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CLIENT ALERT

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OHIO'S NEW PREVAILING WAGE GUIDELINES

On September 9, 2008, Governor Strickland and the Ohio Department of Commerce, Division of Labor & Worker Safety, issued new Guidelines for the interpretation of existing Prevailing Wage Law in the State of Ohio. According to the Department, there has been “confusion, inconsistency, and in some cases, misapplication of the law in specific circumstances of publicly-supported construction activity which facilitates privately-funded construction activity.” The Guidelines are designed “to clarify the Department of Commerce’s position on when prevailing wage applies to construction projects where there is a combination of public and private funding.”

The Guidelines took effect on October 15, 2008. The Department of Commerce concedes they will result in more construction projects being subject to prevailing wage obligations. In the past it was unclear whether public financed or supported asbestos, brownfield, or environmental hazard remediation for a known developer or end user to renovate or build were sufficiently separate from private construction so as not to require payment of prevailing wages. The Guidelines make it clear that projects such as these that “sufficiently benefit” from public support and will be subject to prevailing wage obligations. However, according to the Department this increase results not from an expansion of existing law, but rather from the historic misapplication of existing law.

In its clearest form, Ohio Revised Code § 4115.03, et seq., requires the payment of prevailing wage rates on all publicly funded projects the overall project costs of which exceed statutorily determined thresholds. A construction project financed solely by private monies does not require the payment of prevailing wage rates. The lack of clarity arises however, when both public and private sources of funding are used to finance construction. Examples of public-private funding identified by the Department include public financing of

road construction, infrastructure improvements, remediation of environmental hazards, and installation of machinery in a newly constructed private structure.

The primary focus of the Guidelines is the source of the funding for the project. Anytime a public authority provides financial support or in-kind support to a construction project which exceeds the statutory guidelines, the prevailing wage obligations are triggered. According to the Department, prevailing wage rates must be paid on every project “when the public authority pays for all or a portion of the project or provides a grant or a loan for the project, issues bonds to pay for it, donates or loans public property for the project, or leases public property to the project at below market rates.” Tax abatements, job training grants or the sale or lease of property at market rates do not trigger prevailing wage obligation.

The following key principles will be utilized by the Department in determining whether or not the Prevailing Wage Laws have been triggered:

1. When the primary purpose of the publicly-supported construction activity is to facilitate the use of privately funded construction within six months of the completion of the public construction, all such construction will be presumed to be a single public improvement subject to prevailing wage.
2. When the primary purpose for the publicly-supported construction activity will be presumptively established at the time public funds are committed by the public entity.

The Guidelines contain numerous factual scenarios which provide insight into just how the Department will

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implement the new guidelines. However, the Department recognizes that every construction project is fact specific. Therefore, it has committed itself to respond to requests for determinations within thirty (30) days of receipt from a requesting public authority or body.

As developers consider new projects, they should bear in mind the new Guidelines and the expansion of prevailing wage to construction projects previously considered private for purposes of the prevailing wage obligation. Contractors and Construction Managers need to be mindful of the sources of funding for projects they are bidding. Ultimately, the obligation to prevailing wage falls upon the General or Prime Contractor.

A copy of the Guidelines is posted on the Ohio Department of Commerce's Website at www.com.ohio.gov/laws

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