



## "Excavation Quality Assurance Act," by Andrew Richards, Esq. published in Subcontractors Trade Association, 10-26-2023

New York State recently passed the Roadway Excavation Quality Assurance Act (S.4887/A.5608) to ensure construction workers are paid prevailing wages on roadway excavation projects. The legislation, signed into law by Governor Kathy Hochul on Aug. 16, amends the labor law to protect workers on projects requiring a permit to excavate or open a street. Prevailing wage must be paid on public works projects, and the requirement to pay prevailing wage on roadway excavation projects has already been in place for New York City projects. Now, it is statewide.

### Covered Excavation Projects

Specifically, this legislation mandates that utility company contractors and their subcontractors pay the prevailing wage to employees on "covered excavation" projects. The law does not cover direct employees of a utility company. A covered excavation project is defined in the statute as a construction project that involves a permit issued to a contractor or subcontractor by a state, county or municipality to use, excavate, or open a street. According to the law, "no permit shall be issued for a covered excavation project until an agreement confirming the payment of wages" as required by the law "has been contractually mandated and filed with the department of jurisdiction," meaning the jurisdictional entity charged with issuing the permit.

### Contractors Tread Carefully

Consider there is one major problem with this new law. The NYS DOL has issued enforcement guidelines that the contractor pay prevailing wages on any street opening project even if the contract between the contractor and utility company has been executed. In other words, the contractor will be required to pay prevailing wage going forward based on the prices agreed to with the utility company despite the fact that the contractor did not bid the work using prevailing wage. It appears that the legislature did not take into account that a contractor and utility company execute contracts for periods of time, not knowing when an application for the permit would be submitted. And without a change order from the utility company, the contractor will suffer greatly with any additional non-union labor (e.g., flaggers) utilized for roadway openings permitted after the enactment of the Act.