STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

Away Environmental, Inc., and
Yojana Costello, as an officer and/or shareholder of
Away Environmental, Inc.,

REPORT
&
RECOMMENDATION

Prime Contractor

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 laborers, workers and mechanics employed on a public work project for the Town of Clarkstown.

Prevailing Wage Rate
Case No. 2015002209
Case ID: PW112011009656
Rockland County

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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on December 6, 2016, a hearing was commenced on August 21, 2017 and concluded on January 25, 2018 in Albany, New York and White Plains, New York by videoconference At the conclusion of the hearing the parties requested the opportunity to submit Proposed Findings of Fact and Conclusions of Law. The original submission date was 30 days following receipt of the final transcript. However, at the request of the parties this date was extended and both parties timely submitted their proposals on or before August 31, 2018.

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 Away Environmental, Inc. (“AWAY” or “Respondent”), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the furnishing of materials, labor, tools, and equipment necessary for the performance of lead abatement, environmental cleaning, and certain other capital improvements, in the Police Headquarters and Justice Court Complex, as well as in certain areas of 10 Maple Avenue, as

warranted by test results ("Project ") for the Town of Clarkstown, State of New York ("Department of Jurisdiction" or "Town of Clarkstown" or "Clarkstown Project").

HEARING OFFICER

John Scott was designated as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of Counsel)

AWAY appeared with its attorneys, Ford Harrison, LLP (Jeffrey Douglas, Esq., Eric Su, Esq., and Allan M. Bahn, Esq., of Counsel) and filed an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Whether the Project is covered by Article 8 or Article 9 of the New York State Labor Law;
2. Whether Away failed to pay or provide the rate of wages and supplements prevailing in the locality to or for the benefit of the workers employed in the performance of the Project, and, if so, what is the amount of underpayment, including the rate of interest to be imposed thereon?
3. Was any failure by Away to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
4. Did any willful underpayment involve the falsification of payroll records?
5. Is Yojana Costello an officer and/or shareholder of Away who owned or controlled at least ten per centum of the outstanding stock of Away?
6. Is Yojana Costello an officer of Away who knowingly participated in a willful violation of Labor Law article 8?
7. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
8. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

General

This case involves an emergency lead contamination cleaning project at the Town of Clarkstown that began in September 2010. At that time the Chief of Police observed dust in his personal bathroom. At his request, the Town brought in Charles Schwartz, the owner of Environmental Assessments & Solutions ("EAS" or "Environmental Assessments"), an experienced environmental assessment and testing expert, to conduct initial testing to determine if there was any hazardous material present and to determine the scope of any potential cleaning and abatement. Mr. Schwartz conducted numerous tests and concluded that there was no airborne lead and thus no presence of hazardous waste. However, due to the presence of lead dust and lead contamination in the building and firing range, and in an abundance of caution, Mr. Schwartz developed a cleaning plan to begin immediately.

As a result of the urgency of this matter and the emergency nature of the work, the Town retained AWAY, a certified lead abatement firm, to immediately commence cleaning. On September 9, 2010, Yojana Costello, the owner of AWAY, along with one employee, conducted a thorough cleaning of the Police Chief's bathroom. In the following days under the direction of Mr. Schwartz, AWAY began an intensive cleaning program to clean the entire building as well as a neighboring building.

In furtherance of the project, on or about November 4, 2010, AWAY entered into a contract with the Town to furnish materials, labor, tools and equipment necessary for the provision of environmental cleaning and other capital improvement as warranted by test results in the Police Headquarters and Justice Court Complex, as well as in certain areas of 10 Maple Avenue, in the Town of Clarkstown, New York (Tr. 62, 64, 65, 70, 71; Dept. Ex. 3, 4, 5). The Certificate of Liability insurance for the Clarkstown Project indicated that the policy of professional liability, and pollution liability in the amount of $2,000,000.00 had been issued to AWAY for the Project (Tr. 370; Dept. Ex. 4). The Town agreed to compensate AWAY an hourly fee plus materials as per AWAY's fee schedule, not to exceed $860,000.00 (Tr. 64, 65; Dept. Ex. 4). As the Clarkstown Project continued, additional lead dust, asbestos and mold were discovered in certain

areas of 10 and 20 Maple Avenue (Police Headquarters, Justice Complex), and the Town was authorized to expend an additional $890,000.00 for AWAY's professional services to conduct environmental cleaning and related capital improvements in these areas. One Million, Four Hundred Thousand ($1,400,000.00) Dollars of the total amount authorized for AWAY and its subcontractors was deemed capital improvements and funded via the issuance of serial bonds (Tr. 70, 71, 486; Dept. Ex. 5, 21).

Before requesting that Away immediately commence cleaning in accordance with the instructions of Mr. Schwartz (Tr. 872), the Town failed to apply to the DOL for a PRC Number, which would have designated the work as either Article 8, Article 9 or a combination of both depending on the nature of the work being performed (Tr. 61). In the absence of the PRC Number, AWAY relied on representations from the Town regarding the appropriate wage rate to pay to its employees (Tr. 793). Additionally, the contract between the Town and AWAY did not contain a PRC number, a Prevailing Wage Rate Schedule, or reference to this project being controlled by Labor Law article 8 or article 9 (See, DOL Ex. 4). The Town did not obtain a PRC number until 2015, almost four years after work on the project ended in June 2011 (Tr. 61, DOL Ex. 3).

Prior to commencing work on the Clarkstown Project, AWAY workers received training and lead awareness certificates, lead worker certificates, and OSHA lead construction standard training eight-hour courses. The eight-hour course involved OSHA regulatory review including lead construction standard, hazard communication standard and respiratory protection standard, respirator training including qualitative fit-testing and hands on training, medical surveillance, engineering controls and work practices to reduce exposure and control dust, and site-specific training on the lead compliance plan for the Clarkstown Project (Tr. 86, 91, 966; Dept. Ex. 8). The eight-hour OSHA lead construction standard training course was provided and taught to the workers by Charles Schwartz (Tr. 966; Dept. Ex. 7, 8).

On October 6, 2010, EAS provided a report to the New York State Division of Safety and Health, Public Employee Safety and Health Bureau (DOSH-PESH) which outlined a plan for the lead assessment, testing of lead, cleaning oversight, and the extensive work that was to be done during the course of the Clarkstown Project (Tr. 82; Dept. Ex. 7). The report indicated that significant reservoirs of contamination

had been identified above the hung ceilings, inside the HVAC system and inside the mechanical equipment rooms and firing range. The report stated that the assessment would be ongoing and regular updates, including laboratory analysis reports would be provided (Tr. 82-87). The report further indicated that based upon laboratory analytical results and inspection findings, it was confirmed that the firing range and firing range exhaust system were the source of the lead dust. Lead decontamination work had begun and expanded to include the entire police chief administration wing based upon subsequent inspections and lab results, which identified lead contamination inside the HVAC system and above the hung ceiling in this area and adjoining areas of the building. The report indicated that lead decontamination work had also commenced in the second floor Justice Court Clerk Administration area, including the HVAC system, and that lead decontamination work was planned for all areas of the building and all HVAC systems serving the building (Dept. Ex.7).

The record indicates that Mr. Schwartz collaborated with the DOSH-PESH investigator regarding this project (Tr. 876-877). Additionally, Mr. Schwartz and the DOSH-PESH investigator conducted concurrent hazardous waste testing using different laboratories (Tr. 877). Mr. Schwartz testified that the DOSH-PESH investigator reported results consistent with his that, although there was no hazardous waste at the Clarkstown Project, specialty cleaning of the lead dust from the buildings was required (Tr. 877, 883; Resp. Ex. 1). Mr. Schwartz testified that the DOSH-PESH investigation rendered a written report that he never read (Tr. 883). The DOSH-PESH report was not available and made part of the record of the hearing as the Department of Labor informed the AWAY attorneys that it was no longer in the possession of DOSH-PESH. Mr. McCormack testified that he had no idea what the report stated (Tr. 387).[1]

[1] The attorneys for AWAY requests that I draw an adverse inference against the Department of Labor due to its failure to maintain this DOSH-PESH report that contained potentially exculpatory evidence, to wit: a finding that there was no hazardous waste detected at the Clarkstown project. The testimony offered by Mr. Schwartz regarding the findings and conclusions of the DOSH-PESH investigator is undisputed by the evidence contained the record. The testimony regarding the findings contained in this missing report, as well as findings of Mr. Schwartz as contained in Respondent's Exhibit 1, will be considered and given such weight as is warranted by the full constellation of evidence in the record. This is the same weight that would have been given to the actual DOSH-PESH report if it was a part of the record. I find no prejudice results to AWAY by reason of the missing report. Accordingly, while I have the discretion to make such an inference, I decline to do so in this case.

The EAS plan recommended full time project monitoring, clearance inspection and testing to document and verify lead decontamination work; an employee education and information program for lead, including lead test results and a blood lead testing program for AWAY employees; and that the Town should conduct an OSHA lead hazard awareness course for AWAY employees, which would include respiratory protection and respirator fitting (Tr. 82-87; Dept. Ex. 7).

EAS indicated that its ongoing assessment and lead decontamination of the building's HVAC system, the firing range, mechanical equipment rooms and areas above the hung ceiling would be a major undertaking that would take approximately 5-6 months to complete. (Tr. 82-87; Dept. Ex. 7). EAS remained on site on the Clarkstown Project until April 13, 2011 and testing for lead was a daily function of its role on the Clarkstown Project, with EAS testing for lead and AWAY performing work to remove lead from the buildings (Tr. 821, 822, 962, 963, 964, 965). EAS never documented lead in the air samples and Mr. Schwartz specifically stated that this was not a lead decontamination project but, rather a lead cleaning project. In his Cleaning Project Monitoring, Mr. Schwartz stated "… this project is not and should not be considered lead abatement work, but rather lead cleaning work." (*See* Respondent Ex. 1). He continued, "The intent of this project is not to conduct lead paint abatement or lead abatement but rather specialty cleaning to remove lead dust from surfaces in accordance with the Lead Dust Operations and Management Plan and Lead Dust Cleaning Plan we previously issued." *Id.*

At the time that the Town specifically hired AWAY for lead decontamination/cleaning work, it had a separate maintenance department that performed regular maintenance of the buildings, including 10 and 20 Maple Avenue. Mr. Schwartz indicated that he met with multiple individuals from the Town's maintenance department, which oversees the maintenance, cleaning, and custodial operations in the buildings (Tr. 953, 954, 960). However, regardless of the Town having a maintenance department, Mr. Schwartz recommended that the Town hire AWAY, a certified lead abatement company to perform the lead cleaning project.

AWAY was founded in 2007 and from the time of its inception it performed asbestos, mold, and lead removal (Tr. 753, 806). From the time it was founded until AWAY was performing work on the

Clarkstown Project, it was a lead abatement firm (Tr. 817).

Prior to the Clarkstown Project, AWAY performed work in Connecticut and New York State, and it performed asbestos, mold, and lead removal in public, residential, and commercial buildings (Tr. 753). AWAY employees had experience wearing Tyvek suits and respirators (Tr. 755). Prior to the Clarkstown Project, AWAY performed a single lead abatement work in Section 8 apartments in New York City, by removing and repairing windowsills that were contaminated with lead (Tr. 808, 832). This New York City project was the sole prevailing wage work AWAY performed in New York prior to the Project (Tr. 808).

Yojana Costello is the President and owner of AWAY (Tr. 750; Dept. Ex. 18). Prior to starting AWAY, Ms. Costello worked in the asbestos, mold, and lead abatement fields for almost 20 years as a supervisor for several companies in the areas of the removal of asbestos, lead, and mold. She worked at the Port Authority, Federal Plaza, hospitals, New York City schools, in the train stations in New York City and removed lead from the "yellow lines" near the train tracks. She also worked at the World Trade Center and removed lead from the metal beams (Tr. 750, 752, 811, 812, 813). Ms. Costello received vocational, hands on, training for abatement and removal of asbestos, mold, and lead. She obtained her certificates as a lead and asbestos supervisor in 1998, and worked on lead projects, asbestos projects, and mold projects, both for public entities, and private (Tr. 748, 749, 814, 815). Ms. Costello was a member of the Laborer's Local 78, from 1998 until 2005. Ms. Costello was a union worker, earning prevailing wages and prevailing supplements (Tr. 812, 813, 827).

On or about July 26, 2011, Business Manager Stephen Reich from the Laborer's Local 754 filed a complaint with the Department of Labor (Department), regarding payment irregularities by AWAY, specifically alleging that AWAY failed to pay prevailing wages and supplements on the Clarkstown Project (Tr. 40, 41, 43, 44; Dept. Ex. 1). In his complaint, Mr. Reich indicated that he received certified payroll records for several weeks of the Clarkstown Project from the Town, along with sign in sheets and billing sheets, and he noticed that AWAY was only paying its workers $30.18, or $30.80, in wages, without any supplemental benefits.

The Bureau of Public Work (Bureau) spoke to Mr. Reich upon receiving his complaint and

requested that he provide the documents he obtained from the Town. Upon review of the complaint form and the documents submitted by Mr. Reich, the Bureau commenced an investigation of the Clarkstown Project (Tr. 43, 44, 45, 46; Dept. Ex. 1).

The Department Investigator determined that the Clarkstown Project involved the employment of workers in the Article 8 Laborer-Building, hazardous waste handler Classification (Tr. 74-75; Dept. Ex. 6). The basis for this classification determination was the type of work that was being performed by AWAY on the Clarkstown Project. In general, the work that was performed by AWAY workers entailed construction like activity, including building decontamination units, sealing off entry ways and exits to certain locations, removing ceiling tile, cleaning above the ceiling, cleaning the ducts, removing some carpet, encapsulation work, and grinding, in order to effectuate the removal of lead. Most of this work was performed using air-purifying respirators, including half masks and full-face masks, and Tyvek suits (Tr. 75, 901).

On or about July 1, 2010, the Bureau issued Article 8 Prevailing Wage Rate Schedule 2010 for Rockland County. This Schedule pertains to Public Work Projects which take place within Rockland County. This Schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on the Clarkstown Project from July 1, 2010 through June 30, 2011, including the following classification: laborer-building (hazardous waste handler, category C), with wages of $32.85 per hour, and supplements of $17.75 per hour (Tr. 72, 73, 76, 77; Dept. Ex. 6).

The Bureau requested that AWAY furnish certified payroll records, cancelled payroll checks, benefit plan summaries, cancelled checks, contractor profile, a list of any affiliates or subsidiaries of the business, copy of union reports, contracts, and other documents relating to the Clarkstown Project (Tr. 56, 57, 58; Dept. Ex. 2). AWAY was not fully cooperative with this record request. AWAY failed to provide a contractor profile, failed to turn over the certified payroll records, or other documents to assist the Bureau in its investigation (Tr. 59, 224, 225). The complaint from Mr. Reich, subsequent complaints from the workers and worker interviews, and documents obtained from the Town enabled the Bureau to conduct its

investigation and complete its audit.

During its investigation, the Bureau received two sets of AWAY's payrolls for the Clarkstown Project from the Town (Tr. 92; Dept. Ex. 9, 10). The payrolls are generally consistent with each other, except for the latter set (Dept. Ex. 10) spanning a longer period of time (Tr. 93-98). The Bureau relied on the payrate that was listed for the workers in the payrolls, as the amount received by the workers, and credited to AWAY. However, the Bureau relied on the timesheets that were maintained during the Clarkstown Project as the primary source of hours worked by the workers, and only relied on the hours listed in the payrolls when time sheets were missing (Tr. 99; Dept. Ex. 9, 10, 11).

In the payroll documents, the payrate listed for the workers is $30.18, except for one week listed as $30.80. The "fringe rate" listed for the workers is zero, for every week, in both sets of payrolls (Tr. 100; Dept. Ex. 9, 10). The workers consistently received $30.18 per hour as total compensation, without receiving any supplemental benefits. The total prevailing wage and prevailing supplement package amount they should have received in accordance with the prevailing wage schedule is $50.60 per hour (Tr. 102; Dept. Ex. 6).

The payrolls also indicate that AWAY failed to pay its workers for any overtime work. All hours worked by the AWAY employees were paid at the $30.18 rate, even if workers worked 74 hours in one week, or 17 hours in one day (Tr. 101, Dept. Ex. 9, 10).

During its investigation the Bureau received from the Town time sheets that AWAY maintained during the Clarkstown Project. The time sheets were maintained for the same time period as the payrolls, September 2010 through June 2011 (Tr. 104, 105; Dept. Ex. 11). The information that is contained in the timesheets is the worker names, including the owner of the company Ms. Costello, the date of the work, the shift times, hours of work, shift location, and employee signature (Tr. 107, 108). The time sheets relied on by the Bureau to establish when the workers worked as there were instances where AWAY workers are not listed as working in the payrolls, while they are signed in and working on the Clarkstown Project as indicated in the time sheets. The Bureau also relied on the time sheets to determine the in some cases the type of work that was performed (Tr. 108). Various dates within the time sheets include entries such as

"encapsulation", "shot blasting", "removal of tile", "grinding walls", "poly ceiling", "finish poly" "painting" (Tr. 108-133). The Investigator determined this construction-like work falls under Article 8 (Tr. 130).

During its investigation, the Bureau received from the Town payment vouchers and invoices for materials purchased by AWAY during the Clarkstown Project (Tr. 133, 134, 158, 159; Dept. Ex. 12, 13, 14). These documents contain AWAY invoices for payment to the Town, the work of AWAY's subcontractors being billed for, the supplies, materials, and any equipment that was purchased or used for the work performed by AWAY during the Clarkstown Project. In the invoices submitted by AWAY to the Town, AWAY is billing at a rate of $75.00 per hour for a supervisor, and $65.00 per hour for the "technicians". (Tr. 136, 137, 138, 139; Dept. Ex. 12).

The invoices also reflect that AWAY purchased Tyvek suits, face filters, rolls of poly, 55-gallon three ring drum, white tag coat overalls with hoods and wrists, encapsulation paint, and gallons of Leadsolve detergent. These invoices were also submitted for AWAY employees getting blood tests during the Clarkstown Project, dual cartridge half face respirators, grinders, rental of a man-lift, scaffold, strand boards, studs, insulation, invoices for dumpsters being delivered and picked up (Tr. 140, 142, 149, 150, 151, 152, 157, 161, 162, 163, 164, 180, 181, 184; Dept. Ex. 12, 13, 14).

Toward the later stages of its investigation, the Bureau received multiple complaints from AWAY workers (Tr. 49, 486, 487; Dept. Ex. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I, 22, 23). The workers identified AWAY as their employer, the Clarkstown Project as the project they were performing work on, how much they were paid, and described the work. Each of the nine workers indicated that they were paid $30.18 per hour, with no additional pay or benefits. The workers described their activities as "decontaminating lead…removing lead from the walls, floors, and ducts… removing carpet, ceiling tile, painting lead walls…removing lead from the walls, removing sheet rock, removing insulation, demolishing polygon, using negative air machines, wearing masks and gloves and suits (Dept. Ex. 1A, 1B, 1C, 1D, 1E, 1F, 1G, 1H, 1I).

Investigator McCormack testified at the hearing and recalled conversations with the workers during

the investigation of the Clarkstown Project. He recalled that worker Jose Noguera told him that during the Clarkstown Project he and his fellow workers removed carpet, cleaned and painted cells, removed and replaced tiles, grinded walls and floors in the firing range, cleaned above the ceiling in various areas, removed insulation because it was deteriorated and covered in lead dust and had to be disposed of, set up decontamination areas, which included sealing off entrances and exits to the building and location they were working on and plasticizing rooms. Mr. McCormack also spoke to other workers during the investigation, namely Esvin Oswaldo and Otto Sanchez, and these men described their work activities in very similar ways (Tr. 231, 232, 233). The record also contains testimony of AWAY workers Otto Sanchez (Tr. 535-551, 638-657) and Juan Castrillo (Tr. 682-691) regarding the nature of the work performed and pay received. Investigator McCormack determined that the construction-type work identified in the complaints and by the claimants falls under Article 8 (Tr. 130).

Respondent offered evidence that most of the work on the Project consisted of regular cleaning of surfaces with rags, paper towels and vacuums with all waste being disposed as non-regulated. Ms. Costello testified that her employees often requested protective equipment to prevent their street clothing from becoming soiled. (Tr. 773). However, Ms. Costello provided AWAY's employees with two options for outer suits. The first were white Tyvek suits and the second was blue suits made of lighter material. Based on her personal observations, Ms. Costello testified that AWAY's employees preferred to wear the Tyvek suits because the blue lightweight suits ripped easily. (Tr. 773). Also, AWAY employees utilized masks. Mr. Schwartz testified that there was no requirement to wear a mask during the cleaning, but the employees wore half face respirators around their neck in case they needed to use them. (Tr. 763).

Respondent offered testimony that the AWAY employees did perform work at the Clarkstown Project that is of the nature of demolition work governed by Article 8. Specifically, the workers removed ceiling tiles and performed grinding of walls and removal of steel plates in the firing range. Testimony offered indicated that the employees spent 42.06 hours removing ceiling tiles (Tr. 642, 766; Resp. Exs. 11, 12) and 2,692 hours doing demolition work in the firing range (Tr. 991-994, DOL Ex. 11). The Respondent offered an analysis that the 2,734 total demolition hours represent approximately 16% of the total 16,660

hours worked on the entire project and, therefore, 84% of the work is governed by Article 9 and 16% is governed by Article 8.

The Bureau relied upon the claims of the workers, the applicable prevailing wage rate schedule, payroll records, time sheets, the contractual documents, and invoices for payment, in preparing the audit submitted into evidence on the Clarkstown Project (Tr. 206; Dept. Exs. 1, 1A-1H, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14).

The Bureau determined that all work on the Clarkstown Project was Article 8 and that during the period starting from the week ending September 11, 2010, through week ending June 26, 2011, AWAY underpaid prevailing wages and supplements to twenty-nine (29) workers performing work on the Clarkstown Project in the amount of $332,222.49 (Tr. 216, 219; Dept. Exs. 15, 16).

On or about June 17, 2015, the Bureau issued to AWAY a Notice of Labor Law Inspection Findings notifying AWAY of its findings on the Clarkstown Project (Tr. 221-222; Dept. Ex. 17).

During the period when work was performed on the Project, Yojana Costello was the President, and owner of AWAY (Tr. 376, 815; Dept. Ex. 4, 5, 18). She testified at the hearing that she is the President and owner. She signed the contract with the Town on behalf of AWAY. The Certificate of workers compensation insurance lists Ms. Costello as the President of AWAY (Tr. 64; Dept. Ex. 4, 18).

The Nature of the Work

Senior investigator Daniel McCormack testified that, prior to joining the Department of Labor, Mr. McCormack held asbestos licenses and lead removal certificates (Tr. 387, 388). He has been a senior investigator for over 10 years, and prior to becoming a senior investigator, he was a public work wage investigator for over 10 years as well. Some of his duties as a senior investigator are to determine whether a project being investigated is a prevailing wage project, and more specifically whether it falls under Article 8 or Article 9. Mr. McCormack explained that Article 8 work consists of construction like activity, and includes construction, reconstruction, renovation type projects, whether they entail the replacement of light bulbs on a construction like project or building of new public buildings. He explained that Article 9 projects

are building service projects, and involve the use of janitors, porters, security guards, window washers and cleaners. Senior Investigator McCormack testified that lead abatement work falls under Article 8, and that is true for all jurisdictions across New York State (Tr. 17-22).

Prior to the hearing of this matter, Mr. McCormack performed a search within the public work system of cases, in which he reviewed projects across New York State where the description of work and project title were very similar in nature to the lead removal work that was done on the Clarkstown Project. The search criteria included "lead remediation", "lead removal", "lead abatement", "environmental cleaning", and "firing range", because these were terms used during the investigation of the Clarkstown Project, and because it was central to the work that was performed for the Town (Tr. 32, 33; Dept. Ex. A). In these projects, an Article 8 schedule was requested and accepted. The only occasions where an Article 9 schedule was requested by the Agency, the Agency also requested an Article 8 schedule to perform the environmental cleaning work. The article 9 schedule was requested to haul off the waste after the main Article 8 project was complete (Tr. 33, 34; Dept. Ex. A).

One example of a case that was reviewed included "… the cleaning and lead removal from rifle range located inside school building including the disposal of lead and lead contaminated materials." Another example of a case described its work as "cleaning and lead removal, recycling and disposal of lead and lead contamination from …indoor rifle range." Both of these surveyed cases are Article 8 cases, and based on the description of work, very similar to the work performed on the Project at the Town (Tr. 34, 35, 36; Dept. Ex. A). Additional cases surveyed include descriptions of work such as "cleaning, maintenance, duct work and lead removal"; "lead abatement at firing range"; "services for the periodic cleaning and lead abatement of the indoor firing range, providing hazardous material containment and legal disposal"; "vendor to provide all labor, equipment and materials to perform industrial and environmental cleaning services on an as needed basis"; "abatement of lead for firing range"; "the removal and disposal of all interior finishes in the shooting range using lead safe practices." Every single one of these projects are Article 8 projects, with work that is very similar in nature to the work done on the Clarkstown Project (Tr. 36, 37).

Respondent offered testimony that, while utilizing containment and personal protective equipment, AWAY employees methodically cleaned each room using rags and paper towels, a HEPA vacuum with a brush, and Ledizolv cleaner, starting at the top and working their way down to the floor (Tr. 768, 899-900). Before commencing cleaning, AWAY employees would move furniture and other moveable items that might interfere with their ability to clean thoroughly (Tr. 770). AWAY's employees painstakingly and carefully using wet wipes cleaned above the ceiling grids, then worked their way down the walls. *Id.* Prior to cleaning the floors, AWAY's employees would meticulously clean each item on desks, boxes and other furniture (Tr. 768-769). For example, when cleaning a single desk, Away employees would clean every paper, then move the paper to the other side of the desk, clean the entire area, open each draw, take all items out of the draw, clean each item individually including pencils, holders, then place the pencils back and put all the items back exactly as they were originally found (Tr. 646-648; 768-769). Other than the limited work performed in the firing range and removing ceiling tiles, cleaning of this nature occupied the entirety of the Away employees' time on the Project (Tr. 794)

An Article 9 schedule for the same geographic location and time frame as the Clarkstown Project includes job classifications which are exterminators/fumigators, fuel oil delivery, guards, watchmen, janitors, porters, cleaners, elevator operators, landscape maintenance, moving furniture and equipment, stationary engineer, trash and refuse removal, and window cleaners (Dept. Ex. 19). Investigator McCormack testified on cross-examination regarding a hypothetical scenario that he could envision a public work project that involves both construction-type activity and general cleaning like vacuuming carpets, dusting, and cleaning windows, that would be governed by both Article 8 and Article 9 work (Tr. 253-255). However, none of the classifications contained in the above referenced Article 9 schedule, or the type of cleaning work referenced by Investigator McCormack in his response to the hypothetical, pertain to handling environmentally sensitive materials like lead dust, environmental cleaning, containment or the use of personal protective equipment (Tr. 367, 368, 369; Dept. Ex. 19).

The Department has issued an Apprentice Training Manual, including information and training criteria for Skilled Construction Craft Laborers. This includes the core work skills, the various categories

of laborer's work, the amount of hours the apprentices are to complete, and description of work. The concentrations of laborer's work include building construction, heavy/highway and utility construction, masonry tending, demolition and deconstruction, pipeline, tunneling, landscaping, and environmental remediation. In this training document, environmental remediation includes abating asbestos, remediating hazardous waste, abating lead, among others (Tr. 740; Dept. Ex. 24).

Stephen Reich, Business manager of the Laborer's Local 754 in Rockland County, testified that the Laborers have jurisdiction over hazardous waste removal, asbestos abatement, and lead removal. Mr. Reich testified that the Local 754's collective bargaining agreements that covered Rockland County from 2007 through April 2020 specifically included "hazardous waste handlers" with specific subcategories of work, along with the specific wages and fringe benefits which are to be paid to the hazardous waste handlers (Tr. 413-418, 419, 420; Dept. Ex. 20A, 20B, 20C, 20D, 20E).

At the time of the Clarkstown Project, the collective bargaining agreement wage rate was between $31.85 (category D) and $34.85(Category A) per hour, depending on the level of personal protection needed for the workers, and an additional $22.23 in fringe benefits per hour. Category D work entails Tyvek suits and gloves, but no breathing protection, and category C work entails air filtration masks (Tr. 424, 425, 426; Dept. Ex. 20C)

Subsequently to the hearing in the matter, the Bureau amended the audit based on the testimony that was elicited. While the Bureau determined that laborer (Group F) hazardous waste handler was still the appropriate classification, distinctions could be made based on the protection used by the workers while performing the lead removal work. The Bureau retained category C (air purifying respirators) for the audit but limited this only to work performed in the firing range while the workers used full face masks with air purifiers. The prevailing wage schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing this work: laborer-building (hazardous waste handler, category C), with wages of $32.85 per hour, and supplements of $17.75 per hour. The majority of the remainder of the audit was changed to category D (minimal protection) to cover work that was done outside the firing range, while the workers wore half masks, Tyvek suits, etc. The prevailing

wage schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing this work: laborer-building (hazardous waste handler, category D), with wages of $31.85 per hour, and supplements of $17.75 per hour. The Bureau was further able to identify painting work that was done by the workers while performing lead encapsulation work, from worker complaints and testimony that they removed lead from walls and "painted cells", and some of the daily time sheets. The prevailing wage schedule detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing this work: painter(lead abatement), with wages of $30.59 per hour, and supplements of $16.39 per hour (Dept Ex. 6)

As reflected in the revised audit, annexed to the Department's Proposed Findings of Fact and Conclusions of Law, the Bureau determined that during the period starting from the week ending September 11, 2010, through week ending June 26, 2011, AWAY underpaid prevailing wages and supplements to twenty-nine (29) workers performing work on the Clarkstown Project in the amount of $325,803.08. The Department requests that this is the appropriate audit to be relied on by the Commissioner of Labor in making her Determination and Order.

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8
PUBLIC WORK

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 work 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.

The New York State Court of Appeals adopted a three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 997 NE2d 1223, 975 NYS2d 371 (June 27, 2013). The Court stated the test as follows: First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id.*

Section 220 of the Labor Law applies to laborers, workmen, and mechanics, whose services are performed in connection with the construction, replacement, maintenance, and repair of public works. *Pinkwater v. Joseph*, 300 N.Y. 729, 1950 N.Y. LEXIS 1507 (April 6, 1950). Those laborers, workmen, and mechanics whose work has to do with the construction and maintenance of the fabric and essential parts of public buildings are entitled to the protection of Section 220. *Golden v. Joseph*, 307 N.Y. 62, 1954 N.Y. LEXIS 1001 (May 20, 1954). Even when the connection with building construction and maintenance is as minimal as that of sign painters and sign letterers, article 8 protection is mandated. *Id*.; see *Miele v. Joseph*, 280 A.D. 408, 1952 N.Y. App. Div. LEXIS 3489 (July 1, 1952) (order affirmed by Court of Appeals, Matter of *Miele v. Joseph*, 305 N.Y. 667). The repair of a public work is public work and article 8 applies. See Labor Law Section 220, subd. 3. The test to be applied in determining what is a public work is function rather than magnitude. *Sewer Environmental Contractors, Inc. v. Goldin*, 98 A.D.2d 606, 1983 N.Y. App. Div LEXIS 20886 (December 1, 1983).

Article 9 of the Labor Law covers building service work performed by building service employees in connection with the care and maintenance of an existing building. Building service employees specifically include the following: watchman, guard, doorman, building cleaner, porter, handyman, janitor, gardener, groundskeeper, stationary fireman, elevator operator and starter, window cleaner, and occupations relating to the collection of garbage and refuse, and to the transportation of office furniture and

equipment, and to the transportation and delivery of fossil fuel. Building service work does not include clerical, sales, professional, technician and related occupations. Labor Law section 230. Article 9 specifically states that it does not include any employee to whom the provisions of articles 8 and eight-a are applicable.

Since the Department of Jurisdiction, the Town, a public entity, is a party to the instant public work contract, which did involve the construction or re-construction, replacement, maintenance, and repair of a facility of use to the public, 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]); *Pinkwater v. Joseph*, 300 N.Y. 729, 1950 N.Y. LEXIS 1507 (April 6, 1950).

AWAY is a certified lead abatement firm and the Town hired it for its professional services for the removal of lead, environmental cleaning, and other capital improvements. The contract did require Away to perform construction like activity that involve removal of metal plates and grinding walls in the firing range and removal of ceiling tiles throughout the project area, and construction of isolation barriers in the areas where the lead cleaning was being performed. However, AWAY argues that, since there was no hazardous waste detected at the project and, therefore, no hazardous waste remediation performed at the site, most of the work performed at the Clarkstown Project was building service work performed by building service workers and governed by Article 9. Specifically, AWAY argues that the majority of work involved janitorial type cleaning of non-hazardous substances, using rags, towels, and solvent that was disposed of as regular refuse.

The Clarkstown Project was let as an environmental remediation/lead removal project. AWAY was hired for its professional services, to perform this environmental remediation and lead removal. There was lead dust found at the project site emanating from the firing range (Tr. 859). Mr. Schwartz determined that the firing range and ventilation system should not be used and that the lead dust should be remediated through a specialty cleaning process conducted in accordance with a Lead Dust Contamination Assessment and Lead Dust Cleaning Project Monitoring protocol he devised (Resp. Ex. 1). This Lead Dust Operations and Maintenance Plan was designed to keep the building safe during the lead decontamination project. This

was accomplished by the application of Occupational Safety and Health Administration protocols utilized in connection with lead contamination, the erection of isolation barriers with engineering controls designed to keep the existent lead dust from becoming airborne (Tr. 901; 952), posting of signs in the area where the work was being performed (Tr. 874), and the use of wet wipes, HEPA vacuums with brushes, and a lead cleaning solvent called Ledizol to systematically clean the buildings from the above the ceiling grids to the floor, including carpets and all material on and in desks (Tr. 646-648; 768-769). During the cleaning process the Away employees wore Tyvek suits (Tr. 773) and respirators that were provided by Away (Tr. 773; 763; 774). As a prerequisite to working on the Project the Away employees were certified in lead cleaning practices and they had their blood tested regularly for lead levels (Tr. 82-87; Dept. Ex. 7). Finally, in its invoices to the Town, AWAY refers to its workers, and bills for them as "technicians" (See: Dept. Ex. 12). Article 9 specifically states that building service work does not include the work of professionals and technicians (See: Labor Law section 230).

Article 8 prevailing wage schedule specifically delineates the type of work performed by AWAY on the Clarkstown Project. The building laborers are designated as hazardous waste handlers (Group F), and their rates of pay distinguished based on their level of protection, from minimum protection all the way to a totally encapsulating chemical suit.

Laborer's local representative Stephen Reich testified at this hearing as indicated above and clearly stated that the work of the Clarkstown Project fell under the jurisdiction of laborers, hazardous waste handlers. He indicated that as a Laborer union worker he received training in hazardous waste removal and performed hazardous waste removal (Tr. 397-400). Mr. Reich testified that the Local 754's collective bargaining agreements that covered Rockland County from 2007 through April 2020 delineated the work of the laborers to specifically include "hazardous waste handlers" (Tr. 413-418, 419, 420). Mr. Reich stated that when he sends workers/union members on lead abatement jobs, he is sending them on Article 8 jobs, and they are paid Article 8 wages and benefits. His union has not sent its workers on Article 9 jobs (Tr. 427, 428, 429, 447).

The Department's own apprentice training documents list hazardous waste handling under the jurisdiction of the article 8 laborers, and this includes lead removal (Dept. Ex. 24).

Based on his 20 years' experience with the Department of Labor, 10 of them as Senior Investigator, Daniel McCormack indicated that the work of the Clarkstown Project is Article 8 work. AWAY workers were performing the work of the laborer and engaged in construction like activity work (Tr. 22, 365, 366, 368). The research that Mr. McCormack performed on the lead removal projects which took place across New York State further indicate that this work falls under Article 8 (Tr. 32, 34, 35, 36; Dept. Ex. A).

AWAY workers were not janitors or regular building cleaners. The very work performed by the Away employees was necessitated by the existence of lead dust in the buildings and involved the type of extensive, specialty cleaning that required certified technicians and involved the use of barriers, engineering controls, personal protective equipment, HEPA vacuums, and lead cleaning solvents. As testified to by Mr. MacCormick, the Department has consistently determined that this is not the type of Article 9 routine janitorial work that could have been performed by the Town's own maintenance department. The AWAY workers provided specialty cleaning and lead dust removal throughout the entirety of the Project. I find that only Article 8 applies to the entirety of the Clarkstown Project.

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]).

The Department Investigator determined that the Clarkstown Project involved the employment of workers in the Laborer-Building, hazardous waste handler Classification (Tr. 74; Dept. Ex. 6). The basis for this classification determination was the type of work that was being performed by AWAY on the Clarkstown Project. In general, the work that was performed by AWAY workers entailed construction like activity, including building decontamination units, sealing off entry ways and exits to certain locations, removing ceiling tile, cleaning above the ceiling, cleaning the ducts, removing some carpet, encapsulation work, and grinding, in order to effectuate the removal of lead. Most of this work was performed using air-purifying respirators, including half masks and full-face masks, and Tyvek suits (Tr. 75, 365, 366). This classification was also consistent with the determinations made in other cases involving similar removal of lead contamination in connection with shooting ranges. The Respondent argues that, since there was no hazardous waste material removed in this Clarkstown Project the Department erred in its determination. I find this argument unpersuasive as the record supports the finding that the classification does reflect the nature of the work actually performed.

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 record supports a finding the Bureau's methods of calculating the underpayments was reasonable considering the record. The Bureau relied upon the claims of the workers, the applicable prevailing wage rate schedule, payroll records, time sheets, the contractual documents, and invoices for payment, in calculating the underpayment. The Respondent does not offer evidence to challenge the underpayment methodology and accepts this methodology for the percentage of work it agrees was Article 8 work. The essence of the Respondent's argument is that the bulk of the work was Article 9 work which would presumably result in an overpayment. For the reasons set forth above, this argument is not persuasive.

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]).

Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay (*Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop.*

Educ. Servs. v. Sweeney, 224 AD2d 989 [4th Dept. 1996], *affd* 89 NY2d 395 [1996]),[2] the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999). *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995). *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

Consequently, The Respondent is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment.

However, interest should be waived for a period of five years for the following reasons. First, the Department did not complete the investigation until 2015, four years after the work concluded (See: Dept. Ex. 17). The Department offered no explanation for this delay. Additionally, the completion of this Report and Recommendation was held in abeyance for three years following the filing of the parties' post-hearing submissions due to the impact of the pandemic on the Department's operations, including the Administrative Adjudication Office, and other reasons unrelated to this case.

[2] The lapse of time, standing alone, does not constitute prejudice as a matter of law. *Matter of Louis Harris & Assoc. v. deLeon*, 84 NY2d 698, 702 (1994); *Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 623 (1994); *Cortland Nursing Home v. Axelrod*, 66 NY2d 169, 178-179 (1985). I do not perceive any substantial prejudice in the respondents' ability to defend against these claims as a result of the delay—the lapse of time does not change the fact that true and accurate records establishing that the wages and benefits were properly paid do not exist. The Bureau sought records evidencing that wages and benefits were properly paid as early as March 2000. It in fact received some payroll records in 2000 and 2001, which were not true, complete or accurate, and which were determined to have been falsified. The respondents' difficulty in defending against the Bureau's claim results not from the passage of time but from Apollo's and Apollo Construction's inability to produce true, accurate and complete records, which they knew the Bureau sought as early as 2000 and 2001. Only true, accurate and contemporaneously maintained records establishing that the required prevailing wages and supplements were paid could have effectively refuted the employees' claims. *See, Matter of Mid Hudson Pam Corp. v. Hartnett*, 156 AD2d 818, 821; *Anderson v. Mt. Clemens Pottery Co*., 328 US 680, 686-688 (1946).

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) [3] 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*

[3] "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.

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

I find the that the AWAY's failure to pay the applicable prevailing rates was not willful. AWAY entered upon this work on an emergent basis without a contract with the Town. When a contract was executed, the document drafted by the Town did not reference that this project was a public work project, what Labor Law Article controlled the work, or reference or attach a Prevailing Wage Rate Schedule. The Town told AWAY what wages to pay its workers and AWAY complied. Furthermore, AWAY was not an experienced public work contractor in New York. Finally, the Town never applied for a PRC Number during the pendency of the project to clarify whether the project was governed by Article 8 or Article 9. The weight of the evidence in the record demonstrates that AWAY was unaware of the requirement to pay prevailing rate of wages and supplements on this public work project.

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.

Yojanna Costello was the President of AWAY Environmental, signed various documents, and was directly involved in the project. However, as set forth above, the violation of Article 8 was not willful. Accordingly, while Yojanna Costello is an officer of AWAY, she is not ineligible to bid on, or be awarded public work contracts.

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. AWAY had only one prior public work case in New York prior to this project. There is no evidence of any prior violations. Finally, it appears from the record that AWAY is no longer in business. Considering these facts, I find a penalty of 10% is appropriate.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, 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 AWAY underpaid wages and supplements due the identified employees in the amount of $325,803.08; and

DETERMINE that AWAY 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; however, due to delays attributable solely to the Department such interest shall be waived for a period of five years; and

DETERMINE that the failure of AWAY to pay the prevailing wage or supplement rate was not a "willful" violation of Labor Law article 8; and

DETERMINE that Yojana Costello is an officer of AWAY; and

DETERMINE that AWAY be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

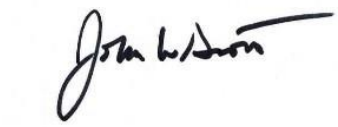
ORDER that the Bureau compute the total amount due (underpayment, interest and civil penalty); and

ORDER that upon the Bureau's notification, AWAY shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12240; 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: July 15, 2021
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer