

WELCOME

Message to our Readers

Thank you for reading the Fall 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 present Legal Alerts written by our team. Alexander A. Miuccio, CIC & BCA General Counsel, shares Contractor Liable for Failure to Account for Trust Funds; and Associate, Richard T. Ward III, presents an update to Design-Build Jobs in New York State. We are also pleased to announce that Jared A. Hand, Associate, has been named 2015 "Rising Star" by Super Lawyers Magazine.

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Contractor Liable For Failure To Account For Trust Funds

By: Alexander A. Miuccio, Esq., Partner



Alexander A. Miuccio, Esq.

Article 3A of the Lien Law provides that monies received by a contractor or subcontractor for a construction project are trust funds to be held by them as trustees for payment to those performing work or supplying materials for the project. The statute is intended to prevent owners, contractors and subcontractors from either using the trust monies to pay creditors on other projects or keeping the monies for

themselves, rather than paying for the costs of construction on the project. If the trust funds available for a project are diverted from that trust, the owner, contractor or subcontractor may incur personal liability for the trust fund diversion.

Section 76 of the Lien Law allows beneficiaries of the Lien Law, such as unpaid contractors or subcontractors, to demand a verified statement of the trust, itemizing all monies it has received and all monies it has spent on the project. If the contractor's verified statement fails to fully account for the funds it received on the project, there is a statutory presumption of a wrongful diversion of trust assets, thereby exposing the contractor to liability for the unpaid amount of the subcontractor's claim.

In the recent case of *Anthony DeMarco & Sons Nursery, LLC v. Maxim Construction Service Corporation*, the contractor, to his peril, faced the consequences of submitting a deficient verified statement under Section 76 of the Lien Law.

Background: LeChase Construction Services, LLC was the general contractor for a construction project

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undertaken by the Dormitory Authority of the State of New York at SUNY Binghamton. Maxim Construction Service Corporation was the site contractor. Maxim entered into a subcontract with Anthony DeMarco & Sons Nursery, LLC, whereby DeMarco was to provide certain landscaping services for the project. Although Maxim paid the subcontractor, DeMarco claimed that it was owed additional monies and filed a mechanic's lien to secure these funds. In response, LeChase withheld a sum from Maxim representing 1½ times the amount of DeMarco's lien.

Subsequent to the filing of its lien, DeMarco demanded that Maxim furnish a verified statement of trust under Section 76 of the Lien Law. Maxim ignored the demand, so DeMarco obtained a court order compelling Maxim to provide the statement. When Maxim ultimately supplied the verified statement, DeMarco deemed it to be deficient and thereafter moved to compel Maxim to fully respond to its demand. The court agreed with DeMarco that Maxim's statement was deficient, but rather than just compel Maxim to provide an adequate statement, it granted DeMarco summary judgment against Maxim, finding that Maxim was liable for the diversion of statutory trust funds.

Decision: On appeal, the appellate court agreed with the trial court that the contractor's verified statement failed to set forth the dates and amounts of the trust assets receivable, trust accounts payable, trust funds received, or a sufficiently detailed breakdown of the total amount of payments made with trust funds, all of which are required under Section 75 of the Lien Law.

When reviewing the statement provided by the site contractor, it was clear that there was a \$4 million gap between the monies Maxim reported receiving from the general contractor LeChase, and what Maxim paid to the various trades on the project. While a portion of this gap may have been attributable to direct labor and equipment costs on the project paid by Maxim, a sizeable

sum remained unaccounted for. Accordingly, because the data contained in the verified statement lacked the level of detail required by the statute, and because Maxim failed to provide a complete accounting of its received trust assets, as was required, the appellate court affirmed the trial court's finding that the statement of account was deficient. Further, because Maxim had a sufficient opportunity to provide a proper itemized statement, and because Maxim provided no reasonable explanation for its failure to do so, the appellate court held that Maxim failed to overcome the statutory presumption of an improper diversion of trust assets. Accordingly, the appellate court held that the trial court properly awarded summary judgment to DeMarco, rather than giving Maxim another opportunity to remedy the deficiencies in its verified statement.

Comment: This case serves as a reminder to contractors of the importance of keeping proper records of trust funds received and spent on a construction project and, more importantly, the severe consequences that can befall a contractor who does not do so. A recovery for diverted trust funds may be the only source of recovery where mechanic's lien rights have expired and the claimant is not protected under a labor and material payment bond. Personal liability of corporate officers for diversion of trusts funds is not dischargeable in bankruptcy and, in extreme cases, could result in criminal prosecution for larceny.

It is only fair that project claimants who have provided the labor and material that made possible the construction of the project should be allowed to sue corporate officers for personal liability where they divert trust funds for purposes other than paying the claims of unpaid contractors, subcontractors or material suppliers on that project.

*Scan here to learn more
about Alexander A. Miuccio*



Jared A. Hand Selected as 2015 “Rising Star” by Super Lawyers Magazine

By: Jared A. Hand, Associate



Jared A. Hand

Welby, Brady & Greenblatt, LLP is proud to announce the selection of firm associate, Jared A. Hand, as a 2015 “Rising Star” in Construction Law.

To be eligible for inclusion in “Rising Stars”, a candidate must be either 40 years old or younger or in practice for 10 years or less. While up to 5 percent of the lawyers in a state are named to Super

Lawyers, no more than 2.5 percent are selected as “Rising Stars”. Congratulations to Jared for being recognized as a top attorney in the New York Metro area.

*Scan here to learn more
about Jared A. Hand*



UPDATE: Reauthorization Of Design-Build In New York Plus Contractor Selection Method For Design-Build Jobs Explained

By: Richard T. Ward III, Associate



Richard T. Ward, III

Since my February 2015 article regarding the status of Design-Build contracting in New York, the legislature passed a new bill reauthorizing the use of the Design-Build project delivery system for certain authorized state entities. The new Bill, S4610A-20151, contains essentially the same language regarding Design-Build as the previous authorizing legislation.

It was signed by Governor Cuomo on

April 13, 2015 and is effective for two years.

If you missed my previous article², Design-Build refers to a project delivery system allowing for a single agreement for project design and construction between the owner and the general contractor without the need for a separate design contract between the owner and a licensed design

professional. In this system, the general contractor is responsible for retaining a licensed design professional of its choosing to perform the required design services on the project. Design-Build contracts would, potentially, be in violation of N.Y. Educ. Law § 7200 if not for the legislative and judicial authorization for its use in public and private contracts.

Those in favor of Design-Build tout its ability to cut costs on public projects while allowing for efficient project delivery. Since Design-Build is here to stay, at least for another two years, construction industry professionals should know that Public Design-Build Projects are governed by a different methodology for contractor selection than that provided in § 103 of the General Municipal Law.

Many construction professionals are familiar with § 103 of the General Municipal Law providing for the award of contracts for public work to the lowest responsible bidder after advertisement for sealed bids. Bill S4610A-2015 provides a different methodology requiring the authorized state entity relating the project to: (1) publicly advertise a request for qualifications; (2) generate a list of entities from the responses to said request from which the state entity will solicit proposals; and (3) the authorized state entity's selection of the proposal which is the “best value” to the state. In generating the list and awarding the contract, the state must give preference to proposals submitted by and/or including certified minority or women-owned businesses under Article 15-A of the executive law. Furthermore, the authorized state entity may maintain a list of “prequalified” contractors who are automatically eligible to submit proposals on its design-build projects, which list must be continuously open to new entries.³

The Bill defines “best value” not just in terms of cost, but also in terms of quality, efficiency, diversity and reputation. In fact, the Bill sets forth a list non-exclusive considerations for making the “best value” determination including: the quality and timeliness of the contractor's performance on previous projects; the level of customer satisfaction with the contractor's performance on previous projects; the contractor's record of performing previous projects on budget and ability to minimize cost overruns; the contractor's ability to limit change orders; the contractor's ability to prepare appropriate project plans; the contractor's technical capacities; the individual qualifications of the contractor's key personnel; the contractor's ability to assess and manage risk and minimize risk impact; and the contractor's past record of compliance with article 15-A of the executive law.

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However, the authorized state entity is not bound by these ten considerations. Their only restraint is that the bill calls for the selection of the proposal that “optimizes quality, cost and efficiency, and price and performance criteria... [based on], wherever possible, objective and quantifiable analysis.”

Once the Design-Build proposal of “best-value” is selected, the Bill provides that the contract can either be awarded based on the proposal or, alternatively, on a cost-plus not to exceed maximum price or lump sum basis.

Practice Tip: Under this method of contractor selection, instead of a race to the bottom, authorized Design-Build contracts are, at least on the face of the Bill, more likely to be awarded based on merit. On the other hand, it is arguable that this selection method allows authorized state entities to exercise more favoritism than § 103 of the General Municipal Law with the result that Design-Build jobs may be awarded exclusively, or on a majority basis, to a few

contractors. Only time will tell as design-build legislation is still relatively young. Ultimately, Construction professionals interested in taking lead on state authorized Design-Build projects should submit proposals intended to highlight not only fair cost, but also the quality workmanship and diversity of the design-build team. Likewise, subcontractors seeking a piece of the Design-Build action should keep a record of successful work to assist their team leads in submitting high-value proposals.

1. Text available at <http://open.nysenate.gov/legislation/bill/S4610A-2015>

2. Available at <http://www.wbgllp.com/legal-alerts.php?id=97>

3. An appeals process is available for contractors denied entry to the “prequalified” list

*Scan here to learn more about
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