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ISSUES IN MUNICIPAL CONSTRUCTION

Mechanic's Lien on a Public Improvement

- Must be filed within thirty (30) days of the time that the project was completed and accepted (Lien Law §12)

- May demand that the public entity provide notice of completion and acceptance (Lien Law §11-a) "at any time before the…project…is completed or accepted" or within 30 days thereof may file a written demand requiring that you receive a notice of completion and acceptance
  - Demand is filed with the head of the department of bureau having charge of the construction
  - Must identify name and address of the one making the demand, the name of the contractor or subcontractor for whom you worked, the estimated value and a description of the public project.
  - Notice must then be provided to the demanding party within 5 days of completion and acceptance
  - *No penalty for non-compliance*

Private Project on Public Land

- A privately run and funded project (i.e. there is no public entity involved) that is taking place on publicly owned land. A typical situation is where the owner is a public entity that leases the land to a private party. The private party then develops the land. In this scenario, there is no public fund to which a lien could attach since there is no public entity involved. The other option is to file a mechanic's lien against the real property. However, the law in New York forbids placing a mechanic's lien against a parcel of publicly owned land. *See* EMC Iron Works v. City of New York, 294 A.D.2d 173, 742 N.Y.S.2d 230 (1st Dept. 2002). Nor can the mechanic's lien attach to the leasehold interest between the public owner and the private tenant. *See* Matter of Paerdegat Boat and Racquet Club, Inc. v. Zarrelli, 57 N.Y.2d 966, 457 N.Y.S.2d 229 (1982). So a private improvement lien is impossible and there is no public fund to which a lien may attach. Beware these projects.

The Little Miller Act

- Governed by State Finance Law §137.
- Applies to project of $100,000 or more but only if the project is not subject to Wick's Law.
- An eligible party may bring a claim against the bond once 90 days have elapsed since last furnishing of labor or materials.

- Sub-subcontractors and materialmen to subcontractors may bring a claim only if they give written notice of the claim to the contractor within 120 days of last furnishing.
- Lawsuit to enforce the claim must be filed within 1 year from the date the project was completed and accepted.

Villages (CPLR §9802)

- Must commence action against the village within 18 months after claim accrues.
- Must file written, verified notice of claim with the village clerk within one year after the claim accrued.
- Must wait 40 days after notice of claim to commence suit

NYC School Construction Authority (Public Authorities Law §1744)

- Must present a detailed, written and verified notice of each claim within 3 months after the accrual of the claim.
- The claim accrues on the date the payment for the amount claimed was denied (only contracts entered into after December 17, 2014)
- Must wait at least 30 days to pursue a claim after presenting notice of claim.

School Districts (and schools) (Education Law §3813)

- Must present a detailed, written and verified notice of each claim within 3 months after the accrual of the claim.
- The claim accrues on the date the payment for the amount claimed was denied (contracts entered into after July 17, 1992).
- There is a provision in the education law to ask a court to approve late notice (I don't suggest being a test case).

Towns

- Lawsuit must be commenced no later than 18 months after it accrues
- Written, verified notice of claim must be filed with the town clerk within six (6) months of the time that the claim accrued
- Must wait 40 days after filing notice of claim to bring suit
- Generally, a claim against the town for breach of contract accrues when the claim is actually or constructively rejected.
- All public works contracts in excess of $35,000 are subject to competitive bidding. Lowest responsible bidder must be awarded the contract (Town Law §122)
- In no event shall any contract be awarded or obligation incurred in excess of the amount specified in the resolution of the Town Board or in the proposition adopted at the Town Election (Town Law §223).

Port Authority of NY/NJ (Unconsolidated Laws §7101)

- Written, verified notice of claim must be filed with PANYNJ at least sixty (60) days prior to commencing suit. (Unconsolidated Laws §7107)
- Suit must be commenced within one year after claim accrues.

New York State Entities

- Any claim for breach of contract against the State of New York must be commenced within six (6) months after it accrues.
- May file a Notice of Intention to File a Claim which will extend time to bring suit to two (2) years after accrual.
- Court of Claims Act permits a request to file a late claim.

The City of New York

- Entire regulatory scheme specifying how to deal with contractual disputes
- For construction, this scheme shall apply only to disputes about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work; such disputes arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Agency Head under the contract (as defined in the contract) makes a determination with which the vendor disagrees. For construction, this section shall not apply to termination of the contract for cause or other than for cause.
- **Must** continue work while the dispute is being considered. Failure to continue shall constitute a waiver of the claim.
- Written notice of dispute must be presented to the agency head within the time specified by the contract or, if no time is specified, within thirty (30) days of receiving written notice of the determination that is the subject of the dispute.
- Within thirty (30) days of receipt of the dispute the agency head will make a determination.
- If agency head determination is not timely challenged it is the final binding determination
- Agency head's determination is challenged by presentation to the CDRB
- Before any vendor may bring a dispute to the CDRB the dispute must be presented to the Comptroller for review. A written notice of claim must be submitted to the Agency Head and the Comptroller.
    - The Notice of Claim shall consist of (i) a brief statement of the substance of the dispute; the amount of money, if any, claimed; and the reason(s) the vendor contends the dispute was wrongly decided by the Agency Head; (ii) a copy of the decision of the Agency Head; and (iii) a

copy of all materials submitted by the vendor to the agency, including the Notice of Dispute. The vendor may not present to the Comptroller any material not presented to the Agency Head, except at the request of the Comptroller.

- Comptroller has 45 days from receipt of all materials to render a decision
- If the claim is not settled or adjusted by the Comptroller within 45 days then the vendor may, within 30 days thereafter, petition the CDRB for review
- CDRB decision is final and binding but subject to Article 78 judicial review (must be commenced within 4 months of CDRB decision)

Recent Municipal Cases

- ACS Sys. Assoc., Inc. v. Safeco Ins. Co. of Am., 134 A.D.3d 413 (1st Dept. 2015): Defendant surety issued the principal general contractor, hired by the School Construction Authority (SCA), a payment bond to ensure its subcontractors were paid. The general contractor was paid in full by the SCA but the subcontractor was not. General Municipal Law §106-b(2) requires prompt payment to be made to the subcontractor when payment is received by a public owner, "less an amount necessary to satisfy any claims, liens or judgements against the subcontractor." The Defendant's argument that the payment owed to the subcontractor should be offset due to the potential yet unrealized claim for damages by the SCA against the general contractor failed to offer sufficient reason to not pay the subcontractor. Thus, the general contractor and Defendant were found to owe the subcontractor the original amount owed for work performed plus interest.

- Electrical subcontractor entered into a contract with the Dormitory Authority of the State of New York (DASNY) to provide electrical work for a State Supreme Courthouse. The company obtained performance and payment bonds from the insurance company and executed an indemnity agreement wherein all of the electrical company's rights to the contract with DASNY would be assigned to the insurance company in the event of abandonment, repudiation, forfeiture or breach of contract. Disputes arose regarding the electrical company's performance and DASNY's refusal to pay. Claims were made against the payment bond by subcontractors and the electrical company abandoned the project and placed its staff on furlough. DASNY terminated the contract with the electrical company based on abandonment and entered into a takeover agreement with the insurance company for $811,095.82. The surety then went after the contractor and its principals to recover its losses under the indemnity agreement. The principals sought to bring a third party claim against DASNY for unpaid contract sums and improper termination. DASNY moved to dismiss. The Court found that the terms of the assignment agreement entered into between the electrical company and the insurance company assigned all of the electrical company's rights and interests regarding payments under the contract. Thus, the electrical company was found to no longer be a real party in interest and had no claim for money owed against DASNY. The claim against DASNY was dismissed even though the claim against the contractor and its principals by the surety remained. Key contractual provision here: if the contractor could be adequately compensated by money damages for any breach of the contract by DASNY then "no default, act or omission of the Owner shall constitute a material breach of contract entitled the Contractor to cancel or rescind the same or to

suspend or abandon performance thereof." Simply put: the contractor could not suspend performance due to payment disputes and the termination was therefore valid triggering the assignment.

- Matter of Suit-Kote Corp. v. Rivera, 2016 NY Slip Op 01539 (3d Dept. 2016). Pursuant to Labor Law §20, a contractor on a public project must pay their workers wages and supplements no less than "the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work is performed. Despite this constitutional mandate, the employer in this matter questioned this payment requirement, and argued that the employer is imposed with an "antecedent obligation that [the employer] must establish before the burden is placed on the other party. The prevailing wage rate is determined by a two-step process which involves (1) classifying the specific trade or occupation and; (2) ascertaining the prevailing wage rate for each trade or occupation within the locality. The rates may also be established based upon collective bargaining agreements (CBAs) where 30% of the workers in a trade in the locality are subject to CBAs. An employer challenging those rates would then have the burden of establishing that less than 30% of the workers in a given locality are subject to the wage rate adopted. The Court explained that while the employer may challenge the determination upon a number of grounds, including that the CBAs were not made with a bonda fide labor organization or that the 30% threshold was not met, the employer in this matter failed to do so.

CHANGE ORDERS

- Change orders can impact additional labor, materials, delays and present sequencing issues. Each can lead to a scenario where Town Law §223 becomes an obstacle. Additionally, this can lead to allegations that the bid documents were insufficient to allow for a proper competitive bid in violation of Town Law §122 and/or §222.

- Design changes can lead to exposure for violations of Town Law §122, §222 and/or §223

- Differing site conditions can cause problems. They can take various forms such as changed conditions, differing conditions or unconcealed unknown conditions. Many public authorities have changed condition clauses in the contract but many do not. Make sure you understand the changed conditions language in the contract and if it is not there consider what may happen on the job.

- Public owners can generally direct the change of any of the details of construction which are deemed necessary for proper completion of the project or for reasons of public interest (limited by the Cardinal Change Rule).

- Is it a valid change?
    - Does the contemplated work fall squarely within the work reasonably identified and expected in the contract documents (including drawings and specifications)?
    - Is the work required because of an error or omission by the contractor?

- The contractor is not entitled to a change to remedy its own substandard work.
- Has the contractor provided proper notice under the contract of the request for an extra?
- Does the resulting change increase or decrease the costs incurred by the contractor?

- Cardinal Changes: Whether the work ordered "so varied from the original plan, was of such importance, or so altered the essential identity or main purpose of the contract that is constitutes a new undertaking."
  - Risk of performing a cardinal change in public work is on the contractor. While the directive for the cardinal change constitutes a breach of contract by the public owner, and may violate bidding statutes, if the work is so clearly outside the scope of the contract that it was clearly a cardinal change then the contractor may not be entitled to payment.
  - Two options in the municipal world: Refuse to perform subject to contractual terms and risk breaching the contract or perform under protest.
  - When a change decreases the scope of work keep in mind that you may have a claim for lost profits on work not performed.

- Contract should specify who is responsible for interpreting plans and specifications. Often, this person is the project architect or engineer. If so, is the clause a "Westinghouse clause" or a "non-westinghouse clause"? Westinghouse clause will permit the architect/engineer to interpret and resolve contractual differences. To be enforceable, there generally must be some form of limited judicial review (i.e. whether the result was arbitrary or capricious).