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

November 10, 2009

[redacted]

Re: Request for Opinion
Lowville Housing Authority
RO-09-0143

Dear [redacted]:

This letter is written in response to your letter of October 19, 2009, in which you request an opinion regarding the applicability of the prevailing wage requirements in Article 8 of the Labor Law and the Federal Davis-Bacon Wage Rates to the Village of Lowville Housing Authority's ongoing projects. Your letter states that the Authority maintains an 80 unit housing complex for elderly and disabled tenants that was constructed using Federal funds. The units are divided up into two phases. Phase I has 50 units subsidized with Federal funds used for capital projects. Phase II has 30 units subsidized with Capital Project funds from the New York State Division of Housing and Community Renewal. Your letter indicates that you were advised that all capital projects/improvements must be undertaken in compliance with Federal standards (i.e. Davis-Bacon Wage Rates). The project's architect was instructed, by the Authority, to request bids using both the Davis-Bacon Wage Rates and the State prevailing wage rates in anticipation of an opinion from this Department as to the proper applicability of such rates.

As a preliminary matter, please be advised that, in general, the Federal Davis-Bacon Act does not preempt more stringent requirements (i.e. higher prevailing wages and additional categories of covered employees) from being implemented by the states (*See, Frank Bros. v. Wis. DOT*, 409 F.3d 880, 892 (7th Cir. Wis. 2005).) Furthermore, it is well settled that work by a New York State public agency, such as a public authority, that is Federally funded is not outside of the coverage of Article 8 of the NYS Labor Law unless otherwise preempted by Federal law (*TAP Electrical Construction Service. inc. v. Hartnett*, 76 N.Y. 2d 164 (1990).) In general, where both Davis-Bacon Act and the State prevailing wage requirements are applicable, the more stringent requirements of the two, e.g., the higher

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of the two rates being required to be paid, would apply. Since, as you note in your letter, the Federal prevailing wage requirements are applicable to the project, it is merely necessary to determine whether the State prevailing wage requirements in Article 8 of the Labor Law also apply to the project.

In general, 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).)

The first prong of the two-pronged test is whether the work is being performed pursuant to a contract for the employment of laborers, workers or mechanics to which a public entity is a party (*see*, cases cited above, *supra.*). The project described will, as clear from your letter, involve a contract for the employment of laborers, workers or mechanics to which the Authority will be a party. Since the Village of Lowville Housing Authority is a "body corporate and politic," thereby making it a public entity, the first prong of the two-pronged test is clearly satisfied.

The second prong of the two-pronged test is whether the contract concerns a public work project (*See*, cases cited above). The Third Department in *Sarkisian Brothers, Inc. v. Hartnett*, 177 AD2d 895 (1991) explained that "[t]o be public work, the project's primary objective must be to benefit the public." While your letter does not describe the project in question in detail, the fact that the projects involve capital improvements on public housing for elderly and disabled tenants clearly demonstrates its primary objective to be to benefit the public. As such, it is clear that the project satisfies the second prong of the test.

In *Vulcan Housing Corp. v Hartnett*, 151 App Div 2d 85 (Third Dept., 1989), the court considered the applicability of prevailing wage laws to 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, by contrast, we are dealing with property which is maintained and owned by the Authority, is used to house low income elderly and disabled tenants as subsidized by federal and State grants, and is the delivery of essentially a public service.

Therefore, please be advised that the project is subject to Article 8 of the New York State Labor Law. Accordingly, the higher of the two prevailing wage rates, whether Federal or State, shall apply.

This opinion is based on the information provided in your letter of October 19, 2009. 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. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

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