Construction Law Newsletter

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MESSAGE FROM THE CHAIR

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The executive committee is trying to make the Construction Law Section useful to its members by providing information and educational services. In that vein, we are planning continuing legal education programs on topics that we think should be of interest to construction practitioners and we are publishing this newsletter. For information on upcoming CLEs, see the notes at the end of this newsletter.

We invite your participation in this effort. If you have an idea for a seminar or a newsletter article, pass it on to one of the committee members or the Column editors discussed in Alan Mitchell's Editor's Notes at the end of this newsletter.

In particular, when you encounter a new or difficult issue in your area of practice, please send a note about it to Alan Mitchell, the newsletter editor. If possible, please send Alan edited copies of any briefs and the court's ruling (Alan's e-mail address is *amitchell@furrer-scott.com*).

In this way, the Section can become a medium for sharing useful information that will help us all be better construction lawyers.

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BEWARE THE BOLI BITE!

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In recent years, the Bureau of Labor and Industries ("BOLI") has stepped up its enforcement efforts on public works projects related to the payment of prevailing wages. BOLI has sanctioned several contractors for a host of prevailing wage violations, sanctions that oftentimes include a three-year debarment from prevailing wage work as well as some steep civil sanctions and penalties.

In doing so, BOLI has engaged in a series of questionable enforcement practices and tactics specifically designed to "dupe" contractors into admitting certain violations that provide the support for steep penalties.

Along the way, several practitioners also have fallen into BOLI's trap, and in the process have had to defend against malpractice claims with the Professional Liability Fund. This article gives construction practitioners a better idea about the serious nature and consequences when a Public works contractor is faced with BOLI enforcement proceedings and puts the weary construction practitioner on notice of these secret enforcement tactics so that hopefully they can avoid malpractice claims.

1. The BOLI Law

The Commissioner of BOLI has jurisdiction over enforcement of prevailing wage rate ("PWR") matters under ORS 279.348 to .380. BOLI has promulgated rules and regulations pursuant to that authority in Chapter 839 of the Oregon Administrative Rules. (BOLI's web site is at *www.boli.state.or.us*.)

Contractors engaged in Public works projects must comply with a host of PWR requirements. The most common violations relate to minimum wage rates, posting of prevailing wage rates, and overtime payments. For example, ORS 279.350(1) and OAR 839-016-0035(1) require contractors employing workers on Public works projects to pay such employees no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner for BOLI, in which the workers are employed. Contractors cannot avoid this requirement by entering into an agreement with their employees to work for a lower hourly rate. ORS 279.350(3).

In addition, ORS 279.350(4) and OAR 839-016-0033(1) require contractors to post the PWR applicable to a project in a conspicuous place at the work site, easily accessible to employees working on the project. If a work site for all practical purposes cannot be accessed by employees because of physical or "psychological" barriers, BOLI will cite the contractor. Placing the list of wages in the contractor's briefcase or in the cab of a supervisor's pickup is not sufficient. Posting in another contractor's job shack also may pose problems if the employee generally has no access to that facility.

ORS 279.334, ORS 279.350, and OAR 839-016-0050 also require contractors to pay overtime for hours worked beyond a statutorily defined "day" and "week." Contractors generally have two options: Either an eight-hour, five-day week or a ten-hour, four-day week. Employers must post notice of the work schedule before work begins on the project. See ORS 279.334(1)(b). No "averaging" is permitted – e.g., if an employee works nine hours on Monday and seven hours on Tuesday, the employee is entitled to one hour of overtime pay. Likewise, if an employee does not work Friday, but works Saturday, the employee is entitled to overtime pay for all of Saturday's work. There are exceptions to the overtime rules, including a certified apprenticeship program, a written labor management-negotiated labor agreement, and certain exempt PWR work. See OAR 839-016-0054 to –0065.

There are other wage-and-hour requirements for contractors. For example, on Public works projects, contractors typically must file a certified statement with the contracting agency certifying compliance with the wage-and-hour laws before getting paid. See ORS 279.354(1).

BOLI has several powerful enforcement options. First and foremost, it can and usually does seek recovery of back wages. See ORS 279.356; OAR 839-016-0080(1). As part of the back-wage claim, BOLI also can pursue a claim for liquidated damages for the injured employee, which may be double the amount of the unpaid wage if the contractor willfully falsifies payroll records. ORS 279.350; OAR 839-016-0080(2). BOLI also can seek preliminary relief, including claims for temporary restraining orders, injunctions, and bonds sufficient to cover agency attorneys' fees. ORS 279.365(2).

In addition to these civil remedies, BOLI can pursue additional sanctions administratively. In addition to the liquidated damages, BOLI can seek civil penalties for wage loss violations. ORS 279.370; OAR 839-016-0500 to -0540. BOLI also can pursue debarment of the contractor from all Public works contracts for a period of up to three years. ORS 279.361; OAR 839-016-0085. Therefore, the consequences of BOLI violations oftentimes are dire.

Contractors who do not willfully violate the PWR rules nevertheless can be subject to penalties and sanctions. Under OAR 839-016-0500, a person acts "knowingly" when the person:

> * * * has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person under reasonably diligent

> inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor or contracting agency are presumed to know the circumstances of the public works construction project (emphasis added).

This obviously provides BOLI with a low threshold for purposes of establishing liability. In two BOLI orders, contractors who innocently violated the PWR rules were nevertheless found liable for sanctions. In In Re Sealing Technology, Inc., #13-93, pp. 17-18 (May 7, 1993), the contractor claimed that it did not know that the prevailing wages were due its employees. The administrative law judge held that contractors cannot escape their responsibility under the law by selective ignorance or inattention and concluded that, "this forum has never given that defense any weight."

Likewise, in In re Loren Malcom, #09-86, p. 19 (Dec. 11, 1986), the contractor claimed that its business was growing so rapidly that its staff was not schooled in PWR practice. The administrative law judge held that failure to maintain a business where the contractor was sufficiently knowledgeable hardly establishes "inadvertence" or "unintentional miscalculation." The order went on to note that penalties were appropriate even where late payment was due solely to inefficiencies in the contractor's payroll system.

The lesson for all contractors: Ignorance of the law is no defense, particularly on PWR work.

2. The BOLI Practice

Chapter 279 gives BOLI significant enforcement authority and power. Under ORS 279.356(2), BOLI can attach the contractor's performance bond by pursuing a "Little Miller Act" bond claim under ORS 279.536 to collect back wages and liquidated damages for an injured worker. If the wage and hour claim is against a subcontractor, BOLI will attach the general or prime contractor's bond. Under ORS 279.365, BOLI also can bring a civil suit in circuit court to require the contracting agency to withhold twice the wages otherwise due the contractor. As part of this proceeding, BOLI also can seek injunctive relief.

In conjunction with attaching the contractor's bond and withholding of wages from the contracting agency, BOLI is entitled to pursue civil penalties and debarment administratively through the APA. See ORS 279.361(1); ORS 279.370(2). The net effect of these enforcement measures can be paralyzing: The contractor's bond and its income are tied up in the project, oftentimes disabling the contractor from meeting its current obligations, from continuing operations, and from defending the debarment and civil penalties claims.

BOLI flexes this enforcement muscle in pursuing back-wage claims and other sanctions. BOLI will make a "prima facie" determination of back wages it believes are due and owing. Oftentimes, this "prima facie" determination is based solely upon statements from the very disgruntled employees who filed the initial wage claim. BOLI typically does not verify this information through an independent audit of the records or statements from the contractor until after the contractor's bond is attached. Not surprisingly, the amount of an initial claim frequently is inflated – this author has seen claims that were ten times the amounts ultimately deemed due and owing. Many contractors simply cannot absorb this hit to their bond and to their cash flow while resolving the issue in court.

This outcome is, of course, by design. BOLI's goal, as stated in its own policy manual, called the *Field Operations Manual*, is to secure payment on the back-wage claim. By placing the contractor in economic duress, BOLI hopes that some early negotiation and resolution of the back-wage claim can occur. This also is to BOLI's benefit because BOLI has no recourse administratively on the back-wage and liquidated damages issue. Compare ORS 279.356(2) with ORS 279.361 to ORS 279.370.

Consequently, BOLI can avoid a civil dispute in circuit court by extracting a negotiated settlement on the back-wage and liquidated damages issues. Oftentimes, the contractor simply must pay a negotiated sum, even if unwarranted, just to keep its business afloat. Unfortunately, the unwary contractor and attorney may make significant admissions on the wage claims that ultimately jeopardize a successful defense on the civil penalties and debarment issues, a scenario I have coined "the BOLI Bite."

3. The BOLI Bite

This can be best explained by a good illustration. Suppose a contractor for one reason or another fails to post PWR in a place deemed conspicuous by a BOLI investigator. Further assume that several employees asked the contractor to switch their typical Friday workday to Sunday two days a month to accommodate a summer softball schedule, and agree to be paid no overtime for the Sunday work. Also assume that the good ol' boss occasionally lets everyone

go a little early on Monday so everyone can catch *Monday Night Football* but makes up the lost time on the following Tuesday. Finally, assume that the contractor records the time on the certified payroll as straight time, not accounting for any of these agreed to and accepted payroll practices.

A disgruntled employee gets dismissed and decides to take the matter up with BOLI. The employee embellishes considerably on the various payroll practices of his former employer. BOLI immediately files a claim against the contractor's performance bond for ten times the amount of any conceivable back wages due and owing, this based upon the "prima facie" determination arising from BOLI's extensive evaluation of the disgruntled employee. The bond claim includes a claim for double liquidated damages for the contractor's allegedly willful falsification of payroll records. BOLI also files a suit to enjoin the contracting agency from making any payment to the contractor until this matter is resolved. This action by design places the contractor in immediate financial strain and duress.

BOLI then dispatches its field investigator to interview every single employee in the corporation. After its investigation, BOLI entertains settlement negotiations on the back-wage and liquidated damages claims. BOLI offers to waive the liquidated damages and dismiss the claim if the contractor agrees to pay a negotiated sum for back wages. BOLI does not explain to the contractor that there is a distinction between the liquidated damages remedy and an administrative claim on debarment and civil penalties.

In fact, BOLI's *Field Operations Manual* expressly discourages its investigators from addressing administrative sanctions and expressly states that investigators cannot negotiate the debarment and civil penalties sanctions in return for payment of back wages. The unsophisticated contractor, reeling from the financial strain of the situation, reluctantly agrees to pay an inflated sum for back wages, believing its bond will be cleared, payments from the contracting agency will resume, and the BOLI claim will retire.

But what the contractor, and oftentimes the practicing attorney, mistakenly assume is that payment of the back-wages claim resolves the entire BOLI action. The contractor unfortunately is surprised to learn that after it has written a check to BOLI on the disputed sum, BOLI then begins its enforcement action, administratively seeking civil penalties and debarment loaded with admissions it gleaned from the back-wage claims. The contractor has just received the BOLI Bite.

Unless pressed to do so, BOLI will not explain to a contractor, or a construction practitioner, that it sets up its enforcement practice in two stages, the first being the back-wage and liquidated damages component and the second being the civil penalty and debarment component. It will not provide a copy of its *Field Operations Manual* so that the contractor can learn BOLI practice and procedure. BOLI also will not explain the distinction between the various sanctions and, most importantly, it will not explain that BOLI may pursue civil penalties and debarment even if the contractor pays the back wages.

In fact, BOLI acknowledges that most contractors do not understand the difference. BOLI by design is silent about the administrative claims because it does not want the contractor to negotiate these administrative claims as part of a settlement on the back wages. By design, the entire process deceives a contractor into paying disputed back wages and making incriminating admissions prior to the administrative proceeding.

What can the careful practitioner do? Here is a list of helpful suggestions that should keep you and your client from unknowingly falling into this trap:

1) Ensure that your client immediately retains counsel and that all communications flow through counsel. Any settlement negotiations should be prefaced, preferably in writing, by an agreement that they are for purposes of settlement and negotiation only pursuant to OEC 408. If BOLI interviews any current employees or staff, the careful practitioner should insist on participating.

2) Immediately request a copy of BOLI's Field Operations Manual. This will describe BOLI's policy on sanctions and will disclose whether the contractor is a candidate for administrative sanctions. If BOLI refuses to provide a copy of the Field Operations Manual, there are copies available in my office.

3) Confirm with BOLI, in writing, the scope of the investigation and whether administrative sanctions are going to be pursued. Do not be seduced by any statement that "administrative sanctions are not being considered at this time." BOLI will not make its final determination about pursuing administrative sanctions until after the back-wage claim has been resolved.

4) Explain to your client all potential liabilities so that your client can make an informed decision regarding settlement based upon all potential exposures. Advise your client, while being cautious, to also be respectful to BOLI personnel. BOLI has

considerable discretion in its enforcement practices and your client's demeanor could affect BOLI's posture on the claim.

5) Insist that the administrative sanctions are negotiated as part of any payment of back wages. BOLI's number one objective is to get back wages paid promptly. The enforcement mechanism on the back-wage component of the claim (i.e., Circuit Court via a Little Miller Act claim) does not lend itself to expeditious resolution and is not a preferred forum for BOLI. Use this leverage to resolve all issues, if possible.

6) Once a portion or the entire claim is settled, be sure to draft a release that clearly sets out which claims have been resolved. Specifically refer to the statutory sections governing the various enforcement remedies available to BOLI. Several practitioners have mistakenly believed that a release on the back-wage claim also included a global release of the administrative claims.

7) Advise your clients to read and understand the PWR law. Do not take chances with ambiguities and interpretation. If your client is entertaining thoughts of adopting a questionable PWR practice, check with BOLI before, rather than after, the fact. If your client's bread and butter is PWR work, it can ill afford to be precluded from PWR work or have its name published on a blacklist of debarred PWR contractors.

DEFECTIVE DESCRIPTIONS IN CONSTRUCTION LIEN CLAIMS

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Under ORS 87.035(3)(d), a construction lien must contain a "description of the property to be charged with the lien sufficient for identification, including the address if known." Strict compliance with all of the requirements of the Construction Lien Law is not required for a lien to be valid. Substantial compliance may be sufficient to satisfy some of the requirements. Whether there is substantial compliance with a particular requirement, such as the requirement to sufficiently describe the property to be charged with the lien, depends on the degree of noncompliance, the underlying policy of the requirement, and the prejudice that the owner of the property or third parties may have suffered as a result of the noncompliance. *Tigard Sand & Gravel Co., Inc. v. LBH Const., Inc.*, 149 Or.App. 131, 136, 941 P.2d 1075 (1997).

Under this test, where an incorrect attempt has been made to describe the property against which a lien is sought, the Oregon courts have held that a description which identifies the property to be charged with the lien is sufficient even though inaccurate if it is "sufficient to enable [the] defendants to identify the property covered."

In *C-3 Builders, Inc. v. Krueger*, 56 Or.App. 502, 506, 642 P.2d 344*, rev. den.* 293 Or. 190, 648 P.2d 851 (1982), the claim of construction lien identified the property to be charged with the lien as Hunter Restaurant Bar, located in Multnomah County, Oregon, in Section 27, 1 N., 3 E., Tax Lot 222, 3.77 acres, at 2600 N.E. 23rd in Troutdale. The name of the business, the tax lot number and the address listed in the lien claim were all incorrect. The correct name was Hunter's Steak and Pancake; the tax lot number was 218, and the address was 2602 N.E. 238th.

The trial court dismissed the complaint on the basis of the incorrect description, but the Court of Appeals reversed, holding that, although the description was flawed, it was sufficient to enable the defendants to identify the property covered. The court, however, pointedly noted that the defendants did not claim prejudice as a result of the deficiencies. The rule that a description that identifies is sufficient even though inaccurate is not a modern rule. It was apparently first applied in Oregon in *Kezartee v. Marks*, 15 Or. 529, 536-37, 16 P. 407 (1888).

A different rule is followed, however, where there is a complete and positive description of the wrong piece of property. "A totally erroneous description * * * is insufficient to sustain a lien." 53 Am.Jur.2d *Mechanics Liens* § 237; *See also*, Annot., 52 A.L.R.2d 12 §§ 5(c), 14 (1957).

In *Joshua Hendy Machine Works v. Pacific Cable Const. Co*., 24 Or 152, 33 P. 403 (1893), the plaintiff filed a construction lien against Lots 3, 4, 5 and 6 in Block 1, Carter's Addition to the City of Portland. At trial, it developed that the plaintiff performed its work upon and supplied material to an improvement located on lots 3, 4, 5 and 6 in Block 1, *Market Street* Addition to the City of Portland. The Supreme Court held that this was "a fatal variance between the allegation and the proof" and dismissed the complaint. *Hendy* cannot be distinguished as an old case decided under outdated law, for, as noted earlier, the current law goes back to at least the *Kezartee* case decided several years earlier in 1888.

In *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 P. 390 (1896), a supplier claimed a construction lien for materials furnished to one E. Bashaw, the general contractor in the construction of a building for the Methodist Episcopal Church in Junction City. The claimant's lien stated that it had furnished materials to be used by the builder in erecting a building for the church in Junction City, but the lien described the lots on which the building was situated as lying in an addition of Junction City which did not exist. The Supreme Court said:

> "The lien having misdescribed the block and addition, the claimant cannot be permitted to aver or prove the correct description of the premises sought to be charged, unless it is manifest that there is a latent ambiguity in the description contained in its notice * * * ; for patent ambiguities and mere mistakes in the description of the subject-matter or names of persons contained in a written instrument cannot, except in a suit for that purpose, be amended by averment, or cured by extrinsic evidence * * *. The church having been built by Bashaw, for the trustees and society, on block 2 in Milliron's addition, and the lien having been claimed against the building so erected, the description of the block and addition, as given in the notice, does not correspond with the designation of the church, and hence a latent ambiguity exists in the written instrument. Mr. Freeman, discussing latent ambiguities * * * says: 'It is a settled rule that the addition of a false description will be rejected, and the instrument take effect, if a sufficient description remains to identify the thing intended to be described.' Applying this rule to the case at bar, and rejecting the false description of the block and addition, can it be said that a sufficient description of the premises remains, by which the property sought to be charged with the lien can be identified? The requirement of the statute is complied with when the notice contains a description of the property to be charged with the lien, sufficient for identification. Hill's Ann. Laws Or. § 3673. 'The general rule,' says Strahan, J., in *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407, 'as to what shall be sufficient description to sustain a mechanic's lien, seems now to be that if there appears enough in the description to enable a party familiar with the locality to identify the premises intended to be described, with reasonable certainty, it will be sufficient.' *** The evidence shows that there is but one Methodist Episcopal church in Junction City, and this was built by Bashaw; and under the rule announced *in Kezartee v. Marks*, *supra*, there can be no doubt that the property can be identified by every person acquainted with the locality by the simple designation remaining in the notice after excluding the false description. Nor do we deem this conclusion in conflict with that announced in the case of [*Joshua*] *Hendy[Machine Works*] *v.* [*Pacific Cable*] *Construction Co*., 24 Or. 152, 33 Pac. 403; for in that case no lien was claimed upon any building, and, the description being false, by rejecting it there was no property described in the notice to which the lien could attach. The ambiguity was patent, and could not be corrected." 29 Or. at 166-170.

In other words, while the rule may be different with regard to a description which is merely loose, vague, or ambiguous, where the real property description in a construction lien claim is unambiguously erroneous and describes with exactitude the wrong parcel of real property, substantial compliance with the Construction Lien Law has not been achieved, and the claim of lien should be held invalid.

NEW STATE LAWS AFFECTING PUBLIC CONTRACTING

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Several new laws from the 1999 Regular Session are particularly significant to attorneys engaged in either construction law or public contracting. There have also been related developments in the administrative rules implementing those laws. The purpose of this article is to provide a brief overview and guide.

HB 2024 (Or Laws 1999, Ch 29) – Amends ORS 279.049 by specifying that the Attorney General's "*Model Public Contract Rules"* become the default procurement rules for all public contracting agencies in Oregon, including local governments, unless those agencies affirmatively opt out under provisions of the Act. This is a major change from prior practice, in which state and local governments needed to affirmatively adopt the Model Rules in order make them applicable.

The Model Rules, located at OAR Chapter 137, address *Public Procurement Rules* (Division 30), *Public Improvement Contracts* (Division 40) and *Architectural and Engineering Contracts* (Division 35). Division 40 includes a series of rules on Alternative Contracting Methods, including use of Design/Build, CM/GC (Construction Manager/General Contractor), and negotiation of contracts when bids exceed the agency's cost estimate.

Practice Tip: The Model Rules are statutorily limited to matters listed in ORS 279.049, and do not address personal service contracts. The Division 35 rules address only the "screening and selection" of "architectural and engineering" services, and do not cover those "related services" that A&E firms often perform, but which do not require professional registration. Public contracting agencies have been encouraged to adopt their own rules in this area, at least until the statutory limitation may be changed.

The rules were filed on December 30 and became effective January 1. The revised AG's "*Model Public Contract Rules Manual*", containing the full text of the model rules, related administrative rules, commentary and appendices on public contracting matters, is not yet printed but may be ordered by contacting the Department of Justice at (503) 378-2992. The model rules are also available on-line at the Secretary of State's website at www.sos.state.or.us.

HB 2895 (Or Laws 1999, Ch 689) – Amends ORS 279.027 in requiring disclosure, within four working hours of bid closing, of first-tier subcontractors above specified thresholds on public improvement contracts valued over $75,000. The underlying purpose of this Act is to reduce bid shopping by making pricing arrangements public soon after the bid results are known.

Practice Tip: The Model Public Contract Rules set forth several new procedures in implementing this requirement. OAR 137-040-0017. Under this rule, separate bid closing and bid opening times are established, the subcontracting disclosure is filed by all bidders within four hours after bid closing, and only those bids responsive to the filing requirement are then opened. ODOT has adopted a similar version of this disclosure rule, at OAR 731-007-0050, but in a form that provides for bids to be opened immediately after bid closing, with a separate disclosure being made four hours later. Local government requirements may also vary; check the procurement document for filing instructions and a disclosure form.

The Act specifies the circumstances under which the contractor may substitute subcontractors that were not disclosed. Permission of the public agency is generally not required in order to make substitutions.

The Act also contains important new provisions regarding prompt payment and interest rate calculations, affecting obligations of both the prime contractor and public agency. Finally, it authorizes the Construction Contractors Board (CCB) to disqualify contractors from holding or participating in a public contract for a public improvement in cases where prompt payment, as defined by the Act, was not made to persons supplying labor and materials, and to maintain a list of disqualified firms. Notice and hearing provisions are included.

HB 2574 (Or Laws 1999, Ch 588) – Amends ORS 279.312 by requiring that public improvement contracts contain a provision that the contractor demonstrate that it has an employee drug testing program in place. Although the statute is silent as to how or when the demonstration is to take place, legislative history makes clear that administrative rules were intended to supply the specifics.

The Oregon Department of Administrative Services (DAS), as the primary procurement agency for the State of Oregon, has taken the lead by working with interested groups in developing minimum requirements for affected state agency procurements. The DAS approach, which is the subject of a proposed formal administrative rule, consists of three elements:

First, award will not be final until the prospective contractor *certifies* that it has a drug testing program in place for employees. The program must include a written policy, drug testing for new subject employees (or random testing every six months), testing for reasonable cause, and testing when subject employees are involved in an incident requiring treatment by a physician or resulting in damage to property.

Second, the contractor must *represent* and *warrant* to the agency that a Qualifying Employee Drug Testing Program is in place at the time of contract execution, and will continue in full force and effect for the duration of the contract. The agency's performance is to be contingent upon the contractor's compliance.

Third, the contract must also contain the contractor's *covenant* that each subcontractor providing labor will either (a) demonstrate that it has its own Qualifying Program, which will remain in place for the duration of the subcontract, or (b) require that the

subcontractor's employees participate in the contractor's own Qualifying Program.

SB 271 (Or Laws 1999, Ch 647) – Amends ORS 279.029 in establishing new "*Standards of Responsibility*" to be used by public contracting agencies in awarding contracts and disqualifying bidders. The standards are much broader than the previous statutory grounds for disqualification. They include not only resources and expertise, but also a satisfactory record of performance, satisfactory record of integrity, legal qualification to contract with the public agency (including reference to the CCB list of disqualified firms), and that requested information has been supplied in connection with an inquiry concerning responsibility.

Aside from that contract-specific analysis, ORS 279.037 is amended to allow a public contracting agency to disqualify a bidder generally from award of that agency's contracts for a period of up to three years, following notice and a hearing. The grounds for such disqualification include convictions for certain offenses connected with obtaining or performing public or private contracts, including both enumerated crimes and offenses indicating "lack of business integrity or business honesty". The grounds also include "Violation of a contract provision that is regarded by the public contracting agency to be so serious as to justify disqualification."

HB 2891 (Or Laws 1999, Ch 462) – Amends ORS 279.029 to clarify that for Design/Build contracts on public improvements in which both design and construction services are provided under a single contract, the performance bond obligation (or obligation of the bidder providing a cashier's or certified check) for faithful performance of the contract ceases for the design services portion after completion of those elements. Liability for corrective work or damages related to the provision of design services also ends upon final completion, or such longer time as may be defined in the contract.

The intent of this Act is to distinguish the performance of design services, as the surety's obligation under performance bonds, from latent defects and other errors and omissions falling within the scope of professional liability insurance.

Two other new laws to be aware of are: (1) **SB 180 (Or Laws 1999, Ch 521)** relating to claims against bonds on public works projects, allowing BOLI a claim for wages without assignment and to include workers who are unidentified when notice is given, and (2) **SB 398 (Or Laws 1999, Ch 264)** relating to the required Attorney General's legal sufficiency approval of state agency contracts, providing for additional class exemptions and state agency ratification in limited circumstances.

1999 LEGISLATIVE SUMMARY

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1. Contractors and Construction Contracts

a. BOLI's "John Doe" Claims

ORS 279.526; 1999 Oregon Laws: Chapter 521

This law expressly permits the Bureau of Labor and Industries ("BOLI") to make Little Miller Act bond claims on behalf of laborers on public works projects without the need of any assignment from the laborers. In addition, BOLI's right to make a claim "extends to workers on the project who are not identified when the written notice of claim is given, but for whom [BOLI] has received information indicating that the workers have not been paid in full."

BOLI is required to give its written notice no later than 120 days after the workers listed in the notice last provided labor to the public works project. If BOLI's notice includes a "John Doe" worker, the notice must state that the claim includes an unidentified worker.

b. Subcontractor Listing

ORS 279.027; 1999 Oregon Laws: Chapter 689

This legislation requires bidders on public works projects with a contract value of $75,000 or more to disclose within four working hours of the bid opening the following information relating to the bidders' first-tier subcontractors:

1. Their names and addresses;
2. Their Construction Contractors Board numbers, if any;
3. The amount of each subcontract.

Subcontractors are defined to include those furnishing labor or materials. Not all subcontractors need be listed. Only those whose subbids are at least five percent of the total project bid or $15,000 (whichever is larger) need be listed. Yet, every subcontractor with a subcontract of $500,000 or more

must be listed regardless of that subcontract's percentage of the total project bid.

Substitution of subcontractors is permitted in limited circumstances which include: the subcontractor's failure or refusal to execute a written contract; the subcontractor's failure or refusal to perform its obligations; and the listing of a subcontractor through an "inadvertent clerical error".

2. Construction Contractors Board

a. Contractor Licensing – Not Registration
ORS Chapter 701; 1999 Oregon Laws: Chapter 402

Oregon's construction contractor's laws will change from a simple "registration" format to a "licensure" requirement effective July 1, 2000.

This means, in part, that applicants for an Oregon Construction Contractors Board ("CCB") license will need to take and pass an examination. 1999 Oregon Laws Chapter 402 §18a. The examination requirement does not apply to contractors registered before July 1, 2000. Id. For this examination requirement only, the CCB is also directed to accept "registration or licensure in another state as a substitute for licensure in Oregon". Id.

b. Increases in Bond and Insurance Requirements and add "Consultant" category

ORS 701.085 & 701.105; 1999 Oregon Laws: Chapter 325

This bill became law on June 23, 1999 and is effective now.

The new insurance and bonding requirements for CCB contractors are as follows:

Category	Bond	Insurance
General Contractor - All Structures	$15,000	$500,000
General Contractor – Residential	$15,000	$500,000
Specialty Contractor - All Structures	$10,000	$500,000
Specialty Contractor – Residential	$10,000	$300,000
Limited Contractor	$5,000	$100,000
Consultant	$10,000	$300,000

The bill also addresses construction consultants. For CCB purposes a "Consultant" is defined as: "[A] person registered as a contractor with the [CCB] who inspects or otherwise provides services to a property owner or other contractor, but who does not substantively add to or subtract from a structure." Home inspectors and lead-based paint inspectors are included in the definition of consultant.

c. Enforcement
ORS 701.102 and others;1999 Oregon Laws: Chapter 344

Contractors who have three or more claims filed against them within a 12 month period may be placed on probation by the CCB under this law. The CCB cannot place a contractor on probation unless it undertakes an investigation and has determined "that it is likely that the contractor has caused harm to the claimants". If placed on probation, a contractor may be required to develop a corrective plan, take certain classes or pass an examination.

The bill also permits the CCB to require a CCB bond up to five times its normal amount from both applicants and registered contractors under certain situations.

d. Consumer Notification Form.
No Summary of Oregon Contractors Law
ORS 701.055; 1999 Oregon Laws: Chapter 35

The Summary of Oregon Contractors Law will be eliminated. Now, the contractor will be obligated to provide a consumer notification form whenever it submits a bid or proposal for work on a residential structure. The form is to be provided at no cost to CCB-registered contractors.

e. CCB Records
ORS Chapter 701; 1999 Oregon Laws: Chapter 174

This legislation mandates that certain records be maintained by the CCB and be made available to the public. This information includes:

1. Inquiries about a contractor without an investigation:
2. Claims being processed;
3. Claims which were settled;
4. Claims which were dismissed; and
5. Claims which resulted in a final order.

f. Slow Pay Public Work Contractors
ORS 701.135; 1999 Oregon Laws: Chapter 689

The CCB may refuse to register an applicant or re-register a contractor if it has failed to make timely payments under public works contracts.

g. Extends Time for Claims by General Contractor
ORS 701.145; 1999 Oregon Laws: Chapter 331

In general terms, registered contractors now have up to 14 months to file a CCB claim against another registered contractor. Under the prior law, while a general contractor was subject to a claim against it by an owner related to a subcontractor's work, by the time the general contractor learned of the owner's claim it was often too late for the general contractor to try "pass" the claim through against the subcontractor through the CCB adjudication process.

3. Construction Liens

a. Bonding Off Construction Liens
ORS 87.076; 1999 Oregon Laws: Chapter 845

This bill, which at one time included far-reaching modifications to Oregon's construction lien statutes, was enacted with only one impact: The manner in which a construction lien can be "bonded off". Under prior law, the owner was to be named as the principal on the lien release bond. Now, the general contractor or the owner can be named as the principal on the bond.

4. Landscape Contractors

a. Unpaid Orders
ORS 671.707; 1999 Oregon Laws: Chapter 153

Final Landscape Contractors Board ("LCB") orders may now be enforced as provided in ORS 205.125 and 205.126. This means, generally, that the final orders can be enforced similar to a judgment entered by a court.

b. Claims Against LCB Bonds
ORS 671.710; 1999 Oregon Laws: Chapter 34

This legislation creates a 90 day "claim window" for the processing of claims against an LCB bond. Claims within the first 90-day time period shall have priority over claims in later 90-day periods. As between claims within the same 90-day period, claims by owners are entitled to first priority.

c. Work Landscape Contractors Can Perform without CCB Registration
ORS 671.520; 1999 Oregon Laws: Chapter 32

This change permits LCB contractors to construct fences, decks, arbors, walkways, retaining walls or driveways without a separate CCB registration if that work is done in conjunction with landscaping work or the LCB contractor has provided a $10,000 bond. If the $10,000 bond is in place, this work need not be done in conjunction with landscaping work.

CCB CASE NOTES

Alan L. Mitchell
Furrer & Scott LLC

As you know, the Oregon Construction Contractors Board ("CCB") issues many final orders as part of the agency's administrative processing of claims against registered contractors. These final orders can be thought of as the "case law" of the CCB.

While there is no formal reporter of this body of case law, the final orders are public record and can be obtained from the agency. I have recently begun to review some of these final orders and, in this issue (and in future issues), will present summaries of a few of the more noteworthy decisions.

As a procedural note, the CCB process operates like that of many agencies. Once the agency makes a determination, a proposed final order is issued. If no objections are made to that proposed order, then the final order issues. Final orders are subject to appeal to the CCB Appeal Committee and decisions of the CCB Appeal Committee are subject to appeal to the Oregon Court of Appeals. Note that the CCB has recently indicated that it may be implementing revisions to its administrative rules concerning final orders.

The following summaries are taken from cases that have been decided by the CCB Appeal Committee.

CCB CAN SUSPEND REGISTRATION DUE TO PRIOR COMPANY'S UNPAID ORDERS

In *In Re Egan*, File No. 26744-SP-V, (January 26, 1999), the CCB held that it has the authority to suspend a current registration where the registrant had previously been a corporate officer of a registered contractor that had failed to pay a final order of the CCB.

At the time Mr. Egan had been a corporate officer of Mortimer Construction, Inc. ("Mortimer"), a CCB claim had been filed against Mortimer. After the claim filing but before the contested case hearing, Mr. Egan resigned from Mortimer and obtained his own registration.

Pursuant to the hearing, the CCB issued a final order against Mortimer, which final order was not fully paid. Even though Mr. Egan had obtained his registration before the final order was issued, the CCB held that ORS 701.102 permitted the agency to suspend Mr. Egan's current registration.

This opinion serves to remind attorneys of an issue to raise with clients when principals of a construction company are leaving that company.

ATTORNEY FEES MAY NOT BE RECOVERABLE EVEN IF THEY ARE ORDERED BY A COURT

In *Jerald & Sheri Spores v. Bruce W. Brooks, General Contractor, Inc.*, Claim No. 88465-101, (October 27, 1999), the CCB held that it was not obligated to enter a final order against a respondent contractor even though the claimant homeowners had obtained a court judgment against the contractor.

In brief, the homeowners filed a claim with the CCB against a contractor and the CCB began processing the claim. The contractor filed a construction lien and then began foreclosure of that lien. As such, the CCB abated processing of the claim pending outcome of the lien foreclosure action.

In the lien foreclosure action, the court found that the contractor had failed to provide the Information Notice to Owner, which meant that the homeowners were the prevailing party. The court then awarded judgment to the homeowners of over $5,000 in attorney fees and costs.

After the contractor filed for bankruptcy protection, the homeowners submitted their court judgment to the CCB for enforcement against the contractor's bond. The CCB found that the agency had no jurisdiction to enter the court's judgment and dismissed the claimants' claim.

This case illustrates a potential "trap for the unwary" concerning recovery of attorney fees through the CCB. Under ORS 701.145(8), when a court judgment is entered against a contractor, the CCB "shall issue a proposed order in the amount of the judgment." *See Wilkes v. Zurlinden*, 146 Or App 371 (1997), *rev'd on other grounds*, 328 Or 626 (1999) (CCB entered award of attorney fees against the contractor).

The "catch" is found in the second sentence of ORS 701.145(8)(a), which provides in part:

> The board's determination of the claim shall be limited only to determinations of whether the claim comes within the jurisdiction of the board and is subject to payment by the surety.

In the *Spores* matter, the ALJ found that there is a "loophole" in the way the CCB is permitted to enter awards against contractors when the award is based upon attorney fees arising out of a construction lien foreclosure.

The "loophole" is that the CCB may enter awards of attorney fees only when the claimant homeowner defends against a subcontractor or supplier construction lien claim where the homeowner has paid the prime contractor in full and the prime contractor has failed to pay the lien claimant. The relevant statute is ORS 701.140(2). See also OAR 812-004-0220 (limiting the circumstances under which a homeowner can recover its costs in defending a construction lien claim).

In sum, attorneys need to be careful in advising their clients about the potential for recovery of attorney fees against a contractor's CCB bond.

UPCOMING CLEs

June, 2000: "Summer CLE"

A luncheon CLE will be held in Eugene at noon on June 5, 2000 at the Downtown Athletic Club. Dana Anderson will speak on "Changes in Public Contracting Law" and Randy .Turnbow and Roger Lenneberg will discuss "Lessons Learned from the Hyundai Litigation."

For details, contract Janelle E. Chorzempa at (503) 232-1410.

November, 2000: "Emerging Issues in Construction Arbitration"

This CLE will be held in the Portland area and will probably be a half-day seminar. It will address some of the issues that arose during the recent Hyundai litigation, including the impact of the Federal Arbitration Act on construction contract arbitration clauses.

The Honorable David V. Brewer is a planned speaker, among others. For details, contact Roger A. Lenneberg at (503) 227-1111.

NOTE FROM THE EDITOR

Alan L. Mitchell
Furrer & Scott LLC

As many of you know, the Construction Law Section Executive Committee would like this newsletter to be published on a more regular basis. In order to do so, we need articles.

In an effort to assist this process, the next newsletter will include a new "Columns" feature. There will be five columns, each with an assigned editor. The columns and editors are as follows:

Case Law Update

Editor: Frank W. Elsasser

Legislative Update

Editors: Joseph A. Tripi and Darien S. Loiselle

Public Contracting

Editor: Dana A. Anderson

Surety & Insurance Issues

Editors: Loren D. Podwill and Howard W. Carsman

Construction Contractors Board Issues

Editors: William J. Boyd and Van M. White, III

My hope is that, as issues or information arises in each of your practices, you will contact either the appropriate editor or me. We will then include this information in the next newsletter. Of course, this new feature, like all aspects of our newsletter, is always open to suggestions for changes and improvements.

Finally, congratulations to those who spotted the typographic error in the January, 1999 newsletter. Even though that newsletter said it was "Issue No. 13," it should have been Issue No. 14. Thank you for your sharp eyes. As you can see, this issue is marked as Issue No. 15.

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