STATE OF NEW YORK: DEPARTMENT OF LABOR

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In the Matter of

Charles A. Gaetano Construction Corp.

Prime Contractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were required to be paid to employees on a project known as the Assured Information Security New Building project in Oneida County

REPORT
&
RECOMMENDATION

Prevailing Wage Rate
Case No. 2010500101
Case ID # PW07 2015006737
Oneida County

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In the Matter of

Charles A. Gaetano Construction Corp.

Prime Contractor,

and

Apple Roofing Corp.

Subcontactor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were required to be paid to employees on a project known as the Assured Information Security New Building project in Oneida County

Prevailing Wage Rate
Case No. 2010500101
Case ID #PW072014004920
Oneida County

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In the Matter of

Charles A. Gaetano Construction Corp.

Prime Contractor,

and

Riegler Electric, Inc.

Prevailing Wage Rate
Case No. 2010500101
Case ID # PW07 2014004923
Oneida County

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were required to be paid to employees on a project known as the Assured Information Security New Building project in Oneida County

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In the Matter of

Charles A. Gaetano Construction Corp.

Prime Contractor,

and

Savoy-Joseph, Inc.

Prevailing Wage Rate
Case No. 2010500101
Case ID # PW07 2014004921
Oneida County

Subcontractor,

for a determination pursuant to Article 8 of the Labor Law as to whether prevailing wages and supplements were required to be paid to employees on a project known as the Assured Information Security New Building project in Oneida County

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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

Pursuant to a Notice of Hearing issued on October 6, 2015, a hearing in the above-captioned Matter was held on November 19, 2015, in Albany, New York. The purpose of the hearing was to provide the parties with an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned whether Labor Law article 8 (§§ 220 *et seq.*) applied to multiple contracts ("collectively, the Projects") with Cardinal Griffiss Realty LLC ("CGR"), which the Department alleges in the Notice of Hearing to be a subsidiary of Griffiss Local Development Corporation ("GLDC"). The contracts involved construction, on land in Oneida County that was formerly part of Griffiss Air Force base, of a new headquarters building for use by Assured Information Security, Inc. ("AIS"), by Apple Roofing Corp. ("Apple"), Riegler Electric, Inc. ("Riegler"), and Savoy-Joseph, Inc. ("Savoy"), as subcontractors of Charles A. Gaetano Construction Corp. ("Gaetano"), on three of the projects, and Gaetano, as sole contractor, on a fourth project.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Jeffrey Shapiro, Senior Attorney, of Counsel).

Apple, Riegler, Savoy, and Gaetano appeared with their attorney, Robert A. Doren, Esq. Additionally, the Department set forth in its Notice of Hearing that it agreed that GLDC and CGR should be allowed to participate as Parties in this matter; as no objections were raised to this arrangement prior to or during the hearing, GLDC and CGR appeared as Parties and were also represented by attorney Robert A. Doren, Esq. Apple, Riegler, Savoy, Gaetano, GLDC, and CGR (collectively, "the Respondents") filed an Answer to the charges incorporated in the Notice of Hearing (HO 2).

Prior to the hearing, the Hearing Officer received two Applications to Appear as a Party. Attorney Jan S. Kublick submitted an Application on behalf of the Finger Lakes Chapter

of the National Electrical Contractors Association, Incorporated ("NECA"), and Corey Devoe, and Michael Croniser, individually. Joel M. Howard, Esq., submitted an Application on behalf of the Associated General Contractors of New York State, LLC ("AGC").

The Department had no objection to the Applications. After a review of the Applications and the opposition submitted by Respondent's counsel, the Hearing Officer allowed NECA[1] and AGC to intervene in this matter and become named Parties. NECA appeared through its attorney, Jan S. Kublick; AGC was represented by its attorney, Joel M. Howard.

ISSUES RAISED

Prior to the hearing, GLDC, CGR and Gaetano commenced an action in New York State Supreme Court, Oneida County, seeking a declaration that they were not subject to the prevailing wage provisions of the Labor Law. Supreme Court granted the Department's motion to dismiss based upon its determination that the Plaintiffs first needed to exhaust their administrative remedies; the New York State Court of Appeals denied Plaintiffs' Motion for Leave to Appeal (*Griffiss Local Development Corporation et al., Appellants, v Colleen C. Gardner, Commissioner, New York State Department of Labor, et al., Respondents*, 103 A.D. 3d 1276, February 8, 2013; *Griffiss Local Development Corporation, et al., Appellants, v Colleen C. Gardner, etc., et al., Respondents*, 21 N.Y.3d 856, June 4, 2013) (R EX 8 – 11[2]).

The Department stated in the Notice of Hearing (HO 1) and again in its Proposed Findings of Fact and Conclusions of Law ("DOL Proposed Findings") that it and Respondents have agreed that if the Commissioner determines that the Projects are subject to Labor Law article 8, underpayments of wages and supplements exist for each of the Respondent contractors on the Projects as follows (HO 1, para. 12, p. 6; DOL Proposed Findings para. 2, p. 3):

Gaetano, $38,308.49;

Apple, $21,196.40;

Riegler, $209,832.37; and

Savoy, $137,070.94[3].

Respondents, the Department, AGC and NECA all agreed to the introduction into evidence of Exhibits 1 through 24, and concurred that that the issues involved in this matter are

[1] The Hearing Officer denied the Applications to Appear as a Party of Corey Devoe, and Michael Croniser.
[2] Although for the most part stipulated to by all of the parties, exhibits introduced by counsel for the Respondents shall be referenced throughout as "R EX ____,"
[3] Respondents admitted to this stipulation in their Answer (HO 2, paragraph 1, p. 3).

legal, not factual. The Department counsel chose not to make an opening statement, instead referring to Respondent Exhibits 2 and 4, opinions previously issued through the Department's Counsel's Office, as the Department's opening statement, and opting to rest the Department's case upon the introduction of Respondent's Exhibits.

Thus, a record was created from which the Commissioner could make a determination as to the applicability of the Labor Law article 8 to the unique facts set forth therein.

FINDINGS OF FACT

1. As stipulated to between the Parties or admitted to in Respondents' Answer, the work at issue in this matter was the subject of contracts entered into in 2010 between CGR and Respondent Gaetano, and subcontracts between Gaetano and its subcontractors. These contracts involved employment of workers in various building trade classifications. The subject of the contracts was the construction of a new building leased to AIS, a cyber-security business, for an initial period of fifteen years, subject to renewal. Subsequent to the initial contract, Gaetano entered into subcontracts with Apple, Riegler, and Savoy for work to be performed pursuant to the main contract. After significant correspondence between the parties, some of which has been entered into the record in this matter, and litigation in New York State courts, this hearing was held to create a record upon which the Commissioner of labor could base a determination as to whether article 8 of the Labor Law applied to the work in question.

2. This matter has its origin in 1993, when the Base Realignment and Closure Commission, a commission created pursuant to federal law "to provide a fair process that will result in a timely closure and realignment of military installations inside the United States" included Griffiss Air Force Base in its July 1, 1993 report to the President.[4]

3. In response to the proposed base closing, an ad hoc, unincorporated citizens group formed, taking as its name the Griffiss Redevelopment Planning Council. (Tr. p. 62)

4. In 1994 the Legislature passed the Aid to Localities Budget and included in section 110 the following language: "The New York State Urban Development Corporation shall provide assistance, out of any funds appropriated therefore, to a local development corporation organized, with the cooperation of the Griffiss Redevelopment Planning Council, Oneida County, and the city of Rome, pursuant to and for the purposes enumerated under section 1411

[4] Although not entered into the record at the time of the hearing, I take notice of the Defense Base Closure and Realignment Commission 1993 Report to the President, found on the Department of Defense website at: http://www.acq.osd.mil/brac/Downloads/Prior%20BRAC%20Rounds/1993com2.pdf

of the not-for-profit corporation law, provided that the board of directors of such local development corporation shall consist of fifteen directors as follows: two directors to be designated by the speaker of the assembly; two directors to be designated by the temporary president of the Senate; five directors to be designated by the governor; three directors to be appointed by the county executive for Oneida county; and three directors to be appointed by the mayor for the city of Rome."[5] (R EX 13)

5. The Griffiss Local Development Corporation was incorporated under section 1411 of the Not for Profit Corporation Law in November, 1994. GLDC was incorporated "for the charitable and public/quasi – public purpose of participating in the development and implementation of a comprehensive strategy to maintain, strengthen and expand the use and viability of the former Griffiss Air Force Base in the city of Rome and Oneida County…" GLDC constituted its board as set forth in the budget language described above. It had various powers, including the ability to develop, construct, acquire, rehabilitate and improve various structures, to assist financially in such work, to maintain and manage such structures, to purchase property, borrow money, negotiate and issue bonds, and to sell, lease, mortgage or otherwise dispose of property structures. (R EX 14)

6. Neither the County of Oneida nor the New York State Legislature passed special legislation in order to create GLDC. (Tr. pp. 50, 64)

7. GLDC was created to assist the community in developing a recovery and reuse strategy for the facilities affected by the base closure plan, and to interact with the United States Air Force and other federal and State agencies involved in the process. (Tr. pp. 57, 58).

8. Soon after the creation of GLDC, the County of Oneida applied for, received, and passed through to GLDC federal money from the Office of Economic Adjustment of the Department Of Defense. The County of Oneida represented to the Office of Economic Adjustment that the ultimate recipient of the federal funds would comply with federal regulations. (Tr. pp. 50, 51, 53, 54)

10. In February 1995, the County of Oneida entered into an agreement with GLDC, described within the agreement as the successor organization to the Griffiss Redevelopment Planning Council. The agreement identified certain federal and county matching funds

[5] Subsequent to completion of the Project, GLDC amended its bylaws and changed the makeup of its board of directors, with appointments thereafter made by board members rather than public figures. (R EX 15)

earmarked to go to the GLDC by the State of New York. GLDC agreed to accept transfer of staff serving the Griffiss Redevelopment Planning Council, to be responsible for managing grant funds necessary to satisfy Oneida County and Office of Economic Adjustment financial requirements, to expend such funds in connection with the redevelopment effort for Griffiss Air Force Base, to have Oneida County sponsor all applications for federal and State funding where sponsorship from a municipal corporation is required, and to provide other services required to administer grants. (R EX 22)

11. Upon the receipt of federal monies, the GLDC was required to comply with the federal Davis – Bacon Act. (Tr. p. 96)

12. Since 1994, GLDC has either leased or sold property to other parties, usually private entities. GLDC did not require the payment of prevailing wages or supplements pursuant to the Labor Law on any of these projects. (R EX 27; Tr. pp. 74 – 78, 95)

13. Prior to changes in the makeup of GLDC's Board of Directors, the County of Oneida never funded or played any role in the day-to-day operations of GLDC. (Tr. p. 80)

14. Oneida County did not indemnify GLDC; it did not exercise any veto power over GLDC's operations; and it did not receive any of the profit generated by GLDC. (Tr. p. 80)

15. GLDC does not have immunity from prosecution, nor does it have the power of eminent domain. (Tr. p. 80)

16. Employees of GLDC are not a part of the New York State Retirement System. (Tr. p. 82)

17. The United States Air Force and the Office of Economic Adjustment took the position that GLDC was not a municipality or a unit of government. GLDC then established a relationship with the Oneida County Industrial Development Agency ("OCIDA"), whereby the United States Air Force transferred the property from the base to OCIDA, and GLDC leased the property and was responsible for management, development, marketing, sale and lease of the property. (Tr. p. 72)

18. OCIDA took title solely to facilitate the pass through of tax exempt incentives and to assist in getting GLDC to manage the property. (Tr. pp. 72, 73)

19. Since 1994, when GLDC negotiated a property transaction with a third party, OCIDA would transfer the property to GLDC via quitclaim deed, and GLDC could then transfer the property to the third party. (Tr. pp. 74, 75)

20. Since 1995, GLDC has acquired 39 parcels of land from OCIDA and sold them to third parties; GLDC has also leased 10 parcels of land. None of the parcels were sold or leased to public entities. (R EX 27; Tr. pp. 75 – 78)

21. In the fall of 2010, OCIDA transferred to GLDC via quitclaim deed a parcel of land described as "Building 301 Parcel" which parcel became the site for the Projects (R EX 16; Tr. p. 83).

22. The same parcel was then sold to CGR, a subsidiary of GLDC. GLDC owned 99.99% of CGR, with the remaining 1% owned by the Economic Development Growth Enterprises Corporation ("EDGE"), a not-for-profit corporation[6]. (R EX 12, 17; Tr. pp. 83, 84)

23. There were no overlapping directors or officers between GLDC and EDGE. (Tr. p. 63)

24. CGR was created to take advantage of the New Markets Tax Credit Program from the United States Department of the Treasury. ("NMTC")[7] (Tr. p. 84)

25. At the time of the land transfer describe above, EDGE had contracted with the County of Oneida to provide certain services to the County involving support of the County's economic development policies, in return for payment from the County for such services. (R EX 23)

26. EDGE also was party to various staff services agreements at this time, among them an agreement with GLDC (R EX 24)

27. In August, 2010, CGR entered into separate Lease and Leaseback Agreements with OCIDA. The Lease provided for the rental of the parcel, included real property and equipment, to OCIDA during the term of the Leaseback Agreement. In the lease, CGR warranted that it had good and marketable title to the parcel. CGR was responsible for payment of all taxes, maintenance, and insurance of the premises. (R EX 18)

28. The Leaseback Agreement notes that OCIDA conveys title to the land and any structures or improvements to GLDC, that GLDC conveys title to CGR, and that CGR subleases

[6] Prior to 1998 EDGE was called the Oneida County Industrial Development *Corporation* (T 63), not to be confused with OCIDA; it shall be called EDGE throughout this discussion.

[7] I note from the web site of the US Treasury that The NMTC Program is designed to attract private capital into low-income communities by permitting individual and corporate investors to receive a tax credit against their federal income tax in exchange for making equity investments in certain entities. https://www.cdfifund.gov/programs-training/Programs/new-markets-tax-credit/Pages/default.aspx

a portion to AIS in a separate Sublease Agreement which has an initial term of fifteen years. (R EX 19, 20; Tr. p. 86)

29. GLDC and CGR entered into the Lease and Leaseback Agreements to obtain the financial benefits offered by OCIDA, which included exemption from mortgage recording taxes and sales taxes on building materials, as well as the negotiation of a payment in lieu of taxes ("PILOT"). (Tr. pp. 86, 87)

30. CGR obtained $2.3 million of the $10.5 million Project cost through the utilization of the NMTC Program, the tax credits having been purchased by U. S. Bancorp. (Tr. pp. 83 - 85) GLDC invested $6.6 million (including the bridge loan described below), and CGR borrowed approximately $1.6 million from Oneida Savings and Loan, which loan GLDC guaranteed. (T. p. 97) GLDC and CGR also obtained a bridge loan of $1 million from Oneida Savings Bank with the expectation that, only after the Project was complete, AIS would meet certain job creation targets which would result in receipt of a $1 million grant from the Empire State Development Corporation ("ESDC"). (Tr. pp. 89, 90) Rome Investment Development Corporation contributed $75,000.00 towards the Project. (Tr. p. 103)

31. If AIS does not meet the job creation requirements for the ESDC grant, it will be liable for repayment of the amount of the grant to GLDC. (Tr. pp. 40 – 43)

32. In or about August, 2010, CGR entered into a construction contract with Gaetano, which contract had no provision for the payment or provision of prevailing wages and supplements pursuant to the Labor Law. (R EX 21)

33. AIS is a for-profit corporation that provides classified information security services to the United States Department of Defense ("DOD") as well as other federal agencies. AIS is headquartered in Rome, New York and has ten locations throughout the United States. AIS is owned by twelve private, individual, shareholders, one of whom owns a supermajority of shares. AIS does not contract with, or receive money from, New York State, Oneida County, or Rome, New York. (Tr. pp. 31 – 33)

34. The AIS facility that was the subject of the Project is not open to the public; DOD requires AIS to maintain 24 hour security; any individual allowed into the facility receives a visitor's badge and is escorted when in the building. (Tr. pp. 34, 35)

35. AIS employs approximately 100 engineers and scientists who perform research concerning computer network security. (Tr. p. 35)

36. AIS moved into the building in October 2011, and has leased three of the four wings plus the center-core area of the building from CGR; there are no other occupants and AIS may lease the remaining wing in the future. (Tr. p. 45)

37. Oneida County did not review any GLDC contracts, sales, or leases; exercise veto power over GLDC actions; become involved in GLDC day-to-day operations; indemnify GLDC; review the contract for the Project; or fund GLDC after1995. (Tr. pp. 50 – 52; 80)

38. No profit generated by GLDC is given to Oneida County. (Tr. p. 81)

CONCLUSIONS OF LAW

JURISDICTION OF ARTICLE 8

New York State Constitution, article 1, § 17 mandates the payment of prevailing wages and supplements to workers employed on public work projects[8]. This constitutional mandate is implemented through Labor Law article 8. Labor Law §§ 220, *et seq*. "Labor Law § 220 was enacted to ensure that employees on public works projects are paid wages equivalent to the prevailing rate of similarly employed workers in the locality where the contract is to be performed and authorizes the [Commissioner of Labor] to ascertain said prevailing wage rate, as well as the prevailing 'supplements' paid in the locality." (*Matter of Beltrone Constr. Co. v McGowan*, 260 AD2d 870, 871-872 [1999]). Labor Law § 220.2 establishes that the law applies to a contract for public work to which the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law is a party. Labor Law §§ 220 (7) and (8), and 220-b (2) (c), authorize an investigation and hearing to determine whether prevailing wages or supplements were paid to workers on a public work project.

In 1983, the New York State Court of Appeals established what was, until recently, the test for whether a project was subject to the Labor Law public work provisions. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), affd 63 N.Y.2d 810 (1984). *Erie* involved a construction contract on a project financed by an industrial development agency, and established the now-familiar two-prong test:

[8] This section derives ultimately from the 1905 amendment of section 1 of article XII of the New York State Constitution of 1894.

> (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. *Id at 537.*

Recently the New York State Court of Appeals adopted a new, three-prong test to determine whether a particular project constitutes a public work project. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc,* 21 NY3d 530 (2013). The Court states this test as follows:

> First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public. *Id at 538.*

The Department and NECA contend that each prong of this test is met for the Projects, and that Labor Law article 8 applies. Respondents and AGC contend that the facts in this case are such that no portion of the test is met.

IS GLDC A PUBLIC AGENCY THAT IS A PARTY TO A CONTRACT INVOLVING THE EMPLOYMENT OF LABORERS, WORKMEN, OR MECHANICS

With regard to the first prong of the test, that a "public agency" must be a party to a contract involving the employment of laborers, workmen, or mechanics, the Department and NECA argue in their post-hearing submissions that GLDC is a "public benefit corporation" or, in the alternative, a third party "acting in place of, on behalf of and for the benefit of [a] public entity..." pursuant to Labor Law §220.2. (Department Proposed Findings para. 6 - 18; NECA Proposed Findings of Fact and Conclusions of Law ("NECA Proposed Findings") para. 6-18) Respondents and AGC argue that the only relevant classification in the language of Labor Law §220 is that of "public benefit corporation," and that GLDC does not fall within the definition of such an entity (Respondent Proposed Findings para. 9 – 13; Respondent Memorandum of Law pp 13 – 15; AGC Memorandum of Law, pp 5, 6)[9]

Prior to the Court's *De La Cruz* decision, the long-standing test to determine whether a particular project constituted public work required that two conditions be satisfied: (1) a public

[9] Labor Law §220.2 establishes those entities whose participation is necessary for coverage by the statute to occur, and states: "Each contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party, and any contract for public work entered into by a third party acting in place of, on behalf of and for the benefit of such public entity..." The Parties in this matter have limited their argument to whether GLDC is a public benefit corporation or, in the alternative, a third party acting on behalf of a public entity.

agency[10] must be a party to a contact involving the employment of laborers, workers or mechanics, and (2) the contact must concern a "public works" project. *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). *See, also, Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996). In order to satisfy the first prong of the *Erie County* test, the "public agency contract" test, it has never been necessary that a public agency be a direct party to the construction contract. *See*, *Bridgestone/Firestone, Inc. v. Hartnett*, 175 AD2d 495, 497 (3d Dept. 1991) (involving warranty work). So, for example, the Appellate Division has found that a county's agreement to lease a new building proposed to be constructed by a limited partnership (and actually constructed by a private construction company pursuant to a separate construction contract that the county was not a party to) necessarily involved the employment of workers to construct the building, and that lease agreement was therefore sufficient to satisfy the first prong of the test. *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207 (3d Dept. 1990), *affd* 76 NY2d 993 (1990).

Likewise, in its *National R.R. Passenger* decision, the Appellate Division found that the financing and implementation agreements that allowed Amtrak to consolidate its lines in New York's Penn Station satisfied the first prong of the *Erie County* test. *Matter of National R.R. Passenger Corp. v. Hartnett*, 169 AD2d 127, 129-130 (3d Dept. 1991). In that case, Amtrak contracted with a private construction company for clearing, grubbing and track removal and fencing preparatory to the installation of the contemplated improvements, and that company then subcontracted with other companies for portions of the work. *Id.* at 129. The State was not a party to the construction contracts, but had entered into agreements with Amtrak to, among other things, share 40% of the cost of the project, which agreements further provided for State Department of Transportation ("DOT") approval of contractor selection and change orders. *Id*. The Court found that "[t]he contractual arrangements between the State and Amtrak rather easily satisfied the first of these elements (referring to the first prong of the *Erie County* test), in that a public agency is one of the parties and Amtrak is obligated thereunder to go forward with the

[10] A public agency is one of the public entities specified in Labor Law § 220 (2). The Court of Appeals has made clear that the definition of public agency may not be expanded beyond those specifically designated entities. *Matter of M.G.M. Insulation Inc. v. Gardner,* 20 NY3d 469, 475 (2013); *Matter of New York Charter School Assoc. v. Smith*, 15 NY23d 403, 410(2010).

project, necessarily involving the employment of workers and mechanics *(see, Matter of 60 Mkt. St. Assocs. v Harnett*, 153 AD2d 205, 207, *affd* 76 NY2d 993)." *Id*. at 130.

The Labor Law uses, but does not define, the term "public benefit corporation." However, General Construction Law §65 establishes the types of corporations which can exist in New York State:

> Classification of corporations. a. A corporation shall be *either*, 1. A public corporation, 2. A corporation formed other than for profit, *or* 3. A corporation formed for profit. b. A public corporation shall be *either*, 1. A municipal corporation, 2. A district corporation, 3. A public benefit corporation." (emphasis added)

There is no ambiguity in this section; a corporation must initially be one of the three options presented; if it is a public corporation it must then be one of the three types set forth.

When the State Legislature passed the 1994 budget legislation it appropriated money to the State Urban Development Corporation, to provide assistance to a local development corporation established pursuant section 1411 of the not-for-profit law. The language in the budget did not provide for the establishment of a public corporation. (R EX 13) Some time after the budget was enacted, GLDC filed a certificate of incorporation pursuant to Not for Profit Corporation Law §1411. (R EX 14) The certificate makes no mention of a "public corporation."

The State Constitution also references the creation of public corporations. Article X, § 5 states:

> No public corporation (other than a county, city, town, village, school district or fire district or an improvement district established in a town or towns) possessing both the power to contract indebtedness and the power to collect rentals, charges, rates or fees for the services or facilities furnished or supplied by it shall hereafter be created *except by special act of the legislature.* (emphasis added)

The record establishes that GLDC has the power to borrow funds and to collect rentals or other fees. (R EX 14, 27; Tr. pp. 83 – 87).[11] The record contains no evidence that GLDC was

[11] By virtue of the Department's having stipulated to the introduction into the record and adopted as its opening statement Exhibits 2 and 4, it implicitly accepts the fact that GLDC can borrow funds and collect rentals. (T 20) Exhibit 4 also contains language which indicates the Department takes the position that the term "the power to collect rental, charges, rates or fees for the services or facilities furnished or supplied..." as found in the Article X, §5 of the State Constitution must be read to mean "the public corporation is given authority to ... impose on the municipal entity as a whole fees, rents or other charges." However, the Department cites no support for this position and refers only to entities created pursuant to the Public Authorities Law, not the Not for Profit Law.

created by a special act of the Legislature[12]. The Department, however, argues that, regardless of the powers held by GLDC, the term "public benefit corporation" must be viewed through the lens of Labor Law article 8. (R EX 4), and that GLDC must be found to be a public benefit corporation as it meets the definition found in General Construction Law §66.4

> § 66. Definitions. 1. A "public corporation" includes a municipal corporation, a district corporation, or a public benefit corporation... 4. A "public benefit corporation" is a corporation organized to construct or operate a *public improvement* wholly or partly within the state, the *profits from which inure to the benefit of this or other states, or to the people thereof.* (emphasis added)

However, it is clear that the General Construction Law is structured such that the definition of a public corporation as a public benefit corporation can be reached only subsequent to the analysis required by§65, which by its plain language states that a corporation can only be one of the three options presented: for-profit, not-for-profit, or public. [13] The Department contends that GLDC, which it categorizes as a local development corporation, "meets the definition of a public benefit corporation" under General Construction Law §66 but avoids the threshold question of how a not-for-profit corporation created under the Not-for-Profit Law avoids being classified as a not-for-profit corporation under General Construction Law §65. (Department Proposed Findings, para. 14). The fact that the courts in this State have found that Labor Law article 8 is to be liberally construed, *See, Matter of Tenalp Construction Corporation, Petitioner, v. Lillian Roberts* 141 A.D.2d 81 (2d Dept. 1988) ("the statute is to be liberally construed to carry out its beneficent purposes."), does not mean that the plain language of the statute may be expanded unilaterally by the Department. In fact, the Court of Appeals has been clear in *M.G.M. Insulation* and *Charter School Assn.* that only the four entities set forth in Labor Law §220.2 meet the definition of "public entities" and has rejected the contention by the Department that other, quasi-public entities fall within the scope of the statute. For example, the

[12] GLDC employees were not a part of the New York State Retirement System, GLDC had no immunity from prosecution, and GLDC did not have the power of eminent domain. (T 81, 82)

[13] The Department argues in R EX 4 that its position has been sustained in an analogous matter by the Court of Appeals. *Matter of Buffalo News, Inc. v. Buffalo Enterprise Development Corporation* 84 N.Y.2d 488 (1994). However, *Buffalo News* involved an interpretation of Public Officers Law §86.3, which defines an "agency" as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other *governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof" Id* at 492(emphasis in original) As this Decision involves a different statute with a significantly expanded definition of public agency, it is of little use in the instant matter.

Court found that charter schools are not public entities within the meaning of the law: "Only four public entities are specifically identified under Labor Law § 220 (2); the State, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law. By its terms, the statute does not expressly apply to education corporations, and that includes charter schools (citations omitted)" *Matter of New York Charter School Assoc. v. Smith*, 15 N.Y.3d 403, 409 (2010) Similarly, the Court in *M.G.M. Insulation* again rejected the 'functional equivalent' test with regard to a volunteer fire department, stating "while charter schools, like volunteer fire corporations, may be 'quasi-public' in nature, they are not a specified public entity and thus, do not fit within the ambit of the statute (citation omitted)" *Matter of M.G.M. Insulation Inc. v. Gardner*, 20 NY3d 469, 475 (2013).

Accordingly, I find that GLDC is not a public benefit corporation under Labor Law article 8.

ARE GLDC, EDGE, AND/OR CGR THIRD PARTIES ACTING IN PLACE OF, ON BEHALF OF, AND FOR THE BENEFIT OF, A PUBLIC ENTITY

Even if GLDC is not a public benefit corporation, the Department argues in the alternative that it falls within the language of Labor Law §220.2 which states that a third party "acting in place of, on behalf of and for the benefit of [a] public entity..." is also subject to the law. The Department argues that CGR, which entered into the sublease with AIS, was acting on behalf of Oneida County (Department Proposed Findings para. 15)[14]

The statutory language in question was enacted in response to the decision in the *Pyramid* case. (*Matter of Pyramid Co. of Onondaga v. New York State Dept. of Labor*, 223 AD2d 285 (3d Dept. 1996)). *Pyramid* involved the construction of access lanes from an interstate to a shopping mall by a private contractor, pursuant to permits issued by the New York State Department of Transportation ("DOT"). The construction took place primarily on State-owned lands, and, once the completed roads were approved by DOT, they were turned over to the State, and used by the general public as part of the State highway system. (*Pyramid* at 286). The court had no difficulty finding that the project was a public work, but found that no contract existed between

[14] The Department also takes the position that "Of course... if GLDC is found not to be a public agency, it should, in the alternative, also be found to be a third party acting on behalf of Oneida County." Department Proposed Findings para. 15, footnote 2.

the contractor and DOT. (*Id.* At 287). The Legislation enacted in 2007 to address the situation that arose in the *Pyramid* case was characterized as closing a loophole in the law by the Governor in his approval memo.[15]

The question here is whether GLDC was acting "in place of, on behalf of, *and* for the benefit of" a public entity (emphasis added). None of the terms set forth are defined in the Labor Law. While the board members of GLDC were appointed by public officials during the time of the Project, no single public official, from the County or elsewhere, had sufficient authority to appoint a controlling number of such members[16]. (Tr. p. 68) There are few, if any, factors to support the Department's argument that the relationship described in Labor Law §220.2 existed. The County of Oneida at no time involved itself in the operations of GLDC, nor did it control GLDC policy. (Tr. p. 52) The County never reviewed any of GLDC's sales or leases. (Tr. p. 51) The County never vetoed a GLDC action, nor is there any evidence that it had such veto authority. (Tr. pp. 52, 81) The County did not indemnify GLDC for its debts and liabilities. (Tr. pp. 52, 53, 81) Significantly, GLDC retains all of the profits generated by the projects it undertakes. (Tr. p. 81) The only agreement between GLDC and the County is one from 1995, which involved general economic development terms, but no language concerning construction or the employment of laborers, workers or mechanics. (R EX 22) The agreement between CGR, an almost wholly-owned subsidiary of GLDC, and AIS is the first document to set forth such requirements. (R EX 21) Other than the fact that GLDC was involved in economic development, as was the County of Oneida, the record lacks any evidence that GLDC meets all parts of the test in the Labor Law, i.e., that it acted "in the place of, on behalf of, and for the benefit of" Oneida County.

As a result I find that neither GLDC or CGR acted in place of, on behalf of, and for the benefit of a public entity.

DID THE PROJECT INVOLVE CONSTRUCTION LIKE LABOR PAID FOR BY PUBLIC FUNDS

[15] "The narrow court interpretations of the term 'agreement' created an unwarranted loophole that has prevented the application of prevailing wage rules to public work projects that should be subject to those rules..." (AGC Proposed Findings, p. 11, citing Governor Approval Memo Number 53, filed with Chapter 678 of the Laws of 2007).

[16] Respondents note that on March 24, 2011, GLDC amended its by-laws and abolished the appointment process in effect at the time of the Project and instead provided that the board became self appointing. (Respondent Proposed Findings, para. 38; R Ex 15) However, this action took place subsequent to the events surrounding the Project.

It is clear from the Record that the contract between CGR and Gaetano did involve construction-like labor, and Respondents raise no argument to the contrary. The Department argues that the financing of the Projects involved multiple sources of public funds. (DOL Proposed Findings, para. 21 – 23) Funds included $2.3 million obtained by CGR through the NMTC Program and the tax credits having been purchased by U. S. Bancorp. (T 83 – 85, R Ex 20) With regard to tax benefits obtained for the Project, the language of the *Erie* case is controlling:

> Although the agency performs a governmental function and operates as a governmental agency and instrumentality, its involvement is limited to providing tax exempt bonds as an investment incentive to the private investors who finance the project. The conveyance of legal title to the agency with the simultaneous lease back to the company is structured merely as a mechanism to facilitate financing and is not a genuine allocation of ownership in the agency. The economic benefits and burdens of ownership are reserved to the company and the agency serves only as a conduit for the tax benefits provided by such an arrangement.

Matter of Erie County Indus. Dev. Agency v. Roberts, 94 A.D.2d 532, 539-540 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984). The ESDC grant, the closest thing to direct public funding, was conditioned upon the Project having been completed before the grant was released; additionally, AIS was required to meet certain job creation goals, and remains obligated to meet those goals through 2017. (Tr. p. 42) Should AIS fail to meet the goals upon which the grant was conditioned, ESDC can recover certain prorated amounts of the grant. (Tr. p. 43) The Department submitted no evidence indicating that the ESDC grant was used to leverage other construction financing or repay such financing once it was received.

When the Court in *De La Cruz* established the new test for public work projects, it made clear that it would need clarification. ("We recognize that this test will have to be applied on a case-by-case basis in order for its contours to be fully explored." *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d 530, 538 (2013)) In particular, the language "the contract must concern a project that primarily involves construction-like labor and is paid for by public funds" could mean any of a number of things – that the contract must be paid for in part by public funds, or it must be paid for in full; money received subsequent to the construction but used to pay off loans can be considered, or it cannot.

There is a question as to whether any of the funds used for the Projects are "public funds." However, as the Projects fail the *De La Cruz* test for other reasons, there is no need to rule on this issue.

WAS THE PRIMARY OBJECTIVE OR FUNCTION OF THE WORK PRODUCT FOR THE USE OR OTHER BENEFIT OF THE GENERAL PUBLIC

The third prong of the *De La Cruz* test requires that the primary objective or function of the work product must be for the use or other benefit of the general public. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.,* 21 NY3d 530, 538. This is essentially the same language used in the second prong of the *Erie County* test. *See*, *Matter of 60 Market Street Assocs. v. Hartnett*, 153 AD2d 205, 207(3d Dept 1990, *affd* 76 NY2d 993 (1990); *Sarkisian Bros. v. Harnett*, 172 AD2d 895 (3d Dept. 1991), *lv. denied*, 78 NY2d 859 (1991). In *De La Cruz* the Court made clear that the work product does not need to be used by the public so long as its function is to serve the general public. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.*, 21 NY3d at 538. Nor is public access to the work product necessary. *Id*. at 539.

De La Cruz involved the repair and maintenance of municipal vessels, performed by a privately owned floating dry dock operator pursuant to contracts with municipal agencies. *De La Cruz v. Caddell Dry Dock & Repair Co., Inc.,* 21 NY3d at 532-533. The vessels worked on included ferryboats, fireboats and garbage barges. *Id.* at 538. The Court found that although a ferryboat was made for the use of the general public, while a fireboat or barge is not, there is no doubt that the latter vessels serve the general public, as fireboats are used by firefighters for the benefit of the entire municipal public. *Id*. The Court concluded that no distinction should be made based solely upon whether the public had access. *Id*. In analyzing the "work product," in the context of repair and maintenance, the Court did not focus on the particular work performed; it focused on the property the work was performed on - the vessels - to ascertain whether the property on which the work was performed was used for the benefit of the general public. The dispositive issue was whether the vessels' primary function was to serve the general public, and the Court found that it was. *Id*

The Department relies in part upon *De La Cruz* and also upon *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D.2d 895 (3rd Dept. 1991) to support its position that the Project meets the third prong of the *De LaCruz* decision (DOL Proposed Findings, para. 24). A review of *Sarkisian* shows that it involved the construction of a hotel and convention center on State land on the State University of New York at Oswego campus. The court found that the project was "intended to benefit the public." *Sarkisian* at 895. Numerous factors supported the court's finding, including:

> the proposal was awarded based on considerations of revenue to the State, restoration of the landmark site, compatibility with the community and the campus, and the accommodations provided to the community. The lease and the agreement subject all renovations, exterior alterations and design drawings to the approval of OGS and SUNY to ascertain that the needs of the public are met. The lease gives OGS an option to purchase petitioner's leasehold interest "for a use other than a hotel and/or conference center for a purchase price equal to the then appraised value" within 15 years of the execution of the lease. Petitioners' option to purchase the building at the conclusion of the original lease term is conditioned on OGS' determination to sell to a nongovernmental purchaser. There is a guarantee of public access to Sheldon Hall on at least one day per month and 75% of its rooms are to be reserved to SUNY or its affiliates, if not already committed, for certain events.

Sarkisian, at 895.

This list of factors demonstrated to the court public use, public ownership, public access and public enjoyment. However, when compared to the facts in the instant case, there is a stark difference. There is no evidence in the Record that there was consideration of revenues to the State or compatibility with other projects at the former Griffiss Air Force Base, nor is there evidence that any public entity reviewed or approved the design and construction of the Project. Additionally, there is absolutely no guarantee of public access to the AIS facility. In fact, the opposite exists, and the public is barred from entrance into the AIS facility except under very limited, controlled circumstances.

The Department goes on to argue that *De La Cruz* stands for the proposition that "the dispositive question is whether the primary function is to serve the general public (citation omitted" (DOL Proposed Findings para. 25) and that the test is met here because there is an economic development goal inextricably bound with the Project. However, as set forth in *De La Cruz*, the fact that there may be a public function involved in a project is not, of itself, sufficient

to render that project a public work: "Our holding is consistent, however, with Appellate Division cases ruling that a work is not public when – although 'it serves a public function' such as 'the rehabilitation of neighborhoods' (*Vulcan Affordable Hous. Corp.*, 151 AD2d at 87) and is paid for in large part by public funds – its objective is private residence (see id.), or it 'is used for a specific and narrowly defined group' of private citizens (*Cattaraugus Community Action v Hartnett*, 166 AD2d 891, 891, 5670 NYS2d 550 (4th Dep[t 1990))." *De La Cruz*, at 538.

The Department then points to certain job creation goals and recruiting requirements set forth in the leaseback and sublease agreements as evidence that the Projects served a public purpose. (R EX 20) However, the fact that these documents evidence an interest in job growth is not sufficient to render the development of a private office building for a private, for-profit business a public work. Furthermore, if the generalized and broadly defined goal of "economic development" were sufficient to make a project a "public work," the scope of the statute would be expanded to cover a vast amount of projects not currently considered subject to Labor Law article 8. As stated by the Court in *Erie* "The public involvement concerns only the creation of the economic conditions and incentives which will encourage and foster this type of private development. The promotion of economic development is an incidental benefit which is distinct from the primary objective and function of this project as a private business." *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 A.D.2d 532, 540 (4th Dept. 1983), *affd* 63 N.Y.2d 810 (1984))

Accordingly, I find that the objective or function of the Projects was not the use or other benefit of the general public as required by *De La Cruz*, and that the Projects, therefore, were not public works as contemplated by the statute.

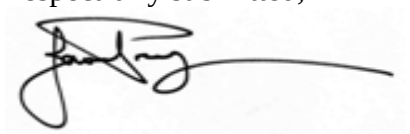
I RECOMMEND that the Commissioner of Labor adopt the within findings of fact and conclusions of law as the Commissioner's determination of the issues raised in this case, and based on those findings and conclusions, the Commissioner should:

DETERMINE that the Projects that were the subject of the Department's investigations are not subject to the provisions of Labor Law article 8; and

ORDER that the Department take no further action concerning the Projects and that this matter be closed.

Dated: November 1, 2016
Albany, New York

Respectfully submitted,



Jerome Tracy, Hearing Officer