Our CONSTRUCTION CLIENTS at WORK!

Gray wins design-build award for Amfine job

Lexington-based **James N. Gray Construction Co.** was the designer and contractor of the Amfine Chemical facility in Pembroke, Ky., which won the DBIA National Design-Build Award for best industrial/process project under $25 million.

The CONSTRUCTION TRAILER

Continued from page 3

both the Operating Engineers and the Laborers for the same work.

• **Check Duplication of Fringe Benefits.** A contractor's existing pension and health insurance plans may require that premiums be paid on its entire work force. Union plans required by a PLA usually require contributions based on the number of hours worked. Contractors often find themselves having to pay twice for benefits for employees working on a PLA.

• **Consider a Separate Company.** Separate union and non-union companies are often used to avoid many of the pitfalls of PLAs. The companies must, however, maintain separate day-to-day management and employee rosters in order to defeat union claims seeking to automatically represent both entities. Such a "double breasted" operation should be carefully structured.

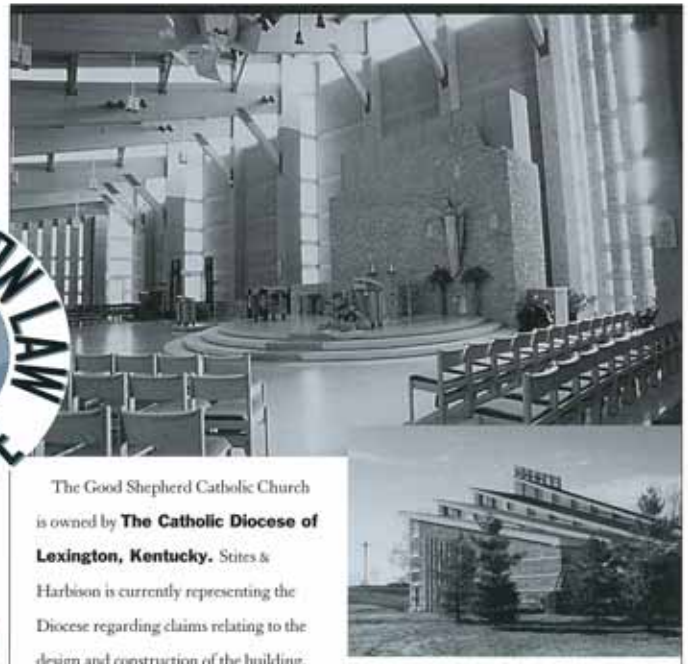
Less than 20 percent of the construction workers in the United States currently belong to a union. But so long as government agencies look kindly on unions, PLAs will be a fact of life for the construction industry.

Ivan H. Rich Jr. is a labor and employment attorney with Stites & Harbison. He's based in the firm's Louisville office and can be reached at 502/681-0514 or irich@stites.com.

STITES & HARBISON PLLC
ATTORNEYS
Riverwood — Building 100, Suite 1700
3350 Riverwood Parkway
Atlanta, GA 30339
(770) 850-7000

Our CONSTRUCTION CLIENTS at WORK!

Lexington Diocese looks to Stites & Harbison



Photos: Bob Hower/Quadrant Photography

The Good Shepherd Catholic Church is owned by **The Catholic Diocese of Lexington, Kentucky.** Stites & Harbison is currently representing the Diocese regarding claims relating to the design and construction of the building.

ADVERTISEMENT

A PUBLICATION OF STITES & HARBISON, PLLC

CONSTRUCTION LAW UPDATE

VOL. 6, No. 1
MAY 2002

INSIDE UPDATE

Welcome, Middle Tennessee!

We've added our fellow members from the Nashville Chapter of the Associated General Contractors to our mailing list for Construction Law Update. Let us know (**mailinglist@stites.com**) if you'd like to get a PDF version of the newsletter along with other electronic updates from Stites & Harbison.

STITES & HARBISON PLLC
ATTORNEYS

Atlanta • Frankfort • Hyden • Jeffersonville
Lexington • Louisville • Nashville • Washington
www.stites.com

Many states, including Kentucky, require that the statement THIS IS AN ADVERTISEMENT *appear on publications such as this.*

MEANS and METHODS

BY JOE HARDESTY AND DAN DOUGLASS, STITES & HARBISON

When can a surety be discharged on a payment and performance bond?

Sureties sometimes oppose claims on a payment or performance bond by arguing that they've been discharged from their obligations because of a material alteration to the bonded contract. The theory is that if the contract becomes a completely different undertaking without the surety's knowledge or consent, then all deals are off.

Not necessarily so. That's because most bond forms waive the obligation of the obligee to notify the surety of changes to the construction contract. Bond forms and the bonded contract often state that the bond covers the contract and all changes to the contract.

The discharge defense is even less successful on claims against a payment bond by subcontractors and material suppliers. Going all the way back to a U.S. Supreme Court case in 1914 *(Equitable Surety Company v. United States of America)*, courts have overruled the

Joe Hardesty

discharge defense because subcontractors and material suppliers are unable to control whether the bonded contract is materially altered.

The answer? In order to avoid a surety's claim of discharge on a performance or payment bond, the owner and contractor should make sure the surety is aware of and consents to all modifications to the bonded contract.

Trouble with subs' bids?

What happens if a contractor relies on a subcontractor's price in submitting his bid for a project, and the subcontractor later refuses to sign a subcontract for the work? In one case, arising out of the Atlanta Olympics, the contractor was able to recover his resulting extra costs from the subcontractor, even though the

Dan Douglass

sub never signed a contract for the work in question. *SKB Industries, Inc. v. Insite,* 250 Ga. App. 574, 551 S.E. 2d 380 (2001).

Here's what happened. The contractor submitted a bid to do hardscaping and landscaping work on the Georgia International Plaza for the 1996 Summer Olympic Games in Atlanta. The contractor relied on a bid from a landscaping subcontractor for a portion of the work. The sub's price was questioned, and the sub assured the contractor that it would do the work for its bid price.

The contractor got the job and sent the sub a written subcontract. The sub requested an initial payment for the work but never signed the subcontract and later refused to do a substantial portion of the landscaping work. As a result of the sub's refusal and the time constraints of the project, the contractor had to perform the work at a substantial extra cost.

The Georgia Court of Appeals found that the jury properly awarded the contractor his extra costs against the sub, even though there was no signed contract. The Court found that the sub made a promise to do the work in his bid and should have expected the contractor to rely on the promise, the contractor did rely on the promise and suffered damages, and the contractor was therefore entitled to enforce the promise.

Every case depends on its particular facts, but in this case, the contractor was entitled to recover its extra costs for reasonably relying on the sub's bid.

Construction Law Update is published by Stites & Harbison, PLLC, for its clients and friends. Editors Dan Douglass (ddouglass@stites.com) and Joe Hardesty (jhardesty@stites.com) invite readers to contact them with questions, comments and suggestions.

The CONSTRUCTION TRAILER

BY IVAN H. RICH JR., STITES & HARBISON

Project Labor Agreements (PLAs) sound like a good idea. The construction unions approach the awarding body – usually on a large public works project – and guarantee there will be no strikes if all work is done subject to a PLA. The PLA then becomes part of the bid specifications, and all contractors on the project must agree to abide by its terms for the life of the project.

The supposed advantages? Speed and efficiency (because there will be no strikes), modified work rules and a ready supply of high-quality labor. The catch is that all employees must pay dues and be referred exclusively through a union hiring hall arrangement, that pension and health plan coverage for all employees must be through union plans and that all grievances on the project must be resolved through the PLA grievance procedure.

In reality, PLAs are another story. They have been opposed vigorously by most construction employer groups, citing strikes, restrictive work rules and delays on projects with PLAs. Governmental entities remain loyal to PLAs, possibly as a way to reward unions for political support. (Public employment is the only area in which unions have recently shown gains in influence and membership.)

Like them or not, here are some suggested do's and don'ts for a contractor faced with a bid containing a PLA.

• Check the Recognition Clause. A PLA will usually require a contractor to adopt the terms of the collective bargaining agreement for each craft jurisdiction on the project. If the recognition clause of a separate agreement must be adopted, it should be checked to make sure the contractor does not recognize the union for jobs other than the project. Unions sometimes use carelessly adopted local agreements to support claims for recognition on a geographical or employer-wide basis unrelated to the PLA.

• Check the Referral System. A non-union contractor should not assume that his current employees will be referred without difficulty through the union hiring hall. Unions are adept at using technicalities to refuse to refer workers with merit shop backgrounds. Similarly, the PLA may require that all apprentices be obtained through union sponsored programs. Before bidding, it is important that the contractor understand how the referral system will work in practice. In addition, in Right-To-Work states, the hiring hall relationship is sometimes used as a means to convince workers to "voluntarily" agree to have union dues deducted from their paychecks.

• Check the Dispute Resolution System. It is important to know exactly who will decide grievances. If a "permanent" arbitrator is named, his or her background and decision history should be reviewed. Sometimes grievances are decided by a joint labor-management committee. Such committees are often subject to considerations apart from the merits of individual grievances. Also, PLAs usually require that craft jurisdictions be rigidly observed. A contractor should consider potential areas in his bid that could be subject to conflicting jurisdictional claims. An arbitrator or a joint committee will often be sympathetic to such claims. It can be a major unforeseen cost item to pay Operating Engineers' rates when Laborers' rates were bid or, worse, pay

Continued on back cover

ON the JOB

Brad Cowgill

Ryan Loughry

Ron Stay

Welcome, new arrivals! Construction lawyers **Brad Cowgill** and **Ryan Loughry** have joined Stites & Harbison's Lexington office, and **Ron Stay** is now based in the firm's Atlanta office.

Buck Hinkle, former chair of the American Bar Association's Forum on the Construction Industry, was honored in February 2002 with an Award of Excellence from the Associated General Contractors of Kentucky.

Buck Hinkle

Anne Gorham

The 2003 annual meeting of the ABA's Forum on the Construction Industry is being co-chaired by **Anne Gorham.**