

PREVAILING WAGE LAW

Public or Private Development? - Be Certain!

For those involved in real estate development in New York, the lines often blur between “private” and “public” projects. Is public funding alone, in whole or in part, enough to legally change the private character of a project? There are serious ramifications of not being fully familiar with the correct answer to this question. Sometimes neither the project’s owner nor the contractor is aware that the project is legally a “public works project” covered by the strict dictates of NYS’s Prevailing Wage Law (Labor Law §§220 *et seq.*). A mistake in this regard, whether honest or not, could lead to extremely painful results.

In our practice, we have seen instances where a contractor has been innocently, but incorrectly, advised by a private developer that the project is “definitely” private in nature (and, presumably, not governed by Labor Law §220). Many months into the project, or even years after its completion, the same contractor is rudely awakened to the harsh reality that the prevailing wage rate should have been paid throughout the project to all the trades and that the contractor is exposed to serious civil, or even potential criminal, consequences.

A not uncommon scenario involves a private developer leasing space from a public agency for a project that is being financed completely, or even partially, with public funds. The private owner/developer enters into a prime contract with the contractor who is unaware that the contract is legally a “public works” contract. Months or years later (assuming the applicable statute of limitations are met), someone - a union, a worker, another contractor - makes a formal complaint to the NYS Department of Labor or the NYC Comptroller and a belated investigation is made to determine whether or not the job is, in fact, a public works project.

Under the applicable law, the contractor is fully exposed and legally responsible for any wage under-payments regardless of the owner's failure to provide the correct information. This is consistent with the general rule that it is the contractor alone who is responsible for determining the applicable prevailing wage. Incorrect information or the absence of any information received from an owner/developer will create no defense against the contractors eventually having to pay the correct wages. (A claim might be made against a private owner/developer for fraudulently or negligently providing incorrect or incomplete information to a contractor upon the occasion of its earlier, timely inquiry. This would not, however, relieve the contractor of its primary responsibility under the NY Labor Law to the underpaid employees- all tradespeople, including those working for subcontractors.)

G&C Commentary

Whenever a contractor is working on a "private job" which involves in some manner public property or funds, a definitive determination regarding prevailing wage applicability should be obtained as soon as possible from either the New York State Department of Labor's Bureau of Public Works or, for projects within the five boroughs of New York City, the Public Wage Bureau of the Office of the NYC Comptroller. Failure to do so at the earliest, pre-bid stages of estimating may doom the project's profitability or worse. Furthermore, reliance should only be made upon these specialized agencies, since, as indicated, incorrect information from the leasing or owning public agency, or the private developer, will not offer a legally valid defense against the failure to pay full prevailing wages and prevailing benefits to all tradesman working on the project.

