



THE LAW OFFICES OF
STEVEN A. BERKOWITZ

The Quarterly Challenge

Conscientious Contractor Act Used To Add Further Deterrence To Prevailing Wage Violators

New Jersey is one of the only states that allows business competitors to monitor each other's compliance with the prevailing wage Act and file suit in the event of a violation. In other words, any contractor, or association that has been adversely affected by a violation of the Prevailing Wage Act may bring an action in superior court. If successful the contractor may recover **THREE TIMES THE PROFIT THAT IT CAN PROVE IT WOULD HAVE MADE ON THE PROJECT**, plus the cost of estimating its bid and attorney's fees.

One aggressive union was tired of contractors coming into its territory and

violating the Prevailing Wage Act. If those violators were caught they were only required to reimburse the employees for a portion of the amount that they did not pay them. This Union hired **The Law Offices of Steven A. Berkowitz** to bring an action on behalf of the second lowest bidder against a contractor that the Department of Labor determined had violated the Prevailing Wage Act.

The guilty contractor was not only fined by the Department of Labor, but after they paid the fine we filed an action in the name of the second low bidder alleging that if the guilty contractor had not

violated the Prevailing Wage Act, the Union's contractor would have won the bid. We sued the guilty contractor for three times the profit that our client would have made plus costs. The matter settled out of court. After the guilty contractor paid its back wages and fines to the Department of Labor, it was embroiled in costly litigation, it had to pay an attorney to defend it and it had to pay the cost of settlement. The warning to contractors that intend to win jobs by violating the prevailing wage is that they may be biting off more than they bargained for.

Do Not Negotiate Your Retainage

With the new single prime contractor law, more contractors will find themselves operating as subcontractors than ever before. The retainage held by the public body is either governed by law or described in the specification. A school board may withhold 2% of the amount due on each partial payment pending completion of the contract when the amount of the contract exceeds

\$500,000 and 5% of the amount due on each partial payment shall be withheld by the board of education when the outstanding balance of the contract is \$500,000 or less. N.J.S.A. 18A:18A-40.3. A municipality may withhold 2% of the amount due. N.J.S.A. 40A:11-16.3. Most General Contractors will ask you to sign a contract wherein you agree to 10% retainage. If your

company has been listed as the subcontractor to whom the general contractor will subcontract the work, your subcontract should have the same terms as the General's contract with the public body. This is assuming that you did not agree to the 10% retainage in your proposal. (If this is the case change your proposals, now!)

DISCLAIMER

These materials are intended to provide general information about the subject matter and are presented with the understanding that neither these materials nor the authors have, nor intend to, render any legal or other professional service or opinions. Anyone dealing with a specific legal matter should research any and all matters described generally herein and should not act upon this information without seeking professional counsel. Do not send us confidential information until you speak with one of our attorneys and get authorization to send that information.



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***A Practice with a concentration in
Public Bid Contracting***



The Law Offices of Steven A. Berkowitz counsels contractors that pay their employees a proper wage and benefits as mandated by law. We strive to maintain a level field upon which contractors can fairly compete for public work. Once the project is secured we work to improve the contractor's cash flow by compelling timely payments from the Owner.

Contact Steven A. Berkowitz to discuss any legal construction issues at 856-751-1860, ext 1.

Do you want your association to get more work by keeping abreast of the latest developments in bidding laws? Call us or email for free subscription.

DBC* Aggregate Limit – He Who Hesitates is Lost

We are all familiar with the Affidavit of Uncompleted Work that contractors submit with bids as is required by a specification. Recently there has been a great deal of attention focused upon this Aggregate Limit, this article will describe how a contractor can protect itself from a challenge and how to challenge another's bid in the event that you believe a competitor is over its limit.

When completing your Total Amount of Uncompleted Contracts Affidavit the critical issue is whether at the time the work is scheduled to begin, your company will exceed its DBC Rating limit. If the amount of the project that you are bidding on at the time you submit your bid, when added to your amount of uncompleted contracts, will exceed your DBC limit, you must include evidence that you will be over your DBC limit when the project is

scheduled to begin, with your bid. Such evidence may include schedules of the projects that your company currently has on hand, applications for payments on the projects on hand, schedules and the like.

On the other hand, if you want to challenge another contractors bid on the grounds that if the bidder is awarded the project, such an award will exceed its DBC limit, it is imperative that you make the challenge to the public body **before** the contract is awarded. The burden is on you, as the challenger, to convince the public body that it should not award the contractor the bid. Be forewarned, if you wait until the public body awards the contract, a Judge will be reluctant to overturn the decision. If you believe that a contractor is going to be over its limit, you will save valuable time and money if you challenge the bid before it is awarded.

You can not rely on the public body or the solicitor to investigate the work that the bidder is currently doing. A little research and attendance at a local board meeting can win a job.

* DBC is actually a misnomer, the Department of Building and Construction ("DBC") has been replaced by the Department of Treasury, Division of Building Management and Construction. For the purposes of discussion in this article we use the acronym DBC.