

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

DOUGLAS L. MALARKEY dba D.L. MALARKEY CONSTRUCTION;  
and its successors or substantially owned affiliated entities D.L.  
MALARKEY CONSTRUCTION, INC., MALARKEY'S BAR & GRILL  
LLC, MALARKEY'S PUB & GRUB, LLC, MARIACHI'S PIZZERIA,  
and CARIBBEAN POOLS;

DEFAULT 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 New York State  
Office of Parks, Recreation & Historic Preservation.

Prevailing Wage Rate  
PRC No. 2014005604  
Case ID: PW062012003977  
Onondaga County

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DOUGLAS L. MALARKEY dba D.L. MALARKEY CONSTRUCTION;  
and its successor or substantially owned affiliated entity D.L.  
MALARKEY CONSTRUCTION, INC., MALARKEY'S BAR & GRILL,  
LLC, MALARKEY'S PUB & GRUB, LLC, MARIACHI'S PIZZERIA,  
and CARIBBEAN POOLS;

Prime Contractor,

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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  
Office of Parks, Recreation & Historic Preservation.

Prevailing Wage Rate  
PRC No. 2014005605  
Case ID: PW062013007834  
Madison County

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DOUGLAS L. MALARKEY dba D.L. MALARKEY CONSTRUCTION;  
and its successor or substantially owned affiliated entity D.L.  
MALARKEY CONSTRUCTION, INC., MALARKEY'S BAR & GRILL,  
LLC, MALARKEY'S PUB & GRUB, LLC, MARIACHI'S PIZZERIA,  
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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 New York State  
Office of Parks, Recreation & Historic Preservation.

Prevailing Wage Rate  
PRC No. 2014005613  
Case ID: PW062013007835  
Oneida 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 October 26, 2015, a hearing was held on December 10, 2015 in Albany, New York and by videoconference with Syracuse, 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 Douglas L. Malarkey, doing business as D. L. Malarkey ("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 Office of Parks, Recreation and Historic Preservation ("Department of Jurisdiction").

## **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, Prime .

## **FINDINGS AND CONCLUSIONS**

On October 30, 2015, 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 Doug Malarkey, owner of Prime, was entered into evidence as Hearing Officer Exhibit 3. The Notice of Hearing scheduled a December 10, 2015 hearing, and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

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

The Notice of Hearing alleges that Prime underpaid wages and supplements to its workers on three public work projects.

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

Prime was the contractor on three public work projects ("Project 1, Project 2, and Project 3; collectively, the Projects") subject to Labor Law article 8; and

Prime entered into contracts for the Projects with the Department of Jurisdiction as follows:

Project 1, PRC No. 2014005604, roofing work at Clark Reservation State Park, Jamesville, New York;  
Project 2, PRC No. 2014005605, roofing work at Lorenzo State Historic Site, Cazenovia, New York; and  
Project 3, PRC No. 2014005613 roofing work at Steuben Memorial Historic Site; and  
Prime willfully underpaid wages and supplements to its workers as follows:

\$9399.55 on Project 1, PRC No. 2014005604;

\$4921.78 on Project 2, PRC No. 2014005605;

\$1389.08 on Project 3, PRC No. 2014005613; and

Douglas L. Malarkey is the Owner of Prime; and

Douglas L. Malarkey knowingly participated in the violation of Labor Law article 8; and

D. L. Malarkey Construction, Inc., is a substantially owned, affiliated entity of Prime.

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

## **RECOMMENDATIONS**

Based upon the default of the Respondent 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 Prime underpaid its workers \$9399.55 on Project 1, PRC No. 2014005604; and

DETERMINE that Prime underpaid its workers \$4921.78 on Project 2, PRC No. 2014005605; and

DETERMINE that Prime underpaid its workers \$1389.08 on Project 3, PRC No. 2014005613; and

DETERMINE that Prime 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 Prime to pay the prevailing wage or supplement rate on each of the three Projects was a "willful" violation of Labor Law article 8, resulting in three separate willful violations; and

DETERMINE that D. L. Malarkey Construction, Inc., was a "substantially owned-affiliated entity" of Prime;

DETERMINE that Douglas L. Malarkey is the Owner of Prime; and

DETERMINE that Douglas L. Malarkey knowingly participated in the violation of Labor Law article 8;  
and

DETERMINE that Prime be assessed a civil penalty in the Department's requested amount of 25% 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 at 16% from date of underpayment and 25% civil penalty); and

ORDER that upon the Bureau's notification, Prime shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at : State Office Building, 333 East Washington Street, Room 419, Syracuse, NY 13202; 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 2, 2016  
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jerome Tracy", with a long horizontal line extending to the right.

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Jerome Tracy, Hearing Officer