CONSTRUCTION RISK MANAGEMENT REPORTER

ERNSTROM & DRESTE LLP

ContrACT

FALL 2025 ISSUE 37

No Piggybacking for Public Works

MICHAEL F. HIGGINS

A contractor that participated in the competitive bidding exception known as "piggybacking" on a New York school district's HVAC project narrowly avoided losing the half-completed contract and returning the monies received. In the recent decision, Broome County Supreme Court clarified that piggybacking is only allowed for contracts to purchase "things" rather than contracts for "public works" construction, but it declined to force a "claw-back" of the contract funds, despite the improper contracting procedure.[1]

Under New York's competitive bidding laws, governments often face delays and high administrative costs to properly solicit and award bids for projects. Among other things, New York General Municipal Law ("GML") ordinarily requires (a) sealed bids and (b) public advertising of projects. GML Section 103(16) contains an exception to this general rule that allows a governing entity to streamline the bidding process by contracting with a provider that has a successfully bid public contract with another governmental entity.[2] This process is known as "piggybacking."

Understandably, piggybacking has become popular. The Interlocal Purchasing System ("TIPS"), a Texas-based clearing house for government contracts that are potentially eligible for piggybacking, takes advantage of this type of exception mechanism

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No Wage Theft Act Claim Against GC for Sub's Unpaid Worker Benefits

NELL M. HURLEY

A New York federal court recently held that the 2022 Construction Industry Wage Theft Act ("Wage Theft Act")[1] was preempted by federal law for claims against the general contractor for its subcontractor's unpaid workers' benefits.[2]

State laws increasingly expand general contractor liability to unsatisfied obligations of downstream subcontractors for employee wages and benefits. New York's prevailing wage laws impose such liability in public construction. The Wage Theft Act, applicable to private projects, makes the GC jointly and severally liable for a lower-tiered contractor's failure to pay its workers' wages and benefits and authorizes third-party beneficiaries to sue to collect. This new case illustrates limits to the use of such state laws where federal law creates the underlying obligation.

The representative of certain union benefits funds ("Finkel") sued general contractor Structure Tone in state court for $2.8 million in benefits contributions its sub failed to pay workers, citing the Wage Theft Act. Structure Tone removed the case to federal court, arguing that ERISA (and/or LMRA)[3] apply exclusively to the claims and preempt state statutory claims. Finkel disagreed and moved for a remand to state court or to amend its pleadings to bring federal claims against Structure Tone. Structure Tone opposed and sought denial of the amendment.

In a matter of first impression, the federal court denied Finkel's motions and granted Structure Tone judgment dismissing the state claims finding:

> ...when a collective bargaining agreement establishes an employer's obligations to contribute to a benefit fund, ERISA and the LMRA each preempt an action asserted under [New York's Wage Theft Act] to collect a subcontractor's delinquent fund contributions from a general contractor.

Per the court, Finkel's proposed amended federal claims failed because recovery of delinquent contributions is only authorized against those with a direct contractual obligation for them, such as a collective bargaining agreement ("CBA"), which Structure Tone did not have.

ERISA is intended to provide a uniform regulatory regime for employee benefits plans and eliminate the threat of conflicting or inconsistent regulation.[4] State statutory claims within the scope of ERISA's civil enforcement provisions must be removed to federal court since ERISA "...completely preempts any state law cause of action that duplicates, supplements or supplants the ERISA civil enforcement remedy," the court noted.

The decision focused on case law interpreting the application of ERISA preemption, finding: Finkel was the type of party, and Wage Theft Act claims were the type of claims, covered by ERISA; and ERISA not only precludes state law claims that directly parallel those enumerated, but also those ERISA omits, including an action against a GC for a subcontractor's delinquent contributions.

Next, the court assessed whether the state claims were based upon an "independent legal duty" that functions irrespective of the existence of an ERISA plan, ultimately concluding that they were not:

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> "The law that makes [the subcontractor's] contributions "required" – or as [Finkel] describes them, "delinquent"…is not [the Wage Theft Act], but [ERISA]….[The Wage Theft Act] depends on ERISA to create the contribution obligation and is thus not independent of ERISA."

In rejecting Finkel's claim that the right to payment [from Structure Tone under the Wage Theft Act] was already established, the court relied upon the important distinction between recovery on "existing state-law debts that happen to be based on ERISA obligations[5] and actions that require the establishment of an ERISA obligation to prevail. Without a judgment or other debt instrument to support the subcontractor-debt element of its Wage Theft Act claim, the court concluded, it is ERISA that creates the contribution obligation and thus preemption is warranted.[6] Since Structure Tone was not bound to the sub's CBA, no ERISA or LMRA claim exists against it.

The case applies only to claims against a GC where the sub is delinquent in benefits contributions under the sub's CBA. The holding relates to ERISA benefits, not to wages for labor, or any non-ERISA benefits. Finally, while the reasoning of the decision appears sound, the case is unreported, was not appealed, and thus promises little precedential potential. Any expansion of this finding to other joint and several liability state laws and enforcement must await future court decisions or legislation. Careful vetting of subcontractors remains paramount. E&D

1 New York Labor Law § 198-e.

2 *Finkel v. Structure Tone, LLC*, 23-CV-1269 (VSB), 2025 Westlaw 1237411 (S.D.N.Y. Apr. 29, 2025) (unpublished).

3 Employee Retirement Income Security Act and Labor Management Relations Act.

4 Also called "alternative enforcement mechanisms," this means a state law cannot be used where ERISA created the exposure and remedy.

5 A garnishment action after a court judgment or an action to enforce a surety's bond payment obligation (basis is contractual agreement, not ERISA).

6 Seemingly similar state prevailing wage enforcement actions (under N.Y. Labor Law §§ 220 and 223) were not preempted where the obligation was found to arise "directly under" the state statute.

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by providing "matchmaking" services, pairing the municipal work specified with an already-contracted contractor.

In the spring of 2024, a school district used TIPS to match with a contractor for an $8.9 million contract for HVAC renovations, part of a multi-phase capital improvement project. The contractor began work immediately upon contract approval by NYSED[3] in July. In September, other contractors and taxpayers petitioned the court to set aside the award for alleged "violation of competitive bidding requirements using a piggyback contract for a construction project." The court framed the issue as:

> …whether "piggybacking" is a permissible means to award a public works contract under [the GML exception] and, if so, whether the [school district] complied with the required steps and safeguards in awarding [the HVAC contract to the contractor].

The court concluded "no" on each issue.

Finding that GML did not define the term "public works," the court determined it to mean "construction or repair projects undertaken by municipalities on their infrastructure that are subject to the competitive bidding process." That definition is consistent with GML's requirement of separate specifications for certain public work and applies to the "erection, construction, reconstruction or alteration of buildings," said the court.

Next, the court looked to the GML §103(16) language that allows "piggybacking":

> …on contracts previously entered by federal, state or local governments to buy "apparatus, materials, equipment or supplies, or to contract for services related to the installation maintenance or repair [of them]."

The court noted that the provision applies to the "purchase" of specific classes of "things" but does not identify or include the "purchase" of public works, demonstrating deliberate legislative choices to define and limit what is available for piggybacking. Thus, the award of the HVAC contract was improper because it was an impermissible use of piggybacking for a public works project, concluded the court.

In determining the appropriate remedy, the court found that disrupting the project or imposing a monetary award against the school district or the contractor was not in the public interest. There was no evidence that the work was performed inefficiently or wasted tax dollars, observed the court. As a result, the court declined to disgorge the compensation paid to the contractor as the petitioners requested but enjoined the school district from future use of TIPS and piggybacking for the award of any further public work.

The court's decision may have been influenced by the relative lack of clarity in the law as shown by the common use of piggybacking, especially by smaller municipal entities and school districts. This decision, coupled with a New York State Comptroller clarification of the significant limits to the piggybacking exception, should result in a change to the types of projects for which the exception is used.

Even so, given the significant risk for participating in an improper bid or award procedure, awareness by contractors of this distinction is imperative. Just because the municipality says "it's okay" doesn't necessarily make it so, and it is the contractor that has the most to lose. Questions about any contract award process should be brought to the attention of construction counsel. E&D

1 *Daniel J. Lynch, Inc. v. Bd. of Educ. of the Maine-Endwell Cent. Sch. Dist.*, 86 Misc.3d 507 (Sup Ct, Broome County 2025).

2 The contract must have been let in a manner consistent with GML.

3 New York State Education Department

Field "Verification" of Dimensions: A Cautionary Tale

CAVAN S. BOYLE

A recent New York appellate decision upheld the denial of a contractor's extra work claim that alleged owner plan errors and misrepresentations, finding instead that the contractor's failure to determine actual field dimensions prior to its design and procurement of a safety component precluded owner liability.[1] The contractor thus bore significant unanticipated costs for redesign and procurement.

The matter involved a 2018 public construction project between American Bridge Company ("AB") and the New York City Department of Transportation ("DOT") to repair and replace parts of the upper level to the Ed Koch Queensboro Bridge.

As a part of the contract, AB was to supply a temporary protective shield for workers' safe access to the site while protecting and maintaining minimum vertical clearance for traffic on the roadway below.[2] The contract, and a DOT answer to a pre-bid question, specified that the DOT estimates of vertical clearance dimensions were from original bridge drawings, that actual field dimensions may differ from plans, and that contractor must "verify actual dimensions as needed." A request to field measure dimensions prior to bid was denied by DOT. AB subcontracted for the shields based upon the DOT estimates.

When work began, AB took its first field measurements and discovered the vertical clearance was shorter than DOT's estimate. AB claimed DOT pre-bid information caused discrepancies in AB's shield design, requiring a change to the shield installation plan, leading to added costs. DOT denied AB's claim for additional payment, citing AB's obligation to verify the minimum vertical clearance per its design obligation under the contract and because "means and methods for erecting" the shield were AB's responsibility. An administrative ruling found in favor of DOT, followed by the state court's dismissal of AB's petition to annul that determination. AB appealed.

The appellate court affirmed the lower court's ruling, finding the contract instructed AB not to rely on the contract plan dimensions, to verify existing field dimensions, and thus DOT was exculpated from liability.[3] The court explained:

> "The contract's ample qualifying language precludes [AB] from recovering the costs…to conform its design to the field dimensions regardless of when [AB] was able to take measurements."

The court was unconvinced by AB's efforts to distinguish between the contracted requirement to confirm or "verify" DOT's estimates post-bid, and an unexpected (and unreasonable) obligation to "determine" the measurements for itself for bidding/procurement purposes, without access to do so. AB argued unsuccessfully that the "verify-in-field" clause was intended to alert DOT of discrepancies before shield installation rather than to shift the risk of any discrepancies to AB.

The court also rejected AB's contention that DOT's plans and pre-bid inaccuracies constituted bad faith misrepresentations because of contract language that the court said "precluded reliance upon" the DOT estimated dimensions.

Although owners generally bear responsibility for their plans and specifications, the widespread use and enforcement of broad exculpatory clauses and disclaimers continue to create new ways to transfer risk to contractors. It is unclear whether the contractor here could have obtained field measurements post-bid but still pre-construction, or at least pre-subcontract, to avoid this outcome. Results like this reinforce the critical need to carefully review bid and contract documents for potential risk-transfer situations. E&D

1 *Am. Bridge Co. v. Cont. Disp. Resol. Bd. of City of New York*, 23 A.D.3d 571 (1st Dept. 2025).

2 The contract required AB to "design, furnish, fabricate, erect, maintain, relocate, and dispose of" the shielding.

3 The court also cited to a contract clause precluding claims based on "an error or omission" of "dimensions and elevations indicated on the plans."

Cavan Boyle, Brian Streicher, Kevin Peartree, and Mike Higgins participated in the 2025 Isaiah House Annual Golf Tournament held at Penfield Country Club on July 28. E&D was a Silver Sponsor for the event, presented by Schuler-Haas Electric Corp.

Brian Streicher, Mike Higgins, and Cavan Boyle at JBX Rochester's 2025 Bowling Tournament benefiting Veterans Outreach Center, Inc. E&D fielded two teams and was a Drinks Sponsor.

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Ernstrom & Dreste, LLP also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Jenna Ellis at jellis@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

Six attorneys were recognized by *Best Lawyers in America*® 2026 Edition in Construction Law/Litigation: Todd Braggins, Martha Connolly, John Dreste, Brian Geary, Mike Higgins, and Kevin Peartree. Another, Cavan Boyle, was named to its *Ones to Watch*® list.

Brian Streicher and Mike Higgins attended the AGC NYS/Acrisure & Tradesman Summer Meeting held August 3-6 at the Sagamore in Bolton Landing, N.Y. E&D sponsored the Monday Morning Educational Program.

Martha Connolly, Kevin Peartree, and Brian Streicher presented *"Controlling Risk in Construction and Project Delivery Systems"* to the AGC NYS Construction Leadership Academy in Rochester, N.Y. on May 9.

Brian Streicher was a featured speaker on the topic of "Contracts, Cost, and Compliance" on April 30 for JBX Rochester's 6-part program *Breaking Ground: Perspectives on Project Teamwork*.

Kellie Ricker recently joined E&D as a Claims Analyst. Kellie has an extensive background in construction project management and scheduling.

Mike Higgins is teaching Business Law at Monroe Community College for the fall semester.

Martha Connolly, Brian Streicher, and Kevin Peartree golfed in the CFMA Heidi Caton Classic Golf Tournament at The Links at Greystone on August 7, with E&D sponsoring at the Bronze Level.