CONSTRUCTION RISK MANAGEMENT REPORTER

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ContrACT

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More Paperwork and Less Privacy

The Expanding Web of Work Force Utilization Reports

TIMOTHY BOLDT

The protection of confidential business information will take a hard blow on June 1, 2017 when Governor Cuomo's Executive Order[1] "Ensuring Pay Equity by State Contractors" takes effect. All New York State Agencies and Authorities must now include a provision in contracts requiring contractors and their subcontractors to disclose salary information and job titles of their employees. This is an expansion of current obligations related to workforce utilization reports designed to demonstrate compliance with equal employment opportunity laws.

According to the Executive Order, the disclosure obligation will be for all employees "performing work on a State Contract, or of each employee in the contractor's entire workforce if the contractor cannot identify the individuals working directly on a State Contract." Reporting obligations will be quarterly on contracts valued at more than $25,000 and will be monthly for contracts exceeding $100,000.00.

The New York State Department of Economic Development, the bureaucracy charged with developing the form, has not indicated

CONTINUED ON PAGE 2

Applying *De La Cruz*: Common Sense Prevails In Determining When Prevailing Wage Requirements Apply

JOHN DRESTE

In 2013, the New York State Court of Appeals decided *De La Cruz v. Caddell Dry Dock & Repair Co.*, Inc. and imposed a new three-prong test to determine whether a particular project is subject to the prevailing wage requirements of Labor Law §220 and Article I, §17 of the State Constitution:

> First, a public agency must be a party to a contract involving the employment of laborers, workers or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public.[1]

Readers may recall that this office then pondered whether or not common sense had finally prevailed with the Court of Appeals' new test that seemed to require a bright line showing, especially with regard to payment for a project by public funds. Since then, courts on the national level have looked at similar questions, reining-in efforts by the U.S. Department of Labor to expand Davis Bacon federal prevailing rate applicability.[2] In one case, the United States Court of Appeals for the District of Columbia Circuit rejected novel efforts by the U.S. DOL to stretch Davis Bacon prevailing rate applicability, and resorted to common-sense definitions defining "public works" as structures such as roads or dams built by the government for public use and paid for by public funds. That Court summarized its position by advising that the proper review is whether a project is built by the government, for the government or for the people the government represents, not whether some secondary public benefits might flow.[3] While not applying the *De La Cruz* rationale, the federal court used reasoning very similar to it to develop a common sense approach, rejecting *ex post facto* efforts to turn a private project into one subject to prevailing rate.

In February, New York's Appellate Division, Third Department issued the first New York State decision applying the *De La Cruz* test in *W.M. Schultz Construction, Inc. v. Mario J. Musolino*.[4] Although the case implicated all three of the *De La Cruz* test prongs, the appellate court ruled that the prevailing rate did not apply because "the use of public funds for a project is a prerequisite to the finding that a contract relates to a public work subject to prevailing wage obligations."[5] The court in Schultz rejected the State's suggestion that *De La Cruz* did not create an entirely new test.[6] It also rejected the State's invitation to adopt inferences and unsupported conclusions at the administrative level concerning the use of public funds, finding that substantial evidence did not support any conclusion that the project was paid for by public funds. The best the State could muster was an argument that the purchase price paid by the State to a predecessor owner should have been assumed to be used months later to pay for construction work that was contracted by a separate successor corporation. The court rejected the notion

CONTINUED ON PAGE 3

IN THIS ISSUE

Applying *De La Cruz*

The Expanding Web of Work Force Utilization Reports

Project Close-Out Negotiations Do Not Toll Contract's One Year Limitations Period

AIA A201 2017 Revisions

The Heavy Burden of Challenging a Responsible Bidder Determination

Project Close-Out Negotiations Do Not Toll Contract's One Year Limitations Period

NELL HURLEY

A subcontractor's action against its general contractor on a public school construction project was dismissed recently by the New York State Supreme Court, Nassau County, based upon a one year limitation provision contained in its subcontract. Although other subcontract provisions required that the subcontractor await the completion of final project negotiations before bringing suit, the subcontractor was not excused from performance, held the court, and thus the subcontractor's action was untimely.

The suit[1] arose from a construction contract between the New York City School Construction Authority and Wenger Construction Co., Inc., which then subcontracted a portion of the work to D&S Restoration, Inc. The subcontract contained a limitation provision that required that any action be commenced within one year of "Substantial Completion of the Subcontractor's work." The last work by D&S was on June 11, 2012 and the SCA certified the work as complete on October 5, 2012. D&S commenced the action on March 21, 2016, over 3 years later. Wenger moved to dismiss the action as untimely.

D&S contended that other provisions of the contract made compliance with the limitations provision impossible and thus it was unenforceable. In particular, the subcontract provided that final payment would not be made to D&S until after completion and acceptance of the project by SCA, payment by SCA to Wenger, and D&S's general release of claims. D&S argued that these terms were conditions precedent to D&S's right to receive payment that made it impossible to bring an action within the one year time period. It was undisputed that SCA and Wenger did not complete their final negotiations until June 24, 2016, at which time payment became due to D&S.

The court disagreed, finding that D&S's theory of impossibility was flawed because the conditions were not unforeseeable or unanticipated and, thus the doctrine did not apply. The impossibility doctrine requires not only that performance itself is objectively impossible, said the court, but also that it must have been caused by unanticipated events that could not have been foreseen or guarded against in the contract. To the contrary, the court found that because D&S was aware that final negotiations on such contracts can and do take extended periods of time after substantial completion has occurred, it was foreseeable that it would happen here.

This decision, and the enforcement of shortened limitations provisions where other contract language requires waiting for the completion of final negotiation for the project, create a dilemma for the subcontractor. An earlier suit may well have been dismissed as premature, since payment was not yet due under the subcontract. In such a case, the subcontractor might consider commencing an action, just to preserve it, and immediately making a motion to hold the matter in abeyance until final negotiations are completed. E&D

1 *D & S Restoration, Inc. v. Wenger Constr. Co., 39 N.Y.S.3d 911 (Sup. Ct. Nassau Co. 2016).*

AIA A201 2017 Revisions

KEVIN PEARTREE

The seventh year of each new decade brings a new version of the American Institute of Architects' foundational contract form, the A201 General Conditions of the Contract for Construction. Hopefully capturing the lessons learned during the ten years of the prior edition of the document and the industry as a whole, the document merits close scrutiny by all who regularly work with and under these construction contract terms and conditions.

In the next edition of *ContrACT*, we will examine more closely how this document, and related forms of agreement have changed, and how these changes might impact your bottom line. Among the notable revision are:

- A new insurance exhibit
- A more comprehensive treatment of the owner's duty to provide proof of its ability to pay for the project
- A requirement that warranties be issued in the name of the owner or be transferrable to the owner
- Required use of the AIA's Building Information Modeling and digital data protocols
- Changes to the form of and lines of communication between the owner and contractor.

A helpful comparison of the 2007 and 2017 editions of the A201 can be found on the AIA website. (https://www.aiacontracts.org/resources/79876-a201-2017-vs-a201-2007). E&D

CONTINUED "MORE PAPERWORK AND LESS PRIVACY"

whether they will expand the current OCSD-3 Form, or create a new separate one for tracking salary information. Contractors are presently required to provide monthly Work Force Utilization Reports on State projects subject to competitive bidding laws. It is unclear if the State will attempt to force monthly reports for salary information, even on projects under the $100,000 threshold, set forth in the Executive Order.

According to Governor Cuomo's website[2], the Executive Order is part of the "New York Promise Agenda," a sweeping and unprecedented package of reforms designed to affirm New York's progressive values, and to set a national standard for protections against all forms of discrimination. But will the pursuit of this laudable goal mean not only more paperwork for contractors, but less privacy for their employees? And will the information provided be used by the State in ways having nothing to do with ending discrimination? E&D

1 *Executive Order 162 (NY 2017).*

2 *https://www.governor.ny.gov/news/icymi-governor-cuomo-signs-executive-orders-eliminate-wage-gap-and-further-new-york-s-efforts.*

The Heavy Burden of Challenging a Responsible Bidder Determination

MATTHEW HOLMES

A recent Nassau County Supreme Court decision demonstrates the latitude public entities have in conducting the bidding process, awarding contracts, and defining what it means to be a "responsible bidder" in the context of a particular job.[1] Though the low bidder on a roads and drainage systems project, Metro Paving was rejected as not responsible when the Village asserted it did not meet a five years relevant experience requirement. Metro Paving obtained a preliminary injunction against the contract being awarded to the second lowest bidder, alleging five causes of action, including the denial of due process and violations of the General Municipal Law. The Village challenged the injunction and the Court vacated its order of a preliminary injunction. The Article 78 proceeding remains pending. While the court did hold that the lowest bidder had a possibility of success on the claim that it was denied due process, it ultimately sided for the Village because their "requirement that eligible bidders must have at least five years of relevant experience was rational." As the apparent lowest bidder, Metro Paving expected to receive the contract pursuant to New York's competitive bidding statutes. After all bids were submitted, the Village rejected Metro Paving as not responsible because it did not meet the bid requirement that it have at least five years of work experience with the type of work specified for the project. Courts have interpreted "responsible" to mean that the lowest bidder has sufficient skill, experience, and financial ability to perform the contract.

Metro Paving asked to be heard on their bid rejection but the Village denied the request.

Metro Paving's Article 78 petition argued that it had been deprived of due process, that the five year experience requirement was arbitrary and capricious, and that the Village violated the competitive bidding procedures, all of which Metro Paving had the burden to prove. After granting the preliminary injunction, the court gave its approval to a public hearing to address the due process concerns of Metro Paving. After that hearing the Village trustees determined that information omitted by Metro Paving was essential to the bid specification and that its noncompliance with the five year experience requirement was too substantive to waive.

The Court ultimately determined that the requirement had a rational basis because the "Project includes road work at a variety of different sites, requiring the contractor to implement traffic coordination and to address draining issues. Drainage work which requires special expertise is a critical part of the Project." Given the rational basis determination, the Court held that Metro Paving had no probability of success on the merits sufficient to support an injunction. The Court supported its decision based on the complexity of the project and the narrow timetable for its completion.

This case demonstrates that a bidder has a heavy burden in contesting a public entity's quasi-judicial determination that a bidder is not "responsible" within the meaning of the competitive bidding statutes. The only way to be successful in overcoming this heavy burden is to prove that the entity's decision was irrational or was arrived at through improper means. E&D

1 *Matter of Metro Paving, LLC v Incorporated Village of Hempstead et. al. (Sup. Ct. Nassau Cnty. 2017, Index #5065/16)*

CONTINUED "APPLYING DE LA CRUZ"

that it could be reasonably inferred that the funds used to pay for the work could be traced back to a public source, such as the initial purchase price paid to the predecessor entity. In essence, the court ruled that the State could not follow the money from one recipient to another to suggest that they retained any public characteristic.[7]

The *Schultz* decision should herald that a common sense approach will prevail, and "public works" should be easily understood to be those directly funded by public entities and competitively bid in the ordinary public bidding process. This constraint makes perfect sense, as one goal of prevailing rate mandates has always been to create a level playing field for all bidding contractors in pursuit of work funded from the public fisc. Pre-*De La Cruz* courts had confronted numerous creative arguments to expand prevailing rate applicability such that costs for entirely privately funded projects were artificially increased by administrative fiat, often after the fact, and without any ability for private developers or contractors to seek additional funds from any source, public or private. That makes no sense.

The State has sought leave to appeal to the Court of Appeals and a decision on that application is pending. Stay tuned. E&D

1 *21 NY3d 530, 538 (21013).*

2 *See District of Columbia and CCDC Office, LLC v. Dept. of Labor, 819 F.3d 444 (D.C. Cir. 2016).*

3 *Id. at 185.*

4 *147 A.D.3d 1259 (3d Dept. 2017), 47 N.Y.S.3d 773, 2017 N.Y. Slip Op. 01425.*

5 *Id. at 1262.*

6 *The State had actually argued that the Court of Appeals did not mean what it said in De La Cruz and that the old two-prong test still applied as merely refined by De La Cruz.*

7 *Citing Matter of New York Charter School Assn, Inc. v. DiNapoli, 13 NY3d 120, 133 (2009).*

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FIRM NEWS

E&D, LLP hosted two seminars for its clients and friends on May 24 and 25 at Oak Hill Country Club in Rochester, NY. Consultant Dennis O'Neill of Beacon Consulting Group joined E&D, LLP attorneys Tim Boldt and Todd Braggins in the presentation of case studies that highlighted real-life project issues and a discussion of troubled job indicators and surety responses to a job in distress.

Kevin Peartree was a co-presenter for the National AGC Webinar Conference "How Different Design-Build Contracts Impact Your Bottom-line, and a Comparison of New Design-Build Agreements from ConsensusDocs".

Tom O'Gara presented "How the Obligee's Failure to Comply with the Performance Bond's Conditions Precedent and the Obligee's Other Obligations Thereunder Impacts the Surety's Performance Bond Obligations and Liability" at the spring meeting of the ABA Fidelity and Surety Law Committee in Naples, Florida.

Timothy Boldt, Martha Connolly and Kevin Peartree recently conducted the program "Controlling Risk in Construction and Project Delivery Systems" for the Associated General Contractors of New York State Future Construction Leaders Program.

Tom O'Gara presented "The ABCs of M/WBEs" to SMACNA of Long Island in Melville, New York.

Timothy Boldt was recently installed as a member of the Salvation Army Advisory Board.