

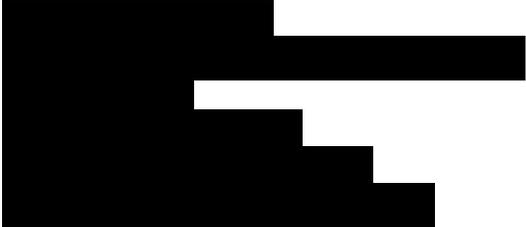


New York State Department of Labor

David A. Paterson, *Governor*

Colleen C. Gardner, *Commissioner*

July 21, 2010



Re: Applicability of Article 8
Fort Edward Rescue Squad
PW2010-007
RO-10-0111

This letter is written to address the applicability of Article 8 of the Labor Law to the construction of a new headquarters for the Fort Edward Rescue Squad. As described in the materials obtained by the Department's Bureau of Public Work, the Fort Edward Rescue Squad ("Squad") is a not-for-profit corporation that provides, through the use of volunteers and paid staff, ambulance and rescue services primarily in the Town and Village of Fort Edward, the Village of Hudson Falls, and the Town of Kingsbury. Formed in the 1950s, the Squad provided cost-free ambulance services through the volunteer efforts of its members and the donations of residents and businesses in the communities in which they operate. In 1999, the Squad began billing a patient's insurance carrier for the services after donations became inadequate to support the addition of paid staff, and increases in the Squad's workload. The financing for the Squad's activities is currently provided through billing patients and/or their insurance carriers for services, along with donations from local individuals and businesses. Apart from a \$1.3 million dollar federal loan for the present construction project, the Squad does not currently receive any contributions or support from any government entity, nor has it ever received any such support. Letters affirming that no relationship exists between the municipalities within the area served and the Squad were included in the materials obtained by the Bureau of Public Work.

The project in question is the construction of a new facility that will serve as the Squad's headquarters. The building will be constructed on land that is owned by the Squad, and is in the same location of the Squad's former headquarters. While a public meeting was held during the

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planning phase of the headquarters where the Squad solicited public comment as to the location and construction of the facility so as to ensure that the needs of the communities it serves were going to be met, involving the public in decision-making with regard to the facility does not convert a private enterprise into a public one.

A two-pronged test is used to determine whether a construction project is subject to Article 8 of the Labor Law (the prevailing wage provisions): “(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); *Matter of Erie County Indus. Dev. Agency v. Roberts*, 94 AD2d 532, 537, aff’d 63 NY2d 810 (1983); *New York Charter School Association v. Smith*, 61 A.D.3d 1091 (3d Dep’t 2009).)

The first prong of the two-pronged test is whether the work is being performed pursuant to a contract for the employment of laborers, workers or mechanics to which a *public entity* is a party. (see, cases cited above, *supra*.) As the Squad is a private entity and not apparently affiliated in any way with the local government, it would be necessary to find that the Squad is acting as a third party on behalf of a public entity in contracting for the construction of the new headquarters. In 2007, Section 220(3) of the Labor Law was amended to provide 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...” (effective October 27, 2007).

While this expanded definition of the term “contract” encompasses many projects to which a public entity is not directly a party to the construction contract, it nevertheless requires some agreement or official relationship between the Squad and a public entity. As already noted, the Squad has produced various documents affirming that there is no connection between it and the municipalities it serves. The Squad receives no public revenues to support its activities nor is it operated under the guidance or control of any legislature or public executive. The present project, although funded by a federal loan, does not appear to be either the result of or attributable to a relationship with a public entity, thereby making it indistinguishable from a private construction project. Federal loans or grants to private entities, it is important to note, generally do not form a basis for satisfying the first prong of the test for determining the applicability of Article 8 of the Labor Law. In *Vulcan Housing Corp. v. Harnett*, 151 AD2d 84 (1989), the Third Department examined the question of the applicability of the prevailing wage law to an affordable housing project financed in part by a grant from the Affordable Housing Corporation to the City of Albany. The grant formed a part of the total financing arrangement in connection with a private developer’s construction of the housing units and despite the presence of such public funds, the Court held that the funding was not sufficient to change the nature of what was essentially a private housing development project.

Accordingly, it is the opinion of this Department that the present project does not satisfy the first prong of the test for determining the applicability of Article 8 of the Labor Law and is, therefore, not subject to its requirements. Accordingly, analysis under the second prong is unnecessary and the project is, based on the information presented and the Squad's representations to the Department through the documents provided, outside of the coverage of Article 8 of the Labor Law.

This opinion is based exclusively on the facts and circumstances contained in the documents obtained by the Bureau of Public Work, as those facts and circumstances are described and summarized above. Existence of any other factual or historical background 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 questions, please do not hesitate to contact me.

Very truly yours,
Maria L. Colavito, Counsel



By:
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Assistant Attorney I

cc:



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