

BEFORE THE DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS
FOR THE STATE OF CALIFORNIA

In the matter of the
Debarment Proceeding Against:

S.J. CIMINO ELECTRIC, INC., a California
Corporation; and SALVATORE JOSEPH
CIMINO, RMO/CEO/President of S.J.
CIMINO ELECTRIC, INC.,

Respondents.

) Case No. SAC 1052

) DECISION RE DEBARMENT
) OF RESPONDENTS FROM
) PUBLIC WORKS PROJECTS

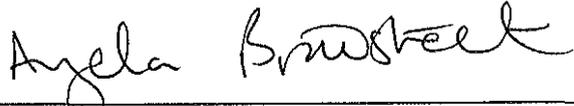
) [Labor Code § 1777.1]

The attached proposed Statement of Decision and Order of Debarment making S.J. CIMINO ELECTRIC, INC., a California corporation; and SALVATORE JOSEPH CIMINO, ineligible to bid on or be awarded a contract for a public works project and ineligible to perform work as a subcontractor on a public works project in the State of California for three years, is hereby adopted by the Division of Labor Standards Enforcement as the Decision in the above-captioned matter.

This decision shall become effective October 15, 2009.

IT IS SO ORDERED

Dated: September 2, 2009



ANGELA BRADSTREET
Labor Commissioner and Chief of the California
Division of Labor Standards Enforcement

DIVISION OF LABOR STANDARDS ENFORCEMENT
Department of Industrial Relations
State of California
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) Case No. SAC 1052
) PROPOSED STATEMENT OF
) DECISION RE DEBARMENT
) OF RESPONDENTS FROM
) PUBLIC WORKS PROJECTS
) [Labor Code § 1777.1]

Debarment proceedings pursuant to Labor Code §1777.1 were initiated by the Division of Labor Standards Enforcement ("DLSE") on May 22, 2009, by the filing and service of a Statement of Alleged Violations against the following named respondents: S.J. CIMINO ELECTRIC, INC., a California corporation; and SALVATORE JOSEPH CIMINO, RMO/CEO/President of S.J. CIMINO ELECTIRC, INC. (hereinafter "Respondents").

The hearing on the alleged violations was held on August 4, 2009, at the Oakland Office of the Labor Commissioner. Susan Dovi served as the Hearing Officer. David D. Cross, appeared on behalf of Complainant, the Labor Commissioner, Chief of the Division of Labor Standards Enforcement, Department of Industrial Relations, State of California. None of the Respondents appeared for the hearing although they were duly served with Notice of Hearing, and the Statement of Alleged Violations by First Class and Certified

Mail to the address currently listed with the Contractors State License Board. The signature on the certified mail receipts indicates that S.J. Cimino received the Notice of Hearing and Statement of Alleged Violations. Present as witnesses for Complainant were Deputy Labor Commissioners Rachel Farmer and Christopher Kim.

The hearing was tape recorded. Witnesses Farmer and Kim took the oath and evidence was received. At the conclusion of the hearing, the matter was taken under submission.

FINDINGS

I. NOTICE

The Hearing Officer finds that the Respondents received lawful notice of the August 4, 2009, hearing. The proof of service for the Notice of Hearing and Statement of Alleged Violations together with the return receipts indicating that notice was served both by First Class and Certified Mail are on file in this proceeding and indicate that S.J. CIMINO signed the return receipts for the Notice and Statement.

II. VIOLATIONS OF THE PUBLIC WORKS LAW

1. Respondent S.J. CIMINO ELECTRIC, INC. is a corporation licensed by the Contractor's State Licensing Board under license number 343802.
2. Respondent SALVATORE JOSEPH CIMINO is the Responsible Managing Officer, Chief Executive Officer, and President of S.J. CIMINO ELECTRIC, INC. and is the sole owner of S.J. Cimino Electric licensed by the Contractor's State Licensing Board under license number 294141. S.J. CIMINO holds a substantial interest in both companies.
3. Respondents were subcontractors on three public works projects, namely the Crossings at Santa Rosa, in Sonoma County, California; the Cottonwood Creek

Apartments in Solano County, California; and the Jennings Avenue Apartments in Sonoma County, California (hereinafter "Projects"), during the periods, April 21, 2007 through June 6, 2007; June 9, 2007 through July 5, 2008; and September 2, 2006 through August 18, 2007, respectively.

4. Deputy Labor Commissioners Farmer and Kim are assigned to the Public Works Unit. Deputy Farmer testified that on the Crossings at Santa Rosa and the Cottonwood Creek Apartments projects, her investigations revealed that Respondents violated Labor Code §§ 1774, 1776, and 1773.1 by failing to pay the prevailing wage rates to employees, failing to maintain accurate certified payroll reports and deducting amounts for health and pension benefits, as a credit against the prevailing wage, that were then not paid in the deducted amount, or at all, to a trustee or to a third party pursuant to a plan, fund or program for the benefit of Respondents employees. Deputy Farmer testified and presented documentary evidence that some employees had a portion of the deducted amount paid to provide health benefits but amounts in excess of the premium used to buy the coverage were deducted and kept by Respondents. In addition, some employees did not have health coverage at all yet amounts were deducted and then kept by Respondents. In other words, Respondents deducted amounts they indicated were paid to a health plan that were either paid in a lower amount to the provider or not paid at all to a provider. In addition, amounts were deducted for pension benefits but were not paid to a bona fide pension plan at all on the Crossings at Santa Rosa project and on the Cottonwood project, pension benefits were paid only after the Division issued a Civil Wage and Penalty Assessment. Finally, Ms. Farmer testified that Respondent SALVATORE JOSEPH CIMINO signed the employees' pay checks and directed other employees to make the deductions that were not paid for the benefit of his

workers.

5. Deputy Farmer also testified that Respondents violated Labor Code § 1815 by failing to pay the correct overtime rate on the Crossings at Santa Rosa and the Cottonwood Creek Apartments projects.

6. Deputy Kim testified that on the Jennings Avenue Apartments project, his investigation revealed that Respondents violated Labor Code §§ 1774, 1776, and 1773.1 by failing to pay the prevailing wage rates to employees, failing to maintain accurate certified payroll reports and deducting amounts for health and pension benefits that were not paid in the amount deducted, or not paid at all to a health plan or pension fund. Some employees had a portion of the deducted amount paid to provide health benefits but some employees did not have health coverage yet amounts were deducted and then kept by Respondents. Deputy Kim testified that the Respondent has a six month vesting requirement before a worker would be eligible for health insurance but that during this six month vesting period, Respondents deducted for health insurance for employees who were not eligible for and did not receive benefits. In addition, Deputy Kim testified that Respondents deducted pension contributions for work performed on the Jennings Avenue Apartments project but that the deducted amounts were not paid into a bona fide pension Plan. Instead, Respondents kept the money deducted.

7. Deputy Kim also testified that Respondents violated Labor Code § 1815 by failing to pay the correct overtime rate on the Jennings Avenue Apartments project.

8. DLSE issued three Civil Wage and Penalty Assessments against Respondents based on the violations on the projects listed in paragraph 3 above. DLSE exercised its discretion and assessed full penalties pursuant to Labor Code § 1775 due to the egregious nature of the violations. Judgment was entered against Respondents on the

Crossings at Santa Rosa project, which was later paid. On the Cottonwood Creek Apartments project, the pension benefits were paid after the DLSE issued the Civil Wage and Penalty Assessment. The other issues, including those related to the health benefits are still pending and the matter is set for hearing in September 2009. The wages and penalties assessed by DLSE on the Jennings Avenue Apartment project have been paid.

CONCLUSIONS OF LAW

Labor Code §1777.1 provides:

(a) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in violation of this chapter **with intent to defraud**, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership or association in which the contractor, or subcontractor has any interest is ineligible for a period of not less than one year or more than three years to do either of the following:

- (1) Bid or be awarded a contract for a public works project;
- (2) Perform work as a subcontractor on a public works project.

(b) Whenever a contractor or subcontractor performing a public works project pursuant to this chapter is found by the Labor Commissioner to be in **willful violation** of this chapter, except Section 1777.5, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has any interest is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation of this chapter to do either of the following:

- (1) bid on or be awarded a contract for a public works project;
- (2) perform work as a subcontractor on a public works project.

California Code of Regulations, Title 8, Section 16800 defines "Intent to Defraud" as "the intent to deceive another person or entity, as defined in this article, and to induce

such other person or entity, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property of any kind.”

Labor Code §1777.1(c) defines a “willful violation” as “when the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.” *California Code of Regulations* 8 CCR § 16800 defines “deliberately” as “premeditated and intentional.”

Labor Code section 1777.1(b) provides that once a contractor or subcontractor willfully violates this section, that contractor or subcontractor is ineligible for a period up to three years for each second and subsequent violation occurring within three years of a separate and previous willful violation. An intent to deceive or defraud can be inferred from the facts. (*People v. Kiperman* (1977) 69 Cal.App.3d Supp. 25,31.) “An unlawful intent is logically inferred from the doing of an unlawful act.” (*People v. McLaughlin* (1952) 111 Cal. App.2d 781, 789.)

The credible and unrefuted evidence presented by Deputies Farmer and Kim establishes that Respondents failed to pay the proper prevailing wage rates, falsified the certified payroll reports and deducted amounts for health and pension benefits that were not deposited to a third party for payment of benefits for the employees. The testimony of Deputies Farmer and Kim, corroborated by documentary evidence, establishes that Labor Code §§ 1774 and 1776 were violated with an intent to defraud S. J. Cimino Electric's workers and the awarding bodies. Furthermore, the violations were willful within the meaning of Labor Code § 1777.1(c) and 8 CCR § 16800 in that the deductions for health and pension benefits were not paid to a trustee, or to a third party pursuant to a plan, fund or program for the benefit of Respondents employees but instead kept by Respondents.

Further, the preparation of false and fraudulent certified payroll records was intentional and deliberate and also exhibits an intent to deceive Respondents' workers, the awarding body and the DLSE.

ORDER OF DEBARMENT

In accordance with the foregoing, it is hereby ordered that Respondents S.J. CIMINO ELECTRIC, INC., a California corporation; and SALVATORE JOSEPH CIMINO, shall be ineligible to, and shall not, bid on or be awarded a contract for a public works project, and shall not perform work as a subcontractor on a public work as defined in Labor Code §§ 1720, 1720.2 and 1720.3, for a period of three (3) years, effective October 15, 2009. A three year period is appropriate under these circumstances where Respondents, experienced contractors, willfully and fraudulently prepared false certified payroll records, failed to pay workers the prevailing wage, kept benefit payments that were deducted from employees' wages, and refused to cooperate and supply records and information requested by DLSE during its investigation, justifying a three year period of debarment.

Dated: September __, 2009

SUSAN A. DOVI
Hearing Officer