

In the Matter of

STEVE GENERAL CONTRACTOR, INC.,

Prime Contractor

and

CATONE CONSTRUCTION COMPANY INC.;

CATONE ENTERPRISES INC.,

a substantially owned-affiliated entity of

CATONE CONSTRUCTION

COMPANY INC.; and JOHN CATONE,

as owner, officer and/or shareholder of

CATONE CONSTRUCTION

COMPANY INC.,

and/or its substantially owned-affiliated entity,

CATONE ENTERPRISES, INC.,

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 laborers, workers and mechanics employed on a public work project known as the renovation of the Transportation Department Complex, in Rochester, New York.

DEFAULT  
REPORT  
&  
RECOMMENDATION

Prevailing Rate Case  
Case ID: 2005005599  
PW05 2009018250  
Monroe County

To: Honorable Colleen Gardner  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on November 3, 2011 in Albany, New York and by videoconference with Rochester, New York. The purpose of the hearing was to provide all parties 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 Catone Construction Company, Inc., Catone Enterprises, Inc. and John Catone ("Sub") a subcontractor

of Steve General Contractor, Inc. (“Prime”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the renovation of the Transportation Department Complex (“Project”) for the Board of Education of the City of Rochester (“Department of Jurisdiction”).

### **HEARING OFFICER**

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

### **APPEARANCES**

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz, (Marshall H. Day, Senior Attorney, of Counsel)

There was no appearance made by, or on behalf of Sub.

Prime paid the amount of the underpayment the Bureau had determined Sub owed with interest in the amount of 6 per centum on August 1, 2012, which payment the Bureau deemed sufficient to resolve Prime’s Article 8 liability and liability for any civil penalty pursuant to 12 NYCRR 221.1. Based upon the payment of the underpayment and interest at the agreed upon rate, and the Department’s agreeing to waive civil penalties as against the Prime, the Prime informed counsel for the Department that it would not appear at the hearing. (T. 4, 39)

### **FINDINGS AND CONCLUSIONS**

On August 16, 2011, the Department duly served a copy of the Notice of Hearing on Sub, via regular and certified mail, return receipt requested. The regular mail envelopes sent to the Sub were not returned to the Department. Additionally, the Department served the Sub by personally serving a copy of the Notice of Hearing on the New York State Secretary of State on October 31, 2011. (Hearing Officer 4)

In addition, the Department duly served a copy of the Notice of Hearing on Prime, via regular and certified mail, return receipt requested. A signed Return Receipt evidencing receipt of the document by the Prime was entered into evidence as Hearing Officer Exhibit 3.

The Notice of Hearing scheduled a November 3, 2011 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing. The Prime and the Sub failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Prime and the Sub are in default in this proceeding.

The Notice of Hearing alleges that Sub underpaid wages and supplements to its workers and that Prime is responsible for Sub's underpayment pursuant to Labor Law § 223. The Notice of Hearing further alleges that John Catone is an owner, officer, and/or shareholder of the Sub owing or controlling at least ten per centum of the outstanding stock and one of the Sub's five largest shareholders. Finally, the Notice of Hearing alleges that Catone Enterprises, Inc. is a substantially owned-affiliated entity or successor corporation of Catone Construction Company, Inc. as defined in Section 220(5)(g and k) of the Labor Law.

Prior to the hearing, Prime paid \$125.25 in wages and \$10,082.02 in supplemental benefits, the amount determined by the Department to be owed by Sub as an underpayment, together with interest at a rate of 6% per annum up to August 1, 2010, and the Department issued a Notice to Release Payment to the Department of Jurisdiction directing the release of funds that were being withheld on this Project. (Dept. Ex. 10, 11, 12; T. 30-32) There are presently no funds withheld by the Department of Jurisdiction on this Project. (Dept. 12, T. 31)

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator, and documents describing the underpayments, which supported the Bureau's charges that:

Sub willfully underpaid \$10,207.27 to its workers for the audit period weeks ending 8/25/2007 to 12/22/2007; and

Sub falsified its payroll records in connection with that willful underpayment; and

John Catone is an officer of Sub; and

John Catone knowingly participated in the violation of Labor Law article 8; and

no civil penalty should be assessed against the Prime based upon its full payment of all underpayments and 6% interest, and the Department's finding of the Prime's adherence to 12 NYCRR 221.1 that resulted in an agreement that any civil penalty would be waived as against the Prime. (T. 39)

The record does not contain sufficient evidence to support the Bureau's charges that John Catone was an owner and/or shareholder of the Sub owning or controlling at least ten per centum of the outstanding stock and one of the Sub's five largest shareholders, or that Catone Enterprises, Inc. is a substantially owned-affiliated entity or successor corporation of Catone Construction Company, Inc. as defined in Section 220(5)(g and k) of the Labor Law.

### **RECOMMENDATIONS**

Based upon the default of the Respondents in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Sub underpaid its workers \$10,207.27 for the audit period weeks ending 8/25/2007 to 12/22/2007 on the Project 5000-K-64715-7358-0000, PRC No. 2005005599; and

DETERMINE that Sub is responsible for interest on the total underpayment at the rate of 10% per annum from the date of underpayment to August 1, 2010, which percentage is the difference between the statutorily mandated rate of 16% per annum and the 6% interest paid by the Prime on August 1, 2010; 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 involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that John Catone is an officer of Sub; and

DETERMINE that John Catone knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Sub be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

DETERMINE that Prime is not responsible for any further interest or any civil penalty due pursuant to its agreement with the Department, its payment of all underpayments and interest at 6%, and the Department's finding of the Prime's adherence to 12 NYCRR 221.1; and

ORDER that the Bureau compute the total amount due (interest at 10% from date of underpayment to August 1, 2010, and 25% civil penalty); and

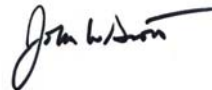
ORDER that Sub shall receive a credit for the \$10,207.27 and the 6% interest paid by Prime; and

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: 109 South Union Street, Room 312, Rochester, NY 14607; 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: February 15, 2012  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott".

John W. Scott, Hearing Officer