



New York State Department of Labor
David A. Paterson, Governor
M. Patricia Smith, Commissioner

November 12, 2009

[REDACTED]

Re: Request for Opinion - Lease between [REDACTED]
[REDACTED] and [REDACTED]
Our File No. RO-09-0002

Dear [REDACTED]:

This is in response to your letters of March 30, 2009 and April 13, 2009, which request reconsideration of our March 17, 2009 opinion in which we advised you that Article 8 of the Labor Law applied to the construction of this leased facility. Your March 30, 2009 letter requests clarification regarding the discussion of "third party contracts" set forth in our March 17, 2009 letter. You also believe I have "misinterpreted" the extent of [REDACTED] control over the specifications of the building. Your letter of April 13, 2009 supplements your letter of March 30, 2009 and provides copies of additional materials which you believe further advance your argument that this is not a public work project. These materials indicate that [REDACTED] intends to make this facility available to other colleges and universities for conducting classes of their own.

As we have previously advised, it is a well-settled law that two conditions must be met before the prevailing wage provisions of Article 8 of the Labor Law will be applied to a particular project: "(1) the public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics, and (2) the contract must concern a public works project" (*Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532, 537 (4th Dep't 1983), *aff'd* 63 N.Y.2d 810 (1984)). To satisfy the first condition, before the 2007 amendment discussed below, the courts generally required that a public entity itself had signed a contract that contemplated the employment of laborers, workers, or mechanics on a public work project. The lease agreement between [REDACTED] and [REDACTED] satisfies this requirement. In 2007, the Legislature amended Labor Law Section 220 to broaden the application of the prevailing wage provisions to include cases where a third party interposed itself between the public entity and the contractor – commonly known as the "third party bill." As amended, Section 220 now encompasses "[e]ach contract to which the state or [a public entity] is a party, and any contract for public work entered into by a third party acting in place of, on behalf of and for the benefit of such public entity pursuant to any lease, permit or other agreement between such third party and the public entity (Labor Law Section 220(2) and 220(3)(c)). However, as noted above, the 2007 amendment is

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not necessary to bring the project within the scope of the prevailing wage law because the lease agreement already meets the first condition of the *Erie* test in that it is a contract that expressly contemplates the employment of workers. The contract does not have to be a construction or employment contract per se. See *Matter of 60 Market Street Associates v. Hartnett*, 153 A.D.2d 205, 207 (3d Dep't) which involved a lease agreement between the county and a private owner/developer to lease an office building to be built and which necessarily involved the employment of workers.

Since the Department is taking the position that the lease in this project between the Community College and [REDACTED] meets the contract prong of the *Erie* test, then the only question to be answered under *Erie* is whether the contract concerns a public work project. That question is answered yes, if it is determined that the primary objective of the project is to benefit the public. As you note, the Courts have focused upon "the public purpose or function of the particular project[; t]o be a public work the project's primary objective must be to benefit the public." *Id.* The Department believes that any construction that will serve as a long term facility for the operations of a community college satellite campus does serve a primarily public purpose. The very reason for the construction of the buildings comprising the college campus, that is, to make post secondary school educational facilities more available to the public at large, answers the question of public purpose.

Community colleges are colleges established and operated pursuant to the provisions of Article 126 of the Education Law, either individually or jointly, by counties, cities, school districts approved by the state university trustees, or individually by community college regions approved by the state university trustees, and providing two-year post-secondary programs pursuant to regulations prescribed by the state university trustees and receiving financial assistance from the state therefor (Education Law, Section 6301(2)). Section 6304(1)(b)(iv) of the Education Law requires the state university trustees to promulgate regulations which shall include a code of standards and procedures for the administration and operation of community colleges. Such standards and procedures may include, but are not limited to, minimum and maximum qualitative and quantitative standards for facilities. Regulations regarding the State University of New York (SUNY) are set forth at 8 NYCRR. Specifically, Part 602 of 8 NYCRR (College Finances and Business Operations) provides that operating expenses which are allowable for State aid and support by student tuition revenues include lease and maintenance costs for rental of physical space and equipment where used for college purposes. Rental leasing of instructional space shall be subject to the approval of the chancellor or designee (*emphasis added*) (8 NYCRR Section 602.4(d)(2)). Section 602.3 of 8 NYCRR discusses the college operating budget. Prior to filing the operating budget request with SUNY, the sponsor's contribution and budget total has to be approved by the college trustees and the sponsor (i.e., the County). The SUNY trustees then must take appropriate action relative to the total operating budget and state financial assistance. Accordingly, this lease of instructional space is subject to the approval of the County, the college trustees, the SUNY trustees and the Chancellor.

As to your contention that *60 Market Street v Hartnett*, 153 A.D. 2d 205 (3rd Dept., 1990), and *County of Suffolk v Coram Equities, L.L.C.*, 31 A.D. 3d 687 (2d Dept., 2006) are applicable to this factual situation, while the third parties profit motive is a factor to be taken into consideration, the College's public purpose in seeking additional campus space is an

equally, if not more compelling factor. Since the inquiry turns primarily on this public purpose, function, or benefit of the project, more particular issues, such as whether a public or private entity will own the property, control the project and its financing, and bear the risks and benefits of the project are not dispositive factors in and of themselves (*Feher Rubbish Removal, Inc. v. New York State Dept. of Labor*, 28 A.D.3d 1, 6-7(4th Dep't 2005)). In the *Feher* case, the Court held that prevailing wage laws applied to providers of refuse collection services to private buildings pursuant to contracts with municipalities. The Court noted that nothing in Article 8 limits its applicability to public work on public buildings. In this situation, while [REDACTED] will not own the property, there is significant public control over the project since the lease must be approved by the County, the college trustees, the SUNY trustees and the Chancellor. There is also no doubt that [REDACTED] and the college community will benefit greatly from this satellite campus, which is designed to expand the services of [REDACTED] to a larger area and to allow [REDACTED] to attract more students to the College. The materials provided in your April 13, 2009 letter indicate that [REDACTED] is interested in partnering with other educational institutions to provide upper level and graduate coursework and programs at the Victor Campus Center. [REDACTED] envisions a regional learning center that meets the demands of the local workforce, enables students in the region to take advantage of learning opportunities and addresses the needs of educational institutions in the area. These activities will draw students to the area, retain residents by providing them with local college options, improve the local economy by ensuring an available and skilled workforce, all of which serve the public good. All of this serves to benefit the public, both the students and the community at large. [REDACTED] also notes that this regional learning partnership will better the lives of the students and create a brighter future in the region. [REDACTED] derives no benefit from this regional learning partnership since [REDACTED] has already leased the entire facility.

Given the level of public control and the public purpose served by the construction of this satellite campus, the Department continues to believe that this project is subject to the requirements of the prevailing wage law, and will adhere to that position.

Very truly yours,

Maria L. Colavito,
Counsel

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Associate Attorney

cc: Pico Ben-Amotz
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Dayfile