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MEMORANDUM OF SUPPORT

BILL: S.5695 (DeFrancisco) / A.2539 (Brindisi)

SUBJECT: Ensures Consistency with the Federal Davis Bacon Act for Calculation of Payments for Supplements and Reciprocity of Debarments

DATE: May 29, 2015

The Associated General Contractors of New York State, LLC (AGC NYS) the leading statewide trade association representing the construction industry supports S.5695 (DeFrancisco) / A.2539 (Brindisi), which amends amend the labor law and the general municipal law, in relation to ensuring consistency with the federal Davis Bacon Act for calculation of payments for supplements and reciprocity of debarments.

Currently, Title 12 NYCCRR §220.2 requires that contributions to retirement plans be calculated on an annualized basis. This means that when supplements are not paid in cash, the credit that contractors can take toward their prevailing wage obligation is established by dividing the amount of contributions by total hours worked on both public and private projects. As a result, since contractors covered by the State's prevailing wage law receive less credit for making retirement plan contributions compared to providing cash equivalent payments, some contractors contribute less to retirement plans or sometimes they do not even establish a plan at all. This adversely affects the long-term financial security of construction workers.

The current New York State policy of calculating contributions to retirement plans on an annualized basis results from federal court decisions that altered the manner in which the New York State Department of Labor (NYSDOL) could enforce the State's prevailing wage law. In *General Electric v. New York State Department of Labor*, 891 F2d, the court determined that the State's prevailing wage law was preempted by Employee Retirement Income Security Act (ERISA) because it "relates to" employee benefit plans when it has "connection with or reference to" such plans. In 1997, *Burgio v. NYS Department of Labor*, 107 F3d 1000, the court determined that when the law required a total amount of benefits and did not require a specific amount of contribution to any one type of plan, the law was not preempted by ERISA. This reversal allowed the NYSDOL to reestablish its authority and issue a notice in 1999 to "remind all interested parties of the manner in which the New York State Department of Labor enforced Article 8 of the Labor Law with regard to the payment of prevailing supplements."

This bill amends Section 220 of the labor law to prevent employers from using public work as a disproportionate or exclusive source of funding for benefits that are in fact continuous in nature and are part of the regular compensation for all employee work whether public or private, the Commissioner shall direct that the proper payment of supplements be calculated using an annualization methodology. In order to protect workers and ensure consistency of application, the Commissioner shall employ the annualization methodology utilized by the U.S. Department of Labor in calculations under the Davis Bacon Act of 1931 40 USC 276 et seq.

AGC NYS concurs with the sponsors of this legislation that the methodology currently utilized by the Commissioner extends the reach of the public work law to partially cover private work as well. The rate for supplements on private work projects should be determined through forces of the free market economy, rather than the rates required for public work projects. The methodology prescribed by the Commissioner of Labor frustrates the purpose of the prevailing wage law by extending it beyond public work. The federal methodology for annualization of benefits under the Davis Bacon Act is fair and does not penalize employers for doing both public and private work. As such, this legislation would clarify that the method utilized by the federal government under the Davis Bacon Act is the method that will be applied in this State.

AGC supports and urges the swift passage of S.5695/A.2539.