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Construction Focus

Court rules that public school officials may require prevailing wages

By Patrick Devine

Ohio's Prevailing Wage Law expressly states that its provisions do not apply to public improvements undertaken by the board of education of any school district. This exemption was created in the midst of the massive public school construction program undertaken by the Ohio School Facilities Commission (OSFC). For many years, most, if not all, OSFC projects proceeded without any prevailing wage requirement. There were, however, school districts around the state that wanted the option to make prevailing wages a part of the specifications for a particular project.

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Responding to this interest, the OSFC passed Resolution 07-98 providing school boards with the discretion to include prevailing wage requirements in the construction specifications. In 2009, the Ashtabula Area City School District Board of Education issued specifications for the construction of five elementary school buildings. The specifications included a requirement that the workers be paid the prevailing wage rates for Ashtabula County.

Before the bids were solicited, the Northern Ohio Chapter of Associated Builders & Contractors (ABC) and one of its members, an electrical contractor, filed a lawsuit seeking, among other remedies, a declaration that Resolution 07-98 was void as contrary to the prevailing wage statute, and that the school district had acted without authority to require bids be submitted with prevailing wage rates. The trial court found that the school district had acted within its discretion by requiring payment of prevailing wages as a bidding condition. The courts said that while the Prevailing Wage Law exempts school boards from the prevailing wage requirements, the law does not prohibit the OSFC and school boards from using the prevailing wage law as a condition within a bid specification for a project.

On appeal, ABC and the contractor asserted that Ohio Revised Code 4115.04(B)(3) precludes school boards from requiring prevailing wage on construction projects. Because this law exempts public schools from the prevailing wage

mandate, ABC contended that the legislature precluded school boards from the prevailing wage requirements. The Court of Appeals disagreed, finding that the evidence supported the determination that the OSFC acted within its discretion in permitting school districts the option to require prevailing wages on a particular project. The Court quoted from a 2004 letter from Senator George Voinovich, former Governor:

> It became my understanding heretofore prevailing wage had been paid and the decision about using prevailing wage standards could be left to the discretion and judgment of local school boards based on their differing community standards. School Boards, with members who are accountable at the local level, are knowledgeable and informed about the practices and preferences of their communities.

The Court of Appeals said that since there is no statutory preclusion against using prevailing wage requirements, the OSFC and school boards have the discretion to make prevailing wage requirements part of the project specifications. Further, according to the Court, if the legislature had intended to prohibit prevailing wage requirements on public school construction, it would have specifically done so. The legislature only exempted school boards from the mandate of using prevailing wage requirements.

The competitive bidding statute for public schools requires the school board to award the contract to only the lowest responsible bidder. ABC and the contractor contended that the prevailing wage requirement was contrary to this statute because the lowest bid will not be achieved if prevailing wages are required. Despite apparent testimony at the trial that the prevailing wage requirement allegedly increased the cost of the labor portion of the bids by 26 percent, the Court of Appeals said that submitted bids must meet the project specifications in order to be considered responsive. A prevailing wage specification is no different than any other specification the school board decides to include in the bid package. If prevailing wages are specified, then the contractors must submit a bid that includes the prevailing wage rates in order to be considered responsive.

In a 2-1 decision, the Court of Appeals affirmed the trial court's refusal to declare OSFC's Resolution 07-98 void. The dissenting opinion would have held that the school board and the OSFC do not have the statutory authority to make prevailing wage requirements part of the project specification and, therefore, Resolution 07-98 is unlawful.

Enertech Electric, Inc. v. Ashtabula Area City School District Bd. of Ed. (June 18, 2010), Ashtabula No. 2009-A-0046, 2010-Ohio-2815. ■

Ohio Supreme Court rules that **a bidder wrongly rejected for public contract** may recover bid preparation costs

By Patrick Devine

In a unanimous decision, the Ohio Supreme Court ruled that a bidder may recover its reasonable bid preparation costs if the bidder establishes that its bid was wrongfully rejected because the public authority violated the public competitive bidding laws. *Meccon, Inc. v. Univ. of Akron* (July 21, 2010), Slip Opinion 2010-Ohio-3297. The rejected bidder must have promptly sought, but was denied, injunctive relief to suspend the public improvement, and a court later finds, after injunctive relief is no longer available, that the public authority wrongfully rejected the bid.

Editor's Notes

We publish *Construction Focus* to keep you informed of current legal developments in the construction industry. *Construction Focus* will provide you with practical information to assist in the management of your workplace and help avoid legal conflict. If you have questions or comments, please contact Patrick Devine at: 614.462.2238 or pdevine@szd.com.

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The Supreme Court had previously ruled in *Cementech, Inc. v. Fairlawn* (2006), 109 Ohio St.3d 475, that a wrongfully rejected bidder cannot recover its lost profits as damages. In that case, the Court determined that allowing a rejected bidder to recover its purported lost profits harms the taxpayers the competitive bid laws were intended to protect. Injunctive relief and the resulting delays in starting the project are, in the Court's opinion, a sufficient deterrent to a public owner's violation of the competitive bidding laws. The *Cementech* decision did not, however, answer the question of whether bid preparation costs could be recovered by a wrongfully rejected bidder. The Court in *Meccon* decided that such costs could be recovered.

The Court, in distinguishing the *Cementech* case, said that the recovery of bid preparation costs is the only remedy available to a wrongfully rejected bidder who alleges that a public authority failed to comply with competitive bidding laws, and promptly seeks, but is denied, injunctive relief. The Court noted that denial of the requested injunctive relief means the determination of whether the public authority wrongfully rejected the bid will not take place until after the construction of the project has been started, and perhaps substantially performed by another contractor. By then, it is too late for the improperly rejected bidder to perform the contract.

The Supreme Court concluded that allowing recovery of bid preparation costs will serve to enhance the integrity of the competitive bidding process. The availability of recovery may deter the public authority from violating the competitive bidding laws, but at the same time strikes a balance between protecting the public from incurring extra costs due to the wrongful conduct of the public authority, and lessening the damages sustained by the lowest and best bidder who, in good faith, participated in the competitive bidding process. ■

Change orders: *differing site conditions*

By Patrick Devine

Differing site conditions that negatively affect the work provide a contractor with the opportunity to recover the resulting additional costs. Providing the proper notice and proving the elements of the circumstances of the differing site conditions claims are essential for the contractor's recovery through the change order process.

There are two distinct types of differing site conditions. A Type I differing site condition occurs when the actual site conditions differ from the conditions indicated in the contract. A Type II differing site condition occurs when the actual site conditions differ from conditions normally encountered in work of the character provided for in the contract.

A recent decision from the Ohio Court of Claims sets forth a dispute over whether a differing site condition claim was adequately proven, and whether the contractor had followed the contract's notice requirements for making a differing site condition claim.

A state agency was having a helicopter apron rebuilt. The agency had an engineering firm assess the soil composition and prepare a report that determined that the soil was suitable for construction when brought to proper moisture conditions. The contractor read the report and walked the site prior to submitting a bid for the lump sum contract. The plans required the removal of the existing asphalt and excavation of the soil to a depth of twenty inches, to be replaced with twelve inches of aggregate topped with eight inches of new asphalt to accommodate heavier helicopters.

During construction, the contractor encountered areas of unsuitable soil which required the contractor to excavate several additional inches to reach stable soil, and replace the excavated soil with more aggregate. The contractor also layered geo-fabric with the aggregate to achieve suitable soil strength. The contractor and the owner's engineer were unable to reach an agreement as to payment for the additional work. The contractor chose to proceed with the work to avoid delaying the project. Both the contractor and the engineer agreed that the additional costs would be reconciled by a final change order to be submitted upon completion of the project.

After substantial completion, the contractor requested the engineer to verify final quantities for the change order. The engineer did not do so, and the contractor

completed its own calculations and requested the engineer to submit the proposed change order to the owner. The engineer did not respond to the request. The contractor then sued the state agency for breach of contract, unjust enrichment and constructive change order.

The Court of Claims quickly dispensed with the Type II differing site condition premise by holding that there was insufficient evidence to establish that the actual nature of the soil differed from the type of soil normally encountered during excavation in that part of Ohio. The court relied upon the engineer's soils report which stated that all soil values were typical of glaciated deposits found in the area.

With respect to a Type I differing site condition claim, the court held that the conditions encountered by the contractor were not materially different from those outlined in the contract, and that the actual conditions were reasonably foreseeable. The court based its conclusion on the soils report, the presence of standing water in various areas of the apron on the day of the pre-bid meeting, the engineer's inclusion of catch basins and a detention pond to facilitate drainage, and the inclusion of geo-fabric in the design. These factors provided notice to the bidders that there were excessive moisture and drainage problems in the subsoil.

Notice for a change order

According to legal precedence, when a construction contract provides that altered or extra work must be ordered in writing, the provision is binding upon the parties to the contract. The contractor cannot recover for such work unless a written directive (change order) is executed in compliance with the contract, unless waived.

The contract in this case provided a Change Order Procedure which prohibited the contractor from proceeding with any change in the work without written authorization. Whenever the contractor seeks additional compensation for causes arising out of or related to the project, the contractor has to follow the contract procedures, including providing timely notice. Under this contract, the contractor was required to make a written claim with the engineer prior to contract completion and no more than 10 days after the initial occurrence of the facts giving rise to the claim for additional costs. When it comes to notice provisions, the contractor should always follow the letter of the contract.

The court found that the contractor failed to submit a written change order to the engineer or to the owner prior to the contractor's completion of the project. The court rejected the contractor's argument that the notice provision was waived when the engineer agreed with the contractor's decision to proceed with the work and to submit a final change order at the completion of the project. There must be a clear and unequivocal act demonstrating the owner's intent to waive the contractual notice, change order and claim review requirements.

Constructive change order

A claim for a constructive change order may have been sustained by the court if the owner had independent knowledge of the condition complained of and had oral notice of the contractor's complaint, and the owner was not prejudiced by lack of prior written notice. In this case, however, the contractor had communicated only with the engineer regarding the differing site conditions, and had not documented these communications. The contractor had failed to submit a formal written change order to the engineer or to the owner within the time permitted by contract or even within a reasonable period of time.

When a contractor has missed a contractual notice deadline, the contractor should continue written communications to the owner and the owner's representative addressing the disputed issue. Even when there has been no response from the owner or owner's representative, the contractor should not remain silent.

Central Allied Enterprises, Inc. v. The Adjutant General's Department (June 18, 2010), Court of Claims of Ohio No. 2007-Ohio-07841, 2010-Ohio-3229. ■

NEWS AND NOTES

On Sept. 2, 2010, **Hansel Rhee** presented "Construction Contracting in Ohio" at the Ohio State Bar Association's Construction Law Forum held in Columbus, Ohio.

On Nov. 4, 2010, **Patrick Devine** and **Rod Davisson** will hold a Public Bidding Roundtable at Schottenstein Zox & Dunn in Columbus, Ohio on how to effectively make the transition from private to public work.

On Dec. 15-16, 2010, **Michael Tarullo** will present "Forensic Schedule Analysis, Concurrent Delay and the updated AACE Recommended Practice for Forensic Schedule Analysis" at the 25th Annual Construction Superconference 2010 held in San Francisco, CA. ■

No damage for delay provision held void

By Patrick Devine

Ohio law prohibits contract language that waives or precludes a contractor's liability for delay when that delay is caused by the contractor. A hazardous waste abatement contractor entered into an agreement with a subcontractor to perform demolition and site work for two buildings located at the Georgia Technical Institute Nanotechnology Research Center in Atlanta, Georgia. The parties agreed that Ohio law governed the contractual dispute.

The agreement provided that the only remedy for delay was a time extension which had to be approved by the project owner. No delay claims would be accepted unless caused by a party other than the abatement contractor, and the delay had to be longer than four months. The effect of these provisions protected the abatement contractor from liability for delays it had caused. The court held that the "no damages for delay" provision was void under Ohio law because it precluded liability for delay even when the cause of the delay was a result of the abatement contractor's actions or failures to act.

There were three instances where the abatement contractor allegedly caused delays: (1) the multiple day suspension of abatement work while waiting safety inspection and clearance from authorities to resume work after the abatement crew caused a fire, thus delaying the demolition subcontractor's work; (2) the abatement contractor's failure to obtain necessary permits for removal of waste materials within demolished walls which prevented the demolition subcontractor from moving the waste material offsite in accordance with the planned work schedule; and (3) the abatement contractor's failure to sufficiently staff the work to complete the abatement work, which caused the demolition subcontractor to change its demolition methods.

The demolition subcontractor sued the abatement contractor for breach of contract and quantum meruit on the basis of multiple delays to the demolition work and failure to pay for additional work that was not part of the original contract.

The cause and effect of the delays in this case were relatively easy to ascertain because the abatement contractor was the first contractor to perform on-site work, and was required to complete its work before the demolition subcontractor could perform. There being no other contractors present to interfere with the schedule, the abatement contractor's work delayed the demolition of the buildings.

Although the demolition subcontractor allegedly failed to comply with the contract's "notice and approval" requirement for delay claims, the court finding that the "no damages for delay" provision was void and unenforceable rendered the "notice and approval" requirement void as well.

Loss of efficiency is a type of delay

Although the abatement contractor delayed the demolition subcontractor's work, the abatement contractor contended there could only be delay damages if the demolition subcontractor was prevented from performing any work at all. Otherwise, the abatement contractor argued, the demolition subcontractor would receive double recovery if it could recover for the work it performed and for the delay it suffered. "Not so fast," was essentially the court's response.

A delay claim is not limited to only situations where the affected contractor is unable to perform. A delay may occur through lost efficiency when performing out of sequence work or performing work in such a manner that the workers are inefficient. Here, the demolition subcontractor had to change its demolition methods because the abatement contractor did not complete its work on schedule. Even though the demolition subcontractor could work on days for which it claimed delay, the subcontractor could not work as efficiently as it could have but for the changed methods required due to the abatement contractor's delay. Performing out of sequence work resulted in loss of efficiency for the demolition subcontractor.

Acme Contracting, Ltd. v. TolTest, Inc. (March 24, 2010), 2010 WL 1140997. ■

Preserving mechanic's lien rights

By Patrick Devine

The steps to perfect a mechanic's lien must be strictly followed. On private commercial projects, a contractor, subcontractor or supplier must file the lien with the County Recorder by submitting an affidavit showing the amount due, a description of the property to be charged with the lien, the name and address of the person for whom the work was performed or the material was furnished, the name of the owner or lessee, if known, the name and address of the lien claimant, and the first and last dates the lien claimant performed any work or furnished any material to the project.

A general contractor subcontracted the HVAC work on a private project. The HVAC subcontractor failed to pay the HVAC equipment supplier who then filed a mechanic's lien against the project.

Lien's identification of property owner

The supplier's lien misidentified the property and the property owner, and failed to record the lien affidavit within 75 days from the date on which it last furnished material to the subcontractor.

The supplier identified the property owner in its lien affidavit as Rite Aid Corporation of Ohio. The correct corporate name of the property owner was "Rite Aid of Ohio, Inc." The statutory language requires the name of the property owner or lessee, "if known." The Court of Appeals noted that the language "if known" suggests that the legislature did not consider the name of the property owner or lessee to be a vital part of the affidavit for a mechanic's lien. In addition, the trivial nature of the difference between "Rite Aid Corporation of Ohio" and "Rite Aid of Ohio, Inc." was not a basis for finding the lien to be invalid. There was no suggestion that the general contractor was misled by the wrong name in the affidavit. The general contractor knew who the correct owner of the building was. The court stated:

> It is beyond belief that the interested parties in this case would not have been able to ascertain the correct owner of the building based solely upon the company name listed in the affidavit. To hold otherwise would lead to the absurd proposition that even the most technical mistakes like the misspelling or omitted punctuation would result in a fatal defect in the mechanic's lien.

The affidavit of lien must also contain a description of the property to be charged by the lien. An incorrect description will invalidate the lien. A legal description is sufficient if consistent with the legal description set forth in the notice of commencement.

Lien's description of the property

The HVAC supplier's affidavit identified the property with the same legal description used by Rite Aid in its notice of commencement, but listed the wrong parcel number for one of the parcels of property. The Court of Appeals concluded that a lien affidavit that contains the correct legal description of the property is sufficient even if it includes an incorrect parcel number. The court said a parcel number is not the same thing as a legal description. The court did note, however, that if the supplier's lien affidavit had set forth a correct permanent parcel number but omitted any legal description of the

property, it may have been required to find that the lien was invalid because it failed to meet the strict terms of the mechanic's lien statute.

Lien's untimeliness

The law requires that a mechanic's lien for furnishing materials arises, in part, only if the materials are furnished with the intent that the materials will be used in the course of the project, and that the materials are incorporated or consumed in the course of the project. The delivery of the materials to the project site creates a conclusive presumption that the materials were used in the course of the project. The supplier had to file its mechanic's lien affidavit within 75 days from the date on which it last furnished material to the subcontractor.

The supplier recorded the mechanic's lien on Jan. 31, 2007. The general contractor contended that the lien was untimely because the last delivery of equipment occurred on Oct. 31, 2006. The supplier said it had sent two power exhausts on Jan. 22, 2007 to a third-party that would transport the units to the job site. The Court of Appeals held that the supplier failed to prove either of two elements necessary to uphold the validity of its lien. The supplier did not prove there was actual delivery of the power exhausts, nor did it prove that the power exhausts were actually incorporated into the building.

Because the steps to perfect a mechanic's lien are strictly construed against the lien, the court held that the supplier failed to timely file its lien.

JJO Construction, Inc. v. Penrod (June 10, 2010), Cuyahoga App. No. 93230, 2010-Ohio-2601. ■

Obama Board era begins

By John Krimm

The National Labor Relations Board (the Board) traditionally consists of three members selected by the party controlling the White House and two picks from the opposing party. Early this summer, the Board finally reached its full complement of members after years of being short-handed due to political wrangling. In April, union attorney and activist Craig Becker was given a recess appointment which runs through August of next year. In June, management labor lawyer Brian Hayes and union attorney Mark Pearce were appointed to terms which expire at the end of December 2012 and August 2013, respectively. With the changing of the guard now complete, the widely-predicted roll back of "Bush Board" precedent appears to be in the offing.

A couple of recent Board decisions provide a foretaste of what is in store. In *Eliason & Knuth of Arizona, Inc.*, 355 NLRB No. 159 (August 27, 2010), the Board ruled, 3-2, that the Carpenters Union did not engage in illegal secondary boycott activity when it displayed a large stationary banner in front of various properties announcing its "labor dispute" with certain non-union contractors who were performing work for the property owners. Even though these banners were seeking to "elicit 'shame on'" the property owners for using non-union labor in an effort to "persuade customers not to patronize" the property owners, the Obama Board essentially held that the protesters' First Amendment rights trumped the property owners' rights under the National Labor Relations Act (NLRA) not to be dragged into a labor dispute that was not of their own making. The Board held that "the holding of stationary banners lacked the confrontational aspect necessary to a finding of picketing proscribed as coercion" under the NLRA's secondary boycott prohibitions.

Republican Member Peter Schaumber, whose term expired at the end of August, penned a lengthy dissent in *Knuth of Arizona*. Joined by the recently appointed Republican, Mark Hayes, Member Schaumber criticized the majority for putting "the neutral party right back into the fray" by "ignoring decades of precedent establishing that bannering is coercive." He went on to state that his dissent was "compelled by a serious concern that [the majority's] standard will assuredly foster precisely the evil of secondary boycott activity and expanded industrial conflict that Congress intended

to restrict" when it amended the NLRA to prohibit secondary boycotts. In closing, Member Schaumber predicted, "We will not be alone in finding this decision to be most troubling and ill-advised."

KenMor Electric decision

The same day as *Eliason & Knuth*, the Board issued its decision in *KenMor Electric*, 355 NLRB No. 173 (Aug. 27, 2010). This case involved a "referral system" run by the Independent Electrical Contractors of Houston (IEC) for the benefit of its members. Board Chair Wilma Liebman, joined by Member Pearce, concluded that the referral system violated Section 8(a)(1) of the NLRA because it "interfered with the right of job applicants who were union members and 'salts' to be hired on an equal basis with other nonunion applicants." The "referral system" had a number of provisions, including a "$50 fee-per-additional-application imposed on new applicants" but not on recently laid off employees of IEC members and a "shared man program" which caused the system, in the majority's view, to "reasonably tend to interfere" with union carpenters' exercise of their rights. Again in dissent, Member Schaumber chided the majority for essentially adopting a "disparate impact" analysis that "goes well beyond anything" the NLRA permits, accusing the majority of having "substituted its judgment for that of Congress" and noting that "its broadly worded decision unjustifiably calls into question legitimate and widely used employment practices."

So, the tables have finally turned and the "Obama Board" has arrived. Years of increasingly vitriolic dissents written by former Democrat Member Dennis Walsh during the Bush Board era seem destined to be replaced by equally strident dissents filed by the new "minority" Board Members. Welcome to Washington, where the names change but the game remains the same. ■

WEB EXTRAS

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Join SZD in welcoming...

E. Rod Davisson

Rod Davisson is a member of SZD's Public Law and Construction Practice Areas. In addition to practicing law, Rod is in his second term as mayor of a central Ohio municipality and spent 15 years as a contractor before attending law school.

Rod is an experienced trial attorney and has litigated cases in Ohio State and Federal Courts, and in the Ohio Court of Claims. He represents municipalities, counties, school districts, joint vocational districts and other political subdivisions on public construction projects such as municipal buildings, public utility infrastructure, courthouses, road and bridge projects, school facilities, recreation centers and athletic facilities. Rod is a well-known lecturer and author on Ohio municipal, construction and economic development topics and is a 2006 recipient of Business First's Forty Under 40 award.

Rod is Ohio's first LEED-AP (BD+C) certified attorney *(Leadership in Environmental Energy & Design Accredited Professional—Building Design & Construction)* and has completed additional training at the University of Wisconsin-Madison College of Engineering in Masonry Design and Construction.

Rod received his undergraduate degree from Franklin University *(cum laude)* and his law degree from Capital University Law School*, Order of the Curia*. ■

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