

# S.2506-B / A.3006-B Part AA

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<b>BILL</b> S.2506-B / A.3006-B Part AA
<b>SUBJECT</b> Extends Prevailing Wage Requirements to Covered Renewable Energy Systems
<b>DATE</b> March 26, 2021
<b>OPPOSE</b>

The Business Council opposes S.2506-B / A.3006-B Part AA, particularly language that would expand the labor and Buy American requirements to the construction, operation and maintenance of renewable energy projects in New York State. In addition to significantly increasing overall project cost and chilling private investment, imposing such a mandate would reduce competition and ultimately frustrate the goals established by the Climate Leadership and Community Protection Act, which requires that New York derive 70% of its electricity from renewable sources by 2030.

The proposals advanced by the legislature would mandate that projects to develop renewable energy systems, meaning those with generating capacities of at least 5MW, be subject to the prevailing wage unless done pursuant to a collective bargaining agreement, labor peace agreement, or project labor agreement. Further, private owners of renewable energy systems would be required to pay the prevailing wage for all operation and maintenance activities while subject to a labor peace agreement, and owners would be forced to utilize union labor for current and future operation and maintenance activities.

## Labor Peace Agreements

The proposal advanced by the legislature would further require private companies –as a precondition to doing business in New York– to enter into labor peace agreements with their own employees, or contract with at least one labor organization for operation and maintenance work. This is both contrary to federal public policy and creates an unacceptable advantage for labor unions over workers that have voluntarily elected to not collectively organize. At minimum, there should be a distinction indicating that companies who directly employ full-time workers to perform operation and maintenance for their renewable energy installations should not be mandated to enter into labor peace agreements nor be required to give preference to union labor over their own employees.

It is important to note that the National Labor Relations Act forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, from working together to improve terms and conditions of employment, or refraining from any such activity.

## **Wage Requirements**

Under both New York State and Federal law, contractors and subcontractors must pay the prevailing rate of wages and benefits to all workers subject to a public work contract, which are calculated according to the local rates where the work is actually performed. This generally applies to construction, reconstruction or maintenance work funded and performed on behalf of public agencies, including the state, municipalities, school districts, special districts, and public authorities. Unlike the federal government (and virtually every other state), New York State calculates the prevailing wage based on the compensation levels set in collective bargaining agreements between bona fide labor organizations and employers in the private sector and adheres to the '30 percent rule', which means that the union wage would apply when a union contract covers as few as 30 percent of "workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed."

According to recent studies, current prevailing wage requirements in New York increase the cost of construction projects between 13 percent and 25 percent, which vary based on the area or region of the state. Should the significant expansion of the prevailing wage set forth by the legislature be enacted, taxpayers can expect to pay billions in extra costs over the next decade given the significant number of renewable projects needed to achieve the targets established by the CLCPA. The imposition of labor mandates will also chill private investment, which the Executive correctly indicated is an integral component of developing in-state green manufacturing. If New York continues to be an imprudent destination for private sector investment, companies will elect to divert their resources to more profitable locations at a time when many states are similarly enacting sweeping climate policies.

The Business Council recognizes that the Executive Budget proposal is far more limited and largely codifies existing procurement preferences included in requests for proposals (RFPs) promulgated by the New York State Energy Research Development Authority (NYSERDA). The Executive proposed the payment of prevailing wage for the installation of renewable energy projects with a generation capacity exceeding 25MW and project cost exceeding \$10 million,

and solar projects with a generation capacity in excess of 5MW and cost exceeding \$5 million. This proposal recognizes that certain utility-scale projects may be more capable of absorbing higher labor costs while still advancing overall state policy. By contrast, the proposals advanced by the legislature would cause much smaller projects to incur significant cost increases which will very likely prevent many of those projects from being developed at all.

## **Buy American**

The legislature advanced language that would require each contract entered into by a public entity for the construction, alteration, improvement or maintenance of renewable energy system to “contain a provision that the iron and structural steel used or supplied in the performance of the contract, or that is permanently incorporated into the public work, be procured in whole or in part from an American source.” While this language seems to thematically follow the New York’s ‘Buy American Act’, it fails to set forth specific guardrails on what the provision must set forth. Solar and on-shore wind installations are required to submit a decommissioning plan for end-of-life management, including the removal of solar panels, panel racking, wind turbines or physical towers. Without further guidance concerning what the term “permanently incorporated” specifically means, it creates considerable uncertainty and risk of litigation which will undoubtedly cause developers to avoid investment in New York State. Particularly given the importance of jobs and economic development in this difficult time, developers seek greater uncertainty, not less.

Further, the Senate included language that provides the commissioner of the Department of Labor with discretion to waive the “Buy American” requirement in the event it is not in the public interest, would be cost prohibitive, or if needed materials are otherwise unavailable. The Assembly curiously did not include this provision, which is not only included in New York’s Buy American statute but also Buy American provisions enacted by other states and the federal government.

## **Conclusion**

We remain strongly opposed to any legislation that would extend the state’s existing prevailing wage mandate for public works projects to private sector projects receiving state and/or local economic development assistance and measures that would force unionization, in likely violation of federal law, all driving up the cost of doing green business in New York. These measures are simply contrary to the state’s economic development objectives, adding significant additional costs and regulatory obligations to many projects that

require assistance to move forward. This concern is particularly prescient for upstate, where many counties have seen flat economic growth for decades, leading to decreased tax revenue and hardship for local communities and school districts. Driving up project labor costs will hamper a wide range of investment and job creation opportunities, including those sponsored by for-profit businesses as well as non-profit service providers on which our communities rely.

The CLCPA created an opportunity for the State to be fertile ground for economic opportunities by being, as proponents routinely touted, first-in-the-nation to enact such sweeping climate policies. But before those opportunities can begin to be realized, state government is seeking to stymie development by tacking on policies that will immediately increase cost and likely drive away interest in investment. The advent of the green economy, if developed conscientiously and correctly, could be an economic boon for upstate economic revitalization, but these proposals would once again stymie meaningful recovery and development by imposing politically-driven policies at the worst possible time.

It is for the above reasons The Business Council strongly opposes the mandates proposed by the legislature in S.2506-B / A.3006-B Part AA.