

WELCOME

Message to our Readers

Thank you for reading the Winter 2015 issue of the Welby, Brady & Greenblatt, LLP Construction Report. We are pleased to bring you a summary of new legal happenings related to the construction industry as well as highlight the impact Firm Partners and Associates are making on the Legal Industry and the markets we serve. In this issue, we are pleased to share three contributions made by two of our Partners and our new Associate. Partner, Thomas H. Welby, discusses OSHA and Whistleblower Protection; Thomas S. Tripodianos, Partner, answers a question on Surety Subrogation Claims; and Rick Ward shares The Importance of Knowing YOUR Contracts.

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The Importance of Knowing YOUR Contracts

By: Richard T. Ward III, Associate

Editor: Thomas S. Tripodianos, Esq.



Richard T. Ward III

The construction industry requires a contract for just about everything. The contract you enter into, whether it is a construction contract, a performance or payment bond, an insurance agreement, a design contract or some combination of the above, contains language that will determine whether you are protected if the project goes awry. The necessity

of risk allocation in construction projects has led to the widespread use of form contracts developed to reduce to writing what the form's author believes to be a fair transfer of risk between contracting parties. However, using a commonly employed form contract is no guarantee of optimal risk allocation and no excuse not to read and understand the language of your contract.

A recent decision of the Appellate Division, Second Department in *Archstone v. Tocci Bldg. Corp. of New Jersey*, 119 A.D.3d 497, 990 N.Y.S.2d 44 (2014), highlights the importance of familiarizing yourself with your contracts, even when a form is used. In 2004, Archstone, a project owner, enlisted Tocci as the general contractor for the construction of a 396-unit apartment complex. Before construction, Tocci secured a performance bond from Liberty Mutual Insurance Company (Liberty Mutual) to ensure the completion of the contract. The bond format was a commonly used form performance bond from the American Institute of Architects (AIA) known as A312 – 1984. After Tocci had substantially completed the project, Archstone discovered extensive water intrusion damage which it alleged was attributable to Tocci's faulty design and construction. In 2008, Archstone brought an action against Tocci and Liberty Mutual.

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