

**LAW OFFICE OF LISA HERZOG**

RECEIVED  
CITY OF GARDEN GROVE  
CITY CLERK'S OFFICE

14252 CULVER DRIVE, SUITE 490

IRVINE, CALIFORNIA 92604-0317

TEL: (310) 210-8025 ♦ FAX: (714) 508-7521

lisadherzog@yahoo.com

2016 AUG 23 PM 12: 23

August 22, 2016

**Sent Via Email and U.S. Mail**

City Clerk's Office  
Kathy Bailor, City Clerk  
11222 Acacia Parkway  
Garden Grove, CA 92840  
cityclerk@ci.garden-grove.ca.us  
(714) 741-5040

**RE: Public Records Request for Documents**

Dear Ms Bailor:

Pursuant to the State of California Public Records Act, California Government Code §§ 6250-6276.48, I hereby request the following records be produced by the City of Garden Grove ("You") to the Law Office of Lisa Herzog ("Herzog" or "we") within the timeframes provided by statute:

- 1. Copies of all contracts between You and PENCO Engineering, Inc. for any projects involving only the following covered trades and crafts: construction management, inspection, geotechnical work and/or land surveying for all design and construction projects ("Projects") awarded between January 1, 2013 and the present.**
- 2. Copies of all invoices received from PENCO Engineering, Inc. submitted to You for the time frame of January 1, 2013 to the present.**
- 3. Copies of all corresponding checks for all invoices, as requested in No. 2 above, paid by You including the date the invoice was paid. Redacting the checking account information on these check copies is acceptable. If, and only if, no check copies are kept, please provide proof of payment including date paid.**

4. **Copies of all certified payroll records and copies of all fringe benefit statements submitted by PENCO Engineering, Inc. to You, including their employees and agents, for any Projects awarded by You between January 1, 2013 and the present.**

**Please Note:**

**A. Certified Payroll.**

Herzog is allowed to go to You, as the “body awarding the contract”, to obtain these records, including certified payroll. Herzog is not required to obtain this information from the California Department of Industrial Relations. See California Labor Code § 1776(b)(3).

Pursuant to California Labor Code Section 1776(b)(3), You are required to request the certified payroll from PENCO Engineering, Inc. and provide it, pursuant to a public records request, even if You have not requested it for your own purposes in the past.

**California Labor Code Section 1776(b)(3) specifically states:**

*“(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:*

*(3) A certified copy of all payroll records enumerated in subdivision (a) shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by the contractor, subcontractors, and the entity through which the request was made. The public may not be given access to the records at the principal office of the contractor.”*

There may be situations where certified payroll is required to be prepared by PENCO Engineering, Inc.; however, You have never requested certified payroll in the past and therefore, You do not have any certified payroll from PENCO Engineering, Inc. in your records. Regardless of whether You have requested it in the past, PENCO Engineering, Inc. is still required to provide certified payroll to You upon request. I am entitled to ask You for this certified payroll pursuant to California Labor Code Section 1776(b)(3).

Additionally, a vendor company may call their services by any name that may, or may not, reflect a requirement to create certified payroll. Whether certified payroll is required is determined by the actual work being done, not by how employees are classified in a contract or on an invoice. In our research of California Department of Industrial Relations (“DIR”) cases, it is not uncommon to have employers misclassify employees as professional services (or laborers)

to circumvent prevailing wage requirements. The final determination will be made by the California Department of Labor Standards Enforcement (“DLSE”).

**Please call PENCO Engineering, Inc. and request their certified payroll for January 1, 2013 to the present.** If they have certified payroll for January 1, 2013 to the present for contracts with You, PENCO Engineering, Inc. must provide You with these documents on an expedited basis and according to statutory timeframes. If PENCO Engineering, Inc. fails to produce the requested documents within the timeframe allowed, I request that You institute penalties provided for in California Labor Code § 1776(h) that states:

*“The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.”*

If PENCO Engineering, Inc. states that they do not have any certified payroll, please send me an email stating the name of the person at PENCO Engineering, Inc. that you spoke to and the date and time that you spoke to them. If certified payroll is received, I am happy to pay for copies at your cost. Alternatively, I would prefer to receive electronic copies of these documents. Please feel free to contact me to discuss this matter further. Additionally, I encourage You to discuss this issue with your own legal counsel for clarification.

**B. Charter Cities.**

If You are claiming to be a “Charter City,” You must meet certain requirements before You can opt out of the prevailing wage requirements carefully set out by California and Federal statutes. See Division of Labor Standards Enforcement, Public Works Manual (May 2013) § 2.9, p. 10 (citing Article XI, § 5 of the California Constitution; *City of Pasadena v. Charleville* (1932) 215 Cal. 384).

*“The courts have identified three factors in evaluating whether a particular public works project is a “municipal affair” of a chartered city, or a matter of statewide concern. If the project would be viewed as a statewide concern, the prevailing wage requirements will apply. The factors to be considered are: (1) the extent, if any, of extra-municipal control over the project; (2) the source and control of the funds used to finance the project; and (3) the nature and purpose of the project.”*

*So. Cal. Roads co. v. McGuire* (1934) 2 Cal. 2d 115; Public Works Case No. 2006-016 [emphasis added]

**C. Exempt Portion of Document.**

An exempt part of any document does not justify withholding the whole document. California Government Code § 6253(a) (stating that any non-exempt (public) part of a record must be made available after any exempt information has been redacted).

**D. Copying Fees for Record Production.**

Pursuant to California Government Code § 6253(b):

*“Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable.” [emphasis added]*

The California Public Records Act provisions allowing an agency to charge a fee covering “direct cost of duplication” only allows the agency to recover costs of copying documents. *North County Parents Organization for Children with Special Needs v. Department of Education* (1994) 23 Cal. App. 4<sup>th</sup> 144, 146. “Direct costs” do not include additional tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted. *Id.* See also 55 Cal. Jur. 3d, Records and Recording Laws § 12 (2015) stating:

*“The amount chargeable by the department for furnishing the copies is the cost of copying them, and any “indirect” costs charged by the department are excluded.” [emphasis added]*

Additionally, even if You have a resolution regarding general copy charges at a higher rate, only direct costs of duplication are allowed in the case of a public records request (as opposed to other copying charges) pursuant to California Government Code § 6253(b).

*“The preemption doctrine prohibits a city or county from making ordinances and regulations in conflict with general state laws.”*

45 Cal. Jur. 3d Municipalities § 244 (citing *Harrahill v. City of Monrovia* (2002) 104 Cal. App. 4<sup>th</sup> 761). See also California Const. Art. 11, § 7. These charges are typically \$.10 per copy.

**E. Statutory Time Frames for Production.**

Responsive documents will be due ten (10) days from receipt of this request pursuant to California Government Code § 6253 and California Labor Code § 1776. If, for any reason, You choose to deny this request, please state the reason for the denial within five (5) business days and provide Herzog the name of the person with whom we may file an appeal.

If You have any questions about these requests or your responsibility to respond, I urge You to speak with your legal counsel for clarification. Additionally, please feel free to email me at [lisadherzog@yahoo.com](mailto:lisadherzog@yahoo.com) regarding this process. If possible, I ask that You email me rather than calling so that I can keep track of all correspondence for each request.

To reduce the usage of paper, I prefer that You provide the documents in electronic full size formats, preferably PDF files wherever possible. If possible, please email the files to [lisadherzog@yahoo.com](mailto:lisadherzog@yahoo.com).

Sincerely,  
**LAW OFFICE OF LISA D. HERZOG**

  
**Lisa D. Herzog**  
Lawyer

LDH:dew