CONSTRUCTION RISK MANAGEMENT REPORTER

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ContrACT

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New York Tries to Impose Prevailing Rate Globally

JOHN DRESTE

In recent years the New York Legislature has annually imposed ever-increasing burdens on the construction industry, some for laudable underlying purposes ("Carlos" law, Wage Theft Act), but others with questionable motives (expanded application of prevailing rate to certain private jobs, extended certified payrolls, mandatory public contractor registration). In each case the burden of compliance, and risk of downstream non-compliance by subcontractors or others, falls on contractors. As a result, even new laws with good intent unduly pressure contractors under pain of financial penalties, and sometimes even criminal exposure, for violations not of their doing.

In late 2025 the Legislature created, and the Governor signed, a new §220(3)(f) in the New York Labor Law. It was subsequently amended (A2747-A/S5236A) but still mandates that companies supplying "custom fabricated" products to New York public works projects-such as precast concrete, structural steel, curtain wall systems, electrical duct systems, rebar cages, and mechanical insulation, not only register per other recent laws, but also pay the prevailing rate of wages for the county in which the project is located. The supplier/manufacturer must also provide certified payrolls to confirm compliance, with failures ultimately penalizing the contractor. This mandate applies regardless of where the supplier/manufacturer is located, ***whether in-state, out of state, or even out of the country***. In other words, a supplier/manufacturer in North Carolina, during the time an item for a New York job is being manufactured, must pay its workers the prevailing rate for the New York county where the project sits. Anecdotal feedback thus far has been that key out of state suppliers/manufacturers will simply no longer quote New York public projects. Design professionals and owners must take this into account if their intent is to specify custom systems or other items that will no longer be shipped to New York. Loss of supply chain aside, from a practical standpoint, manufacturers concurrently work on items earmarked for multiple jobs and now have to track and pay higher a rate for the time dedicated to a New York project. This is an unrealistic expectation, but as with other new laws, the New York contractor will be held ultimately liable for any shortfall in paperwork and payments.

One change in the law's text via the amendment process altered the listed covered "custom" items from "including but not limited to" to merely "including." Some commentators have latched onto that change to suggest that means the list is exhaustive, but New York law treats those two terms almost identically, meaning the listed items are not exclusive. Had a limitation been intended, the change would have said "limited to" or any other clear similar statement.

An absence of clarity overall creates uncertainty. What is truly "custom" is not defined. Also, the law extends to any "covered projects" pursuant to another recent law that extended prevailing rate to private projects that meet certain tests for public funding or similar support. The geographic scope of the new law extends to manufacturing "off-site, or in another jurisdiction" which on its face extends to foreign-made items. Apart from all

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Can Contractors Say Goodbye to the Piggyback Ride?

MICHAEL F. HIGGINS

Procurement by municipal entities and school districts is generally governed by the competitive bidding requirements of NY General Municipal Law ("GML") §103. As discussed in the fall 2025 issue of this newsletter, piggybacking arises from an exception to the competitive bidding requirements under GML 103. "Piggybacking" 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. In short, one public entity can make purchases and obtain certain services by "piggybacking" on a contract already let and awarded by another public entity, thereby avoiding the usual competitive bidding requirements of NY Gen. Mun. Law 103. A number of public entities have been stretching this exception to procure services normally viewed as construction work.

In a closely watched appeal, a New York appellate court has confirmed that "piggybacking" is not permissible to avoid competitive bidding on public works contracts.[1] The unanimous decision by the Appellate Division, Third Department, significantly narrows the previously growing practice of letting public works projects to contractors who had an existing successful bid on a different project.

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E&D Welcomes Associate Attorney

Ernstrom & Dreste, LLP is pleased to announce the addition of Associate Attorney Izabel Yurovskiy to its team of dedicated legal professionals serving clients in the construction and surety industries.

Izabel joins us with significant and varied legal practice experience and proven skills important to dispute resolution, advocacy and legal counseling. Her prior professional practice involved contract review, insurance analysis and complex litigation, case management, court hearings, alternative dispute resolution, legal research and writing, discovery, motions, and appeals.

Izabel earned her law degree at Syracuse University College of Law in 2021 where she was active in the Advocacy Honor Society, Arbitration Division, and the Jewish Law Students Association. She obtained her undergraduate degree in psychology from the University of Rochester in 2017. In addition to English, Izabel is fluent in Russian and is proficient in Spanish.

At E&D, Izabel's practice involves all aspects of construction and surety claim evaluation and management, strategy assessment, alternative dispute resolution, all phases of litigation (including pleadings, discovery, motion practice and trial preparation), and appeals.

Izabel Yurovskiy

Ernstrom & Dreste Welcomes New Partners

Ernstrom & Dreste, LLP is pleased to announce that Cavan S. Boyle and Michael F. Higgins have joined the firm's partnership. Their advancement reflects the firm's continued commitment to providing knowledgeable counsel and strong advocacy for clients in construction, surety, and complex commercial litigation matters.

Cavan S. Boyle joined Ernstrom & Dreste in 2022 after moving to Rochester from the Boston area where he worked in civil litigation matters. Cavan now focuses his practice on surety, construction, and complex commercial litigation matters. As partner, he will continue working with clients on litigation strategy, dispute resolution, and practical solutions to the challenges that arise throughout legal matters.

Michael F. Higgins came to Ernstrom & Dreste in 2024 with significant experience as a litigator. In his E&D practice, Mike represents clients in construction, surety, commercial litigation, and related disputes. In joining the partnership, he will continue supporting clients through risk management, negotiation, litigation, and other dispute resolution processes.

Join us in congratulating Cavan and Michael as they join our experienced leadership team that will continue mentoring the new generation of the firm and guiding development and growth well into the future.

CONTINUED "NEW YORK TRIES TO IMPOSE PREVAILING RATE GLOBALLY"

the other unworkable elements to the law, it is almost laughable to suggest that fabricators in Europe, Asia, Mexico, Canada or elsewhere will even consider compliance.

But there is some hope. A consortium of trade organizations and contractors, spearheaded by the Associated General Contractors of New York, filed suit to challenge the legality of the new law, in large part because New York cannot dictate wages paid by employers in other states or countries. The impact and limitation on competition is also self-apparent. The Federal Court sitting in Albany has issued a temporary stay preventing enforcement of the law pending arguments. The case should be fully briefed in September and everyone in the construction industry should hope for a finding that the law is impermissible. Failing that, we will be one step closer to imposing so much non-construction burden on the industry that contractors may ultimately also leave the state. If that occurs, please, will the last to leave turn off the lights? E&D

We have moved!

We remain in the Clinton Square building, but E&D has relocated our office to the 5th floor. Our new address is: **525 Clinton Square, Rochester, NY 14604.**

CONTINUED "CAN CONTRACTORS SAY GOODBYE TO THE PIGGYBACK RIDE?"

Piggybacking remains permissible for the purchase by public owners of "things" and related service contracts as opposed to "public works contracts." The court defined "public works contracts" as "construction or repair projects undertaken by municipalities on their infrastructure." The appellate court affirmed that a non-competitively bid contract for HVAC renovations and classroom construction was an impermissible use of piggybacking in violation of New York's competitive bidding laws.

A public entity may still utilize piggybacking for the purchase of "things" which are defined as "apparatus, materials, equipment or supplies" or "to contract for service related to the installation, maintenance or repair of apparatus, materials, equipment and supplies." What is now clearly prohibited is using piggybacking in lieu of bidding for major capital improvements. Yet, the line between a permissible piggybacking purchase and a public works project that must be bid is not clearly defined. That ambiguity provides significant risk to suppliers and public owners considering piggybacking.

It appears that public owners may test the limits of piggybacking by attempting to utilize piggybacking for providing materials, equipment or supplies within a capital improvement contract. After the conclusion of this lawsuit, the New York State Department of Education issued clarifying guidance to school districts which noted that piggybacking could still be used "to purchase physical commodities or equipment" in an overarching capital construction work if the project is independently and competitively bid. In other words, the Department has seemingly approved direct purchase of items by a District via the piggybacking sourcing, but such direct purchases still run the risk of being construed as part of the capital improvement contract as opposed to strictly for the purchase of "apparatus, materials, equipment or supplies," especially with incidental services related to "installation, maintenance or repair."

In this specific case the court determined that the scope of "purchase" easily fell outside the permissible scope of piggybacking because it included such activities as general construction, plumbing, electrical and HVAC scopes of work for a total value of $8.9 million. Yet, smaller scopes of work may still blur the line between a "capital improvement" and the mere purchase and installation of equipment. Suppliers and vendors considering supplying goods through a piggybacking arrangement are cautioned that they face the risk of disgorgement of payments if a court later determines that the contract was not permitted under piggybacking and violative of competitive bidding law.

The use of piggybacking is further complicated by New York's statute regarding prevailing wage requirements for custom manufacture or prefabricated components for public improvements. See nearby article. While this law, passed at the end of 2025, is currently stayed during a court challenge to its validity, it remains important for a municipality considering piggybacking to determine whether a direct purchase contract might also need to comply with prevailing wage requirements (in the event the pending court challenge is unsuccessful).

The expanding use of the piggybacking exception to competitive bidding was unquestionably reined in and narrowed by the recent appellate court ruling. The question remains how narrow the remaining exception to bidding may be. Without further guidance, significant ambiguity and risk remains for owners, contractors, or suppliers considering participating in a piggybacking arrangement. E&D

1 *Daniel J. Lynch, Inc. v. Bd. of Educ. of Maine-Endwell Cent. Sch. Dist.*, No. CV-25-0422, 2026 N.Y. Slip Op. 03209 (3d Dept May 21, 2026)

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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

Martha Connolly, Kevin Peartree, Brian Streicher, Cavan Boyle, and Michael Higgins presented "Controlling Risk in Construction and Project Delivery Systems" to the Associated General Contractors of New York State (AGC NYS) Construction Leadership Academy in Rochester, NY on May 8.

John Dreste, Martha Connolly, and Cavan Boyle attended the AGC NYS/ EW Howell Construction Group Summer Meeting held August 2-5 at The Sagamore in Bolton Landing, NY. The E&D attendees joined fellow AGC members, Construction Leadership Academy students, and other colleagues in educational sessions, panel discussions, and social gatherings.

John Dreste was a speaker on the panel discussing *Avoiding the Extreme Risk of the Prevailing Wage for Custom Fabrication Law* at the AGC NYS Summer Meeting in August.