

ARTICLE 13
WORDS 464

**Limitations on Cross-Withholding of Projects Funds
To Enforce the NYS Prevailing Wage Law**

By Henry L. Goldberg

General contractors recognize that the New York Labor Law insures that if a subcontractor on a public project does not pay the correct prevailing wages and benefits to its workers, the New York State Department of Labor ("DOL") can look to the general contractor to make good for its sub's underpayment. The DOL through its Bureau of Public Works can direct the contracting public agency to "withhold" moneys due the general contractor on the particular job where the sub's workers were not properly paid. In addition, consistent with the terms of most public work contracts and the New York Labor Law itself, in certain cases, the DOL can "cross-withhold" by directing the hold-up of money owed to the general contractor on an unrelated job to secure an underpayment on the original, audited project.

In 2002, however, New York's highest court, the Court of Appeals, held that the NYS - DOL's Bureau of Public Works cannot recover wages that the employer failed to pay on one project from moneys otherwise due that employer on another (unrelated project), if any trust fund beneficiary on the unrelated project had not yet been paid.

The Court of Appeals explained that this cross withholding limitation is directly related to workers' rights to wages under the New York Lien Law § 70. The New York Lien Law Article 3-A trust impressed on project funds prevents the DOL from using the money for workers on an unrelated project by cross-withholding. Although, the Court of Appeals noted the DOL's claim that the public owner has a contractual right to withhold the funds from the general contractor, the Court held that the claims of the Lien Law Article 3-A trust beneficiaries are stronger than that of a Labor Law §220 (prevailing wage law) claimant. As the Court stated, "a comparison of the literal language of Labor Law § 220-b (2) (a) (1) with that of Lien Law § 70 (1) reveals that the Article 3-A trust is broader and may arise prior to the existence of any funds to which DOL's notice of cross-withholding could attach." (*Id.* at 939.)

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It appears that New York's Lien Law Article 3A Trust Fund provisions outweigh New York's Labor Law §220. However, it should be noted that the provisions of New York's Lien Law which preclude cross-withholding until all trust fund claimants on an unrelated project have been paid, have no counterpart under federal statutes. The United States DOL, in enforcing the federal Davis Bacon Act, have no such limitations and can lawfully direct a federal agency to withhold funds from the prime contractor and/or cross-withhold funds from an unrelated federal project that the audited prime contractor is also working on.