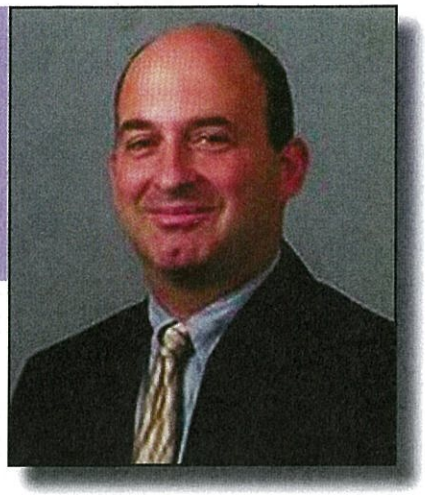
SUBCONTRACTORS, PREVAILING WAGES AND THE CONSTRUCTION FAIR PLAY ACT



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General contractors who retain subcontractors on municipal projects face prevailing wage requirements that require them to understand whether their subcontractors can be legally categorized as independent contractors or employees. The answer will determine whether the general contractor, or the subcontractor, is responsible for complying with prevailing wage standards benefiting the laborers and workers of the subcontractor. New York State provides an answer in the Construction Industry Fair Play Act (the "Act"), enacted in 2010.

The Act presumes that a subcontractor is an "employee" for various purposes (including wages and unemployment insurance) and imposes penalties against contractors who misclassify their defined employees. Labor Law 861-c. The scope of the Act is broad, covering a wide gamut of contractors in large or small projects, and among other things, may impact whether you, as the general contractor, are ultimately responsible for paying the prevailing wages to your subcontractor's workers under a municipal or public works contracts.

However, if the general contractor satisfies either a "three-prong" test or alternative "separate business entity" test, a subcontractor can be permissibly deemed an independent contractor. At that point, it would be the subcontractor, and not the general contractor, who would be responsible for the subcontractor's workers' prevailing wage, unemployment insurance and similar burdens.

The three-prong test states that a subcontractor is not an employee of a contractor if:

(a) the subcontractor is free from direction and control in how it performs contracted work;
(b) the subcontractor's work falls outside the usual course of your business; and
(c) the subcontractor maintains an independent business that provides those services to the contractor.

Let's consider how "usual course" of business is broadly worded. If a contractor has an in-house electrical team, but nevertheless retains a subcontractor electrician to perform wiring services on the renovation of a municipal building, the "usual services" both provide may render the subcontractor an employee, and not an independent contractor. In that situation, the public works contract would likely impose compliance with prevailing wage requirements on the general contractor because the subcontractor does not meet the three-prong test.

Under the alternative "separate business entity" test, a series of yes/no questions are considered:

(a) does your subcontractor perform services free of your direction and control, except as to the ultimate result you desire?
(b) will your subcontractor's business continue after the project is completed?
(c) has your subcontractor contributed its own "capital" to the project (material and/or equipment is

considered capital)?
(d) does your subcontractor own or lease its own contributed "capital" and will it realize its own profits on the project?
(e) are your subcontractor's services available to others?
(f) does your subcontractor identify itself as an independent business on its tax returns?
(g) will your subcontractor perform under its own name on the project?
(h) does your subcontractor pays for its own licenses or permits?
(i) will your subcontractor provides its own tools for its work on the project?
(j) may your subcontractor hire and pay for its own workers without your approval?
(k) will you identify your subcontractor as an independent business to your client? and
(l) does your subcontractor have the right to provide similar services to others?

If the contractor answered YES to each question, the subcontractor is an "independent contractor" responsible for its workers' prevailing wages. Several administrative decisions provide guidance.

For instance, an installer was not an independent contractor, but an employee of the general contractor, when that contractor established non-negotiable installation prices, determined cost issues incurred by the installer, provided installation work as part of its own services, and reimbursed the installer for normal business expenses. Matter of Barrier Window Sys. Inc. (Commissioner of Labor)(3d Dep't 2017). A subcontractor will typically be considered an "employee" of the contractor where the contractor controls the manner in which a subcontractor performs its work, and provides the equipment to the subcontractor for completion of that work. Matter of Prestige Industry Corp., (WCB Case No. G1918280, 2/20/19); Matter of Israel Construction Corp., (WCB Case No. G1655328, 7/31/18).

The lesson is that simply defining one as an "independent contractor" in a subcontractor agreement may not be enough. Under the Act, the realities will prevail, and a contractor who is not careful enough to put into practice what is defined on paper may soon find itself in an unfortunate and unexpected financial predicament.

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