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CITY AND COUNTY OF SAN FRANCISCO

ADMINISTRATIVE HEARING

IN THE MATTER OF:)	CONTRACT NO. 2752
)	"PIER 35 NORTH APRON REPAIR"
HUEY CONSTRUCTION)	
MANAGEMENT CO., INC.,)	HEARING: AUGUST 15, 2012
dba MH CONSTRUCTION)	RECORD CLOSED: SEPTEMBER 4, 2012
MANAGEMENT CO.,)	
)	
APPELLANT,)	DECISION OF HEARING OFFICER
)	
APPEALING THE ASSESSMENT OF)	
FORFEITURE BY THE OFFICE OF)	
LABOR STANDARDS ENFORCEMENT)	
(OLSE).)	

INTRODUCTION

This case involves an assessment of forfeiture, including penalties, by the San Francisco Office of Labor Standards Enforcement (OLSE) against Huey Construction Management Co. Inc., dba MH Construction Management Co. (MH Construction), for failure to pay prevailing wages for work on San Francisco Contract No. 2752 (Contract), commonly known as the "Pier 35 North Apron Repair Project." The scope of the work for this project involved the demolition and removal of existing asphalt paving, wood framed deck and rail assemblies along the North Apron on Pier 35, and the construction of a new reinforced concrete slab.

OLSE assessed the forfeiture and penalties by Notification of Forfeiture dated May 8, 2012 and by Certification of Forfeiture also dated May 8, 2012. (Hearing Officer Exhibits 1-2) OLSE made the assessment pursuant to San Francisco Charter Section A7.204, San Francisco Administrative Code Section 6.22E and the project contract, and based its assessment on the misclassification and payment of workers as Laborers instead of Pile Drivers, the resulting underpayment of fringe benefits and apprenticeship training fund contributions for those workers,

1 and the underpayment of wages to two employees in the Teamster and Operating Engineers
2 classification.

3 By letter to City Controller dated May 22, 2012, MH Construction requested a hearing on
4 the challenged assessment and penalties pursuant to San Francisco Administrative Code Section
5 6.22(E)(8)(c). In compliance with San Francisco Administrative Code Section 6.22(E)(8)(c)(ii)
6 and (iii), representatives of OLSE and MH Construction met and conferred on June 20, 2012 in
7 an attempt to resolve MH's challenge to the OLSE's determination of forfeiture and penalties. By
8 letter dated June 22, 2012, the OLSE sent a Revised Audit Letter to MH Construction decreasing
9 the amount of funds to be withheld from the contract payment from \$86,919.57 to \$76,732.24. By
10 letter to the City Controller dated June 22, 2012, MH Construction renewed its request for hearing
11 on the assessment and penalties contained in the Revised Audit Letter. By letter dated July 12,
12 2012, the City Controller appointed the undersigned, Jeffrey Eckber, as Hearing Officer in this
13 matter. (Hearing Officer Exhibits 3-8)

14 By letter dated July 19, 2012, the undersigned Hearing Officer informed the parties that
15 the hearing in this matter would be held on August 15, 2012, and that MH Construction and OLSE
16 should submit a Pre-Hearing Statement by noon on August 3, 2012 and August 10, 2012,
17 respectively. MH Construction and OLSE thereafter timely filed their Pre-Hearing Statements.
18 Attached to its Pre-Hearing Statement, OLSE submitted a second revised audit dated August 10,
19 2012, in which it reduced its assessment of back wages and penalties from a total of \$76,732.24
20 to \$62,009.39. (OLSE Pre-Hearing Statement, Footnote 1, page 2:23-25; OLSE Exhibit 14, page
21 1)
22

23 A hearing in this matter was held on August 15, 2012 in Room 479 in San Francisco City
24 Hall. The following people appeared: Matthew Huey, principal for appellant, MH Construction;
25 Elenita Dianela, office manager for MH Construction; Robert Trenkle and Ramon Hernandez,
26 witnesses for MH Construction; Joseph Sandoval, Deputy City Attorney for San Francisco
27 representing the OLSE; Donna Levitt, Shirley Trevino and Ardis Graham, representatives of
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1 OLSE; Joseph Roger, Yakov Okupnik, and Pat Karinen, witnesses for the OLSE; and Tim Leung,
2 observer.

3 Prior to the presentation of opening arguments and the submission of evidence, Matthew
4 Huey of MH Construction moved to postpone the hearing to allow the appellant more time to
5 review OLSE's Pre-Hearing Statement, which it received on Friday, August 10, 2012. MH
6 Construction testified that its legal counsel was unable to review the Pre-Hearing Statement until
7 Monday, August 13, 2012, and argued that appellant and its counsel therefore had inadequate
8 time to review the Pre-Hearing Statement and prepare for the hearing on Wednesday, August 15,
9 2012. OLSE opposed the motion to postpone. Joseph Sandoval, counsel for OLSE, testified that
10 he first learned of MH Construction's request for postponement on the afternoon of Tuesday,
11 August 14, 2012, and immediately called Bill Last, the attorney representing MH Construction.
12 Mr. Last told Mr. Sandoval that MH Construction had first approached him on Monday, August 13,
13 2012 to handle the case, and he was not prepared to do so on such short notice at the hearing on
14 Wednesday, August 15, 2012. Mr. Sandoval also testified that there was no new evidence or
15 argument in the OLSE Pre-Hearing Statement other than the revised audit dated August 10,
16 2012. (OLSE Exhibit 14) The Hearing Officer denied MH Construction's motion to postpone the
17 hearing.

18
19 Robert Trenkle of the International Laborer's Union then made a motion for continuance
20 because the Laborer's Union usual counsel, the Weinberg Law Firm, had a conflict. The
21 Weinberg Law Firm also represents the Carpenter's Union, which includes the Pile Driver's
22 classification of workers. Mr. Trenkle represented that upon short notice the Laborer's Union was
23 unable to obtain alternative counsel to represent its interest at the subject hearing. In addition,
24 Mr. Trenkle argued that the case was a jurisdictional dispute between the laborers' and pile
25 drivers' unions, and therefore the laborers' union had standing to make the motion to postpone
26 the hearing. Joseph Sandoval, on behalf of OLSE, opposed Mr. Trenkle's motion on the grounds
27 that Mr. Trenkle and the Laborer's Union, whether Local 261 or the International Laborer's Union,
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1 had no standing to make such a motion in this dispute since they are not a party, because the
2 motion was untimely and because there was no good cause to grant the motion. The
3 undersigned Hearing Officer agreed with the OLSE's arguments, and denied Mr. Trenkle's motion
4 for continuance.

5 OLSE then moved to exclude Mr. Trenkle as a witness because he was not disclosed as a
6 witness in MH Construction's Pre-Hearing Statement, and because any dispute between the
7 unions as to which classification of worker should be entitled to do the work is outside the scope
8 of this hearing, which OLSE argued is simply to decide the rate of pay that the contractor is
9 obligated to pay for the subject work. MH Construction opposed the OLSE's motion to exclude
10 because in its Pre-Hearing Statement it explicitly reserved the right to add witnesses to its
11 witness list, and because Mr. Trenkle's testimony was relevant to the issue of the rate of pay
12 owed for the subject work. The undersigned Hearing Officer denied the OLSE motion to exclude,
13 but stated that the OLSE would be given an opportunity to respond to Mr. Trenkle's testimony in a
14 post-hearing submission, if Mr. Trenkle's testimony involved information or documents that were
15 not contemplated within the scope of MH Construction's Pre-Hearing Statement.
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17 The hearing was thereafter conducted. At the hearing, the parties had a full opportunity to
18 present evidence and argument. Those who testified did so under oath. At the hearing, MH
19 Construction claimed that even if the Hearing Officer concludes that pile driver wages should
20 have been paid instead of laborer's wages for the demolition, drilling, epoxy and dowel work, the
21 amount of back wages and penalties owed should be \$57,228.41, and not the amount of
22 \$62,009.40 contained in the OLSE August 10, 2012 Revised Audit. (MH Construction Exhibit L,
23 page 1; OLSE Exhibit 14, page 1) MH Construction testified that the difference between the MH
24 Construction and OLSE audits was due to some mistakes in the payroll records and time sheets
25 that MH Construction had just recently identified. OLSE agreed to look at the new information
26 MH Construction presented, and meet and confer with MH Construction to see if the parties could
27 agree on a Stipulated Audit. Accordingly, at the conclusion of the hearing, the record was held
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1 open until August 29, 2012 for the parties to meet and confer and submit documentation, either
2 jointly or separately, regarding the amount of back wages, benefits and penalties owed in
3 alternative instances. That is, the parties would set forth the amount owed where the Hearing
4 Officer decides that the contractor was obligated to pay for the subject work at pile driver wages
5 and the amount owed if the hearing Officer decides the contractor was obligated to pay at the
6 lower laborer wages. The parties did not request leave to file post-hearing evidence for any other
7 purpose.

8 On September 4, 2012, OLSE submitted two revised audits for the aforementioned
9 alternatives, both dated August 30, 2012, based on the meet and confer process with MH
10 Construction. MH Construction did not submit any post hearing documents. In the interest of
11 justice and a complete record, the Hearing Officer re-opened the record to allow for the
12 consideration of the OLSE's September 4, 2012 submission. The record closed on September 4,
13 2012.

14 STATEMENT OF FACTS

15 1. On August 15, 2011, the San Francisco Port Commission (Port) awarded MH
16 Construction the contract of rebuilding the North Apron on Pier 35. (MH Construction Exhibit H,
17 Contract, page 1 of 19) The subject work involved the demolition and removal of existing asphalt
18 paving, wood framed deck and rail assemblies along the North Apron on Pier 35, and the
19 construction of a new reinforced concrete slab. The purpose of the work was to strengthen the
20 North Apron of Pier 35, so it is capable of supporting forklifts used during cruise ship operations
21 over its entire length. (MH Construction Exhibit H, page 8 of 19; MH Construction Exhibit K,
22 photos of work; OLSE pre-Hearing Statement, page 2, lines 15-17; OLSE Exhibit 8, page 8 of 19)

24 2. Joseph Roger, Structural Engineer for the Port of San Francisco, prepared the
25 structural specifications for the Pier 35 North Apron project. Mr. Roger testified that Pier 35 was
26 originally constructed in 1918 with a depressed deck on the north apron, which made it easier to
27 unload train cars that pulled onto the pier. At some point in time, when trains were no longer
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1 being used, the depressed deck area was filled in with wood framing and boards to level it with
2 the rest of the decking on the pier. More recently, the leaseholder of the pier expressed its
3 dissatisfaction with the wood decking because it was not strong enough to support larger
4 equipment needed to load or unload supplies from cruise ships. The job to remove the wood
5 decking and rail lines, and install reinforced concrete decking in its place, was therefore put out to
6 bid, and the contract was awarded to MH Construction. (MH Construction Exhibit H; OLSE Exhibit
7 8)

8 3. Article 4.02 of the Contract signed by the parties states in pertinent part (MH
9 Construction Exhibit H, page 3 of 19; OLSE Exhibit 8, page 3 of 19):

10 **Prevailing Wages.** The latest Wage Rates for Private Employment on Public Contracts
11 in the City and County of San Francisco, as determined by the San Francisco Board of
12 Supervisors and the Director of the California Department of Industrial Relations, and,
13 when federal funds are involved, the current General Wage Determination Decisions, as
14 determined by the U.S. Secretary of Labor, as same may be changed during the term of
15 this AGREEMENT, shall be included in this AGREEMENT and are hereby incorporated by
16 this reference. CONTRACTOR agrees that any person performing labor in the provision
17 of the Work shall be paid not less than the highest general prevailing rate of wages as so
18 determined.

15 Article 4.03 of the Contract states in pertinent part (MH Construction Exhibit H, page 3 of 19;
16 OLSE Exhibit 8, page 3 of 19):

17 **Penalties.** CONTRACTOR shall forfeit to the CITY back wages due plus fifty dollars
18 (\$50.00) for:

19 A. Each laborer, workman, or mechanic employed in the provision of the Work, for
20 each calendar day or portion thereof during which such laborer, workman, or
21 mechanic is not paid the highest general prevailing rate of wage for the work
22 performed

22 4. Matthew Huey, the principal and owner of MH Construction with over 20 years of
23 construction experience, testified that his firm bid the project based on its assumption that it could
24 use laborers at a laborers rate of pay for the demolition, drilling and doweling work. He further
25 testified that his project manager, David Hudson, attended the pre-bid meeting. Mr. Huey further
26 testified that it is his experience that representatives from the relevant City Departments appear
27 at the pre-bid meetings, including a representative from OLSE, and that the appropriate
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1 classifications of workers to be used on the project are often discussed. He further testified that
2 because he did not attend the meeting, he is not sure whether there was any discussion about
3 the appropriate classifications of workers to use for this project at this pre-bid meeting, but he
4 assumes that nothing was said at the meeting about the need to use pile drivers, and not
5 laborers, because Mr. Hudson would have conveyed that information to him afterwards, and did
6 not do so. Mr. Huey further testified that his firm has never used pile drivers because they have
7 not handled a project where it would be appropriate to use them. His understanding is that pile
8 drivers are only used for work related to driving piles or posts into unstable ground.

9 5. OLSE Director Donna Levitt testified that she attended the pre-bid meeting in July
10 2011, at which time she handed out a flyer informing those in attendance that any contractor
11 awarded the bid would be required to pay the correct rate of pay in accordance with "prevailing
12 wage rates for each craft, classification and type of work performed." (OLSE Exhibit 18) She did
13 not inform the contractors the rates of pay that would be required for the subject contract as that
14 is not the role of the OLSE at such a meeting, and the OLSE and the City have no obligation to
15 tell the bidding contractors what classification of workers to use in its bids. Ms. Levitt further
16 testified that an OLSE Compliance Officer attended the pre-construction meeting on October 18,
17 2011 to answer any questions that MH Construction might have at that time. After the meeting,
18 the Compliance Officer told Ms. Levitt that Matthew Huey of MH Construction asked her whether
19 he needed to pay prevailing wages for security guards hired for the job, and she answered yes.

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21 6. As part of the documentation submitted to the City by MH Construction after it was
22 awarded the contract, MH Construction submitted Office of Economic and Work Force
23 Development (OEWD) Form 1. In that form, MH Construction identified that laborers, carpenters
24 and rebar installers would be doing the work. (MH Construction Exhibit H, page 19 Of 19; MH
25 Construction Pre-Hearing Statement, page 2, Facts of the Case, para. 1) Matthew Huey, the
26 principal of MH Construction, testified that prior to submitting Form 1, he consulted with a
27 representative of the Local 261, the local laborer's union, who confirmed to him that the subject
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1 work was within the jurisdiction of Local 261's Master Labor Agreement with the Associated
2 General Contractors of California (AGC). (MH Construction Pre-Hearing Statement, page 2,
3 Facts, para. 1)

4 7. Donna Levitt credibly testified that the information in OEWD Form 1 is used to help
5 contractors comply with the City's local hire ordinance by identifying the estimated number of
6 entry level and journey level positions that may be needed to perform the work on the project.
7 (OLSE Pre-Hearing Statement, page 3, footnote 4) The form is just an estimate of workers that
8 will be needed. The contractor is not locked into the composition of the workforce as stated in
9 that form. The OEWD disseminates the information contained in Form 1 to the pre-
10 apprenticeship programs and prospective local employees, who can then approach the contractor
11 to request employment on the job. Ms. Levitt further credibly testified that the City does not use
12 OEWD Form 1 to determine whether the contractor is paying the workers the correct rate of pay
13 according to the prevailing wage standards adopted by the Board of Supervisors, as that is not
14 the purpose of the form. It is assumed that the contractor will pay the correct prevailing wages
15 per the terms of the contract.

16 8. The subject project work was performed between October 25, 2011 and March 9,
17 2012. (MH Construction Pre-Hearing Statement, Facts, page 2, para. 2) Yakov Okupnik,
18 construction inspector for the Port of San Francisco Engineering Department, testified that he
19 was the Project Inspector for the Pier 35 North Apron Project, and he prepared the Daily
20 Inspection Reports for the project. (OLSE Exhibit 10, pages 1-108) Mr. Okupnik testified that his
21 job was to make sure the construction was completed in conformance with the contract plans and
22 specifications, that work was inspected as needed by third parties with special expertise, and that
23 work was done within the period of time indicated in the certified payroll records submitted by the
24 contractor. Mr. Okupnik further testified that it was also his job to report the daily activities on the
25 Daily Inspection Reports, including how many workers and the type of work they are doing, but
26 that his job was not to determine if the contractor is paying the correct wages to his workers, as
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1 that inquiry falls outside his area of expertise. Mr. Okupnik further testified that in his experience,
2 contractors use laborers to perform demolition work, but he did not offer an opinion whether the
3 demolition work at issue in this case should have been paid at a laborers or a pile drivers rate.

4 9. Pat Karinen, a field representative for Piledrivers Local Union #34, testified that
5 Jim Johansen, another field representative for Local #34, told him that he visited the job site at
6 some point while the work was being done and spoke with David Hudson, the project manager for
7 MH Construction. Mr. Johansen told Mr. Karinen that he asked Mr. Hudson for copies of the
8 certified payroll, and determined that the workers on the job were not being paid pile driver rates.
9 Mr. Karinen further testified that Mr. Johansen told him that he told Mr. Hudson that the workers
10 were performing pile driver work and should be paid accordingly, and Mr. Hudson replied that the
11 contractor was going to stick with the guys they had been using. MH Construction claims that
12 neither Mr. Karinen nor any other Local 34 representative voiced any objection to MH
13 Construction's use of laborers, or the rate of pay for the laborers, until after MH Construction
14 completed the job. (MH Construction Pre-Hearing Statement, page 2 of 8, Section C, para. 2)

15 10. As required by contract, MH Construction submitted weekly certified payroll
16 statements (CPS) to the City's Elation Computer program system in which the job classification of
17 its workers were identified. Matthew Huey testified that the City voiced no objections based upon
18 worker misclassification at that time. (MH Construction Pre-Hearing Statement, page 2 of 8,
19 Section C, para. 3) Donna Levitt credibly testified, however, that the Elation system is not
20 designed to evaluate whether an employee is misclassified. (OLSE Pre-Hearing Statement, page
21 4; lines 11-12) Rather, it is intended to compute the wages owed based on the classification
22 tendered.
23

24 11. On March 6, 2012, the day that MH Construction completed its work, the Pile
25 Driver's Local 34 submitted a complaint to the Port, claiming that MH Construction should have
26 paid its workers who performed demolition, drilling and the installation of dowels a rate of pay for
27 Pile Drivers and not the lower Laborer's rate. On March 9, 2012, the complaint was forwarded to
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1 the Office of Labor Standards Enforcement (OLSE). Shirley Trevino, Contract Compliance
2 Officer for the OLSE for the past 10 years, investigated the complaint, and concluded that it was
3 valid based on the project specifications that describe the work to be done on the project, the Port
4 Inspector's daily reports that set forth the work that was actually done each day, and the
5 prevailing wage and scope of work standards for Pile Drivers and Laborers established by the
6 California Department of Industrial Relations, standards which have been adopted by the San
7 Francisco Board of Supervisors. (OLSE Exhibits 9-11)

8 12. The DIR published scope of work provisions for Pile Driver says, in relevant part
9 (OLSE Exhibit 1, pages 3-5):

10 **B. Type of Work**

11 The character of work covered by this Agreement shall be all heavy, highway and building
12 work falling within the recognized jurisdiction of Local Union #34. . . .

13 The character of work covered by this Agreement shall include specifically the following:

14 1. **In the construction of waterfront and marine facilities**, such as docks, piers,
15 wharves, bulkheads, jetties, and similar structures, the Pile Driver classification shall apply
up to and including the decking thereof.

16 . . .

17 4. **Heavy structures:** These structures shall include all wharves, docks, piers, . . .

18 . . .

19 9. **Reconstruction, Repair, Dismantling, or Salvage:** Labor performed in the
20 reconstruction, repair, wrecking, dismantling or salvaging of any of the foregoing
21 structures shall be included to the same extent as labor employed in new construction of
such structures. . . .

22 13. The DIR published scope of work for Laborer says, in relevant part (OLSE Exhibit
23 11, page 3 of 5):

24 **B. Coverage and Description of Laborers' Work Covered by this Agreement.**

25 . . .

26 (2) Subject to the preceding paragraph and subject also to the provisions of Section
27 14 of this Agreement, it is agreed that Laborers' work shall include but not be limited to: . . .

1 All Laborer's work in connection with excavation for building and all other construction,
2 including digging of trenches, piers, foundations and holes; digging, lagging, sheeting,
3 cribbing and bracing of foundations, holes, caissons and cofferdams, manning, setting
4 and moving all manually movable pumps. . . .

5 All Laborer's work in connection with concrete work, including chipping and grinding,
6 sandblasting, mixing, handling, shoveling, conveying, pouring, concrete pumps and similar
7 type machines, grout pumps, nozzle men (including gunmen and potmen), vibrating,
8 guniting and otherwise applying concrete, whether done by hand or any other process,
9 and wrecking, stripping, dismantling and handling concrete forms and false work including
10 tending of plasterers and brick and block layers.

11 All Laborers' work in the excavation, grading, preparation concreting, asphalt and mastic
12 paving, paving, ramming, curbing, flagging and laying of other stone materials, and
13 surfacing of streets, way, courts, underpasses, overpasses and bridges.

14 14. Donna Levitt, the Director of the OLSE, testified on behalf of the OLSE position.

15 Ms. Levitt has worked for the OLSE since 2001, and has managed prevailing wage cases since
16 2003. Ms. Levitt credibly testified that the OLSE concluded that the work in question, which
17 involved demolition, drilling and doweling, should have been classified as Pile Drivers work, and
18 paid as such. The OLSE determined that the work falls within the DIR scope of work
19 classification for Pile Drivers, and not Laborers, because the work involved only a partial
20 demolition of the decking on that pier, where substantial structures remained standing to support
21 the construction of the new concrete decking. The work was therefore similar to the re-roofing
22 project addressed in the May 28, 1999 letter from counsel for the State Division of Labor
23 Standards Enforcement to a roofing contractor, where it was stated (OLSE Exhibit 15, page 1 of
24 1):

25 If a building or structure is being demolished, a laborers classification may be used. If a
26 building, structure, beams joist, or any other support structure is going to be left as a
27 support for the new roof, it is not a demolition project, but a re-roofing project, and a
28 roofers classification must be used to do the roofing tear-off.

15. Ms. Levitt pointed out that evidence submitted by MH Construction supported her
conclusions in this regard. In a letter dated September 25, 1986, J.A. Jones Construction
Company concluded that boilermakers should be hired to dismantle and rig ductwork, fans,
precipitator and stacks, and iron workers should be hired to dismantle and rig precipitator support
steel, whereas laborers should be hired for "all further dismantling and handling at ground level."

1 (MH Construction Exhibit I, pages 10-11) Ms. Levitt also argued that the DIR Scope of Work
2 classifications adopted by the Board of Supervisors, and not the claims of any particular labor
3 union that work falls within its jurisdiction, control the prevailing wage inquiry.

4 16. Accordingly, by Notification of Forfeiture and Certification of Forfeiture, both dated
5 May 8, 2012, OLSE assessed a forfeiture of funds held for payment on the contract for back
6 wages and penalties in the total amount of \$86,919.57. (Hearing Officer Exhibits 1-2) After the
7 meet and confer process, the OLSE issued a Revised Audit dated June 22, 2012 in which it
8 reduced its assessment of back wages and penalties from \$86,919.57 to \$76,732.24. (Hearing
9 Officer Exhibit 5) On August 10, 2012, the OLSE issued a Second Revised Audit in which it
10 reduced its assessment of back wages and penalties from \$76,732.24 to \$62,009.39. (OLSE
11 Exhibit 14, page 1 of 16)

12 17. On September 4, 2012, the OLSE submitted a Third Revised Audit dated August
13 30, 2012 in which it increased its assessment of back wages and penalties from \$62,009.39 to
14 \$62,554.10 based on an increase in overtime hours that had not been entered into the Certified
15 Payroll Records (CPR). (OLSE Post-Hearing Submission, received September 4, 2012, page 2 of
16 39, lines 4-5; pages 9, 11, 18) The total amount of \$62,554.10 included unpaid wages of
17 \$47,068.48, penalties of \$14,850.00 (297 days x \$50.00) and training fund contributions of
18 \$635.63. (OLSE Post-Hearing Submission, received September 4, 2012, page 7 of 39) The
19 August 30, 2012 audit provided a breakdown of back wages owed and penalties for each worker.
20 (OLSE Post-Hearing Submission, received September 4, 2012, pages 7-21) On September 4,
21 2012, the OLSE also submitted an audit in the amount of \$24,580.90 for the assessment if the
22 undersigned Administrative Law Judge concludes that the work in question should have been
23 paid as laborers and not pile drivers. (OLSE Post-Hearing Submission, received September 4,
24 2012, pages 25-39)

25 18. In its pre-hearing briefing, MH Construction indicated that it disputes only the
26 OLSE's claim that MH Construction misclassified and underpaid workers doing pile driver work,
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1 and the related findings attributable to the finding of misclassification. (MH Construction Pre-
2 Hearing Statement, pages 1-2) At the hearing, MH Construction presented an audit that states
3 that if the subject work should have been paid at a pile driver rate, the amount owed in back
4 wages and penalties should be \$57,228.41. (MH Construction Exhibit L, pages 1-25)

5 19. In its post-hearing brief, the OLSE states that the parties are in agreement about
6 most issues with regard to the OLSE August 30, 2012 audit, including the proper assessment
7 should the Hearing Officer find that pile drivers should have been doing the disputed work. For
8 instance, the parties are in agreement regarding the number of hours worked by 9 of the 10
9 subject workers, all except Yan Chen. OLSE believes the remaining worker, Yan Chen, worked
10 108 hours, and MH Construction believes he worked 116 hours. The parties are also in
11 agreement about the wages paid by MH Construction during the project to all workers except for
12 Cai Lai, Keung Leung and Yan Chen. OLSE states the sole remaining unresolved issues were
13 the total wages paid for the three workers (Cai Lai, Keung Leung and Yan Chen) and the total
14 wages that should have been paid. OLSE further states that for "reasons that (MH Construction)
15 has not explained," MH Construction disagrees with the OLSE amounts. (OLSE Post-Hearing
16 Submission, received September 4, 2012, page 2 of 39, lines 25-26) MH Construction did not
17 submit briefing or documentation to explain its position in this regard.
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19 20. In support of its case, MH Construction presented the testimony of Robert Trenkle,
20 a representative of the Laborer's International Union, which is the governing body for local
21 laborer's unions, including Local 261. Mr. Trenkle testified that it was his opinion that the subject
22 work was within the laborer's scope of work. Mr. Trenkle based his opinion on a review of photos
23 of the work that was done in this instance. (MH Construction Exhibit K, pages 1-9) Mr. Trenkle
24 also based his opinion on his experience being involved in jurisdictional disputes with the
25 Laborer's International Union, and a multitude of letters from various contractors for the
26 proposition that it is within the laborer's scope of work to perform demolition in any context,
27 whether over land or water or whatever the circumstance. MH Construction submitted into
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1 evidence a representative sampling of such letters. (MH Construction Exhibit I, pages 1-36)

2 Upon cross examination, Mr. Trenkle testified that 9 of the letters in the representative sampling
3 involved demolition and construction in Northern California, and further testified that none of
4 those 9 letters reference laborers' work on piers. (MH Construction Exhibit I, pages 28-36)

5 21. Mr. Trenkle further testified that union agreements often have conflicting language
6 about the scope of work of various crafts and classifications, which is why it is common to have
7 jurisdictional disputes. It is his opinion that Local 34, the Pile Driver's Union, did not complain
8 about the matter to the OLSE until the project was completed because had they done so within
9 the time frame of the project, their complaint would have failed. Specifically, Mr. Trenkle testified
10 that any jurisdictional dispute about which union should be entitled to perform certain work is
11 handled first by the local unions, and if the dispute is not resolved at that level, then by the
12 International Unions. If the International Unions cannot resolve the dispute, it would have gone to
13 the Northern California Basic Craft Alliance (BCA), whose bylaws provide for dispute resolution in
14 instances such as this. (MH Construction Exhibit J, pages 2-3) Mr. Trenkle further testified that
15 this protocol over jurisdictional disputes is intended to insulate the employers from deciding the
16 matter, and lets the unions decide who should do the work. Mr. Trenkle concluded that had the
17 dispute been handled within the union dispute resolution framework as described above, it would
18 have been determined that the work should have been done by laborers and not pile drivers,
19 because, according to him, laborers traditionally do demolition work.

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21 22. Mr. Trenkle further testified that in his experience there are very few disputes
22 about who should be doing demolition work because it is just commonly assumed that laborers
23 will do that work. He acknowledged that he was not aware that Pile Drivers could do demolition
24 work. However, that fact did not change his conclusion about who should be doing the work in
25 this instance because, in his opinion, laborers can do any sort of demolition work.

26 23. Ramon Hernandez, a laborer with 20 years of field experience and the Business
27 Manager for Laborer's Union Local 261 for the past two years, also testified on behalf of MH
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1 Construction. Mr. Hernandez also concludes that the subject work was properly within the DIR
2 Scope of Work for laborers, and wrote a letter dated April 27, 2012 to the City Administrator to
3 that effect. In that letter, Mr. Hernandez states: "The Union agrees that the work falls within the
4 jurisdiction of Laborers Local 261." (MH Construction Exhibit B, page 1 of 18) Mr. Hernandez
5 attached to his letter a letter dated September 18, 1982 from Dale Witcraft, the Chairman of the
6 Impartial Jurisdictional Disputes Board for the Construction Industry, to William Konyha, General
7 President of the United Brotherhood of Carpenters and Joiners. That letter references the fact
8 that the general contractor and subcontractor were using laborers to perform the work of cutting
9 piles to grade at a project in Richmond, California. The issue addressed in the letter is whether
10 the general contractor violated procedural rules when it followed the assignment of work to
11 laborers made by its subcontractor, and began cutting piles with its own workers. (MH
12 Construction Exhibit B, page 3 of 18) The letter does not address whether work to demolish and
13 reconstruct decking on an existing pier falls within the pile drivers or laborers scope of work
14 classification.

15 24. Pat Karinen, a field representative and treasurer for Pile Drivers Local 34, testified
16 on behalf of the OLSE. Mr. Karinen credibly testified that he has worked in the construction
17 industry for 35 years, during which time, among other work, he has built copperdams, repaired
18 and dismantled docks and has been involved in marina and sea wall construction and off shore
19 work. He has been a member of Local 34 since 1979. Mr. Karinen testified that it is his opinion
20 that the subject work should have been paid at a rate of pay for pile drivers. He reached this
21 conclusion because of his experience in the field, and the nature of the work involved, which was
22 work dismantling timber structures and rail lines on the decking of the existing Pier 35. Mr.
23 Karinen credibly testified that he was familiar with the work that was involved because he visited
24 the work site in February 2012 in the course of being at Pier 35 for other Local 34 business. Mr.
25 Karinen further credibly testified that he knows of several contractors who use pile drivers to do
26 work such as that in question, including CS Marine Constructors, Inc., Power Engineering
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1 Construction, Vortex Marine Construction and Dutra Construction, and that it is his experience
2 that Pile Drivers do whatever work is necessary on existing docks to build or rebuild them,
3 including the dismantling or demolition of those docks.

4 25. Mr. Karinen confirmed his opinion in a letter dated May 30, 2012 to Donna Levitt of
5 the OLSE, where he states that "in the demolition and reconstruction, no matter what type of
6 material the dock or wharf was constructed of, members of Pile Drivers Local Union No. 34 have
7 traditionally been assigned that work by Contractors working in Northern California." (OLSE
8 Exhibit 17, page 4 of 4) He also solicited a letters from (1) William Feyling, Executive Director of
9 the Northern California Counsel of Carpenters, who on May 30, 2012 wrote to Ms. Levitt that "the
10 construction, reconstruction, repair wrecking, dismantling and salvage of waterfront and marine
11 related facilities, such as docks, piers, wharves, bulkheads, jetties and similar structures, has
12 historically been performed by members of Pile Drivers, Divers, Carpenters, Bridge, Wharf and
13 Dock Buildings Local Union #34 in Northern California." (OLSE Exhibit 17, page 1 of 4); (2)
14 Jeffrey Scot Zaccor, President of Zaccor Companies, Inc., who on June 1, 2012 wrote that,
15 "Since 1983 Zaccor Companies has traditionally used pile drivers to demolish, salvage or
16 dismantle docks, piers, berths, and wharves on, over, and adjacent to water, as well as buildings
17 on land." (OLSE Exhibit 17, page 2 of 4); and (3) Jan Stockon, Corporate Secretary/Business
18 Manager for CS Marine Constructors, Inc. who on June 22, 2012 wrote that "CS Marine
19 Constructors, Inc. has traditionally used members of Piledrivers Local Union #34 for the
20 demolition and reconstruction of docks of all materials." (OLSE Exhibit 17, page 3 of 4)

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22 26. In response to MH Construction's claim that Local #34 should have raised its
23 complaint earlier in the process at the time it became aware that MH Construction was not paying
24 its workers at pile driver rates, Mr. Karinen testified that it was his understanding that Mr.
25 Johansen did raise the issue with a representative of MH Construction to no avail. Further, in
26 situations as such this, where the contractor is not a union shop and is not a signatory to the
27 union wage agreements, his understanding was that a complaint about who is doing work for the
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1 non-union contractor will not be taken up by the respective local or international craft unions. He
2 offered no opinion as to why Local #34 did not file a complaint with the OLSE earlier than it did in
3 this instance. Donna Levitt of the OLSE added that she does not know why Local 34 waited until
4 March 9, 2012 to file its complaint with the OLSE, but views that inquiry as irrelevant. The
5 complaint was timely filed, because the City had not yet released final payment to the contractor,
6 and therefore it does not matter that it was not filed earlier.

7 27. MH Construction argues that it was appropriate to pay its workers at a Laborer's
8 rate when they performed demolition, drilling and installation of dowels, because the local
9 Laborer's Union, Local 261, confirmed that the subject work properly falls within the jurisdiction of
10 Local 261's Master Labor Agreement with the Associated General Contractors of California. It
11 further argues that even if it turns out that MH Construction was wrong in that conclusion, it is
12 unfair to impose penalties on MH Construction because it disclosed its intention to hire laborers
13 and not pile drivers to the City in OEWD Form 1 prior to the start of work, and disclosed the fact
14 that it had hired laborers in its certified payroll records, and the City, through the OLSE, did not
15 complain about the classification until after all the work was done. MH Construction argues that
16 the City is at fault for not managing the contract properly, and MH Construction should not
17 penalized for the City's negligence or malfeasance.

18 28. The OLSE argues that the contract requires the contractor to pay prevailing
19 wages, and it is the responsibility of the contractor to do so for the benefit of the workers.
20 Furthermore, the contractor has the responsibility to pay the correct wages whether or not the
21 City advises it about the proper classifications to use or not, and the City has no responsibility to
22 tell the contractor what rates of pay it needs to use. The OLSE further argues neither the OEWD
23 Form I nor the Elation electronic certified payroll system are intended to inform the City that the
24 contractor is paying the wrong wages. OEWD Form I is designed to encourage local hires. The
25 Elation system is designed, among other things, to catch errors where a worker is designated as
26 a certain type of worker and is not paid accordingly. It is not designed to detect a
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1 misclassification for any particular worker. If a worker is designated as a Laborer, but the
2 contractor should be paying him as a Pile Driver, the Elation system will not identify that error
3 because there is nothing in the system to identify the work each identified worker is actually
4 doing.

5 29. In summary, the OLSE argues that MH Construction has not met its burden of
6 proof that they paid the proper wages to the workers who performed demolition, drilling and
7 epoxy work on the subject project, and has not presented any factual or legal justification for not
8 paying the proper wages. There is nothing the City did as a matter of fact or law that excuses the
9 contractor's obligation to pay the appropriate prevailing wage for the work that was done. Finally,
10 the OLSE argues that it is not up to the unions to decide what is the proper classification of
11 worker to use in this instance. Rather it is up to the Board of Supervisors to decide the proper
12 classifications, which it has done by adopting the DIR published scope of work provisions for pile
13 drivers and laborers.

14 CONCLUSIONS OF LAW

15 1. The determinative issue in this case is whether MH Construction should have paid
16 workers for demolition, drilling and epoxy work on the subject Pier 35 project at a rate of pay for
17 pile drivers or laborers. Based on all the evidence, including the testimony of the witnesses, the
18 project contract, the Daily Inspection Reports, and the DIR prevailing wage and scope of work
19 standards, the undersigned Hearing Officer concludes that the disputed work should have been
20 paid at the pile driver prevailing wage rate. The amount paid to the 10 workers identified in the
21 audits submitted in this matter for the relevant time periods from October 25, 2011 through March
22 6, 2012 was \$103,827.73, whereas the prevailing wage requirement was \$150,743.97, a
23 difference of \$47,068.48. The difference in that amount is therefore properly assessed as a
24 forfeiture of funds by the OLSE.
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26 2. MH Construction did not establish that it was proper to pay its workers as laborers
27 for the disputed work, and did not sustain its burden of proof to show that the OLSE audits were
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1 inaccurate in any respects. The fact that laborers commonly do demolition work and that the
2 Laborers' International Union and Laborers' Local 261 claim the work falls within the jurisdiction of
3 the Laborer's Union is not controlling. Rather, what controls the inquiry is the DIR scope of work
4 standards adopted by the Board of Supervisors, and those standards indicate that in a situation
5 as that presented here, where work is being done to demolish and rebuild decking on piles that
6 remain standing, the work of demolition and reconstruction falls within the scope of work
7 standards for pile drivers.

8 3. The testimony and opinions of Robert Trenkle and Ramon Hernandez do not
9 prove otherwise for appellant MH Construction. These two witnesses contended that laborers
10 often do demolition work on water related projects, but they did not explain why the Scope of
11 Work Provisions for Pile Drivers do not control in instances such as this, where demolition is done
12 on decking over piles that remain standing. Furthermore, the letters they presented from other
13 contractors in MH Construction Exhibits B and I related to work outside the subject jurisdiction or
14 work that was different in nature to the subject matter work. For example, the Witcraft letter Mr.
15 Hernandez relies on, and those letters following it in MH Construction Exhibit B, involve work in
16 other states or work cutting piles, and therefore do not address the dispute presented here,
17 whether work to demolish and reconstruct decking on existing piers falls within the pile drivers or
18 laborers scope of work classifications for work performed in San Francisco in 2010-2011. The
19 letters presented by Mr. Trenkle are similarly unpersuasive. They mostly do not involve work in
20 Northern California, and those that do, do not involve work on piers. And, as OLSE argued, one
21 of the letters, from J.A. Jones Construction Company, supports the OLSE position in this regard
22 where it concludes that the more specific union workers, such as the Boilermakers and Iron
23 Workers, should be assigned to the dismantling and rigging work, whereas the laborers were
24 assigned to "all further dismantling and handling at ground level."
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26 4. MH Construction also did not establish that it should be excused from its obligation
27 to pay the prevailing wage to these workers because the City failed to inform the contractor that
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1 the wage rates used in its bid or in the wages paid during the course of the construction were
2 inadequate. As the City established, the filing of the OEWD Form I is intended to help contractors
3 comply with the City's local hire ordinance. The fact that the contractor states in OEWD Form I
4 that it intends to hire laborers, and says nothing about pile drivers, does not excuse the contractor
5 from paying the appropriate prevailing wage. The document is not intended as notice to the City
6 of the wages the contractor intends to pay to its workers for purposes of compliance with the
7 prevailing wage laws, and MH Construction did not establish that the filing of such a document
8 shifts the burden to the City to inform the contractor about such compliance. Similarly, the
9 Certified Payroll Records are not intended to identify misclassifications of workers, but rather they
10 are used, among other things, to make sure that the classification of workers that the contractor is
11 using are paid according to that classification. The filing of such CPRs therefore is not notice to
12 the City that the contractor is not in compliance with the prevailing wage standards.

13 5. Finally, MH Construction did not establish that it should be excused from its
14 obligation to pay prevailing wages because the complaining party, Local 34, waited until the
15 contractor completed the job to file its complaint. As the City established, a prevailing wage
16 complaint is considered timely where, as here, final payment has not yet been made. Therefore,
17 it is irrelevant that the complaint could have been made earlier.

18 6. Because it is determined that the subject workers should have been paid the
19 higher rate as pile drivers and not laborers, the undersigned Hearing Officer also finds that MH
20 Construction should have contributed additional monies for apprenticeship training fund
21 contributions in the amount of \$635.63 for the time period from October 24, 2011 through March
22 9, 2012, as broken down in the August 30, 2012 OLSE audit. (OLSE Post-Hearing Submission,
23 received September 4, 2012, Attachment 3, pages 7-21)

24 7. Finally, the San Francisco Administrative Code provides that the contractor or
25 subcontractor who failed to pay a worker at the appropriate prevailing wage rate "shall" forfeit to
26 the City "\$50.00 per day" for each such worker. Based upon the Hearing Officer's finding that 10
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1 employees were paid less than the prevailing wage for a total of 297 days, the \$50.00 per day
2 penalty must be imposed, and totals \$14,850.00.

3 8. MH Construction disputes the imposition of penalties because it believes it was
4 proper to pay the workers at a rate of pay for laborers, and because it is unfair to impose
5 penalties here, where the contractor had notified City of its intention to use laborers in OEWD
6 Form I prior to the start of construction, and the City did not notify the contractor that such a rate
7 of pay was unlawful, and where the complaining party, Local #34, knew that the contractor was
8 not paying pile driver rates of pay, but waited until the completion of work to file a complaint. MH
9 Construction's complaint of unfairness is not persuasive. There is no discretion in the law to
10 waive the imposition of penalties. Further, the contractor did not notify the City of its intention to
11 pay for the disputed work as laborers in a way that would have clearly raised and decided the
12 issue. For example, it did not contact the OLSE, the City agency in charge of reviewing the issue
13 of prevailing wage, and ask them the rate of pay it should pay the subject workers, as it had done
14 when inquiring about the rate to pay security guards. And it did not inquire about the prevailing
15 wage even after the Local 34 representative raised the issue with its project director. Even if, as
16 MH Construction contends, the Local 34 representative did not raise the objection until after the
17 work was completed, that is not a legal basis to avoid penalties. Accordingly, the OLSE's
18 imposition of penalties in the amount of \$14,850.00 is warranted.
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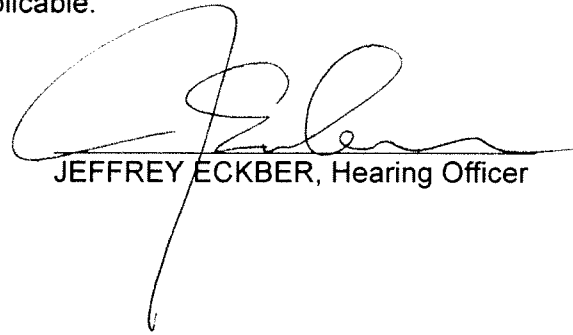
20 ORDER

21 Wherefore all the evidence having been heard and considered, it is the order of this
22 Hearing Officer that:

23 1. MH Construction shall forfeit to the City and County of San Francisco the amount
24 of \$62,554.10 from its contract balance on San Francisco Contract No. 2752, commonly known
25 as the "Pier 35 North Apron Repair Project." A portion of those funds in the amount of \$635.63
26 shall be paid to the apprenticeship-training fund. The OLSE shall distribute the balance of such
27 funds in accordance with San Francisco Administrative Code Section 6.22(E)(8)(d).
28

1 2. This Decision of Hearing Officer is final. Pursuant to San Francisco Administrative
2 Code Section 6.22(E)(8)(c)(viii), either party may appeal this Decision only by filing in the San
3 Francisco Superior Court a petition for a writ of mandate under California Code of Civil
4 Procedure, section 1084, *et seq.*, as applicable.

5
6 Dated: October 2, 2012



JEFFREY ECKBER, Hearing Officer

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1 **PROOF OF SERVICE**

2 I, Elvira James, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the within
4 entitled action. I am employed by the City and County of San Francisco, 25 Van Ness Avenue, Suite 320,
5 San Francisco, CA 94102.

6 On October 2, 2012, I served the attached:

7 **Decision of Hearing Officer**

8 In The Matter of the Appeal of Huey Construction Management Co., Inc. dba MH
9 Construction Management Company, from a Determination by the City and County of San
10 Francisco Office of Labor Standards Enforcement (OLSE) regarding Contract No. 2752
11 "Pier 35 North Apron Repair"
12 [San Francisco Administrative Code §6.22(E)(8)(c)]

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

15 Matthew Huey, President
16 Huey Construction Management Co., Inc.
17 dba MH Construction Management Company
18 1630 – 17th Street
19 San Francisco, CA 94107

20 Joseph Sandoval, Jr., Deputy City Attorney
21 Construction Team
22 San Francisco City Attorney's Office,
23 Fox Plaza, 1390 Market Street, 4th Floor
24 San Francisco, CA 94102-5408

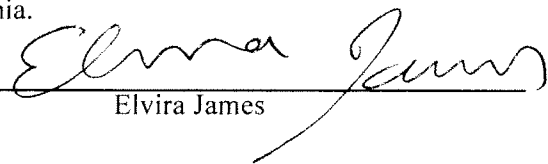
25 Donna Levitt, OLSE Division Manager
26 CCSF Office of Labor Standards Enforcement
27 City Hall, Room 430
28 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

and served the named document in the manner indicated below:

29 **BY MAIL:** I caused true and correct copies of the above documents, by following ordinary
30 business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at 25 Van
31 Ness Avenue, Suite 320, City and County of San Francisco, California, 94102, for collection and
32 mailing with the United States Postal Service, and in the ordinary course of business,
33 correspondence placed for collection on a particular day is deposited with the United States Postal
34 Service that same day.

35 **BY FACSIMILE:** I caused a copy(ies) of such document(s) to be transmitted via facsimile
36 machine. The fax number of the machine from which the document was transmitted was (415)
37 252-4699. The fax number(s) of the machine(s) to which the document(s) were transmitted are
38 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.

Executed October 2, 2012, at San Francisco, California.

25 
26 _____
27 Elvira James
28