STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

V.M.K. Corp.; and RICHARD MACONE,
as a shareholder of V.M.K. Corp.;

REPORT
&
RECOMMENDATION

Prime Contractor,

and

TURBO GROUP, INC.; and STEVEN P. SUCATO,
SANDRA SUCATO, and VICTOR GUARQUILLA,
as officers and/or shareholders of TURBO GROUP, INC.;
and its successors or substantially owned-affiliated entities
TURBO GROUP USA, INC. and TURBO GROUP, LLC;

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 Dormitory Authority
of the State of New York.

Prevailing Wage Rate
PRC No. 2009002122
Case ID: PW012009010954
Ulster County

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

Pursuant to a Notice of Hearing issued on May 19, 2015 and a Notice of Adjournment and Rescheduled Hearing issued on September 16, 2015, a hearing was held on November 3, 2015, in Albany, New York and New York, New York by videoconference 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 Trubo Group, Inc. (“Sub”) a subcontractor of V.M.K. Corp (“Prime”), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the roof

removal and installation of a new roof system, with associated asbestos abatement, at College/Shango Hall, College of New Paltz ("Project") for the Dormitory Authority of the State of New York ("Department of Jurisdiction/DASNY").

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).

Sub appeared *pro se* and did not file an Answer to the charges incorporated in the Notice of Hearing**.**

Prime failed to appear at the hearing or 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 Turbo Group, LLC a "successor or substantially owned-affiliated entity"?[1]
5. Is Turbo Group, USA, Inc. a "successor or substantially owned-affiliated entity"?

[1] The Department alleged in the Notice of Hearing that Turbo Group, LLC is a successor/substantially owned –affiliated entity of Turbo Group, Inc. At the hearing, the attorney for the Department withdrew this allegation. T. 16.

6. Is Sandra Sucato a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
7. Is Victor Guarquilla a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
8. Is Steven P. Sucato a shareholder of Sub who owned or controlled at least ten per centum of the outstanding stock of the Sub?
9. Is Richard Macone a shareholder of Prime who owned or controlled at least ten per centum of the outstanding stock of the Sub?
10. Is Steven P. Sucato an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
11. Is Sandra Sucato an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
12. Is Victor Guarquilla an officer of Sub who knowingly participated in a willful violation of Labor Law article 8?
13. Should a civil penalty be assessed and, if so, in what amount?
14. Is Prime responsible for the underpayment, interest and civil penalty due pursuant to its liability under Labor Law article 8

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 between Prime and DASNY, to remove the existing roof and install a new roof system, with associated asbestos abatement, at College/Shango Hall, College of New Paltz. (PRC No. 2009002122).

The investigation of the Project was commenced as a result of an employee complaint received by the Bureau on September 29, 2009, which alleged that the complainant had worked on the Project as a working supervisor whose job required him to remove asbestos flashing from parapet walls on the roof. The complainant alleged that he was not paid the proper prevailing wages and supplemental benefits for the Project (DOL Ex. 1; T. 23-30).

Prime entered into a contract with the Department of Jurisdiction on June 9, 2009, and Richard Macone signed the contract as president of Prime (DOL Ex. 4; T. 37-38).

Prime entered into a subcontract with Sub on May 28, 2009 and Steven P. Sucato signed as an officer of Sub (DOL Ex. 6; T. 40-42). The subcontract involved the removal and disposal of approximately three thousand, three hundred linear feet of asbestos-containing material, including flashing that extended up the parapet wall one foot, and that went out two feet onto the roofing field. The total quantity of asbestos-containing material to be removed was ten thousand square feet. (T. 42-43).

The Project involved the employment of laborers, workers, or mechanics as roofers on this public work project, and the Department issued a Prevailing Wage Rate Schedule ("PRS") for the Project for the period of time that work was performed by Sub (DOL Ex. 7; T. 42-44).

Sub prepared certified payrolls for the Project, certified to by Michael Wynn, as Office Manager of Sub (DOL Ex. 8; T. 48). In the certified payrolls for the Project, Sub classified its workers as laborers (DOL Ex. 8). The Bureau determined that, based upon the nature of the work performed on the contract, the workers should be properly classified in the roofer classification (T. 43-44). The PRS in effect at the time of the Project set forth the appropriate roofer's wages for the workers on the Project of $36.25 in wages and $26.59 in supplemental benefits (DOL Ex. 7, T. 44).

The Bureau received these certified payrolls from Sub (DOL Ex. 8; T. 45). The Bureau determined that the certified payrolls submitted by Sub were false in that they, *inter alia*, falsely reported that the employees were paid the correct wages and supplements and that supplements were paid to the union. (T. 48-50, 87-89). The Bureau nevertheless relied on the certified payrolls, in conjunction with the employee complaint and log entries (DOL Ex. 1), to establish the employees' days and hours worked (T. 60, 70). To establish the rate the contractor paid the employees, the Bureau relied on an employee's complaint and the hourly rate shown in the certified payroll records (DOL Ex. 8).

Sub failed to pay its workers the wages and supplemental benefits as required by the relevant PRS (DOL Exs. 7, 8; T. 60-62). The Bureau's audits compared the rates that should have been paid in the roofer classification according to the relevant PRS against the rates the Bureau determined Sub actually paid for the hours the employees worked on the Project in order to calculate the underpayment determined due (DOL Ex.7; T.43-44).

During the Project Sub had meetings and discussions with Robin Matusak, the initial Public Work Investigator on this case (T. 22), regarding the proper classification of the workers on the Project and the wages and supplemental benefits that were required to be paid to the workers performing work as roofers pursuant to the relevant PRS (T. 88-89). As a result of these discussions, Steven P. Sucato and the Sub were instructed as to the proper classification and wages to be paid the workers (T. 136-138). Sub thereafter made direct payments to the workers that were applied to reduce the underpayment of wages and supplemental benefits. (DOL Exs. 8, 9, 11; T. 71-73).

The Department issued a detailed calculation of underpayment of wages and supplemental benefits due to Sub's workers for the period of weeks ending 7/12/2009 through 9/9/2009 (DOL Ex. 11). The underpayments, not including interest, amounted to $34,927.80 for 36 workers on the Project (DOL Ex. 11).

On 8/5/2011 the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of $81,946.62 (DOL Ex. 13). No funds were withheld pursuant to the Notice to Withhold Payment (DOL Ex. 13; T. 76-77).

The Department alleged in the Notice of Hearing that Turbo Group, LLC is a successor/substantially owned–affiliated entity of Turbo Group, Inc. At the hearing, the attorney for the Department withdrew this allegation (T. 16).

The Department offered evidence indicating that Sandra Sucato signed the Certificate of Incorporation of Turbo Group, Inc. (DOL Ex. 14; T. 78), that Steven P. Sucato was the President of Turbo Group, Inc. and Turbo Group USA, Inc. (DOL Exs. 14, 15, 16; T. 79, 81, 83-84, 85), and that Turbo Group, Inc. and Turbo Group U.S.A., Inc. shared the same address (DOL Exs. 14, 15, 16; T. 79, 81, 83-84, 85). The Department also offered evidence indicating that Vincent Guarquilla was an agent for service of process for Turbo Group USA, Inc. (DOL Ex. 16; T. 89).

During the course of the hearing the Department produced substantial and credible evidence, including sworn testimony of the Bureau investigator and documents describing the underpayments, which supported the Bureau's charges as contained in the Notice of Hearing (HO Ex. A).

The witnesses for the Sub testified that they were initially unaware that the correct classification for workers on the Project was roofer (T. 94,132-133, 136). Approximately two

weeks after the start of the Project, the Sub was instructed by Public Work Investigator Robin Matusak that the proper classification was roofer and that all workers were to be paid the wages and supplemental benefits as indicated in the relevant section of the PRS (T. 137). During the hearing the Sub did not dispute the Department's classification of the workers as roofers, that workers should have been paid wages and supplements pursuant to the relevant PRS, or that there were underpayments (T. 112, 119). In consultation with Robert Matusak, Sub made payments to the workers in the amount of $6607.72, as make-up payments to the workers (DOL. Exs. 8, 9, 11; T. 54-56, 109). Additionally, the witnesses for the Sub testified that the Sub also paid $6000.00 into the union as supplemental benefits for the workers, (T. 120). The Department was never able to confirm this payment to the union (T. 52). Sub requested an opportunity following the conclusion of the hearing to present proof of the alleged payments of these supplemental benefits to the union. Sub was granted time after the hearing concluded to produce this evidence but as of the date of this Report and Recommendation the Sub has failed to produce any evident of such payments (T.148, 154).

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 the roof removal and installation of a new roof system, with associated asbestos abatement, at College/Shango Hall, College of New Paltz for the Dormitory Authority of the State of New York, which required construction-like labor paid for by public funds. Finally, the work product, here the replacement of a roof system and asbestos removal at a building at the College of New Paltz, 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]).

Sub classified its workers as laborers/asbestos workers. The Department investigator classified Sub's workers as roofers. During the hearing Sub did not contest the Department's classification or offer any evidence tending to show that the Department's classification was incorrect. Accordingly, the Department properly classified the workers on the Project as roofers.

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]).

The Bureau determined that the certified payrolls submitted by the Sub were false. However, the Bureau did rely on these payrolls, in conjunction with the employee complaint form, logs, project registers, and some of the spreadsheets submitted by Sub and the claimant to determine the days and hours worked by the employees (T. 58-59). The Bureau relied on the certified payrolls to determine the wages paid the workers and whether any supplemental benefits were paid to or on behalf of the workers. However, since Sub indicated in the certified payrolls that supplemental benefits were paid to the local unions on behalf of the employees and deducted these supplemental benefits from the employees' pay as voluntary deductions when, in fact, these benefits were not paid to the unions, the Bureau Investigator collected that money for the employees as an adjustment on the Department's audit (DOL Exs. 10, 11).

In light of Sub's inaccurate payroll records on the Project, the Bureau was entitled to use information from employee complaint forms, employee logs, project registers, and some of the spreadsheets submitted by Sub. *Matter of A. Uliano & Son. Ltd. v. New York State Department of Labor*, 97 AD3d 664, 667 (2d Dept. 2012); *Matter of Georgakis Painters Corp. v Hartnett*, 170 AD2d 726, 728 (3d Dept 1991); *Matter of Naftilos Painters Painting and Sandblasting, Inc. v Hartnett*, 173 AD2d 964, 967 (3d Dept 1991). The Bureau's reliance on the foregoing documents, and the inferences drawn therefrom, was necessitated by Sub's failure to maintain accurate records for the Project and the Bureau's determinations have a rational basis and are supported by substantial evidence.

The Bureau determined the rates that should have been paid for the time the employees worked in the roofer classifications by reference to the PRSs in effect at the time. By multiplying the appropriate rates by the hours worked in the roofer classifications, the Bureau determined the wages and supplements that should have been paid on the project. It then compared the prevailing wages and supplements that should have been paid against what Sub actually paid and thereby determined the underpayments on the project. With regard to the Bureau's determination not to credit any supplemental benefit payments other than the make-up payments reflected in the Bureau's audit, it is the employer's responsibility to prove that it paid the supplemental benefits to employees engaged on the public work project. 12 NYCRR § 220.2 (c) (1). The regulations expressly provide that the failure to do so shall result in an investigative finding that the supplements were not paid. 12 NYCRR § 220.2 (c) (3). As Sub failed to provided actual proof of payment of those benefits to the employee or the local union, the Bureau correctly found that they were not paid.

The Bureau's methodology for determining the underpayments on the projects is reasonable and supported by substantial evidence.

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) [2] 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

[2] "When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, 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, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination." Labor Law § 220-b (3) (b) (1), as amended effective November 1, 2002.

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 record does not contain any indication that Sub was informed by Prime that this was a public work project or provided a copy of the applicable PRS. The subcontract offered by the Department (DOL Ex. 6) is just a written proposal from Sub to Prime that contains no reference to these issues. Also, there is no evidence that Sub was an experienced public work contractor or that sub had any other dealings with the Bureau prior to this contract. However, the record contains evidence that Bureau Investigator Matusak educated Steven P. Sucato and Sub that they were required to pay the workers prevailing wages and supplemental benefits, and that Matusak actually explained to Sub that they had to pay roofer rates as opposed to laborer rates. Regardless of Matusak's instructions Sub still underpaid the workers both wages and supplemental benefits. Sub offered no evidence indicating even substantial compliance with the applicable PWRs other than lack of knowledge of the proper worker classification at the time the project commenced and their unsupported allegation that the supplemental benefits they indicated as being paid to the workers in the certified payrolls were paid to the local union.

Based upon the foregoing, the record supports a finding that Sub knew prior to the completion of the Project that its employees were not being paid at the roofer rates for wages and supplemental benefits as required by the applicable PRS or being paid the supplemental benefits reflected in the certified payroll records. The record supports a finding that the underpayments of wages and supplemental benefits constitutes a willful violation of Labor Law §220.

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).

It is clear from the record that Sub failed to meet its obligation to maintain true and accurate payroll records. The information contained in the payroll records was inconsistent with information gleaned from the employee complaint form, employee logs, and project registers. Additionally, and more significantly, the payroll records indicate that supplemental benefit payments were paid on behalf of the employees to the local unions when the record contains no evidence to support a finding that the supplemental benefits were, in fact, paid. The false reporting of the payment of supplemental benefits demonstrates an intention to deceive and constitutes payroll falsification.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

Labor Law § 220 (3) (b) (1) provides that any successor or substantially owned-affiliated entity of the contractor shall likewise be ineligible to bid on, or be awarded public work contracts for the same period as the contractor.

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).

The record indicates that Turbo Group, Inc. was involved in an asbestos abatement business, that Steven P. Sucato was president of this corporation, and Sandra Sucato signed the Certificate of Incorporation for this corporation. The record also indicates that Turbo Group, Inc. and Turbo Group USA., Inc. shared the same address and that Steven P. Sucato was the Chief Executive Officer and an agent for service of process for both corporations. The Department also offered evidence indicating that Vincent Guarquilla was an agent for service of process for Turbo Group USA., Inc. Finally, the Department withdrew all allegations against Turbo Group, LLC. The record contains no evidence of the nature of the business of Turbo Group USA, Inc. or whether there were any indicia of a controlling ownership interest by one of these corporations over the other.

Based upon the record, I find that Turbo Group, Inc. and Turbo Group USA, Inc. are not substantially owned –affiliated entities or successors within the meaning of Labor Law § 220 (3) (b) (1).

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.

The record contains documentary evidence establishing that Steven P. Sucato was an officer of Sub at the time the Project was performed and in that capacity is subject to the same bidding ineligibility as Sub.

The record lacks sufficient evidence to determine whether Sandra Sucato or Victor Guarquilla was an officer of Sub, or that Steven P. Sucato, Sandra Sucato or Victor Guarquilla was a shareholder of Sub.

In the Notice of Hearing the Department requests a finding that Richard Macone was a shareholder of Prime at the time the work was performed on the Project. The record contains insufficient evidence to make this determination. However, this finding is irrelevant to this proceeding. It is established that the liability of the prime contractor for any noncompliance of a sub arises under Labor Law § 223, and the prime's shareholders and officers are not subject to the bidding ineligibility provisions of Labor Law § 220-b (3) (b) (1) on the basis of its subcontractor's willful violations 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. The willful underpayment of $34,927.80 to thirty-six employees, which involved the falsification of payroll records, are serious violations involving bad faith that justifies the maximum penalty sought by the Department, to-wit: 25% of the total amount due on the Project.

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.

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 $34,927.80; 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 Turbo Group USA, Inc. and Turbo Group, LLC were not "substantially owned-affiliated entities" of Turbo Group, Inc. on the Project;

DETERMINE that Seven P. Sucato is an officer of Sub; and

DETERMINE that neither Sandra Sucato nor Victor Guarquilla were officers or shareholders of Turbo Group, Inc. on the Project; and

DETERMINE that Steven P. Sucato 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

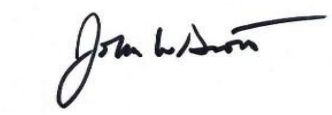
ORDER that the Bureau compute the total amount due (underpayment, interest, and civil penalty); and

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 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: June 10,2016
Albany, New York

Respectfully submitted,



John W. Scott, Hearing Officer