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ContrACT

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Put It In Writing Means Put It In Writing

BY THOMAS K. O'GARA

Contracts that require all modifications to be in writing will be strictly enforced by the courts. When a contract contains such a provision the court will, in rare situations, enforce the oral modification but only when there is partial performance on the additional oral term or the conduct of the parties unequivocally refers to the additional oral term.

In *Phoenix v. U.W. Marx Inc.*, 64 A.D.3d 967 (3d Dep't 2009), the Phoenix Corporation entered into a Subcontract with U.W. Marx, Inc. to install steel reinforcement on a time sensitive construction project. The Subcontract included a common provision which mandated that any modification to the Subcontract must be in writing to be enforceable. When Phoenix's start date was delayed, through no fault of its own, U.W. Marx asked Phoenix to double its workforce and implement ten-hour work days, six days a week. Pursuant to the terms of the Subcontract, Phoenix had previously agreed to be responsible for all of its own overtime. Phoenix's owner alleged in court that U.W. Marx had agreed to float Phoenix's payroll and to

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How Will Climate Change Legislation Change The Climate for Construction?

BY DOUGLAS A. BASS

As of the writing of this article, the "American Climate and Energy Security Act," also known as the "Waxman-Markey Bill" remains pending in the U.S. House of Representatives, with the Senate yet to offer any alternative. Whatever one's politics may be, it is likely that something will ultimately be passed, and the House version (the "Climate Bill" for short) is a probable template. The broad scope of the Climate Bill seeks as its end-goal to convert the United States into a "Green Economy," and has a major focus on the energy efficiency of all existing and newly constructed structures. The legislation will have economic and life-style repercussions throughout this country, and even seeks to reach world-wide. Existing structures in the U.S. account for (according to some sources) as much as 50% of the greenhouse gasses ("GHG") emitted in this country. It is impossible to realistically attempt to deal with GHG reduction without targeting new, and existing buildings.

This emerging further intrusion by the Federal Government into the construction industry will come on the heels of various state-level actions that raise concerns. In California, millions of dollars worth of public work has reportedly been "paid" by the state in the form of IOUs. In New York, there is a practical freeze on public work change order approval despite a continuing contractual mandate that the contractors proceed with the work, knowing that payment is likely going to trail performance. What happens when a subcontractor or supplier wants cash? Is the Owner in default, or has the Owner performed in accord with law? Does the contractor (or its surety) become the de facto financier for the project? How will this new far-reaching Climate Bill legislation impact or add to all of these current issues? And what new unforeseen issues will the Climate Bill create, especially in terms of performance obligations and the related responsibility for end results? In short, how will the far-reaching Climate Bill affect the climate for construction?

There are several major issues that this bill will force us all to consider:

1. What are the upfront costs to successfully make the transition to a new way of building and can they be offset to a significant degree if states and contractors "play ball" with the federal government?
2. Who bears the risk of the energy efficiency requirements necessary under the bill – the designers, the constructors, the owners or some combination of all? What will the impact be on smaller contractors specializing in private work if the bill forces the cost of doing business higher than a small business can absorb?
3. What opportunities does the bill create? An enormous amount of construction work should be generated not only to build the structures of tomorrow but to retrofit those of today. New "green" energy sources will need to be built, requiring the

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DOL and OSHA: "Back in the Enforcement Business."

BY TIMOTHY D. BOLDT

"Make no mistake, the Department of Labor is back in the enforcement business." This was message delivered by U.S. Labor Secretary Hilda Solis this past June. "We're here to help companies provide safe workplaces, but we'll also crack down on those who don't" Lest anyone call their bluff, there will be an additional one hundred thirty OSHA inspectors on the department's payroll in 2010, all pursuing Solis' goal, among others, of putting an end to all workplace deaths.

Acting OSHA Chief Jordan Barab echoed Solis' sentiments asserting that "there's a new sheriff in town to enforce the law" and saying further:

So, let me lay it out for you, so that there's no doubt about where the Department of Labor and OSHA are going: Secretary Solis and I believe in vigorous enforcement of laws that protect the safety and health of workers. We're committed to a strong federal role in protecting workplace safety and health, as mandated in the OSH Act that created the Agency….Under the 'New OSHA,' we will react - swiftly and decidedly - when we see a problematic trend.

Although, it is not clear precisely how the administration intends to achieve this goal, it has been implied that anything and everything is being considered including sweeping changes to existing rules, cracking down on repeat offenders and implementing harsher penalties, including ones which make certain violations criminal offences.

Contractors should always be vigilant about safety. Their workers are their greatest resource. Time will tell whether a new era of more aggressive enforcement has arrived. But it should not take a pronouncement by the Secretary of Labor or the head of OSHA to assure contractors' commitment to ensuring a safe workforce and work environment. The vigilant contractor will:

- Identify and reduce project specific safety risks; especially ones related to scaffolds, ladders and aerial lifts, work in exactions and trenches and respiratory protections;
- Strictly comply with OSHA Safety Programs and Compliance Reviews, including 1926.502; 1926.20, 1926.21 and 1926.454;
- Make sure every employee understands the importance of safety in the work place;
- Strictly comply with OSHA recordkeeping requirements; especially with respect to injuries and illnesses; and
- Be ready for inspections and be ready to review, analyze and respond to citations. E&D

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erection of acres of windmills and solar panels, for example. New cottage industries for specialists in the new national energy code, inspectors to ensure compliance, and vocational educators to train the next generation of contractor will spring up.

4. What will be the impact on the construction economy? Will the legislation create new jobs and opportunities or instead make it more difficult to meet project goals? Will this make the U.S. less competitive in the world market?

Among other things the legislation tackles is building energy efficiency by creating national percentage targets for energy use reductions in new residential and commercial buildings as measured against the baseline 2006 International Energy Conservation Code and the and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc. (ASHRAE) Standard 90.1-2004:

- On the enactment of HR 2454, a 30% reduction in energy use relative to a comparable building constructed in compliance with the baseline code or standard;
- In 2014 for residential buildings and 2015 for commercial buildings, a 50% reduction in energy use relative to the baseline code or standard;
- In 2017 for residential buildings and 2018 for commercial buildings, and every three (3) years after through 2029 and 2030, respectively, a 5% additional reduction in energy use relative to the baseline code or standard.

The Energy Department will establish a National Energy Efficiency Building Code for residential and commercial buildings that meets these targets if the currently recognized developers of national energy codes and standards fail to do so. Once established, states and localities would be required to ensure their codes meet or exceed these targets. States that are non-compliant risk becoming ineligible to receive funding under the bill or allowance allocations.

Also provided for is the establishment of a building retrofit program for residential and non-residential buildings. The EPA and Energy Department will develop standards for national energy and environmental retrofitting policies to be administered through programs called the Retrofit for Energy and Environmental Performance (REEP) program. The purpose of the program is to facilitate the retrofitting of existing buildings across the United States to achieve maximum cost-effective energy efficiency improvements and significant improvements in water use and other environmental attributes.

Also of interest to contractors will be the EPA's establishment of greenhouse gas emission standards for new heavy-duty vehicles and engines and for non-road vehicles and engines and national goals for reductions in transportation-related greenhouse gas emissions. E&D

Reminder

Under the 2008 amendments to the New York General Municipal Law and the State Finance Law, more commonly known as the Wicks Law, on public projects that do not meet the new statutory dollar minimums or where a project labor agreement will be employed, bidders musts submit with their bids a separate sealed envelope containing a list of the subcontractors the bidder will use, signed by the bidder. The successful bidder's sealed list is opened upon award of the bid. From that point on, the owner must approve any change of subcontractor by the contractor. In these situations, bidders must be sure to include the sealed list with their bid. Failure to do so can result in disqualification of the bid. More than a few bidders have learned this lesson the hard way.

School District Claims Require Strict Compliance and Clarity

BY MONIQUE F. MAZZA

Two recent decisions by a New York appellate court underscore the importance of complying with the stringent notice of claim and statute of limitation requirements of the Education Law and the fatal consequences for those that do not comply. New York Education Law §3813 requires litigation to be commenced within one year after a cause of action arises. But before that, a written notice of claim must be served upon the school district's governing body within three months of the date on which the claim accrued. Failure to file the notice of claim can be fatal to the lawsuit.

When there is a construction claim, more often than not the cause of action is for the contract balance, and arises on the date payment for the amount claimed is denied. If a claim is expressly denied, the accrual date is easy to determine. The more difficult situation arises when a school district simply ignores the request or otherwise fails to remit payment without comment. When this happens, New York courts have held that a contractor has notice of the rejection when they should have viewed the school district's silence as a rejection. The following two cases provide a good example of the complexities of this issue.

In *Zurich American Insurance Company v. Ramapo Central School District*, 63 A.D.3d 729 (2d Dep't 2009), New York's appellate court for the Second Department refused to dismiss a claim against a school district because the school district failed to demonstrate that the contractor's claim had been finally rejected, expressly or constructively. The contractor submitted claims to the school district on December 2005 seeking compensation for additional work performed on a project. In its claim letter, the contractor did not set a deadline or other ultimatum for payment, but instead requested that its claims simply be accepted, or otherwise submitted to mediation. On February 7, 2006, the school district's architect declined to approve the claims and referred the contractor to the mediation provisions of the contract. More than a year later, in February 2007, the matter was unsuccessfully mediated and the school district advised the contractor that its claims were rejected. Within three months of that, the contractor filed notice of claim and filed its lawsuit in November 2007.

The school district immediately moved to have the lawsuit dismissed on the basis that the notice of claim was untimely under the Education Law since it was filed more than three months after the architect's February 7, 2006 letter. The school district also argued that the lawsuit was untimely because it was not brought within one year of the February 7, 2006 letter. The motion was denied because the February 7, 2006 letter from the architect did not "unequivocally deny" the contractor's demand for payment and the conduct of the school district "was not so unambiguous" that the contractor should have viewed the denial of its claims to be a final determination. To the contrary, the court determined that it was clear from the parties' correspondence and engagement in voluntary mediation that they were attempting to resolve their dispute. The court noted that if the school district's position was that the claim was barred by the contractor's failure to serve a timely notice of claim, "it would have been disingenuous for the School District to have participated in voluntary mediation."

In another recently decided case from the Second Department, the court reached the opposite result. In *Fapco Landscaping, Inc. v. Valhalla Union Free School District*, 61 A.D.3d 922 (2d Dep't 2009), the appellate court agreed with the school district's argument that the complaint of contractor, Fapco Landscaping, Inc. ("Fapco"), was barred as being untimely under the Education Law. On July 28, 2004, Fapco made a demand for payment to the school district for the construction of two athletic fields. Notably, and in contrast to the claim letter in *Zurich*, the demand letter here set forth a date of August 4, 2004 as the deadline for the school district to pay. In response, the school district, by letter dated July 29, 2004, rejected Fapco's demand for payment. Subsequently, Fapco brought suit

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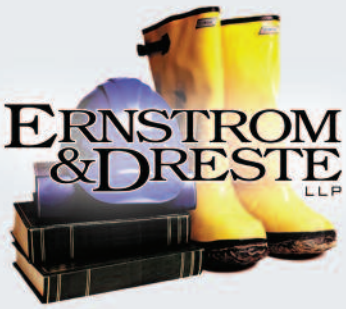
cover any additional overtime expenses incurred by Phoenix in meeting U.W. Marx's request. However, the parties did not put the agreement in writing. Phoenix hired additional laborers to complete the job on-time, and for a short period U.W. Marx did float Phoenix's payroll. When final payment became due, U.W. Marx refused to pay Phoenix's overtime costs on the grounds that the oral modification was not enforceable under the written Subcontract.

The Appellate Division, Third Department ruled in favor of U.W. Marx, finding that Phoenix was not entitled to overtime costs because they failed to put the alleged modification in writing, as required by the express terms of the Subcontract. Generally, a written agreement that prohibits oral modifications of a contract will be strictly enforced. In rare circumstances, an oral term may be valid if there has been partial performance, or the conduct of the parties unequivocally refers to the oral modification. However, unless the conduct of the parties clearly evidences a new indisputable change in the contract, New York courts are more likely to reject the alleged oral modification. A mere mutual departure from the written agreement is not sufficient to prove an enforceable oral modification.

The court in *Phoenix* found that the parties did intend to orally modify the Subcontract. However, based on the parties' conduct, the only additional terms that were undeniable were Phoenix agreeing to increase its work force and U.W. Marx briefly agreeing to float Phoenix's payroll. Neither Phoenix's hiring additional laborers nor U.W. Marx's advancement of payment were unequivocally referable to an agreement to pay overtime expenses. Since Phoenix could not demonstrate unequivocal conduct that showed an oral modification, they were not entitled to overtime costs.

This case emphasizes the importance of being aware of and adhering to the requirements of the contract. Clauses prohibiting oral modifications are fairly common and strictly enforced. A written change order signed by both parties is always the best way to ensure agreement on and payment for extra work. E&D



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ERNSTROM & DRESTE NEWS

Douglas A. Bass presented an overview of the Waxman-Markey Climate Act Bill at the National Bond Claims Association 2009 Annual Meeting in Atlanta, discussing risks and opportunities for the construction and surety industries created by the proposed legislation and the efforts to transform the United States into a "Green Economy".

Ernstrom & Dreste also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Mindy Moffett at mmoffett@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste's website (ernstromdreste.com).

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against the school district to recover damages for breach of contract on September 29, 2005. The court, however, dismissed Fapco's lawsuit as untimely because it was outside the one-year mark under the Education Law. Specifically, the court determined that the cause of action accrued at the earliest on July 29, 2004, when the school district expressly rejected Fapco's demand for payment, and at the latest on August 4, 2004, the deadline established in Fapco's demand letter. Thus, under either date, Fapco's lawsuit was brought more than one-year from the time of accrual. In addition, the court held that since the school district established that the one-year statute of limitations expired, the trial court was without power to grant Fapco leave to serve a late notice of claim.

These cases not only underscore the importance of complying with statutory notice requirements, they also illustrate the need to bring clarity to the contract claim process. When the record is unclear, the courts will assess all the circumstances and decide when a contractor seeking payment should have viewed the claim as constructively rejected. The language employed by contractors in their demand letters for payment will be scrutinized by courts trying to determine when a claim actually accrued. For contractors interested in preserving their claim rights, the better course of action is to leave no doubt in the mind of the court or the school district. Assert claims and payment deadlines clearly and then calendar dates for further action. E&D