

IN THE MATTER OF

BULK STORAGE INC. and TED DEERY,
as a shareholder of
BULK STORAGE INC.,

Prime Contractor
And

MIDLAND CONSTRUCTION OF CEDAR
LAKE, INC.,

and

GRETCHEN SULLIVAN,

as owner, officer and/or shareholder of

MIDLAND CONSTRUCTION OF CEDAR LAKE, INC.,
Subcontractor

**DEFAULT
REPORT
&
RECOMMENDATION**

Prevailing Rate Case
PRC No. 0304760
Case ID: PW06 040024
Oswego County

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 construction of the Town of Palermo Salt Storage Facility, in Palermo, New York.

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 October 21, 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 Midland Construction of Cedar Lake, Inc. ("Midland"), a subcontractor of Bulk Storage Inc. ("Bulk Storage"), complied with the requirements of Article 8 of the Labor Law (§§220 *et seq.*) in the performance of a public work contract involving the construction of a salt storage facility ("Project") for Town of Palermo, New York ("Palermo").

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, Midland or Gretchen Sullivan. Nor was there an appearance made by, or on behalf of Bulk Storage or Ted Deery. The day before the hearing, the Hearing Officer did receive a letter from Ted Deery on behalf of himself and Bulk Storage advising that because the job was completed eight years ago, he lacked any records to defend himself against the allegations. The letter stated that Bulk Storage had paid all subcontractors in full. The letter further stated that, had the matter been timely investigated by the Department, the company may have been in position to establish that certain benefit payments had been paid by Midland.

FINDINGS AND CONCLUSIONS

On August 15, 2011, the Department duly served a copy of the Notice of Hearing on each of the Respondents, via first class and certified mail, return receipt requested. Signed return receipt cards evidencing receipt of the document by Bulk Storage and Ted Deery were entered into evidence as Hearing Officer Exhibit 3. The first class mailings sent to Midland and Gretchen Sullivan were not returned to the Department. The Notice of Hearing scheduled an October 21, 2011 hearing and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing.

Midland and Gretchen Sullivan failed to file an Answer to the charges contained in the Notice of Hearing or to appear at the hearing. As a consequence, Midland is in default in this proceeding. Bulk Storage and Ted Deery also failed to appear at the hearing and are likewise in default.

The Notice of Hearing alleges that Midland underpaid wages and supplements to its workers and that Bulk Storage is responsible for Midland's underpayment pursuant to Labor Law § 223.

Bulk storage's unsworn October 17, 2011 letter, received the day before the hearing, has no evidentiary weight. The statements in the letter are therefore insufficient to satisfy the requirements authorizing a civil penalty waiver or reduction against a prime

contractor. *See*, 12 NYCRR § 221.1. Furthermore, with regard to the statement that investigative delay hindered Bulk Storage's ability to address payments that *may* have been made by Midland, Midland's payroll records were obtained by the Bureau in the course of its investigation and were produced at the hearing. The passage of time, standing alone, does not constitute prejudice warranting dismissal of the proceeding. *Matter of Corning Glass Works v Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of D&D Mason Contractors, Inc. v Smith*, 81 AD3d 943, 944 (2d Dept. 2011).

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, supporting the Bureau's charges that Midland willfully underpaid \$32,598.50 to its workers for the audit period weeks ending October 25, 2003 to January 3, 2004; that Midland falsified its payroll records in connection with that willful underpayment; and that Gretchen Sullivan was an officer of Midland who knowingly participated in the violation of Article 8 of the Labor Law.

On April 18, 2011, the Bureau issued a Notice to Withhold Payment to Palermo directing a withholding on the contract in the amount of \$56,798.74. Palermo has advised the Bureau that no money is being withheld on the contract (T. 47).

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

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 Midland underpaid its workers \$32,598.50 on the Project;

DETERMINE that Midland 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;

DETERMINE that the failure of Midland to pay the prevailing wage or supplement rate was a “willful” violation of Article 8 of the Labor Law;

DETERMINE that the willful violation of Midland involved the falsification of payroll records under Article 8 of the Labor Law;

DETERMINE that Gretchen Sullivan is an officer of Midland;

DETERMINE that Gretchen Sullivan knowingly participated in the violation of Article 8 of the Labor Law;

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

DETERMINE that Bulk Storage is responsible for the underpayment, interest and civil penalty due pursuant to Labor Law § 223; and

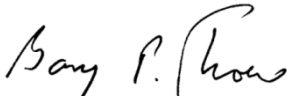
ORDER that the Bureau compute the total amount due (underpayment of \$32,598.50, interest at 16% from date of underpayment and 25% civil penalty);

ORDER that upon the Bureau’s notification, Midland shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at State Office Building located at 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: November 10, 2011
Albany, New York

Respectfully submitted,


Gary P. Troue, Hearing Officer