

STATE OF NEW YORK: DEPARTMENT OF LABOR  
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In the Matter of

TRANSITIONAL BUILDERS, INC., and MARK  
FUMASOLI as a shareholder of TRANSITIONAL  
BUILDERS, INC.,

Prime Contractor,  
and

**DEFAULT**  
**REPORT**  
**&**  
**RECOMMENDATION**

NORTHEAST LANDSCAPE & MASONRY  
ASSOCIATES, and PETER M. PERGOLA and  
ANTHONY PERGOLA as officers and/or shareholders  
of NORTHEAST LANDSCAPE & MASONRY  
ASSOCIATES,

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  
Village of Fishkill (Project)

Prevailing Wage Rate  
PRCNo.20120100334  
PW082013003842

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

Pursuant to an Amended Notice of Hearing issued on March 11, 2016, a hearing was held on April 18, 2016 in Albany, New York and by videoconference with White Plains, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Bureau of Public Work ("Bureau") of the New York State Department of Labor ("Department") into whether Northeast Landscape & Masonry Associates ("Sub") a subcontractor of Transitional Builders, Inc. ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the

performance of a public work contract involving the renovations, additions, and alterations to the Village of Fishkill Fire Station (“Project”) for the Village of Fishkill, New York (“Department of Jurisdiction”).

### **HEARING OFFICER**

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

### **APPEARANCES**

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

There was no appearance made by, or on behalf of Sub.

There was no appearance made by, or on behalf of Prime.

### **FINDINGS AND CONCLUSIONS**

On March 11, 2106, the Department duly served a copy of the Notice of Hearing on Sub, via regular and certified mail, return receipt requested. A signed Return Receipt evidencing receipt of the document by Sub was entered into evidence as Hearing Officer Exhibit 5. The Notice of Hearing scheduled a April 18, 2016 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

In addition, the Department duly served a copy of the Notice of Hearing on Prime, via regular and certified mail, return receipt requested. A signed Return Receipt evidencing receipt of the document by Prime was entered into evidence as Hearing Officer Exhibit 5.

The Department duly served a copy of the Amended Notice of Hearing on Prime and Sub, via regular and certified mail, return receipt requested. Signed Return Receipts evidencing receipt of the document by Prime and Sub were entered into evidence as Hearing Officer Exhibit 5. The Amended Notice of Hearing scheduled an April 18, 19, and 20, 2016 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

Sub was initially represented in this case by Zabell & Associates, P.C. In a letter dated March 17, 2016, Saul D. Zabell, Esq., acknowledged receipt of the Amended Notice of Hearing and Designation of Hearing Officer dated March 11, 2016 but advised the Department that his firm no longer represented the Sub in this case (Hearing Officer Ex. 6).

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

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

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator, an employee of Sub, and documents describing the underpayments, which supported the Bureau's charges that:

The Project was subject to Labor Law article 8; and

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

Sub entered into a contract with Prime for work on the Project; and

Sub willfully underpaid \$17,495.90 to its workers for the audit period weeks ending 04/28/2013 to 06/02/2013; and

Sub falsified its payroll records in connection with the willful underpayment; and

Peter M. Pergola is an officer of Sub; and

Anthony Pergola is an officer of Sub; and

Peter M. Pergola is a shareholder of Sub owning or controlling at least ten per centum of the outstanding stock, and

Anthony Pergola is a shareholder of Sub owning or controlling at least ten per centum of the outstanding stock, and

Peter M. Pergola knowingly participated in the violation of Labor Law article 8; and

Anthony Pergola knowingly participated in the violation of Labor Law article 8; and

On June 14, 2013 the Department issued a Notice to Withhold Payment to the Department of Jurisdiction for direct withholding in the amount of \$65,480.14. On August 27,

2013 the Department of Jurisdiction acknowledged that the amount currently withheld as a result of the Notice was \$62,953.34.

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

### **RECOMMENDATIONS**

Based upon the default of the Respondents in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that Sub underpaid its workers \$17,495.90 on Project PW08 2013003842, PRC No.2012010334; and

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

DETERMINE that 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 involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Peter M. Pergola is an officer of Sub; and

DETERMINE that Anthony Pergola is an officer of Sub; and

DETERMINE that Anthony Pergola is a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of Sub; and

DETERMINE that Peter M. Pergola is a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of Sub; and

DETERMINE that Anthony Pergola knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Peter M. Pergola knowingly participated in the violation of Labor Law article 8; and

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

DETERMINE that Prime is responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 8; and

ORDER that the Bureau compute the total amount due (underpayment of \$17,495.90, interest at 16% from date of underpayment and 25% civil penalty); and

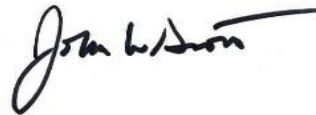
ORDER that Department Of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that if the 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: January 17, 2017  
Albany, New York

Respectfully submitted,



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John W. Scott, Hearing Officer  
Administrative Adjudication