STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

ELLICOTT GROUP, LLC

Plaintiff,

MEMORANDUM DECISION

vs.

Index No. 10684/2009

STATE OF NEW YORK EXECUTIVE DEPARTMENT OFFICE OF GENERAL SERVICES,

Defendant.

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **HARTER SECREST & EMERY LLP**
Attorneys for Plaintiff
Kenneth W. Africano, Esq.,of counsel
Craig A. Slater, Esq., of counsel
Angela M. Demerle, Esq., of counsel
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CURRAN, J.

This matter came before the Court upon an order to show cause seeking a preliminary injunction against the State of New York Executive Department Office of General Services (OGS). Upon due consideration, the Court denies the application.

BACKGROUND

The following facts are alleged by the parties and are uncontroverted, unless otherwise stated. According to Carl Paladino, the managing partner, Ellicott Group LLC (Ellicott or Plaintiff) owns approximately eleven (11) office buildings in downtown Buffalo and has been in the commercial leasing business for 31 years (Paladino Affid. ¶2). Plaintiff and its affiliates currently lease space to various New York State agencies in Buffalo, and none of those leases required the payment of the "prevailing wage" as defined under Labor Law Articles 8 and 9 to persons providing construction for the build-out of the space or to the workers providing service and maintenance for the leased premises (*id.* ¶¶3-4).

In the spring of 2009, OGS issued a Request for Information (RFI) to prospective Buffalo landlords concerning the leasing of approximately 22,000 square feet of space to the New York State Workers Compensation Board (WCB Lease) and approximately 1,800 square feet of space to the New York State Office of Alcoholism and Substance Abuse Services (OASAS lease) (Reale Affid. Exhibit A; Paladino Affid. ¶ 6). As later revised, the RFI included a "boilerplate" provision for a standard form of lease, that, "[i]n relation to all new construction, major renovations, or substantial capital improvements performed under [the] Lease, Landlord shall abide by the provisions of Article 8 of the State Labor Law" (*id.*). Among other provisions, Article 8 includes a requirement that employees on "public work" projects be paid not less than the "prevailing rate of wages" in the locality as determined by the Commissioner of the New York State Department of Labor (Labor Law § 220 [2], [3] [a], [3-a] [a] [i], [5] [a], [e]). In addition, various service workers for the demised premises would have to be paid prevailing wages as well (Reale Affid. Exhibit A).

In response, Mr. Paladino protested to OGS and to its real estate broker concerning the proposed standard prevailing wage provisions (Reale Affid. Exhibit B). The Commissioner of OGS, John Egan, responded by letter dated June 23, 2009, stating in part:

> . . .OGS believes that it is important that prevailing wages be paid under state contracts **in accordance with the policy of this state (see Labor Law Articles 8 & 9) to pay prevailing wages where public monies are expended in state contracts**. Accordingly, the payment of prevailing wages is now a provision in all leases entered into by OGS.
>
> We disagree that this position is inconsistent with New York State law. The case you rely on, 60 Market Street Associates v Hartnett [153 AD2d 205 [3d Dept 1990], *aff'd* 76 NY2d 993 [1990]), does not preclude a state agency and a landlord from contractually agreeing that Articles 8 and 9 of the Labor Law will apply to the lease.

(Reale Affid., Exhibit C [emphasis supplied]). In a subsequent letter, Commissioner Egan indicated that the prevailing wage provisions would apply to all leases regardless of whether the building was entirely or only in part leased to a State agency (Reale Affid. Exhibit E). As explained by Michele M. Reale, associate attorney with OGS:

> This position is important because . . .one of OGS' goals in including prevailing wage requirements in all leases is consistency.

(Reale Affid. ¶ 26).

Ultimately, Plaintiff submitted bids on both the WC lease and the OASAS lease, and, in the belief that its bid "would not be considered unless it conceded to pay prevailing wages," it acknowledged "under protest" its acceptance of OGS' proposed prevailing wage provisions (Paladino Affid. ¶¶6, 11). In late August, Plaintiff was notified by OGS that the standard prevailing wage clause had been modified (*id*. ¶ 12). The current proposed language is as follows:

> In relation to all work performed by laborers, workmen, or mechanics involving alteration, renovation, reconstruction, repair, rehabilitation, construction, or demolition performed on behalf of a public agency (entity) under this Lease. . . , or in relation to all building service work as defined in Article 9 of the New York State Labor Law, performed on behalf of a public agency (entity) under this Lease...., the Landlord ... shall abide by the provisions of Articles 8 and/or 9 of the New York State Labor Law. The Landlord . . .agrees that the wages to be paid to any building service employee (including, but not limited, to watchmen, guards, doormen, building cleaners, porters, janitors, gardeners, groundskeepers, stationary firemen, elevator operators and starters, window cleaners and occupations relating to the collection of garbage or refuse and to the transportation of office furniture and equipment, and the transportation and delivery of fossil fuel), or to any worker, laborer, or mechanic, shall not be less than the prevailing wage for the locality in which the work is to be performed. The Landlord. . . shall contact the New York State Department of Labor to obtain the appropriate prevailing wage schedule, upon execution of the . . . Lease. . . Agreement

(Paladino Affid., Exhibit 2, Reale Affid. ¶ 14).

According to OGS, as of the date of the argument on the preliminary injunction, it is currently finalizing its review of the responses to its RFI, and it is anxious to make an award and to proceed with the leasing process (Nicholson Affid. ¶ 5). The WCB's prior long term lease at the Statler Building was rejected when that building's owner was in bankruptcy proceedings, and the WCB is currently in a temporary lease elsewhere through May 31, 2010 (Nicholson Affid. ¶¶ 3-4). Further, OGS asserts that its leasing process is an extensive one, involving, first, negotiations with the tentative awardee; review and approval by OGS; followed by approval by the Attorney General and the Office of the State Comptroller, the latter of which has by statute at least 90 days for its review (Reale Affid. ¶¶19-22). Thus, the leasing process typically takes a minimum of nine (9) months from the date of the award (Nicholson Affid. ¶ 5).

OGS maintains that leases are not subject to the competitive bidding procedures of the State Finance Law § 163 (*see* Op. St. Comp. 91-13, at 8). Rather, OGS evaluates all proposals to lease property to State agencies on the basis of "best value" which, according to Ms. Reale, is "a determination which weighs price against the quality and efficiency of the vendor" (Reale Affid. ¶ 20). Thus, the process OGS currently undergoes with respect to leases is similar to the process for securing professional services. Plaintiff contests the assertion that OGS is not bound by competitive bidding laws.

PROCEDURAL HISTORY

On September 3, 2009, Plaintiff initiated this action under CPLR 3001, seeking a declaration "that OGS lacks statutory authority to require, and is acting contrary to law by mandating, that the 'prevailing wage' be paid for work done on privately owned and leased premises" (Verified Complaint ¶ 1). Plaintiff challenges OGS' statutory and constitutional authority to require private landlords to agree to the prevailing wage provisions, and also contends that competitive bidding laws bar OGS from mandating anti-competitive preconditions that are not rationally related to the bidding statutes' purposes to protect the public fisc and to prevent favoritism or fraud.

By order to show cause, Plaintiff sought a temporary order restraining OGS from requiring that prevailing wages be paid by Plaintiff with respect to the build-out, building service, and maintenance of the premises to be leased; restraining OGS from refusing to award the bids to Plaintiff due to its objections to the prevailing wage provisions or due to this lawsuit; and restraining OGS from mandating that these or similar provisions be added to existing leases or lease renewals between Plaintiff or its affiliates and State agencies. In

response to Plaintiff's order to show cause, OGS agreed to "standstill" on any award for the two leases until September 18, 2009, and Plaintiff withdrew its request for a temporary restraining order (without prejudice to renewal). On September 17, 2009, the Court held oral argument on Plaintiff's request for a preliminary injunction, and reserved decision.

DISCUSSION

To be entitled to a preliminary injunction, Plaintiff must show (1) a likelihood of success on the merits; (2) irreparable harm if the preliminary injunction is not granted; and (3) a balancing of the equities in its favor (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Time Square Books, Inc. v City of Rochester,* 223 AD2d 270, 272 [4th Dept 1996]; *L&M Bus Corp. v New York City Dept. of Educ.*, 21 Misc3d 1111 (A), *9 [Sup Ct NY County 2008]). Plaintiff has the burden of proving each element by clear and convincing evidence (*Skelos v Paterson*, 2009 WL 2528624, *4 [2nd Dept 2009], *rev'd on other grounds* 2009 WL 2997072 [NY Sept. 22, 2009]).

Ms. Reale, who oversees the OGS leasing program, asserts that New York State has a strong public policy, embodied in the State Constitution (NY Const, art I § 17), statutory law and case law, to pay prevailing wages to all workers on public work projects (Reale Affid. ¶ 7). In addition, the Legislature recently amended section 220 of the Labor Law to close a loop-hole recognized by the Third Department in *Pyramid Co. v New York State Dept. of Labor* (223 AD2d 285 [3rd Dept 1996]). The amended section two provides in part that prevailing wages must be paid with respect to the following "public work" contracts:

> Each contract to which the state . . . is a party, and any contract for public work entered into by a third party acting in place of, on behalf of and for the benefit of the public entity **pursuant to any lease**, permit or other agreement between such third party and the public entity, and which may involve the employment of laborers, workers or mechanics. . .

(Labor Law § 220 [2], [3] [a] [emphasis supplied]).

Because there is no statutory definition of "public work" and because the 2007 amendment to Labor Law § 220 expressly included leases in the list of contracts covered by the law, OGS began receiving reports from State agencies that their leasing projects were being investigated by the New York State Department of Labor in order to determine if prevailing wages were being paid on those projects. This "ambiguity" created "uncertainty," and OGS determined that it needed a uniform policy consistent with Labor Law § 220 and public policy and which "recognized the fact that when state monies are expended for work in state leases, either directly or indirectly through amortization in the rental rate, such work directly benefits the State" (Reale Affid. ¶¶8-11). Accordingly, OGS will include prevailing wage provisions in all future leases, "subject to negotiation as to scope" (*id.* ¶¶ 11, 15).

In support of the application for a preliminary injunction, Plaintiff relies upon a case from the Third Department, *Matter of 60 Market Street Associates v Hartnett* (153 AD2d 205, 207 [3rd Dept 1990], *aff'd for the reasons stated* 76 NY2d 993 [1990]). Under the circumstances of that case, the Third Department held that the lease to a county of a privately owned facility to be built by the private owner on its land did not constitute a "public work" to which Labor Law § 220 and the prevailing wage laws would apply (*60 Market Street*, 153

AD2d at 207).[1] Similarly, in the Second Department, a private property owner had contracted to construct a building on its own land and lease part of it to the County of Suffolk for 30 years, under a lease containing a provision that the landlord would pay prevailing wages "in accordance with" Labor Law § 220. The Second Department determined that, because under the circumstances the construction of the building did not constitute a "public works project," Labor Law § 220 did not apply and the landlord's failure to pay prevailing wages did not conflict with the contract (*County of Suffolk v Coram Equities, LLC,* 31 AD3d 687 [2nd Dept 2006]).

In light of that case law, Plaintiff has made a significant showing of a likelihood of success on the merits of its assertion that, by mandating the payment of prevailing wages for workers on a build-out and in service and in maintenance positions in the buildings to be leased, OGS has violated the doctrine of separation of powers (*see generally Under 21 v City of New York*, 65 NY2d 344, 355-56 [1985]).

Nonetheless, the Court must decline to enter a preliminary injunction. It is well-settled that a preliminary injunction "should be awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm" (*City of Buffalo v Mangan*, 49 AD2d 697 [4th Dept 1975]; *see Anastasi v Majopon Realty Corp.*, 181 AD2d 706, 707 [2nd Dept1992]).

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[1] The prevailing wage laws apply to municipalities as well as to the State (Labor Law § 220 [2], [3]).

Here, Plaintiff has failed to make the requisite showing that it has been harmed at all, much less irreparably harmed (*City of Buffalo Mangan*, 49 AD2d at 697).[2]

Plaintiff anticipates that, "absent unfair prejudice as a result of this [action]," it will be the successful bidder (Paladino Affid. ¶ 7). However, Plaintiff is unable to point to any harm it has so far suffered, apart from being forced to base its bids upon wage rates it believes it should not have to pay to workers it will hire. Plaintiff has not yet been awarded a bid, nor is there any showing that Plaintiff has expended anything on such wages.

The entry of a preliminary injunction is a drastic measure (*Anastasi*, 181 AD2d at 707). The parties do not dispute that, were the Court to issue a preliminary injunction barring OGS from mandating the prevailing wage provisions, OGS would have to begin the bidding process again. "Where, as here, a preliminary injunction would afford the same relief as that which is ultimately sought, courts are especially loathe to grant the application" (*City of Buffalo v Mangan*, 49 AD2d at 697). Finally, "[a]s the principle of separation of powers militates against summary constitutional adjudication, it cautions against pendente lite relief restraining the executive branch" (*Skelos v Paterson*, 2009 WL 2252337, *9 [Sup Court Nassau

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[2] Mr. Paladino makes the following assertions: a) Plaintiff will pay approximately 30-40 percent more for construction work for the build out of the space for the leases if required to pay prevailing wages; b) during the lease period, if required to pay prevailing wages to maintenance and service workers, Plaintiff will pay approximately 25 percent more. Further, because the submitted bids concern space in an already occupied building, Plaintiff already has contracts in place for many of the services and maintenance of the building and would have to amend those contracts to require the contractors to pay prevailing wages, or terminate them (Paladino Affid. ¶¶13-14, 17).

County July 21, 2009], *aff'd* 2009 WL 2528624 [2nd Dept 2009], *rev'd on other grounds* 2009 WL 2997072 [NY Sept. 22, 2009]).

For all of these reasons, the Court denies the application for a preliminary injunction. Plaintiff should settle an order with Defendant, and both parties must appear at a preliminary conference on **Tuesday, October 13, 2009 at 10:00 a.m.**.

DATED: September 25, 2009

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HON. JOHN M. CURRAN, J.S.C.