SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

In the matter of the application of
JAMES ELDER, as a member and as financial secretary treasurer of ENTERPRISES ASSOCIATION OF STEAMFITTERS LOCAL 638 of the UNITED ASSOCIATION, AFL-CIO, RICHARD ROBERTS, as a member and as business agent at large of ENTERPRISE ASSOCIATION OF STEAM FITTERS LOCAL 638 OF THE UNITED ASSOCIATION, AF-CIO, DENIS HUGHES, as president of the NEW YORK STATE AFL-CIO, EDWARD MALLOY as president of the NEW YORK STATE BUILDING & CONSTRUCTION TRADES COUNSEL and JAMES CASTELLANE, as president of the NASSAU/SUFFOLK BUILDING TRADES COUNSEL,
Petitioners,

Index No. 020615/07
Sequence #001
Part 40

4/1/2008

For a judgment pursuant to CPLR Article 78

- against -

NASSAU COUNTY INDUSTRIAL DEVELOPMENT AGENCY and COLD SPRING HARBOR LABORATORY
Respondents.

Order to Show Cause w/Exhibits "A-L" 1
Verified Petition 2
Verified Answer Verified Petition 3

Affidavits In Reply/Opposition
Arthur Brings; Arthur Brings [Supplemental] 4-5
Joseph Gioino 6
Howard Fensterman 7
Petitioners' Briefs 8
Respondents' Briefs 11, 12, 13 14
Affidavits of Service 15-27
County Clerk's File 28

Upon the foregoing papers, petitioners' application for a judgment pursuant to CPLR Article 78 is determined as follows:

Petitioners as representatives of a local steamfitter's union and its affiliated trade councils seek, *inter alia*, a judgment declaring that the Nassau County Industrial Development Agency (IDA) acted arbitrarily and capriciously and/or in abuse of its discretion by failing to adhere to and enforce its own written Prevailing Wage Policy as incorporated into the contractual requirements contained in the lease agreement between the IDA and Cold Spring Harbor Laboratory (CSHL).

On February 13, 2008 CSHL was given permission to intervene in this application as a direct party-respondent (Seq. #002).

The IDA is a governmental agency constituting a public benefit corporation organized to promote and assist in developing and building projects for profit and non-profit organizations with the goal of benefitting the people of Nassau County. The IDA offers, among other things, various forms of low-cost financial assistance for these public and private projects (see General Municiple Law Article 18-A).

CSHL is a preeminent scientific research facility and not-for-profit corporation.

On March 1, 2006 CSHL made an application to the IDA for tax exempt bonds in the amount of 55 million dollars in order to acquire an interest in a certain property and to construct and furnish new laboratory space for the Center of Excellence in Bioinformatics in the form of six research buildings and a "chiller" building. The 55 million dollars requested represented only a portion of the total cost of the project estimated at that time at close to 100 million dollars.

On June 1, 2006 an agreement was reached through a trust indenture with the IDA and the Bank of New York for tax exempt bonds. On June 6, 2006 after a public hearing the IDA adopted a final resolution approving the bonds for the project, referred to as the Upper Campus Construction Project. On or about June 26, 2006 the lease agreement was signed.

CSHL had commenced the project after its Board's approval in 2002 and entered into a contract with a general contractor. Work began just over one year before CSHL's application was approved by the IDA.

The steamfitting work in turn was subcontracted to Sav Mor Mechanical Incorporated (Sav Mor) which had a collective bargaining agreement with a union other than petitioners: Local 355.

The gravamen of petitioners' Article 78 proceeding is that Local 355 workers on the steamfitting work were not paid the prevailing wage in violation of both New York State Labor Law §220

and the lease agreement between the IDA and CSHL, as subject to the IDA's Prevailing Wage Policy.

The lease agreement at Section 4.7, as paraphrased, states that CSHL will comply with and observe at its own cost and expense all Federal, State, and local statutes, codes, etc., including those pertaining to minimum wages and employment practices.

The agreement summary at page F-1 reads that CSHL shall comply with the applicable prevailing wage requirements under the Labor Law and cause any contractors or subcontractors to do the same.

There is no serious issue as to whether CSHL's project separate and apart from its contract with the IDA was subject to Labor Law §220, entitled 'Public Works'. The undersigned concludes it was not *(Hart v. Holtzman, 215 AD2d 175; Erie County Industrial Development Agency v. Roberts, 94 AD2d 535, aff'd 63 NY2d 811).*

Nevertheless, CSHL's wage obligations vis-a-vis the Labor Law stem not only from the agreement at Section 4.7, but from the entire integrated transaction *(see North Fork Bank v. County of Suffolk IDA, 261 AD2d 458).* Further, Section 1.5 (b) of the lease agreement binds CSHL to the IDA's Prevailing Wage Policy.

Even if one were to consider the agreement as worded to be ambiguous, the Court may look to parole evidence to determine the intent of the parties *(see Onondga County IDA v. Town of Van Buren, 101 AD2d 703).*

According to the uncontradicted evidence, the IDA's current Prevailing Wage Policy applies to any application submitted on or after January 1, 2004. Under the current Policy, when the IDA issues tax-exempt bonds, the applicant must agree to either abide by Labor Law §220's wage parameters or submit a project labor agreement for approval.

Construction of the Upper Campus Construction Project commenced on May 3, 2005 using private

contributions and grants and designating a general contractor who selected a subcontractor employing Local 355 workers. As that portion of the construction was nearing completion and after CSHL successfully applied to the IDA for financing, CSHL entered into a second contact with the general contractor on December 21, 2006 for the remainder of the project.

All workers on the second half of the project were paid in compliance with the Labor Law as per the Prevailing Wage Policy, with the exception of Sav Mor workers who continued to be paid with non-IDA financing funds, *i.e.*, monies that were left from other private financing.

Nevertheless, the general contractor initiated a bidding process for the steamfitter's work that was nearing completion. Sav Mor was the lowest bidder as against petitioners under Local 355's collective bargaining provisions, as well as under the prevailing wage rates as defined under the Labor Law (compare, *B. Milligan Contracting v. Oswego County Opportunities, 258 AD2d 931*).

When the IDA was asked for a clarification of which wage scale applies, petitioners were informed as explained herein by the IDA's chairman and executive director in their affidavits, that the Policy is applied consistently to all applicants only to the funding from tax exempt bonds and not to the entire project, which may be benefitted by other unrelated sources of financing. The Policy does not require the financing costs be applied to any specific portion of a contract; it is at the borrowers' discretion where to apply monies raised prior to the IDA's approval.

In the case at bar as it turns out, the IDS's Policy applied only to 48% of CSHL's entire project (see Minutes of June 6, 2006 IDA meeting).

In other words, the word "project" contained in the Policy and as interpreted refers to the IDA's financial assistance "project" and not to CSHL's entire construction "project". To do otherwise, according to the IDA, would be an inequitable interpretation of the Policy and would have a chilling effect on other projects needing assistance.

It is this interpretation allowing the so-called "splitting" CSHL followed that petitioners claim to be

arbitrary and capricious or an abuse of discretion.

The standard of review pursuant to CPLR §7803(3) where an agency is not required to conduct a hearing on the subject issue is whether a determination was arbitrary or capricious *(Pell v. Board of Education, 34 NY2 222; Maryhaven Center v. Wing, 251 AD2d 413).* Here, the IDA interprets its own written policy regarding wages to apply only to those funds from the tax-free bonds, a policy it applies consistently to all IDA projects.

The rational basis for this interpretation is explained by the example that if an applicant requires only 10% financing, to apply the IDA's Prevailing Wage Policy to the entire construction project would be both unreasonable and deterring.

Since the IDA's interpretation of its own written policy is neither unreasonable, irrational, an abuse of discretion or contrary to the Policy's clear wording, the Court will defer to respondent, especially since the interpretation is applied across the board and there is nothing in General Municipal Law §18-A, Labor Law §220 or case law to the contrary *(see Howard v. Wyman, 28 NY2d 434; Kennedy v. Novello, 299 AD2d 605, 607; cf. Main Seneca Corporation v. Town of Amherst Industrial Development Agency, 100 NY2d 246, affirming 292 AD2d 812; Orchard v. Glen Residence v. Erie County Industrial Development Agency, 303 AD2d 49).*

The petition is dismissed.

Dated: April 24, 2008 ....J.S.C.

ENTERED
APR 29 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE