



## **REPORT TO THE MEMBERS OF THE SYRACUSE BUILDERS EXCHANGE**

**Earl R. Hall, Executive Director**

**April 4, 2020**

### **LEGAL MATTER**

In recent weeks the Syracuse Builders Exchange, and our attorneys at Sheats & Bailey, PLLC, have heard from general contractors and subcontractors that an up-line entity has made a promise to them. The promise is that if the contractor or subcontractor comes to the project site and is found to be in violation of the NYS Executive Orders, Public Health Law and NYS ESD Guidelines with regard to a project, then the up-line entity promises to indemnify the down-line entity for any fines. For example, if the subcontractor is worried about violating the NYS ESD Guidelines regarding a non-essential business, the general contractor might say "If you come back, we will indemnify you from any fines." We have heard the same thing between our general contractors and some project owners.

New York law indicates that an agreement to indemnify someone for that other person's fines should they be found to have violated a law is unenforceable. What that means in practical application is that if an owner promises such indemnification to a general contractor, or if a general or prime contractor makes such a promise to a subcontractor, then the company making the promise may be able to completely skate free of that promise. Please be careful if you are a contractor coming to a project only because you have an agreement with the up-line entity that they will indemnify you if you get fined. The up-line entity can then simply say, "No, we are not going to pay you because the agreement is unenforceable."

Be careful and be safe. Apply good common sense to the situation. If you are offered such an agreement, please be sure to consult with qualified and experienced construction counsel before you proceed.

### **UPDATE ON NYS BUDGET**

Earlier this week, New York State Governor Andrew Cuomo, the Assembly Majority Leader and the Senate Majority Leader agreed to a \$177 billion state budget. The spending plan includes a \$1 billion reduction from Governor Cuomo's original executive budget proposal. The budget anticipates a revenue shortfall of at least \$10-\$15 billion. The plan authorizes short term borrowing of up to \$11 billion, provides authority to the New York State Budget Director to cut spending throughout the year, and authorizes the ability to utilize the state's reserve funds.

In addition, the budget includes the expansion of New York's prevailing wage requirements, effective January 2022; however, implementation could be delayed.

### **Expansion of Prevailing Wage Summary**

**Prevailing Wage will apply to privately owned projects under the following conditions:**

1. 30% of the total construction project's costs are received in public funds; and
2. Total project cost is at least five million dollars

### **Public Funds to be included:**

1. Payment of money by public entity to developer, business or contractor
2. Saving achieved from rents, fees, interest rates, loans, insurance costs that are below market value
3. Tax credits, tax abatements, tax exemptions, TIFs and PILOTs
4. Money loaned by a public entity to be repaid on a contingent basis
5. Credits applied by a public entity against repayment obligations

### **Exemptions**

1. Affordable housing where at least 25% of the units are required to be affordable for at least 15 years subject to a governmental regulatory agreement
2. Supportive housing where 35% of the units are supportive for vulnerable populations subject to governmental regulatory agreement
3. Small residential work (1-2 family dwellings, owner occupied, less than 4 units)
4. Not-for-profit with gross annual revenue of less than \$5 million
5. Manufactured home park subject to a regulatory agreement for at least 15 years
6. Downtown Revitalization Initiative Grants
7. Regional Revolving Loan Trust Fund program which provides small loans
8. Certain energy projects (community generated distribution at 5mw or less)
9. Supermarket retail space funded by the FRESH program through NYC IDA
10. Historical Preservation redevelopment
11. Brownfield tax subsidies are excluded but the projects could potentially qualify

### **Local Labor Agreement Exemption**

1. If a private entity or entities wish to be exempt from requirements of new section 224-a, such entity or entities may make an agreement with a construction trade labor organization which is authorized to represent workers on such project.

### **Enforcement**

1. Owner/Developer must file a certification to DOL prior to construction commencement of project indicating whether the project requires payment of prevailing wages
2. Owner must maintain certified payrolls for 6 years; if delegating to contractor then owner is jointly and severally liable for all violations of contractor. All payroll records subject to FOIL
3. Stop Work Orders - DOL will now have the ability to issue stop-work orders for suspected prevailing wage violations pursuant to this section AND traditional public work

### **MWBE/Diversity**

1. NYS MWBE and Workforce Diversity requirements apply
2. DOL will issue a report annually on MWBE utilization, diversity in the workforce and compliance with equal opportunity laws

### **Apprenticeship Reporting**

All apprenticeship programs will report data to DOL which will be available on DOL's website. The report must include:

- Total number of apprentices
- Demographics (including race and gender)
- Rate of advancement
- Rate of placement on jobs

### **HOPING FOR A QUIET WEEKEND**

That's a wrap for the week of March 29 –April 4. Hopefully our members will not receive an email from the Builders Exchange on Sunday, although the past 2 weekends have been busy as the COVID-19 situation specific to construction remains fluid. May our member employers, your employees and all of your family members remain safe and healthy.