

IN THE MATTER OF

ORA PLUMBING HEATING & CONTRACTING, LLC

Prime Contractor

and

AINSLEY O'CONNOR

Individually as President and as a shareholder who owns or control at least ten percent of the stock of

ORA PLUMBING HEATING & CONTRACTING, LLC

A proceeding pursuant to Article 8 of the Labor Law to determine whether a contractor paid the rates of wages or provided the supplements prevailing in the locality to workers employed on a public work project.

**REPORT  
&  
RECOMMENDATION  
ON  
STIPULATION**

Prevailing Rate Case  
08-08113; 05-07771  
Westchester County

To: Honorable M. Patricia Smith  
Commissioner of Labor  
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on June 23 and August 25, 2009. 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 Ora Plumbing Heating & Contracting, LLC ("Prime") complied with the requirements of Article 8 of the Labor Law (§§ 220 *et seq.*) in the performance of two public work contracts involving plumbing and associated work on (1) the Franko Elementary School ("Project 1") and (2) the Thorton High School ("Project 2") for the Mount Vernon City School District.

## **APPEARANCES**

The Bureau was represented by Department Counsel, Maria Colavito (Richard Cucolo, Senior Attorney, of Counsel). Ainsley O'Connor appeared on behalf of the Prime and himself.

## **FINDINGS AND CONCLUSIONS**

On April 30, 2009, the Department duly served a copy of the Notice of Hearing on Ainsley O'Connor and the Prime, via regular and certified mail, return receipt requested. A signed a Return Receipt evidencing receipt of the document by Ainsley O'Connor and the Prime was entered into evidence as Hearing Officer Exhibit 1. The Notice of Hearing scheduled a June 23, 2009 hearing. The Notice of Hearing alleges that the Prime underpaid wages and supplements to its workers and that Ainsley O'Connor is the Prime's president and a shareholder who owns or controls at least 10% of its outstanding stock. At the hearing, Ainsley O'Connor testified that he is the sole shareholder of the Prime.

Although the Prime failed to file an Answer to the charges contained in the Notice of Hearing, it did appear at the hearing through its sole shareholder, Mr. O'Connor. At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator and documents describing the underpayments, supporting the Bureau's charges that the Prime underpaid its workers on Projects 1 and 2 by paying apprentice rates to unregistered apprentices who should have been paid at the journeyman rate.

During the course of the hearing, Mr. O'Connor stipulated to the Bureau's computation of underpayments set forth in audits entered in evidence as Department Exhibits 12 and 27. In addition, he stipulated to an underpayment computation for Everton Scott, who was not included in the Department's original audits, of four 35-hour weeks on Project 1 and twelve 35-hour weeks on Project 2, to be calculated at the building laborer rate set forth in the applicable prevailing wage rate schedules. He further stipulated that the underpayments on the two projects would result in a determination of two separate willful violations of Article 8 of the Labor Law. A copy of that stipulation is annexed hereto as Exhibit "A" (the "Stipulation"). Pursuant to that Stipulation, the

Department agreed to revise its audit to include the Everton Scott computation and Mr. O'Connor was to be provided with an opportunity to review the revised audit so he could indicate whether he had any objection to the Everton Scott computation based of the aforesaid stipulated methodology.

After the hearing, a revised audit was forwarded to Mr. O'Connor that computed the underpayment for Everton Scott. In an undated letter to Department Counsel, received in Counsel's Office on October 8, 2009, Mr. O'Connor objected to the calculation presented without particularizing the objection.<sup>1</sup>

Based on the Stipulation, and the objection to the Everton Scott calculation, the only issues to be determined are the accuracy of the Everton Scott calculation and the amount of civil penalty to be imposed. With regard to the former issue, a review of the revised audit discloses that the Bureau calculated the Everton Scott underpayment in accordance with the aforesaid stipulated methodology.<sup>2</sup> With regard to the latter, the record discloses that the prime is a small contractor that was engaged in its first public work contract. The issue of improper rate payment to unregistered apprentices did not arise until after the work was completed. The Prime was cooperative in the Bureau's investigation of the projects. Although Mr. O'Conner should have been aware of the apprenticeship registration requirements because he was in receipt of the contract and project specifications, it does not appear that he was actually aware of the violations at the time they occurred. Under the circumstances, a ten percent (10%) civil penalty is warranted.

## **RECOMMENDATIONS**

Based upon the Respondents Stipulation on the record, and upon the sworn and credible testimonial and documentary evidence adduced at hearing in support of those charges contained in the Notice of hearing, I recommend that the Commissioner of Labor

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<sup>1</sup> The two sentence letter states: "This is to inform you I am in receipt of the transcript in the above mentioned case of which the audit indicate [sic] prevailing rate for Everton Scott. I object to the calculations that you presented." That letter was provided to the Hearing Officer by email transmission from the Department's counsel on October 9, 2009.

<sup>2</sup> The Audit for Project 1 calculated for four 35-hour weeks applying the building laborer rate established in the 2007 prevailing wage rate schedule and the Audit for Project 2 calculated for twelve 35-hour weeks applying the building laborer rates established in the 2006 and 2007 prevailing wage rate schedules, which is consistent with the stipulated methodology.

make the following determinations and orders in connection with the issues raised in this case:

DETERMINE that the Prime underpaid its workers \$46,860.16 on Project 1;

DETERMINE that the Prime underpaid its workers \$89,573.11 on Project 2;

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

DETERMINE that the failure of the Prime to pay the prevailing wage and supplement rate on each of the two projects constitutes two separate “willful” violations of Article 8 of the Labor Law;

DETERMINE that Ainsley O’Connor is a shareholder of the Prime who owned or controlled at least ten per centum of its outstanding stock;

DETERMINE that the Prime be assessed a civil penalty in the amount of 10% of the underpayment and interest due; and

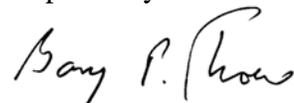
ORDER that the Bureau compute the total amount due (underpayment, interest at 16% from date of underpayment and 10% civil penalty);

ORDER that upon the Bureau’s notification, the Prime shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at 120 Bloomingdale Road, Room 204, White Plains, NY 10605; and

ORDER that the Bureau compute and pay the appropriate amount due for each employee on the Project, and that any balance of the total amount due shall be forwarded for deposit to the New York State Treasury.

Dated: October 16, 2009  
Albany, New York

Respectfully submitted,



Gary P. Troue, Hearing Officer