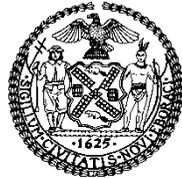


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Briefing Paper of the Infrastructure Division

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COMMITTEE ON CONTRACTS

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April 21, 2015

Oversight: The Mayor's Housing Plan: Contractor Employment Practices and Accountability

Introduction

On April 21, 2015, the Committee on Housing and Buildings, chaired by Council Member Jumaane D. Williams and the Committee on Contracts, chaired by Council Member Helen Rosenthal, will hold a joint oversight hearing entitled “The Mayor’s Housing Plan: Contractor Employment Practices and Accountability.” The Committee expects to receive testimony from representatives of the Department of Housing Preservation and Development (HPD), the Mayor’s Office of Contract Services, (MOCS), affordable housing developers, housing advocates, legal service providers, members of the real estate industry, and other interested members of the public.

Background

In 2014 Mayor Bill de Blasio put forth a Plan – *Housing New York: A Five-Borough, Ten-Year Plan* (the Plan) – to create or preserve 200,000 affordable housing units over the next 10 years.¹ The Plan proposes to preserve 120,000 affordable housing units and to support the construction of 80,000 new affordable housing units throughout the City.² As part of the creation and preservation of these affordable housing units, the City will have to contract with a number of affordable housing developers. While increasing the City’s supply of affordable housing is a laudable goal, the City must also ensure that the contracts for building and preserving affordable housing units are awarded equitably and that the workers on such projects are treated fairly.

¹ See THE CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 29 (2014), available at http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf

² *Id.* at 29.

Two City agencies work on contracts: MOCS and HPD. MOCS is responsible for overseeing contracting activities of all city agencies.³ In general, in order to contract with a city agency, a contractor must submit a bid to offer the good or service the agency is requesting.⁴

MOCS describes the contracting process as:

- An agency need is identified.
- A solicitation is written and published.
- A competition is held.
- A vendor is selected and a determination is made concerning responsibility.
- A contract is negotiated and signed.
- The contract is registered by the Office of the Comptroller.⁵

Every agency is required to comply with various laws when entering into contracts, including relevant labor laws and the Procurement Policy Board Rules, to ensure there is integrity in the contracting process and to prevent fraud.⁶ For instance, pursuant to the Procurement Policy Board Rules and relevant law, “purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”⁷ The Rules define a responsible proposer as “[a] vendor who has the capability in all respects to perform in full the contract requirements, and the business integrity and reliability that will assure good faith performance.”⁸ The City has previously successfully argued that a failure to meet the prevailing wage

³ See Nyc.gov, About Procurement, available at <http://www.nyc.gov/html/mocs/html/procurement/procurement.shtml>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Procurement Policy Board Rules § 2-08(a)(1).

⁸ Procurement Policy Board Rules § 1-01.

requirements of the Labor Law indicates a lack of business integrity and “is an issue material to the responsibility of the contractor.”⁹

At the same time, HPD utilizes a sponsor review process to vet entities or individuals seeking to do business with HPD.¹⁰ This process includes disclosure statement reviews and background checks.¹¹ The staff also works with applicants to ensure that any necessary corrective actions have been taken in regards to outstanding violations and arrears.¹²

The Construction Industry in New York City

In recent years, there has been an increase in the number of permits being issued for new residential construction throughout the five boroughs. According to a report issued by the New York City Rent Guidelines Board, between 2012 and 2013 there was a 74.1 percent increase in the number of permits issued for new dwelling units, rising to 17,995, the fourth consecutive year of increase.¹³ Queens permits increased by 121.4 percent to 3,161; Manhattan permits increased by 108.6 percent to 4,856; Brooklyn permits increased by 83.1 percent to 6,140; Staten Island permits increased by 78.3 percent to 1,200; and Bronx permits increased by 3.4 percent to 2,638.¹⁴

The City, through the Department of Housing Preservation and Development (HPD) and the New York City Housing Development Corporation (HDC), sponsors residential construction. HPD’s affordable housing programs include, but are not limited to, the Cornerstone program (a multi-family new construction housing initiative), the Neighborhood Redevelopment Program

⁹ *Omni Contr. Co., v. City of New York*, 2009 N.Y. Misc. LEXIS 4986, 8-9 (N.Y. Sup. Ct. Nov. 12, 2009).

¹⁰ See [nyc.gov](http://www1.nyc.gov/site/hpd/developers/sponsor-review-procedures.page), Sponsor Review, available at <http://www1.nyc.gov/site/hpd/developers/sponsor-review-procedures.page>.

¹¹ *Id.*

¹² *Id.*

¹³ See New York City Rent Guidelines Board’s 2014 Housing Supply Report *available at* http://nycrgb.org/downloads/research/pdf_reports/14HSR.pdf.

¹⁴ *Id.* (The number of permits issued in the Bronx rose by the greatest proportion of any borough during 2012).

(which gives City-owned buildings to non-profits to rehabilitate and operate as affordable housing) and the Neighborhood Entrepreneurs Program (which enables neighborhood based private property managers to manage and own clusters of occupied and vacant City-owned buildings as affordable housing).¹⁵ HDC's affordable housing programs include the Low-Income Affordable Marketplace Program (which provides financing for apartments that rent to tenants with incomes no more than 60 percent of the area median income) and the New Housing Opportunities Program (which helps finance housing for middle-income New Yorkers).¹⁶ HPD and HDC programs spurred a total of 15,382 housing starts in Fiscal Year 2013, a 9.7 percent decrease over the prior fiscal year.¹⁷ The City also promotes residential construction by offering developers tax incentives. One of the City's main tax incentive programs is the 421-a program, which provides a multi-year tax-exemption from property taxes for new construction of multiple dwellings. In 2013, the number of housing units newly receiving exemptions decreased for the second consecutive year, down 27.3%, to 7,890.¹⁸

According to the New York Building Congress, a membership coalition of business, labor, association and government organizations promoting the design, construction and real estate industry in the City, construction spending in the City is on the rise. Construction spending reached \$26.1 billion in 2014, a 31 percent increase from 2013.¹⁹ Spending on residential construction reached \$11.9 billion in 2014, a 73 percent increase from 2013 when spending on residential construction reached \$6.9 billion.²⁰ The New York Building Congress found that the surge in residential construction is largely a product of the ongoing demand for luxury

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See New York Building Congress's New York City Construction Outlook *available at* <http://www.buildingcongress.com/outlook/>.

²⁰ *Id.*

apartments – in 2014, fifteen residential projects had a combined construction value of \$5.8 billion, which is approximately 58 percent of the total spending on residential construction that year.²¹

According to the New York Building Congress, in 2013, the latest year for which data is available, construction employment in the City averaged 120,900, a 4.2 percent increase from 2012, when construction employment averaged 116,000.²² In 2012, the latest year for which complete data is available, construction worker earnings for the entire year averaged \$71,700 per worker.²³ Construction workers earned an average of \$51,999 in the first nine months of 2013 (given that earnings are generally the greatest in the fourth quarter due to year-end bonuses, the New York Building Congress assumes that annual earnings in 2013 ended up in the \$73,000 range).²⁴

Wage Theft & City Contracts

In addition to calling for the creation of new affordable housing units, the Plan called for the creation of quality construction jobs with fair wages.²⁵ The assurance of fair wages is especially important as the implementation of the Plan is expected to create 194,000 construction jobs and 7,100 permanent jobs.²⁶ However, concerns have recently been raised about affordable housing developers committing “wage theft.”²⁷ According to the New York Daily News, the City’s largest affordable housing developers have had to pay \$11.1 million in back wages over

²¹ *Id.*

²² See New York Building Congress’s New York City Construction Outlook *available at* <http://www.buildingcongress.com/outlook/050714.html>.

²³ *Id.*

²⁴ *Id.*

²⁵ See THE CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 40 (2014) *available at* http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf

²⁶ *Id.* at 8.

²⁷ “Wage theft” is a general term and can mean violations of minimum wage and overtime laws, violations of prevailing wage requirements, failure to pay in a timely manner, etc.

the last three years.²⁸ In addition, the New York State Attorney General's office recently announced the arrest of five construction contracts receiving city funds, who allegedly underpaid their employees approximately \$1 million in wages.²⁹

New York City is somewhat limited in its ability to combat wage theft. The New York State Labor Law contains provisions regarding the payment of wages,³⁰ permissible deductions from wages,³¹ the illegality of requiring workers to return parts of their wages,³² and the minimum wage.³³ It also provides the Department of Labor with the sole authority to enforce such laws.³⁴ However, nothing in the State law bars the City from considering previous incidents of wage theft when deciding who to contract with.

HPD has a Labor Monitoring Unit (LMU) responsible for ensuring that developers, contractors, subcontractors and other actors³⁵ receiving financial assistance comply with local, state and federal laws.³⁶ The LMU conducts site interviews of employees, reviews payroll submissions and investigates employee complaints.³⁷ If a contractor is found to have failed to comply with relevant labor laws, they may be placed on an enhanced contractor review list.³⁸

The "enhanced contractor review" designation is meant to assist HPD in determining whether or not a contractor will be a responsible user of public funds, thus warranting the award

²⁸ Greg B. Smith, Firms building city-backed affordable housing repeatedly caught cheating workers out of wages, NY Daily News, April 12, 2014, available at <http://www.nydailynews.com/new-york/nyc-crime/city-hires-housing-firms-cheat-workers-wages-article-1.1754687>.

²⁹ Derek Kravitz, 5 NYCH Public Works Contractors Arrested For Almost \$1 Million In Wage Theft, Wall Street Journal Blog, April 4, 2015, available at <http://blogs.wsj.com/metropolis/2015/04/08/5-nyc-public-works-contractors-arrested-for-almost-1-million-in-wage-theft/>.

³⁰ New York State Labor Law § 191

³¹ New York State Labor Law § 193

³² New York State Labor Law § 198-B.

³³ New York State Labor Law § 652.

³⁴ See New York State Labor Law § 21;

³⁵ For the ease of reference, these various agents will be referred to as "contractors" throughout this paper.

³⁶ See generally, "Labor Compliance," available at <http://www1.nyc.gov/site/hpd/developers/labor-standards.page>.

³⁷ *Id.*

³⁸ See generally, "Enhanced Contractor Review," available at <http://www1.nyc.gov/site/hpd/developers/enhanced-review.page>.

of a City contract.³⁹ The decision to place a contractor under this status is a collaborative decision-making effort among the LMU, HPD's Office of Legal Affairs and Office of Development, and the Department of Investigation.⁴⁰ This team will not only determine which contractors should be placed under review, but also what, if any conditions the contractor must comply with to be removed from this status.⁴¹

There are several criteria that will be considered in determining if a contractor should be placed under enhanced review. These factors include but are not limited to –

- Having a history of multiple or significant construction quality issues;
- Having a history of multiple or significant labor law or construction law violations;
- Having \$500,000 or more in current prevailing wage withholdings; or
- Being listed in one or more of the following publications – *Excluded Parties List System*, the *List of Employers Ineligible to Bid on or Be Awarded any Public Work Contract* and the *List of Debarred Offerors*.⁴²

When one of these issues is raised, HPD will begin an internal investigation into the contractor. Before any final determination is made, HPD will notify the contractor that they are being investigated and, if there are any factual disputes, contractors are given an opportunity to respond and defend themselves.⁴³ If a contractor is placed under enhanced review, HPD reserves the right to continue to award the offending contractor taxpayer funds.⁴⁴ However, such contractors may be required to submit to additional monitoring by HPD staff, retain a third party monitor, or

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., "Firms building city-backed affordable housing repeatedly caught cheating workers out of wages," Greg B. Smith, April 12, 2014, available at <http://nydn.us/1oYa6Ay>.

take other actions that HPD may require at their own expense.⁴⁵ The LMU maintains a list of all contractors on enhanced review status, of which there are currently 26.⁴⁶ This list is reviewed quarterly, and if a contractor has complied with the conditions outlined by HPD, the contractor may be removed from enhanced review status.⁴⁷

Despite HPD's best efforts, some affordable housing developers continue to commit wage theft.⁴⁸ The Council hopes to learn more details about the various steps HPD has taken to combat wage theft and to hear recommendations for what more can be done.

Conclusion

The Committees are looking forward to exploring the details of the Plan as it relates to ensuring that workers receive fair wages. The Committees are particularly interested in hearing more about (1) actions taken by the LMU; (2) outcomes of the enhanced review process; and (3) recommendations for reducing wage theft.

⁴⁵ The Department of Housing Preservation and Development, General Contractors and Subcontractors currently under Enhanced Review Status, available at <http://www1.nyc.gov/assets/hpd/downloads/pdf/developers/general-sub-contractors-updated-list.pdf>.

⁴⁶ *Id.*

⁴⁷ See generally, "Enhanced Contractor Review," available at <http://www1.nyc.gov/site/hpd/developers/enhanced-review.page>.

⁴⁸ See, e.g., "Firms building city-backed affordable housing repeatedly caught cheating workers out of wages," Greg B. Smith, April 12, 2014, available at <http://nydn.us/1oYa6Ay>.