In the Matter of

LARSON CONSTRUCTION CO., INC.,

Case No. 114-00

Final Order of the Commissioner Jack Roberts

Issued August 30, 2001

SYNOPSIS

Respondent Larson Construction Co. ("LCCI") intentionally failed to post the applicable prevailing wage rates during the performance of two contracts for public works and filed an untimely certified payroll report for the same contracts. The Commissioner imposed $4,000 in penalties for these violations of Oregon's prevailing wage rate laws. The Commissioner found that Respondent David Larson, LCCI's corporate president, was responsible for Respondent LCCI's failure to post the applicable prevailing wage rate, and ordered that both Respondents and any firm, corporation, partnership or association in which Respondents have a financial interest be placed on the list of those ineligible to receive public works contracts or subcontracts for a period of one month. The Commissioner additionally placed Howard Johnson & Sons Construction on the list of ineligibles for one month based on Respondent David Larson's financial interest in that company. The Commissioner also found that Respondents did not take actions that circumvented payment of the prevailing wage rate. ORS 279.350, ORS 279.354, ORS 279.361, ORS 279.370, OAR 839-016-0010, OAR 839-016-0033, OAR 839-016-0085, 839-016-0090, OAR 839-016-0340, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 20-21, 2001, at the offices of Oregon Adult and Family Services, 450 Marine Drive, Astoria, Oregon, and on March 26, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Respondent David M. Larson ("Larson") was present throughout the hearing. Respondents Larson Construction Co.,

Inc. ("LCCI"), Larson, and Howard E. Johnson & Sons Construction Co., Inc. ("HJSCCI") were represented by Christine M. Meadows, attorney at law. Tony Ewing was present throughout the hearing as the individual designated to assist in the presentation of LCCI's case. Respondents Michael Sarin and Ewing were represented by Thomas J. Murphy, attorney at law. Sarin, Ewing, and Murphy were all present at the start of the hearing. Sarin and Murphy left after Murphy and Gerstenfeld submitted a fully executed settlement document resolving the issues raised in the Agency's Notice of Intent as to Respondents Sarin and Ewing.

The Agency called the following witnesses: Lois Banahene, leadworker in BOLI's Wage & Hour Division Prevailing Wage Rate Unit; Tyrone Jones, Wage & Hour Division Compliance Specialist; L. Alan Johansson, City of Warrenton Director of Public Works and city engineer; and David Larson, Tony Ewing, and Michael Sarin, Respondents.

Respondents called the following witnesses: Respondents Larson, Sarin, and Ewing; Julie Stanley, LCCI's office manager; Gilbert G. Gramson, former City of Warrenton city manager; and Gary Cokley, building contractor.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 and X-16 (submitted or generated prior to hearing), X-13 (submitted during the hearing), and X-14 and X-15 (generated after the hearing);

b) Agency exhibits A-1 through A-6, A-9 through A-22, and A-25 through A-28 (submitted prior to hearing), A-29 through A-31 (submitted at hearing), and A-32 (submitted after hearing);

c) Respondent exhibits R-4 through R-23 (submitted prior to hearing), and R-25, R-26, R-27, R-29 (submitted at hearing), and R-30 (submitted after hearing);

d) Exhibits ALJ-1, ALJ-2, ALJ-3 (submitted at hearing at the ALJ's request).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On October 3, 2000, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondents LCCI, Larson, Sarin, and Ewing:

> a) In February 2000, Respondent LCCI provided manual labor on the Fire Station Demolition Contract ("FSD contract"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay at least $133.33 in prevailing wages to two employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $10,000 penalty for these two alleged violations.
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> b) Respondent LCCI failed to file certified payroll reports within 15 days of starting the FSD contract, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a $5000.00 penalty for this alleged violation.
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> c) Respondent LCCI intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the FSD contract, in violation of ORS 279.350(4) and OAR 839-016-0033(1). The Agency sought a $5,000 penalty for this alleged violation.
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> d) Respondents LCCI and David M. Larson were each placed on the list of those ineligible to receive contracts or subcontracts for public works on July 22, 1998 and are to remain on the list until July 21, 2001. While on the list of ineligibles, Respondent LCCI intentionally entered into the FSD contract, one that is regulated under Oregon's prevailing wage rate laws. The Agency sought a $5,000 penalty for this alleged violation.
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> e) In February 2000, while on the list of ineligibles, Respondent LCCI intentionally entered into the Fire Station Rock contract ("FSR contract"), which was part of a public works project subject to regulation under Oregon's prevailing wage rate laws. The Agency sought a $5,000 penalty for this alleged violation.
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> f) Respondents Larson, Sarin, and Ewing were corporate officers or corporate agents responsible for the failure and refusal to pay

the prevailing wage rate on, and the failure to adequately post the prevailing wage rates on the FSD contract.

g) The Agency also asked that Respondents LCCI, Larson, Sarin, and Ewing, and any firm, corporation, partnership or association in which they had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years.

2) The Notice of Intent instructed Respondents that they were required to make a written request for a contested case hearing within 20 days of the date on which they received the Notice, if they wished to exercise their right to a hearing.

3) The Agency served the Notice of Intent on Respondents Larson, Sarin, and Ewing in person, together with a document providing information on how to respond to a notice of intent. The Agency served the Notice of Intent on Respondent LCCI by personal service on Larson, LCCI's registered agent.

4) Respondents Sarin and Ewing, through counsel, mailed an answer and request for hearing on October 19, 2000, which the Agency received on October 23, 2000.

5) Respondents Larson and LCCI, through counsel E. Andrew Jordan of Tarlow, Jordan & Schrader, mailed an answer and request for hearing on October 24, 2000, which the Agency received on October 24, 2000.

6) The Agency filed a request for hearing with the Hearings Unit on October 26, 2000.

7) On December 7, 2000, the Hearings Unit served Respondents with: a) a Notice of Hearing in Case Number 114-00 that set the hearing for March 20, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On January 8, 2001, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by March 9, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On January 12, 2001, the Agency filed a motion to amend the Notice of Intent to include Howard E. Johnson & Sons Construction Co., Inc. ("HJSCCI") as a named respondent in the proceeding and to add the following allegations:

> a) Respondent Larson and any firm, corporation, partnership or association in which he has a financial interest was placed on the List of Ineligibles on July 22, 1998 and is to remain on that list until July 21, 2001. Respondent Larson has a financial interest in HJSCCI, which should also be placed on the List of Ineligibles through July 21, 2001.
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> b) Respondent Larson has a financial interest in HJSCCI, which should also be placed on the List of Ineligibles to receive contracts or subcontracts for public works for the same period(s) of time as Respondent Larson in this proceeding.

10) On January 16, 2001, the ALJ issued an interim order stating that Respondents had seven days after service of the Agency's motion to file a written response.

11) Respondents did not file any response to the Agency's motion, and on February 2, 2001, the ALJ granted the Agency's motion to amend to add HJSCCI as a named respondent. In order to expedite matters and avoid possible postponement, the ALJ required the Agency to serve HJSCCI with the following documents and to inform the forum when service was accomplished and provide a mailing address for HJSCCI:

> 1) The Notice of Intent;
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> 2) The Answers and Requests for Hearing filed by the other Respondents;
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> 3) BOLI's Multi-Language Notice;

4) BOLI's Notice of Rights and Responsibilities;

5) BOLI's Division 50 Rules re: Contest Case Hearings;

6) ALJ's Interim Order for Case Summary;

7) The Agency's Motion to Amend Notice of Intent;

8) ALJ's Interim Order entitled "Timeline for Responding to Agency's Motion to Amend";

9) ALJ's Interim Order granting Agency's Motion to Amend.

12) On February 28, 2001, the Agency filed a letter notifying the forum that HJSCCI had been served with all the documents required in the ALJ's interim order granting the Agency's motion to amend.

13) On March 9, 2001, HJSCCI, through counsel Christine M. Meadows of Tarlow, Jordan & Schrader, filed an answer to the Agency's Amended Notice and request for hearing. HJSCCI's answer included an admission that "David M. Larson has a financial interest in Respondent Howard E. Johnson & Sons Construction Co., Inc."

14) The Agency and Respondents filed timely case summaries on March 9, 2001.

15) On March 12, 2001, the Agency filed a supplemental case summary.

16) On March 19, 2001, Respondents filed a supplemental case summary.

17) On March 19, 2001, the Agency submitted a letter stating that Respondents Ewing and Sarin had reached an informal resolution with the Agency. The Agency's letter enclosed a partially executed copy of a Consent Order signed by Respondents Sarin and Ewing.

18) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) Prior to opening statements, Mr. Gerstenfeld and Mr. Murphy jointly submitted a fully executed Consent Order reflecting a complete resolution of the matters

alleged in the Notice as to Respondents Sarin and Ewing. The ALJ received the Consent Order as Exhibit X-13 and Mr. Murphy was excused from the hearing.

20) Prior to opening statements, the Agency moved to amend paragraphs 12 and 13 of its amended Notice of Intent to substitute “Larson Construction Co., Inc.” for “David M. Larson” based on evidence acquired in discovery. Respondents did not object and the Agency’s motion was granted.

21) Prior to opening statements, the Agency moved to delete paragraph 3 and subsection (1) of paragraph 10 from the Notice of Intent, and to reduce civil penalties sought to $20,000. Respondents did not object and the Agency’s motion was granted.

22) On March 20, the hearing was adjourned at approximately 5 p.m. Immediately afterwards, in the company of Mr. Gerstenfeld, Ms. Meadows, and Mr. Ewing, the ALJ visited and made observations at the City of Warrenton’s municipal building, the site of the FSD and FSR Contracts. At the conclusion of the site visit, the ALJ asked Mr. Gerstenfeld and Ms. Meadows to each take photographs of the municipal building and its adjacent parking lot and to submit them to the forum by April 6, 2001.

23) The evidentiary portion of the hearing was concluded at 5 p.m. on March 21. Due to conflicting schedules, closing arguments were scheduled and held at 1 p.m. on March 26 in the Portland State Office Building. The ALJ, Mr. Gerstenfeld, Mr. Larson, and Ms. Meadows were present during closing argument.

24) On March 27, 2001, the ALJ issued a Final Order Based on Informal Disposition reflecting the Consent Order executed between the Agency and Respondents Sarin and Ewing.

25) On April 5, 2001, the Agency and Respondent each submitted photographs of the municipal building and its adjacent parking lot. Neither objected to the other's submission.

26) The ALJ issued a proposed order on June 25, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent and the Agency both filed timely exceptions. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent David Larson has been involved with the construction business since 1976 on the Oregon coast. He has been engaged in public works construction for 20 years. He is corporate president and a shareholder of LCCI and has a financial interest in HJSCCI. There was no evidence that LCCI has a financial interest in HJSCCI.

2) On October 24, 1997, the Agency issued a Notice of Intent to LCCI and David M. Larson alleging that Respondents had violated Oregon's prevailing wage rate laws from 1995 to 1997and proposing to assess civil penalties in the amount of $58,522 and to place Respondents on the List of Ineligibles for a period of three years from the date of publication of their names on the List of Ineligibles. On July 22, 1998, after hearing, the Commissioner issued a final order concluding that Respondents had performed a subcontract on a public works project and intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program, in violation of ORS 279.350(7). The Commissioner placed both Respondents on the List

of Ineligibles for three years and assessed $59,993.72 in civil penalties for those violations.

3) Respondents' names were first published on the List of Ineligibles on July 22, 1998, with a "Removal Date" of July 21, 2001.

4) On August 26, 1998, the Agency sent a letter to Mitch Mitchum, the Public Works Director of the City of Astoria, regarding the scope of LCCI's and Larson's debarment. Among other things, the letter stated:

> "The debarment makes Larson ineligible to receive public works contracts. This ineligibility extends to public works contracts generally, not just to those contracts over $25,000 or those regulated by the prevailing wage requirements. * * * "

5) On August 31, 1998, in response to the Agency's letter, Joseph Tripi, legal counsel for LCCI, Larson, and Johnson Brothers Rock Co. sent a letter to BOLI demanding a retraction letter from the Agency that stated that LCCI, Larson, and companies affiliated with Larson or Johnson Brothers were not debarred from public works contracts under $25,000.

6) On September 1, 1998, the Commissioner responded with a letter that rejected LCCI's demand for a retraction of the Agency's letter.

7) On September 25, 1998, Tripi filed a lawsuit on behalf on LCCI, Larson, and HJSCCI seeking damages of approximately one million dollars based on the issuance of the Agency's August 26, 1998, letter and the Agency's refusal to retract that letter.

8) On November 13, 1998, the Agency sent another letter to Mitchum informing him of "a change in the Bureau's interpretation of the debarment laws." In pertinent part, it stated:

> "The debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which, accordingly, a debarred contractor may enter into: (1) contracts when the total project

> cost is less than $25,000; and 2) projects regulated under the federal Davis-Bacon Act. * * * Regarding the $25,000 threshold, it applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a *project* is being performed for less than $25,000, it is not covered – in this case it means a debarred contractor could work on it. It is important, however, to recognize the distinction between the amount of the project and the amount of a contract: the threshold applies to the entire project, not just isolated contracts. Thus, if your agency were engaging in a project which would cost $50,000 it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate contractors to perform the work, with none of the individual contracts being in excess of $25,000. In summary, a debarred contractor can receive a contract or subcontract for a public work if the total project cost is less than $25,000 or if the project is being regulated under the federal Davis-Bacon Act."

9) LCCI, Larson, and HJSCCI dismissed their lawsuit against BOLI based on the Agency's issuance of the November 13, 1998, letter.

10) In November 1998, the Agency published its interpretation of the "scope of debarment" when a contractor is placed on the List of Ineligibles.[i] In pertinent part, it reads as follows:

> "Debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which, accordingly, a debarred contractor may enter into:
>
> "(1) contracts when the total project cost is less than $25,000; and
>
> "2) projects regulated under the federal Davis-Bacon Act.
>
> "The $25,000 threshold applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a *project* is being performed for less than $25,000, it is not covered and a debarred contractor may work on it. It is important, however, to distinguish between the amount of a project and the amount of a contract: The threshold applies to the entire project, not just isolated contracts. Thus, if an agency were engaging in a project which would cost $50,000, it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate contractors to perform the work, with none of the individual contracts being in excess of $25,000.
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> "If neither of the above two exceptions apply, a debarred contractor may not work on a public works project, either as a prime contractor or a subcontractor."

"* * * * *"

11) Larson and LCCI have relied on BOLI's November 13, 1998, interpretation of "scope of debarment" for the purpose of determining if LCCI or Larson was eligible to work on a contract since BOLI's letter containing that interpretation was issued.

12) The Agency's Field Operations Manual ("FOM"), Volume VI – Prevailing Wage Rate, includes an "Interpretation" entitled "Criteria used to Determine PWR Coverage." In pertinent part, it contains the following language:[ii]

> "Generally
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> "The Prevailing Wage Rate Law, ORS 279.348 to 279.363, requires that the prevailing rate of wage, as determined by the Labor Commissioner, must be paid to workers upon all public works contracts. ORS 277.348(1);[iii] 279.350(1). "Public works" are defined very broadly to include roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on by a public agency to serve the general public interest and is not limited to those public works listed. ORS 279.348(3). The only public works projects excluded are projects * * * of $25,000 or less * * *. ORS 279.357(1) and (2); 261.345.
>
> "Criteria
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> "1. Does the particular project in question involve improvement of "public works?" A single public works project may include several types of improvements or structures. ORS 279.348(3)
>
> "2. What is the ultimate intent of the parties to the particular project? Precisely what did the parties contemplate their project or entity would finally look like? It must be underscored that what is meant by this criteria is not the desire to avoid the effect of law, but the anticipated outcome of the particular improvements the agency plans to fund. * * *
>
> "3. Are the particular projects, alleged to be separate and distinct, in actuality, one project? A project encompassing several structures or distinct improvements may be one project if the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function.
>
> "4. Is the timing of each particular project, alleged to be a separate and distinct project, indicative of one project or several projects? Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project.
>
> "5. Are the contractor, subcontractor and their respective workers either the same or substantially the same throughout the particular project

or, if different, part of a continuum providing distinct improvements that complete the public agency's ultimate intent?

"6. How do the public agency and contractors administer and perform the improvements alleged to be separate and distinct?

"7. Does the total value of all anticipated improvements to the public works exceed $25,000? * * *"

14) Subsequent to the issuance of the final order summarized in Finding of Fact – The Merits 2, BOLI issued a Notice of Intent to LCCI proposing to assess $500 in civil penalties based on LCCI's alleged failure to complete the Commissioner's 1999 wage survey. That case was resolved prior to hearing when LCCI sent BOLI a check for $500 on February 24, 2000.

15) On January 20, 1999, the City of Warrenton ("City") awarded a contract in the amount of $1,600,373 to C.A. Taggart Construction for a project entitled the "Warrenton Municipal Complex" ("WMC project"). This project involved construction of a new municipal complex for the City containing a fire station, adjoining city offices, a police station, and a large parking lot to service the complex. The project was considered a public works contract requiring payment of the prevailing wage rate. The City also awarded two related contracts, in the amount of $70,000 and $45,000, to Jim Wilkins to do site work. These two contracts were considered public works contracts requiring payment of the prevailing wage rate.

16) The WMC project was planned to take place on a rectangular city block in Warrenton containing 16 lots of the same size. The block was bordered on its two longer sides by S. Main St. and S.W. Main St. One shorter side of the block was bordered by S.W. 2nd St. The project involved eight adjacent lots numbered 1-4 and 13-16. It divided the block down the middle, and covered the half of the block that faced S.W. 2nd St. Lots 1-4 bordered S.W. Main on one side, with lot 1 being the corner lot facing S. Main and S.W. 2nd. Lots 13-16 bordered S.W. Main on one side, with lot 16

being the corner lot facing S.W. Main and S.W. 2nd. Abutting were the back sides of lots 1-6, 2-15, 3-13, and 4-12.[iv]

17) At the time the WMC project was bid, the City's existing fire station covered most of lot 16. A house and garage, known together as the "Hamilton house," occupied lot 4.

18) The WMC project included plans for a single L-shaped building containing a fire station and police station on opposite ends of the "L," with city offices in between that would together occupy lots 1-3 and 16, and a large paved parking lot that would occupy lots 4, and 13-15.

19) Because the City's existing fire station was located on the site where the new police station would be built, the City planned that the WMC project would be performed in two phases. Phase one of the plan involved the construction of a new fire station and adjoining city offices on lots 1-3. When the first phase was completed, it was planned that the fire department would move into the new station. Phase two of the plan involved demolishing the old fire station located on lot 16 to make room for the new police station, and removal of the Hamilton house to make room for paved parking.

20) The WMC project could not have been completed without the demolition or removal of the City's old fire station and the Hamilton house and its adjoining garage. Demolition of the old firehouse was originally contemplated as necessary in order to complete WMC project. Demolition of the Hamilton house was only planned after the project began due to the City's acquisition of the house in the spring of 1999, after the WMC project had already begun.

21) By January 2000, phase one of the WMC project was nearing completion, and the old fire station and Hamilton house had to be demolished before phase two could begin.

22) The City originally planned that the Army National Guard would demolish the old fire station and Hamilton house, charging only for fuel and dump fees. However, in January 2000, the City learned that local contractors were interested in performing the demolition and that the Guard was prohibited from performing the job if local contractors were interested in bidding on it.

23) When City officials learned that the Guard could not perform the demolition work, Gilbert Gramson, the City's manager, instructed Alan Johansson, the City's director of public works and city engineer, to personally solicit bids from five local contractors - LCCI, Jim Wilkins Co., Taggart, Cokley Excavation, and Carlson Contracting. The scope of the bids was to be was limited to demolition of the old fire station and Hamilton house ("FSD contract"). The City did not publicly advertise the FSD contract for bid. At that point, Gramson regarded the FSD contract as a separate contract from the WMC project.

24) When Johansson called LCCI, he spoke with Tony Ewing, LCCI's estimator. Johansson described the FSD contract and asked Ewing to submit a bid. Johansson told Ewing that the old fire station was being demolished because it was no longer needed, and the Hamilton house was being torn down because it was an eyesore and a liability. There was no discussion about any construction activity that might take place in the future where the old fire station and Hamilton house were presently located. Johansson did not tell Ewing that the job was subject to the prevailing wage rate or that it was part of a larger project.

25) Before submitting a bid, Ewing visited the FSD contract site with Michael Sarin, LCCI's project manager. During their visit, there were job trailers on the lots that would later become paved parking for the WMC project. There were construction materials piled between the old fire station and the Hamilton house. The L-shaped

portion of the municipal complex building that had already been constructed was completely sided except for a wall faced with plywood and tarpaper that was about ten feet away from the old fire station. The municipal building appeared to be "substantially complete" except for the unfinished wall facing the old fire station.

26) Before Ewing submitted LCCI's bid, Ewing and Johansson discussed the fact that LCCI was on the List of Ineligibles. Ewing told David Larson that Johansson had some concerns about LCCI's eligibility to work on the FSD contract. Larson instructed Ewing to forward BOLI's November 13, 1998, letter to the City and let the City determine if LCCI was eligible to work on the job.

27) On January 26, 2000, Ewing submitted a written bid to Johansson for the FSD contract in the amount of $8,000. Along with the bid, he submitted a copy of a letter LCCI had received from BOLI (the "BOLI letter") describing the scope of a debarment. Ewing was familiar with the contents of that letter at the time he submitted it. It read as follows:

> "A debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which accordingly, a debarred contractor may enter into: 1) contracts when the total project cost is less than $25,000; and 2) projects regulated under the federal Davis-Bacon Act. I believe the second of these is self-explanatory. Regarding the $25,000 threshold, it applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a project is being performed for less than $25,000, it is not covered – in this case it means a debarred contractor could work on it. It is important, however, to recognize the distinction between the amount of a project and the amount of a contract: the threshold applies to the entire project, not just isolated contracts. Thus, if your agency were engaging in a project which would cost $50,000 it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate contractors to perform the work, with none of the individuals (sic) contracts being in excess of $25,000. In summary, a debarred contractor can receive a contract or subcontract for a public work if the total project cost is less than $25,000 or if the project is being regulated under the Davis-Bacon Act."[v]

Johansson received the letter containing the bid and the letter quoted above prior to January 31, 2000.

28) LCCI's bid on the FSD contract only included the demolition of the old fire station and the Hamilton house. The bid did not include constructing a "haul" road to provide access to the Hamilton house.

29) Ewing and Larson expected that the City would determine whether or not LCCI was eligible for the FSD contract.

30) Gramson instructed Johansson to contact BOLI, determine LCCI's eligibility to work on the FSD contract, and to put his recommendations in writing. On January 28, 2000, Johansson telephoned BOLI to determine if LCCI was eligible to work on the FSD contract. He was unable to reach anyone at BOLI and reported this to Gramson. Johansson took no additional actions to determine if LCCI was eligible to work on the FSD contract.

31) LCCI, Cokley, and Wilkins all submitted bids on the FSD contract by 1/31/00. Taggart and Carlson declined to enter bids. Johansson never told Cokley, who has been a contractor for eight years, that the FSD contract was subject to the prevailing wage rate or that it was part of a larger project. Cokley believed it was a "stand alone"[vi] project and bid the job based on straight wage, not prevailing wage rate.

32) On January 31, 2000, Johansson submitted a draft memorandum to Gramson regarding "Demolition of Old Fire Station and Hamilton House." In pertinent part, it read as follows:

> "Larson Construction has proposed to do the demolition for $8,000 total cost. Larson is under a debarment from the State for prevailing wage violation. They can work on projects under $25,000. The total project is considered under the debarment. They are therefor excluded from this work since the entire project has to consider all work at the Municipal Center."

33) On February 1, 2000, Johansson submitted a second draft memorandum to Gramson on the same subject. The only reference to Larson read as follows:

> "Larson Construction has proposed to do the demolition for $8,000 total cost."

The remainder of the memorandum, in pertinent part, stated:

> "Cokley Excavation has quoted $8,000 to demolish the old fire station and the Hamilton house.
>
> "Both Larson and Cokely (sic) excavation have quote (sic) $8,000 as the low price for this project. It is a tie low price. I recommend that the City select one Contractor for this work and then if the two are tie low prices on another job that the City select the other Contractor. I recommend that the City select Cokley Excavation to remove the old fire station and Hamilton house. I recommend that the City select Larson Construction rather than Cokely (sic) excavation on the next tie low price."

34) At some point between the time LCCI submitted its bid and the date the Contract was awarded to LCCI, Ewing told Johansson that LCCI would contest it if the City awarded the contract to Cokley without determining if LCCI was eligible for the job.

35) On February 2, 2000, Ewing and Gary Cokley were called by Johansson and asked to come to city office and draw lots to determine who would perform the work on the Contract. Ewing won the drawing and asked Johansson if it was okay for LCCI to start on the job. Johansson said he had checked into it and it was all right for LCCI to move in its equipment and begin the demolition.

36) On February 2, 2000, Johansson submitted a third memorandum to Gramson regarding the FSD contract. In pertinent part, it read as follows:

> "Larson Construction has proposed to do the demolition for $8,000 total cost. * * *
>
> "* * * * *
>
> "Cokley Excavation has quoted $8,000 to demolish the old fire station and the Hamilton house.
>
> "Both Larson Construction and Cokely (sic) Excavation have quoted $8,000 as the low price for this project. It is a tie low price. The Oregon Model Contracting rules require that in a tie that lots are drawn and the winning be determined by the draw. We had a drawing with both

> Contractors present. Larson Construction was the winner of the drawing. I recommend the City select Larson Construction to remove the old fire station and Hamilton house."

37) On February 2, 2000, Johansson sent Ewing a letter that officially awarded the FSD contract to LCCI and also stated it was LCCI's "**NOTICE TO PROCEED**." (emphasis in original). The letter said a Purchase Order would be issued to LCCI in the amount of $8,000 and that the work encompassed by the LCCI's bid included "the demolition of the existing fire station and the demolition of the Hamilton house and garage. The work also includes the removal and disposal of all demolition debris." The same day, the City sent Ewing a letter assigning number 2259 to the FSD contract Purchase Order.

38) LCCI commenced work on the FSD contract on February 7, 2000. At that time, no one had informed Ewing or any other representative of LCCI that the FSD contract was subject to the prevailing wage rate or that it was part of a larger project.

39) After the FSD contract was awarded to LCCI, LCCI and the City determined a "haul"[vii] road would need to be constructed before LCCI could demolish the Hamilton house. This was because of unstable, soft ground and standing water on the project site. Phase two of the WMC project included ground stabilization and drainage work in the area where the "haul" road needed to be located, and Johansson decided it would be expeditious to ask LCCI to perform the already planned ground stabilization and drainage work in that area.[viii] Johansson and Sarin discussed this situation, including the fact that the area would become a parking lot, and Johansson asked for LCCI to submit a bid for work that included building a "haul" road for LCCI's equipment to travel over, putting down some rock, removing some material, and putting in some drainage pipe and a catch basin. The catch basin and drainpipe were to be in the middle of lot 4, where the Hamilton house stood. The "haul" road was located on the border of lots 4 and 5, and entered the project from S.W. Main St. in lot 13.

40) On February 7, 2000, Ewing submitted a letter bid to Johansson on LCCI's behalf for the additional work ("FSR contract") discussed by Sarin and Johansson. The letter read, in pertinent part:

> "RE: Fire Station Rock and Catch Basin
>
> "Dear Alan:
>
> "We are pleased to provide this quote for the work to be done on the above mentioned project. The lump sum quote for this project is $1,867.00. This is for the installation of seventy feet of four inch 3034 storm line,[ix] one type one catch basin, the removal of brush on the site, and the mobilization cost for the equipment needed. For the placement of rock, sand and removal of sand and sod refer to the unit prices below. Any permits, fencing, etc. to be supplied by the city, or us for an additional fee. We exclude the removal of any hazardous materials.
>
> "Sod, and Sand Removal $6.50 c.y.
>
> "Rock Placement $13.00 c.y.
>
> Sand Placement $7.00 c.y.
>
> "(all items include trucking, dump fees etc.)"

None of this work was included in the bid LCCI submitted to the City on January 26 and was not included in the purchase order 2259.

41) On February 7, 2000, LCCI commenced work on the FSD contract. On that day, Les Hannah, an LCCI employee, worked 8.5 hours on the FSD contract performing demolition, and John Holtzheimer, an HJSCCI employee,[x] worked from 8:50 am. until 4:24 p.m. hauling demolition refuse away from the FSD job site. Respondent Larson was on the FSD job site briefly on February 7, instructing Hannah to salvage some materials from the old fire station. During the week beginning February 7, Sarin visited the FSD job site periodically to see how work was progressing. Ewing also visited the FSD job site briefly on one or two occasions while work was going on.

42) On February 8, 2000, Johansson gave oral authorization to Ewing to begin work on the FSR contract.

43) On February 8, 2000, Hannah worked 8.5 hours on the FSD contract performing demolition, and Holtzheimer worked 9.5 hours hauling demolition refuse away from the FSD contract.

44) On February 9, 2000, the City sent Ewing a letter that read, in pertinent part:

> "Subject: Fire Station Rock & Catch Basin
>
> "Dear Mr. Ewing:
>
> "The following is the Purchase Order # for the above mentioned request. Purchase Order # 2268 is in the amount of $1867.00, per your quoted price. Please use this Purchase Order Number on all correspondence and invoices for this additional work."

45) Some of Taggart's building materials were in the way and had to be moved before LCCI could complete the demolition of the old fire station. Johansson directed Sarin to contact Taggart's site superintendent to get the materials moved. The materials were subsequently moved. Johansson did not ask Taggart's site superintendent to move the materials.

46) On February 9, 2000, Hannah worked 9 hours on the FSD contract performing demolition, and Holtzheimer worked 9.5 hours hauling demolition refuse away from the FSD contract, hauling mud away from the FSR contract,[xi] and hauling 24 yards of rock to the FSR contract.[xii] Grant Seal, an HJSCCI employee,[xiii] spent 2 ¼ hours hauling 42 yards of concrete away from the FSD contract, and Scotty Stough, an HJSCCI employee,[xiv] worked from 11:30 a.m. until 1:15 p.m. hauling 30.3 yards of rock and 24 yards of sand to the FSR contract.[xv]

47) On February 10, 2000, Hannah worked 7.5 hours building the "haul" road, and Holtzheimer worked 8.5 hours hauling demolition refuse away from the FSD job site and hauling 40 yards of rock to the FSR job site.[xvi] Seal spent 25 minutes moving LCCI's "91 Tilt," a piece of equipment used by LCCI on the FSD contract to another location.

48) On February 10, 2000, Gary Timmerman, an employee of the Fair Contracting Foundation, visited the WMC project site. He told Hannah that, in his opinion, LCCI's work was subject to the prevailing wage rate. Hannah told this to Ewing.

49) Timmerman also visited Johansson on February 10 and told Johansson that, in his opinion, the work LCCI was doing was subject to the prevailing wage rate and that LCCI was in violation.

50) On February 11, 2000, Hannah spent 6 hours demolishing the Hamilton house. Holtzheimer spent 8 ¾ hours hauling debris and mud from the FSD and FSR job sites.

51) On February 14, 2000, Johansson called BOLI and spoke with Lois Banahene, leadworker in BOLI's prevailing wage rate unit. Banahene advised him that the FSD and FSR contracts were subject to the prevailing wage rate, and that the contracts with LCCI needed to be amended to conform to prevailing wage rate regulations. That same day, Johansson sent an amended contract to Ewing that stated, in pertinent part:

> "I discussed this project with Lois Banahene, Oregon State Bureau of Labor and Industries, BOLI. Since prevail (sic) wage construction will occur on the site where the old fire station was demolished, the State of Oregon prevailing wage requirements apply to the demolition, also.
>
> "**You are notified that your Contract is now amended to include the following**:
>
> "**Wage Rates shall be governed by the latest edition of "Prevailing Wage Rates for Public Works Contracts in Oregon" as compiled by Oregon Bureau of Labor and Industries. Attached BOLI publication effective January 01, 2000.**
>
> **"You are required to utilize State of Oregon, Bureau of Labor and Industries Public Works Contractor Wage Certification (Form WH-38S) and file as directed by ORS 279.**

> "I observed three workers on the project, Excavator Operator, Truck Driver, and a Project Forman (sic). You are required to provide Certified Payroll for those workers who provided Labor on the demolition."

On February 14, 2000, Johansson also telephoned Ewing and told him that he had spoken with a representative of BOLI, who had informed him that the FSR and FSD contracts were subject to the prevailing wage rate. Johansson's contemporaneous notes reflect that he spoke with Ewing at 5 p.m. By that time, LCCI had completed its work on the FSD and FSR contracts.

52) Prior to 5 p.m. on February 14, 2000, the City did not inform Larson, Ewing, Sarin, or any other representative of LCCI that the FSD and FSR contracts were subject to the prevailing wage rate or that they were part of the WMC project or any other larger project.[xvii]

53) Prior to 5 p.m. on February 14, 2000, no one from LCCI asked Johansson or anyone else at the City if the FSD or FSR contracts were part of the WMC project, and no one from LCCI sought BOLI's advice regarding whether or not LCCI was barred from performing work on the FSD or FSR contracts.

54) Prior to 5 p.m. on February 14, 2000, Larson, Ewing, and Sarin did not believe that the FSD and FSR contracts were subject to the prevailing wage rate or that they were part of a larger project that was subject to the prevailing wage rate, thus making LCCI ineligible to work on the contracts.

55) LCCI installed the drainpipe and catch basin for the FSR contract prior to 5 p.m. on February 14, 2000. Jim Wilkins began the site work for phase 2 of the WMC project shortly thereafter.

56) LCCI did not post the applicable prevailing wage rates during the performance of the FSD or FSR contracts. Prior to being placed on the list of ineligibles, LCCI had posted prevailing wage rates on job trailers located on job sites or by putting them on the stake and driving the stake into the ground on the job site.

57) Sarin called Lois Banahene the day after the City told Sarin that the FSD contract was subject to the prevailing wage rate. Banahene reiterated that the FSD and FSR contracts were subject to the prevailing wage rate.

58) Sarin then spoke with Tyrone Jones, BOLI Wage & Hour Division compliance specialist. Jones said LCCI needed to submit certified payroll reports and a public work contract fee and stated he would call Sarin when he needed more information.

59) On February 29, 2000, LCCI submitted four invoices to the City, described as follows:

a) Invoice #1552 in the amount of $8,000.00 for purchase order 2259;
b) Invoice #1553 in the amount of $624.00 for purchase order 2268;
c) Invoice #1554 in the amount of $1,689.00 for purchase order 2268;
d) Invoice #1555 in the amount of $662.48.

60) The employees who worked on the FSD and FSR contracts for LCCI and HJSCCI who were entitled to be paid the applicable prevailing wage rate for their work were paid the applicable prevailing wage rate for their work on those contracts in checks issued March 6, 2000, the first regular payday after the contracts were completed.

61) On March 3, 2000, Stanley sent a completed WH-38[xviii] to the City and Jones. On the form, Stanley wrote that the project name was "Demolition of Existing Fire Station & the Hamilton House, PO#2259." She indicated that Hannah had worked a total of 39.5 hours and Holtzheimer 5 hours on the project between February 7 and 11, 2000. The WH-38 did not list Seal or Stough.

62) Stanley enclosed a completed "Public Work Contract Fee Information Form" and a check made out to BOLI, from LCCI, in the amount of $100.00 with the WH-38. On the Form, Stanley described the project as "demolition of existing fire

station & the Hamilton House, PO#2259" in "Warrenton, OR." On March 8, 2000, BOLI sent LCCI a "Certificate of Payment" in return.

63) Taggart began actual construction on the police station on or around March 15, 2000. The police station was constructed on the site of the old fire station.

64) On April 5, 2000, the City of Warrenton issued a check to Larson Construction in the amount of $10,975.48. A document created by the City that accompanied the check showed payment to Larson Construction for Invoice ##s 1552, 1553, 1554, and 1555. Invoice #1555 was in the amount of $662.48 and was described on the check stub as "INSTALLATION OF STORM LINE & CATCH BASIN."

65) The completed WMC complex consists of a singled, L-shaped building that houses the City's fire department, city offices, and police department, and has paved parking. The building and parking occupy the lots described in Finding of Fact – The Merits 18.

66) On May 1, 2000, Banahene sent a letter to Stanley requesting additional information and documents regarding the FSD and FSR contracts no later than May 10, 2000. Stanley provided that information and documents in a letter to Banahene dated May 9, 2000.

67) On or about October 3, 2000, BOLI served the City with a Notice of Intent charging it with failure to provide proper notification that the FSD demolition contract was a prevailing wage rate job. The City settled the case with BOLI prior to hearing.

68) The placement of LCCI and Larson on the List has "devastated" LCCI's business and has put LCCI's ability to exist as a viable business in jeopardy. Larson expected to make a profit on the FSD Contract, but that job alone would not have substantially reduced LCCI's financial stress.

69) As of the date of hearing, LCCI still had not paid all the civil penalties assessed in the final order described in Finding of Fact – The Merits 2.

70) BOLI holds seminars around the state of Oregon to educate contractors on Oregon's prevailing wage rate laws. Julie Stanley, LCCI's office manager, is LCCI's only employee who has attended such a seminar. She attended a seminar prior to April 21, 1998.

71) Julie Stanley is economically dependent on LCCI, as she and her husband both work for LCCI. David Larson is her uncle, and she has another uncle who also works for LCCI. Despite this inherent bias, the forum found her to be a credible witness.

72) David Larson's testimony was unbelievable on two key points. First, he testified that he had visited the FSD contract site the first day of work and was aware that a new fire station was being constructed by the City and familiar with that construction, but he had no idea how close the FSD contract was to the new fire station. This contrasts starkly with the ALJ's personal observations when visiting the FSD contract site and the credible testimony of Ewing, Sarin, and Johansson. Second, he testified that he saw no sign of any other construction activity on the day of his visit. This contradicts the credible testimony of Ewing, who testified there was a job trailer on the site, and Sarin, who testified that there were construction materials on the site, as well as a job trailer, during the performance of the FSD contract. Because of this testimony, the forum has only believed Larson's testimony where it was supported by other credible evidence.

73) Michael Sarin was a named Respondent in this case, is LCCI's general manager, and had a strong financial interest in the outcome of the case against LCCI. His testimony was internally consistent, and he answered questions directly and candidly. Despite his inherent bias, the forum found his testimony credible, with two

exceptions. Those exceptions were his testimony that LCCI did not install the catch basin or drainpipe on the FSR contract, which the forum has discredited based on LCCI's submission of an invoice and receipt of payment for that very work, and his testimony that overstated how close the WMC project was to completion at the time LCCI bid the FSD contract.

74) Tony Ewing was a named Respondent in this case and, like Sarin, had a strong financial interest in the outcome. He was also present throughout the hearing to assist Respondent LCCI's case. His demeanor throughout the hearing was somewhat cavalier, as though he did not take the proceedings seriously. Despite this, the forum has credited his testimony wherever it was not contradicted by more credible evidence. As with Sarin, the forum has specifically discredited his testimony that LCCI did not install the catch basin or drainpipe on the FSR contract, based on LCCI's submission of an invoice and receipt of payment for that very work and his testimony that overstated how close the WMC project was to completion at the time he bid the FSD contract. The forum has also rejected his testimony that LCCI posted the applicable prevailing wage rates for the FSD contract.

75) Gary Cokley's testimony was credible. Although he was called as LCCI's witness, he had no motive to shade his testimony in LCCI's behalf. He is in direct competition with LCCI and stands to gain if LCCI goes out of business. In contrast to Sarin and Larson, he testified that the WMC project looked substantially complete, but not complete or finished when he visited it prior to his FSD bid, emphasizing his lack of bias in Respondents' favor. The forum has also attached considerable significance to his testimony that Johansson never told him that the FSD contract was subject to the prevailing wage rate or was part of a larger project.

76) Alan Johansson was not a credible witness for several reasons.

First, he suffered from a suspect inability to recall when asked specific questions on cross examination regarding what representations he made or didn't make to LCCI representatives concerning whether or not the FSD contract was a prevailing wage rate job.

Second, his testimony on important points was contradicted by more credible documentary evidence – some of which Johansson himself created - and the inferences to be drawn from it. One example is his testimony that he was unaware, at the time the FSD contract was bid, that it was subject to the prevailing wage rate. This testimony was directly contradicted by his memorandum of January 31 stating that LCCI was "excluded from this work."[xix] There would be no reason to exclude LCCI from the work unless it was a prevailing wage rate job. When asked by the ALJ to explain why he changed his mind between January 31 and February 1, 2000, from a conclusion that LCCI was excluded from the FSD contract to the opposite conclusion, Johansson claimed he based his change of mind on the BOLI letter sent by Ewing and Ewing's statement that the letter qualified LCCI to do the work. In fact, Ewing had submitted this letter when he faxed LCCI's original bid to Johansson on January 26, and Johansson had it in his possession when he wrote his January 31 memorandum to Gramson stating that LCCI was "therefore excluded from [the FSD contract] since the entire project has to consider all work at the Municipal Center." Johansson's January 31 memorandum also directly contradicts his testimony that he did not make an independent interpretation of the BOLI letter as applied to LCCI. That memorandum relies on the very factors outlined in the BOLI letter in proposing to exclude LCCI from the FSD contract. In addition, it is notable that he claimed Ewing told him that the BOLI letter proved LCCI was qualified for the contract, but made no reference to this statement in his letter awarding the contract to LCCI. Finally, like Ewing and Sarin, his

testimony that LCCI did not install the catch basin or storm drain on the FSR contract was contradicted by LCCI's submission of an invoice and receipt of payment for that very work,

Third, at least one significant part of his testimony was inherently improbable. That was his claim that he made no independent determination of whether or not LCCI was eligible to work on the FSD contract and that he relied totally on Ewing's alleged statement that the BOLI letter proved LCCI was eligible. It makes no sense whatsoever that a City engineer in charge of a major construction project would rely totally on the purported representations of a debarred contractor in determining the contractor's eligibility for a contract. As stated earlier, it is also clear that he did rely on the BOLI letter to make an earlier independent preliminary determination that LCCI was not eligible.

Based on all of the above, the forum has only credited Johansson's testimony where it is supported by other credible evidence in the record. In addition, the forum has relied on Ewing's testimony wherever it conflicted with Johansson's.

77) Gilbert Gramson was a credible witness. His testimony was forthcoming and responsive to questions on direct and cross-examination and was not impeached by other more credible testimonial or documentary evidence. The forum has credited his testimony in its entirety.

78) Lois Banahene and Tyrone Jones were credible witnesses.

79) On April 14, 1995, the Agency published an interpretation of ORS 279.348(3) and OAR 839-016-004(17) regarding demolition projects that reads as follows:

> "Demolition, alone, is not subject to the prevailing wage rate requirements. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished in preparation

> to/contemplation of further construction activity at the site, the demolition work and all components of the project would be covered under Oregon's prevailing wage rate law."[xx]

ULTIMATE FINDINGS OF FACT

1) Respondent LCCI is an Oregon corporation and Respondent Larson is corporate president and a shareholder of LCCI. Both Respondents' names were first published on the List of Ineligibles on July 22, 1998, with a "Removal Date" of July 21, 2001.

2) Respondent Larson has a financial interest in HJSCCI. There was no evidence that LCCI has a financial interest in HJSCCI.

3) On January 20, 1999, the City awarded a contract in the amount of $1,600,373 to C.A. Taggart Construction for the WMC project. This project involved construction of a new municipal complex for the City containing a fire station, adjoining city offices, a police station, and a large parking lot to service the complex. The WMC project took place on half of a city block that involved eight adjacent city lots numbered 1-4 and 13-16. The project was a public works contract requiring payment of the prevailing wage rate.

4) Alan Johansson, the City engineer and public works director, acted as the City's representative during the WMC project.

5) Because the City's existing fire station was located on the site where the new police station would be built, the City planned that the WMC project would be performed in two phases. Phase one of the plan involved the construction of a new fire station and adjoining city offices on lots 1-3. When the first phase was completed, it was planned that the fire department would move into the new station. Phase two of the plan involved demolishing the old fire station located on lot 16 to make room for the new police station, removal of the Hamilton house, an existing structure on lot 4, to

make room for paved parking, and construction of a paved parking lot on lots 4 and 13-15.

6) In late January 2000, the City solicited bids from five contractors, including LCCI, for the FSD contract. That contract involved demolition of the City's old fire station, located on lot 16, and the Hamilton house, a house and garage standing on lot 4 that was planned to become part of a paved parking lot for users of the City's new municipal complex.

7) Tony Ewing, LCCI's estimator, and Michael Sarin, LCCI's project manager, visited the FSD job site prior to making a bid. At that time, phase one of the WMC project was nearing completion. At least one Taggart job trailer was parked on the WMC project site and there were construction materials stacked on that site.

8) Before Ewing submitted LCCI's bid, Ewing and Johansson discussed the fact that LCCI was on the List. Ewing told Larson about Johansson's concerns, and Larson instructed Ewing to forward a letter from BOLI dated November 13, 1998, that defined the scope of prevailing wage rate debarments and let the City determine if LCCI was eligible to work on the job.

9) On January 26, 2000, Ewing submitted LCCI's bid, in the amount of $8,000, for the FSD contract, along with the BOLI letter. LCCI's bid only included the demolition of the old fire station and the Hamilton house. Johansson received this prior to January 31, 2000.

10) On January 31, 2000, Johansson made a determination, based on the BOLI letter, that LCCI was not eligible for the FSD contract because it was part of a larger project. Johansson did not convey this determination to anyone but the City Manager.

11) At some point between the time LCCI submitted its bid and the date the Contract was awarded to LCCI, Ewing told Johansson that LCCI would contest it if the City awarded the contract to Cokley without determining if LCCI was eligible for the job.

12) On February 2, 2000, Johansson awarded the FSD contract to LCCI, assigning purchase order #2259 to the contract. That same day, Johansson told Ewing that LCCI could move its equipment in and start the job.

13) After the FSD contract was awarded to LCCI, LCCI and the City determined a "haul" road was needed before LCCI's demolition equipment could access and demolish the Hamilton house. Since phase two of the WMC project included ground stabilization and drainage work in the area where the "haul" road would be located, Johansson asked LCCI to perform the already planned ground stabilization and drainage work in that area. Johansson and Sarin discussed this work ("FSR contract"), including the fact that the area would become a parking lot, and Johansson asked for LCCI to submit a bid for work that included building a "haul" road for LCCI's equipment to travel over, putting down some rock, removing some material, and putting in a drainpipe and a catch basin.

14) LCCI submitted a bid on the FSR contract on February 7, 2000. On February 8, 2000, Johansson gave oral authorization to Ewing to begin work on the FSR contract. On February 9, 2000, the City sent Ewing a letter assigning purchase order #2268 to the FSR contract.

15) LCCI commenced work on the FSD contract on February 7, 2000. One LCCI and one HJSCCI employee worked on the FSD contract on February 7 and 8. On February 9, one LCCI and three HJSCCI employees performed work related to the FSD and FSR contracts. On February 10, one LCCI and two HJSCCI employees performed

work related to the FSD and FSR contracts. On February 11, one LCCI and one HJSCCI employee performed work related to the FSD and FSR contracts.

16) On February 10, 2000, an employee of the Fair Contracting Foundation told LCCI's employee on the FSR contract and Johansson that, in his opinion, LCCI's work was subject to the prevailing wage rate. LCCI's employee told this to Ewing.

17) On February 14, 2000, LCCI completed the FSR contract.

18) The WMC project could not have been completed without the demolition of the old fire station and Hamilton house and installation of the drainage pipe and catch basin on the FSR contract.

19) On February 14, 2000, Johansson called BOLI and was told by a BOLI employee that the FSD and FSR contracts were subject to the prevailing wage rate. At 5 p.m. on February 14, 2000, Johansson called LCCI and told Ewing what the BOLI employee had said. On February 14, 2000, Johansson also mailed an amended contract to Ewing that included notification that wage rates for the FSD contract must be the applicable prevailing wage rates, that LCCI must file a BOLI Public Works Contractor Wage Certification, and that LCCI must provide certified payroll reports.

20) At no time prior to 5 p.m. on February 14, 2000, did Johansson or anyone else from the City or BOLI inform LCCI, Larson, or any other contractor who bid on the FSD contract that the FSD or FSR contracts were subject to the prevailing wage rate. Prior to that time, Larson, Ewing, and Sarin did not believe that the FSD and FSR contracts were subject to prevailing wage rate or that they were part of a larger project that was subject to the prevailing wage rate, thus making LCCI ineligible to work on the contracts.

21) At no time prior to February 14, 2000, did any employee of LCCI ask Johansson if the FSD or FSR contracts were related to a larger project.

22) LCCI did not post the applicable prevailing wage rates during the performance of the FSD or FSR contracts.

23) On February 15, 2000, a representative of BOLI told Sarin that the FSD and FSR contracts were subject to the prevailing wage rate.

24) On March 3, 2000, LCCI mailed certified payroll reports for the FSD contract to the City and BOLI. The same day, LCCI mailed a completed "Public Work Contract Fee Information Form" to BOLI, along with a check made out to BOLI in the amount of $100.00.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

> "'Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004(17) provides:

> "'Public work', 'public works' or public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

ORS 279.348(5) provides:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

See also OAR 839-016-0004(16) (same). The WMC project and FSD and FSR contracts were public works projects.

2) ORS 279.357 provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed $25,000.

"(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * * *

"(2)(a) No public contracting agency shall divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380."

"* * * * *

"(c) In making determinations under this subsection, the commissioner shall consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency and the contractors administer and implement the project."

OAR 839-016-0310 further provides, in pertinent part:

"(1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(2) When making a determination of whether the public agency divided a contract to avoid compliance with ORS 279.348 to 279.380, the commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

"(a) The physical separation of project structures;

"(b) Whether a single public works project includes several types of improvements or structures;

"(c) The anticipated outcome of the particular improvements or structures the agency plans to fund;

"(d) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;

"(e) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;

"(f) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;

"(g) The manner in which the public contracting agency and the contractors administer and implement the project;.

"(h) Other relevant matters as may arise in any particular case[.]"

The WMC, FSD and FSR contracts combined to form a single public works project, the total cost of which exceeded $25,000.00. Consequently, the FSD and FSR contracts did not fall within the exemption created by ORS 279.357(1)(a).

3) ORS 279.354 provides, in pertinent part:

> "(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.
>
> "(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Certified statements shall be submitted as follows:
>
> "(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before final payment is made of any sum due on account of a contract for a public work."

OAR 839-016-0010 provides, in pertinent part:

> "(1) The form required by ORS 279.354 shall be known as the Payroll and Certified Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor's payroll for the work week immediately preceding the submission of the form to the public contracting agency by the contractor or subcontractor.
>
> "* * * * *

”(4) Each Payroll and Certified Statement form shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Payroll and certified statement forms shall be submitted as follows:

“(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the work first began on the project and once before the agency makes its final inspection of the project[.]”

By failing to submit a certified payroll statement within 15 days of the date the work first began on the FSD contract, Respondent LCCI committed one violation of ORS 279.354 and OAR 839-016-0010(4)(a).

4) ORS 279.350(4) provides:

“Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge.”

OAR 839-016-0033(1) provides:

“Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project.”

Respondent LCCI did not post the prevailing wage rate applicable to the FSD and FSR contracts during the performance of those contracts and committed one violation of ORS 279.350(4) and OAR 839-016-0033(1).

5) ORS 279.370 provides, in pertinent part:

“(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto.”

OAR 839-016-0530(3) provides, in pertinent part:

“(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

“* * * * *

“(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354;

> “(f) Paying the prevailing rate of wage in violation of ORS 279.350(6);
>
> “* * * * *
>
> “(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7).”

ORS 279.350(7) provides:

> “(7) No person shall take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project.”

OAR 839-016-0300 provides:

> "No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects."

LCCI's entering into the FSD and FSR contracts with the City did not violate ORS 279.350(7) or OAR 839-016-0300.

6) ORS 279.370 provides, in pertinent part:

> "(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0500 provides:

> "As used in OAR 839-016-0500 to 839-016-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project."

OAR 839-016-0520 provides:

> "(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:
>
> "(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.
>
> "(b) Prior violations, if any, of statutes and rules.
>
> "(c) The opportunity and degree of difficulty to comply.
>
> "(d) The magnitude and seriousness of the violation.
>
> "(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.
>
> "(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"* * * * *

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

"* * * * *

"(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7)[.]"

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

The Commissioner's imposition of the penalties in this case is an appropriate exercise of his discretion.

7) ORS 279.361 provides, in pertinent part:

"(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor * * * has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies."

"(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage * * *."

OAR 839-016-0085 provides, in pertinent part:

"(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

"* * * * *

"(c) The contractor * * * has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4) and these rules.

"(2) When the contractor * * * is a corporation, the provisions of section (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

"(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to * * * post the prevailing wage rates * * * includes, but is not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

"(a) The corporate president;

"(b) The corporate vice president;

"(c) The corporate secretary;

> "(d) The corporate treasurer;
>
> "(e) Any other person acting as an agent of a corporate officer or the corporation.
>
> "(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list."

OAR 839-016-0090 provides, in pertinent part:

> "(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.
>
> "(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles."

Respondent LCCI intentionally failed to post the prevailing wage rates during the performance of the FSD and FSR contracts. Respondent Larson was responsible for this failure and should have known that the prevailing wage rates must be posted. For these reasons, the Commissioner must place Respondents LCCI and Larson on the List of Ineligibles for a period not to exceed three years. Although there was no evidence that LCCI has a financial interest in HJSCCI, Respondent Larson does have a financial interest in Respondent HJSCCI. The Commissioner's decision to place LCCI, Larson, and HJSCCI on the List for one month is an appropriate exercise of his discretion.

OPINION

In this case, the Agency seeks to assess $20,000 in civil penalties against Respondent LCCI, a debarred contractor, based on its participation in two public works projects for the City of Warrenton. The Agency also seeks to debar Respondents LCCI

and Larson for an additional three years, and to debar a third Respondent, HJSCCI, for three years based on LCCI's alleged financial interest in HJSCCI.

THE FSD AND FSR CONTRACTS WERE TWO SEPARATE CONTRACTS.

The Agency alleged in its Notice that the FSD and FSR contracts were two separate contracts. Respondents denied this allegation in their answer. At hearing, undisputed evidence established that the two contracts, though related, involved two different offers and acceptances, two separate purchase orders, two separate bids that took place on two different dates and involved two disparate bidding processes, two distinct jobs, and two distinct billings. Based on this evidence, the forum concludes that the FSD and FSR contracts were two separate contracts.

THE FSD AND FSR CONTRACTS WERE "PUBLIC WORKS."

The City of Warrenton is a "city" in the state of Oregon, bringing it within the definition of a "public agency." ORS 279.348(5). The FSD and FSR contracts were contracted for by the City "to serve the public interest." ORS 279.348(3). They involved two different types of work. The FSR contract involved construction of a road and installation of a drainpipe and catch basin, both of which are encompassed by the plain meaning of the language contained within the statutory definition of "public works."[xxi] In contrast, the FSD contract involved only demolition. On its face, ORS 279.348(3) and OAR 839-016-0004(17) do not appear to include demolition. However, in 1995, the Agency published its interpretative explanation of the statute and rule regarding demolition. That interpretative explanation was offered and received as an exhibit during the hearing and reads as follows:

> "Demolition, alone, is not subject to the prevailing wage rate requirements. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished in preparation to/contemplation of further construction activity at the site, the demolition

> work and all components of the project would be covered under Oregon's prevailing wage rate law."[xxii]

This forum and Oregon's appellate courts have previously held that an agency may apply a policy interpretation established at a contested case hearing to matters that are the subject of the case. *In the Matter of Centennial School District*, 18 BOLI 176, 198 (1999), *aff'd Centennial School District No. 28J v. Oregon Bureau of Labor and Industries,* 169 Or App 489, 508 (2000), *rev den* 332 Or 56 (2001). The Oregon Supreme Court has stated that when an agency's interpretation of its own rule is plausible and cannot be shown to be inconsistent with the wording of the rule itself, or with any other source of law, the agency's interpretation is entitled to deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). The agency's interpretation of its rule draws a common sense distinction between demolition that is merely destruction of a structure and demolition that is connected with construction, reconstruction, or renovation subject to prevailing wage rate laws that cannot occur until an existing structure has been demolished. This is a plausible interpretation that is neither inconsistent with the wording of the rule or any other source of law. Consequently, the forum relies on the agency's interpretation regarding when demolition work is subject to Oregon's prevailing wage rate laws in determining whether the FSD contract falls within the category of "public works."

The evidence is undisputed that the old fire station was demolished to make room for the City's new police station, and the Hamilton house was demolished to create space for the WMC's parking lot. Based on the agency's interpretation that demolition is subject to Oregon's prevailing wage rate laws when it is conducted in preparation to or contemplation of further construction activity at the site, the forum concludes that the FSD contract also falls within the definition of "public works" contained in ORS 279.348(3).

THE FSD AND FSR CONTRACTS DID NOT FALL WITHIN THE EXEMPTIONS IN ORS 279.357.

Projects "for which the contract price does not exceed $25,000" and projects "regulated under the Davis-Bacon Act" are exempt from the provisions of ORS 279.348 to 279.380. There was no evidence presented showing that the FSD and FSR contracts were regulated by the Davis-Bacon Act. However, both the FSD and FSR contracts involved individual contracts for less than $25,000, a fact which would make them exempt from Oregon's prevailing wage rate laws unless they were part of a larger "project" costing more than $25,000. ORS 279.357(1)(a).[xxiii]

The forum has previously defined a public works "project" as "a large, multiphase endeavor that may encompass more than one contract." *In the Matter of City of Klamath Falls*, 19 BOLI 266, 282 (2000). The criteria for determining whether a prohibited division has occurred are set out in ORS 279.357(2)(A)-(D) and related Agency administrative rules and published "Interpretations."[xxiv] This language contemplates that the commissioner will examine various smaller public works undertakings – phases, parts, and structures – to determine whether they are, in fact, part of a single larger endeavor – a public works "project." *Id*. at 282-83. Flowing from this prohibition is the logical corollary that any contract for less than $25,000 that is part of a larger public works "project" involving more than $25,000 does not fall within the ORS 279.357(1)(a) exemption.

Comparison of the facts in this case with the criteria contained in the statute, administrative rules, and interpretations results in the following analysis:

A. The physical separation of the project structures.

The work performed by LCCI on the FSD and FSR contracts was on the same project site as the WMC project, which involved a contract for $1,600,373. This is indicative of a single public works project.

B. The timing of the work on project phases or structures and whether the work is performed in one time period or in several phases as components of a larger entity.

The work performed by LCCI on the FSD and FSR contracts constituted the first step of phase two of the WMC project and phase two could not have taken place without it. The timing of the contracts indicates they were part of a single public works project.

C. The continuity of project contractors and subcontractors working on project parts or phases and whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project or, if different, part of a continuum providing distinct improvements that complete the public agency's ultimate intent.

Although the extent of Respondents' knowledge concerning whether or not the FSD and FSR contracts were part of a larger contract is disputed, from a purely objective point of view there is no dispute over the fact that the FSD and FSR contracts were part of a continuum that completed the City's ultimate intent – completion of a new municipal complex. This is indicative of a single public works project.

D. The manner in which the public contracting agency and the contractors administer and implement the project.

The evidence relevant to this criterion is inconclusive.

E. Whether a single public works project includes several types of improvements or structures and whether the structures are similar to one another and combine to form a single, logical entity having an overall purpose or function.

The demolition of the old fire station was a prerequisite to the construction of the new police station, and demolition of the Hamilton house and installation of the storm line and catch basin were integral to the construction of the parking lot. This is indicative of a single public works project.

F. The anticipated outcome of the particular improvements or structures the agency plans to fund.

The anticipated outcome of the WMC project was completion of a new municipal complex for the City that housed city offices, a fire station, and police station, with an adjacent paved parking lot. LCCI's performance of the FSD and FSR contracts helped further this goal. This is indicative of a single public works project.

The facts of this case, evaluated against the six relevant criteria cited above, point to a conclusion that the WMC complex was a single public works project for more than $25,000 that included the FSD and FSR contracts. Consequently, the FSD and FSR contracts were not exempt from the provisions of ORS 279.348 to 279.380.

RESPONDENTS FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES DURING THE PERFORMANCE OF THE FSD AND FSR CONTRACTS.

A. Respondent violated ORS 279.350(4).

Sarin, LCCI's project manager, testified that LCCI did not post the applicable prevailing wage rates during the performance of the FSD and FSR contracts. Based on Sarin's credible testimony, the forum has drawn the same conclusion. The only issue is to the amount of civil penalty, if any, that should be assessed against LCCI for this violation.

B. Civil Penalty.

In determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors. OAR 839-016-0520(1). Respondent bears the burden of proving mitigating circumstances. OAR 839-016-0520(2). In its Notice, the Agency seeks to assess the maximum $5,000 civil penalty based on LCCI's failure to post the applicable prevailing wage rates. The forum examines the aggravating and mitigating factors present to determine an appropriate civil penalty.

1. Aggravating factors.

There are several aggravating factors in this case. First, LCCI could have easily complied with the law by having an employee attach them to a stake and drive the stake into the ground on the job site, a practice LCCI had used in the past. Second, based on the language of OAR 839-016-0500, the forum concludes that LCCI, Larson, Ewing, and Sarin should have known of the violation, in that the circumstances of the project[xxv] were such that a reasonable person would have made a more diligent inquiry, including taking the initiative to ask Johansson if the proposed FSD and FSR contracts were part of a larger project, then calling BOLI if there was any question that the FSD and FSR contracts were subject to the prevailing wage rate before entering into the contracts. No such inquiries were made prior to the completion of the contracts. Third, LCCI committed a number of violations of Oregon's prevailing wage rate laws, including a violation of ORS 279.350(4), between 1995 and 1997 and was placed on the List of Ineligibles and assessed substantial civil penalties as a result. LCCI also violated ORS 279.359 in 1999.[xxvi] Fourth, LCCI's response to its previous violations has not been overwhelming. Since the final order was issued regarding those violations, LCCI has not sent any of its employees to BOLI's prevailing wage rate seminars to obtain additional education in the law. Fifth, the forum considers failure to post prevailing wage rates as a serious violation. *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 78 (1998).

2. Mitigating factors.

Based on OAR 839-016-0500, the forum has concluded that LCCI should have known of its violation, which is an aggravating factor. However, OAR 839-016-0520(4) mandates that "the commissioner *shall* consider all mitigating circumstances presented by the contractor * * * for the purpose of reducing the amount of the civil penalty to be

assessed." (emphasis added) LCCI cannot be wholly excused from its failure to make a more diligent inquiry into the circumstances of the project.[xxvii] However, the forum cannot ignore Johansson's twin assurances to LCCI, made after examining LCCI's proffered letter from BOLI defining the scope of debarment, consisting of the contract award to LCCI and instructions to Ewing to go ahead with the work. Under these unique circumstances, the forum considers LCCI's lack of actual knowledge that the FSD and FSR contracts were subject to Oregon's prevailing wage rate laws as a mitigating factor.

Additionally, the evidence does not support a conclusion that LCCI influenced the City to award the FSD contract to it. Although Ewing told Johansson that LCCI would contest it if the City awarded the FSD contract to Cokley without first determining if LCCI was eligible for the contract, there is no evidence that Ewing or anyone else at LCCI knew of Johansson's conclusion that LCCI was ineligible. The contract itself was actually awarded on the basis of drawing lots, a purely objective system that was not influenced by LCCI.

3. Amount of civil penalty.

The commissioner has imposed civil penalties for a violation of ORS 279.350(4) in only one previous case. *Id*. In that case, a $4,000 civil penalty was imposed on the same Respondent LCCI where LCCI: took no action to correct its failure to post prevailing wage rates after the agency informed it of a similar violation on another site; failed to post prevailing wage rates for many months; did not show the rates to workers who asked about them; knew or should have known of their duty to post the rates; did show some cooperation with the agency's investigation; and sent their office manager to prevailing wage rate training.

Factors in common here are: LCCI should have known of its obligation to post the prevailing wage rates on the FSD and FSR job sites and LCCI cooperated with the Agency's investigation. Based on the prior case and the aggravating and mitigating factors present in this case, the forum determines that a $3,000 civil penalty is appropriate.

FAILURE TO TIMELY FILE CERTIFIED PAYROLL STATEMENT

A. LCCI failed to timely file a certified payroll statement.

The Agency seeks a $5,000 civil penalty based on LCCI's failure to *timely* file certified payroll statements. ORS 279.354(2)(a) requires that certified payroll statements must be filed "once before the first payment and once before final payment is made of any sum due on account of a contract for a public work" for "any project 90 days or less from the date of the award of the contract to the date of completion of work under the contract." For contracts of this duration, OAR 839-016-0010 requires that "the [certified payroll statement] shall be submitted once within 15 days of the date the work first began on the project * * *."

LCCI commenced work on the FSD contract on February 7 and the FSR contract on February 9, 2000. Sarin, Respondent's project manager, acquired actual knowledge from the City on February 14, 2000, that both contracts were subject to the prevailing wage rate and that LCCI was required to provide "Certified Payroll for those workers who provided Labor on the demolition." On February 15, 2000, a BOLI representative also told Sarin that the FSD and FSR contracts were subject to the prevailing wage rate. LCCI actually provided a certified payroll statement to BOLI and the City on March 3, 2000.

Fifteen days after February 7 is February 21, and 15 days after February 9 is February 23. Both dates fall well before March 3. Even if the forum adopts LCCI's

argument that the 15 days should not begin running until LCCI acquired actual knowledge that the FSD and FSR contracts were subject to the prevailing wage rate, 15 days from February 14 is February 28, four days before the statements were actually submitted. Either way, the forum has no choice but to conclude that LCCI violated ORS 279.354 and OAR 839-016-0010.

B. Civil penalty.

Again, in determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors, with Respondent bearing the burden of proving mitigating circumstances.

1. Aggravating factors.

There are several aggravating factors in this case. First, LCCI had seven days to timely submit certified payroll reports after Sarin acquired actual knowledge that they were required. The submitted report only has two names on it and Respondent presented no evidence to show that it could not have been completed and submitted in that period of time. Second, LCCI and its employees knew of the violation. Third, LCCI committed a number of violations of Oregon's prevailing wage rate laws, including a violation of ORS 279.350(4), between 1995 and 1997 and was placed on the list of ineligibles and assessed substantial civil penalties as a result. LCCI also violated ORS 279.359 in 1999.[xxviii] Fourth, LCCI's response to its previous violations has not been overwhelming.

2. Mitigating factors.

The Agency did not allege that the submitted certified payroll report was incomplete or inaccurate. The only issue is its untimely submission, which did not result in underpayment of wages to any workers. Johansson's deliberate failure to inform LCCI that the FSD and FSR contracts were subject to the prevailing wage rate is not a

mitigating factor because LCCI had adequate time to comply after it acquired actual knowledge of the requirement.

3. Amount of civil penalty.

Besides the aggravating and mitigating factors discussed above, the forum also considers recent actions it has taken against other contractors, including Respondent LCCI, for violations of ORS 279.354 in determining the appropriate amount of civil penalty.

In the prior case against LCCI, LCCI was assessed a $5,000 civil penalty for filing multiple inaccurate and incomplete certified payroll reports by failing to report workers, hours and dates of work on a public works project that lasted from on or about September 12, 1995, to on or about January 6, 1997. *Larson* at 57.

In the second case, the respondent contractor was assessed a $1,000 civil penalty for one violation for submitting a certified payroll report that inaccurately stated that five workers on a project were laborers when, in fact, their correct classification was boilermakers. *In the Matter of Northwest Permastore*, 18 BOLI 1, 20 (1999), *order withdrawn for reconsideration, order on reconsideration* 20 BOLI 37 (2000), *aff'd Northwest Permastore Systems, Inc. v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

Next came *In the Matter of Southern Oregon Flagging*, 18 BOLI 138 (1999), where the forum imposed a civil penalty of $250 for each of respondent's 24 violations of ORS 279.354 where respondent should have known that their payroll methods, as reflected in their certified statements, were illegal. *Id*. at 166-67. Those violations also resulted in two wage claims and payment to four other workers of over $900. However, respondent committed no more violations after receiving a warning letter from BOLI.

Next, the forum imposed a $1,000 civil penalty for each of respondent's three violations of ORS 279.354(1) where respondent had previously been warned about other violations of the prevailing wage rate laws, where it would not have been difficult for respondent to complete the certified payroll report forms accurately, and where each report contained a relatively serious misstatement or omission. *In the Matter of Keith Testerman*, 20 BOLI 112, 128-29 (2000).

In *Johnson Builders, Inc*., 21 BOLI 103, 127 (2000), the forum imposed civil penalties of $1,250 for each of respondent's 23 violations of ORS 279.354(1) where respondent misclassified workers or submitted certified statements without accompanying payroll, and $2,000 each for respondent's nine additional violations of ORS 279.354(1) where no certified payroll reports were submitted. There were no mitigating factors and numerous aggravating factors, including seven violations of ORS 279.350 and one violation of ORS 279.355(2). *Id.* at 126.

Most recently, the forum assessed civil penalties of $1,000 each for two separate violations of ORS 279.354(1) where two certified payroll reports filed by respondent did not state the hours two employees worked each day and the violations were similar in magnitude to those committed in *Testerman*. *In the Matter of William George Allmendinger*, 21 BOLI 151, 170, 172 (2001).

When the forum takes all the aggravating and mitigating factors into account and measures them against civil penalties assessed in *Larson, Southern Oregon, Northwest Permastore*, *Testerman*, *Johnson Builders*, and *Allmendinger*, a civil penalty of $1,000 is appropriate.

LCCI DID NOT TAKE ACTION THAT CIRCUMVENTED THE PAYMENT OF THE PREVAILING WAGE TO WORKERS

In its Notice, the Agency alleged that, by "intentionally entering into the [FSD and FSR] contracts" while on the List of Ineligibles, LCCI intentionally circumvented

Oregon's prevailing wage rate laws and committed two violations of ORS 279.370 and OAR 839-016-0530(3)(h). The Agency sought a $5,000 civil penalty for each violation. At hearing, the Agency case presenter further clarified the Agency's position, stating that each violation occurred at the time LCCI entered into the contracts, and that by entering into prevailing wage rate contracts while on the List of Ineligibles and by intending to treat them as a non-prevailing wage rate contract, LCCI intended to pay less than the prevailing wage rate, thus intending to circumvent payment of the prevailing wage rate. The Agency does not allege there was any actual underpayment of wages, and there was no evidence of any actual underpayment. However, the Agency argues that is only because the violation was caught before the first regular payday after work on the FSD and FSR contracts. In short, the Agency argues that Respondent's intent, not the actual result, created the violation, and that Respondent's intent to violate the statute can be inferred from Respondent's entering into the FSD and FSR contracts while on the List of Ineligibles.[xxix]

In order to determine whether the alleged violations occurred, the forum examines the language of the pertinent statute, the Agency's administrative rules that provide interpretative guidelines to the statute, and a prior case heard by the forum in which a violation of ORS 279.350(7) was found.

ORS 279.350(7), the statute that gives rise to the alleged violation, reads as follows:

> "No person shall take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

OAR 839-016-0300, the related substantive administrative rule adopted by the Agency, states:

> "No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects."

OAR 839-016-0330 prohibits "wage averaging" that occurs when an employer "reduce[s] a worker's regular rate of pay for work on projects not subject to the Prevailing Wage Rate Law * * * when the reduction in pay has the effect of the worker not receiving the prevailing rate of wage for work performed on the public works project" and spells out factors the Agency will use to determine if an employer has made such a reduction. This rule provides guidelines for the Agency to use in determining if the employer has violated ORS 279.350(7) by "reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

OAR 839-016-0310, 839-016-0320, and 839-016-0340 describe other actions that the Agency considers circumventions of the payment of the prevailing wage. None of them apply to contractors.

Next, there is the administrative rule cited by the Agency in its Notice -- OAR 839-016-0530(1)(h). This provision appears as a subparagraph to a rule entitled "Violations for which a Civil Penalty May be Assessed." It provides that the commissioner may assess a civil penalty for the following violation:

> "Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) and this section [neither of which are applicable here], in violation of ORS 279.350(7)."

Finally, the forum applied ORS 279.350(7) in the prior case against Respondents when it assessed the $5,000 civil penalty sought by the Agency for Respondents' act of "requiring workers to accept less than the prevailing wage rate as part of [its] bogus apprenticeship program."[xxx] *Larson*, 17 BOLI at 79. In that case, the forum characterized Respondents' circumvention as "a deliberate effort to avoid complying

with the law, and its effect was to cheat the workers out of the minimum wage required by law." *Id*. at 80.

Applying the law to the facts, the forum finds that LCCI's status as a private corporation makes it a "person." OAR 839-016-0004(14). Second, the forum has already determined that the FSR and FSD contracts were public works contracts. Third, LCCI's act of entering into the FSR and FSD contracts constitutes taking an "action" that had the potential to circumvent the payment of the prevailing wage rate. That leaves two key words, the phrase "that circumvents," still open to interpretation.[xxxi]

Where statutory interpretation is required, the forum must attempt to discern the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id*. at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.*

In its statutory context, "circumvent" means "to overcome or avoid the intent, effect, or force of **:** anticipate and escape, check, or defeat by ingenuity or strategem **:** make inoperative or nullify the purpose or power of esp. by craft or scheme * * *." *Webster's Third New International Dictionary*, 410 (unabridged ed 1985). In other words, "circumvent" refers to a deliberate action, followed by the effect of avoiding an otherwise expected outcome. The phrase in ORS 279.350(7) containing the legislature's only specific description of an "action that circumvents" supports this interpretation in its qualifying language "in a manner that ***has the effect*** of offsetting * * *." (emphasis supplied)

In this case, it is undisputed that LCCI entered into the FSR and FSD contracts while on the List of Ineligibles and paid its workers the prevailing wage rate. The language of the statute and the Agency's administrative rules, as well as the previous *Larson* case, do not support a conclusion that LCCI violated ORS 279.350(7) by these acts.

PLACEMENT ON THE LIST OF INELIGIBLES

In its amended Notice, the Agency seeks to have Respondents LCCI, Larson, and HJSCCI placed on the List of Ineligibles for three years. This debarment, with respect to LCCI and Larson, is sought solely on the basis of their failure to post the applicable prevailing wage rates during the performance of the FSD contract. As for HJSCCI, its debarment is sought on the basis that LCCI allegedly has a financial interest in it.

ORS 279.361 provides that when a contractor intentionally fails or refuses to post the applicable prevailing wage rates, the contractor and any firm in which the contractor has a financial interest shall be placed on the List of Ineligibles for up to three years. It further provides that the president of a corporate contractor who is responsible for the failure or refusal to post the applicable prevailing wage rates shall be placed on the List of Ineligibles for up to three years. That individual is "responsible" if he or she "knew or should have known * * * that such wages must be posted." OAR 839-016-0085(3).

A. Liability of LCCI and Larson.

The forum has already concluded that LCCI failed to post applicable prevailing wage rates during the performance of the FSD and FSR contracts.

1. LCCI's failure to post the prevailing wage rates was "intentional."

The preponderance of the evidence must establish that LCCI's failure to post was "intentional" and that Larson was responsible for the failure to post and "knew or

should have known * * * that such wages must be posted" for both LCCI and Larson to be placed on the List. ORS 279.361(1) and (2), OAR 839-016-0085(2) and (3).

In the context of a prevailing wage rate debarment, this forum has previously defined "intentional" as being synonymous with "willful." The forum has also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." *In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138, 160 (1999) (quoting *Sabin* at 1093). Here, LCCI and its agents knew they had not posted the applicable prevailing wage rates on the FSD and FSR contracts, intended not to post them, and were under no restrictions that would have prevented them from posting the rates. Consequently, the forum must place LCCI on the List of Ineligibles for a period of time not to exceed three years.

2. Larson was "responsible" for LCCI's failure to post the prevailing wage rates because, as corporate president, he "knew or should have known" that the prevailing wage rates must be posted on the FSD and FSR contracts.

Whether or Larson was "responsible" for LCCI's failure to post the applicable prevailing wage rates on the FSD and FSR contracts is the next question. Pursuant to OAR 839-016-0085(3)(a), Larson, as LCCI's corporate president, was "responsible" if he "knew or should have known * * * that such wages must be posted." Whether Larson "knew" is dependent on whether he had actual knowledge that the FSD and FSR contracts were subject to the prevailing wage rate. If Larson had this knowledge, the forum would automatically conclude that he was aware that of the legal requirement to post the applicable prevailing wage rates on the job site based on his prior experience as a contractor on public works. Since there is no evidence that Larson had this actual knowledge prior to the work on both contracts being completed, the forum cannot

conclude that he "knew" that the prevailing wage rates must be posted on either contract. Whether Larson "should have known" is a different story. The phrase "should have known" is synonymous with constructive knowledge or notice. In the case of *In the Matter of Jet Insulation, Inc*., 7 BOLI 133, 140 (1988), the forum relied on an Oregon Supreme Court decision, *American Surety Co. of New York v. Multnomah County*, 171 Or 287 (1943), for a definition of "constructive notice." The forum stated "The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led." *Jet* at 140.

In this case, there are several facts that lead the forum to conclude that Larson "should have known" that the applicable prevailing wage rates must be posted on the FSD and FSR contracts. First, Larson was an experienced contractor who had to know that any contract involving the City was a public works subject to the prevailing wage rate unless it was for less than $25,000 or was regulated by the Davis-Bacon Act.[xxxii] Second, Larson visited the actual job site before the contracts were awarded to LCCI and observed that the WMC project was taking place in the same immediate area. Third, Larson was well aware of BOLI's interpretation of the scope of debarment stating that contracts for less than $25,000 were not exempt if they were part of a larger project and had relied on it for the prior 16 months in determining LCCI's eligibility to bid on projects. He directed Ewing to send a copy this very interpretation to the City with LCCI's bid. These facts should have put Larson on notice, irregardless of Johansson's representations, of the likelihood that the FSD and FSR contracts were prevailing wage rate jobs. At that point, a person of common prudence would have inquired further into the circumstances of the prospective contracts. However, Larson neither asked nor

directed any LCCI employee to ask Johansson the obvious question - whether the FSD and FSR contracts were part of the larger WMC project. This inquiry alone should have made it clear to Larson that the FSD and FSR contracts were part of the larger WMC project and, as such, subject to the prevailing wage rate under BOLI's guidelines.[xxxiii] If Larson was still uncertain if the circumstances of the project came within the scope of debarment, there was sufficient time so that he could have called BOLI to obtain an opinion. Instead, he opted to rely solely on the City's determination, which turned out to be both misleading and erroneous. Under the *Jet* standard of constructive notice, Larson's "ostrich" defense has no merit, and the forum concludes that Larson "should have known" that the FSD and FSR contracts were subject to the prevailing wage rate. Based on his prior experience, the forum concludes that Larson also should have known that the prevailing wage rates must then be posted on the job site. As a consequence, Larson is subject to debarment for up to three years.

B. Length of Debarment

As stated earlier in this Opinion, debarment in this case is predicated on the determination that LCCI and Larson failed to post the applicable prevailing wage rates, in violation of ORS 279.350(4), during the performance of the FSD contract. Based on this determination and the mandatory language in the statute, the Commissioner has no choice but to debar LCCI and Larson. The Commissioner's only discretion in this matter is the length of the debarment.

ORS 279.361 provides that debarment "shall" be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor

should last less than the entire three-year period allowed by law. *See In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 161 (1988).[xxxiv] Aggravating factors may also be considered. *See, e.g., Testerman* at 129.

In this case, specific aggravating circumstances with regard to LCCI consist of its violations between 1995 and 1997, for which LCCI was placed on the List of Ineligibles, LCCI's subsequent violation of ORS 279.359, and LCCI's current violations of failure to post, which it should have been aware of, and knowing failure to file a timely certified payroll report. With regard to Larson, specific aggravating circumstances consist of the 1995 and 1997 violations for which he was found jointly responsible with LCCI, and LCCI's current violation of failure to post, which he should have been aware of. The seriousness of LCCI's and Larson's failure to post and the ease with which it could have been accomplished are further aggravating circumstances, as is LCCI and Larson's tepid response to its prior violations. In short, there are a number of aggravating circumstances, the majority of which are related to prior violations.

Actions taken by the City related to the FSD and FSR contracts offset these aggravating circumstances to a considerable degree. While it is true that, based on the circumstances of the project, Larson and LCCI should not have relied completely on the City's determination that LCCI was eligible to perform the contracts, it is equally true that the City misled LCCI. The City's own documents show that the city engineer made an initial determination that LCCI wasn't eligible based on BOLI's guidelines and passed this information on to the City's manager. Neither informed LCCI of this conclusion and the city engineer told LCCI it was alright to proceed, knowing of LCCI's and Larson's concern that LCCI not perform work within the scope of its debarment. The City also knowingly failed to disclose that the contract was subject to the prevailing wage rate to

other FSD contract bidders. Although the forum has concluded that Larson and LCCI should have taken the initiative and inquired further about the circumstances of the job, the aforementioned facts lead to the conclusion that LCCI and Larson's violations were not deliberate, even though they may have been "intentional."

In prior cases where a contractor or subcontractor was debarred, the period of debarment has ranged from one month[xxxv] to three years.[xxxvi] This case, like *Southern Oregon*, presents unique mitigating circumstances that make one month a more appropriate period of debarment than the three years sought by the Agency or the one-year recommended by the ALJ in the proposed order.

C. Liability of HJSCCI.

HJSCCI's fate in this matter is tied to that of Respondent Larson. ORS 279.361(2) and OAR 839-016-0085(4) provide that any "firms, corporations, partnerships or associations" in which a debarred contractor, subcontractor, or other person has a financial interest shall also be placed on the list of ineligibles. Therefore, if either LCCI or Larson have a financial interest in HJSCCI, HJSCCI must be placed on the List of Ineligibles. Although no evidence was presented showing that LCCI has a financial interest in HJSCCI, HJSCCI admitted in its answer to the Agency's amended notice that that Respondent Larson has a financial interest in HJSCCI. Based on this admission, the forum concludes that HJSCCI should also be placed on the List of Ineligibles for one month, the same period of debarment imposed on LCCI and Larson.

RESPONDENT'S EXCEPTIONS

A. Status of Municipal Building at Time of Ewing's Initial Inspection.

Respondent excepts to Proposed Finding of Fact – The Merits 25 regarding its reference to the completed state of the new municipal building at the time of Ewing's

initial inspection. The forum has modified Findings of Fact – The Merits 25 and 75 in response to Respondent's exception.

B. Omission of Mitigating Circumstances Regarding Respondent LCCI's 1999 Wage Survey Violation.

Respondent argues that the forum should temper its consideration of Respondent LCCI's 1999 wage survey violation as an aggravating circumstance by also considering potential mitigating circumstances surrounding that violation. The forum has considered neither aggravating nor mitigating circumstances surrounding that violation and rejects Respondent's argument.

C. Mitigating Circumstances Make One Year on the List of Ineligibles too Harsh.

Respondent argues that four factors – lack of actual notice that the FSR and FSD contracts were subject to prevailing wage rates, Respondent's reasonably diligent inquiries regarding prevailing wage, all employees were paid the prevailing wage when due, and the severe financial impact on Respondents and their community – constitute mitigating factors that require placement on the List of Ineligibles for a period of less than one year. The forum has already considered the first three factors. The fourth does not constitute a mitigating factor and the forum rejects it. *Larson*, 17 BOLI at 76. The forum has reevaluated the mitigating circumstances in this case and places Respondents on the List of Ineligibles for one month instead of one year.

THE AGENCY'S EXCEPTIONS.

A. Julie Stanley's Credibility.

The Agency contends that the forum did not list all the factors relevant to determining Stanley's credibility, and overvalued her testimony as a result. The forum has relied on Stanley's testimony in determining facts that were undisputed, making reassessment of her credibility meaningless to the outcome of this case.

B. Application of ORS 279.357 Exception.

The Agency excepts to the ALJ's conclusion that ORS 279.357(2)(a) expresses the applicable exception from PWR coverage, and argues that the correct exception is stated in ORS 279.357(1)(a). The Agency is correct. The forum has modified the language in the section of the Opinion entitled "The FSD And FSR Contracts Did Not Fall Within The Exemptions In ORS 279.357" in response.

C. LCCI Violated ORS 279.350(7).

The Agency contends that a contractor who is on the List of Ineligibles and intentionally receives a covered project violates ORS 279.350(7) at the time the contractor enters into the contract for the project *and* at any time when it pays its employees less than the prevailing wage rate. The section of the Opinion entitled "LCCI Did Not Take Action That Circumvented The Payment Of The Prevailing Wage To Workers" has been modified in response to the Agency's exception. The Agency's exception is overruled for reasons stated in the Opinion.

D. The Sanctions Imposed Were Insufficient.

1. Mitigating Factors.

The Agency excepts to the ALJ's use of the fact that no employees were underpaid on the FSR and FSD contracts as a mitigating factor in assessing civil penalties. After consideration, the forum agrees that, under these circumstances, Respondent's full payment of its employees is not a mitigating factor. The section in the Opinion discussing mitigating factors relative to Respondent's posting violation has been modified to reflect this.

The Agency also excepts to the forum's use of the City's "deliberateness" in not telling LCCI that the FSD and FSR contracts were covered by PWR as a mitigating factor. In response to this exception, the forum has modified the section in the Opinion

discussing mitigating factors relative to Respondent's posting violation. Finally, the Agency's contention that "the evidence established that even after LCCI knew the FSR contract was covered by the PWR laws, it continued to perform work on that contract" is not supported by substantial evidence in the record.

2. Aggravating Factors.

The Agency excepts that the forum failed to give several aggravating factors their due weight in imposing sanctions, arguing that Respondent's past violations, Respondent's lack of contrition, and the lack of testimonial candor by Respondents' witnesses require stiffer civil penalties and longer placement on the List of Ineligibles. These factors were given due consideration and evaluated appropriately in the Proposed Order. The Agency's exception is overruled. The forum also notes that the Agency's argument that the Proposed Order "imposes only $1,500 in civil penalties for each failure to post the prevailing wage rates" on the FSR and FSD contracts is misplaced, inasmuch as the Notice of Intent did not seek a civil penalty for LCCI's failure to post on the FSR contract.[xxxvii]

E. Ineligibility Periods Should Run Consecutively.

The Agency seeks a ruling by the forum as to whether Respondent's placement on the List of Ineligibles should run concurrently with the current period of ineligibility, which expires July 21, 2001, or should begin running after the expiration of the current period of ineligibility. Because this Order is being issued after July 21, 2001, this issue is moot and the forum declines to rule on it.

F. "Responsible" and "Knew or Should Have Known" in OAR 839-016-0085(3).

The Agency excepts to the forum's analysis of OAR 839-016-0085(3) in its determination of Larson's placement on the List of Ineligibles and asks that the forum modify its analysis to reflect that the terms "'responsible for' and 'knew or should have

known' are different sides of the same coin, not separate tests which both must be met, for an individual to be on the list of ineligibles based on a corporation's violation." The forum agrees that the analysis contained in the Proposed Order is confusing and has modified the section in the Opinion discussing Larson's placement on the List of Ineligibles to clarify this issue.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the penalty assessed as a result of Respondent Larson Construction Co., Inc.'s violations of ORS 279.354, ORS 279.350, OAR 839-016-0010, and OAR 839-016-0033, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Larson Construction Co., Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FOUR THOUSAND DOLLARS ($4,000.00), plus any interest at the legal rate on that amount from a date ten days after issuance of the Final Order in this case and the date Respondent Larson Construction Co., Inc., complies with the Final Order.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Larson Construction Co., Inc.**, and **David M. Larson** and any firm, corporation, partnership or association in which they have an interest shall be ineligible to receive any contract or subcontract for public work for a period of one month from the date of publication of their name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Howard E. Johnson & Sons Construction Co., Inc.** and any firm, corporation, partnership or association in which it has an interest shall be ineligible to receive any contract or subcontract for

public work for a period of one month from the date of publication of its name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

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[i] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate), Interpretation* section, p. 218.

[ii] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate), Interpretation* section, *Criteria Used to Determine PWR Coverage*, adopted 06-27-89, p. 208.

[iii] ORS 277.348(1) is apparently a typographical error in the FOM, as the correct statutory cite is ORS 279.348(1).

[iv] The city's map shows an alleyway between these lots that runs parallel to S. and S.W. Main, but there is no sign of this alleyway on the completed project.

[v] This letter is identical in all substantive respects to BOLI's letter described in Finding of Fact – The Merits 8, *supra*.

[vi] Cokley testified that this term meant "not a portion of another contract or a subsidiary to another job."

[vii] Johansson and Ewing both used this term in referring to the road that LCCI constructed that provided access for LCCI's excavator to the Hamilton house.

[viii] It was undisputed that the drainage work and ground stabilization for the parking lot were planned as part of phase two of the WMC project, and that the drainage work and some ground stabilization for the parking lot would have eventually been performed by another contractor. It was not clear whether or not the construction of a haul road to allow the excavator access to Hamilton house would have been required if another contractor besides LCCI had demolished the Hamilton house.

[ix] During testimony, this "storm line" was most commonly referred to as a "drainpipe," and the forum has opted to use the term "drainpipe" when referring to the "storm line" described in Ewing's letter.

[x] The forum infers that Holtzheimer was an HJSCCI employee from the fact that his time is recorded on an HJSCCI timesheet, whereas Hannah's is recorded on an LCCI timesheet.

[xi] The forum concludes that the mud hauling was related to the FSR contract based on LCCI's billing to the City for 96 units of mud removed from the WMC project site related to Purchase Order 2268. LCCI did not bill the City for any mud removal related to the FSD contract.

[xii] The forum infers that Holtzheimer hauled the rock for the FSR Contract based on LCCI's billing to the City for 95 yards of rock delivered related to building the "haul road."' LCCI did not bill the City for any rock delivery related to the FSD Contract.

[xiii] The forum infers that Seal was an HJSCCI employee from the fact that his time is recorded on an HJSCCI timesheet. *See supra* text accompanying note 9.

[xiv] *Id.*

[xv] *See supra* text accompanying note 12.

[xvi] *Id.*

[xvii] Johansson did tell that the City intended to put a parking lot where the "haul" road would be constructed when Johansson asked him to put in a bid for constructing the "haul" road, catch basin, and drainpipe line. *See* Finding of Fact – The Merits 39, *supra*.

[xviii] A WH-38 is a form created by BOLI for contractors to use in submitting certified payroll reports that comply with the requirements of ORS 279.354.

[xix] *See* Finding of Fact – The Merits 32, *supra*.

[xx] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate)*, *Interpretation section*, p. 213.

[xxi] Building the "haul" road involved "construction" of a "road[s]." Installation of a drainpipe and catch basin involved "construction" fitting in the category of "improvements of all types."

[xxii] *See* Finding of Fact – The Merits 79*, supra*.

[xxiii] *See also In the Matter of City of Klamath Falls*, 19 BOLI 266, 283 (2000) ("the ORS 279.357(1)(a) exemption for '[p]rojects for which the contract price does not exceed $25,000.00' applies only where the cost of the *entire* project – not just a single contract – is $25,000.00 or less." (emphasis in original)

[xxiv] The statutory language is contained in Conclusion of Law 2, *supra*. *See also* OAR 839-016-0310(2), which provides useful guidance to contracting agencies that must determine whether their contracts form part of a public works project; BOLI's interpretation of that rule, cited in Finding of Fact 13, *supra*; and BOLI's interpretation of the "Scope of Debarment," cited in Finding of Fact 10, *supra*.

[xxv] *See* Findings of Fact – The Merits 25 and 39, *supra*.

[xxvi] *See* Finding of Fact – The Merits 14, *supra*.

[xxvii] The forum has assessed a $3,000 civil penalty against LCCI based on this conclusion.

[xxviii] *See* Finding of Fact – The Merits 14, *supra*.

[xxix] This conclusion is borne out by footnote 4 of the Agency's exceptions which asserts that ORS 279.350(7) was violated by LCCI "when LCCI entered into the contracts in the first place."

[xxx] Based on the same facts, the forum also assessed a civil penalty of $45,993.72 based on LCCI's failure to pay the prevailing wage rate.

[xxxi] The forum relies on the language of ORS 279.350(7) and OAR 839-016-0300, the Agency's substantive rule that restates the basics prohibition on circumvention contained ORS 279.350(7) in determining whether a violation occurred. OAR 839-016-0530(3)(h), upon which the Agency relies, merely states that a civil penalty may be assessed for a violation of ORS 279.350(7). Because it does not establish a substantive violation and its language ("Taking action to circumvent") is inconsistent with the relevant statutory language ("takes any action that circumvents"), as well as the language of OAR 839-016-0300 ("take action which circumvents"), the forum does not rely on OAR 839-016-0530(3)(h) to determine if LCCI violated ORS 279.350(7).

[xxxii] There was no evidence that Larson believed the FSD and FSR contracts were regulated by the Davis-Bacon Act or that he believed demolition was an exempt activity.

[xxxiii] This assumes, of course, that Johannson would have provided accurate information.

[xxxiv] *Compare In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

[xxxv] *In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138 (1999*)* (the forum found that respondents intentionally failed to pay the applicable prevailing wage rates over a four month period because the fringe benefits it paid to workers were placed in a plan that did not meet the requirements of a bona fide plan, but concluded that respondents' violation was mitigated by immediate actions taken to correct the plan, payment of the underpaid fringe benefits as back wages, and the prior approval by USDOL and ODOT of the plan.)

[xxxvi] *See, e.g.*, *Larson at* 81 (the forum found that respondents intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in

violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program.)

[xxxvii] *See* Finding of Fact – The Merits 1, *supra*.