

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

BEN CICCONE, INC.; and BRANDON A. CICCONE
and BRANDON CICCONE, SR., as shareholders of
BEN CICCONE, INC.;

Prime Contractor,

and

IDEMA GENERAL CONTRACTORS, INC.;
and JAMES E. RHYNDERS and JAMES B. RHYNDERS aka
JAMES RHYNDERS, SR., as officers and/or shareholders of
IDEMA GENERAL CONTRACTORS, INC.; and
its successors or substantially owned-affiliated entities
IDEMA DEVELOPMENT, INC., and MATTHEW IDEMA
GENERAL CONTRACTORS, 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 New York State
Department of Transportation.

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In the Matter of

SUN UP ENTERPRISES, INC.; and
HAROLD W. BUCHNER, as a shareholder of
SUN UP ENTERPRISES, INC..

Prime Contractor,

and

IDEMA GENERAL CONTRACTORS, INC.;
and JAMES E. RHYNDERS and JAMES B. RHYNDERS aka
JAMES RHYNDERS, SR., as officers and/or shareholders of
IDEMA GENERAL CONTRACTORS, INC.; and
its successors or substantially owned-affiliated entities
IDEMA DEVELOPMENT, INC., and MATTHEW IDEMA
GENERAL CONTRACTORS, 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 State University of
New York.

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AMENDED
REPORT
&
RECOMMENDATION

Prevailing Wage Rate
PRC No. 2011001580
Case ID: PW11 2013004528
Orange County

Prevailing Wage Rate
PRC No. 2011000226
Case ID: PW112013004599
Ulster County

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In the Matter of

IDEMA GENERAL CONTRACTORS, INC.;
and JAMES E. RHYNDERS and JAMES B. RHYNDERS aka
JAMES RHYNDERS, SR., as officers and/or shareholders of
IDEMA GENERAL CONTRACTORS, INC.; and
its successors or substantially owned-affiliated entities
IDEMA DEVELOPMENT, INC., and MATTHEW IDEMA
GENERAL CONTRACTORS, INC.;

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 Poughkeepsie,
State of New York.

Prevailing Wage Rate
PRC No. 2012000333
Case ID: PW11 2014002068

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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 April 4, 2015, a hearing was held on May 7, 2015 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 IDEMA General Contractors, Inc. ("IDEMA/Respondent") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of three public work contracts involving the furnishing of materials, labor, tools, and equipment necessary for Region 8 Emergency Highway Standby within various counties of the State of New York ("Project #1") for the New York State Department of Transportation ("Department of Jurisdiction #1"); the furnishing of materials, labor, tools, and equipment necessary for site renovation Phase 1 and 2 at Hasbrouck Quad at SUNY New Paltz, in the county of Ulster, New Paltz, New York ("Project #2") for the State University of New York ("Department of Jurisdiction #2"); and the furnishing of materials, labor, tools, and equipment necessary for the demolition and replacement of the existing roof at

the Arlington Wastewater Treatment Plant Thickener Building (“Project #3”) for the Town of Poughkeepsie, Dutchess County, State of New York (“Department of Jurisdiction #3”)

The purpose of this Amended Report and Recommendation is to correct errors in the statement of the amount of the underpayments in Project #1 and Project #3 in the first and third “DETERMINE” paragraphs in the RECOMMENDATION section of this Report and Recommendation.

HEARING OFFICER SUBSTITUTION

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, of counsel.

There was no appearance at the hearing made by, or on behalf of IDEMA. I received correspondence dated April 10, 2015 from Michelle L. Trier, attorney for IDEMA. Ms. Trier indicated that IDEMA filed under Chapter 7 of the Bankruptcy Code on May 17, 2013. Based upon this filing, Ms. Trier requested that the proceeding be stayed pursuant to the automatic stay provision of the Bankruptcy Code. (Hearing Officer Ex. 4)

On May 8, 2015 I received via UPS Express, correspondence from John K. Gifford, attorney for James B. Rhynders, and an affidavit of James B. Rhynders, alleging that James B. Rhynders did not receive notice of the hearing in this matter until May 5, 2015. Neither Mr. Giffors, nor James B. Rhynders contacted me prior to the May 7, 2015 hearing. James B. Rhynders further alleges that he severed his relationship with IDEMA in 2006. Mr. Gifford requests that the matter be dismissed as it relates to James B. Rhynders. This correspondence and affidavit will be deemed Hearing Officer Exhibit 9.

BEN CICCONE, INC., and BRANDON A. CICCONE and BRANDON CICCONE, SR., as shareholders of BEN CICCONE, INC., the Prime Contractor in Project #1 (“Ciccone/Respondent”) paid the amount of the underpayment the Bureau had determined

IDEMA owed in Project #1, with interest, in advance of the hearing, which payment the Bureau deemed sufficient to resolve Ciccone's Article 8 liability.

SUN UP ENTERPRISES, INC., and HAROLD W. BUCHNER, as a shareholder of SUN UP ENTERPRISES, INC., the Prime Contractor in Project #2 ("Sun Up/Respondent") paid the amount of the underpayment the Bureau had determined IDEMA owed in Project #2, with interest, in advance of the hearing, which payment the Bureau deemed sufficient to resolve Sun Up's Article 8 liability.

FINDINGS AND CONCLUSIONS

On April 6, 2015, the Department duly served a copy of the Notice of Hearing on IDEMA, via regular and certified mail, return receipt requested (Hearing Officer Ex. 2). Signed Return Receipts evidencing receipt of the document by IDEMA and the attorney for IDEMA, Michelle L. Trier, Esq., were entered into evidence as Hearing Officer Exhibit 3. The Notice of Hearing scheduled May 7, 2015 and May 8, 2015 hearing dates 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 Ciccone and Sun Up, via regular and certified mail, return receipt requested. Signed Return Receipts evidencing receipt of the document by these Respondents were entered into evidence as Hearing Officer Exhibit 3.

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

The Notice of Hearing alleges that IDEMA underpaid wages and supplements to its workers in Project #1, Project #2, and Project #3, that Ciccone is responsible for IDEMA's underpayment in Project #1 pursuant to Labor Law § 223, and that Sun Up is responsible for IDEMA's underpayment in Project #2 pursuant to Labor Law § 223.

Prior to the hearing, Ciccone entered into a stipulation and paid \$129,307.75 of the amount alleged by the Department to be owed by IDEMA in Project #1 as an underpayment, which amount included interest at a rate of 6% per annum. In addition, Ciccone served an affidavit requesting that civil penalties be waived pursuant to 12 NYCRR Section 221.1 (DOL Ex. A).

Prior to the hearing, Sun Up entered into a stipulation and paid \$8,082.38 of the amount alleged by the Department to be owed by IDEMA in Project #2 as an underpayment, which amount included interest at a rate of 6% per annum. In addition, Sun Up served an affidavit requesting that civil penalties be waived pursuant to 12 NYCRR Section 221.1 (DOL Ex. B).

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:

Project#1

The Project #1 was subject to Labor Law article 8; and

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

IDEMA entered into a contract with Ciccone for work on the Project; and

IDEMA willfully underpaid \$107,166.26 to its workers for the audit period weeks ending 09/20/2011 to 02/28/2012; and

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

On September 18, 2013, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$220,747.98.

Project#2

The Project #2 was subject to Labor Law article 8; and

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

IDEMA entered into a contract with Sun Up for work on the Project; and

IDEMA willfully underpaid \$6,769.89 to its workers for the audit period weeks ending 06/28/2011 to 10/27/2012; and

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

On August 12, 2013, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$60,435.08.

Project#3

The Project #3 was subject to Labor Law article 8; and
IDEMA entered into a contract for the Project with the Department of Jurisdiction; and
IDEMA willfully underpaid \$15,351.63 to its workers for the audit period weeks ending 08/11/2012 to 10/20/2012; and

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

On February 27, 2015, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$28,900.83.

GENERAL

James E. Rhynders is an officer of IDEMA; and

James B. Rhynders is an officer of IDEMA; and

James E. Rhynders knowingly participated in the violation of Labor Law article 8.

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

RECOMMENDATIONS

Based upon the default of the IDEMA 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 IDEMA underpaid its workers \$107,166.26 on Project #1:
PW 2013004528, PRC No. 2011001580; and

DETERMINE that IDEMA underpaid its workers \$6,769.89 on Project #2:
PW 2013004599, PRC No. 2011000226; and

DETERMINE that IDEMA underpaid its workers \$15,351.63 on Project #3:
PW 2014002068, PRC No. 2012000333; and

DETERMINE that in Projects #1, #2, and #3 IDEMA 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 in Projects #1, #2, and #3 the failure of IDEMA to pay the prevailing wage or supplement rate was a “willful” violation of Labor Law article 8; and

DETERMINE that in Projects #1, #2, and #3 the willful violation of IDEMA involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that IDEMA Development, Inc. and Matthew Idema General Contractors, Inc. were “substantially owned-affiliated entities” of IDEMA on these three Projects;

DETERMINE that in each of these three Projects James E. Rhynders is an officer of IDEMA; and

DETERMINE that in each of these three Projects James B. Rhynders is an officer of IDEMA; and

DETERMINE that in each of these three Projects James E. Rhynders participated in the violation of Labor Law article 8; and

DETERMINE that in each of these three Projects IDEMA be assessed a civil penalty in the Department’s requested amount of 25% of the underpayment and interest due; and

DETERMINE that Department’s initiating and pursuing the within proceeding upon receiving information that IDEMA violated Section 220 of New York Labor Law by not paying prevailing wages to its workers falls within the police power exception to the automatic stay pursuant to 11 U.S.C. 362(b)(4) (See, In re Pollock, 402 B.R. at 537).

DETERMINE that, pursuant to the stipulation between Ciccone and the Department, Ciccone has paid the underpayments determined due, together with interest on the

underpayments at a rate of 6% per annum, and Ciccone shall not be responsible for the payment of any civil penalty pursuant to 12 NYCRR Section 221.1; and

DETERMINE that, pursuant to the stipulation between Sun Up and the Department, Sun Up has paid the underpayments determined due, together with interest on the underpayments at a rate of 6% per annum, and Sun Up shall not be responsible for the payment of any civil penalty pursuant to 12 NYCRR Section 221.1; and

ORDER that the Bureau compute the total amount due (Project #1: underpayment of \$107,166.26, interest at 16% from date of underpayment and 25% civil penalty; Project #2: underpayment of \$6,769.89, interest at 16% from date of underpayment and 25% civil penalty; and Project #3: underpayment of \$15,351.63, interest at 16% from date of underpayment and 25% civil penalty); and

ORDER that, with complete performance of the stipulations entered into between Ciccone and Sun Up and the Department, Ciccone and Sun Up have fully satisfied their liability under Labor Law article 8;

ORDER that IDEMA shall receive a credit for the underpayments and interest paid by Ciccone and Sun Up; and

ORDER that Departments 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: 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if the withheld amount is insufficient to satisfy the total amount due, IDEMA, 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: December 4, 2015
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Scott". The signature is written in a cursive style with a long horizontal stroke extending to the right.

John W. Scott, Hearing Officer