

AGC NYS GUIDANCE DOCUMENT: CONTRACTUALLY MANAGING RISKS OF PREVAILING WAGE LAW EXPANSION



Section 224-a of the NYS Labor Law technically went into effect at the beginning of 2022. Loosely, this new law expands NYS Prevailing Wage Law coverage/requirements (as well as some degree of MWBE compliance) to private construction projects valued at over \$5 million where at least 30% of the total construction project costs are to be subsidized by public funds. Just within those two pieces - \$5 million and 30% of construction costs – there are many questions to be answered. Those were to have been fleshed out by a “Public Subsidy Board” to be created under the law, but which has not yet been appointed. Notably, there are many who would suggest that the law cannot even go into effect until that Public Subsidy Board is duly constituted and has fleshed some of these issues out.

Nonetheless, the law is clear that determination of whether the above thresholds have been met such that the prevailing wage requirements apply are obligations of the owner/client. Unfortunately, absent contractual protections the risks of an incorrect determination lies with the contractors and subcontractors. Those risks include:

- Additional labor costs in the form of wages and benefits,
- Additional administrative burdens related both to prevailing wage and MWBE provisions,
- Costs associated with a stop work order from the Department of Labor (as contemplated in the law) or potentially other government agency,
- Fines, penalties and potentially even a Willful Violation, and
- Legal Costs associated with violations issued

While AGC NYS had awaited the appointment and rulemaking from the anticipated Public Subsidy Board to provide some recommendations related to those contractual protections, we have determined that we can no longer wait. We have, therefore, assembled a Task Force of Attorneys from the AGC NYS Legal Advisory Committee who have graciously volunteered to offer some suggestions along these lines.

The Task Force is comprised of:

- Anthony Adams - Adams Leclair
- Jacob Amir - Smith, Buss & Jacobs LLP

- John Dreste – Ernstrom & Dreste
- Jennifer Harvey – Peckham Industries

While the suggestions will look first and foremost to the issues/contract language for the Owner/Contractor Agreement/General Conditions, there will also be some suggestions for Contractor/Subcontractor contracts. As to the subcontract agreements, this guidance may also deal with some of the risks associated with the Wage Theft Act.

AGC NYS would like to thank the members of this task force for their work on this important effort.

NOTE: Upon issuance of guidance and rules from the Public Subsidy Board, we will pass the information along and make modifications to this document as needed.

The information contained herein should not be construed as legal advice concerning any specific facts or circumstances. The contents are for general information purposes only. You are urged to consult with your legal counsel concerning any specific situation or legal issue.

Owner/Contractor Agreements

As indicated in the introduction, the owner/developer are to make a determination and “shall certify under penalty of perjury” whether the project is subject to the provisions of this law. The law further provides the owner/developer with the opportunity to seek guidance from the Public Subsidy Board as to whether the project is subject to the provisions of the law. Given the superior knowledge of the owner/developer relative to a project (including finances), the obligation to determine the applicability of the law and, the ability to get a determination, it is important to ensure that the owner/developer bears the risk of an incorrect determination that the project is not covered. Particularly when dealing with an LLC, special note should be taken relative to the portions in **Red**.

1. The Owner certifies, declares and represents that the contract work set forth in the Agreement **IS/ IS NOT (circle one)** a “covered project” subject to the requirement for New York Labor Law Article 8 prevailing wages/benefits, as set forth under New York Labor Law §224-a to 224-d, § 813-a, and pursuant to State Unconsolidated Laws, Chapter 252 New York State Urban Development Corporation Act, § 16-o. **(If Owner selects “IS” covered then treat as public project, including application of Article 8, Labor Law §220, § 220-b, with all usual public contract provisions for Subcontracts, and insist on security/bond from Owner under Lien Law § 5 or other security as deemed appropriate.)**
2. The Owner acknowledges that the contractor is relying on the Owner’s representation made herein as to the “covered” nature of the work as defined by the law, and the application or non-application of these laws, and Owner shall expressly and fully **INDEMNIFY** and **HOLD HARMLESS** the Contractor for all underpayment of prevailing wages, fringe benefits, fines, penalties, interest, expenses, costs, including impact costs due to all Stop Work Orders issued under these laws, attorney’s fees and all other damages that may be incurred by Contractor as a result thereof. The provisions of this paragraph shall apply to and survive termination of this agreement and completion of this project. **(Use if Owner selects “IS NOT” and consider other types of security from Owner).**

York laws and requirements related to payment of wages to employees, including but not limited to: New York Labor Law Article 6, §§190-199-d “Payment of Wages”; New York Labor Law Article 25-B, §§861-861g “Construction Industry Fair Play Act”; and New York General Business Law Article 35-E, §§756-758, “Construction Contracts”, including § 756-f “Wage Theft and Enforcement” and expressly agrees to provide certified payroll records with each payment application under the Agreement, and such other information and data required by these laws and/or requested by Contractor.

3. Subcontractor agrees to expressly obligate and require compliance with these laws by all its’ subcontractors, and to require all sub-subcontractors to expressly so obligate their own subcontractors. Subcontractor shall monitor and enforce each sub-subcontractor’s compliance therewith, including requiring certified payroll records with all payment applications.
4. Subcontractor expressly agrees that, should it later be determined by the New York Department of Labor that prevailing wages/benefits are or should have been made applicable to the Subcontract work, the Subcontractor shall be limited in the amount of any claim recovery against the Contractor to the dollar amount the Contractor receives therefor from the Owner.
5. In addition to any indemnification obligation set forth elsewhere in this Agreement or available at common law, and to the fullest extent permitted by law, the Subcontractor expressly agrees to indemnify and hold Contractor, its principals, members, directors and officers, harmless for, and/or from any loss, including but not limited to any unpaid wages/benefits, claims, fines, penalties, liquidated damages, interest, expenses, attorney’s fees, costs, including impact costs for all Stop Work Orders issued under these laws, that Contractor may sustain by reason of Subcontractor’s failure to comply with and/or monitor or enforce compliance with laws related to prevailing wages/benefits. The provisions of this paragraph shall apply to and survive termination or completion of this Agreement.
6. In addition to any provisions in this Agreement or available under law governing termination, Contractor retains the right to terminate Subcontractor from the project in the event Subcontractor fails to adhere to the foregoing obligations, or where Contractor determines that Subcontractor is withholding or intends to withhold wages and/or benefits, including prevailing wages. Such termination shall be deemed for good cause and effective on a date determined by Contractor.

Contractor/Subcontractor Agreements

With the convergence of the prevailing wage expansion and the Wage Theft Act at the beginning of 2022, the Task Force felt it important to include language in this guidance to help manage the risks associated with the Wage Theft Act, in the event §224-a does not apply.

1. **Prevailing Wage.** Subcontractor expressly acknowledges that Owner has represented that the Prime Contract work, including the Subcontract work pursuant to the Agreement, IS/IS NOT (circle one) a “covered project,” subject to the requirement for New York Labor Law Article 8 prevailing wages/benefits for labor, as set forth under New York Labor Law §§ 224-a to 224-d, § 813-a, and pursuant to State Unconsolidated Laws, Chapter 252 New York State Urban Development Corporation Act, § 16-o. **(If Owner selects “IS” covered, then treat as public contract and include Article 8 provisions for prevailing wage typically included in Subcontracts, including requirement of certified payrolls etc. If Owner selects “IS NOT” covered, add the following paragraphs):**
2. **Wage Theft.** Subcontractor expressly acknowledges its obligation to fully comply with all applicable New