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Construction Focus

Prevailing Wage Penalties are Mandatory

By Patrick Devine

When the Department of Commerce determines that there has been an underpayment of prevailing wages on a public improvement, the contractor liable for the underpayment may also be assessed a penalty equal to 100 percent of the amount of the underpayment. The Prevailing Wage Law provides that an employee on a public improvement who is paid less than the prevailing wage amount may recover the difference between the prevailing wage and the amount actually paid to the employee and, in addition, a sum equal to 25 percent of that difference. The liable party shall also pay a penalty to the Director of Commerce of 75 percent of the difference.

QUICK LOOK INSIDE

SPRING 2010

In a recent Ohio Supreme Court case, the issue arose as to whether the penalty is mandatory and must be imposed when the enforcement action was initiated by an employee.

In this case, a general contractor entered into a contract with a state university for the construction of student housing. Prevailing wages applied to the project. A subcontractor of the general contractor repeatedly assured the general that it was paying the prevailing wage. The general contractor reviewed the subcontractor's payroll records to confirm the correct prevailing wage rate. Nevertheless, the subcontractor failed to pay the prevailing wage amounts. The Department of Commerce investigated and issued an initial determination that the general contractor and the subcontractor were liable for $368,266 in back wages and $368,266 in penalties. This was the first time the general contractor had learned of the problem.

Thirty-six underpaid employees of the subcontractor who had not assigned their claims to the Department of Commerce filed a lawsuit under the Ohio Prevailing Wage Law. A default judgment was entered against the subcontractor. The trial court held the general contractor liable for the back pay but denied the employees' request to penalize the general contractor for an additional 25 percent of the back wages. The trial court held that the penalty was discretionary, and was not warranted because the general contractor had cooperated in the investigation. For the same reasons the court also did not

impose the 75 percent penalty to be paid to the Director of Commerce. The court of appeals affirmed and the Ohio Supreme Court accepted the case for review.

The Supreme Court recognized that Ohio's Prevailing Wage Law provides to employees a framework of administrative and civil proceedings to ensure an employer's compliance with the law. This framework includes statutory deterrents in the form of civil and criminal penalties.

Where there has been a determination of an underpayment of prevailing wages, an employee has three choices. The employee can initiate an enforcement action, or the employee can assign to the Director of Commerce the right to institute the enforcement action. If the employee chooses to do neither, the Director has an obligation to bring an action within a specified time to collect any amounts owed to the employee and the Director.

If the employee does initiate the enforcement action the remedy set forth in the statute includes recovery of the underpaid amount plus a penalty amount equal to 25 percent of the underpayment. According to the Supreme Court's decision, there is no discretion regarding the award of the penalty amount. If the employee proves his or her case, then the statutory penalty follows as a matter of course and is mandatory. This is also true for the 75 percent penalty to be paid to the Director of Commerce whenever the Director determines that there has been a prevailing wage underpayment and the determination becomes final.

There is one exception to the payment of penalties. No penalties will be assessed when the Director of Commerce finds that an underpayment is the result of a misinterpretation of the prevailing wage statutes or an erroneous preparation of the payroll documents, and restitution of the underpayment has been made.

Bergman v. Monarch Constr. Co. (2010), 2010-Ohio-622. ■

Time to File a **Claim Against the State**

By Patrick Devine

Proper documentation of a construction claim is an obvious prerequisite for recovering extra costs on a project. But when dealing with State of Ohio projects, one must be vigilant about the time frames in which to file and pursue the claim. In particular, when a claim is submitted to the State Architect, the time to bring a lawsuit against the State, if the claim is not resolved, begins to run 120 days from the submission of the claim to the State Architect.

In a recent case involving a project for The Ohio State University (OSU), a contractor asserted that after it had signed the contract with OSU it experienced unanticipated costs due to a change in the law regarding the ratio of apprentices to journeymen. The contractor also alleged that OSU failed to maintain the construction schedule, changed the design and required additional work not in the contract.

On Jan. 27, 2005, the contractor submitted a written claim to the project administrator pursuant to the dispute resolution procedures in Article 8 of the contract. This provision allows a contractor to appeal to the State Architect for a final administrative decision if the project manager does not resolve the claim. The State Architect is then to render a decision, or schedule a meeting within 30 days of receiving the contractor's claim. Unless the parties mutually agree to an extension of time, the State Architect has 60 days from the meeting to

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.

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render a decision on the claims. The contract provided that the State Architect's decision is final as required by Ohio Revised Code section 153.12.

In this case, on Aug. 23, 2005, the contractor appealed to the State Architect the project administrator's decision to reject the claims. A meeting was held with the State Architect who issued a decision on Jan. 6, 2006, notifying the contractor that there was insufficient information to justify additional compensation. The decision addressed each claim individually with the State Architect either denying the claim, requesting revisions or additional information regarding the claim, or postponing a ruling pending review. The contractor apparently considered the decision to be merely a request for additional information rather than a final decision.

Time passed with no resolution. In September 2007, the contractor sent a letter to OSU regarding the status of its claims and the outstanding contract balance. OSU responded in October 2007, that the State Architect's decision was final and that the contract balance would be released once the contractor submitted its final close-out documents.

In July 2008, the contractor sued OSU in the Court of Claims asserting breach of contract. OSU responded by filing a motion for summary judgment contending that the two year statute of limitations in Ohio Revised Code section 2743.16 time-barred the contractor's action. The Court of Claims granted OSU's motion and dismissed the case.

Ohio Revised Code section 2743.16(A) provides that when suing the State, "civil actions against the state...shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties."

For State of Ohio public improvement projects, Ohio Revised Code section 153.12 requires a contractor to exhaust the administrative remedies set forth in the contract's Article 8 provisions before filing a lawsuit on disputed claims. Paragraph (B) of section 153.16 states "[n]otwithstanding any contract provision to the contrary, any claim submitted under a public works contract shall be resolved within one hundred twenty days." After the conclusion of the 120 day period the contractor shall be deemed to have exhausted all administrative remedies.

OSU argued that the contractor's time period to file a lawsuit started to run from Dec. 21, 2005, 120 days after the contractor's claim was submitted to the State Architect (Aug. 23, 2005). In the alternative, OSU argued that the contractor's cause of action began to run on Jan. 6, 2006, when the State Architect sent the final decision letter. In response, the contractor asserted that the State Architect's decision letter was not final, and the contractor's cause of action did not arise until OSU sent its letter in October 2007, rejecting the claim.

From the Court of Appeals' viewpoint, the statutes referenced above require that the State resolve claims within 120 days of submission to the State Architect. If the State does not do so, then in effect, the claim is rejected and the contractor is free to bring a lawsuit against the State. The Court concluded:

> Under the terms of R.C. 153.12(B) and 153.16(B), plaintiff's [contractor's] cause of action for breach of contract accrued by December 21, 2005, when the 120 day period lapsed after the plaintiff's appeal to the State Architect, regardless of whether the State Architect subsequently issued a final decision on the validity of plaintiff's claims. According to R.C. 2743.16(A), plaintiff had two years, or until December 21, 2007, to file its complaint in the Court of Claims. Because plaintiff did not file its complaint until July 29, 2008, the Court of Claims properly granted summary judgment to defendant [OSU] on plaintiff's breach of contract claims.

As final salt in the wounds of the contractor, the Court held that because the contractor never submitted its close-out documents but instead filed its lawsuit, the claim for the contract balance and retainage merged with the claim for the additional costs. This merger also resulted in time-barring the contractor's claims for the outstanding balance due under the contract.

The Painting Co. v. Ohio State University (Oct. 29, 2009), Franklin App. No. 09AP-78, 2009-Ohio-5710. ■

NEWS YOU CAN USE

Prevailing Wage Thresholds Increased

Effective Jan. 1, 2010, the threshold amount for triggering prevailing wages for "new" construction of public improvements increased to $78,258.

The threshold increased to $23,447 for "reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting" public improvements.

The thresholds are increased by the Director of the Ohio Department of Commerce every other year. ■

Who Does the OUPS Law Protect?

By Patrick Devine

This question was recently addressed by an Ohio Court of Appeals in a case involving the installation of a fence on private property where the excavator struck underground utility lines.

Russell Knox, a prospective landowner, began making improvements to a property he intended to purchase from his sister. Knox hired Jonathan Heizer to drill the postholes for a fence line that had been pre-marked by Knox.

Heizer knew that, as an excavator, he was supposed to call the Ohio Utilities Protection Service (OUPS) before he began digging; but since the fence line had already been marked he assumed that Knox either believed there were no underground utilities in the area, or that OUPS had already been notified.

While Heiser was digging a posthole, a neighbor came running and told Heiser that he had hit the electrical and telephone lines running to her property. She operated a tanning business from her property. The utility companies were notified and service was restored that day.

The neighbor sued Heizer, Knox and his sister for $18,750 in consequential damages for lost revenue and equipment damage due to an electrical spike caused by Heizer hitting the electrical line. The trial court found only Knox liable.

The neighbor appealed contending that the trial court erred in not finding Heizer, the excavator, liable for negligence. She argued that Heizer's failure to meet his duty under the OUPS law, Ohio Revised Code 3781.28, to notify OUPS before he began digging constituted negligence per se. Heizer responded that the OUPS statute was intended solely to benefit the utility companies, and only utility companies may hold Heizer liable under the statute.

The Court of Appeals decision analyzed the concept of negligence per se and whether the OUPS statute imposes upon any person a specific duty for the protection of others and, if so, is the failure to perform that duty negligence per se. Ohio Revised Code section 3781.28(A) states "at least forty-eight hours but not more than ten days before commencing excavation, the excavator shall notify the protection service of the location of the excavation site and the date on which excavation is planned to commence." This duty is imposed on all excavators and whether the duty has been met requires an answer to only one question: Did the excavator timely notify OUPS? The Court of Appeals stated that the statute can be adopted as the appropriate standard of care.

The next question is, "Who is this standard of care designed to protect?" The Court of Appeals acknowledged that there is little statutory history as to why the General Assembly enacted the OUPS law. But court decisions around the state have held that the purpose of OUPS is to help protect underground utility facilities in private and public improvement projects. The Court of Appeals then cited the Web site of OUPS and found in OUPS' membership application form the statement: "The purpose for which the Ohio Utilities Protection Service was formed...is to operate a statewide one-call system...in order to reduce dig-in damages, periods of utility service disruptions, and the risk of injury to excavators and the public."

The Court of Appeals then concluded that the purpose of the OUPS statutory scheme "is broader than mere protection for underground utilities...and see no good reason to think, that the statute contemplates only the interests of utility companies." The Court concluded:

> It only makes sense that the statutory scheme, and R.C. 3781.28(A)'s notification requirement in particular, seeks to prevent damage to underground utilities in order to prevent potential injuries and to protect a variety of interests – the utility owners' interest in preventing damage to their equipment, no doubt, but also the public's interest in safety, and the interest in undisrupted service that those who rely on an underground utility have. While the immediate purpose of the statute may be to protect underground utilities, this is simply the means chosen by the General Assembly to achieve larger goals.

The Court of Appeals therefore rejected Heizer's argument that the OUPS statutory protection is only for the sake of the utility companies.

Boyd v. Moore (2009), 184 Ohio App.3d 16. ■

Terms and Conditions on the Reverse Side of Sales Agreements

By Patrick Devine

The fine print language common on the reverse side of a supply sales agreement or credit application can be one-sided and problematic for contractors. A common "no modification" clause attempts to prohibit post-contract changes to the terms and conditions of the sales agreement. Many times, however, the parties to the agreement have performed in a manner that is contrary to the strict terms of the agreement. Can a contracting party's course of performance serve to modify the agreement despite a no modification clause? In certain circumstances, as seen below, the answer is yes.

A contractor specializing in the installation of water, sewer and storm lines had used the same pipe supplier for over 15 years. The contractor entered into a credit agreement with the pipe supplier, and the pipe material was purchased on a credit account. There were problems with the pipe on two projects; but the pipe supplier paid the contractor for the additional costs related to fixing the problems. Although the contractor considered obtaining pipe material from another source, the original supplier made assurances that it would reimburse the contractor if there were any future problems. As a result, the contractor continued to utilize the supplier for three additional projects.

The contractor, however, continued to have problems with a certain diameter pipe supplied for these projects. The supplier reimbursed the contractor for additional costs on one of the projects, but refused to pay claims on the other two. The contractor sued the supplier for alleged breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, bad faith breach of contract and fraud. The pipe supplier filed a counterclaim for breach of contract for unpaid bills.

No-Oral Modification and Anti-Waiver Clause

The trial court granted summary judgment in favor of the pipe supplier, finding that the presence of a no-oral modification clause and an anti-waiver clause in the credit application barred the contractor from relying upon the course of business between the parties or statements made by the pipe supplier's representatives. The trial court ordered the contractor to pay the unpaid bills of the pipe supplier. The contractor appealed the court's decision.

The no-oral modification clause in the credit application stated that signing the agreement "constitutes acceptance of all of [pipe supplier's] Terms and Conditions of Sale printed on the reverse side of this application, for all current and future orders and sales. The terms and conditions may not be amended, modified, terminated or revoked except by a written document signed by an authorized representative of [pipe supplier]."

The anti-waiver provision stated: "WAIVER. No delay or failure of Seller to exercise any right or remedy under these Terms and Conditions shall be construed to be a waiver thereof. Waiver by Seller of any breach shall be limited to the specific breach so waived and shall not be construed as a waiver of any subsequent breach."

The Uniform Commercial Code (UCC) Governs Sales Between a Contractor and Supplier

The UCC enforces no-oral modification clauses to protect against fraudulent or mistaken oral testimony concerning actions by one or both parties to the contract subsequent to entering into the contract. As with most rules, there are exceptions. The Ohio UCC provides that an attempt at modification or rescission may operate as a waiver, and that a course of performance may show a waiver or modification of a term of the contract inconsistent with such course of performance.

The Court of Appeals recognized that although the UCC permits no-oral modification clauses in contracts, the courts do not favor them for a number of reasons. A no-oral modification clause would deny effect to every oral modification, including those fully voluntary, freely entered and entirely consensual. Parties to a contract should be free to decide how they deal with each other including modifying or at least waiving the no-oral modification clause. Like any other term of a contract, a no-oral modification clause can be waived. Such waiver can be established by evidence of course of performance.

In this case, the contractor argued that the supplier's course of conduct of reimbursing the contractor for the additional costs due to the alleged defective pipe and providing assurances that it would continue to do so constituted a course of conduct establishing a waiver of the no-oral modification clause. The supplier responded that the anti-waiver provision in the contract prohibits waiver of the no-oral modification clause, or any other provision in the contract.

The Court of Appeals noted that "[t]ypically, anti-waiver clauses serve to protect a party when it has previously accepted a late payment or failed to exercise a remedy when the agreement was earlier breached." The Court said that the anti-waiver clause in this case is limited to this type of situation. It would apply to the pipe supplier's failure to exercise any rights or remedies if the contractor is in breach of the contract. In other words, the anti-waiver clause provided that if the pipe supplier failed to exercise its rights and remedies in the past, it has not waived its ability to rely upon the rights and remedies in the future. The clause in this case made no mention of breaches by the pipe supplier.

The Court of Appeals said that if the pipe supplier intended the anti-waiver clause to apply to all provisions in the contract, the pipe supplier would have to expressly include such language in the clause.

Fields Excavating, Inc. v. McWane, Inc. (Nov. 9, 2009), Clermont App. No. CA2008-12-114, 2009-Ohio-5925. ■

Settlements of Claims are Contracts and will be Construed Like Contracts

By Patrick Devine

When entering into a settlement of a claim, the contractor must be careful to include all terms of the settlement and make certain that the provisions state what the contractor agreed to. This principal was exemplified in the following case.

A contractor entered into an agreement with a city to paint a water tower. After a dispute arose regarding the contractor's performance and the city's payment under the agreement, the parties entered into a settlement agreement and mutual release.

It was agreed in the settlement that the city would pay the contractor a lump sum of $30,000 and the city would retain 5 percent of the contract sum until after the warranty inspection, at which time the city would pay the contractor the retained amount so long as the work was completed in accordance with the specifications. The city further agreed to waive liquidated damages.

Breach of Contract and Unjust Enrichment

Despite the settlement agreement, the contractor sued the city alleging breach of contract and unjust enrichment. The contractor alleged the city owed $31,756, which the city had retained from the original contract amount, and that this was the amount owed following the warranty inspection. The contractor relied upon correspondence dated prior to the settlement agreement. The contractor alleged that the city had withheld as retainage more than 5 percent of the contract bid. The city counterclaimed, alleging that the amount owed to the contractor was $15,878, which represented 5 percent of the contract bid price.

Relying on the principle of contract law, which says that the plain and unambiguous terms of an agreement must be given their plain and ordinary meaning, the court sided with the city. The court said the settlement agreement did not state that the city would pay the contractor an unspecified amount being retained by the city. The agreement specifically stated that the city would pay the contractor a one time lump sum of $30,000 and 5 percent of the contract bid price upon a successful inspection, which amounted to $15,878. The Court enforced the terms of the settlement which stated that the settlement agreement supercedes any prior agreements.

The court said that if the contractor believed it was entitled to an additional ten percent of the contract bid price, then it should have negotiated for that amount at the time of the settlement agreement. The terms of the settlement agreement control.

D & M Painting Corporation v. City of Perrysburg (Feb. 12, 2010), Wood App. No. WD-09-033, 2010-Ohio-465. ■

WEB EXTRAS

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Project Labor Agreements

By Patrick Devine

A Project Labor Agreement or PLA is a project specific uniform agreement covering all the crafts on a project and lasting only as long as the project. A PLA essentially sets the terms and conditions of employment on the project by standardizing schedules, work rules and labor dispute resolution procedures. PLAs have been around for quite some time but have garnered recent controversy when PLAs were implemented in public sector construction projects.

On Feb. 6, 2009, President Obama issued Executive Order 13502 which encouraged federal agencies to consider requiring the use of PLAs on large scale federally funded construction projects of at least $25 million. This rescinded President Bush's executive order that prohibited making PLAs a bid specification for federal projects. The Obama Executive Order, in permitting federal agencies to use PLAs, stated: "where the use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) consistent with law."

In July 2009, the Federal Acquisition Regulation (FAR) Council issued a proposed rule to amend the FAR to implement President Obama's Executive Order. The rule would apply to the General Services Administration, the Department of Defense and the National Aeronautics and Space Administration. In November 2009, the General Services Administration announced that it is conducting market surveys in certain parts of the country as part of a pilot program to explore the feasibility of using PLAs. An initial list of 10 large American Recovery and Reinvestment Act projects were chosen as part of the pilot program. One project on the list is the A.J. Celebrezze Federal Building in Cleveland.

PLAs in the Public Sector

Even before Obama's Executive Order, the use of PLAs in the public sector in Ohio and other jurisdictions has been well settled. The early legal challenges to public PLAs focused on whether such agreements violated competitive bidding principles and whether the requirements of PLAs were preempted by the National Labor Relations Act. The United States Supreme Court in the 1993 *Boston Harbor* case disposed of the preemption challenge and opened the door for use of PLAs by state, county and municipal agencies.

In Ohio, the argument that PLAs, as a bid specification, violates competitive bid statutes was laid to rest in a 1995 decision, *State ex rel. Associated Builders & Contractors v. Jefferson Co. Bd. of Comm.* which upheld a PLA required for the construction of a county jail. In that case, the PLA was approved because it did not distinguish between union and non-union contractors in the bidding process. The PLA did not require any contractor to become a union employer, and did not apply beyond the particular project. Finally, the PLA did not prevent any contractors from submitting bids and being considered for award.

With these legal hurdles out of the way, the use of PLAs in Ohio's public sector has grown. Since 2007 the Ohio School Facilities Commission has permitted school districts to utilize PLAs for certain projects under that program. In July 2009, the Community Learning Center Joint Board of Review overseeing $800 million in Akron school and community learning center construction projects approved PLAs for three projects.

Considering Union vs. Non-Union Interests

A major premise for PLAs is that they work best for large multi-prime or large construction projects that would otherwise have a dozen or more contractors working under a diverse set of work rules, conditions, hours and payment procedures. The resulting inefficiencies and potential for labor strife cause some public owners to consider a PLA for a specific project.

The controversy raised over PLAs is generally drawn over the division between the interests of union and non-union contractors. Pro-PLA advocates contend that PLAs can reduce project costs, increase efficiency, avoid delays due to labor disputes, insure a steady supply of skilled workers, allow trades to work side by side under the same terms and conditions and provide a labor dispute process for the duration of the project.

Those not in favor of PLAs contend that they limit competition, raise project costs, are unfavorable to non-union contractors and that they don't make sense if the public improvement is already subject to the prevailing wage laws.

Both sides have commissioned studies that support their respective positions. Nevertheless, when considering whether to require a PLA for a particular project, the public owner should develop a record for supporting its decision to enter into a PLA. There must be more of a reason for a PLA than just the general prospect that it might be advantageous to the owner.

The public owner must show that its purpose is consistent with the interests embodied in the competitive bidding statutes. It may be helpful if a consultant or the construction manager provides a report addressing a number of issues including the nature of the project, its complexity, scope and size, the estimated project cost, the estimated time to complete the project, the number of trades that will be involved and the likelihood the project will be affected by labor disruptions. The study should also analyze any elements that will make the project completion more difficult, and whether the local construction industry is predominately independent or unionized.

When is a PLA Appropriate

In one court case, the state commissioned a study to determine if a PLA was needed on a prison project. The study expressed a concern about the availability of sufficiently trained craft labor in the particular area of the state where the prison was to be built in light of other prison projects and several significant private sector construction projects in progress in the same geographic area. The study concluded that a PLA was appropriate to ensure the project proceeds on an expedited schedule with a sufficient pool of skilled, experienced labor.

The PLA language itself must be consistent with the principles underlying competitive bidding laws which include maintaining competition, guarding against favoritism and obtaining the best possible work at the lowest price. The PLA should not distinguish between union and non-union contractors in the bidding process. It must not require any contractor to become a union employer, and it must be limited to the particular project.

Despite the controversy surrounding PLAs, they are being utilized more and more in the public sector. If not properly crafted and launched for the appropriate project, PLAs can and will continue to be challenged. ■

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News and Notes

On Dec. 14, 2009, **John Krimm** presented "Labor Relations Under the Obama Administration: The Good, The Bad and The Ugly" at the Ohio Contractors Association's Winter Conference in Columbus.

John Krimm authored an article published in the January 2010 issue of *Ohio Contractor* titled "Labor Relations, Times, They are a Changin' Under Obama Administration."

On March 23, 2010, (Columbus) and March 25, 2010, (Cleveland) SZD's Labor & Employment Practice Group presented **"Social Networking Brings New Challenges for Employers."**

On March 25, 2010, **Patrick Devine** presented "Prevailing Wage Law in Ohio" in Columbus for Lorman Education Services.

On April 21, 2010, SZD's Labor & Employment Practice Group will present the **"Fundamentals of Employment Law in Ohio"** for Sterling Education Services, Inc. For more details and to register, go to: www.sterlingeducation.com - Seminar #10OH04061. This course has been approved for Ohio CLE 7.0, CPE 8.0 and HRCI 7.0 education credit.

On April 23, 2010, **Michael Tarullo** will moderate the plenary session on "The AACE Recommended Practice for Forensic Schedule Analysis: The Good, The Bad and The Ugly" at the 2010 Annual Meeting of the ABA Forum on the Construction Industry in Austin, Texas.

Michael Tarullo has been named Chief Editor of the American Bar Association's 2010 *Construction Glossary Book*.

Michael Tarullo has recently updated a chapter in the American Bar Association's Design Build Deskbook, 4th Ed., titled "Federal Design Build Procurement."

Michael Tarullo authored an article published by the American Bar Association titled "Challenges for the Legal Practitioner - Project Scheduling and Scheduling Experts." ■