STATE OF NEW YORK DEPARTMENT OF LABOR

MITSUBISHI CONSTRUCTION CORP.
Prime Contractor

and

AGC MASONRY, INC.
and
ALISHER KARIMOV,

Individually as an officer, owner and/or among the five largest shareholders of the corporation

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the workers employed on a public work project known as the construction of upgrades to the wastewater treatment plant, Hunt Road Pumping Station improvements, and replacement of the Hunt Road force main and siphon for the Town of Orangetown Sewer District in Orangetown

REPORT
&
RECOMMENDATION

Prevailing Rate Case
Case No. 2006007504
PW 11 2008016558
Rockland County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on May 15, 2012, in Albany, New York and White Plains, New York by videoconference The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether AGC Masonry, Inc., and Alisher Karimov, individually as an officeholder and/or among the five largest shareholders of the corporation ("Sub") a subcontractor of Mistsubishi Construction Corp. ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the

performance of a contract involving upgrades to the Hunt Road Pumping Station ("Project") for the Town of Orangetown ("Department of Jurisdiction").

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz (Louise Roback, Senior Attorney, of Counsel).

Sub appeared *pro se* and filed an Answer to the charges incorporated in the Notice of Hearing**.**

Prime failed to appear at the hearing and did not file an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Did Sub pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Sub to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Alisher Karimov a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
5. Is Alisher Karimov an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
6. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The Project involved a public work contract between Prime and the Department Of Jurisdiction in Rockland County entered into on August 14, 2007 (DOL 4, 10).

The Project, PRC No. 2006007504, involved upgrades and improvements to the Town of Orangetown waste water treatment plant and Hunt Road pumping station (DOL 4, 8 – 10).

On September 27, 2007Sub entered into an agreement with Prime for to perform work on the Project (DOL 5).

The Department of Jurisdiction included the Department Prevailing Wage Rate Schedule for Rockland County, effective July 1, 2006 through June 30, 2007 ("Schedule 1") in its Standard General Conditions of the Construction Contract (DOL 12).

The Department subsequently issued the Prevailing Wage Rate Schedule for Rockland County, effective July 1, 2007 through June 30, 2008 ("Schedule 2") (DOL 6).

Schedule 2 contained the hourly rate of pay and supplemental benefit amounts for Laborer/Heavy Highway, Group E (demolition men) in the amounts of $28.30 per hour in wages and $14.35 per hour in supplemental benefits (DOL 6; T. 41).

On September 22, 2008, the Prime filed a complaint with the Department in which it alleged Sub issued falsified certified payrolls (DOL 1).

On December 18, 2008 and again on November 18, 2009, the Department issued to Sub a request for payroll records and supporting documentation (DOL 5, 6).

The Department did not receive records from Sub in response to the requests it issued (T. p. 12, 14, 48).

The Department submitted request to withhold funds to the Department of Jurisdiction, but no funds were withheld (DOL 18, 18A).

The Department obtained payroll records and supporting materials from Prime and the Department of Jurisdiction (DOL 5, 7, 8, 9, 10, 11, 12, 13, 14; T. p. 14).

The Department investigator met with Alisher Karimov in December, 2009. During the course of the meeting, Mr. Karimov informed the investigator that he hired three workers to work with him on the Project on the days that he was there, and that he paid the three workers $20 and $25 per hour in cash (T. p. 33, 35).

To prepare the Audit, the Department investigator used the days and hours worked as shown on Sub's certified payrolls for workers shown on those payrolls (T. 35).

The Department investigator classified all of the workers on the Project as laborers (DOL 15).

For the day laborers admitted by Sub as having been on the Project, the Department investigator used the names "John Doe" one, two and three (DOL 15; T. 36).

Sub paid only wages and did not pay or provide any supplemental benefits (T. 37, 38).

The Department investigator credited Sub with paying the amounts shown as having been paid on the certified payrolls (DOL 15; T. 38).

For the three unidentified John Doe workers, the Department investigator established their hours of work to be the same as those shown for Mr. Karimov, and credited Sub with having paid them $25.00 per hour (T. 39).

Based upon the interview with Mr. Karimov, the certified payrolls, and supporting documents, the Department investigator prepared an audit finding underpayments by Sub to workers on the Project in the amount of $4,778.40 ("Audit") (DOL 16).

Sub is a business incorporated in the State of New York (DOL 19).

Mr. Karimov is the sole owner and president of Sub (T. 33, 52).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law article 8. Labor Law § 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and

hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

Since the Department Of Jurisdiction, a public entity, is a party to the instant public work contract, Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts,* 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." (*Matter of Armco Drainage & Metal Products, Inc. v State of New York,* 285 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. *(Matter of Lantry v State of New York,* 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello,* 31 AD3d 925, 927 [2006], *lv denied,* 8 NY3d 802 [2007]). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " (*Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame,* 15 NY 103, 109 [1965]). Workers are to be classified according to the work they perform, not their qualifications and skills. (*See, Matter of D. A. Elia Constr. Corp v State of New York,* 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

Based upon the supporting documentation for the Project, the testimony of the Department investigator and Mr. Karimov, and the fact that Sub does not dispute the classification, it is appropriate.

UNDERPAYMENT METHODOLOGY

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available

evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." (*Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [1989] (citation omitted)). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

The Department investigator determined that the certified payrolls obtained from the Prime were incorrect and then used the next best sources of information, including statements from Mr. Karimov, to prepare the Department audit and determine the amount of underpayment on the Project, consistent with the case law set forth above.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. (*Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). Consequently, Sub is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

WILLFULNESS OF VIOLATION

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation.

This inquiry is significant because Labor Law § 220-b (3) (b) (1) [1] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [1992]). The violator's knowledge may be actual or, where he should have known of the violation, implied. (*Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra)* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly

[1] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), as amended effective November 1, 2002.

familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

Sub deliberately failed to include three workers used on the Project in the certified payrolls submitted to Prime, thereby willfully violating the law.

FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2011, http://www.merriam-webster.com/dictionary/falsify).

It is clear from the record that Sub failed to meet its obligation to maintain true and accurate payroll records and I find, in light of Sub's deliberate failure to include all of the workers on the Project in the certified payrolls**,** that Sub's willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payrolls.

PARTNERS, SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity. Mr. Karimov was the sole owner, shareholder and president of Sub and, as such, is subject to this limitation.

CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements.

The size of the Project was limited, and the number of workers involved small. The Department did not provide any evidence of prior experience by Sub with the Labor Law. However, the violations involving workers left off the payroll are significant. Accordingly, a penalty of twenty per cent should be applied.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 AD2d 950 [1996], *lv denied* 89 NY2d 802 [1996]). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *(Canarsie Plumbing and Heating Corp. v Goldin*, 151 AD2d 331 [1989]). Sub performed work on the Project as a subcontractor of Prime. Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Sub underpaid wages and supplements due the identified employees in the amount of $4,778.40 and

DETERMINE that Sub is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Sub to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that the willful violation of Sub did involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Alisher Karimov is an officer of Sub; and

DETERMINE that Alisher Karimov is a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of Sub; and

DETERMINE that Alisher Karimov knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub be assessed a civil penalty in the amount of 20% of the underpayment and interest due; and

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 8; and

ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, White Plains, New York, 10605; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: March 19, 2013
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer