STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

Mitsubishi Construction Corporation,
and
John Ray White,
as a shareholder of
Mitsubishi Construction Corporation;

Prime Contractor,
and

Mojibur Rahaman DBA R&S General Construction;

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 Town of Orangetown, in Orangeburg, New York.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
PRC No. 2006007504
Case ID:
PW112009023199
Rockland County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on November 22, 2013, in Albany, New York and White Plains, New York by videoconference The purpose of the hearing was to provide the parties with 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 Mitsubishi Construction Corporation, and John Ray White,as a shareholder of Mitsubishi Construction Corporation (“Prime”) and Mojibur Rahaman, DBA R&S General Construction (“Sub”), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a

contract involving work on the wastewater treatment plant for the Town of Orangeburg, New York ("Department of Jurisdiction").

HEARING OFFICER

Jerome Tracy was designated by the Commissioner of Labor as Hearing Officer and conducted the hearing in this matter.

APPEARANCES

The Bureau was represented by Acting Department Counsel, Pico Ben-Amotz (Elina Matot, Senior Attorney, of Counsel).

Sub appeared *pro se* and filed an Answer to the charges incorporated in the Notice of Hearing. Prime failed to appear at the hearing and did not file an Answer to the charges incorporated in the Notice of Hearing.

ISSUES

1. Did Sub pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Sub to pay the prevailing rate of wages or to provide the supplements prevailing in the locality "willful"?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Mojibur Rahaman an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
5. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

On or about August, 2007, Prime entered into a contract with the Department of Jurisdiction for construction of a wastewater treatment plant (DOL 3) ("the Project").

On or about March 6, 2008, Prime entered into a subcontract with Sub for the installation of a sprinkler system and masonry work on the Project; Mojibar Rahaman signed the subcontract for Sub (T. 18; DOL 4).

On or about October 23, 2006, the Department of Jurisdiction notified the Department of the Project and requested the appropriated Prevailing Wage Rate Schedule (DOL 2).

On or about July 1, 2007, the Department issued a Prevailing Wage Rate Schedule for work performed in Rockland county, wherein the Project took place ("Schedule 1") (DOL 7).

Schedule 1 set forth the prevailing rate of wages and supplements for regular, overtime, weekend and holiday work for the following trades:

- Laborer - $28.71/hour wages, $14.30/hour supplemental benefits;
- Mason - $36.50/hour wages, $21.66/hour supplemental benefits.

On or about July 1, 2008, the Department issued a Prevailing Wage Rate Schedule for work performed in Rockland county, wherein the Project took place ("Schedule 2") (DOL 8).

Schedule 2 set forth the prevailing rate of wages and supplements for regular, overtime, weekend and holiday work for the following trades:

- Laborer - $30.21/hour wages, $14.80/hour supplemental benefits;
- Mason - $37.25/hour wages, $23.04/hour supplemental benefits.

Subsequent to a request from Prime, the Department issued a request for payroll records to Sub on November 20, 2009 (DOL 1).

The Department received certified payroll records for work performed by Sub on the Project for weeks ending March 3, 2008 through October 4, 2008, certified as true and accurate by Mojibar Rahaman as president of Sub (DOL 9). The certified payrolls only sometimes showed payment of supplemental benefits to workers on the Project.

The Department received daily construction reports ("Reports") for work on the Project from the Prime (T. 55; DOL 10). The Reports were a daily record prepared by Prime of the type of work performed on the Project, the subcontractors present, and the number of workers on the job site (T. 57).

Based upon Schedules 1 and 2, the certified payrolls, the Reports, discussions with workers, and a discussion with Sub, the Department investigator prepared an audit of Sub for work performed on the Project (T. 62, 63; DOL 12).

The investigator classified Sub's workers as laborers or masons depending upon the work they performed, credited Sub with the amounts it showed as having paid as wages on the certified payrolls and, because either no supplements were shown as paid or no proof of payment of supplements provided, gave no credit to Sub for payment of the required supplements (T. 67, 72).

The investigator used Schedule 1 or 2, depending upon the dates worked by Sub's workers, to determine the correct prevailing rate of wages and supplements for the workers engaged in the type of work they performed on the Project (T. 71, 72). The investigator used the Reports and compared them with the certified payrolls. If the Reports showed Sub's workers present on days they did not appear on the certified payrolls, the investigator added that time to the time shown on the certified payrolls to arrive at the total weekly hours for each of Sub's workers (T. 69). The completed audit covered three workers for the weeks ending March 23, 2008 through October 5, 2008 and resulted in a total underpayment of wages and supplements in the amount of $30,932.66 (DOL 13).

The Department attempted to withhold funds on the Project but the Department of Jurisdiction ultimately reported that there was no money available (T. 81- 83).

In its Answer, Sub admitted that it was a subcontractor to Prime on the Project and that it was owed money by Prime (HO 3).

Sub signed two separate stipulations admitting the underpayments found by the Department (T. 123; DOL 17, 17A).

R & S General Construction is an unincorporated business wholly owned by Mojibur Rahaman (DOL 19).

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work. This constitutional mandate is implemented through Labor Law article 8. Labor Law § 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

The New York State Court of Appeals recently adopted a three-prong test to determine whether a particular project constitutes a public works project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, _ NY3d _, 2013 NY Lexis 1731, 2013 NY Slip Op 4842 (June 27, 2013). The Court stated the test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id.*

Since the Department Of Jurisdiction, a public entity, is a party to the instant public work contract, which concerns the construction of a facility of use to the public, Labor Law article 8 applies. (Labor Law § 220 (2); *Matter of Erie County Industrial Development Agency v Roberts*, 94 AD2d 532 [1983], *affd* 63 NY2d 810 [1984]).

CLASSIFICATION OF WORK

Labor Law § 220 (3) requires that the wages to be paid and the supplements to be provided to laborers, workers or mechanics working on a public work project be not less than the prevailing rate of wages and supplements for the same trade or occupation in the locality where the work is performed. The trade or occupation is determined in a process referred to as "classification." (*Matter of Armco Drainage & Metal Products, Inc. v State of New York,* 285 AD 236, 241 [1954]). Classification of workers is within the expertise of the Department. *(Matter of Lantry v State of New York,* 6 NY3d 49, 55 [2005]; *Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906 [2006], *lv denied*, 8 NY3d 803 [2007]; *Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). The Department's classification will not be disturbed "absent a clear showing that a classification does not reflect 'the nature of the work actually performed.' " (*Matter of Nash v New York State Dept of Labor,* 34 AD3 905, 906, *quoting Matter of General Electric, Co. v New York State Department of Labor,* 154 AD2d 117, 120 [3d Dept. 1990], *affd* 76 NY2d 946 [1990], *quoting Matter of Kelly v Beame,* 15 NY 103, 109 [1965]). Workers are to be classified according to the work they perform, not their qualifications and skills. (*See, Matter of D. A. Elia Constr. Corp v State of New York,* 289 AD2d 665 [1992], *lv denied*, 80 NY2d 752 [1992]).

The Department based its classification of the workers on the work actually performed; as such it meets the standards set forth above.

UNDERPAYMENT METHODOLOGY

"When an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer…." (*Matter of Mid Hudson Pam Corp. v Hartnett,* 156 AD2d 818, 821 [1989] (citation omitted)). "The remedial nature of the enforcement of the prevailing wage statutes … and its public purpose of protecting workmen … entitle the Commissioner to make just and reasonable inferences in awarding damages to employees even while the results may be approximate…." *Id*. at 820 (citations omitted). Methodologies employed that may be imperfect are permissible when necessitated by the absence of comprehensive payroll records or the

presence of inadequate or inaccurate records. (*Matter of TPK Constr. Co. v Dillon*, 266 AD2d 82 [1999]; *Matter of Alphonse Hotel Corp. v Sweeney*, 251 AD2d 169, 169-170 [1998]).

The Department's reliance upon varied sources to determine the actual underpayments was reasonable in light of the records provided by Sub as well as Sub's willingness to sign a stipulation admitting its liability.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. (*Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]). Consequently, Sub is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment. Sub should, however, receive credit against interest owed for any interest amount paid by Prime.

WILLFULNESS OF VIOLATION

Pursuant to Labor Law §§ 220 (7-a) and 220-b (2-a), the Commissioner of Labor is required to inquire as to the willfulness of an alleged violation, and in the event of a hearing, must make a final determination as to the willfulness of the violation. This inquiry is significant

because Labor Law § 220-b (3) (b) (1) [1] provides, among other things, that when two final determinations of a "willful" failure to pay the prevailing rate have been rendered against a contractor within any consecutive six-year period, such contractor shall be ineligible to submit a bid on or be awarded any public work contract for a period of five years from the second final determination.

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181 AD2d 1013, 1013 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [1992]). The violator's knowledge may be actual or, where he should have known of the violation, implied. (*Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra)* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly

[1] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), as amended effective November 1, 2002.

familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

In light of the facts set forth at the hearing, I find Sub's actions to have been willful under the meaning of the law.

FALSIFICATION OF PAYROLL RECORDS

Labor Law § 220-b (3) (b) (1) further provides that if a contractor is determined to have willfully failed to pay the prevailing rates of pay, and that willful failure involves a falsification of payroll records, the contractor shall be ineligible to bid on, or be awarded any public work contract for a period of five (5) years from the first final determination. For this section of the law to be meaningful, the term "falsification of payroll records" must mean more than a mere arithmetic error; if it did not, in any case where the certified payrolls did not perfectly match the payments to workers such payrolls could be deemed falsified, and the contractor debarred. The definition of the word falsify generally involves the intent to misrepresent or deceive ("falsify." *Merriam-Webster*, 2011, http://www.merriam-webster.com/dictionary/falsify).

While it is clear from the record that Prime/Sub failed to meet its obligation to maintain true and accurate payroll records, I do not find, particularly in light of Sub's inability to speak or understand English, that such failure rises to the level of falsification as contemplated by this section of the Labor Law.

CIVIL PENALTY

Labor Law §§ 220 (8) and 220-b (2) (d) provide for the imposition of a civil penalty in an amount not to exceed twenty-five percent (25%) of the total amount due (underpayment and interest). In assessing the penalty amount, consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations, and the failure to comply with record-keeping and other non-wage requirements.

The Department provided no evidence to show a history of prior violations by Sub. Based upon the information adduced at the hearing, Sub was a small contractor. Sub failed to

properly maintain records and underpaid its workers. As to the good faith of Sub, while it signed a stipulation not once, but twice, it never paid the underpaid amounts due to its workers. In light of these factors, I recommend a penalty of twenty-five percent, as requested by the Department.

LIABILITY UNDER LABOR LAW § 223

A prime contractor is responsible for its subcontractor's failure to comply with, or evasion of, the provisions of Labor Law article 8. (Labor Law § 223; *Konski Engineers PC v Commissioner of Labor,* 229 AD2d 950 [1996], *lv denied* 89 NY2d 802 [1996]). Such contractor's responsibility not only includes the underpayment and interest thereon, but also includes liability for any civil penalty assessed against the subcontractor, regardless of whether the contractor knew of the subcontractor's violation. *(Canarsie Plumbing and Heating Corp. v Goldin,* 151 AD2d 331 [1989]). Sub performed work on the Project as a subcontractor of Prime. Consequently, Prime, in its capacity as the prime contractor, is responsible for the total amount found due from its subcontractor on this Project.

RECOMMENDATIONS

I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that Sub underpaid wages and supplements due the identified employees in the amount of $30,932.66 and

DETERMINE that Sub is responsible for interest on the total underpayment at the 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 did not involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Mojibur Rahaman is an officer of Sub; and

DETERMINE that Mojibur Rahaman 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 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 and civil penalty); and

ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; 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: January 22, 2014
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer