

# THE PUBLIC SUBSIDY BOARD

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## PROCEDURES OF THE PUBLIC SUBSIDY BOARD

(Updated September 25, 2024)

### PROCEDURES FOR PUBLIC SUBSIDY BOARD TO CONSIDER AND ISSUE DETERMINATIONS

The Public Subsidy Board (“Board”) is empowered by Sections 224-a and 224-c of the Labor Law to examine, make recommendations, and issue specific binding determinations on whether a project, or certain kinds of projects, under certain conditions will be subject to the prevailing wage requirements in Sections 220 and 220-b of the Labor Law. For the Board to issue determinations on the applicability of Labor Law Section 224- a to potentially “covered projects,” the Board needs to establish procedures to identify potentially covered projects, hold confidential hearings about specific projects, and hold public hearings about matters broadly applicable to all projects.

### PROCESS TO IDENTIFY POTENTIALLY COVERED PROJECTS

1. Requests for a determination as to whether a project is a “covered project” for purpose of Labor Law Section 224-a are to be submitted to the Department of Labor’s Bureau of Public Work (“BPW”) via form PW-39a, which shall be date and time stamped upon receipt.

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- a. If a request for determination is made directly to a Board Member, they are to refer the requestor to BPW.
2. Within five days of BPW receiving a request for determination, the Secretary shall notify the Board of the existence of a potentially covered project.
3. BPW conducts preliminary research and fact finding to gather data-driven, objective information including the project cost, the type and amount of the public funds provided by a public entity, the location and nature of the project, the identity and corporate form of the owner(s)/developer(s) of the project, any known contractors or subcontractors involved, whether there is a pre-hire collective bargaining agreement, labor peace agreement, project labor agreement, or other enforceable labor agreement in place, the identity of the determination requestor, any past history with BPW and other relevant information needed to determine whether the project may be covered by Labor Law Section 224-a.
4. The Board shall decline review if the BPW determines that:
  - a. The total construction project costs equal \$3 million or less, or the total amount of public subsidies equal 15% or less of the total construction project costs.
  - b. The total construction project costs equal \$7 million or more, and the total amount of public subsidies equal 45% or more.

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- c. The Project is exempt from being considered a covered project pursuant to one of the subsections of 224-a(4).
5. For matters in which the Board declines review pursuant to Section 4 above, the Secretary shall inform the Board, the owners/developers, as well as the requestor and any impacted public entities that provided information, that:
  - a. The Board has declined review pursuant to this policy and procedure;
  - b. That the BPW has determined that the project is either not covered (in the case of Section 4(a) or 4(c) above) or covered (in the case of Section 4(b) above);  
and
  - c. That the Board may choose to reevaluate a project in the future if new or additional information is discovered that would impact the application of Section 4 above.
6. For all matters not covered by Section 4 above, within thirty days of BPW receiving a request for determination, the Board Secretary shall deliver to the Board a report containing the submission form, BPW's preliminary findings, recommendations for any additional information that could be relevant to obtain before making a final determination, and an assessment by BPW of the applicability of Labor Law 224-a.
7. Any owners/developers, public entities having provided public subsidies or who may provide public subsidies, and contractors known to have an interest in the project

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shall be notified of a request for a determination at the same time as the Board is notified in Paragraph 2 and may respond in writing for the Board's consideration within forty days.

8. At a meeting of the Board, during an Executive Session to maintain confidentiality required by Labor Law 224-c for discussion related to a specific project or individual, the Board members will vote as to whether they wish to issue a determination, not issue a determination, or conduct additional fact-finding.
  - a. The Board shall meet within thirty days of receiving a report on a potentially covered project by BPW if possible, or within a reasonable time thereafter.
  - b. If a majority of the Board issues a determination without conducting additional fact-finding, then within five days the Secretary shall notify the owner(s)/developer(s), public entities who have provided or may provide public subsidies, and contractors of the Board's determination.
  - c. If a majority of the Board elects to conduct a fact-finding hearing, then the Chair may call for a confidential hearing about the specific project or individual. The Board members will provide their availability and the chair shall set a hearing date within thirty days and make requests for documentation and testimony to be secured for the hearing.
  - d. If a majority of the Board declines to issue a determination, then within five days the Secretary shall notify the owner(s)/developer(s), public entities who

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have or who may provide public subsidies, and known contractors or subcontractors. BPW shall provide written notice of whether Labor Law 224-a shall be enforced, predicated upon the information known at the time and subject to any determination the Board may choose to issue in the future should new information be discovered.

- e. If a majority decision of the Board cannot be reached due to a failure to obtain a quorum for voting, abstentions, or any other unforeseen circumstances, then within five days the Secretary shall notify the owner(s)/developer(s), public entities who have or who may provide public subsidies, and known contractors or subcontractors of the Board's inability to render a determination. BPW will provide a written notice of whether Labor Law 224-a shall be enforced, predicated upon the information known at the time and subject to any determination the Board may choose to issue once it is able to reach a majority decision.
9. The Board may reconsider a prior determination on a project if relevant facts have changed or were not known when the Board issued the prior determination. For example, the Board may reconsider a prior determination if, (1) the project obtains additional public subsidies that were not contemplated or known at the time the Board considered the project, (2) the project does not obtain public subsidies that were initially contemplated when the Board considered the project, or (3) it becomes

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known that the owner(s)/developer(s) failed to disclose to the Board public subsidies that were received for the project.

- a. A motion to reconsider a prior determination may be made by any Board member during an Executive Session.
  - b. If a majority of the Board agrees to reconsider the prior determination, the Board Secretary will submit a report to the Board, as soon as practicable, outlining the facts considered by the Board when the prior determination was made, and any additional facts that are now available.
  - c. Board members will vote as to whether they will issue a revised determination, maintain the prior determination, or conduct additional fact-finding using the procedures described in Section 6 above.
10. In accordance with Labor Law Section 224-c(5), determinations made by the Board pursuant to this process shall be published on the Department's website. Such publications shall include the following:
- a. Project Name;
  - b. Owner or Developer Name;
  - c. Project Location;
  - d. Board Determination;
  - e. Basis for Determination; and

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- f. Date of Board's Determination.

## PROCESS FOR HOLDING A

### CONFIDENTIAL HEARING ABOUT A SPECIFIC PROJECT

1. The Board is empowered by Labor Law Section 224-c(5) to issue binding determinations to any public entity, or any private or not-for-profit owner or developer as to any particular matter related to an existing or potential covered project. The Board will consider all relevant documents, testimony, and materials presented during the hearing by any interested sources, which may include the project owner or BPW.
2. Hearings addressing a specific project or individual must be confidential pursuant to Labor Law Sections 224-c(2) and 224-c(5) with one exception: publication of Board determinations shall be made on the Department's website, subject to redaction or confidentiality as the Board shall deem warranted in accordance with any applicable federal or state statutory or regulatory requirement governing confidentiality and personal privacy.
3. Once a hearing date is selected, notice of the hearing will be sent by the Chair with the assistance of the Secretary to the Board members, owner(s)/developer(s), public entities having provided public subsidies or who may provide public subsidies, and contractors known to have an interest in the project.

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- a. Any requests for testimony or documents shall be issued by the Chair on behalf of the Board. The Secretary will assist the Chair in drafting such requests.
  - b. BPW will prepare an updated report with any additional information that has been gathered and the Secretary shall distribute such report to the Board prior to such hearing.
4. The confidential hearing will be conducted as follows:
- a. The Secretary will read the project details and BPW report into the record and provide and introduce copies of any documentation to the Board and record.
  - b. The Chair will call witnesses that are present to testify, including a representative from the specific project, such as an owner or developer.
  - c. The Chair and each Board member will be given an opportunity to question each witness.
  - d. After all the questioning is complete, the Chair and each Board member will be given an opportunity to make a statement regarding their conclusions.
  - e. The Chair will then call for a vote to determine if the Board is ready to proceed with issuing a determination or to conduct additional fact finding.
    - i. If a majority of the Board votes for additional fact finding, then each member may make requests for additional records or testimony to be requested prior to continuation of the hearing scheduled for a later



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- date.
- ii. The continuation hearing shall take place within fifteen days if possible, or within a reasonable time thereafter.
  - iii. The Board shall make all efforts to limit fact finding hearings to one continuation only. If an additional continuation is necessary then the Board may approve it by a majority vote.
  - iv. If a majority of the Board votes for issuing a final determination, then a second vote will be held for members to vote for the project being covered or not covered by Labor Law 224-a. The final determination will be decided by a majority vote.
  - v. Once the Board makes a final determination, the Secretary shall draft a written determination and issue it within five days to the owner(s)/developer(s), public entities having provided public subsidies or who may provide public subsidies, and contractors and subcontractors known to have an interest and post it on the Department's website, subject to any necessary redactions required by law.

## PROCESS FOR HOLDING A

## PUBLIC HEARING ABOUT ABROADLY APPLICABLE RECOMMENDATION

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1. Labor Law Sections 224-c(2) and 224-c(4) require the Board to hold a public hearing before making any recommendations that apply broadly to all projects, for example, regarding the minimum threshold percentage of public funds and the dollar threshold of projects as set by law, certain construction work excluded as a covered project, the definition of construction for purposes of Section 224-a of the Labor Law and particular instances of benefits, monies, or credits as to whether or not they should constitute public funds.
2. At any meeting of the Board, a Board member may request that a hearing be held regarding any issue or issues under the Board's purview. The Chair will call for a vote and if a majority of the Board agrees, a hearing will be held on the matter.
3. If a hearing is to be held, Board members will provide availability to the Secretary and a hearing will be scheduled in accordance with the Open Meetings Law and Labor Law Section 224-c notice requirements of any public hearing.
  - a. Each member will be given an opportunity to make requests for documentation and testimony to be secured for the hearing.
  - b. Any requests for testimony or documents shall be issued by the Chair on behalf of the Board. The Secretary will assist the Chair in drafting such requests.
4. The public hearing will be conducted as follows:

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- a. An agenda shall be posted at least twenty-four hours in advance, but sooner if possible.
  - b. The Secretary will introduce the matter and provide and introduce copies of any documentation to the Board and record.
  - c. The Chair will call witnesses that are present to testify.
  - d. The Chair and each Board member will be given an opportunity to question each witness.
  - e. Members of the public may be given the opportunity to speak on the record with a time limit of three minutes, or provide written testimony, or both. All written testimony should be submitted at least forty-eight hours in advance of the hearing in order for it to be properly considered by the Board.
  - f. At the conclusion of questioning and public comments, the Chair and each Board member will be given an opportunity to make a statement or comments regarding their observations and conclusions, or ask each other questions, or both.
5. The Chair will then call for a vote to determine if the Board is ready to close the hearing or adjourn for additional fact finding.
- a. If the matter is adjourned for additional fact finding, then any additional documentation or testimony sought by Board members will be requested by the Secretary in order to complete the hearing at a future date.

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- b. If the hearing is closed, then the Secretary will reduce the Board's recommendation to a writing and distribute to the Board members to review within seven days.
  
6. A public meeting will be scheduled within three weeks of the close of the hearing, in accordance with all proper notice requirements required by law, to vote whether to adopt the written recommendations as the Board's final recommendation.
  
7. The Commissioner of Labor has the authority to adopt or reject the Board's final recommendation as a rule or regulation pursuant to Section 224-a(8)(e) of the Labor Law.
  - a. If rejected, a written explanation as to why shall be provided by the Commissioner of Labor to the Board.