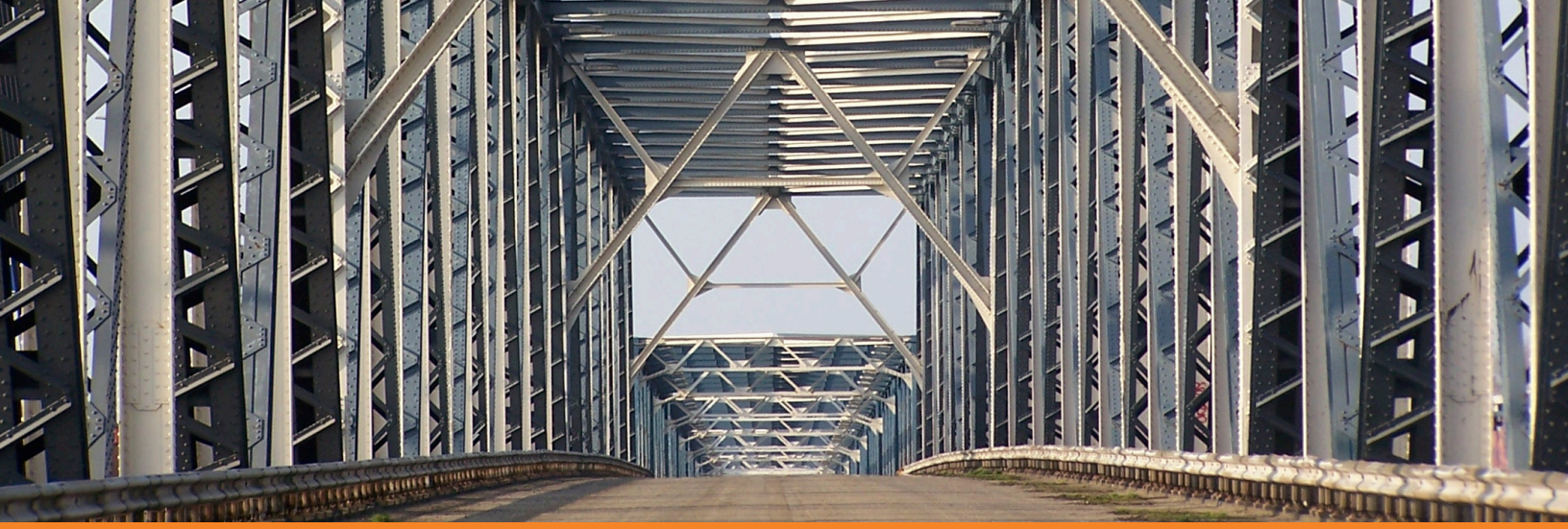

ZETLIN & DE CHIARA LLP

ZETLIN & DE CHIARA LLP
REVIEW
CURRENT LEGAL AND BUSINESS DEVELOPMENTS AFFECTING THE DESIGN, CONSTRUCTION AND REAL ESTATE INDUSTRIES

2010 VOL. 16 NO. 1

INFRASTRUCTURE DEVELOPMENT OFFERS NEW BUSINESS OPPORTUNITIES
The changing economic climate brings a tide of legislation as Z&D weighs in on P3s, federal and local stimulus plans designed to rekindle delayed projects, and legislation that may streamline litigation.

BUSINESS LEADERS SPEAKING
Michael Della Rocca, President of Halcrow North America, Shares Industry Insights with Z&D Partner Michael Zetlin

With funds for infrastructure improvements drying up across the nation, many private companies and government agencies are collaborating in creative ways to generate the revenue needed for important construction projects. Public-private partnerships, or P3s, have been one solution to a shortage of funds since the early 1990s.

Across the United States, $30 billion has already been invested toward the completion of 50 P3 projects, as two dozen states have enacted authority for state transportation agencies to consider and enter into public-private partnerships. The U.S. Department of Transportation, hard pressed to support the Highway Trust Fund and federally aided transportation projects, has hailed P3s as the 'silver bullet' in solving transportation funding woes.

Also known as 'privatizing' or 'monetizing' public assets, a P3's scope can range from simple litter removal at a site to the outright sale of a government transportation asset.

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>> Visit www.zdlaw.com/leaderspeaking to view the full interview.

LEGISLATIVE ALERT:
STIMULATING DEVELOPMENT – AND OPTIMISM

By James J. Terry, Esq. and Meghan A. Douris, Esq.

James J. Terry, Esq.

In February 2009, President Obama signed The American Recovery and Reinvestment Act (the "Stimulus Package"). This $787 billion package sought to alleviate the nation's financial crisis. As economic malaise persisted, in November 2009, President Obama signed the Worker, Homeownership and Business Assistance Act of 2009 (the "Act"), which extended and expanded numerous tax incentives from the initial Stimulus Package.

While the Act provides numerous incentives to individuals, of particular note to the development community is the provision pertaining to the "Net Operating Loss Carryback." (Net operating loss is the amount by which a company's tax deductions exceed its gross taxable income, resulting in a negative taxable income.) The Act permits all businesses (except those that received funds under the Troubled Asset Relief Program) to carry back a net operating loss generated in either 2008 or 2009 so as to claim a tax refund from any of the previous five years when the company made a profit. This represents a significant change from prior law, which had permitted only "small businesses" (defined as having gross revenues of less than $15,000,000) to carry back losses for the preceding five years, while larger businesses were restricted to the preceding two years.

Many companies have no current taxable income against which to apply a net operating loss, nor do some companies anticipate any in the near future. Nevertheless, a number of companies have had taxable income in the previous five years, and applying recent net operating losses to those years enables them to obtain a cash refund, with no limitations on how to use it.

Developers may recoup business losses from 2008 or 2009 (but not both) against taxes paid in the preceding five years, which may generate substantial cash flow for development pursuits. Furthermore, small companies that had taken a five-year carryback under the initial Stimulus Package can also carry back 2009 losses. One limitation of the Act is that in the fifth year, the carryback will be limited to 50 percent of a company's taxable income for that year, although any loss not utilized may be "carried forward."

The White House hopes that the Act will provide an influx of cash, permitting companies to expand their businesses, take on new projects and avoid furloughing their workers. The administration estimates that the Act will restore $33 billion to businesses of all sizes, enabling them to utilize the cash as they see fit – an enormous increase from the estimated $5 billion of tax benefits associated with the initial Stimulus Package.

Many developers are expected to take advantage of these tax benefits. Those who can do so may be able to resume funding of projects placed on hold due to the recession, or embark on new land acquisition and construction ventures. Such prospects would provide a welcome boost to the lagging construction industry by fostering employment, sales of material and equipment and a myriad other goods and services associated with real estate development.

While the efficacy of stimulus packages will remain up for debate, the Act affords potential advantages for members of the development community. Many will find it to be a tangible boon to their businesses, while others may benefit from increased market optimism. In any event, a developer's time devoted to considering the provisions of the Act will be time well spent.

SAVE THE DATE

NAVIGATING THE PUBLIC SECTOR: UNDERSTANDING THE PUBLIC DESIGN REVIEW PROCESS

Mark your calendars for **March 18, 2010** for a special forum on understanding the public design review process, to be held at the Harvard Club of New York City, 33 West 44th Street. This engaging discussion-driven forum presents an overview of the public agency design review process. Learn how to establish successful and productive relationships with these agencies and streamline your public design review submission. Hear from public sector decision makers and leading design professionals who have been involved in public projects.

8:00 AM – 8:30 AM
Breakfast & Networking

8:30 AM – 10:30 AM
Panel Discussion

Moderated by:
- Lina G. Telese, Esq.
  Partner, Zetlin & De Chiara LLP

Featured Speaker:
- David J. Burney, Commissioner,
  NYC Department of Design and Construction

Guest Panelists:
- Wendy Feuer, Assistant Commissioner of Urban Design & Art, NYC Department of Transportation
- Gale Rothstein, Assistant Vice President, Design Review Liaison to Public Design Commission, NYC Economic Development Corporation
- Anthony Fieldman, Design Principal, Perkins + Will
- Greg Pasquarelli, Principal, SHoP Architects

To Register:
contact Whitney Murray at 212.682.6800 or via email at wmurray@zdlaw.com

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The process has generated considerable controversy on Capitol Hill, with critics claiming that the sale of public assets and privatization of government projects display a lack of concern for the public good. But, according to Michael Della Rocca, President of Halcrow North America, the benefits of P3s have been proven in the global marketplace. Michael Della Rocca sat down with Michael Zetlin to discuss the economy, the condition of public projects, and the light at the end of the tunnel.

HALCROW: AN INTERNATIONAL PERSPECTIVE

Della Rocca has had considerable experience with P3s. A London-based multinational firm, Halcrow has been in business for 140 years, working in countries where public-private partnerships are considerably more common. That experience has afforded Della Rocca confidence in the future of P3s, although he admits that convincing state governments to experiment with P3s is a complex challenge. "Many people looking at the U.S. market tend to view it as a single market, which is inappropriate," Della Rocca says. "It really is 50 distinct markets, each with their own perspective on how the project can be considered. So you need to have a tailored approach, that is unique to the expectations and legal framework in each of those states."

With funding in the public sector dwindling just as rapidly as in the private sector, many state and municipal government projects are stalled or have been sacrificed in the interest of other priorities. Infrastructure competes with healthcare and education for government dollars, and funding to those programs maybe preserved by diminishing funds thats states had previously allocated to infrastructure. At that point, moving projects forward means raising revenue through taxes or transportation tolls or the allocation of federal stimulus funds.

The success of stimulus packages is inconsistent, Della Rocca points out, as many states and other entities used the most recent tranche of federal funding in lieu of their own dollars, rather than adding federal money to current expenditures and enhancing programs.

"When the funds were first available from the stimulus package, people were hoping that the money spent would go into projects that would generate long term economic benefits," Della Rocca explains. "The reality of what has happened, at least with this first wave of funding, is the money has been allocated principally to rehabilitation projects, which do serve a purpose in fixing an existing problem but don't necessarily generate the kind of long term economic returns that infrastructure investment usually does."

The stimulus money has helped states maintain a holding pattern, Della Rocca says, which preserves existing jobs but doesn't stimulate growth. Della Rocca admits, "There are examples of programs where major capital investments with long term benefits have received funding, but I think they are more the exception than the rule."

One such exception was the ARC Tunnel improvement by NJ Transit and The Port Authority of New York and New Jersey, which Della Rocca hails as a "successful" project that was moving along on its own in terms of funding and environmental approvals, but some of that money did go into accelerating its implementation.

For the most part, however, Della Rocca has been disappointed with how the money has been allocated in terms of generating work. Even in a down economy, savvy businesses are striving to take advantage of government priorities to find work. Della Rocca points out that, even though education and healthcare compete with construction projects, school and hospital construction ultimately become a boon to the construction industry as well.

Della Rocca remains confident for P3 progress. "The market here is still maturing. If you look at what happened in the U.K. 10 to 15 years ago, they were in the same position the United States is in right now," he says. "It took some growing pains to get to the point where it was a commonly accepted approach and delivery mechanism." One by one, state and local governments are catching up, with states like Virginia and Texas leading the way

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CITY ADDRESSES THE WOES OF STALLED PROJECTS

By Lori Samet Schwarz, Esq.
Zetlin & De Chiara LLP

Lori Samet Schwarz

In sharp contrast to the construction boom of only a few years ago, the current economic downturn has taken a toll on private construction in New York City. The New York City Department of Buildings' January 3, 2010 weekly report of "stalled construction sites" lists a total of 532 street addresses in the five boroughs, up from 402 reported on July 26, 2009 (http://www.nyc.gov/html/dob/html/guides/snapshot_report.shtml). Inactive or abandoned construction sites have raised health and safety concerns throughout the City. These often poorly maintained sites can be eyesores that also adversely affect neighboring property values, further exacerbating the financial woes of local residents. Where financing has completely dried up or the projects are embroiled in foreclosures or other litigation, the future of these projects can be uncertain.

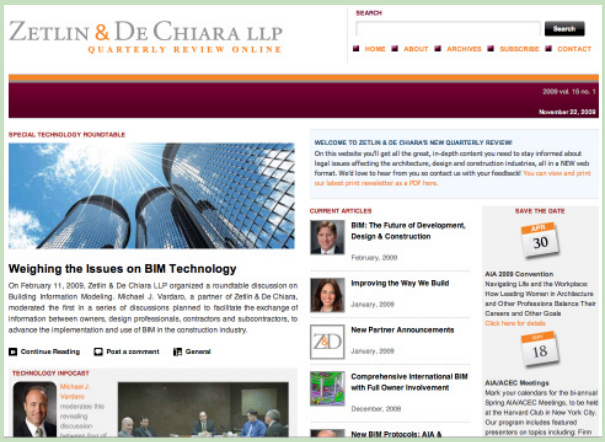
Extensive project delays can also adversely impact owners/developers/lenders once they are able to resume construction. While effective as of July 1, 2008, the new New York City Construction Codes did not become mandatory until July 1, 2009. Therefore, with limited exceptions, owners seeking permits between July 1, 2008 and July 1, 2009 had the option to design in accordance with either the 1968 Code or the more stringent requirements of the 2008 Code. However, once permits were issued, if the work did not commence within twelve months, or once started was halted for twelve months, the permit could not be reinstated without compliance with the 2008 Code.

Enter Introductory Number 1015-A, passed by the City Council on October 14, 2009, and signed into law by Mayor Bloomberg on October 28, 2009. This measure amends Section 28-105.9 of the New York City Administrative Code to authorize the DOB Commissioner to establish a program that will enable the owners of stalled or abandoned construction sites to renew for up to four years an existing permit that might otherwise expire in exchange for documenting that certain measures are in place to ensure the safety of adjoining property owners and the public during the suspension period. While the DOB has yet to formalize program requirements, participants must notify the DOB when work is suspended and submit for the Commissioner's approval a detailed plan for maintaining the site during a lull in construction activities. At a minimum, the plan must include proposed measures for: (1) preventing unauthorized access to the site; (2) installation of proper shoring of excavated sites or backfilling; (3) removal of construction debris, rubbish, stagnant water, volatile gases and liquids, excess vegetation and graffiti; (4) maintaining installed fire suppression and detection systems and scheduling of inspections for equipment remaining at the site; (5) correction of any outstanding violations and payment of fines; (6) maintenance of appropriate construction fencing; (7) monitoring of all measures during the suspension of work; and (8) where appropriate, restoring safe access to affected public sidewalks. The legislation requires the DOB to post and regularly update a list of all program participants on its website. The DOB posting will also indicate whether a site has been removed from the program either because of non-compliance with the program or because work has commenced or resumed.

The benefits to the surrounding community are obvious: assurances that the site will be properly and safely maintained even while inactive. However, the benefit to an owner/developer, a lender or any party acquiring a troubled project, cannot be understated. This new legislation will apply whether permitted work has been temporarily suspended or was never commenced. Upon entering the DOB program, the permit will remain in effect until the end of the term for which it was issued. So long as the site remains in good standing in the program, the permit can be renewed for up to two additional terms of two years each. Once permitted, even under the 1968 Code, the approved plans will not have to be re-designed. As a result, once an owner is ready to move forward again with the construction, there will not be additional delays occasioned by re-design of projects and re-filing of permit applications. And as noted by the Mayor's Office, construction workers will be able to get back to work in a matter of days rather than months, further boosting the local economy.

How many stalled construction projects will enter this new program remains to be seen. If the cost of participation in the program is onerous, financially strapped owners may be unable to avail themselves of its benefits. ■

Zetlin & De Chiara Sustainability Update



Zetlin & De Chiara has long been a source of wisdom and sound advice for sustainable building. Our partners are proud to provide publications, presentations and programs that spread the green message and help construct an environmentally responsible economy. In keeping with our spirit of environmental responsibility, Zetlin & De Chiara's Review is now offered in electronic format. Just as we refuse to compromise the quality of our publication, we refuse to compromise on its impact on natural resources. Expect a full, conveniently accessible and fully sustainable electronic newsletter in your inbox and on our website, www.zdlaw.com.

CIVIL LIABILITY FOR FALSE CLAIMS IN PUBLIC CONSTRUCTION

By Michael S. Zetlin, Esq. and Jaimee L. Nardiello, Esq.
Zetlin & De Chiara LLP

The current economic climate has changed the landscape of government-funded construction projects. As the demand for experienced contractors and design professionals and the availability of new construction projects have decreased, those in the industry must do what they can to set themselves apart in order to bring in work. For some, that is relatively straightforward, as they can rely on their knowledge and reputation to earn jobs. Others may consider resorting to corrupt tactics when submitting bids, or attempt to obtain or siphon money from a project.

To combat such corruption in government construction projects, Congress enacted the Federal False Claims Act ("FFCA"). The FFCA is a body of law originally passed during the Civil War in response to overcharges and other abuses by defense contractors. Under the FFCA, both the Attorney General and private persons – known as qui tam "relators" or colloquially as "whistleblowers" – may institute civil actions to enforce the FFCA. Congress intended the FFCA to help the government uncover fraud and abuse by unleashing a "posse of ad hoc deputies to uncover and prosecute frauds against the government."

The first substantial amendments to the FFCA came in 1986. In those amendments, Congress sought to broaden the reach of the FFCA to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government." Thus, the FFCA currently enables private litigants to bring actions on behalf of the government against anyone who:

1. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
2. Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or
3. Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

The success of the FFCA has become evident in recent years. Since being revised in 1986, the federal government has recovered over $21 billion through actions brought under the Act. In fiscal year 2008 alone, the federal government recovered over $1 billion.

In addition to the FFCA, many states have enacted their own versions of a False Claims Act. At least 16 states, including California, Florida and Massachusetts, have adopted versions of the FFCA.

WHO CAN BRING AN ACTION?

The FFCA authorizes an action to be brought by any "person." This means that almost any current employee, former employee or even business competitor possessing evidence of fraud, can initiate a civil suit under the FFCA. Importantly, if a claim is brought under the FFCA by a current employee, contractor or agent, certain safeguards are in place to protect him or her. The FFCA specifically protects any employee, contractor or agent who is "discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment" when that individual brings an action under the FFCA by allowing recovery of damages from the employer.

There is considerable incentive to institute an FFCA action. If the relator prevails, he or she receives 15 to 25 percent of the government's total recovery (if the Attorney General joins the lawsuit) or 25 to 30 percent (if the Attorney General declines joining the lawsuit but allows the relator to pursue the lawsuit alone). Between January and September of 2008, relators were awarded approximately $198 million in successful FFCA actions.

WHO MAY BE LIABLE?

The FFCA allows a wide range of project participants to be found liable. Owners, design professionals, construction managers and contractors have all been found liable under the FFCA. For example, in a recent Nebraska case, the owner of an architectural and engineering firm was ordered to pay the government $460,428 for violating the FFCA. Similarly, a builder was found to have committed 76 FFCA violations when it falsely certified the costs of construction of a low-income housing project.

Basically, anyone in the construction industry who presents a false claim for payment to the government can be liable under the Act. Importantly, the FFCA requires that the defendant know of its wrongdoing, as it prohibits a contractor from "knowingly" presenting a false or fraudulent claim to the government or "knowingly" making a false record or statement to get a false claim paid. However, the Act defines "knowingly" as actual knowledge, deliberate ignorance or reckless disregard. This means that, in some instances, a contractor can be subject to liability under the FFCA even if it did not actually know of the falsity of the claim submitted.

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Though it may be hard to imagine how a false claim could be unknowingly submitted, a Pennsylvania Court was recently faced with that very situation. In that case, the Court found that enough evidence existed to allow a case to go to trial where a contractor had submitted reports to the San Francisco Bay Area Transit System that overstated the amounts of money it paid to certain subcontractors. Though the contractor claimed that the report contained only "honest mistakes," the Court found that the evidence showed that the contractor knew of these mistakes or should have caught them while reviewing the reports prior to their submission.

CONTRACTORS BEWARE

The Department of Justice has had remarkable success in prosecuting claims under the FFCA. In fact, of the cases that the Department of Justice has prosecuted to resolution since the enactment of the Act, it has recovered money approximately 97 percent of the time. This alone is troubling for contractors, and when coupled with the fact that a claim under the FFCA is so easy to allege, contractors encounter treacherous ground.

Though there are many ways to be found liable under the FFCA, there are three examples which demonstrate the most prevalent of those situations.

a. False Representations in the Bidding Process

Any time a party submits a bid for a government contract, it must be mindful of

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the representations it makes as part of its submissions. If a contractor knowingly makes a false statement in submitting a bid, it could face liability under the FFCA.

In Daewoo Engineering and Constructing Co., Ltd. v. United States, Daewoo, an engineering firm and construction company, entered into a contract with the U.S. Army Corps of Engineers to build a 53-mile road around a tropical island in the North Pacific. Daewoo's initial bid was $73 million, which was below the government's original estimate for the project. Daewoo was awarded the project and work ensued. Ultimately, the government brought a claim against Daewoo alleging, in part, violations of the FFCA. Following a 13-week trial, the court found the following actions by Daewoo in submitting its bid to have been fraudulent:

- Submitting a bid identifying a specific individual, who had an excellent reputation in the construction industry and considerable experience to serve as Project Manager on the job, while knowing that the individual was unavailable to work on this project;
- Representing to the government in its bid that it would perform its own earthwork removal, yet accepting bids from subcontractors to perform those services, and failing to disclose the potential use of these subcontractors to the government;
- Representing to the government in its bid that it would work double shifts to perform the earthwork and failing to do so, causing an approximately seven-month delay to the project schedule.

b. Submissions of False Certifications for Payment

Once a party is awarded a government contract, it should check and re-check its certifications for payment. In Lamb Engineering & Construction Co. v. United States, the Department of Energy, the Western Area Power Administration ("WAPA") and Lamb Engineering & Construction Co. entered into a contract for Lamb to construct an electrical substation in Kingman, Arizona. In the course of performing the contract, Lamb submitted five progress billings to WAPA, the last four of which were supported by attached invoices from subcontractors and suppliers.

Accompanying its submission of at least four of the progress billings were certifications by Lamb that "payments to subcontractors... have been made... and timely payments will be made." The Court found that the evidence proved that, at the time Lamb submitted its last progress billing and certification, it still owed money to at least one subcontractor and at least 12 vendors on invoices it had attached to earlier progress billings.

The Court further found that Lamb's submission of certifications averring that payments to subcontractors have been, or will timely be made, to be a false statement made with the aim of securing progress payments from the government, thus violating the FFCA.

c. Submissions of False Certifications of Compliance

A party must also be sure not to submit false certifications of compliance. In Commercial Contractors, Inc. v. United States, the U.S. Army Corps of Engineers awarded a contract to Commercial Contractors, Inc. ("CCI") to construct several segments of the Telegraph Canyon Channel in Chula Vista, California, as part of a flood control project. The contract required CCI to excavate the areas in which the channel segments were to be built, to construct the channel segments, and to backfill the excavated areas surrounding the channel segments. The contract contained detailed specifications that governed all aspects of the work to be performed, including drawings indicating the lines to which CCI was required to excavate, quality control standards specifying the hardness that the poured concrete was required to achieve before the supporting forms could be removed, and other provisions specifying the proper composition and required compaction density of the backfill materials.

Ultimately, CCI asserted a claim against the government for additional costs, and the government counterclaimed against CCI, asserting violations of the FFCA and the Contract Dispute Act (CDA). The court determined that CCI violated both the FFCA and the CDA and awarded the government $14,190,161.85 in damages. The court's judgment rested on its finding that the following submissions by CCI were false or fraudulent:

- Excavating less than the contract drawings required, but submitting cross-sections and quantity surveys indicating that it had excavated up to the contract lines;
- Overstating the amount of backfill it removed from the project;
- Burying debris under and alongside the channel at the project in violation of the terms of the contract, then submitting claims for properly filling the excavated areas and for clearing the excess fill and debris;
- Moving the survey stakes set forth in the contract documents to avoid construction difficulties due to wet ground caused by the tide; and
- Improperly heating concrete test cylinders to precipitate drying time where the contract set forth specific concrete placement methods.

PENALTIES AND DAMAGES FOR VIOLATING

The FFCA authorizes the Court to impose a civil penalty between $5,000 and $11,000 for each violation. Though a single violation of the FFCA may impose a relatively modest penalty, in situations where a person is found liable for submitting 50 or 60 false claims for payments, the violator could be facing a substantial penalty.

Moreover, this penalty is in addition to any award of damages that may be granted against the violator, and the FFCA allows a person harmed by the false claim to recover triple its damages. For example, if the government incurred $50,000 in damages from a contractor's submission of falsely certified work, the contractor may be required to pay the government three times its damages or $150,000. In addition, the FFCA allows for the award of reasonable attorney fees and costs to a successful claimant.

CONCLUSION

In view of the steep penalties and damages that may be imposed for violating the FFCA, a contractor, owner, construction manager or design professional should be petrified of (and strongly deterred from) intentionally or recklessly submitting any type of false claim. In fact, it would be prudent for every company to implement a compliance system to verify that bids and claims are vetted carefully before submission to the agency overseeing the project. In that way, project participants can steer clear of the formidable danger posed by the FFCA. ■

RECENT CONSTRUCTION CONTRACT ACT AMENDMENTS IMPACT THE OWNER/DEVELOPER – CONTRACTOR RELATIONSHIP

By James J. Terry, Esq. and Kyle Hendrickson, Esq.
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On September 8, 2009, the Governor of New York signed into law new legislation amending the Construction Contracts Act (the "Act"). The amendments to the Act (the "Amendments") expand the number of contracts subject to the Act, convert many of the Act's default rules into mandatory requirements and provide for expedited arbitration if an owner does not comply. According to the New York State Legislature, these Amendments were needed to "ensure greater enforcement mechanisms are available for employees, contractors and subcontractors." Additionally, the Amendments were deemed "necessary to ensure that payments required by construction contracts are made in a timely manner." While they may ensure prompt payment to contractors, they will limit the flexibility of owners in contracting for construction, alteration or maintenance of their property.

THE PRE-AMENDENT CONSTRUCTION CONTRACTS ACT

Prior to the Amendments, the Act contained a set of default rules for construction contracts that required payment to contractors within a prescribed period of time. The Act applied to contracts for the "construction, reconstruction, alteration, maintenance, moving or demolition of any building, structure or improvement" except for public buildings or structures, "where the aggregate cost of the construction project including all labor, services, materials and equipment to be furnished, equals or exceeds" $250,000. However, the Act did not apply to individual one-, two- or three-family homes, residential tract developments of 150 or fewer one- or two-family homes, residential projects where the aggregate size of the project was 9,000 s.f. or less, public housing projects of fewer than 150 units or projects related to the reconstruction of the World Trade Center.

If a project was subject to its provisions, the original Act created a set of default rules entitling contractors to submit invoices on a monthly basis, at which time an owner was generally required to approve or disapprove the invoice within 12 business days. If approved, the owner was then required to pay the contractor within 30 days.

Regardless of whether the default rules of the Act applied or the parties had agreed to different terms for payment, aggrieved contractors had certain remedies under the original Act that could not be changed by agreement. First, if payment was delayed beyond the established time period, the contractor was entitled to interest on the unpaid balance at the rate of one percent per month (well above the legal rate of nine percent per year statutorily applicable to most contracts in New York). Second, if an owner failed to approve or pay undisputed invoices, the contractor was entitled to suspend performance after providing the owner with written notice and an opportunity to cure.

2009 AMENDMENTS TO THE CONSTRUCTION CONTRACTS ACT

Although the Amendments do not fundamentally alter the rules for payment set forth in the original Act, they convert many default rules into mandatory requirements, expand the reach of the Act and provide for arbitration as a remedy for non-payment.

The Amendments expand the number of projects subject to this statute. First, the cost threshold for contracts for construction, alteration or maintenance of structures to which the Act will apply is reduced from $250,000 to $150,000. Second, the threshold number of one- or two-family dwellings in a residential tract development is reduced from 150 to 100. Third, the size threshold for residential construction projects is reduced from 9,000 s.f. to 4,500 s.f. or less. Fourth, the threshold number of residential units receiving financial assistance from the government is reduced from 150 to 75 units.

The Amendments also convert the default rules regarding payment into mandatory requirements and provide that any contractual provision establishing payment terms which differ from those established in the Act are "void and unenforceable." Accordingly, all contracts to which the Act applies must now provide for payments on the terms set forth in the Act.

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Kyle Hendrickson, Esq.

Generally, the Amendments only prohibit contractual provisions that depart from the Act's payment provisions. Thus, although owners may not negotiate for an extension of time in which to pay contractors after approval of an invoice, owners may negotiate for an extension of the time to approve or disapprove an invoice.

The Amendments also create an additional remedy for contractors for non-payment beyond the interest payment and work suspension remedies contained in the original Act. The Amendments provide for expedited arbitration and describe the procedures to be followed. Specifically, upon service of written notice that a violation of the Act has occurred, the parties are to attempt to resolve the matter between themselves. If unable to do so, 15 days following delivery of the written notice, "the aggrieved party may refer the matter… to the American Arbitration Association for an expedited arbitration." As with the payment provisions, the Act expressly provides that any contractual provision making this expedited arbitration unavailable to any party is "void and unenforceable."

CONCLUSION

In short, the Amendments to the Act have significantly limited the latitude of owners entering into certain construction contracts to negotiate the terms of payment to contractors. While latitude still exists to negotiate for additional time to approve payment applications, owners must be cognizant of the limitations imposed by the Act or they will be caught off guard by the potentially powerful remedy newly granted to contractors to compel compliance through an expedited arbitration procedure. ■

HALCROW CONTINUED FROM PG. 3

in procurement and evaluation of unsolicited proposals with sophisticated new mechanisms.

Ultimately, the situation is driven by need. With funds for infrastructure development falling short, Della Rocca predicts P3s will become more common simply out of economic necessity. As the economy continues to struggle, infrastructure as a necessary means to drive the economy becomes more evident, and Della Rocca predicts that need will bring government agencies around to consider alternative funding options.

HIGH-SPEED RAIL

"When the President, without any foreshadowing, put into his stimulus package $8 billion to move the high-speed rail program forward in the United States, we were really energized," Della Rocca says. "When you look at the 11 corridors that have been designated for a potential high-speed rail investment in the United States, we see that as a real growth opportunity for our firm but also for the industry at large."

Halcrow's own success with public transportation overseas gives it a unique advantage as U.S. demand for mass transit improvements increases. Again, Della Rocca points to the success of high speed rail in overseas projects, "Most recently, we completed the Channel Tunnel Rail Link in the U.K. It was completed on time, it was completed under budget, and it is the type of high-speed rail technology solution that really advances the state of the art in the industry."

SUSTAINABLE BUILDING

Throughout the recession, green and energy efficiency initiatives will result in demand for new sustainable structures, or existing structures will be retrofitted to meet the demands of an economy that can no longer afford massive waste.

Even as the economic crunch is forcing budget cuts, the demand for efficiency and sustainability continues to attract business. This means a higher demand for green buildings and a greater investment in alternative energy, says Della Rocca.

Tenants are now more concerned than ever with LEED-certified buildings, a real marketplace consideration that, as Della Rocca says, is "not just a socially responsible thing to do anymore." The demand for green building specifications drives a need for energy audits, retrofits for improving the mechanical/electrical systems and façade replacements that improve operating costs. With the capital to build new commercial towers under constraint, retrofits are often the best way for owners and developers to offer a competitive product and compete for tenants.

Technological innovations are driving the market. Alternative energy systems and high efficiency projects are quantified by carbon footprinting, which allows tenants and developers to analyze the effectiveness of green policies. Advanced software makes green construction easier than ever before as services and design elements can be evaluated immediately under industry-standard criteria. The growing demand for green building, paired with the operational savings benefits means a growing marketplace in both public and private projects. ■

London-based Halcrow is an independent, global consulting firm specializing in planning, design and management services for infrastructure development, working through a hundred companies worldwide in transportation, maritime, buildings and facilities, water and waste water, as well as management consulting.

Halcrow's global presence has yielded cutting-edge experience in public-private partnerships as well as sustainable design, both of which are relatively fledgling industries in the United States. Della Rocca is hoping to change that, and to grow the North American branch of Halcrow from the current 600 employees to over 3,000 within the next decade.

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2010 Volume 16 Number 1

Review Publication from
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