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Responsible Contractors Help Build Thriving Communities

High road employers that pay living wages not only create the types of good jobs that communities need, but also have more stable workforces that deliver better services for the taxpayers and minimize the hidden public costs of low wages.

(Sonn & Gebreselassie, National Employment Law Project).¹

Introduction: What is responsible contractor language, and why is it important?

Public construction projects are often costly undertakings. In recent years, municipalities and schools are increasingly using responsible contractor policies to “set certain minimum employment standards” for bidding on construction work.² In response to this trend, responsible contractor (RC) language is being developed and used to provide needed reform in the construction contract bidding process. According to a recent study of responsible contractor reforms, the public policy goal of these reforms is to “ensure that all contracts for public works are awarded to reputable, responsible firms that have the qualifications, resources and personnel required to successfully perform contract work.”³

RC language also is designed to address various contract problems that may arise in the absence of regulation. Lacking federal solutions to these problems,⁴ states and communities are challenged to provide RC reforms in order to avoid costs that unreliable contractors can, and often do, pass on to the public.

While both state and federal laws and ordinances typically specify that bids should be awarded to the lowest responsible bidder, what is meant by “responsible” in this context is not usually defined clearly in construction contracts. RC language is designed to close this loophole. Responsible contractor issues are part of a wider campaign to protect community interests from being harmed by questionable business practices. RC agreements are akin to Living Wage campaigns, Prevailing Wage statutes, and Project Labor Agreements. All consider the larger economic picture in order to ensure quality contract work, and a proper balance of interests that protects the public.

Construction in the U.S. is an industry known for having a high rate of unfair pay violations.⁵ Audits conducted by the Maine Department of Labor have detected a higher rate of Independent Contractor (IC) misclassification in Maine’s construction industry than in other industries.⁶ Independent contractor misclassification -- a major problem in employment law -- enables employers to pay low wages and avoid paying employee benefits, payroll taxes, and insurances. There are other ways for dishonest employers to violate the law as well, such as paying “under the table” without tax deductions.

¹ Paul K. Sonn & Tsedeye Gebreselassie. “The Road to Responsible Contracting,” p. 13. National Employment Law Project (NELP), June 2009. http://nelp.3cdn.net/985daceb6c3e450a10_pzm6brsaa.pdf.

² David C. May & C. Jeffrey Waddoups. “Construction Procurement Policies that Address Health Insurance: A Cost Analysis,” p. 4. The Center for Construction Research and Training, April 2010. <http://www.cpwr.com/whatsnew.html>

³ Gerard M. Waites, Esq. “Responsible Contractor Reforms, Ordinances and Policies,” p. 1. O’Donoghue & O’Donoghue, LLP, September, 2008.

⁴ Sonn & Gebreselassie, *ibid.*, p. 1. This report states: “federal contracting is financing millions of poverty wage jobs across our economy, and supporting employers that are significant or repeat violators of workplace, tax, and other laws.”

⁵ National Employment Law Project (NELP). “Just Pay: Improving Wage and Hour Enforcement at the United States Department of Labor,” p. 2. Just Pay Working Group, April 14, 2010.

<http://www.nelp.org/page/-/Justice/2010/JustPayReport2010.pdf?nocdn=1>.

The report states that many employers in “retail, janitorial, hospitality, construction, home care, agriculture and trucking offer subpar wages and then do not pay for overtime hours worked.”

⁶ Bureau of Labor Education (BLE). “Stretching the Law, Stressing the State: Misclassified Workers in Maine’s Construction Industry,” p. 2. University of Maine, Orono, ME., 2007. <http://dll.umaine.edu/ble/pubs>.

The main problem that RC policies address is the fact that there are two kinds of employers bidding for the same contracts. “High-road” employers do not cut corners, at the expense of workers and taxpayers. They often offer benefits, pay mandated taxes and insurances, are union neutral, and may be from the local community. On the other hand, “low-road” employers may misclassify their laborers as independent contractors to avoid paying workers compensation, payroll taxes, and benefits, such as health insurance. In addition, they may pay substandard wages, with few or no benefits, to other employees as well.

Because they are able to offer lower bids due to reduced wage and benefit costs, low-road contractors are more likely to win public contracts with this unfair advantage. In reality, however, such employers can cost communities and the state significant revenues in public assistance and other expenses over time, despite the appearance of lower costs.⁷ Also, high-road bidders can be discouraged from bidding when they know unscrupulous contractors are likely to underbid them.

Responsible contractor language can help to **screen out** low-road employers before the bidding process begins. Experts suggest a strong contractor responsibility review system that sets ground rules for compliance with wage and other laws, and discourages contractors who wish to lowball by shirking their responsibility for providing decent pay, benefits, and for meeting other statutory provisions.⁸

In addition to passing RC laws and ordinances, state and local governments can add RC language to existing regulations in order to clarify contracts, ordinances, and even economic development subsidy agreements. RC provisions can be introduced by executive order, or in the form of policy directives and bidding specifications.⁹ Responsible contracting is important because it creates a level playing field for all bidding contractors.

What is responsible contractor language designed to do?

RC language protects communities by clearly defining contractor responsibilities to address critical issues in public contracting. A cost analysis of RC policies by May and Waddoups describes responsible contracting as a “potential remedy for bidding practices that drive down wages, reduce health insurance and retirement security, discourage job skill training and competent safety programs, and inhibit community workforce inclusion.”¹⁰ In addition, RC policies address the problem of contractors who provide “poverty wages and limited benefits,” a practice which imposes substantial costs on taxpayers since “their employees must rely on public safety net programs to make ends meet.”¹¹

⁷ David Madland & Michael Paarlberg. “Making Contracting Work for the United States,” p.-15. American Worker Project, December 2008. http://www.americanprogressaction.org/issues/2008/contracting_reform.html In Maine, for example, from 1999 to 2002, misclassification of construction workers alone resulted in “an annual average loss of \$314,000 in unemployment compensation taxes, \$6.5 million in workers compensation premiums, between \$2.6 million and \$4.3 million in state income taxes, and \$10.3 million in FICA taxes.” Sarah Leberstein. “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, p. 5, fn9. National Employment Law Project (NELP), June 2010. www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf

⁸ Sonn & Gebreselassie, *ibid.*; pp. 8-12.

⁹ Waites, *ibid.*

¹⁰ David C. May & C. Jeffrey Waddoups, *ibid.*, p. 2.

¹¹ Sonn & Gebreselassie, *ibid.*, p. 3. For instance, according to this study, nearly half of state and federal public assistance spending in California in 2002 went to the working poor. The report states that if these workers had received \$14.00 an hour as well as health benefits, \$10.1 billion in costs could have been reduced to \$3.2 billion.

Some key responsible contractor provisions include giving highest priority to employers who:

- pay a living wage and/or prevailing wage¹²
- provide quality, affordable healthcare
- provide paid sick days
- offer Registered Apprenticeship programs, and
- classify employees properly.¹³

Although some of these requirements may mean higher costs initially, these impacts can be offset by savings like reduced staff turnover, the increased productivity of skilled labor, and superior work quality.¹⁴ With the savings in public assistance funds that would go to poorly paid workers, hiring responsible contractors is smart business from the economic development perspective as well, especially where the contract encourages the hiring of local workers. The wages and benefits paid to these workers contribute to the local economy.

Why are transparency and prequalification requirements important in responsible contracting?

Ideally, RC language should use a prequalification system so that only those employers who are prepared to meet RC requirements can move on to the bidding process. Experts advise the use of a standard points system and prequalification questionnaire for impartial review.¹⁵

A database system mandated by the federal government is designed to track contractor infractions and serve as a tool for screening out low-road employers.¹⁶ Federal administrators are recommending that state and local procurement data be included in this database, since “contractor fraud, law-breaking and non-responsibility are of equal concern for state and local governments.”¹⁷ Contractors travel to numerous job sites, and this circumstance “permits fraudulent contractors and service providers to move between levels of government and across jurisdictions with little fear of detection.”¹⁸ The community can be involved in the prequalification process if the information on contractor histories is made public, thus facilitating watchdog support from the community.

How are registered apprenticeship programs relevant to responsible contracting?

Apprenticeship is a training strategy that has had a remarkably long and successful record in the U.S. for producing highly skilled and educated workers. Registered apprenticeship programs provide an intensive and structured educational program, which combines practical on-the-job training with related academic classroom instruction. This education and training is very comprehensive. For example, in the unionized building and construction trades, the typical apprenticeship program is four to five years in duration. During this apprenticeship period, apprentices work full-time in their respective trade for approximately 1500 to 2000 hours per year, and receive up to 180 to 240 hours of related academic instruction annually.¹⁹

¹² Responsible contractor language also can provide for higher wages to workers covered by such contracts, in states that have very low prevailing wages. Sonn & Gebreselassie, *ibid.*, p. 22, fn 62.

¹³ *Ibid.*, p. 9.

¹⁴ *Ibid.*, p. 3.

¹⁵ *Ibid.*, pp. 9 & 12. “In order to encourage bidders possessing the requisite experience to spend the resources necessary to prepare bids for a large public works construction project, it is paramount to eliminate the prospect of low bids from contractors whose qualifications to perform the work have not been examined by the owner.”

¹⁶ *Ibid.*, p. 5.

¹⁷ *Ibid.*, p. 6.

¹⁸ *Ibid.*

¹⁹ Source: John Napolitano, Business Manager, Plumbers & Pipefitters, Local 716, Augusta, Maine (Phone interview – Sept. 2010)

Responsible contractors play an important role by working with trade unions to sponsor and support registered apprenticeship programs. These programs have extensive training and education standards that are approved by both federal and state Bureau of Apprenticeship and Training Departments.

According to the U.S. Department of Labor, the benefits of these programs are numerous and multifaceted. For employers, apprenticeship programs produce highly skilled workers, reduce turnover rates, increase productivity, lower investment in employee recruitment, increase the diversity of the workforce and help to establish career progression.²⁰ For apprentices and unions, apprenticeship programs enable the apprentice to attain nationally recognized and portable credentials, improve skills and abilities, and attain higher compensation and advancement as both skills and experience progress.²¹

How have “RC” requirements been implemented in other states and municipalities?

While many state and local public contracting laws mandate the hiring of responsible contractors, often they do not go far enough in clearly defining the requirements for “responsibility.” The experiences of states and municipalities suggest that RC language should include the following:

- **Responsibility standards and review:** This should be the first step in the bidding process, and prequalification should be used where possible to disqualify low road bidders. A standard questionnaire and quantified point system are extremely helpful for this important provision.²²
- **Transparency provisions:** There should be clearly defined processes and requirements to ensure transparency in the bidding process, such as a public prequalification system described previously.
- **Living wages or prevailing wages:** Living wages or prevailing wages promote economic development, and help reduce the need for publicly funded assistance to low-wage workers.²³
- **Health benefits:** This provision also helps factor in costs that would otherwise be shifted to taxpayers, and helps discourage low-balling contractors. For example, the city of El Paso, Texas has found that “while the bids that the city receives from contractors that provide health benefits may tend to be a little higher, the net impact on the taxpayer is about the same because of offsetting public health care system savings.”²⁴
- **Paid sick days:** These reduce costs in employee recruitment and turnover, and prevent the spread of illness in the workplace that can cause delays. San Francisco’s Office of Labor Standards Enforcement has concluded that “requiring city contractors to provide paid time off that employees may use when they are sick results in a healthier, more stable and more productive workforce.”²⁵
- **Proper employee classification:** This is especially important in avoiding cost shifting to taxpayers, since misclassified workers may earn poverty wages and are likely to lack benefits. For example, ordinances in Worcester and Somerville, Massachusetts require contractors to certify compliance with independent contractor classification requirements on a weekly basis.²⁶
- **Registered apprenticeship programs:** These programs are extremely important for both apprentices and practitioners. For practitioners, the attainment of **registered status** means that their program is fully recognized and credentialed for training apprentices to become skilled journeyworkers in a given trade or field. For apprentices, their successful completion of a registered program demonstrates that they have attained this skilled journeyworker status.

²⁰ U.S. Dept. of Labor, ETAHOME, Apprenticeship, “Employers.” www.doleta.gov/oa/employer.cfm

²¹ U.S. Dept. of Labor, ETAHOME, Apprenticeship, “Apprentices.” www.doleta.gov/oa/apprentices.cfm

²² Sonn & Gebreselassie, *ibid.*, pp. 8-12.

²³ *Ibid.*, pp. 13-14.

²⁴ *Ibid.*, p. 15.

²⁵ *Ibid.*, p. 17.

²⁶ *Ibid.*, p. 18. Three or more violations of this rule bar contractors from receiving municipal contracts.

How does RC language help to insure that construction projects are completed on time?

Good planning before construction starts can help avoid work stoppages caused by disputes and other misunderstandings among contractors. To this end, responsible contractor agreements can include language similar to a Project Labor Agreement (PLA). A PLA mediates labor relations for projects involving both union and non-union contractors. Its scope “generally includes mutually agreed-to work and wage rules for the duration of the project, including deadlines, wages, costs, production incentives, and hiring.”²⁷ For example, such agreements can help prevent delays by clearly specifying all jurisdictional boundaries among participating contractors on a project.

Prequalification is essential. If contractor compliance review is left as a last step, problems can arise. To avoid delays, managers may turn a blind eye to contractor infractions, leading to even bigger problems down the road. As one contract manager points out, “When you get a bad contractor on the back end, they’ve already done the damage, and then it’s a costly process of kicking them out.”²⁸

Skilled laborers with safety training are critical for keeping work plans on schedule. Studies show the important role of safety education in reducing occupational injuries and illnesses, thereby preventing injury-related delays.²⁹ Also, skilled workers with higher wages and appropriate training are likely to be more productive. Low wages, however, can contribute to significant increases in cost overruns and delays due to a less skilled and motivated workforce, as well as greater employee turnover.³⁰

One example of a Model Contractor Ordinance calls for a review of contractor responsibility certifications, technical qualifications, and other contractor information.³¹ To avoid delays, the contractor compliance process may be better handled with a statewide, database-driven compliance system that contractors may use to streamline the process, and assure that their compliance records are in order at all times.

Conclusion

Public contracts by states, counties and municipalities are a critical arena in which the economic well-being of both workers and the public at large needs to be supported. It is up to state and local governments to protect the integrity of their communities and assure fairness in public contracting, by developing and implementing responsible contracting requirements. These will help create a level playing field for contractors who play by the rules, and will help protect responsible contractors and their employees from abuses such as employee misclassification.

Responsible contractor language is a versatile tool for providing these protections. Without such regulation and protections, dishonest contractors will reap their profits at public expense, while taxpayers, responsible contractors, communities and workers will be the losers.

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²⁷ Bureau of Labor Education (BLE). “Project Labor Agreements and Construction in Maine,” p. 1. University of Maine, Orono, ME, 2005. <http://dll.umaine.edu/ble/pubs>

²⁸ Sonn & Gebreselassie, *ibid.*, p. 12.

²⁹ Bureau of Labor Education (BLE). “Attaining Occupational Health & Safety Through ... Education, Engineering, and Enforcement,” p. 3. University of Maine, Orono, ME, 2008. <http://dll.umaine.edu/ble/pubs>

³⁰ Sonn & Gebreselassie, *ibid.*, pp. 3-4.

³¹ Waites, *ibid.*, p. 2. Other areas are performance capabilities, history of legal compliance, and business integrity.

Key State and Local Responsible Contracting Strategies

(National Employment Law Project)

| Strategy | Description | Advantages for the Government and Taxpayers | Advantages for Workers |
|--|---|--|--|
| Responsibility Standards and Review | <ul style="list-style-type: none"> • Screen out repeat violators of workplace, tax and other laws. • Specifically make responsibility review the first step in the bidder evaluation process, where appropriate through a “prequalification” phase • Use a standardized responsibility questionnaire and quantified point system • Publish the names of firms seeking to bid or prequalify, in order to allow the public to report relevant information | <p>Higher quality and more reliable services</p> <p>Increased competition among responsible contractors</p> <p>Reduced monitoring, compliance and litigation costs</p> <p>Stronger incentive for compliance</p> | Better jobs |
| Living Wages | Favor contractors that pay living wages. | <p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> | Better wages |
| Health Benefits | Favor contractors that provide quality, affordable health benefits | <p>A means of factoring the public costs of low wages into contractor selection</p> <p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> <p>A means of factoring the public costs of uninsured workers into contractor selection</p> | Quality, affordable health benefits |
| Paid Sick Days | Favor contractors that provide paid sick days | <p>Reduced staff turnover and recruitment costs</p> <p>Higher quality and more reliable services</p> | <p>Paid sick days</p> <p>Reduced risk of workplace illness</p> |
| Proper Employee Classification | Certification by contractors that all workers are properly classified and are covered by workers compensation and unemployment insurance | <p>Savings from reduced workplace illness</p> <p>Leveled playing field for all contractors</p> <p>Improved tax compliance resulting in increased state and federal revenue</p> <p>Savings from reducing the ranks of the uninsured</p> | Workers’ compensation and unemployment insurance coverage for injured and unemployed workers |

Source: Paul K. Sonn & Tsedeye Gebreselassie. *The Road to Responsible Contracting*. National Employment Law Project, June 2009. http://nelp.3cdn.net/985daceb6c3e450a10_pzm6brsaa.pdf, p. 9.