



New York State Department of Labor
David A. Paterson, Governor
Colleen Gardner, Commissioner

November 24, 2010

[REDACTED]

Re: Request for Opinion
Article 9 Applicability
Recycling Container Hauling
RO-10-0148

Dear [REDACTED]:

This letter is written in response to your letter dated September 17, 2010, in which you inquire as to the applicability of Article 9 of the Labor Law to the hauling of a roll-off recycling container from the Town of Sanford's Highway Garage to a recycling facility. Your letter states that the County of Broome previously placed a roll off container at the Town of Sanford's Highway Garage for residents to leave recyclables for transport to the County landfill. The County recently notified the Town that it would no longer provide this service but that it was willing to donate the container to the Town if the Town would arrange for it to be transported to the County landfill. The Town is considering seeking competitive proposals for the hauling of the container and, in that consideration, your letter inquires as to the applicability of Article 9 to such hauling.

Article 9 of the Labor Law sets forth the requirements for building service employees in public work contracts to be paid at a rate not less than the prevailing rate of wages. In short, to be within the coverage of Article 9 of the Labor Law, the work must be (1) "building service work," (2) that is performed pursuant to a public work contract.

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Building Service Work

As stated above, Article 9 applies to building service work and building service employees. The term "building service work" is defined, in relevant part as, "work performed by a building service employee." Similarly, Section 230(1) of the Labor Law provides that the term "building service employee includes, but is not limited to...occupations relating to the collection of garbage or refuse..." The prevailing wage requirement in Article 9 applies regardless of whether the properties being served are public or private buildings, as long as the work is being done pursuant to a public work contract. (*Feher Rubbish Removal, Inc. v. New York State Department of Labor*, 28 A.D.3d 1, 807 (4th Dept., 2005).)

In applying this framework to the present case, it is clear that the hauling work in question constitutes building service work. The recycling container in question is made available to Town residents at a building to which they can bring recyclables as part of the Town's overall program for the collection of refuse that would otherwise collect at buildings occupied by such residents. The collection of these recyclables by the contractor at the Highway Garage and their transport by the Town's contractor to a facility for sorting and disposal is an essential part of the Town's collection of garbage or refuse. The Department has long determined that Article 9 of the Labor Law applies to the full range of activities relating to collecting of garbage or refuse, including recyclables, at a collection site, transfer site, sorting station, and similar facility and to the hauling of such materials to the final disposal site. Such collection has taken place at, for example, centralized recycling centers or short term collection locations. Consistent with such previous determinations, please be advised that the work in question is within the meaning of the term "building service work."

Public Work Contract

The same two prong test that is used to determine whether a project is a "public works contract" in Article 8 of the Labor Law is used to determine if the contract is a public works contract in Article 9 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 Dept., 1991); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009) See also, *Feher, supra* at 497-8, holding that the provisions of Article 9 should be construed together with Article 8 of the Labor Law.) "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, supra*.)

It is evident that the contract between the Town of Sanford and the winning bidder would satisfy the first prong since a public entity will be a party to the contract. The second prong is also clearly satisfied as the primary purpose of the contract is to provide a service to the residents of the Town of Sanford, a purpose which was recognized by the Court in *Feher* as having a purpose of benefitting the public. (*Feher, supra* at 498.)

Accordingly, it is the opinion of this Department that the contract in question is a public work contract within the applicability of Article 9 of the Labor Law.

This determination is based exclusively on the facts and circumstances contained in your letter dated September 17, 2010 and is given on your representation, express or implied that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letters and email might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

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