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CONSTRUCTION IN BRIEF

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What to do when you DON'T get it all in writing

Constructive Changes

How many times have you done extra work on a project without the approvals required by the contract? Did you do this because you were just trying to get your work done in the required time? With construction work becoming increasingly sensitive to project schedule requirements and completion dates, contractors often find themselves deciding whether they should proceed with additional work before a change order request is processed. This article discusses when you may still be able get paid for additional work in the absence of the contractually required documentation.

First, however, a reminder about protecting your right to payment for additional work. You should of course refuse to proceed without a signed change order. If the circumstances, as they often do, make that impractical, don't forget to put the owner or contractor on notice of the fact that you are or will be doing the added work at their direction to avoid delay to the project. Also, it is very important to notify the owner or contractor when the added work will extend the performance period under the contract.

Under the doctrine of constructive changes, a contractor may have a valid claim to compensation for changes in the manner, method or scope of work where no formal change order has been issued. The theory is that the owner, through some act or omission, caused the work to be performed without issuing a change order and therefore cannot deprive the contractor of compensation for that work. Strict proof of a constructive change, however, is required to recover under this theory.

Facts that show the owner requested, authorized or consented to the change are key to establishing a constructive change. If a person other than the owner is responsible for requesting or consenting to the change, the owner must have given that person authority in order for the owner to be bound. To determine if an individual had the authority to bind, the contract and the conduct of the parties must be examined, as superintendents, engineers and architects all may have authority to obligate an owner or contractor to pay for additional work. Nevertheless, each case must be analyzed on an individual, fact-specific basis.

A classic example of a constructive change is where the work required is unforeseen but necessary to the project, or where the change is so large that the work could not have been done without the owner's knowledge. Also, a constructive change occurs where the owner or contractor is aware of the change and the additional work required, but does not object. On public projects the rules are typically more stringent in terms of requiring the proper approval. Nevertheless, most courts agree that when changes are ordered by a public building inspector or other similar authority, a contractor will be entitled to compensation for the added work.

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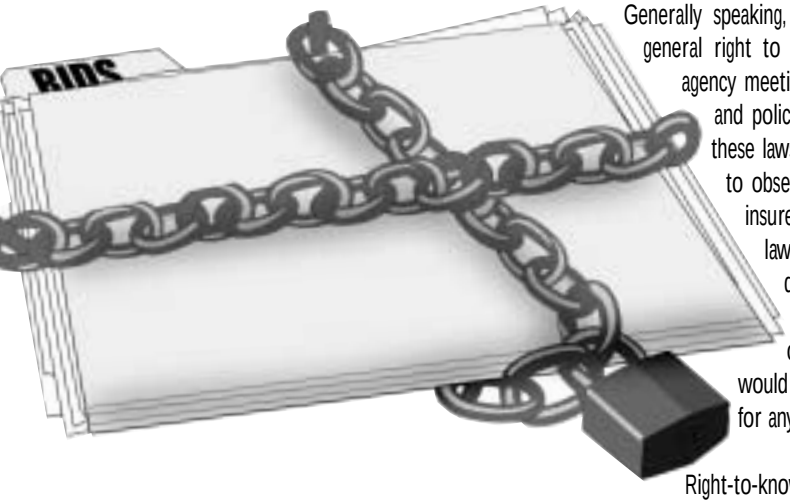
PUBLIC BIDDING

DO YOU HAVE A RIGHT TO SEE OTHER BIDS?

-- Jill Alden, Esquire



How many times have you been the second lowest bidder on a public job, only to notice that the apparent low bidder is a competitor that you believe is having financial problems? The first thing you want to do is review their bid because you just can't believe the company was able to get the required A listed bond.

Do you have a right to see the bid so that you can decide if you want to file a bid protest? Unfortunately, many state and local procurement offices refuse to release the bid submissions after the bids have been opened. They only make the bids available to the public for review after the project has been officially awarded, which can take weeks. This practice appears to be in conflict with well-established ***sunshine*** and ***right-to-know laws***.

Generally speaking, sunshine laws give the public the general right to be present and have notice of all agency meetings and be present for deliberation and policy making sessions. The purpose of these laws is to give citizens the opportunity to observe government decision making to insure fairness and compliance with the law. Given that bid openings must be done in public, it would seem to follow that the actual bid that is opened during an agency meeting would be public information made available for any citizen to access upon request.

Right-to-know laws give the public the right to examine information contained in public records at reasonable times. As long as the public record is not confidential, access to the information must be freely given. There are two categories of records that constitute public records. The first category includes an account, voucher or contract dealing with the receipt or disbursement of public funds by an agency. The second category includes any minute order or decision by an agency fixing personal or property rights.

A bid for public work that will form the basis of a contract award would seem to fall into the first category. While a bid proposal is not a contract, it has contract like implications since a contractor is obligated to honor the price quote and post a bid bond. A bid could also fall into the second category of public records, which requires the disclosure of minutes and decisions which fix personal or property rights of persons and usually includes only those documents that are essential to an agency decision. Generally, courts are more likely to permit access to information when the information forms the basis of an agency decision. In the case of a bid, the apparent low bidder's bid package clearly forms the basis of the decision to accept that bid.

Clearly, it seems that right-to-know and sunshine laws favor permitting review of the bid submissions on public jobs. We have found, however, that procurement offices continue to resist releasing this information until after a bid is awarded. The only possible argument against allowing immediate public review of the apparent low bidder's bid package, is that the bid has not been officially accepted yet and is in the review process. When the contract is awarded, the bid documents would then be made available for review by the general public.

WHAT'S NEW?

As we have mentioned in previous newsletters, CSPG&F has experienced tremendous growth over the years. In the most recent issue of **PaLAW**, which is a supplement to the Legal Intelligencer/Pennsylvania Law Weekly, the extent of our growth was put in perspective. CSPG&F was listed as the ninth fastest-growing law firm in the Commonwealth of Pennsylvania, with an increase of more than 20% in the number of practicing attorneys from 2001 to 2002. This increase is a direct reflection of our growing client base and the trust that our existing clients place in us as they continue to consult CSPG&F on issues that face their companies. We thank you for your business and promise to maintain our commitment to providing superior legal services.

Speaking of growth, CSPG&F is proud to announce that two new associates have recently joined the firm. We welcome **Robert Birch** and **Jonathan Landesman**. Bob has joined our new Business Practice Group and Jon our Labor and Employment Department.

Also, as you can see from the pictures here, CSPG&F sponsored another successful golf outing this past September. A good time was had by all who participated. Can't wait to see everyone out on the links again next year!

Finally, the firm continues to maintain its commitment to the construction industry by speaking to groups and organizations about issues of concern to industry participants. Roy Cohen and Jason Copley recently gave a presentation entitled "Strategies for Getting Paid," which was sponsored by the Construction Financial Management Association. Roy and Jason spoke about the risks associated with certain contract provisions in contracts and factors to consider before withholding performance.

-- Edward T. DeLisle, Esquire

Your Form I-9 Obligations

-- Jonathan Landesman, Esquire

Federal immigration law requires all employers to verify whether their employees are authorized to work in this country.

This verification process requires that all new hires complete a Form I-9 and present documentation confirming their identity and eligibility to work in the U.S. Both the Immigration and Naturalization Service and the Department of Labor conduct audits of companies to verify compliance with the I-9 regulations. Penalties for documentation and record-keeping violations range from $100 to $1,000 per worker. Penalties for knowingly hiring an unauthorized alien can be as high as $10,000 per worker. What's more, employers can be subject to additional fines and up to six months imprisonment where a "pattern or practice" of intentional violation of the law is demonstrated. To be sure, I-9 problems can be very costly.

THE TOP TEN WAYS TO AVOID LIABILITY

The Form I-9 is available for you to complete at *www.ins.usdoj.gov/graphics/formsfee/forms/I-9.htm*. Employees fill out Section 1 of the I-9 by providing basic information (name, address and social security number) and state that they are eligible to work in the U.S. Section 1 must be completed and signed on the first day of work.

Section 2 of the I-9 must be completed by the employer within three days of hire. The employer must "attest" under penalty of perjury in Section 2 that it reviewed the documentation provided by the employee. The I-9 form includes three lists of acceptable documentation, A, B, and C, and the employer may accept either one document from list A or one document each from lists B and C. Section 2 also requires the employer to attest that the documentation appeared to be genuine. This does not mean that the employer is guaranteeing the documents' genuineness; instead, the employer is simply saying that upon review the documents appeared authentic.

With apologies to CBS, David Letterman and the entire cast of *The Late Show*, we present our Top Ten "Dos and Don'ts" to Avoid Form I-9 Liability:

10. Do require all new hires to complete and sign Section 1 on their first day of work.
9. Don't ask an applicant to complete an I-9 prior to extending a job offer. The I-9 requires information that could be used as a weapon in a discrimination lawsuit if the applicant is not hired.
8. Do review the documents provided by the employee to make sure they are on the Form I-9's list of acceptable documents and to make sure they appear genuine.
7. Don't ask the employee for any particular documents or more documents than required by the I-9. Employers must accept any one document on List A or one document each from Lists B and C.
6. Do establish and implement a consistent I-9 procedure for all new hires.
5. Don't consider the expiration date of I-9 documentation when making decisions to hire, promote, or layoff employees.
4. Do make and retain copies of all I-9 documentation provided by employees. These documents will come in handy in the event of an audit.
3. Don't forget to keep a tickler file to follow-up on expiring documents. Employees should be notified of the need to re-verify documentation 90 days before the current documents expire.
2. Do retain the Form I-9 and copies of an employee's documents for the later of three years after the date of hire or one year following termination of employment.
1. Don't put the Form I-9 in an employee's personnel file. To protect your company against discrimination claims, the I-9 and supporting documentation should be retained in a separate file.

If you have a specific question or concern regrading I-9 documentation, we recommend that you consult with counsel.

A Note From The Editor

The goal of *Construction in Brief* is to bring you articles that help you identify issues of concern to your business. As this is always a challenging endeavor, we thought we should ask for your help! Please submit suggestions for future articles to me by regular mail or e-mail at jcopley@cohenseglias.com.

Inside this issue you will find articles on access to bid information, constructive changes and I-9 documentation. We hope that you find these articles interesting and informative. As always, if you have a specific legal concern we recommend that you consult with counsel so that you may receive the best possible advice.

-- Jason A. Copley, Esquire
Editor, *Construction In Brief*

COVER STORY (continued)

A similar situation arises where a defect exists in the plans and specifications provided by the owner of a project. Undoubtedly, this would necessitate additional work beyond the scope of the contract. The law supports the conclusion that a contractor can rely on the plans and specifications provided by an owner in contracting for work, under the theory that the owner gives an implied warranty that its design is correct. If a contractor does not discover a defect while doing the work, he is insulated from liability. If the contractor discovers this defect during construction, he has an affirmative duty to alter his performance in an attempt to remedy the defect. In either case, the contractor has a valid claim for the additional work performed.

Although in theory, the doctrine of constructive change is straightforward, the application of it successfully can prove demanding. Whether you are currently on a job with changes being ordered, or have performed extra work and not been compensated, you should consult with counsel if you intend to rely upon the doctrine of constructive changes.

-- Kimberly Gurvich, Esquire

Governor-Elect Rendell shown here with Partner Edward Seglias

A Firm Fund Raiser

On August 21st, CSPG&F hosted a fund raiser on behalf of Ed Rendell, which raised more than $75,000 for his gubernatorial campaign. A number of the firm's clients generously contributed to the effort and for that we thank them.

Mr. Rendell and his staff clearly were impressed by the level of participation on what was a warm August night, and expressed their appreciation to us for hosting the event. Ed spoke to the gathering about his experience running the City of Philadelphia and how, as governor, he expects to use the knowledge that he gained to improve the business, educational and social environment across the Commonwealth of Pennsylvania. He also met individually with a number of people to talk about issues of concern, the current business climate, and of course, the "Birds."

Thanks again to all those who helped make the evening a tremendous success.

-- Edward Seglias, Esquire

Questions regarding a specific legal matter? We recommend you speak with a CohenSeglias attorney:

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