

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

EL SOL CONTRACTING & CONSTRUCTION CORPORATION;
and ROBERT POMPONIO, PAUL POMPONIO, NICHOLAS
POMPONIO, and PAULINO DOMINGUEZ, as
shareholders of EL SOL CONTRACTING & CONSTRUCTION
CORPORATION; and its successor or substantially owned-affiliated
entity EL SOL LIMITED ENTERPRISES, INC.,

Prime Contractor,
And

C.B.E CONTRACTING CORPORATION;
and M. ANVER BEIG and MUHAMMED BEIG, as officers
and/or shareholders of
C.B.E CONTRACTING 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 laborers, workers and mechanics
employed on a public work project for New York State
Department of Transportation.

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DEFAULT
REPORT
&
RECOMMENDATION

Prevailing Wage Rate
PRC No. 9507331
Case ID: PW11000056
Richmond County

Prevailing Wage Rate
PRC No. 9303078
Case ID: 38990023
Richmond County

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Prevailing Wage Rate
PRC No. 9700163
Case ID: PW11000055
Richmond County

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To: Honorable Mario J. Musolino
Acting Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on September 30, 2015, and a Notice of Rescheduled Hearing dated November 12, 2015, a hearing was held on February 12, 2016 in Albany, New York and by videoconference with White Plains, 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 C.B.E. Contracting Corporation ("Sub") a subcontractor of El Sol Contracting & Construction Corporation ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of three public work contracts for the New York State Department of

Transportation (“Department of Jurisdiction”) involving the maintenance and repair of eleven bridges on Route 440 in Staten Island, Richmond County, New York (“Eleven Bridge Project”); the rehabilitation of seventeen bridges along Routes I 278 and 440 in Richmond County, New York (“Seventeen Bridge Project”); and the rehabilitation of eighteen bridges on the Staten Island Expressway in Richmond County, New York (“Eighteen Bridge Project”).

HEARING OFFICER

John W. 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.

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

Prior to the hearing, Prime entered into a Stipulation with Department that provided for the payment of the amount of the underpayments the Bureau had determined Sub owed with interest at 6% by the release of funds cross-withheld against Prevailing Rate Case No. 2009008704, which Stipulation the Bureau deemed sufficient to resolve Prime’s Article 8 liability.

FINDINGS AND CONCLUSIONS

On October 6, 2015, the Department duly served a copy of the Notice of Hearing on Sub, via regular and certified mail, return receipt requested. The regular mail envelope was not returned to the Department. Additionally, on October 30, 2015 the Department served the Notice of Hearing on Sub by service on the New York State Department of State. Finally, a Notice of Adjournment and a subsequent Notice of Rescheduled Hearing were served on Sub via regular and certified mail, return receipt requested, on October 27, 2015 and November 12, 2015, respectively (Hearing Officer Exs. 7 and 8). While the record does not contain the certified mail receipt cards, the regular mail envelopes from these service attempts on Sub were not returned to the Department. The Notice of Rescheduled Hearing scheduled a hearing on February 10, 11 and

12, 2016 and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

In addition, the Department duly served a copy of the Notice of Hearing on Prime, via regular and certified mail, return receipt requested. Return Receipts evidencing receipt of these documents by Prime were entered into evidence as Hearing Officer Exhibit 3. Copies of the Notice of Adjournment and Notice of Rescheduled Hearing were served on the attorneys for Prime.

Prime timely served an Answer to the charges contained in the Notice of Hearing which was entered into evidence at Hearing Officer Exhibit 6.

Sub failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Sub is 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.

Prior to the hearing, Prime stipulated, *inter alia*, to pay the underpayment of Sub, together with interest at the rate of 6%, in full satisfaction of Prime's liability under Labor Law article 8 (Dept. Ex. A). Additionally, Prime submitted an affidavit, unopposed by the Department and attached to Dept. Ex. A, in which it offered evidence that it satisfied all six requirements contained in 12 NYCRR § 221.1(a)(1) – (6), and requesting that any penalty assessed against Sub be waived insofar as it would normally apply to Prime under Labor Law § 223.

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:

ELEVEN BRIDGE PROJECT

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

Sub entered into a contract with Prime for work on the Project; and

Sub willfully underpaid \$7,398.05 to its workers for the audit period weeks ending 09/26/1996 to 07/31/1997; and

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

M. Anver Beig is an officer of Sub; and

Muhammad Beig¹ is an officer of Sub; and

Muhammad Bieg knowingly participated in the violation of Labor Law article 8.

On October 4, 2002, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$71,631.90.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau with respect to the Eleven Bridge Project should be sustained.

SEVENTEEN BRIDGE PROJECT

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

Sub entered into a contract with Prime for work on the Project; and

Sub willfully underpaid \$49,546.31 to its workers for the audit period weeks ending 09/26/1996 to 09/25/1997; and

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

M. Anver Beig is an officer of Sub; and

Muhammad Beig is an officer of Sub; and

Muhammad Beig knowingly participated in the violation of Labor Law article 8.

¹ In the caption for this proceeding the Department refers to Muhammed Beig as an officer and/or shareholder of Sub. However, in the Certified Payroll records (DOL Exs. 15 and 17) and in the Department of State Entity Information form and corporate filings (DOL Ex 33 and 34), this individual's name is indicated as Muhammad Beig. I accept Muhammad as the correct spelling of this individual's given name and, in this Report and Recommendation, this gentleman is referred to as Muhammad Beig.

On October 4, 2002, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$71,631.90.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau with respect to the Seventeen Bridge Project should be sustained.

EIGHTEEN BRIDGE PROJECT

The Project was subject to Labor Law article 8; and

Prime entered into a contract for the Project with the Department of Jurisdiction; and

Sub entered into a contract with Prime for work on the Project; and

Sub willfully underpaid \$30,416.89 to its workers for the audit period weeks ending 07/31/1997 to 09/4/1998; and

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

M. Anver Beig is an officer of Sub; and

Muhammad Beig is an officer of Sub; and

Muhammad Beig knowingly participated in the violation of Labor Law article 8.

On October 4, 2002, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$135,509.80

For the foregoing reasons, the findings, conclusions and determinations of the Bureau with respect to the Eighteen Bridge Project should be sustained.

RECOMMENDATIONS

Based upon the default of Sub 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 \$7,398.05 on Project PW11000056, PRC No. 9507331; and

DETERMINE that Sub underpaid its workers \$49,546.31 on Project 38990023, PRC No. 9303078; and

DETERMINE that Sub underpaid its workers \$30,416.89 on Project PW11000055, PRC No. 9700163; and

DETERMINE that Sub is responsible for interest on the total underpayment at the statutorily mandated 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 involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that M. Anver Beig is an officer of Sub; and

DETERMINE that Muhammad Beig is an officer of Sub; and

DETERMINE that Muhammad Beig 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 stipulated to pay the amount of the underpayments the Bureau had determined Sub owed with interest at 6% by the release of funds cross-withheld against Prevailing Rate Case No. 2009008704 in complete satisfaction of its liability under Labor Law article 8; and

DETERMINE that Prime established all of the factors set forth in 12 NYCRR § 221.1 and, therefore, any penalty against Prime is waived; and

ORDER that the Bureau compute the total amount due (total underpayment \$87,352.25, interest at 16% from date of underpayment, and 25% civil penalty); and

ORDER that Department Of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: Bureau of Public Work, New York State Department of Labor, The Maple Building, 3 Washington Ctr., 4th Floor, Newburgh, New York 12550; and

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Sub, upon the Bureau's notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; 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: April 19, 2016
Albany, New York

Respectfully submitted,



John W, Scott, Hearing Officer
Administrative Adjudication