A TALE OF TWO ENTITIES: MAINTAINING SEPARATE AND DISTRICT ENTITIES

BY: NICHOLAS A. SULLIVAN, ESQ., FLORIO, PERRUCCI, STEINHARDT, CAPPELLI, TIPTON & TAYLOR LLC

In the construction business, it is a commonplace occurrence for a single contractor to operate two entities. In this context, one of the entities may perform work under a collective bargaining agreement and the other entity will perform similar work but does not operate under a collective bargaining agreement, also known as an open shop. This situation is not prohibited by law, but it can cause a variety of challenges for the contractor. Under the law, the two entities must remain separate and distinct entities because if they are not, the National Labor Relations Board (NLRB) or a court of competent jurisdiction (court) may find the two companies are operating as a single entity, or that the open shop is an alter ego of the union affiliated entity, and should be bound to the terms of the collective bargaining agreement.

Advantages and Disadvantages of the Two Entities

The main advantage of having one entity operate under a collective bargaining agreement and another entity to operate as an open shop is the ability to profit from both union and non-union projects.

A disadvantage is that both entities face potential liability in terms of Employee Retirement Income Security Act ("ERISA") contributions. If the open shop is not properly separate and distinct from the union affiliated entity, the open shop could be held to the terms of the collective bargaining agreement including, but not limited to, paying welfare, health and pension benefits, insurance coverage, and other terms and conditions under the collective bargaining agreement.

Steps to Maintain Separateness of the Two Entities

The challenge for such a firm operating two entities is maintaining the separateness of the two entities. In order to maintain the required separateness, it is recommended that the construction firm should have different individuals serving as officers, on the board of directors, and as upper management for each entity. This includes having different individuals in charge of labor relations for each entity and each entity should establish its own compensation and benefits, employment practices, handbooks, safety rules, and training practices. This requires each entity to hire its own employees and maintain distinct resources for each entity, including equipment, licenses, certifications, bylaws, and agents. Further, each entity should have its own office space, administrative staff, payroll accounts, and each entity should file its own separate tax returns.

Further, the two entities must be separate in their finances with their own separate bank accounts, lines of credit, personal guarantors, bonding, insurance requirements, financial records, financial professionals, and the two entities should not comingle funds. Finally, the two entities should have different contact information, such as phone numbers, addresses, email addresses, and each should use its own letterhead.

This does not guarantee that the NLRB or court will find that the entities are sufficiently separate, but these steps increase the likelihood that each entity is found to be separate and distinct from the other entity.

Legal Determination if Entities are Sufficiently Separate and Distinct

The NLRB, or a court of competent jurisdiction, will use one of two legal tests to determine whether the two entities are sufficiently separate and distinct.

The "single employer test" is used when the two entities run parallel operations. Four factors are reviewed when the "single employer test" is considered by the NLRB, or courts. The four factors that will be considered are common ownership of the entities, the interrelations of operations of the two entities, the common control of labor relations between the two entities, and common management personnel between the two entities.

The "alter ego test" analyzes the extent that the two entities have identical management, business operations and purposes, equipment, customers, board of directors, and officers.

If a court or the NLRB finds these factors weigh against the entities, either could determine that the two entities are not sufficiently separate and distinct. If this finding is made, this could have significant ramifications, legal and financial, for both entities involved, including the open shop being required to comply with the terms and conditions of the union-affiliated entity's collective bargaining agreement.

Conclusion

This two-entity business operation is beneficial due to the ability of the firms to obtain the opportunity to perform work for union and non-union affiliated projects. However, the owner must be aware of the inherent legal risks of a two-entity business operation and must ensure that these entities are two separate and distinct entities. This is necessary to avoid, or withstand, any legal challenges before the National Labor Relations Board or court of competent jurisdiction.