

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
Sherburne-Earlville CSD. (Project I)

Prevailing Wage Rate
PRC No. 2008005987
Case ID: PW02 2009010290

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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 Deerfield. (Project II)

Prevailing Wage Rate
PRC No. 2009006979
Case ID: PW02 2010000008

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
City of Little Falls. (Project III)

Prevailing Wage Rate
PRC No. 2009007054
Case ID: PW02 2009011179

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
Richfield Springs CSD. (Project IV)

Prevailing Wage Rate
PRC No. 2008000241
Case ID: PW02 2009010289

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
West Canada Valley CSD. (Project V)

Prevailing Wage Rate
PRC No. 2006007164
Case ID: PW02 2010028134

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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 Oneida County.
(Project VI)

Prevailing Wage Rate
PRC No. 2010004751
Case ID: PW02 2010028049

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
Dormitory Authority of the State of New York. (Project VII)

Prevailing Wage Rate
PRC No. 2007004913
Case ID: PW02 2009023650

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In the Matter of

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION SERVICES, 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
Camden CSD. (Project VIII)

Prevailing Wage Rate
PRC No. 2008001489
Case ID: PW02 2009010344

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In the Matter of

EV ROOFING & CONSTRUCTION SUPPLY CORP.

Prime Contractor

and

NATIONAL BUILDING & RESTORATION, CORP.
and JOSEPH K. SALERNO, JOSEPH K. SALERNO, II
and ANNA ROSE SALERNO, as officers and/or shareholders
of NATIONAL BUILDING & RESTORATION, CORP.,
and its successor or substantially owned-affiliated entity,
NATIONAL CONSTRUCTION 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
Morrisville State College. (Project IX)

Prevailing Wage Rate
PRC No. 2010001947
Case ID: PW02 2010031809

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**AMENDED¹
REPORT
&
RECOMMENDATION**

To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

¹ A prior Report and Recommendation in this matter dated July 7, 2023, inadvertently contained several mathematical errors concerning remaining underpayment amounts which are corrected in this document; no other findings or recommendations are changed.

Pursuant to a Notice of Hearing issued on December 7, 2015, hearings in this matter were scheduled for five days in March of 2016, 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. In what was to become an all-too-common occurrence, all of the initial dates were adjourned in response to requests by both the Department's and Respondents' counsels. It was not until September 12, 2016, that the first of many hearing days was held in Albany, New York and Endicott, New York, by videoconference. Hearings continued throughout 2017, 2018 and 2019, with many adjournments throughout due to changes in attorneys, illness, bad weather, and various other reasons. In early 2019, as the matter neared conclusion, the Department added additional parties to the proceeding, which necessitated further adjournments, the appearance of new counsel for the new Respondents, and more hearing dates. In 2020, as a result of the pandemic, further delays occurred. After twenty-five hearing days, the hearing concluded on September 30, 2021. Upon receipt of a request to extend the time for submission of post-hearing Proposed Findings of Fact and Conclusions of Law, the Hearing Officer allowed the parties until April 29, 2022 to submit their proposals, after which he closed the record in this matter.

The hearing concerned investigations conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether National Building and Restoration Corp., and Joseph K. Salerno, Joseph K. Salerno II, and Anna Rose Salerno as officers and/or shareholders of National Building and Restoration Corp. ("NBRC"), and National Construction Services, Inc. ("NCS"), (collectively, "Respondents"), as a substantial owned-affiliated entity, complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of multiple public work contracts described below².

The nine Projects involved in this matter are as follows:

A public work project ("Sherburne Project/Project I") for the Sherburne-Earlville Central School District ("Sherburne CSD").

² In its initial Notice of Hearing the Department named National Building and Restoration Corp., Joseph K Salerno and Joseph K Salerno II, as officers and/or shareholders of National Building and Restoration Corp. It was not until January 23, 2019, that the Department amended its Notice of Hearing to add National Construction Services, Inc., to the proceeding, alleging that it was a successor to, or substantially owned-affiliated entity of, National Building and Restoration Corp. Then, on April 23, 2019, the Department amended its Notice of Hearing yet again, to add Anna Rose Salerno to the proceeding as an officer and/or shareholder of National Building and Restoration Corp.

A public work project (“Deerfield Project/Project II”) for the Town of Deerfield, New York (“Deerfield”).

A public work project (“Little Falls Project/Project III”) for the City of Little Falls, New York (“Little Falls”).

A public work project (“Richfield Project/Project IV”) for the Richfield Springs Central School District (“Richfield”).

A public work project (“West Canada Project/Project V”) for the West Canada Valley Central School District (“West Canada”).

A public work project (“Oneida Project/Project VI”) for Oneida County (“Oneida”).

A public work project (“DASNY Project/Project VII”) for the Dormitory Authority of the State of New York (“DASNY”).

A public work project (“Camden Project/Project VIII”) for the Camden Central School District (“Camden”).

A public work project (“Morrisville Project/Project IX”) for the State University of New York, Morrisville (“Morrisville”)³.

APPEARANCES

The Bureau was represented by then Department Counsel, Pico Ben-Amotz (now, Jill Archambault), Jeff Shapiro, of Counsel. Mr. Shapiro left the Department during the course of this proceeding and was replaced by Larissa Bates, of counsel.

NBRC, Joseph K. Salerno, Joseph K. Salerno II, and Anna Rose Salerno appeared through their attorney, Joseph Steflik, Esq., and filed an Answer to the charges incorporated in the Notice of Hearing and subsequent Amended Notices of Hearing.

EV Roofing and Supply Corp. (“EVR”), the prime contractor on the Morrisville Project only, failed to appear at the hearing and did not file an Answer to the charges incorporated in the Notice of Hearing. Nor did EVR respond in any way to the multiple hearing continuation notices or the Amended Notices of Hearing. EVR is therefore in default in this proceeding.

NCS appeared through its attorney Louis DiLorenzo and filed an Answer to the charges incorporated in the Amended Notices of Hearing.

³ Unlike the other Projects, NBRC was a subcontractor to EV Roofing and Supply Corp. on this Project.

ISSUES

1. Did NBRC pay the rate of wages and/or provide the supplements prevailing in the locality of each of the Projects, and, if not, what is the amount of underpayment?
2. Was any failure by NBRC 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. Are NBRC and NCS “substantially owned-affiliated entities”?
5. Are Joseph K. Salerno, Joseph K. Salerno II, and Rose Salerno shareholders of NBRC who owned or controlled at least ten per centum of the outstanding stock?
6. Are Joseph K. Salerno, Joseph K. Salerno II, and Rose Salerno officers of NBRC who knowingly participated in a willful violation of Labor Law article 8?
7. Should any period of the time for which interest would otherwise be assessed on any underpayments of prevailing wages and/or supplements be reduced?
8. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned separate investigations into nine projects performed by NBRC made by the Bureau.

PROJECT I – SHERBURNE-EARLVILLE CENTRAL SCHOOL DISTRICT

On or about April 13, 2009, NBRC entered into a contract with the Sherburne-Earlville Central School District (“Sherburne”) to furnish materials, labor, tools and equipment necessary for various capital improvements, including but not limited to the construction of an elementary school addition and concession/restroom building (“Project I”), located in the Town of Sherburne, County of Chenango (DOL Ex. 67, 68, 68a; Tr. 394-400⁴).

⁴ Department of Labor Exhibits will be referenced as “DOL XX,” NBRC exhibits as “NBRC XX,” and NCS exhibits as “NCS XX.” All references to the transcript pages of the proceeding will be shown as “Tr. X or Tr. XX.”

The contract involved the employment of workers in the classifications of Carpenter - Building, Iron Worker, Laborer – Building, Mason - Building, Operating Engineer – Building (Class C), Roofer, and Sheetmetal Worker (DOL Ex. 67, 68, 68a; Tr. 394-400).

On or about July 1, 2008, the Bureau issued Prevailing Wage Rate Schedule (“Chenango 2008”) for Chenango County. Chenango 2008 detailed the amount of wages and supplements that were to be paid to or provided for the workers, laborers and mechanics performing work on Project I from July 1, 2008, to June 30, 2009, including the following classifications: Carpenter - Building, with wages of \$24.81 per hour and supplements of \$16.92 per hour; Iron Worker (District 7), with wages of \$23.13 per hour and supplements of \$19.26 per hour; Laborer – Building (District 8), with wages of \$22.00 per hour and supplements of \$16.00 per hour; Mason - Building, with wages of \$25.83 per hour and supplements of \$13.22 per hour; and Operating Engineer – Building (Class C), with wages of \$26.02 per hour and supplements of \$17.25 per hour (DOL Ex. 111; Tr. 541-542).

On or about July 1, 2009, the Bureau issued Prevailing Wage Rate Schedule for Chenango County (“Chenango 2009”). Chenango 2009 detailed the amount of wages and supplements that were to be paid to or provided for the workers, laborers and mechanics performing work on Project I from July 1, 2009, to June 30, 2010, including the following classifications: Carpenter - Building, with wages of \$25.06 per hour and supplements of \$17.87 per hour; Iron Worker (District 7), with wages of \$23.63 per hour and supplements of \$20.26 per hour; Laborer – Building (District 8), with wages of \$23.00 per hour and supplements of \$16.80 per hour; Mason - Building, with wages of \$26.13 per hour and supplements of \$14.17 per hour; Operating Engineer – Building (Class C), with wages of \$26.28 per hour and supplements of \$18.95 per hour; Roofer, with wages of \$23.00 per hour and supplements of \$10.59 per hour; and Sheetmetal Worker, with wages of \$25.85 per hour and supplements of \$15.56 per hour (DOL Ex. 110; Tr. 538-541).

On or about July 30, 2009, NBRC employee Patrick Powers filed a complaint with the Department alleging that NBRC failed to pay the proper prevailing wages and/or supplements on Project I. (Dept. Ex. 4; Tr. 271-275). Mr. Powers provided the Department with notes and earning statements detailing the work he performed on Project I and the amount of wages paid to him by NBRC (DOL Ex. 2, 3; Tr. 262-271).

As a result of the complaint, the Bureau commenced an investigation of Project I. On or about July 31, 2009, the Bureau requested that NBRC furnish payroll records relating to Project I (DOL Ex. 11; Tr. 289-291).

In response to the Bureau's request, NBRC provided the requested documentation (DOL Ex. 12, 15-21, 25-29, 31-45, 47-50, 54-65, 70, 71, 73; Tr. 291- 295, 298-316, 326-354;).

The Bureau also received field reports from the consulting firm Bearsch Compeau ("Bearsch") with regard to Project I (DOL Ex. 22; Tr. 316-321, 323;).

The Bureau determined that NBRC employed twenty-five (25) workers on Project I in the classifications of Carpenter -Building, Iron Worker (District 7), Laborer – Building (District 8), Mason - Building, Operating Engineer – Building (Class C), Roofer, and Sheetmetal Worker, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (DOL Ex. 112a, 113b; Tr. 794-814;).

The Bureau's calculations showed that during the period from the week ending February 19, 2009, through week ending February 19, 2010, NBRC underpaid prevailing wages and supplements to workers performing work on Project I in the amount of \$50,527.80 (DOL Ex. 112a, 113b; Tr. 794-814;). That amount was reduced to \$31,004.78 after NBRC made direct payment of unpaid wages and supplements to workers subsequent to the commencement of the Bureau's investigation of Project I (DOL Ex. 112a, 113b; Tr. 794-806;).

The Bureau determined that evidence obtained during the investigation of Project 1 showed that NBRC's payroll records for Project 1 were falsified (DOL Ex. 113a; Tr. 594;). The logs submitted to the Bureau by NBRC showed that NBRC had more employees working on Project 1 on certain days than NBRC's payroll records documented (DOL Ex. 17, 113a; Tr. 594;). For example, on June 15, 2009, NBRC documented two workers and one supervisor on certified payroll records for that day (DOL 113a; Tr. 614-618;). NBRC's logs documented that four workers for NBRC were working that day (DOL Ex. 17, 113a; Tr. 614-618;).

The Bureau further determined that NBRC misclassified workers on Project I by using field reports from Bearsch and information provided by workers (DOL 22, 113a). For example, worker Anthony Recchio was classified by NBRC as both a laborer and a carpenter, but Recchio informed the Bureau that he only performed work that fell under the Carpenter classification

(Dept. Ex. 113a; Tr. 599). NBRC classified worker Patrick Powers as a laborer and a carpenter on payroll records (Dept. Ex. 13a). However, the Bearsch field reports showed that the work performed that week fell under the classifications of carpenter, mason, and ironworker (Dept. Ex. 1, 2, 4, 22, 113a; Tr. 603-607; Dept. Ex.). In addition, Mr. Powers stated on his claim form and logbook that he “built forms and pour[ed] concrete” and therefore performed work that fell under the classifications of Carpenter, Mason, and Ironworker, not Laborer (Tr. 603-607; Dept. Ex. 2, 4, 22, 113a).

Gary Bowman testified that he worked for NBRC on Project 1 and provided the Bureau with a daily log of the work he performed, which included framing and sheetrock work (Dept. Ex. 6, Tr. 229-235). Mr. Bowman provided copies of his wage statements to the Bureau, and he submitted a claim for unpaid wages (Dept. Ex. 14, 142, Tr. 236-237, 239-244).

Christopher Conklin testified that he worked for NBRC on Project I and performed mostly mason work with some carpenter work (Tr. 16-17). Mr. Conklin filed a claim for unpaid wages with the Bureau, and he stated that NBRC did not pay him the correct rate and misclassified him as a laborer (Tr.18-21; Dept. Ex. 95a).

On or about March 25, 2010, and May 29, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising NBRC that it had violated various provisions of the Labor Law by failing to pay prevailing wages and supplements to workers performing work on Project I (Dept. Ex. 74, 102).

PROJECT II – TOWN OF DEERFIELD

On or about September 14, 2009, NBRC entered into a contract with the Town of Deerfield (“Deerfield”) to furnish materials, labor, tools and equipment necessary for renovation and reconstruction of the Town of Deerfield Court Facility (“Project II”) located in the Town of Deerfield, New York (Dept. Ex. 114a, 114b; Tr. 689-693).

The contract involved the employment of workers in the classifications of Carpenter - Building and Laborer - Building. (Dept. Ex. 114a, 114b; Tr. 689-693).

On or about July 1, 2009, the Bureau issued the Prevailing Wage Rate Schedule for Oneida County (“Oneida 2009”). Oneida 2009 detailed the amount of wages and supplements that were to be paid to or provided for the workers, laborers and mechanics performing work on

Project II from July 1, 2009, to June 30, 2010, including the following classifications: Carpenter - Building, with wages of \$23.24 per hour and supplements of \$12.48 per hour; and Laborer - Building with wages of \$19.55 per hour and supplements of \$12.34 per hour (Tr. 751-754; Dept. Ex. 136).

On or about July 21, 2009, worker Patrick Powers filed a complaint with the Department alleging that NBRC failed to pay the proper prevailing wages and/or supplements to workers on Project II (Tr. 271-275; Dept. Ex. 4). In response to the complaint, the Bureau commenced an investigation of Project II (Tr. 684).

On or about January 4, 2010, the Bureau requested that NBRC furnish payroll records relating to Project II (Tr. 695-697; Dept Ex. 114d).

In response, NBRC provided payroll records and other documentation that was requested by the Bureau (Tr. 698-723, 735-736, 821-829; Dept Ex. 115-127, 133).

Based on its investigation, the Bureau determined that NBRC employed three (3) workers on Project II in the classifications of Carpenter -Building and Laborer - Building, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (Tr. 832-847; Dept. Ex. 139a, 140b).

During the period from the week ending October 23, 2009 through the week ending January 8, 2010, NBRC underpaid prevailing wages and supplements to workers performing work on Project II in the amount of \$2,474.49 (Dept. Ex. 139a, 140b). That amount was reduced to \$595.51 after NBRC made direct payment of unpaid wages and supplements to workers subsequent to the commencement of the Bureau's investigation of Project II (Tr. 832-847; Dept. Ex. 139a, 140b).

The Bureau completed its audit by obtaining the workers' hours worked and rates of pay from NBRC certified payroll records. (Tr. 861-870; Dept. Ex. 140a, 140b, 140c). The prevailing wage rates and supplemental benefits rates were from the Oneida 2009 (Tr. 861-870; Dept. Ex. 140a, 140b, 140c). The Bureau determined the correct classification for the workers on Project II was Carpenter based upon the nature of the work, which was the renovation of a courthouse that included studding work, framing work, installing drywall, and cutting the materials for such work (Tr. 865-870, 876-879; Dept. Ex. 114a, 114b).

The Bureau determined that NBRC misclassified workers on the payroll records for Project II (Tr. 876-879). NBRC's payroll records did not list classifications for the workers for all of the weeks on Project II, but the workers were paid at rates that were lower than the applicable Carpenter rate for those weeks (Tr. 862-870; Dept. Ex. 140a). During the weeks when NBRC did list classifications on the payroll records for Project II, the workers were misclassified as doing Laborer work for some hours on certain days as contained within the Bureau's audit (Tr. 876-879; Dept. Ex. 140c). The Bureau determined that any demolition work that took place on Project II was completed prior to the weeks covered by the audit, which was at the beginning of Project II, and therefore there was no Laborer work done during the weeks contained within the audit (Tr. 878-879; Dept. Ex. 114a, 114b, 140c). Therefore, the workers should have been classified only as Carpenters during the audit period after demolition work was completed (Tr. 876-879; Dept. Ex. 140c).

On or about June 20, 2012, and January 9, 2013, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by failing to pay prevailing wages and supplements to workers performing work on Project II (Tr. 723-728; Dept. Ex. 128, 129).

PROJECT III – CITY OF LITTLE FALLS

On or about August 5, 2009, NBRC entered into a contract with the City of Little Falls ("Little Falls") to furnish materials, labor, tools and equipment necessary for installation of all precast coping at the Little Falls municipal pool ("Project III"), located in the City of Little Falls, New York (Tr. 892, 896-903; Dept. Ex. 144, 144a).

28. The contract involved the employment of workers in the classifications of Laborer - Heavy & Highway (Group B) and Mason – Heavy & Highway (Tr. 892, 896-903; Dept. Ex. 144, 144a).

29. On or about July 1, 2009, the Bureau issued the Prevailing Wage Rate Schedule for Herkimer County ("Herkimer 2009"). Herkimer 2009 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project III from July 1, 2009, to June 30, 2010, including the following classifications: Laborer - Heavy & Highway (Group B), with wages of \$23.75 per hour and

supplements of \$15.29 per hour; and Mason – Heavy & Highway with wages of \$27.87 per hour and supplements of \$15.53 per hour (Tr. 927; Dept. Ex. 152).

30. On or about August 26, 2009, the Bureau requested NBRC to furnish payroll records relating to Project III due to other Public Work projects that were being investigated by the Bureau where NBRC was a contractor (Tr. 913-915; Dept. Ex. 146a).

31. In response, NBRC provided certified payroll records and other documentation related to Project III that was requested by the Bureau (Tr. 915-917; Dept. Ex. 147, 148).

32. On or about November 16, 2009, a complaint was filed with the Department by worker Gary Bowman alleging that NBRC failed to pay the proper prevailing wages and/or supplements on Project III (Tr. 887-889; Dept. Ex. 142). In response to the complaint, the Bureau commenced an investigation of Project III (Tr. 882-887; Dept. Ex. 141).

33. Based on its investigation, the Bureau determined that NBRC employed nine (9) workers on Project III in the classifications of Laborer -Heavy & Highway (Group B) and Mason – Heavy & Highway, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (Tr. 927-930, 937-942; Dept. Ex. 153a, 153b).

34. During the period from the week ending July 25, 2009, through the week ending August 1, 2009, NBRC underpaid prevailing wages and supplements to workers performing work on Project III in the amount of \$1,239.71 (Tr. 927-930, 937-942; Dept. Ex. 153a, 153b). That amount was reduced to \$1,039.71 after NBRC made direct payment of unpaid wages and supplements to workers since the commencement of the Bureau's investigation of Project III (Tr. 953-954; Dept. Ex. 153a, 153b).

35. The Bureau completed its audit by obtaining the workers' hours worked and rates of pay from NBRC's certified payroll records (Tr. 942-948; Dept. Ex. 153a, 153b, 154a). The prevailing wage rates and supplemental benefits rates were from Herkimer 2009. (Tr. 861-870; Dept. Ex. 152). The Bureau determined the classifications for the workers on Project III based on the nature of the work performed on Project III and the classifications listed on NBRC's certified payroll records (Tr. 942-943; Dept. Ex. 154a). The Bureau also obtained information directly from some workers, such as Christopher Conklin, with regard to wages paid, hours worked, and

classifications (Tr. 944; Dept. Ex. 92, 94). Mr. Conklin indicated that even though he performed Mason work, he was only paid \$200.00 per day on Project III, which was less than the amount documented on NATIONAL's payroll records for Project III (Tr. 25-28, 945-946; Dept. Ex. 94, 154a). The Bureau determined that NBRC's certified payroll records for Project III were falsified as a result.

36. The Bureau determined that NBRC required kickbacks from workers on Project III by demanding that workers pay money back to NBRC after workers cashed their paychecks (Tr. 25-28, 945-946; Dept. Ex. 92, 94). For example, Christopher Conklin stated that he was required to cash his paycheck and give money back to NBRC via Joseph Salerno II or else he would lose his job (Tr. 25-29, 945-946; Dept. Ex. 92, 94). Even though the paycheck Mr. Conklin was given indicated he was paid more than \$200.00 per day, he was required to cash that check and give all the money back to NBRC and was then only given \$200.00 in cash as his actual wages (Tr. 25-29, 945-946; Dept. Ex. 92, 94, 154a). Lawrence Shepard testified that he was also given a paycheck from NBRC, and that he was required to cash and then give the money back to NBRC via Joseph Salerno II or else he would lose his job (Tr. 104-106). Mr. Shepard was thereafter paid \$200.00 cash even though the paycheck he was given, in addition to NBRC's certified payroll records, falsely showed that he was paid more than \$200.00 per day (Tr. 104-106; Dept. Ex. 154a). Gary Bowman also testified that he was paid \$200.00 per day in cash for work done on Project III, but NBRC's certified payroll records falsely documented that he was paid more than that amount. (Tr. 238-239; Dept. Ex. 142, 154a). Mr. Bowman testified that other workers on Project III informed him that Joseph Salerno II required workers to pay wages back to Mr. Salerno (Tr. 245-246).

37. On or about June 22, 2011 and June 19, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project III (Tr. 917-922; Dept. Ex. 149, 150).

PROJECT IV – RICHFIELD SPRINGS CENTRAL SCHOOL DISTRICT

On or about February 12, 2009, NBRC entered into a contract with the Richfield Springs Central School District ("RFCSD") to furnish materials, labor, tools and equipment necessary for

renovation of an existing District building (“Project IV”), located in the Village of Richfield Springs, New York (Tr. 977-979; Dept. Ex 163).

The contract involved the employment of workers in the classifications of Carpenter – Building/Heavy & Highway, Laborer - Building, Mason – Building, and Sheetmetal Worker (Tr. 977-979; Dept. Ex. 163).

On or about July 1, 2008, the Bureau issued the Prevailing Wage Rate Schedule for Otsego County (“Otsego 2008”). Otsego 2008 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project IV from July 1, 2008, to June 30, 2009, including the following classifications: Carpenter – Building/Heavy & Highway, with wages of \$24.81 per hour and supplements of \$16.92 per hour; Laborer - Building with wages of \$22.00 per hour and supplements of \$16.00 per hour; and Mason – Building, with wages of \$25.83 per hour and supplements of \$13.22 per hour (Tr. 1047-1048; Dept. Ex. 180).

On or about July 1, 2009, the Bureau issued the Prevailing Wage Rate Schedule for Otsego County (“Otsego 2009”). Otsego 2009 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project IV from July 1, 2009, to June 30, 2010, including the following classifications: Carpenter – Building/Heavy & Highway, with wages of \$25.06 per hour and supplements of \$17.87 per hour; Laborer - Building with wages of \$23.00 per hour and supplements of \$16.80 per hour; Mason – Building, with wages of \$26.13 per hour and supplements of \$14.17 per hour; and Sheetmetal Worker, with wages of \$27.53 per hour and supplements of \$12.77 per hour (Tr. 1048; Dept. Ex. 181).

Prior to the commencement of the investigation of Project IV, workers for NBRC had filed complaints with the Department regarding other public work projects on which NBRC was a contractor. (Dept. Ex. 4, 77, 94, 104). Those complaints alleged that NBRC failed to pay the proper prevailing wages and /or supplements to workers on other public work projects (Dept. Ex. 4, 77, 94, 104). In response to the complaints filed by workers regarding other projects, the Bureau commenced an investigation of Project IV as this was another public work project on which NBRC was a contractor (Tr. 958-963; Dept. Ex. 155).

On or about July 31, 2009, the Bureau requested NBRC to furnish payroll records relating to Project IV (Tr. 968-975; Dept. Ex. 156).

In response, NBRC provided certified payroll records and other documentation related to Project IV that was requested by the Bureau (Tr. 970-972; Dept. Ex. 157, 159).

During the investigation, the Bureau received daily reports from Project IV from Bovis Lend Lease (“Bovis”) (Tr. 984-992; Dept. Ex. 169, 170). The daily reports were filled out by contractors onsite and then submitted to Bovis at the end of each day (Tr. 991). Bovis also had individuals on site who would review the work that was being done, in addition to the reports submitted by contractors, and write their own reports (Tr. 991-992; Dept. Ex. 169, 170). The daily reports documented the number of employees that were observed and recorded as being present on site from NBRC each day (Tr. 992-993; Dept. Ex. 169, 170).

Based on its investigation, the Bureau determined that NBRC employed fourteen (14) workers on Project IV in the classifications of Carpenter – Building/Heavy & Highway, Laborer - Building, Mason – Building, and Sheetmetal Worker, and failed to pay or provide prevailing wages and/or supplements to workers in accordance with the prevailing wage schedule in effect at the time (Tr. 1051-1123; Dept. Ex. 183a, 184a, 184b, 184c).

During the period from the week ending April 10, 2009, through week ending January 1, 2010, NBRC underpaid prevailing wages and supplements to workers performing work on Project IV in the amount of \$31,914.26. (Tr. 1051-1123; Dept. Ex. 183a, 184ba, 184b, 184c). That amount was reduced to \$14,578.32 after NBRC made direct payment of unpaid wages and supplements to workers subsequent to the commencement of the Bureau’s investigation of Project IV (Tr. 1114; Dept. Ex. 183a, 184b).

The Bureau completed its audit by obtaining the workers’ hours worked and rates of pay from NBRC’s certified payroll records (Tr. 1097-1113; Dept. Ex. 184a). The prevailing wage rates and supplemental benefits rates were from Prevailing Wage Rate Schedule 2008 and Prevailing Wage Rate Schedule 2009 for Otsego County (Tr. 1097-1113; Dept. Ex. 180, 181).

The Bureau determined that NBRC’s certified payroll records for Project IV misclassified workers (Tr. 1098-1114; Dept. 184a, 184c). The Bureau’s findings regarding the classifications for the workers on Project IV were based on the nature of the work done each day

as reflected on the Bovis daily reports (Tr. 1098-1113; Dept. Ex. 169, 170, 184a, 184c). For example, for worker Crispen Boyson for the week ending July 10, 2009, NATIONAL's certified payroll records classified him as a Laborer and paid him a rate of \$19.55 per hour (Tr. 1098-1101; Dept. 184a, 184c). However, the Bovis daily reports for that week indicated that the work performed by NBRC's workers was the grinding of masonry joints, and therefore Mr. Boyson should have been classified as a Mason with a prevailing wage rate paid of \$26.13 and supplemental rate of \$14.17 (Tr. 1098-1101; Dept. 184a, 184c). Another example is worker Jason Knopik, who was classified on NBRC's certified payroll records as both a Laborer and Carpenter during the week ending May 8, 2009 (Tr. 1103-1106; Dept. 184a, 184c). However, the Bovis daily reports for that week indicated only work that fell under the Carpenter classification took place, such as taping, installation of sheet rock, taping the drop ceiling, and installation of sheet rock ceiling grids (Tr. 1103-1106; Dept. 184a, 184c).

On or about March 25, 2010 and June 18, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project IV (Tr. 1030-1038; Dept. Ex. 175, 176).

PROJECT V - WEST CANADA VALLEY CENTRAL SCHOOL DISTRICT

On or about December 17, 2009, NBRC entered into a contract with the West Canada Valley Central School District ("WCCSD") to furnish materials, labor, tools and equipment necessary for renovation of a gymnasium ("Project V"), located in the Town of Newport, New York (Tr. 1127-1140; Dept. Ex. 186, 188, 189, 190, 191).

The contract involved the employment of workers in the classifications of Laborer (Group #1), Laborer (Group #2), Mason – Building (Bricklayer/Blocker), and Mason – Building (Pointer/Caulker/Cleaner) (Tr. 1127-1140; Dept. Ex. 186, 188, 189, 190, 191).

On or about July 1, 2009, the Bureau issued the Prevailing Wage Rate Schedule for Herkimer County ("Herkimer 2009"). Herkimer 2009 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project V from July 1, 2009 to June 30, 2010, including the following classifications: Laborer (Group #1), with wages of \$19.55 per hour and supplements of \$12.34 per hour; Laborer (Group #2), with wages of \$19.70 per hour and supplements of \$12.34 per

hour; Mason – Building (Bricklayer/Blocker), with wages of \$25.81 per hour and supplements of \$14.74 per hour; and Mason – Building (Pointer/Caulker/Cleaner), with wages of \$25.81 per hour and supplements of \$14.74 per hour Tr. (Tr. 1164-1165; Dept. Ex. 202).

On or about July 1, 2010, the Bureau issued the Prevailing Wage Rate Schedule for Herkimer County (“Herkimer 2020”). Herkimer 2010 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project V from July 1, 2010 to June 30, 2011, including the following classifications: Laborer (Group #1), with wages of \$20.00 per hour and supplements of \$13.34 per hour; Laborer (Group #2), with wages of \$20.15 per hour and supplements of \$13.34 per hour; Mason – Building (Bricklayer/Blocker), with wages of \$27.20 per hour and supplements of \$15.14 per hour; and Mason – Building (Pointer/Caulker/Cleaner), with wages of \$27.20 per hour and supplements of \$15.14 per hour (Tr. 1165; Dept. Ex. 203).

On or about December 1, 2010, a complaint was filed with the Department with regard to Project V alleging that NBRC failed to pay the proper prevailing wages and/or supplements to workers on Project V (Tr. 107-110; Dept. Ex. 77). In response to the complaint, the Bureau commenced an investigation of Project V (Tr. 1124-1127; Dept. Ex. 185).

On or about December 13, 2010, the Bureau requested NBRC to furnish payroll records relating to Project V (Tr. 1148-1149; Dept. Ex. 195).

In response, NBRC provided certified payroll records and other documentation related to Project V that was requested by the Bureau (Tr. 1146-1148; Dept. Ex. 194).

During the investigation, the Bureau also received daily reports for Project V from H.R. Beebe. (Tr. 1153-1157; Dept. Ex. 198, 206a, 206b). The daily reports documented the number of workers that were observed and recorded as being present on site from NBRC each day (Tr. 1153-1157; Dept. Ex. 198, 206a, 206b).

Based on its investigation, the Bureau determined that NBRC employed six (6) workers on Project V in the classifications of Laborer (Group #1), Laborer (Group #2), Mason – Building (Bricklayer/Blocker), and Mason – Building (Pointer/Caulker/Cleaner), and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time. (Tr. 1166-1174; Dept. Ex. 204a, 205a).

During the period from the week ending March 19, 2010, through the week ending August 6, 2010, NBRC underpaid prevailing wages and supplements to laborers, workers and mechanics performing work on Project V in the amount of \$15,191.84 (Tr. 1166-1174; Dept. Ex. 204a, 205a). That amount was reduced to \$2,914.83 after NBRC made direct payment of unpaid wages and supplements to workers since the commencement of the Bureau's investigation of Project V (Tr. 1166-1174; Dept. Ex. 204a, 205a).

The Bureau's audit of Project V contains one worker who is identified as "John Doe" and classified as a Mason and Laborer. (Tr. 1214-1220; Dept. Ex. 204a, 205a). "John Doe" was included in the audit as a result of the Bureau finding that NBRC falsified its certified payroll records for Project V by failing to include all workers who were onsite on certain days on their payroll records during the audit period (Tr. 1214-1220; Dept. Ex. 206a, 206b). The Bureau determined that an additional worker for NBRC had worked on Project V but could not be identified (Tr. 1214-1220). The evidence for "John Doe" came from the H.R. Beebe daily reports and NBRC's own daily reports (Tr. 1214-1220, Dept. Ex. 189, 206a, 206b). For example, for the week ending May 28, 2010, the H.R. Beebe daily report indicates that NBRC had seven workers on site on May 24, 2010, who were "cleaning the scope masonry veneer of the north side of the auditorium." (Tr. 1215; Dept. Ex. 189, 206a, 206b). NBRC's own daily report for that date showed eight individuals on site, and one of them, Rocca Femme, was a supervisor on Project V and therefore not counted as a worker (Tr. 1215-1216, Dept. Ex. 206a, 206b). However, NBRC's certified payroll records only show six workers on site on May 24, 2010, which resulted in the Bureau determining that the certified payroll records were falsified and an additional worker was therefore included on the audit (Tr. 1214-1220; Dept. Ex. 206a, 206b). The Bureau used the description of the work performed on the daily reports to determine the proper classification for the individual listed as "John Doe" on the audit (Tr. 1216-1223, 1238-1246; Dept. Ex. 206a, 206b). The Bureau did not give NBRC any credit for wages paid to "John Doe" because there was no evidence of any payment made to that individual for work performed on Project V. (Tr. 1223-1224, 1237-1238; Dept. Ex. 204a, 205a) The Bureau determined the hours worked by "John Doe" based on reviewing the hours documented for other workers on NATIONAL'S certified payroll records (Tr. 1222-1223; Dept. Ex. 206a, 206b).

The Bureau used the H.R. Beebe daily reports to determine the classifications for workers on the audit due to the daily reports describing the work performed by NBRC's workers each day

on Project V (Tr. 1216-1232, 1238-1246; Dept. Ex. 206a, 206b). The Bureau used the information on NBRC's certified payroll records for the workers' hours worked and rates of pay for the audit (Tr. 1216-1232; Dept. Ex. 206a, 206b). The prevailing wage rates and supplements on the audit were obtained from Herkimer 2009 and Herkimer 2010 (Tr. 1229-1232).

63. On or about July 14, 2011, and June 21, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project V (Dept. Ex. 199, 200).

PROJECT VI – ONEIDA COUNTY SAND AND SALT STORAGE FACILITIES

On or about June 16, 2010, NBRC entered into a contract with Oneida County ("Oneida") to furnish materials, labor, tools and equipment necessary for construction of two sand and salt storage facilities for the Oneida County Department of Public Works ("Project VI"), located in the Town of Oriskany, New York (Tr. 1256-1259; Dept. Ex. 207, 208).

The contract involved the employment of workers in the classifications of Carpenter – Building; Laborer - Building (Group #1), Laborer - Building (Group #4), Mason – Building (Cement), and Operating Engineer – Building (Class A) (Tr. 1256-1259, 1263-1265; Dept. Ex. 207, 208, 210).

On or about July 1, 2010, the Bureau issued the Prevailing Wage Rate Schedule for Oneida County ("Oneida 2010"). Oneida 2010 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VI from July 1, 2010 to June 30, 2011, including the following classifications: Carpenter – Building, with wages of \$24.08 per hour and supplements of \$13.17 per hour; Laborer - Building (Group #1), with wages of \$20.00 per hour and supplements of \$13.34 per hour; Laborer - Building (Group #4), with wages of \$20.50 per hour and supplements of \$13.34 per hour; Mason – Building (Cement), with wages of \$27.20 per hour and supplements of \$15.14 per hour; and Operating Engineer – Building (Class A), with wages of \$27.58 per hour and supplements of \$20.30 per hour (Tr. 1312; Dept. Ex. 238).

On or about December 1, 2010, a complaint was filed with the Department with regard to Project VI alleging that NBRC failed to pay the proper prevailing wages and/or supplements to

workers on Project VI (Tr. 115-118, 1267-1270; Dept. Ex. 79, 211). In response to the complaint, the Bureau commenced an investigation of Project VI (Tr. 1248-1256; Dept. Ex. 206).

On or about December 13, 2010, the Bureau requested NBRC to furnish payroll records relating to Project VI (Tr. 1272-1274, Dept. Ex. 214).

In response, NBRC provided certified payroll records and other documentation related to Project VI that was requested by the Bureau (Tr. 1274-1285; Dept. Ex. 215-220).

Based on its investigation, the Bureau determined that NBRC employed nine (9) workers on Project VI in the classifications of Carpenter – Building; Laborer - Building (Group #1), Laborer - Building (Group #4), Mason – Building (Cement), and Operating Engineer – Building (Class A), and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (Tr. 1314-1325; Dept. Ex. 239a, 240b).

During the period from the week ending August 20, 2010 through the week ending December 10, 2010, NBRC underpaid prevailing wages and supplements to workers performing work on Project VI in the amount of \$13,170.40. (Tr. 1314-1325; Dept. Ex. 239a, 240b). That amount was reduced to \$2,902.62 after NBRC made direct payment of unpaid wages and supplements to workers since the commencement of the Bureau's investigation of Project VI (Tr. 1352-1355; Dept. Ex. 239a, 240b).

The Bureau used NBRC's certified payroll records for Project VI to determine the classifications for some workers, rates of pay, and hours worked by the workers (Tr. 1336-1350; Dept Ex. 240a). The prevailing wage rates and supplements were obtained from Oneida 2010 (Tr. 1336-1350; Dept Ex. 238). Some workers indicated that they performed work that fell under classifications that were different than the classifications listed for them on NBRC'S certified payroll records (Tr. 1338-1341). For example, Lawrence Shepard was misclassified by NBRC as a Laborer on the payroll for the week ending August 20, 2010, when he was actually performing work that fell under the Operating Engineer classification, such as operating a lull and all-terrain forklift (Tr. 115-120; 1338-1341; Dept. Ex. 79, 211). In addition to Operating Engineer work, Mr. Shepherd also performed work that fell under the Carpenter classification, such as setting forms in preparation for the pouring of concrete (Tr. 115-120; 1339-1341; Dept. Ex. 79, 211).

On or about July 14, 2011 and June 21, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by failing to pay prevailing wages and supplements to laborers, workers and mechanics performing work on Project VI (Tr. 1304-1307; Dept. Ex. 235, 236).

PROJECT VII – DORMITORY AUTHORITY OF THE STATE OF NEW YORK

On or about May 14, 2008, NBRC entered into a contract with the Dormitory Authority of the State of New York (“DASNY”) to furnish materials, labor, tools and equipment necessary for the McPike Addiction Treatment Center asbestos abatement and alterations project at the Mohawk Valley Psychiatric Center (“Project VII”), located in the City of Utica, New York (Tr. 1371-1374; Dept. Ex. 243, 244).

The contract involved the employment of workers in the classifications of Carpenter – Building; Laborer - Building (Group #1), Mason – Building, and Sheetmetal Worker (Tr. 1371-1376; Dept. Ex. 243, 244, 246).

On or about July 1, 2007, the Bureau issued the Prevailing Wage Rate Schedule for Oneida County (“Oneida 2007”). Oneida 2007 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VII from July 1, 2007 to June 30, 2008, including the following classifications: Carpenter – Building, with wages of \$21.89 per hour and supplements of \$11.06 per hour; Laborer - Building (Group #1), with wages of \$19.15 per hour and supplements of \$9.89 per hour; Mason – Building, with wages of \$24.31 per hour and supplements of \$12.89 per hour; and Sheetmetal Worker, with wages of \$25.00 per hour and supplements of \$14.41 per hour (\$13.66 plus 3% of hourly wage paid per hour) (Tr. 1510-1511; Dept. Ex. 337).

On or about July 1, 2008, the Bureau issued the Prevailing Wage Rate Schedule for Oneida County (“Oneida 2008”). Oneida 2008 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VII from July 1, 2008 to June 30, 2009, including the following classifications: Carpenter – Building, with wages of \$22.64 per hour and supplements of \$11.575 per hour; Laborer - Building (Group #1), with wages of \$19.55 per hour and supplements of \$10.89 per hour; Mason – Building, with wages of \$24.31 per hour and supplements of \$12.89 per hour; and

Sheetmetal Worker, with wages of \$25.40 per hour and supplements of \$15.01 per hour (\$14.25 plus 3% of hourly wage paid per hour) (Tr. 1510-1511; Dept. Ex. 338).

On or about July 1, 2009, the Bureau issued the Prevailing Wage Rate Schedule for Oneida County ("Oneida 2009"). Oneida 2009 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VII from July 1, 2009 to June 30, 2010, including the following classifications: Carpenter – Building, with wages of \$22.17 per hour and supplements of \$13.555 per hour; Laborer - Building (Group #1), with wages of \$19.55 per hour and supplements of \$12.34 per hour; and Mason – Building, with wages of \$25.81 per hour and supplements of \$14.14 per hour (Tr. 1510-1511; Dept. Ex. 339).

Prior to the commencement of the investigation of Project VII, workers for NBRC had filed complaints with the Department regarding other public work projects on which NBRC was a contractor. (Dept. Ex. 4, 77, 94, 104). Those complaints alleged that NBRC failed to pay the proper prevailing wages and/or supplements to workers on other public work projects (Dept. Ex. 4, 77, 94, 104). In response to the complaints filed by workers with regard to other public work projects that NBRC employed workers on, the Bureau commenced an investigation of Project VII as this was another public work project on which NBRC was a contractor (Tr. 1363-1370; Dept. Ex. 241).

On or about November 30, 2009, the Bureau requested NBRC to furnish payroll records relating to Project VII (Tr. 1376-1379; Dept. Ex. 247).

In response, NBRC provided certified payroll records and other documentation related to Project VIII that was requested by the Bureau (Tr. 1394-1489; Dept. Ex. 248-254, 258-319, 329-331).

Based on its investigation, the Bureau determined that NBRC employed six (6) workers on Project VII in the classifications of Carpenter – Building; Laborer - Building (Group #1), Mason – Building, and Sheetmetal Worker, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (Tr. 1512-1547; Dept. Ex. 340b, 341a, 341c, 341d).

During the period from the week ending June 6, 2008, through the week ending November 13, 2009, NBRC underpaid prevailing wages and supplements to workers performing work on Project VII in the amount of \$60,758.32. (Tr. 1512-1547; Dept. Ex. 340b, 341a, 341c, 341d). That amount was reduced to \$45,222.35 after NBRC made direct payment of unpaid wages and supplements to workers since the commencement of the Bureau's investigation of Project VII (Tr. 1512-1547, 1566-1575; Dept. Ex. 340b, 341a, 341c, 341d).

The Bureau used the information from NBRC's certified payroll records to determine the hours worked by workers and their rates of pay on the audit. (Tr. 1548; Dept. Ex. 341a). The prevailing wage rate and supplements were from Oneida 2007, 2008, and 2009 (Tr. 1549-1563; Dept. Ex. 337-339). The Bureau referred to the daily reports from DASNY to determine the workers' classifications (Tr. 1549-1563; Dept. Ex. 319, 341a). The daily reports provided descriptions of the work done on Project VII each day, such as demolition, framing, metal fascia work, and repointing floor joists (Tr. 1549-1563; Dept. Ex. 319).

On or about April 1, 2010 and June 20, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project VII (Tr. 1500-1507; Dept. Ex. 334, 335).

PROJECT VIII – CAMDEN CENTRAL SCHOOL DISTRICT

On or about February 10, 2009, NBRC entered into a contract with Camden Central School District ("CCSD") to furnish materials, labor, tools and equipment necessary for the reconstruction of four elementary schools ("Project VIII") located in the Village of Camden, New York (Tr. 1587-1594; Dept. Ex. 343-347).

The contract involved the employment of workers in the classifications of Laborer - Building (Group #2) and Mason – Building (Tr. 1587-1594; Dept. Ex. 343-347).

On or about July 1, 2008, the Bureau issued a Prevailing Wage Rate Schedule for Oneida County ("Oneida 2008"). Oneida 2008 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VIII from July 1, 2008 to June 30, 2009, including the following classifications: Laborer - Building (Group #2), with wages of \$19.70 per hour and supplements of \$10.89 per hour; and

Mason – Building, with wages of \$24.31 per hour and supplements of \$12.89 per hour (Tr. 1629-1630; Dept. Ex. 368).

On or about July 1, 2009, the Bureau issued a Prevailing Wage Rate Schedule for Oneida County (“Oneida 2009”). Oneida 2009 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project VIII from July 1, 2009 to June 30, 2010, including the following classifications: Laborer - Building (Group #2), with wages of \$19.70 per hour and supplements of \$12.34 per hour; and Mason – Building, with wages of \$25.81 per hour and supplements of \$14.74 per hour (Tr. 1629-1630; Dept. Ex. 369).

On or about December 16, 2010, a complaint was filed with the Department with regard to Project VIII alleging that NBRC failed to pay the proper prevailing wages and/or supplements to workers on Project VIII. (Tr. 1594-1597; Dept. Ex. 348). In response to the complaint, the Bureau commenced an investigation of Project VIII (Tr. 1582-1587; Dept. Ex. 342).

On or about July 31, 2009, the Bureau requested NBRC to furnish payroll records relating to Project VIII (Tr. 1597-1600; Dept. Ex. 350).

NBRC provided payroll records and documentation related to Project VIII that were requested by the Bureau (Tr. 1600-1606; Dept. Ex. 351-353).

During the investigation, the Bureau also received daily reports (“Daily Reports”) for Project VIII from Bovis Lend Lease (“Bovis”). (Tr. 1610-1619; Dept. Ex. 358). The daily reports were filled out by NBRC and then submitted to Bovis on a daily basis (Tr. 1614-1617; Dept. Ex. 358). The daily reports documented the number of employees from NBRC that were on site working each day (Tr. 1610-1619; Dept. Ex. 358).

Based on its investigation, the Bureau determined that NBRC employed thirteen (13) workers on Project VIII in the classifications of Laborer - Building (Group #2) and Mason – Building, and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time, i.e., Oneida 2008 or Oneida 2009 (Tr. 1646-1662; Dept. Ex. 370a, 371a, 371b, 371c).

During the period from the week ending March 27, 2009, through the week ending January 1, 2010, NBRC underpaid prevailing wages and supplements to laborers, workers and

mechanics performing work on Project VIII in the amount of \$42,136.41. (Tr. 1646-1662; Dept. Ex. 370a, 371a, 371b, 371c). That amount was reduced to \$35,425.64 after NBRC made direct payment of unpaid wages and supplements to workers subsequent to the commencement of the Bureau's investigation of Project VIII (Tr. 1646-1662, 1679-1686; Dept. Ex. 370a, 371a, 371b, 371c).

NBRC failed to include all workers who performed work on Project VIII on their certified payroll records (Tr. 1662-1668, 1677; Dept. Ex. 370a, 371a, 371b, 371c). The daily reports showed that there was an additional worker who worked on Project VIII for NBRC who was not named on the certified payroll records, and was identified on the audit as "John Doe #1." (Tr. 1662-1668, 1677; Dept. Ex. 370a, 371a, 371b, 371c). In one example, during the week ending July 31, 2009, the daily reports showed one superintendent and five laborers were on site for NBRC each day from July 27, 2009 through July 31, 2009 (Tr. 1665-1666; Dept. Ex. 371a, 371c). However, NBRC's certified payroll records for that week only showed four workers on site that week working eight hours per day (Tr. 1665-1666; Dept. Ex. 371a, 371c). Based on the work that was being done that week, such as the restoration of brick façade, the Bureau determined that John Doe #1 should be classified as a Mason (Tr. 1666-1667; Dept. Ex. 370a, 371a, 371b, 371c). The Bureau determined John Doe #1 worked eight hours per day because NBRC's certified payroll records showed all workers worked eight hours per day that week (Tr. 1667-1668; Dept. Ex. 370a, 371a, 371b, 371c). No credit was given to NBRC for payment of wages to John Doe #1 because there was no evidence that John Doe #1 received any payment from NBRC for work performed on Project VIII (Tr. 1667; Dept. Ex. 370a, 371a, 371b, 371c). The prevailing wage rate and supplements for John Doe #1 came from the applicable prevailing wage schedule (Tr. 1667; Dept. Ex. 368, 369, 371a, 371b).

Workers were misclassified by NBRC on its certified payroll records as being Laborers when they were performing Mason work (Tr. 1678; Dept. Ex. 371a, 371b, 371c). The Bureau used the Daily Reports to determine the type of work performed by workers each day, and that was then used to classify the workers on the audit (Tr. 1666-1673, 1678; Dept. Ex. 371a, 371b). For example, replacing stone, precasting lintels on site, and grinding joints was work that fell under the Mason classification (Tr. 1670-1673, 1678; Dept. Ex. 371a, 371b). The workers' hours and rates of pay on the audit were obtained from NBRC's certified payroll records (Tr. 1668-1673; Dept. Ex. 371a, 371b). The prevailing wage rates and supplements for workers on the

audit came from the applicable prevailing wage schedule (Tr. 1667; Dept. Ex. 368, 369, 371a, 371b).

On or about March 26, 2010, and June 19, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project VIII (Dept. Ex. 365, 366).

PROJECT IX – MORRISVILLE STATE COLLEGE

On or about May 4, 2010, EV Roofing and Construction Supply Corp. (“EVR”) entered into a contract with Morrisville State College (“Morrisville”) to furnish materials, labor, tools and equipment necessary for removal of an existing roof, installation of a new roofing system, and repair of a parapet (“Project IX”), located in the Village of Morrisville, New York (Tr. 1691-1695; Dept. Ex. 373)⁵.

On or about June 14, 2010, NBRC entered into a subcontract with EV to furnish materials, labor, tools and equipment necessary for Project IX (Tr. 1695-1696; Dept. Ex. 374).

The subcontract involved the employment of workers in the classifications of Carpenter – Building; Laborer - Building (Group #1), Mason – Building, and Operating Engineer – Building (Class A) (Tr. 1695-1696; Dept. Ex. 374).

On or about July 1, 2010, the Bureau issued a Prevailing Wage Rate Schedule for Madison County (“Madison 2010”). Madison 2010 detailed the amount of wages and supplements which were to be paid to or provided for the workers, laborers and mechanics performing work on Project IX from July 1, 2010 to June 30, 2011, including the following classifications: Carpenter – Building, with wages of \$24.08 per hour and supplements of \$13.17 per hour; Laborer - Building (Group #1), with wages of \$20.00 per hour and supplements of \$13.34 per hour; Mason – Building, with wages of \$27.58 per hour and supplements of \$15.14 per hour; and Operating Engineer – Building (Class A), with wages of \$27.58 per hour and supplements of \$20.30 per hour (Dept. Ex. 400).

On or about December 1, 2010, Lawrence Shepard filed a complaint with the Department with regard to Project IX alleging that NBRC failed to pay the proper prevailing wages and /or

⁵ As noted previously, EVR is in default in this proceeding.

supplements to workers on Project IX. (Tr. 1696-1700; Dept. Ex. 375-378). In response to the complaint, the Bureau commenced an investigation of Project IX (Tr. 1688-1691; Dept. Ex. 372).

On or about December 21, 2010, the Bureau requested NBRC to furnish payroll records relating to Project IX (Tr. 1702-1703; Dept. Ex. 381).

NBRC provided payroll records and other documentation related to Project IX that were requested by the Bureau (Tr. 1706-1711; Dept. Ex. 383-385). The Bureau also received copies of payrolls records and other documentation related to Project IX from EV (Tr. 1703-1721; Dept. Ex. 382, 386-389).

Based on its investigation, the Bureau determined that NBRC employed six (6) workers on Project IX in the classifications of Carpenter – Building; Laborer - Building (Group #1), Mason – Building, and Operating Engineer – Building (Class A), and failed to pay or provide prevailing wages and/or supplements to the workers in accordance with the prevailing wage schedule in effect at the time (Tr. 1737-1750; Dept. Ex. 401a, 402a, 402b).

During the period from the week ending July 2, 2010 through the week ending December 10, 2010, NBRC underpaid prevailing wages and supplements to workers performing work on Project IX in the amount of \$17,152.47. (Tr. 1737-1750; Dept. Ex. 401a, 402a, 402b). That amount was reduced to \$1,095.78 after NBRC made direct payment of unpaid wages and supplements to workers since the commencement of the Bureau’s investigation of Project IX (Tr. 1753-1757; Dept. Ex. 401a, 402b).

The Bureau used the information from NBRC’s certified payroll records for Project IX to determine the hours worked by workers, classifications for some workers, and the rates of pay on the audit (Tr. 1746-1750; Dept Ex. 401a, 402a, 402b). The prevailing wage rates and supplements on the audit were from Madison 2010 (Tr. 1747-1750; Dept Ex. 400, 401a, 402a, 402b). One worker, Lawrence Shepard, was misclassified by NBRC on the certified payroll records for Project IX. (Tr. 1748-1749; Dept Ex. 375, 401a, 402a, 402b). The certified payroll records state that Mr. Shepard was classified as a Laborer, but Mr. Shepard informed the Bureau that he performed work on Project IX that fell under the Operating Engineer classification. (Tr. 1748-1750; Dept Ex. 375, 401a, 402a, 402b).

On or about June 21, 2011, and June 23, 2012, the Bureau sent Notices of Labor Law Inspection Findings to NBRC advising that they had violated various provisions of the Labor Law by, among other things, failing to pay prevailing wages and supplements to workers performing work on Project IX (Tr. 1733-1734; Dept. Ex. 398).

INDIVIDUAL LIABILITY OF CORPORATE OFFICERS AND SHAREHOLDERS

During the period when work was performed on Projects I through IX, Joseph K. Salerno was an officer who knowingly participated in NBRC's failure to pay or provide prevailing wages and supplements to or for the benefit of the employees who performed work on the contract for Projects 1 through IX, and was a shareholder of NBRC owning or controlling at least ten per centum of the outstanding stock (Tr. 3314-3317). Joseph K. Salerno testified that he is the president of NBRC (Tr. 3314-3317). In 1991, when the name of the company was changed from National Surface Cleaning and Building Restoration to National Building and Restoration Corp., Joseph K. Salerno claimed that he became the sole owner of the company (Tr. 3316-3317).

During the period when work was performed on Projects I through IX, Joseph K. Salerno II was an officer who knowingly participated in NBRC's failure to pay or provide prevailing wages and supplements to or for the benefit of the employees who performed work on the contract for Projects 1 through IX (Tr. 3215-3216; Dept. Ex. 144a, 146, 207, 322, 323, 324, 405). Joseph K. Salerno alleged that his son, Joseph K. Salerno II, was never an officer of NBRC (Tr. 3213-3214). However, evidence presented at the hearing shows that Joseph K. Salerno II signed documents as vice president on behalf of NBRC (Tr. 3215-3216; Dept. Ex. 144a, 146, 207, 322, 323, 324, 405). Documents provided by NBRC to the Department name Joseph K. Salerno II as vice president and treasurer of NBRC (Dept. Ex. 13, 177, 362).

Evidence presented at the hearing showed that at least by 2014, Anna Rose Salerno was a shareholder of NBRC owning or controlling at least ten per centum of the outstanding stock. A letter from NBRC dated July 1, 2015 states that "Anna Rose Salerno [is] the sole shareholder and director of National Building Restoration Corporation as of June 30th 2015." (Dept. Ex. 419). The letter further notes that there had "been no changes with the NYS Department of Labor situation since 2014[.]" (Dept. Ex. 419). A stock certificate dated June 30, 2015 also indicates that Anna Rose Salerno is the owner of 100 shares of NATIONAL's stock. (Dept. Ex. 419).

SUBSTANTIALLY OWNED-AFFILIATED ENTITY

Information provided by NBRC and NCS on their NYS-45 quarterly reports for the years 2011-2014 show that the companies routinely comingled employees (Dept. Ex. 408). A number of employees worked for both companies simultaneously throughout the years 2011 to 2014 (Dept. Ex. 408A). A total of 22 employees worked for both companies at the same time during those years (Dept. Ex. 408A).

NBRC and NCS shared the same address of 1010 Tilden Avenue, Utica, New York, 13501. (Dept. Ex. 405, 407). Both companies shared work on projects such as the City of Utica Parking Garage project, as evidenced by a letter from NBRC and certified payroll records for that project (Dept. Ex. 405, 407). The two companies also shared officers where Joseph K. Salerno II was Vice President of NBRC and simultaneously President of NCS (Tr. 3215-3216; Dept. Ex. 144a, 146, 207, 322, 323, 324, 405, 407). Joseph K. Salerno II continued to sign documents on behalf of NBRC even after NCS was formed (Dept. Ex. 413). Both companies agreed to indemnify each other (Dept. Ex. 415).

NCS was not formed until 2011, after most of the violations alleged by the Department in Projects I through IX occurred (Tr. 3897).

FALSIFICATION OF PAYROLLS

NBRC's certified payroll records demonstrate that NBRC failed to pay the proper prevailing wages and supplemental benefits to its employees during Projects I – IX. Certified payroll records for Projects I, III, IV, V, and VIII were falsified by NBRC. (Tr. 25-28, 594-599, 614-618, 641-648, 945-946, 970-993, 1214-1246, 1600-1619, 1646-1678; Dept. Ex. 1, 22, 92, 94, 113a, 153a, 153b, 154a, 157, 159, 169, 170, 189, 204a, 205a, 206a, 206b, 350, 351, 352, 353, 358, 370a, 371a, 371b, 371c). Information concerning the number of workers on site each day on the certified payrolls did not match the information on the field reports and daily reports on Projects I, IV, V, and VIII (Tr. 594-599, 614-618, 641-648, 970-993, 1214, 1246, 1600-1619, 1646-1678; Dept. Ex. 1, 22, 113a, 157, 159, 169, 170, 189, 204a, 205a, 206a, 206b, 350, 351, 352, 353, 358, 370a, 371a, 371b, 371c).

NBRC required workers to pay money back to NBRC after they cashed their paychecks. (Tr. 25-28, 104-106, 945-946; Dept. Ex. 92, 94, 153a, 153b, 154a).⁶

Field reports, daily reports, and statements from workers on the Projects about the work they performed and the wage rates and supplements they were paid contradict NBRC's certified payrolls and showed that NBRC failed to pay the proper prevailing wages and/or supplements (Tr. 16-21, 25-28, 115-120, 229-244, 599, 603-607, 862-879, 945-946, 1098-1114, 1216-1246, 1314-1325, 1336-1350, 1548-1563, 1666-1678, 1748-1750; Dept. Ex. 1, 2, 4, 6, 14, 22, 79, 94, 95a, 113a, 114a, 114b, 142, 140a, 140c, 154a, 169, 170, 184a, 184c, 204a, 205a, 206a, 206b, 211, 319, 337, 338, 339, 341a, 371a, 371b, 371c, 375, 401a, 402a, 402b). Employees Christopher Conklin, Gary Bowman, and Lawrence Shepard testified about the work they performed on the Projects, which further supports the finding of misclassification and the underpayment of prevailing wages and supplements (Tr. 16-21, 25-28, 115-120, 229-244, 945-946; Dept. Ex. 6, 14, 79, 94, 95a, 142, 154a, 211).

CALCULATION OF UNDERPAYMENTS

The Bureau used a combination of employee statements and certified payroll records to calculate underpayments of wages and supplements. The certified payrolls were relied upon for most of the Projects regarding the actual amount of wages and supplements paid to workers, with the exception of Project III where NBRC obtained kickbacks from workers by demanding that workers pay money back to NBRC after they cashed their paychecks as set forth in the testimony of employees Conklin, Shepard, and Bowman (Tr. 25-28, 104-106, 945-946; Dept. Ex. 92, 94, 154a). Classifications were determined by relying on employee statements detailing the type of work done on each Project, certified payroll records, field reports, daily reports, and the nature of the work required for each Project. The prevailing wage rates and supplements were taken from the applicable Prevailing Wage Rate Schedules.

CIVIL PENALTY

⁶ Some testimony contradicts the statements from workers that they were required to repay wages or face termination (see, e.g., Tr. 3295 – 3297). I find this other testimony unconvincing and afford it no weight with regard to this issue.

NBRC had experience with Department investigations involving public work and had previously been debarred from working on public work projects for five years for falsifying payroll records and willfully violating the Labor Law (Dept. Ex. 403, 404).

CONCLUSIONS OF LAW

MOTION TO DISMISS

On June 13, 2017, Respondents' counsel moved to dismiss this proceeding. Pursuant to Department of Labor hearing rules of procedure, a determination on this motion was held until the conclusion of the hearing.⁷ Although not specifically renewed in their post hearing submissions, the underlying bases for this motion appear in Respondents' brief (See, e.g., NBRC Post Hearing Brief p 34). Respondents argue that the Department has not met its burden of proof, claim that the witnesses presented by the Department did not have personal knowledge of the violations in question, amended the underpayment calculations, and changed its position on classifications. The evidence adduced at the hearing is sufficient to overcome these arguments. There were some workers who testified concerning actual work conditions, there were supporting materials that the Department could and did rely upon, the Department clarified and explained its position regarding classification, and, as set forth below, the creation of intermediate audits did not fatally prejudice Respondents. For all of these reasons, based upon the evidence in the record, the motion to dismiss is not granted.

SPOLIATION

Respondents' counsel argued in his Proposed Findings that destruction of certain calculations by Department staff constituted spoliation of evidence. Given the thousands of pages of testimony amassed in this proceeding, most of which constitute the exhaustive cross-examination of the Department's witnesses, and the nature of the materials alleged to have been destroyed i.e., intermediate audits that were changed as new information was received, I find that

⁷ 12 NYCRR 701.7 states "The only motion permitted in the course of the hearing shall be a motion to dismiss which shall be preserved on the record, if made, for the consideration of the Commissioner of Labor in issuing an order and determination following the hearing."

even assuming, *arguendo*, the destruction occurred as stated, Respondents were not unfairly prejudiced by such actions. The claim of spoliation is dismissed.

DUE PROCESS VIOLATIONS

Respondent NCS argues that the failure of the Department to include NCS in its initial Notice of Hearing – indeed to even mention the existence of NCS until the hearing had been ongoing for years – constitutes so grave and outrageous a violation of due process that NCS should not be subject to this proceeding. The Department’s inexplicable decision to include NCS shortly before what would otherwise have been the last day of the hearing created massive procedural and substantive issues and extended this proceeding for more than three years. Under these circumstances, the Hearing Officer took steps to mitigate the impact of NCS’ inclusion. He awarded NCS’ counsel extensive time to review all of the transcripts and evidence in the record up to the point of NCS’ inclusion in the proceeding. NCS was allowed to question any witness it chose with regard to the matters the Department charged it with. At the same time, the Hearing Officer did not allow NCS to re-examine all witnesses *de novo*, which would have unnecessarily duplicated the many days of testimony already in the record. Under these facts I find that the late addition of NCS, while inexcusable as a matter of good litigation practice, did not violate NCS’ due process rights in that NCS did ultimately receive notice of the Department’s allegations and have an opportunity to be heard on the matter.

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects⁸. 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 § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal

⁸ This section derives ultimately from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

corporation or a commission appointed pursuant to law is a party. 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.

In 1983, the New York State Court of Appeals established what was, until recently, the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *Erie* involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

(1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public works project. *Id at* 537.

In 2013, the New York State Court of Appeals adopted a new, three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc*, 21 NY3d 530 (2013). The Court states this 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 at* 538.

Respondents do not dispute that the Departments of Jurisdiction in Projects I through IX were public entities and parties to the various public work contracts. The contracts involved describe work which required construction-like labor paid for by public funds. Finally, the work products were clearly for the use or other benefit of the general 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]).

Respondent NBRC disputes the classifications used by the Department to determine the applicable wage and supplement amounts for workers on the Projects. However, the Bureau investigators used multiple sources to make its classifications, including the Project documents, worker statements, the nature of the work performed, and supporting, contemporaneously made reports. Review by a supervising Bureau member resulting in the correction of some classifications. NBRC argues that evidence in the record supports its position that NBRC properly classified its workers. I find that the weight of the evidence taken in its entirety supports the classification determinations made by the Department for the workers on the Projects.

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]).

To determine underpayments the Department again used the relevant wage schedules, certified payrolls, worker testimony, and in some cases, daily reports. Again, the weight of the evidence in the record supports the Department's methodology.

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]).

Although the courts have consistently sustained agencies in not dismissing administrative proceedings brought to vindicate important public policies based upon extensive delay (*Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619, 624 (1994); *Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v. Sweeney*, 224 AD2d 989 [4th Dept. 1996], *aff'd* 89 NY2d 395 [1996]), the courts have both endorsed and directed agencies to exclude interest from an award for that period of time attributable solely to the agency's unreasonable delay. *Matter of CNP Mechanical, Inc. v. Angello*, 31 AD3d 925, 928, *lv denied*, 8 NY3d 802; *Matter of Nelson's Lamplighters, Inc. v. New York State Department of Labor*, 267 AD2d 937, 938 (3d Dept. 1999). *Matter of M. Passucci General Constr. Co., Inc. v. Hudacs*, 221 AD2d 987, 988 (4th Dept. 1995). *Matter of Georgakis Painting Corp. v. Hartnett*, 170 AD2d 726, 729 (3d Dept. 1991).

It has taken a regrettably long period of time for this matter to conclude. Blame can be laid on all of the parties involved for delays, but the Department must shoulder a portion of the burden. For example, the failure of the Department to include NCS and Ana Rose Salerno in this proceeding until the eleventh hour alone resulted in several years' worth of delay. There was also considerable delay between the conclusion of the investigations of the Projects by the Bureau and the commencement of a hearing. Other matters, such as illness, bad weather, a worldwide pandemic, and scheduling conflicts simply could not be helped. Based upon the

information present in the record, I find that interest in this matter should be suspended for a period of six years.

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) ⁹ 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

⁹ “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.

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

The violations here cannot be considered minor or inadvertent. Testimony shows that Respondent NBRC submitted payroll records that did not accurately reflect the work performed or the number of workers involved on the various Projects. These were not minor errors nor were they explained by inexperience. Based upon the evidence as a whole, I find the violations in the Projects to be willful.

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>). In the absence of a statutory definition, the meaning ascribed by lexicographers is a useful guide. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 537-538; *Quotron Systems v. Gallman*, 39 NY2d 428, 431 (1976).

NBRC did not include some workers on its payrolls, as shown by independently kept daily logs. In one case it showed workers as paid but required return of the money.

In light of the evidence set forth above showing deliberate, intentional falsification, I find that NBRC falsified its payrolls on several of the Projects.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where some indicia of a controlling ownership relationship exists or as “...an entity which exhibits any other indicia of control over the ...subcontractor..., regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions,... power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.” The Legislature intended the definition to be read expansively to address the realities of whether entities are substantially owned-affiliated entities. *Matter of Bistriani Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

Counsel for NCS argues that NCS did not violate the prevailing wage law, an argument that may be accurate but is nonetheless irrelevant.¹⁰ The question in this matter is not whether NCS violated Article 8, either through underpayments or some other way, but whether it meets the statutory definition set forth above. In the same way, the argument that NCS was not charged within two years of the violations in question falls flat. The portion of Labor Law section 220-b that deals with a statute of limitations deals with the filing of claims or beginning of investigations into violations, not the establishment of the relationship in question here. NCS also argues that because it was not formed for most of the time that the violations in question occurred, it cannot be a substantially owned – affiliated entity or a successor. However, it is the nature of a successor corporation that it takes over certain work after the prior entity does not, cannot, or chooses not to continue doing all of the work it had done previously. The connections between the two entities are real. Salerno II was simultaneously an officer of NBRC and NCS; the business shared workers and locations; they indemnified each other. These are not casual connections. Instead, they go to the nature of what a substantially owned – affiliated entity or

¹⁰ NCS Post Findings of Fact and Conclusions of Law, Findings of Fact p. 7: The record contains no evidence that National Construction Services, Inc. has committed any violations of the Prevailing Wage Law.”

successor corporation is under the law, and NCS should be deemed a substantially owned-affiliated entity or successor corporation.

SHAREHOLDERS OR OFFICERS

Labor Law § 220-b (3) (b) (1) further provides that any such contractor, subcontractor, successor, or any substantially owned-affiliated entity of the contractor or subcontractor, or 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, or any officer of the contractor or subcontractor who knowingly participated in the willful violation of Labor Law article 8 shall likewise be ineligible to bid on, or be awarded public work contracts for the same time period as the corporate entity.

Joseph Salerno was the owner of NBRC during the Projects. As such, he is individually liable for the violations that took place. Salerno's son, Salerno II, was an officer of NBRC, having signed documents as vice-president of the company. The evidence is clear that Salerno and Salerno II were owners and/or officers of NBRC.

As for Ana Rose Salerno, whose bafflingly late addition to this proceeding by the Department caused unnecessary confusion and delay, the only evidence presented by the Department involves her status years after the Projects in question were concluded. Given this lack of contemporaneous evidence I find that Ana Rose Salerno was not an owner or officer of NBRC during the Projects and thus is not subject to any findings of willfulness or other liability pursuant to this decision.

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]).

Respondent NBRC performed work on Project IX as a subcontractor of EVR, which has been found to be in default in this proceeding. Consequently, EVR, in its capacity as the prime contractor on Project IX, is responsible for the total amount found due from its subcontractor on Project IX.

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 recommends a penalty of the full amount of 25%. The Respondents had extensive experience in public work, prior violations, prior findings against them by the Department, and significant involvement with Department investigators in the past. The violations in question are serious and involve falsified records. Under these circumstances, viewing the record as a whole, I find that a 25% penalty is appropriate.

RECOMMENDATIONS

Based upon the weight of the evidence set forth in the record as a whole, 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 Respondent NBRC underpaid wages and supplements due the identified employees on the Projects as follows:

Project I: \$31,004.78;

Project II: \$595.51;

Project III: \$1,039.71;

Project IV: \$14,578.32;

Project V: \$2,914.83;

Project VI: \$2,902.62;

Project VII: \$45,222.35;

Project VIII: \$35,425.64;

Project IX: \$1,095.78;

DETERMINE that Respondent NBRC is responsible for interest on the total underpayment for each Project at the rate of 16% per annum from the date of underpayment to the date of payment, however, as a result of delays attributable to the Department, interest shall be tolled for a period of six years; and

DETERMINE that the failure of Respondent NBRC to pay the prevailing wage or supplement rate was a “willful” violation of Labor Law article 8; and

DETERMINE that the willful violation of Respondent NBRC involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that National Construction Services, Inc., was a “substantially owned-affiliated entity” of NBRC; and

DETERMINE that Joseph K. Salerno and Joseph K Salerno II were officers of NBRC; and

DETERMINE that Joseph K. Salerno was a shareholder of NBRC who owned or controlled at least ten per centum of the outstanding stock of NBRC; and

DETERMINE that Ana Rose Salerno was not an officer or shareholder of NBRC; and

DETERMINE that Joseph K. Salerno and Joseph K. Salerno II knowingly participated in the violation of Labor Law article 8; and

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

DETERMINE that prime contractor EVR is responsible for the underpayment, interest, and civil penalty due on Project IX; and

ORDER that the Bureau compute the total amount due (underpayment, interest, and civil penalty); and

ORDER that any Department of Jurisdiction for Projects I through IX withholding funds remit payment of any such 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 State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901; and

ORDER that if any withheld amount is insufficient to satisfy the total amount due, or if no withholdings exist, Respondent NBRC, 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: 7/24/2023
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.

Jerome Tracy, Hearing Officer