

STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

CORTLAND GLASS COMPANY, INC.,
Prime Contractor,
and

TMS STAFFING SERVICES, INC.,
and

MARLENE HAMANN
as Owner, Officer and Shareholder of
TMS STAFFING SERVICES, 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 for the Bath Central School District in Bath, New York

DEFAULT
REPORT
&
RECOMMENDATION

Prevailing Rate Case
PRC No. 99-07393B
Case ID: PW02-030018
Steuben 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 May 20, 2011. 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 TMS Staffing Services, Inc. ("TMS") and Marlene Hamann, Subcontractor, and Cortland Glass Company, Inc. ("Cortland"), Prime Contractor, complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of a public work contract primarily involving, *inter alia*, removal and installation of preglazed metal windows into masonry openings and removal and installation of metal panels in school buildings for the Bath Central School District (PRC 99-07393B).

APPEARANCES

The Bureau was represented by Department Counsel, Maria Colavito, Marshall H. Day, Senior Attorney, of Counsel. There was no appearance made by, or on behalf of TMS, Marlene Hamann or Cortland.

FINDINGS AND CONCLUSIONS

On April 20, 2011, the Department duly served a copy of the Notice of Hearing on TMS, Marlene Hamann and Cortland, via regular and certified mail, return receipt requested. A second copy was served on TMS and Cortland by service upon the Department of State on May 6, 2011. The Notice of Hearing scheduled a May 20, 2011 hearing and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing. All named Respondents failed to serve an Answer and failed to appear at the hearing. As a consequence, all named Respondents are in default in this proceeding.

The Notice of Hearing alleges that TMS underpaid wages and supplemental benefits to its workers. At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigators and documents describing the underpayments, supporting the Bureau's charges that TMS willfully underpaid its workers \$3,474.11 in supplemental benefits on the Project for the audit period weeks ending July 29, 2001 to September 9, 2001; that, at all relevant times, Marlene Hamann was the president of TMS; that as an officer of the corporation Marlene Hamann knowingly participated in the violation of Article 8 of the Labor Law by certifying on its payrolls that all supplemental benefits required to be paid were paid when in fact they were not; and that at all relevant times Cortland was a Prime Contractor on the Project; and that Cortland is responsible for TMS's underpayment pursuant to Labor Law § 223.

The Department issued Notices to Withhold Payment on the Project seeking to withhold money on the contract. The Bureau was advised that no money was withheld on the Project as a result of the notice.

For the foregoing reasons, the findings, conclusions and determinations of the Bureau should be sustained.

RECOMMENDATIONS

Based upon the default of the Respondents in 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 TMS underpaid its workers \$3,474.11 on the Project; and

DETERMINE that TMS is responsible for interest on the total underpayment at the statutorily mandated rate of 16% per annum from the date of underpayment to the May 20, 2008, which time period abates interest for three years on account of Departmental delay in bringing this matter to hearing; and

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

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

DETERMINE that Marlene Hamann is an officer of TMS, to wit: its president; and

DETERMINE that as an officer of TMS Marlene Hamann knowingly participated in the violation of Article 8 of the Labor Law; and

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

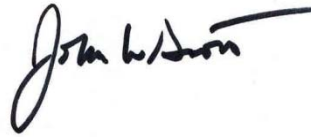
ORDER that the Bureau compute the total amount due (underpayment determined due, interest at 16% from date of underpayment through May 20, 2008, and 25% civil penalty on the Project);

ORDER that upon the Bureau's notification, TMS shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building, 44 Hawley Street Room 908, Binghamton, NY 13901; 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, 2011
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott", with a long horizontal flourish extending to the right.

John W. Scott, Hearing Officer