Welby, Brady & Greenblatt, LLP
ATTORNEYS AT LAW

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REPORT

# WELCOME

## *Message to our Readers*

Thank you for reading the Summer 2016 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve.

In this issue, we are pleased to present Legal Alerts written by our team. John J.P. Krol, Esq, P.E., discusses Federal Contracts, the Boards of Contract Appeals, and Federal Liability under Integrated Design and Construction Contracts; Richard T. Ward III, Associate, presents on The Critical Need for Record Keeping on Oral Arguments; and Gregory J. Spaun, Partner, discusses New York's Prompt Payment Act.

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## Federal Contracts, the Boards of Contract Appeals, and Federal Liability under Integrated Design and Construction Contracts

*By: John J.P. Krol, Of Counsel*

**John J.P. Krol**

Those of you who work regularly at West Point, at Picatinny Arsenal, or for the General Services Administration know that most federal agencies employ informal in-house procedures to resolve contract disputes. But what if those in-house procedures fail, and that the contractor must proceed against a federal agency? What is the route for dispute resolution?

In order to litigate a federal government contract claim, the contractor must proceed either in the United States Court for Federal Claims in Washington, D.C. or in one of the many Boards of Contract Appeals, such as, the Armed Services Board of Contract Appeals, the General Services Board of Contract Appeals, or the Civilian Board of Contract Appeals. The advantage of appearing before Boards of Contract Appeals is that the trials are held in the general locale of the project. The judges come to you.

These Boards of Contract Appeals, although administrative in nature, are not as favorable to the government agency as their status as a fellow government agency may suggest. One such case where the contractor prevailed in front of a Board of Contract Appeals was *Kiewit-Turner, a Joint Venture v. Department of Veterans Affairs*, which involved the construction of a Veteran Affairs (VA) medical center campus in Colorado. The VA had awarded a contract for preconstruction services to Kiewit-Turner, a Joint Venture (KT) with an option for performance of construc-

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tion services. However, the design was already 50% complete when the VA hired KT. All funding decisions had been made and the VA had established construction costs at $582 million. At the 65% design phase, KT advised the VA that construction would cost $664 million.

The Board found that the VA knew that the design was over budget by approximately $200 million. It found in addition that the VA failed to control its design team, failed to process change orders, failed to make timely payments, and drove up the costs of construction. The Board found that under these circumstances, KT was entitled to stop work. The Board cited an engineer's description of the VA team as the "least effective and most dysfunctional [VA] staff on any project that [he] had ever seen."

Following the Board's decision, the VA found additional funding to cover more than $150 million in delinquent payments to KT. KT has resumed construction work on the project on a cost-reimbursable basis.

Prevailing on any claim, before a court or before a Board of Contract Appeals, requires properly documenting that claim and presenting it in such a manner as to show entitlement under the contract. You should contact your construction counsel as soon as you believe that you may have an issue so as to be able to sufficiently document your claim during the project, and so that you can have it properly presented afterwards.

*Scan here to learn more about John J.P. Krol*

## The Critical Need For Record Keeping on Oral Agreements

*By: Richard T. Ward III, Associate*

**Richard T. Ward III**

Contractors, subcontractors and owners involved in residential or small scale construction projects often find themselves contracting through short-form, non-comprehensive written contracts or, sometimes, bare oral agreements. This is also common where extra work not contemplated in the original agreements becomes necessary. While contracting in definitive terms is generally the best plan, oral contracts have remained a part of the construction industry because some projects may seem to lend themselves to a simpler contract or an oral agreement. Counterintuitively, contracting on less-than-complete and/or oral terms often makes detailed record keeping even more critical for both owners and contractors. Such is particularly the case when construction does not go as planned and the scope of work must be changed, or a contractor must be terminated.

The New York Appellate Division, Second Department, recently released a decision in the case of *DiSario v. Rynston*[1] reminding of the critical importance of record-keeping on construction projects, especially those based on oral contracts. Rynston, a Suffolk County homeowner, sought to remodel his home and hired DiSario to perform the work, which included enlargement of the kitchen, remodeling of the master bath and painting of the master bedroom. The parties entered into an oral[2] agreement that DiSario would perform all of the work for $48,000. While DiSario was performing the work, he discovered that there

were various unforeseen extra work items that needed to be performed. Chief among these items was additional kitchen work attributable to the existence of a structural post not previously known, as well as an infestation of carpenter ants in the kitchen ceiling. Although none of these additional items were subject to the original agreed contract sum of $48,000, DiSario, with the homeowner's consent, undertook to perform these extra tasks throughout the project. Eventually, the homeowner became dissatisfied with DiSario's work and terminated him after paying only $15,000 of the agreed $48,000 contract price. Thereafter, DiSario demanded payment of the unpaid balance of $27,000, which included allegedly unpaid contract work and agreed upon extras. The homeowner refused to pay any additional sum to DiSario, and DiSario filed a mechanic's lien for $27,000. The Homeowner proceeded to complete DiSario's scope of work with completion contractors.

DiSario brought an action to enforce the $27,000 lien, but was only awarded $7,000 of his claim. The lower court found that although DiSario could not sufficiently prove he performed $27,000 worth of work, he was able to prove that he performed $7,000 worth of work for which he was not paid. DiSario appealed the award seeking a greater payment and the homeowner cross-appealed, arguing that DiSario was not entitled to any award at all, and that he was entitled to compensation for its cost to complete DiSario's work.

The Appellate Division, Second Department, reversed the court below and found in favor of the homeowner, holding that DiSario would not receive any payment for contract or extra work performed. The court pointed out that while DiSario was able to establish the existence of both the oral contract and the homeowner's consent to the extra work, DiSario failed to produce the accompanying bills, invoices, receipts, timesheets, checks or other documentary evidence that supported that he performed any such work. DiSario apparently offered some oral testimony regarding the description and value of the work, but the court did not find it persuasive.

Interestingly, the homeowner's counterclaim against DiSario for the increased cost to complete DiSario's original scope was dismissed for similar reasons. The court found that the homeowner failed to provide documentary evidence of the description and value of alleged completion work, and found oral testimony on that point inadequate.

**TAKEWAY:** Owners and contractors alike need to engage in detailed record keeping, no matter the size of the construction project. Sometimes record keeping is required specifically in the contract documents, but that is not always the case and is even less common in smaller residential construction. Still, in the event something goes wrong on a construction project of any size, witness testimony alone will often not be enough to convince a judge or jury that you are entitled to any payment. Use of simple agreements, especially oral contracts, should not be an excuse to relax record-keeping. Quite the contrary, such should instead warn of the necessity to keep especially detailed records of all contract and extra work. In the end, the party that keeps detailed records of work, including important information regarding the work such as dates, values of labor/materials and detailed descriptions, will likely have a much easier (not to mention less expensive) time winning its case. Contractor and owners undertaking a construction project would be well served to consult their construction attorney to ensure they employ adequate record keeping procedures in the event that litigation becomes necessary.

*Scan here to learn more about Richard T. Ward III*

1.DiSario v. Rynston No. 2014-04072, 2016 WL 1355814, at (N.Y. App. Div. Apr. 6, 2016)

2.In some counties and in New York City, an oral agreement for home improvement contracting services is unenforceable by the contractor.

## New York's Prompt Payment Act Survives.....For Now

*By: Gregory J. Spaun, Partner*

Gregory J. Spaun

New York's Prompt Payment Act was amended in 2009[1] to deal with the problem of slow payments from owners to construction contractors and subcontractors. Under the Act, as amended, a contractor or owner presented with an invoice for payment for construction services or materials has 12 days to lodge objections to the invoice (or portions thereof). The portions of the invoice which are not objected to within the 12 day time frame are deemed approved and must be paid within 30 days thereafter. In the event that such invoices are not paid within that timeframe, or if the objections to the invoice are disputed, the unpaid contractor has the option to bring an expedited arbitration proceeding, rather than suffer through years of litigation. Reinforcing this right is another section of the Act, which provides that any contractual provision which denies a party the right to that expedited arbitration proceeding is void. This particular provision raised eyebrows when it was enacted because it deprives a party of his or her Constitutional right to a jury trial.

This question was recently passed on (by being passed over) by an appellate court in the case of Matter of *Capital Siding & Construction, LLC v Alltek Energy System, Inc.* In Capital Siding, Alltek entered into a construction subcontract with Capital Siding. During the job, Capital Siding withheld certain amounts from Alltek's payment, which Alltek disputed. In order to quickly resolve this dispute, Alltek sought expedited arbitration pursuant to the Act. In response, Capital Siding brought a special proceeding to permanently stay Alltek's arbitration, noting that the subcontract specifically provided for litigation.

The trial court denied Capital Siding's request, holding that the Act provides for arbitration, and that the Act specifically voided the contractual provision which denied Alltek of its statutory right to such arbitration. Capital Siding appealed, also raising the constitutional issue that the Act denied it of its right to a trial by jury—an argument it would not have been able to raise if the contract contained a waiver of a jury trial, as many construction contracts do. The Appellate Division affirmed the trial court's holding.

As to the constitutional issue, that the Act denied Capital Siding of its Sixth Amendment right to a trial by jury, the Appellate Division declined to rule on the substance of the issue. Rather, that court dodged the issue by noting that the issue had been improperly raised for the first time on appeal, and that Capital Siding had failed to provide the Attorney General with a required notice of its intent to challenge the constitutionality of the statute "at any stage of this proceeding".

As is implicit in the Appellate Division's note that Capital Siding failed to provide notice of its constitutional challenge "at any stage", the Appellate Division could have permitted Capital Siding to give that notice and permitted the Attorney General to be heard in support of the Act. However, the Appellate Division's decision not to do so means that the Prompt Payment Act survives--for now, until a challenger raises the issue before the trial court and provides the Attorney General with the required notice.

*Scan here to learn more about Gregory J. Spaun*

1. The Prompt Payment Act contains limitations as to what projects to which it is applicable.