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

May 13, 2010

[redacted]

Re: [redacted] / Telecommunications Agreement with State
Our File No. RO-10-0013

Dear [redacted]:

This letter is in response to your inquiry of January 25, 2010, concerning the applicability of the prevailing wage law to certain telecommunications installation work performed on the [redacted] Building in Albany, New York. As you know, this office had previously issued a determination related to a "Telecommunications Site Manager Service Agreement" (TSMA) between your client, [redacted] and the State of New York (State) with regard to certain construction and maintenance work on state owned facilities. A copy of that memorandum is attached (Our File No. RO-09-0044). As noted in that opinion, construction on state owned property is subject to the prevailing wage law, both as a matter of law under *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991) and as a contractual matter pursuant to paragraph 10 (c) of the telecommunications Site Manager Service Agreement. However, you raise an issue in your letter which is somewhat different than that addressed in our prior opinion and requires a separate determination.

Specifically, your question relates to work performed by [redacted] not for use by state entities, but rather by private entities. In the terms of the TSMA, there is a definitional distinction between "facilities", defined in the agreement as existing State owned structures and equipment and "user equipment", defined in the agreement as telecommunication transmitting and receiving equipment owned by a third party user. Third party users are specifically authorized by the TSMA, and under the agreement, the State receives fifty percent of any user fees paid to [redacted] Such payments are consideration for the use by the third party users of State facilities.

On behalf of [redacted] you raise two arguments in regard to the applicability of the prevailing wage law. First, it is your contention that there is no contract with a public agency requiring the employment of laborers, workers or mechanics with respect to user equipment. Rather, the claim is made that the agreement only requires [redacted] to provide management services with respect to user equipment. Second, you argue that there is no public purpose related

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to work associated with "user equipment". For both reasons, you claim that the prevailing wage law would not apply to the installation of "user equipment."

Your points, of course, are related to case law that is used in determining the applicability of the prevailing wage law. It is a well settled law that two conditions must be met before the prevailing wage provisions of Labor Law § 220 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, *affd* 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).

As to your first point, there is little question that the TSMA is an agreement which anticipates the employment of laborers, workers and mechanics during the course of the agreement. The agreement anticipates construction of new facilities on State owned properties, and also anticipates construction by third parties in the installation of telecommunications equipment. The fact that [redacted] operates only as a manager is not dispositive, as [redacted] is authorized to issue license agreements which will necessarily lead to construction activities on the part of third parties (see the User License agreement attached as exhibit "A" to the TSMA, which provides the terms and conditions of a user's rights in regard to the construction, use and removal of such equipment). As you know, Chapter 678 of the Laws of 2008 expanded the definition of the term "contract" to include permits, leases and other agreements involving third parties who perform work which would have been covered work had the municipal entity contracted for the work itself. When [redacted] issues licenses as authorized by the TSMA, those licenses make the licensee responsible for the payment of prevailing wages. The license itself becomes a contract, for purposes of the prevailing wage law, between the State as a party to the TSMA and the licensee, a third party who is subject to the requirements of the prevailing wage law under Labor Law Section 220(2) and (3)(c). The first prong of the *Erie* test is met.

As to your second point, to the effect that the work performed under the "user" provisions is not public work as that term is generally applied by the courts, we believe that your analysis in that regard is correct. As we noted in a prior opinion addressing a similar situation (Our File No. RO-08-0098, Omnipoint, copy attached),

> "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 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 "retains ownership of the lines to be installed in the project, bears the risk of future financial losses or physical destruction, is entitled to all profits from its operations over the lines, and retains the authority to condition the public's use and enjoyment of its facilities upon the purchase of a passenger ticket. These are 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 (citing cases)"."

The TSMA agreement with respect to the installation of "user equipment" is of the same nature as that considered by the court in *National* and by this Department in the Omnipoint matter. The "users" identified in TSMA will be private companies that retain ownership of their equipment after installation, bear the risk of loss, will reap financial profits or benefits from the equipment and have the ability to limit the public's use of the equipment to those who subscribe to their service. The construction of user equipment to existing towers, licensed by [redacted] on behalf of the State, does not convert a private endeavor into a public work. The prevailing wage law is not applicable to that work. It should be stressed, however, that work by [redacted] or its contractors to "Facilities" as defined by the TSMA which include replacement of towers, shelters, buildings, cabinets, foundations and fencing on or about the site will be subject to the prevailing wage law, as the maintenance and improvement of State owed equipment on State owned property is always subject to the prevailing wage law.

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

Enclosures:

cc: Chris Alund
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Opinion File