

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

THE LANE CONSTRUCTION CORP., and
ROBERT E. ALGER, MICHAEL M. COTE
and DONALD P. DOBBS as shareholders of
THE LANE CONSTRUCTION CORP.,

Prime Contractor,

and

TESTA CORP., and STEVEN TESTA, as an officer
and/or shareholder of TESTA 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 known as the rehabilitation
of the Interstate 87 Bridge in the Towns of Colonie, New York
and Halfmoon, New York.

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DEFAULT
REPORT
&
RECOMMENDATION

Prevailing Wage Rate
PRC No. 2012002729
Case ID: PW01 2013009432
Albany County

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

Pursuant to a Notice of Hearing issued on May 11, 2016, a hearing was held on June 23, 2016 in Albany, 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 Testa Corp. ("Sub") a subcontractor of The Lane Construction Corp. ("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 Interstate 87 Bridge over the Mohawk River in the towns of Colonie and Halfmoon, New York (“Project”) for the New York State Department of Transportation (“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, Larissa C, Bates, Senior Attorney, of Counsel.

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

Prime appeared and entered into a Stipulation to pay the amount of the underpayment the Bureau determined Sub owed with interest in advance of the hearing.

FINDINGS AND CONCLUSIONS

On May 17, 2016, the Department duly served a copy of the Notice of Hearing on Prime and Sub, via regular and certified mail, return receipt requested. Return Receipts evidencing receipt of the document by Prime and the Attorney for Prime were entered into evidence as Hearing Officer Exhibit 3. The Return Receipts evidencing receipt of the document by Sub was not received but the regular mail envelopes were not returned to the Department. On June 3, 2016, the Department personally served a copy of the Notice of Hearing on Sub by service on the New York State Department of State (See, Hearing Officer Exhibit 4). The Notice of Hearing scheduled a June 23, 2016 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

Prime entered into a Stipulation dated June 21, 2016, and paid \$39,064.60, the amount alleged by the Department to be owed by Sub as an underpayment, inclusive of interest at a rate of 8% per annum, which payment the Bureau deemed sufficient to resolve Prime’s Article 8 liability (DOL Ex. 21). Attached to the Stipulation Prime submitted an affidavit, unopposed by the Department, 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.

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 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 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 \$34,580.42 to its workers for the audit period weeks ending 09/08/2012 to 03/27/2015; and

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

Steven Testa is an officer of Sub; and

Steven Testa knowingly participated in the violation of Labor Law article 8; and

On January 3, 2014, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$133,650.00.

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

RECOMMENDATIONS

Based upon the default of Sub 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 \$34,580.42 on Project PW 01 2013009432, PRC No. 2012002729; 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 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 Steven Testa is an officer of Sub; and

DETERMINE that Steven Testa 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 has paid \$39,064.60 in underpayments and interest required to fully satisfy its vicarious liability under Labor Law article 8 and, pursuant to the Stipulation, the Department will release to the Prime all funds currently withheld by the New York State Comptroller’s Office; and

ORDER that the Bureau compute the total amount due (underpayment of \$34,580.42, interest at 16% from date of underpayment and 25% civil penalty); and

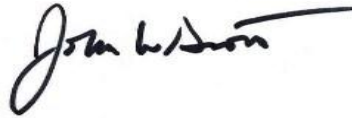
ORDER that Sub shall receive a credit for the \$39,064.60 paid by Prime; and

ORDER that upon the Bureau’s notification, Sub shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at: The Department of Labor, Bureau of Public Work, State Office Campus, Building 12, Room 134A, Albany, NY 12240; 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,

A handwritten signature in black ink, appearing to read "John W. Scott", with a long horizontal flourish extending to the right.

John W. Scott, Hearing Officer
Administrative Adjudication