Construction Law Newsletter

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MESSAGE FROM THE CHAIR

Rod Mills
Seifer, Yeats, Mills & Zwierzynski, LLP

The annual meeting of the Construction Law Section was held at the Greek Cuisina in Portland, Oregon on December 7, 2001. The following officers were elected:

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We are planning several CLEs during the upcoming year. The first CLE will be in June and you will be receiving information about it shortly. General information about our upcoming CLEs is at the end of this newsletter.

The success of our section and in particular our newsletter depends upon your participation. If you have an interest in writing for the newsletter (or even suggestions for articles), please contact Alan Mitchell, our editor.

If at any time you have any questions, comments or suggestions regarding our section, please do not hesitate to contact either me or any other member of the Executive Committee.

PUBLIC CONTRACTING LAW REVISION EFFORTS UNDERWAY

Dana Anderson
Assistant Attorney General

In response to HR 1 from the 2001 Legislative Assembly, representatives of local governments, schools, state agencies, contractors, unions, and trade organizations are working on a comprehensive rewrite of ORS Chapter 279 (Public Contracts and Purchasing). This is the third consecutive biennium that such an attempt has been made. Unlike the prior biennial efforts, however, this one appears to have at least some chance of succeeding.

Several subcommittees of interested individuals have been formed to work on various aspects of the rewriting effort. Aside from subcommittees on purchasing, source selection and other nonconstruction issues, a separate subcommittee was formed to examine public improvement issues. That group is now meeting weekly in a concerted effort to reorganize and clarify public improvement statutes, add provisions on public contracting for "Architects, Engineers and Related Services," and make any other needed changes for which a clear consensus is apparent. Proposals that might be considered as controversial, or changing established policy, may be addressed in measures separate from the basic rewriting legislation but are not the focus of the current revision effort.

At this early stage, the only conceptual recommendation is to split ORS Chapter 279 into basically three parts: (1) provisions that apply to all forms of public contracts; (2) provisions that deal only with public improvements, architects, engineers and related services and which would be contained a new "ORS Chapter 279B"; and (3) provisions that deal with everything else, such as nonconstruction personal services, trade services, goods and equipment. There is consensus that this split not only makes sense, but also would allow reform in the nonconstruction field to proceed over time even if no agreement can be reached on substantive changes to the more contentious public improvement provisions.

The subcommittees will report back to the full Public Contracting Law Revision Work Group recognized by HR 1, working through the House Interim Work Group on Public Contracting Law. Any recommendations would be introduced as legislative measures in the 2003 Legislative Assembly, where formal hearings would be held through the regular committee structure. Interim questions may be forwarded to the Committee Administrator, Cara Filsinger at 503-986-1627, or to Jessica Harris with the AGC at 503-682-3363. Ms. Harris has taken a lead role through the AGC in facilitating the work of the Public Improvement Issues Group.

CHOICE OF LAW CLAUSES

Alan Mitchell
Scott ◆ Hookland LLP

The 2001 Oregon Legislature adopted HB 2414 (ORS 81.100-.135), which sets out new rules for choice of law clauses in Oregon construction contracts. While the bill nominally leaves alone most choice of law clauses, it specifically applies to any contract "for construction work to be performed primarily in Oregon." ORS 81.105. It also applies to personal services contracts where the work is to be rendered primarily in Oregon by an Oregon resident. Id.

The law expressly exempts all contracts in which one of the parties is a financial institution. ORS 81.102. Thus, construction lending agreements may not be affected by this new law.

Under the new law, Oregon law applies to those contracts noted above. What the bill does not say is exactly what will happen to choice of law clauses that require the application of other law. Presumably, they are just void.

Further, these clauses are often combined with a choice of forum clause. The bill does not

address these clauses and, thus, one can argue that they are untouched by the bill.

This new law applies to "all contracts, whether entered into before, on or after [January 1, 2002], unless that application would violate constitutional prohibitions against impairment of contracts." ORS 81.100, note. Also, this new law does not apply to any choice of law that is "at issue" in any action commenced prior to January 1, 2002. Id.

These new statutes also set out rules governing the form of contracts, the capacity to contract and the consent to contract. Thus, this new legislation may be of use in cases where these basic contract issues are in dispute.

BOLI BITTEN?
NEW ATTACKS BY PLAINTIFFS' BAR

Darien Loiselle
Schwabe, Williamson & Wyatt PC

The Background

Contractors on public works projects should be on notice that the plaintiffs' bar has advanced a new attack for employees who are not timely paid wages upon termination. Historically, these employees filed notices against the payment performance bond posted by the contractor, and later filed suit seeking recovery of back wages, liquidated damages (which often double the amount of the unpaid wages), interest and attorneys fees under ORS Chapter 279 (Oregon's "Little Miller Act"). These employees also have turned to the Bureau of Labor & Industries ("BOLI") for civil penalties and administrative sanctions, including potential debarment of the contractor from public works contracts for a period of up to three (3) years.

These remedies and sanctions alone may cripple a contractor, and clearly are enough to motivate any reputable contractor to timely pay employees. Now, enterprising plaintiff's counsel are pursuing a new arsenal under ORS 652.140 and 652.150 for penalty wages.

ORS 652.140 and 652.150 expressly apply to discharges of employees. If the employee is not timely paid wages upon termination, wages continue to accrue from the date of termination for up to thirty (30) days or until the employee is paid, whichever is first. And to make matters even more frightening, the plaintiffs' bar now claims that not only the employee's direct employer is responsible, but also the general contractor and any contractor upstream from the direct employer, as well as their sureties.

An Example

Take your typical construction of a new high school. The general contractor enters subcontracts with various specialty subtrades, including electrical, plumbing, painting and drywall. At various times over the course of the project, these specialty subcontractors may have an entire army of employees pressing towards a schedule completion date. The project falls behind the original schedule. The owner, and therefore the general, accelerate the work, but do not accelerate payment. The specialty subcontractors attempt to comply (possibly hire new employees, or subcontract some of the work), but because of cash flow issues, have difficulty meeting payroll. An electrical sub-subcontractor who was contracted to do a significant phase of the conduit work becomes insolvent, cannot make payroll, and closes shop without paying its employees.

The employees of the defunct electrical subcontractor retain counsel, send out notices of claim to their employer, the electrical subcontractor and the general contractor as well as the sureties for each. In response, the general and the electrical subcontractor scramble to obtain wage records from an uncooperative and defunct sub-subcontractor to verify the amounts due and owing and make this payroll. At the same time, they are dealing with the challenge of finding replacement contractors and getting the work back on schedule (not to mention a potential BOLI investigation, or even worse, a suit enjoining the school district from making payment to the general). In other words, a real mess.

Unfortunately, it takes thirty (30) days to sort out these issues before payroll is made to the

employees. The employees later file suit, claiming penalty wages because they were not timely paid upon termination. The suit is against not only the defunct sub-subcontractor (who is now insolvent and has no ability to pay or defend the lawsuit), but also the electrical subcontractor and the general contractor (who now are obviously target defendants). The penalty wages quadruple what was once believed to be a one-week payroll.

The Law

Oregon appellate courts have not addressed whether non-direct employers, such as the general and electrical subcontractor noted above, are immune from this exposure. At least one Multnomah County Circuit Court judge has held that ORS Chapter 279, rather than ORS Chapter 652, provides the sole remedy for these employees and also held that non-direct employers are not "employers" as that term is defined under ORS Chapter 652.

There are other good reasons beyond the scope of this article why the judge's determination is sound. However, few contractors have the resources to litigate an issue like this through the appellate court. Thus, until the issue is resolved, some common sense recommendations to avoid these pitfalls are in order.

Avoiding The Pitfalls

If you represent the direct employer and your client must terminate an employee or close shop, be sure your client takes all steps to immediately disburse payroll. If your client cannot make payroll, be sure you communicate immediately to the employee(s) why, and when you expect payroll to occur. This assurance may prevent a run to the courthouse. The last thing you need is a lawsuit tacked on top of an already difficult situation. If your client is a contractor upstream from the direct employer, you should take the following steps:

Get copies of the certified payroll records, timecards, and any records regarding hours and wages from the direct employer of the employee.

Confirm that the employee's wage classifications are correctly classified.

Obtain addresses, phone numbers, and social security numbers of affected employees, then contact these employees and provide assurances that they will be the first paid from the amounts due the direct employer.

Confirm with the employees the amounts that are due and process the payroll.

Expedite payments to these employees.

Closing Remarks

Conforming to payment requirements on public works projects is more important than ever. All contractors, whether direct employers or non-direct employers, must exercise extreme care to assure that employees are timely and appropriately paid. Whether the claims are brought through BOLI or an enterprising attorney, no contractor can afford the disruption, inconvenience or expense associated with these claims (regardless of the ultimate merits).

STORMWATER PERMITS AND CONSTRUCTION SITES

Neal Hueske
Schwabe, Williamson & Wyatt PC

To the construction industry, the past never looked better in many ways.

Time once was, a builder with a backhoe and some manpower could build just about anything he wanted. Nowadays, permits, approvals, design review, safety review and all levels of governmental oversight are part of business as usual. In the same way, environmental regulation has shifted towards activities that have historically escaped much scrutiny. For instance, feedlots, forestry operations, and urban runoff are now recognized as contributors to water quality problems throughout the region. As a result, local and state governments struggle to comply with and impose federal environmental and species protection requirements that seem anomalous in an urban setting.

Expanding Permit Requirements

Against this backdrop, the federal Environmental Protection Agency (EPA) has slowly been expanding its net to apply Clean Water Act stormwater permitting requirements to more and more construction sites. After March 10, 2003, all sites larger than one acre (or even smaller individual sites that are part of a larger common plan or development) will be required to obtain a state or federal permit issued pursuant to the Clean Water Act before beginning site disturbance. This requirement is the federal deadline; each state must set an earlier deadline. For instance, Oregon will require all smaller construction sites to apply for an NPDES permit by December 1, 2002.

These requirements have applied to "large" construction sites (five acres or more) for several years, but in 1999, EPA enacted its Phase II Stormwater Regulations, which will apply to sites between one and five acres. Many states, including Oregon, recently have completed administrative rulemaking necessary to authorize a permitting program for these smaller construction sites and will begin issuing such permits in late 2002 or early 2003. Washington DOE plans to reissue its general stormwater permit to include smaller construction sites in time to meet the March 2003 deadline.

The federal and state NPDES permitting requirements currently apply to any person involved in construction activities that disturb five or more acres of land, including clearing, grading and excavation activities. The permits are authorized by the federal Clean Water Act, but most permits will be issued by authorized state regulatory agencies, such as the Oregon Department of Environmental Quality and Washington Department of Ecology. In states that have not been authorized by EPA to administer the permit program, EPA will issue permits. Moreover, some local jurisdictions, such as city and county governments, have been authorized by the states to issue the permits directly. Operators should inquire at the local level to determine who has permitting authority for a particular project.

Proper Permit Application

After obtaining the necessary forms, operators of construction sites should retain an environmental engineer or other specialist to assist in submitting the proper application for an NPDES permit, which will include a detailed Erosion and Sediment Control Plan. Most state agencies have published detailed guidance documents to provide detail on the required content of such plans. For example, Oregon DEQ has available a document entitled "NPDES Storm Water Regulations for Construction Projects," February 2001. This document can be obtained from DEQ offices as well as on DEQ's website (www.deq.state.or.us).

The application fee will vary from state to state. Many states will also include an annual compliance demonstration fee that will be assessed as long as the permit is active.

Most states will use "general permits," which means that the permits contain boilerplate provisions that will apply to each qualifying site, and will not be site-specific. Some examples of basic permit requirements include:

No discharge of significant amounts of sediment to surface waters;

The preparation and implementation of an Erosion and Sediment Control Plan to prevent discharges to surface water. In Oregon, such plans must be submitted at least 30 days in advance of construction activities. If DEQ does not respond within 30 days, the plan is considered approved by default;

The completion of a Stormwater Pollution Prevention Plan (SWPPP), or some similar documents;

Maintenance of erosion and sediment controls, cleanup of deposits of sediments that level the site, and proper storage, handling and disposal of hazardous materials;

Compliance with all applicable water quality standards;

Visual inspections of erosion and sediment control measures.

The actual content of the permits will vary depending on the agency with permitting authority. Either the property owner, consulting engineer, developer or the contractor may apply for and obtain the required permit. Whoever is the applicant and ultimate permittee will be legally responsible for ensuring compliance, including the maintenance of appropriate sediment and erosion control measures. In the case of a permit violation, the agency will take enforcement action against the party named on the application. Therefore, site operators and owners must carefully determine who should bear responsibility for NPDES permitting requirements. In the preamble to the federal regulation, EPA argued that the permittee should be the person who has (1) operational control over the site activities necessary to ensure permit compliance and (2) operational control over the site specifications.

Termination of Permits

The permit will continue to apply (and be assessed annual fees) until the operator notifies the permitting agency that it should be terminated. A permit is properly terminated when the agency determines that all soil disturbance activities are complete and the site has been finally stabilized through vegetation or other measures. In addition, all temporary erosion controls should be removed from the property.

Penalties for Noncompliance

For most site operators, dealing with a state or federal environmental agency is a new experience and many may be tempted to downplay the significance of the permitting requirements. However, failure to implement (and more importantly, to maintain) the erosion and sediment control practices can result in hefty civil penalties (in some cases, up to $25,000 per day for each violation; however, most agencies, including EPA, seldom seek the full available penalty). More importantly, instances of non-compliance with the permits may require the operator to stop work at a site until the violation is corrected or the proper permit is obtained. Obtaining the necessary permit can often take several months, an unacceptable and expensive delay for most construction projects.

As the world of environmental regulation clamps down tighter and tighter on the construction industry, savvy site operators will stay abreast of changes in the law to avoid any unanticipated "surprises" that might cause delay. Wishful thinking aside, these regulations will not easily go away. Thus, operators should consult with engineers and project managers who have experience with stormwater permits and the necessary plans and should treat these permits as much of an indelible part of the process as ordinary development permits.

DUAL GATES: A COMMENTARY

Thomas Triplett
Schwabe, Williamson & Wyatt PC

Two guiding principles come to mind: Everything changes but remains the same; and consistency is the hobgoblin of the small mind.

The construction industry goes through peaks and valleys of prosperity. As it now approaches its cyclical trough, like night follows day, the trade unions are becoming more aggressive.

While the forms of aggressiveness constantly change, the goal posts do not. They either want to organize your work force; strip merit shop contractors of their key workers; or put you out of your misery.

An old saw has been "job targeting." Of course, it is a major tax on their members, who need not, under *Beck*, pay these dues. And of course, the Board of Contract Appeals has foreclosed deductions on federal jobs to fund the program. The recent good news is that a Minnesota District Court's recent decision suggested that use of these funds on federal jobs may violate the antitrust laws.

Picketing is passe. Dual gates frustrate the effects of this stratagem. Merit shop contractors wait in the wings to take over the contract of union

subcontractors unable or unwilling to work on a picket job.

Given that these tools will not work, new ploys have been developed.

1. Plant a salt and urge, upon termination of employment, that one red cent was still owing; sue for penalties and attorney fees; and discipline the unwary merit shop contractor by imposing upon it the cost of defense and potential cost of penalties.

2. Make common cause with the Bureau of Labor and Industries. Induce an employer to settle a minor prevailing wage dispute, and then have the Bureau lead the charge for debarment.

3. Hire undercover agents to attempt to determine if, at any moment in time, you are out of compliance with apprenticeship standards. Should that occur, for whatever reason (e.g. doctor's appointment, family emergency), demand that training agent status be stripped and lead BOLI to the attack if a prevailing wage job.

4. Promise key merit shop journeyman nirvana. One year of employment, guaranteed! Preference over long time union member! End run the hiring hall rules. Defend to its members' last dollar the right to violate the hiring hall rules and their rights.

The list could go on. The point is clear. The goal post remains unchanged. Only the methods and means of attainments have changed.

So, what is the elixir of life to ward off these parties? Exercise extreme care to assure that employees are timely paid exactly what is owed. Pay slavish attention to apprenticeship ratios. And, finally, explain to employees that it is a wolf in sheep's clothing that seeks to beguile them with promises of grandeur.

UPCOMING CLES

June, 2002: "Sticks and Bricks for Oregon Lawyers"

This CLE will look at how a construction project is actually put together. Hoffman Construction will guide a tour of the Brewery Blocks project followed by lunch with a discussion of some of the issues observed at the project. Space is limited to 25 attendees for the site visit.

This CLE will be on June 28, 2002, beginning at 10:00 am. Lunch will be from noon until 2:00; no charge for section members, $15 for non-members. For details, contact Jack Levy at (503) 227-2424.

September, 2002: "Residential Construction Defect Issues"

This CLE will be a half-day seminar presenting an overview of construction defects and claims concerning residential projects.

This CLE will be held in Bend on September 20 from noon to 5 at Awbrey Glen Golf Club. For details, contact Mike Peterkin at (541) 389-2572

December 6, 2002: "CCB Practice Update"

This CLE will be an update on the bi-annual Practicing Before the CCB CLEs. Topics include recent legislative and administrative rule changes, CCB enforcement issues and bankruptcy issues. Speakers include Bill Boyd of the CCB, Alan Mitchell and others.

This CLE will be a half-day (morning) seminar and will be held on December 6 at the Sweetbriar Inn in Tualatin. For details, contact Alan Mitchell at (503) 620-4540.

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