Welby, Brady & Greenblatt, LLP
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REPORT

WELCOME

Message to our Readers

Thank you for reading the Winter 2015 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 share three contributions made by two of our Partners and our new Associate. Partner, Thomas H. Welby, discusses OSHA and Whistleblower Protection; Thomas S. Tripodianos, Partner, answers a question on Surety Subrogation Claims; and Rick Ward shares The Importance of Knowing YOUR Contracts.

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The Importance of Knowing YOUR Contracts

By: Richard T. Ward III, Associate
Editor: Thomas S. Tripodianos, Esq.

Richard T. Ward III

The construction industry requires a contract for just about everything. The contract you enter into, whether it is a construction contract, a performance or payment bond, an insurance agreement, a design contract or some combination of the above, contains language that will determine whether you are protected if the project goes awry. The necessity of risk allocation in construction projects has led to the widespread use of form contracts developed to reduce to writing what the form's author believes to be a fair transfer of risk between contracting parties. However, using a commonly employed form contract is no guarantee of optimal risk allocation and no excuse not to read and understand the language of your contract.

A recent decision of the Appellate Division, Second Department in *Archstone v. Tocci Bldg. Corp. of New Jersey*, 119 A.D.3d 497, 990 N.Y.S.2d 44 (2014), highlights the importance of familiarizing yourself with your contracts, even when a form is used. In 2004, Archstone, a project owner, enlisted Tocci as the general contractor for the construction of a 396-unit apartment complex. Before construction, Tocci secured a performance bond from Liberty Mutual Insurance Company (Liberty Mutual) to ensure the completion of the contract. The bond format was a commonly used form performance bond from the American Institute of Architects (AIA) known as A312 – 1984. After Tocci had substantially completed the project, Archstone discovered extensive water intrusion damage which it alleged was attributable to Tocci's faulty design and construction. In 2008, Archstone brought an action against Tocci and Liberty Mutual.

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Liberty Mutual argued in response that Archstone failed to comply with notice provisions of the performance bond and was thus precluded from asserting any claim on the bond. Paragraph 3.1 of the bond required that Archstone notify both Tocci and Liberty Mutual if it was considering declaring a default and to further request and attempt to hold a conference within 15 days of that notice to discuss alternative solutions to declaring a default. Archstone, admittedly, had not complied with 3.1. The Supreme Court, Nassau County agreed with Liberty Mutual and granted summary judgment dismissing Archstone's claim against it. The decision was affirmed by the Second Department, which cited other New York courts interpreting non-compliance with Paragraph 3.1 of A312 – 1984 to be a bar to recovery on the bond.

The AIA makes changes to its forms on a regular cycle in order to better suit the needs of contracting parties. Interestingly, in 2010, the AIA updated form A312 adding a new paragraph after 3.1 explicitly stating that compliance with 3.1 was NOT a condition precedent to recovery under the bond and therefore recovery could be had without compliance with that paragraph. The change reflects AIA's opinion that the notice provisions of 3.1 were meant to protect sureties from actual prejudice from non-compliance, not to be an escape rope. Unfortunately for *Archstone*, its contract predated the 2010 changes, and so, although the outcome is contrary to the AIA intention as described in the 2010 change, it was barred from recovering on the bond.

Practice Tip: The Archstone decision is a reminder of a few key points. The first is that form contracts provided by entities such as the AIA are constantly changing and so the parties that use those forms should stay apprised of what changes are occurring and why. Second, form agreements are only a good starting point. Each project is unique and the agreements used on that project should be drafted to take that uniqueness into account. Third, and most importantly, carefully read each of your contracts including ancillary agreements such as bonds and insurance contracts. When doing so, pay close attention for provisions that affect your ability to assert your rights under the contract and when in doubt, consult your construction attorney to help you draft, identify and understand these key provisions.

See other changes to A312-1984 and related AIA documents at the link below: ***http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiab083075.pdf***

OSHA and Whistleblower Protection

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

Thomas H. Welby

A "whistleblower" is someone, usually an employee, who brings to the attention of senior management, outside authorities, media, or the public at large assertions of wrongdoing by his employer. Under the OSH Act, as well as many other federal and state statutes, there are prohibitions against firing, or otherwise retaliating against, employees who "blow the whistle" on their employer's acts, or who assert their rights under any of the relevant statutes.

Employers cited under OSHA often believe, sometimes correctly, that the inspection leading to the citation was triggered by an employee complaint. While seldom will such suspicions be susceptible of proof, the employer may be tempted to discharge or otherwise retaliate against an employee suspected of making a report to OSHA.

That's a temptation you always ought to resist.

For one thing, the construction industry is one of the top producers of workplace injuries and fatalities. As such, it is perennially targeted by OSHA for enhanced enforcement. Thus, even assuming that your employee *did* report a violative condition, leading to an OSHA inspection and a citation, chances are good that — even in the absence of a report — you would have seen an OSHA Compliance Officer sooner rather than later anyway.

Second, the definition of a "Serious" OSHA violation is one likely to cause serious injury or death. As unpleasant as it may be to be cited by OSHA for such a violation, your employee, by calling OSHA before a fatality or serious injury occurred, has actually *done you a favor* (even if his motives may not have been completely pure). You really need to correct any "Serious" violation *before* a serious or fatal accident occurs.

Third, from an employee relations viewpoint, punishing an employee for exercising his or her legal rights is terrible policy .

Fourth, retaliating against an OSHA "whistleblower" is unlawful.

The OSH Act prohibits employers from discharging employees because they file complaints or otherwise exercise rights afforded by the Act, including, but not limited to, informing OSHA of unsafe conditions, and requesting a federal inspection. 29 U.S.C. § 660(c)(1) provides in part that:

> No employer shall discharge or in any manner discriminate against any employee because [he] has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of [his] exercise . . . of any right afforded by this chapter.

The OSH Act further provides, in 29 U.S.C. § 660(c)(2):

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the [U.S.] Secretary [of Labor] alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

It is therefore the Secretary of Labor, to the exclusion of the aggrieved employee, whom the statute authorizes to initiate a civil action in a federal district court based on an employer's allegedly having violated the OSH Act by discharging or otherwise discriminating against the employee for reporting a safety or health matter. Courts have held the statutory remedies to be exclusive: they provide for the filing of a complaint with the Secretary of Labor, but not for the filing of a federal court action *by the employee.*

While the federal OSHA agency's mandate is essentially to enforce standards, and promote workplace safety and health in those states that have not established analogue "Little OSHA" (state-run) agencies, interestingly Congress has put OSHA in charge of administering a total of some 21 federal "whistleblower protection" statutes. These statutes, and administrative and case law rules construing them, generally protect employees engaging in "protected activity" from "adverse employment actions," typically including firing or layoffs, blacklisting, demotion, denial of overtime or promotion, disciplining, denial of benefits, failure to hire or to rehire, intimidation, being threatened, reassignment affecting prospects for promotion, or reduction in pay or hours.

The whistleblower statutes administered by OSHA include, in addition to § 11(c) of the OSH Act itself, a panoply of environmental and nuclear safety laws, transportation industry laws, and consumer and investor protection laws. Many of the transportation industry laws relate to employee safety *per se* (for example, the Federal Railroad Safety Act, the Seaman's Protection Act, and the Surface Transportation Assistance Act, among others) while most of the others do not. The statutes falling within OSHA's authority have not been rewritten to make uniform what constitutes "protected activity," or proscribed "adverse employment actions," or what substantive remedies are available. The time frames within which the administrative complaints must be filed range from 30 days to 180 days, according to which statute is claimed to have been violated, and some statutes allow for private lawsuits, whereas others do not.

One recent case that has garnered some attention involves a retaliation case under the Federal Railroad Safety Act. A coach cleaner for Metro-North was retaliated against after he reported a knee injury he suffered in 2011. While driving the injured employee to the hospital, a Metro-North supervisor reportedly told the worker that railroad employees injured on the job were written up for safety, and not considered for advancement or promotions within the company.

OSHA's investigation found that the employee engaged in protected activity when he reported his injury and filed his complaints with OSHA; that Metro-North knew these were protected activities; and that these protected activities were contributing factors in Metro-North's disciplining of the employee.

OSHA ordered Metro-North to pay the aggrieved employee $10,000 in compensatory damages, a whopping $250,000 in punitive damages (the largest punitive award ever in a FRSA case) and to expunge the employee's record of all charges and disciplinary action.

While this award is subject to a possible appeal, its severity should tell you all you need to know about the inadvisability of retaliating against employees who assert statutorily-protected rights under the OSH Act or other laws.

Surety Does Not Have a Claim Against the Owner for Post-Termination Payments to the Contractor

By: Thomas S. Tripodianos, Partner

Thomas S. Tripodianos

Question. Joint sureties issued a performance bond to the Public Owner in connection with Contractor's contract. The Sureties claim the Public Owner made an improper post-termination payment to Contractor to the detriment of their rights as potential subrogees. The sureties neither performed the contract themselves nor financed the project's completion. Is the Sureties claim proper?

Answer. Not at this time.

The Sureties issued a performance bond in connection with a public improvement project. The Public Owner has declared the Contractor in default and asserts that the Sureties have breached their obligations under the performance bond. The Contractor has alleged the Public Owner is in material breach of the contract and seeks to withdraw from the same. The Contractor contests the Public Owner's claims of default. The Sureties assert that the Public Owner improperly made a post-termination payment to Contractor to the detriment of the Sureties' rights as potential subrogees.

In the Bond, the Sureties agreed,

> if requested to do so by the [Public Owner], to fully perform and complete the Project to be performed under the Contract, pursuant to the terms, conditions and covenants thereof, if for any cause the Contractor fails or neglects to so fully perform and complete such Project…. [and] to commence the work of completion within twenty (20) days after written notice thereof from the [Public Owner] and to complete such Project within such time as the [Public Owner] may fix.

At the conclusion of the 20-day period, the Sureties notified the Public Owner that they have been unable to conclude that Contractor is, in fact, in material breach of the subject Contract such that it could properly be terminated for default under the terms and conditions of that Contract. Therefore, the Sureties have been unable to conclude that the conditions triggering any obligation under the Bond have been met.

The Sureties further contend that the Public Owner made a post termination payment to the Contractor and in doing so the Public Owner failed to mitigate its damages, to the ultimate detriment of the Sureties. The Sureties never notified the Public Owner that it should not make further payments to Contractor or that doing so would impair their interests.

The Sureties assert that the Public Owner's post-termination payment to Contractor was improper, notwithstanding that the payment was approved before Contractor's termination. They argue that any balance the Public Owner owes Contractor under the Contract serves as the Sureties' collateral in the event that they are required to pay or otherwise perform under the Bond. According to the Sureties, if the Public Owner is correct that Contractor materially breached the Contract, then payment was an overpayment that impaired their interests in the unpaid balance of the contract price. The Sureties further contend that, in the event that Contractor is found liable and they are compelled to fulfill their obligations under the Bond, they are entitled to a damages offset under the doctrine of equitable subrogation.

Subrogation is the right one party has against a third party following payment, in whole or in part, of a legal obligation that ought to have been met by the third party. The doctrine of equitable subrogation allows insurers to "stand in the shoes" of their insured to seek indemnification by pursuing any claims that the insured may have had against third parties legally responsible for the loss. In short, one party known as the subrogee is substituted for and succeeds to the rights of another party, known as the subrogor. The doctrine of subrogation, which is based upon principles of equity, has a dual objective as stated by New York courts: It seeks, first, to prevent the insured from recovering twice for one harm, as it might if it could recover from both the insurer and from a third person who caused the harm, and second, to require the party who has caused the damage to reimburse the insurer for the payment the insurer has made.

Generally in a public improvement contract, the contractor is required to find a surety that will secure the performance of his contract. Upon default by the contractor, the surety, pursuant to a performance bond, completes the contract, at its own cost and expense. It then becomes equitably subrogated to the rights of the contractor and certain of the rights of the owner in the unpaid balance of the contract price.

Here, it is undisputed that the Sureties have neither undertaken performance of the Contract themselves nor financed the project's completion. The Sureties' lack of performance to date precludes them from asserting an equitable subrogation claim at this time for any improper payments that the Public Owner purportedly made to Contractor.