



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

August 20, 2009



Re: Request for Opinion
Article 8 Applicability
Gas Station Remediation Project
RO-09-0096

Dear [REDACTED]:

This letter is written in response to your letter dated July 8, 2009 in which you request a reconsideration of this Department's determination (PRC No. 2009003837) that Article 8 of the Labor Law applies to the New York State Thruway, Angola Travel Plaza Eastbound Remediation Project to be performed by your client, [REDACTED]. After a review of your letter and the contract materials provided by you on July 30, 2009, it remains the opinion of this Department that the project falls within the coverage of Article 8 of the Labor Law and, as such, all workers on that project must be paid in accordance with the prevailing wage schedule provided in late April 2009.

As correctly stated in your letter, a two-pronged test is used to determine whether a construction project is subject to Article 8 of the Labor Law (the prevailing wage provisions): "(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); *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 AD2d 532, 537, affd 63 NY2d 810 (1983); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) However, your letter fails to correctly apply those prongs to the present project by concluding that (1) the state is not a party to the contract and (2) the project is not a public works project.

Public Agency is Party to a Contract

Your letter states that neither the State nor the Thruway Authority is party to a contract under which [REDACTED] is performing soil excavation activities, but that

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██████████ has merely been issued a permit by the Thruway Authority to perform the remediation of contaminated soil. Citing to the decision in *Pyramid Co. of Onondaga v. NYS Department of Labor*, 223 AD2d 285, 287 (3rd Dep't 1996), for the premise that the issuance of a permit does not provide a public agency with a contractual right, your letter asserts the first prong of the test, i.e. the Article 8 contract requirement, is not satisfied in the instant project. However, your letter overlooks the fact that ██████████, a component of ██████████ since the November 30, 1999 merger of ██████████ and ██████████ is a party to a lease which not only gives ██████████ use of the land on which the Angola Travel Plaza is located but also authorizes ██████████ to operate a gas and service station at the Angola Travel Plaza. The lease contracts date back to 1975 and provide, in several places, for the restoration and remediation of the property by ██████████. These contracts specifically anticipate the hiring of "consultants, persons or firms to perform remediation of the hydrocarbon contamination, that may be required to meet Federal or State regulatory requirements." (See e.g., 1975 Contract, Addendum E, Page 5, Paragraph B.) Presumably, your client's responsibility for performing the remediation of the contaminated soil arises out of these contracts and is not, as your letter states, merely pursuant to a permit to perform the project issued by the Thruway Authority.

Consequently, the decision in *Pyramid* cited by you is inapplicable since it is limited to cases in which an employer obtains a permit to perform work unrelated to the performance of a contract with a public entity. A contractor that is required to perform work on public land pursuant to a lease agreement is not relieved of its responsibilities under Article 8 merely because the contractor was required by a public entity to obtain a permit before conducting such work. A lease agreement with a public entity that serves as the basis for the remediation work to be performed at the Travel Plaza certainly meets the first prong of the two prong test for determining whether the remediation project is public work.

Additionally, the statutory amendments contained in Chapter 678 of the Laws of 2007, amending Labor Law Section 220(3), expand the definition of the term contract as follows:

The term "contract" as used in this article also shall include 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, or where there is no lease, permit or other agreement and ownership of a public work is intended to be assumed by such public entity at any time subsequent to completion of the public work.

This newly enacted language provides for the expansion of the term "contract" to include any public work performed, as relevant to the present project, under a permit or other agreement pursuant to which a department of jurisdiction grants the responsibility of performing public improvement work. Since the work performed in the present situation is admittedly done pursuant to a permit granted by the Thruway Authority, such work clearly falls within the meaning of the term "contract" as expanded by Section 220(3) of the Labor Law. Accordingly, the project at issue easily satisfies the first prong in the test for determining whether Article 8 applies.

Public Works Project

Your letter also asserts that the project is simply "not a 'public works project,'" since the project does not provide a direct and specific public benefit, which you assert was required by the courts in *National RR Passenger Corp. v. Hartnett*, 169 A.D.2d 127 (3d Dep't 1991), *Cattaraugus Community Action v. Hartnett*, 166 AD2d 891 (4d Dep't 1990), and *Vulcan v Affordable Housing Corp. v Hartnett*, 151 AD2d 84 (3d Dep't 1989). 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*, *supra* at 130.)

Certainly the remediation of public lands from soil contaminants is unquestionably intended to provide a direct and specific public benefit. Your letter underplays this goal by stating that the purpose of the project is to comply with the "requirements of the applicable environmental regulations." This statement, however, fails to take into account that such regulations were adopted for the benefit of the public and the protection of the public health and safety. At the very least, the remediation project will restore the public property in question to the condition it was in prior to the [REDACTED] lease. This serves the important public purpose of preserving the property's value by restoring it to a condition where it may be utilized for other purposes. In addition, remediation of the property also prevents further contamination of the surrounding groundwater, another important public purpose. Thus, the project results in a public benefit for the state as the owner of the property and for the surrounding localities who have an interest in preserving their local watershed. Accordingly, it is the opinion of this Department that the remediation project is a "public works" project and, as such, it satisfies the second prong of the test for determining whether a project is subject to Article 8 of the Labor Law.

Based upon the foregoing and the information currently available to us with regard to the project, it is the opinion of this Department that the New York State Thruway, Angola Travel Plaza Eastbound Remediation Project is subject to the provisions and requirements of Article 8 of the Labor Law. Accordingly, all workers on that project must be paid in accordance with the prevailing wage schedule provided to your client in late April of 2009.

This opinion is based on the information provided in your letter of July 15, 2009 as well as other information related to this project previously provided to the Department. A

different opinion might result if the circumstances outlined in your letter changed, if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

By: 

John Charles
Associate Attorney