CONSTRUCTION RISK MANAGEMENT REPORTER

ERNSTROM & DRESTE LLP

ContrACT

SPRING 2023 ISSUE 32

Danger Zone: Waivers and Releases Torpedo Prior Contractor Claims

MARINA S. DE ROSA

Most construction project owners require contractors to sign waivers and lien releases throughout the project, typically as a condition of receiving periodic payments, and before final payment. These executed waivers and releases help owners manage financial risk and reduce potential claim exposure. Typically, these waivers and releases are printed on or in conjunction with payment applications or certificates of payment, often in fine print, among other dense text. The placement means these important terms can be easily overlooked, viewed as simply an acknowledgement of receipt of payment, which the contractor is in a hurry to receive. Depending on the language and timing of the waivers and releases, however, execution can result in forfeiture of otherwise valid claims. Such was the unfortunate result for a contactor in a recent case out of New York's First Department Appellate Division.[1]

The matter arose from a 2016 New York City residential building construction project for which X-treme Concrete Inc. ("X-treme") was a concrete subcontractor and Pizzarotti, LLC ("Pizzarotti") was the construction manager. During construction in 2017, X-treme's steel suppliers alleged non-payment and filed mechanic's liens on the project. Immediately thereafter, Pizzarotti claimed X-treme had stopped work and terminated its subcontract. X-treme then filed

CONTINUED ON PAGE 3

Unfit to be Registered: The New DOL Contractor and Subcontractor Registration Law

NELL M. HURLEY

At the end of 2022, New York amended its Labor Law, adding § 220-i which creates a new mandatory registration system for public works contractors and subcontractors to be run by the Department of Labor Bureau of Public Works ("DOL"). Proponents of the law claim that it will better guard the public fisc and workers from unscrupulous contractors who skirt applicable labor and other laws. While everyone supports that laudable goal, most in the construction industry agree that the law as initially passed[1] was unlikely to expand such protections. It would, however, present risks to timely bidding processes, the use of design-build delivery systems, add administrative burden to contractors, subcontractors, public contracting entities, and the DOL, and likely run afoul of state bidding laws by prequalifying subcontractors. Indeed, leading construction industry groups and others found the scheme so flawed and duplicative that the Governor was strongly, but unsuccessfully, urged to veto the bill. Fortunately, Chapter Amendments were obtained addressing some of the most egregious of the new law's deficiencies.[2]

Even with the significant improvements, the scheme remains troublesome, presenting costs and risks to contractors in meeting uncertain and complex registration processes, and the expansion of DOL's power to prevent contracts and subcontracts based upon a new standard of "unfit to be registered." The good news is that the system will apparently be slow in the making, with compliance deferred until December 2024.

Section 220-i applies to contractors and subcontractors for all New York public works, and for all covered private projects under the recently expanded prevailing wage laws.[3] Each contractor/bidder must obtain and submit a registration certificate from DOL with its bid for a public project, or prior to commencing work on a covered private project. This requires the contactor to provide DOL with information and documentation regarding: its business entity, owners and officers; tax identification number, unemployment insurance registration number and workers' compensation board employer number; proof of workers' compensation insurance coverage; outstanding wage assessments, debarment history, final determinations as to any violations of labor, employment tax, workers' compensation and workplace safety laws; apprenticeship program participation; and MWBE status. Subcontractors must likewise be registered and approved by DOL prior to commencing any work on such a project. Registration requires a $200 fee and must be renewed every two years. Failure to comply, including a contractor's knowledge that a subcontractor is not registered before working, may result in a fine of $1,000. A private owner on a covered project is also obligated to ensure compliance or be similarly subject to the fine.

Under the new law, DOL must review information for every public works/covered project contractor and subcontractor to see if that entity is "unfit to be registered" due to an inability "to lawfully adhere to contractual obligations [under Article 8 of the Labor Law]."[4] The statute says the determination must be made based on (1) a clearly documented history, or (2) an official record of past dealings, or (3) a present demonstrable inability to adhere to [Article 8 Labor Laws]. Current debarment, existing bid ineligibility,[5] and

CONTINUED ON PAGE 2

IN THIS ISSUE

Unfit to be Registered: The New DOL Contractor and Subcontractor Registration Law

Danger Zone: Waivers and Releases Torpedo Prior Contractor Claims

CONTINUED "UNFIT TO BE REGISTERED: THE NEW DOL CONTRACTOR AND SUBCONTRACTOR REGISTRATION LAW"

failure to satisfy a previous wage violation are explicitly referenced as grounds for an "unfit" finding, though a contractor cannot be found "unfit" based solely on a debarment in the prior eight years or solely on the wage violations of subcontractors. Beyond that, the statute appears to allow wide latitude as to the meaning of "unfit," likely to be fleshed out by DOL in forthcoming regulations.[6] Notably, the statute is silent on whether DOL can or should make an "unfit" finding based upon "non-responsibility" grounds (beyond prevailing wage violations) which are currently left to post-bid qualification by the owner/public entity.

There are some procedural protections for registration applicants. Before DOL can find a contractor or subcontractor "unfit," it must notify the entity in writing of the reasons for the proposed finding and provide the opportunity to cure or be heard. The contractor/subcontractor has 30 days to request the hearing or the proposed determination becomes final. A DOL proposed finding before bid could prevent contractor bid submission or, on covered private projects, delay contract/subcontract work. In the event of a lapse in registration status (or a determination of "unfitness") during construction, the contractor/subcontractor cannot be prohibited from completing the contract work. An "unfit" determination (not merely a notice from DOL of a proposed "unfit" finding) during contract performance will require the appointment of a monitor, at the contactor's expense, to oversee the remaining work, and can result in the revocation or suspension of the registration. Questions about who can act as a monitor, and what specifically that role will entail, are unclear but may be addressed in DOL regulations.

Many rightly point out that information required by the new system has historically been addressed by post-bid responsibility determinations, weeding out the "unfit" through similar or more detailed disclosure forms and existing resources. For example, the State Comptroller's office maintains the successful New York State Vendor Responsibility System (VendRep), and other available resources, providing most of the information as that to be required by DOL. Currently debarred contractors are plainly listed on DOL's website, and DOL has data as to violations that could be shared with owners/contracting entities. Similarly, contractors found "non-responsible" by any State entity appear on the Office of General Services ("OGS") website.

Perhaps more importantly, the DOL registration system raises concerns about how the new DOL pre-bid (or pre-work for covered projects) contractor vetting system fits into and affects the current public bidding process and contractors. A registration certificate is presented in the statute as a condition precedent to submitting a public works bid, or performing covered project work.[7] A DOL finding of "unfit for registration" apparently results in a de facto "debarment" of the contractor, arguably on a lesser or at least different standard than historically required for debarment. How long does this "debarment" last? Where DOL issues a certificate, to what extent can that be relied upon by public entities for post-bid responsibility determinations? Contractors and public/covered contracting entities alike should stay apprised on this topic as DOL regulations are formulated and the details on "unfit to be registered" come into clearer focus. E&D

1 S.5994 (Ryan)/A.1338-C (Magnarelli), now N.Y. Labor Law § 220-i.

2 Amendments to Chapter 827 of the Laws of 2022, S.838 (Ryan)/A.984 (Magnarelli), when approved, eliminate the problematic requirement that contractors submit registration certificates for all of its subcontractors at the time of bid, among other changes, addressing the

Two Attorneys Join E&D

Ernstrom & Dreste, LLP is pleased to announce the addition of two associate attorneys to our team of surety and construction law professionals.

Cavan S. Boyle brings a broad legal practice background that includes extensive litigation and courtroom experience. Admitted to practice in Massachusetts and New Hampshire, Cavan most recently worked for a well-respected firm in the Boston area, practicing general civil litigation and honing his skills as a zealous advocate for his clients. Prior to that, after earning his law degree in 2013 from Suffolk University Law School, Cavan worked with his father's New Hampshire private and varied law practice. Cavan is also a graduate of Bates College. Cavan awaits admission in New York on motion, and will represent clients in surety, construction, and other complex commercial matters, including all aspects of claims, risk management, and litigation.

Cavan S. Boyle

Marina S. De Rosa recently graduated *cum laude* from Syracuse University College of Law, where she was an Associate Editor of the Journal of Science and Technology and a member of the Travis H.D. Lewin Advocacy Honor Society. Marina competed in the prestigious NBTA 2021 Tournament of Champions, and in the National Trial Competition, placing first in the Region with her partner in 2021. Marina was awarded the Lee S. Michaels Advocate of the Year Award, the International Academy of Trial Lawyers Student Advocate Award, and was inducted into the Order of the Barristers. Marina is also a *magna cum laude* graduate of Florida State University. Having passed the New York bar examination, Marina was sworn in and admitted to practice in New York in January, 2023. Marina will practice in the areas of surety and construction law, including all phases of claims, litigation and alternative dispute resolution.

Marina S. De Rosa

issues around prequalifying subcontractors.

3 NY Labor Law §§ 224-a to 224-d. Generally, where total construction project costs exceed $5m and at least 30% of that comes from "public funds." See our article "*New Risks: Expanding Prevailing Wage Laws to Private Projects*," Ernstrom & Dreste, LLP ContrACT Construction Risk Management Reporter, Issue 30, Spring 2022, available on our Publications page at www.ernstromdreste.com.

4 Although the "unfit" determination provision focuses primarily on prevailing wage laws under Labor Law Article 8, it appears that violations of other Labor Law provisions, such as those under the new Construction Industry Wage Theft Act of Article 6, could also be considered, as well other laws related to worker protections.

5 Due to violations of workers' compensation or prevailing wage laws.

6 Unlike a DOL debarment determination, there is no apparent duration specified on an "unfit" finding, so perhaps the contractor can reapply if it believes it has cured its "unfitness."

7 Still unclear is the process for public entities receiving a bid lacking the certificate.

CONTINUED "DANGER ZONE: WAIVERS AND RELEASES TORPEDO PRIOR CONTRACTOR CLAIMS"

its own lien. Pizzarotti hired a replacement contractor and filed suit against X-treme and others for damages, including increased costs to finish the job. X-treme asserted counterclaims for underpayment, based upon previously claimed extra work, and damages related to owner delays. The lower court granted Pizzarotti's motion to dismiss X-treme's counterclaims, and X-treme appealed. Unfortunately for X-treme, not only did its subcontract contain an enforceable "no damage for delay" clause, X-treme also executed waiver and release forms as a part of the payment process that proved fatal to X-treme's counterclaims, even as to prior apparently properly asserted claims. The appellate court affirmed the dismissal.

The court first found that the "no damage for delay" clause applied because the basis for the delay - incomplete drawings - was expressly mentioned in the subcontract and thus, by definition, was contemplated by the parties.[2] Similarly, the court ruled that the specific language of the waiver and release forms operated to release whatever claims X-treme may have had on the project. X-treme argued that the executed documents were "mere receipts for payment" or "conditions precedent to payment" a commonly used defense to such waivers/releases by contractors and subcontractors. The court rejected that argument based upon the specific language used in the forms beginning in September 2016 that expressly stated that X-treme:

> "agrees that the waiver of lien and release is ***neither a receipt of payment nor a condition precedent to payment***, but a knowing and willful acknowledgement that subcontractor has been fully paid throughout the above referenced date."[3]

Also, X-treme apparently made no attempt to except from or reserve in those waivers and releases any of its previously asserted claims. The court further relied on additional language in the February 2017 final waiver and release forms executed by X-treme, acknowledging that it had been paid in full through that date, and that it "waived and released *all claims whatsoever,* whether in law or in equity, arising in connection with its work *up through the date of the waiver* of lien and release." The court reasoned that for each set of forms executed starting with its September 2016 requisition, X-treme released all claims arising under prior requisitions, which included claims contained in the lawsuit. Since X-treme was paid the full amounts of the requisitions, and all other claims were waived or released, even those previously asserted through the claim/change order process, X-treme's counterclaims were dismissed in their entirety. The court found the language of the waivers and releases to be unambiguous and saw no evidence of conduct by Pizzarotti demonstrating an intent to treat the waivers and releases as mere receipts of payments.

The *Pizzarotti* case is a true cautionary tale for contractors and subcontractors who could unintentionally forfeit their rights to claims. Of course, the contractor should know and follow the contract's procedures to properly assert and preserve claims, including timely compliance with notice provisions and change order requirements. But, as demonstrated in this case, contractors and subcontractors must also be vigilant when signing waivers and releases, in particular those related to payment application processes. Pre-contract, request that waiver and release forms be attached to the contract as exhibits so they can be reviewed or even negotiated upfront to include a reservation of rights for previously asserted claims. If that is not an option, pay special attention to all waiver and release language in the contract, and that contained in payment requisition forms received or required post-contract execution. Most importantly, at the time of payment requisition, and at project end, the contractor MUST reserve its rights by identifying in writing, either on the forms themselves, or with reference therein to an attachment, those claims and rights that are *not* being waived or released. Specify claims already made and/or anticipated under the contract, to include requested change orders. Be sure to review and submit that reservation of rights each and every time a payment requisition is submitted and any other time waiver or release forms are required. This practice does not guaranty a claim recovery, but it should go a long way towards avoiding claim forfeiture. E&D

1 *Pizzarotti, LLC v X-Treme Concrete Inc.*, 205 AD3d 487 [1st Dept 2022].

2 It is now common for contracts to list extensive potential reasons for owner-caused delay, seemingly for the very purpose of showing that each was "contemplated" so as to bolster likelihood of "no damage for delay "enforcement against contractor delay claims.

3 X-treme noted that this language was not present in the first few waiver and release forms for payment and was added, without notice, to subsequent forms beginning in September 2016.

925 Clinton Square
Rochester, New York 14604

Visit us online at:
WWW.ERNSTROMDRESTE.COM

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

FIRM NEWS

Kevin Peartree delivered a discussion of "*The Integration of Delegated Design, Design Assist, and Design Build*," for the DBIA Liberty Region Upstate Chapter on December 1, 2022.

E&D fielded a team to compete in the 2023 Rochester JBX (Junior Builders Exchange) Volleyball Tournament on February 25, 2023. E&D was an Open Bar Sponsor of the event.

Kevin Peartree, Cavan Boyle and Marina De Rosa presented the Construction Law Update 2023 featuring "*Recent Court Decisions and New Regulations Every Contractor Should Know*" for the Rochester Builders Exchange on March 1, 2023.

Brian Streicher will speak on the topic "*Contracts, Costs and Compliance*" for Rochester JBX (Junior Builders Exchange) on March 22, 2023.

In May 2023, Kevin Peartree, Martha Connolly, and Brian Streicher will present on "*Controlling Risk in Construction and Project Delivery Systems*" to the AGC NYS Construction Leadership Academy (formerly Future Construction Leaders) at a session in Rochester, New York.

Todd Braggins, Brian Streicher, and Marina De Rosa attended the 2023 ABA/TIPS Fidelity & Surety Law Committee Midwinter Conference held January 19-20 in Washington, D.C. E&D was a sponsor of the After Hours Party.