

# CONTRACTING TOPICS

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*Johnson & Conway, LLP* 2

**Johnson & Conway, LLP**

Attorneys at Law

- New Jersey Office**

18 Sycamore Avenue  
Ho-Ho-Kus, NJ 07423  
(201) 447-5600

- New York Office**

307 7th Avenue  
Suite 2001  
New York, NY 10001

Web site:  
www.jnclaw.com

## CONTRACTORS, MATERIAL SUPPLIERS AND PREVAILING WAGES

New Jersey's Prevailing Wage Law (like the federal Davis-Bacon Act) has an exception for "material suppliers or their employees who do not perform services at the job site." It is sometimes difficult, however, to determine whether a supplier's employee falls within the exception.

Making the correct determination is important because penalties for violation of the Prevailing Wage Law can be severe. Not only do the penalties include civil fines and imprisonment (for willful violation), but unintentional violations may even result in debarment for up to three years. Finally, a workman may bring suit for the wages owed on behalf of himself and others similarly situated and may recover attorney's fees. Or, more typically, the action may be brought by

the State following a complaint.

Furthermore, a contractor may be held liable to the workers of its subcontractor, if the subcontractor fails to pay them prevailing wages. As a consequence, a contractor could be on the hook if one of its suppliers is deemed to be a subcontractor and fails to pay statutory wages.

How might a contractor or material supplier run afoul of this law? In a 1988 Massachusetts case, an asphalt supplier was found to have violated a similar prevailing wage law because the asphalt trucks worked as a unit of the asphalt spreaders constantly delivering material into the spreader's hopper. Sometimes the trucks were



pushed by the spreaders. This was enough involvement for the court to find the supplier to be "an integral part of the road construction process." In a 1964 Wisconsin case, an aggregate supplier was found to have violated that state's prevailing wage law because its trucks did not deliver the material to a stockpile, but rather spread the gravel, or, in the case of aggregate, dumped it next to the ready-mix plant.

## PROMPT PAYMENT IN NEW JERSEY

Like every other state, New Jersey has a Prompt Payment Act (N.J.S.A. 52:32-41) that applies to contractors, subcontractors and material suppliers on State jobs. The statute requires the State to pay contractors within 60 days of the later of the State's receipt of the invoice or the delivery of goods and services. Contractors must pay subcontractors and suppliers

within 10 days of receipt of payment by the State. Interest on late payments accrues at the rate of prime plus 1%. "Court costs" may be recovered in the event of a lawsuit. However, the statute does not apply to municipal work.

New Jersey, like half the states, also requires prompt payment of subcon-

tractors on private jobs, unless the requirement is waived by contract. Payment must be made within 10 days of receipt of payment by the contractor. Failure to do so can result in interest changes of prime rate plus 1%. Like the Prompt Payment Act for State work, N.J.S.A. 2A:30A-2 also covers material suppliers.

## FAMILY BUSINESS SUCCESSION PLANNING IS VITAL

As a number of our closely held business clients have discovered, an up-to-date business succession plan is absolutely vital when unforeseen events, such as death of one of the shareholders, occurs. Without such a plan, the imposition of a crippling estate tax can effectively prevent a transfer of stock to the other shareholders or family members and may result in the liquidation of the company in order to pay the taxes.

The most popular succession planning agreements are often referred to as “buy/sell” agreements. These agreements provide a mechanism to purchase the deceased shareholder’s stock and to avoid draconian estate tax effects. There are two basic types of buy/sell agreements:

- The “Redemption Agreement,” in which the corporation purchases the shares from the deceased, thereby proportionately increasing the percentages of the re-

maining shareholders, and

- The “Cross Purchase Agreement,” in which the other shareholders purchase the decedent’s interest.

Of course, there are pros and cons for each arrangement, and individual circumstances will dictate the most effective type of plan. For a number of reasons, the Cross Purchase Agreement has been somewhat more popular of late. It allows the remaining shareholders to take their increased interest at a “stepped up” basis (valued at the time of death), which will result in a tax savings when they transfer their shares. Also, the Cross Purchase is better suited to take advantage of the \$675,000 “Qualified Family Owned Business Interest Deduction” for family businesses, in addition to having other advantages.

However, potential developments in the tax law may change the preference

for Cross Purchase Agreement. One problem with the Redemption Agreement has been the fact that payments for redemption of corporate stock may be considered divi-



dends, thus triggering an income tax.

Because of proposed legislation to reduce or eliminate corporate dividends, it may become preferable to have payments treated as dividends, if the new law provides for a dividend tax rate lower than the capital gains rate. Consequently, the next months should have an interesting effect on financial and business planning, and we will keep our clients informed of our take on the situation.

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## JOHNSON & CONWAY, LLP

Johnson & Conway, LLP is a law firm serving the construction industry throughout New Jersey. Its three partners, **Geoffrey Johnson**, **John Napolitano** and **William “Mickey” Conway** have a total of 45 years of legal experience working with small to mid-sized construction professionals, owners and contractors. In addition, John Napolitano has a background in engineering and is

a licensed engineer.

We handle a wide range of matters from contract review and negotiation, corporate counsel and succession planning, employment disputes, and litigation, both complex and small before the courts and regulatory bodies.



Please feel free to call any of our partners or visit our web site ([www.jnclaw.com](http://www.jnclaw.com)) for additional information on the firm.