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Construction In Brief

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Signing Is Everything: New Pennsylvania Case Distinguishes Between Partially and Fully Executed Public Contracts

By Jennifer M. Horn and Daniel E. Fierstein

Public construction work can be attractive to contractors, especially in a down economy, because the payments are considered more secure than with private work. One major pitfall of public work, however, is that the legal recourse available to contractors against a governmental entity is oftentimes more limited than the remedies contractors have against a private owner. In a recent case against the Commonwealth of Pennsylvania ("Commonwealth"), a gaming company, Scientific Games International ("SGI"), learned the hard way that taking legal action against the Commonwealth is difficult.

The difficulty contractors face stems from a legal principal called "sovereign immunity." Sovereign immunity means that a government entity, like the Commonwealth, cannot be sued except under very limited circumstances that are determined by the Legislature. For example, if a contractor is not being paid for work in accordance with its contract with the Commonwealth, the contractor may (after going through an administrative claim process) sue the Commonwealth for breach of contract only because the Legislature expressly created this remedy in the Commonwealth Procurement Code.

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Contributors:

What's New

Brief Note:

We hope everyone is enjoying the warm weather! For those of you who do public work, make sure to check out the enclosed article regarding the pitfalls about seeking legal recourse against a government entity — know your rights!

In addition, we are excited to announce that Steve Williams has been named Chair of the Commercial Litigation Group. Continue reading the What's New section for more details.

As always, please reach out to us with any questions.

Ashling and Kate
Co-Editors-in-Chief

By Kerstin Isaacs

Labor & Employment Breakfast

In response to requests from our Annual Labor & Employment Law Seminar in March, we are hosting our first Breakfast Seminar covering everything you need to know to protect your company through a "bulletproof" employee handbook.

When: June 18, 2013
Time: 8:00 – 9:30 AM
Where: Cohen Seglias's Philadelphia Office

Does your company have an employee handbook? If so, when was the last time it was dusted-off and updated? The laws and regulations that affect your workplace are in a near-constant state of flux. In this presentation, our panel will identify and discuss the policies that are absolutely essential to protect your business from employment-related litigation. Also, we will discuss the most common mistakes employers make when putting together a handbook — such as imposing unlawful wage deductions as a form of employee discipline. And of course, we'll save plenty of time to answer all of your questions. We hope you can join our panelists, Marc Furman and Jonathan Landesman, for this fast-paced and informative presentation.

For questions on the seminar and to register, please contact Zoë Shore at zshore@cohenseglias.com or 215.564.1700.

Promotions

We are pleased to announce that **Steve Williams** has been named Chair of the Firm's Commercial Litigation Group. Steve joined the Firm six years ago, and has been instrumental in developing our growing presence in the Harrisburg area.

New Faces

We are pleased to welcome Associate **Catherine Nguyen** to the Construction Group in Philadelphia. She has represented clients in construction litigation, contract disputes, labor and employment matters, landlord-tenant matters, and consumer protection cases. Catherine advises clients regarding the operation of commercial enterprises, including drafting leases, employment agreements, and restrictive covenants. She has experience litigating a variety of administrative law and civil matters in state, federal, and appellate courts, and is licensed to practice law in Pennsylvania and New Jersey.

Recognition

Marian A. Kornilowicz, Chair of the Business Practice Group, has been awarded the 2013 Preservation Alliance Rhoda and Permar Richards Award, for his dedicated service to the Preservation Alliance for Greater Philadelphia. The recipient of the Richards Award is chosen by a group comprised of various preservation leaders, including current and past Preservation Alliance board members. The Award, which was first given out in 1999, is bestowed on a variety of people who have gone above and beyond in their service to the Alliance.

Kerstin is the Firm's Marketing Director. She can be reached at (215) 564-1700 or kisaacs@cohenseglias.com.

Signing Is Everything:
Distinction Between Partially and Fully Executed Public Contracts *Continued from page 1…*

By Jennifer M. Horn and Daniel E. Fierstein

In *Scientific Games International, Inc. v. Commonwealth of Pennsylvania*, the Commonwealth solicited bids for the design, installation, and maintenance of a statewide computer system to monitor slot machines at gaming venues. After bids were opened and evaluated, the Commonwealth selected SGI for the award and began to negotiate a contract with SGI. Before contract documents were fully executed (the final draft of the contract had been signed by SGI but not by the Commonwealth), the Commonwealth cancelled the award, noting that the cancellation was "in the best interests of the Commonwealth." SGI sued the Commonwealth in the Commonwealth Court of Pennsylvania seeking an order from the Court declaring the contract enforceable and preventing the Commonwealth from canceling the contract.

Ultimately, the Supreme Court of Pennsylvania considered the issue and dismissed SGI's case because the Commonwealth's Procurement Code does not allow bidders to challenge award cancellations if they have not yet entered into a fully executed contract. The Procurement Code specifically provides that "[a]n invitation for bids, a request for proposals or other solicitation may be canceled, or any or all bids or proposals may be rejected, at any time prior to the time a contract is executed by all parties when it is in the best interests of the Commonwealth." In other words, since the Procurement Code states that cancellations cannot be challenged without a fully executed contract, the Commonwealth is immune from legal challenges. This provision of the Procurement Code can have harsh effects on awardees that have signed their contracts but are simply waiting for the various Commonwealth Agencies and officials (*e.g.*, the Department of Revenue, the Commonwealth Comptroller, the Office of Chief Counsel, the Office of General Counsel, and/or the Office of the Attorney General) to fully execute the contract.

In addition to confirming the Commonwealth's ability to cancel solicitations and awards without challenge, the Supreme Court of Pennsylvania also held that even if SGI was permitted to bring this lawsuit against the Commonwealth, it did so in the wrong forum. The Supreme Court concluded that SGI should have filed its case with the Commonwealth Board of Claims because the Commonwealth Procurement Code requires all claims arising from contracts with the Commonwealth and/or its agencies to be brought before the Board of Claims.

For contractors, this case should serve as a lesson that their legal rights are significantly limited without a fully executed contract, especially in the public contracting arena. In fact, the Uniform Electronic Transactions Act provides that if a law requires a signature, an electronic signature satisfies the law. Electronic signatures have become an acceptable means for the Commonwealth to execute its contracts, which can be a good way to expedite contract execution. Contractors are well advised to be respectfully vigilant during the contract execution phase. As demonstrated in the *SGI* case, if the Commonwealth decides to cancel the award before signing the contract, the contractor's ability to challenge the Commonwealth's actions is weakened considerably. Following an award, contractors should strive to negotiate quickly and efficiently and urge the Commonwealth to execute the contract as quickly as possible.

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New York City's New Law to Enhance Participation by M/W/EBEs

By Joyce J. Sun

New York City has a new law, which goes into effect on July 1, 2013, amending the New York City Charter and the Administrative Code of the City of New York to strengthen the City's program to increase participation by Minority-Owned Business Enterprises (MBEs), Women-Owned Business Enterprises (WBEs) and Emerging Business Enterprises (EBEs) in City procurement.

The new law, Local Law 1 of 2013, eliminates the $1 million cap on M/W/EBE program-eligible contracts that was set by the former Local Law of 2005 and allows for the inclusion of higher value contracts in the goals program. It also strengthens enforcement mechanisms to ensure that the City's participation goals are met.

It is expected that the new law will increase the overall value of program-eligible contracts from an estimated $433 million to $2.2 billion.

New Participation Goals for City Agencies

Importantly, Local Law 1-2013 establishes new "citywide participation goals" in four (4) industry classifications of City contracting, which each City agency is required to consider when setting its own annual agency goals for participation by certified M/W/EBEs.

For construction contracts, the new law adds the new participation categories of Asian-Americans and Women. For Asian-Americans, the annual procurement goal is 8% of total annual agency expenditures. For Women, the annual procurement goal is 18% of total annual agency expenditures. The 2013 law revises downward the annual procurement goals for construction contracts for African-Americans from 12.63% to 8%, and for Hispanic-Americans from 9.06% to 4%. The annual procurement goal for construction contracts for EBEs remains the same under the 2013 law at 6% of total annual agency expenditures. Thus, the total citywide participation goal for MBEs, WBEs and EBEs will be 44%, up from 27.69% under the old law.

The new law also increases the annual procurement goals for MBEs and WBEs for professional services contracts (for example, contracts for architectural and engineering services and construction management services), standard services contracts, and goods contracts.

Each City agency is required to submit to the Commissioner of the Division of Economic and Financial Opportunity of the City's Department of Small Business Services (SBS) an agency utilization plan for the upcoming fiscal year, which must include: information about the agency's participation goals for M/W/EBEs for the year, and an explanation for any agency goal that is different than the citywide participation goal for the relevant group, and industry classification.

The Commissioner is required to publish on the Division's website no later than July 31 of each year, a plan and schedule for each agency, which shall include information specific to each prospective agency solicitation, including: "the specific type and scale of the services and/or goods to be procured, the term of the proposed contract, the method of solicitation the agency intends to utilize, and the anticipated fiscal year quarter of the planned solicitation."

Determining Credit for Participation

The new law provides that in establishing a goal for a particular procurement for construction, professional services, or standard services, an agency may achieve the goal "by a combination of prime contract and subcontract dollars, a combination of construction and services performed pursuant to the contract, and/or a combination of M/W/EBEs. Alternatively, an agency may establish specific goals for particular types of services, and/or goals for particular types of certified firms."

For each contract that a contractor utilization plan has been submitted, an agency must require that the contractor submit at least once a year a list of its intended subcontractors. It may also require contractors to report periodically about contracts awarded by their direct subcontractors to indirect subcontractors. In addition, the new law requires contractors to submit, with each of their vouchers for payments, and/or periodically as the agency may require, certified statements containing the total amounts paid to their direct subcontractors, and the total amounts paid by their direct subcontractors to indirect subcontractors.

Improved Accountability and Enhanced Oversight

Under the new law, a mayoral representative will hold quarterly meetings with each agency to discuss the agency's utilization goals and whether the agency has made substantial progress toward achieving its goals.

Additionally, the new law charges the Commissioner of the Division of Economic and Financial Opportunity with the powers and duties to establish criteria and procedures to recognize M/WBE certifications by other governmental entities, to conduct site visits at businesses seeking certification to verify their eligibility, and to increase information available on the Division's website to include specific information about each M/W/EBE.

With respect to compliance by contractors, the new law provides that for each contract for which participation goals have been established, at least once annually during the contract term, the agency shall review the contractor's progress towards attainment of its utilization plan, including reviewing the percentage of work the contractor has actually awarded to M/W/EBE subcontractors, and the payments that the contractor has made to those subcontractors.

Moving Forward

By removing the $1 million cap on contracts covered by the City of New York's participation goals for M/W/EBEs and strengthening the City's oversight function, new Local Law 1 of 2013 will help ensure that M/W/EBEs will be targeted for higher value contracts with the City of New York.

M/W/EBEs and contractors that utilize M/W/EBEs should familiarize themselves with the new law, particularly its recordkeeping and reporting requirements.

Contractors interested in utilizing M/W/EBEs should:

- review agency plans and schedules for prospective solicitations published on the SBS's website, and identify portions of work that can be performed by qualified M/W/EBEs;
- refer to the City's Online Directory of Certified Businesses;
- access the resources of the SBS, which include networking events and targeted solicitations; and
- keep complete and accurate records concerning M/W/EBE utilization.

Joyce is a Partner in the Construction Group. She can be reached at 212.425.7854 or jsun@cohenseglias.com.

Landlord Alert – HUD Issues New Rule that May Impact Tenant Screening

By Steven M. Williams

The Federal Department of Housing and Urban Development ("HUD") issued a new rule on February 15, 2013, that calls into question whether landlords/management companies can deny tenancy to a prospect simply because of a prior criminal record or arrest. Under the new rule, if a landlord/management company is sued by a prospective tenant for discrimination, the landlord/management company will have to show that its policy has a legitimate business purpose and protects a legitimate business interest. If the landlord can prove this, the burden shifts to the prospective tenant to prove that the landlord's/management company's legitimate business interest can be protected in a different way that would not have a discriminatory effect. If the prospective tenant is successful in proving this, the landlord/management company can be liable for housing discrimination. All landlords/management companies should review their rental criteria policies and practices to make sure that they do not run afoul of this rule.

Steve is a Partner with the Firm and a member of the Real Estate Group. He can be reached at 717.234.5530 or swilliams@cohenseglias.com.

Anticipating Retaliation Lawsuits from Your Employees

By Jonathan Landesman and Mark J. Leavy

An employee that wants to sue a current or former employer cannot always just file a lawsuit in court. For a significant number of employment claims, an employee is first required to file a "Charge" with the Equal Employment Opportunity Commission ("EEOC") — and then, only after the EEOC has concluded an investigation, can the employee proceed with a lawsuit. Among the claims that an employee must file with the EEOC are those for retaliation.

Charges of retaliation outnumber all other types of cases handled by the EEOC. Retaliation in the employment context essentially means that an employer is punishing an employee — by disciplining them, demoting them, firing them, etc. — because the employee came forward to the employer and made a protected complaint. A protected complaint can be an allegation of harassment or discrimination in the workplace.

It is very rare to have a retaliation case that involves what lawyers call "direct evidence." This means that an employee in a retaliation case can rarely produce "hard" evidence that would show that the employer fired them because of their complaint, such as an admission in an email, a letter, a voicemail message, or any other type of "smoking gun" piece of evidence.

Instead, retaliation cases require the plaintiff to prove three things. First, the plaintiff has to show that he/she made a protected complaint. Second, the plaintiff has to show that he/she suffered from an adverse employment action — i.e., a change in the terms and conditions of employment such as a demotion, suspension, or termination. And, third, the plaintiff has to establish a causal link between the complaint and the adverse employment action.

> If the adverse employment action happened within days of the protected complaint, then the plaintiff's case is relatively strong.

The most disputed issue in a retaliation lawsuit is the third element — proving a causal link. And the most important piece of evidence in establishing the causal link is timing. If the adverse employment action happened within days of the protected complaint, then the plaintiff's case is relatively strong. However, if a substantial period of time has elapsed between the adverse employment action and the protected complaint, then the employer can seek summary judgment and try to get the case dismissed based on the argument that the prolonged gap in time means between the complaint and the adverse employment action are not causally connected.

Recently, a federal court in New York dismissed a retaliation lawsuit precisely because of the significant gap in time between when the employee had complained about the employer's alleged wage and hour law violations and the employee's termination. In *Straebler v. NBC Universal, Inc.*, the United States District Court for the Southern District of New York ruled that the plaintiff's complaint did not state a "plausible" claim for retaliation where there was a 13-month gap between the employee's complaints about alleged wage and hour violations and the termination. The judge explained that the case had to be dismissed because, absent other factual allegations, the gap in time of more than a year between the protected complaint and the termination could not provide enough of a basis for a retaliation claim.

The bottom line is that if an employee has come to you with a complaint, you have to be very cautious about how you treat that employee. This is true, even if you conduct an internal investigation and determine that the employee's complaint has no merit. Taking any action against an employee who has complained — especially terminating such an employee — is often tantamount to inviting litigation.

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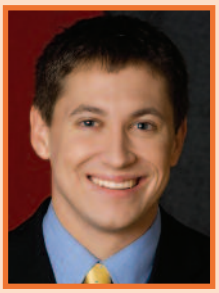
Backcharges Assessed
Against Subcontractors Can Invalidate Lower-Tier Bond Claims

By Edward Seglias and Matthew A. Gioffre



A recurring, and often frustrating situation for a general contractor on a public project in Pennsylvania, is when a claim is made by a lower-tier subcontractor against the general contractor's payment bond, which arises when a subcontractor fails to complete its work or goes out of business, and leaves unpaid balances owed to its lower-tier subcontractors and suppliers. In this situation, lower-tier subcontractors often attempt to invoke the security provided by the payment bond as a means of recovering the money they are owed by the debtor subcontractor. However, under Pennsylvania law, a general contractor and its surety's liability under the bond is not automatic. In fact, claims by lower-tier subcontractors, against a general contractor or its surety, are barred when the general contractor has paid its subcontractor the balance owed under the subcontract, taking into account any backcharges assessed for deficiencies in the subcontractor's work. Good news for the general contractor, but bad news for the lower-tier subcontractor or vendor.

Section 3939(b) of the Procurement Code states that "[o]nce a contractor has made payment to the subcontractor according to the provisions of this subchapter, future claims for payment against the contractor or the contractor's surety by parties owed payment from the subcontractor which has been paid shall be barred." In short, a general contractor will not be required to pay twice (once to its subcontractor and again to satisfy the claims of lower-tier subcontractors). As such, a general contractor and its surety are protected from liability for claims of lower-tier subcontractors where the contractor has paid its subcontractor in accordance with the terms of its subcontract and the prompt payment provisions of Pennsylvania's Procurement Code.

The court in *Trumbull Corp. v. Boss Construction, Inc.* relied on Section 3939(b) of the Procurement Code to bar a lower-tier subcontractor's bond claim against the general contractor and its surety. During the performance of the project, one subcontractor failed to perform in accordance with its subcontract and experienced financial difficulties. As a result, the general contractor assessed backcharges and issued joint checks to some of its lower-tier subcontractors. Some of the lower-tier subcontractors who were not paid in full brought claims against the general contractor and its surety. Because the subcontractor at issue had received payments in accordance with the requirements of the Procurement Code, the general contractor and surety were not held liable for the bond claims of the lower-tier subcontractor.

> A contractor and its surety are protected from liability for claims of lower-tier subcontractors where the contractor has paid its subcontractor in accordance with the terms of its subcontract.

Importantly, the *Trumbull* Court acknowledged that this defense is available even if a general contractor has assessed backcharges against its subcontractor and, as a result, has not paid the full amount of the subcontract. This is because the Procurement Code permits a general contractor to "withhold payment from any subcontractor responsible for a deficiency item," which is defined as "[w]ork performed but which the design professional, the contractor or the inspector will not certify as being completed according to the contract." Accordingly, if a general contractor has assessed backcharges against a subcontractor for a "deficiency item" but has otherwise paid the subcontractor in full, its payment obligations under the Procurement Code are fulfilled and any bond claims of lower-tier subcontractors are barred.

Every general contractor working on public projects should be familiar with the *Trumbull* case, and make sure that their surety is familiar with that case as well. On the other hand, lower-tier subcontractors working on public projects in Pennsylvania must be mindful of any backcharges assessed against the party with whom they have contracted. Even if those backcharges have nothing to do with your work, they could impact your ability to receive payment and your bond rights.

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