

In the Matter of

FAHS CONSTRUCTION GROUP, INC., and MAYNARD  
FAHS, JR. and STEVE G. KUCERAK, SR., as officers  
and/or shareholders of FAHS CONSTRUCTION GROUP,  
INC.;

Prime Contractor,

and

ZISKE-KRAFT WERKS, INC. d/b/a KRAFTWERKS,  
and WILLIAM KRAFT, JR., as an officer and/or shareholder  
of ZISKE-KRAFT WERKS, INC.;

Subcontractor,

and

RICH T CONSTRUCTION, and RICHARD TIMIAN, as  
officer and/or shareholder of RICH T CONSTRUCTION;

Sub-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 rehabilitation of  
Physical Science Building at the State University of New  
York College of Oneonta.

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

**DEFAULT REPORT &  
RECOMMENDATION**

Prevailing Wage Rate  
PRC No. 2013011212  
Case ID: PW00 2016011097  
Otsego County

Pursuant to a Notice of Hearing issued on June 5, 2018, a hearing was held on September 26, 2018 in Albany, New York, and by videoconference with Syracuse, New York<sup>1</sup>. 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 Rich T Construction (“Sub”) a subcontractor of intermediate contractor Ziske-Kraft Werks, Inc. d/b/a Kraftwerks (“Ziske-Draft Werks”) which was in turn a subcontractor to Fahs Construction Group, Inc. (“Prime”) complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving the rehabilitation of the Physical Science Building at the State University of New York College at Oneonta, located in Oneonta, New York, Otsego County (“Project”) for the State University Construction Fund (“Department of Jurisdiction”).

### **APPEARANCES**

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

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

Prime appeared through its attorneys, Pope, Schrader & Pope.

Ziske-Draft Werks appeared through its attorneys, Rupp, Baase, Pfalzgraf & Cunningham.

### **FINDINGS AND CONCLUSIONS**

On June 29, 2018, the Department duly served a copy of the Notice of Hearing on Sub, via regular and certified mail, return receipt requested using the last four known addresses of Sub. One of the certified mailings was returned signed by a representative of the Sub. (Hearing Officer Ex. 2). Two of the four regular mail envelopes were not returned to the Department. The Notice of Hearing scheduled a September 26, 2018 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

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<sup>1</sup> The prime contractor’s attorney requested and was granted the ability to appear by phone with a representative of the Prime.

Prime and Ziske-Draft Werks each filed an Answer with the Department (Hearing Officer Ex. 3 and Ex. 4).

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

The Notice of Hearing alleges that Sub willfully underpaid prevailing wages and supplemental benefits to one of its workers, and that those underpayments involved the falsification of payroll records. It also alleges that the Prime is responsible for Sub's underpayments pursuant to Labor Law § 223.

At the hearing, pursuant to a stipulation entered into on the record between Prime, Ziske-Draft Werks, and the Department, Ziske-Draft Werks paid the amount of the underpayment the Bureau had determined Sub owed, with interest at 10% and civil penalty at 20% - a total of \$2,067.36 - which payment the Bureau deemed sufficient to resolve Prime's Article 8 liability.<sup>2</sup> (Hearing Officer Ex. 6)

After the stipulation was recited into the record, Prime and Ziske-Draft Werks departed from the hearing, and the Department commenced with a default proceeding against the Sub.

At the hearing, the Department produced substantial and credible evidence, including the sworn testimony of the Bureau investigator 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

Ziske-Draft Werks entered into a subcontract with Prime for work on the Project; and

Sub entered into a subcontract with Ziske-Draft Werks for work on the Project; and

Sub willfully underpaid \$1,411.50 to one worker during the week ending 7/17/16; and

Richard Timian, Sr. is the sole owner of Sub; and

Richard Timian, Sr. knowingly participated in Sub's violation of Labor Law article 8;

and

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<sup>2</sup> Said Stipulation of Settlement is recited commencing on page fifteen of the transcripts of this proceeding.

The willful violation of Sub and Richard Timian, Sr. involved the falsification of payroll records under Labor Law Article 8<sup>3</sup>, and

Sub willfully underpaid \$1,411.50 to one of its workers during the week ending July 17, 2016.

Sub had no prior history of violations (although a second Notice of Hearing has been issued against the Sub), was uncooperative with the investigation, and violated the Labor Law by falsifying payroll records, failing to properly list one of its workers on the certified payrolls and failing to pay the employee the prevailing rate of wages and supplements required by law. The Department presented no evidence with regard to the size of Respondent's business, although the certified payrolls indicate that it was a small family owned business consisting of fewer than three employees including its owner/officer.<sup>4</sup>

On April 18, 2018, the Office of the State Comptroller withheld \$2,611.28 from Prime.

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

## RECOMMENDATIONS

Based upon the default of the Sub in answering or contesting the charges contained in the Department's Notice of Hearing, and upon the sworn and credible testimonial and documentary

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<sup>3</sup> The Department requested a finding that Sub falsified its payrolls. The Department relied upon Sub's payrolls to obtain the hours and time period the Sub worked on the Project, and they relied on the interview of the employee conducted by the Bureau to verify the hours worked and to determine the hourly rates paid. Since the certified payrolls excluded the employee at issue, the Department found that the payroll records were inconsistent with the employee's statement that he worked on the project as a carpenter during the week ending July 17, 2016. Labor Law § 220-b (3) (b) (1) 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. 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). Here, the Department found the certified payrolls were false given the fact the employee interviewed did not appear in the certified payroll submitted to the jurisdiction during the week in question, and the employee received a rate of pay substantially under the amount required to be paid in that county for a prevailing wage project he was a part of.

<sup>4</sup> While the Department requested a penalty of 25%, it only presented oral testimony with regard to the statutory factors used to determine the civil penalty; of the factors named, it presented evidence relevant to only four. The Commissioner of Labor, or his designated representative, may reduce the civil penalty to an amount less than that which would otherwise be assessed in accordance with the criteria enumerated in subdivision 8 of section 220 and subdivision 2 of section 220-b of the Labor Law, where uncontroverted evidence exists of some, but not all, of the factors set forth therein; *i.e.* size of the employer' business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other nonwage requirements, controls in determining the appropriate civil penalty to be assessed.

evidence adduced at the hearing in support of those charges, and based upon the record as a whole, 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 one of its workers prevailing wages and supplements in the amount of \$1,411.50 on the Project; 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 involved the falsification of payroll records under Labor Law article 8; and

DETERMINE that Richard Timian, Sr., was the owner and officer of Sub; and

DETERMINE that Richard Timian, Sr. knowingly participated in the violation of Labor Law article 8; and

DETERMINE that as a result of Sub and Richard Timian, Sr. knowingly participating in the falsification of payroll records within the meaning of Labor Law article 8, both the entity and the individual are ineligible to submit a bid, on or be awarded any public contract with the state, any municipal corporation or public body for a period of five years.

DETERMINE that Sub be assessed a civil penalty in the amount of 20% of the underpayment and interest due; and

ORDER that the Bureau compute the total amount due (underpayment of \$1,411.50, interest at 16% from date of underpayment and 20% civil penalty); and

ORDER that Prime has fully satisfied its liability under Labor Law article 8; and

ORDER that Sub shall receive a credit for the \$2,067.36 paid by Ziske-Draft Werks<sup>5</sup>; and

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<sup>5</sup> As stipulated to on the record, nothing in this Default Report and Recommendation prevents Prime or Ziske-Draft Werks from pursuing the Sub for the credits paid. (T. p. 20)

ORDER that the Bureau shall calculate the difference between an interest amount of 10% and one of 16% and also calculate the amount of penalty at 20%, thereby arriving at the outstanding balance that remains unpaid; and

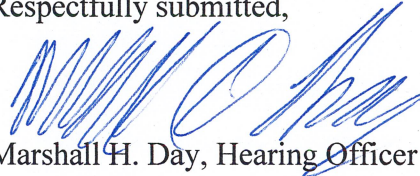
ORDER that upon the Bureau's notification, Sub shall immediately remit payment of the total amount due, made payable to the Commissioner of Labor, to the Bureau at: State Office Building Campus, Bldg. 12, Room 130, Albany, NY 12240; and

ORDER that the Department of Jurisdiction shall release any withheld funds to Prime; and

ORDER that the Bureau compute and pay the appropriate amount due to the 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 11, 2018  
Albany, New York

Respectfully submitted,



Marshall H. Day, Hearing Officer