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***AVOIDING PITFALLS OF UNION FUND AUDITS***

By: Jill Tobia Sorger, Esq.

***Introduction:***

Every contractor faces “it” sometime - the dreaded labor audit. Regardless of whether it is commenced by a union fund, the New Jersey Department of Labor and Workforce Development (“NJDOL”) or another entity, an audit’s commencement marks the beginning of a time consuming and expensive process for the contractor. Even in the case of a “routine” audit (i.e. one not initiated by a suspicion or evidence of underpayment, mis-classification etc.), the burden is still immediately placed on the contractor to produce documents and information, such as payroll records, time sheets and proof of insurance, to an auditor whose job, for lack of a better expression, is to find mistakes and collect monies. If a contractor is not diligent in providing information and documentation, the auditor will often make findings and conclusions in favor of his or her client (i.e. the fund or the NJDOL) simply because there is no evidence to the contrary. It had also become quite common for auditors to pick up workers from other trades as delinquencies. Making matters worse, the practicality of the situation is that once audit findings are issued, these “findings” seem to take on the perception that they are “gospel” conclusive proof of the liability of a contractor when in fact,

this is not always the case. While the same may be used as evidence in an arbitration or administrative law or court proceeding, the contractor still has the legal right and opportunity to challenge the same even after such findings are issued.

Recently, contractors have been receiving particularly high (and unsupported) audit findings and are further have been missing their opportunities, either in arbitration or in court, to challenge such findings. An examination of the reasons why this situation is occurring has revealed several common pitfalls of which every contractor facing an audit should be aware of and protect itself against.

***Audit Pitfalls:***

**Ignoring or Glossing Over the Audit:** One of the most common mistakes made by contractors is either completely ignoring and/or glossing over the audit. As stated above, the practicality of the situation is that once audit findings are issued by the auditor, they are perceived as determinations of liability. Accordingly, to prevent the issuance of grossly inaccurate audit findings that often result when a contractor fails to monitor audits closely and to provide sufficient information, the contractor should devote its time and energy to providing documentation and information to the auditor in order to justify its payments, classification of employees and/or any other issue identified by the audit. In addition to providing documents and information in its possession, the contractor should also take proactive steps to produce additional forms of evidence to the auditor. For example, obtaining sworn statements of not only workers but also supervisors and customers is also an effective method of countering a preliminary audit finding of mis-

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classification. Furthermore, the contractor should also be careful to confirm the transmission of any documents provided to the auditor in writing so as to effectively counter any contention in an arbitration or court proceeding that said information was not provided or does not exist. Finally, contractors should always request and review all work papers and/or calculations of the auditor in order to prevent mistakes by the auditor from being perpetuated as an audit finding.

**Losing Track of the Audit Status.** Another common mistake made by contractors is that once the actual “audit” is conducted (i.e. the auditor visits the contractor’s premises and inspects records), the contractor often waits to hear from the auditor instead of actively following up on its own. The contractor should note that the auditor really has no obligation to provide follow-up information to the contractor and often, his or her findings will be issued without any further communication from the auditor. It is the contractor’s responsibility to remain apprised of whether findings are issued.

**Inadvertently Missing A Notice of Arbitration Due to the Intentional Creation of Confusion.** Additionally, once audit findings are issued, the contractor should immediately dispute the amount in writing. It should also be on the look out for an Arbitration Notice (if the audit is by a union fund) or other Notice setting a date for arbitration and/or setting forth the procedure to contest the findings. Recently, a common reason that arbitrations are being inadvertently missed by contractors is that while a contractor is dealing with the auditor in good faith to resolve the matter, the attorney for the union fund is simultaneously scheduling an arbitration with the fund’s permanent arbitrator. The contractor is therefore often confused when it receives the Notice of Arbitration and

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fails to appear as it mistakenly thinks the matter is being resolved with the auditor. Additionally, even if the contractor has legal counsel, the fund attorney will only notify the contractor of the arbitration; thereby often misleading the contractor into assuming its attorney has been notified and is handling the situation. The end result is that the contractor misses the arbitration (along with the opportunity to present its evidence against the audit findings) and the audit findings (along with an assessment of interest, liquidated damages, attorneys fees and arbitrator's fee) are entered as a default award by the fund's permanent arbitrator.

**Failing to Timely Contest a Default Arbitration Award Based on an Audit.** The final mistake a contractor often makes is that if, as detailed above, a "default" arbitration award is entered, the contractor must file in court to vacate the award within three (3) months of its issuance. The union fund, however, has twelve (12) months to confirm the award as a judgment against the contractor. Therefore, based on the law, after three (3) months and before twelve (12) months, confirmation of the award becomes almost automatic as the contractor loses the majority of its defenses. The contractor must keep the above law in mind as often times it will attempt to negotiate the default award in good faith with the union fund to more accurately reflect what may be in fact owed. However, if this process lasts longer than three (3) months, the fund has the ultimate bargaining power as it is able to simply confirm the award as a judgment without the contractor being able to defend itself. While such a tactic goes against "good faith dealing", the rise of such judgments being entered indicates that such bad faith dealing is becoming more commonplace.

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***Advice for Contractors:***

The best way for a contractor to counter audit pitfalls is by devoting time and attention to the same from the onset. Timely provision of information and documentation, along with diligent follow-up, can prevent the majority of the above outlined scenarios from occurring. Understanding the audit process and consulting with legal counsel from the initial stages of the audit will ensure that the contractor has every opportunity to present evidence to either prevent and/or disprove negative audit findings. While correctly approached audits can be routine and benign, if they are neglected they can become a serious liability to a contractor.

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