

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF NEW YORK

IN THE MATTER OF AN INVESTIGATION BY ATTORNEY
GENERAL ERIC T. SCHNEIDERMAN OF LIN-KIM COMPANY,
INC. AND ITS OFFICERS, LINDA GREGORIO, KENNETH
BUDDENHAGEN, AND MELISSA PETERS

AOD No. 12-209

Report, Findings, and Assurance of Discontinuance

- I. Office of the Attorney General's Report and Findings
 1. This Report arises out of Attorney General Eric T. Schneiderman's investigation into the fraudulent billing practices of Lin-Kim Company, Inc. ("Lin-Kim") and its officers Linda Gregorio, Kenneth Buddenhagen, and Melissa Peters (collectively, the "Individuals"). The investigation was conducted pursuant to the provisions of Executive Law section 63(12), Article 22-A of the General Business Law, and New York's False Claims Act (State Finance Law sections 187 through 194) (the "OAG Investigation"). The State of New York, Lin-Kim and the Individuals shall be referred to collectively herein as the "Parties."
 2. Lin-Kim, a construction company based in Lindenhurst, New York, was hired by the State of New York Office of General Services ("OGS") to provide emergency construction services on numerous contracts and the following contracts have outstanding invoices or Retainage held: EA692-G; EA273-H; EA007-H; EA648-P; EA588-H; EA595-H; EA182-E; EA296-G; EA496-H; EA564-G; EA662-G; EA025-H; and EA1538.
 3. The Office of the Attorney General ("OAG") investigated Lin-Kim and the Individuals for conduct during the period of January 1, 2006 through December 31, 2008 (the "Relevant Period").

4. The OAG Investigation found that Lin-Kim and the Individuals fraudulently altered a check (check number 4801), so as to change the payment due, and submitted it to the State for reimbursement.
5. As evidence of work performed and as a precondition to payment, Lin-Kim was required to submit accurate time sheets to the State. The OAG Investigation found that Lin-Kim and the Individuals engaged in a practice whereby it submitted false time sheets that sought payment for hours not worked. For example Lin-Kim's time sheets sought payment for (i) hours where its employees ceased working and had checked into a hotel or had logged out of a secure facility, (ii) inflated time ostensibly spent shopping for materials, and (iii) time it should have deducted for employees' lunch.
6. Employers are required to pay unemployment taxes for their employees. The amount of tax is a percentage of wages paid. The labor rate worksheet received by Lin-Kim states that for New York State unemployment taxes the tax is applicable "up to the 1st \$8,500 of base salary paid per employee per year." The OAG Investigation found that Lin-Kim billed the State for unemployment tax reimbursement on every dollar of wages paid for the years 2006, 2007, and 2008 even though it had capped its unemployment tax payments to the government, consistent with the instructions on the labor work sheet and on the corresponding applicable tax forms.
7. New York State law requires employees to obtain workers' compensation insurance that provides cash benefits and/or medical care for workers who suffer a work related injury or illness. When an employer buys workers' compensation

insurance, the insurer is assuming the employer's statutory obligation to pay medical, wage replacement and death benefits. Premiums reflect the employer's potential liability for claims based on individual experience, wages paid to employees, and the type of business in which the employer is engaged. The State reimburses contractors on emergency contracts for the contractors' workers' compensation insurance premiums payable on the project. The OAG Investigation found that Lin-Kim's wrongful conduct resulted in a loss of \$73,536.37.

8. All workers' compensation premiums are calculated by multiplying the insurance base rate for the particular industry by each \$100 of expected wages to be paid in the upcoming calendar year. After the calculation is made, the premium is adjusted for various credits, state fund discount, terrorism premiums, and assessments for administrative costs for the workers' compensation system. After all of these charges or credits have been applied to the base rate, a final adjusted rate is obtained. This adjusted rate, for Lin-Kim, was always lower than the base rate.
9. The OAG Investigation found that Lin-Kim continually charged an inflated rate to the State for workers' compensation insurance reimbursement, resulting in inflated payments of \$70,155.33.
10. Lin-Kim's contracts with the State were cost-plus contracts. On a cost-plus contract a contractor is guaranteed a percentage mark-up on every dollar it spends. Accordingly, if an employer classifies work as requiring a higher skilled trade, the wage rate and corresponding benefits are higher than the wage rate and

benefits applicable to the lowest wage rate. Proper classification is important on a public work project because the rate of pay for each employee depends upon the classification of work performed.

11. The OAG Investigation found that in more than 500 instances during the Relevant Period, Lin-Kim and the Individuals misclassified work on its State projects as being performed by an individual with a higher than necessary trade classification.
12. On October 25, 2006, Lin-Kim submitted to the State a material expense report with two receipts for a project at the Arthur Kill Correctional Facility which claimed charges for the rental of hydraulic pumping equipment. Both receipts were submitted with the claim for payment. The OAG Investigation concluded that Lin-Kim fraudulently filed both receipts, claiming reimbursement twice for the same rental.
13. OGS has received invoices from Lin-Kim seeking payment in the amount of \$461,301.00 and has Retainage held in the amount of \$50,930.00 for a total of \$512,231.00 in claimed amounts due to Lin-Kim for work performed on the above-referenced contracts.

II. Terms and Conditions

A. General

14. This Agreement is entered into by the State of New York, acting through the OAG (collectively, the "State"), Lin-Kim, and the Individuals.
15. Lin-Kim and the Individuals do not admit or deny the OAG's Report and Findings as set forth in this Agreement.

16. For the Relevant Period the State contends that it has certain civil claims against Lin-Kim and the Individuals under the New York State False Claims Act (N.Y. State Fin. Law § 187, et seq.), other New York statutes and the common law for the following "Covered Conduct":

- a. During the Relevant Period, Lin-Kim and the Individuals submitted or caused to be submitted to the State a fraudulent altered check (check number 4801) and associated falsified invoices, purportedly from and falsified by BRW Associates, Inc., in an effort to overcharge the State.
- b. During the Relevant Period, Lin-Kim and the Individuals overcharged the State for hours Lin-Kim employees did not work, including: i) hours after which employees ceased working and had checked into a hotel or had logged out of a secure facility, ii) hours falsely claimed to be spent shopping for materials, and iii) hours spent for lunch that were required to be deducted but were not..
- c. During the Relevant Period, Lin-Kim and the Individuals overcharged the State for unemployment insurance taxes by requesting reimbursement for \$73,536.37 for taxes Lin-Kim did not pay on wages in excess of wage caps.
- d. During the Relevant Period, Lin-Kim and the Individuals overcharged the State for Workers' Compensation Insurance in the amount of \$70,155.33.
- e. During the Relevant Period, Lin-Kim and the Individuals misclassified worker's trade classifications for work performed on its projects for the State resulting in overbilling to the State.

f. During the Relevant Period, Lin-Kim and the Individuals double billed the State for equipment rented for use on State projects.

17. To avoid the delay, uncertainty, inconvenience and expense of a continued OAG Investigation of Lin-Kim and the Individuals or of protracted litigation concerning the Covered Conduct, the Parties desire a final negotiated settlement and compromise of their disputes, as more fully set forth herein.

18. The Parties have determined and hereby agree that settlement is in their respective best interests and the OAG has agreed to accept the terms of this Agreement and to the discontinuance of the OAG Investigation of Lin-Kim and the Individuals concerning the Covered Conduct described herein pursuant to N.Y. Exec. Law § 63(15).

B. Terms

19. To resolve the State's claims for the Covered Conduct described above, Lin-Kim and the Individuals shall cause to be paid to and received by the State of New York the sum of three hundred and ninety thousand dollars (\$390,000.00) through an offset from moneys otherwise due to Lin-Kim under the above referenced projects Lin-Kim had with OGS and not through the contribution of funds directly from Lin-Kim or the Individuals. The parties to this Agreement understand that Bank of America has filed a lien with the New York State Office of the State Comptroller (OSC) against Lin-Kim for \$113,000.00. Any remaining sums held by OGS will be used to reduce or satisfy the amount due on the Bank of America judgment lien as filed with OSC or any settlement of such judgment lien made between Bank of America and the State of New York.

20. Lin Kim and the Individuals are forever debarred from submitting bids on or being awarded any public work contracts with the State of New York, any municipal corporation within the State of New York or public body within the State of New York upon the signing of this Agreement.
21. Lin-Kim and the Individuals are forever barred from seeking or obtaining employment with any entities who have contracts for employment with, or provide services to, the State of New York, any municipal corporation within the State of New York or public body within the State of New York upon signing this Agreement.

C. Releases

22. In consideration of the obligations incurred by Lin-Kim herein, the State agrees to release Lin-Kim, and all of its current and former officers, directors and employees (collectively, the "Lin-Kim Releasees"), from any civil claims for the Covered Conduct for the Relevant Period that the State has or may have against the Lin-Kim Releasees under the New York False Claims Act, N.Y. Exec. Law § 63(12), or any other New York statute, or common law, or under any theory in law or equity, including but not limited to equitable theories of payment by mistake, disgorgement, unjust enrichment, breach of contract, or fraud.
23. In consideration of the obligations incurred by the Individuals herein, the State agrees to release the Individuals (the "Individual Releasees"), from any civil claims for the Covered Conduct for the Relevant Period that the State has or may have against the Individual Releasees under the New York False Claims Act, N.Y. Exec. Law § 63(12), or any other New York statute, or common law, or

under any theory in law or equity, including but not limited to equitable theories of payment by mistake, disgorgement, unjust enrichment, breach of contract, or fraud.

24. Lin-Kim releases the OAG, OGS, as well as all other New York State governmental entities, subdivisions, agencies, employees, attorneys, servants, officers, and agents ("New York Released Parties") from any claims (including for attorney's fees, costs, and expenses of every kind and however denominated) that Lin-Kim has asserted, or could have asserted, or may assert in the future against any of the New York Released Parties related to the Covered Conduct.
25. The Individuals release the New York Released Parties from any claims (including for attorney's fees, costs, and expenses of every kind and however denominated) that Individuals have asserted, or could have asserted, or may assert in the future against any of the New York Released Parties related to the Covered Conduct.
26. The OAG agrees that it will not prosecute Lin-Kim or the Individual Defendants for any criminal offenses for the Covered Conduct.
27. Lin-Kim and the Individuals release and discharge OGS and the other New York Released Parties from all requests for payments, claims, demands and liabilities of every kind and nature, legal or equitable, occasioned by or arising out of any and all contracts between Lin-Kim and OGS (including for attorney's fees, costs, and expenses of every kind and however denominated) that Lin-Kim has asserted, or could have asserted, or may assert in the future against OGS or the other New York Released Parties related to said contracts awarded by OGS.

28. Lin-Kim and the Individuals release and discharge OGS and the other New York Released Parties from any costs billed by Lin Kim to OGS. Moreover, the Parties agree that this Agreement resolves all outstanding costs billed by Lin-Kim to OGS.

29. The releases set forth in paragraphs 22 - 28 above shall not take effect until this Agreement is fully executed by all parties.

III. Miscellaneous

30. The State has agreed to the terms of this Agreement based on, among other things, the representations made to the OAG by Lin-Kim, the Individuals and their counsel and on the OAG Investigation of the Covered Conduct. If any material representations, submissions or omissions by Lin-Kim or the Individuals to the OAG are later found to be inaccurate or misleading, this Agreement is voidable by the OAG in its sole discretion, and the OAG may reinstate the OAG Investigation of the Covered Conduct. The State retains the right pursuant to N.Y. Exec. Law § 63(15) to compel compliance with all of the terms of this Agreement.

31. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Agreement has been made to or relied upon by Lin-Kim or the Individuals in agreeing to this Agreement. Lin-Kim and the Individuals represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

32. Lin-Kim and the Individuals represent and warrant, through the signatures below, that the terms and conditions of this Agreement are duly approved, and execution

of this Agreement is duly authorized, by the appropriate employees, directors and/or officers of Lin-Kim.

33. Lin-Kim and the Individuals shall not take any action or make any statement denying, directly or indirectly, the propriety of this Agreement or expressing the view that this Agreement is without factual basis. Nothing in this paragraph affects Lin-Kim or the Individual's (i) testimonial obligations or (ii) right to take legal or factual positions in defense of litigation or other legal proceedings to which the State is not a party.
34. This Agreement is not intended for use by any third party in any other proceeding against Lin-Kim or the Individuals relating to the Covered Conduct or to the OAG Investigation.
35. For purposes of construction, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.
36. The individuals signing this Agreement on behalf of Lin-Kim represent and warrant that they are authorized by Lin-Kim to execute this Agreement. The State's signatory represents that he is signing this Agreement in his official capacity and that he is authorized to execute this Agreement.
37. This Agreement may not be amended except by an instrument in writing signed on behalf of all the Parties to this Agreement.
38. This Agreement shall be binding on and inure to the benefit of the Parties to it and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations

under this Agreement without the prior written consent of the OAG.

39. In the event that any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, in the sole discretion of the OAG.
40. To the extent not already provided under this Agreement, Lin-Kim and the Individuals shall, upon request by OAG, provide all documentation and information necessary for OAG to verify compliance with this Agreement that is within their possession, custody, or control, or that is readily attainable through reasonable means.
41. All notice, requests and other communications to or from any party concerning the subject matter of this Agreement shall be in writing and addressed, with reference to the opening caption and AOD No. 12-209, as follows:

Counsel for Lin-Kim, Linda Gregorio, and Kenneth Buddenhagen

Stephen W. Kretz, Esq.
Donohue, Kretz & Garabrant
36 East Montauk Highway
Lindenhurst, NY 11757

Counsel for Melissa Peters

Stephen N. Preziosi, Esq.
The Law Office of Stephen N. Preziosi
570 7th Avenue, 6th Fl.
New York, New York 10018

Counsel for the State of New York

Dana V. Syracuse, Esq.
Taxpayer Protection Bureau
Office of the Attorney General
of the State of New York

120 Broadway, 25th Floor
New York, NY 10271

42. Acceptance of this Agreement by the OAG shall not be deemed or construed as an approval by the OAG or the State of New York of any of the Covered Conduct, and Lin-Kim and the Individuals shall make no representation to the contrary.
43. Pursuant to N.Y. Exec. Law § 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of violation of the applicable law in any action or proceeding thereafter commenced by OAG.
44. If, pursuant to N.Y. Exec. Law § 63(15), a court of competent jurisdiction finally determines after all applicable appeals have been exhausted, that Lin-Kim or the Individuals have breached this Agreement, Lin-Kim or the Individuals shall pay to the OAG the costs, if any, of such determination and of enforcing this Agreement, including, without limitation, legal fees, expenses, and court costs.
45. The OAG finds the relief and agreements contained in this Agreement appropriate and in the public interest. The OAG is willing to accept this Agreement pursuant to N.Y. Exec. Law § 63(15), in lieu of commencing a statutory proceeding.
46. This Agreement shall be governed by the laws of the State of New York without regard to any conflict of laws principles. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the Supreme Court of the State of New York, New York County.
47. This Agreement is effective on the date of signature of the last signatory to the Agreement (the "Effective Date"). Facsimiles of signatures shall constitute

acceptable, binding signatures for purposes of this Agreement.

48. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement.

IN WITNESS WHEREOF, this Agreement is executed by the Parties hereto.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL
OF THE STATE OF NEW YORK

Dated: 1-4-2013

By: 
Dana Syracuse
Assistant Attorney General
Taxpayer Protection Bureau

On behalf of Lin-Kim Company, Inc.

Dated: 12-27-12

By: 
Print Name: Linda Gregorio
Title: President
Company: Lin-Kim Company, Inc.

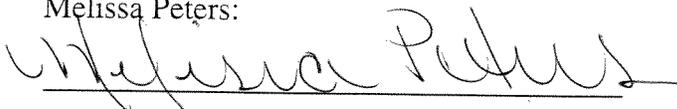
Dated: 12-27-12

Linda Gregorio:


Dated: 12-27-12

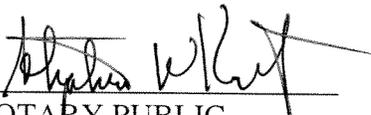
Kenneth Buddenhagen:


Dated: 12-27-12

Melissa Peters:


STATE OF NEW YORK, COUNTY OF ~~NEW YORK~~ ^{SUFFOLK} ss:

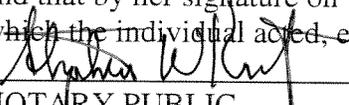
On the ~~27~~²⁷ day of December, in the year 2012 before me personally appeared LINDA GREGORIO, known to me to be the person whose name is subscribed to the within instrument, who being duly sworn by me did depose and say that he/she resides at Lindenhurst in the Town of Babylon, County of Suffolk, State of New York, and further that: He/she is the President of Lin-Kim Company, Inc., the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, he/she is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, he/she executed the foregoing in the name of and on behalf of said corporation as the act and deed of said corporation.


NOTARY PUBLIC

STEPHEN W. KRETZ
Notary Public, State of New York
Reg. No. 02KR4607148
Qualified in Suffolk County
My Commission Expires May 31, 2015
~~SUFFOLK~~

STATE OF NEW YORK, COUNTY OF ~~NEW YORK~~ ^{SUFFOLK} ss:

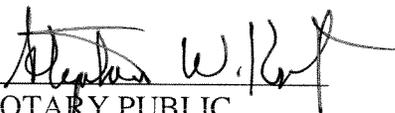
On December ~~27~~²⁷, 2012 before me, the undersigned, a Notary Public in and for said State, personally appeared Linda Gregorio, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.


NOTARY PUBLIC

STEPHEN W. KRETZ
Notary Public, State of New York
Reg. No. 02KR4607148
Qualified in Suffolk County
My Commission Expires May 31, 2015
~~SUFFOLK~~

STATE OF NEW YORK, COUNTY OF ~~NEW YORK~~ ^{SUFFOLK} ss:

On December ~~27~~²⁷, 2012 before me, the undersigned, a Notary Public in and for said State, personally appeared Kenneth Buddenhagen, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.

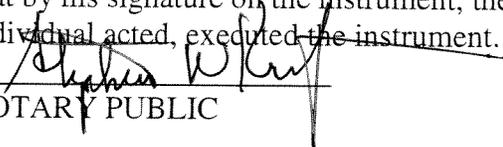

NOTARY PUBLIC

STEPHEN W. KRETZ
Notary Public, State of New York
Reg. No. 02KR4607148
Qualified in Suffolk County
My Commission Expires May 31, 2015

SUFFOLK

STATE OF NEW YORK, COUNTY OF ~~NEW YORK~~ ss:

On December ²⁷ 2012 before me, the undersigned, a Notary Public in and for said State, personally appeared Melissa Peters, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.


NOTARY PUBLIC

STEPHEN W. KRETZ
Notary Public, State of New York
Reg. No. 02KR4607148
Qualified in Suffolk County
My Commission Expires May 31, 2015