WELBY, BRADY & GREENBLATT, LLP
ATTORNEYS AT LAW

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REPORT

WELCOME

Message to our Readers

Thank you for reading the Winter 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. Paul G. Ryan, Partner, discusses NYC's New Crane Rules; Gregory J. Spaun, Partner, presents Indemnified For Your Own Negligence? The Loophoel in Action; and Jared A. Hand, Associate, shares Public Owner Held Not Responsible for Contractor's Escalation Costs;

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NYC's New Crane Rules -Who's Going To Pick Up The Tab?

By: Paul G. Ryan, Partner

Paul G. Ryan

By now, I am sure all of you have heard about the recent crane collapse in New York City, and many of you may have even seen the video. As a result of this incident, Mayor DiBlasio has unilaterally changed the operating rules for cranes within the City of New York. As many of you may know, the City previously required cranes to cease operating at wind speeds of 30 miles per hour or greater.

Following the recent crane collapse, Mayor DiBlasio has lowered the wind speed threshold at which cranes must be shut down. Under the new set of rules currently in place, cranes are to stop operating and go into safety mode under two scenarios:

1. When there is a forecast of steady wind speed of 20 miles per hour or higher; or
2. Actual readings of gusts of at least 30 miles per hour

Prior to the recent incident, cranes were allowed to operate until measured wind speeds reached 30 miles per hour or gusts reached 40 miles per hour. These parameters being self-monitored by the operator of the crane within the cab.

Additionally, in an effort to ensure compliance, Mayor DiBlasio increased the fine for failing to take precautions to $10,000.00 per infraction, up from the previous $4,800 level. To put this in perspective, according to data provided by the City, based upon 2015 weather data, under the old operating rules, cranes were only required to cease operating due to wind conditions for a total of seven (7) days during 2015. However, had the new rules been

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in place during 2015, cranes would have been required to cease operations due to wind conditions for a total of forty (40) days. Despite this estimate by the City, many in the industry feel this number is far too low. One NYC contractor already estimated that it would have lost 322 days on its current project over the last two years based on historical data had the Mayor's new rules been in effect. In response to this estimate, the Allied Building Metal Industries Inc. has authored an open letter to the NYC Building Commissioner, which is available http://www.wbgllp.com/PDF/allied-letter.pdf.

Depending on how your contract reads, and whether you working weekday or calendar day, that difference amounts even by the City's conservative numbers to anywhere between six to eight weeks of downtime that would have occurred during the 2015 construction year. Mayor DiBlasio has indicated that these new rules are only meant to be temporary, however the new rules are here now and must be dealt with on the many ongoing jobs across New York City until any further rules are announced.

Therefore, the question that comes to mind, assuming 2016 weather is the same or near the same as 2015 weather, who is responsible for the cost of this additional significant downtime that is likely to occur if the new crane rules remain in effect? Before anyone panics, the first course of action is to consult your contract and see what your delay provisions provide for, and whether there is any mention of risk of regulatory or other governmental authority delays. Also, look over your contract for liquidated damages provisions and under what parameters you are entitled to an extension of time, be it compensated or uncompensated.

Given the potential cost impact, there is little doubt that there will be disputes as to responsibility for this downtime. In all likelihood, owners will take the position that this is an anticipated delay and therefore not compensable, while contractors will look at this as an uncontemplated delay for which they should be compensated. Regardless of what the ultimate answer to that question is, each contractor must examine its contract carefully, and make sure that when experiencing any of these delays, the contractual notice provisions are followed so as to preserve its rights down the road. Failing to do so may serve to prevent any possibility of recovery.

Scan here to learn more about Paul G. Ryan

Public Owner Held Not Responsible For Contractor's Escalation Costs

By: Jared A. Hand, Associate

Jared A. Hand

In Laws Construction Corp. v. Town of Patterson (135 AD3d 830, 2d Dept. 2016), plaintiff submitted a bid to perform work on a New York construction project and was deemed the lowest bidder. Thereafter, construction was delayed and plaintiff was given the option to withdraw its bid. However, plaintiff elected to not withdraw its bid after defendant's Town Supervisor advised (in writing) that *"there appears to be no prohibition regarding (the) application of contingency monies built into contracts toward potential increases in costs of material and labor due to the extended time factor."*

Plaintiff submitted fourteen applications for payment to defendant, none of which included escalation costs, and all of which were paid. Plaintiff's fifteenth application for payment, however, sought reimbursement for increased labor and material costs caused by delay in construction, totaling $121,119.93, which defendant refused to pay. Plaintiff then commenced suit against defendant to recover the escalation costs.

In response to plaintiff's suit, defendant argued that plaintiff was attempting to improperly modify a competitive bid after the fact. In response, plaintiff sought to impose the legal doctrine of promissory estoppel, which stands for the principle that a promise is enforceable by law when the promisor (i.e. defendant) makes a promise to the promisee (i.e. plaintiff), who relies on it to their detriment.

In affirming summary judgment for defendant, the Appellate Division held that barring "exceptional circumstances" involving wrongful or negligent conduct of a governmental subdivision, estoppel is generally not available against a municipal defendant with regard to the exercise of its governmental functions. The Appellate Division further held that the Town Supervisor's written statement did not establish an agreement by defendant to pay for plaintiff's increased costs. The Appellate Division also rejected plaintiff's argument that an oral representation (made during construction) by an agent of defendant was sufficient to grant it rights by estoppel. Such an oral representation would be contrary to the terms of the relevant contract,

which required changes in the contract sum and time to be effectuated via written change order.

The holding in Laws Construction Corp. v. Town of Patterson demonstrates the importance of complying with agreed-upon contractual mechanisms for adjusting contract sums and performance schedules. If and to the extent you are seeking an extension of time or additional compensation, whether by way of escalation or otherwise, such extensions or additions should be accomplished through valid written change orders, or, if possible, through fully executed amendments to the relevant agreements. As Laws Construction Corp. v. Town of Patterson illustrates, a vague written promise will not hold weight against a municipal owner.

Scan here to learn more about Jared A. Hand

LEGAL ALERT: Indemnified For Your Own Negligence? The Loophole in Action.

By: Gregory J. Spaun, Partner

Gregory J. Spaun

For years, since the enactment of Section 5-322.1 of the General Obligations Law, it has been known that an upstream party to a construction contract, such as an owner or a general contractor, cannot require a downstream contractor to indemnify the upstream party for its own negligence. The rationale is that the upstream party should not, through the use of greater bargaining power, be able to require the downstream party to serve as a substitute for its own insurance carrier. In such a situation, the upstream party would suffer none of the adverse consequences typically associated with its own negligence, such as having to incur the loss or place a claim against its insurance policy—and the consequences typically associated with a claim, such as having to pay a deductible, having the loss present on a loss run, and having its future rates take the loss into consideration and impact its ability to renew (or obtain a replacement for) the policy.

When the legislature enacted Section 5-322.1, it left a significant loophole open: the situation where the construction contract requires the downstream contractor to procure insurance and name all upstream parties as additional insureds on the downstream party's insurance policy and insure and hold them harmless for all claims arising out of the downstream party's work, including claims arising out of the that upstream party's own negligence. This is a narrow loophole because, generally, when the claim arises out of the downstream party's work, it is, at least in part, due to the downstream party's negligence (or the negligence of one of its subcontractors). However, the recent case of *Burlington Insurance Co. v New York City Transit Auth.* (132 AD3d 127, [1st Dept 2015]) highlights that the loophole is not merely theoretical.

In *Burlington*, the named insured was the tunnel borer working for the NYCTA on a subway construction project. The construction contract required the tunnel borer to name the NYCTA and the lessor/owner of the property on which the project was located (which happened to be the City) as additional insureds on its general liability insurance policy, and to and have that insurance carrier hold them harmless from *all claims* arising from the borer's work. The contract also required the NYCTA to identify all underground hazards, including buried pipes, cables, etc.

During the project, the tunnel borer bored into a live buried electrical cable, which caused an explosion and a serious injury to borer's worker. Clearly, the borer had no way of knowing that it was boring into an unmarked cable and, therefore, cannot have been negligent. The NYCTA, on the other hand, was negligent in failing to identify hazard for the borer (and also breached the construction contract in that regard).

Both owner and the NYCTA were additional insureds under the borer's policy, as was required under the construction contract. Upon the making of the claim, the borer's carrier accepted the tender of owner's defense and indemnification. The borer's carrier also initially accepted the tender of the NYCTA, but only under a reservation of rights. The borer's carrier later disclaimed as against the NYCTA when it came out that the borer was not negligent. The borer's carrier ultimately settled the injured worker's lawsuit on behalf of the owner for $950,000.

When the dust settled, the borer's carrier, as subrogee of the City/owner, sued the negligent NYCTA to recover the monies it expended in settling underlying personal injury claim.

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In doing so, the carrier noted that the proximate cause of the accident was the NYCTA's negligence in failing to mark the cable. In response, the NYCTA counterclaimed for coverage under the borer's insurance policy.

After discovery, the parties moved for summary judgment. The trial court granted summary judgment to carrier, holding that the NYCTA, as the negligent party, owed it common law indemnification. The Appellate Division, however, reversed. In doing so, it held that the construction contract required the borer to procure insurance covering the NYCTA for all claims "arising out of" the borer's work. Clearly, although the borer was not negligent, the injury arose out of its work—certainly, had the borer not been boring in that particular location, the accident would not have happened. Accordingly, since the injury "arose out of" named insured's work, the additional insured NYCTA was entitled to coverage—even though it was solely negligent. Further, because an insurance carrier cannot seek subrogation from its own insured (even an additional, as opposed to a primary insured), the carrier here could not seek to recover its loss from the truly negligent party. In other words, the NYCTA—the sole negligent party—was held completely harmless for its own negligence by the borer's insurance carrier. So, while the NYCTA got off scot-free, and although the borer could not be required to directly indemnify the NYCTA for its negligence, the borer had to suffer with a $1 million loss on its loss run and the corresponding increase in insurance premium (and difficulty in obtaining renewal coverage).

The lessons to be learned here are that the loophole is not merely theoretical, and that although a non-negligent party cannot be forced to directly indemnify a negligent party for such negligence, it can be required to procure insurance that would cover that negligence with no consequences to the truly negligent party—and suffer the resulting effects of having to do so. Various trade organizations are currently lobbying the state legislature to close this loophole. In the meantime, it would be advisable to consult with experienced construction counsel to review your construction contracts while they are still in the negotiation stage to try to tailor the insurance provisions so that they only cover situations arising out of the contractee's negligence.

Scan here to learn more about Gregory J. Spaun