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Building Knowledge

The newsletter of the Illinois State Bar Association's Section on Construction Law

Editor's note

BY SAMUEL H. LEVINE

This issue of *Building Knowledge* discusses three cases of significance to the Construction Bar.

Steven Mroczkowski and Thomas Christensen write about the case of *GX Chicago, LLC v. Galaxy Environmental, Inc.*, which is one of the most important cases to be decided this year. It addresses the rights of owners and secondary subcontractors when both comply with the provisions of the Mechanics Lien Act

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Clarifying "the amount due from the owner to the contractor" under Section 30 of the Mechanics Lien Act: *GX Chicago, LLC v. Galaxy Environmental, Inc.*

BY STEVEN D. MROCZKOWSKI AND THOMAS A. CHRISTENSEN

Introduction

Where it appears that there may be insufficient funds available to pay all mechanics lien claims, Section 30 of the Illinois Mechanics Lien Act (the "Act") allows owners or lien claimants to file suit and request a court-determined distribution of the total funds remaining.[1] "Upon the hearing the court shall find *the amount due from the owner to the contractor*, and the amount due to each of the persons having liens."[2] If the amount due to the contractor is not enough to satisfy all lien claims in full, the amount remaining will be divided among lien claimants *pro rata*.[3] Based on the plain language of the Act, it is unclear what "the amount due from the owner to the contractor" means in practice. Are sub-subcontractors entitled to access the pool of funds owed to a general contractor by an owner? Are they limited in their recovery to funds available to their immediate contractor? This was the debate in the recent case of *GX Chicago, LLC v. Galaxy Environmental, Inc.*[4]

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Editor's note

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and there is not enough money to pay secondary subcontractors. The owner wins. Steve is a senior associate attorney with Sosin & Arnold Ltd. He is a member of the ISBA Construction Law Section. His practice includes commercial and business litigation, construction law, mechanics liens and bond claims. Thomas Christensen is a partner with Huck Bouma, P.C. and a member of the Construction Law Section Council. He represents clients in construction and commercial litigation matters.

Margery Newman writes about the new U.S. Department of Transportation Disadvantaged Business Enterprise program regulations. In particular, her article focuses on the Personal Net Worth form and related requirements to qualify as a DBE. Margery is a partner with Deutsch, Levy & Engel. She is chair of the ISBA Construction Law Section. Her practice includes complex construction litigation in both private and public sectors. This article first appeared in the Illinois Mechanical and Specialty Contractors Association Newsletter.

Bruce Schoumacher writes about a recent federal case addressing whether generators delivered to a construction site are in fact new. Bruce is a shareholder and Group Co-Chair at Querrey & Harrow, Ltd where he practices construction, commercial and professional liability law. He is the immediate past chair of the ISBA Construction Law Section. This article first appeared in Business Development, an e-mail magazine for architects, engineers and contractors.

Illinois has finally enacted a law permitting parties with an interest in real estate to substitute a surety bond for a claim for a mechanics lien. New Section 38.1 of the Mechanics Lien Act becomes effective January 1, 2016. The bond stands as security for both the claim for mechanics lien and funds in the hands of the owner. The substitution of a bond for a lien will be discussed in a future issue of the *Building Knowledge* Newsletter. ■

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GX Chicago, LLC v. Galaxy Environmental, Inc.

In 2010, property owner GX Chicago, LLC ("GX") engaged Ledcor Construction, Inc. ("Ledcor") to serve as the general contractor for a construction project.[5] Ledcor contracted with Galaxy Environmental, Inc. ("Galaxy") to perform masonry work on the project.[6] Galaxy contracted with several subcontractors to supply labor and materials to the project.[7] The contract between Ledcor and Galaxy increased during the life of the project from an initial amount of $199,500 to $518,185.75.[8] On June 30, 2011 Galaxy submitted an application for payment to Ledcor claiming that it was owed $117,201.06.[9] The June 30, 2011 payment application did not state any outstanding amounts owed to any of Galaxy's subcontractors.[10]

On July 15, 2011, Ledcor paid Galaxy the total amount requested in the June 30, 2011 payment application.[11] GX and Ledcor later became aware that several of Galaxy's subcontractors had not been paid in full for their labor and materials supplied to the project.[12] With this knowledge, Ledcor made no further payments to Galaxy.[13]

In October and November of 2011, GX and Ledcor received several notices of mechanics liens, which totaled $267,989.98.[14] Ledcor claimed that it only owed Galaxy $126,178.30 and argued that it could not be liable to any of Galaxy's subcontractors in excess of that sum.[15] After the parties failed to resolve the lien claims, GX and Ledcor filed suit under section 30 of the Act.[16] Ultimately, GX, Ledcor, and Galaxy agreed that the final amount owed to Galaxy totaled $143,122.38 and GX and Ledcor offered to deposit that sum with the clerk of the circuit court for distribution to all of the lien claimants.[17] The unpaid Galaxy Subcontractors disagreed, claiming that in fact $218,546.19 remained payable to Galaxy.[18] They filed actions to foreclose their respective mechanics liens, breach of contract against Galaxy, and *quantum meruit* against GX and Ledcor.[19]

Despite the dispute about the amount remaining to be paid to Galaxy by Ledcor, the Galaxy Subcontractors argued that under section 30 they were entitled to access the funds remaining to be paid to Ledcor by GX, a much larger pool of funds than that owed by Ledcor to Galaxy.[20] GX and Ledcor disagreed, arguing that the Galaxy Subcontractors were only entitled to access the pool of funds that remained to be paid to their immediate contractor, Galaxy.[21] After several hearings, the trial court entered an order limiting GX's and Ledcor's liability to the $143,122.38 that remained due under the contract between Ledcor and Galaxy.[22] The trial court ordered GX and Ledcor to deposit that sum with the clerk of the circuit court and ruled that following the deposit, "neither [owner] nor [Ledcor] shall owe any further amount to [Galaxy] or to any of the subcontractors of [Galaxy]."[23] The trial court ruled that the unpaid Galaxy Subcontractors had a lien on the deposited funds, *pro-rata*, pending further order of court.[24] It ruled that any amounts claimed by the Galaxy Subcontractors in excess of the deposited sum must be pursued against Galaxy directly; the trial court then extinguished the Galaxy Subcontractors' lien claims.[25]

The Galaxy Subcontractors appealed. They asserted that the trial court erred by interpreting section 30 of the Act as applying to the amount owed by Ledcor to Galaxy (the Galaxy Subcontractors' immediate contractor) instead of the amount owed from the owner to the general contractor, Ledcor; that they were denied due process because the trial court did not conduct an evidentiary hearing on the amount owed to Galaxy from GX; that it was improper to extinguish their liens; and that it was error to dismiss their affirmative defenses and counterclaims upon deposit of the agreed-upon amount remaining due under the Ledcor-Galaxy contract by GX and Ledcor.[26]

The *GX Chicago, LLC* court affirmed the trial court. While section 30 of the Act was "the crux of the appeal,"[27] its interpretation was an issue of first impression. As such, the court reviewed other sections of the Act to guide its analysis. The court reviewed sections 5, 21, 22, 24, and 27 of the Act prior to interpreting section 30.

Section 5 of the Act requires contractors to notify owners of amounts owed to any subcontractors in a sworn statement.[28] Owners are also obligated to require sworn statements before they make payment to their contractors.[29] The court reiterated that "an owner is entitled to rely upon a contractor's [section 5] affidavit in making payments and is protected as against unidentified subcontractors so long as he has no knowledge or notice that the affidavit contains false or incomplete information."[30] Sections 21 and 22 of the Act allow subcontractors and sub-subcontractors to assert liens for unpaid labor and materials provided to a project.[31] The court noted that section 24 of the Act allows subcontractors to send notice of amounts due directly to a property owner despite the lack of contractual privity with the owner.[32] Where an owner is notified of amounts due to a subcontractor, the owner must retain funds sufficient to pay the subcontractor and to make payment in full to the subcontractor.[33] Barring knowledge or collusion, owners are not liable to subcontractors omitted from sections 5 and 22 sworn statements, or for amounts in excess of those indicated on properly requested and provided sworn statements.[34]

Section 30 of the Act provides that an owner or lienholder can file an action in circuit court where "there are several liens under sections 21 and 22 of [the Act]… and the owner or any person having such a lien shall fear that there is not a sufficient amount coming to the contractor to pay all such liens."[35] In a section 30 action, the court is charged with finding "the amount due from the owner to the contractor."[36] The court noted that the preceding phrase "establishes the pool of funds that will apply toward satisfaction of the lien holders' claims, either in full, or *pro rata*."[37]

III. Other Authorities Discussed in *GX Chicago, LLC* Demonstrate Owners' Advantage in Disputes with Lower-Tier Subcontractors and Suppliers

In reaching its ruling, the Court reviewed a number of previously decided Illinois Appellate Court cases. While none

of these cases dealt directly with section 30, taken together, they illustrate the important protections that owners and original contractors reap from strictly complying with the payment scheme contemplated by the Act.

Bricks, Inc. v. C&F Developers, Inc.,[38] involved the lien of a subcontractor (G&B) hired to perform masonry work on a project, and G&B's material supplier (Bricks). During the construction, the general contractor submitted section 5 sworn statements to the owner, which identified G&B as a subcontractor, but did not identify Bricks as a supplier to G&B.[39] When G&B failed to pay Bricks, Bricks served the owner with a 90-day notice of subcontractor's lien pursuant to section 24 of the Act.[40] By this time, the owner had paid G&B all but $10,000 of its contract sum.[41]

The court held that even though Bricks timely served a section 24 notice, Bricks was limited in its recovery to the sum remaining to be paid by the owner to G&B.[42] The court reasoned that "an owner is entitled to rely upon a contractor's affidavit in making payments and is protected against unidentified subcontractors so long as he has no knowledge or notice that the affidavit contains false or incomplete information."[43] Thus, Bricks could not recover more than the amount that the owner still owed to G&B, its immediate contractor.

Similarly, in *Doors Acquisition, LLC v. Rockford Structures Construction Co.,*[44] the owner was held to be protected from mechanics liens of union laborers who worked for a subcontract, due to the fact that the owner had already paid its general contractor in full before receiving their notice of lien, in reliance on a section 5 sworn statement.

Citing both of these cases, the court in *GX Chicago, LLC* held that "where an owner has acted in good faith and in compliance with the Act, the balance is struck in favor of the owner so as not to hold the owner liable for amounts beyond what was contractually owed to the lien holder's immediate contractor."[45] The court applied this reasoning to find that the reference in section 30 of the Act to "the amount due from the owner to the contractor" refers to "the amount owed to the claimant's immediate contractor, when the liens at issue are asserted by sub-subcontractors that lacked privity with either the owner or the owner's general contractor."[46] The court distinguished three cases where the owner was not protected from liability to lower-tier subcontractors, because the owner had not followed the requirements of the Act, either by not requiring a section 5 sworn statement from the general contractor or by paying the general contractor after receiving a 90-day notice.[47]

In *GX Chicago, LLC*, *Bricks* and *Doors*, the courts faced the fundamental problem that arises when both the owner and a lower-tier subcontractor have complied with the Act, but one of two outcomes is necessary: the owner will be required to pay more than his contract price, or the lower-tier subcontractor will have his lien rights against the owner limited. These courts uniformly resolve the conflict in favor of the owner.

The payment scheme contemplated by the Act avoids this conundrum in virtually every other situation, primarily through the requirement of a section 5 sworn statement. But lower-tier subcontractors or suppliers who are not reflected on a section 5 sworn statement are at risk of losing their rights despite strictly complying with the Act.

IV. Implications of the *GX Chicago, LLC* Holding

The fundamental problem for lower-tier subcontractors or suppliers is that when they are not reflected on the section 5 sworn statement that the general contractor provides to the owner, the owner has no notice of amounts claimed by them. If a section 24 notice, even though timely served, reaches the owner after the owner has paid the claimant's immediate contractor in full, the owner will not be required to double pay, despite the adverse consequence to the lower-tier.

To counteract this effect, lower-tier subcontractors and suppliers should consider notifying the owner of their involvement in the project immediately at the outset, and promptly serving a section 24 notice for all amounts due as those amounts accrue. The courts in *GX Chicago, LLC*, *Bricks,* and *Doors* all raised the same central concern: resistance to forcing an owner to pay the claim of a lower-tier of which the owner had no notice. By providing notice of their involvement at the outset, and serving a claim for all amounts due with all dispatch, lower-tiers may insulate themselves against this concern.

The authors are cognizant of the practical limitations on lower-tiers' ability to aggressively notify owners of their involvement and of all amounts due, as well as the possibility that a contract provision may specifically prohibit direct communication with the owner. Moreover, industry standards may make it difficult for lower-tier contractors to take aggressive steps at the beginning of a project that would protect it against future payment concerns. In a competitive construction industry, lower-tier subcontractors must weigh payment-protecting behavior against the risk of being labeled litigious if they aggressively attempt to combat payment issues that may or may not occur in the future. However, case law has made clear that where lower-tiers and owners comply with the Act, the tie usually goes in the owners' favor.

Another implication of the *GX Chicago, LLC* case involves potential collusion among owners, general contractors, and upper-tier subcontractors. The *GX Chicago, LLC* court held that there was no genuine issue of material fact where Galaxy agreed with Ledcor and GX as to the amount due and owing to Galaxy.[48] The court found that where the parties to a contract agreed as to an amount owed on a contract, the mere contention of the non-party Galaxy Subcontractors that a different amount was owed could not create an issue of fact requiring an evidentiary hearing.[49] Additionally, the Galaxy Subcontractors were not allowed to conduct discovery on this issue.[50] It is unlikely that lower-tiers will be able to plead collusion or fraud with the requisite specificity to create a genuine issue of material fact related to fraud or collusion upstream. And, not having the ability to obtain information related to collusion through discovery will further limit potential recoveries, whether such collusion exists or not.

The *GX Chicago, LLC* holding provides specific guidance that "the amount

due from the owner to the contractor" limits lien claimants to the pool of funds designated to their immediate contractor. How the holding will affect the industry remains to be seen. However, it reiterates a pattern that has emerged in mechanics lien litigation: be they owners, general contractors, subcontractors, or lower-tier suppliers, all must strictly comply with the Act; even where slight doubts may exist, not doing so can have perilous consequences and can cost the noncompliant party its recovery. ■

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1. 770 ILCS 60/1 et seq., §30 (2006).
2. *Id*., emphasis added.
3. *Id*.
4. 2015 IL App (1st) 133624, (1st Dist. 2015).
5. *Id*. at ¶3.
6. *Id*.
7. *Id*.
8. *Id*. at ¶4.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*. at ¶5.
13. *Id*.
14. *Id*. at ¶6.
15. *Id*.
16. *Id*. at ¶8.
17. *Id*. at ¶22.
18. *Id*. at ¶10.
19. *Id*. at ¶11.
20. *Id*. at ¶16.
21. *Id*. at ¶15.
22. *Id*. at ¶27.
23. *Id*.
24. *Id*.
25. *Id*. at 27-29.
26. *Id*. at ¶33.
27. *Id*. at ¶37.
28. 770 ILCS 60/5(a) (2006).
29. *Id*.
30. *GX Chicago, LLC*, 2015 IL App (1st) 133624 at ¶38.
31. 770 ILSC 60/21, 22 (2006).
32. *Id*. at §24 (2006).
33. *Id*. at §27 (2006).
34. *Id*.
35. *Id*. at §30 (2006).
36. *Id*.
37. *GX Chicago, LLC*, 2015 IL App (1st) 133624 at ¶44.
38. 361 Ill.App.3d 157, 836 N.E.2d 743 (1st Dist. 2005).
39. *Id*. at 159, 836 N.E.2d 746.
40. *Id*.
41. *Id*.
42. *Id*. at 164, 836 N.E.2d 750.
43. *Id*. at 164, 836 N.E.2d 749.
44. 2013 IL App (2d) 120052-U (2d Dist. 2013).
45. 2015IL App (1st) at ¶58
46. Id.
47. *Id*. at ¶¶60-61, *citing Brady Brick and Supply Co. v. Lotito*, 43 Ill.App.3d 69, 356 N.E.2d 1126 (2d Dist. 1976); *A.Y. McDonald Manufacturing Co. v. State Farm Mutual Automobile Insurance Co.*, 225 Ill.App.3d 851, 587 N.E.2d 623 (4th Dist. 1992); *Struebing Construction Co. v. Golub Lakeshore Place Corp.*, 281 Ill.App.3d 689, 666 N.E.2d 846 (1st Dist. 1996).
48. *GX Chicago, LLC*, 2015 IL App (1st) 133624 at ¶65.
49. *Id*. at ¶66.
50. *Id*. at ¶19.

What are you worth—The new U.S. DOT DBE regulations

BY MARGERY NEWMAN

The U.S. Department of Transportation ("DOT") amended its Disadvantaged Business Enterprise ("DBE") program regulations in November, 2014. The new rules do the following:

- Revise the uniform certification application reporting forms;
- Create a new uniform personal net worth form;
- Add new provisions authorizing summary suspensions under specified circumstances; and
- Modify several program provisions concerning subjects such as (1) overall goal setting, (2) good faith efforts, and (3) counting for trucking companies.

The DOT DBE program is designed to enable small businesses owned and controlled by socially and economically disadvantaged individuals to compete for federally-funded contracts let by State and local transportation agencies which receive funds from DOT. These State and local agencies are referred to as "recipients". One of the most hotly contested revisions relates to the personal net worth ("PNW") form and related requirements to qualify as a DBE.

A. PERSONAL NET WORTH

Based upon comments it received, the DOT created its own PNW form. This form allows recipients to request certain backup information for assets or liabilities noted on the PNW form on a case-by-case basis. The DOT PNW form is a new form which must be used without modification by certifiers (recipients) and applicants whose economically disadvantaged status is relied upon for DBE certification. Sections 26.67(a)(2)(i) and (ii) of 49 CFR26 were amended to reflect this requirement. DOT specifically stated that with regard to personal net worth, DOT intended for all information collection requests to serve a useful purpose that addressed a specific question regarding a value stated in the form. It was not to operate as authority to collect all possible documentation for each listed asset or a general requirement that business owners obtain appraisals of all assets. *See* DOT final rule. As a result, recipients should not request PNW statements for owners that are not claiming social and economic disadvantage. Additionally, a recipient should not request

a PNW statement from persons who are not listed as comprising 51% or more of the ownership percentage of the applicant firm.

The DOT PNW form is modeled closely on the Small Business Administration's ("SBA") form 413, but with differences tailored to DBE program-specific needs, e.g., not to include the 49 CFR §26.67(a)(2)(iii) exclusions for ownership interest in the firm and equity in the primary residence.

Like the SBA, the DOT is requiring each owner to list all assets, whether solely or jointly held, and specify liabilities. The categories of assets and liabilities required by DOT mirror closely the SBA's categories, but there are some differences. The DOT PNW form omits "sources of income and contingent liabilities," which are contained on the SBA's form. On the DOT PNW form, owners must report any equity line of credit balances on real estate holdings, how the assets were acquired, and the source of market valuation. Owners must also detail the nature of the personal property or assets, such as automobiles and other vehicles, their household goods, and any accounts receivable, placing a value on such items. The DOT PNW form also added a section asking whether any of the assets were insured.

The DOT decided not to require submission of the PNW form by a spouse of the DBE who is not involved in the operation of the business. The DOT agreed that such a requirement is unduly burdensome for the applicant and the certifier (recipient), needlessly intrudes into the affairs of individuals who are not participants in the program, and is not necessary because certifiers (recipients) may request this information as needed on a case-by-case basis. In keeping with recent United States Supreme Court rulings, the DOT added a definition of spouse that includes same-sex or opposite-sex couples that are part of a domestic partnership or civil union recognized under State law.

B. $1.32 MILLION CAP

The DOT also decided that recipients needed to consider two different indicia of whether a DBE is economically disadvantaged. First, if the PNW indicates that assets held by an applicant total $1.32 million or more, the DBE applicant is "presumed" to not be economically disadvantaged. The purpose and intent of the $1.32 million cap is to ensure that the DBE program reaches only those disadvantaged individuals adversely impacted by discrimination and the effects of discrimination and to accomplish the goal of remedying the effects of discrimination. The presumption, however, that a person with personal net worth exceeding $1.32 million is a rebuttable presumption.

Second, if the PNW falls below the $1.32 million threshold, but there is evidence that indicates assets held by the applicant suggest that he or she is not economically disadvantaged, then the DBE applicant may also be "presumed" to not be economically disadvantaged. For example, a person with a very expensive house, a yacht, or extensive real and personal property holdings may be found not to be economically disadvantaged even though they have a PNW below the $1.32 million threshold.

According to the DOT, it wanted to provide recipients with a tool to exclude from the program someone who, in terms of overall assets, is what a reasonable person would consider to be a wealthy individual, even if that person had liabilities sufficient to bring his or her net worth under $1.32 million. The DOT strongly believed that recipients should be able to look beyond the individual's PNW bottom line and consider his or her overall economic situation in cases where the specific facts suggest the individual is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged.

C. ABILITY TO ACCUMULATE SUBSTANTIAL WEALTH

In order for recipients to look beyond an applicant's PNW, the DOT devised an "ability to accumulate substantial wealth" standard as evidenced by the individual's income, and the value of the various accumulated personal assets. Unfortunately, the "ability to accumulate substantial wealth" is a subjective standard which could lead to arbitrary decisions by recipients as to whether an applicant is actually economically disadvantaged. As a result, the DOT included in its final rules specific factors that recipients may consider in evaluating the economic disadvantaged status of an applicant or owner. Those factors include:

- Whether the average adjusted gross income of the owner over the most recent three-year period exceeds $350,000;
- Whether the income was unusual and not likely to occur in the future, (*e.g.*, inheritance);
- Whether the earnings were offset by losses (*e.g.*, losses from gambling);
- Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the business;
- Whether there exists other evidence that income is not indicative of lack of economic disadvantage; and,
- Whether the fair market value of all assets exceeds $6,000,000.

The DOT stressed that requiring recipients to consider the above factors for every DBE applicant whose PNW falls below the $1.32 million regulatory cap is not a requirement. The purpose of the final rule, as articulated by DOT, is to provide recipients "who have a reasonable basis to believe that a particular owner should not be considered economically disadvantaged, despite their PNW" have the explicit authority to look at evidence beyond the PNW to determine whether that DBE is truly economically disadvantaged. The listed factors are intended to provide guidance to recipients and are not intended to be a checklist.

The new DBE rules cover more than an analysis of the DBE's PNW. There have been amendments to certification provisions (49 CFR §26.65), program objectives (49 CFR §26.1), good-faith efforts to meet contract goals (49 CFR §26.53), trucking (49 CFR §26.55(d)), regular dealers versus brokers (49 CFR §26.55(e)), and how to address setting contract goals for design-build contracts (49 CFR §26.53(b)). This article covers just one aspect of the new DBE regulations. ■

Is it really new?

BY BRUCE H. SCHOUMACHER

Most construction contracts specify that the equipment and material incorporated in the construction must be new. Obviously, when a piece of equipment is delivered in a box from a manufacturer or distributor, it is new, especially if it does not show any use, wear or damage. A recent federal government contract case considered whether equipment delivered to the site was new. You may be surprised at the result.

In that case, a contractor was awarded a contract to construct electrical improvements for a VA medical center. The contract require that equipment incorporated into the construction had to be new. In 2004, generators were delivered to the site for installation. The VA engineer did not think they were new because they showed a lot of wear and some damage.

The contractor traced the history of the generators and determined that they had been manufactured in 2000. The generators had been previously sold, but had never been used. The VA rejected that generators because they were not new because of the previous ownership.

The contractor filed a claim with the VA alleging that the VA breached by the contract by rejecting the generators. Since the VA did not respond to the contractor's claim, the contractor appealed to the Civilian Board of Contract Appeals.

The appeal board denied the contractor's claim, finding that the generators were not new because they could not be factory tested. The board noted the Federal Acquisition Regulations were part of the contract that the regulations required the generators to be capable of factory testing to be considered new. The contractor then appealed United States Court of Appeals for the Federal Circuit.

The court of appeals rejected the reasoning of the board of contract appeals. The appellate court stated that the VA had failed to show the generators could not be factory tested. Further, the appellate court stated that the generators had been tested by factory certified technicians and that the VA had refused to attend the test.

The contractor claimed that the generators were new because they had not been previously used. The court of appeals did not accept that argument. The appellate court said that the contract required the generators to be "new and unused." So, although the generators may not have been previously used, the court had to determine the meaning of the word "new."

The court noted several possible definitions of "new." It explained that it could mean that the generators had not previously owned by another person. It also considered whether "new" meant that the generators had to be recently manufactured. Finally, "new" could mean that the generators were in a fresh condition.

The appellate court accepted the latter definition that the generators must be in a fresh condition. However, it noted that they did not have to in perfect condition, but that the generators should not have "significant damage." The court then stated that cosmetic damage was not a reason alone to reject the generators.

Because the court of appeals could not determine the extent of the damage to the generators from the record before it, it remanded the case to the board of contract appeals to determine whether the generators had sustained any significant damage before they were delivered to the construction site.

For those of you who want to read the appellate court's opinion, it can be found at *Reliable Construction Group, LLC. v. Department of Veterans Affairs*, 779 F.3d 1329 (2015). ■

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