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Pennsylvania Commonwealth Court Issues Decision in Ursinus College v. Prevailing Wage Appeals Board: Saul Ewing

On August 4th, the Pennsylvania Commonwealth Court (the “Court”) issued its decision in *Ursinus College v. Prevailing Wage Appeals Board*. The Court reversed a decision by the Prevailing Wage Appeals Board (the “Board”) in which the Board found that a construction project financed with tax-exempt bonds issued by a municipal authority for the benefit of Ursinus College (the “College”) was a “public work” subject to the Pennsylvania Prevailing Wage Act (the “Act”) and ordered the College to retroactively pay the applicable prevailing wage rate to the project workers.

What You Need to Know:

- The Court held that a private project funded via conduit financing was not public work under the Act when the economic reality of the transaction showed it was a private business deal.
- The Act will not apply to a project so long as no government entity either owns the project, bears any risk in the transaction, or actually holds the funds at any point.

In 2016, the College, a Pennsylvania private, non-profit college entered into an agreement with a municipal authority (the “Authority”) for the financing of part of a construction project for the College. Under the terms of the transaction, the Authority issued the bonds and lent the proceeds to the College, but never held or disbursed the funds. Instead, a trustee was appointed to hold and disburse the funds to the College, collect the College’s repayments, and then pay the bondholders directly. The Authority had assigned to the trustee all of its rights, title, and interest in its loan agreement with the College and bore no risk or obligations for the repayment of the bonds.

Shortly after the Pennsylvania Bureau of Labor Law Compliance determined that the project was not public work, the International Brotherhood of Electrical Workers, Local No. 98 (“IBEW”) brought a grievance under the Act. IBEW argued that the project was public work, and therefore the workers on the project should have received prevailing wage. As previously summarized by the Pennsylvania Supreme Court, a project is public work under the Act if it meets four elements: “(1) *there must be certain work*; (2) *such work must be under contract*; (3) *such work must be paid for in whole or in part with public funds*; and (4) *the estimated total cost of the project must exceed \$25,000.*” This case hinged on the third element, whether the College project had been paid in whole or in part with public funds.

The Board found that the project was public work under the Act, because the College “*would not have had this funding stream available **but for** the existence of the Authority and its coordination of the funding through its statutory powers as a public body*” (emphasis added). The Board retroactively awarded prevailing wage to the workers of the College’s project.

On appeal, the Court reversed the Board’s decision and held that courts must look at the economic

reality of the transaction when determining if a project is paid in whole or in part with public funds. In order to make such assessment, courts will look at the risk allocation among the participants to the conduit financing deal. On one hand, a project is not paid in whole or in part with public funds when no public entity bears any risk in the transaction. On the other hand, a project is funded with public funds if the government entity has any ownership interest in the project, if it has any repayment obligation or bears any risk under the bonds, or if it actually holds the funds at some point in the transaction.

The parties can still apply for reargument with the Court or file a petition for allocatur with the Pennsylvania Supreme Court, and we will update this alert if any new development arises.

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