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CONSTRUCTION IN BRIEF

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Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

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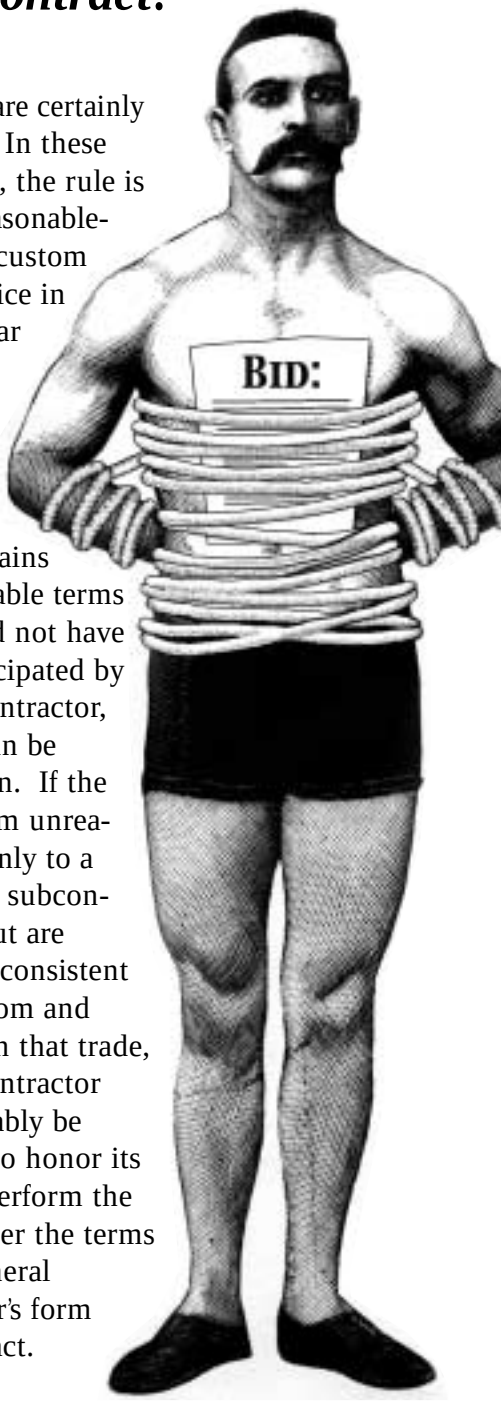
Bound to Your Bid?

When must a sub honor its bid and execute a contractor's form subcontract?

Most subcontractors understand that if they present a bid to a general contractor, they may actually be required to perform that work at the quoted price. The subcontractor is, of course, only required to honor the bid when it has been relied upon by a general contractor who has contracted with an owner. What happens, however, when the general contractor provides its form subcontract to the subcontractor? Must the subcontractor agree to the terms which it believes are unfair or unreasonable? As you can imagine, it depends on the circumstances.

First of all, it is becoming increasingly common for general contractors to attach their form subcontracts to bid packages. Subcontractors should be careful to review these form subcontracts, because if they are the successful bidder for the work, the terms of the form subcontract may govern. Subcontractors should notify a general contractor if their bid is "subject to" or "conditioned upon" the "negotiation of a mutually agreeable subcontract," when the terms of the form subcontract are not acceptable. However, a bid may be more attractive when the subcontractor reviews the subcontract and indicates that it is acceptable, or identifies the provisions which must be modified in order for the form subcontract to be acceptable.

In situations where a form subcontract is not provided with a bid solicitation package, the rules are certainly different. In these situations, the rule is one of reasonableness and custom and practice in a particular trade. In other words, if the form subcontract contains unreasonable terms that could not have been anticipated by the subcontractor, the bid can be withdrawn. If the terms seem unreasonable only to a particular subcontractor, but are generally consistent with custom and practice in that trade, the subcontractor will probably be required to honor its bid and perform the work under the terms of the general contractor's form subcontract.



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The Power of The SCHOOL BOARD

New Rules that May Disqualify Bidders from Public School Projects in New Jersey

We are often contacted by our clients and asked to counsel them on various issues concerning public bidding. Questions range from "Can I fix a mathematical error in my bid after submission?" to "Can I challenge a bid that's lower than mine, if I don't think it complied with the bid specifications?" Questions such as these are typical and are raised whether a project is located in Pennsylvania, New Jersey, New York, Virginia, or any other jurisdiction. For the past several years, however, a new question has arisen due to changes in New Jersey's public bidding law, namely: "*Can a school board really disqualify my low bid and prevent me from bidding on its projects in the future?*" This may surprise contractors, but the answer to the question is "**yes**."

In 1999 the public bidding laws in New Jersey were amended, as they relate to school projects. The amendments allow local boards of education to disqualify the lowest responsible and responsive bidder on a project, if that board determines that it had a "prior negative experience" with the bidder. A school board may conclude that it had "prior negative experience" with a prospective contractor if (1) the bidder failed to properly perform a prior project for that school board, as determined by a court of law or through binding arbitration; (2) the bidder defaulted on a prior contract with that board requiring it to either retain a replacement contractor, or rely upon the bidder's surety to complete the work; or (3) the bidder was debarred, or otherwise suspended, from performing work for the State of New Jersey at the time that it submitted its bid.

This definition is meant to protect the bidder from subjective disqualification. In addition, the amendment requires a school board to give a bidder facing disqualification notice of that possibility, as well as a right to address these issues raised as a concern by the school board. As part of this process, the bidder is given the opportunity to call witnesses and present evidence to show that disqualification is not appropriate. If the bidder is unsuccessful in persuading the board that disqualification is not warranted, the board may disqualify that bidder from the subject project and from future projects for up to five years.

Last year, the New Jersey State Legislature made further amendments to the public bidding laws governing school projects. Effective September 29, 2002, bidders that have had a "prior negative experience" with two or more boards of education, or with the New Jersey Economic Development Authority, may be disqualified as a bidder even if the bidder successfully completed other projects for that board in the past. This change in the law is important in that it allows school boards to look beyond their own experience with a bidder and instead, consider the statewide performance of the bidder on prior school projects.

Contractors that make their living performing public school work in New Jersey should protect themselves by challenging any improper action by a school board which could later be construed as a "prior negative experience." If you have a specific legal question regarding this issue, we recommend that you consult with an attorney.

-- Edward T. DeLisle, *Esquire*

Prevailing Wage Traps

AN OUNCE OF PREVENTION

-- Jonathan Landesman, *Esquire*

Small wonder that even well-intentioned contractors often find themselves paying hefty penalties and facing possible debarment for prevailing wage violations. Indeed, prevailing wage laws present a tangled web of compliance traps and the Department of Labor is not willing to accept "I didn't understand the law" as an excuse. To make matters worse, prevailing wage violations just got ten times more expensive for contractors doing work in New Jersey – administrative penalties now range up to $5,000 per violation! With so much at stake, why wait until the Department of Labor knocks on your door? There are preventative measures that you can take to sidestep prevailing wage liability when the D.O.L. comes a-knockin!

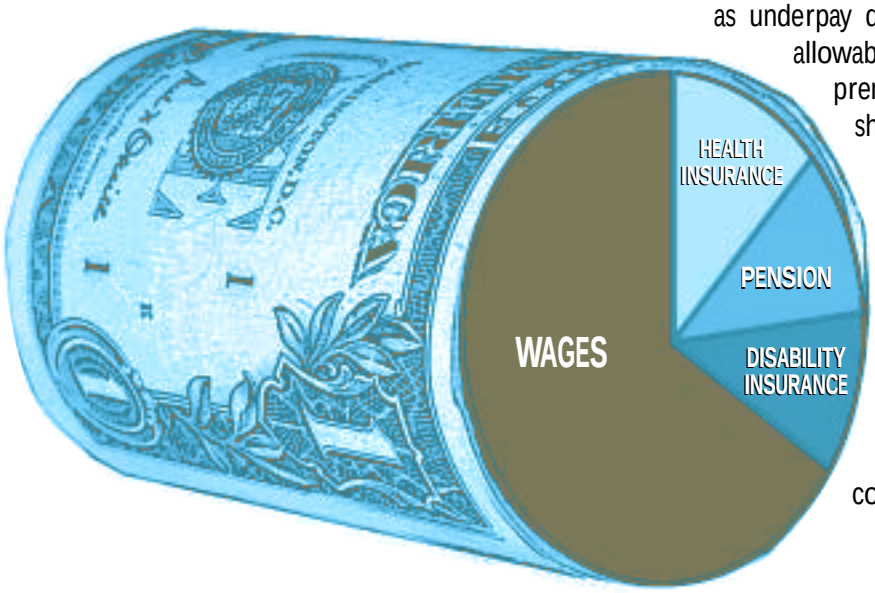
First, make sure you're paying each craft the correct rate. Many union contractors fail to realize that their contract rate may differ from the applicable prevailing rate. Moreover, drywall, carpet and other contractors who pay a piece rate must ensure that all employees receive no less than the prevailing rate. In addition, material men and cross-crafted employees often must receive multiple rates.

Paying the correct rate also means not taking inappropriate credits. Perhaps the most common prevailing wage violation involves taking credit for un-vested retirement plan contributions. Other examples of improper credits are workers' compensation, disability insurance, tool allowances and (sometimes) uniform costs. Further, even though making deductions that dip into an employee's base rate is acceptable under the federal prevailing wage law, most states – including New Jersey – make such deductions unlawful.

If the D.O.L. finds that you failed to pay the correct rate, in some cases, you may seek indemnification from the public body. Generally, indemnification is available only if there is an express contractual provision under which the public body agreed to indemnify the contractor for prevailing wage liability. To protect your company's rights, make sure that every public works contract you sign includes a specific indemnity provision addressing prevailing wage issues.

Apprentice registration is another problem area. All workers on a public works project except for registered apprentices must receive the mechanic's rate for the appropriate craft involved. This means that unregistered apprentices and helpers also receive the mechanic's rate. It is absolutely critical that all apprentices are registered in the state in which the state-funded project is located because many states do not extend reciprocity to other state registrations. For example, the New Jersey Department of Labor has made it crystal clear that it will not accept Pennsylvania registration. One more point on apprentices: remember that the prevailing wage laws impose a duty on contractors to follow-up on education. This duty is not satisfied by simply asking the apprentice about class; instead, the contractor must communicate directly with the apprentice's school.

A lot of contractors have difficulty properly computing daily premiums. In fact, we've found that just as many contractors overpay as underpay daily premiums. Some of these contractors fail to take allowable credits for meal periods. Worse still, others pay premium time for an entire shift even when only part of the shift qualifies as premium time.



Finally, the importance of maintaining detailed, accurate records cannot be overstated. Like tax return forms, completing certified payroll forms is a "must". Without the required records there is little hope of successfully defending against a Department of Labor investigation.

As always, if you have a question or specific concern regarding prevailing wage issues you should consult with counsel.

Bound to Your Bid?

(cover story -- continued)

A court recently faced with this type of situation recognized that general contractors rely heavily upon subcontractors' bids in placing themselves at financial risk with an owner on a construction project. To avoid any unfairness to general contractors, the court found that subcontractors would only be relieved of their bids (1) where a condition or term in the subcontract was "unreasonable" under the circumstances; and, even more importantly (2) when the condition or term in question was not "reasonably foreseeable" by the objecting subcontractor.

Whether or not a particular term is reasonably foreseeable will depend on the custom and practice in a particular trade and region. It is also important to note if the term was included in the bid specifications or set forth in a letter of intent sent by a general contractor.

Both general contractors and subcontractors should remember that they can avoid most problems in this area by making sure that the requirement, or refusal, to execute a form subcontract is not a surprise to the other party. If you have a specific question or concern about the issues discussed in this article, you should speak with an attorney.

-- Alyson M. Sciacca, *Esquire*

A Note From The Editor

Welcome to another great edition of *Construction in Brief*, brought to you by the law firm of Cohen, Seglias, Pallas, Greenhall & Furman, P.C. You'll notice that this edition is bigger than ever before, offering a fresh look at issues of legal concern in today's business climate. The contributors to this newsletter continue to bring you insight and information on a variety of topics. As always, we welcome you to submit suggestions for future articles that may be of interest to you, either by regular mail or e-mail at: **jcopley@cohenseglias.com**

Inside this issue you will find articles on subcontractors honoring bids, the new power of school boards in NJ, prevailing wage traps and an informative article on business succession planning.

As a reminder, if the Winter Storm of 2003 delayed your work, don't forget to take the steps necessary to extend your contract completion date where appropriate. This may include the submission of a specific request to either the owner or general contractor. SEE YOUR CONTRACT DOCUMENTS!

Remember, if you have a specific legal concern we recommend that you consult with counsel so that you may receive the best possible advice. See you next issue.

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

Business Succession Planning

(continued from page 5)

when the business buys the departing shareholder's stock. This will be an issue if the remaining shareholders eventually sell their shares in the business. However, under a cross purchase arrangement, the remaining shareholders would get a "step up" in tax basis in the purchased stock. The higher basis will mean a smaller capital gains tax when they later sell the stock. The point is that a little planning can go a long way.

Cross purchase agreements are not always the preferred choice. Under a redemption arrangement, the cash values of life insurance policies are not subject to the claims of creditors of the shareholders as they would be in a cross purchase arrangement. Further, because life insurance is an after-tax purchase, a stock redemption plan can be more cost-effective than a cross purchase agreement if the corporation's tax bracket is lower than the stockholders' tax brackets.

Because of the tax consequences and the complexity of buy-sell agreements, you will want to work with a team of advisors: your financial planner, an insurance specialist, and an attorney, all of whom need to be knowledgeable about buy-sell agreements. There are no fixed rules for determining which type of buy-sell agreement is most appropriate for an owner's particular needs and objectives. However, each type of arrangement has advantages business owners need to consider. If you start planning now, you can avoid the tragedies Ben Franklin contemplated over 200 years ago!

-- Robert J. Birch, *Esquire*

Business Succession Planning With Buy-Sell Agreements

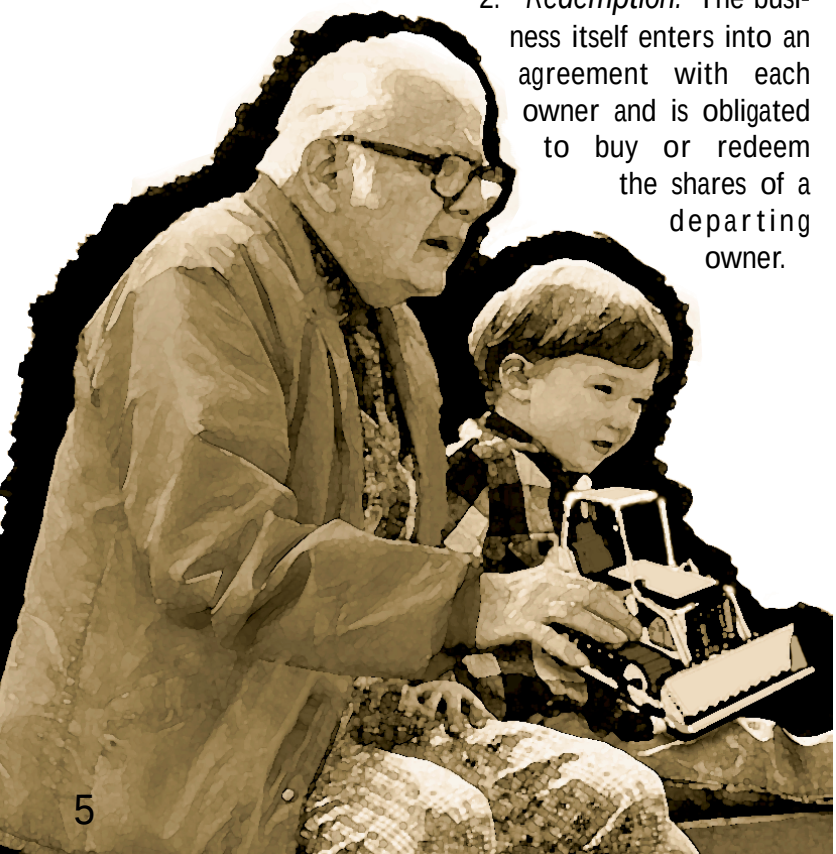
Benjamin Franklin once said that "…life's tragedy is that we get old too soon and wise too late." No doubt Ben had business succession planning in mind. One of the most agonizing experiences that any business owner faces is transitioning from one generation to the next. Because succession planning can be complex due to the myriad of tax and non-tax considerations, business owners tend to put off planning for another day. This can cause unwanted problems that can be easily avoided.

Whether you are doing business as a sole proprietor, corporation, partnership or limited liability company ("LLC"), a business succession plan involves a buy-sell agreement that addresses what will happen to the business in the event of some triggering event such as a business owner's death or disability, and will enable the owner to smoothly transition his or her business to the next generation.

There are essentially two types of buy-sell agreements:

1. *Cross purchase.* Each owner enters into an agreement with every other owner. This approach becomes cumbersome if more than three or four individuals are involved. For example, 64 separate agreements would be required for eight owners.

2. *Redemption.* The business itself enters into an agreement with each owner and is obligated to buy or redeem the shares of a departing owner.



The purchase will normally be funded with earnings from the business, or with insurance proceeds. Assuming the purchaser's available cash flow is insufficient, the purchase of an owner's interest on his or her death or disability is normally funded with life insurance proceeds. Under these circumstances, the person obliged to purchase an owner's interest (i.e., the remaining owners or the business entity) would acquire life insurance policies payable upon the death of each owner and would be responsible for paying the insurance premiums on the policies. As the owner and beneficiary under the policies, the purchaser is not entitled to deduct the premium payments, but the insurance proceeds that are used to fund the purchase obligation under the buy-sell agreement are received by the purchaser on a tax-free basis.

When a buy-sell agreement is funded by insurance, there are distinct advantages to using a redemption agreement rather than a cross purchase agreement. The primary advantage of the redemption agreement is that the entity needs to purchase only one policy for each owner. As noted, in the case of a cross-purchase agreement, each owner is required to purchase a policy on the life of every other owner.

If the business has many owners, a trust arrangement may reduce the number of insurance policies that are required to be purchased, and may ensure that the terms of the buy-sell agreement are fulfilled. In a trust arrangement, either a revocable or irrevocable trust is created and managed by a third party trustee. The trustee is responsible for handling all the paperwork, owning and maintaining the life insurance policies on the shareholders, collecting the insurance proceeds and ensuring that the terms of the buy-sell agreement are met. As a variation of the trust arrangement, the owners can form a new entity such as a partnership or LLC to purchase and hold the life insurance policies.

Even if you currently have a buy-sell agreement, that agreement should be reviewed to determine if it is in accord with your estate plan and whether the tax consequences are what you intended. Suppose that you currently have a redemption agreement. One of the problems with this arrangement is that the surviving shareholders do not get the benefit of an increase in the tax basis of their shares

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WHAT'S NEW?

CSPG&F Opens New Office in Pittsburgh

CSPG&F is pleased to announce the opening of a new office in Pittsburgh, Pennsylvania. This big announcement follows many months of hard work with both existing and new clients on projects in Western Pennsylvania and West Virginia. Our office, which officially opened on January 1, 2003, is located in the heart of Pittsburgh in The Gulf Tower. The office address is The Gulf Tower, 707 Grant Street, 34th Floor, Pittsburgh, PA 15219.

Given this exciting development, we look forward to continuing to serve our clients' legal needs in the Pittsburgh area with greater ease and convenience.

We are also proud to announce that **CSPG&F** has named Jason A. Copley as a Partner effective January 1, 2003, following five successful years with the firm as an associate. The firm has benefitted greatly from Jason's litigation and engineering background over the years and looks forward to his continued leadership.

Finally, as the opening of our new office in Pittsburgh indicates, the firm has continued to grow since our last newsletter. In this regard, we are happy to announce the addition of our newest associate, Timothy Woolford. Tim concentrates his practice on construction and commercial litigation.

-- Edward T. DeLisle, *Esquire*

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

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