



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

November 10, 2009

[REDACTED]

Re: [REDACTED]
Dialysis Treatment Center at Monroe Community Hospital
Our File No. RO-09-0074

Dear [REDACTED]:

On behalf of your client, [REDACTED], you ask our opinion as to the applicability of the prevailing wage law to a project involving the lease of some 7,050 square feet of space within the Monroe Community Hospital (MCH) for the installation of a Dialysis Treatment Center. MCH is a County owned facility. With regard to the lease, [REDACTED] (presumably a subsidiary [REDACTED] has entered into an agreement with the County of Monroe (County) by which [REDACTED] will construct and operate an outpatient dialysis facility at the Monroe Community Hospital. [REDACTED] is to pay the County \$144,525.00 in the first year, with an annual escalator clause in succeeding years, for the use and occupation of the space. The lease agreement is for a ten-year period with three optional five-year extension terms. [REDACTED] will expend all necessary funds (estimated at over \$850,000.00) for the construction and installation of equipment necessary to operate the facility. The lease provides that [REDACTED] shall remove all equipment installed upon the termination of the lease and return the property to its original condition.

It is a well settled law that two conditions must be met before the prevailing wage provisions of Labor Law § 220 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, 465 N.Y.S.2d 301, *affd* 63 N.Y.2d 810, 482 N.Y.S.2d 267, 472 N.E.2d 43; *see*, Matter of National R.R. Passenger Corp. v. Hartnett, 169 A.D.2d 127, 572 N.Y.S.2d 386). Here, the first condition is obviously met, as the County has entered into a contract (the lease) that will involve the employment of laborers, workers and mechanics. Our inquiry will focus on the second condition, that the contract must concern a public work project. To determine whether that condition is met, we must answer the question as to whether the work concerns a project with a public purpose.

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The Lease Agreement provides that [REDACTED] is authorized to build-out the premises as needed, "using contractors of its own choosing, pursuant to plans and specifications signed and approved by the County. Any changes to the plans and specifications must be submitted to the County for approval" (Page 5 of Lease Agreement, Section 7). The agreement also limits the use of the leased premises for the purpose of operating an outpatient dialysis facility and related offices uses, and for no other purpose without the consent of the County (page 3 of Lease Agreement, Section 3).

Under the terms of the lease, [REDACTED] has the right to the non-exclusive use of common areas of the Monroe Community Hospital which include the main lobby, common corridors and hallways, stairwells, elevators, and restrooms. These common areas are subject to the Building's rules and regulations. Additionally, [REDACTED] is provided access to all mechanical, electrical, telephone, and switching rooms that serve the premises (page 3 of Lease Agreement, Section 1). The Lease Agreement also provides [REDACTED] with the use of roadways, parking lot and loading dock which are part of the publicly-owned Monroe County Hospital. The County is responsible for maintaining the perimeter sidewalk and for grounds keeping and landscaping of the grounds surrounding the Building (see page 8 of Lease Agreement, Sections 11 and 12).

The Lease Agreement also provides that [REDACTED] cannot assign or sublet the leased premises without the approval of the County and that such approval shall not be withheld only if the proposed transferee is of a character or is engaged in a business which is in keeping with the County's standard for the Building (see page 19 of the Lease Agreement, Section 29). All of the aforementioned provisions of the lease evidence continued public ownership and control of the premises in question as well as the shared use of public space and appurtenances by clients of the dialysis center, without which the dialysis center would not be able to function.

Your letter cites to a number of cases which deal with privately owned property and whether the property is being used for a public purpose. However, this matter involves the lease of publicly owned property to a private entity. As a consequence, the fact situation in this matter is similar to that in *Sarkisian Brothers, Inc. v. Hartnett*, 172 AD2d 895(3d Dept, 1991). In that case, a former classroom building located on the campus of the State University of New York at Oswego was leased to a private entity for a hotel and convention center. The building was leased subject to certain specification and requirements and limiting the use to a hotel/conference center. The petitioner in that case argued that the renovation project was not a public work project because it was a private venture for profit and privately financed. The Court in *Sarkisian* noted that the project in dispute was intended to benefit the public. The building was to be leased, not sold, as a hotel/conference center. The proposal was awarded based on considerations of revenue to the State, restoration of the landmark site, compatibility with the community and campus, and the accommodations provided to the community. The lease agreement provided that all renovations, exterior alterations and design drawings were subject to the approval of OGS and SUNY to ascertain that the needs of the public were met. There was a guarantee of public access to the hotel/convention center on at least one day per month and 75% of the rooms were to be reserved to SUNY or its affiliates, if not already committed, for certain events. The Court noted that these provisions tend to demonstrate the public use, public ownership, public access and public enjoyment characteristics of the project which supported a finding that this was a public work project.

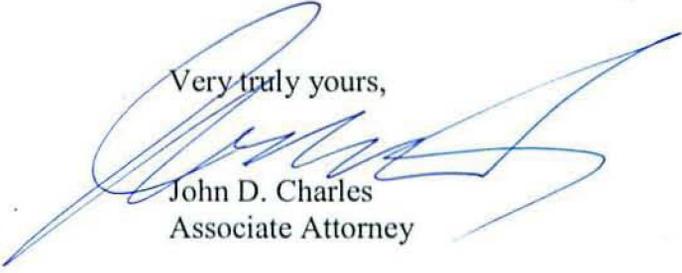
The [REDACTED]/County lease is of the same nature as that considered in the *Sarkisian* case. The leased premises are publicly owned. The property was leased subject to certain restrictions including limiting the use of the property for the purpose of operating an outpatient dialysis facility and related office uses, and for no other purpose without the consent of the County. Similar to the facts in the *Sarkisian* case, the operation of the outpatient dialysis facility supports the overall function of the property as a healthcare facility, just as hotel/convention center supported SUNY Oswego by providing a hotel for visitors to the college. Other similarities between *Sarkisian* and this matter are noted as follows: the publicly owned premises were leased and not sold; the lease was awarded based on considerations of revenue to the County; the lease required that all plans and specifications must be approved by the lessor.

Additionally, the lease between the County and [REDACTED] also provides that the lessee will have use of the Common Areas of the Hospital Building (the main lobby, common corridors and hallways, stairwells, elevators and restrooms) and the right to use the roadways, parking lot and loading dock. All of these areas are owned and maintained by a public entity for public use.

Accordingly, it is opinion of this Department that all of these facts, taken as a whole, demonstrate that the work in question concerns a project with a public purpose. Therefore, the provisions of Article 8 of the Labor Law, the prevailing wage law, apply to this project.

This opinion is specific to the facts described in the documents provided and, were those facts to vary from those set forth in the documents, or if additional facts and circumstances exist of which we are not currently aware, this opinion could be changed accordingly. I trust that this is responsive to your inquiry. Please let us know if you need any further clarification on this issue.

Very truly yours,



John D. Charles
Associate Attorney

cc: Pico Ben-Amotz
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