



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

July 9, 2009



Re: Prevailing Wage and NYS Police Leases
Your letter of June 1, 2009
Our File number RO-09-0087

Dear [REDACTED]:

Thank you for your letter of June 1, 2009, in which you request our further consideration of our March 31, 2008, opinion with regard to the applicability of the prevailing wage law to the construction, by private landlords, of barracks to be leased to the State Police. We also acknowledge receipt of additional information received subsequent to the letter including, among other things, the standard specifications for your barracks along with those of the Office of General Services. You indicate that you are particularly interested in the Department's reconsideration of its previous opinion with regard to the State Police's lease of landlord-constructed barracks meeting these standard specifications.

As we understand the process by which the State Police obtain leaseholds for use as police stations, requests for proposals are issued and prospective landlords respond with details as to proposed locations, timeframes, and lease costs. The estimates are based upon building specifications provided by the State Police and the Office of General Services which are specific to your needs, including requirements such as (but not limited to) cabinets and lockers, communications equipment, and specific appliances that are to be supplied. The State Police then enter into a lease agreement with the prospective landlord approved by the Comptroller's Office and the Attorney General's Office and, upon approval, the prospective landlord commences construction of the facility. The term of the lease is usually twenty years, sometimes with options for one or more five years extensions, sometimes not.

It is a well-settled law that two conditions must be met before the prevailing wage provisions of Article 8 of the Labor Law 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

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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, *aff’d* 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). “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 Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (Third Dept., 1991). Obviously, in the case of leases entered into by the state, the first condition is met by the existence of the lease between the State Police and the landlord (both as previously determined by this Department and as confirmed by the recent amendments to the prevailing wage law), so the answer to the question of whether prevailing wage applies to the barracks construction hinges on an analysis of whether the contract concerns a public work project.

As discussed in greater detail in a previous opinion issued by this office with regard to the application of prevailing wage requirements to space leased by other state agencies (see attached), there are two lines of cases in that regard, and ownership of the real property in question would appear to be a critical factor that operates as a line of demarcation. In *Sarkisian Brothers*, a building on the grounds of SUNY Oswego was rehabilitated and turned into a hotel and convention center. The lease of that property provided that the lessee would be responsible for all costs associated with the rehabilitation and conversion of the building to the specified use. The State retained ownership of the property, with lessee having an option to purchase at the conclusion of the lease only upon the State’s determination to sell to a non-governmental purchaser. The State retained the right to approve all renovations and design drawings through the Office of General Services and SUNY. Certain usages of the facilities were guaranteed to SUNY. The Court held that all of the above circumstances were sufficient indices of public use, ownership, and public enjoyment so as to support the Labor Department’s determination that the project was one of public purpose sufficient to require the payment of prevailing wage rates under Article 8 of the Labor Law.

There is also a line of lease cases, the most cited of which are *60 Market Street v Hartnett*, 153 A.D. 2d 205 (3rd Dept., 1990), and *County of Suffolk v Coram Equities, L.L.C.*, 31 A.D. 3d 687 (2d Dept., 2006) which hold that the construction of office buildings by private parties for lease to public entities is not public work. Those holdings recognize that while the buildings under consideration were being constructed for use by public entities for a public purpose, this fact was not sufficient to convert a project entered into by the private building developer for the purpose of generating a profit into a public purpose.

Against that background, we are asked to consider whether work performed by private entities to construct State Police barracks is subject to the prevailing wage law. As a result of our discussion on this topic and the documents that have been provided to us, it is clear that the

buildings are designed and constructed to specifications dictated by your agency and such specifications are put out to public bid with the resulting building subsequently leased by the agency. Many or all of the leases involve long term commitments which do not generally cover the entire useful life of the building and they are typically subject to the executory clause by which the State retains the option to cancel any lease in the event that funding for such expenditure is no longer available.

Based upon the case law as it currently exists, it would appear that where the real property involved is in public ownership, any lease of that property to any private organization would require the payment of prevailing wages where the lease is for a public purpose. *Sarkisian, supra*. Conversely, the lease of private property for the use of a public agency does not generally transform the private property's purpose into a public one requiring the payment of prevailing wages for its construction, *60 Market Street, supra*. The question being considered herein, however, appears even more refined: is the expenditure of public money for the purpose of construction of a building by a private entity using specifications unique to the needs of the State agency, under a long term lease agreement which details those requirements, subject to the requirements of the prevailing wage law?

As we have stated numerous times, this Department has always made these determinations on a case-by-case basis given that application of the court established public work test is fact based and no two construction projects are exactly alike. For example, in 1974 the Department determined that the private construction of an office to be leased to the Division of Unemployment was public work, referring to a prior opinion of counsel to the effect that leases that require the lessor to do certain work on some portion of a building was public work. In 1976, we determined that construction performed by private parties on privately held real property as a result of a lease agreement with BOCES was public work. In 2000, we determined that the installation of a cabling network in a privately-owned leased facility was public work, regardless of the ownership issue. Last year we determined that minor renovations to a leasehold were not public work. In a second opinion we determined that funding for an urban renewal project alone was not sufficient to require the application of the prevailing wage law where the ultimate use of the project would be in private ownership. We also found a BOCES project, in which significant alterations were made to a proposed leasehold, constituted public work. Other opinions have followed the reasoning in *60 Market Street*, where the facts were similar to that situation.

The Department is of the opinion that the construction of barracks by private owners utilizing the standard specifications provided to us with your request for reconsideration for long term lease by the State Police is not public work for the purposes of the prevailing wage law, as the court has held in *60 Market Street*. Such work would be required of any private landlord leasing to any tenant, be they public or private, and as a result such work does not convert work

performed for a private purpose (i.e., the generation of lease income for the building owner) into a public purpose. To the extent that this opinion differs from those previously issued with regard to barracks such as those located in Chestertown and Maybrook, the previous opinion should be considered superceded by this opinion.

On the other hand, construction of a building for a specific public purpose, in the context of long-term leases, made to meet the unique specifications of a public agency, and funded by the public entity using public funds, should be subject to the prevailing wage law. Such expenditures are for a specific public purpose, and the use of private landlords as an intermediary between the public entity and the contractor performing work on behalf of that agency would not affect the application of the prevailing wage law. This would include those situations where a barracks is constructed to the specific plans of the State Police in accordance with plans that are unique to the needs of your agency and where the building would not be useful for any other purpose at the conclusion of the lease without alterations or where the lease of the building is for such a long period that it would cover the entire useful life of the building. Given the specificity of detail, the unique features required, the anticipated length of use of the facility through the lease term and renewal options and the unlikelihood that such structures could be adapted to other uses without significant alterations, such work, performed by a private developer on behalf of the governmental unit should be subject to the prevailing wage law.

As we have stated previously in other opinions, unless and until legislative action finally resolves the question of what constitutes a "public purpose" for purposes of determining what is a public work, this Department will continue to exercise its best judgment in this regard based upon the particular facts of the matter before us.

Please feel free to contact us should you have any further questions with regard to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Maria Colavito".

Maria Colavito
Counsel

Attachment

cc: David Weinstein
Jeff Mans
M. Patricia Smith
Mario Musolino
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