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New York State enacts new prevailing wage requirements applicable to private construction of “covered projects” in New York, with carve-outs for affordable housing and certain other types of projects

By Joseph Lynch, Deborah VanAmerongen, Meghan Altidor, and James Allen

The New York State Legislature has expanded prevailing wage requirements for “covered projects.” However, there are notable exceptions for affordable and supportive housing. In addition, a Public Subsidy Board has been formed that may have a significant impact over the use of state funding on affordable and supportive housing developments.

As a part of the state budget, the New York Legislature has passed amendments to the state labor law that impact wages paid during the course of privately owned construction for a number of “covered projects.” Governor Cuomo signed the legislation today. The amendments also authorize the formation of a Public Subsidy Board to be comprised of a combination of appointees of the governor, senate, and assembly, as well as various state officials and members representing employers and employees in the construction industry. The new law would be effective on January 1, 2022.

Covered projects receiving public funding

Generally, the revised law will require owners or developers of privately owned or operated construction projects to pay laborers a prevailing wage and certify whether the construction project is subject to the new requirements within five days of commencing construction. The amended law applies to “covered projects” that are “paid for in whole or in part out of public funds,” including savings achieved from a public benefit, where the public funding amount or benefit, in the aggregate, is at least 30% of the total construction costs and such project costs are over \$5 million. The amended law creates a definition for “paid for in whole or in part out of public funds” and specifically notes that certain projects are not included in that definition, such as projects receiving tax benefits under Real Property Tax Law § 421-a and certain projects related to brownfield remediation or brownfield redevelopment.

The amendments also provide a number of exceptions to the definition of “covered project” that are relevant for affordable housing developers. Notably, among other exceptions, the new law does not apply to any of the following:

Affordable

Construction projects of multiple residences where:

- No less than 25% of the residential units are affordable and retained subject to a regulatory agreement with a local, state, or federal governmental entity, or a nonprofit entity with an anticipated formal agreement with a local, state, or federal governmental entity for purposes of providing affordable housing, provided that the period of affordability is not less than 15 years from the date of construction.
- No less than 35% of the residential units are supportive housing for vulnerable populations, provided that such units are subject to a regulatory agreement with a local, state, or federal governmental entity.

Revitalization

Projects funded by section 16n of the Urban Development Corporation Act (New York Communities Initiative) or the Downtown Revitalization Initiative.

Historic

Construction work performed on projects that receive tax benefits related to certain historic rehabilitation efforts under the current federal tax law.

The law also allows affordable and supportive housing projects that receive public funds or benefits to be exempted at the direction of the newly created Public Subsidy Board and details other requirements and exceptions not directly related to housing construction.

The Public Subsidy Board

The Public Subsidy Board has the authority to recommend a revised minimum threshold percentage or dollar amount of public funds to be considered when determining what qualifies as a “covered project” (although it cannot recommend a lower amount than those articulated above). Importantly, the board is also permitted to recommend what construction work should be excluded from the designation of a “covered project” and how to define “construction.” Moreover, the board may make recommendations concerning “particular instances of benefits, monies, or credits as to whether or not they should constitute public funds.” All of which will be important for stakeholders seeking to build affordable housing.

Nixon Peabody will continue monitoring the final language and impact of this new law as it relates to affordable and supportive housing. Read the full law [here](#). For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Joseph Lynch, 212-940-3717, jjlynch@nixonpeabody.com
- Deborah VanAmerongen, Strategic Policy Advisor, 212-940-3054, dvanamerongen@nixonpeabody.com
- Meghan Altidor, 212-940-3021, maltidor@nixonpeabody.com
- James Allen, 212-940-3049, jaallen@nixonpeabody.com