WELBY, BRADY & GREENBLATT, LLP

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WELCOME

Message to our Readers

Thank you for reading the 33rd 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.

In this issue, we are presenting Legal Alerts written by our Legal Staff. Austin S. Brown, Associate, discusses N.Y. Labor Law §220: The Burden of the Prevailing Wage on Closely-Held Business Entities;

Frank Gramarossa, Associate, informs his reader to Notify Early, Notify Often...; and Thomas S. Tripodianos, Partner, explains the new EO_192 and MTA Debarment Regulations.

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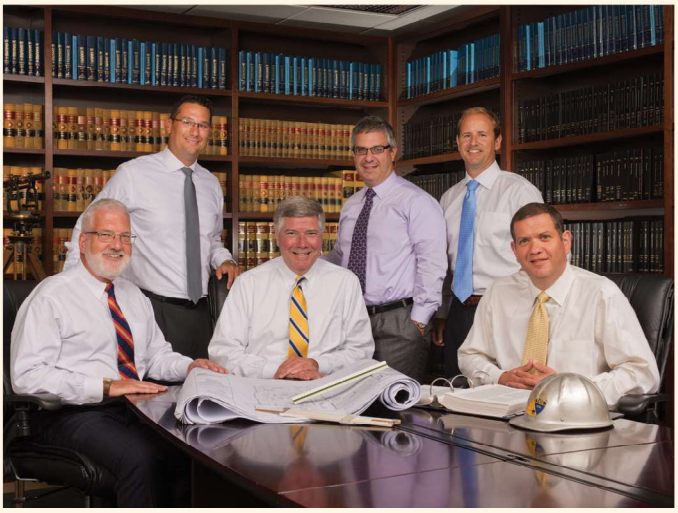

N.Y. LABOR LAW §220: THE BURDEN OF THE PREVAILING WAGE ON CLOSELY-HELD BUSINESS ENTITIES

By: Austin S. Brown, Esq., Associate,

Austin S. Brown

Many construction contractors throughout the State of New York derive a substantial portion of their revenue from public construction projects. Contractors on these jobs need to be wary of what is known as N.Y. Labor Law §220(3)(a) (a/k/a the "Prevailing Wage"). The Prevailing Wage was enacted to ensure that workers on public works projects are properly classified and receive what the State determines to be the "prevailing wage" from their employers; however, what happens when one of these workers is also the owner of their own company? Must the Prevailing Wage still be paid and all of the associated taxes and expenses incurred?

Here, we will be discussing the impact that the Prevailing Wage has on a the principal of a contractor who is also the sole-owner ("principal") of his own corporation or limited liability company ("LLC") and is working as a worker on a public works project. However, before addressing this rather unique issue, it is first necessary to explain some background information.

The Prevailing Wage

An employer that fails to pay a worker the Prevailing Wage could face extensive criminal and civil liability, including debarment from being awarded future work on public works projects. Of course, with such serious repercussions for failure to comply with Prevailing Wave requirements, the paperwork necessary for contractors to prove that all of their employees (and, in some cases, the employees of their subcontractors) are in compliance is time-consuming, and the associated costs are expensive; for example, some expenses include, but aren't limited to: a) taxes; b) payroll expenses; c) increased insurance premiums; and d) administrative expenses.

Closely-Held Business Entities

Corporations and LLC's are separate legal entities that shield individuals from personal liability while they are

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operating their respective business. There are countless ways for a contractor to be sued within the State of New York, which is why contractors often form corporations or LLCs. Without the protections afforded by a business entity, doing business might not be worth the risk. When a business entity is only owned by a small number of members, or even one member, it is known as a closely-held corporation or LLC. So, in the eyes of the law, even if a business entity is owned and operated by a single principal, that business entity is still entirely separate-and-apart from the principal, even though the entire business runs through him or her. These closely-held business entities are often smaller construction contractors with a principal that is self-employed and is performing labor him or herself.

The Issue

When a principal performs work on a public works project without paying him or herself a wage, it would seem entirely fair because the principal owns and operates the company. Why should that principal have to pay him or herself a wage, and incur the correlating taxes and expenses, when the principal will be the party receiving the profits at the end of the day?

For example, if the closely-held business entity is an excavation subcontractor on a public works project, a heavy equipment operator will likely be needed. Since a heavy equipment operator receives a higher average wage rate than a laborer, it would make perfect sense that the principal would want to operate the heavy machinery him or herself - thereby reducing labor expenses and all taxes and expenses associated with the Prevailing Wage. Of course, any other worker employed by the excavation subcontractor on the public works project would be receiving the Prevailing Wage. In theory, this business strategy makes perfect sense and does not cut against the legislative intent of the Prevailing Wage whatsoever. After all, the money is coming from the principal's profits, and simultaneously going back to the principal as wages. However, while this is fair in theory, the reality is quite different.

When the principal, on behalf of the excavation subcontractor, submits payment applications for approval to the general contractor on a public works project, it is **currently a requirement** that the principal pay the Prevailing Wage to him or herself. If the principal does not have the proper paperwork to present to the general contractor, it is likely that processing of the payment applications will be delayed, and there will be a risk of non-payment and potential exposure to liability for failure to pay the Prevailing Wage.

Many contractors on public works projects are unaware of the numerous pitfalls that arise when dealing with the Prevailing Wage. This is especially true here, where the principal's conduct is not necessarily morally wrong, but still constitutes a violation of the Prevailing Wave requirements. Contractors on public works projects should be cognizant of both contractual and statutory requirements as the failure to understand the Prevailing Wage can subject contractors to extensive civil and criminal liability. Reliable legal advice from experienced construction litigators can help contractors avoid these potential pitfalls and the avoid exposure to liability.

Scan here to learn more about Austin S. Brown

NOTIFY EARLY, NOTIFY OFTEN....

By: Frank Gramarossa, Esq., Associate

Frank Gramarossa

Many contractors are unaware of the procedural pitfalls that lie beneath them when they are submitting a claim for non-payment. What happens when a contractor fails to provide timely notice of its claim, or somehow else fails to conform to the claims process set forth in the contract? The claim becomes subject to dismissal. The issue of untimely notice was again analyzed in the New York State Courts recently by the Appellate Division, First Department in the case titled *Lanmark Group, Inc., v. New York City School Construction Authority*, (148 AD3d 603).

In *Lanmark*, the plaintiff was Lanmark Group, Inc., a contractor hired by the SCA to do work on the exterior masonry, parapets, roof, and paved areas at PS 204(K) in Brooklyn. After work began, the SCA also asked Lanmark to remove existing back up brick from the school, and install

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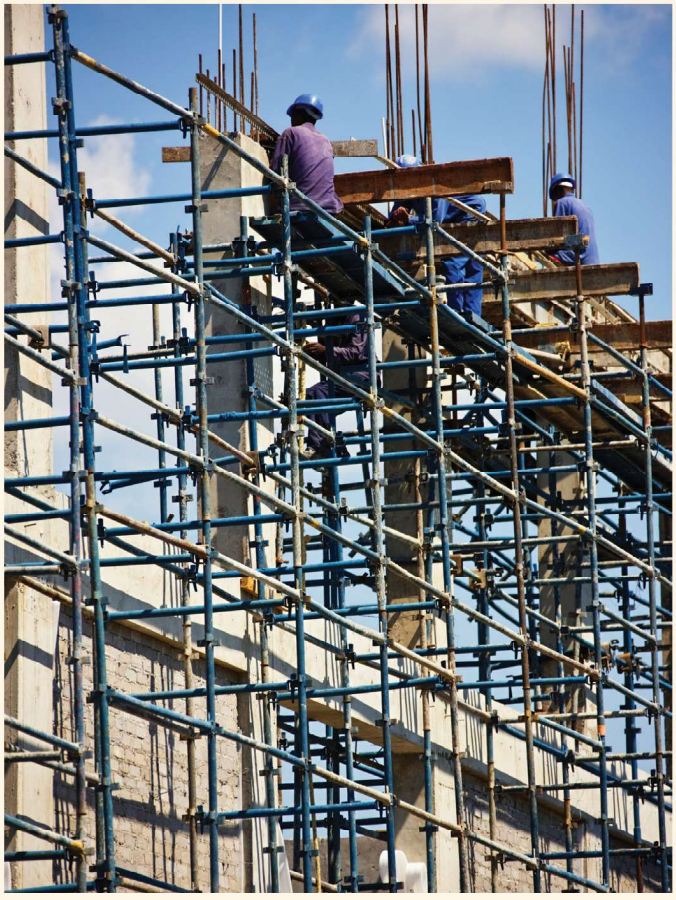
some door jambs, frames, saddles and hinges. Lanmark claimed this work was additional work outside of the original scope. The parties disputed the scope of work called for in the original contract; specifically how much brick had to be removed, and how much was outside the original scope.

On October 27, 2014, Lanmark sent a letter to the SCA requesting clarification of the scope of the extra work, and it added that it disagreed with the architect's definition of the scope of work. The next day, the SCA responded stating it could not specify the quantities of brick to be removed. Then on December 1, 2014, Lanmark sent a cost estimate in the amount of $891,231.44 for the removal of 6,800 sq. ft. of brick that it claims was not in the original scope. The SCA responded with an offer of $120,406; however, it did not indicate whether the offer was based on Lanmark's estimate (6,800 sq. ft.) or the architect's scope definition (3,890 sq. ft.). After some discussion, on February 24, 2015, SCA issued a unilateral change order for $120,406. In doing so, the SCA clarified that the amount was for the removal of 6,800 sq. ft. of brick. On April 6, 2015, Lanmark filed notice of claim for the brick removal. Lanmark then commenced work on the brick removal, which was completed on July 31, 2015.

Lanmark commenced a lawsuit on December 1, 2015 to collect on the balance of its claim. The SCA filed a motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction on the grounds that Lanmark did not provide timely notice required by Public Authorities Law §1744(2). That statute requires that any action against the SCA based in contract requires: 1) notice of claim to be filed with the SCA within three months of accrual; and 2) that the action be commenced within 1 year. The issue before the Court was simple: when did Lanmark's claim accrue? The SCA argued that the claim accrued on December 1, 2014, the date when Lanmark submitted its cost estimate. This would mean the time to file a notice of claim would expire on March 1, 2015, thus making Lanmark's filing on April 6th untimely. Lanmark argued that the claim did not accrue until the brick work was substantially completed on July 15, 2015, rendering its April 6th filing timely.



The lower court (Supreme Court, New York County), agreed with Lanmark and denied the SCA's motion. It cited a Court of Appeals case (*CSA Constr. Corp. v. New York City School Constr. Auth.*, 5 NY3d 189, 192 [2005]), which held that "a contractor's claim accrues when damages are ascertainable" which, although the date will vary based on facts and circumstances, "generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted". The appellate court upheld the decision, holding that the "[Lanmark]'s notice of claim was timely served, because it was filed before the [SCA] executed a certificate of completion." In addition, the Court held that Lanmark's submission of a cost estimate did not trigger the running of the three-month notice period, as it was not a detailed invoice for final payment for work completed.

Many contractors are unaware of numerous notice requirements applicable to their claims, whether required by contract or by statute. Contractors should be cognizant of both contractual notice provisions and statutes requiring the filing of a notice of claim prior to initiating a lawsuit. Contractors should also have an understanding as to when their claim accrues. Failure in understanding this timing and notice issue can lead contractors to unwittingly create procedural defects in their claims. Reliable legal advice from experienced construction counsel can help contractors avoid these potential pitfalls and bring them one step closer to obtaining a favorable result to resolve their claim.

Scan here to learn more about Frank Gramarossa

E0_192 AND MTA DEBARMENT REGULATIONS

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

If being a public works **contractor, consultant or supplier** wasn't already difficult enough things just got harder. Public Authorities Law Section 1279-h, became law without public comment on April 12, 2019, when it was passed as part of the New York State budget bill. The MTA provided the regulations called for under the law on June 5, 2019, which **mandate retroactively** that the MTA debar contractors (defined to include consultants, vendors and suppliers) if they: (1) fail to achieve substantial completion of their contractual obligations within 10% of the adjusted contract time; or (2) present claims (which includes change orders) for additional compensation that are denied in an amount that exceeds the total adjusted contract amount by 10% or more.

While the MTA regulations provide that debarment by one is debarment by all of the agencies under the MTA umbrella things get even worse because Executive Order 192, issued on January 15, 2019, mandates debarment by all state agencies and authorities of contractors debarred by any state agency or authority **forever** [the MTA Regulations suggest the debarment in only for five years but EO 192 would override that] unless a court determines the debarment was in error, or a secure a waiver from the Counsel to the Governor. Considering the weight given to past debarment in considering bid awards the detrimental effect could extend past New York.

It gets even worse. The MTA cannot consider mitigating factors or whether claims have been made in good faith. Debarment is required once a final determination is made by the MTA that the regulations have been violated "and its contracting personnel have no discretion to excuse or justify violations of any provision." But wait, there's more. Not only is the debarment hearing held and decided by the MTA itself the " panel may, in its discretion, also debar any of (1) the contractor's parent(s), subsidiaries and affiliates; (2) any joint venture **(including its individual members)** and any other form of partnership (including its individual members) that includes a contractor or a contractor's parent(s), subsidiaries, or affiliates of a contractor, (3) a contractor's directors, officers, principals, managerial employees, and any person or entity with a ten percent or more interest in a contractor; (4) any legal entity controlled, or ten percent or more of which is owned or controlled, by a contractor, or by any director, officer, principal, managerial employee of contractor, or by any person or entity with a 10 percent or greater interest in contractor, including without limitation any new entity created after the date of the notice of intent to debar".

A coalition of industry associations has been formed to challenge the validity of the law and regulations but, for the time being they are in full force and effect. Anyone doing business on public work in New York and especially with the MTA is urged to consult with competent counsel as to how to mitigate the risks imposed by these new laws.

Scan here to learn more about Thomas S. Tripodianos