

STATE OF NEW YORK DEPARTMENT OF LABOR

In the Matter of

VMJR Companies, LLC.; and VICTOR MACRI, JR.,
as a shareholder of
VMJR COMPANIES, LLC.;
Prime Contractor,
NICHOLAS DeGREGORY, JR. DBA
NJ DEGREGORY & COMPANY;
and
DBA N.J. DEGREGORY & SONS CONSTRUCTION;

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 Bolton
Conservation Park Center in Bolton Landing, New York.

**DEFAULT REPORT
&
RECOMMENDATION**

Prevailing Rate Case
PRC No. 2009009924
Case ID: PW01 2010020921
Warren County

To: Honorable Peter M. Rivera
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued in this matter, a hearing was held on April 4, 2013, in Albany, New York and Utica, 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 Nicholas DeGregory, Jr., DBA N. J. DeGregory and Company and N. J. DeGregory and Sons Construction, ("Sub") a subcontractor of VMJR Companies, LLC and Victor Macri, Jr., as shareholder of VMJR Companies, LLC ("Prime"), complied with the requirements of Labor Law article 8 (§§ 220 *et seq.*) in the performance of a contract involving the restoration of the Bolton Conservation Park Center ("Project") for the Town of Bolton ("Department of Jurisdiction").

APPEARANCES

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

Sub failed to appear at the hearing and did not file an Answer to the charges incorporated in the Notice of Hearing.

Prime appeared with its attorney, Brendan R. Wolf, Esq and filed an Answer to the charges incorporated in the Notice of Hearing.

FINDINGS AND CONCLUSIONS

On October 19, 2012, the Department duly served a copy of the Notice of Hearing on Sub via regular and certified mail, return receipt requested. The Notice of Hearing scheduled an April 4, 2013, hearing and required the Respondents to serve an Answer at least 14 days in advance of the scheduled hearing. The Notice mailed via regular mail was not returned to the Department. Prior to the hearing Department counsel spoke with Sub, who acknowledged receipt of the Notice of Hearing.

In addition, 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 Prime, was entered into evidence as Hearing Officer Exhibit 3.

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 \$26,632.76 to six of its workers on the Project for the audit period weeks ending 4/24/10 through 7/03/10; and

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

On October 18, 2010, the Department issued a Notice to Withhold Payment to the Department of Jurisdiction in the amount of \$8,000.88; and

Prime has demonstrated it meets the standards set forth in 12 NYCRR § 221 for the waiver of penalty, and the Department has no objection to such waiver; and

The Department consents to a waiver of six months' interest insofar as any underpayments must be paid by Prime pursuant to Labor Law § 223; and

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

RECOMMENDATIONS

Based upon the default of the Respondent 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 six workers \$26,632.76 on the Project, PRC No. 2009009924; 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 Sub be assessed a civil penalty in the Department's requested amount of 25% of the underpayment and interest due; and

DETERMINE that, in the event the Department is unable to collect the total amount due from Sub, Prime will be responsible for the underpayments determined due, but interest on the underpayments against Prime, assessed at a rate of 16% per annum, shall be calculated for a the period of time from the date of underpayment to the date of payment less six months; and

DETERMINE that Prime shall not be responsible for the payment of any civil penalty; and

ORDER that the 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 Campus, Bldg. 12, Room 130, Albany, NY 12240; 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: May 23, 2013
Albany, New York

Respectfully submitted,

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

Jerome Tracy, Hearing Officer