



New York State Department of Labor

David A. Paterson, *Governor*

M. Patricia Smith, *Commissioner*

December 31, 2009



Re: Request for Opinion
Applicability of Article 8
Fire System Inspection and Testing
RO-09-0180

Dear [REDACTED],

This letter is written to address the issue of whether public contracts for the inspection and testing of fire systems are within the coverage of Article 8 of the New York State Labor Law and require the payment of prevailing wages. At the outset, I want to thank you for providing the background materials relating to [REDACTED] inspection and testing activities and the applicability of the various states' prevailing wage laws to such activities. After a review of the materials provided by your company and a thorough consideration of the matter, please be advised that it is the Department's position that public contracts for inspection and testing of fire systems do fall within the coverage of Article 8 of the New York State Labor Law.

As you know, the applicability of Article 8 of the Labor Law to a particular public contract "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract," (*Erie County Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), *aff'd* 63 NY2d 810.) Accordingly, a two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: "(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." (See, *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3d Dep't., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) [emphasis added] However, it has been held that this provision of law "applies only to workers involved in the construction, replacement, maintenance and repair" of public work. (*Erie County Indus. Dev. Agency v. Roberts*, 94 AD2d 532, 537, (4th Dep't.1983), *aff'd* 63 NY2d 810.) Since nothing in your letter disputes the application of the two-pronged test to public contracts for the testing and inspection of fire systems,

the following discussion is limited to whether such contracts involve the employment of laborers, workers, or mechanics in the construction, replacement, maintenance and/or repair of public work.

Employees performing testing and inspection work on fire systems are properly categorized as laborers, workmen, or mechanics. There is no dispute that electricians, who fall within the category of laborers workman or mechanics, perform this work, at the very least during the installation of fire systems. The “nature of the work” (*Matter of General Elec. Co. v New York State Dept. of Labor*, 154 A.D.2d 117, 120 (1990), *aff’d* on op below 76 N.Y.2d 946, quoting *Matter of Kelly v Beame*, 15 N.Y.2d 103, 109, (1965); *see also, Matter of Consolidated Masonry Contrs. v Angello*, 2 A.D.3d 997, 997, (2003)), is the same and therefore, it is the opinion of this Department that no basis exists to conclude that the individuals performing testing of fire systems fall outside of the covered workers in Section 220 of the Labor Law.

In your letters, the most recent of which is dated December 14, 2009, you assert that public contracts for code-compliance inspections and testing are outside of the coverage of Article 8 of the Labor Law since they do not involve maintenance or repairs. However, that assertion fails to recognize “the nature, or the direct or primary objective, purpose and function, of the work product of the contract,” (*Erie County Industrial Dev. Agency v. Roberts*, *supra*), i.e. the purpose of the contracts for inspection and testing, which you characterize as being merely to satisfy a customer’s compliance with state or local code provisions, in fact, generally require inspections to be undertaken so as to ensure that systems are properly operating up to code standard, and if not, that necessary repairs are made.

The materials and letters provided by you to the Department cite to NFPA 72 [the National Fire Alarm and Signal Code (“NFPA 72”), which has been adopted by the New York State Fire Code], for the basic requirement for periodic inspection and testing of fire systems in order to ensure its operational integrity. (*see e.g.*, NFPA 72, Ch. 14 *et seq.*; *see also*, NFPA 72-14.2.1.1.) Therefore, a contract to satisfy the inspection and testing requirements in NFPA 72 is, in the opinion of this Department, an integral part of an overall contract for the maintenance of a system and is, therefore, included within the coverage of Article 8 of the Labor Law. Accordingly, any public contracts which are aimed, either explicitly or impliedly, at satisfying the testing and inspection requirements of NFPA 72, or any other code adopted for the purpose of maintaining fire systems in proper operating order are within the coverage of Article 8 of the Labor Law.

This connection between testing and maintenance is also recognized in state contracts related to fire systems maintenance. A statewide purchasing memorandum from the Office of General Services dated October 1, 2009 (cover page attached: *see also* link at <http://www.ogs.state.ny.us/purchase/snt/awardnotes/7720120191can.htm>), clearly identifies the maintenance services (including preventative and remedial) as including testing, inspection and monitoring.

Moreover, we note that [REDACTED], then Director of Service Marketing for [REDACTED], summarizes the "maintenance activities for fire alarm systems" as follows:

1. Test and calibrate alarm sensors, such as flame and smoke detectors, per manufacturer specifications. This requires knowing about the different sensors—and their testing requirements, failure modes, and re-installation requirements.
2. Simulate inputs and test the annunciators. This requires specific knowledge of the system under test.
3. Set sensitivity. This requires an understanding of the particular system, the specific application, and fire detection theory.
4. Coordinate with fire department to test the input to their system.
5. Check the battery for corrosion and expiration date, then take appropriate action, if necessary.¹

As you can see from his summary, testing and inspection appear to be included, independent of the above discussed factors, as integral parts of the maintenance of fire systems by employees working within your own company. Furthermore, [REDACTED] Standard Fire Alarm Testing and Inspection Procedure anticipates the replacement of any broken "pull station rods or glass" and that any deficiencies that are observed are communicated to the customer along with a recommended solution. That procedure further requires the cleaning of various parts of the system and the implementation of repairs that are covered by the service agreement. Clearly, this procedure combines testing with corrective actions that are needed to maintain the system in proper working condition.

For these reasons, the Department of Labor is now of the opinion that the testing of fire systems is included within the category of system maintenance and is, therefore, subject to the payment of prevailing wages. This opinion hereby overrules all prior opinions and/or communications which are inconsistent with this opinion because we find that such prior opinions and communications did not consider the full nature and purpose of the inspection and testing of fire systems. However, because there has been much confusion in the past about the Departments position as to the applicability of the prevailing wage law to this work, this opinion shall be applied prospectively to contracts that are put out for bid after January 1, 2010, unless a previous contract actually required the payment of prevailing wages for this work.

¹ "Fire Alarm System Testing, Inspection and Maintenance," Electrical Construction and Maintenance Magazine, June 1, 2002, available online at: http://ecmweb.com/mag/electric_fire_alarm_system_2/index.html.

As a result of our reconsideration of this matter, please be advised that all inspection work performed by your company on fire protection systems and other such inspection work is covered by the prevailing wage law and employees performing such work must be paid prevailing wages as established by the Commissioner consistent with the classification appropriate to the work performed.

Please do not hesitate to contact me should you have further questions with regard to this matter.

Very truly yours,

A handwritten signature in black ink that reads "M Patricia Smith". The signature is written in a cursive style with a large, stylized initial "M".

M. Patricia Smith

cc: Mario Musolino
Pico Ben-Amotz
Chris Alund
Dave Bouchard
Fred Kelley