Caution on OSHA Inspections

Here Are Some Reasons Why Contractors Should Consult Their Attorneys on the OSHA Matter

(Editor’s Note: In all of iaWCC/GDCI’s comments to contractors concerning the Fourth Amendment controversy surrounding OSHA, the advice has always been for a contractor to consult with his attorney before taking any action. The following article taken from McNeill Stokes’ regular newsletter explains why caution beforehand is an advisable course.)

In a recent case involving an Idaho contractor, Barlow’s, Inc., the U.S. Supreme Court held that the Fourth Amendment compels the OSHA inspector to obtain a warrant based on probable cause if the owner of the business premises sought to be inspected refuses to consent to an inspection.

While this ruling is an important reaffirmation of Fourth Amendment rights, particularly for businessmen, several things should be considered by a construction subcontractor before he attempts to block an OSHA inspection of his worksite.

1. The Court adopted a vague, but obviously very broad standard of probable cause. The Court specifically rejected the notion that the inspector must present evidence sufficient to raise a reasonable suspicion of the existence of a violation. The Court said that probable cause could be shown by presenting evidence that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].” What standards are “reasonable” is anyone’s guess, but the Court did say that mere conclusory allegations that OSHA has an inspection program designed to assure maximum compliance and that a particular employer’s business fits within the program, are an insufficient basis upon which to issue a warrant. Rather, specific facts to support such allegations must be shown, and presumably the judicial officer deciding whether to issue a warrant must decide on the reasonableness of the specific standards or program relied upon. Of course, this decision can (and will) be reached ex parte, i.e., without an opportunity being given to the employer to argue against the warrant.

This procedure raises problems for the contractor. Depending upon how the lower courts construe the Supreme Court language, it may be very easy for OSHA to devise effective

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standards to guarantee they will get a warrant for any inspection. If so, the contractor is faced with the possibility of simply angering the OSHA inspector by asking for a warrant. Or, if he decides to contest the validity of the basis of the warrant, this may be quite lengthy and expensive, and he may lose and have "riled" OSHA even more.

2. OSHA may seek consent from someone else who has control over the worksite, such as the owner or another contractor. If either the owner or another contractor working essentially in the same area consents to the inspection, it is probably valid, and even if it is not, the offended contractor would probably have to go to court immediately for a temporary restraining order to keep the inspector out. Again, this proceeding could be very expensive and time-consuming. Also, once again, such tactics could backfire if the inspection is ever made, because the contractor is now deemed by OSHA to be "uncooperative" and likely to be hiding something.

3. The OSHA inspector also has a right, under general Fourth Amendment law, to inspect and investigate any conditions which appear to constitute a violation and which are in "plain view" to him while he is standing in a public area. Thus, just as a policeman would be authorized to conduct a search and seizure in a house in which he sees, from the street, some criminal activity going on, so an OSHA inspector could conduct an inspection of apparently violative conditions on a construction site which he can see from the street, i.e., no perimeter protection on open floors. Further, the "plain view" doctrine can allow a search which turns up violations which were originally not in "plain view", without violating the Fourth Amendment rights of the person or persons who are accused as a result of the search.

The Court did affirm that the search pursuant to such a warrant would, as in other cases, be subject to the scope set forth in the warrant. Thus, if an inspector secured a warrant to search the premises of the grading and excavation contractor on a job site with a multi-story building, the search would be limited to that specific area.

If the inspector, while in that area, spotted a defective ladder leading to another area, he could validly inspect and investigate this alleged violation, even to the point of questioning other workers on any part of the job site, because the ladder was in "plain view" while he was in an area in which he had a right to be, pursuant to the warrant. However, he could not use such a warrant as a springboard to inspect the entire building site, since the entire site was not particularized in the warrant.

Also, the considerations in inspecting a shop and a job site are entirely different. The showing of probable cause would be different. The doctrine of "plain view" would probably not be helpful in most cases in attempting a warrantless search of a shop or plant. The contractor would, of course, be the only person who could consent to an inspection of his shop or plant.

All of these factors and the facts of any particular site should be thoroughly discussed with the contractor's attorney before, not after, any attempt is made to refuse an OSHA inspector permission to enter. The consequences of an ill-advised refusal could be a much tougher inspection and citation, at best, or a contempt of court charge, at worst.