STATE OF NEW YORK DEPARTMENT OF LABOR

IN THE MATTER OF

NIKKO CONSTRUCTION CORP.;
and
MARIA D.STRANIEVE and RICHARD M. STRANIEVE, JR.

as shareholders of

NIKKO CONSTRUCTION CORP.,
Prime Contractor

and

LEAD CONSTRUCTION SERVICES, INC;
and
JUANA MARTINEZ, JOSE MONTAS,
and ANTHONY FUCCI as officers and/or shareholders of
LEAD CONSTRUCTION SERVICES, INC.,
and its successor or substantially owned-affiliated entity
ALLSTATE ENVIRONMENTAL CORP.;

Subcontractor

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project for the Yorktown Central School District in Yorktown Heights, New York.

REPORT
&
RECOMMENDATION

Prevailing Rate Case
PRC No. 2009009906
Case ID: 082010020760
Westchester County

To: Honorable Mario Musolino
Acting Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on October 16, 2013, a hearing was held on October 9, 2014, in Albany, New York. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a

record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Lead Construction Services, Inc. (“Sub”), and Juana Martinez, Jose Montas, and Anthony Fucci as officers and/or shareholders of Lead Construction Services, Inc., and its successor or substantially owned-affiliated entity Allstate Environmental Corp., a subcontractor of Nikko Construction Corp. (“Prime”), and Maria D. Stranieve, and Richard M. Stranieve, Jr., as shareholders of Nikko Construction Corp., complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving a project for the Yorktown Central School District (“Department of Jurisdiction”).

APPEARANCES

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

Sub failed to appear at the hearing did not file an Answer to the charges incorporated in the Notice of Hearing.

Prime appeared with its attorney, Gerard Damiani, Esq., and did not file an Answer to the charges incorporated in the Notice of Hearing

ISSUES

1. Did Sub pay the rate of wages or provide the supplements prevailing in the locality, and, if not, what is the amount of underpayment?
2. Was any failure by Sub to pay the prevailing rate of wages or to provide the supplements prevailing in the locality “willful”?
3. Did any willful underpayment involve the falsification of payroll records?
4. Is Allstate Environmental Corp., a “substantially owned-affiliated entity” of Sub?

5. Are Juana Martinez, Jose Montas, and Anthony Fucci shareholders of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?

6. Are Juana Martinez, Jose Montas, and Anthony Fucci officers of Sub who knowingly participated in a willful violation of Labor Law article 8?

7. Should a civil penalty be assessed and, if so, in what amount?

FINDINGS OF FACT

The hearing concerned an investigation made by the Bureau on a project involving public work performed by Sub.

The Project involved a public work contract dated March 9, 2010, between Prime and the Department Of Jurisdiction in Yorktown Heights, New York, for Brookside Elementary School renovations and additions (PRC No. 2009009906) (DOL 15).

Prime entered into a subcontract with Sub on or about March 15, 2010, for Brookside Elementary School renovation and Jose Montas signed the subcontract on behalf of Sub (DOL 17A). Prime and Sub initialed a revised subcontract for the same project on the same date and Anthony Fucci signed the subcontract on behalf of Sub (DOL 17B).

On or about August 4, 2010, Juana Martinez, as President of Sub, signed an Unconditional Waiver of Lien Upon Progress Payment (DOL 18).

On or about July 1, 2009, the Bureau issued Prevailing Wage Rate Schedule 2009 for Westchester County ("2009 Schedule"). The 2009 Schedule set forth the wages and supplements to be paid to or provided for the workers performing work on The Brookside Elementary Project from July 1, 2009 through June 30, 2010, including the following classification: Laborer-Asbestos and Hazardous Materials Removal, with wages of $31.45 per hour, and supplements of $21.30 per hour (DOL 19).

On or about July 1, 2010, the Bureau issued Prevailing Wage Rate Schedule 2010 for Westchester County ("2010 Schedule"). The 2010 Schedule set forth the amount of wages and supplements to be paid to or provided for the workers performing work on The Brookside Elementary Project from July 1, 2010 through June 30, 2011, including the following

classification: Laborer-Asbestos and Hazardous Materials Removal, with wages of $31.45 per hour, and supplements of $23.50 (DOL 20).

Pursuant to multiple complaints filed with the Bureau by workers on the Project, the Bureau began an investigation of the Project (DOL 1-12).

Complainants were workers employed on the Project, and they performed laborer/asbestos handling and removal work (DOL 1-12; T pp. 34, 51, 67, 79).

On August 11, 2010, the Bureau requested payrolls and supporting materials from Sub (DOL 13).

Juana Martinez, as president of Sub, certified the payrolls for the Project received by the Bureau – which payrolls contained hours worked, hourly wages paid, and a statement that supplements were paid to the workers - as being true and accurate (DOL 21). Martinez further certified that workers had been paid pursuant to the 2009 and 2010 Schedules in a separate certification submitted to the Bureau (DOL 22).

The Bureau used bank records and proof that money orders had been paid to workers to credit Sub with payments actually made to employees on the Project (DOL 28; T. pp. 71, 72).

The Bureau created an audit of the Project based upon claimant statements and documents received during the investigation. The total amount of wages and supplements due to workers on the Project, absent interest, is $79,091.40 (DOL 30; T. p. 78).

Pursuant to a Notice to Department of Jurisdiction to Withhold Payment issued August 31, 2010, the Bureau required the Department of Jurisdiction to withhold payment of $100,000.00 to Prime; the Department of Jurisdiction acknowledged that it withheld $100,000.00 (DOL 33).

The rates of pay and supplemental benefits shown on the payroll records certified by Sub were shown to be false when compared to other records and worker testimony (DOL 21 – 28; T. pp. 110, 111).

In its Certificate of Incorporation, dated January 11, 2010, Sub lists the address for service of process as: 3 Alan B. Shepard Jr. Place, Yonkers, N.Y. 10705 (DOL 37).

The Contractor Profile for Sub shows Juana Martinez to be President, Owner, and Chief Executive Officer of Sub, with an address of 27 Butler Place, Yonkers, NY 10710 (DOL 37A).

On July 16, 2010, Jose Montas, on behalf of Sub, accepted a cash payment to Sub of $2000.00 from Prime for work performed on the Project (DOL 38).

Allstate Environmental Corp. is a New York State corporation established on June 27, 2001. Its Chief Executive Officer is Jose Montas (DOL 39).

In the Contractor Profile for Allstate Environmental Corp. ("Allstate"), Jose Montas is listed as President, Chief Executive Officer, and Owner, with an address of 27 Butler Place, Yonkers, NY 10710. Allstate is listed as performing asbestos and lead abatement (DOL 40).

An employee on a project performed by Allstate is also shown as an employee of Sub on the Project (DOL 41).

FACTORS AFFECTING PENALTY ASSESSED ON PRIME

The Department does not contest statements by Prime's counsel that Prime:

(1) provided Sub with the applicable prevailing wage rate schedule for the project and any subsequently issued annual determinations or corrections;

(2) made a good faith effort to assure that Sub complied with all Labor Law requirements, including, but not limited to, requesting and reviewing certified payroll records;

(3) cannot locate Sub, despite the Prime having made a good faith attempt to locateSub;

(4) Prime has paid Sub in full in accordance with the terms of its subcontract agreement;

(5) Prime has fully cooperated, in a timely manner, with the Department of Labor's investigation; and

(6) in all likelihood, Prime will be unable to receive indemnification from the subcontractor for the restitution it has paid.

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

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

The New York State Court of Appeals has adopted a three-prong test to determine whether a particular project constitutes a public works project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 2013 NY Lexis 1731, 2013 NY Slip Op 4842 (June 27, 2013). The Court states the test as follows:

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

The Department Of Jurisdiction, a public entity, is a party to the instant public work contract. The contract involved asbestos removal at a public school and required construction-like labor paid for by public funds. Finally, the work product here a is 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]).

There is no question that the classification chosen by the Bureau is correct based upon the uncontested evidence concerning the work actually performed by Sub's workers on the Project.

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]).

Once it determined that the certified payrolls provided for the Project did not accurately reflect hours, wages and supplements, the Bureau based its audit upon a combination of the most reliable documentation and testimony available. Such an audit complies with the requirements for the use of a reasonable methodology as set forth above.

INTEREST RATE

Labor Law §§ 220 (8) and 220 b (2) (c) require that, after a hearing, interest be paid from the date of underpayment to the date of payment at the rate of 16% per annum as prescribed by section 14-a of the Banking Law. (*Matter of CNP Mechanical, Inc. v Angello*, 31 AD3d 925, 927 [2006], *lv denied*, 8 NY3d 802 [2007]).

Consequently, Sub is responsible for the interest on the aforesaid underpayments at the 16% per annum rate from the date of underpayment to the date of payment.

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

For the purpose of Labor Law article 8, willfulness "does not imply a criminal intent to defraud, but rather requires that [the contractor] acted knowingly, intentionally or deliberately" – it requires something more than an accidental or inadvertent underpayment. (*Matter of Cam-Ful Industries, Inc. v Roberts*, 128 AD2d 1006, 1006-1007 [1987]). "Moreover, violations are considered willful if the contractor is experienced and 'should have known' that the conduct engaged in is illegal (citations omitted)." (*Matter of Fast Trak Structures, Inc. v Hartnett*, 181

AD2d 1013, 1013 [1992]; s*ee also, Matter of Otis Eastern Services, Inc. v Hudacs*, 185 AD2d 483, 485 [1992]). The violator's knowledge may be actual or, where he should have known of the violation, implied. (*Matter of Roze Assocs. v Department of Labor*, 143 AD2d 510 [1988]; *Matter of Cam-Ful Industries, supra)* An inadvertent violation may be insufficient to support a finding of willfulness; the mere presence of an underpayment does not establish willfulness even in the case of a contractor who has performed 50 or so public works projects and is admittedly familiar with the prevailing wage law requirement. (*Matter of Scharf Plumbing & Heating, Inc. v Hartnett*, 175 AD2d 421 [1991]).

The facts present in this case make it clear that Sub was aware of its obligation to pay the prevailing rate of wages and supplements pursuant to Article 8 and failed to do so. Accordingly, this failure is a willful violation of the law.

FALSIFICATION OF PAYROLL RECORDS

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

In light of the fact that Sub prepared and certified payroll records which were on their face inaccurate, incomplete, and wildly at variance with the statement of workers on the Project and other contemporaneous documents, I find that Sub's willful failure to pay or provide prevailing wages and/or supplements involved the falsification of payrolls.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one were 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 Bistrian Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

As Sub had a clear relationship with Allstate involving shared types of work, employees, and addresses , Allstate is a "substantially owned-affiliated entity" Sub.

PARTNERS, 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.

Several documents produced in evidence show some degree of ownership of Sub or Allstate. The Contractor Profile for Sub shows the sole owner to be Juana Martinez; the Contractor Profile for Allstate shows Jose Montas as the sole owner. Accordingly, Martinez and Montas own or control at least ten per centum each of their respective corporations, and are liable for underpayments as set forth above. As they are liable as result of their ownership, there is no need to determine if, as officers, they knowingly engaged in a violation of Article 8.

The Department presented no evidence concerning the ownership status or position held by Anthony Fucci. Although Mr. Fucci signed the revised subcontract between Prime and Sub, his title is not listed. Nor is he shown to be an Owner of Sub or Allstate. Therefore, I do not find that Anthony Fucci was an owner of Sub or any substantially owned-affiliated entity of Sub, nor do I find that Anthony Fucci was an Officer of Sub or Allstate who knowingly participated in a willful violation of Article 8 of the Labor Law.

CIVIL PENALTY

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

LIABILITY UNDER LABOR LAW §223

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

Prime argues in its Proposed Findings of Fact and Conclusions of Law that, because a period of time elapsed between the commencement of the investigation by the Bureau and the Bureau's notice to Prime of that investigation, moneys paid by Prime to Sub during that interval could have been withheld by Prime and should not be a part of Prime's liability pursuant to §223. The language in this section of the Labor Law makes no provision for notice to a prime

contractor, nor does it establish time periods during which the liability accrues. Instead, it clearly states, without exception, that when there is evidence of non-compliance by a subcontractor, the prime contractor "shall be responsible for such non-compliance..." (Labor Law § 223). Accordingly, Prime is liable for the full underpayment of wages and supplements established in the record of this proceeding.

However, I note that Prime submitted a statement, unopposed by the Department and made a part of the transcript, in which it requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against Sub be waived insofar as it would normally apply to Prime under Labor Law § 223. I further note that this regulation contains, in § 221.1(a)(1) – (6), six requirements, all of which must be met if the Commissioner is to waive the assessment of any penalty. Prime established all of the factors set forth in the regulation and, therefore, any penalty against Prime is waived.

RECOMMENDATIONS

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

DETERMINE that Sub underpaid wages and supplements due the identified employees in the amount of $79,091.40; and

DETERMINE that Sub is responsible for interest on the total underpayment at the rate of 16% per annum from the date of underpayment to the date of payment; and

DETERMINE that the failure of Sub to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that the willful violation of Sub did involve the falsification of payroll records under Labor Law article 8; and

DETERMINE that Allstate Environmental Corp is a "substantially owned-affiliated entities"

DETERMINE that Juana Martinez is a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of Sub and Jose Montas is a shareholder of Allstate who owned or controlled at least ten per centum of the outstanding stock of Allstate; and

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

DETERMINE that Prime is responsible for the underpayment and interest but no civil penalty pursuant to its liability under Labor Law article 8; and

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

ORDER that the Department of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605

ORDER that if any withheld amount is insufficient to satisfy the total amount due, Sub, 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: March 5, 2015
Albany, New York

Respectfully submitted,

Jerome Tracy, Hearing Officer