In a recently reported case an owner hired a general contractor, who in turn hired a subcontractor, who in turn purchased concrete from a supplier. When one of the subcontractor’s workers was injured, the workman sued suppliers from the supplier, including the owner. The owner demanded that the supplier’s insurance company defend and indemnify him. The supplier’s insurance company refused, so the owner commenced a declaratory judgment action against the subcontractor and its concrete supplier’s insurance company, seeking to have the lower court declare that the supplier’s insurance company must provide liability coverage to the owner as an additional insured. The insurance company moved to dismiss the action and lost, so it appealed to the Appellate Division, First Department. 1

The supplier’s insurance policy provided that an organization be added as an additional insured “when you (supplier) and such … organization have agreed in writing in a contract or agreement that such … organization be added as an additional insured on your policy.”

The supplier’s insurance company argued to the appellate court that because there was no written agreement between the owner and the supplier that indemnified the owner, the supplier’s insurance company did not have to provide liability coverage to the owner as an additional insured. The court rejected that argument saying that the supplier’s insurance policy did not say that there only be some written agreement between the owner and供应商 to name the owner as an additional insured. The appellate court was not persuaded, however, saying that the owner’s reliance on a reference language in the subcontractor/supplier purchase order established the written agreement between the owner and supplier to name the owner as an additional insured. The appellate court also rejected the owner’s argument that the incorporation by reference language in the subcontractor/supplier purchase order established the written agreement between the owner and supplier to name the owner as an additional insured. The court said such a reading required the court to read terms into the policy that does not exist. The supplier’s insurance policy did not say that there only be some written agreement. Rather, it said that there must be a written contract between the supplier and the owner and requiring the supplier to include the owner as an additional insured.

Because, such a contract does not exist here, the supplier’s insurance company is not required to provide insurance coverage for the owner.

Situations such as the one the owner found itself in here can be avoided by proper drafting of insurance provisions, including flow-down requirements, and, equally important, by verifying that those provisions are followed before access to the project site is granted by the owner to contractors, subcontractors and suppliers.

In a project owner usually draft contracts that require their direct contractors and their subcontractors and their suppliers to name the owner and the owner’s lenders as additional insureds in their general liability policies. When that does not happen, or when sufficient attention is not paid to the details of what is provided by lower tier subcontractors and suppliers when they arrive at the project site, upstream contractors and owners could find themselves without insurance they thought they had bargained for. Whether such coverage is in place depends upon what is stated in the lower tier subcontractor’s or supplier’s insurance policy.

The supplier’s insurance company argued to the appellate court that because there was no written agreement between the owner and supplier requiring that the owner be named as an additional insured because the supplier and the subcontractor had previously entered into a purchase order for the concrete, in which the supplier agreed to “assume all the obligations and risks which (the subcontractor) assumed towards (the owner).”

The appellate court was not persuaded, however, saying that the owner’s reliance on a reference language in the body of the clause itself, which required a written agreement between the supplier and the owner requiring the supplier to name the owner as an additional insured on the supplier’s insurance policy.

The appellate court also rejected the owner’s argument that the incorporation by reference language in the subcontractor/supplier purchase order established the written agreement between the owner and supplier to name the owner as an additional insured. The court said such a reading required the court to read terms into the policy that does not exist. The supplier’s insurance policy did not say that there only be some written agreement. Rather, it said that there must be a written contract between the supplier and the owner and requiring the supplier to include the owner as an additional insured.

Because, such a contract does not exist here, the supplier’s insurance company is not required to provide insurance coverage for the owner.

Additional Insured – Owners, Lessees or Contractors – Automatic when required in construction agreement with you.

This, the owner argued, automatically made the owner an additional insured because the supplier and the subcontractor had previously entered into a purchase order for the concrete, in which the supplier agreed to “assume all the obligations and risks which (the subcontractor) assumed towards (the owner).”

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1. AB Glenn Constructions, LLC v. Peters Schultecke & Sons, Inc., 102 AD3d 425 (1st Dept. 2013)

Clarification Sought on Prevailing Wage Requirements

The United States Court of Appeals, Second Circuit, has asked New York’s highest court to answer the following questions relating to prevailing wage laws:

1. What deference, if any, should a court pay to an agency’s decision, made for its own enforcement purposes, to construe section 220 of the NYLL (New York Labor Law) respectively, what the court is deciding the meaning of this section for a period of time before the agency’s decision?

2. Does a party’s commitment to pay prevailing wages pursuant to NYLL section 220 bind it to pay those wages only for work activities that were clearly understood by the parties to be covered by section 220, or does it require the party to pay prevailing wages for all the work activities that are ultimately deemed by a court or agency to be “covered” by that portion of the statute?

The Court states in its August 25, 2014 opinion that “We refer to the parties, and the court below, to this important question: What did the DOL mean when it determined that the work at issue was not subject to prevailing wage requirements?”

The Court further explains that the decision is being made for its own enforcement purposes, to construe section 220 of the NYLL (New York Labor Law) respectively, what the court is deciding the meaning of this section for a period of time before the agency’s decision.

The second question, deals with the question of intent of the contracting parties. It is undisputed that the DOL Commissioner ordered the matrices removed and issued an opinion letter indicating the work was not subject to prevailing wage requirements. Subsequently however the DOL Commissioner redacted the matrices removed and issued an opinion letter indicating the work was indeed “covered” but would only enforce those provisions prospectively.

The first question dealing with the “decision of how to treat agency determinations that are made separately from a direct legal claim, and the extent to which the agency’s own prospective enforcement decisions ought to bear upon that, separately brought, claim, will affect cases for beyond the particular question before us.”

The second question, deals with the question of intent of the contracting parties. It is undisputed that Simplex Grinnell agreed to pay prevailing wages under the statute as interpreted by the agency and the court at the time of contract. What is not clear is whether Simplex Grinnell also contracted to be bound by what the statute was ultimately read to require, even if that requirement was not clear when the contract was signed.”

The decision in this case can have far-reaching effects in how contractors bid on projects involving providing wages and how they handle disputes involving prevailing wages. We will continue to monitor this case and will report on the Court of Appeals decision.
ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM

Welby, Brady & Greenblatt, LLP is pleased to report that the ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM has been approved by the ACORD voting members.

Prior to the creation of the Addendum municipalities, state agencies, property owners and general contractors did not have confidence that the limited information provided on the Acord Certificate of Insurance provide adequate insurance of the intended risk transfer. Reading and understanding complicated insurance policies from multiple trades on a single project was simply not a cost effective option.

Facilitated by the Professional Insurance Agents of New York (PIANY), Welby, Brady & Greenblatt, LLP and a group of other industry stakeholders sought to find an alternative. The group collaborated to craft a form to be used as an addendum to the existing certificate that lists the typical coverages included in the insurance requirements of construction contracts. Moreover, the group will devise educational materials to further assist the industry.

A draft copy of the ACORD 855 NEW YORK CONSTRUCTION CERTIFICATE OF LIABILITY INSURANCE ADDENDUM can be downloaded from our website at www.wbgflp.com or by scanning this QR code with your Smart Phone.

Changes in the New York City Building and Administrative Code in the aftermath of Hurricane Sandy.

By: Anthony P. Carlucci, Jr., Esq., Partner

In light of the devastating effects of Hurricane Sandy on the New York City area, recent and subsequent proposals have been requested by the New York City Council to try and minimize the harm that may be caused by any future events. At the request of the Council, Urban Green (which serves as the New York Chapter of the U.S. Green Building Council (USGBC)), was tasked with researching how buildings might remain more sustainable and habitable during and after such severe weather. These proposals were released in a report by Urban Green’s Building Resiliency Task Force in June 2013. As of November 14, 2013, fifteen of the twenty nine suggested legislative changes have been passed into law by the NYC Council, with many others having been introduced and under consideration.

Many of these new laws pertain to changes in the building code, and apply to older structures as well as new construction. One of the first proposals passed into law requires that “vulnerable building elements”, of new or renovated buildings (such as electrical services, fire protection systems, compressed gas or material tanks, and vent piping), must be located above the flood line. In hospitals, these systems must not have confidence that the limited information provided on the Acord Certificate of Insurance provide adequate insurance of the intended risk transfer. Reading and understanding complicated insurance policies from multiple trades on a single project was simply not a cost effective option.

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Other sanitary related measures require backflow valves to protect from overflows in buildings, and to protect plumbing systems and components that have openings below the flood level elevation. Additionally, new systems and components, including plumbing fixtures, will be required to be elevated above the flood elevation specifications.

Enacted changes also include an easing of outside barrier requirements, which allow building owners to be more proactive in directing floodwaters by allowing flood shields to extend into the current public right of way in temporary situations. It further allows for use of temporary stairs and ramps to be used to access exits above the flood line.

Additional proposals will be passed into legislation in the coming months and Welby, Brady & Greenblatt, LLP, will continue to provide updates on the status of this legislation.

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