GOING OUT OF BUSINESS

When to Use a Fixed Payment

Your local hardware store has been in its current location for almost forty years, and is being displaced by a road widening. You have met with the owner, and he insists that it is pointless for him to look for another location, convinced that large chain hardware stores make competition impossible. He was able to maintain a profitable business at his current location due to customer loyalty, however, that loyalty will not likely transfer to a new location, he has decided it is time for him to cease operations. The owner's business profits have been declining over the last few years, but they are still substantial - over $50,000.

Given the above scenario, a fixed payment (§24.305) in lieu of actual costs might be an obvious choice. However, the benefit has a statutory minimum payment of $1,000 and a maximum payment of $20,000. The actual payment due the displaced person is based on the average annual net earnings (profit) in the two years preceding displacement, constrained by the minimum and maximum authorized by the law. In the above case, the payment would be a single lump-sum payment of $20,000 since the business has net profits of $50,000 in each of the two years preceding displacement. In addition, any cost to dispose of his inventory and other personal property would come from his fixed payment.

Anyone running a successful business may find this payment a bit miserly. In this scenario, it would not even be one-half of the business's typical yearly profit. It could also cost the business a significant amount of money to dispose of inventory, shelving, and other items of personal property. In the end, his going out of business sale may end up costing him a lot of money. So what other choices does the business have?

What if we could find a way to pay the owner to dispose of his inventory, even if it were sold at less than costs and meet some of his other costs too? That might be a better option than the fixed payment.

The owner could elect to proceed using a variation of the actual moving cost, and use the *Actual Direct Loss of Tangible Personal Property* payment, §24.301(g)(14). Under this scenario, there is no maximum payment. The payment is based on the lesser of the fair market value in place of the items as they are for continued use, less any proceeds for their sale, or the estimated cost to move the items. The owner would sell everything located at the site that was not acquired by the agency. This sale of personal property would include his inventory, shelving, counters, and even the cash register. The amount of money that the Agency would have spent to move the personal property is then used to subsidize any loss incurred by the business due to the sale. In other words, he can hold a going out of business sale, discount the items for quick sale, and then claim payment for any apparent loss.

For example, let's say the fair market value of the owner's inventory (cost of goods to the business) is $300,000, and his other personal property (shelving, counters, cash register, etc) is $50,000, for a total of $350,000. The estimated cost of moving all the items is $150,000. The owner holds his going out of business sale and sells the inventory and other personal property for a total of $100,000. When this amount is subtracted from the fair market value of the inventory/personal property ($350,000 - $100,000 = $250,000), the estimated move cost is still the lesser amount, and the owner is eligible for an actual direct loss payment of $150,000. Remember he also received the sale proceeds of $100,000.

Even more, we can pay his costs associated with selling the items. This might be advertisement, or a banner on the store declaring that the business is terminating and all of the goods are for sale.

The bottom line: the use of the direct loss option may provide the business owner with a useful option to terminate his business and provide greater net compensation than the fixed payment. This option becomes particularly viable when a business has a substantial amount of personal property.

THINGS TO KEEP IN MIND

Several states have authorized fixed payment amounts that are higher than the amount provided in the federal law. If the project is receiving federal funds from the Federal Highway Administration, federal funding would participate in a payment above the $20,000 amount for a highway project only, under 23 CFR 710.203, which allows participation in any expense provided under state law. For projects funded by other federal agencies, there is no reimbursement for a fixed payment above the $20,000 maximum.

When using the direct loss payment in retail operations, make sure you read the special provision contained in §24.301(g)(14)(i). It provides direction as to how market value is determined when goods are held for resale. This concept would apply to our owner's inventory, but not to his other items of personal property, like his store shelving.

Another beneficial aspect of using the direct loss provision instead of the fixed payment is that we can also pay the business for any actual costs incurred prior to the decision to terminate the business. This might include a search expense or other professional services.