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The Quarterly Challenge

Know the rules of the game that you are playing

Contractors that participate in Public schools bids have become accustomed to the laws that govern the award of the bids and the way that the bids are awarded. However, contractors must be mindful that certain school districts are not bound by traditional bidding laws. Certain construction projects that are undertaken by special needs, "Abbott School Districts," of which there are 30 in this state, are fully funded by the State of New Jersey's Economic Development Authority. This means that, for the purposes of bidding laws, they are not governed by the traditional Local School Contracts Laws. Instead they are governed by the

EDA's bidding laws. These laws are very similar to the traditional bidding laws, however there are differences. Most notably is that the bids are conducted by the New Jersey School Construction Corporation (NJSCC), a subsidiary of the EDA. The impact on the bidder is that instead of challenging the bid award in Superior court, the bidder is required to challenge the award with the NJSCC. Yes, the bidder is required to challenge the NJSCC's decision with the NJSCC. If the bidder does not like the NJSCC's decision, he is free to challenge the bid with, you guessed it, the NJSCC. If the bidder is not satisfied with the de-

termination made by the NJSCC as to the NJSCC's decision, the bidder must file an appeal with the appellate division. This is not much more difficult than challenging a school board's decision in superior court, however a decision from the appellate division will usually take longer to obtain. Remember that if there is any doubt in your mind as to the proper award of a bid for a construction project in an Abbott School district, it is very important to lodge your protest with the NJSCC quickly and be as persuasive as possible to avoid the time and expense of bringing the matter to the Appellate Division of the Superior Court.

New Jersey Supreme Court holds that listed subcontractors *need not* be registered prior to being listed on public works

A blow to contractors that are registered in accordance with the contractor registration act has been incurred at the hands of the Supreme Court. As readers of this newsletter are well aware, general contractors are required to list the names of the plumbing, electrical, mechanical and structural steel subcontractors, to whom the bidder will

subcontract the work if he is the successful bidder. It seems intuitive that if a bidder is going to list the name of the subcontractor, such a subcontractor must be able to perform the work on the public project. The Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 et seq., is a regulatory program that was established for the purposes of regulating

contractors' and subcontractors' participation in public works projects based upon prior violations of the prevailing wage act. Thus, certain subcontractors, those that violate the prevailing wage act, will be ineligible to be registered. The issue before the court was whether the listed subcon-

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tractor was required to be listed at the time that the bid was submitted to the public body. The Supreme Court analyzed the language of the statute and determined that the legislature did not intend that subcontractors were required to be registered at the time that

they were listed. Berkowitz & Associates argued on behalf of certain unions that the bidding laws require that bidders may only list registered subcontractors as the subcontractor to whom the bidder will subcontract the work. In effect, the Supreme Court was sending the message that if we thought that

subcontractors are required to be registered prior to being listed, then the legislature would have to write law accordingly.

Contractors that violate prevailing wage act are now subject to six years of liability

Following up on an article published in this newsletter in the fourth quarter of 2001, the Supreme Court unanimously affirmed the Appellate Division's decision that the statute of limitations for an employee of a contractor that fails to pay its employees the prevailing wage on a public project is six years. **STEVEN A. BERKOWITZ & ASSOCIATES, P.C.** appeared as amicus curiae on behalf of the pipe trades in support of the six year statute of limitations. Prior to the Supreme Court's decision, the trial courts had held, in at least four other unpublished decisions, that the statute of limitations was two years for such an action, in other words employees that were improperly paid by their employers could only recover back wages for the past two years. Indeed, contractors that were sued by their employees to recover back wages that were due to them due to the contractor's failure to pay them the prevailing wage, would argue that since contrac-

tors were only required to keep prevailing wage records for two years under the statute, the employees could only recover for two years. Contractors were often successful in court using this argument. Luckily, the Supreme Court accepted our argument that the failure to pay an employee the prevailing wage is more akin to a breach of contract action and therefore the six year statute of limitations for breach of contract should apply. For contractors that do not pay their employees the prevailing wage, this means that they could be subject to three times the liability. For contractors that pay their employees the prevailing wage, you are best advised to keep records of the amounts that the employees were paid and basis for paying the employees the proper rate. This information can save time and money in the future. In addition, as reported previously, school boards are able to take prior prevailing wage violations into account when de-

termining whether to award a construction project. A prior prevailing wage violation may be the basis for challenging a bid.