Today, many contractors want to take advantage of a wider variety of business opportunities. They also know the value of being more flexible and competitive. Dual shop fulfills these goals. For a union contractor, it’s good business sense to try to capture a part of the construction market primarily available to nonunion contractors. The costs are lower because a contractor isn’t obligated to pay the excessively high union-scale wages or provide union work conditions and fringe benefits.

On the other side of the coin, a union contractor may be forced to start a nonunion shop . . . there’s general deterioration in the union’s competitive position in the market.

You can be successful in dual shop operations but it’s not easy. Strict requirements under the national labor laws and practical realities in the industry can quickly trap the unwary.

Although we use the term “dual shop”, it is a misleading name. In reality, a contractor who wants to have nonunion and union operations has to set up two distinct companies.

Key To Success

When you set up a dual shop, make sure the two corporations have “separate employer status” under the national labor relations laws. There are five general criteria considered by the courts and the National Labor Relations Board:

- Common ownership and financial control
- Common day-to-day management and control
- Interrelated operations
- Common control of labor relations policies
- Shifting work from the union company to the nonunion company.

Common ownership doesn’t negate separate employer status if separate day-to-day management, operations and labor relations policies are strictly maintained. (A common labor relations policy can indicate that two companies are, in fact, the same employer.) Separate employer status is most frequently denied on the grounds that the open shop company was used to strip the union company of its work.

9 Guidelines

1. Non-Overlapping Officers and Directors

   Each company must have its own chief executive and labor relations director. These officers can’t hold office or directorship in the other company. If possible, the Boards of Directors should not overlap.

2. Independent Managers and Employees

   It’s essential for each company to have its own top management, supervisors, and employees. Personnel shouldn’t be interchanged between the companies. However, any employee can resign from one company and join the other on a one-time only basis.

3. Independent Labor Relations Policies

   The labor relations policies of each company must be separately administered. In addition, it’s essential that stockholders don’t direct the labor relations or personnel policies of the nonunion company. The president of the nonunion company should be solely responsible for establishing its labor relations and personnel policies.

4. Separate Operations

   It’s best to maintain separate territories of operations for each “company.” Be sure the nonunion company stays out of areas where the union company has applicable union agreements. (Local union agreements apply only within the territorial jurisdiction of the local.) If the nonunion company doesn’t infringe on union territory, the unions can’t
legally complain. However, separate territories may not be possible in all operations.

Running two companies in different types of markets helps indicate a lack of allied status between them. It’s important that the nonunion company isn’t a vehicle to strip the union company of union work. (The NLRB has often denied separate employer status if an open shop company has harmed the union’s work force.) The objective of a successful dual shop operation is not to strip the union company, but to increase the common pool of potential customers. Continuing efforts should be made to build the union company’s market.

5. Separate Facilities

Separate offices, books and records, facilities, telephone support services, bank accounts, etc., help contribute to separate employer status. In a number of decisions, the NLRB found leases on equipment or purchases of services could be shared by commonly owned corporations without destroying separate employer status, if fair rental is paid under a written agreement. However, each company should have its own small tools.

6. Personnel and Accounting

Use of common accounting personnel is normally considered compatible with separate employer status. But each company must maintain separate accounts and records. Each company should prepare its own payroll and have its own bank accounts, lines of credit, telephone systems, offices and office personnel. The nonunion company should reimburse the parent corporation or the union company for accounting services on an arms-length basis. The companies shouldn’t exchange any personnel services. Sharing these services too closely approaches the area of labor relations policies, and any common control in this area can in itself destroy separate employer status.

7. Independent Sales and Construction Management

As much as possible, sales, estimating, public relations and customer liaison should be conducted separately. Sales leads can be informally exchanged.

8. Insurance and Fringe Benefit Programs

Any proposed dual shop organization requires an examination of the potential effect on any tax qualified pension and profit sharing plans maintained by the companies involved. There are two major problem areas when separate companies are formed under common control:

- the basic tax qualification of new and existing retirement plans
- withdrawal liability can be imposed upon a company that contributed to a multi-employer pension plan.

Under ERISA, if two companies are under common ownership, the common corporate structure results in all entities being members of a single “controlled group”. The result of “controlled group” status is that employees of both companies will be treated as employed by a single employer (for ERISA purposes). Union employees are permissibly excluded because they’re under collectively bargained plans. To comply with ERISA requirements (i.e., determining eligibility, participation, vesting and the provision of benefits), the “management plan” must take into account all employees of the con-
Another way trade associations may violate antitrust laws is with mandatory participation (of non-members) in industry funds.

Labor Unions
As a contractor, you must be careful as you deal with labor unions. Although some labor agreements are exempt from scrutiny, the antitrust laws remain unclear. In a case currently before the Eleventh Circuit Court of Appeals, the debate is whether a utility company and a group of unions can, pursuant to the terms of a Project Agreement, lawfully exclude nonunion contractors from work on a nuclear power plant. This decision will have substantial impact on businesses that operate under project agreements or have been excluded from work under such agreements.

Trade Associations
Trade associations lobby for construction industry members, disseminate marketing information and updates on technological advances, and provide promotional services for members. However, their activities may be illegal if they:

1. sponsor unreasonably anticompetitive industry standards
2. withhold benefits for no substantial reason
3. impose upon non-members payment into a promotional fund.

Any participation or agreement with the trade associations’ illegal actions may subject contractors to liability. Price-related discussions between competitors are particularly suspect in antitrust investigations.

Bid Depositories
The operation of a bid depository is another potentially illegal activity. Bid depositories can be created in many ways. Basically, all subcontractors’ quotes are collected by an independent agency or trade association. The bids are kept closed and confidential for a specified period of time before bidding by the general contractor begins. The operating rules of the depository may require participating general contractors to use only participating subcontractors’ quotes, excluding all others. If a sub or general contractor doesn’t comply with the bid depository rules, they may be excluded from future participation. Also, the “guilty” contractor’s bids may be boycotted on future projects. The operation of a bid depository has been considered a violation of the Sherman Act because non-participating members are prevented from competing in the open market.

Industry Funds
Another way trade associations may violate antitrust laws is with mandatory participation (of non-members) in industry funds. In the landmark case of National Constructors Association v. National Electrical Contractors Association, the Fourth Circuit Court of Appeals ruled in favor of the National Constructors Association. An agreement between the International Brotherhood of Electrical Workers and NECA was declared a violation of the federal antitrust laws. (This agreement required all employers to contribute one percent of their gross labor payroll to the national electrical industry fund whether they were...
NECA members or not.) This requirement was held to be illegal price fixing because it stabilized the price of electrical construction contracts between NECA and the non-NECA members. Before the agreement, non-NECA members had a competitive edge over NECA members because only NECA members paid dues. Requiring non-NECA members to contribute to the fund increased their cost of doing business. Thus the illegal agreement equalized prices, reducing competitive bidding.

**General Contractor/Subcontractor Relations**

Another antitrust problem area is general contractor/subcontractor relations. A general contractor and a subcontractor may enter into an agreement—later declared illegal—in order to maintain the good working relationship they’ve already established. A subcontractor may quote a better price to a favored general contractor than to other contractors. Here there are two issues involved:

1. whether actual illegal collusive activity has occurred
2. whether the appearance of illegal activity is so persuasive it results in liability.

Antitrust problems can also arise if a subcontractor agrees to quote for only one general contractor on a particular project. Such an agreement can be considered an illegal group boycott of competing subcontractors. Even if this activity is practiced just to maintain a good working relationship between the sub and general contractor, it may constitute exclusionary conduct.

**Contractor/Supplier Relations**

Tying Arrangements

A tying arrangement means one product or service is sold only with the purchase of another (the tied commodity). This violates the Clayton Act and Section One of the Sherman Act. A tying relationship increases the contractor’s cost of doing business and often causes him to bid higher than otherwise necessary. Tying arrangements usually violate antitrust laws.

**Conclusion**

As you can see, the antitrust laws are complicated and can have significant impact in the construction industry. You must know about bidding practices, general contractor/subcontractor relations, and contractor/supplier relations. Each fact, situation and potential course of business conduct must be individually judged. When you suspect there may be an antitrust violation, be sure to consult your lawyer.

**How To Recruit Executives For Construction Companies**

There are three critical variables in construction... Continued on page 90
Continued from page 87

• labor
• materials
• management

... don’t let your company be caught with less than the best of any of these. Observe two companies positioned side by side in the same industry, one will do better than the other. Throw out the occasional “lucky break”, and 90% of the time—you’ll find the company with the better performance record has better management. Let’s consider how you can get the finest executive personnel available.

In trying to locate executives for positions above $50,000, you’re looking primarily for managerial leadership skills rather than specific training or expertise. When you’re dealing with these more subjective matters, it may be beneficial to work with a search firm. Using a search firm requires you to explain all about your company so the firm understands what you’ll require in a top executive. But it’s worth the effort for several reasons.

1. It will require you to really think about and formulate your needs and objectives.
2. There are many qualified candidates for high level jobs.
3. Most of these candidates are successfully employed with your competitors, and therefore, difficult to attract.
4. An executive search is a thorough, personal approach that executives relate to well... they appreciate the confidential nature of the relationship.
5. It takes a recruiter with an executive background to recognize desirable traits in your candidates.

By using executive search, you’ll be reviewing the most qualified executives for each position. By selecting your candidates from the largest possible field, you’ll get a competitive management advantage. The boost this gives your company towards attaining its overall goals will more than pay the recruiting expense.

Although the construction industry has been slow to accept executive search, real estate companies use it extensively. Both industries suffer high executive turnover due to changing work loads resulting from bidding and economic cycles. The service’s popularity in the real estate field indicates that it’s probably a good idea for construction companies. If you haven’t tried executive search, I urge you to find a reputable search firm to help you recruit your next senior executive.

The Power of Purchase Orders And Warranties

After negotiating a fixed price supply contract over the phone, you should send a letter of confirmation to the supplier. Include a purchase order (like the insert) specifying the...
“Stress your contractual rights and demand that the supplier either correct the defects or replace the inadequate material or equipment.”

price, quantity to be supplied, and other necessary information. The letter of confirmation of an oral agreement will satisfy the requirements of a contract (as determined in the Uniform Commercial Code), if not objected to in writing within ten days of receipt. If your purchase order is signed by the supplier, and a copy or acknowledgement of it is returned to you—it becomes the contract itself. It will then govern all aspects of the relationship between you and your supplier in that transaction. So, if there’s no response, the contract stands with the terms agreed upon by phone. If the supplier signs and returns the purchase order, your contract will be based on the purchase order terms.

A purchase order should ensure:
• the specified materials
• in the stated quantity
• at the agreed upon price
• with punctual delivery
(Get an attorney to draft a purchase order form that best suits your particular needs.)

Warranty Clauses
The typical construction contract contains a warranty clause. Understand the scope of any warranties. Be certain they’re clearly defined. Furthermore, since you’re generally required to guarantee your work to the general contractor and/or owner, be sure to get warranties from your suppliers for the materials they provide. The suppliers’ warranties should have the same duration and scope as warranties given to the general contractor and/or owner. If the warranties you give extend beyond the warranties you receive—you’re taking a chance. Price the work to cover any additional warranty risk.

Tie In Your Suppliers
Your suppliers should be tied into the guarantees of your contracts. Purchase orders should state that the supplier: “Ship the following items and do the work in strict accordance with plans and specifications.” Of course, it’s necessary to give the supplier copies of the plans and specifications at the time your materials order is placed. (This facilitates the supplier’s compliance with your warranty.)

Implied Warranty
The law sometimes implies a warranty of “merchant ability” or “fitness for use”. Therefore, legal remedies may be available even if you’ve neglected to write guarantees into the purchase order or if your supplier hasn’t provided a warranty. But it’s always wise to cover yourself in the supply contract terms. Don’t count on a court later providing implied warranty protection.

By requiring suppliers to guarantee their materials and equipment to contract specifications, you’ll be protected from additional costs if damages result from faulty supplies. This type of protection should be sought in all supply contracts. Express warranties may also be contained in suppliers’ statements and advertising.

Protect Yourself
A wise course of action with guarantees of materials or equipment is to have your supplier word the warranties in favor of the owner. If problems arise after you’ve completed your work, the owner can approach the supplier without unnecessarily involving you in a legal hassle. If default on any guarantee or warranty becomes apparent before you finish the job, you should insist on the legally implied warranties. Stress your contractual rights and demand that the supplier either correct the defects or replace the inadequate material or equipment. If the supplier fails to do so, your remedy should be an action for breach of contract.

Conclusion
If you have a negotiated supply contract, a letter of confirmation and a purchase order—then there’s legal leverage against a defaulting supplier. Some contractors have been faced with price increases from suppliers with whom they had unenforceable oral agreements. Using letters of confirmation and purchase orders is an absolute must for contractors to protect themselves from suppliers reneging on agreements.