Speaking Engagements

Thomas S. Tripodianos was invited to speak at the 2014 PIA Hudson Valley Regional Awareness Program and the IRMI Construction Risk Conference.

On November 6th, 2014 Mr. Tripodianos will speak on "The Impact of New York Labor Law on Construction Insurance" for the Professional Insurance Agents in Tarrytown, New York. He will present on the same topic the week of November 13th, 2014 at the Insurance Risk Management Institute's "IRMI Construction Risk Conference" in Nashville , TN.

To learn more about Thomas S. Tripodianos, scan this QR code with your smart phone.

Firm Partners Selected for 2014 Super Lawyers

Firm Partners Thomas H. Welby, Gerard P. Brady, Michael E. Greenblatt and Paul G. Ryan have been selected for the 2014 Super Lawyers. We are proud to have our Partners recognized for consecutive years:

- **Thomas H. Welby since 2011**
- **Gerard P. Brady since 2010**
- **Michael E. Greenblatt since 2009**
- **Paul G. Ryan since 2013**

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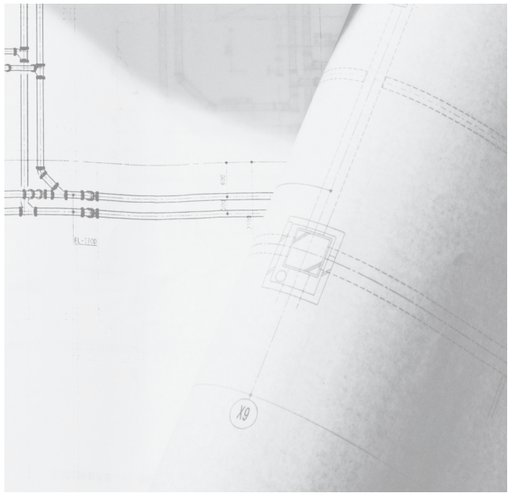
WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW
REPORT
ISSUE 15, SUMMER 2014

W E L C O M E

MESSAGE TO OUR READERS

Thank you for reading the Summer 2014 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 announce Welby, Brady & Greenblatt, LLP Partners selected for the 2014 Super Lawyers; Jared A. Hand, Associate, shares Revisions to the NT DOT Standard Specifications; Firm Partner, Thomas H. Welby, P.E., Esq., discusses Revised OSHA Electrical Standards that take effect; and, Alexander A. Miuccio, Firm Partner and General Counsel to the CIC & BCA informs on Supplier Liable to Subcontract for Breach of Promise of Good Faith and Fair Dealing. For articles like these, visit our website at www.wbgllp.com or scan this QR code with your smartphone.



Supplier Liable to Subcontract for Breach of Promise of Good Faith and Fair Dealing

By: Alexander A. Miuccio, Partner – General Counsel to the CIC and BCA

Alexander A. Miuccio

Courts have traditionally recognized that in every contract an implied duty of good faith and fair dealing exists between the parties that govern their respective contract performance and enforcement.

Despite the efforts of the courts in determining when and how the covenant of good faith and fair dealing is violated, the definitions of "good faith" and "fair dealing" remain obscure. In the recent case of Helmar Construction v 1198934 Ontario, Inc., however, the court found that a supplier's conduct in dealing with a subcontractor constituted a breach of the covenant of good faith and fair dealing.

Background

Prior to 2004, Helmar undertook to perform certain curtain wall installation at the construction of the Queens Ambulatory Pavilion at Queens Hospital Center. In 2004, Helmar contracted with Ontario for it to supply materials required for Helmar to perform its own subcontract which included, among other items, certain items of aluminum curtain wall, storefronts, glazing, windows and other hardware. Ontario was also required to supply shop drawings and complete field measurements.

From the beginning of the project there were issues with Ontario's performance, including its delays in delivering its materials and its delivery of defective, damaged and otherwise nonconforming materials. Helmar had repeatedly attempted to discuss these issues with Ontario by making numerous telephone calls and sending repeated letters and faxes. Helmar's repeated attempts to resolve these issues often went ignored and unanswered. As a result, Helmar sustained backcharges from the general contractor. Helmar sued Ontario for breaching the contract, and Ontario claimed that its slow delivery and lack of responsiveness was justified by Helmar's withholding of a disputed 10% retainage.

Decision

After a trial, the court held that under the circumstances of Ontario's failing to respond to Helmar's concerns about problems with Ontario's materials, Ontario had breached the contract by breaching the covenant of good faith and fair dealing. The court held that even assuming that Helmar was not justified in withholding 10% retainage, Ontario's failure to respond to Helmar's calls and correspondence went well beyond any resulting cash flow problem and was well outside of what could be considered good faith or fair dealing.

Comment

Although the duty of good faith and fair dealing between the parties is implied in every contract, it is rarely used by the courts in contract litigation. In this case, however, the Court made it clear that parties to construction contracts have not only the obligation to live up to the obligations under that contract, but to attempt to resolve problems that arise in a timely fashion, and in good faith. Parties to such contracts would accordingly be well advised that when a problem arises they should not ignore

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To Learn more about Alexander A. Miuccio, scan this QR code with your smart phone

Revised OSHA Electrical Standards Take Effect

By: Thomas H. Welby, P.E., Esq., Partner

Thomas H. Welby

OSHA has overhauled its standards for the construction of electrical transmission and distribution installations, and the general industry and construction standards for electrical protective equipment. The new rules make the construction standards more consistent with the more recent general industry standards, as well as with approved consensus standards already in widespread use.

In addition to electrical utilities, the new rules impact contractors building, repairing, and maintaining electric power facilities, and manufacturing (and other) firms that own or operate their own electrical power generation, transmission or distribution installa¬tions as a secondary part of their business operations. Tree-trimming companies will also be affected.

While space does not allow a full examination of the new electrical standards, the primary changes under the new rules fall mostly under four categories: (1) new provisions regarding the passing of information between the "host employer" and "contract employers;" (2) revised provisions on the use of fall protection systems; (3) revised requirements for "MAD," or minimum approach distances; and (4) new requirements to protect employees from hazards associated with electric arcs. We'll look at these briefly, in the order listed.

Sharing of information: Under the new rules, the host employer is required to pass on to the contracting employers all information concerning safe work performance related to the design, condition, operation and capacity (fault currents) of all equipment. Each of the contract employers is required, in turn, to pass instructions to their respective employees, based on information received from the host employer.

Each contract employer should contact the host employer, before work begins, of any unique hazards not covered in their conversation. During performance, the contract employer should contact the host employer, within two working days, when unanticipated hazards become apparent.

The host and contract employers are to coordinate work rules, so that all employees are properly protected.

Labeling the calculated fault current on electrical equipment has been an NFPA 70E requirement since 2008, but is not a requirement prescribed under the new OSHA standards. Labeling outdoor, high-off-the-ground equipment is of doubtful utility, but maximum fault current, and maximum clearing time of the upstream protective device in the system, is critical information, which should be included in written or electronic work orders, and documented, in a readily-accessible place, in locations where arc flash incident energy labels are not installed.

Each contract employer should have — and the host employer should make sure that each of them has — supervisory processes to ensure worker compliance with electrical safe work processes. OSHA's new standards do not require that a pre-job meeting be documented, but we recommend that minutes of such a meeting state, in detail, what information was shared, as well as a summary of what initial and refresher training is contemplated, and what monitoring will be done to ascertain what safety-related information is (and is not) being understood and followed, so that refresher training cycles can be determined accordingly.

Fall protection: Under the new standards, workers climbing poles and elevated 4' or more off the ground must use fall protection systems, unless the employer can show that doing so is infeasible, or creates an additional or greater hazard. Workers performing covered work can no longer use body belts as part of a fall arrest system; they must use harnesses. (According to OSHA, it's mainly employees of tree-trimming services that use body belts at present).

Work positioning systems must now be rigged, so that an employee cannot free-fall more than 2 feet. Companies now working under NFPA 70E and 2012 NESC standards must change their training and work rules, as fall protection is now required at 4' elevations (not 10') and it's no longer permissible to be unattached during repositioning activities.

Minimum approach distances: Under OSHA's new rules, MAD will now be calculated using tables based on engineering principles, including system transient overvoltage and spark-over distances mainly applicable when working on systems greater than 72.5kV. Distances must be appropriate for the particular workplace, not the industry at large.

Companies following NFPA 70E or 2012 NESC need to note, and incorporate into their training and procedures, differences in the definitions of certain terms, as used in the new OSHA standards (e.g., MAD, or minimum approach distance; LAB or "boundary — limited approach;" RAB, or "boundary — restricted approach;" and AFB, or "boundary — arc flash").

Protection from electric arcs: These new rules are intended, among other things, to afford workers the benefit of clothing made of flame-resistant materials, rated to withstand the incident energy of electrical arc flash exposure, and reduce the likelihood of burns.

Under OSHA's new rules, employers must estimate the arc flash incident energy to which employees could be exposed. In devising the new rules, OSHA in effect rejects the NFPA 70E tables now widely utilized, in that those tables prescribe appropriate levels of PPE based in part on the likelihood that an arc will occur. OSHA's approach under the new rules bases the determination of the level of PPE solely on incident energy: if there is a significant likelihood that an arc will occur, then protection against the full incident energy of the arc flash is required.

Where the incident energy calculation exceeds 2.0 cal/cm2 the employer must require that exposed employees wear clothing with a rating equal to or greater than the expected exposure. This will generally need to include rubber insulating gloves and leather protectors (or 12-oz. leather work gloves), heavy-duty work shoes or boots, and a Class E hard hat.

Polypropylene has been added to the list of prohibited fabrics for protective clothing.

Employers must henceforth have written statements in their electrical safety program, prescribing worker attire from the skin out. Compliance with NFPA 70E in determining PPE levels may no longer constitute

Continued on page 3

Continued from page 2

compliance with the new OSHA rules, especially when working from a bucket, on a pole, or while using a live-line tool.

One aspect of the new rules that threatens confusion and noncompliance is the requirement, above a certain threshold level, for face protection. Many workers find that face protection limits visibility, and are resistant to using it. Also, heat stress mitigation will probably be required where arc-rated clothing must be worn, and it is controversial whether 40 cal/cm2 arc-rated clothing is truly necessary.

Additional subjects addressed in the new rules include job briefings; insulation and work¬ing position of employees working on or near live parts; de-energizing trans¬mis¬¬sion and distribution lines and equipment; protective grounding; operating mechanical equipment near overhead power lines; and working in manholes and vaults.

Full documentation concerning the new rules can be found on OSHA's website, or in the Federal Register.

To learn more about Thomas H. Welby, scan this QR code with your smartphone

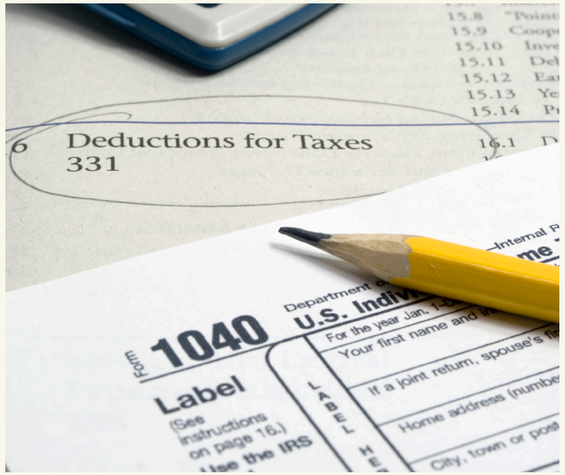
Revisions to the NY DOT Standard Specifications: Section 100-Phase 7

By: Welby, Brady & Greenblatt, LLP

The New York Department of Transportation utilizes its administrative document, the Standard Specifications, to provide a compilation of standard requirements for construction contracts. These specifications are written to the contractor. They define the contractor's responsibility in meeting each specification, enumerate the Department's expectations and how it is going to measure and pay, and explain what the contractor is expected to provide[1].

Recently, the Department of Transportation released an Engineering Instruction, entitled Revisions to Standard Specifications: Section 100-Phase 7, which provides revisions and changes to Section 100 of the Standard Specifications, and consolidates all existing changes. These revisions apply to contracts submitted for bidding after January 9th, 2014.

The adoption of the revisions to section 100 warrant the review of the Standard Specifications, as many of these revisions have altered the general terms for bidding construction contracts and contracting with the Department of Transportation. Section 104-01, Scope of Work, for example, has had language added to it which requires a contractor to commence its work within 14 days of being awarded a contract by the Office of the State Comptroller, unless written consent of the Department of Transportation is given to begin at a later date.



The addition of vendor responsibility, section 105-05, is another example of a new addition to the document. This section establishes that a contractor shall at all times during the contract term remain responsible, and that if requested by the Commissioner of Transportation, or his or her designee, the contractor agrees to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity. The section also reserves the right for the Commissioner to suspend any and all activities of a contractor at any time when he or she discovers information that calls into question the responsibility of the contractor, and establishes the proper course of action if this were to occur (including written notice, termination, etc.).

More examples of additions to the Standard Specifications include the addition of Marine Protection & Indemnity and Pollution Liability Insurance to the insurance requirements of section 107-6, the establishment of what costs are recoverable for a contractor under acceleration compensation, and when a contractor will be reimbursed for additional costs associated with acceleration directed by the Department of Transportation in writing.

Failure to account for changes to the Standard Specifications in new bids will subject a contractor to potential liability and/or contract termination. The changes highlighted above, along with others, have altered various aspects of how contracts with the Department of Transportation are handled, including deadlines, timeframes, and necessary insurance provisions/required clauses, among other things. The changes cannot be ignored, as they have a large impact on contractors bidding for, and working under contracts with the Department.[2]

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[1] New York Department of Transportation, *Standard Specifications (U.S. Customary Units)* 3 (Jan. 9 2014).

[2] Anthony Ruggeri, a third year law student and law clerk with the firm, assisted with the preparation of this article.