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

September 28, 2010

[redacted]

Re: Town of Gates Volunteer Ambulance Headquarters
Our File No. RO-10-0139

Dear [redacted]:

We have been asked to determine the applicability of the prevailing wage law to the work being performed by the Gates Volunteer Ambulance Service, Inc. (GVAS) with regard to its recently purchased building, formerly used as the Gates Public Safety Building. You also question the bid process, in that bidding for the work is being performed by invitation only, thereby circumventing public bidding requirements. I will address the bidding issue first, and then analyze the public work issue.

To summarize the nature of the parties involved and their contractual agreements, the Town of Gates (Town) has a contract with GVAS for the provision of ambulance services to the Town. GVAS is a not-for-profit corporation. GVAS derives income for the services it provides from the insurance coverage of residents who use the service and from an annual fee paid by the Town to GVAS. The annual fee is raised by the Town from its "Gates Ambulance District" (District), which is a separate municipal entity on which the members of the Town Board appear to serve as the District's Commissioners. The District taxes the Town's property owners, the Town collects the taxes, and the tax revenues are then used by the Town to make its annual payment to the GVAS. Recently, under a purchase agreement between the Town and GVAS, the Town sold its public service building to the GVAS for its use as the offices and garage of the GVAS. GVAS is now the title owner of the property to which improvements are to be made.

Insofar as the bidding issue is concerned, Section 101 of the General Municipal Law requires that there be separate specifications on any building construction project for any contract in which an "officer, board, or agency of a political subdivision or of any district therein" is a party. Here, the construction contracts are between GVAS, a not-for-profit corporation and private contractors for work performed on a building owned by GVAS. The bidding requirements of the General Municipal Law do not extend to this project, because, unlike the prevailing wage law, the language of the General Municipal Law does not extend its

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provisions to third parties who act in concert with municipalities. In the case of *New York City Chapter, Inc. of the National Electrical Contractors Association v. Fabber,* 73 Misc 2d 859, aff'd on decision below, 41 A.D.2d 821, (1st Dept., 1973), the court held that with regard to a project carried out by the Port Authority that:

> "The Port Authority is not a private corporation merely acting as a nominal substitute to carry out a project that is in substance under the complete dominion and control of the city and for the city's public purposes. Here, the Port Authority is itself a distinct public body charged with broad responsibility in the area of developing marine terminals in the port district."

In the same sense, GVAS is not acting as a "nominal substitute" for the Town of Gates, as that term is used in the decision above, but rather has direction and control over the project for construction purposes, on a building that it now owns and on which it bears the risk of loss. The Town is not requiring the work contemplated, but rather has helped make the work possible by selling the property at issue. None of the indicia of nominal substitute as that term is used in *New York Chapter, id.* is present in this matter. GVAS, is not an "officer, board, or agency of a political subdivision or of any district therein..." under General Municipal Law Section 101, but rather is a not-for-profit corporation that is not under the control of the Town.

As a result of the above, no separate specification, or for that matter no competitive bidding, is required in regard to this project. Therefore, the bidding process that you have described does not violate either the General Municipal Law or the Labor Law.

With regard to the question of the applicability of the prevailing wage law to the work performed, a different analysis is required. We are all aware of the well-settled law with regard to the applicability of the prevailing wage law. In determining whether a project is public work, two conditions must be fulfilled: "(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" *Matter of Erie County Indus. Dev. Agency v Roberts,* 94 AD 2d 532, 537 (4th Dept. 1983), *aff'd* 63 NY2d 810 (4th Dept. 1984), *see also, Matter of National R.R. Passenger Crop. v. Hartnett,* 69AD2d 127. "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 Dept., 1991).

In addition, recent amendments to the prevailing wage law have further clarified the meaning of the word "contract" as used in Article 8 to include agreements with third parties for public work.

> "Contract, as used in this article also shall include 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, or, where there is no lease, permit or other agreement and ownership of a public work is intended to be assumed by such public entity at any time subsequent to the completion of the public work." Labor Law §220 (3) (effective October 27, 2007).

Both tests set forth in *Erie* are at issue in this fact situation. The first question - whether a contract exists in which a public agency is a party that will involve the employment of laborers - is met here by the existence of the Service agreement between the Town of Gates and GVAS. The Town has contracted with GVAS for the provision of ambulance services. That agreement requires that the Town pay to GVAS all costs associated with the operation of GVAS that are not covered by the insurance policies of those who use the service provided by GVAS. The agreement is funded by taxpayer dollars raised through the Town's ambulance district. To provide such services, it is foreseeable that GVAS will need a physical plant from which it can operate to provide such services and it is further foreseeable that such plant will require maintenance, repairs and alterations, all of such work will require the services of laborers, workers and mechanics. In addition, the parties have entered a separate purchase agreement, which has resulted in the sale of the former Gates Public Safety Building to GVAS. By that agreement, Gates has transferred real property to the GVAS that is in need of alteration and maintenance to meet the needs of GVAS. The contracts with GVAS are contracts between the parties which meet the definition set forth in *Erie*, supra. and is consistent with the court's holding in *Feher v. NYS Dept. of Labor*, 28 A.D.3d 1, 807 N.Y.S.2d 494, (Fourth Dept., 2005). The Town has entered into agreements with GVAS whereby the not-for-profit corporation has or will perform construction, reconstruction, repair, and/or maintenance work which will require the employment of laborers, workers, and or mechanics. As a result, the Town is a party to a contract meeting the definition of Labor Law §220(3) that will ultimately result in the employment of workers. See also *National Railroad Passenger Corporation v. Hartnett*, 169 AD2d 127, *60 Market Street v. Hartnett*, 153 A.D. 2d 205 (3rd Dept., 1990).

As to the second prong of the test, the question is whether the alterations, maintenance and repairs to the former Gates Public Safety Building is public work. The use of the former public safety building by GVAS is clearly a public use. The Town, through its Ambulance District, taxes the residents of the Town to provide ambulance service throughout the Town. The taxpayers of the Town are paying for the service. The building to be used by GVAS is the Town's former Public Safety Building, which was sold to GVAS by the Town. The sole use of the building will be to provide GVAS with facilities by which it can provide ambulance services to the Town, as set forth in the contract between the Town and GVAS. The Town has apparently determined that the provision of ambulance services is a public purpose, since it created an ambulance district to meet the needs of the Town in that regard. The ambulance district taxes the residents of the Town for these services.

This set of facts is similar to those recently determined to result in the applicability of the prevailing wage law to a volunteer fire department in the Town and Village of Bath. There, the Commissioner determined that the construction of a firehouse by a volunteer fire department on real property owned by the volunteer fire department was public work that required the payment of prevailing wages to the employees who performed such work. In Bath, municipal entities paid the volunteer fire department for its services under a service contract. The contract was

increased to meet additional costs incurred by the construction of the new fire house. Here, the Town agrees to pay the total cost of the operations of GVAS, less any payments recovered from those patients whose health insurance covered GVAS services. As a result, any costs associated with the alteration, maintenance or repair of the former Gates Public Safety Building will ultimately be borne by the taxpayers of the Town of Gates. The provision of ambulance services is a public purpose that has been determined by the Town, and, as a result, the second prong of the *Erie* test is met.

This office is of the opinion that work performed by GVAS at the former Gates Public Safety Building under the circumstances outlined above is public work as that term is set forth in the prevailing wage law and that all laborers, workers or mechanics that perform work on such project are required by law to receive the prevailing wage as established by the Commissioner of Labor. At the same time, we are of the opinion that Sections 101 and 103 of the General Municipal Law are not violated in regard to the bidding process used by GVAS on this project.

This determination is based exclusively on the facts and circumstances revealed in the documents described above 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 letters and email 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,

John D. Charles
Associate Attorney

cc: Pico Ben-Amotz
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Opinion File
Dayfile