PREVAILING WAGE AND DIRTY DIRT: WHO'S CLEANING UP?

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As the state with the most brownfield[1] sites, New Jersey has a strong interest in encouraging the remediation of contaminated sites, many of which are "legacy" sites, in order to positively impact local economies and better safeguard the environment. The remediation process involves a wide range of participants, including public and private sector entities which finance the remediation and the individual workers and laborers who carry out the cleanup and actual remediation of the contaminated site. The New Jersey Prevailing Wage Act (the "Act")[2], provides a mechanism to ensure that any worker involved in a publicly-funded public works project is compensated in a fair and timely manner, so long as they fall within the scope of the Act. This article will explore if and under what circumstances environmental remediation comprises a "public works project" thus triggering prevailing wage requirements[3] in accordance with the Act.

THE PREVAILING WAGE ACT

With the enactment of the Act, the State of New Jersey declared that there is a public policy of the State "to establish a prevailing wage level for workmen[4] engaged in public works in order to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being."[5] In order to understand whether the Act applies to any particular project, it must be determined whether the work at issue constitutes a "public work" within the parameters of the law. The Act declares that "public works" can fit into one (1) of two (2) categories set forth within the definition, as follows, with emphasis added:

1) Construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body ...; **or**
2) Construction, reconstruction, demolition, alteration, custom fabrication, or repair work done on any property or premises, whether or not the work is paid for from public funds, if, at the time of the entering into of the contract the property or premises is owned by the public body.[6]

In other words, a "public work" must either be (i) deemed to be construction, reconstruction, demolition, alteration, custom fabrication, or repair work (or maintenance work, as applicable) and (ii) done under contract and paid for out of public body[7] funds, or, the property upon which the work is done must be owned by the public body. This definition of a "public work" requires prevailing wages to be paid irrespective of whether a contaminated site is remediated by a responsible party or by the State of New Jersey. This issue is further discussed below.

COURTS' INTERPRETATION OF THE APPLICABILITY OF PREVAILING WAGE ACT

Our courts have yet to address the specific applicability of the Act to environmental remediation. However, the Appellate Division has narrowed down the types of projects that may be included within the definition of "public works". Therefore, it is unknown whether a court would deem environmental remediation activities to comprise construction, reconstruction, demolition, alteration, custom fabrication, or repair work (or maintenance work); however, environmental remediation can often include "demolition"; for example, in the remedial investigation of a property upon which buildings exist they must often be demolished. Environmental remediation can also include actual "construction"; for example, in the implementation of an engineering control.

In Foundation for Fair Contracting, Ltd. v. New Jersey Department of Labor[8], the Appellate Division held that if the public body is not a party to the contract at issue, then the Prevailing Wage Act does not apply. In other words, a project is not a "public work" for purposes of the statute if the public body is not a party to the contract (i.e. irrespective of the type of work being performed). In this case, a worker on a construction project sought a declaration that the Prevailing Wage Act applied to a redevelopment project for senior citizen housing. Specifically, the redeveloper responsible for building the project entered into a Redevelopment Agreement with the City of Trenton for the construction of seventy (70) affordable housing units for senior citizens with low to moderate incomes. The City had received $1.3 million in grant monies from the New Jersey Department of Community Affairs under the Neighborhood Preservation Program, part of the Fair Housing Act, in order to fund part of the project. The redeveloper entered into a contract with a construction company. When prevailing wages were not paid to the workers by the construction company, the Department of Labor (DOL) was asked for an opinion. The DOL issued an opinion stating that it had been advised by the Attorney General's office that the Prevailing Wage Act did not apply in the absence of a contract between the public body and the contractor, even if the project was *partially funded or made possible by public funds*. The trial court agreed with the DOL and the Appellate Division affirmed.

The Appellate Division stated that had it held differently, it would have rendered meaningless that portion of the Prevailing Wage Act which modifies the phrase "every contract… for any public work" with the express phrase limitations "to which any public body is a party."[9] The Court went on to cite other portions of the statute which also modify the language by describing the public bodies which are subject to the Prevailing Wage Act as public bodies which have "awarded a contract."[10] The Court explained that a public body cannot award a contract to which it will not be a party and therefore, the Legislature clearly intended to that the Prevailing Wage Act shall only apply to contracts to which a public body is a direct party.[11] The Court was also not persuaded in any way that the project was being built in accordance with a contract between the redeveloper and the City, because the City was not a signatory to it.

The Court acknowledged that a portion of the Prevailing Wage Act also refers to a public body as the public body awarding any con-

tract for public work "or otherwise undertaking any public work."[12] Although the Court conceded that this language could potentially be construed as implying that a contract need not include the public body as an actual signatory in order for the contract to be deemed a "public work" contract, the Court reasoned that the Legislature simply intended to account for those public work contracts that aren't required *to be bid* pursuant to the law.[13]

As it regards the role in this analysis that is played by public funds, a grant by a public agency or the benefit of Payments-in-Lieu-of-Taxes (PILOT), which are often negotiated as part of redevelopment agreements with public bodies, are irrelevant if the public body is not a direct signatory to the work contract at issue. The DOL opinions, with which the Appellate Division has expressly agreed, stated that "*where the Legislature has intended that the prevailing wage be paid on projects financed by a public body that is not a party to the resulting project, it has stated such intention explicitly.*"[14] For example, N.J.S.A. 55:14K–42 states that if a housing sponsor or any contractor engaged by the housing sponsor is granted a loan from the Housing Finance Agency, then workmen shall be paid a prevailing wage rate.[15] Similarly, the Legislature has also explicitly stated that where a construction contract is undertaken with the financial assistance of the Economic Development Authority, the workers must receive the prevailing wage rate.[15] Further, "the Legislature has recognized that the Prevailing Wage Act does not cover contracts made between private parties for which financing has been provided by a public agency." A clear statutory statement that prevailing wages must be paid is required, otherwise, prevailing wages will not be deemed to be a requirement.[16]

Finally, although the Long Term Tax Exemption Law delegates certain municipal authority to an urban renewal entity that undertakes a redevelopment project, and thus, might be deemed the equivalent of a municipality in a limited circumstance, such a delegation does not turn the redeveloper into a public body for purposes of prevailing wage. As such, the grant of a PILOT in order to make a project financially feasible does not in and of itself trigger a requirement to pay prevailing wage.[17] The Court boldly reasoned that "the Legislature has apparently concluded that the goals expressed in the Fair Housing Act and the Long Term Tax Exemption Law…" which include improving conditions in "certain run-down urban areas"…" take precedence over the goals of the Prevailing Wage Act."[18]

As a result of the holding in Foundations for Fair Housing, a contaminated property owned by a developer who enters into a contract with a private contractor to remediate the property would *not* be required to pay prevailing wages, even if the funding which makes the project possible, in whole or in part, is provided by a public body, *so long as the public body is not a signatory to the contract*. This is a critical factor in determining the applicability of prevailing wage. Instead, a contaminated property would only be subject to prevailing wage requirements during remediation activities if the public body is a direct signatory to the contract or if the property is owned by a public body at the time that the work is being done irrespective of where the funding originates. Under a plain reading of the Act, even if a developer undertakes a remediation on a property that is ultimately slated to be conveyed to a public entity, the developer would only be required to pay prevailing wages if "at the time of the entering into of the contract, the property or premises is owned by the public body."

Additionally, it is unclear whether remediation would even be deemed to be "construction, reconstruction, alteration, custom fabrication, or repair work or maintenance work" for purposes of applicability of the statute. The Act fails to define such terms, and there is no case law or guidance on this point. It is interesting to note, however, that in an August 20, 2009 opinion letter by the New York State Department of Labor, it was decided that a remediation project did fall within the gambit of the New York Prevailing Wage Act (Article 8) since it was considered a "public work" contract, having met the State's two-pronged test for determining whether a contract is for "public work" i.e. (1) the public agency was a party to a contract involving the employment of laborers, workmen or mechanics (vis a vis a lease agreement); and (2) the contract concerned a "public works" project. Ultimately, the question remains whether "environmental remediation" can be included within the definition of "construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work" for purposes of determining the potential applicability of prevailing wage. However, what is not questionable is the potential result of any failure to pay prevailing wage where same is required.

REMEDIES UNDER THE ACT

If there is a violation of the Act, remedies may be pursued against any employer which failed to pay prevailing wages. If prevailing wages are required, but not paid, the fiscal or financial officer of the related public body, the lessee to whom the public body is leasing a property or premises, or the lessor from whom the public body is leasing or will be leasing a property or premises, as the case may be, must notify the Commissioner of Labor in writing of the employer who failed to pay prevailing wage rates. Workers may also file a written complaint with the Commissioner, however, same must be done within two (2) years of the date on which the incident complained of occurred.

An employer is guilty of a disorderly person's offense where they pay wages lower than the applicable prevailing wage.[19] In addition to such sanctions, the Commissioner may assess and collect administrative penalties, up to a maximum of $2500.00 for a first violation and up to a maximum of $5000 for each subsequent violation.

Moreover, if the Commissioner determines that a contractor and subcontractor has failed to maintain and report every wage record which it is required to maintain and has also failed to pay wages as it is required to do, the Commissioner shall conduct an audit of the contractor's records within twelve (12) months of its determination. If the audit reveals that the contractor and subcontractor is continuing to fail to maintain its records and pay its employees, the Commissioner may, after affording the employer the opportunity for a hearing, issue a written determination directing an agency to suspend one or more licenses held by the contractor and subcontractor.[20] If a second audit reveals that the contractor and subcontractor is still continuing to fail to maintain its records and pay its workers, the Commissioner may, after affording the employer another hearing, direct the agency to permanently revoke one or more of the contractor's licenses.

Furthermore, If the commissioner determines that an employer has paid wages at rates less than the rates applicable under that Act, the Commissioner may immediately issue a stop-work order to cease all business operations at every site where the violation

has occurred. The stop-work order may be issued only against the employer found to be in non-compliance. The stop-work order remains in effect until the Commissioner vacates the stop-work order upon finding that the employer has agreed to pay wages at the required rate and has paid any wages due and any penalty deemed satisfactory to the Commissioner. The Commissioner may also require the employer to file periodic reports for a probationary period not to exceed two (2) years. The Commissioner may also assess a penalty of $5,000.00 per day for each day that the employer conducts business operations that are in violation of the stop-work order.

If a worker on a public work project is paid less than the prevailing wage, the worker may recover in a civil action the full amount of the prevailing wage less the amount actually paid, plus costs and attorneys' fees. Interestingly, any agreement between a worker and an employer to work for less than the prevailing wage is no defense to the action. At a worker's request, the Commissioner may take an assignment of the wage claim in trust and may bring any legal action necessary to collect the claim. The statute of limitations period for bringing a claim under the Prevailing Wage Act is six (6) years.[21]

PREVAILING WAGES IN FEDERALLY-FUNDED REMEDIATION PROJECTS

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[22] provides a statutory mechanism for workers involved in the remediation of a federally-funded public works project to be compensated in a fair and timely manner. This mechanism came to be through the passage of the Davis-Bacon Act in 1931, and the subsequent amendments in 1935, 1964 and 1994. Specifically, Section 104(g) of CERCLA provides, in pertinent part, that: "…all laborers and mechanics employed by contractors or subcontractors employed in the performance of construction, alteration, or repair work funded in whole or in part [by federal Brownfields grants] shall be paid locally prevailing wages." In these cases, locally prevailing wages are determined by the U.S. Department of Labor.

Unlike the State of New Jersey's environmental remediation laws, such as the New Jersey Spill Compensation & Control Act[23], CERCLA provides statutorily embedded wage guarantees to certain workers who perform work on federally-funded contracts. The express wage guarantee creates a mechanism for workers to earn prevailing wages while working on projects that otherwise might not trigger such a requirement. For example, if a project is partially funded by the State and by an Environmental Protection Agency grant but does not fall within the definition of "public works" under the Act, the project may still be required to provide prevailing wages under Section 104(g) of CERCLA. Unlike the Prevailing Wage Act, prevailing wages must be paid under CERCLA irrespective of whether a public entity is a signatory to the contract or whether the property on which the work is being performed is publicly owned. The only requirement to guarantee prevailing wage under CERCLA is that the project receive some funding from a federal Brownfields grant.

CONCLUSION

Environmental remediation may be subject to the Prevailing Wage Act in limited circumstances, namely, where either the public body is a direct signatory to the contract under which the remediation is being performed and public funds are used for the project, or, where the public body owns the property being remediated. If the project does not fit the definition of a "public work" within the meaning of the Act, the project may still be subject to prevailing wages, as determined by the U.S. Department of Labor, if the project receives some degree of federal-funding.

In any event, it is important for the development community and public bodies to understand when prevailing wage requirements might apply to any portion of a project, including any environmental remediation component of a project. The application of prevailing wage clearly has a significant financial impact on a project's bottom line for which a developer or redeveloper must be prepared. Public bodies must similarly be advised on the potential applicability of prevailing wage in a variety of agreements and contracts, including Redevelopment Agreements and Financial Agreements.

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[1] Under N.J.S.A. 58:10B-23.d, a brownfield is defined as "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant."

[2] N.J.S.A. 34:11-56.44, et seq.

[3] "Prevailing wage" means the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workers of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done. N.J.S.A. 34:11-56.26(9).

[4] "Workman" or "worker" includes laborer, mechanic, skilled or semi-skilled, laborer and apprentices or helpers employed by any contractor or subcontractor and engaged in the performance of services directly upon a public work, regardless of whether their work becomes a component part thereof, but does not include material suppliers or their employees who do not perform services at the job site. N.J.S.A. 34:11-56.26(7).

[5] N.J.S.A. 34:11-56.25

[6] N.J.S.A. 34:11-56.26(5)

[7] "Public body" means the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions. N.J.S.A. 34:11-56.26(4).

[8] 316 N.J. Super. 437 (App. Div. 1998).

[9] *Id.* at 444.

[10] *Id.* at 445.

[11] *Id.*

[12] *Id.*; *See* N.J.S.A. 34:11-56.28.

[13] *Id.* at 446.

[14] *Id.* at 447.

[15] N.J.S.A. 34:1B–5.1.

[16] 316 N.J. Super. 437, 447 (App. Div. 1998).

[17] It must be noted that since the 2016-2017 legislative session, a bill has been introduced into Congress that would require the payment of prevailing wage rates on sites that receive PILOTs. The bill has historically been sent to committee and has "died" at each legislative session. The bill has yet to be re-introduced in the 2022-2023 Congress. *See* Bills S1956 and A1571 for the latest copy of the introduced bills.

[18] *Id.* at 449.

[19] Each week on any day during which a worker is paid less than the applicable rate, and each worker so paid, constitutes a separate offense.

[20] The length of the suspension is at the Commissioner's discretion.

[21] *Troise v. Extel Communications, Inc.*, 345 N.J. Super. 231, 236–240, 784 A.2d 748, 752–754 (App. Div. 2001), judgment aff'd, 174 N.J. 375, 808 A.2d 96 (2002).

[22] 42 U.S.C. §§ 9601 et seq.

[23] 42 U.S. Code § 9604(g)

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