



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

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November 17, 2010

[REDACTED]

Re: Upstate Med Tech Centre  
Our File No.: RO-10-0157

Dear [REDACTED]:

Thank you for the extensive information that you have provided to the Department's Bureau of Public Work with regard to the question of the status of the Genesee Gateway Local Development Corp. (GGLDC) and ultimately, the applicability of the prevailing wage law (Labor Law Article 8) to a project to be constructed by the GGLDC, in particular, the Upstate NY MedTech Centre.

To summarize the parties involved in this matter, the Genesee County Industrial Development Agency (IDA), d/b/a the Genesee County Economic Development Center (the GCEDC) is a governmental agency pursuant to Section 852 and 895-e of the General Municipal Law. Industrial Development Agencies are public benefit corporations pursuant to Section 856(2) of the General Municipal Law. When exercising the rights and powers provided to the IDA, the General Municipal Law provides that an IDA performs "...a public purpose essential to the public interest..." Inasmuch as the IDA is a public benefit corporation, one of the four enumerated public entities covered under Article 8 of the Labor Law, an IDA is generally subject to the provisions of the prevailing wage law (Labor Law, Section 220(2)) where such IDA satisfies the two-pronged legal test which establishes a public work project.

We are all aware of the well-settled law with regard to this issue. 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 (4<sup>th</sup> Dept. 1983), *aff'd* 63 NY2d 810, *see also*, *Matter of National R.R. Passenger Corp. v Hartnett*, 69AD2d 127. "Later, it was stated that contemporary definitions

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focus upon the public purpose or function of a particular project\*\*\*. To be public work, the projects primary objective must be to benefit the public” (citations omitted) Sarkisian Brothers, Inc. v. Hartnett, 172 A.D. 2d 895, (3<sup>rd</sup> Dept., 1991).

Initially, it must be determined whether the project is subject to the prevailing wage law under the *Erie* decision insofar as that decision exempts most IDA projects from prevailing wage requirements. In *Erie*, as in most IDA projects, a private developer initiated the project in question and retained the risk and benefits associated with its development and ownership. The project’s objective was the establishment of private manufacturing facilities. The plants to be constructed were to be operated by a private corporation for the sole benefit of its shareholders and were not for public use. No public funds were to be used, and the IDA, a government agency and instrumentality, was limited in its involvement to providing tax exempt bonds to private investors who would finance the project. Ownership by the IDA in *Erie County* was limited and temporary and structured merely as a mechanism to facilitate financing. Under such circumstances, the court held that the project did not serve a public purpose and did not meet the second condition of the two part test set forth above. It now remains for us to compare the facts present in this case against those that gave rise to the exception created by the *Erie County* court to determine whether this project should be similarly exempt from prevailing wage coverage.

The Genesee Gateway Local Development Corporation (GGLDC) is a local development corporation organized pursuant to Section 1411 of the Not-for-Profit Corporation Law, and is wholly owned by the IDA (see GGLDC By-Laws). The GGLDC describes itself in its letterhead as “GCEDC’s Real Estate & Development Affiliate”. GGLDC has title ownership to the Upstate Med & Tech Park located across the street from Genesee Community College. GGLDC has contracted with private contractors to construct the Upstate NY MedTech Centre (MedTech) facility. The intent of the construction of the MedTech is to provide “low-cost commercialization facilities” in Western New York to support “the innovations emerging from our regional universities” by providing “low cost facilities.” While the MedTech project overview dated May 22, 2009, is not particularly clear in this regard, the intent of the project appears to be for the GGLDC to own, operate, and lease facilities to start-up companies affiliated with SUNY and Community College programs, both private and public in nature.

As we understand them, the facts and circumstances involved in this matter are in stark contrast to those established in *Erie*. First, this project is not being initiated by a private developer, but rather by an IDA itself (GCEDC). The project’s objective, as noted above, is to construct office and research facilities called MedTech to provide “low-cost commercialization facilities” in Western New York to support “the innovations emerging from our regional universities” by providing “low cost facilities”. The GCEDC, operating through its wholly owned subsidiary, GGLDC, is to own and operate the facilities to be constructed. GCEDC is involved in this project as the actual owner, not merely as temporary holder of title or as a facilitator that provides tax exempt bonds to enhance the funding of the project. The risks and benefits of the project would inure to the GCEDC. Given the public nature of the GCEDC and

the mandate contained in Section 1411 of the Not-for-Profit Corporation Law with regard to the operations of a Not-for-Profit LDC (which provides, in part, that such corporations, when formed by “public officers or private individuals” must operate to provide “public purposes” and to function toward “lessening the burdens of government and acting in the public interest” and that “such corporations will be performing an essential governmental function”) there is little question that both the GCEDC and the GGLDC are operating in this matter in a far different role than “merely as a mechanism to facilitate financing.” In fact, GCEDC and its wholly-owned affiliate, GGLDC, are the actual initiators, owners, operators, and principals of this project. No private involvement, other than as possible tenants of the facilities, is contemplated for the project.

As to the two-part test set forth in *Erie*, both parts are at issue in this fact situation. With regard to the first question, i.e. whether a public entity is a party to a contract that will involve the employment of laborers, workers, or mechanics, there is no question that GCEDC, a public benefit corporation, through its alter-ego/affiliate GGLDC, will be entering into such a contract.

Secondly, 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).

So, even if GGLDC were somehow found to be an independent private Not-for-Profit entity, it would still be found to be involved as a third party in a contract pursuant to these recent provisions of the Labor Law.

Finally, it can be argued that the GGLDC itself, as a local development corporation formed under Not-for-Profit Law, Section 1411, is an entity subject to the prevailing wage law. That section provides, in part, that such corporations, when formed by “public officers or private individuals” must operate to provide “public purposes” and to “lessening the burdens of government and acting in the public interest.” When carrying out such purposes “such corporations will be performing an essential governmental function.” In the event that the Not-for-Profit ceases to exist, the assets of a Section 1411 corporation are to be divided amongst the

governmental entities that sponsored the corporation in the first place. See, Not-for-Profit Corporation Law, Section 1411(a). In this case, that entity would be the GCEDC. All assets of the GGLDC would become those of the GCEDC upon dissolution of the Not-for-Profit.

At least two lower courts have addressed the question of the nature of a local development corporation formed under Section 1411. In *Griffiss Local Development Corporation v State of New York Authority Budget Office, et. al.*, 26 Misc. 3d 815 (Alb. Cty, 2009), the court suggested that Section 1411 of the Not-for-Profit Corporation Law "defines an LDC as a public benefit corporation." Likewise, in *Western New York District, Inc. of the Wesleyan Church v. Village of Lancaster*, 17 Misc. 3d 798 (Erie Cty, 2007), the court stated "the Village of Lancaster Community Development Corporation...is a public benefit corporation organized and existing under the laws of the State of New York." Emphasis supplied. A Local Development Corporation is, therefore, itself an entity subject to the prevailing wage law.

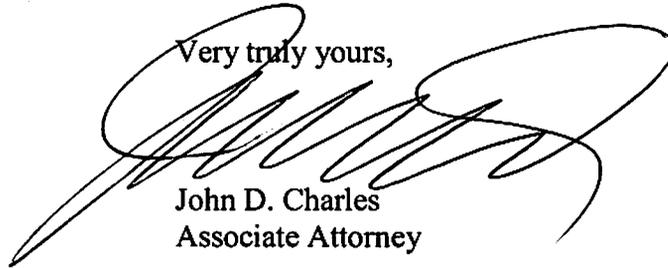
Under any of the three theories set forth above, the first test as to applicability of the prevailing wage law to the GCEDC has been met. A public entity is a party to a construction contract that involves the work of laborers, workers and mechanics.

As to the second prong of the test, the question is whether the construction of office and research facilities to be owned and operated by GGLDC, on property owned by GGLDC is public work. That question is rather handily answered by *Sarkisian Brothers, Inc. v. Hartnett, supra*. There, buildings on a State University campus, owned by the college, were restored and transformed into a privately-operated hotel facility for use by the general public and secondarily for use by the school itself. Profits from that enterprise would inure to the benefit of the private party. That work, which was completely funded by a private party as a profit-making venture, was found to be public work given the public entity's retention of ownership of the property in question. Here, the facility in question is both publicly-financed and publicly-owned, merely to be leased to a private (and potentially public) party, for statutorily stated purposes. As such, its facts lean even more heavily towards a finding of public purpose than those in *Sarkisian*. Moreover, the overall objective is not to create a facility to profit a private entity; rather, it is to increase employment opportunities for all members of the public, with the long term goal of developing the office park to generally upgrade economic and employment opportunities throughout the area, and more specifically to "embrace these emerging life science innovations and companies...with the ultimate goal of retaining those companies here in WNY and positioning them for long term growth, success and increases in the area's economic base." These are all public purposes under both the General Municipal Law and the *Erie* test.

Accordingly, this office is of the opinion that work performed on this project does not meet the prevailing wage exception enunciated in *Matter of Erie County Indus. Dev. Agency v Roberts, supra*, and is, therefore, 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 projects are required by law to receive the prevailing wage as established by the Commissioner of Labor.

This opinion is based exclusively on the facts and circumstances described in the materials supplied to the Bureau of Public Work and is given based on representations, 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,

A handwritten signature in black ink, appearing to read "John D. Charles", written over the typed name and title.

John D. Charles  
Associate Attorney

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