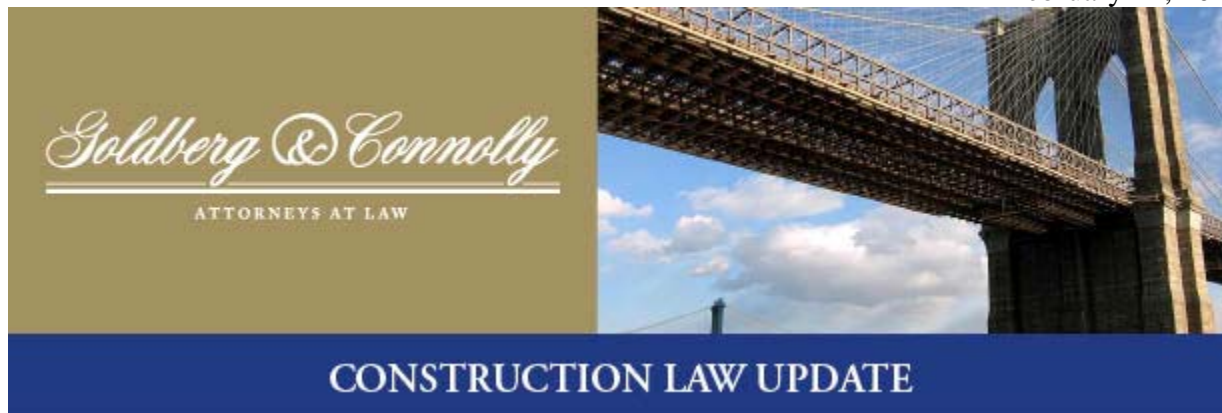


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APPRENTICESHIP PROGRAMS - PROTECT YOUR COMPANY FROM NON-RESPONSIBILITY FINDINGS & PREVAILING WAGE VIOLATIONS

By Henry L. Goldberg, Esq.

Over the last year, we have advised, through our many programs and articles, that DBE and M/WBE goals and monitoring are the “hot” issues in public contracting and continue to be a priority high on the agendas of government agencies at all levels. We now have observed the emergence of another area of focus by government agencies – whether public contractors have approved apprenticeship programs for each trade classification of work to be utilized on public improvement projects. At first glance, this may seem to only affect non-union contractors, but as we will discuss, it can be a significant problem for union contractors as well.

Pursuant to the New York Labor Law, governmental entities are given extraordinarily broad discretion to choose whether to require that contractors and subcontractors on public improvement contracts have apprenticeship programs appropriate for the type and scope of work to be performed. More significantly, the Labor Law empowers each governmental agency to establish their own apprenticeship program requirements to suit their individual needs. Essentially, agencies have carte blanche to set the apprenticeship program requirements for public improvement projects as they see fit. This can spell trouble for the unwary contractor.

Generally, to be accepted, apprenticeship programs must be registered and approved by the Department of Labor (DOL) and often have to have been in existence for at least three years and graduated at least one apprentice in that time. This is usually not a problem for union contractors. Issues often arise, however, with how agencies require the use of apprenticeship programs to perform project work.

One such requirement is that contractors must have, or participate in, an apprenticeship program covering each and every trade classification of work being performed on the project. This is the requirement that even union contractors will have trouble meeting in certain instances. Generally, union contractors are signed up with only one particular trade union that has an approved apprenticeship program covering only the specific trade work governed by that union. Thus, if the scope of the public contract to be performed by the union contractor includes work that is outside the work covered by the contractor's union's apprenticeship program, the union contractor will be unable to meet the apprenticeship requirements with its own forces.

The union contractor can, of course, subcontract work out, but then it might also be required to show that the subcontractor participates in registered apprenticeship programs covering the subcontracted work. Contracts may also contain self-performance requirements that will limit subcontracting opportunities.

We have seen limitations on agency apprenticeship requirements, such as only requiring apprenticeship programs where the total amount of the project exceeds \$3 million, and limiting such requirements to subcontracts that exceed \$1 million. However, these limitations will vary between agencies and must be investigated/reviewed carefully for each project.

In addition, contractors often do not understand that each individual apprentice, not just the program, must be registered and approved by the DOL. If an individual is not registered with the DOL as an apprentice, the contractor is not permitted to classify them on their certified payrolls and/or pay them as an apprentice. If the contractor is classifying individuals as apprentices that are not registered and certified by the DOL, they risk a possible prevailing wage violation.

G&C COMMENTARY

Given the essentially unchecked discretion of agencies to set their own apprenticeship requirements on each individual contract, it is extremely important that you pay strict attention to the apprenticeship requirements set forth in the bid package and ensure that such requirements can be met as planned/represented. Agencies regularly monitor contractors' use of apprentices during the performance of the work to see if contractors are utilizing apprentices/apprenticeship programs as represented. The failure to meet the apprenticeship requirements as represented can result in a finding of non-responsibility.

Initially, a contractor should double check that the apprenticeship program(s) it participates in are registered and approved by the DOL and covers the work the contractor will perform. A review of the list on the DOL's website should provide this information.

In addition, be sure to request the certifications for each individual apprentice from your apprenticeship program sponsor (i.e., union) and keep them on file. It is up to the program sponsor to ensure that each individual apprentice is certified by the DOL, but it is the contractor that lists them on certified payrolls and risks a prevailing wage investigation.

So be proactive and do your homework to avoid a finding of non-responsibility or prevailing wage investigation. Do not assume the union with whom you are a signatory to a CBA has ensured that all its apprentices have been properly approved and registered with the DOL.

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