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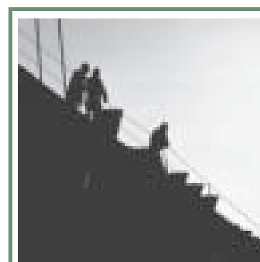
CONSTRUCTION FOCUS

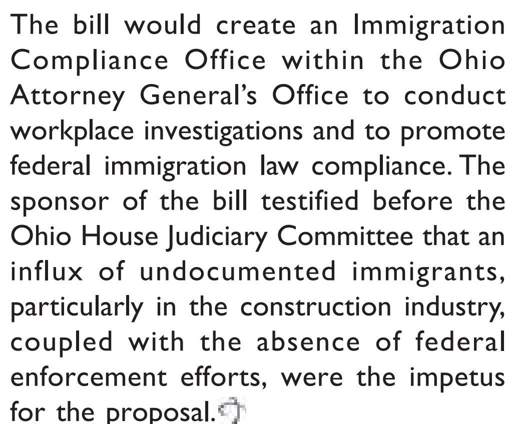


Legislative News: Workforce Protection and Illegal Alien Enforcement Act

After the recent elections, the Ohio General Assembly will reconvene before the end of the calendar year in what is commonly referred to as a "lame duck" session. The legislature will address several items of unfinished business, and there may be an attempt to pass a number of legislative proposals that affect the construction industry.

While one of those proposals, H.B. 654, may not be considered before the end of the year, it is worth being aware of. The legislation, introduced by Representative Bill Seitz, is entitled "Workplace Protection and Illegal Alien Enforcement Act." While the intent of the wide ranging legislation is to crack down on unauthorized aliens, one of its key proposals would be to temporarily take away from construction companies the right to bid on state contracts if they knowingly employ unauthorized aliens. The bill would prohibit companies from hiring unauthorized aliens if they receive state grants and loans, and would require contractors to verify the legal status of their employees.

The bill proposes that before beginning work on a public improvement, the contractor must submit an affidavit affirming that the contractor shall not employ an unauthorized alien, and that the contractor has verified a prospective employee's legal status or authorization to work before hiring that person. Verification would require review of any of a list of specific documents that establish a prospective employee's legal status, including some form of photograph identification. The legislation would recognize good faith attempts by the contractor, to verify the legal status of the prospective employee or if the employee provided false documentation. The contractor will also be required to maintain such records for inspection. Contractors who wish to bid on a public works project must be registered or have applied for registration with the Director of the Ohio Department of Administrative Services.



The bill would create an Immigration Compliance Office within the Ohio Attorney General's Office to conduct workplace investigations and to promote federal immigration law compliance. The sponsor of the bill testified before the Ohio House Judiciary Committee that an influx of undocumented immigrants, particularly in the construction industry, coupled with the absence of federal enforcement efforts, were the impetus for the proposal.

— Patrick A. Devine

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From the Editor

If you are like me, you must be wondering where 2006 went. This year has flown by. You may have noticed we missed a quarterly edition or two of Construction Focus. As someone recently told me, "When you get older, time goes by faster."

With this edition of Construction Focus, we get back on track with some ever present and always timely issues such as productivity, competitive bidding and mechanics' lien law. We also provide some "insider" information with the On the Horizon segment of this edition regarding the anticipated revisions to the AIA contract documents, as well as initiatives in the construction of health care facilities. For those of you on our email list, we will continue to provide immediate notice of new developments with our *SZD Tips from the Trenches.*

If you have questions or comments, please contact me at: 614-462-2238 or pdevine@szd.com.

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editor: Patrick A. Devine
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CONSTRUCTION FOCUS is a publication of Schottenstein Zox & Dunn's Construction Law Practice Group. Our Construction Law attorneys have hands-on experience in construction issues, enabling us to provide comprehensive solutions for our clients. Our experience includes bidding and awards; construction claims and dispute resolution; scheduling; analysis; surety issues; government contracts; commercial development; risk management; litigation; and HR, EEO, OFCCP and other labor & employment matters. CONSTRUCTION FOCUS offers opinions and recommendations of an informative nature, and should not be considered as legal or financial advice as to any specific matter or transaction. Readers should consult their own professional advisors to discuss their specific circumstances.

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Addressing Lost Productivity Claims

The greatest economic risk for a contractor relates to the variability of labor productivity. The construction industry has become acutely aware of the importance of productivity loss as reflected by the numerous studies conducted by various trade associations. Yet this largest economic risk is often left to chance, post project analysis and claims. In order to address this key issue, one must be critical of self and raise the importance of this risk to the highest levels of the organization. Although all would profess a desire to avoid claims, such are commonplace in a market where projects are time sensitive and design issues are pervasive. Success in pursuit of a claim begins by working with individuals that can help tell the story using the information from the project.

It is recognized by those confronted with substantial losses on projects that the fundamental communication problem they face is demonstrating cause and effect of labor inefficiencies. Causes of such inefficiencies are not surprising in that they relate primarily to failed communication and planning on projects. Quantifying productivity loss is a challenge because detailed records often are not kept on projects or are kept in a format that can be easily used to relate work performed and the labor hours incurred. Preoccupied by the dynamics of an industry where the contractor just wants to build, documentation and scheduling often take a backseat.

All too often, the contractor's approach to time impact claims is to assert that it is entitled to receive payment for the difference between its planned cost of performance and the actual. For a host of reasons, many courts have frowned on such an analysis.

The threshold statement in all claim circumstances is "show me the money," particularly as it relates to identifying where and when the cost of inefficiency has occurred. This is easier said than done, often requiring a review of project schedules, payroll information, daily reports, meeting minutes and a host of other documentation. However, once the contractor has identified where the loss has occurred, the next step is to determine what events may have impacted its performance and how those impacts related to the plan for project construction.

It is recommended that in any circumstance where impacts have occurred, the contractor identify "events" instead of "entities" since the true cause may

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Implications of Public-Private Projects

There is a growing trend of public sector owners entering into partnerships with private entities to improve properties, whether through long term ground leases, lease back or other similar initiatives. There are many implications from such agreements that result in the public sector participation, planning, financing and operating components. Depending on the scenario, there may be intended or unintended consequences regarding applicability of prevailing wage laws, competitive bidding laws, public mechanics' lien law and other public project requirements.

A recent situation in Cincinnati, Ohio is illustrative of this situation. The City of Cincinnati owned eight dilapidated buildings downtown that it wanted to bring up to residential building code compliance. The City entered into a loan agreement with a private company who would redevelop the properties for housing purposes. The City sold the properties to the developer for $1, and the developer gave a mortgage back to the City. The developer was also to invest several million of its own dollars into the project. The City was to share in the profits of the sale of the completed units.

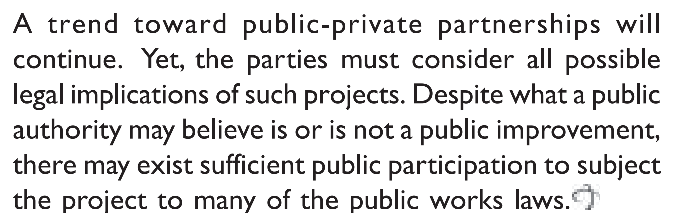
The City funded the first phase of the project which consisted of cleaning up and repairing the floors, brick work and roofs of the buildings. The developer entered into an agreement with a subcontractor to do the first phase work. The work became more expensive than originally estimated, and the developer abandoned the project. Unfortunately, the developer did not pay the subcontractor for its work. The subcontractor filed mechanics' liens on the properties.

When the City foreclosed on the mortgage for the properties, the subcontractor sought enforcement of its lien on public funds. In order for the subcontractor to have collected on the lien on public funds, the work performed must have been for a public improvement which, for mechanics' lien purposes, means any construction or improvement of any nature by a "public authority." Under the public mechanics' lien law, a subcontractor who has performed work on a public improvement under a contract with a principal contractor may timely serve the public authority with an affidavit stating the amount due and unpaid for work performed, and thereby obtain a lien on the public funds.

The City of Cincinnati argued that the project was not a public improvement because the City was not the owner of the properties and was merely providing seed money to revitalize the neighborhood. The City lost this argument. Under the public mechanics' lien law, a public authority includes a city and any officer or agent thereof. A court found that the developer who contracted with the subcontractor was an agent of the City of Cincinnati. Not only did the City have an agreement with the developer to share in the profits when the buildings were sold, the City provided complete contractual oversight of the project, provided all construction standards and requirements, and imposed City policies for equal employment opportunities and prevailing wages. The City had inspectors on the job every day to approve the work, and the City retained the right to approve all subcontractors and plans.

The court, in enforcing the subcontractor's mechanics' lien, held that these factors transformed the redevelopment project by the private developer into a public improvement project authorized by a public authority.

A trend toward public-private partnerships will continue. Yet, the parties must consider all possible legal implications of such projects. Despite what a public authority may believe is or is not a public improvement, there may exist sufficient public participation to subject the project to many of the public works laws.



— Patrick A. Devine

Email Connection

Would you prefer to receive **Construction Focus** electronically? If you sign up to receive newsletters via email, you will also be added to our email distribution list for updates on hot topics that affect the construction industry called: *SZD Tips from the Trenches*.

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ADDRESSING LOST PRODUCTIVITY CLAIMS

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not be obvious. A further concern with identifying entities may be the contractual language that would prevent timely or actual recovery.

The traditional approach to claim analysis often focuses on a comparison of what was planned versus actual performance. This approach can often lead to false impressions. How one deals with the potential problem can impact how one actually articulates what happened on the project. For instance, assuming one has the ability to compare resource requirements based on project scheduling, one could find that actual hours expended compare very well to the plan hours, yet it is obvious that the progress on the project is lagging behind. This would suggest that the analysis of comparing plan versus actual is not accurate. In such circumstances, it is important to create what we call an "adjusted plan schedule" that is resource loaded.

The concept of an adjusted plan schedule is that a better view of productivity loss is to compare what the expected labor expenditure would be based on the actual release of work to the contractor. Such an approach accounts for shifting of work activities, working out of sequence, stacking of activities and a variety of other conditions often found on projects. Accordingly, the analysis is to compare resource demand based on actual release of work to the actual hours expended.

In two recent cases, this analysis clarified what was perceived to have occurred on the project by

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On the Horizon...

National Conference on Redevelopment and Construction of Government Health Care Facilities

Members of SZD's Construction and Health Care Practice Groups were recently invited to participate in a national conference on redevelopment and construction of government health care facilities, sponsored in part by the Department of Defense. The federal government has identified a facilities need that could amount to billions of dollars of future construction over the next decade. The interactive discussions during the conference focused on project delivery. The message was clear at the end of the day that "performance based procurement," such as design/build, would be the foundation for much of the future project work. Many agencies of the federal government and a growing number of states have embraced design/build delivery systems for public projects. In Ohio, communities with "home rule" authority potentially can use a design/build delivery system for their public works, but much of the public works in Ohio remain "multiple prime." SZD's Construction Group has participated in nearly a billion dollars worth of design/build project development and has identified a growing interest in such performance based procurement throughout Ohio. What lays ahead for Ohio remains uncertain as it relates to performance based procurements.

American Institute of Architects

For the past few years, the American Institute of Architects has been working on revisions to its portfolio of contract documents. It is anticipated that in late 2007 a new version of the A-201 General Conditions will be introduced along with several new documents relating to design services. Also implemented are changes in the claims resolution process identified in the A-201 document in particular as it relates to arbitration as the final means of resolving disputes. Other changes anticipated will address the growing use of electronic transfer of information particularly as it relates to design documents. SZD construction lawyers are part of the team currently reviewing proposed changes to the AIA documents. The Associated General Contractors will introduce another portfolio of contract documents as a collaborative effort of several other national trade associations. These documents are anticipated to be introduced in 2007.

Limitations on Remedies Afforded Rejected Bidders

Construction Focus has followed, through a series of previously published articles, the see-saw battle of a wrongfully rejected bidder to recover its damages on a public works project. This past summer, the Ohio Supreme Court brought to an end the contractor's quest and in doing so made clear that injunctive relief, and not recovery of lost profits, is the only remedy available to contractors whose bids are wrongfully rejected.

Cementech, Inc. bid on a public works job administered by the City of Fairlawn. The City issued an addendum, but when the bids were opened it was determined that Cementech's bid failed to include the addendum in its bid. The City Law Director, acting outside his authority, rejected Cementech's bid. When the City issued an intent to award the contract to the next lowest, responsive bidder, Cementech filed a lawsuit asking the court to issue an injunction to stop any further action by the City. The court denied the request for an injunction and issued a summary judgment in favor of the City.

Cementech's decision to appeal only the summary judgment and not the denial of the injunctive relief proved ultimately fatal to its cause. Cementech asserted on appeal that it should be awarded its lost profits due to the City's violation of the competitive bidding law.

The reality is, however, if the contract award which is in violation of the competitive bidding process is not stopped or enjoined before the work begins, the courts take the position that the taxpayers should not have to pay twice. In fact, the Ohio Supreme Court said: "While allowing lost-profit damages in municipal contract cases would protect bidders from corrupt practices, it also would harm the taxpayers by forcing them to bear the extra cost of lost profits to rejected bidders." The courts seemingly will give a free pass to governmental entities that ignore the competitive bidding laws once the work has been or is being performed.

The bottom line for contractors who have been victims of abuses of the competitive bidding laws, is they must seek to enjoin the award of the contract. The Supreme Court rationalized limiting a rejected bidder to injunctive relief by stating:

"[I]njunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders…and the resulting delays serve as a sufficient deterrent to a municipality's violation of competitive bidding laws."

Of course, a public owner who enters into a contract made in violation of the state's competitive bidding laws will not be able to enforce it as such contract is void as a matter of law. The public policy behind the competitive bidding laws will not permit enforcement of contracts made in violation of such laws.

— Patrick A. Devine

Addressing Lost Productivity Claims

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quantifying more definitively the productivity differential. Once the more accurate productivity loss time period is identified, then specific events can be related to the time periods in question. This allows the contractor to better demonstrate cause and effect, substantially increasing the likelihood of recovery.

There are innumerable factors for which a contractor is not responsible that can cause loss in productivity in construction work. Identifying and quantifying those losses can be challenging.

When faced with making a lost productivity claim, the contractor should consider alternative means of supporting the claim, including an adjusted plan schedule.

— Michael D. Tarullo

Dancing With The Stars of Mechanics' Lien Laws

If you have watched the show "*Dancing With the Stars*," you know that popular actors, actresses and sports figures are teamed with professional dancers to perform a variety of ballroom dances. In the competition for the grand prize, the performers, untrained in dancing, must avoid total embarrassment by quickly learning the intricate steps and rhythms of dance styles like the bomba, salsa and waltz. With each misstep, the participant greatly increases their odds of being voted off the program.

Following the steps of the mechanics' lien law can, to the uninitiated, have all the pitfalls of dancing the salsa for the first time in front of a national television audience. One misstep and you may face the embarrassment of losing the competition for funds on a project.

Arthur Murray's "one step, two step" protocol has its similarities in lien law. The owner, to protect its interests in the property or project, must take the first step of Filing a Notice of Commencement. The notice must include specific information, including the proper name of the owner. This triggers the obligation of a second step, which is the filing of a Notice of Furnishing by a contractor or supplier not in direct contract with the owner.

Ohio Revised Code 1311.04(A) states that a Notice of Commencement shall be recorded "in substantially the form specified in division (B) of this section." Subsection (B) lists twelve requirements and states the Notice of Commencement "shall contain, in affidavit form, all of" the requirements.

Ohio Revised Code 1311.05 provides that, generally a subcontractor or materialman who performs work upon or furnishes material in furtherance of an improvement to real property and who wishes to preserve his lien rights shall serve a Notice of Furnishing. This should be done within twenty-one days after performing the first work or furnishing the first materials, unless the time period is extended as provided for in the statute. Subsection (H) relieves a subcontractor or materialman from filing a Notice of Furnishing if the owner fails to record a Notice of Commencement in accordance with 1311.04.

What happens if the Notice of Commencement is deficient? For example, what if the Notice lacked the date the owner first executed the contract, or a list of all original contractors, or the address of the person who prepared the Notice? This is where some courts have switched the music in the middle of the dance. In one situation, a Court of Appeals said that despite such deficiencies in the Notice of Commencement, the notice "substantially complied" with the statute. The court held that the overriding purpose of both 1311.04 and 1311.05 is to place subcontractors and materialmen on notice of whom the owner is and where the construction work is to be performed. In this particular case, all of the information necessary for the filing of a Notice of Furnishing was provided and, therefore, the materialman was required to file such a Notice.

What if the owner lists the wrong name on the Notice of Commencement? The failure of a subcontractor or materialman to file a Notice of Furnishing may be excused. In one case, the property was listed under the owner's name of Airline Professional Association Teamsters Local 1224. The Notice of Commencement was filed, however, under the name, "APA Teamsters Local 1224." The court held that the owner did not substantially comply with the law when it filed the Notice of Commencement. The court said that "A misidentified owner, however, is a more substantial deficiency than an omitted date." The subcontractor was consequently relieved of the obligation to record a Notice of Furnishing.

Listing the correct owner on the mechanics' lien and making sure the County Recorder records the lien under the proper name of the landowner are also critical steps. A recent case demonstrates the dire consequences even when you think you have done everything right to perfect a mechanics' lien. An excavation contractor had signed a contract to do work for R.L. Court & Associates, also known as Court

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Dancing With The Stars of Mechanics' lien Laws

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Development. When payment was not forthcoming, the contractor filed a mechanics' lien which listed the owner of the property as "Court Development, Inc." The County Recorder, however, recorded the lien under the name "R.L. Court & Associates." The same day the mechanics' lien was filed, a lender filed a mortgage on the property. When payment on the mortgage stopped, the lender filed suit against "Court Development, Inc." to foreclose on the mortgage. When the lender performed a title search on the property, the report did not list the mechanics' lien because the property was owned solely by "Court Development, Inc." and the lien was improperly recorded under "R.L. Court & Associates."

The lender purchased the property at the foreclosure sale. The contractor attempted to have the sale vacated on the basis it had a mechanics' lien on the property and had not been notified of the foreclosure sale. The court refused to vacate the sale on the basis that a bona fide purchaser, who acquires property in good faith for valuable consideration, takes free from any equity in the property of which they do not have actual or constructive notice. The lender who bought the property without knowledge of the mechanics' lien takes the property free of the contractor's lien. The lien does not attach to the owner of the property, but follows the property. A suit to enforce a mechanics' lien turns on whether the lien is currently valid as against the property. Because a sale to a bona fide purchaser without notice extinguished the existing lien on the property, the court did not permit the contractor to enforce the lien against either the bona fide purchaser or the previous owner. Although the lien was extinguished, the contractor still can enforce the contract against Court Development, or perhaps go against the County Recorder for the improper recordation of the mechanics' lien.

The mechanics' lien law also sets forth specific steps that must be taken to serve the affidavit of lien and any notice or document required to be served by the mechanics' lien law. There are various means to accomplish such service, but ultimately the key is to serve the document whereby a written receipt of service is obtained. If you cannot prove with a written receipt that someone received the affidavit of lien or other notice, you may be out of luck.

If you have properly filed a mechanics' lien and you subsequently receive a Notice to Commence Suit, you have sixty days to file the lawsuit to enforce your lien. Failure to timely file the lawsuit may result in having the lien declared void and invalid.

Unlike the contestants on "Dancing With the Stars" who often survive each week simply on their popularity and not their dancing skills, the requirements for asserting a mechanics' lien must be strictly performed. Those who follow the steps with precision may be rewarded with security for payment.

— Patrick A. Devine

SZD Attorneys, Professionals Secure Chair Positions

Schottenstein Zox & Dunn Co., LPA (SZD) is proud to announce that three of their attorneys and professionals have each been named Chair of a Columbus Bar Association Substantive Committee for the 2006-07 Term. **Hansel H. Rhee**, Partner in the firm's Construction Practice Area, has become the new chair of the Construction Committee. **Kelley D. Louis**, Library Manager, will continue as chairman of the Legal Research & Information Committee for the CBA. And **Aaron L. Granger**, Associate in the firm's Workplace Safety and Labor and Employment Practice Areas, will continue to chair the Workers' Compensation Committee.

News & Notes

In April 2006, **H. Alan Rothenbuecher and Joshua N. Stine**, co-authored: "Force Majeure: Minimizing this Risk Transfer Event" - Publication: *Alliance of Plastics Processors Magazine*.

On June 9, 2006, **Corey V. Crognale** presented "Violations of Specific Safety Requirements" at the Associated General Contractors of Ohio Safety Committee Meeting in Columbus, Ohio.

In August 2006, **Patrick A. Devine** authored: "When Must a Subcontractor Be Paid Under a 'Pay-When-Paid' Clause?" - Publication: *Business Credit*.

In August 2006, **Michael D. Tarullo and Hansel H. Rhee** co-authored: "Project Site Agreements, Specialized Agreements for the Construction Project" - Published through the *American Bar Association*. This text is in downloadable electronic format with contract documents for use. For more information, go to the American Bar Association website: www.abanet.org and click on *Webstore*, then *e-Products*.

In September 2006, **Roger L. Sabo** presented "Proof of Construction Contract Claims" at an Ohio State Bar Association seminar.

Michael D. Tarullo was elected "Chair-Elect" of the ABA Forum on the Construction Industry and selected to the American College of Construction Lawyers.

Michael D. Tarullo is Chief Editor of "Forms and Substance, Specialized Agreements for the Construction Project" - Due to Publish in December 2006 through the *American Bar Association*. This book deals with a broad spectrum of issues from the concept of a project through final completion. For more information, go to the American Bar Association website: www.abanet.org and click on *Webstore*.

On December 12, 2006, **Michael D. Tarullo** will present "Risks and Rewards of the Design/Build Delivery System for Construction Projects" at the Annual meeting of the County Sanitary Engineers' Association.

On March 22, 2007, **Patrick A. Devine** will speak on "Ohio Prevailing Wage Law" in Columbus, Ohio through Lorman Education Services. For more information, contact Pat Devine at 614-462-2238.

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