

THE DEVIL IS IN THE DETAIL—INCORRECT OR INSUFFICIENT PAPERWORK CAN RESULT IN DEBARMENT FROM PUBLIC WORK

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For contractors who do public work, a recent opinion issued by the Appellate Division highlights the importance of record keeping and the importance of submitting accurate information to the Commissioner of the New Jersey Dept. of Labor & Workforce Development (Commissioner). In *New Jersey Dept. of Labor & Workforce Development v. R.I., Inc.*, Docket No. A-1492-073 (N.J. App. Div. March 27, 2009), the Appellate Division upheld an administrative decision by the Commissioner debaring a contractor from bidding on public work for three years.

Under the Prevailing Wage Act (PWA), N.J.S.A. 34:11-56.25 to -56.70, of which the Public Works Contractor Registration Act (CRA), N.J.S.A. 34:11-56.48 to -56.57 is a part, contractors and subcontractors engaged in public work within the State are required to obtain a registration certificate from the New Jersey Department of Labor & Workforce Development. This requirement was enacted to enforce laws and regulations concerning wages, unemployment, temporary disability and worker’s compensation insurance and payment of payroll taxes. Under the CRA, no contractor may bid or work on a contract for public work unless registered, and a violation of the CRA is a disorderly persons offense.

Applicants can obtain either a one or two-year registration certificate. One-year certificates are issued to new and one-year renewal applicants; two-year certificates are issued to contractors who have maintained at least two years of uninterrupted registration. Registrations must be renewed not less than thirty days before the expiration date of the immediate preceding registration. N.J.S.A. 34:11-56.54.

In RI, a contractor submitted an application on May 9, 2005 for a two year renewal of its registration certificate, which was denied by the Department because there had not been two years of uninterrupted registration. The Department refunded a portion of the application fee and issued a one year registration certificate which noted that June 27, 2006 was the expiration date. The contractor, however, failed to submit a renewal application prior to the expiration date printed on the 2005 certificate, causing its registration to lapse. Nonetheless, the contractor continued working on a public works project which had begun on May 31, 2006 and was scheduled to finish on October 31, 2006.

On August 18, 2006, approximately two months after its registration had lapsed, the contractor submitted an application for a one year renewal, but the application failed to identify a corporate officer. During this time, the contractor was also involved in a disciplinary action brought by the Department for failure to pay workers in accordance with the PWA on three public works projects. On August 30, 2006, the Department suspended the contractor and its principals from bidding or engaging in any public works projects pending debarment.

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On October 13, 2006, the Department Commissioner ordered that the contractor and its principals be debarred for a period of three years and pay \$47,965.88 in backwages to employees, administrative fees and penalties.

When the Department acted on the contractor's August 18, 2006 renewal application, the Department issued a denial letter on September 19, 2006, on the grounds that the company had "engaged in a public work without a valid Public Works Contract or Registration certificate." N.J.S.A. 34:11-56.51; N.J.A.C. 12:62-2.4(a)(2). The Department's letter also based the denial on N.J.A.C. 12:62-2.1(g), which states:

If the applicant knowingly supplies incomplete or inaccurate information to the department in connection with his or her application, he shall be disqualified under these rules, barred from reapplying for registration for a period of up to one year from the date of notice of disqualification and may be subject to other penalties described in N.J.A.C. 12:62-2.3, 2.4 and 2.5.

At a hearing conducted on April 27, 2007, before an administrative law judge (ALJ), a representative of the Department testified that while it was standard policy for the Department to send pre-expiration notices to contractors, there was no statute or regulation requiring such a notice and that the Department did not keep copies of the notices in its contractor files. Thereafter, the ALJ issued a written decision on August 9, 2007, affirming the Department's denial of the application based on the following findings: the contractor had pre-expiration notice since the expiration date was on the certificate itself; the contractor engaged in a public work project while unregistered; and its untimely registration renewal application contained a material omission by failing to list a corporate office in violation of the requirement that contractors provide the Department with the names and addresses of each individual with an interest in the company seeking registration. N.J.A.C. 12:62-2.1(c)(4), (8). The Appellate Division affirmed the ALJ's decision finding that the Department's actions were not arbitrary and capricious.

The RI decision illustrates the consequences of submitting incomplete information to the Department of Labor & Workforce Development when renewing a Public Works Contractor Registration Certificate and the risk associated with relying on the Department to send a pre-expiration notice before taking steps to renew a registration certificate. While many contractor's rely on the Department to send them a pre-expiration notice, the prudent contractor should set up the appropriate internal procedures to ensure that its registration certificates remain current. If a contractor fails to do so and its Public Works Contractor Registration Certificate lapses, the consequences could be devastating.

If you have any questions about this article or other public bidding issues, please call Thomas J. O'Leary or Michael X. McBride members of the firm's Construction Law Practice Group at (973) 535-0500. We also would be pleased to provide you with assistance with respect to other construction law or public contracting issues.