WISCONSIN ADOPTS NEW "SINGLE-PRIME" DELIVERY METHOD FOR STATE CONSTRUCTION PROJECTS

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Effective January 1, 2014, a fundamental change was made to the method by which public construction projects are led by the State of Wisconsin's Department of Administration. Wisconsin adopted a new single-prime delivery method to replace its former multiple-prime method. Under the former multiple-prime method, the State would contract with a principal contractor, but would also enter separate contracts directly with mechanical, electrical, plumbing, and fire protection (MEP) subcontractors. Under the new single-prime method, the State will only enter into a single contract with a general prime contractor.

Wisconsin's new single-prime delivery method is actually a unique hybrid, because the State will continue to solicit competitive public bids from the MEP subcontractors, as was done under prior law. However, the successful MEP bidders will enter subcontracts with the general prime contractor, rather than with the State.

Under the new law, all contractors must first be certified by the Division of Facilities Development before submitting any bid. The bidding process begins with the submission of competitive public bids by the MEP subcontractors. The successful low MEP bidders are then selected and identified by the Department of Administration, and the Division of Facilities Development must post the bidders' names and the amounts of the successful MEP bids on its website. Within five (5) days thereafter competitive public bids for the general prime contract must be submitted. The bidders must include the bids of the successful MEP contractors in their own bids for the general prime contract. The general prime contract is then awarded to the lowest qualified responsible bidder.

The general prime contractor is required by law to enter into subcontracts with each of the successful MEP subcontract bidders selected by the Department. The law mandates that each subcontract must contain certain terms prescribed by statute, including provisions pertaining to prompt payment, insurance and bonding, indemnification, and retainage. The law generally precludes alteration of the scope or price of the subcontract work. It is up to the general prime contractor and each of the MEP subcontractors to negotiate all other subcontract terms. Reaching agreement on the many remaining critical subcontract terms could prove problematic, however, given the arranged marriage between the general prime

contractor and each MEP subcontractor that results from Wisconsin's hybrid single-prime delivery method. The general prime contractor will probably find it difficult or impossible to dictate terms unfavorable to the MEP subcontractors, because it has no voice in the selection of the MEP subcontractors and the law does not require the MEP subcontractors to accept any terms besides those imposed by statute.

Wisconsin's new hybrid single-prime system affords protection to MEP subcontractors against bid shopping, and continues the relative autonomy they enjoyed under the old multiple prime system. Those benefits come at a price, however. The new law requires each MEP subcontractor to obtain a 100% performance bond and a separate 100% payment bond naming the general prime contractor as the obligee.

Of perhaps greatest concern to MEP subcontractors are the new law's indemnification provisions. The new law mandates the inclusion into all MEP subcontracts of certain extensive and complex indemnification terms, which generally obligate the MEP subcontractor to "defend, indemnify, and hold harmless" the general prime contractor and its principals for damages and fines for "bodily injury, sickness, disease, or death, or injury to or destruction of property, including… loss of use" arising from the performance of the subcontract work. This includes an obligation to indemnify the general prime contractor for claims arising from its own negligence or fault in providing supervision or oversight of the MEP subcontractor's work. MEP subcontractors may find that these indemnification obligations expose them to potential liability for which they may have no insurance coverage under their general liability policies.

By creating its own unique hybrid delivery method, Wisconsin has ventured into uncharted territory. Time will tell whether this experiment meets with success or failure. The new law raises many unanswered questions. Prospective bidders need to know that the rules have changed, how they have changed, and the significant implications of those changes.

WISCONSIN ELIMINATES BUILDING CONTRACTOR REGISTRATION PROGRAM

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Effective July 2, 2013, Wisconsin eliminated its Building Contractor Registration Program.[1]

The Building Contractor Registration Program was eliminated in connection with the passage of Wisconsin's Biennial Budget Act. A new statute was also enacted that prohibits the Department of Safety and Professional Services from creating or enforcing any administrative rule that would require any person engaging in the construction business to hold any license, except a license specifically required by statute.[2]

Under former law, no person or entity could legally work in the construction business in Wisconsin without being registered as a Building Contractor, unless the person or entity held a Dwelling Contractor Certification or some other Wisconsin construction license. The Building Contractor Registration requirement was therefore the "catch-all" credential requirement for those who held no other credential. In order to obtain the Building Contractor credential, the applicant was merely required to submit the appropriate application form, certify compliance with Wisconsin's statutory worker's compensation and unemployment compensation requirements, and pay the registration fee. The registration had to be renewed every four years. There was no requirement that an applicant possess any special skills or qualifications. The Building Contractor Registration Program had therefore been criticized as being little more than an excuse to charge a fee.

If you have any questions regarding this article, please contact Attorney Steve Slawinski at O'Neil, Cannon, Hollman, DeJong & Laing S.C. at 414-276-5000.

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[1] 2013 Wis. Act 20 § 1708e, repealing Wis. Stat. § 101.147.
[2] 2013 Wis. Act 20 § 1708f, enacting Wis. Stat. § 101.1472(2) (2013).

WISCONSIN'S NEW "RIGHT TO REPAIR" LAW

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Wisconsin's new "Right to Repair" law was enacted on March 27, 2006, and became effective on October 1, 2006. The new law affects the relationship between owners and builders or remodeling contractors, and between such contractors and the suppliers of windows and doors.

The "Right to Repair" law is a misnomer. The new law does not give the contractor an absolute right to repair a claimed defect. Instead, the new law is lmerely an ADR (Alternative Dispute Resolution) law that applies to construction defect claims on residential construction

and remodeling projects. It is intended to reduce owner lawsuits by fostering settlement through mandatory pre-suit procedures aimed at opening a dialogue for a negotiated resolution of such claims.

At the time that the contract is made, the contractor is required to provide the owner with a specific statutory notice and a brochure prepared by the Department of Commerce advising the owner about the new law. Before an owner may commence a lawsuit or an arbitration against the contractor for breach of warranty or for construction defects, the owner must first give the contractor a written notice of the nature and description of the alleged defects, and the owner must also provide the contractor with an opportunity to offer to repair the defect or to make a monetary settlement offer. An action or arbitration filed by the owner without first giving the contractor such notice would be subject to dismissal without prejudice or to stay by the court or arbitrator pending the owner's compliance with the statutory requirements.

In response to the owner's notice of claim, the contractor has five options:

- Make a written offer to repair the defect at no cost to the owner
- Make a written monetary settlement offer
- Make a written offer including a combination of repairs and monetary payment
- Make a written statement rejecting the claim
- Make a proposal for inspection of the dwelling

Under the option to make a proposal for inspection of the dwelling, the contractor has the right to inspect the dwelling and to conduct destructive testing before responding to the claim on the merits. Contractors also have a right to seek contribution from suppliers of windows and doors, and may require their participation in this process. In cases where the contractor does not flatly reject the owner's claim, the "Right to Repair" law includes specific procedures and deadlines requiring the parties to make a series of offers and counteroffers until the parties either reach an agreement or reach an impasse. The obvious intent is to cause the parties to engage in active negotiation. However, the law does not require the parties to reach an agreement.

The law will not apply to all owner-contractor disputes. For example, it may not apply to claims involving purely design defects, as opposed to construction defects. Nor would it apply to accounting or delay claims, or to claims arising under Wisconsin's Home Improvement Practices regulations. Furthermore, it allows owners to make immediate repairs "to protect the health and safety of its occupants" without first giving notice to the contractor. It is the author's opinion that owners would also be permitted to make emergency repairs where a failure to take immediate action could result in serious additional damage to the home, such as the emergency repair of a plumbing leak.

The "Right to Repair" law leaves many questions unanswered. For example, it does not

specifically state what happens if the owner first repairs the alleged defect before giving notice to the contractor of a claim where the repair was not an emergency. Under such circumstances, the contractor's right to inspect the defect and to offer to repair has been compromised, but not necessarily its right to make a monetary offer of settlement. Such questions are left to the Courts to decide.

Without question, there will be a learning curve both for contractors and for attorneys and judges in dealing with the new "Right to Repair" law.

For more information, please contact Steven J. Slawinski.