



PUBLIC POLICY—John Horton, Director of Public Policy & Government Relations

Generals and Specialty Contractors: Three Bills That Will Change the Way You Do Business

The New Mexico Legislature has passed and Governor Richardson has signed three bills that will change the business relationships between general (or prime) contractor and specialty contractors on public works jobs. One bill will also affect relationships on private construction projects. The three bills **which become effective on June 17, 2005** are the following:

- **Senate Bill 657**—Independent Contractor Status—introduced by Senator Cisco McSorley (D)
- **Senate Bill 806**—Public Works Contractor & Bid Requirements—introduced by Senator H. Diane Snyder (R) and Senator Mary K. Papen (D)
- **Senate Bill 814**—Procurement Code Subcontractor Bonding—introduced by Senator James Taylor (D)

*****None of the following is intended to be legal advice, only a discussion of the provisions of the three bills for the purpose of creating awareness of their provisions and encouraging contractors to seek an attorney's help in dealing with these issues.*****

SB 657 will affect both public works projects and construction on private construction projects. The bill clarifies independent contractor and employee status under the Department of Labor statutes for workers in the construction industry. Enforcement of the law will be the responsibility of the New Mexico Department of Labor. **The new law adds a criminal penalty (up to a fine of not more than \$5,000 or by imprisonment for a term not to exceed 6 months, or both) for “a contractor who intentionally and willfully reports to a state agency or other client [emphasis added] that an employee is an independent contractor or who, for the purposes of a program administered by a state agency, intentionally and willfully treats or otherwise lists [emphasis added] an employee as an independent contractor when the employee’s status does not meet the standards indicative of the independent contractor.”** In addition, following conviction of a contractor for violating this law the bill grants authority to the construction industries commission to “suspend, revoke or refuse to renew a license issued” by CID.

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Who is the responsible contractor who is accountable for determining correct employee versus independent contractor status? It would seem to be the sub or general using this presumed employee. **General contractors should consult their legal advisors to prevent situations where the general inadvertently is taking responsibility for such workers either contractually or by their actions on a job.**

Provisions of SB 657 require a contractor who is an “employer” **consider a person providing labor or services to the contractor for compensation to be an employee and not an independent contractor unless all of the following exist:**

1. the person is free from direction and control over the means and manner of their work, subject only to guidance to specify the desired results;
2. the person is responsible for obtaining business registrations or licenses to provide services;
3. the person provides their own tools or equipment;
4. the person has the authority to hire and fire employees to perform the work;
5. payment to the person is made upon completion of specific portions of the work or is made on the basis of a periodic retainer; and
6. the person represents to the public that work is provided by an independently established business—as determined when four or more of the following circumstances exist:
 - a. services are provided outside the home or from an area of the home set aside for that purpose;
 - b. business cards are provided or the person is a member of a trade or professional association;
 - c. labor or services are performed only pursuant to a written contract;
 - d. labor or services are performed for two or more persons within a period of one year; or
 - e. the person assumes financial responsibility for errors and omissions as evidenced by insurance, performance bonds and warranties relating to the labor or services provided.

Following the effective date of this bill, June 17, 2005, a general contractor or prime contractor on any construction project should **be alert to the business practices of subcontractors on the project and to their own business practices with respect to workers on the project which might cause exposure to the provisions of SB 657.**

SB 806 clarifies current law and changes bid-day requirements for prime contractors bidding on public works projects. Disputes about the current requirements and differences in interpretation have caused bid protests and re-bids. The new law **prohibits departments from accepting bids for award if the bid was submitted by a prime contractor that does not provide proof of required registration for itself with the labor and industrial division. The required proof is the 13-digit registration number issued by the department.** Bids may be accepted and considered for award if submitted by a registered prime contractor but include a bid from an unregistered subcontractor. The bill amends the Subcontractor Fair Practices Act allowing substitution of the unregistered subcontractor without any change in the bid. The law requires bid documents and specifications to include a clear notification of the registration requirement.

In the process of assembling bids general or prime contractors should assure themselves any subcontractors from whom bids are received and included are registered with the

labor department. Substitution will be allowed, however the general or prime contractor will bear the risk of any additional cost.

SB 814 is a one-paragraph addition to the Procurement Code that provides for the bonding of subcontractors. If the subcontractor's contract for work to be performed on the project is \$50,000 or more, the subcontractor shall provide a performance and a payment bond.

Payment and performance bonds provided should name the general (or prime) contractor on the job as obligee because the law specifies the "contract for work" of the subcontractor. Our information is that joint-obligee bonds (payable in favor of the public owner and the prime contractor) could be used but would create a direct requirement on the part of the public owner to pay the subcontractor if the prime contractor did not—many public owners do not want that role.

The current Procurement Code allows reduction of the amount of bonding required of the general (or prime) contractor if the agency wishes to 'self-insure' the project to a certain extent. Our information is that using this provision in the current law and combining the use of joint-obligee bonds from the subcontractors would not reduce the cost of bonding provided by the prime contractor. Sureties will not reduce the cost because "we don't know when the prime contractor might go out of business—at the beginning, middle or near the end of the project—the exposure is still the full value of the contract."

For public works construction projects bidding on June 17, 2005 and forward general contractors and prime contractors may consider changing internal processes to assure themselves that a subcontractor is both registered and can provide the bonds required.

It is unclear at what date those bonds are required, but a reasonable interpretation would be on the day contracts are signed. If that is the case, expect to have to provide some written evidence of the fact that you have received the performance and payment bonds required by the law to the public agency following award and signing contracts.

It is unclear if the quality of the bond surety required in 13-4-18 will be required of subcontractors providing bonds to a general (or prime) contractor. General contractors should plan to provide the names of surety companies for subcontractors to the public owner on the public works project. If the surety is listed in Federal Circular 570 that information would be valuable--whether you have to provide it or not. At this point one should expect to have the quality of the surety affect the price of bonds for the subcontractor is some way.

At this time it is unclear if the Subcontractors' Fair Practices Act allows for substitution of a sub that cannot post these bonds. The failure to bond will be discovered by the general or prime at a later date. To assure (as much as possible today) the general's ability to substitute a subcontractor who cannot provide the required bonding, consider the following action:

- For the first few bids following the June 17, 2005 date (and until any rules are adopted), a general contractor may consider making it a written requirement when soliciting bids from subcontractors that bidding will "require performance and payment bonds of the subcontractor in accordance with the provisions of Senate Bill 814, signed by the governor on April 4, 2005." Including similar language would appear to bring a right to substitute for that subcontractor into line with the

SCFPA Section 13-4-36 (8). Substituting will be at the cost of the general or prime contractor. **Consult with your attorney on this matter.**

- Also, any general soliciting bids from subcontractors may consider language to make it clear in writing that "providing performance and payment bonds in accordance with Senate Bill 814, signed by the governor on April 4, 2005" will be a provision of the contract with the subcontractor. Making that provision known would appear to allow a general to substitute a sub who couldn't provide the bonds under the SCFPA 13-4-36 (1). Substitution will be at the cost of the general or prime contractor. **Consult with your attorney on this matter.**
- Work with your attorney to include appropriate language in contracts with subcontractors to provide for all actions required of all parties in the event of the bankruptcy or insolvency of a bonded-subcontractor. Also, consider the contract language that addresses a bonded-subcontractor who fails to perform. Contract terms may affect the amount of cash flow the prime contractor must dedicate to the completing of a project where a bonded-subcontractor become insolvent, bankrupt or fails to perform.

When bidding on public works projects in the near future one should expect public owners to require a general (or prime) contractor to list all the subcontractors included in the bid and the amount of the project assigned to them--not just those under the listing threshold or doing more than \$50,000 in work and required to be registered with the department of labor. Public owners will attempt to assure themselves that all subs over \$50,000 "shall provide performance and payment bonds" and also that all those under \$50,000 have been considered. Public owners will also attempt to identify situations where subcontractors' work has been broken up into smaller parcels and given to related companies to subvert the law--more fuel to fire protests and disputes between contractors.

Consider the impact of these new laws upon your estimating and bidding activities to minimize disputes, disruptions, protests, and other actions and reactions that will affect your bottom line.