

W E L C O M E

MESSAGE TO OUR READERS

Welcome to the 2013 Spring issue of the Welby, Brady & Greenblatt, LLP Construction Advisor. We are pleased to bring you a summary of new legal happenings related to the construction industry. In this issue, we are featuring Legal Alerts written by our Associates. Ana C. Cruz shares amendments to the NYC Charter and Administrative Code in Relation to Minority and Women Own Business opportunities; and Tristan Smith discusses the topic of Insured, Insurer and the Attorney-Client Privilege; We are also pleased to announce two new additions to the Firm and our office expansion to Manhattan, NY!

More resources and articles provided by Welby, Brady & Greenblatt, LLP are available at our website, www.wbgllp.com, and can be viewed on your mobile device by scanning the QR code.



Insured, Insurer and the Attorney-Client Privilege

By Tristan Smith, Associate at Welby, Brady & Greenblatt, LLP



Tristan Smith

There is a common misconception that any and all communications between a client and their attorney are protected from disclosure by the attorney-client privilege. However, this is not always the case.

In *Melworm v. Encompass Indemnity Company*, the insured plaintiffs, the Melworms, filed a lawsuit against their insurer due to the denial of a claim for vandalism to the Melworms' boat. Prior to investigating the claim, the insurance company retained an attorney, who was to advise the insurance company of its rights under the policy and

conduct an examination of the Melworms.

During discovery, the insurance company provided a redacted electronic claims diary and redacted letters to the Melworms' counsel. The Melworms moved to compel the insurance company's production of the redacted portions of the documents. The insurance company opposed the motion on the ground that the redacted portions were subject to the attorney-client privilege, as they entailed internal discovery conducted by counsel, and therefore were subject to the privilege (including the examination). The Melworms argued that the privilege did not apply for two reasons: 1) the investigation of their claim is itself not subject to the privilege; and 2) the privilege is exercised by the insured, and not the insurer.

The Nassau County Supreme Court granted the Melworms' motion to compel based upon their first argument. New York law generally provides that in an insured versus insurer dispute pertaining to a claim, the claims file is generally not privileged. The basis for this is that the payment or rejection of claims is a part of the regular course of business of an insurance company. Therefore, reports that aid the insurer in this decision are likewise made in the regular course of business, even if the report is by an attorney. Furthermore, evaluating the extent of potential liability of the insured is also within the ordinary course of business, and therefore, the examination of the Melworms is not privileged either.

However, the Court disagreed with the Melworms' second argument that the privilege is only exercised by the insured. This is only true in a situation where the insurance company is under a duty to defend the insured, and the insured later brings an action against the insurance company relating to the denial of the claim. Here, if the insurance company tries to invoke privilege, they will be unsuccessful because the privilege lies with the insured.

If you have any questions about the information set forth in this Legal Alert, call us at 914-428-2100.

Firm Additions and Expansions

Welby, Brady & Greenblatt, LLP is happy to announce two new attorney additions and recent office expansion. Jared A. Hand and Eric A. Sauter have joined the Firm as Associates. Mr. Hand is admitted to practice law in New York and New Jersey as well as the United States District Courts for Southern and Eastern Districts of New York. Mr. Hand focuses on a wide array of legal issues including contract disputes, lien foreclosures and litigation.



Jared A. Hand



Scan this code with your Smart Phone to learn more about Jared A. Hand

Eric A. Sauter joined the Firm in March 2013 to assist in the representation of owners, sureties, construction managers, general contractors and subcontractors in complex litigation and in alternative dispute resolution proceedings and real estate development. Mr. Sauter is admitted to practice law in New York State.



Eric A. Sauter



Scan this code with your Smart Phone to learn more about Eric A. Sauter

Welby, Brady & Greenblatt, LLP has an additional office! The Firm has opened an office in Manhattan at 299 Broadway, Suite 1405, New York, NY 10007. Call the office at 212-485-0098 to make an appointment.



LEGAL ALERT

Amendments to the NYC Charter and the Administrative Code in Relation to Opportunities for Minority and Women Owned Business Enterprises and Emerging Business Enterprises in City Procurement

By: Ana C. Cruz, Associate



Ana C. Cruz

On January 7, 2013, the Mayor signed Introductory No. 911-A into law (Law No. 2013/001). This Local Law amends the New York City charter and the administrative code of the City of New York, in relation to opportunities for minority and women owned business enterprises and emerging business enterprises in City procurement. The laws that are amended are: New York City Charter § 1304 and New York City Administrative Code § 6-129.

Summary of Amendments to New York City Charter § 1304

The 2013 amendments grant the commissioner of the division of economic and financial opportunity within the Department of Small Business Services a number of additional powers and duties in the implementation of the purpose of the division, including the power to:

(i) recognize firms, that are certified as minority owned and women owned businesses by other governmental entities, to be recognized as certified business enterprises by the City of New York;

(ii) perform site visits at businesses seeking certification; and

(iii) post on the division's website, a directory of City certified business enterprises which must include information such as the business enterprise's market sector, bonding capacity, contract price and tasks for its last 3 contracts, union affiliation, and the renewal date for its certification.

Summary of Amendments to New York City Administrative Code § 6-129

The definition of graduate MBE, WBE, and EBEs is no longer limited to entities that were previously awarded prime contracts. However, the qualifying contract size for these entities increased from fifteen to fifty million dollars and, to qualify, the size of the entities must exceed the size standards established by the US small business administration for three years. The amendments also add a definition for "human services" and state that participation requirements are not applicable for those services.

The participation goals for construction contracts are now applicable to all construction contracts irrespective of the amount of the contract, rather than being limited to contracts under one million dollars. The percentages per category of participant were redistributed and were increased to 44% from 27.69%. The categories of Asian Americans and Women were added to the citywide contracting participation goals for MBEs, WBEs and EBEs. The participation goals for construction subcontracts did not change.

The participation goals for professional services contracts, including architectural, engineering, and construction management services, are also now applicable to all construction contracts irrespective of the amount of the contract, rather than being limited to contracts under one million dollars. The percentages per category of participant were redistributed and were increased to 63% from 36.5%. Women were added as a category to the citywide contracting participation goals for MBEs, WBEs and EBEs. The participation goals for professional services subcontracts did not change.

The participation goals for goods contracts are now applicable to all goods contracts under one hundred thousand dollars, rather than one million dollars. The percentages per category of participant were redistributed and were increased to 51% from 41.52%. Women were added as a category to the citywide contracting participation goals for MBEs, WBEs and EBEs.

Going forward, and no later than 2015, the commissioner must review and adjust the City's participation goals, as necessary, on a bi-yearly basis.

The division has also taken on additional tasks to offer assistance to MBEs, WBEs, and EBEs such as conducting meetings with MBEs, WBEs and EBEs to discuss what agencies look for in evaluating bids and proposals, and educating prime contractors on opportunities to partner or subcontract with certified MBEs, WBEs and EBEs.

Agencies are able to set differing participation goals for their annual agency utilization plans with higher, lower, or the same levels as citywide goals, subject to the approval of the commissioner. The agency's plan and schedule must be published on the division's website no later than July 31 of each year. Pursuant to the amendment, an "agency may establish a goal for a procurement that may be achieved 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 MBEs, WBEs and/or EBEs. Alternatively, an agency may establish specific goals for particular types of services, and/or goals for particular types of certified firms."

"A contractor that is an MBE, WBE or EBE shall be permitted to count its own participation toward fulfillment of the relevant participation goal, provided that the value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays

to direct subcontractors. A contractor that is a qualified joint venture shall be permitted to count a percentage of its own participation toward fulfillment of the relevant participation goal. The value of such a contractor's participation shall be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement."

The contracting agency must require that the qualifying contractor submit a list of its intended subcontractors at least once per year. The contracting agency may also require the contractor to report periodically about the contracts awarded by its direct subcontractors to indirect subcontractors.

A bidder has the option of requesting that the contracting agency change the participation goals in light of the availability of firms to perform the services required, or by demonstrating that it has legitimate business reasons for proposing a lower level of subcontracting in its utilization plan. If the contracting agency agrees, it shall revise the solicitation and extend the deadline for bids and proposals. Furthermore, an agency may modify the participation goals when there are changes to the scope of work that affect the scale and types of work. The City chief procurement officer may also identify types of contract where payments to indirect subcontractors can be credited toward the participation goals. Contractors or subcontractors that are both MBEs and WBEs are only credited toward the goal for one of those categories.

There are also amendments that enhance the reporting and oversight requirements.

Impact

The most significant amendment to the law is the elimination of the \$1 million cap on contracts that are covered by participation goals. This change will ensure that MWBEs are targeted bidders for larger contracts.



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