



Construction Law COMMENT

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LABOR RELATIONS

Company may not unilaterally repudiate CBA

by Mo Syed
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A subcontractor inadvertently obligated itself to pay union wages and benefits on all of the subcontractor's projects in the union's jurisdiction when its president signed collective bargaining agreements without first reading the contracts. Because the subcontractor believed the agreements only applied to two projects, the union filed an unfair labor practice charge with the National Labor Relations Board (Board) when the subcontractor did not apply the labor agreements to other projects. The Court of Appeals for the 7th Circuit affirmed a Board decision that found the labor agreement applied to all of the subcontractor's work. Thus, the court of appeals held the subcontractor violated the National Labor Relations Act by repudiating the contract.

The underlying charge

In 2003, a nonunion subcontractor began work on a student housing project at a public university in Indianapolis, Indiana. The general contractor for the project was a signatory to a labor agreement with a local union council. The labor agreement encouraged the general contractor to use subcontractors who were also signatories to the labor agreement and required the general contractor to notify the union if it used non-union subcontractors. A union representative visited the construction site, noticed the non-union subcontractor and requested a meeting.

During the meeting, the subcontractor signed a labor agreement in the mistaken belief the labor agreement only applied to the student housing project. In fact, the labor agreement applied to all work the subcontractor performed in the union's jurisdiction. In accordance with the labor agreement, the subcontractor paid union wages and made contributions to union benefit funds for the duration of the project.

Shortly after the labor agreement expired, the subcontractor began another project at the university. Repeating history, the subcontractor signed another labor

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FEDERAL REGULATION

New EPA rule requires stormwater discharge sampling

by Wally Irvin
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Construction activities such as clearing, excavating and grading disturb soil and sediment that often runs off construction sites during storms and flows into nearby water bodies. According to the U.S. Environmental Protection Agency (EPA), soil and sediment runoff is one of the leading causes of water quality problems nationwide. In particular, sediment

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NEGLIGENCE

Negligence: preferred claim in absence of a breach of contract

by Elizabeth Holt
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A U.S. District Court for the District of South Carolina held an engineer liable to a city for negligence when the engineer advised the city to award a contract to a contractor without investigating the contractor's dramatically low bid. The 4th Circuit Court of Appeals affirmed the trial court's judgment that granted the city \$459,769 in damages plus attorney fees.

Engineer fails to properly review bids

The city retained an engineer to review and recommend a bid for the installation of three 42-inch pipes to carry rainwater out to sea. The engineer received bids and recommended the city accept a bid that was dramatically lower than any other bid and used a more risky construction method. When the contractor refused to complete the project without additional payments, the city terminated the contract.

The contractor sued the city seeking \$3 million in additional costs it incurred as a result of following allegedly defective specifications. The contractor

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also sued the city’s design engineer claiming the engineer breached the implied warranty of suitability for the design specifications. The city, however, filed a claim against the contractor for breach of contract, seeking to recover around \$400,000 in re-procurement costs incurred by hiring a replacement contractor who used an alternative method of construction. The city also sued the engineer for negligence and breach of contract.

After an eight-day trial, the district court held the contractor and the city could not recover from the other for breach of contract, because the parties did not have a “meeting of the minds” as to the allocation of risk for adverse subsurface conditions, the source of disagreement on whether or not the specifications were defective. The court also found the engineer was not liable to the contractor in negligence, but did find the engineer liable to the city. The trial court found the engineer negligently recommended the city award the contract to the contractor despite the fact the contractor’s bid was dramatically lower than other bids and failing to investigate the contractor’s bid prior to recommending the city accept the bid.

Appeal and review of negligence finding

In reviewing the award, the court of appeals noted a party must show another person’s actions were the cause of their injury to succeed on a negligence claim. A party may prove causation by establishing they would not have been injured ‘but for’ the other person’s action. The engineering firm argued its negligence could not serve as a but for cause of the city’s

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agreement without reading the contract. This labor agreement, however, obligated the subcontractor until March 2009. The subcontractor again mistakenly believed the labor agreement only applied to the current project, rather than all of the subcontractor’s work for the next five years. Consequently, the subcontractor only made contributions for the duration of project.

During the next three years, the subcontractor worked mostly non-union and did not pay union wages or make benefit-fund contributions. In 2007, however, a union representative noticed the subcontractor working on a union project and requested the subcontractor’s employees sign union cards. The subcontractor advised the union representative it was non-union and was not bound by the 2004 labor agreement, prompting the union to file an unfair labor practice charge with the Board.

Court and board require comprehensive application

After a hearing, the Board held the subcontractor violated the Act by repudiating the labor agreement and not paying union wages and benefits for all work in the union’s jurisdiction. The Board ordered the subcontractor to apply the labor agreement to all of its projects

damages because the city could have awarded the contract to the contractor despite the engineering firm’s actions. The engineer relied upon statements from a city superintendent who said the city might have awarded the contract to the contractor even if the engineer advised the city of the additional risks between the two methods of construction. The engineer also claimed the city would open itself up to criticism if it did not accept the lowest bid. Nevertheless, the court held these facts to be mere speculation and did not prevent a finding of causation.

In addition to cause, an injured party must also show a person could anticipate their actions could cause an injury. However, an injured party is not required to show the other party’s negligence was the sole proximate cause of its injuries. Instead, the party must only show the other party’s actions could cause, or be a contributing cause to, their injury. In this case, the city hired the engineer for his expertise. Thus, the court of appeals noted the engineer knew the city would rely on the engineer’s expertise in recommending a contractor. Additionally, the court held the engineer could anticipate the city would incur damages if the contractor did not complete the contract for the contract price. Thus, the court held the damages incurred by the city were a natural consequence of the engineer failing to investigate the contractor’s dramatically low bid.

Because the engineer failed to show it was not the cause of the city’s damages, the court of appeals affirmed the trial court judgment. ■

and pay back wages to compensate its employees in accordance with the labor agreement.

On appeal, the court of appeals noted the Act prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights under the Act. The employer repudiated the contract by not applying the labor agreement to all of the subcontractor’s work in the union’s jurisdiction. The subcontractor violated the Act by not paying its employees in accordance with the labor agreement. Thus, the court of appeals affirmed the Board’s decision and required the subcontractor to pay its employees in accordance with the labor agreement for all work performed in the union’s jurisdiction.

An ounce of prevention

Read any contract, including a labor agreement, in full before executing the document. As indicated in this case, making assumptions about the scope of the contract can dramatically impact a contractor’s business and bottom line. Taking the time to understand a contract may require a commitment of time, but it will almost always ensure savings when things go wrong. ■

PREVAILING WAGE

Contractor fined \$1.6 million under False Claims Act



Roxana Correa

A contractor who failed to ensure a subcontractor paid its electricians the prevailing wage and falsely certified that prevailing wages were paid must pay the U.S. government more than \$1.6 million in fines. The U.S. District Court for the Middle District of Tennessee found the contractor violated the False Claims Act (FCA), and awarded the government three times its actual damages.

The contract

The contractor entered into a contract with the United States Army to construct several buildings at the Fort Campbell military base in Clarksville, Tennessee. The contract required all contractors working on the project to pay their electricians a base hourly rate of \$19.19, plus fringe benefits of \$3.94 an hour. The contract incorporated provisions of the Davis-Bacon Act (the Act), including those requiring contractors to pay prevailing wages, submit certified payrolls and ensure all subcontractors complied with the Act. The Act also requires contractors to include flow down provisions in their subcontractors. Under the Act, the prime contractor is responsible for a subcontractor's compliance with the contract and compliance with the Act, particularly the submission of certified payrolls.

The contractor hired an electrical subcontractor but did not execute a written contract. Instead, the contractor provided the subcontractor with excerpts from its contract with the government. The contractor did not discuss the Act with the subcontractor or ensure the subcontractor submitted certified payrolls. The contractor also failed to provide the subcontractor a blank payroll certification form or inform it of the need to submit payroll records until almost two years after the project began.

Payroll review leads to fines

A review of the contractor's and subcontractor's records, daily calendars and pay stubs revealed 62 inaccurate or false payroll certifications. The majority of the inaccuracies were contained in the contractor's

original payroll certifications from 2004-2005. Among those were certifications in which the contractor failed to list the subcontractors' employees. Nine of the payroll certifications signed by the subcontractor were incorrect. Additionally, the payroll certifications for 2008 listed one electrician, who was not paid the prevailing wage required by the contract. The contractor's 2004 and 2005 payroll certifications also reflected the fact the worker did not receive the prevailing rate. The Department of Labor concluded the contractor's original payroll certifications were false because the contractor knew its subcontractor had employees working on the project but failed to list them on its certified payrolls. The Department also held the contractor responsible for the inaccurate payroll certifications submitted by the subcontractor in 2008.

Need for compliance

The court concluded the contractor failed to follow the requirements of the Act by not ensuring the subcontractor paid its electricians the prevailing wage and falsely certifying that prevailing wages were paid to the subcontractor's electricians. By submitting false certifications, the court concluded the contractor also violated the False Claims Act, which holds a company liable if it makes a false record or statement that is material to a false or fraudulent claim. To constitute a violation, the false statement must have been made in order to receive payment from the government. The court found the contractor submitted certifications containing false or inaccurate information and that the certifications were made to receive payment from the government on the project. The court found the contractor was unjustly enriched by retaining money paid by the government that should have gone to the electricians under the Act.

Thus, the court awarded the government \$1,661,423.13 – three times its actual damages of \$553,807.71, the sums paid to the contractor for work performed by the subcontractor. In so ruling, the court concluded the certification and payment requirements in the contract between the government and the contractor were clear and that the contractor should have understood government contracts and the wage requirements as it had a history dealing with such contracts. ■

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THIRD PARTY CLAIMS

Investors' assurance of funding insufficient to form contract

by Roxanna Correa

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One of the most important aspects of a construction project to a contractor is ensuring the owner pays all of the contractor's invoices. If a contractor questions an owner's ability to make payment, many contracts allow the contractor to request assurances of payment from the owner. In other cases, the contractor may seek to meet with the owner's lender or investors. But, as an Ohio contractor learned, these assurances do not always guarantee payment.

Oral contract?

The U.S. District Court in Ohio dismissed a lawsuit filed by a contractor seeking \$2.2 million for work it performed on an ethanol production plant. The contractor claimed it relied on the assurances of the owner's debt and equity lenders that the contractor would be paid in full for its work. The court, however, held the investors' assurances the project had sufficient funding and the contractor would be paid were insufficient to establish an oral contract

between the contractor and the investors.

Ability to pay is responsibility of owner

In October 2007, the contractor signed a contract with the owner to serve as the prime mechanical contractor for the project. The contract included a clause that allowed the contractor to stop working if it did not receive financial information confirming the owner's ability to pay for the work. As the project progressed, the owner began experiencing budget overruns and cash flow problems resulting in late payments to the contractor. In addition, when the contractor submitted its March 2008 invoice, the owner requested a 30-day extension in which to make payment. Consequently, the contractor contacted the owner and requested financial assurances. The owner advised the contractor it had an additional \$10 million line of credit and a potential \$5 million loan, in addition to the funding already in place, which could be used to pay construction costs. After speaking with the owner, the

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runoff reduces the depth of small streams, lakes and reservoirs, leading to the need for dredging. Effective February 1, 2010, a new EPA rule requires construction site owners and contractors who disturb one or more acres of land to implement a range of erosion and sediment control best management practices to reduce pollutants in stormwater discharges.

Turbidity sampling

In addition, owners and contractors on sites that impact 10 or more acres of land at one time must sample discharges to ensure all discharges do not exceed new requirements for turbidity. Turbidity, a key test of water quality, is a measure of the cloudiness or haziness of water; similar to smoke in air. A high turbidity level is caused by the presence of suspended solids in water. The new rule marks the first time the EPA has imposed national monitoring requirements and enforceable numeric limitations on construction site stormwater discharges.

The EPA, however, intends to phase in the new turbidity testing requirement over time. Owners and contractors must begin testing sites that impact 20 or more acres beginning on August 1, 2011. The EPA delayed the effective date for sites that affect

10 or more acres until February 2, 2014. For more information on compliance with the new rule, visit the EPA's website, <http://www.epa.gov/guide/construction/>. ■

"I Didn't Know That"
(Why We Say The Things We Say)

by Karlen Evins



"Deadbeat"- The first deadbeats were technically "debt beaters." These were people who avoided their creditors by leaving their debts behind. In the early days of this country, there were two ways to shirk your financial obligations: (1) by declaring bankruptcy, or (2) by actually moving out of the colony where the debt was incurred. Those choosing the latter were known as debt beaters, which later was shortened and mispronounced as deadbeats.

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FEDERAL CONTRACTING

New regulation requires contractors to report subcontract amounts and executive pay

by Wally Irvin

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A new regulation issued jointly by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration requires many federal contractors to disclose first-tier subcontract awards of \$25,000 or more. The regulation also requires the contractor to disclose the compensation paid to their top five executives.

Overwhelmed contractors stand up

The regulation is effective as of July 8, 2010, however, because the regulation may have a significant economic impact on a substantial number of small businesses, the reporting obligation is implemented over time. Until September 30, 2010, new subcontracts must only be reported on prime contracts worth more than \$20 million. From October 1, 2010 until February 28, 2011, reporting will only be required for prime contracts worth more than \$550,000. On March 1,

2011, reporting is required for all subcontracts of at least \$25,000.

In addition to reporting new subcontract awards, prime contractors must disclose the compensation paid to their top five executives. However, a prime contractor is only required to make this additional disclosure if the contractor or subcontractor receives more than 80 percent of its annual gross revenue and \$25 million from government contracts. In addition, a contractor is not required to report executive pay if they already report compensation information. Finally, contractors are exempt completely if their gross income is less than \$300,000.

Additional information regarding the reporting requirements may be found at www.fsrs.gov (subcontract award and subcontractor executive pay) and www.ccr.gov (prime contractor executive pay). ■

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contractor also spoke with the investors. Both investors confirmed the additional \$15 million in funding. One investor also said the \$10 million was sufficient equity to pay all pending and future invoices and that the costs incurred by the contractor were not “a needle mover” in the big picture of the project. The second investor stated the contractor was the only vendor left to be paid and liability from the project would be less than \$10 million. According to the contractor, the investors also promised the contractor it would be paid in full for all past and future work.

Based on these conversations, the contractor agreed to the 30-day extension. When the new deadline arrived, however, the owner failed to make the payment. Although the contractor received payment for March and April, the owner did not pay the contractor for any work performed after May 2008. As a result, the contractor stopped working at the plant. Days later, the owner filed for bankruptcy.

Breach of an oral contract

The contractor filed a lawsuit against the investors for breach of an oral contract. Specifically, the contractor claimed the investors created an enforceable oral contract when they promised the contractor it would be paid in full. The court, however, found the conversations between the contractor and the

investors were insufficient to form a contract because the parties did not agree on any of the essential contract terms, such as price, duration or the timing of payments. In fact, the contractor and the investors did not even agree on the “fundamental question of who would pay [the contractor] for its work.” Thus, the court concluded “such broad assertions” as the investors’ assurance that the project had sufficient funding and the contractor would be paid for its work “are too indeterminate to support an enforceable contract.” ■

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