

# Goldberg & Connolly's

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## BLUEPRINT

### THE CONSTRUCTION AND SURETY LAW UPDATE

CONSTRUCTION • GOVERNMENT CONTRACT CLAIMS • SURETY • LABOR • LITIGATION

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#### CLAIMS FOR DELAY

##### • Tactics For Owner Caused Delay Is the GC Liable?

Owner-caused delay often disproportionately damages the party actually doing the work, more often than not the subcontractor. To whom, therefore, can a subcontractor turn for compensation for delay - the owner, the general contractor or both? A landmark ruling of New York's highest court that we believe has gotten far too little attention addressed the respective rights and liabilities of owners, general contractors and subcontractors when confronted with construction delay. The New York Court of Appeals surprisingly, held in that decision that the prime contractor could not be held liable for the acts or omissions of an owner. However, this reveals an inherent inconsistency, a "Catch 22." A subcontractor is not in privity of contract with an owner and cannot sue it directly. Thus, the court held that in the case of delay exclusively caused by the owner: (1) the sole entity that should be held responsible by a subcontractor is beyond the reach of the subcontractor, and (2) the general contractor, who could be sued by the subcontractor, will ordinarily not be held liable for the acts of the owner.

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## **Claims for Delay**

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In this appellate case, a prime contractor in New York City hired a subcontractor to perform part of its work. Although the prime contract contained the City's standard "no-damage-for-delay" provision which attempted to limit the City's liability for delay, the prime contractor's agreement with its subcontractor contained no similar language. After various delays and interferences on the project, the prime contractor sued the City for damages and, as part of that action, sought to recover damages on behalf of the subcontractor resulting from City-caused interferences to the subcontractor's performance. The prime contractor's suit failed to progress and the subcontractor eventually commenced its own lawsuit against the prime contractor (the only party it could sue directly) to recover its delay damages.

At the trial of the subcontractor's action, the project's delays were shown to have been primarily caused by the City, its engineer, or other "Wicks" prime contractors, as well as by extreme weather, but not by the subcontractor's own prime. Based on this evidence, the trial court dismissed the subcontractor's action, finding the prime contractor was not liable for the owner's acts and omissions. This dismissal was eventually appealed to New York's highest court, the Court of Appeals.

The subcontractor argued, that in the absence of a clause in the subcontract expressly relieving the prime contractor of responsibility, the prime had implicitly agreed to assume responsibility for all delays that a subcontractor might experience no matter what their cause. The Court of Appeals rejected this theory, ruling that a prime contractor is not responsible for delays that its subcontractor may incur unless those delays are caused by "some agency or circumstances under the prime contractor's direction or control." In other words, prime contractors are only responsible for their own acts or omissions, and, absent an express provision in the contract, do not guarantee to its subcontractors the owner's performance on the project. The court also strongly suggested that "if a subcontractor wants a prime contractor to be a guarantor of job performance, it should bargain for the inclusion in its contract of a provision to that effect."

**G&C Commentary:** This case is consistent with the long tradition of the New York Court of Appeals of completely missing the boat in construction related cases by strictly applying contract law more applicable to commercial cases without any consideration of the construction context in which a particular case arose.

Privity of contract in New York is still essential for a breach of contract action. The subcontractor in this case could not sue the owner directly because, as is typically the case with regard to subcontractors and owners, they are not in privity of contract.

### **Importance of Liquidating Agreements**

This decision also clearly elevates the importance of "liquidating agreements" between primes and subcontractors in dealing with the issue of owner-caused delays. A critical element of an enforceable liquidating agreement in New York is an acknowledgment of liability by the general contractor, but only to the extent it collects damages from the owner on behalf of the subcontractors. Liquidating agreements typically allow subcontractors to bridge the privity "gap" to recover from an owner.



## **THE NEW PRIVATE SECTOR**

### **"PROMPT PAYMENT" LAW - REVISITED**

#### **• Remember the "Non-Waivable" Provisions!**

In our Summer 2003 edition, we explained that private sector construction contracts are now subject to the same type of "prompt payment" regulations that have long been a feature of public sector contracting. In the "Construction Contracts Act" (effective for contracts entered into on or after January 14, 2003), the New York legislature established payment procedures to limit unjustified payment delays by private sector owners, developers, contractors and subcontractors to downstream parties. The Act prescribes billing and payment cycles and outlines available remedies for non-compliance. In sharp contrast to the public sector law, however, many of the provisions of the Act can be modified by agreement between the parties. In other words, the Act provides a "default" system if the

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**“Prompt Payment” Law** (Continued from page 2)

construction agreement (e.g., subcontract) is silent, but allows the parties, in certain instances, to modify payment procedures to suit the particular needs of a project and to reflect the realities of their respective bargaining positions.

Considering the economic advantage enjoyed by owners and contractors, this ability to “opt out” is an invitation to undermine the new statute and relax payment obligations. It is important to note, however, that there are some important provisions safeguarding lower-tier payees that can not be modified.

**The “Non-Waivable” Remedies**

• **Right to Walk off the Job**

The most dramatic new remedy available to unpaid parties is the ability to suspend performance for non-payment. In fact, it is hard to imagine that the legislators fully appreciated what a dramatic departure this was from business “as usual” in the construction industry. If unpaid for more than thirty days from when payment is due, unless the payment period is modified by contract, an unpaid contractor or subcontractor may actually suspend its work without fear of termination. What’s more, it would be automatically entitled to an extension of time to complete the work corresponding to the length of the self-imposed suspension. This is an extraordinarily powerful self-help vehicle.

The right to suspend is contingent upon the suspending contractor’s providing at least ten days’ written notice to the party with whom it is in contract of its intention to suspend its work. The party owing the money may cure the default at any time during those ten days. Furthermore, the Act specifically provides that any contract clause which attempts to prevent a party from being able to suspend performance for non-payment will be deemed null and void.

• **Right to 12% Interest**

The Act also provides that any untimely payment (whether calculated using the statute’s billing cycle or

**Construction Law . . .**

**STEEL PRICING CRISIS**  
**- NYS DOT TAKES LEADERSHIP ROLE**

While construction agencies throughout the U.S. are wringing their hands over what to do about the unprecedented recent increase in the cost of steel, the NYS DOT is acting decisively to meet this crisis. As we go to print, a new contract provision is under development to allow for price adjustments based on the price of the steel at the time of actual purchase above and below an established index. Steel pricing at the time of purchase in excess of the index will result in a contract adjustment and steel pricing below the index will result in a credit back to the State. DOT anticipates introducing this provision in contracts that are let commencing September 2003.

For existing contracts, the procedure has not yet been finalized, but reliable sources at the DOT have indicated that, barring unforeseen developments and subject to the consent of the Controller of the State of New York, by the end of May a new procedure should be in place allowing for issuance of an “order on contract” for a similar index-driven increase or credit against the steel item contract price where the steel is a “major item” in the contract. DOT is also now making partial payments for structural steel members even prior to fabrication to assist contractors in locking in a price for steel.

any billing cycle established within the contract) will accrue interest at the rate of 1% per month. The applicability of interest also cannot be waived by contract, and the Act provides that the interest rate may only be adjusted upward.

Although billing and payment cycles may be modified, the Act requires that subcontractors be provided with written notice, at the time the subcontract is entered into, of the dates when payments of approved requisitions will be made. In addition, subcontractors have the right to demand in writing that owners advise the subcontractors within five days after making payment to the general contractor when the payment was made. These notice rights also cannot be waived by

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**“Prompt Payment” Law** (Continued from page 3)

contract. Further, failure to accurately disclose the information will void any contractually modified due dates and the billing and payment cycles will revert to those listed in the Act.

• **New York Law Mandatory**

New York law must apply in order to prevent the “back door” avoidance of the Act’s provisions by designating the law of another state. The Act requires that any contract for a construction project located in the state (except a material supply contract) must be interpreted under New York law. Further, the Act states that no contract (again, except a material supply contract) can require litigation or other dispute resolution procedures to be held in any state other than New York.

**G&C Commentary:** The legislature afforded owners, contractors and subcontractors the ability to “opt out” of significant portions of the Act. Payment timetables and procedures may be modified by negotiation. However, extremely potent new tools such as the right to suspend work, the subcontractor’s right to demand notice of any payment made by the owner to a general contractor, and the right to 12% interest, cannot be stricken from the contract.

Lurking in the background is the landmark New York Court of Appeals decision in *West-Fair*, which held that “pay-if-paid” provisions are void as against public policy; while “pay-when-paid” provisions, if reasonable, are enforceable. The Act suggests, however, that a contractor’s obligation to pay a subcontractor may be conditioned upon the owner’s payment to the contractor.

The Act, in part, states:

...the contractor shall pay to the subcontractor, and each subcontractor shall in turn pay to its subcontractors, the full or proportionate amount of funds received from the owner for each subcontractor’s work and materials based on work or services provided under the construction contract, seven days after receipt of good funds for each interim or final payment, provided all contractually required documentation and

**Legislative Update . . .**

**DURATION OF PUBLIC IMPROVEMENT  
MECHANIC’S LIENS**

The legislature recently issued a technical amendment to the Lien Law correcting a discrepancy between the duration of liens on public and private improvements. Previously, liens on public improvements were only valid for six months, whereas private improvement liens were valid for one year. Effective with the amendment, the duration for both types of liens is now one year. As before, the time period is measured from the date on which the notice of lien is filed with the public agency for a public improvement lien and with the County Clerk’s Office for a private improvement lien.

For a public or private improvement lien, only a single one-year extension can be filed without court intervention. If no action is commenced to foreclose the lien within the one-year extended period, a court order must be obtained to continue the lien. Otherwise, the lien will be extinguished. Any court-ordered extension can similarly only extend the lien for one year. Further, only two such court orders can be granted for any lien. Thus, the maximum amount of time within which a public or private improvement lien may be foreclosed is four years: the original one-year period plus the first, one-year extension which becomes effective immediately upon filing, plus two, court-ordered, one-year extensions.

waivers are received.

This language seems to contradict the *West-Fair* ruling. In order to preserve their rights under *West-Fair*, subcontractors will need to include language in their subcontracts specifically avoiding any provisions that apparently conditions payment from their general contractor on payment from the owner.

Contractors, on the other hand, may want to argue that the new legislation is entitled to be taken literally, thereby modifying the *West-Fair* decision’s effect. Certainly, we have not heard the end of this apparent

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inconsistency between the *West-Fair* ruling of New York’s highest court and the legislature’s “Construction Contracts Act of 2003.”



## **SURETY LAW**

### **• Extended Exposure to Prevailing Wage Claims**

The exposure of a surety that issues a payment bond on a public works project in New York has been significantly extended by a recent amendment to §220-g of the New York Labor Law. Section 220-g sets forth the time period within which a worker can commence an action on a payment bond to seek unpaid wages, benefits, penalties (up to 25%) and interest (up to 16%). Prior to November 1, 2002, that period was one year from the date of the underpayment. The new amendment, effective November 1, 2002, significantly extends that time period. The statute of limitations is now either one year from the date of the underpayment or *one year from the filing of an order* by the Commission of Labor or any other public fiscal officer determining the wage or benefits underpayment. This latter method of determining the statute of limitation’s commencement date, as a practical matter, effectively extends the claim period against sureties by a number of years.

In fact, before the change, workers were seldom able to maintain an action on a payment bond for prevailing wage underpayment. By the time a complaint would be made and investigated by the Department of Labor, the one-year period would almost certainly have been passed and the right to sue on the payment bond would have expired. Under the amended law, however, claims can be made against the surety during the entire investigation (no matter how long it takes), during the administrative trial (again, no matter how long it takes), and then for a full year after the administrative law judge finally makes and files his or her decision. The result is that the right to sue on the bond may now extend for many years after the underpayment, rather than the mere one-year period previously applicable.

The new §220-g also expressly allows an under-paid employee to permit the Commissioner of Labor (or, in

## **Spotlight On The Firm. . .**

### **Goldberg & Connolly Announces Merger**

Our merger with **Altieri, Kushner & Miuccio** in October 2003 makes **Goldberg & Connolly** one of the largest construction law firms in the New York City metropolitan area. The union of our two established, construction-industry-focused law firms presents resources and contacts that immeasurably benefit our clients. The combined firm’s depth and breadth of experience in all facets of public and private construction enable us to address all our client issues in a creative, cost effective manner.

**Jay Kushner** and **Alexander A. Miuccio**, both partners of **Altieri, Kushner & Miuccio**, have become partners at Goldberg & Connolly.

The merger significantly contributes to the firm’s representation of construction industry trade associations. Goldberg & Connolly attorneys proudly serve as counsel to the **Construction Industry Council of Westchester & Hudson Valley (CIC)**, **Subcontractors Trade Association (STA)**, **Construction Management Association of America - Metro New York /New Jersey Chapter**, the **Construction Financial Management Association - New York City Chapter**, the **Association of NYC Concrete Producers**, the **Greater New York and New Jersey Tile Contractors Association**, the **Contracting Stone Setters Association**, the **New York Surety Association**, and the **Marble Industry of New York, Inc.**

New York City, the Comptroller) to bring the action against the surety on his behalf. This is an important change from the previous law, which provided that other than the worker, only the worker’s union could bring the action. The Commissioner of Labor sought this provision in order to enable the government to pursue recovery by grouping together claims which, because of their relatively small size when taken alone, may not have warranted legal action against the surety.

**G&C Commentary:** Combined with the new, extended statute of limitations, this new government power to commence an action could lead to a significant

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## **Prevailing Wage**

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increase in the number of prevailing wage claims made against payment bonds issued on public works projects. Of course, the best “insurance” against exposure to liability for §220-g claims is vigorous, contemporaneous supervision of compliance with all prevailing wage law requirements. All “downstream” employers with whom your company contracts must be monitored. As we have often expressed, violations of the prevailing wage laws are a “fool’s paradise,” trading short term gain for ever increasing civil and criminal exposure.



## **LABOR LAW BONDING OFF A LABOR LAW §220 “Notice To Withhold Funds”**

An important enforcement provision in Labor Law §220, New York State’s “Prevailing Wage Law,” is the right of the investigating labor agency to put the project’s public owner on notice of a possible prevailing wage violation by a prime contractor or one of its subcontractors. In such a case, the agency must withhold the full estimated prevailing wage underpayment. Estimated amounts asserted by the New York State Department of Labor (“DOL”) or, in NYC, the New York City Comptroller’s Office, are typically quite “liberal.” Further exacerbating the impact of such notices is that the estimated underpayments can be increased by the DOL by a factor of 16% for statutory interest and another 25% for statutory penalties. In many cases, these funds can be tied up for years as the investigation winds through the investigatory process toward an administrative hearing.

This withholding of contract funds can have a significantly adverse impact on a project’s cash flow. One strategy we developed years ago was to negotiate for the ability of a general contractor to post a bond in the full amount of the estimated assessment which would allow for contract funds to flow uninterrupted and the project to proceed. There was no specific provision in the Prevailing Wage Law which allowed for the providing of a bond in lieu of the withholding of contract funds. However, it was a common sense approach which satisfied the needs of all parties. The

## **VENDEX Update . . .**

### **Attention Public Contractors & Subcontractors - VENDEX Questionnaires Changed**

Vendor Information Exchange System's (VENDEX") procedures require all contractors (and subcontractors) on public contracts to complete questionnaires before awarded a job. The Mayor's Office of Contracts ("MOC") revised the Vendor and Principal questionnaires and eliminated the Not-for-Profit, Business Entity and Individual questionnaires. Those filing Individual questionnaires will now file Principal questionnaires. Old questionnaires, however, may still be submitted any time prior to July 1, 2004. In addition all questionnaires now must be submitted directly to MOCs and not to the agencies. MOC has made the revised VENDEX questionnaires available "online" at [www.nyc.gov/vendex](http://www.nyc.gov/vendex).

contractor was able to have tied-up contract funds released, the public owner had the assurance that there would be appropriate security for the alleged prevailing wage underpayments while its project proceeded unimpaired, and the enforcement agencies would have a secure fund from which to pay any valid claim. However, as more people learned of it, it became increasingly difficult to arrange for the voluntary acceptance of this bonding-off procedure by the enforcement agencies. Also, the enforcement agencies, at times, became frustrated with the process of calling in the bonds, preferring to keep the far more available cash secured by a Notice of Withhold. Without the DOL’s approval, public owners have never acted independently to accept bonds as a substitute for the withholding of contract funds.

Recently, an appellate court decision has now identified an implicit legal right to “bond off” a DOL Notice of Withhold, regardless of the DOL’s refusal to voluntarily accept the procedure. The only limitation, however, is that it requires court review and approval.

In the case before the appellate court, the contractor received a Notice of Withhold and attempted to bond it off. However, the DOL advised the public owner not to accept the bond in lieu of withheld contract funds and

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the owner agreed. The contractor then sued, and, on appeal, the appellate court ruled in favor of the contractor, holding that a public owner should accept the bond as substitute security where there was court approval.

The appellate court based its ruling on General Municipal Law §107. That law provides that a public contractor can submit an undertaking (e.g., bond) against any claim, and that upon the filing of a proper undertaking the public owner “shall be authorized to make payments to such contractor pursuant to the terms of such contract.” The law was enacted specifically “to permit the contractor to obtain the release of money withheld by a municipality in connection with a public works contract upon the posting of a sufficient bond.” Labor Law §220-b, however, provides that withheld moneys “shall not be used for any other purpose except under court order.” Interpreting these two laws together, the appellate court found that “the legislature and the DOL anticipated court intervention to allow a contractor to use contract funds in order to stay in business until a final determination could be made regarding an alleged underpayment of wages.” Other than the sufficiency of the bond which the court will, of course, resolve in its review, the only condition on the contractor’s ability to “bond off” a Notice of Withhold appears to be a court review and a resulting court order.

**G&C Commentary:** With the laws as written, the appellate court got it right. However, for a number of reasons, the decision highlights the need for legislative action.

It seems the requirement for a court order is redundant and inefficient. Considering that General Municipal Law §107 allows the fiscal officer of a public owner to prescribe the terms of the bond, we see no further assurance or security to be gained by judicial intervention. Indeed, in making its ruling, the appellate court issued no opinion as to the sufficiency of the bond. Rather, it implies that as a matter of law the bond should be accepted. The legislative policy allowing the substitution of bonds should be determinative, and the legislature should technically amend §220-b to harmonize the statutes.

## **ON-TIME COMPLETION**

### **• Not a Bar to Damages for Government Delay**

On time and on budget completion are the hallmarks of efficient contracting. However, many contractors who finish on time, but not on budget, fail to pursue rightful damages for government-caused delay. From the contractor’s perspective, what is the value of on-time performance when the company suffers a loss? It depends. A contractor can obtain damages for government-caused delay where it can prove that it planned to (and would have) actually finished the contract prior to the contract completion date but for certain government-caused acts and/or omissions.

In a recent federal Board of Contract Appeals decision, the contractor had been awarded a competitively bid construction contract by the National Parks Service to repair the parking garage at the John F. Kennedy Center for Performing Arts in Washington D.C. The contract called for completion within three years. After completion of the project within the time prescribed by the contract, the contractor sought an equitable adjustment for “alleged charges, delays, disruptions, and loss of labor productivity” caused by the government, totaling approximately \$1.5 million. The contractor argued that government-caused actions prevented it from completing the project within its “as bid” schedule.

An important issue in this case was whether there was early notification to the government of the contractor’s intent to better the original contract schedule. Significantly, however, the Board found, that “the proper focus is whether [the contractor] would have completed the project early, but for the government-caused delay.”

The federal law applicable to delay claims focuses primarily on facts related to the actual performance of the contract. Detailed evidence must be presented that demonstrates whether the contractor intended to, and actually would have , completed the project early but for any proven government-caused delay. The issue as to whether or not the contractor informed the government at the outset of its intention to complete early is not

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## **On-Time Completion**

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determinative. Evidence of such advice is relevant, but the weight to be given it is in the discretion of the Board of Contract Appeals, to be determined on a case-by-case basis after a full hearing.

Federal contractors should and will be given an opportunity to present evidence of their original intent to finish early, as well as the extent to which government-caused delay frustrated that plan. If a contractor protected the project's schedule at its own expense, despite the government's delay or disruption, and still finished early or on time, it should be entitled to an opportunity to protect its lost profits as well.

**G&C Commentary:** This case clearly establishes that contractors will have the opportunity to seek damages from the federal government when they are frustrated in effectuating their "as bid" early completion schedules. In this regard, it would be extremely helpful to advise the government, in writing, of such an intent at the earliest possible time. However, this case now establishes that such notice is not essential. It is crucial to maintain accurate and sufficiently detailed "as bid" schedules, schedule analyses and other estimating records. Furthermore, a contractor must be prepared to prove its intended "means and methods" for early completion. Both the contractor's "as bid" early completion schedule and its planned means and methods must be feasible and credible.

The foregoing does not present a particularly difficult burden particularly where these records are kept on a contemporaneous basis. The records must be prepared with advanced thought and careful planning. A contractor who determines late in the job that it "could have" completed early, but for the actions of the government, will (and should) have a much more difficult burden of demonstrating entitlement to damages for government-caused delay where it completes on time.

Finally, it should also be noted that the rule in New York State is quite similar. If, absent state-caused delays, the contract could have been completed early with substantial savings, a public agency in New York may be held liable in damages to the contractor for the

loss of such savings. This is true even when a project is complete and accepted well before the original contract completion date. A New York State appellate court has held, for example, that where difficulties arose in the construction and dewatering of cofferdams due to the failure of the State to act promptly to complete necessary redesigns, the contractor's ability to finish early as intended was frustrated by the State and the contractor may hold the New York State agency accountable in damages.



*Your suggestions and comments are welcome.*

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