

Construction Law Newsletter

Published by the Section
on Construction Law
of the Oregon State Bar

Issue No. 9

August 1991

NEW MODEL PUBLIC CONTRACT RULES

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You should be aware that the Attorney General's Model Public Contract Rules were revised effective August of 1990. Most state agencies that function under these rules and many local public bodies have adopted them, in whole or in part.

There are not many new surprises in the Model Public Contract Rules. First, as you may have expected, the rules include a new OAR 137-30-008, which requires bidders to be registered with the Construction Contractors Board before submitting bids or proposals. Otherwise, the bid "shall" be deemed non-responsive and be rejected, "unless contrary to federal law." Certain federal grant agencies have maintained that registration amounts to a prohibited pre-qualification process under their regulations. If you are involved in situations where an unregistered bidder has submitted a proposal or bid, you may wish to follow up on the federal granting agency's internal regulations or interpretations in that regard.

Contracts will also require certification by the contractor that the contractor is in compliance with Oregon's tax laws in accordance with ORS 305.385, which requires agencies to provide the Department of Revenue with annual lists of entities contracting to provide goods or services, and allows agencies to suspend licenses or refuse to renew any contract if the party is not current in its tax obligations. ORS 305.385(6) specifically requires this certification but, technically, only applies to those providing goods, services or real estate space. (OAR 137-30-010(3)(B)(i).

Likewise, the public contracts must contain a clause that requires all employers who work under the contract to provide worker's compensation coverage for their employees as required by ORS 279.320(2). (OAR 137-30-010(3)(B)(iii)). The contractor must also certify that all its subcontractors will be registered with the Construction Contractors Board before the subcontractors commence work under the prime contract. (OAR 137-30-010(3)(B)(v)).

OAR 137-30-020(1) prohibits the contracting agency

from accepting telefax bids, proposals, or signatures. It is unclear why. To the same effect is OAR 137-30-060(1) which prohibits the acceptance of telefax modifications to bids and proposals.

OAR 137-30-104 now sets a 14-day period (although allowing the agency to establish a different time in its ITB or RFP) for disappointed vendors or contractors to file a protest with the agency. This rule purports to make protests filed with an agency subject to the strictures (and pitfalls) of the Administrative Procedures Act. You may wish to consider the interplay with ORS 279.067, which does not place any time limit on the right of an adversely affected bidder to file suit and which should overrule any attempt to make bid protests the subject of only administrative processes. At best, this rule, if enforced, would establish a deadline after which no agency protest would be considered, requiring the affected bidder to resort to the courts.

Subsection 2 of the rule requires the protestor to specify the grounds for its protest, arguably precluding the protestor from later raising before the agency arguments different from those set forth initially.

The new amendments to the Department of General Services public contract exemption rules allow contracts of less than \$50,000 (not \$100,000) to be let without formal competitive bidding to certified ESB's after good faith effort to obtain a minimum of three competitive quotes.

Perhaps the most significant amendment is new OAR 125-310-026, allowing the use of CM/GC (construction manager/general contractor) contracts, which would generally be utilized in conjunction with RFP procurements. The new rule allows public contracting agencies to seek individual or class exemptions from the Department of General Services to use RFP procedures for selection of CM/GC firms, who will be required to establish guaranteed maximum prices for constructing public improvements. Contractual requirements must be stated clearly in the solicitation document and must describe the methods by which the CM/GC "shall" competitively select other contractors and subs to perform the work and describe the methods by which the CM/GC may compete to perform the work. Evaluation criteria must be stated clearly in the solicitation document and may include, but are not limited to, cost, quality, and relevant experience, and

time required to commence and complete the project.

The agency must prepare written findings to support the use of the *CM/GC* contracting method and submit them to the director of the Department of General Services for approval. The findings must show compliance with ORS 279.015(2)(a) and (b) (unlikely to encourage favoritism or diminish competition, and will result in substantial cost savings). The rule contains a blanket exemption for Department of General Services, Department of Corrections, and the Oregon State System of Higher Education to utilize this method.

The foregoing is simply a summary of the major changes to the Model Public Contract Rules and is not, of course, a substitution for reading and studying those rules yourself.

AFFIRMATIVE ACTION REPORT - OSB CONSTRUCTION LAW SECTION 1990-1991

*By William F. Cloran
Assistant Attorney General*

PROGRAM/GOALS. The OSB Construction Law Section's Affirmative Action Program serves the Section's Third Goal of "Service to the Public." The purpose of the program is to inform minorities and women of the opportunities available in the practice of construction law, and to let firms and other employers know of the potential benefit minority and women lawyers can bring to a law practice. The Section decided upon an active program when it perceived that (1) the number of minority lawyers was limited, (2) the traditional career tracks for minority lawyers and women practitioners would not lead to consideration of a practice in construction law early enough in their legal careers to allow full exploitation of the opportunity. There was perceived to be little, if any, resistance to minorities or women as practitioners in the construction bar or in the industry. The problem instead seemed primarily one of getting the word out about the opportunity.

IMPLEMENTATION. Chairman Arnie Gray appointed former Chairmen Mike Scott and Bill Cloran in the Fall of 1990 to implement a program to publicize the opportunities in construction law. Messrs. Scott and Cloran sought information on the minority makeup of the Bar and the success of the Bar's affirmative action program. That inquiry led to the conclusion that efforts would be best expended in the law schools and on undergraduates considering law school. Existing

construction law firms seem to be doing a good job in recruitment and promotion of women. There simply have not been many racial minority members in the Bar to "pitch" any kind of a program to.

EXECUTION. Execution of the program began with Mike Scott making a presentation of the concept to the Affirmative Action Committee of the Bar. Bill Cloran wrote to the three Oregon law schools to request an opportunity to make presentations to target student groups. Mr. Cloran also made contact with the engineering departments at the University of Portland and Oregon State University. All schools except the University of Oregon Law School responded favorably. Mr. Cloran visited the senior engineering classes at the University of Portland and OSU in September and October. Mr. Scott mailed informational materials to all major law firms, and coordinated with Lewis and Clark Law School. Messrs. Scott and Cloran made a presentation at Willamette University's law school. The University of Oregon Law School finally responded in the winter, but it could never seem to set a date for a visitor to make a presentation to interested minority students. The presentations emphasized the opportunities available in construction law, prerequisite training, and career planning paths. The Bar clerkship and scholarship programs were also emphasized.

RECOMMENDATIONS. Minorities and women represent a large and capable portion of new lawyers entering the profession over the next 20 years. Many people from these groups enter law school with life experiences outside of the classroom which give them a maturity not available in junior associates and an ability to relate to people who work for a living. They can be valuable assets to any practice area, but especially to one concerned with the professionalism and competence of its members. The best of these people will be recognized as a valuable commodity at some time in the future and will be heavily recruited after passing the bar exam. A strong program designed to let women and people of color know of the opportunities in our practice area will help to maintain professional standards by getting some very good people to think about joining us in the practice of construction law, and building a base of strong and competent lawyers of diverse backgrounds in our specialty — a specialty that

their vision of what lawyers do may not include unless it is brought to their attention.

IN THE FUTURE, THE SECTION SHOULD:

- Continue informational programs by sending lawyers to speak to minority and women student groups;
- Promote policies favoring equal opportunity and treatment for all lawyers, and advancement based upon professionalism and competence; and,
- Initiate programs to provide academic and financial encouragement to students and lawyers from disadvantaged circumstances who show promise as construction law practitioners.

AGC/OSHD COMMITTEE UPDATE

Copies of the revised Standard Highway Specifications became available in June 1991. The first OSHD bid letting for projects using these new specifications in their entirety will probably be in September 1991. Some portions of the new specifications are currently being used in the Special Provisions for current projects.

All construction law attorneys, contractors, subcontractors, suppliers, and OSHD representatives will need to become familiar with the changes. As the revised specifications replace the 1984 version, the Associated General Contractors and OSHD are conducting an informal survey to see if there is interest in a possible seminar this fall covering the new specifications and highlighting the changes. If you have any interest in a seminar, have comments regarding the present specifications, questions about the revised specifications or suggestions for further revisions, you should contact the AGC subcommittee chair for the appropriate sections. The AGC chairs, and their OSHD counterparts, are:

Legal and Administrative: Bob Reinhardt of Morse Brothers Wayne Cobine, OSHD);

Roadwork, Drainage and Sewers: Brent Kerr of Kerr & Associates (Ken Karnosh, OSHD);

Bridges: Dave Place of Hamilton Construction (Tom Lulay, OSHD);

Bases and Asphalt: Jay Compton of Salem Road & Driveway (Al Vohland, OSHD);

Lean Concrete Base and PCC Pavement: Dick Angstrom of OCAPA (Al Vohland, OSHD);

Traffic Control, Safety & Guidance Devices and Signs: Maxine Pierce of M.R. Pierce Construction (John Sheldrake, OSHD);

Illumination and Traffic Signals: Emerson

Hamilton of Cherry City Electric (Dwayne Hofstetter, OSHD); and

Landscaping: Audrey Castile of S&L Landscaping (Merle Anderson, OSHD).

Remember, contractor and subcontractor input is essential to the OSHD specification revision process. Our comments are also a valuable and essential part of that process. So talk with your clients and make sure you are heard.

RECENT DEVELOPMENTS IN CONTRACT LABOR LAW

Spring and early summer of 1991 has seen two case law developments of interest to attorneys who represent participants in the public contract construction arena. The following are summaries graciously prepared by Bill Cloran, Assistant Attorney General.

**Building and Construction Trades v.
Department of Labor**
932 F.2d 985 (D.C. Cir. 1991)

This case may represent an end of the trend to expand coverage under the Davis-Bacon Act, 40 U.S.C. § 276a, et seq., to laborers and mechanics at sites remote from the actual place where a public improvement is being constructed. The workers involved were truck drivers bringing materials and supplies to the site from storage and manufacturing facilities. The court held that regulations purporting to include the delivering truck drivers within the coverage of the Act conflicted with the situs language in the law.

Dicta in the case suggests that an attack on similar rules which consider whether material extraction and processing operations geographically separate from the work are "commercial sources" or "dedicated sources" may also be feasible. In restricting the Act's application to the location of the improvement, the court said, "We find no ambiguity in the text: 'site of the work' clearly connotes to us a geographical limitation."

A recent article by a national AGC staffer reprinted in the Daily Journal of Commerce on July 15, 1991, at page 15, contains some interesting observations from an industry viewpoint, but it is more correctly analyzed as an advocacy essay than as a dispassionate analysis of the state of the law. Clients familiar with the article may have to be cautioned that the case itself concerned only truckers and not material sources.

Babler Bros., et al. v. Roberts

Case No. 90-1119-FR (D. Or. 1991)
-and-

Dyad Construction, Inc. v. City of Portland, et al.
Case No. 91-47-FR (D. Or. 1991)

These two cases presented attacks by non-union contractors and the AGC upon ORS 279.334(3), Oregon's eight hour day law. In the principal claims, the plaintiffs alleged that ORS 279.334(3), which exempts union contractors from the law, was invalid as preempted by the National Labor Relations Act, 29 U.S.C. § 141, et seq., or, alternatively, as in violation of the equal protection guarantee of the U.S. Constitution. Attorneys representing Babler Bros. and the AGC, and attorneys for the State, worked with the Court to get a decision prior to the construction season. In both cases, the Court held that the law is a valid exercise of State power. Both decisions have been appealed to the Ninth Circuit. For now, Oregon law continues to require overtime pay for work over eight hours per day unless the workers involved are covered by a collective bargaining agreement.

Rumor Mill

There is a rumor afoot that the U.S. Department of Labor plans to issue wage rates under the Walsh-Healey Act sometime this year. Walsh-Healey has been a "dead letter" in the wage rates area for years. Although the Labor Secretary had the authority to establish rates, she/he seemed content to live with the minimum wages established by the Fair Labor Standards Act. The potential for reduced Davis-Bacon Act coverage may have the effect of bringing the new Walsh-Healey rates into play for manufacturers and material suppliers delivering goods pursuant to a subcontract for a public work that is federally funded.

CALENDAR OF UPCOMING EVENTS

Mark your calendars now as there are two important events in the next two months you will want to attend:

September 12, 1991: Executive Committee Meeting, commencing at 4:00 pm. at the offices of Stafford, Frey, Cooper & Steward in Portland. This will be a working session to prepare for the annual meeting.

October 5, 1991: Annual Meeting of the Construction Law Section, from 12:00 p.m. to 2:00 p.m., at the Seaside Civic Convention Center. This is a Saturday folks, so you have no good excuse for not attending and participating in this event. The tentative agenda includes a mini-CLE or legislative update and primer on "Oregon Lien and Bond Law," followed by a short business meeting and election of officers. Section members who RSVP to the offices of Stafford Frey by September 15th (221-0699) will be provided lunch.

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