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Contractor Bound To PLA Breached Contract By Assigning Work To Carpenters

In a very interesting case of first impression, the U.S. District Court for the District of New Jersey held that a subcontractor that assigned roofing work on a project covered by a project labor agreement (PLA) to workers represented by a union that was not signatory to the PLA is liable for breach of contract under state common law, despite a National Labor Relations Board (NLRB) decision upholding the assignment under Section 10(k) of the National Labor Relations Act. *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc.*, Case No. 07-3023 (D.N. J. December 3, 2009). Pursuant to a state statute authorizing PLAs on public works, Egg Harbor Township required all parties working on a community center project to be signatories to a particular PLA. The general contractor signed the PLA and subcontracted roofing work to a subcontractor which signed a letter of assent binding it to the PLA. The roofing subcontractor had an area-wide labor agreement with the Carpenters Union and used their employees to install metal roofing and perform related tasks, even though the Carpenters were not signatory to the PLA. The Sheet Metal Workers, who claimed jurisdiction over the work under the PLA, filed a grievance and received a favorable arbitration award under the PLA procedures for resolution of jurisdictional disputes. At the same time, the NLRB ruled that the Carpenters were entitled to the work.

The Sheet Metal Workers then sued. The district court found that the Sheet Metal Workers established a breach of contract relying on the arbitrator's decision, including findings regarding contractual requirements that all work must be assigned to a PLA signatory and must be made based on area practice. The court, while acknowledging that the arbitrator's and NLRB's decisions conflicted, found that this conflict did not effect the Sheet Metal Workers' claims because the lawsuit sought only monetary damages for breach of the PLA.

Bottom Line

Contractors must carefully read all contracts to which they may become obligated and to ensure that, considering other contracts, they are not creating conflicting commitments. ■

New Jersey Enacts Bills Promoting Diversity In Public Contracting

New Jersey just enacted two new bills designed to encourage diversity in public contracting.

One law requires New Jersey state and local government agencies to transfer an amount equal to 0.5 percent of any public works contract of $1 million or more to the state Department of Labor and Workforce Development. The requirement applies to all public works contracts

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that receive funding through the American Recovery and Reinvestment Act, regardless of their size. The funds are earmarked for grants to public, private, not-for-profit, employer, and labor organizations that sponsor outreach and training programs for minority groups and women in trade and professional occupations within the construction industry. The state Labor and Treasury departments are required to submit annual reports providing data for each program funded under the bill, including the amount of funds each outreach or training program received and performance results of minority group member and women participants, such as employment placement, increased earnings and employment retention, and enrollment into registered apprenticeships.

The state also codified an August 2009 executive order (E.O. 151) in which the Governor affirmed the state's commitment to equal employment opportunity for women and minorities in every public contract. The new law states that If the division determines that a contractor has failed to make a good-faith effort to recruit and employ minorities and women, the bill provides that state may withhold payment from the state-funded portion of the contract and the contractor may be subject to an assessment. Further, contractors that receive ARRA funding must ensure that minorities and women apprentices and trainees are working on state and ARRA-funded worksites.

Bottom Line

Both laws are now in effect. Those contractors that perform work on public works should make sure that they are in compliance with their Affirmative Action and Diversity obligations. Failure to do so could result in fines or even debarment. ■

New Jersey Rule Implements Prevailing Wage Law

A final rule just published implements a 2008 state law that requires contractors to pay prevailing wage rates to workers performing construction work on a New Jersey public utility. The regulation, which is in effect now, provides that contracts for construction work on a public utility must specify what the prevailing wage rates are that apply to the project, state that workers will be paid the applicable prevailing wage rates, and attest that only workers who have completed OSHA-certified safety training particular to their jobs will be employed on the worksite. It establishes recordkeeping requirements for contractors and the authority of the state Department of Labor and Workforce Development with regard to inspecting records and questioning workers. The rule defines what constitutes a violation and specifies the penalties for those convicted of violations.

Bottom Line

Companies with state contracts now have a yet another new regulation to deal with. Review this regulation carefully and make sure you are in compliance, failure to do so could result in fines and debarment. ■

Third Circuit Decries 'Politically Correct' Test For Bias In The Workplace

The Third Circuit Court of Appeals recently issued an opinion which most employers will find exceedingly refreshing. In affirming the dismissal of an age bias case, the Court held that a single remark, referring to the plaintiff as the "Old Man of the Operation," was not sufficient evidence to support a *prima facie* case of age discrimination. "After all," the Court noted, "whether or not a supervisor makes reference to an employee's age it is likely that he will have some concept of it," he said. What seems important about this case, however, is the court's criticism of an "employment culture" that requires every workplace remark to be "politically correct." *Hyland v. American Int'l Group*, No. 08-4203,(3d. Cir. January 12, 2010). According to Judge Morton Greenberg, writing for the court, "[I]t would be unfortunate if the courts forced the adoption of an employment culture that required everyone in the structure to be careful so that every remark made every day passes the employment equivalent of being politically correct lest it be used later against the employer in litigation."

With regard to the reorganization that led to plaintiff's discharge, the court stated, "[I]t is necessary to remember that the age discrimination laws are not intended to remedy all of the possible wrongful adverse employment decisions by an employer, and the law surely should not be used to impede an employer's effort to organize its business as it deems fit so long as the employer in doing so does not violate employment age discrimination restrictions." ■

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