

Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Barry Ng
Jacky Morales-Ferrand
Jennifer A. Maguire

**SUBJECT: LIQUIDATED DAMAGES FOR
LATE PAYROLL RECORDS ON
CITY'S HOUSING PROJECTS**

DATE: April 7, 2016

Approved

Date

4/8/16

REPLACEMENT

REASON FOR REPLACEMENT MEMO

To include additional discussion and information as a result of staff's meetings on February 26 and March 21, 2016 with representatives associated with the Ford Road Family Housing Phase II project ("Ford Family Representative") as well as inclusion of a new policy option from the Ford Family Representatives.

City staff has worked with the Ford Family Representative in an attempt to develop a consensus regarding the liquidated damage assessment. Although consensus was not reached, this replacement memo attempts to fully discuss the implications of a potential change as well as include the Ford Family Representative's perspective and preferred option.

RECOMMENDATION

(a) Adopt a resolution:

- (1) Amending the current prevailing wage enforcement mechanism for late submission of certified payroll records on City's Housing projects to assess liquidated damages in the amount of \$250.00 per day provided that the liquidated damages assessed do not exceed the total contract amount of the developer's, general contractor's or subcontractor's contract who failed to submit timely certified payroll records, and provided further there was no actual wage violation discovered in the late records and the late records were submitted to the City within one year from when they were due;

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- (2) Applying the amended prevailing wage enforcement mechanism for late submission of certified payroll records to all City's Housing project contracts entered into on or after January 1, 2013; and
 - (3) Authorizing City staff to refund, subject to the appropriation of funds, the difference in the amount of liquidated damages between the prior enforcement mechanism without a cap and the amended enforcement mechanism with a cap for all City's Housing project contracts entered into on or after January 1, 2013 where full payment of liquidated damages was made to the City within one year from when they were due.
- (b) Adopt the following 2015-2016 Appropriation Ordinance amendments in the Low and Moderate Income Housing Asset Fund:
- (1) Increase the appropriation to the Housing Department for Loan Management in the amount of \$100,680; and
 - (2) Decrease the Unrestricted Ending Fund Balance appropriation in the amount of \$100,680.

OUTCOME

Provide the City Council with the opportunity to discuss and consider changes to the current prevailing wage enforcement mechanism on City agreements administered by the Housing Department as it relates to the untimely submission of payroll records and other labor compliance documentation.

EXECUTIVE SUMMARY

At the April 29, 2015 Rules and Open Government Committee meeting, Ford Road Family Housing, L.P. requested a refund of \$226,500 for liquidated damages it paid for the late submission of payroll records on the Ford Road Family Housing Phase II project. The matter was referred to the City Attorney's Office and Department of Public Works/Office of Equality Assurance for review.

At the June 10, 2015 Rules and Open Government Committee meeting, the City Attorney informed the Committee that the Construction and Permanent Loan Agreement between the City and the Developer does not provide for any discretion in assessing liquidated damages nor does the Loan Agreement provide for any mechanism to waive or refund liquidated damages. The City Attorney recommended that if the Committee desired to change the liquidated damage mechanism in future agreements the matter should be referred to a future City Council meeting to allow Council the opportunity to fully discuss the implications and provide direction to City staff. The Rules and Open Government Committee unanimously recommended forwarding the policy discussion to a future City Council meeting.

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The Office of Equality Assurance is responsible for implementation, monitoring and enforcing the City's various wage policies. Problems generally arise when contractors do not provide payroll records timely. These records are essential to monitor and ensure that workers are paid correctly and do not become victims of wage theft. In order to provide for timely submission of these critical documents, the City Council and Redevelopment Agency Board on January 27, 2004 approved enhanced enforcement efforts for agreements administered by the City's Housing Department. The enhanced enforcement tool requires developers and contractors to pay the City daily liquidated damages of \$250.00 per day in the event documentation is not provided within 15 days following the end of each month.

The referral from the Rules and Open Government Committee to the City Council arises out of a Construction and Permanent Loan Agreement between the City and Developer dated January 2, 2013 for the Ford Road Family Housing Phase II project located at 215, 221 and 229 Ford Road. The Construction and Permanent Loan Agreement is consistent with the prevailing wage enforcement mechanism approved by Council on January 27, 2004; liquidated damages in the amount of \$250 per day would be imposed for failure to timely submit payroll records.

The Office of Equality Assurance staff met with repeated delays in obtaining accurate and complete information from one of the subcontractors on the project – Coast Building Products. All parties, including the Developer and general contractor, were notified of the issues and problems with Coast but, the situation was not rectified.

Per the Rules and Open Government Committee direction, staff has identified four policy options for Council consideration:

- a) Continue with the current liquidated damage assessment for late submission of payroll records;
- b) Assess penalties for late submission of payroll records of \$100 per worker per day consistent with California Labor Code Section 1776;
- c) Assess a flat penalty of \$500 for each week that payroll records are late provided there was no wage violation discovered in the late records. The penalty would be applied per week and not per payroll record.
- d) Assess liquidated damages of \$250 per day but cap the assessment at the developer's, general contractor's or subcontractor's total contract amount who failed to submit timely payroll records provided there was no wage violation discovered in the late records and provided further the late records are received within one year when due.

If Council elects to amend the current prevailing wage enforcement mechanism for late payroll records on City's Housing projects, staff recommends Option D; adoption of a resolution to assess liquidated damages in the amount of \$250 per day provided the liquidated damages assessed do not exceed the total contract amount of the developer's, general contractor's or subcontractor's contract who failed to submit timely records, and provided further there was no wage violation discovered in the late records and the records are received within one year they are due. In order to continue to encourage City's Housing projects, staff also recommends

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applying the revised enforcement mechanism to all City's Housing project contracts entered into on or after January 1, 2013, including the Ford Road Family Housing Phase II project. Staff believes Option D provides the right balance of ensuring certified payroll records are submitted on time and wage theft does not occur on City's Housing projects while continuing to encourage affordable housing projects. Option C is the Ford Family Representative's preferred option.

BACKGROUND

Rules and Open Government Committee Referral

At the April 29, 2015 Rules and Open Government Committee meeting, Ford Road Family Housing, L.P. ("Developer") requested a refund in the amount of \$226,500 for liquidated damages it paid for the late submission of payroll records on the Ford Road Family Housing Phase II project ("Ford Family II"). The matter was referred to the City Attorney's Office and Department of Public Works/Office of Equality Assurance for further review. The Ford Family II project is described in greater detail later in this memo.

At the June 10, 2015 Rules and Open Government Committee meeting, the City Attorney provided a written memo to the Rules Committee stating that the Construction and Permanent Loan Agreement between the City and the Developer does not provide for any discretion in assessing liquidated damages nor does the Loan Agreement provide for any mechanism to waive or refund liquidated damages. [See ATTACHMENT A]

The City Attorney recommended that if the Rules and Open Government Committee desired to change the liquidated damage mechanism in future agreements the matter should be referred to a future City Council meeting to allow Council the opportunity to fully discuss the implications of a potential change and provide direction to City staff. The Rules and Open Government Committee unanimously recommended forwarding the policy discussion to a future City Council meeting.

Labor Compliance Overview

The Office of Equality Assurance ("OEA") is charged with the responsibility to implement, monitor and enforce the City's various wage policies; i.e., living wage, prevailing wage and minimum wage. There are generally two types of construction projects requiring the payment of the City's prevailing wage. First, are public works projects. Second, are affordable housing projects funded, in whole or part, by the City. This memo only addresses the latter (prevailing wage enforcement in contracts administered by the City's Housing Department, such as Disposition and Development Agreements, loan agreements, and Owner Participation Agreements).

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Problems generally arise when contractors do not provide the required payroll records and labor compliance documents to allow OEA to verify wage compliance. Payroll records and accurate information including their timely submission are essential for OEA to monitor and ensure that workers are paid correctly and do not become victims of wage theft.

For public works construction contracts, contractors must submit the payroll records of its employees and those of its subcontractors to the City with each application for progress payment. The submission of verified and certified payroll records is an express condition precedent to the City's obligation to make a progress payment. In the absence of verified and certified payroll records, the City is not obligated to approve or make, in whole or part, any progress payment due the contractor until the contractor has submitted the required payroll records.

However, for Housing Department projects involving development or lease agreements with the private sector, it is more complicated because the Housing Department does not hold the construction contract and has less direct control over the contractor. The Housing Department usually is providing funding for acquisition, construction or other assistance as opposed to directly contracting for construction. If the Housing Department is not directly contracting the construction of improvements, construction funds cannot be withheld pending submission of payroll records.

Enforcement Strengthened in 2004

In light of the fact that the documentation provision is critical to OEA's ability to monitor a contractor's compliance with the City's wage requirements, the City Council and San José Redevelopment Agency Board on January 27, 2004 unanimously approved enhanced prevailing wage enforcement efforts for agreements administered by the City's Housing Department. [See ATTACHMENT B]

This enhanced enforcement tool requires developers and contractors to pay the City daily liquidated damages of an unspecified amount per day based on various factors as determined by staff in the event documentation is not provided within fifteen (15) days following the end of each month. Developers are required to initial the liquidated damage section of the agreement and the section reads:

Late Payroll Liquidated Damages

- (1) For each day beyond the Payroll Due Date that the Developer fails to submit contractor's certified payroll to City, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED AND FIFTY DOLLARS (\$250.00); and

Wage Violation Liquidated Damages

- (2) For each instance where the City determined that prevailing wage requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

In determining whether liquidated damages apply, there is no requirement in the agreement that the violation be "willful" or "intentional." If OEA identifies a violation, a Notice of Violation is issued. The Notice of Violation includes an explanation of the violation, the amount of restitution owed, the liquidated damage assessment for the violation, when the restitution check(s) are due and the review process should the developer, prime contractor or subcontractor dispute the Notice of Violation. The review process allows the developer, prime contractor and/or violating subcontractor the right to contest a Notice of Violation. All parties are afforded the opportunity to provide additional information and relevant documentation to the OEA Director no later than ten (10) days from the date of the issuance of the Notice of Violation. Any additional information and relevant documentation that is provided is then reviewed and considered by the OEA Director. The OEA Director either upholds, revises or rescinds the Notice of Violation. Within ten (10) days following issuance of the OEA Director's Decision, the party(ies) may request a hearing with the City's Hearing Officer if they are not satisfied with the OEA Director's Decision.

Policy Importance and Communication

The responsibility for timely submission of payroll records and labor compliance documents is appropriately placed on the developer and prime contractor. Given that labor compliance documents are essential to ensure against wage theft, an effective message to the contracting community regarding the City's commitment to wage compliance and intolerance of wage theft is needed along with a strong deterrent and disincentive.

Prior to the 2004 prevailing wage enforcement enhancement, OEA rarely received timely labor compliance documents. However, since 2004, this enhancement has been a great help to ensure timely submission of payroll records and other compliance documents. Obtaining timely payroll information ensures that: (1) workers are paid the proper prevailing wage; (2) workers do not have to wait months and even years to receive their proper wages; (3) wages are not unlawfully withheld from workers; and (4) the City is not funding projects where workers are not being paid in accordance with contractual requirements.

OEA's practice provides developers and prime contractors with submittal timelines in writing prior to the start of each project. Additionally, OEA holds a pre-construction meeting for the developer and all contractors to discuss labor compliance requirements and submittal deadlines, and to explain why it is necessary and critical that payroll records and related information be submitted in a timely manner and the consequences should the timelines not be adhered to. It is

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important to note that OEA staff is always willing to provide time extensions based on reasonable cause.

Since 2004, there have been a total of five (5) requests from developers and contractors made to the Rules and Open Government Committee to have their respective liquidated damage assessments waived or rescinded (excluding the Ford Family II Project). Three of the five requests were Housing/Redevelopment Agency projects and the other two were public works projects. Of the three Housing/Redevelopment Agency projects, one of the requests was to waive or rescind the liquidated damage assessment for the late submission of payroll records. The Rules and Open Government Committee denied all five (5) requests. It should be noted that none of the situations described above involved a refund of liquidated damages already fully paid to the City similar to the Ford Family II Project.

Ford Family II Project

The referral from the Rules and Open Government Committee to the City Council arises out of a Construction and Permanent Loan Agreement ("Loan Agreement") between the City and Developer dated January 2, 2013. On November 6, 2012, the City Council approved a funding commitment to Eden Housing or its affiliate for up to \$2,114,455 for a construction/permanent loan for the Ford Family II affordable housing project located at 215, 221 and 229 Ford Road. Pursuant to Section 5.12 of the Loan Agreement, the City required that prevailing wages be paid for all construction work required under the Loan Agreement and imposed liquidated damages for violations. The Developer initialed Section 5.12 of the Loan Agreement agreeing, among other things, that liquidated damages in the amount of \$250 per day would be imposed for failure to timely submit payroll records. Section 5.12 of the Loan Agreement is consistent with the prevailing wage enforcement mechanism approved by the City Council on January 27, 2004 as described above. Construction began on February 1, 2013 and was completed in late 2014.

The Developer selected L&D Construction Co., Inc. ("L&D") as its prime contractor for the project. On January 23, 2013, OEA provided written notice to the Developer and L&D of the City's payroll submittal timelines and liquidated damages for late submittals. On February 1, 2013, OEA held a pre-construction meeting for the Developer, L&D and its subcontractors to discuss labor compliance requirements, submittal deadlines and consequences should the timelines not be adhered to. On February 1, 2013, the Developer issued the Notice to Proceed to L&D.

OEA staff met with repeated delays, beginning in July 2013 through August 2014, in obtaining accurate and complete information from one of the subcontractors on the project – Coast Building Products ("Coast"). All parties, including the Developer and L&D, were notified of the issues and problems with Coast but, the situation was not rectified nor did the City receive any communication that efforts were being made to provide the documents. A more detailed accounting of the repeated requests can be found on Page 2 of ATTACHMENT C – Summary of Facts. From the Ford Family Representative's perspective, Coast had difficulty providing information and ultimately Coast made personnel changes in October 2013 to address these

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problems. During this time, L&D made every effort to provide information in a timely manner but was not always successful. L&D, at their own initiative, hired an experienced labor compliance consultant to monitor and review subcontractors' payroll records with daily sign-in sheets to ensure that prevailing wage requirements and submittal timelines were being met.

On September 9, 2014, OEA issued a Notice of Violation against the Developer stating Coast's workers were underpaid and payroll records were missing. The Notice of Violation included the review process should the Developer, L&D and/or Coast dispute the Notice of Violation. L&D contested the Notice of Violation on September 22, 2014. [See ATTACHMENT C for Summary of Facts]

On November 17, 2014, the OEA Director considered all of the evidence and issued a written decision on the appeal. The OEA Director revised the Notice of Violation. The revised Notice of Violation stated that 18 of Coast's workers were underpaid a total of \$2,964.56 resulting in \$8,893.68 in liquidated damages. Further, the OEA Director stated that Coast failed to provide timely payroll records for weeks ending October 20, 2013, October 27, 2013, November 3, 2013 and August 17, 2014. Consistent with the prevailing wage enforcement mechanism approved by the City Council on January 27, 2004, liquidated damages of \$231,750 were assessed for late submission of payroll records. The table on ATTACHMENT C - Summary of Facts shows the breakdown of the liquidated damages.

In a letter dated November 24, 2014 and received by OEA on November 25, 2014, L&D requested information regarding the procedure, contacts and timeframe for filing a formal appeal and a breakdown of the \$231,750 liquidated damage assessment for submission of late payroll reports. On November 26, 2014, OEA responded in a letter, sent via email, by reiterating the Notice of Violation Review Process – if the parties are not satisfied with the OEA Director's Decision, they have ten (10) days in which to request a hearing with the City's Hearing Officer. From the Ford Family Representative's perspective, they believed their November 24, 2014 letter requesting information regarding the procedure, contacts and timeframe for filing a formal appeal served as their request for a hearing with the City's Hearing Officer.

On December 4, 2014, L&D Construction sent a letter to the OEA Director stating that Coast would submit restitution checks to OEA no later than December 8, 2014. The letter also included an explanation of Coast's handling and submittal of payroll records, the termination of personnel in October 2013 and requested the liquidated damage assessment for late submission of payroll records be rescinded. As stated previously in this memo, once liquidated damages are assessed they cannot be rescinded, waived or refunded.

Coast made restitution to the eighteen (18) underpaid workers and paid the \$8,893.68 liquidated damage assessment to the City on December 8, 2014.

On January 15, 2015, L&D requested an appeal of the OEA Director's decision dated November 17, 2014. The request was denied because it was untimely; it was 49 days late.

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On January 26, 2015, the Developer paid the full amount of liquidated damages owed to the City (\$231,750).

On April 6, 2015, more than two (2) months after fully paying the liquidated damages to the City, the Developer sent a letter to the City Clerk requesting a hearing before the City Council for a refund of \$226,500 (the Developer is not requesting a refund for the late payroll for week ending August 17, 2014) from the \$231,750 amount already paid. There is no such appeal process under any City Council policy or approval.

On September 24, 2015, Assistant City Manager Dave Sykes, Public Works Director Barry Ng and OEA Director Nina Grayson met with a representative of the Developer, Andy Madeira, Michael Lodoen, Vice President of L&D, Mark Lazzarini, CWDCO, and Joan Gallo, Hopkins & Carley, to discuss the liquidated damage assessment. They expressed concern, even though the loan agreement stipulated the daily liquidated damage assessment for late submission of payroll records, that it was punitive, excessive and exceeded the value of the subcontract with Coast by over \$100,000. During the meeting, L&D acknowledged that there was no dispute that the payroll records were not provided in a timely manner and as a result they failed to:

- Ensure the timely submission of payroll records; and
- Submit a timely request for a hearing with the City's Hearing Officer.

The Ford Family Representative suggested that a possible policy option could be to cap the liquidated damage assessment for the late submission of payroll records at some dollar amount if there is no wage violation associated with the untimely submission and the payroll records are provided within 30 days of written notice that the payroll records are missing.

On February 26, 2016, staff met again with the Ford Family Representative. At this meeting, they proposed an alternative option -- a flat weekly penalty of \$500 for each week that payroll records for a subcontractor is late. The penalty would only apply for those payroll periods when it is shown that employees were paid the correct prevailing wage rates. The penalty would be assessed starting with the first payroll period that is late and would be applied each week until all outstanding payroll records for that subcontractor have been submitted. The penalty would be applied per week and not per payroll record.

During our discussion, the Ford Family Representative stressed that the threat of large penalties will discourage contractors and subcontractors from working on affordable housing projects in San José because the penalties have the potential to escalate quickly. They also stated that subcontractors generally work on a small profit margin. The rule of thumb is that subcontractors generally apply a 15% mark-up over their actual labor and material costs for both profit and overhead. With a 15% mark-up, a limited penalty could still result in a substantial loss. If the penalty exceeds 15% of the subcontract value, they surmise that it would be difficult for a general contractor to seek reimbursement from the subcontractor at fault.

ANALYSIS

Policy Options for Consideration

Per the Rules and Open Government Committee direction, staff has identified four (4) policy options for Council consideration:

- a) *Continue with the current liquidated damage assessment for late submission of payroll records.*

Under this option, developers and contractors would continue to pay the City daily liquidated damages of an unspecified amount depending on various factors as determined by staff (generally \$250 per day), in the event documentation is not provided within fifteen (15) days following the end of each month. If the developer or prime contractor fails to perform its due diligence to ensure timely submission or fails to request a time extension from OEA, liquidated damages could become significant.

Pros: The current enforcement mechanism has been extremely helpful in gaining compliance since 2004. If OEA staff does not receive timely payroll records, it cannot determine if wage theft occurred. Since 2004, there have been one hundred and sixty-three (163) affordable housing and Redevelopment Agency projects with this liquidated damage language included in the agreements. There have been only two occasions, this project and the Fountain Alley project, where the developer or prime contractor has requested to have the assessment of liquidated damages for late submittals of payroll records waived or rescinded. The current enforcement mechanism is clear, objective and is easily and consistently enforced. It does not provide discretion for staff or Council to waive or reduce liquidated damages or refund liquidated damages.

Cons: Liquidated damages can add up quickly if the Developer or contractor fails to perform its due diligence to ensure timely submission of payroll records.

- b) *Assess penalties for late submission of payroll records of \$100 per worker per day consistent with California Labor Code Section 1776.*

Labor Code Section 1776 states that if a contractor or subcontractor fails to provide certified payroll records within ten (10) days of written notice, the contractor or subcontractor shall, as a penalty, forfeit \$100 per each calendar day or portion thereof for each worker until certified payroll records are provided. Additionally contractors are not responsible for the non-compliance of its subcontractors.

Under this policy option, staff would recommend continuing the same enforcement mechanism of requiring the developer and contractor to be responsible for their subcontractors as opposed to what is stated in Labor Code Section 1776. The example below illustrates the penalties under this policy option and how the penalty can quickly escalate by the number of workers on each payroll.

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	Week Ending 3/7/15	Week Ending 3/7/15
Payroll Due Date	4/15/15	4/15/15
Date Payroll Received	5/29/15	5/29/15
Number of Workers	2	10
Number of Days Late	44	44
Penalty (\$100 per day per # worker(s))	\$8,800	\$44,000

Pros: The City's enforcement mechanism would be consistent with the penalties under the California Labor Code for public works projects and provides consistency for the contracting community as well as upholds the City's commitment to wage compliance.

Cons: The responsibility for timely submission of payroll records would no longer be on the developer and prime contractor; it would shift to OEA staff who would be required to send written notices to the developer and contractor each time they are late with submittals. Penalties would only begin to accrue after ten (10) days written notice from OEA to the contractor.

- c) *Assess a flat penalty of \$500 for each week that payroll records are late provided there was no wage violation discovered in the late records. The penalty would be applied per week and not per payroll record.*

Under this option, there either is full compliance with the payroll record and labor compliance documentation requirements during any given week or there is not. If, in any week, all required labor compliance documents for each subcontractor is not provided to the City by the due date, the flat penalty of \$500 for each week that payroll records are late would be imposed on that subcontractor for that week and all subsequent weeks for which payroll records was late or continued to be late.

The example below illustrates the penalties under this policy option.

	Week Ending 3/7/15	Week Ending 3/28/15
Payroll Due Date	4/15/15	4/15/15
Payroll Received	5/29/15	5/29/15
# Weeks Late	6	6
Penalty Assessed (\$500 per week, not per payroll record)	\$3,000 (6 weeks x \$500 per week)	\$0 (no additional penalty for other late payroll records during the submittal period)

If there is a wage violation discovered in the late records under this option, the presumption of unintentional oversight is lost and the liquidated damage assessment would remain at \$250 per day until the records are received. Additionally, once the payroll records are received

and OEA finds a wage violation, liquidated damages in the amount of three (3) times the difference between the actual amount of wages paid and the prevailing wage would still be assessed consistent with the January 27, 2004 Council approval.

Pros: Limits the penalty amount to no greater than \$500 per week if there is no wage violation since it is presumed there was a mistake or unintentional oversight.

Cons: Provides for an insufficient deterrent or disincentive to submit timely payroll records as well as demonstrates a muted commitment to wage compliance.

d) Assess liquidated damages of \$250 per day but cap the assessment at the developer's, general contractor's or subcontractor's total contract amount who failed to submit timely payroll records provided there was no wage violation discovered in the late records and provided further the late records are received within one year when due.

Under this option, if there is no wage violation but payroll records are submitted late, there is a presumption of unintentional oversight and no intentional violation. If payroll records are late and there is no wage violation, the \$250 per day liquidated damage would apply provided the damages do not exceed the total contract amount of the developer's, general contractor's or subcontractor's contract. However, the cap would only apply under this option if (i) the records are received within one year when due and (ii) there was no wage violation discovered in the late records. Otherwise, there will be no cap on the liquidated damages of \$250 per day. This Option D is staff's preferred option.

The examples below illustrate liquidated damages under this policy option.

	Week Ending 3/7/15
Subcontract Amount	\$50,000
Payroll Due Date	4/15/15
Date Payroll Received	5/30/15
# of Days Late	45
Liquidated Damage Assessment (\$250 per day but does not exceed contract amount)	\$11,250 (45 x \$250)

	Week Ending 3/7/15
Subcontract Amount	\$50,000
Payroll Due Date	4/15/15
Date Payroll Received	2/9/16
# of Days Late	300
Liquidated Damage Assessment (\$250 per day but does not exceed contract amount)	300 x \$250 = \$75,000 Liquidated damage assessment would be \$50,000

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If there is a wage violation discovered in the late records under this Option D, the presumption of unintentional oversight is lost and the liquidated damage assessment would remain at \$250 per day until the records are received (with no cap). Additionally, once the payroll records are received and OEA finds a wage violation, liquidated damages in the amount of three (3) times the difference between the actual amount of wages paid and the prevailing wage would still be assessed consistent with the January 27, 2004 Council approval.

Pros: Limits the amount of liquidated damages to no greater than the contract value of the developer's, general contractor's or subcontractor's contract if there is no wage violation since it is presumed there was a mistake or unintentional oversight. Provides for a sufficient deterrent or disincentive to not submit untimely payroll records as well as shows the City's commitment to wage compliance.

Cons: A contractor who fails to submit timely payroll records may not make any money on the project if his/her tardiness causes the liquidated damages to equal the contract value.

If Council elects to continue with the current prevailing wage mechanism for untimely submittal of certified payroll records, no City Council action is required and staff will continue to implement the City Council's January 27, 2004 approval.

If Council elects to amend the current prevailing wage enforcement mechanism for late certified payroll records on City's Housing projects, staff recommends adoption of a resolution to assess liquidated damages in the amount of \$250 per day provided the liquidated damages assessed do not exceed the total contract amount of the developer's, general contractor's or subcontractor's contract who failed to submit timely records, and provided further there was no wage violation discovered in the late records and the records are received within one year (365 days) they are due.

In order to continue to encourage City's Housing projects and recognizing inadvertent mistakes, staff also recommends applying the revised enforcement mechanism to all City's Housing project contracts entered into on or after January 1, 2013, including the Ford Family II project described above. The table below shows how each option would be applied to the Ford Family II project.

	Payroll for Week Ending 10/20/13	Payroll for Week Ending 10/27/13	Payroll for Week Ending 11/3/13	Payroll for Week Ending 8/17/14
OPTION A Current Enforcement Mechanism - \$250 per day	312 days late x \$250 = \$78,000	312 days late x \$250 = \$78,000	282 days late x \$250 = \$70,500	21 days late x \$250 = \$5,250
OPTION B Assess penalties in accordance with CA Labor Code Section 1776 (\$100 per day per worker)	317 days late x 3 workers X \$100 = \$95,100	317 days late x 1 worker x \$100 = \$31,700	287 days late x 2 workers x \$100 = \$57,400	26 days late x 2 workers x \$100 = \$5,200

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OPTION C \$500 per week penalty, not per payroll record	45 weeks late x \$500 = \$22,500	\$0	\$0	\$0
OPTION D \$250 per day but capped at not more than contract value (\$131,070)	312 days late x \$250 = \$78,000	312 days late x \$250 = \$78,000 (adjust for cap = \$53,070)	282 days late x \$250 = \$70,500 (adjust for cap = \$0)	21 days late x \$250 = \$5,250 (adjust for cap = \$0)

In summary, the total liquidated damages or penalties for the submission of four late payroll records would be:

	Total Liquidated Damages or Penalties
OPTION A Current Enforcement Mechanism - \$250 per day	\$231,750
OPTION B Assess penalties in accordance with CA Labor Code Section 1776 (\$100 per day per worker)	\$189,400
OPTION C \$500 per week penalty, not per payroll record	\$22,500
OPTION D \$250 per day but capped at contract value	\$131,070

Since the Ford Family II project has already paid liquidated damages to the City in the amount of \$231,750, if the amended policy is applied retroactively to prior contracts entered into on or after January 1, 2013 (including the Ford Family II project), staff would need authority to refund, subject to appropriation, the difference from Option A and Option D in the amount of \$100,680 (\$231,750 - \$131,070) to the Ford Family II project. The refund amounts for each Policy Option are shown below.

	Amount to be Refunded
OPTION A Current Enforcement Mechanism - \$250 per day	\$0 (\$231,750 - \$0)
OPTION B Assess penalties in accordance with CA Labor Code Section 1776 (\$100 per day per worker)	\$42,350 (\$231,750 - \$189,400)
OPTION C \$500 per penalty per week, not per payroll record	\$209,250 (\$231,750 - \$22,500)
OPTION D \$250 per day but capped at contract value	\$100,680 (\$231,750 - \$131,070)

Staff believes Option D provides the right balance of ensuring certified payroll records are submitted on time and wage theft does not occur on City's Housing projects while continuing to encourage affordable housing projects and recognizing innocent mistakes can be made.

In conclusion, the proposed resolution will (i) amend the current prevailing enforcement mechanism on City's Housing projects to \$250.00 per day with a cap and approve contract language to be included in all future City's Housing agreements, which may be modified by

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staff; (ii) apply the amended prevailing wage enforcement mechanism to all City's Housing project contracts entered into on or after January 1, 2013; and (iii) authorize staff to refund, subject to appropriation, the difference between the current enforcement mechanism of no cap and the amended mechanism with a cap, as all explained in detail above.

EVALUATION AND FOLLOW-UP

No additional follow-up is anticipated once Council identifies a policy option. Once a policy option is chosen, staff will make any necessary changes in its prospective agreements and make developers and contractors aware of those changes in writing and at pre-construction meetings.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the April 19, 2016, City Council Meeting.

COORDINATION

This memorandum has been prepared by the Public Works Department in coordination with the Housing Department and the City Attorney's Office.

COST SUMMARY/IMPLICATIONS

1. **AMOUNT OF RECOMMENDATION:** Staff would process a developer refund of up to \$100,680.
2. **SOURCE OF FUNDING:** Low and Moderate Income Housing Asset Fund (346)
3. **FISCAL IMPACT:** The recommended budget adjustments would allow for disbursement up to \$100,680 for a refund to Eden Housing or its affiliate from the Ending Fund Balance in the Low and Moderate Income Housing Asset Fund (346). The original liquidated damages were placed in this fund.

April 7, 2016

Subject: Liquidated Damages for Late Payroll Records on City's Housing Projects

Page 16

BUDGET REFERENCE

The table below identifies the fund and appropriations proposed to fund the actions recommended as part of this memorandum.

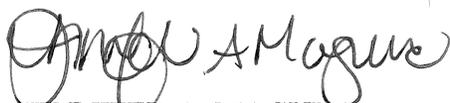
Fund #	Appn #	Appn. Name	Total Appn	Proposed Action	2015-2016 Adopted Operating Budget	Last Budget Action (Date, Ord. No.)
346	8999	Unrestricted Ending Fund Balance	\$2,570,203	(\$100,680)	XI-52	10/20/15, Ord. 29636
346	0109	Loan Management	\$225,000	\$100,680	XI-52	6/23/15, Ord. 29589

CEQA

Not a Project, File No. PP10-068(b), Municipal Code or Policy Change.

/s/
BARRY NG
Director of Public Works

/s/
JACKY MORALES-FERRAND
Director of Housing



JENNIFER A. MAGUIRE
Senior Deputy City Manager/
Budget Director

For questions, please contact Nina Grayson, Division Manager, Public Works Department at 408-535-8455.

ATTACHMENTS:

- A – Rules Committee 6-10-15, Item G.2
- B – January 27, 2004, Item 7.1 City Council/Redevelopment Agency Board memo
- C – Summary of Facts – Ford Road Family Housing Phase II

ATTACHMENT A



Memorandum

TO: RULES COMMITTEE

FROM: Richard Doyle

**SUBJECT: PREVAILING WAGES -
LIQUIDATED DAMAGES
WAIVER REQUEST**

DATE: June 10, 2015

BACKGROUND

At the April 29, 2015 Rules Committee meeting, Andy Madeira, Senior Vice President of Eden Housing, requested a waiver of the liquidated damages assessed against Ford Road Family Housing, L.P., a California limited partnership ("Developer") and Coast Building Products for late submission of payroll reports on the Ford Road Family Housing Phase II project ("Ford Family II"). The matter was referred to the City Attorney and Department of Public Works/Office of Equality Assurance.

The matter arises out of a Construction and Permanent Loan Agreement ("Loan Agreement") between the City and the Developer dated January 2, 2013. On November 6, 2012, the City Council approved a funding commitment to Eden Housing or its affiliate for up to \$2,114,455 for a construction/permanent loan for the Ford Family II affordable housing project located at 215, 221 and 229 Ford Road. Pursuant to the Loan Agreement, the City contributed \$2,114,455 in Neighborhood Stabilization Program 2 ("NSP2") funds and Low and Moderate Income Housing Asset funds to the project. The City also owns the site of the project and has leased the site to the Developer at \$1/year for 75 years.

In Section 5.12 of the Loan Agreement, the City required that prevailing wages be paid for all construction work required under the Loan Agreement and imposed liquidated damages for violations. The Developer's General Partner's authorized signatory initialed Section 5.12 of the Loan Agreement agreeing, among other things, that liquidated damages in the amount of \$250/day would be imposed for failure to submit the certified payroll by the payroll due date. The Developer's contract with its General Contractor also incorporated an exhibit including these requirements and the liquidated damages.

The prevailing wage provisions contained in the Loan Agreement and contract, including the imposition of liquidated damages, are consistent with the prevailing wage enforcement mechanism approved by the City Council and the Redevelopment Agency Board on January 27, 2004. A copy of that staff report, including proposed liquidated damage language, is attached.

The City's Office of Equality Assurance ("OEA") monitored Ford Family II for compliance with the prevailing wage requirements. During construction of the project, OEA discovered prevailing wage violations and subsequently assessed liquidated damages against the Developer

as required under the Loan Agreement. OEA has provided a Summary of the Prevailing Wage Investigation (“OEA Summary”) and a copy is attached.

ANALYSIS

As mentioned above, the assessment of liquidated damages arises out of a contract, the Loan Agreement, entered into between the Developer and the City. The Loan Agreement contained prevailing wage requirements and liquidated damage provisions that applied if the prevailing wage requirements were violated. The Developer initialed the liquidated damage section which provides that the City and the Developer recognize that a breach of the applicable prevailing wage provisions would cause the City damage by undermining the City’s goals in assuring timely payment of prevailing wages, and would cause additional expense in obtaining compliance and conducting audits, and that the delays, expense and difficulty involved in proving actual losses in a legal proceeding would not be remedied by the Developer’s payment of restitution to the worker(s) paid less than the prevailing wage. Accordingly, instead of requiring such proof of loss or damage, the Loan Agreement provides that:

- (1) For each day beyond the Payroll Due Date that the Developer fails to submit contractor’s certified payroll to City, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
- (2) For each instance where the City determined that prevailing wage requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

There is no requirement in the Loan Agreement that the violation be “willful” or “intentional” in determining whether liquidated damages apply. In fact, the purpose of liquidated damages as set forth in the Loan Agreement is so that the parties would not have to attempt to determine the extent of the damages in each case. The Loan Agreement does not provide for any discretion in assessing liquidated damages where there is not a violation of the prevailing wage requirements nor does the Loan Agreement provide for any mechanism to waive liquidated damages.

Based on OEA’s monitoring of this project, OEA determined that a violation of the prevailing wage requirements contained in the Loan Agreement had occurred as described in the OEA Summary attached. As a result, liquidated damages were assessed against the Developer.

CONCLUSION

The prevailing wage requirements contained in the Loan Agreement described above are contract provisions. These provisions are consistent with the prevailing wage enforcement and mechanisms approved by the San Jose Redevelopment Agency Board and City Council on January 27, 2004. OEA determined that a prevailing wage violation had occurred under the Loan Agreement.

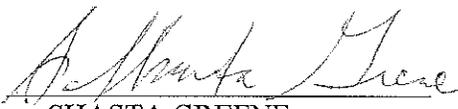
Rules and Open Government Committee
June 10, 2015
Subject: Prevailing Wage Liquidated Damages Waiver Request

If the Committee desires to allow for a waiver of liquidated damages under these circumstances on future agreements like the one described above, our office would recommend that these matters be referred to a future City Council meeting so that the City Council can more fully discuss the implications of a waiver on the prevailing wage enforcement mechanisms and provide direction to City staff to change these mechanisms to allow such a waiver.

COORDINATION

This Memorandum was coordinated with the Department of Public Works/Office of Equality Assurance.

RICHARD DOYLE
City Attorney

By: 
SHASTA GREENE
Sr. Deputy City Attorney

For questions, please contact S. Shasta Greene, Sr. Deputy City Attorney, at 408-535-1900.

cc: Norberto Dueñas, City Manager
Jacky Morales-Ferrand, Interim Director of Housing

Attachments



SUMMARY OF PREVAILING WAGE INVESTIGATION

FORD ROAD FAMILY PHASE II

On January 2, 2013, a Construction and Permanent Loan Agreement between the City and Ford Road Family Housing L.P. (Ford Road Family) was executed in the amount of \$2,144,455 for the construction of 74 rental dwelling units to be made available to extremely low income and very low income households earning 30% to 50% of the area median income with one unrestricted manager's unit.

On February 1, 2013, Ford Road Family issued a Notice to Proceed to its prime contractor, L&D Construction (L&D). On that same date, the City's Office of Equality Assurance (OEA) conducted a preconstruction meeting for L&D and its subcontractors. The purpose of preconstruction meetings is to go over prevailing wage requirements, timelines and liquidated damages related to prevailing wage violations and timely submission of labor compliance related documents.

Both the Developer and L&D have completed several affordable housing projects such as Ford Road Family Phase II and are familiar with the City's prevailing wage requirements and liquidated damage provisions identified in the Loan Agreement. As the prime contractor, L&D was responsible for ensuring prevailing wage compliance for all of its subcontractors and second tier subcontractors as well as submitting timely and accurate labor compliance documents (wage rates information, fringe benefits information and verification and weekly certified payroll reports for all subcontractors) to OEA.

L&D entered into a subcontract with Coast Building Products (Coast) in the amount \$131,070 to install insulation on the project. OEA's investigation into Coast's wage issues began on July 2, 2013 and concluded on November 7, 2014. OEA's 16-month investigation concluded that Coast had wage violations and late submission of payroll reports. The wage violations resulted in back wages of \$2,964.56 being owed to 18 Coast workers, a liquidated damage assessment of \$8,893.68 for the wage violation; and a liquidated damage assessment of \$231,750 for late submission of payroll records. Following is a chronology of events.

On March 15, 2013, OEA makes first inquiry to L&D regarding status of Coast's labor compliance documents.

From July 2, 2013 through August 12, 2014, OEA repeatedly makes requests to L&D for Coast's fringe benefits verification. The requests were made on the following dates: 7-2-13; 7-24-13; 3-19-14; 5-15-14; and 6-26-14 (specifically requesting Coast's 2014 First Quarter Carpenter's Union fringe benefit verification); 6-27-14; 7-2-14; 7-24-14; 7-25-14; and 8-11-14. OEA's request was a simple inquiry as to the classification of a worker and his fringe benefit package. Coast would provide a response to the inquiry but without the back-up

documents needed for verification. After these repeated requests for Coast's back-up documents, OEA determined the information Coast's originally provided was inaccurate and the fringe benefits which Coast claimed was paid was in fact only partially paid.

During the course of OEA's repeated requests, OEA escalated notification of Coast's problems to all parties of interest concerning this project including but not limited to Ford Road Family representatives.

On August 14, 2014, OEA requested on-site sign-in sheets for Coast for weeks ending 2-9-14 and 5-18-14 to check against the accuracy of the payroll reports submitted to OEA. On August 20, 2014, the on-site sign-in sheets were received and were reviewed. OEA found discrepancies between the on-site sign-in sheets and the payroll reports' hours with no explanation provided.

OEA noticed a pattern developing – each time OEA asked for information, Coast and L&D provided incomplete and at times wrong information. OEA had to continually ask repeatedly for clarification and verification. As a result of incomplete and inaccurate responses, OEA had no confidence in the hours and wages reported on the certified payroll reports and requested all on-site sign-in sheets for Coast to check against all payroll reports submitted.

On September 9, 2014, OEA issued a Notice of Violation for: inconsistent workforce classification; fringe benefits claimed but not paid; inaccurate reporting of hours worked; and missing payroll reports (workers signed in but no payroll report submitted).

On September 22, 2014, L&D responded to the Notice of Violation and submitted payroll reports for weeks ending 10-20-13, 10-27-13 and 11-3-13. However, documents provided in the response to the other issues relating to the wage violations were incomplete.

On October 6, 2014, OEA Director requested further information and enumerated in detail the various inconsistencies and deficiencies in the documents submitted by L& D and asked for further clarification.

On October 15, 2014, L&D responded to OEA Director's inquiries.

On November 17, 2014, OEA Director's Decision was issued to Ford Road Family and copied to L&D Construction and Coast; it summarized the history of the investigation and the issues involved. The Decision revised the September 9, 2014 Notice of Violation: (1) restitution owed decreased from \$6,597.80 to \$2,964.56; (2) liquidated damages assessed for wage violation decreased from \$19,793.40 to \$8,893.68; (3) identified the late submission of payroll reports for weeks ending 10-20-13, 20-27-13, 11-3-13 and 8-17-14; and (4) assessed liquidated damages for late submission of those payroll reports in the amount of \$231,750. The Decision instructed the preparation of restitution checks, to provide telephone numbers for the affected workers, who to make the liquidated damage checks payable to and the due date for the checks; to be submitted by close of business December 8, 2014.

On November 25, 2014, OEA Director received letter from L&D. The letter asked for the

procedure, contacts and timeframe for filing a formal appeal and requested a breakdown of the liquidated damage assessment for the late submission of payroll reports.

On November 24, 2014, OEA Director responded by citing the Notice of Violation Review Process included in the September 9, 2014 Notice of Violation and directing L&D to Page Two of the November 17, 2014 Decision for the breakdown by payroll week for late submission calculations.

On December 4, 2014, L&D requested the liquidated damage assessment for late submission of payroll records be rescinded.

On January 14, 2015, having not received the liquidated damage check for late submission of payroll reports, OEA Director notified Ford Road Family and stated that there is no discretion in assessing liquidated damages and there is no mechanism for waiving or reducing liquidated damages that have been assessed.

On January 15, 2015, via email, L&D requested a hearing with the City's Hearing Officer.

On January 20, 2015, OEA Director responded to Ford Road Family, L&D and Coast stating request for hearing was not timely and is denied; the date to request a hearing with the City's Hearing Office is ten calendar days following the issuance of the OEA Director's Decision. The Decision was issued November 17, 2014.

ATTACHMENTS

September 9, 2014 OEA Notice of Violation
September 22, 2014 Letter from L&D Construction
October 6, 2014 OEA Response
October 15, 2014 Letter from L&D Construction
November 17, 2014 OEA Director's Decision
November 24, 2014 Letter from L&D Construction
November 26, 2014 OEA Response
December 4, 2014 Letter from L&D Construction
January 14, 2015 OEA Letter
January 15, 2015 Letter from L&D Construction
January 20, 2015 OEA Response

Date Issued: September 9, 2014

VIA EMAIL: Amanda Kobler: amanda@phasedeux.com

VIA EMAIL: Michael Crespan: mcrespan@charter.net

Ms. Amanda Kobler
Ford Road Family Housing L.P., a California Limited Partnership
2323 Magnolia Street, Suite 2
Oakland, CA 94607

RE: NOTICE OF VIOLATION
Ford Road Family Housing Phase II: Subcontractor: Coast Building Products

Dear Ms. Kobler:

Upon review of Coast Building Products (Coast) labor compliance documents and certified payroll reports (CPRs), the City's Office of Equality Assurance (OEA) has identified wage violations. Following are issues relating to this Violation Notice:

1. Coast is a union contractor. In order to comply with Prevailing Wage requirements, a Coast worker has to be first classified correctly for the work performed under the wage index issued for the project; second, the worker has to be paid the correct hourly rate; and third fringe benefits for the worker have to be paid into the worker's account in the union trust funds.
2. The first batch of Coast CPRs for the period of week ending (WE) 11-10-2013 through WE 2-2-14 was submitted on 2-18-2014. Most of these CPRs were Non Performance, the bulk of Coast's work started in January, 2014.
3. I requested that Coast provide fringe verification on the following dates: 3-19-14; 5-15-14; 6-26-14 (specifically asking for first quarter 2014 Carpenter's Union fringe verification); 6-27-14; 7-2-14; 7-24-14; 7-25-14; 8-11-14. On 8-3-14, Coast provided August, 2013 fringe verification. On 8-12-14, I again requested 2014 fringe verification. Fringe verification for January through May, 2014 was provided on 8-12-14.
4. Upon review of Coast's CPRs, I have the following issues identified:
 - A. Inconsistency of classification for workers on the CPRs: terms used on the CPRs are: Journeyman, Carpenter, Journeyman Carpenter, Residential Carpenter Specialist.
 - B. The correct classification for Coast's scope of work for this project is Residential Carpenter, Residential Carpenter Specialist classification is not allowed.
 - C. Lawrence H. Rollock (Rollock) is classified on the CPR as Residential Carpenter Specialist and his fringe rate appeared to be less than the required Residential Carpenter fringe rate. I requested clarification.

NOTICE OF VIOLATION

Ford Road Family Housing Phase II: Subcontractor: Coast

September 9, 2014, Page 2

- A. On 6-27-14, Coast's email stated that Rollock is paid "...wage of \$38.75+\$26.77 fringes. We have paid our installers \$39.35 + \$26.77 fringes. Lawrence Rollock fringe \$26.77 (?) our fringe statement." (? and underline added)
- B. Without the fringe verification from Coast, I am unable to ascertain the veracity of the statement that Rollock and others are paid \$26.77 (per hour) fringe. Please see item (3) above of the continued request for fringe verification.
- C. On 8-12-14, fringe verification was finally provided: Lawrence Rollock and other workers on the CPR were not paid \$26.77 per hour fringe as claimed by Coast in their 6-27-14 email. Fringe benefits range from \$8.94 to \$26.77 per hour.

4 F

I have also requested Coast's on-site sign-in sheets to double check against information provided on the CPR. Coast's workers did not consistently sign-in. However, upon review of those few sign-in sheets provided from the job site, a couple of the workers who signed in were not reported on the CPRs.

5 F

Two (2) sign-in sheets provided are dated: 10-16-13 and 10-29-13. Two (2) workers: Pete Amaral and Brandon Wood signed in. No CPRs submitted correspond to those dates (please refer to item 2. above CPR#1 is WE 11-10-2013). Both of these workers are listed on Coast's fringe benefit roster.

6 A

The last sign-in sheet provided is dated: 8-12-14. Two (2) workers: Manuel Navarro and Oscar Castro signed in. However, Coast submitted a "Final" payroll which is a Non Performance for WE 8-10-14. I am unable to locate these workers on Coast's fringe benefit roster.

7 B

The Wage Violation calculation does not include the four (4) missing workers as listed in 6. & 7. above. Coast is to provide clarification for items 6. & 7. within ten (10) days from the date of the Issuance of this Notice of Violation. Should Coast provide payroll information, please also provide payroll journal reports, check numbers and front and back of checks to verify payments to the workers.

Order to Pay Restitution

OEA has determined that Coast failed to pay 19 of its employees on this project the required hourly prevailing wage rate from CPR #1 WE 11-10-13 through CPR #36 WE 8-10-14.

This determination does not include the missing payrolls for items 6. & 7. above which has not been submitted.

NOTICE OF VIOLATION

Ford Road Family Housing Phase II: Subcontractor: Coast
September 9, 2014, Page 3

Pursuant to the Construction and Permanent Loan Agreement Between the City of San Jose and Ford Road Family Housing L.P. (Ford and Monterey Family Apartments) dated January 2, 2013, Section 5.12 (hereafter referred to The Agreement Section 5.12) Coast is ordered to pay restitution to each employee listed on the attached Restitution spread sheets in the amounts determined by OEA for each employee. The total amount of restitution owed to Coast's employees is \$6,597.80.

Liquidated Damage for Violation of Prevailing Wage Requirement

Pursuant to The Agreement Section 5.12 subparagraph d(2), the liquidated damages assessment for this prevailing wage violation is three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid. The Developer is hereby directed to remit a check made payable to the City of San Jose for liquidated damages in the amount of \$19,793.40 (\$6,597.80 x 3). The check is due no later than twenty (20) days from the date of the Issuance of this Notice of Violation. The check is to be mailed to the following address: City of San Jose, Nina Grayson, Office of Equality Assurance, 200 East Santa Clara Street, Fifth Floor, San Jose CA 95113.

Payment Process Information

Coast must prepare restitution checks to all underpaid employees and deliver the restitution checks by mail or in person to Leslie Ku, Contract Compliance Specialist, 200 East Santa Clara Street, Fifth Floor, San Jose CA 95113 no later than twenty (20) days from the date of the Issuance of this Notice of Violation. OEA will disperse the restitution checks to the affected workers. Coast is to provide phone numbers for all workers receiving restitution checks in order to facilitate timely disbursements of said checks.

The City of San Jose Reserves the right to further assess \$250 per day late submission of certified payroll pursuant to The Agreement Section 5.12 subparagraph d(1).

Notice of Violation Review Process

Ford Road Family Housing L.P. and Coast have the right to contest this Notice of Violation. Ford Road Family Housing L.P. and Coast are afforded the opportunity to provide additional information and relevant documentation to Nina Grayson no later than ten (10) days from the date of the Issuance of this Notice of Violation.

The additional information and relevant documentation will be reviewed and responded to by the OEA Director. If Ford Road Family Housing L.P. and Coast are still not satisfied with the result, following written request to the OEA Director made no later than ten (10) days following the OEA Director's response, Ford Road Family Housing L.P. and Coast may request a hearing with the City's Hearing Officer. After the conclusion of the hearing, the Hearing Officer will issue a written decision affirming, modifying or dismissing OEA's determination. The Hearing Officer's decision will be final.

NOTICE OF VIOLATION

**Ford Road Family Housing Phase II: Subcontractor: Coast
September 4, 2014, Page 4**

Failure to Pay Restitution

If Ford Road Family Housing L.P. and Coast fail to pay the restitution and liquidated damages within the time required by this Notice or, in the event that this Notice of Violation is contested as provided above, within the time required by the decision of the City Officer, all payments to the Ford Road Family Housing L.P. will be withheld until restitution and liquidated damages are provided.

Sincerely,



Leslie S. Ku
Contract Compliance Specialist

Enclosure

c Nina Grayson CSJ OEA
 Roy Buis
 Kristine Clements, CSJ Housing
 Isaac Orona, CSJ Housing
 Dan Beaton, CSJ Housing
 Michael Lodoen, L&D Construction
 Jennifer Cheng, L&D Construction
 Albert Cheng, L&D Construction

Employee Name & last 4 digit of SS#	CPR Work Classification	Coast Union Classification	CPR #	Total Prevailing Wage Hours	Prevailing Wage Hourly Rate	Dollar Hourly Rate Paid	Hourly Fringe Benefits Paid	Hourly Restitution Amount Due	Total Gross Amount Due	Total by Worker		
1 Bach, Kieran A: 8031	Journeyman Carpenter	Residential Carpenter JM	19	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00			
			21	4	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 18.00			
			26	6	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 27.00	\$ 117.00		
2 Figueroa, Gerardo: 2191	Journeyman	Residential Carpenter JM	1	7	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.35	\$ 37.45			
			7	6	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 27.00			
			10	7	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.35	\$ 37.45			
			12	8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16			
			13	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00			
			14	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00			
				OT hrs.	8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16		
				See 9-9-14 email re CPR #15	15	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
				CPR #15: signed-in but not paid in CPR	15	8	\$ 65.52	\$ -	\$ 21.67	\$ 43.85	\$ 350.80	
				See 9-8-14 email re CPR #16	16	24	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 108.00	
	CPR #16: signed-in but not paid in CPR	16	8	\$ 65.52	\$ -	\$ 21.68	\$ 43.84	\$ 350.72				
		17	24	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 108.00				

P 1/4 LK

		CPR #18: signed-in but not paid in CPR	18	2	\$ 65.52	\$ -	\$ 21.67	\$ 43.85	\$ 87.70	
			19	23	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 103.60	
			20	6.5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 29.25	
			21	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
			23	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	
			24	30	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 135.00	
			28	4	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 18.00	\$ 1,741.19
3	Lomeli, Juan Carlos: 3907	Journeyman Residential Carpenter JM	12	8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16	
			14	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	
				8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16	
			19	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	
			20	6.5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 29.25	\$ 161.57
4	Mendoza, Antonio Ortiz : 5761	Residential Carpenter Residential Carpenter JM	17	5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 22.50	\$ 22.50
5	Miranda, Emilio Gomez: 3805	Residential Carpenter Residential Carpenter JM	14	8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16	
		Signed-In 2-14 but not paid on CPR #15	15	8	\$ 65.52		\$ 21.67	\$ 43.85	\$ 350.80	\$ 380.96
6	Perez, Feliciano Guzman: 8503	Journeyman Residential Carpenter JM	11	8	\$ 65.52	\$ 38.60	\$ 21.67	\$ 5.35	\$ 42.80	
			14	3	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 13.50	
				8	\$ 84.47	\$ 59.03	\$ 21.67	\$ 3.77	\$ 30.16	\$ 86.46
7	Ramirez, Jose : 6956	Residential Carpenter Residential Carpenter JM	11	7	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 31.50	\$ 31.50

P 2/4
9-9-14 USK

8	Llomas Guzman, Juan C :9332		Residential Carpenter Class 1	19	8	\$ 65.52	\$ 39.35	\$ 15.28	\$ 10.89	\$ 87.12	\$ 87.12
9	Solorio-Alba, Gustavo : 4440	Carpenter	Residential Carpenter Class 2	11	7	\$ 65.52	\$ 39.35	\$ 14.75	\$ 11.42	\$ 79.64	
				28	8	\$ 65.52	\$ 39.35	\$ 14.75	\$ 11.42	\$ 91.36	\$ 171.30
10	Rollock, Lawrence H.: 9569	Residential Carpenter	Residential Carpenter Specialist 2	19	20.5	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 234.32	
				21	4	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 45.72	
				26	8	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 68.58	\$ 348.62
11	Riley, Austin K.: 9406	Residential Carpenter	Residential Carpenter Specialist 1	30	2	\$ 65.52	\$ 39.35	\$ 8.94	\$ 17.23	\$ 34.46	\$ 34.46
12	Juan Perez Miranda: 3262	Residential Carpenter	Residential Carpenter Specialist 1	14	2	\$ 65.52	\$ 39.35	\$ 8.94	\$ 17.23	\$ 34.46	\$ 34.46
13	Tinoco Lemus, Gerardo: 7854	Residential Carpenter Apprentice - pay as JM	Carpenter Apprentice CPR paid as JM	16	8	\$ 65.52	\$ 39.35	\$ 17.92	\$ 8.25	\$ 66.00	\$ 66.00
14	Amaral, Peter Alan: 5273	Carpenter Journeyman	Carpenter Journeyman								
			CPR reported 2 OT hr - not paid on CPR	33	2	\$ 59.02	\$ -	\$ -	\$ 59.02	\$ 118.04	\$ 118.04
15	Huizar, Daniel: 4714	Carpenter Journeyman	Carpenter Journeyman								

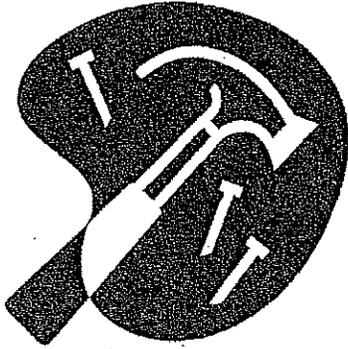
P-3/4
9-9-14 151C

		Sign-in 2 hrs 6-25-14 - not paid on CPR	33	2	\$ 39.35	\$ -	\$ -	\$ 39.35	\$ 78.70	\$ 78.70
16	Torres, Adrian: 6325	Carpenter Apprentice 4								
		Sign-in 6-29-14 Sunday - not paid in CPR. DT.	33	8	\$ 59.02	\$ -	\$ -	\$ 59.02	\$ 472.16	\$ 472.16
17	Ramos, Luis: 1928	Carpenter Apprentice 6								
		Sign-in 6-29-14 Sunday - not paid in CPR. DT.	33	8	\$ 70.84	\$ -	\$ -	\$ 70.84	\$ 566.72	\$ 566.72
19	Faulkner, Charles: 5235	Carpenter Apprentice 6								
		Sign-in 6-29-14 Sunday - not paid in CPR. DT.	33	8	\$ 70.84	\$ -	\$ -	\$ 70.84	\$ 566.72	\$ 566.72
		Sign-in 6-25; 6-26; 6-27: 8 hrs/day - not paid in CPR	33	24	\$ 35.42	\$ -	\$ -	\$ 35.42	\$ 850.08	\$ 850.08
		Sign-in 6-30-14: 8 hrs., 7-1-14: 8 hrs., 7-2-14: 6 hrs. per sign in sheet but not paid	34	22	\$ 35.42	\$ -	\$ -	\$ 35.42	\$ 779.24	\$ 2,196.04

Total
Resitution
Due \$ 6,597.80

P 4/4

9-9-14 1211



September 22, 2014

Letter by Email

Nina Grayson
City of San Jose
Office of Equality Assurance
200 East Santa Clara Street 5th Floor
San Jose, CA 95113

Subj: Response Notice of Violation Ford Road Housing Phase II: Subcontractor Coast Building Products

Dear Ms. Grayson

Upon reviewing the documentation provided by Coast Building and discussions with both their local office and their Payroll Office in Florida the following response to your Notice of Violation dated September 9, 2014 is provided.

-While on paper the correct classification of Residential Carpenter was not always used the workers were always paid not less than the Basic Hourly rate for Residential Carpenter Journeyman. However, the fringes paid to their union were calculated at the rate required by their job classification not the rate required for a journeyman Residential Carpenter. This applies to all workers who are less than Residential Carpenters including Mr. Rollock.

While not making excuses for this error, the local office did classify the workers correctly and did notify their payroll office of the requirement to pay the workers not less than the Basic Hourly rate for a journeyman Residential Carpenter, but the local office has no control over the payment of the fringes to the union.

-Payrolls for weeks ending 10/20/13 thru 11/3/14 along with all other supporting documents will be sent overnight to your office. The correct payroll #1 should be for the w/e 10/20/14

-Fringe transmittals for June-August 2014 will be sent overnight to you 6/29/14.

-The sign in sheet that you list for 6/29/14 is in fact for 6/24/14. No Sunday work was done on 6/29/14.

--When reviewing payrolls; payrolls 15 and 16 should be considered together; because of internal problems all of the hours worked had to be shown on the two payrolls.

-Both Navarro and Castro are members of the Carpenters Union.

I hope this answers all of the questions raised in your Notice of Violation; if you should need additional documentation or information please let me know. I am aware that Coast has already corrected and paid some of the restitution that is due their workers and I am aware that this is a violation of the City of San Jose's restitution procedure. Coast can provide copies of cancelled checks and signed affidavits if you want. Finally, Coast is unsure of how to handle the fringe restitution due their workers; whether it should be paid directly to the workers or whether they are required by union contract to pay it to the union. Greg Duckworth who handles these matters is out of the office until next week and they have already scheduled a meeting (in the Florida office) to finalize how this matter should be resolved. We ask that any due date for payment of the restitution be scheduled for after the 2nd of October 2014.

Sincerely,

Michael Crespan
L&D
mccrespan@charter.net

Attachments: All attachments have been sent overnight to your office.

Cc: Albert Cheng L&D Construction
Michael Lodoen L&D Construction
Jennifer Cheng L&D Construction
Leslie Ku, City of San Jose
Amanda Kobler
Roy Buis
Kristen Clements, Housing Department
Issac Orona Housing Department
Brenda Hauth Coast Building
Greg Duckworth Coast Building
Stephanie Morris Coast Building

October 6, 2014

Via Email - amanda@phasedeux.com

Amanda Kobler
Ford Road Family Housing L.P.
22645 Grand Street
Hayward CA 94541

RE: September 9, 2014 Notice of Violation – Ford Road Family Phase II – Coast Building Products

Dear Ms. Kobler:

L&D Construction is contesting the Notice of Violation issued on September 9, 2014 by Leslie Ku. On Wednesday, September 17, 2014 Coast Building Products (Coast) requested a 7-day time extension to contest the Notice of Violation. I extended the deadline to close of business Monday, September 22, 2014. Receipt of L&D Construction's September 22, 2014 letter is a timely contest of the Notice of Violation. Included in their September 22, 2014 letter were statements that various documents "will be sent overnight." The OnTrac overnight delivery of various documents was received on September 23, 2014.

The documents received on September 23, 2014 did not include a cover sheet detailing its contents: There are duplicate copies of items, a payroll report with no accompanying Statement of Compliance, missing pages to Coast's August 2014 Carpenters Union transmittal, Employee Earnings Reports printed on different dates with different hours with no explanation etc.

At this time, I am unable to render my decision regarding the Notice of Violation for the following reasons:

- Coast's August 2014 fringe verification (provided in the September 23, 2014 OnTrac overnight delivery) is missing Coast's internal control cover page that summarizes their contribution amounts. Additionally, pages are missing from Coast's Carpenters Union transmittal.
- On the August 12, 2014 on-site sign-in, two workers, Manual Navarro and Oscar Castro, signed in. However, these two workers are not found on Coast's August incomplete transmittal to the Carpenters Union; perhaps Mr. Navarro and Mr. Castro are listed on the missing pages from Coast's August 2014 transmittal.
- A "corrected" Payroll Report 16 (W/E 2/23/14) was provided on September 23, 2014 but no Statement of Compliance was included. A Statement of Compliance is to be provided for "corrected" Payroll Report 16.

Amanda Kobler

RE: September 9, 2014 Notice of Violation – Ford Road Family Phase II – Coast Building Products

October 6, 2014

Page Two

Also provided on September 23, 2014 was Payroll Report 15 (W/E 2/16/14) accompanied by a Statement of Compliance. Payroll Report 15 does not include "revised" or "corrected."

These two payroll reports (15 and 16) differ vastly than the payroll reports submitted on 4/17/14.

Certified payroll reports are submitted under penalty of perjury. A further detailed explanation of why Payroll Reports 15 and 16 are corrected, revised or amended is needed. L&D Construction's September 22, 2014 summary explanation of "When reviewing payrolls; payrolls 15 and 16 should be considered together; because of internal problems all of the hours worked had to be shown on the two payrolls" makes no sense.

- L&D Construction's September 22, 2014 summary includes a statement that "Both Navarro and Castro are members of the Carpenters Union."

No payroll reports have been provided to date that includes these two workers. The last payroll report for Coast is for W/E 8/10/14.

August payroll reports were due on September 15, 2014. L&D Construction submitted August payroll reports on September 15 but Coast was not included in that submittal. Coast needs to provide payroll reports for all work performed since August 10.

- L&D Construction's September 22, 2014 summary includes the following statement: "I am aware that Coast has already corrected and paid some of the restitution that is due their workers and I am aware that this is a violation of the City of San Jose's restitution procedure. Coast can provide copies of cancelled checks and signed affidavits if you want."

No information has been provided to date as to what Coast has done other than the statement above. Coast is to provide amended payroll reports showing the additional amounts paid to the employees. For example: Coast submitted payrolls for Weeks 1, 2 and 3. After submittal, Coast realized an underpayment of wages had been made. Coast must calculate the amount of underpayment and submit payrolls 1a, 2a and 3a using the City's Restitution: Amended Payroll Form showing the additional amount paid to the employees. See attached Form.

In this instance, since the workers have been paid, Coast is to notate the check number on the Restitution: Amended Payroll Form and provide copies of the payroll journal, front and back of the cancelled checks and Coast's bank statements.

Additionally, for workers who received restitution, Coast is to provide signed Affidavits of Restitution. The Affidavit of Restitution to be used is attached. Please ensure the workers provide their telephone numbers.

Amanda Kobler

RE: September 9, 2014 Notice of Violation – Ford Road Family Phase II – Coast Building Products

October 6, 2014

Page Three

Kindly provide the requested documents within ten (10) days of the date of this letter. After the documents are received and reviewed, I will issue my decision. Thank you for your prompt attention.

Sincerely


Nina Grayson
Director

Attachments

- c Daniel Beaton, Housing Department
- Roy Buis
- Albert Cheng, L&D Construction
- Jennifer Cheng, L&D Construction
- Kristen Clements, Housing Department
- Mike Crespan, L&D Construction
- Gregory Duckworth, Coast Building Products
- Leslie Ku, Office of Equality Assurance
- Michael Lodoen, L&D Construction
- Isaac Orona, Housing Department

RESTITUTION: AMENDED PAYROLL FORM

CONTRACTOR: _____ PAYROLL PERIOD: _____ to _____

PROJECT/CONTRACT: _____

EQUALITY ASSURANCE/ PUBLIC WORKS
 200 EAST SANTA CLARA STREET
 SAN JOSE, CA 95113
 PHONE: 408.536.8430
 FAX: 408.262-6270

EMPLOYEE NAME, ADDRESS, SOCIAL SECURITY NUMBER	WORK CLASSIFICATION	DAY							Total Prevailing Wage Hours	Prevailing Wage Hourly Rate*	Dollar Hourly Rate Paid*	Hourly Restitution Amount Due*	Total Gross Amount Due
		M	T	W	TH	F	S	S					
		DATE											
		HOURS WORKED EACH DAY											
		S											
		O											
		S											
		O											
		S											
		O											
		S											
		O											
		S											
		O											
		S											
		O											

* The hourly rate should reflect the total hourly combined rate (Basic Hourly Rate + Hourly Benefit Amount).
 Attach Amended Payroll Form to a copy of the original California Department of Industrial Relations Public Works Payroll Reporting Form for each week.

AFFIDAVIT OF RESTITUTION

City of San Jose Prevailing Wage Requirements

I _____ have received Check Number _____
(Employee Name)

in the amount of \$ _____, from _____
(Company Name)

for restitution wages owed to me for work performed on the City of San Jose Contract described below.

Contract: _____

By signing below I acknowledge receipt of the above referenced check:

Employee Name (print)

Employee Phone #

Employee Signature

Date



CONSTRUCTION CO., INC.

GENERAL CONTRACTOR

THE DAVIDSON BUILDING
255 W. JULIAN ST., SUITE 200 • SAN JOSE, CA 95110-2406
(408) 292-0128 • FAX (408) 993-1511 • www.landd.com

MICHAEL A. LODOEN, PRESIDENT
CHARLES W. DAVIDSON, SECRETARY
LICENSE #385833

October 15, 2014

Nina Grayson
City of San Jose
Office of Equality Assurance
200 E. Santa Clara Street 5th Floor
San Jose, CA 95113

RECEIVED

OCT 16 2014

**PUBLIC WORKS
EQUALITY ASSURANCE**

RE: Request for Additional Documents October 6, 2014/Notice of Violation Coast Building

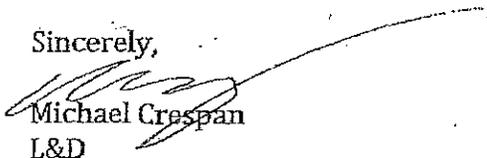
Ms Grayson

Please find enclosed the following documents:

Revised payrolls 1, 2 and 3
Revised payrolls 15 and 16
Revised payroll 37 FINAL
August 2014 Carpenters Combine Employers Report of Contributions
Copies of checks issued for payment to Carpenters Trust August 2014
Hod Carriers 166 transmittal listing Oscar Castro
Plasters Local 66 transmittal listing Manuel Navarro

If you should require any other documents and/or information please advise.

Sincerely,


Michael Crespan
L&D

November 17, 2014

Via Email - amanda@phasedeux.com

Amanda Kobler
Ford Road Family Housing L.P.
22645 Grand Street
Hayward CA 94541

RE: Ford Road Family Phase II - Director's Decision - Coast Building Products

Dear Ms. Kobler:

The purpose of this letter is to transmit my decision regarding the Office of Equality Assurance's September 9, 2014 Notice of Violation.

On September 22, 2014, L&D Construction, via letter dated September 22, 2014, contested the Notice of Violation and assessment of liquidated damages. Below is a summary of the issues.

September 9, 2014 Notice of Violation

The Office of Equality Assurance's September 9 Notice of Violation addressed five issues:

1. Coast's inconsistent classification of workers;
2. Coast's delay in providing fringe benefit verification;
3. Fringe Benefit Statement information not matching information provided in union contribution;
4. Incomplete on-site sign-in sheets; and
5. Workers reported on site-in sheets but no payroll reports submitted.

September 22 and 23, 2014 Response from L&D Construction and Coast

1. Submission of payroll reports for weeks ending 10-20-13, 10-27-13 and 11-3-13 (all as CPR #1 amended);
2. Submission of payroll reports for weeks ending 2-9-14, 2-16-14 and 2-23-14 (CPR #14, 15 & 16 as corrected) and claimed CPR #15 and CPR #16 should be "considered together;"
3. Claimed Coast made restitution to some of its workers; and
4. Claimed M. Navarro and O. Castro were in Carpenters Union

October 6, 2014 Response from OEA Director

OEA Director unable to issue decision regarding September 9 Notice of Violation based on L&D

Construction and Coast's September 22 and 23, 2014 responses. Further clarification was requested regarding Items 2., 3. and 4. of the September 22 and 23, 2014 responses.

October 16, 2014 Response from L&D Construction and Coast

1. No further clarification provided for CPR #15 and CPR #16 (Item 2. under September 22 and 23, 2014 Response from L&D Construction and Coast)
2. No documents submitted regarding restitution made to workers (Item 3. under September 22 and 23, 2014 Response from L&D Construction and Coast)
3. Provided union transmittals showing M. Navarro is in Plasters Local 66 and O. Castro is in Hod Carriers Local 166 (Item 4. under September 22 and 23, 2014 Response from L&D Construction and Coast)
4. No verification of contributions provided for Item 3. above

Based on L&D Construction and Coast's information provided and my review of the file, I am revising the Notice of Violation. Following are issues related to my decision:

1. **CPR #37 (8-17-14)** – The payroll record for 8-17-14 reports an hourly wage rate of \$39.55 for M. Navarro and O. Castro. The back-up documents provided by Coast report an hourly wage rate of \$33.35 per hour resulting in an hourly underpayment of \$6.20. No verification was provided to show that fringe benefit contributions were made. Restitution owed is \$450.38. Liquidated damage assessment is \$1,351.14. Payroll #37 was due to the Office of Equality Assurance no later than September 15, 2014. This payroll report was submitted to the Office of Equality Assurance on October 6, 2014, 21 days late. Liquidated damage assessment is \$5,250 (21 days x \$250 per day).
2. **CPR #1** – Payroll records for weeks ending 10-20-13 and 10-27-13 were due to the Office of Equality Assurance no later than November 15, 2013. Payroll records for week ending 11-3-13 were due to the Office of Equality Assurance no later than December 15, 2013. These three payroll records were submitted to the Office of Equality Assurance on September 23, 2014, a total of 906 days late. Liquidated damage assessment is \$226,500 (906 days x \$250 per day).
3. **Original CPR #1 (11-10-13) through CPR #36 (6-20-14)** – Wage Rate Sheet submitted on June 20, 2014 is misleading. Workers on this project were not paid the fringe benefits stated in the Wage Rate Sheet effective July 1, 2013. Additionally, P. Amaral should have been paid 2 hours OT for week ending 7-1-14. Restitution owed is \$2,514.18. Liquidated damage assessment is \$7,542.54.

Attached are Revised Restitution calculations for the 18 affected workers.

Total restitution for these 18 affected workers is \$2,964.56 (\$450.38 + \$2,514.18)

Liquidated damage assessment for wage violations is \$8,893.68 (\$1,351.14 + \$7,542.54)

Liquidated damage assessment for late submission of payroll records is \$231,750 (\$5,250 + \$226,500).

Coast is instructed to prepare 18 restitution checks as shown in the attached Revised Restitution calculations. Coast is to also provide a telephone list for all workers who are to receive

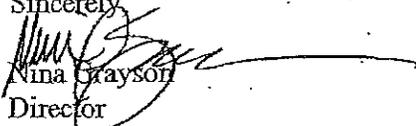
Amanda Kobler
RE: Ford Road Family Phase II - Director's Decision - Coast Building Products
November 17, 2014
Page Three

restitution checks. The list will facilitate prompt dispersal of the restitution checks by the Office of Equality Assurance.

The liquidated damage check is to be made payable to the City of San Jose.

The restitution checks and liquidated damage check are to be mailed or hand delivered to Leslie Ku, Contract Compliance Specialist, 200 East Santa Clara Street, Fifth Floor, San Jose CA 95113 no later than close of business Monday, December 8, 2014.

Sincerely,


Nina Grayson
Director

Attachments

c Daniel Beaton, Housing Department
Roy Buis
Albert Cheng, L&D Construction
Jennifer Cheng, L&D Construction
Kristen Clements, Housing Department
Mike Crespan, L&D Construction
Gregory Duckworth, Coast Building Products
Leslie Ku, Office of Equality Assurance
Michael Lodoen, L&D Construction
Isaac Orona, Housing Department

Employee Name & last 4 digit of SS#	Correct Work Classification	CPR #	Total Prevailing Wage Hours	Prevailing Wage Hourly Rate	Dollar Hourly Rate Paid	Hourly Fringe Benefits Paid	Hourly Restitution Amount Due	Total Gross Amount Due	Total by Worker
Bach, Kieran A: 8031	Residential Carpenter JM	19	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
		21	4	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 18.00	
		26	6	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 27.00	\$ 117.00
Figueroa, Gerardo: 2191	Residential Carpenter JM	1	7	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.35	\$ 37.45	
		7	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 27.00	
		10	7	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.35	\$ 37.45	
		12	8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	
		13	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	
		14	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
			8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	
		15	24	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.26	\$ 126.24	
		16	32	\$ 65.52	\$ 38.78	\$ 21.67	\$ 5.07	\$ 162.24	
		17	24	\$ 65.52	\$ 39.07	\$ 21.67	\$ 4.78	\$ 114.72	
		18	2	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 9.00	
		19	23	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 103.50	
		20	6.5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 29.25	
		21	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
23	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00			
24	30	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 135.00			
28	4	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 18.00	\$ 1,083.05		
Lomell, Juan Carlos: 3907	Residential Carpenter JM	12	8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	
		14	16	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 72.00	
			8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	
		16	3	\$ 65.52	\$ 37.07	\$ 21.67	\$ 6.78	\$ 20.34	
		19	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	
20	6.5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 29.25	\$ 224.79		

Mendoza, Antonio Ortiz : 5761	Residential Carpenter JM	19	5	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 22.50	\$ 22.50
Miranda-Gomez, Emiliano: 3805	Residential Carpenter JM	14	8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	
		15	8	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 36.00	\$ 69.60
Perez-Guzman, Feliciano: 8503	Residential Carpenter JM	11	8	\$ 65.52	\$ 38.50	\$ 21.67	\$ 5.35	\$ 42.80	
		14	3	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 13.50	
			8	\$ 84.90	\$ 59.03	\$ 21.67	\$ 4.20	\$ 33.60	\$ 89.90
Ramirez, Jose : 6956	Residential Carpenter JM	11	7	\$ 65.52	\$ 39.35	\$ 21.67	\$ 4.50	\$ 31.50	\$ 31.50
Llomas Guzman, Juan C :9332	Residential Carpenter JM	19	8	\$ 65.52	\$ 39.35	\$ 15.28	\$ 10.89	\$ 87.12	\$ 87.12
Serrano, Roberto Ulise: 8560	Residential Carpenter JM	16	6.5	\$ 65.52	\$ 31.15	\$ 15.28	\$ 19.09	\$ 124.09	\$ 124.09
Solorio-Alba, Gustavo : 4440	Residential Carpenter JM	11	7	\$ 65.52	\$ 39.35	\$ 14.75	\$ 11.42	\$ 79.94	
		28	8	\$ 65.52	\$ 39.35	\$ 14.75	\$ 11.42	\$ 91.36	\$ 171.30
Rolleck, Lawrence H.: 9569	Residential Carpenter JM	19	20.5	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 234.32	
		21	4	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 45.72	
		26	6	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 68.58	\$ 348.62
Riley, Austin K: 9406	Residential Carpenter JM	30	2	\$ 65.52	\$ 39.35	\$ 8.94	\$ 17.23	\$ 34.46	\$ 34.46

Perez Miranda, Juan: 3252	Residencial Carpenter JM	14	2	\$ 65.52	\$ 39.35	\$ 8.94	\$ 17.23	\$ 34.46	\$ 34.46
Tinoco Lemus, Gerardo: 7854	Residencial Carpenter JM	16	8	\$ 65.52	\$ 39.35	\$ 17.92	\$ 8.26	\$ 66.00	\$ 66.00
Naranjo, Elias: 7855	Residencial Carpenter JM	16	8	\$ 65.52	\$ 39.35	\$ 14.74	\$ 11.43	\$ 91.44	\$ 91.44
Amaral, Peter Alan: 5273	Residencial Carpenter JM	34	2	\$ 84.90	\$ 39.50	\$ 27.72	\$ 17.68	\$ 35.36	\$ 35.36
Navarro, Manuel Selvador 7186	Residencial Carpenter JM	37	8	\$ 65.52	\$ 33.35		\$ 32.17	\$ 257.36	\$ 257.36
Castro, Oscar 6749	Residencial Carpenter JM	37	6	\$ 65.52	\$ 33.35		\$ 32.17	\$ 193.02	\$ 193.02

Total \$ 2,964.56
3X Liquidated Damages \$ 8,893.68



CONSTRUCTION CO., INC.

GENERAL CONTRACTOR

THE DAVIDSON BUILDING
255 W. JULIAN ST., SUITE 200 • SAN JOSE, CA 95110-2406
(408) 292-0128 • FAX (408) 993-1511 • www.landd.com

MICHAEL A. LODOEN, PRESIDENT
CHARLES W. DAVIDSON, SECRETARY
LICENSE #385833

November 24, 2014

Nina Grayson
Office of Equality Assurance
City of San Jose
200 E. Santa Clara Street, 5th Floor
San Jose, CA 95113

RE: Ford Road Family Phase II-Director's Decision-Coast Building Products

Dear Ms Grayson:

Could you please provide the procedure, contacts and timeframe for the filing of a formal appeal to your letter dated November 17, 2014?

In addition would you also please provide a breakdown by payroll/document of your calculations of the late submission of payroll records?

We appreciate your prompt attention to this request.

Sincerely,

Michael Crespan

L&D Construction Co.

Cc: Daniel Beaton
Amanda Kobler.
Roy Buis
Albert Cheng
Jennifer Cheng
Kristen Clements
Michael Lodoen
Gregory Duckworth
Issac Orona
Brenda Hauth

RECEIVED

NOV 25 2014

PUBLIC WORKS
EQUALITY ASSURANCE

MSY
11/26/14

November 26, 2014

Via Email - amanda@phasedeux.com

Amanda Kobler
Ford Road Family Housing L.P.
22645 Grand Street
Hayward CA 94541

RE: Ford Road Family Phase II – Coast Building Products

Dear Ms. Kobler:

On November 25, 2014, I received a letter dated November 24, 2014 from L&D Construction Co. Inc. regarding the November 17, 2014 Director's Decision letter.

The letter requests the following information:

1. Provide procedure, contacts and timeframe for filing formal appeal
2. Provide breakdown of liquidated damage assessment for submission of late payroll records

Notice of Violation Review Process

Ford Family Housing L.P., L&D Construction and/or Coast have the right to contest a Notice of Violation. They are afforded the opportunity to provide additional information and relevant documentation to the OEA Director no later than ten (10) days from the Date of the Issuance of the Notice of Violation.

Additional information and relevant documentation is reviewed and responded to by the OEA Director.

If the parties are not satisfied with the result following written request to the OEA Director made no later than ten (10) days following the OEA Director's response, the party(ies) may request a hearing with the City's Hearing Officer. The letter requesting a hearing is to be submitted to the OEA Director.

Breakdown of Liquidated Damage Assessment for Submission of Late Payroll Records

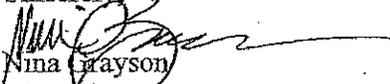
Please be directed to Page Two of November 17, 2014 Director's Decision, under **1. CPR #37 (8-17-14)** and **2. CPR #1** for breakdown by payroll week for late submission calculations.

In addition, please see chart below.

Amanda Kobler
RE: Ford Road Family Phase II -- Coast Building Products
November 26, 2014
Page Two

	W/E 10/20/13	W/E 10/27/13	W/E 11/3/13	W/E 8/17/14
Date Due	11/15/13	11/15/13	12/15/13	9/15/14
Date Received	9/23/14	9/23/14	9/24/14	10/6/14
# Days Late	312	312	282	21
LD Assessment (\$250 per day)	\$78,000	\$78,000	\$70,500	\$5,250

Sincerely,


Nina Grayson
Director

- c Daniel Beaton, Housing Department
- Roy Buis
- Albert Cheng, L&D Construction
- Jennifer Cheng, L&D Construction
- Kristen Clements, Housing Department
- Mike Crespan, L&D Construction
- Gregory Duckworth, Coast Building Products
- Brenda Hauth, Coast Building Products
- Leslie Kn, Office of Equality Assurance
- Michael Lodoen, L&D Construction
- Isaac Orona, Housing Department



CONSTRUCTION CO., INC.

GENERAL CONTRACTOR

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255 W. JULIAN ST., SUITE 200 • SAN JOSE, CA 95110-2406
(408) 292-0128 • FAX (408) 993-1511 • www.landd.com

MICHAEL A. LODOEN, PRESIDENT
CHARLES W. DAVIDSON, SECRETARY
LICENSE #385833

December 4, 2014

By Facsimile 408-292-6270 and Email

Nina Grayson
City of San Jose-Office of Equality Assurance
200 E. Santa Clara Street-5th Floor
San Jose, CA 95113

Re: OEA letter dtd 11/26/14/Ford Road Family Phase II-Directors Decision

Ms Grayson:

Restitution for affected workers and liquidated damages for wage violations: Coast will not contest and will submit requested documents/checks no later than the close of business on Monday December 8, 2014.

Liquidated damage assessment for late submission of payroll records-payrolls for weeks ending 10/20/13, 10/27/13 and 11/3/13: The following information is provided to further clarify and explain Coast Building's handling and submittal of these payrolls. The Coast Dublin office is biggest office in the company. In October 2013 the General Manager/Office Manager was terminated; he was responsible for dispatching crews and listing who would be on what jobs. At the same time there was also a change in the payroll person and the payroll process was new to her. In no small part because of the staff changes that took place during that period the workers who should have been charged to the Ford II project were instead charged to other jobs and therefore certified payrolls for what should have been the beginning of the Ford II project were not generated.

It wasn't until the first Notice of Violation from your office that Coast became aware of the situation. They then requested copies of the sign-in sheets and initiated an internal review of the matter. Within 30 days of the original Notice of Violation (9/9/14) Coast prepared and submitted the payrolls that should have been submitted in 2013. Once they were made aware of their error there was no hesitation in correcting the matter.

Payroll for week ending 8/17/14: The original FINAL payroll #36, a Statement of Non-performance, for w/e 8/10/14 was submitted to your office on 9/1/14. Coast was advised at the end of August that they had workers on site for the week ending 8/17 and had not submitted a certified payroll. The revised FINAL payroll for that period was submitted after Coast had reviewed the matter.



CONSTRUCTION CO., INC.

GENERAL CONTRACTOR

THE DAVIDSON BUILDING
255 W. JULIAN ST., SUITE 200 • SAN JOSE, CA 95110-2406
(408) 292-0128 • FAX (408) 993-1511 • www.landd.com

MICHAEL A. LOBOEN, PRESIDENT
CHARLES W. DAVIDSON, SECRETARY
LICENSE #385833

While it can be argued that Coast's office procedures need to be tightened up no case can be made that they deliberately delayed submitting payrolls; much to the contrary as soon as they were made aware of the situation, after a reasonable period of research on their part, the payrolls were submitted in a timely manner. Therefore we request that your finding of **Liquidated damage assessment for late submission of payroll records** be rescinded.

Please advise if there is any further documentation that you may require.

Thank you in advance for your consideration.

Sincerely,



Michael Crespan
L&D Construction

cc: Michael Lodoen; Jennifer Cheng; Albert Cheng; Amanda Kobler; Daniel Beaton; Roy Buis; Kristen Clements; Gregory Duckworth; Issac Orona; Brenda Hauth.

Attachments: 9/1/14 transmittal and Statement of Non-performance

January 14, 2015

Via Email -- a.madeira@edenhousing.org

Andy Madeira
Ford Road Family Housing L.P.
22645 Grand Street
Hayward CA 94541

RE: Ford Road Family Phase II – Liquidated Damage Assessment for Submission of Late Payroll Records

Dear Mr. Madeira:

The purpose of this letter is to inform you that the liquidated damage check for late submission of payroll records in the amount of \$231,750 was not submitted to the City of San Jose by close of business December 8, 2014 and remains outstanding.

On November 17, 2014, I transmitted my decision to Ford Road Family Housing L.P. regarding L&D Construction's September 22, 2014 letter contesting the Office of Equality Assurance's September 9, 2014 Notice of Violation. That decision stated restitution checks and the liquidated damage check was to be provided no later than close of business December 8, 2014.

On November 25, 2014, I received a letter dated November 24, 2014 from L&D Construction requesting the procedure, contacts and timeframe for filing a formal appeal of my November 17, 2014 decision. On November 26, 2014, I responded in a letter sent via email to Ford Road Family Housing L.P. outlining the Notice of Violation Review Process and Breakdown of Liquidated Damage Assessment for Submission of Late Payroll Records.

As stated in the September 9, 2014 Notice of Violation letter and repeated in my November 26, 2014 letter, the date to request a hearing with the City's Hearing Officer is ten days following the OEA Director's response. No such written request from Ford Road Family Housing L.P., L&D Construction or Coast Building Products was received by November 27, 2014.

However on December 4, 2014 via email, I received a letter from L&D Construction stating Coast Building Products would not contest the revised restitution amounts for the 18 workers and the associated liquidated damage assessment. The same letter provided various excuses for Coast's late submission of payroll reports and requested that I rescind the liquidated damage assessment for the late submission of payroll reports.

Under Council Resolution No. 71584, there is no discretion in assessing liquidated damages if there is a violation of the prevailing wage requirements, and there is no mechanism for waiving or reducing liquidated damages that have been assessed. Therefore, I am unable to rescind the

Andy Medeira

RE: Ford Road Family Phase II - Liquidated Damage Assessment for Submission of Late Payroll Records

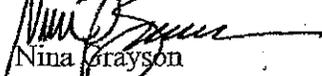
January 14, 2015

Page Two

liquidated damage assessment.

Kindly remit a check made payable to the City of San Jose in the amount of \$231,750. The check is to be mailed or hand delivered to Leslie Ku, Contract Compliance Specialist, 200 East Santa Clara Street, Fifth Floor, San Jose CA 95113 no later than close of business January 26, 2015.

Sincerely,



Nina Grayson
Director

c Daniel Beaton, Housing Department
Roy Buis
Albert Cheng, L&D Construction
Jennifer Cheng, L&D Construction
Kristen Clements, Housing Department
Mike Crespan, L&D Construction
Gregory Duckworth, Coast Building Products
Amanda Kobler, Phase Deux
Leslie Ku, Office of Equality Assurance
Michael Lodoen, L&D Construction
Linda Mandolini, Eden Housing
Isaac Orona, Housing Department



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MICHAEL A. LODOEN, PRESIDENT
CHARLES W. DAVIDSON, SECRETARY
LICENSE #385833

Ms Nina Grayson
City of San Jose
Office of Equality Assurance
200 East Santa Clara Street
Fifth Floor
San Jose, CA 95113

Sent via Email

RE: Ford Road Family Phase II-Liquidated Damage Assessment for Submission of Late Payroll Reports

Dear Ms Grayson

In response to your letter dated January 14, 2015 we formally request a hearing with the City's Hearing Officer.

Sincerely,



Michael Crespan
L&D

Cc: Amanda Kobler; Andy Madeira; Michael Lodoen; Gregory Duckworth; Albert Cheng; Jennifer Cheng; Daniel Beaton; Kristen Clements; Leslie Ku; Linda Mandolini; Isaac Orona

January 20, 2015

Via Email -- amadeira@edenhousing.org

Andy Madeira
Ford Road Family Housing L.P.
22645 Grand Street
Hayward CA 94541

RE: Ford Family Phase II

Dear Mr. Madeira:

The purpose of this letter is to acknowledge receipt of L&D Construction's January 15, 2015 email requesting a hearing with the City's Hearing Officer.

The request for a hearing is not timely and is denied. As stated in the September 9, 2014 Notice of Violation and restated in my November 26, 2014 letter, the date to request a hearing with the City's Hearing Officer was ten days following the issuance of the Director's Decision. The Director's Decision was issued on November 17, 2014.

Sincerely,


Nina Grayson
Director

c Daniel Beaton, Housing Department
Roy Buis
Albert Cheng, L&D Construction
Jennifer Cheng, L&D Construction
Kristen Clements, Housing Department
Mike Crespan, L&D Construction
Gregory Duckworth, Coast Building Products
Amanda Kobler, Phase Deux
Leslie Ku, Office of Equality Assurance
Michael Ledoen, L&D Construction
Linda Mandolini, Eden Housing
Isaac Orona, Housing Department



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle
City Attorney

SUBJECT: Prevailing Wages – Liquidated
Damages Waiver Request

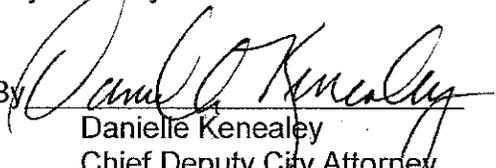
DATE: June 9, 2015

SUPPLEMENTAL MEMORANDUM

The purpose of this memorandum is to provide the Rules and Open Government Committee with two documents related to the waiver request: (1) Eden Housing's letter dated April 6, 2015, requesting a waiver or reduction of the liquidated damages that were assessed against Ford Road Family Housing, L.P. and Coast Building Products; and (2) a memorandum (referenced in our original memorandum), dated January 27, 2004, to the City Council and Redevelopment Agency Board, that sets forth the liquidated damages provisions approved by the City Council and Redevelopment Agency Board as enforcement mechanisms for prevailing wage requirements.

RICHARD DOYLE
City Attorney

By


Danielle Kenealey
Chief Deputy City Attorney

cc: Norberto Dueñas
Jacky Morales-Ferrand
Barry Ng
Nina Grayson

Attachs.

For questions please contact Danielle Kenealey or Shasta Greene at 408-535-1900.



April 6, 2015

Office of the City Clerk
 City of San Jose
 200 E. Santa Clara Street
 San Jose, CA 95113
 Attn: Toni Taber

██████████
 Hayward, CA 94541

██████████ Phone
 ██████████ Fax

**RE: REQUEST FOR COUNCIL HEARING
 APPEAL OF ASSESSED LIQUIDATED DAMAGES
 FORD FAMILY PROJECT (aka FORD ROAD PLAZA)**

To Whom It May Concern:

Eden Housing is a not-for-profit affordable housing developer, manager and social services provider. Since 1968, we have developed or acquired over 8,000 affordable units serving working families, seniors, and special needs populations. Eden and the City of San Jose have long worked together to address housing needs in the City – to date Eden has developed over 900 affordable homes for San Jose residents.

We are writing you today regarding an unfortunate penalty imposed on the Ford Family project by the Office of Equality Assurance in the hopes the City Council will provide some relief. We are disputing \$226,500 of a \$231,750 liquidated damages fine. Ford Family is a 75-unit affordable family project located at 215 Ford Road. The City invested \$2,114,455 million in subordinate financing in addition to donating the land. The City of San Jose, the Housing Authority of the County of Santa Clara, and the Office of Supportive Housing, County of Santa Clara are key partners in this project. The project was completed on September 15, 2014, on time and on budget. We received over 4,500 applications, and the project is fully occupied.

There are two matters we are presenting for Council consideration:

- 1) Timeframe for Appeal: Eden's general contractor, L&D Construction, notified OEA on November 24, 2014 of our intent to appeal the liquidated damages decision issued November 17, 2014 by OEA. L&D sent a letter discussing the issues central to the appeal on December 4, 2014. OEA staff indicated that under a strict interpretation of the City ordinance our appeal was not received in time and the maximum penalty was imposed. We believe we did notify the City of our intent to appeal within the mandated timeframe. We also believe that the procedures described by OEA in their letters were unclear, hence the differing interpretations.
- 2) Merits of Appeal: The Ford Family project was assessed \$226,500 of liquidated damages for submission of late payroll paperwork for three pay periods in 2013. It was a clerical reporting error by the subcontractor, Coast Building Products. Once L&D and Coast were made aware of the missing paperwork, it was provided to OEA within 15 days. All workers were confirmed paid correct wages in 2013. The damages were assessed for late submission of paperwork only. Staff indicated that they do not have discretion to waive the fine, and can only do so with direction from the City Council.

We request that City Council consider the merits of our appeal and waive or reduce the fine, OR that City Council direct Staff to consider the merits our appeal and authorize Staff to reduce or waive the fine, whichever option the Council believes is appropriate.



The attached Statement of Facts and copies of relevant correspondence provides details for your consideration on both matters.

OEA's mission, taken from their website, is to ensure that workers are paid the correct wages by their employers. The workers in this matter were paid correctly and on time by the subcontractor. The assessment of \$226,500 in liquidated damages solely based on late paperwork seems excessively punitive when the goal of OEA, to ensure compliance with California Labor Code, was already complied with by the subcontractor.

The general contractor was L&D Construction, who did a great job and with whom Eden has worked with on 8 projects totaling 532 units of affordable housing since 1994. Four (4) of the eight projects are located in San Jose totaling 304 units. Over many years, L&D continues to be reliable, cost competitive, and a cooperative partner in meeting the requirements of building affordable housing, including compliance with Prevailing Wage and other labor equality rules.

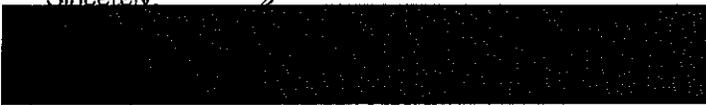
Our loan agreement with the City provides that for each day that the wage documentation is not provided, a penalty, or "liquidated damages," of \$250 per day may be charged to the project. The rate is the same regardless of the amount of the wages in question, the amount of the subcontract, the size of the project, and irrespective of whether the correct wages were paid or not.

Given our long history of partnering with the City, and the contractor's good faith efforts to provide the documentation as soon as they were notified of the omission, we are looking to Council for reasonable consideration of the facts since wages were paid correctly and there was no bad faith or attempt to underpay workers. City staff indicated that imposition of this penalty from the first day the documentation was due is mandatory, and that they had no discretion to modify or reduce it. We also respect the City's process and procedures and believe we were meeting those timeframe requirements for appealing the OEA decision.

Finally, we note that the City of San Jose is facing a dire shortage of affordable housing at a time of greatly reduced resources to build the housing and greatly increasing costs due to a boom in commercial building. If contractors perceive the City will reflexively impose disproportional penalties, Eden is concerned that our costs to build in San Jose will increase even more, with no benefit to the project or the workers who the ordinance is intended to help. A letter in support for Coast Building Products is enclosed from the Northern California Carpenters Union.

Eden is greatly appreciative of the support and partnership of the City of San Jose in providing the 900 units of affordable housing we have developed with you. We look forward to our continued partnership, and thank you for your consideration.

Sincerely,



Andy Madeira
Senior Vice President

cc: Nina Grayson, OEA, City of San Jose
Jacky Morales-Ferrand, Department of Housing, City of San Jose
Michael Lodoen, L&D Construction
Gregory Duckworth, Coast Building Products

Encl.

THE REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE

MEMORANDUM

TO: HONORABLE MAYOR, CITY COUNCIL, & REDEVELOPMENT AGENCY BOARD	FROM: HARRY S. MAVROGENES DEL D. BORGS DORF
SUBJECT: PREVAILING WAGES	DATE: JANUARY 27, 2004

RECOMMENDATION

It is recommended that the City Council and Redevelopment Agency Board take the following actions:

- (a) Approval by the Agency Board of recommended changes to agreements regarding implementation of enforcement mechanisms for Prevailing Wage Law requirements in Agency contracts.
- (b) Approval by the City Council of recommended changes to certain City agreements, administered by the Housing Department, regarding implementation of enforcement mechanisms for Prevailing Wage Law requirements.

BACKGROUND

The Redevelopment Agency Board directed staff and the General Counsel to incorporate language that describes consequences for violations of prevailing wage requirements into Redevelopment Agency contracts. Agency staff met with representatives from the General Counsel's Office and the Office of Equality Assurance to prepare recommended contract provisions. On November 12, 2003, City staff presented an update on prevailing wage enforcement efforts to the Making Government Work Better Committee and, at the same time, the Redevelopment Agency staff and General Counsel's Office presented the attached revised policy to enhance prevailing wage enforcement efforts for Redevelopment Agency contracts.

ANALYSIS

The Redevelopment Agency contracts with the Office of Equality Assurance through an annual Project Services Memorandum for the monitoring of prevailing wage compliance on Agency projects. Agency contracts and agreements range from straightforward construction contracts to facade improvement grants, to development agreements with private parties. In addition, the City's Housing Department uses funds provided by the Agency to offer loans and grants to housing developers, with the requirement that the housing developer comply with long-term affordability restrictions. The City, through the Housing Department, also enters into development agreements for City-owned property acquired with funds provided by the Redevelopment Agency. All of these agreements are subject to the Labor Code's prevailing wages requirements, though reporting and monitoring efforts vary with the differing structures of the agreements.

It is clearly understood in the construction industry that public projects require the payment of prevailing wages and that reporting of these payments is made through the provision of certified payroll documents with payment requests. The Office of Equality Assurance routinely handles these monitoring efforts.

Redevelopment Agency or Housing Department projects involving development or lease agreements with the private sector can become somewhat more complicated, as the Agency and Housing Department do not hold the construction contract and, therefore, have less direct control over the contractor. If the Agency and/or the Housing Department are not directly funding construction of improvements, they cannot withhold construction funds pending collection of certified payroll documentation. For this reason, different mechanisms for enforcing prevailing wage provisions are appropriate, given the particular terms of an agreement. The Office of Equality Assurance works with the developers and their contractors to obtain the necessary information.

The attached clauses provide recommended language for the various types of agreements entered into by the Redevelopment Agency and the City's Housing Department. In summary, for leases, DDAs, loan agreements, and OPAs, new language is recommended that would require the developer to secure initial compliance documentation and the monthly certified payroll from the contractor, prior to disbursement of construction funds. Under these agreements, the developer will be required to pay the City or the Redevelopment Agency daily liquidated damages in the event the documentation is not provided within the time established in the agreement. The specific amount of liquidated damages will depend upon a variety of factors, and will be determined on a project-by-project basis.

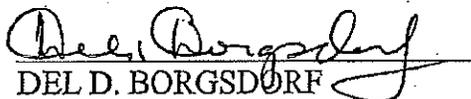
It is uncertain how the development community will respond to these additional requirements. In the case of agreements entered into by the City's Housing Department, the Department intends to condition the use of City loan proceeds or funds on the incorporation of these liquidated damages provisions. The inclusion of the recommended language could lead to increased developer costs or the loss of developer interest, should a developer refuse to agree to such provisions. To address these uncertainties, staff will return in six months with a report on developer responses and experience.

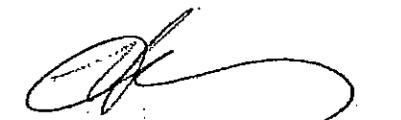
On projects such as facade improvements, it is already extremely difficult to interest the construction community in these small projects because of the required paperwork associated with prevailing wages. Beginning in 2003, submittal of prevailing wage documentation for facade contractors has been a part of those agreements.

Within Redevelopment Agency construction contracts, three language changes are recommended: 1) Inclusion of prevailing wage initial compliance documentation in the contract documents and the requirement that completed forms be returned with other documents within eight days of the contract award, 2) inclusion of a second liquidated damages provision relating to non-payment of prevailing wages, and 3) clarification of language regarding findings and conditions by which all or part of a pay request can be withheld, to the extent there is no certified payroll to support it.

COORDINATION

This report has been coordinated with the Office of Equality Assurance, the Housing Department, the City Attorney, and the Agency's General Counsel.


DEL D. BORGS DORF
City Manager


HARRY S. MAVROGENES
Interim Executive Director

Attachments

Attachment A

1. PROPOSED LANGUAGE FOR DISPOSITION AND DEVELOPMENT AGREEMENTS, OWNER PARTICIPATION AGREEMENTS, AND LEASES

#. [\$#####] Prevailing Wages During Construction

Developer shall pay, or cause to be paid, prevailing wages, for all construction work required under this Agreement. For the purposes of this Agreement, "prevailing wages" means not less than the general prevailing rate of per diem wages, as defined in Section 1773 of the California Labor Code and Subchapter 3 of Chapter 8, Division 1, Title 8 of the California Code of Regulations (Section 16000 *et seq.*), and as established by the Director of the California Department of Industrial Relations ("DIR"), or in the absence of such establishment by the DIR, by the City's Office of Equality Assurance ("OEA"), for the respective craft classification. In any case where the prevailing wage is established by the DIR or by OEA, the general prevailing rate of per diem wages shall be adjusted annually in accordance with the established rate in effect as of such date.

In addition to State Law requirements regarding prevailing wages, the Redevelopment Agency of the City of San Jose recognizes that Developer's payment of prevailing wages promotes the following goals:

1. Protection of job opportunities within the City of San Jose and stimulation of the economy by reducing the incentive to recruit and pay a substandard wage to workers from distant, cheap-labor areas;
2. Benefiting the public through the superior efficiency and ability of well-paid employees, thereby avoiding the negative impact that the payment of inadequate compensation has on the quality of services because of high turnover and instability in the workplace;
3. Payment of a wage that enables workers to live within the community, thereby promoting the health and welfare of all citizens of San Jose by increasing the ability of such workers to attain sustenance, avoid poverty and dependence on taxpayer funded social services; and
4. Increasing competition by promoting a level playing field among contractors with regard to the minimum prevailing wages to be paid to workers.

Developer's compliance with prevailing wage requirements is a material consideration of Agency in entering into this Agreement. Agency will monitor Developer's compliance with the Labor Code requirements and additional requirements of this Agreement through the City Of San Jose's Office of Equality Assurance.

Developer shall:

- Require its construction contractor and subcontractors to complete and submit all prevailing wage initial compliance documentation to OEA.
- Following commencement of construction, require its contractor and subcontractors to submit completed certified payroll records with each monthly pay request and Developer shall refuse to pay all or a portion of a pay request to the extent not supported by certified payroll documentation.
- Submit all certified payroll to Agency on a monthly basis within fifteen days of Developer's receipt ("Payroll Due Date").
- Require the contractor for the construction of the Project to grant the City of San Jose ("City") and Agency access to the Project site at reasonable times for the purpose of enforcing the provisions of this Section.
- Provide the City and Agency with documentation relating to compliance with this Section.
- Indemnify and hold the City and Agency harmless from any third party costs, claims, or damages arising from the contractor's or any subcontractor's failure to pay prevailing wages.

Agency and Developer recognize that Developer's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code and Agency's additional prevailing wage compliance provisions within this Agreement, will cause the Agency damage by undermining Agency's goals in assuring timely payment of prevailing wages, and will cause the Agency additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Agency and Developer further recognize the delays, expense and difficulty involved in proving Agency's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, Agency and Developer agree that:

(A) for each day beyond the Payroll Due Date that Developer fails to submit contractor's certified payroll to Agency, Developer shall pay to Agency as liquidated damages the sum of _____ DOLLARS (\$_____.00); and

(B) for each instance where Agency has determined that prevailing wage requirements were not met, Developer shall pay to Agency as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

AGENCY

DEVELOPER

2. PROPOSED LANGUAGE FOR CONSTRUCTION CONTRACT
OWNER/CONTRACTOR AGREEMENT

Section 3.4 Liquidated Damages.

A. Timely Completion

OWNER and CONTRACTOR recognize that time is of the essence of this Agreement, and that OWNER will suffer financial loss if the work is not complete within the time specified, plus any extensions of time authorized under Section 3.3 of this Agreement. OWNER and CONTRACTOR further recognize the delays, expense and difficulty involved in proving OWNER's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, OWNER and CONTRACTOR agree that for each calendar day's delay beyond the Scheduled Completion Date, (which delays are not excused pursuant to Section 3.3 of this Agreement), CONTRACTOR shall pay to OWNER the sum of [_____ and No/100 Dollars (\$ _____)] as liquidated damages.

B. Prevailing Wage Compliance

OWNER and CONTRACTOR recognize that CONTRACTOR's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code and OWNER's additional prevailing wage compliance provisions within this Contract (Article IV of the Owner-Contractor Agreement and Article 17 of the General Conditions), will cause the OWNER damage by undermining OWNER's goals in assuring timely payment of prevailing wages, and will cause the OWNER additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by CONTRACTOR's payment of restitution to the worker paid less than the prevailing wage. OWNER and CONTRACTOR further recognize the delays, expense and difficulty involved in proving OWNER's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, OWNER and CONTRACTOR agree that for each instance where Owner has determined that prevailing wage requirements were not met, CONTRACTOR shall pay to OWNER as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

OWNER

CONTRACTOR

additional provisions appear throughout the Agency's construction bid package, including provisions in determining a bidder's responsibility, withholding payment, and mechanics of coordinating with OEA. The volume of the documents is such that only the most pertinent provisions are excerpted here.

2. PROPOSED LANGUAGE FOR CONSTRUCTION CONTRACT (cont.)

ARTICLE IV

PREVAILING WAGES

The general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification, or type of workman needed to execute this Agreement is that ascertained by the Director of the Department of Industrial Relations of the State of California, copies of which ("Prevailing Rate Schedules") are on file in the OWNER's principal office. The Prevailing Rate Schedules shall be made available to any interested party on request. The holidays upon which such rates shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the PROJECT. CONTRACTOR shall post the Prevailing Rate Schedule at the Site.

CONTRACTOR shall forfeit, as a penalty as set forth in California Labor Code §1775, fifty dollars (\$50.00) for each calendar day or portion thereof, for each worker paid less than the prevailing rates set forth in the Prevailing Rates Schedules for any work done under the CONTRACT DOCUMENTS or any work done by any subcontractor under CONTRACTOR. CONTRACTOR shall comply with the payroll records requirements set forth in Section 17.2 of the General Conditions and the provisions in Section 7.10 of the General Conditions concerning apprentices and shall be responsible for causing all of CONTRACTOR's subcontractors to comply with these requirements and provisions.

In addition to the California Labor Code requirements, OWNER recognizes that CONTRACTOR's payment of prevailing wages promotes the following goals:

1. Protection of job opportunities within the City of San Jose and stimulation of the economy by reducing the incentive to recruit and pay a substandard wage to workers from distant, cheap-labor areas;
2. Benefiting the public through the superior efficiency and ability of well-paid employees, thereby avoiding the negative impact that the payment of inadequate compensation has on the quality of services because of high turnover and instability in the workplace;
3. Payment of a wage that enables workers to live within the community, thereby promoting the health and welfare of all citizens of San Jose by increasing the ability of such workers to attain sustenance, avoid poverty and dependence on taxpayer funded social services; and
4. Increasing competition by promoting a level playing field among contractors with regard to the minimum prevailing wages to be paid to workers.

CONTRACTOR's compliance with prevailing wage requirements is a material consideration of OWNER in entering into this Contract. OWNER will monitor CONTRACTOR's compliance with the Labor Code requirements and additional requirements of this Contract through the City Of San Jose's Office of Equality Assurance, as detailed in the General Conditions Articles 7, 9 and 17.

3. EXISTING LANGUAGE FOR FAÇADE IMPROVEMENT GRANTS

#. Progress Payments; Final Payment.

(a) Subject to all the terms and conditions of this Agreement, AGENCY agrees to make the following progress payments ("Progress Payments") to Contractor:

(1) A Progress Payment equal to thirty percent (30%) of the sum of the Total Base Grant plus GRANTEE's Contribution, or _____ (\$_____), shall be paid by AGENCY to Contractor after: (i) AGENCY's determination that Contractor has completed thirty percent (30%) of the Eligible Improvements; and (ii) GRANTEE's submittal to AGENCY of Contractor's completed prevailing wage compliance documentation and certified payroll; and

(2) A Progress Payment equal to forty percent (40%) of the sum of the Total Base Grant plus GRANTEE's Contribution, or _____ (\$_____), shall be paid by AGENCY to Contractor upon: (i) AGENCY's determination that Contractor has completed seventy percent (70%) of the Eligible Improvements; (ii) Contractor's submittal to AGENCY of unconditional lien releases for the work completed for the 30% Progress Payment; and (iii) GRANTEE's submittal to AGENCY of Contractor's certified payroll.

(b) Any GRANTEE Contribution shall be the first funds used for the payment of any Progress Payment.

(c) All AGENCY payments shall be made by check and shall be made payable to Contractor.

(d) Upon final completion of the Eligible Improvements, in accordance with the approved plans and specifications, if the completed work is approved by GRANTEE, which approval shall not be unreasonably withheld, GRANTEE shall request AGENCY's approval of the work performed and shall submit the Contractor's Certificate of Completion, unconditional lien releases and certified payroll for the work covered by the previous progress payment to AGENCY along with a request for final payment signed by GRANTEE as approved.

##. All proposed contractor for the construction of the Eligible Improvements shall: require that the Contractor pay prevailing wages pursuant to the requirements of the California Labor Code, Section 1771, *et. seq.* For the purpose of this Agreement, Prevailing Wages are the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification, or type of worker needed to execute this Agreement as ascertained by the Director of the Department of Industrial Relations of the State of California, copies of which ("Prevailing Rate Schedules") are on file in the City

of San Jose's Office of Equality Assurance. The Prevailing Rate Schedules shall be made available to any interested party on request. The holidays upon which such rates shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project. Contractor shall post the Prevailing Rate Schedule at the Site. Contractor shall comply with the payroll records requirements concerning apprentices and shall be responsible for causing all of Contractor's subcontractors to comply with these requirements and provisions.

The Contractor and each subcontractor shall keep an accurate payroll record showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed by the Contractor or subcontractor in connection with the project. The payroll records shall be kept in accordance with the provisions of Section 1776 of the California Labor Code, and Contractor and each subcontractor shall otherwise comply with all requirements of such Section 1776.

4. PROPOSED LANGUAGE FOR CONSULTANT AGREEMENTS

PREVAILING WAGES.

CONTRACTOR shall pay, or cause to be paid, prevailing wages, as set forth in the Labor Code Section 1770 *et. seq.*, for all labor performed on the Project sites to facilitate the professional services provided under this AGREEMENT, including, but not limited to, drilling, trenching, and excavation. CONTRACTOR shall include in all agreements for such labor, a requirement that the employer provide all workers with written notice that prevailing wages apply.

CONSULTANT expressly agrees that the compensation agreed to between the parties includes all payment necessary to meet State prevailing wage law requirements. CONTRACTOR shall indemnify the AGENCY for any claims, costs or expenses which the AGENCY incurs as a result of CONTRACTOR's failure to pay, or cause to be paid, prevailing wages.

SAN JOSE
THE LETITIA BUILDING
[REDACTED]
SAN JOSE CA 95113-2406

PALO ALTO
[REDACTED]
PALO ALTO CA 94306-2062
[REDACTED]



HOPKINS & CARLEY
A LAW CORPORATION

MAILING ADDRESS
[REDACTED]
SAN JOSE CA 95109-1469
hopkinscarley.com

June 8, 2015

JOAN R. GALLO
[REDACTED]

Agenda 6/10/15
Item: G 2

Rules Committee
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Re: L&D Construction Co. Prevailing Wage Adjustment Request

Dear Rules Committee Members:

I represent L&D Construction Co. in the matter of the Prevailing Wages penalty imposed for the late filing of the necessary prevailing wage documentation. As more fully explained in the letter to you from Eden Housing dated April 6, 2015, a clerical error by a subcontractor resulted in the delay in the filing of documentation of the payment of prevailing wages. The prevailing wages were paid in a timely matter but the records were attributed to the wrong project in the subcontractor's books. The penalty imposed of \$226,500 is almost \$100,000 more than the entire amount of that \$131,070 subcontract.

1. The Council has the discretionary ability to unilaterally waive or agree to amend the agreement to lessen the penalty.

It is basic that any provision to a contract can be waived by the party benefited by it or amended by agreement of the parties. The contract at issue here admittedly does have a provision imposing a \$250 per day liquidated damages. However, liquidated damages are supposed to reflect the potential damage caused by the delay and not be a penalty for an inadvertent clerical error when the wages were properly paid.

The Agreement with Eden Housing makes the ability of the Council to waive or amend the Agreement clear by its own terms since it reads: "Section 11.04. **Waiver.** Any waiver by City of any term, condition or requirement of any of the Loan Documents shall not constitute a waiver of any other term, condition or requirement hereof or constitute a waiver of the same term, condition or requirement in any other instance." and "AMENDMENTS ARTICLE XII Amendments to this Agreement shall be effective

only upon the mutual agreement in writing of the parties hereto. No amendment shall be binding upon City unless duly executed by appropriate officer of the City.”

Thus the Council has the discretion to waive or amend the contract with Eden Housing to enable it to modify the liquidated damages provision for this contract.

2. Council should exercise its discretion to reduce the penalty for the inadvertent failure to provide documentation in this case.

In adopting its policy of imposing liquidated damages, the Council focused on the harm to workers who are not paid the required wages. The point is summed up in the model provision which was to be incorporated into the City Contracts. It relates exclusively to failure to pay proper wages. As stated in the model provision which is an exhibit to the attached Resolution 71584 “Contractor further agrees that such damage would increase the greater number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.” The resolution itself does not set penalties for failure to provide documentation. This request involves only circumstances in which the wages were timely paid.¹

The Labor Code on which the prevailing wage requirement is modeled is instructive. Under the Labor Code Section 1775 the penalty amount for a wage payment violation is determined by the Labor Commissioner based on considerations including “Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.” Labor Code Section 1776 addresses failure to provide the proper documentation. The contractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records before penalties are imposed.

The facts here are simple. The subcontractor paid the correct prevailing wages but attributed the work to another of its projects. My client and the Subcontractor became aware that three weeks of documentation October and November 2013 were missing when they were first notified by the Office of Equality Assurance on September 9, 2014. The information was located and they provided the necessary documentation within 15 days from receipt of that notice. If the approach of the Labor Code were followed, my client would not be held responsible until the error was discovered and would only accrue 10 days from receipt of the notice. As I understand it for 5 days delay for each of the 3 weeks

¹ As a separate matter there was one actual circumstance of under payment of the \$2,964.56 and the \$8,893.68 liquidated damages was paid and is not contested.

City of San Jose
Rules Committee
June 8, 2015
Page 3

involved, under the Labor Code, would be \$3,750 as opposed to the \$226,500 penalty imposed .

We are asking that the Council exercise its discretion, since this was a clearly an inadvertent error with no associated error in payment to employees, impose a penalty appropriate for the short delay in providing the documentation from the date of the notice.

Thank you for your consideration.

Sincerely,

HOPKINS & CARLEY
A Law Corporation



Joan R. Gallo

JRG/tsa

cc: L&D Construction Co., Inc.
Rick Doyle
City Council
City Clerk

RESOLUTION NO. 71584

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE APPROVING A POLICY THAT CITY CONTRACTS CONTAINING THE CITY'S PREVAILING WAGE AND LIVING WAGE REQUIREMENTS EXPRESSLY MAKE THE PAYMENT OF COMPENSATION CONDITIONED UPON COMPLIANCE WITH THESE REQUIREMENTS, AND, AS REMEDIES FOR A BREACH OF THESE REQUIREMENTS, GIVES THE CITY THE RIGHT TO CONDUCT AN AUDIT AND SETS FORTH LIQUIDATED DAMAGES

WHEREAS, on February 7, 1989, the City Council adopted Resolution No. 61144 approving a policy requiring that City contracts for certain designated projects and services provide for the payment of at least the prevailing wage ("Prevailing Wage Requirements"); and

WHEREAS, on October 10, 1989, the City Council adopted Resolution No. 61716 extending the Prevailing Wage Requirements to include most City housing projects administered by the City's Department of Housing; and

WHEREAS, on June 8, 1999, the City Council adopted Resolution No. 68900 approving a policy requiring the payment of a livable wage for workers employed by employers who are awarded City service contracts or who receive direct financial assistance from the City ("Living Wage Requirements"); and

WHEREAS, the Prevailing Wage Requirements and Living Wage Requirements provide many practical benefits to the City, including, but not limited to, each of the following:

- A. They protect City job opportunities and stimulate the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- B. They benefit the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- C. By requiring that workers be paid a wage that enables them not to live in poverty, they benefit the health and welfare of all citizens of San Jose by increasing the ability of such workers to attain sustenance, decreasing the amount of poverty and reducing the amount of taxpayer funded social services in San Jose.
- D. They increase competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

WHEREAS, the breach of a contract by failing to comply with the applicable Prevailing Wage Requirements or Living Wage Requirements damages the City not only with

regard to the cost of greater enforcement efforts, but also in the failure to achieve the above-described benefits; and

WHEREAS, given the substantial benefits to the City resulting from compliance with the Prevailing Wage Requirements and Living Wage Requirements, the City Council desires to approve a policy to strengthen compliance with these requirements.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. CONTRACTUAL PROVISION

It is the Policy of the City that City contracts containing the Prevailing Wage Requirements or the Living Wage Requirements include a contractual provision substantially in the form of Attachment "A" of this Resolution.

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SECTION 2. RELATION TO PREVAILING WAGE REQUIREMENT/LIVING WAGE REQUIREMENTS

- A. This Policy shall be in addition to all other remedies and enforcement actions available to the City, including, but not limited to, those expressly set forth in the Living Wage Requirements and Prevailing Wage Requirements.
- B. This Policy shall supersede anything to the contrary contained in the Living Wage Requirements and Prevailing Wage Requirements.

SECTION 3. IMPLEMENTATION OF POLICY

- A. This Policy shall be implemented in future City contracts through the City's authority to contract with parties affected by the adoption of this Resolution.
- B. It is the intent that the provision adopted by this Policy be included in any requests for proposals, requests for qualifications or specifications for a project or service which are subject to the Prevailing Wage Requirements or Living Wage Requirements and which are issued following the adoption of this Resolution, provided that doing so will not significantly delay issuance of the requests for proposals, requests for qualifications or specifications.

- C. Where no requests for proposals, requests for qualifications or specifications for a project or service are issued, it is the intent that the provision adopted by this Policy be included in all new agreements for which the terms have not been previously negotiated.

ADOPTED this 27th day of May, 2003, by the following vote:

AYES: CAMPOS, CHAVEZ, CORTESE, DANDO, GREGORY,
LeZOTTE, REED, WILLIAMS, YEAGER; GONZALES

NOES: NONE

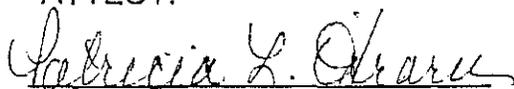
ABSENT: CHIRCO

DISQUALIFIED: NONE



RON GONZALES
Mayor

ATTEST:



PATRICIA L. O'HEARN
City Clerk

Attachment "A"

MODEL CONTRACT PROVISION

I. Remedies For Contractor's Breach Of Prevailing Wage/Living Wage Provisions.

A. **General:** Contractor acknowledges it has read and understands that, pursuant to the terms and conditions of this Contract, it is required to pay workers either a prevailing or living wage ("Wage Provision") and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") Contractor further acknowledges the City has determined that the Wage Provision promotes each of the following (collectively "Goals"):

- 1. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- 2. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- 3. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
- 4. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

B. **Withholding Of Payment.** Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Provision and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Provision.

In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Provision, is an express condition of

City's obligation to make each payment due to the Contractor pursuant to this Contract. The City is **not** obligated to make any payment due the Contractor until Contractor has performed all of its obligations under these provisions.

Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Contract or a waiver of the right to withhold payment for any subsequent breach of the Wage Provision or the Documentation Provision.

C. Liquidated Damages For Breach Of Wage Provision:

Contractor agrees its breach of the Wage Provision would cause the City damage by undermining the Goals, and City's damage would not be remedied by Contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid.

The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Provision would be impracticable and/or extremely difficult. Therefore, the parties agree that, in the event of such a breach, Contractor shall pay to the City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the amount of wages that should have been paid.

- D. Audit Rights.** All records or documents required to be kept pursuant to this Contract to verify compliance with the Wage Provision shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor's address indicated for receipt of notices in this Contract.

ATTACHMENT B

THE REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE

MEMORANDUM

TO: HONORABLE MAYOR, CITY COUNCIL, & REDEVELOPMENT AGENCY BOARD	FROM: HARRY S. MAVROGENES DEL D. BORGS DORF
SUBJECT: PREVAILING WAGES	DATE: JANUARY 27, 2004

RECOMMENDATION

It is recommended that the City Council and Redevelopment Agency Board take the following actions:

- (a) Approval by the Agency Board of recommended changes to agreements regarding implementation of enforcement mechanisms for Prevailing Wage Law requirements in Agency contracts.
- (b) Approval by the City Council of recommended changes to certain City agreements, administered by the Housing Department, regarding implementation of enforcement mechanisms for Prevailing Wage Law requirements.

BACKGROUND

The Redevelopment Agency Board directed staff and the General Counsel to incorporate language that describes consequences for violations of prevailing wage requirements into Redevelopment Agency contracts. Agency staff met with representatives from the General Counsel's Office and the Office of Equality Assurance to prepare recommended contract provisions. On November 12, 2003, City staff presented an update on prevailing wage enforcement efforts to the Making Government Work Better Committee and, at the same time, the Redevelopment Agency staff and General Counsel's Office presented the attached revised policy to enhance prevailing wage enforcement efforts for Redevelopment Agency contracts.

ANALYSIS

The Redevelopment Agency contracts with the Office of Equality Assurance through an annual Project Services Memorandum for the monitoring of prevailing wage compliance on Agency projects. Agency contracts and agreements range from straightforward construction contracts to facade improvement grants, to development agreements with private parties. In addition, the City's Housing Department uses funds provided by the Agency to offer loans and grants to housing developers, with the requirement that the housing developer comply with long-term affordability restrictions. The City, through the Housing Department, also enters into development agreements for City-owned property acquired with funds provided by the Redevelopment Agency. All of these agreements are subject to the Labor Code's prevailing wages requirements, though reporting and monitoring efforts vary with the differing structures of the agreements.

It is clearly understood in the construction industry that public projects require the payment of prevailing wages and that reporting of these payments is made through the provision of certified payroll documents with payment requests. The Office of Equality Assurance routinely handles these monitoring efforts.

Redevelopment Agency or Housing Department projects involving development or lease agreements with the private sector can become somewhat more complicated, as the Agency and Housing Department do not hold the construction contract and, therefore, have less direct control over the contractor. If the Agency and/or the Housing Department are not directly funding construction of improvements, they cannot withhold construction funds pending collection of certified payroll documentation. For this reason, different mechanisms for enforcing prevailing wage provisions are appropriate, given the particular terms of an agreement. The Office of Equality Assurance works with the developers and their contractors to obtain the necessary information.

The attached clauses provide recommended language for the various types of agreements entered into by the Redevelopment Agency and the City's Housing Department. In summary, for leases, DDAs, loan agreements, and OPAs, new language is recommended that would require the developer to secure initial compliance documentation and the monthly certified payroll from the contractor, prior to disbursement of construction funds. Under these agreements, the developer will be required to pay the City or the Redevelopment Agency daily liquidated damages in the event the documentation is not provided within the time established in the agreement. The specific amount of liquidated damages will depend upon a variety of factors, and will be determined on a project-by-project basis.

It is uncertain how the development community will respond to these additional requirements. In the case of agreements entered into by the City's Housing Department, the Department intends to condition the use of City loan proceeds or funds on the incorporation of these liquidated damages provisions. The inclusion of the recommended language could lead to increased developer costs or the loss of developer interest, should a developer refuse to agree to such provisions. To address these uncertainties, staff will return in six months with a report on developer responses and experience.

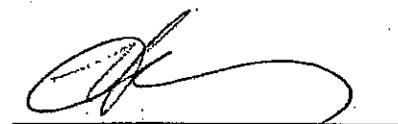
On projects such as facade improvements, it is already extremely difficult to interest the construction community in these small projects because of the required paperwork associated with prevailing wages. Beginning in 2003, submittal of prevailing wage documentation for facade contractors has been a part of those agreements.

Within Redevelopment Agency construction contracts, three language changes are recommended: 1) Inclusion of prevailing wage initial compliance documentation in the contract documents and the requirement that completed forms be returned with other documents within eight days of the contract award, 2) inclusion of a second liquidated damages provision relating to non-payment of prevailing wages, and 3) clarification of language regarding findings and conditions by which all or part of a pay request can be withheld, to the extent there is no certified payroll to support it.

COORDINATION

This report has been coordinated with the Office of Equality Assurance, the Housing Department, the City Attorney, and the Agency's General Counsel.


DEL D. BORGS DORF
City Manager


HARRY S. MAVROGENES
Interim Executive Director

Attachments

Attachment A

1. PROPOSED LANGUAGE FOR DISPOSITION AND DEVELOPMENT AGREEMENTS, OWNER PARTICIPATION AGREEMENTS, AND LEASES

#. [\$#####] Prevailing Wages During Construction

Developer shall pay, or cause to be paid, prevailing wages, for all construction work required under this Agreement. For the purposes of this Agreement, "prevailing wages" means not less than the general prevailing rate of per diem wages, as defined in Section 1773 of the California Labor Code and Subchapter 3 of Chapter 8, Division 1, Title 8 of the California Code of Regulations (Section 16000 *et seq.*), and as established by the Director of the California Department of Industrial Relations ("DIR"), or in the absence of such establishment by the DIR, by the City's Office of Equality Assurance ("OEA"), for the respective craft classification. In any case where the prevailing wage is established by the DIR or by OEA, the general prevailing rate of per diem wages shall be adjusted annually in accordance with the established rate in effect as of such date.

In addition to State Law requirements regarding prevailing wages, the Redevelopment Agency of the City of San Jose recognizes that Developer's payment of prevailing wages promotes the following goals:

1. Protection of job opportunities within the City of San Jose and stimulation of the economy by reducing the incentive to recruit and pay a substandard wage to workers from distant, cheap-labor areas;
2. Benefiting the public through the superior efficiency and ability of well-paid employees, thereby avoiding the negative impact that the payment of inadequate compensation has on the quality of services because of high turnover and instability in the workplace;
3. Payment of a wage that enables workers to live within the community, thereby promoting the health and welfare of all citizens of San Jose by increasing the ability of such workers to attain sustenance, avoid poverty and dependence on taxpayer funded social services; and
4. Increasing competition by promoting a level playing field among contractors with regard to the minimum prevailing wages to be paid to workers.

Developer's compliance with prevailing wage requirements is a material consideration of Agency in entering into this Agreement. Agency will monitor Developer's compliance with the Labor Code requirements and additional requirements of this Agreement through the City Of San Jose's Office of Equality Assurance.

Developer shall:

- Require its construction contractor and subcontractors to complete and submit all prevailing wage initial compliance documentation to OEA.
- Following commencement of construction, require its contractor and subcontractors to submit completed certified payroll records with each monthly pay request and Developer shall refuse to pay all or a portion of a pay request to the extent not supported by certified payroll documentation.
- Submit all certified payroll to Agency on a monthly basis within fifteen days of Developer's receipt ("Payroll Due Date").
- Require the contractor for the construction of the Project to grant the City of San Jose ("City") and Agency access to the Project site at reasonable times for the purpose of enforcing the provisions of this Section.
- Provide the City and Agency with documentation relating to compliance with this Section.
- Indemnify and hold the City and Agency harmless from any third party costs, claims, or damages arising from the contractor's or any subcontractor's failure to pay prevailing wages.

Agency and Developer recognize that Developer's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code and Agency's additional prevailing wage compliance provisions within this Agreement, will cause the Agency damage by undermining Agency's goals in assuring timely payment of prevailing wages, and will cause the Agency additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Agency and Developer further recognize the delays, expense and difficulty involved in proving Agency's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, Agency and Developer agree that:

(A) for each day beyond the Payroll Due Date that Developer fails to submit contractor's certified payroll to Agency, Developer shall pay to Agency as liquidated damages the sum of _____ DOLLARS (\$_____.00); and

(B) for each instance where Agency has determined that prevailing wage requirements were not met, Developer shall pay to Agency as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

AGENCY

DEVELOPER

2. PROPOSED LANGUAGE FOR CONSTRUCTION CONTRACT
OWNER/CONTRACTOR AGREEMENT

Section 3.4 Liquidated Damages.

A. Timely Completion

OWNER and CONTRACTOR recognize that time is of the essence of this Agreement, and that OWNER will suffer financial loss if the work is not complete within the time specified, plus any extensions of time authorized under Section 3.3 of this Agreement. OWNER and CONTRACTOR further recognize the delays, expense and difficulty involved in proving OWNER's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, OWNER and CONTRACTOR agree that for each calendar day's delay beyond the Scheduled Completion Date, (which delays are not excused pursuant to Section 3.3 of this Agreement), CONTRACTOR shall pay to OWNER the sum of [_____] and No/100 Dollars (\$ _____)] as liquidated damages.

B. Prevailing Wage Compliance

OWNER and CONTRACTOR recognize that CONTRACTOR's breach of applicable prevailing wage provisions, including those applicable through the California Labor Code and OWNER's additional prevailing wage compliance provisions within this Contract (Article IV of the Owner-Contractor Agreement and Article 17 of the General Conditions), will cause the OWNER damage by undermining OWNER's goals in assuring timely payment of prevailing wages, and will cause the OWNER additional expense in obtaining compliance and conducting audits, and that such damage would not be remedied by CONTRACTOR's payment of restitution to the worker paid less than the prevailing wage. OWNER and CONTRACTOR further recognize the delays, expense and difficulty involved in proving OWNER's actual losses in a legal proceeding. Accordingly, and instead of requiring such proof of loss or damage, OWNER and CONTRACTOR agree that for each instance where Owner has determined that prevailing wage requirements were not met, CONTRACTOR shall pay to OWNER as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wage which should have been paid.

OWNER

CONTRACTOR

additional provisions appear throughout the Agency's construction bid package, including provisions in determining a bidder's responsibility, withholding payment, and mechanics of coordinating with OEA. The volume of the documents is such that only the most pertinent provisions are excerpted here.

2. PROPOSED LANGUAGE FOR CONSTRUCTION CONTRACT (cont.)

ARTICLE IV

PREVAILING WAGES

The general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification, or type of workman needed to execute this Agreement is that ascertained by the Director of the Department of Industrial Relations of the State of California, copies of which ("Prevailing Rate Schedules") are on file in the OWNER's principal office. The Prevailing Rate Schedules shall be made available to any interested party on request. The holidays upon which such rates shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the PROJECT. CONTRACTOR shall post the Prevailing Rate Schedule at the Site.

CONTRACTOR shall forfeit, as a penalty as set forth in California Labor Code §1775, fifty dollars (\$50.00) for each calendar day or portion thereof, for each worker paid less than the prevailing rates set forth in the Prevailing Rates Schedules for any work done under the CONTRACT DOCUMENTS or any work done by any subcontractor under CONTRACTOR. CONTRACTOR shall comply with the payroll records requirements set forth in Section 17.2 of the General Conditions and the provisions in Section 7.10 of the General Conditions concerning apprentices and shall be responsible for causing all of CONTRACTOR's subcontractors to comply with these requirements and provisions.

In addition to the California Labor Code requirements, OWNER recognizes that CONTRACTOR's payment of prevailing wages promotes the following goals:

1. Protection of job opportunities within the City of San Jose and stimulation of the economy by reducing the incentive to recruit and pay a substandard wage to workers from distant, cheap-labor areas;
2. Benefiting the public through the superior efficiency and ability of well-paid employees, thereby avoiding the negative impact that the payment of inadequate compensation has on the quality of services because of high turnover and instability in the workplace;
3. Payment of a wage that enables workers to live within the community, thereby promoting the health and welfare of all citizens of San Jose by increasing the ability of such workers to attain sustenance, avoid poverty and dependence on taxpayer funded social services; and
4. Increasing competition by promoting a level playing field among contractors with regard to the minimum prevailing wages to be paid to workers.

CONTRACTOR's compliance with prevailing wage requirements is a material consideration of OWNER in entering into this Contract. OWNER will monitor CONTRACTOR's compliance with the Labor Code requirements and additional requirements of this Contract through the City Of San Jose's Office of Equality Assurance, as detailed in the General Conditions Articles 7, 9 and 17.

3. EXISTING LANGUAGE FOR FAÇADE IMPROVEMENT GRANTS

#. Progress Payments; Final Payment.

(a) Subject to all the terms and conditions of this Agreement, AGENCY agrees to make the following progress payments ("Progress Payments") to Contractor:

(1) A Progress Payment equal to thirty percent (30%) of the sum of the Total Base Grant plus GRANTEE's Contribution, or _____ (\$_____), shall be paid by AGENCY to Contractor after: (i) AGENCY's determination that Contractor has completed thirty percent (30%) of the Eligible Improvements; and (ii) GRANTEE's submittal to AGENCY of Contractor's completed prevailing wage compliance documentation and certified payroll; and

(2) A Progress Payment equal to forty percent (40%) of the sum of the Total Base Grant plus GRANTEE's Contribution, or _____ (\$_____), shall be paid by AGENCY to Contractor upon: (i) AGENCY's determination that Contractor has completed seventy percent (70%) of the Eligible Improvements; (ii) Contractor's submittal to AGENCY of unconditional lien releases for the work completed for the 30% Progress Payment; and (iii) GRANTEE's submittal to AGENCY of Contractor's certified payroll.

(b) Any GRANTEE Contribution shall be the first funds used for the payment of any Progress Payment.

(c) All AGENCY payments shall be made by check and shall be made payable to Contractor.

(d) Upon final completion of the Eligible Improvements, in accordance with the approved plans and specifications, if the completed work is approved by GRANTEE, which approval shall not be unreasonably withheld, GRANTEE shall request AGENCY's approval of the work performed and shall submit the Contractor's Certificate of Completion, unconditional lien releases and certified payroll for the work covered by the previous progress payment to AGENCY along with a request for final payment signed by GRANTEE as approved.

##. All proposed contractor for the construction of the Eligible Improvements shall: require that the Contractor pay prevailing wages pursuant to the requirements of the California Labor Code, Section 1771, *et. seq.* For the purpose of this Agreement, Prevailing Wages are the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification, or type of worker needed to execute this Agreement as ascertained by the Director of the Department of Industrial Relations of the State of California, copies of which ("Prevailing Rate Schedules") are on file in the City

of San Jose's Office of Equality Assurance. The Prevailing Rate Schedules shall be made available to any interested party on request. The holidays upon which such rates shall be paid shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of worker employed on the project. Contractor shall post the Prevailing Rate Schedule at the Site. Contractor shall comply with the payroll records requirements concerning apprentices and shall be responsible for causing all of Contractor's subcontractors to comply with these requirements and provisions.

The Contractor and each subcontractor shall keep an accurate payroll record showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week and the actual per diem wages paid to each journeyman, apprentice, worker or other employee employed by the Contractor or subcontractor in connection with the project. The payroll records shall be kept in accordance with the provisions of Section 1776 of the California Labor Code, and Contractor and each subcontractor shall otherwise comply with all requirements of such Section 1776.

4. PROPOSED LANGUAGE FOR CONSULTANT AGREEMENTS

PREVAILING WAGES

CONTRACTOR shall pay, or cause to be paid, prevailing wages, as set forth in the Labor Code Section 1770. *et. seq.*, for all labor performed on the Project sites to facilitate the professional services provided under this AGREEMENT, including, but not limited to, drilling, trenching, and excavation. CONTRACTOR shall include in all agreements for such labor, a requirement that the employer provide all workers with written notice that prevailing wages apply.

CONSULTANT expressly agrees that the compensation agreed to between the parties includes all payment necessary to meet State prevailing wage law requirements. CONTRACTOR shall indemnify the AGENCY for any claims, costs or expenses which the AGENCY incurs as a result of CONTRACTOR's failure to pay, or cause to be paid, prevailing wages.

ATTACHMENT C

SUMMARY OF FACTS

City and Developer entered into a Construction and Permanent Loan Agreement for construction of the Ford Road Family Housing Phase II project on January 2, 2013.

Developer selected L&D Construction as its prime contractor for the project.

On January 23, 2013, OEA provided written notice to Developer of City's payroll submittal timelines - fifteen (15) days following the end of each month weekly certified payroll reports due for prime contractor and all subcontractors – and liquidated damages for late submittals.

On February 1, 2013, OEA held a pre-construction meeting for the Developer, L&D Construction and its subcontractors to discuss labor compliance requirements, submittal deadlines and consequences should the timelines not be adhered to. Coast did not attend the pre-construction meeting.

On February 1, 2013, Developer issued Notice to Proceed to L&D.

L&D Construction hired Coast Building Products to install insulation. Coast's contract was \$131, 070.

Developer, L&D and Coast are familiar and experienced with prevailing wage requirements and have worked on numerous City prevailing wage projects.

L&D hired an experienced labor compliance consultant to monitor and provide oversight for prevailing wage requirements and submittals.

Coast Products is a union contractor and the fringe benefits portion of the prevailing wage is paid to the union trust fund. OEA routinely requests verification of fringe benefit contributions into the union trust fund. Upon review of the information provided by Coast relating to worker classifications and wage rates for this project, there was a question relating to the fringe benefit amount for the Residential Carpenter classification.

In order to clarify the fringe rates, and to prevent any wage violation when work commenced, OEA requested Coast's fringe contribution into the Carpenter's Union on July 2, 2013 and on July 24, 2013. There was no response.

On February 18, 2014, OEA received Coast's first certified payroll report for Week Ending November 10, 2013. This payroll report was due December 15, 2013. Furthermore, the issue regarding the fringe benefit amounts for the Residential Carpenter classification remained unanswered.

OEA made a total of ten (10) written requests to Developer and L&D for Coast's fringe benefit verification. The written requests were made on the following dates:

July 2, 2103
July 24, 2013
March 19, 2014
May 15, 2014
June 26, 2014
June 27, 2014
July 2, 2014
July 24, 2014
July 25, 2014
August 11, 2014

The June 26, 2014 request specifically requested Coast's First Quarter (Q1) 2014 fringe verification from the Carpenter's Union. On August 3, 2014, Coast submitted their August 2013 fringe verification from the Carpenter's Union.

On August 12, 2014, OEA again requested Coast's Q1 2014 fringe verification from the Carpenter's Union. It was submitted on August 12, 2014. Coast's submittals revealed some workers did not receive the required hourly fringe rate of \$26.77 as Coast claimed on their certified payroll. Instead, fringe benefits ranged from \$8.94 to \$26.77 per hour.

On August 14, 2014, OEA requested L&D's daily sign-in sheets for weeks ending February 9, 2014 and May 18, 2014 to randomly check the accuracy of Coast's certified payroll. OEA's review of L&D's daily sign-in sheets and Coast's certified payroll found discrepancies. Neither L&D nor Coast provided OEA any explanation for these discrepancies.

OEA recognized a pattern developing; each time OEA requested information, Coast either provided incomplete or inaccurate and false information. OEA continually had to seek clarification and verification. OEA had no confidence in the hours and wages reported on Coast's payroll reports and requested L&D's on-site workers daily sign-in sheets for all weeks worked.

OEA's review of the daily sign-in sheets revealed that Coast's workers did not consistently sign-in and when they did sign-in they were not reported on Coast's certified payroll.

The October 16, 2013 and October 29, 2013 sign-in sheets showed two (2) Coast workers signed in but no certified payrolls submitted corresponded to these dates. Coast's Payroll #1 was week ending *November 10, 2013*. These two workers were shown on Coast's fringe benefit roster.

The August 12, 2014 sign-in sheet showed two Coast workers signed in but Coast's "final" certified payroll was week ending August 10, 2014. Additionally, the two workers were not listed on Coast's fringe benefit roster.

On September 9, 2014, OEA issued its Notice of Violation (NOV). The NOV stated Coast failed to pay 19 workers the required hourly wage rate from November 10, 2013 through August 10, 2014. The amount of restitution owed the affected workers was \$6,597.80 and the liquidated damage assessment was \$19,793.40. The restitution calculations did not include the missing certified payrolls. The NOV included information on the review/appeal process and timelines.

On September 17, 2014, L&D, on behalf of Coast, requested a time extension to provide additional information and relevant documentation. A time extension to September 22, 2015 was granted by OEA.

On September 22, 2014, L&D contested the NOV. On September 23, 2014, L&D provided Coast's payroll records for weeks ending October 20, 2013, October 27, 2013 and November 3, 2013.

On October 6, 2014, OEA Director informed Developer, L&D and Coast that a decision was unable to be rendered due to incomplete and missing documents. OEA Director provided Developer, L&D and Coast ten (10) days to provide the documents.

On October 15, 2014, L&D submitted some of the requested documents.

On November 17, 2014, OEA Director issued her decision with the following findings:

1. Workers on the project were not paid correct wages; 18 workers were underpaid a total of \$2,964.56. The liquidated damage assessment for the wage violation was \$8,893.68.
2. Four of Coast's payroll records were submitted late:
 - W/E 10/20/13 was received on 9/23/14 (312 days late)
 - W/E 10/27/13 was received on 9/23/14 (312 days late)
 - W/E 11/3/13 was received on 9/23/14 (282 days late)
 - W/E 8/17/14 was received on 10/6/14 (21 days late)

For the four late payroll submittals, OEA assessed the Developer \$231,750 in liquidated damages as shown in the table below:

	Payroll for Week Ending 10/20/13	Payroll for Week Ending 10/27/13	Payroll for Week Ending 11/3/13	Payroll for Week Ending 8/17/14
Date Due	11/15/13	11/15/13	12/15/13	9/15/14
Date Received	9/23/14	9/23/14	9/23/14	10/6/14
# Days Late	312	312	282	21
Liquidated Damage Assessment (\$250 per day)	\$78,000	\$78,000	\$70,500	\$5,250

On November 25, 2014, L&D requested information regarding the procedure, contacts and timeframe for filing a formal appeal and a breakdown of the liquidated damage assessment for submission of late payroll reports.

On November 26, 2014, OEA responded to L&D's request.

Coast made restitution to the 18 workers and paid the \$8,893.68 liquidated damage assessment to the City on December 8, 2014.

L&D's request for a hearing was received on January 15, 2015, 49 days late, and was deemed to be untimely.

On January 26, 2015, Developer paid the \$231,750 liquidated damage assessment to the City.