

STATE OF NEW YORK
DEPARTMENT OF LABOR



Barbara C. Deinhardt
Deputy Commissioner of Labor
for Legal Affairs and Counsel

□ GOVERNOR W. AVERELL HARRIMAN
STATE OFFICE BUILDING CAMPUS
ALBANY, NEW YORK 12240
518 - 457-4380
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ONE MAIN STREET
BROOKLYN, NEW YORK 11201
718 - 797-7388

March 13, 1990

Mr. Garrett J. Geurtze
Architect, A.I.A.
Director, Facilities Development Bureau
New York State Office of Parks, Recreation and Historic Preservation
The Governor Nelson A. Rockefeller Empire
State Plaza, Agency Building 1
Albany, New York 12238

Re: Consulting Engineer Survey Work

Dear Mr. Geurtze:

I have received your February 12, 1990 letter in which you request an opinion concerning the applicability of Article 8 of the New York State Labor Law to certain consultant engineer survey work to be performed for the Office of Parks, Recreation and Historic Preservation at Southwick Beach State Park.

The work to be performed pursuant to the contract is for aerial photogrammetry of an existing three hundred acre park and a forty-two acre parcel which OPRHP may subsequently acquire, to provide ground control for future surveys and one foot interval contours of the site. You indicate that the purpose of collecting the data is to provide current mapping of the park for inventory and masterplanning (i.e. goals and objectives and a framework and criteria for future development by identifying appropriate uses for the facility) purposes.

Article 8 of the Labor Law is applicable to any contract for consulting engineer survey work awarded after July 1, 1989 entered into in connection with an existing or contemplated public work project, including feasibility and preliminary design surveying, and line and grade surveying for inspection and supervision of construction.

The work which you describe to be performed at Southwick Beach State Park does not appear to meet the criteria set forth above and, accordingly, would not require the payment

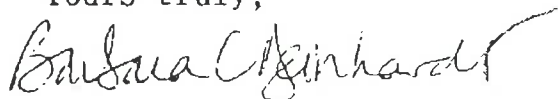
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Consulting Engineer Survey Work
March 13, 1990

to prevailing wages and supplements. From the information provided, the work to be performed is more in the nature of boundary and general topographical surveying. Although future development may result indirectly from the instant surveying, additional ground and feasibility surveying must be performed (for which prevailing wage and supplement rates will be applicable) prior to the commencement of any improvement project.

If you have any questions or require additional clarification, feel free to contact me.

Yours truly,



BARBARA C. DEINHARDT
Deputy Commissioner of Labor
for Legal Affairs

BCD:lm

cc: Charles C. Drobner ✓
John Boyd
Chet Rysedorph

STATE OF NEW YORK
DEPARTMENT OF LABOR



Barbara C. Deinhardt
Deputy Commissioner of Labor
in: Legal Affairs and Counsel

□ GOVERNOR W. AVERELL HARRIMAN
STATE OFFICE BUILDING CAMPUS
ALBANY, NEW YORK 12240
518 487 4330

☒ ONE MAIN STREET
BROOKLYN, NEW YORK 11201
718 797 7388

March 27, 1990

Ms. Susan M. Crossett
Director of Government Relations
Associated Builders and Contractors, Inc.
Empire State Chapter
5010 Campuswood Drive
Pioneer Business Park
East Syracuse, New York 13057-1272

Re: OPINION Applicability of
Labor Law Article 8 to Pro-
fessional Survey Work

Dear Ms. Crossett:

In your March 14, 1990 letter, you inquire whether certain survey work performed by an architectural/engineering firm hired by a contractor to confirm an original survey, constitutes public work for which prevailing wages and supplements must be paid or provided.

Surveying performed merely to determine or review existing boundaries (i.e. map or land acquisition surveys) is not public work within the meaning of Article 8 of the Labor Law and, accordingly, prevailing wage and supplement rates determined by the Commissioner of Labor need not be paid. However, any contract for consulting or professional engineer survey work awarded after July 1, 1989 which is entered into in connection with an existing or contemplated public project (including feasibility and preliminary design surveying, line and grade surveying for inspection and supervision of construction), is itself a contract for public work for which prevailing rates are applicable.

In the situation you describe in your letter, the work performed by the architectural/engineering firm appears to be public work and the firm would be a subcontractor on the project. Contrary to the opinion of the General Contractor, the contract for the survey work would not be a professional fee.

I trust this provides the requested clarification.

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Susan M. Crossett
Opinion-Professional Survey Work
March 27, 1990

Sincerely,

Barbara C. Deinhardt
Deputy Commissioner of Labor
for Legal Affairs

By:

Lisa F. Bleiberg
Lisa F. Bleiberg
Senior Attorney

LFB:lm

bc: Charles C. Drobner w/original letter
John Boyd " "
Chet Rysedorph " "
Lee Hunt " "
Richard Covuoto " "
Alan Frederick " "
Lynne Thornton (for opinion File)

State of New York
Department of Labor



Lise Gelernter
Deputy Commissioner of Labor
for Legal Affairs and Counsel

Governor W. Averell Harriman
State Office Building Campus
Albany, New York, 12240
518-457-4318

One Main Street
Brooklyn, New York, 11201
718-797-7388

August 10, 1992

Mr. John S. Munsey
Project Manager
C.T. Male Associates, P.C.
P.O. Box 727
Latham, New York 12110

Re: Applicability of Article 8
File No. RO 92-80

RECEIVED 125
N.Y.S. DEPT. OF LABOR

AUG 10 1992

BUREAU OF PUBLIC WORKS
ALBANY, NEW YORK

Dear Mr. Munsey:

I am writing in response to your request for an opinion as to the applicability of Article 8 of the New York State Labor Law to certain work that C.T. Male Associates, P.C., will be performing.

In your letter, you state the City of Albany has hired C.T. Male to perform preliminary site assessments involving drilling, surveying and test hole excavation work. C.T. Male will hire a subcontractor to perform the test hole excavation work. After reviewing the preliminary site assessments, the City of Albany will purchase one or more of the parcels upon which the work was performed in order to construct a solid waste planning unit.

Article 8 of the Labor Law is applicable to any contract for consulting engineer survey work entered into in consideration of an existing or contemplated public work project. This includes feasibility and preliminary design surveying and line and grade surveying.

In the situation described in your letter, the work performed by C.T. Male would be considered public work, which would necessitate the payment of prevailing wages and supplements to workers employed by the contractor and any subcontractors.





STATE OF NEW YORK
DEPARTMENT OF LABOR

ONE MAIN STREET
BROOKLYN, NY 11201

November 28, 1988

Gregory A. Hamlin, Esq.
Kernan and Kernan, P.C.
258 Genesee Street
Utica, New York 13502

Re: Application of Section 220
of the Labor Law to Surveying
Services

Dear Mr. Hamlin:

On September 23, 1988, you requested an opinion concerning the applicability of Section 220 of the Labor Law to surveying services for the New York State Department of Transportation.

After reviewing all the documentation provided, including the agreement to be entered into between the Department of Transportation and Stetson Harza, it is the opinion of the Department of Labor that the work to be performed by or on behalf of the consultant is public work within the meaning of Article 8 of the Labor Law for which prevailing wages and supplements must be paid.

Yours truly,

Barbara C. Deinhardt
Deputy Commissioner of Labor
for Legal Affairs

By: *Lisa F. Bleiberg*
Lisa F. Bleiberg
Senior Attorney

LFB:lb

bc: Charles C. Dropper
Richard Coyne

NEW YORK STATE DEPARTMENT OF LABOR
BUREAU OF LEGAL AFFAIRS
110 N. STATE ST. 11TH FL. ALBANY, N.Y. 12243





STATE OF NEW YORK
DEPARTMENT OF LABOR
COUNSEL'S OFFICE

July 9, 1993

Marcus A. Rotundo, P.E.
President
CME Associates, Inc.
P.O. Box 554
Central Square, New York 13036

Re: Request for Opinion -
Applicability of Article
8 to Preliminary Design
Studies and Testing

Dear Mr. Rotundo:

Lise Gelernter has asked me to respond to your June 22, 1993 letter in which you inquire concerning the applicability of Article 8 of the New York Labor Law to work performed by your firm. I regret that you were given conflicting information by Department of Labor field personnel, and I hope this letter will provide the requested clarification.

CME Associates, Inc. provides geotechnical, engineering and subsurface exploration services to ascertain the subsurface soil, groundwater and bedrock conditions and performs subsurface tests in support of design. These pre-design or feasibility studies result in test reports and engineering recommendations.

Since July 1, 1989, the Commissioner of Labor has determined that consulting engineer survey work, including feasibility and preliminary design surveying, line and grade surveying for inspection and supervision of construction, which is performed in connection with an existing or contemplated public project, is public work within the meaning of Article 8 of the Labor Law for which prevailing wages and supplements must be paid.

If you do not receive a schedule of prevailing rates from the public owner for which CME is performing work, you should request one. If the public owner refuses to obtain a schedule, you should contact the local office of the Bureau of Public Work, or the central office in Albany, and you will be provided with the correct rate information. The Bureau of Public Work will then contact the public owner to assure that the proper rate schedule is obtained. While I agree that it is frustrating to bid on a job without any rates or to be told that the project is not public work, it is ultimately the employer's responsibility

to comply with the provisions of the Labor Law. When in doubt, you should contact the Bureau of Public Work. They will, in addition to providing you with rate information, apprise you of whether a specific project is covered.

In your letter you raise several additional questions.

a. If a project is public work and a PRC was not issued what should we do if we are informed it is public work after we have completed the work?

Once a determination has been made that a project is public work, the employer is obligated to pay the rate differential, interest, and a possible civil penalty. Any recourse you may have against the public owner is not addressed under the Labor Law and an issue which you may wish to discuss with a private attorney.

b. If we receive a Bid Request for a project we feel is public work and no PRC is provided, if our competition secures the job and we feel it is not paying prevailing wages, what can we do?

If you have specific information to support your "feeling" that a competitor is not paying prevailing rates, you may file a complaint with the Bureau of Public Work which will be investigated. The complaint must state the specific basis for the allegation of non-compliance with the Labor Law.

c. Please delineate the difference between NYS public work and federal public work.

While both laws require employers to pay prevailing rates on covered work, there are differences in how the rates are set, and in certain instances, as to what work is covered. The federal public work laws (Davis-Bacon and Related Acts) are administered and enforced by the United States Department of Labor. Any questions about federal requirements and enforcement, should be directed to that agency. In certain instances, both State and federal prevailing wage laws will apply to the same project. This is especially true for highway construction projects. In general, where both State and federal laws are applicable, an employer must comply with the more stringent requirements. For example, if the State rate is higher than the analogous federal rate, the State rate must be paid.

d. How do we request a special rate case determination (i.e. one which represents our industry)?

There are several methods for obtaining a rate determination. A distinction must be made between a challenge to a rate set by the Commissioner of Labor (i.e. the monetary amount contained in the wage schedule), and the classification title

attributed to specific work. If you do not agree with the rate established for an trade or occupation, Section 220.6 of the Labor Law provides:

An employer may contest a determination by the fiscal officer [Commissioner of Labor or New York City Comptroller]...The employer must allege and prove, by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer.

The contest must be made by commencing a proceeding pursuant to Article 78 of the Civil Practice Law and Rules within four months of the determination of the rate.

If you disagree with the classification, the matter may informally be addressed by the Bureau of Public Work or formally litigated at an administrative hearing conducted pursuant to Section 220.8 or Section 220-b.2 of the Labor Law. To informally challenge a classification, you must provide, in writing, documentation to support the allegation that work customarily and traditionally performed by "your industry" is not covered by the classification at issue. The documentation must establish that the work is sufficiently unique and is not performed by any other trade or occupation. At a formal administrative hearing, the Department of Labor must present evidence to support its classification determination. You would then have an opportunity to introduce evidence to establish that the determination is incorrect.

e. Who is the fiscal officer and how is he/she held responsible if he/she fails to do his/her job?

Fiscal Officer is used in two contexts in Article 8 of the Labor Law: Section 220.5(e) defines the term to mean the Commissioner of Labor or the New York City Comptroller (for work performed by or on behalf of New York City). Although there are no specific provisions in the Labor Law setting forth penalties for the fiscal officer failing to properly perform his/her job, remedies are provided pursuant to Article 78 of the Civil Practice Law and Rules where the fiscal officer fails to act or acts inappropriately. Similarly, the various contracting entities are bound to act in accordance with their obligations under the Labor Law and legal recourse may be available where there is a failure to act or improper action taken.

f. When will the Department educate it's own personnel and other State contracting agencies relative to this law and to whom it applies?

The Bureau of Public Work routinely provides education and training for its personnel. This is done on an ongoing basis, in addition to the initial training given to new investigators. The Department of Labor has also participated in Statewide prevailing wage seminars sponsored by various groups which were designed to educate both public owners and public work contractors and subcontractors concerning the requirements of Article 8 and the Department of Labor's enforcement.

If you are dissatisfied with information or responses provided by Bureau personnel, or think the information you have received is incorrect or incomplete, you should contact Chet Rysedorph, Director, Bureau of Public Work, at (518) 457-3589 or the undersigned at (718) 797-7383.

Sincerely,



Lisa F. Bleiberg
Associate Attorney

LFB:lm
cc: Chet Rysedorph



STATE OF NEW YORK
 DEPARTMENT OF LABOR
 Bureau of Public Work
 Room 130, Building 12
 Harriman State Office Building Campus
 Albany, New York 12240

September 16, 2002

Mr. Jay Simson
 Executive Director
 New York Association of
 Consulting Engineers, Inc.
 6 Airline Drive
 Albany, New York 12205-1022

RECEIVED
 NYS DEPT. OF LABOR

SEP 19 2002

BUREAU OF PUBLIC WORK
 BINGHAMTON, NY

Dear Mr. Simson:

This is in response to your letter dated August 28, 2002, to Christopher D. Alund, Director of the Bureau of Public Work, requesting answers to several questions involving survey work. Although not specifically stated, I presume that your questions all refer to workers on a public work project.

Your first question asks to obtain copies of the law and policy for you to provide your members. This information is available on our website at www.labor.state.ny.us.

Questions number two through five all deal with to whom and when prevailing wages must be paid to employees on a public work project. Article 8 of the New York State Labor Law is applicable to any contract for consulting engineer survey work entered into in connection with an existing or contemplated public work project, including feasibility and preliminary design surveying, and line and grade surveying for inspection and supervision of construction. On any public work project, a contractor is responsible to pay his workers the proper hourly prevailing wage and supplemental benefit rate for each classification of work performed for all hours worked on the site of the project. The work you describe in your questions, i.e. measuring with a tape or instrument, cutting brush and pounding in stakes, would be surveyor's work and, as such, prevailing rates for that classification must be paid. The title (inspector or field engineer) does not determine the rate of pay; it is the classification of the work performed by a worker in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contractor on a public work project that determines the

rate paid. Article 8 does not cover travel time to work or home. Our enforcement surrounds the task being done and the prevailing rate to be paid for the task being performed.

Please feel free to contact me if you have any additional questions about this or any related matter.

Sincerely,



David G. Bouchard
Supervising Investigator

DB:he

bcc: Supervisors ✓



PREVAILING WAGE: SURVEY

The listed questions came about regarding the pay of surveyors. If there are related positions we would appreciate information, but we would like to keep things separate by position so we can track it easier. One apparent difficulty is that many design firms perform many functions that include measuring (with a tape or instrument), mapping, general information collection that is performed by field engineers or technicians (not by a survey crew), and it may be as simple as one (or two) people taking a tape out into the field for a short period of time.

The survey people referenced in these questions do not have the qualifications to do complicated survey work. Many workers can use an instrument to pick up rudimentary information like an elevation and these workers do not generally call themselves surveyors by title. Through schooling or practical experience they can do the basics.

1. Are there detailed regulations of this law set down in print somewhere, and if so, how do we get a copy? How detailed are they? Is there a sample policy that we can provide members with if they inquire?
2. Does prevailing rate apply to construction inspectors who occasionally pick up record (as-built) information with a tape or instrument? Most firms consider this to be "incidental" surveying and in the case of a construction inspector (or field engineer) the person does not have the title of "surveyor". What about these "incidental" activities? They could be 10 minutes or several hours. What is considered to be "incidental"?
3. Does the title of surveyor make any difference vs. field engineer or inspector?
4. If an engineer or technician goes into the field to pick up field information (for an hour), is that considered survey? Many times engineers or technicians use a measuring tape to collect this info. Is this different depending on;
 - Time - if for just a few minutes? For an hour? For a half day? For a full day?
 - Instrument - if they use an instrument rather than a tape?
 - Purpose - if the information is collected for design vs. as-built information?
5. If a surveyor is in the field, but not surveying with an instrument (person could be cutting brush, pounding in stakes, generally looking over the site, or just waiting to start for some reason) is person entitled to prevailing rate? What about driving or other transportation to/from the site? At what point does the person's activity become compensable at prevailing rate? Is anytime on the site compensable, and if so, is it all at the prevailing rate?
- 5a. What is defined as surveying and can you have a 'split' employee who is paid prevailing survey rate for survey work but not for other non-survey work being done that same day on site?

