



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

November 16, 2009

[REDACTED]

Re: Request for Opinion - Lease between [REDACTED]
[REDACTED] and [REDACTED]
Our File No. RO-09-0123

Dear [REDACTED]:

Please accept this letter in response to yours of July 14, 2009, with regard to a proposed lease agreement between your client ([REDACTED]) and [REDACTED]). You provided a copy of the lease involving this project and your cover letter seeks to distinguish this project from the [REDACTED] upon which we issued an opinion letter on March 17, 2009. You did not include Schedule "A" to the lease, which was a site plan for the project, apparently agreed upon by [REDACTED] and [REDACTED]. We understand from the documents you have provided that the lease in this matter involves the construction of an entire building that will serve the purpose of a satellite campus for [REDACTED].

We believe that the opinion we issued in March, along with the follow-up opinion issued on November 12, 2009, in relation to the [REDACTED] matter, is equally valid as to the [REDACTED] project (copies of both opinions are attached hereto). We see no basis to distinguish these two construction projects. Accordingly, the Department believes that the prevailing wage law also applies to the [REDACTED] project.

Very truly yours,

John D. Charles
Associate Attorney

cc: Pico Ben-Amotz
Chris Alund
David Bouchard
Fred Kelley

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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 [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 [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

John D. Charles
Associate Attorney

cc: Pico Ben-Amotz
Chris Alund
David Bouchard
Fred Kelley
Dayfile



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

March 17, 2009

[REDACTED]

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

Dear [REDACTED]::

Please accept this letter in response to yours of January 8, 2009, with regard to a proposed lease agreement between your client ([REDACTED]) and the ([REDACTED]). You were kind enough to supply the lease involving this project and a copy of your opinion to the County Attorney regarding this issue. We understand from the documents you have provided that the lease in this matter involves the construction of an entire building that will serve the purpose of a satellite campus for [REDACTED]

As you know, 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, 465 N.Y.S.2d 301, *aff'd* 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 project's primary objective must be to benefit the public" (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (Third Dept., 1991).

As to the first condition, [REDACTED] has entered into a contract (the lease) that requires the employment 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

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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).

This lease in this case meets the first prong of the public work test enunciated by the courts and now established by the statute. For purposes of the contract prong of the *Erie County* test, it matters not that [REDACTED] is working through a third party landlord who will construct the facility. 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. [REDACTED] through its third party contracts is engaging contractors who will hire laborers, workmen, 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. In *National*, the question was whether the construction of a \$50 million dollar rail line by Amtrak needed to transfer all Empire Corridor rail service to Pennsylvania Station from Grand Central Station was a public work project. The Appellate Division, Third Department, determined it was not, based upon the primary purpose and function of the project itself. While the Court conceded the overall public purpose of improving rail service, it noted that Amtrak was created to fulfill a function that was not historically that of government, but rather of private common railroad carriers. Following that line of logic, the Court determined that Amtrak's purpose in entering into the contract with the State was to enhance its non-governmental function of providing efficient and, eventually, profitable rail service. Specifically the Court determined that Amtrak retained ownership of the lines to be installed in the project, bears the risk of future financial losses or physical destruction, and was entitled to all profits from its operations. The court noted that those factors that have repeatedly been held sufficient to preclude any determination that a given project constitutes a public works for purposes of applying Labor Law § 220.

In this case, a landlord is seeking to construct a satellite campus for [REDACTED] for the exclusive use [REDACTED] for a period of twenty to sixty years. The provision of a community college campus for the use of the public so as to make post-secondary education available and affordable by the general public is a public purpose (see generally Education Law Article 126). Absent that purpose, there would be no need for the construction; indeed, the facility would not be constructed but for the specific use as a [REDACTED] satellite campus.

In *Vulcan Housing Corp. v Hartnett*, 151 App Div 2d 85 (Third Dept., 1989), the court considered 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 to be 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, by contrast, we are dealing with a complete public use of the structure, with public access and public enjoyment as the use is the delivery of an essential public service.

There is a line of lease cases, the most cited of which are *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) which hold that the construction of office buildings by private parties for lease to public entities is not public work. In *60 Market Street*, the court analyzed the nature of the project and found that the landlord's primary objective was to make a profit on the project, and that the overall nature of the project showed the project to be of a private nature. Obviously, a contractor's profit motive is not dispositive of the public work question. Were that the case, then all public work would fall under this "exception", since all private contractors seek profit as their primary objective. Rather, additional considerations related to the nature of the project, its use and the relationship of the parties must be considered. In *60 Market Street*, the court pointed out that the project was not subject to bid and that the county's fit specifications accounted for only a small portion of the cost of the project which was an office building. Those factors are not present in this project, which is based solely on the exclusive use and occupancy by [REDACTED] where [REDACTED] has agreed, under Schedule "C" to the lease, to construct the premises to [REDACTED] specifications, including exterior and interior layouts as depicted in accompanying drawings, and where the building is not simply a general use office building but rather a classroom building, containing computer connections and laboratories that are particularly designed for instructional use.

In this regard it should be stressed that the lease is made between the [REDACTED] and the potential contractor/landlord, for the construction of new satellite campus facilities to supplement the main campus [REDACTED]. A close examination of the terms and conditions of the lease for the [REDACTED] Project clearly delineate a public presence: the lease involves a public entity, [REDACTED]. The lease and associated documents further spell out terms that would only be germane to a facility created exclusively for the use of the facility as a college instructional building, including classrooms designated as computer and physics laboratories in addition to general use classrooms. It should be further noted that the lease in question will be in effect for twenty years before it is next due for renewal, with two optional twenty year renewal periods, meaning the lease could extend for up to sixty years, constituting virtual ownership. The courts have traditionally viewed long term leases as having an effect on the nature of the ownership of such property. See *In Matter of Etta Glasser v. Robert E. Herman, et al.*, 35 Misc. 2d 873, 231 N.Y.S.2d 232 (Spec. Term, 1962) wherein the court described such a lease as providing "virtual ownership" rights to the lessee.

The question that must be answered is whether the finished project has as its primary function a private or a public purpose. As shown above, the work to be performed on the [REDACTED] satellite campus project in regard to construction of the building has a wholly public purpose. Its genesis was the need for additional community college presence in off campus locales so as to meet [REDACTED] mission to make educational services readily available to county residents. This purpose has a direct benefit to the public.

While the lease of private property for the use of a public agency on its own does not transform the private property's purpose into a public one requiring the payment of prevailing wages for its construction, as noted in *60 Market Street, supra.*, multiple factors must be considered in making this determination. The question being considered here is more refined: is

the construction of a building by a private entity using specifications unique to the needs of the municipal entity, under a long term lease agreement which details those requirements, subject to the requirements of the prevailing wage law?

Major alterations to a building, or new construction performed to meet the unique specifications of a public agency, should be subject to the prevailing wage law. Where such expenditures are for a specific public purpose and would have not have been performed but for the need of the public entity for specialized facilities, then the use of private landlords as an intermediary between the public entity and the contractor who performs work on behalf of that agency would not affect the application of the prevailing wage law. *These situations require the employment of laborers, workers, and mechanics in the same manner and for the same purpose as such work as if it were performed on publicly-owned buildings or in the situation where the public entity would perform such work directly to a leasehold.*

The *Sarkisian Bros.* case cited above is helpful in this regard. In *Sarkisian*, the court held that construction performed pursuant to a lease agreement between the State and a private developer for the renovation of a State-owned historic building as a hotel and convention center was public work. The court reached this conclusion even though the private developer bore the entire cost of construction. The court's decision was based upon the facts that the project was intended to benefit the public; that there was significant State involvement in the design of the building; that the State requested proposals for the work; and that the public would have use of the building. It is the opinion of the Department of Labor that except for the ownership question, the facts of the [REDACTED] Project are similar to those facts which the *Sarkisian* court relied upon to reach its determination that the work in that case was public work. Based upon *Sarkesian*, and the facts outlined above which differentiate this matter from *60 Market Street*, the Department believes that the work on this and similar lease projects is subject to the prevailing wage law.

Accordingly, the work performed in the furtherance of the design, construction and lease agreement between [REDACTED] and [REDACTED] for construction of a satellite campus building for a community college is public work as that term is used in Article 8 of the Labor Law. It should be noted that the lease also provides that janitorial services will be the responsibility of [REDACTED] which could raise Article 9 issues.

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

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