

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

Xavier Construction Co., Inc.; and Frank Acocella, as an officer and/or shareholder of Xavier Construction Co., Inc. and its substantially owned-affiliated entities, Xavier Contracting, LLC, Xavier Enterprises, LLC, and Esquire Realty Company, LLC

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

Prime Contractor,

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 Town of Eastchester, State of New York.

Prevailing Wage Rate  
PRC No. 2009000979  
Case ID: PW082010027650  
Westchester 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 March 8, 2016, a hearing was held on May 3, 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 Xavier Construction Co., Inc., ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a public work contract involving alterations to the multi-purpose room at the Eastchester Public Library ("Project") for the Town of Eastchester ("Department of Jurisdiction").

## **HEARING OFFICER DESIGNATION**

Jerome Tracy 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 Prime.

## **FINDINGS AND CONCLUSIONS**

On April 27, 2016, 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 Counsel for Prime was entered into evidence as Hearing Officer Exhibit 2. In addition, the regular mail envelope sent to Prime was not returned to the Department. The Notice of Hearing scheduled a May 3, 2016 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

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

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

Prime willfully underpaid \$4721.45 to its workers for the audit period weeks ending 8/28/09 to 9/4/09; and

Frank Acocella is an officer of Prime; and

Frank Acocella knowingly participated in the violation of Labor Law article 8; and<sup>1</sup>  
Prime was not cooperative during the Department's investigation and the violations involved were serious.

### **RECOMMENDATIONS**

Based upon the default of the Respondent 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 Prime underpaid its workers \$4721.45 on the Project; and

DETERMINE that 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; and

DETERMINE that the failure of Prime to pay the prevailing wage or supplement rate was a "willful" violation of Labor Law article 8; and

DETERMINE that Frank Acocella is an officer of Prime; and

DETERMINE that Frank Acocella knowingly participated in the violation of Labor Law article 8;

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

ORDER that the Bureau compute the total amount due (underpayment of \$4721.45, interest at 16% from date of underpayment and 25% civil penalty); and

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<sup>1</sup> In the Notice of Hearing, the Department alleged "upon information and belief" that there were multiple substantially owned – affiliated entities related to Prime. However, the only relevant evidence in the record is a series of corporate documents obtained from the New York State Department of State, showing similar addresses and a recurring corporate officer. There was no proof offered concerning relevant factors such as similar contracts, work, employees, etc., upon which such a finding could be made, nor did Department Counsel address this matter in other than a cursory fashion in opening and closing statements. Accordingly, no finding that there exist substantially owned – affiliated entities can be made.

ORDER that upon the Bureau's notification, 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: June 7, 2016  
Albany, New York

Respectfully submitted,

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

Jerome Tracy, Hearing Officer