

PREVAILING WAGE LEGISLATION AND INDUSTRIAL DEVELOPMENT AGENCIES

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Hodgson Russ Public Authority Alert
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On April 2nd, the New York State Assembly and Senate passed the Governor's budget bill which contains provisions imposing prevailing wage requirements on certain projects receiving financial assistance from New York State industrial development agencies (IDAs).

“Covered Projects”

The legislation provides that “covered projects” would be subject to the prevailing wage requirements contained in Section 220 and 220-b of the Labor Law of New York State. “Covered projects” are defined as construction work done under contract which is “paid for in whole or in part out of public funds” where the amount of all such public funds, when aggregated, is at least thirty percent (30%) of the total construction project costs and where project costs are over \$5 million.

Public Funds

As defined in the legislation, “paid for in whole or in part out of public funds” means:

- Payment of money by a public entity directly to or on behalf of the contractor, subcontractor, developer or owner that is not subject to repayment;
- Savings achieved from fees, rents, interest rates, or other loan costs, or insurance costs that are lower than market rate costs; savings from reduced taxes as a result of the tax credits, **tax abatements**, **tax exemptions** or tax increment financing; and any other savings from reduced, waived or forgiven costs that would have otherwise been at a higher or market rate but for the involvement of the public entity;
- Money loaned by the public entity that is to be repaid on a contingent basis; or
- Credits that are applied by the public entity against repayment of obligations to the public entity.

Applicability to IDAs

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These prevailing wage requirements would be applicable to IDAs under the legislation, since “public entity” is defined to include, but not be limited to, New York State, local development corporations, municipal corporations, *industrial development agencies*, or industrial development authorities, and any state, local or interstate or international authorities as defined in Section 2 of the Public Authorities Law.

Exceptions

The legislation provides a number of exceptions to the definition of “covered projects.” The list of exceptions is detailed and complex, and will be the subject of a subsequent Client Alert. Examples appear to include low income housing projects, projects funded with Downtown Revitalization Initiative moneys and projects that have a project labor agreement.

Public Subsidy Board

The legislation would also create a public subsidy board (PSB) whose members would be appointed by the Governor. The membership would consist of one member upon recommendation of the President of the Senate, one member upon recommendation of the Assembly Speaker, the Commissioner of Labor, the President of the Empire State Development Corporation, the Director of the Division of the Budget, two members representing employees in the construction industry (of whom one would be a representative of the largest statewide trade labor association representing building and construction workers and the other a representative of the largest trade labor association representing building and construction workers with membership in New York City) and two members representing employers in the construction industry (of whom one would be a representative of the largest statewide organization representing building owners and developers, either for-profit or not-for-profit, and the other a representative of a statewide organization representing building owners and developers, either for-profit or not-for-profit, representing a region different than the region primarily represented by the other employer representative).

The PSB would have the authority to examine and make recommendations having the full force and effect of law on matters including:

- The minimum threshold percentage of public funds;
- The minimum dollar threshold of projects;
- The construction work excluded as a “covered project”;
- The definition of “construction”; and
- Particular instances of benefits, monies or credits as to whether or not they constitute “public funds”

In making its recommendations, the PSB would examine the impact of such thresholds and circumstances on private development in light of available public subsidies, existing labor market conditions, prevailing wages, and the extent such adjustments could mitigate adverse impacts. The PSB is additionally empowered to issue binding determinations, based on documents or testimony, or both, in its sole discretion. Any determination issued by the PSB would be final and could not be appealed to the Commissioner of Labor, nor would any private right of action be available to any individual.

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Enforcement

Any construction work deemed to be part of a “covered project” would become subject to Sections 220, 224-b, 224-c and 220-b of the Labor Law of New York State. In plain English, this would mean:

- Owners or developers of “covered projects” would be required to certify under penalty of perjury within five (5) days of commencement of construction whether the project is subject to these requirements;
- Owners or developers would be entitled to seek guidance from the PSB;
- Owners or developers would be required to retain original payroll records;
- The public entity providing any of the public funds would be required to identify the nature and dollar value of such funds (and whether such funds are excluded from such determination); and
- The Commissioner of Labor would be authorized to issue rules regarding these provisions.

Effective Date

When signed into law by the Governor, the legislation would go into effect on January 1, 2022 and would apply to contracts for construction executed, incentive agreements executed, procurements or solicitations issued, or applications for building permits on or after such date. It should be noted that the legislation would not apply to any appropriations of public funds made prior to January 1, 2022, or to reappropriations of such funds first appropriated prior to such date.

To learn more about the proposed legislation and how it may affect your industrial development agency, please contact A. Joseph Scott III (518.433.2419), Christopher C. Canada (518.736.2921) or any other member of Hodgson Russ’s Public Authority Practice.

Hodgson Russ remains on top of these circumstances as they develop. Our attorneys are working remotely and seamlessly, and are ready, willing and able to address the needs of our clients, so we urge you to be in close touch with us as challenges and questions present themselves.

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