Deb Brenneman

From: Reager & Adler P.C. [dbrenneman@reageradlerpc.com]
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To: Deb Brenneman
Subject: The Construction Law Bulletin

THE CONSTRUCTION LAW BULLETIN

June 2008

Group News

- Ted Adler was selected for inclusion in **"Pennsylvania Super Lawyers 2008"** a periodical published by *Law & Politics*. Ted has been listed in Pennsylvania Super Lawyers for four consecutive years in the fields of Construction/Surety Law.

- Tom Williams was once again elected to the Board of Directors of the Keystone Chapter of the **Associated Builders and Contractors.**

- Tom also recently received certification of completion of training as an arbitrator and mediator from Construction Disputes Resolution Services in Albuquerque, New Mexico.

- John Pietrzak and Rich Joyce will be part of a group of attorneys facilitating the **Contract Study Group** sponsored by the Central PA Regional chapter of the **American Subcontractors Association.** The group will meet the first Thursday of every month at ASACP's offices in Harrisburg.

- John Pietrzak will be a panelist at two daylong presentations on "**AIA Contracts**" hosted by Lorman Education Services on June 24, 2008 in Harrisburg and on September 18, 2008 in Lancaster. Additional information on registration for this program may be obtained by contacting the firm, or emailing John directly at: JPietrak@ReagerAdlerPC.com.

- Rich Joyce will be a presenter at a seminar entitled "**Employment Law Update in Pennsylvania**", in Harrisburg on August 19, 2008. This seminar is designed for human resources professionals, and thus, might be useful for the human resources representative from your company. If you would like more information regarding this seminar, kindly contact Rich directly at: RJoyce@ReagerAdlerPC.com

Recent Developments
By: Rich Joyce

In March's installment of the Construction Law Bulletin, we discussed a recent case involving a number of issues that you might face in your business. As we discussed, in *James Corporation v. North Allegheny School District*, the Pennsylvania Commonwealth Court reviewed what it termed a "a matter of first impression"; to wit, whether a contractor could be awarded acceleration damages under a "measured mile" approach to calculating damages.

A project to renovate an elementary school was the subject of the lawsuit initiated by the Contractor. The Contractor sought payment for acceleration costs, resulting from delays on site, and payment for additional work directed by the School District.

As discussed in March, the Court awarded damages to the Contractor for the delays encountered in the actual work performed. In this issue we will discuss the award of damages under the Pennsylvania Procurement Code ("Code").

As the contract was a public contract, the Contractor sought damages under the Code based on the amounts wrongfully withheld by the School District. At the trial court level, the Court found that the Contractor was entitled to an award of attorney's fees because the School District had acted in bad faith in withholding payment from the Contractor. The Court found that the School District acted in bad faith when it recognized delay yet refused to do anything about it, but instead threatened contractors with dismissal, where the School District refused to pay for hand excavation, fence relocation and dumpsters, and where the School District refused to pay for extra materials that it had directed be procured during the project.

Our Commonwealth Court upheld the finding of bad faith and award of attorney's fees by the trial court. In particular, the Commonwealth Court found the School District's conduct egregious where the School District refused to pay change orders that had been duly executed, and for which the Contractor performed the work, and also where the School District arbitrarily added an additional 50 percent to the anticipated costs of punch list items, so that more than the necessary retainage could be withheld from the Contractor. While anticipated cost of punch list items may be included in retainage, the Court held that the School District did not deal fairly with the Contractor in this instance, thus validating the award of attorney's fees.

The Court determined that under the Procurement Code, the Contractor was entitled to prejudgment interest on the payment applications for which the School District had wrongfully withheld payment. Moreover, the Court granted post-judgment interest to the Contractor and the Court held that the Contractor was entitled to post-judgment interest until the date the claim was paid by the School District. The Court employed the rationale that "here, the School District wrongfully deprived the Contractor use of the funds, some since 1999. Thus, we conclude that the Contractor is entitled to interest until such time as the School District satisfies the judgment entered against it."

While the award of post-judgment interest is common, the Court's award here of

prejudgment interest will provide a basis in the future for contractors similarly situated to the Contractor in this case, to seek such damages from a public authority.

This was the second part of a three part series on this case. In a future Bulletin, we will analyze the Court's discussion on calculation of damages, including the "measured mile" approach. So, stay tuned....

More Recent Developments

Allegheny County Court Re-affirms Court's Strong Deference to Public Bodies on PLA Agreements

By Rich Joyce

For those of you who bid public jobs, the issue of Project Labor Agreements (PLAs) can be a hot-button issue. As a little background, over the past decade, or so, public owners have increasingly included in the bid package a PLA, which requires that any contractor who bids on the job agree to hire labor for the project from the local union shop for their particular trade. The stated purpose behind such agreements is to promote labor harmony, and thus, avoid unnecessary delay and expense to the taxpayers of the public owner. Skeptics of the agreements have argued that PLAs are basically "union-only" contractor agreements that violate public bidding laws. Proponents, on the other hand, suggest that PLAs do not bar any contractor from bidding the job, nor do they require any contractor to become a union contractor, but rather, PLAs simply ensure labor harmony by utilizing a workforce that has already agreed to keep the job progressing.

One such PLA was recently challenged by a taxpayer in Allegheny County. The Shaler School District had determined to use a PLA during construction of two construction projects within the District.

The Project Labor Agreement (PLA) was entered into between the School District and the Pittsburgh Regional Building and Construction Trades Council, as the Trades Council assured the School District that the PLA would help to maintain labor/management harmony and therefore, the expeditious "completion of the project on time and on budget."

Roger Sossong, a taxpayer in the School District, filed for a preliminary injunction to stop the school from awarding a contract that contained the PLA. A judge in the Allegheny County Court of Common Pleas denied Sossong's motion for preliminary injunction. The Court based its denial of the motion on its belief that it would be more unfair to taxpayers to enjoin the award of the contract because there would be an adverse impact on the public interest; to wit, the entire project would need to be re-bid at expense to the taxpayers. Also, the Court felt that since the project was to be performed pursuant to the Prevailing Wage Act, there was no real likelihood that the cost of the job would be any more with union contractors than with nonunion contractors.

Moreover, the Court, relying on A. Pickett Construction, Inc., v. Luzerne County Convention Center Authority, held that inclusion of a PLA by a municipality was within the

municipality's discretion.

Finally, the Court also noted that Sossong had notice of the PLA at the time the project was let for bid, and therefore, Sossong should have objected to the PLA prior to the eve of award of contract.

In a second motion, accompanied by an Amended Complaint in equity, Sossong asked the Court to reconsider its original Order denying his motion for preliminary injunction, stating that this case differed from A. Pickett, in that the School District in this case never conducted a feasibility study regarding the PLA. The School District responded that although it did not conduct its own study, it did consider a study produced by Hill International for a different school district in the Pittsburgh area.

Sossong also challenged the Court's Order denying his motion for preliminary injunction because the Court never conducted an evidentiary hearing. The Court denied Sossong's second motion, and Sossong appealed to the Commonwealth Court.

First, the Commonwealth Court held that it was not necessary for the trial court to conduct an evidentiary hearing, and that such a hearing is within the discretion of the trial court. Additionally, the Commonwealth Court found no problem with the School District's use of the PLA. Citing Pickett, the Court stated that "a PLA requirement does not violate lowest responsible bidder laws where it is related to the need for prompt completion of a project [.]"

And despite the fact that the School District did not conduct its own study, the Commonwealth Court held that Sossong admitted in his first motion on the pleadings that the School District was "concerned about prompt completion of the project," and thus, the trial court did not abuse its discretion.

While the Court's determination on the record was that Sossong waived the argument regarding reliance on a feasibility study, in a footnote the Court stated that even though Sossong objected to the School District's failure to conduct its own study, "the School District denied this averment and attached the Hill Report to its response. Thus, Sossong obviously was mistaken about the School District's failure to rely on a detailed report."

In conclusion, this case is further evidence that Pennsylvania courts are very hesitant to sustain objections to use of PLAs in public contracting.

Out-of-State Court Limits "Pay-when-Paid" and "Pay-if-Paid" Clause Protection for Sureties.

by Rich Joyce

At the end of January of this year, a United States District Court in Atlanta held that a surety was unable to rely on a "pay-if-paid" clause to avoid payment of a subcontractor under a payment bond. While the surety referred to the clause as a "pay-when-paid," the Court correctly assessed that where a clause states that a subcontractor will only receive money if the prime contractor is paid, it is not simply a timing mechanism, but instead a precondition to payment, it is a pay-**if**-paid clause.

The subcontractor in this case, however, argued that under the Miller Act, the surety was bound to make payment, and that contractual clauses which preclude timely payment, and thus bar recovery on a contract, are contradictory to the terms of the Miller Act.

The Court agreed with the subcontractor and held that the Miller Act itself provides a timing mechanism for payment; to wit, the Act states that a subcontractor may sue for payment 90 days after it has finished its work. Thus, the Court concluded that "a subcontractor's right of recovery on a Miller Act payment bond accrues 90 days after the subcontractor has completed its work, not when and if the prime contractor is paid by the government."

While the Court acknowledged that a surety is entitled to all contractual defenses of its principal contractor, and that the surety's contractual obligations to the subcontractor arise out of the prime contract, the Court felt that the conflict between a strict "pay-if-paid" clause and the Miller Act must be resolved in favor of the subcontractor.

In conclusion, the Court stated, "[a] surety's liability is governed by the obligations of the prime contractor under the contract, however, not to the extent that a surety may avoid its obligations imposed by the Miller Act. A contract provision that would deny the subcontractor its federal remedy under the Act cannot be used as a defense by a surety."

The Court was reluctant to allow a "pay-if-paid" clause to serve as a waiver of claims under the Miller Act. Thus, while state law has not changed regarding "pay-when-paid" and "pay-if-paid" clauses, contractors should be aware of this federal court decision because if they wind up in a slow pay situation with a government owner, the protection of the "pay-if-paid" clause from subcontractor claims may no longer be available to the contractor's surety.

THE CONSTRUCTION LAW BULLETIN ***is intended to inform and not to advise. While this periodical is based on existing law, the statements herein are general, and the status of the law is subject to change. Individual facts may alter the procedural or substantive issues involved in prosecuting or defending a claim. Should you have an issue that you believe is similar to any of those discussed here, you should contact legal counsel for a consultation.***

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Scourchesne@ReagerAdlerPC.com.

Reager & Adler, P.C. · 2331 Market Street · Camp Hill, Pennsylvania 17011
(717) 763-1383 · Fax (717) 730-7366 · www.ReagerAdlerPC.com
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