguments. First,  
8 the weight of documentary evidence in this case (including numerous photographs) shows that  
9 TBE misclassified its employees other than Mr. Jones as laborers rather than electricians.  
10 Second, it seems unlikely to the Hearing Officer that Appellants would pay Local 6 over  
11 \$100,000 for moneys that were not owed, especially in light of the fact that the California Code  
12 of Civil Procedure sections 9400, *et seq.* provide for an expedited process to adjudicate such  
13 claims. For the reasons discussed above, the Hearing Officer credits Ms. Liu's testimony, as  
14 well as her analysis linking the payment made to Local 6 to the of number hours TBE appears to  
15 have misclassified its employees.

16       • Ms. Liu also analyzed Wickman's August 6, 2020, Application and Certification  
17 for Payment and found that the value Wickman assigned to TBE's labor for the Project  
18 (\$538,437.00) was more than double the payments reflected in the CPRs for the period of  
19 January 1, 2019, through March 21, 2020 (\$242,531.43). (OLSE Exhibit 38.) She noted that  
20 labor costs based on OLSE's audit (\$402,150.24) more closely align with Wickman's assigned  
21 value, but still left room for a markup. The Hearing Officer finds Ms. Liu's analysis on this one  
22 point to be insufficiently developed to be persuasive on this record. While her analysis suggests  
23 that TBE has profited by misclassifying and underpaying its employees, the Hearing Officer  
24 does not rely on this particular argument in finding that TBE indeed misclassified and underpaid  
25 its employees.

1           **Testimony of Patrick Mulligan**

2           •       Patrick Mulligan, Director of OLSE, testified regarding OLSE’s procedures for  
3 investigating complaints. Mr. Mulligan testified that OLSE has a handbook detailing  
4 procedures for OLSE’s complaint procedures. However, he stated that the contents of the  
5 handbook are more guidelines than mandatory rules, that OLSE has significant discretion in  
6 investigating complaints and that, while there are codified rules setting certain broad parameters  
7 for an investigation, depending on the circumstances of a specific case, OLSE’s investigations  
8 can and do vary within the bounds of the codified parameters. Mr. Mulligan further testified  
9 that, although he oversees numerous investigations on file with OLSE and that he is not as  
10 familiar with the instant matter as the assigned compliance officers, his understanding is that  
11 OLSE’s investigation of TBE’s work has proceeded within the bounds of OLSE’s lawful  
12 discretion. The Hearing Officer finds that Mr. Mulligan’s testimony described above is  
13 credible.

14           **Testimony of Robin Ho**

15           •       Robin Ho, a Supervising Compliance Officer with OLSE, testified for OLSE.  
16 Ms. Ho testified that she has been a Supervising Compliance Officer for more than four years  
17 and has participated in over 150 compliance cases. She supervised Anna Liu on this matter.  
18 Ms. Ho testified on OLSE’s procedure for investigating complaints, her agreement with Ms.  
19 Liu’s findings, and OLSE’s basis for the Certification of Forfeiture.

20           •       Ms. Ho testified that when OLSE receives a complaint, OLSE will determine  
21 whether there is merit to the complaint and whether OLSE has authority to handle the  
22 complaint. If the answer to these questions is “yes,” then OLSE starts an investigation. This  
23 usually involves the distribution of a case assignment letter and one or more requests for  
24 information, and once OLSE has obtained relevant documentation, it begins its a review and  
25 analyses of documents such as payroll records, inspector reports, and sign-in sheets. Ms. Ho  
26

1 testified that while investigating the complaint against TBE, OLSE did not depart in any notable  
2 way from OLSE's usual procedures.

3 • Ms. Ho further testified that she provided support to Anna Liu throughout the  
4 audit process and that she supervised Ms. Liu's work. She stated that she reviewed some of the  
5 details of the audit and spoke with Ms. Liu about her work. She testified that, based on her  
6 experience, including that as a Supervising Compliance Officer, she agrees with the audit and  
7 its findings.

8 • Ms. Ho testified that she believes that TBE violated prevailing wage  
9 requirements because the evidence demonstrates that TBE misclassified its workers. She stated  
10 that a central part of the Certification of Forfeiture is OLSE's finding that Three Brothers paid  
11 an electrician rate to Mr. Jones and paid all other workers as laborers only. She testified that  
12 this is a clear violation of prevailing wage requirements because TBE's contract is an electrical  
13 contract primarily consisting of electrical scopes of work, and also including some plumbing  
14 scopes. She concluded that given the scope and nature of work required by TBE's subcontract  
15 with Wickman, it would not be possible for roughly two-thirds of the hours to be classified as  
16 laborer's hours. Thus, Ms. Ho concluded that TBE's classification of all employees other than  
17 Mr. Jones was clearly incorrect.

18 • Ms. Ho testified that another central part of the Certification of Forfeiture is  
19 OLSE's finding that TBE failed to report hours on the CPRs for days where other documents,  
20 such as sign-in sheets or daily logs, indicate TBE had performed work. She emphasized that to  
21 the extent the Appellants criticize the documents OLSE relied on in reaching this conclusion,  
22 any lack of documentation was Appellants' own fault because they failed to comply with the  
23 requirements of Administrative Code section 6.22(e)(6), which requires contractors and  
24 subcontractors to keep payroll and basic records, including the contractors' daily logs, and make  
25 all such records available to OLSE. Ms. Ho testified that OLSE spent months trying to obtain  
26 complete documentation, but to no avail, and that Contractors' criticisms of the documentation

1 supporting the audit are unpersuasive and lack credibility because Contractors caused any such  
2 information deficit. The Hearing Officer finds Ms. Ho's testimony described in the sections  
3 above to be credible.

4 **Testimony of Daniel Tan**

5 • Daniel Tan, San Francisco Public Works' Resident Engineer for the Project, has  
6 worked for Public Works for over five years as an Assistant Engineer and is familiar with the  
7 California Department of Industrial Relations' scope of work for electricians, plumbers and  
8 laborers. Mr. Tan testified on, among other things, his observations of TBE's work on the  
9 Project. Mr. Tan testified that his responsibilities on the Project included writing daily  
10 construction progress reports, reviewing payment applications and change orders, and acting as  
11 the City's Representative between Contractors and the Design team under the Project Manager.  
12 He testified that he visited the job sites regularly and directly observed TBE performing work.  
13 He would also take pictures of work he observed. He further testified that in filling out the  
14 Public Works Inspector Reports, to the extent such information was available, he would speak  
15 with the workers on site, review the information on sign-in sheets and rely on his own  
16 observations. Where he did not observe work directly, he would speak with Wickman's  
17 superintendent, Hugo Gomez.

18 • Mr. Tan testified that he had reviewed from the perspective of an engineer the  
19 DIR's scope of work for Electrician and had an understanding of the meaning of that scope  
20 based on the DIR's plain language and his experience. He stated that he observed TBE  
21 performing work falling within the Electrician scope.

22 • Mr. Tan testified that he had reviewed from the perspective of an engineer the  
23 DIR's scope of work for Plumber and had an understanding of the meaning of that scope based  
24 on DIR's plain language and his experience. He stated that he observed TBE performing work  
25 falling within the Plumber scope.

1           •       Mr. Tan testified that he had reviewed from the perspective of an engineer the  
2 DIR's scope of work for Laborer and had an understanding of the meaning of that scope based  
3 on DIR's plain language and his experience. He testified that his understanding, based on his  
4 observations and his understanding of the contract documents, is that TBE's subcontract did not  
5 contain a scope of work falling within the DIR's Laborer scope.

6           •       Mr. Tan testified that based on his training and experience, he had knowledge of  
7 construction (including mechanical, electrical and plumbing) materials and activities associated  
8 with installing or removing those materials. Mr. Tan testified that he was not lacking in  
9 background knowledge of those materials or activities, but he would ask questions about the  
10 work employees were performing if he did not know simply based on his observations. He  
11 observed TBE's crew working together as a group on tasks that were related to overall goals  
12 within the scope of TBE's work. Tan testified that he observed two or more TBE workers  
13 handling, installing, or moving electrical equipment, and he believes such work falls within the  
14 DIR's electrician scope. He testified that the TBE crews did not have dedicated laborers. He  
15 observed some work, such as clean-up work, that a laborer might perform, but that such work  
16 was performed on behalf of TBE's team, and such work was incidental to the electrical or  
17 steamfitting work. Thus, he did not view the work those individuals were performing as  
18 laborer's work or laborer's scope.

19           •       Mr. Tan supported his testimony with photographs he personally took of TBE  
20 employees performing work. He testified that the photographs were not staged. He testified  
21 that, as a whole, the photographs show that multiple TBE workers were performing electrician  
22 or plumber scopes of work, and that Alex Jones was not the only TBE employee performing  
23 such work. Mr. Tan's examples included, but were not limited to, the following:

24           •       Mr. Tan presented a February 12, 2019, photograph of work at Tenderloin  
25 Station. He testified that it depicts two TBE employees installing wiring and disconnect switch  
26 for a fan coil unit in the report writing room. (OLSE Exhibit: Photos, Tenderloin Station, photo

1 dated “Feb 12, 2019 at 8:53:31 AM”.) Mr. Tan testified that he believes such work falls within  
2 the electrician’s scope.

3 • Mr. Tan presented an August 5, 2019, photograph of work at Tenderloin Station.  
4 He testified that it depicts two TBE employees installing the fuel line in the basement. (OLSE  
5 Exhibit: Photos, Tenderloin, photo dated “Aug 5, 2019 at 10:47:50 AM”.) Mr. Tan testified that  
6 he believes such work falls within the steamfitter’s scope.

7 • Mr. Tan presented an August 6, 2019, photograph of work at Tenderloin Station.  
8 He testified that it depicts two TBE employees other than Mr. Jones pulling wires for panel  
9 P3A. (OLSE Exhibit: Photos, Tenderloin, photo dated “Aug 6, 2019 at 1:16:58 PM”.) Mr. Tan  
10 testified that he believes such work falls within the electrician’s scope.

11 • Mr. Tan presented an August 12, 2019, photograph of work at Tenderloin  
12 Station. He testified that it depicts a TBE employee other than Mr. Jones installing the  
13 anchorage for the generator vent pipes supports. (OLSE Exhibit: Photos, Tenderloin, photo  
14 dated “Aug 12 at 12:42:58 PM”.) Mr. Tan testified that he believes this work falls within the  
15 steamfitter’s scope.

16 • Mr. Tan presented an August 21, 2019, photograph of work at Tenderloin  
17 Station. He testified that it shows Daniel Robinson relocating and reinstalling existing light  
18 fixtures in the generator room. (OLSE Exhibit: Photos, Tenderloin, photo dated “Aug 21, 2019  
19 at 9:48:51 AM”.) Mr. Tan testified that he believes this work falls within the electrician’s  
20 scope.

21 • Mr. Tan presented an August 27, 2019, photograph of work at Tenderloin  
22 Station. He testified that it depicts Alex Jones, two other TBE employees, and another person  
23 for a different company, moving the new generator into the station. (OLSE Exhibit: Photos,  
24 Tenderloin, photo dated “Aug 25, 2019 at 12:40:30 PM”.) Mr. Tan testified that he believes  
25 this work falls within the electrician’s scope.



1 • Mr. Tan presented an August 27, 2019, photograph of work at Bayview Station.  
2 He testified that it depicts TBE employees other than Mr. Jones moving the generator onto the  
3 site. (OLSE Exhibit: Photos, Bayview, photo dated “Aug 27, 2019 at 10:16:39 AM”.) Mr. Tan  
4 testified that he believes this work falls within the electrician’s scope.

5 • Mr. Tan presented a December 6, 2019, photograph of work at Bayview Station.  
6 He testified that it depicts Alex Jones and one other TBE employee installing unistrut supports  
7 for generator day tank exhaust lines. (OLSE Exhibit: Photos, Bayview, photo dated “Dec 6,  
8 2019 at 9:43;41 AM”.) Mr. Tan testified that he believes this work falls within the steamfitter’s  
9 scope.

10 • Mr. Tan presented a December 11, 2019, photograph of work at Bayview  
11 Station. He testified that the photograph depicts a TBE employee other than Mr. Jones putting  
12 together the generator fuel lines, either cleaning out a weld or preparing to weld. (OLSE  
13 Exhibit: Photos, Bayview, photo dated “Dec 11, 2019 at 11:47:51 AM”.) Mr. Tan testified that  
14 he believes this work falls within the steamfitter’s scope. The Hearing Officer finds that Mr.  
15 Tan’s testimony described in the sections above is credible. There are many other photographs  
16 in the record that show TBE employees other than Mr. Jones performing similar (i.e., electrical  
17 or plumbing) work.

### 18 **CONCLUSIONS OF LAW**

19 1. Whether prevailing wage requirements apply to the subject Project is not in  
20 dispute. In this case, under Administrative Code 6.22(e)(8)(c)(vi), “Appellant has the burden of  
21 proving by a preponderance of the evidence that the basis for the Certification of Forfeiture or  
22 Determination of Violation is incorrect, including any back wage and penalty assessments that  
23 are at issue in the appeal.” Towards that end, Appellants would need to show that the OLSE  
24 was in error in determining that: (1) TBE failed to report hours for TBE’s workers in the CPRs;  
25 and (2) TBE misclassified its workers for prevailing wage purposes. Based on all the evidence  
26 in the administrative record, including the testimony of the witnesses, the relevant contract

1 documents, the Public Works Inspection Reports, the Wickman daily reports, the Project sign-in  
2 sheets, and the relevant DIR scopes of work, the undersigned Hearing Officer concludes that the  
3 Appellants have failed to carry their burden of proving by a preponderance of the evidence that  
4 the basis of OLSE's Certification of Forfeiture is incorrect.

5         2.       Neither Appellant has provided compelling evidence that casts doubt on OLSE's  
6 conclusions that TBE underreported worker hours on CPRs and misclassified workers as  
7 laborers. Contractors spent most of their time at hearing attempting to show minor errors in  
8 OLSE's audit with little success. In fact, neither Contractor introduced any evidence at hearing  
9 supporting their positions that TBE properly paid and classified its employees. (Appellant  
10 Wickman attempted to attach and introduce into the record Exhibits A-D as attachments to its  
11 Post-Hearing Brief. Counsel for OLSE objected to the introduction of these attachments on the  
12 grounds that they violated the Hearing Officer's page limit for closing briefs, as well as the  
13 Hearing Officer' admonishment that closing arguments are to be limited to documents already  
14 in the record. The Hearing Officer sustains OLSE's objection on both grounds and hereby  
15 strikes Exhibits A-D.)

16         3.       In addition, the evidence in the record demonstrates that the Contractors violated  
17 Administrative Code section 6.22(e)(6). That provision states:

18                 Every Public Works contract or subcontract for any Public Work or  
19                 Improvement shall contain a provision that the Contractor shall keep, or  
20                 cause to be kept, for a period of four years from the date of substantial  
21                 completion of a public work, payrolls and basic records including time  
22                 cards, trust fund forms, apprenticeship agreements, accounting ledgers, tax  
23                 forms and superintendent and foreman daily logs for all trades workers  
24                 performing work at or for a City Public Work or Improvement.  
25                 Every contractor who shall undertake the performance of any part of a  
26                 Public Work or Improvement shall keep a like record of each person  
                    engaged in the execution of the subcontract.

...

The Contractor shall be responsible for the submission of payroll records of its subcontractors. All certified payroll records shall be accompanied by at statement of compliance, signed by the Contractor indicating that the payroll records are correct and complete, that the wage rates contained therein are not less than those determined by the Board of Supervisors and

1 that the classification set forth for each employee conform with the work  
2 performed.

3 All such records as described in this section shall at all times be open to  
4 inspection and examination of the duly authorized officers and agents of  
5 the City, including representatives of the Office of Labor Standards  
6 Enforcement.

7 Emails such as those found in OLSE Exhibit 26 & 33, along with the testimony of Ms. Liu,  
8 demonstrate that TBE's refusal to produce daily logs to OLSE violated section 6.22(e)(6) and  
9 TBE's obligation to keep and produce basic records demonstrating its compliance with  
10 prevailing wage requirements. Indeed, Mr. Jones admitted that he did not always keep such  
11 records.

12 4. Appellants failed to establish that OLSE was incorrect in concluding that TBE  
13 improperly paid its workers as laborers and they failed to carry their burden of proving by a  
14 preponderance of the evidence that OLSE's classification of TBE's workers as Electrician or  
15 Plumber was incorrect. TBE argued that Alex Jones was the only TBE employee who  
16 performed work falling within the Electrician scope; however, Wickman contradicted TBE's  
17 argument, instead contending that Kevin Robinson also performed Electrical scope and that  
18 "TBE typically provided a four person crew to the Project. One of those was Mr. Jones. One  
19 other person would perform electrical work, such as installing conduit and pulling cable."  
20 (Wickman Pre-Hearing Statement at 2-3.) Neither Contractor provided persuasive  
21 documentation or witness testimony supporting their arguments on this matter or demonstrating  
22 that any of TBE's workers legitimately performed laborer's scope of work or worked as  
23 dedicated laborers. On the other hand, OLSE provided compelling documents and witness  
24 testimony demonstrating that the work TBE performed fell within the DIR Electrician and  
25 Plumber scopes of work. Among other evidence, Daniel Tan testified to this effect, stating  
26 based on his own observations that TBE's crews did not include dedicated laborers. He also  
provided compelling photographic evidence that multiple TBE employees other than Alex Jones  
or Kevin Robinson performed work falling within the DIR scopes for Electrician or Plumber.

1           5.       Wickman argues that TBE’s workers performed demolition work, and that such  
2 work is properly classified as laborer’s work, not electrical. Wickman argued that once the  
3 power has been disconnected from an electrical component, it may safely be removed from the  
4 premises by non-electricians. This argument is not support in the law. The DIR’s scope of  
5 work for Electrician states that “[e]lectrical work as covered by this Agreement shall include the  
6 handling, installing, or moving of all related materials and equipment from the first point of  
7 delivery at the jobsite through the final installation, **and the dismantling and removing of**  
8 **electrical material from the jobsite ...**” The demolition work that TBE’s crews performed on  
9 the Project involved dismantling and removing electrical components and material. The DIR’s  
10 Electrician scope of work covers this type of demolition.

11           6.       Wickman argues that sign-in sheets and Wickman daily reports noted that TBE’s  
12 workers were electrical, but that this did not mean the workers should be classified as  
13 electricians for prevailing wage purposes. Hugo Gomez provided credible testimony supporting  
14 this argument. However, even accepting this argument as true, it does not undermine the basis  
15 of OLSE’s Certification of Forfeiture. While OLSE’s investigation relied on the sign-in sheets  
16 and available daily reports, its conclusion that TBE misclassified its workers was not based  
17 solely or primarily on the designation of the workers on sign-in sheets and daily reports.  
18 Rather, OLSE introduced and relied on evidence that describes TBE’s scope of work and the  
19 work TBE’s employees performed. Such evidence demonstrates that TBE’s subcontract did not  
20 include laborer scopes of work and that none of the work performed by TBE’s employees was  
21 properly classified as laborer’s work. As discussed above, OLSE presented evidence that  
22 Appellants’ payment of over \$100,000 to Local 6 likewise supports its conclusions.

23           7.       In addition, OLSE gave Mr. Jones many opportunities to supply documentary  
24 evidence showing that he properly classified and paid his employees. Such records included  
25 copies of original time cards, copies of worker paystubs and cancelled payroll checks,  
26 documents reflecting payment of benefits, and contractor daily reports reflecting the work

1 performed – documents that the San Francisco Administrative Code required him to maintain  
2 and produce to OLSE upon request. OLSE Investigator Anna Liu told Mr. Jones on many  
3 occasions that upon such a showing, she would revise the Audit accordingly. The evidence  
4 more than demonstrates a willingness on behalf of OLSE to work with Mr. Jones to secure  
5 documents Mr. Jones claimed would have proven that he appropriately classified and paid  
6 TBE’s employees. The following pattern emerged: Mr. Jones would agree to produce such  
7 records by a certain date, then fail to produce any documents by the date, then offer another  
8 deadline to comply with OLSE’s request for information, then miss the *new* deadline, etc. This  
9 pattern was repeated multiple times, until Mr. Jones finally wrote to OLSE to say that he would  
10 not be producing any further documentation – again, documentation that it was required to keep  
11 and produce and that could have bolstered his case. Given TBE’s pattern of promising  
12 information on these points and ultimately failing to submit any such evidence, Appellants  
13 cannot be heard to attack OLSE’s Audit for initially reviewing and relying on sign-in sheets  
14 listing TBE employees as “electricians.” As discussed herein, the evidence showing that TBE  
15 misclassified and underpaid TBE employees goes far beyond time-sheet entries.

16 8. Appellants likewise failed to carry their burden of proving by a preponderance of  
17 the evidence that OLSE’s conclusion that TBE underreported hours to the CPRs was incorrect.  
18 Neither TBE nor Wickman provided persuasive evidence that TBE complied with its  
19 obligations to properly report worker hours on TBE’s CPRs. TBE and Wickman questioned the  
20 reliability of the documents OLSE reviewed as part of its audit, but this is insufficient to carry  
21 Appellants’ burden of proof on this assertion as set forth in the San Francisco Administrative  
22 Code section 6.22(e)(8)(C)(vi);

23 9. Importantly, TBE refused to produce daily logs to OLSE, and Mr. Jones  
24 admitted that he failed to keep such documents. This is a violation of Administrative Code  
25 section 6.22(e)(6). It is at least possible that such records, including original time cards, pay  
26 stubs and cancelled checks, could have provided persuasive evidence in support of TBE’s

1 position; however, here, such documents were not made available to OLSE, notwithstanding  
2 TBE's obligation to keep, preserve and produce such records. The statutory framework  
3 surrounding San Francisco Public Works projects and the payment of prevailing wages requires  
4 more of Appellants than to merely question OLSE's investigatory methods and argue that  
5 certain information is missing. Such arguments are disingenuous when information is missing  
6 by virtue of one of the Appellant's failure to maintain and produce such information. (*See*  
7 *generally Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 ("The United States Supreme  
8 Court decided in *Anderson v. Mt. Clemens Pottery Co.*, [328 U.S. 680 (1946)] that in cases such  
9 as the present one, where the employer has failed to keep records required by statute, the  
10 consequences for such failure should fall on the employer, not the employee.") Moreover,  
11 OLSE provided compelling evidence that TBE failed to report its hours properly in its CPRs. In  
12 particular, the testimony of Anna Liu provided multiple clear examples of days on which the  
13 sign-in sheets, Public Works Inspector Reports, and/or Wickman daily logs recorded TBE work  
14 that TBE did not include in its CPRs. This evidence is unrebutted in the administrative record.

15 10. TBE has argued that OLSE's investigation here violated applicable procedural  
16 requirements. However, TBE has failed to provide evidence of any legal requirement that  
17 OLSE has violated. During the hearing, Patrick Mulligan, Robin Ho, and Anna Liu all credibly  
18 described OLSE's procedures for investigating a complaint and testified that OLSE has  
19 complied with all applicable procedural requirements.

20 11. Mr. Jones argues that he was unaware of the significance of the Project sign-in  
21 sheets because he failed to attend a preconstruction informational meeting for the Project. This  
22 argument fails. It is unclear why TBE did not attend the preconstruction meeting for this  
23 Project; however, it was Wickman's responsibility as the prime contractor to include those City  
24 requirements in the subcontract (*see, e.g.,* Admin. Code § 6.22(e)(5)), and all subcontractors are  
25 bound by applicable prevailing wage statutory requirements, regardless of whether they  
26

1 attended the preconstruction meeting. Prevailing wage requirements are statutory, and  
2 compliance is not optional. (*See Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 988.)

3       12. In its Post-Hearing Brief, Wickman argued for the first time that the penalty  
4 portion of the OLSE’s Certification of Forfeiture must be reduced by \$9,350.00 on the theory  
5 that California Code of Civil Procedure section 340(b) prevents the OLSE from assessing  
6 penalties for conduct occurring more than one year prior to the filing of the Certification of  
7 Forfeiture. (That section provides for a one-year statute of limitations for, “An action upon a  
8 statute for a forfeiture or penalty to the people of this state.”) The Hearing Officer finds  
9 Wickman’s argument procedurally inappropriate as it was not raised during the hearing or in the  
10 pre-hearing briefing, and OLSE had no opportunity to respond to it. Nonetheless, the Hearing  
11 Officer finds the argument lacking on the merits. As mentioned above, the project is not  
12 complete. Whichever statute of limitations applies to the City’s claim for penalties would not  
13 begin to run until completion of the project and acceptance by the City, at the earliest. The City  
14 became aware of the alleged failure to comply with the prevailing wage requirements of the S.F.  
15 Administrative Code and the contract in January 2020. Under Wickman’s theory, the City  
16 would have had to immediately issue a certification of forfeiture to recover penalties associated  
17 with work occurring between January 2019 and January 2020, and the City would be unable to  
18 ever assess penalties associated with work prior to January 2019. This cannot be correct. The  
19 City’s claims with respect to the performance of the work by the Contractors would not accrue  
20 until the project is complete at the earliest, and, thus, OLSE properly assessed penalties for pre-  
21 July 2019 work.

22       13. Finally, during the second day of the hearing, OLSE acknowledged certain  
23 clerical errors included in Audit (iterations 4) and the Certification of Forfeiture, and, as  
24 indicated in its Post-Hearing Brief, a downward adjustment of \$2,586.49 to the Certification of  
25 Forfeiture is warranted. The record indicates that these issues were clerical errors, and as such,  
26 there is no evidence that this downward adjustment calls into question the basis for OLSE’s

1 Certification of Forfeiture, including the OLSE's conclusions that TBE inaccurately reported  
2 hours to the CPRs or improperly classified its workers as laborers. That said, the downward  
3 adjustment will be incorporated into the Determination section below.

4 **DETERMINATION**

5 Wherefore all the evidence having been heard and considered, it is the determination of  
6 this Hearing Officer that:

7 1. The Contractors have failed to prove by a preponderance of the evidence that the  
8 basis for the Certification of Forfeiture is incorrect.

9 2. OLSE's Certification of Forfeiture is modified to reduce it by \$2,586.49 to  
10 account for OLSE's acknowledged clerical errors. With this adjustment, the Hearing Officer  
11 affirms the Certification of Forfeiture. Pursuant to San Francisco Administrative Code section  
12 6.22(e)(8), Wickman and TBE shall jointly and severally forfeit to the City and County of San  
13 Francisco the amount of \$179,022.71, which consists of:

- 14 • \$128,227.96 in back wages owed to TBE's workers;
- 15 • \$22,194.75 in back wages/benefits owed to IBEW, Local 6; and
- 16 • \$28,600.00 in penalties.

17 Such funds shall be distributed as appropriate and required by applicable law.

18 3. This decision is final. Pursuant to San Francisco Administrative Code section  
19 6.22(e)(8)(C)(viii), a party may appeal a final determination under subsection 6.22(e)(8) only by  
20 filing in the San Francisco Superior Court a petition for a writ of mandate under California  
21 Code of Civil Procedure, Section 1084, *et seq.*, as applicable and as may be amended from time  
22 to time.

23 Dated: May 12, 2021

24 

25 BY: \_\_\_\_\_

26 Martin Gran, Esq.  
Hearing Officer