



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

August 25, 2010

[REDACTED]

Re: Griffiss Local Development Corp
Our File No. RO-10-0125

Dear [REDACTED]:

We are in receipt of your letter of August 9, 2010 to Delores Caruso, in which you inquire as to the applicability of the prevailing wage law with regard to certain construction being undertaken by Cardinal Griffiss Realty, LLC. Ultimately, the answer to the question revolves around the definition of the term "public benefit corporation" as it is used in Article 8 of the Labor Law.

To summarize a rather complicated corporate structure, the Oneida County Industrial Development Agency (OCIDA) was the title owner of certain real property formerly part of the Griffiss Air Force Base. It transferred that property to the Griffiss Local Development Corporation (GLDC), a not-for-profit corporation organized under Section 1411 of the Not-For-Profit Corporation Law. GLDC transferred the property to Cardinal Griffiss Realty, LLC, (CGR), an entity in which GLDC had a 99.5% ownership interest, with a Not-For-Profit corporation called Economic Development Growth Enterprises (EDGE) holding the remaining .5% ownership interest. CGR has entered into an agreement with OCIDA whereby it has leased the real property to the OCIDA as a security interest for OCIDA funding, with a lease back by OCIDA to CGR. CGR has a lease agreement with a private for-profit company, Assured Information Security, Inc. (AIS), whereby CGR will construct an office building of some 46,000 square feet and lease 35,000 square feet of that space to AIS. The question to be resolved is whether the construction of that office building is subject to the prevailing wage provisions of Article 8 of the Labor Law.

We are all aware of the well-settled law with regard to this issue. In determining whether a project is public work, two conditions must be fulfilled: "(1) the public agency must be a party to a contract involving the employment of laborers, workmen or mechanics, and (2) the contract must concern a public works project" *Matter of Erie County Indus. Dev. Agency v Roberts*,

Phone: (518) 457-4380 Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

94 AD 2d 532, 537 (4th Dept. 1983), *aff'd* 63 NY2d 810 (4th Dept. 1984), *see also*, *Matter of National R.R. Passenger Corp. v. Hartnett*, 69AD2d 127. “Later, it was stated that contemporary definitions focus upon the public purpose or function of a particular project***. To be public work, the projects primary objective must be to benefit the public” (citations omitted) *Sarkisian Brothers, Inc. v. Hartnett*, 172 A.D. 2d 895, (3rd Dept., 1991).

Both tests set forth in *Erie* are at issue in this fact situation. With respect to the first question, the prevailing wage law is limited in its applicability to contracts “to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party...” (Labor Law, Section 220(2)). A public benefit corporation is defined as a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof (General Construction Law, Section 66(4)). A local development corporation is defined as a non-profit corporation incorporated or reincorporated under the laws of this state, regardless of its particular name, which meet the additional requirements of Section 1825 of the Public Authorities Law. Section 1825 requires that the local development corporation be incorporated or reincorporated under Section 1411 of the Not-For-Profit Corporation Law or be incorporated under Articles 2 or 4 of the Not-For-Profit Corporations Law, in addition to other purposes, to construct new industrial or manufacturing plants or new research and development buildings and acquire machinery and equipment deemed related thereto or acquire, rehabilitate, and improve for use by others, industrial or manufacturing plants in the area of the state in which an assisted project is to be located, to assist financially in such construction, acquisition, rehabilitation and improvement and to maintain such plants, buildings and equipment for others, and may also be authorized to study and promote, alone or in concert with local officials and interested local groups, the economic growth and business prosperity of the area and the solution of other civic problems of the region which includes such areas. Section 1411 of the Not-For-Profit Corporation Law provides that corporations may be incorporated or reincorporated under this section as not-for-profit local development corporations operated for the exclusively charitable or public purposes of relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs, carrying on scientific research for the purpose of aiding a community or areas or by encouraging the development of, or retention of an industry in the community or areas, and lessening the burdens of government and acting in the public interest, and any one or more counties, cities, towns or village of the state, or any combination thereof, may cause such corporation to be incorporated by public officers or private individuals, and in carrying out these purposes and in exercising the powers set forth in Section 1411, such corporations will be performing an essential governmental function. Section 1411 corporations have the following powers: to construct, acquire, rehabilitate and improve for use by others industrial or manufacturing plants; to assist financially in such construction, acquisition, rehabilitation and improvement; to acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests; and otherwise to carry out its corporate purposes and to foster and encourage the location or expansion of industrial or manufacturing plants.

Chapter 63 of the Laws of 1994 authorized the New York State Urban Development Corporation to provide assistance to a local development corporation organized, with the

cooperation of the Griffiss Redevelopment Planning Council, Oneida County, and the City of Rome, pursuant to and for the purposes enumerated under Section 1411 of the Not-For-Profit Corporation Law. GLDC was incorporated as a Section 1411 not-for-profit corporation in 1994. GLDC was to be operated exclusively for the charitable and public/quasi-public purpose of participating in the development and implementation of a comprehensive strategy to maintain, strengthen and expand the uses and viability of the former Griffiss Air Base in the City of Rome and Oneida County, including, without limitation, the Rome Laboratory; working with the United States Air Force, Department of Defense and other federal, state and local officials and with the private sector to redevelop and expand the uses of the facilities within the former Griffiss Air Force Base; developing and overseeing strategies to minimize the overhead and operating costs of the Lab and other properties within the former Griffiss Air Force Base; and otherwise lessening the burdens of government and acting in the public interest. The Certificate of Incorporation also provides that the Corporation shall cooperate and coordinate its activities and plans with local governments in the City of Rome, Oneida County and the City of Utica and shall coordinate its efforts with the Oneida County Industrial Development Corporation, Rome Industrial Development Corporation and the City of Utica Department of Urban and Economic Development, and other state and local economic development organizations that may be appropriate. The Certificate also sets forth the powers of the GLDC which include the following: to develop, construct, acquire, rehabilitate and improve for use by others the Lab and other structures, buildings and facilities located within the former Griffiss Air Force Base; to assist financially in such development, demolition, construction, acquisition, rehabilitation and improvement; to maintain, manage and administer such structures, buildings and facilities for others; to acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests therein; to the extent permitted by law, to sell, lease, mortgage or otherwise dispose of or encumber, without leave of court, any structures, buildings or facilities or any other real or personal property or any interest therein upon such terms as it may determine and to foster and encourage the location, retention or expansion of industrial or manufacturing plants, research and development facilities, (including the Lab), education, commercial, residential, office, warehouse, and public recreation facilities (including provision for open space) and other structures, buildings and facilities within the former Griffiss Air Force Base.

Clearly GLDC is a local development corporation organized under Section 1411 of the Not-For-Profit Corporation Law. The question is whether the GLDC, when performing its corporate purposes as established by its certificate of incorporation and Section 1411 of the Not-For-Profit Corporation Law, meets the definition of a public benefit corporation. In our view it does, because it is organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof. The public improvement is the redevelopment and expansion of the uses of existing or future facilities within the former Griffiss Air Force Base. The profits from these improvements inure to the benefit of the people of this state, more particularly the residents of the City of Rome, the City of Utica and the County of Oneida. With respect to profits, we find that the redevelopment of the former Griffiss Air Force Base will foster and encourage the location, retention or expansion of industrial or manufacturing plants, research and development facilities which will have a positive impact on promoting and providing for additional employment, and encouraging the development of, or retention of an industry in the community. The County of Oneida and the Cities of Utica and Rome should profit significantly from this project.

Additionally, at least two lower courts have addressed the question of the nature of a local development corporation formed under Section 1411. *In Griffiss Local Development Corporation v State of New York Authority Budget Office, et. al.*, 26 Misc. 3d 815 (Alb. Cty, 2009), the court suggested that Section 1411 of the Not for Profit Corporation Law "defines an LDC as a public benefit corporation." Likewise, in *Western New York District, Inc. of the Wesleyan Church v. Village of Lancaster*, 17 Misc. 3d 798 (Erie Cty, 2007), the court stated "the Village of Lancaster Community Development Corporation... is a public benefit corporation organized and existing under the laws of the State of New York."

This leads us to the next question as to whether the GLDC is a party to a contract involving the employment of laborers, workmen or mechanics. In the instant case, the party contracting for the construction of the office building in question is CGR. CGR is a limited liability company which has two members: GLDC and EDGE. CGR is deemed to be a subsidiary of GLDC. We also consider CGR to be an alter ego of GLDC due to fact that CGR is almost totally owned by GLDC. Accordingly, it is our belief that GLDC, a public benefit corporation, is a party to this contract. However, if a court were to find that GLDC is not a party to this contract, we would find in the alternative that this contract was entered into by a third party, namely CGR, acting in place of, or on behalf of and for the benefit of a public entity (i.e., GLDC, a public benefit corporation) within the meaning of Labor Law §220(2).

Additionally, we find that CGR entered into this contract as either an alter ego or third party on behalf of a municipal corporation, Oneida County. As previously noted, GLDC, one of the two entities that makes up CGR, clearly plays a pivotal role in development and implementation of Oneida County's economic development programs and policies; the Oneida County Executive is on the Board of GLDC and the County Executive has legislative authority to appoint four other members to such Board. The County also has strong, direct ties with the other entity that makes up CGR, EDGE. EDGE is a not-for-profit corporation which entered into an agreement with the County of Oneida on May 15, 2009¹ to act as the single economic development organization that will facilitate the growth and development of Oneida County, and represent the interests of all residents of Oneida County. Among other provisions, this Agreement provides that EDGE will: support economic development policies that will increase the number of jobs and improve general economic conditions, and the standard of living for residents of Oneida County; report on its activities to the County Executive and members of the Board of Legislators; publicize the advantages of Oneida County and the region by overseeing and facilitating overall general economic development; provide a targeted marketing and promotion plan regarding how EDGE intends to publicize and promote Oneida County as a location for business expansions within key industry clusters; coordinate its business outreach activities, visits, and business development projects with the Regional Office of the Empire State Development Corporation, the Workforce Investment Board, other economic development and educational partners, and with the County Executive's Office; administer and oversee management of the EDGE Job Development Loan Fund including a Small Business

¹ While the Department has not been provided documentation to verify that this agreement was extended beyond its 2009 termination date, its reference as an exhibit in pending litigation leads us to believe it has been extended and is still in effect.

Development Loan Program capitalized with funding secured from the U.S. Department of Housing and Urban Development; administer the Oneida County Empire Zone Program; administer various grants obtained by the County for general economic development projects; file an annual report and budget of its expenditures and receipts with the Clerk to the Board of Legislators. This Agreement indicates Oneida County, a municipal corporation, exercises significant control over EDGE. This leads us to conclude that Oneida County, a municipal corporation, is also a party to a contract involving the employment of laborers, workmen, or mechanics by virtue of EDGE's ownership of CGR.

We therefore find that the first prong of the Eric County test has been met.

As to the second prong of the test, the question is whether the construction of an office building, on property owned by a public entity, is public work (i.e., does the project have a public purpose). That question is answered by *Sarkisian Brothers, Inc. v. Hartnett, supra*. There, buildings on a State University campus, owned by the college, were restored and transformed into a privately-operated hotel facility for use by the general public and secondarily for use by the school itself. Profits from that enterprise would inure to the benefit of the private party. That work, which was completely funded by a private party as a profit making venture, was found to be public work. The Court in *Sarkisian* found that the project in dispute was intended to benefit the public. With regard to the Griffiss project, the project is funded in large measure by public funds (or funds secured by mortgages provided by GLDC) and the overall objective is to increase employment opportunities for all members of the public, with the long-term goal of developing an office park to upgrade economic and employment opportunities throughout the area. Those are all public purposes that fall under the *Erie* test.

Additionally, we consider the following facts to be relevant in our determination as to the public purpose of this project. First, is the ownership of the parcel and the facility that is to be constructed thereon. The Leaseback Agreement between OCIDA and CGR provides that this facility will be constructed on a 7.5 acre parcel of land and the acquisition and installation of equipment thereon are all to be used for redevelopment efforts for the recently realigned Griffiss Air Force Base. The United States of America conveyed a 55+ acre parcel of land to OCIDA by means of a Quitclaim Deed dated May 13, 2002. OCIDA leases Parcel F6A to GLDC pursuant to a lease agreement dated December 1, 2002 (the Prime Lease). OCIDA and GLDC are entering into a Partial Release of Lease Agreement dated August 1, 2010 whereby the 7.5 acre parcel of land is released from the premises described in the Prime Lease. OCIDA has agreed to convey fee title to the 7.5 acre parcel to GLDC by way of Quitclaim Deed. GLDC has agreed to convey fee title to the 7.5 acre parcel to CGR by way of a Bargain and Sale Deed. CGR has agreed to grant OCIDA a leasehold interest in the 7.5 acre parcel by way of a Lease Agreement. CGR has agreed with OCIDA, to acquire construct, renovate and equip the facility that is to be constructed on such parcel in accordance with the plans and specifications for the improvements to the parcel as prepared by CGR and approved by OCIDA, and as revised from time to time in accordance with the Leaseback Agreement. OCIDA will lease the facility to CGR and CGR will sublease a 35,000+ square foot portion of the facility to AIS under the terms and conditions set forth in a Sublease Agreement dated July 1, 2010. CGR will retain 10,000+ square feet of the facility to lease to prospective subtenants. This rather complicated recitation of facts ultimately

means that GLDC/CGR will own the 7.5+ acre parcel where the facility will be constructed. As noted previously, GLDC is a public benefit corporation.

Second, the Leaseback Agreement provides that financing for the construction of this facility is to come from various sources including: Enhanced Capital New Market Development Fund V, LLC; Oneida Savings Bank which will finance a portion of the cost of the facility by making a loan to GLDC; Mohawk Valley Rehabilitation Corporation which will finance a portion of the cost of the facility by making a loan to GLDC; and Rome Industrial Development Corporation which will finance a portion of the cost of the facility by making a loan to GLDC. This indicates that GLDC will be responsible for a number of mortgages that will finance a significant portion of this project.

Third, the Leaseback Agreement provides that CGR agrees to make all necessary repairs and replacements to the facility, whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen, and to operate the facility in a sound and economic manner. CGR may also make any structural additions, modifications or improvements to the facility or any part thereof, provided such actions do not adversely affect the structural integrity of the facility. In the event of any damage or destruction of the facility, in whole or in part, OCIDA has no obligation to replace, repair, rebuild, restore, or relocate the facility, and upon the occurrence of such damage or destruction, the net proceeds derived from the insurance shall be paid in accordance with the terms of the mortgages (many of which are the obligation of GLDC). As noted previously, we consider GLDC and CGR to be alter egos, since GLDC owns 99.99% of CGR. As such, ultimately, GLDC (a public benefit corporation) will be responsible for making all necessary repairs and replacements to the facility.

Fourth, the Leaseback Agreement provides that OCIDA and CGR agree that, in consideration of the participation of OCIDA in the transactions contemplated in the Agreement, except as otherwise provided by collective bargaining contracts or agreements to which it is a party, CGR will cause any new employment opportunities created in connection with the facility to be listed with the New York State Department of Labor. CGR agrees that it will first consider for such new employment opportunities persons eligible to participate in federal job training partnership programs. Additionally, CGR has committed that the sublessee (AIS) will maintain 81 full time equivalent jobs and create 39 new, full time equivalent jobs as a result of the construction, renovation and equipping of the facility. AIS has also agreed to certain employment goals set forth in an Incentive Proposal dated June 3, 2010. CGR must submit to OCIDA an annual employment report to determine whether AIS has met the employment obligation. These provisions in the Leaseback Agreement indicate the strong public purpose behind this project, which is to promote job growth and job retention for Oneida County through the development of the former Griffiss Air Force Base.

Fifth, upon termination or expiration of the Leaseback Term, CGR shall purchase the facility from OCIDA for the purchase price of \$1.00. CGR shall purchase the facility by giving written notice to OCIDA and declaring CGR's election to purchase. As noted previously, CGR, is 99.99% owned by GLDC, which means that GLDC (a public benefit corporation) will own this facility upon the expiration or termination of the lease.

Sixth, the Sublease between CGR and AIS dated July 1, 2010, provides that with the exception of non-structural alterations costing less than \$50,000, AIS shall not improve, construct, renovate, make addition to, demolish, modify, remove or alter the premises or any part thereof without the prior written consent of OCIDA and CGR. In this instance, it is clear that the public entities, OCIDA and GLDC, have direct control regarding the use of this land and facility. It is clear that these entities are developing this project as part of an overall plan to redevelop the former Griffiss Air Force Base to promote job growth and job retention in the area. This is clearly a public purpose.

Seventh, the Sublease provides that CGR will at its own cost and expense, in the event of damage to or destruction of the facility by fire or other cause, repair or rebuild the facility within a reasonable time. Since GLDC (a public benefit corporation) owns 99.99% of CGR, a public entity will be responsible for the cost and expense of repairs due to damage or destruction of the facility.

Eighth, the Sublease provides that CGR's obligations under the lease are contingent upon CGR obtaining certain Project Funding, which may include: bank and public agency loans, GLDC Base Redevelopment Grants, CGR's equity investment, New Market Tax Credit funding, and financing from the New York State Empire State Regional Development Corporation Regional Blueprint Fund (ESDC Blueprint Financing). The ESDC Blueprint Financing is subject to AIS meeting the Job Creation and Retention Requirements. This reaffirms our prior finding that much of the financing for this project will come from public funding or from funds secured by mortgages from public entities (i.e., GLDC, a public benefit corporation).

The project in question, considered as a whole, clearly has a public purpose and meets the second prong of the *Erie* test. This office is of the opinion that work performed on this project is public work as that term is set forth in the prevailing wage law and that all laborers, workers or mechanics that perform work on such project are required by law to receive the prevailing wage as established by the Commissioner of Labor.

This opinion is based exclusively on the facts and circumstances described in your letter dated August 9, 2010, and the additional materials that you provided to this office, and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. This opinion cannot be used in connection with any pending private litigation concerning the issue addressed herein. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria Colavito, Counsel


By: Joan Connell
Deputy Counsel

**cc: Pico Ben-Amotz
Chris Alund
David Bouchard
Fred Kelley
Opinion File
Dayfile**