

# CONSTRUCTION LAW NEWSLETTER

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## TRENDS IN CONSTRUCTION LAW

In October of 2014, Governor Cuomo announced a 30% goal of MWBE participation in individual state contracts. Article 15A of the Executive Law requires that each state contract solicitation set forth the expected degree of MWBE participation based in part on the potential subcontract opportunities available and the availability of MWBE.

The Associated General Contractors of NYS (“AGC”) sent numerous Freedom of Information

(FOIL) requests to various NYS agencies seeking information on how the MWBE goals were established for particular projects.

When some agencies denied the FOIL requests based on assertions of privilege, the AGC filed a lawsuit on April 11, 2017 against such agencies seeking production of the records.

AGC takes the position that it is unlikely that specific, fact based analysis of individual and highly varied contracts throughout the state



would repeatedly result in the same 30% goal. Thus, compliance with Article 15A of the Executive Law would be questionable.

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## CASE LAW UPDATE

On April 6, 2017, the Third Department Appellate Division decided the case of *Lightning Capital Holdings, LLC v. Erie Painting & Maintenance, Inc.*

The case involved a party suing a contractor and its surety to recover on unpaid invoices.

The plaintiff had supplied materials and rented equipment to the contractor for an NYS Thruway Authority project involving rehabilita-

tion of a dam. Subsequently, the supplier filed for Chapter 11 bankruptcy.

Another company purchased the supplier/debtor's assets in bankruptcy and after the bankruptcy proceeding was terminated, sought to collect on the unpaid invoices.

The Appellate Division ruled that the party who purchased the supplier/debtor's assets in bankruptcy had no standing (authority) to sue to recover on the invoices because the

cause of action was not listed as an asset in the bankruptcy proceedings.

In other words, because the cause of action for the unpaid invoices was not “dealt with” in the bankruptcy proceeding, the party who purchased the supplier/debtor's assets in bankruptcy had no ability to recover on the unpaid invoices after the bankruptcy proceeding was terminated.

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