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New Legislation Threatens to Further Erode Market Share of Non-Trade Union Contractors in California

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In January 2016, two new laws go into effect that will change the face of various public and private construction projects in California. These new rules represent the latest in an ongoing effort by the State Building and Construction Trades Council of California (SBCTC) to force public and private owners to use SBCTC-affiliated contractors for various construction work and to impose obligations traditionally tied to public works—e.g., prevailing wage requirements—even on private construction projects.

Assembly Bill 852: Prevailing Wage on Certain Private Hospital Projects

The first new law, AB 852 (Burke), requires, with limited exceptions, that workers be paid prevailing wage when they are employed under private contract on a project that is (1) for work on a general acute care hospital,[1] and (2) financed in whole or in part by conduit revenue bonds. In essence, this means that owners and contractors planning conduit revenue bond-financed work—including "construction, alteration, demolition, installation, or repair work"—on any hospital with more than 76 beds should expect that after January 1, 2016, the cost for that work could increase substantially. Perhaps more importantly, owners should be aware that the failure to ensure that eligible workers are paid the prevailing wage could subject them to both civil and criminal penalties under California's prevailing wage law.

[1] *See* Cal. Health & Safety Code § 1250 ("'General acute care hospital' means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services. ...").

Assembly Bill 1358: Extends "Skilled and Trained" Workforce Requirements to School District Projects

The second new law, AB 1358 (Dababneh), comes on the heels of two other bills sponsored by the SBCTC: SB 54 (Hancock), enacted in 2013, and SB 785 (Wolk), which followed in 2014.[2] Like SB 54 and SB 785, AB 852 and AB 1358 are products of the SBCTC's ongoing campaign to extend the prevailing wage to private construction projects and expand the union through its apprenticeship programs. For example, SB 54, which is now codified at Health and Safety Code 25536.7, effectively requires that oil refiners hire SBCTC-affiliated contractors on certain projects and pay prevailing wage to workers on those projects.

Similarly, AB 1358 requires, among other things, that in order to bid on design-build projects for California school districts, design-build entities must "provide[] an enforceable commitment to the school district that the entity and its subcontractors at every tier will use a skilled and trained workforce to perform all work on the project or contract that falls within an apprenticeable occupation in the building and construction trades." [17250.25(c)]. That is to say, the design-build entity must (1) ensure that its workforce meets the training standards set forth in AB 1358, and (2) provide evidence to the school district of the same.[3]

According to AB 1358, a "skilled and trained workforce," is a workforce that is made up entirely of "skilled journeypersons" or registered apprentices. A "skilled journeyperson," in turn, is a worker who (1) has graduated from a state-approved apprenticeship program in California or a federally-approved program outside California, or (2) has at least as many hours of on-the-job experience as would be required to graduate from such a program. Importantly, starting in July 2016, the hours-based exception for non-graduates begins a partial phase-out; as of July 1, 2016, at least 20% of the skilled journeypersons *must* be graduates of a state- or federally approved program. That number gradually increases to 30% in 2017, 40% in 2018, 50% in 2019, and 60% by July 1, 2020. Owners that fail to adhere to these requirements may face civil and potential criminal liability.

By requiring a "skilled and trained workforce," the laws effectively mandate that the affected public agencies hire contractors that are associated with the SBCTC. That is because the SBCTC sponsors the vast majority of state-approved apprenticeship programs in California. A design-build contractor that is not associated with the SBCTC—including contractors affiliated with other national trade unions like the United Steel Workers—will, as a practical matter, likely be unable to hire a sufficient number of "skilled journeypersons" or "registered apprentices," and will thus be ineligible to perform the work.

Conclusions

Accordingly, these new laws that force owners to (a) pay prevailing wages even on private projects and (b) use only SBCTC-affiliated companies to perform the work are extremely favorable to the SBCTC and its constituents. On the other hand, they will result in many lost business opportunities for non-SBCTC contractors.

[2] SB 54, summarized further below, imposed prevailing wage and apprenticeship requirements on certain construction projects at oil refineries. SB 785 introduced a number of changes to the statutes governing design-build contracts with various public entities; AB 1358 essentially extends to California school districts the changes introduced by SB 785.

[3] The law sets forth three ways in which design-build entities can meet that burden. First, the entity can agree to comply with the workforce provisions and then, on a monthly basis throughout the lifetime of the contract or project, it may provide evidence to the school district that the entity and its subcontractors are in fact in compliance. Second, the entity can agree to become a party to any project labor agreement that the school district has entered into and that incorporates the workforce requirements set forth in AB 1358. Finally, the entity itself can enter into a project labor agreement that incorporates those requirements and that binds the entity and every subcontractor working on the project.

It is uncertain whether these laws will withstand scrutiny by the California courts. At least one lawsuit challenging the legality of SB 54 is currently pending in federal court in the Eastern District of California. The lawsuit contends that SB 54 is invalid, among other reasons, because it (a) is preempted by the federal National Labor Relations Act, (b) is preempted by the federal Employee Retirement Income Security Act, and (c) violates the Equal Protection clause of the U.S. Constitution. This legal challenge—which may by extension impact the viability of AB 852 and AB 1358—will likely not be fully adjudicated for many months, long after the new laws described above become effective. Thus, regardless of the outcome in federal court, public agencies, owners and contractors will need to take measures to ensure compliance with the new laws and/or prepare for the financial consequences these laws are sure to have.

For more information about AB 852, AB 1358, SB 785, SB 54, or the expanding application of "skilled and trained" workforce requirements and public works regulations to private projects, please contact any of the attorneys listed below.

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