

STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

DALRYMPLE GRAVEL and CONTRACTING
COMPANY, INC.; and DAVID J. DALRYMPLE, as a
shareholder of DALRYMPLE GRAVEL and
CONTRACTING COMPANY, INC.,

Prime Contractor,

and

CENTRAL TRAFFIC CONTROL, LLC; and SHANE BURDICK
and KATIE BURDICK as officers and/or managing members of
CENTRAL TRAFFIC CONTROL, LLC; and/or SHANE BURDICK
and KATIE BURDICK T/A CENTRAL TRAFFIC CONTROL, LLC;
and EAST COAST PAVING, successor or substantially owned-
affiliated entity of CENTRAL TRAFFIC CONTROL, LLC, and/or
SHANE BURDICK and KATIE BURDICK T/A CENTRAL TRAFFIC
CONTROL, 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
Chemung County Department of Public Works, NY.

Prevailing Rate Case
No. 2016007533
Case ID: PW022016009984
Chemung County

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No. 2016002445
Case ID: PW022016009078
Chemung County

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

Pursuant to a Notice of Hearing issued on April 24, 2017, a hearing was held on June 22, 2017 in Albany, New York and by videoconference with Glendale, 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 Central Traffic Control, LLC ("Sub") a subcontractor of Dalrymple Gravel and Contracting Company, Inc. ("Prime") complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of two public work contracts involving the provision of flagging services in connection with 2016 RFB-1897 HMA Municipal CR 75 (Arnot Rd) CR 64 (Big Flats Rd) PRC # 2016007533 ("Highway Project #1") and 2016 RFB-1870-72 HMA Municipal CR 41 (Federal Road) PRC # 2016002445 ("Highway Project #2") for Chemung County ("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, (Elina Matot, Senior Attorney, of Counsel)

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

Prime was represented by Bond, Schoeneck and King (Subhash Viswanathan, Esq., of Counsel)

FINDINGS AND CONCLUSIONS

On May 4, 2017, the Department duly served a copy of the Notice of Hearing on Prime and Sub, via regular and certified mail, return receipt requested. Signed Return Receipts evidencing receipt of the document by both Prime and Sub were entered into evidence as Hearing Officer Exhibit 3.

The Notice of Hearing scheduled a June 22, 2017 hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing.

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.

Prime filed an Answer to the charges contained in the Notice of Hearing dated June 5, 2017 and appeared personally and by Counsel at the hearing.

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 and Prime produced substantial and credible evidence, including the sworn testimony of the Bureau Senior Investigator Steven C. Barber and Margaret J. Collins, an employee of Prime and the Project Manager for Prime on Highway Project #1 and Highway Project #2, and documents describing the underpayments, which supported the Bureau's charges that:

Highway Project #1

The Highway Project #1 was subject to Labor Law article 8; and

Prime entered into a contract for Highway Project #1 with the Department of Jurisdiction;
and

Sub entered into a contract with Prime for work on Highway Project #1; and

Sub willfully underpaid \$6148.13 to its workers for the audit period weeks ending 09/24/2016 to 10/01/2016; and

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

Shane Burdick is an officer and/or managing Member of Sub; and

Katie Burdick is an officer and/or managing Member of Sub; and

Shane Burdick knowingly participated in the violation of Labor Law article 8; and

Katie Burdick knowingly participated in the violation of Labor Law article 8.

On November 9, 2016, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$8914.79.

Highway Project #2

The Highway Project #2 was subject to Labor Law article 8; and

Prime entered into a contract for Highway Project #2 with the Department of Jurisdiction;
and

Sub entered into a contract with Prime for work on Highway Project #2; and

Sub willfully underpaid \$601.68 to its workers for the audit period weeks ending 10/01/2016 to 10/01/2016; and

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

Shane Burdick is an officer and/or managing Member of Sub; and

Katie Burdick is an officer and/or managing Member of Sub; and

Shane Burdick knowingly participated in the violation of Labor Law article 8; and

Katie Burdick knowingly participated in the violation of Labor Law article 8.

On October 21, 2016, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$9787.24.

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 record indicates that Sub is a relatively small contractor with a limited

workforce. Additionally, there is no history of previous violations as it appears that the projects at issue herein were Sub's first New York public work projects. However, it is beyond dispute that Prime provided Sub with the applicable prevailing wage rate schedule and educated Sub on the necessity of producing accurate certified payroll documents indicating that it paid its workers the prevailing wages and supplemental benefits.

Sub's failure to pay its employees any wages or supplemental benefits on these projects is a serious violation (DOL Ex. 2, 3; T. 65, 67, 84, 87, 163-166, 176, 194). Additionally, Sub's failure to provide accurate certified payroll records and to cooperate with the Bureau in its investigation is indicia of bad faith (T. 84). Finally, the record supports a finding that Sub failed to keep accurate payroll records and modified its payroll records to give the appearance of compliance with Labor Law article 8 (DOL Ex. 9, 10; T. 84, 85, 86-87, 163-164). However, that Sub was a small, unsophisticated contractor with no prior New York public work experience or history of previous violations makes the maximum penalty requested by the Department disproportionate to the underlying offences. I recommend the imposition of a 20% penalty.

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 Projects 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.

12 NYCRR § 221.1 provides that when after a hearing it is determined that a subcontractor failed to pay prevailing wages and/or supplements, and the prime contractor makes restitution, the Commissioner of Labor may waive the civil penalty to be assessed in accordance with subdivision 8 of section 220 and subdivision 2 of section 220-b of the Labor Law, where uncontroverted evidence of all the following factors exist: 1) the prime contractor provided the subcontractor with the applicable prevailing wage rate schedule for the project; 2) the prime

contractor made a good faith effort to assure that the subcontractor complied with all Labor Law requirements; 3) the subcontractor cannot be located, despite the prime contractor having made a good faith attempt to locate the subcontractor; 4) the prime contractor has paid the subcontractor in full in accordance with the terms of the subcontract agreement; 5) the prime contractor has fully cooperated with the Department of Labor's investigation; and 6) the prime contractor will be unable to receive indemnification from the subcontractor for the restitution it has paid.

Prime requests that, pursuant to 12 NYCRR § 221.1, any penalty assessed against Sub be waived or reduced insofar as it would normally apply to Prime under Labor Law § 223. I 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. In Prime's case, it failed to prove and, in fact, admitted that it had not – “paid the subcontractor in full...” as is required by § 221.1 (a) (4). Therefore, the Commissioner may not waive the penalty in full. However, § 221.1 (b) states that, when uncontroverted evidence of some, but not all, of the factors set forth in the regulation exist, the Commissioner may reduce the civil penalty to an amount less than that which would otherwise be assessed. The record demonstrates that Prime provided Sub with the applicable prevailing wage rate schedule for the project (DOL Ex. 9, 10; Prime Ex. 4; T. 166, 176, 180); Prime made a good faith effort to assure that the Sub complied with all Labor Law requirements (T. 166, 176, 180, 189, 192); and Prime has fully cooperated with the Department of Labor's investigation (DOL Ex. 1, 7, 9, 10; T. 167). Additionally, Sub's failure to interpose an Answer in this action or appear at the hearing is some indication the Prime may not be able to locate Sub or obtain indemnification for the restitution paid. I therefore recommend that, in the event the Commissioner needs to collect funds directly from the Prime, the penalty assessed against the Prime be 5% of the amounts due on the projects.

SUBSTANTIALLY OWNED-AFFILIATED ENTITIES

In pertinent part, Labor Law § 220 (5) (g) defines a substantially owned-affiliated entity as one where 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 Bistriani Materials, Inc. v. Angello*, 296 AD2d 495, 497 (2d Dept. 2002).

The Department alleges that East Coast Paving is a substantially owned-affiliated entity of Sub. The record indicates that both entities provide construction related services (DOL Ex. 33, 34) and share the same phone number Prime used to contact Sub throughout the course of their business dealings (DOL Ex. 34; T. 163). In reality, Sub and East Coast Paving may be one and the same entity as Central Traffic Control LLC identifies itself as doing business as East Coast Paving (DOL Ex. 34). As Sub and East Coast Paving provide similar contracting services and appear to share the same business phone and the same business identity, Sub and East Coast Paving should be deemed “substantially owned-affiliated entities” on these Projects.

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

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 from both the Department and Prime 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 \$6148.13 on Project PW022016009984, PRC No. 2016007533; and

DETERMINE that Sub underpaid its workers \$601.68 on Project PW022016009078, PRC No. 2016002445; 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 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 Central Traffic Control LLC and East Coast Paving were “substantially owned-affiliated entities” on these Projects;

DETERMINE that Shane Burdick is an officer and/or managing member of Sub; and

DETERMINE that Katie Burdick is an officer and/or managing member of Sub; and

DETERMINE that Shane Burdick knowingly participated in the violation of Labor Law article 8; and

DETERMINE that Katie Burdick knowingly participated in the violation of Labor Law article 8; and

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

DETERMINE that Prime is responsible for the underpayment, interest and 5% of the civil penalty due pursuant to its liability under Labor Law article 8; and

ORDER that the Bureau compute the total amount due (underpayment of \$6148.13 on Highway Project #1, underpayment of \$601.68 on Highway Project #2, interest at 16% from date of underpayment and 20% civil penalty); and

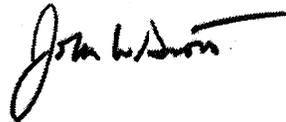
ORDER that Department Of Jurisdiction remit payment of any withheld funds to the Commissioner of Labor, up to the amount directed by the Bureau consistent with its computation of the total amount due, by forwarding the same to the Bureau at: State Office Building, 44 Hawley Street, Room 908, Binghamton, NY 13901; and

ORDER that if the withheld amount is insufficient to satisfy the total amount due, Sub, upon the Bureau’s notification of the deficit amount, shall immediately remit the outstanding balance, made payable to the Commissioner of Labor, to the Bureau at the aforesaid address; 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: March 9, 2018
Albany, New York

Respectfully submitted,

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

John Scott, Hearing Officer