

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

In the Matter of:

PACIFIC ENGINEERING BUILDERS,  
INC.,

Appellant,

Appealing the Assessment of Forfeiture  
By the Department of Public Works and  
the Office of Labor Standards  
Enforcement

Hearings:

January 28, 2004 and February 20, 2004

**DECISION**

This case is a hearing regarding an assessment of forfeiture, including penalties, by the San Francisco Office of Labor Standards Enforcement (the "OLSE") and the Department of Public Works ("DPW") against Pacific Engineering Builders, Inc. ("PEBI"), with respect to payment of prevailing wages for work on San Francisco Department of Public Works Contract No. 6065A(R) (the "Contract") for the public work known as Zoo Street (the "Project"). OLSE/DPW assessed the forfeiture and penalties for misclassification of Scrappers, misclassification of Group 4 Laborers, failure to pay overtime for Saturday work, and failure to make mandatory contributions to the Training Fund, as required by the San Francisco Charter section A7.204, the San Francisco Administrative Code section 6.22(E), and the Project contract. PEBI requested a hearing under Administrative Code section 6.22(E)(8)(a).

On January 28, 2004 and February 20, 2004, City Administrator Bill Lee heard testimony and argument, and received documentary evidence concerning this matter. Witnesses called by the parties testified under oath. Kennedy Chan, PEBI President, appeared on behalf of appellant PEBI. Deputy City Attorney Sheryl Bregman appeared as attorney for DPW and OLSE. At the hearing, the parties had a full opportunity to present relevant evidence and argument. The parties also submitted pre- and post-hearing argument. After consideration of all of the evidence and argument submitted by the parties, the Hearing Officer issues this Decision.



## Procedural Background

This matter arises out of PEBI's performance under San Francisco Department of Public Works Contract No. 6065A(R) (the "Contract") for the public work known as Zoo Street (the "Project"). The Contract requires that PEBI pay its workers on the Project the highest general prevailing wages for the types of work performed, in accordance with local and state law.

During the course of construction, the OLSE began its review of the wages PEBI paid its workers. On October 22, 2001, the OLSE was on site at the Project and advised the PEBI superintendent that the "scrapper" classification would not be allowed on non-drywall work. On November 6, 2001, OLSE was on site and advised PEBI that the sign-in sheets were inadequate because they did not show the workers' start times and quitting times. On January 12, 2002, OLSE was on site and observed Saturday work; the DPW inspector informed OLSE that PEBI workers were often working seven days per week plus holidays.

OLSE and PEBI corresponded and communicated a number of times over the course of 2002 and the beginning of 2003. The OLSE issued to PEBI a final assessment on June 27, 2003. The final assessment stated that PEBI may request a hearing within 15 days, and included a copy of the San Francisco Administrative Code section describing the appeal procedure. PEBI sent OLSE additional information that crossed in the mail with the June 27, 2003 assessment. On July 23, 2003, the OLSE and PEBI met to review the June 27 assessment in light of the additional material supplied by PEBI. On July 25, 2003, PEBI advised the OLSE that it intended to resolve the issues without a hearing before the City Administrator. On August 4, 2003, the OLSE revised its assessment. PEBI requested a hearing on December 8, 2003.

In the June 27, 2003 assessment, as revised on August 4, 2003, the OLSE determined that PEBI misclassified certain workers as "scrapers"; misclassified certain workers as Group 4 Laborers; failed to pay its workers overtime; and failed to pay training contributions. The total forfeiture was \$52,330.80, consisting of backwages in the amount of \$19,873.02, training fund contributions in the amount of \$957.78, and penalties in the amount of \$31,500.

On January 28 and February 20, 2004, the OLSE, the Department of Public Works, and PEBI appeared before the Hearing Officer for this hearing. Based on new information provided



1 classification and "the classification set forth for each employee [must] conform with the work  
2 performed." (Admin. Code §6.22(E)(6) [emphasis added].)

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

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

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

(DLSE Public Works Manual, pp. 55-56.) The United States Department of Labor has likewise  
determined that, ". . . If a construction contractor who is not bound by classifications of work at  
which the majority of employees in the area are working is free to classify or reclassify, grade or

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

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

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

16 (Admin. Code, §6.22(E)(8)(a) [emphasis added].) A contractor forfeits underpaid wages and  
17 associated penalties effective the moment of the violation, irrespective of when the violation is  
18 discovered. (*East Quincy Services District v. General Accident Insurance Company of America*  
19 (2001) 88 Cal.App.4<sup>th</sup> 239, 245, quoting *J & K Painting Co. v. Bradshaw* (1996) 45 Cal.App.4<sup>th</sup>  
20 1394, 1404-1405.) The contracting department and the Office of Labor Standards Enforcement  
21 are charged with enforcing the prevailing wage requirements. (Admin. Code § 6.24(A).)

22 A contractor who disagrees with an assessment by the Office of Labor Standards  
23 Enforcement may request, within 15 days, a hearing before the City Administrator. (Admin.  
24 Code § 6.22(E)(8)(c).) The decision of the City Administrator shall be final. (Admin. Code §  
25 6.22(E)(8)(c).)

#### 26 **Factual Findings**

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

### Misclassification of Scrappers

Based on the scopes of work published by the California Department of Industrial Relations (the "DIR"), the OLSE determined that PEBI misclassified certain workers as "stocker scrappers". The OLSE determined the proper classification for such workers was Laborer: Group 3. OLSE assessed the difference between the rate paid for stocker scrapper and Laborer Group 3. PEBI contends that stocker scrapper was the correct classification for the work performed.

The classification of "Stocker Scrapper" is included in the DIR prevailing wage determination for the craft of Drywall Installer/Lather. The scope of work published by the DIR describes the work performed by the stocker/scrapper as "stocking and clean-up work associated with metal studs and gypsum drywall installation." The building and installation of wood materials associated with concrete formwork falls within the DIR scope of work for the Carpenter craft, with associated "wrecking, stripping, dismantling, and handling" of concrete forms performed by the Laborer craft.

OLSE and PEBI agree that the PEBI employees classified as "scrapper" on the Project performed stocking and cleanup of concrete forms. PEBI used a subcontractor to perform all of the drywall-lather work for the Project.

PEBI contends that the only difference between the work performed by workers it classified as "scrappers" and the DIR scope of work for the "scrapper" craft is that "PEBI's stocking and cleanup work is associated with wood studs instead of metal studs." PEBI argues that whether a worker handled wood or metal should make no difference in determining the proper classification for the work.

The type of material handled by the stocker scrapper, however, is an integral part of the classification. The DIR scope of work for Drywall Installer/Lather refers only to metal studs; there is no reference to any type of wood material. The handling and installation of wood materials associated with concrete formwork is listed in the DIR scope of work for the craft of Carpenter. The two types of materials are not interchangeable—unlike metal studs, the wood used for formwork is temporary and never becomes part of the concrete wall itself. The type of

1 work performed by employees of PEBI, who PEBI classified as stocker scrapper, is contained in  
2 the scope of work for the craft of Laborer. The DIR scope of work for Laborer includes  
3 "wrecking, stripping, dismantling, and handling concrete forms."

4 Accordingly, the Hearing Officer finds that PEBI misclassified workers as stocker  
5 scrappers; workers who performed stocking and clean-up of concrete forms must be paid at the  
6 Laborer: Group 3 rate.

#### 7 Misclassification of Group 4 Laborers

8 The OLSE determined that PEBI misclassified certain workers as Laborer: Group 4 (final  
9 clean-up labor), when the proper classification for the type of work they performed was Laborer:  
10 Group 3 (construction labor). The OLSE reached this determination based on the Inspector  
11 Reports and the DIR scope of work for Laborer. OLSE assessed the difference between the rate  
12 paid for Laborer Group 4 and Laborer Group 3.<sup>1</sup> PEBI contends that Laborer Group 4 was the  
13 correct classification for the work performed.

14 The scope of work published by the DIR describes the work performed by Laborer Group  
15 3 as that of general construction laborers. The Laborer Group 3 classification also includes  
16 gardener, horticultural and landscape laborer. The DIR scope of work for Laborer Group 4 is  
17 limited to "final clean up work of debris, grounds and building," and, for new construction, a  
18 limited type of "landscape" work. The landscape work allowed within the Group 4 Laborer craft  
19 on new construction is limited to service landscape work (such as gardener, horticulture,  
20 mowing, trimming, replanting, and watering) *during the plant establishment period.*

21 PEBI paid none of its workers the Group 3 rate in the first several months of the Project.  
22 The DPW Resident Engineer's daily inspection reports for the days that the Group 4 Laborers  
23 worked, from August 27, 2001 to November 3, 2001, show that during this period, PEBI workers  
24

25 <sup>1</sup> The OLSE allowed PEBI to use the Laborer: Group 4 classification for three workers on  
26 September 18, 2001, a day that the Inspector reported that PEBI performed, "cleanup at the  
27 storage area in the parking lot." The OLSE also allowed the use of the Group 4 Laborer  
28 classification, for the period October 17 through 19, 2001, when employees were screening sand  
from the concrete rubble. The OLSE determined that such work, on this project, met the criteria  
of the "Material Cleaner" in the Group 4 Laborer classification.



1 performed various tasks including: window protection work; repairing an underground water line  
2 break; cleanup of storage area on Fleischaker lot; removing, moving, and re-erecting sound  
3 barriers (4 days); fabricating framework for translucent panels at field trailers; installing drain  
4 lines; moving materials in the parking lot; potholing to expose utilities (11 days); setting  
5 boundary barriers for the parking lot; pouring concrete; installing poles for temporary electrical  
6 lines; excavation for footings, pads, water lines / removing spoils (13 days); set-up of storage  
7 container area; cleanup at storage area; removing trees and fence posts; soil compaction (4 days);  
8 building up soil elevations; setting sonotubes (2 days); and backfilling trenches (2 days).

9 PEBI states that "the workers that were classified as the Group 4 Laborers for the first  
10 few months were assigned to set up, clean up the office trailers and containers, and the ground  
11 trimming work for the surveyors to set staking." PEBI also contends that a portion of the  
12 disputed work was "cleaning and grubbing" work that is closest to the "trimming" work allowed  
13 for the Group 4 Service Landscape Laborer. The Hearing Officer is not persuaded by PEBI's  
14 arguments.

15 First, the daily inspection reports describe a variety of general construction tasks, not  
16 "final clean-up of debris, grounds, and building." The evidence shows that the work performed  
17 falls primarily within the scope of work for Laborer Group 3.

18 Second, the ground trimming work that was performed also falls within the Group 3  
19 classification. The scope of work issued by the DIR for the Laborer craft states that the type of  
20 "landscape" work performed by the Group 4 Laborer on new construction is limited to service  
21 landscape work (such as gardener, horticulture, mowing, trimming, replanting, and watering)  
22 *during the plant establishment period*. The Laborer: Group 3 classification includes gardener,  
23 horticultural and landscape laborer. The work performed by PEBI employees did not include the  
24 maintenance of plants during the plant establishment period; a subcontractor to PEBI performed  
25 that work. Testimony from the Resident Engineer and Inspector established that a PEBI  
26 employee performed the "cleaning and grubbing" rough-grade work to level an area for the  
27 surveyor's staking while using heavy machinery in the beginning of the project before there were  
28

1 any new plants. The proper classification for this type of "ground trimming" work is Laborer:  
2 Group 3.

3 Accordingly, the Hearing Officer finds that PEBI misclassified workers as Laborer:  
4 Group 4; workers who performed construction labor tasks not associated with final clean-up  
5 must be paid at the Laborer: Group 3 rate.

### 6 Overtime

7 The OLSE determined that PEBI failed to pay its workers required overtime for 23  
8 Saturdays worked.<sup>2</sup> The OLSE reached this determination based on the certified payroll records.  
9 OLSE assessed the difference between the straight-time rate that PEBI paid and the overtime  
10 rate. PEBI contends that it was excused from paying overtime for Saturday work.

11 PEBI's certified payroll records ("CPRs") show that its employees worked 24 Saturdays,  
12 beginning the first week of the project in July 2001, without payment of overtime. PEBI's CPRs  
13 also show that the project was never shut down; work was performed every day, Monday  
14 through Friday, during the normal work week preceding each of the Saturdays in question.

15 PEBI contends that overtime pay was excused because of inclement weather, lack of  
16 materials, and design changes and other unexpected delays on the jobsite. The DIR wage  
17 determination for Laborers provides that "Saturdays in the same work week may be worked at  
18 straight-time if the job is shut down during the normal work week due to inclement weather,  
19 major mechanical breakdown or lack of materials beyond the control of the employer." The  
20 wage determination for Carpenters provides: "Saturdays in the same work week may be worked  
21 at straight-time if the job is shut down during the normal work week due to inclement weather or  
22 major mechanical breakdown."

23 PEBI contends that underground materials and lumber did not arrive as scheduled and  
24 that concrete was not available as needed. In a letter from PEBI dated June 24, 2003, PEBI also  
25 claims that special order items had long lead times. But PEBI provides no evidentiary basis to

26 <sup>2</sup> Initially, OLSE assessed PEBI for 24 Saturdays of unpaid overtime. As described  
27 below, OLSE revised that assessment downward to 23 Saturdays based on new information  
28 provided by PEBI at the hearing.

1 establish that materials required for the Project involved unusual lead times. Nor did PEBI  
2 establish that availability of materials was outside its control. Rather, it was PEBI who had full  
3 control of ordering the necessary materials and scheduling appropriate delivery in accordance  
4 with its project schedule. Moreover, PEBI did not provide any evidence that the project was shut  
5 down due to a lack of materials beyond the control of the employer. The Resident Engineer  
6 testified that the Project was never shut down due to a lack of materials. PEBI's payroll records  
7 corroborate the Engineer's testimony. The CPR's show that the Project was not shut down for  
8 any day in the regular work week preceding any of the Saturdays that were paid at straight-time.

9 PEBI claims that inclement weather interfered with Project work on three days – August  
10 29, August 30, and September 24, 2001. Inclement weather, however, did not require the Project  
11 to be shut down on any of these dates. The testimony of the Resident Engineer confirmed that  
12 the Project was never shut down, for inclement weather or any other reason, in August or  
13 September of 2001. The daily inspection reports detail work performed by PEBI on all three  
14 dates. PEBI's certified payroll records confirm that workers worked a regular work day on each  
15 of these dates. Moreover, the weather reports from the website Wunderground.com further  
16 confirm that there was no rain during the regular work day on any of the three dates claimed by  
17 PEBI.<sup>3</sup>

18 Finally, PEBI complains that design changes and other unexpected problems at the  
19 jobsite caused delays. But PEBI presents no evidence that such problems caused the Project to  
20 be shut down. Nor does PEBI offer any evidence that these types of problems fall within the  
21 narrow exception to the requirement to pay overtime compensation that is contained in the DIR  
22 wage determination.

23 Accordingly, the Hearing Officer finds that PEBI failed to pay overtime as required for  
24 23 Saturdays during the course of the Project.

25  
26 <sup>3</sup> During the hearing, PEBI claimed that inclement weather shut the Project down on  
27 November 12, 2001, and that therefore the following Saturday was properly worked on straight-  
28 time. By letter dated February 19, 2004, the OLSE acknowledged the November 12, 2001,  
inclement weather date and revised its final determination to account for that date.

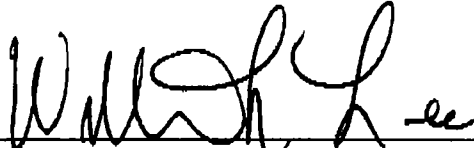
**Training Fund Contribution.**

OLSE submitted evidence that PEBI failed to make certain required contributions to the Training Fund. In its written submissions and at the hearing, PEBI contested OLSE's assessment of backwages and penalties, but did not contest OLSE's training contribution assessment or offer any evidence to dispute the appropriateness of this assessment. The Hearing Officer finds that the evidence in the record establishes that PEBI failed to make certain required contributions to the Training Fund.

**Summary of Decision**

For all of the above reasons stated above, PEBI shall forfeit to the City and County of San Francisco the amount of \$50,314.84 from its contract balance on San Francisco Department of Public Works Contract No. 6065A(R) for the public work known as Zoo Street. The OLSE shall distribute such funds in accordance with San Francisco Administrative Code section 6.22(E)(8)(d).

Dated: 1/7, 2005

  
\_\_\_\_\_  
WILLIAM L. LEE  
City Administrator

**PROOF OF SERVICE**

I, MARY GO, declare as follows:

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

On January 7, 2005, I served the attached:

**HEARING OFFICER'S DECISION**

(In the Matter of Pacific Engineering Builders, Inc. Appellant, Appealing the Assessment of Forfeiture By the Department of Public Works and the Office of Labor Standards Enforcement)

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

**Kennedy Chan**  
**Pacific Engineering Builders, Inc.**  
**1009 Terra Nova Blvd.**  
**Pacifica, CA 94044**  
  
**(650) 557-1239**

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

**(VIA FACSIMILE AND U.S. MAIL)**

**Fax: (415) 255-0733**

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

**Fax: (415) 554-6291**

and served the named document in the manner indicated below:

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

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

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

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

Executed January 7, 2005, San Francisco, California.

*Mary Go*

MARY GO

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28