



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

September 25, 2009

[REDACTED]

Re: Southampton Housing Authority
Our File No. RO-09-0076

Dear [REDACTED]:

You ask our opinion as to the applicability of the prevailing wage law to a project involving the construction of 16 single family homes on real property currently in the ownership of the Town of Southampton. The Town has agreed by resolution to transfer the property to either the Southampton Housing Authority (SHA) or a not-for-profit corporation controlled by the SHA for the purpose of construction of low income housing. As I understand the project from your description, the SHA will ultimately be engaged to provide management services for the planned homes, which will remain in the ownership of the SHA or the not-for-profit corporation and be leased to low income families that qualify under certain income guidelines. The homes are to be constructed by an LLC, whose sole member will be a not-for-profit corporation consisting of a majority of members of the SHA. The LLC and/or the not-for-profit corporation and the SHA will enter into a contractual relationship regarding the operation of the residences.

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). “Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the projects primary objective must be to benefit the public” (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (Third Dept., 1991). The Southampton Housing Authority is a “body corporate and politic...” (Public Housing Law, Section 466), and, if it were to perform the work itself under a direct contract with a construction company, would be subject to the prevailing wage law.

As to the first condition, it appears that the SHA or the Town has or will enter into a contract (either the deed of transfer or the management agreement) that requires the employment

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of laborers, workers and mechanics. Effective October 27, 2007, Section 220 (3) of the Labor Law reads as follows:

“Contract” now also includes “reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance...” Labor Law §220 (3).

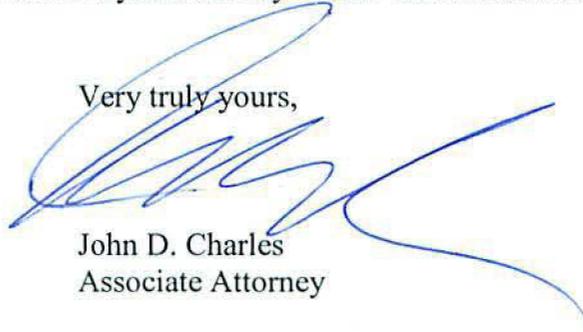
The anticipated deed or operating agreement would meet this definition of “contract” so that the first prong of the test will be met. Certainly, either the SHA or the Town constitutes a “department of jurisdiction” subject to the prevailing wage law. When those entities act through third parties, their responsibilities to comply with the provisions of the prevailing wage law remain. It matters not that the SHA plans to work through not-for-profit corporations. Where a public agency contracts with third parties with the ultimate object of constructing public facilities, that work is subject to the prevailing wage law in the same manner as if the public agency had contracted directly with a private contractor. The SHA or the Town, through third party contracts, intends to engage contractors who will hire laborers, workers, and mechanics to perform the work.

The second question is whether the project is for a public purpose. To answer this public purpose question, the courts have instructed that the inquiry must focus “on the nature, or the direct or primary objective, purpose and function of the work product of the contract” *National R. R. Corp. v Hartnett*, 169 A.D.2d 127 ((Third Dept., 1991) at 130. The nature, primary objective and purpose of the work product of the contract is amply demonstrated by the policy of the State of New York and the purposes set forth in Section 2 of the Public Housing Law. The State is obviously in the business of providing affordable housing in those markets where such housing is scarce. It does so through the creation of municipal housing authorities charged with providing such housing and filling the gaps in safe and affordable housing that private enterprise has been unable to supply. The construction of public housing by public housing authorities is public work subject to the prevailing wage law. This project is distinguished from the construction of affordable housing by private entities using public money received from grants obtained from the Private Housing Finance Law, as in *Vulcan Housing Corp. v Hartnett*, 151 App Div 2d 85 (Third Dept., 1989). In *Vulcan*, the court was largely dealing with housing facilities that were to be privately owned. There was no public use of the structure, no public ownership, no public access and no public enjoyment, as the homes that were created were in private ownership. As a result, the Appellate Division held that the project was not subject to the prevailing wage. In the situation under discussion herein, however, we are dealing with a public housing project which either will be owned by the government through the SHA or one of its captive subsidiaries and will be operated by the SHA. Those homes are anticipated to be rental facilities which will be available to members of the general public who meet income guidelines, in public ownership, to be used and enjoyed by those who lease the properties.

The prevailing wage law is based upon a State Constitutional provision which mandates the payment of prevailing wages to workers on public projects as a public policy of the State. That Constitutional provision and the statute which implements the constitutional requirements, (Article 8 of the Labor Law) may not be evaded by the use of multiple layers of not-for-profit corporations and/or LLCs which are substituted for the SHA in an attempt to circumvent the public policy of this State. Construction of public housing facilities under the circumstances of this project is subject to the provisions of Article 8 of the Labor Law and laborers, workers and mechanics who are employed in the construction must be paid at the prevailing wage rates applicable to their professions.

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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Opinion File
Dayfile