

CONSTRUCTION LAW NEWSLETTER

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TRENDS IN CONSTRUCTION LAW

Governor Cuomo has announced a goal of 30% MWBE participation in state construction projects. While this is a salutary objective, it can impose some serious negative consequences for those further down the construction chain.

Unlike with private projects, lien and statutory bond rights on a public project only go as far as a sub-subcontractor, or supplier to a subcontractor. Anyone farther down the line has no lien or statutory bond rights. A typical scenario is when a prime contractor subcontracts with an MWBE company. That MWBE company then

contracts with a subcontractor, who in turn orders construction materials or further subs out the work. In these scenarios, the last party has no lien or statutory bond rights. Thus, the last party down the line would be limited to a lawsuit against the party with whom it contract-

Lien and bond rights on public projects were statutory enactments which served the purpose of promoting construction and assuring parties of the likelihood of payment. The unintended consequences of the MWBE goal is that more parties who contribute valuable labor and materials on public projects will have their remedies for non-payment severely limited.



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CASE LAW UPDATE

On December 1, 2015, the First Department Appellate Division, decided the case of *ACS Sys. Assoc., Inc. v. Safeco Ins. Co. of Am.*

In the case, the School Construction Authority hired the GC to perform a school renovation project. It was undisputed that the GC had been paid in full for its work. However, it refused to pay its subcontractor over \$1 million because of what the court described as a “potential” claim for liquidated damages that the

owner may impose on the GC.

The subcontractor sued the GC and its bonding company. The sub argued that General Municipal Law section 106-b(2) required the GC to pay it within seven days of its receipt of payment from the owner. The GC responded that the statute permits the GC to withhold payment from its sub for “an amount necessary to satisfy any claims, liens or judgments against the subcontractor...which have not been suit-

ably discharged.” The Supreme Court granted the subcontractor’s motion for summary judgment and the Appellate Division affirmed, stating that the “potential” claim for liquidated damages was not a valid basis for withholding payment from the sub. The statute provides for 12% per annum interest on overdue amounts. Thus, it is notable that the amount awarded to the sub consisted of \$1,103,542.23 in principal and \$399,421.77 in interest (\$1,502,964 total).

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