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

October 19, 2010

[redacted]

Via Fax and First Class Mail

Re: Request for Opinion
Article 8 Applicability
DOCS Dormitory
RO-10-0004
PW2010-001

Dear [redacted]:

This letter is written to provide an opinion as to the applicability of Article 8 of the Labor Law, which requires the payment of prevailing wages, to the renovation of a three story building for a Department of Correctional Services (DOCS) dormitory in New Windsor, New York. The property upon which the building at issue is located, is owned by the Town of New Windsor and has been leased to [redacted] for a 99 year term commencing January 1, 2000. Pursuant to a separate agreement between [redacted] and New Windsor, the property has been exempted from real property taxes in exchange for payments in lieu of taxes which are reduced based on the development of the property undertaken by [redacted], so as to facilitate and encourage such development.

On or about August 25, 2008, [redacted], entered into a lease agreement with the Office of General Services to serve as developer and landlord for a building containing 75 four-person housing units. The building is intended to replace a dormitory facility in Dutchess County. DOCS currently offers approximately 1,000 staff housing beds to its employees throughout the state. The units included in the [redacted] project are intended to be used as a residential dormitory for nearly 300 uniformed DOCS employees who work in the nearby Downstate, Fishkill, Beacon, and Green Haven Correctional Facilities. Pursuant to the terms of the lease agreement, [redacted] was required to

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rehabilitate the building to ready it for that use. The lease further provides for DOCS to remit payments, classified as rent, for portions of the operating costs of the dormitory, which will be undertaken by [redacted]. This letter will address the applicability of Article 8 of the Labor Law to the rehabilitation project.

The applicability of Article 8 of the Labor Law to a particular public contract "focuses on the nature, or the direct or primary objective, purpose and function, of the work product of the contract." (*Erie County Industrial Dev. Agency v. Roberts*, 94 AD2d 532 (4th Dep't 1983), aff'd 63 NY2d 810.) Accordingly, a two-pronged test is generally used to determine whether a construction project is subject to Article 8 of the Labor Law: "(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); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep't 2009).) "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, (3rd Dep't, 1991).

As to the first prong, it is evident from a review of the lease that the State has entered into a contract (the lease) with [redacted] that requires it to engage contractors who will employ laborers, workmen and mechanics for the rehabilitation work. Effective October 27, 2007, Section 220 (3) of the Labor Law reads as follows:

> "Contract" now also includes "reconstruction and repair of any such public work, and any public work performed under a lease, permit, or other agreement pursuant to which the department of jurisdiction grants the responsibility of contracting for such public work to any third party proposing to perform such work to which the provisions of this article would apply had the department of jurisdiction contracted directly for its performance..." Labor Law §220 (3).

Consequently, this lease meets the first prong of the public work test enunciated by the courts and now established by the statute. It matters not that the State, through the lease, will have the landlord/developer actually perform the work. Where a public agency contracts with third parties with the ultimate object of constructing facilities to be used by the public, that work meets the first test of the *Erie County* standard in the same manner as if the public agency had contracted directly with a private contractor. The State, through its third party contracts, is engaging contractors who will hire laborers, workmen, and mechanics to perform the work. Therefore, with regard to the work performed in the rehabilitation of the property in question, the first prong of the two-pronged public work test has been satisfied.

As to the second prong of the test, it has been held that the construction of office buildings by private parties in connection with a lease to public entities is not public work. (*60 Market Street v Hartnett*, 153 A.D. 2d 205 (3rd Dept., 1990); *County of Suffolk v Coram Equities, L.L.C.*, 31 A.D. 3d 687 (2d Dept., 2006).) The Court in *60 Market Street,* holding that a project for the construction of office space to be leased to a public entity was not a public work project,

pointed to the nature of the project, its use, and the relationship of the parties as factors in considering whether a project involving property leased to the State has as its primary function a private or a public purpose.

However, the present lease is distinguishable from the decision in *60 Market Street* upon a number of different grounds which, taken together, demonstrate the underlying and primary public purpose of the project. As mentioned above, the property on which the building to be rehabilitated stands is still owned by the Town of New Windsor. While it is subject to a long-term lease, the Town still maintains all the privileges of ownership including a right of reverter should [redacted] violate or abandon the lease. While it retained a right to a payment in lieu of taxes, the Town granted [redacted] an exemption from real property taxes to facilitate the development of the lands surrounding the former Stewart International Airport, presumably to ensure a measure of economic stability for the area. Since it is not the practice for state or local governments to give away long-term rights to valuable public property for anything other than a public purpose, in granting the lease and the tax exemption, the Town demonstrated that the underlying and primary objective of the development and rehabilitation of the property was to benefit the public.

The building rehabilitation was designed to meet the specific operational needs of DOCS, i.e. to provide 300 units of staff housing to its employees. The lease provides that DOCS will pay [redacted] monthly payments reflecting full occupancy of all rentable units in the building regardless of actual occupancy. We understand that DOCS in turn collects rent from its employees occupying the units. Consequently, it appears that [redacted] has assumed very little entrepreneurial risk of loss in constructing the housing unit as it is guaranteed full monthly rentals for all units over the course of the lease term. In addition to collecting rents and ensuring continued occupancy of the building, like a landlord, DOCS maintains a key ongoing *operational* role in the housing facility. For example, all tenant complaints are to be submitted to DOCS on forms developed by DOCS and the titular Landlord must report to DOCS regarding the outcome and disposition of all complaints.

The Department has consistently held that the construction of dormitories for a public university satisfies the public purpose test for public work since their construction is intrinsic to the operation of the university and is intended to benefit the public. The present building is factually indistinguishable from those determinations since the availability of staff housing appears to be essential to the operation of the prisons served by this housing.

Therefore, based on the materials and information provided, it appears that the project satisfies the second prong in determining whether the project is within the coverage of Article 8 of the Labor Law. Accordingly, since both prongs for determining whether a project is subject to the provisions and requirements of Article 8 of the Labor Law have been met, it is the opinion of this office that the above-described work is subject to the provisions of that Article.

This opinion is based exclusively on the facts and circumstances described in your request and in the documents possessed by the Department, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented.

Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel

By: Michael Paglialonga

Michael Paglialonga
Assistant Attorney I

CC: [redacted]

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