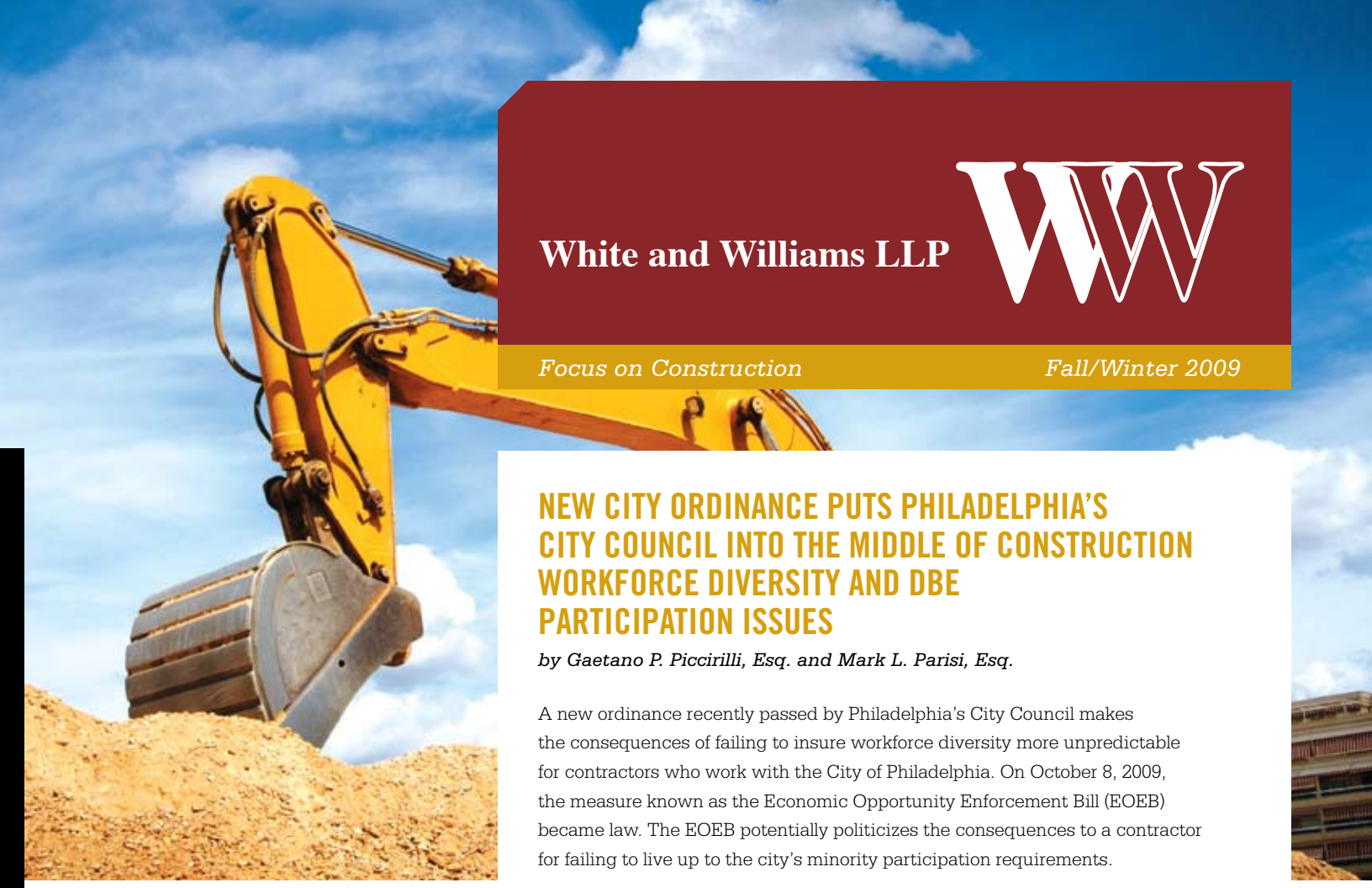

White and Williams LLP

Focus on Construction *Fall/Winter 2009*

NEW CITY ORDINANCE PUTS PHILADELPHIA'S CITY COUNCIL INTO THE MIDDLE OF CONSTRUCTION WORKFORCE DIVERSITY AND DBE PARTICIPATION ISSUES

by Gaetano P. Piccirilli, Esq. and Mark L. Parisi, Esq.

A new ordinance recently passed by Philadelphia's City Council makes the consequences of failing to insure workforce diversity more unpredictable for contractors who work with the City of Philadelphia. On October 8, 2009, the measure known as the Economic Opportunity Enforcement Bill (EOEB) became law. The EOEB potentially politicizes the consequences to a contractor for failing to live up to the city's minority participation requirements.

As many contractors are aware, bidders on Philadelphia city projects are required to include in their bid certain percentages of participation from disadvantaged businesses, including minority-owned, women-owned and disability-owed business enterprises (generally known as DBEs). The law requires contractors to use their "good and best faith efforts" to comply with applicable DBE participation goals.

Presently, contractors who submit sealed bids for city public works projects, where the cost of the project is expected to exceed $1 million,[1] must develop and agree to abide by the terms of an Economic Opportunity Plan (EOP),[2] otherwise, the bid is deemed "not responsible" and, thus, not eligible for contract award.[3] Generally, an EOP[4] is intended to spell out the specific steps to be taken by the contractor to satisfy its DBE participation requirements.

Where a contractor fails to comply with an EOP,[5] the City can assess certain penalties,[6] including withholding contract payments, terminating the contract, recovering liquidated damages, and suspending the contractor (debarment) from bidding or participating in city projects for up to three years. Prior to the passage of this new city ordinance, monitoring of a contractor's compliance with an EOP rested entirely with the city Procurement Department, with no involvement whatsoever by City Council. While the new law does not increase the penalties for failing to comply with EOP requirements, it fundamentally alters the process for possible debarment. The EOEB now allows City Council[7] to make a preliminary determination, after a public hearing, that there are "reasonable grounds to believe" that a contractor has failed to comply with EOP requirements. After such a determination by City Council, the City Finance Director is then required to provide notice and a hearing as to whether the contractor can demonstrate its "best and good faith efforts" to comply with the EOP and, if not, whether debarment is an appropriate remedy.

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IN THIS ISSUE...

COURT WATCH

JERROLD P. ANDERS,
Partner, Philadelphia Office

Recently, Jerry Anders, Co-Chair of the Construction Practices Group, successfully concluded a construction accident case in which a worker plunged to his death while building a highway bridge. Construction accidents or construction defect cases require a multi-disciplinary approach relating to contracts, indemnity, safety and OSHA regulations as well as a thorough understanding of the liabilities and defense based upon contract, warranty and strict liability. The Construction Practices Group and Mr. Anders used this approach to convince the Dauphin County Court of Common Pleas that an internationally known client had no responsibility for the fatal accident. As a result, the client was dismissed from the case upon motion, and ultimately experienced substantial savings as the case continued against other defendants with similar exposure. Mr. Anders was assisted in this matter by **Eileen Monaghan,** an associate in the Construction Practices Group.

Mr. Anders can be contacted at 215.864.7003 or andersj@whiteandwilliams.com.

WILLIAM J. TAYLOR,
Partner, Philadelphia Office

During the past several months, Bill Taylor, Co-Chair of the Construction Practices Group, successfully litigated several mechanics lien claims on behalf of a number of subcontractor clients from around the country in the Commerce Court Division of the Philadelphia County Court of Common Pleas against the owner/operator of a newly constructed high-end restaurant in Philadelphia. After filing complaints to enforce the mechanics liens, Mr. Taylor was able to obtain settlements in excess of $800,000 for the firm's construction company clients for their unpaid work and other claims. Mr. Taylor was assisted in this matter by **Gaetano Piccirilli,** an associate in the Construction Practices Group.

Mr. Taylor can be contacted at 215.864.6305 or taylorw@whiteandwilliams.com.

NEW CITY ORDINANCE CONTINUED...

The EOEB does not change a contractor's requirements in relation to the project EOP. Rather, it now allows for the city's legislative branch, Philadelphia City Council, to act in cases where the city's executive branch, specifically the city Procurement Commissioner and/or the Office of Economic Opportunity, chooses not to. The legislation sets up a situation where a contractor no longer has to satisfy the demands and requirements of the city contracting agency, but also the demands and requirements of City Council members who may have differing interests and ideas as to the issue of DBE participation. The new legislation is not clear on how these matters would be brought to Council's attention, thus, one must assume it would be through the introduction of a bill or resolution — a standard political mechanism — by one of the 17 members of City Council.

The new legislation essentially takes the issue of contract compliance with respect to a project's EOP outside the administrative process and throws it directly into the political process. Moreover, while the city's executive branch traditionally has expertise in the field of public contracting necessary to make initial debarment determinations, the EOEB apparently assumes that City Council has the necessary expertise in public works to make preliminary determinations as to the need for a debarment hearing. Unfortunately, while council members may be experts in passing local laws and constituent service, City Council is not the city's building agency and may not have the necessary expertise to handle this issue.

The initial debarment process laid out by the EOEB is also significantly different than what a public contractor experiences on the state level. For example, under the Commonwealth Procurement Code, only the Department of General Services or the Department of Transportation, in consultation with the particular contracting entity (*i.e.*, the Departments of Corrections, Education, etc.) can bring debarment proceedings against a contractor.[8] By contrast, the Pennsylvania state legislature certainly is not empowered to do so.

Contractors facing possible debarment before the Philadelphia Procurement Commissioner or the Philadelphia OEO have always been better served when accompanied by counsel. Now that Philadelphia City Council is also empowered to initiate and pursue debarment proceedings, counsel will be even more important to assure that the contractor is afforded proper due process as opposed to becoming a political casualty.

The attorneys of the Construction Practices Group at White and Williams LLP can help area contractors before, during and after a bid. We can help with the pre-qualification process, review of bids for conformity to avoid bid defects, bid protests and review of contracts and subcontracts for all types of public and private jobs. In addition, we can assist in becoming DBE certified and in debarment proceedings.

For more information, please contact Gaetano Piccirilli (215.864.6288; piccirillig@whiteandwilliams.com) or Mark Parisi (215.864.7180; parisim@whiteandwilliams.com).

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1. *This new ordinance applies equally to participants, including contractors, in City Development Projects in excess of $50 million, where city or city agency funds account for at least 10 percent of the funding source.*
2. *See Philadelphia Code, Title 17, § 1602(2).*
3. *Subject to certain exceptions found in the City Code at § 17-1602(3).*
4. *Prototype EOPs are developed by the Philadelphia Office of Economic Opportunity, the Philadelphia Procurement Department and the applicable contracting agency, are set forth in the bid specifications, and are intended to be uniform in content and structure for all contracts. Id. at 1603(2)(a).*
5. *Id. at § 17-605.*
6. *Id. at § 17-606.*
7. *The new ordinance also includes a proposed change to the City's Home Rule Charter that would allow City Council to conduct such hearings.*
8. *Section 531 of the Commonwealth Procurement Code expressly spells out the Commonwealth's debarment process and it allows the head of a purchasing agency, i.e. DGS or DOT, have the authority to debar a "person from consideration for the award of contracts." 62 Pa. Cons. Stat. Ann. § 531.*

NEW AMENDMENTS TO THE PENNSYLVANIA MECHANIC'S LIEN LAW CLARIFY WHEN A WAIVER OF LIENS IS PERMISSIBLE

by William J. Taylor, Esq. and Gaetano P. Piccirilli, Esq.

Most owners, contractors and subcontractors understand that the 2007 amendments to the Pennsylvania Mechanic's Lien Law (the Lien Law) sought to severely limit the permitted use of pre-construction and pre-payment waiver of lien rights, on the grounds that such waivers were against public policy.[1] Per the present Lien Law, it is only when work is performed on a "residential building" with a total contract price of less than $1 million that a contractor can, by contract, lawfully waive the right to file a mechanic's lien.[2] However, there has been confusion regarding when a contractor or subcontractor may legally waive its mechanic's lien rights, with most of the confusion centering around the definition of "residential building." New amendments to the Lien Law now seek to clarify when a contractor may legally waive its lien rights by redefining the term "residential building."

Under the 2007 amendment to the Lien Law, "residential building" was defined as "property on which there is a residential building, or which is zoned or otherwise approved for residential development, planned development or agricultural use, or for which a residential subdivision plan or planned residential development plan has received preliminary, tentative or final approval…"[3] This definition did not provide much clarity as to what constitutes a "residential building," and there has been much confusion and debate as to whether large-scale projects, including apartment buildings, condominium developments, and mixed residential-commercial development projects, would be considered "residential buildings" so that waivers of liens could be validly executed and filed.

The 2009 amendments to the Lien Law seek to clarify when contractors or subcontractors may legally waive their mechanic's lien rights, by revising the wording and definition of "residential building." The amended law now refers to "residential property," not "residential building," and clarifies and restricts the definition of "residential property" as "property on which there is or will be constructed a residential building not more than three stories in height, not including any basement level…"[4] This new, more qualified definition of "residential property" reflects the legislative intent that the permissible waiver of contractor's and subcontractor's mechanic's lien rights is limited primarily to contracts for the construction of single-family homes and developments.

By qualifying that a residential building is one that is not greater than three stories in height (not including a basement), the amendments drastically limit the types of property that might be deemed "residential property." Under the amended statute, large residential development projects, apartment and condominium complexes and mixed residential/commercial development projects are now clearly outside the purview of a permissible waiver of liens.

The 2009 amendments to the Lien Law took effect on October 12, 2009. With the passage of these amendments, the validity of a waiver of liens is no longer a gray area. Now, owners and contractors know that a waiver of liens is only valid on projects for residential property, meaning single-family homes or projects not exceeding three stories in height, and with a total contract price of less than $1 million.[5]

For more information regarding these new amendments to the Pennsylvania Mechanic's Lien Law, please contact Bill Taylor (215.864.6305; taylorw@whiteandwilliams.com) or Gaetano Piccirilli (215.864.6288; piccirillig@whiteandwilliams.com).

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1. *See 49 P.S. § 1401(b).*
2. *See 49 P.S. § 1401(a), which allows contractors and subcontractors to waive their mechanic's lien rights in regard to a contract for a residential building with a price of less than $1 million.*
3. *See 49 P.S. § 1201(14)*
4. *The full definition of "residential property" in the revised statute is as follows: "Residential property" means property on which there is or will be constructed a residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is at grade level, or which is zoned or otherwise approved for residential development on which there is or will be constructed a residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is at grade level, planned residential development or agricultural use, or for which a residential subdivision or land development plan or planned residential development plan has received preliminary, tentative or final approval on which there is or will constructed a residential building not more than three stories in height, not including any basement level, regardless of whether any portion of that basement is at grade level, pursuant to the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code." 49 P.S. § 1201(14).*
5. *A subcontractor may still validly waive its mechanic's lien rights on any project if the contractor has posted a bond guaranteeing payment for labor and materials provided by the subcontractor. See 49 P.S. §§ 1401(a)(2)(ii) and 1401(b)(2).*

PENNSYLVANIA SUPREME COURT AFFIRMS THAT A RELEASE OF THE PRINCIPAL ALSO RELEASES THE SURETY

by William J. Taylor, Esq. and Eileen E. Monaghan, Esq.

The Pennsylvania Supreme Court has offered assurance to sureties in regard to the effect of a release of their principal. In its decision, *Kiski Area School District v. Mid-State Surety Corporation,* 600 Pa. 444, 967 A.2d 368 (2008), the Court reaffirmed the longstanding principle in Pennsylvania that the release of a principal also releases its surety.

This case arose from an alleged failure to satisfactorily complete a construction contract. The Kiski Area School District contracted with Lanmark, Inc. to perform construction and renovation services for the Allegheny-Hyde Park Elementary School in Allegheny Township, Westmoreland County, Pennsylvania. Mid-State provided a performance bond for the project, naming Lanmark as the principal and the school district as the obligee.

In the event of a delay in completing the work, the contract between the school district and Lanmark required Lanmark to pay the school district liquidated damages. In the event of a default by Lanmark, Mid-State's bond provided that Mid-State would assume responsibility to complete Lanmark's work, and would be entitled to be paid any remaining contract balance owed by the school district.

The school district ultimately became dissatisfied with Lanmark's work, declared Lanmark to be in default, withheld final payment, and demanded that Mid-State assume responsibility for the remaining work. However, the school district never paid Mid-State the remaining contract balance.

Two lawsuits arose from this dispute. Lanmark first sued the school district for payment of the outstanding contract balance. The school district then filed a separate suit against Lanmark. Mid-State was named a party to both cases, having been joined as an additional defendant in the first matter and sued as an original defendant in the second.

The school district and Lanmark reached a settlement agreement in the first matter, which they placed on the record at a hearing before a judge. The terms of the agreement provided that the school district would pay Lanmark $430,000, and the parties would release each other "for any and all claims that Lanmark and/or the Kiski Area School District has, have had, or may in the future have against each other, known or unknown, arising out of or relating to the construction contract dated February 27th, 1997, regarding the Allegheny/Hyde elementary school…" In the negotiations leading up to the settlement agreement, neither party mentioned Mid-State.

After the settlement hearing, Lanmark and Mid-State requested that the release include language that provided that the school district also released its claims against Mid-State. The school district refused to include this language in the release, arguing that it had reserved its rights against Mid-State. The parties could not agree on language pertaining to Mid-State, and the school district and Lanmark ultimately executed a release that mirrored the release placed on the record at the settlement hearing. The release did not mention any release of, or reservation of rights against, Mid-State. In fact, the release mentioned nothing at all about Mid-State.

Following the execution of the release, Mid-State filed a motion for summary judgment in the second action, arguing that the release had discharged Mid-State and that the school district's final payment to Lanmark barred any claim on the bond. The trial court agreed and granted Mid-State's motion. On appeal, however, the Superior Court reversed, and held that summary judgment was improper because a reservation of rights could be inferred by the school district's statements that it would not release Mid-State. The Pennsylvania Supreme Court grante the surety's petition for allowance of appeal.

To determine whether the release of Lanmark released Mid-State, the Supreme Court first examined the nature of the surety relationship. At the heart of a surety relationship is the guarantee that if a principal, like Lanmark, defaults on a contract, then the obligee, like the school district, is entitled to performance by the principal's surety. In other words, the surety stands in the shoes of the principal. Pennsylvania courts have long recognized this principle. Pennsylvania courts have also recognized that the existence of a surety relationship does not entitle an obligee to more than one full performance, and that an obligee cannot demand performance by the surety if the principal has fully performed.

In the *Kiski* case, however, the Court was faced with an alleged partial performance of a contract by the principal. The Court recognized that where a principal only partially performs on a contract, the obligee may release the principal from its remaining performance. Generally, such a release of the principal also releases the surety, however, the Court recognized two exceptions to this rule: 1) where a surety consents to its own on-going liability, despite the release of its principal; or 2) where the obligee expressly reserves its rights against the surety.

The Court found neither exception to be present in the *Kiski* case. It was undisputed that Mid-State had not consented to its on-going liability. Moreover, it was clear that the release executed by the school district and Lanmark made no mention of any reservation of rights against Mid-State. The Court held, based on its prior opinion in *Keystone Bank v. Flooring Specialists, Inc.*, 513 Pa. 103, 518 A.2d 1179 (1986), that any reservation of rights against a surety on a performance bond must be clearly and expressly stated in the language of the release of the principal.

In affirming the "bright-line rule" of *Keystone Bank,* the Supreme Court rejected arguments advanced by the school district that the court should employ a "totality of the circumstances" analysis, and consider evidence beyond the language of the release itself, to determine whether the principal's release was intended to also discharge the surety. The school district's argument was based on §39(b)(ii) of the *Restatement (Third) of Suretyship & Guaranty* (1996), which suggests that a reservation of rights may be inferred from the "language or *circumstances* of the release" (emphasis added). The Court reasoned that this was not a situation where the release contained an ambiguous term that needed to be clarified through an examination of extrinsic evidence, and that instead the "bright-line rule" would apply. Moreover, the Court noted that §39(c) of the *Restatement* makes clear that there can be no reservation of rights against the surety in certain circumstances, and that specifically in §39(c)(iii) the *Restatement* states that there can be no reservation where the owner releases the contractor from performance. In such a circumstance, regardless of any attempt to reserve rights, the surety is discharged. The Court held that §39(c)(iii) applied squarely to the facts of the case.

The Court also found compelling the fact that the school district essentially paid Lanmark the remaining amount due on the contract and agreed that Lanmark would have no continuing obligations under the contract. It emphasized that the school district was entitled only to a single performance, by either Lanmark or Mid-State. Moreover, because Mid-State, as surety, stood in the shoes of Lanmark, as principal, it had no greater obligation to the school district than Lanmark.

Ultimately, the Court held that the school district's complete release of any future performance by Lanmark fully discharged Mid-State from any obligation under its bond. This decision is a stark reminder to obligees to include clear and explicit language in a release of a principal if they wish to reserve their rights against the surety. It also offers reassurance to sureties that they continue to stand in the shoes of their principals, and that they can be discharged, as a matter of law, if their principal is released under certain circumstances, regardless of the intent of the obligee.

For more information, please contact Bill Taylor (215.864.6305; taylorw@whiteandwilliams.com) or Eileen Monaghan (215.864.6263; monaghane@whiteandwilliams.com).

CONSTRUCTION COURT CASES

by Jerrold P. Anders, Esq. and Eileen E. Monaghan, Esq.

BELOW PLEASE FIND OUR DISCUSSION OF RECENT CONSTRUCTION CASES FROM THE STATE AND FEDERAL COURTS OF PENNSYLVANIA, NEW JERSEY AND DELAWARE.

* The Pennsylvania Supreme Court's recent holding in *Philomeno & Salamone v. Board of Supervisors of Upper Merion Township and Upper Merion Township,* 600 Pa. 407, 966 A.2d 1109 (Pa. 2009), cautions Boards of Supervisors against waiting more than 90 days to decide initial subdivision applications. In *Philomeno,* the Court held that Section 508 of the Pennsylvania Municipalities Planning Code (MPC), which requires action on an application within 90 days of the next meeting of its governing body, deemed approved an initial subdivision plan despite the subsequent filing of a conditional use application. While a revision of a land use application may extend the 90-day period, this particular conditional use application dealt with zoning issues and was therefore clearly not intended to revise the original subdivision application which addressed land use. Where an original subdivision application is not withdrawn and a subsequent conditional use application is not a revision, the original application will be deemed approved if a board fails to act on it within 90 days.

* Subcontractors who relinquish possession and control of an accident site prior to an accident were recently offered some comfort by the decision of the Beaver County Court of Common Pleas in *Stewart v. O.C. Cluss Lumber Company, Inc., et al.,* 2009 WL 1848432, 7 Pa. D. & C. 5th 369 (Pa. Com. Pl. 2009). The court concluded that a subcontractor who contracted to perform framing work was not liable after another subcontractor's employee fell from an unprotected second floor balcony. The subcontractor was not responsible because: (1) it had not contracted to erect temporary railings, and (2) it had relinquished possession and control of the unit two months prior to the incident, and other subcontractors were in control of the premises between the time when defendant completed its work and when the accident occurred. *Stewart* emphasizes the importance that possession and control of a work site play in a court's determination of liability for a construction site accident.

* Faulty workmanship and failure to comply with contracts are not "accidents" which will trigger coverage under a comprehensive general liability policy (CGL). In *Specialty Surfaces International, Inc., et al. v. Continental Casualty Co.,* 2009 WL 1457701 (E.D.Pa. 2009), plaintiffs sought defense coverage under a CGL policy after they were sued because drainage systems in synthetic playing fields they manufactured allegedly failed and rendered fields unusable. The policy at issue provided coverage only when a suit was brought for property damage that resulted from an occurrence, and defined occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." Applying Pennsylvania law, the Eastern District concluded that plaintiffs were not entitled to defense or indemnification under the CGL because all of the claims were based on allegations of faulty workmanship and failure to comply with contract documents, which were not accidents.

* A defendant may not be able to force a plaintiff to arbitrate a claim when all parties to the litigation are not parties to the arbitration clause. At least so held the Bucks County Court of Common Pleas in *Wojno v. Ameriprise Financial Services, Inc., et al.,* No. 08-06813-26-2 (February 25, 2009). In *Wojno,* plaintiffs contracted with Ameriprise to provide debt management advice. When they ultimately secured a different loan than what was originally represented to them, plaintiffs sued Ameriprise and various other defendants. Ameriprise argued that the matter should be arbitrated because its agreement with plaintiffs contained an arbitration provision. The Court of Common Pleas disagreed and concluded that the enforcement of arbitration provisions when the underlying dispute includes parties who were not involved in the arbitration agreement frustrates the objectives of alternative dispute resolution.

* Injunctive relief against both developers and municipalities may be granted when storm water drainage systems fail to effectively curb run-off water. In *Medallis v. Northeast Land Development,* 2009 WL 2952807, 8 Pa. D. & C. 5th 411 (Pa. Com. Pl. 2008), the Lackawanna Court of Common Pleas concluded just that when faced with complaints by plaintiffs that the construction of a development was causing flooding to their property. Plaintiffs filed suit against the landowners/developers of the Village at Tripp Park and the City of Scranton after they experienced flooding problems upon commencement of construction. The court concluded that the subdivision and development of the Village directly or indirectly altered the natural flow of surface waters in the course of construction activities. It then enjoined the landowners and developers from any further development of the Village until the storm water issues were corrected. It also determined that the City was not entitled to immunity from injunctive action, and enjoined the City from issuing any further subdivision and/or lot development permits for the continued development of the Village until the effectiveness of the storm water drainage system was verified.

* Plaintiffs cannot establish a promissory estoppel claim simply by showing that they relied on a lapsed permit when they purchased land. When the plaintiffs in Peluso v. Kistner, 970 A.2d 530 (Pa. Cmwlth. Ct. 2009) purchased a lot in Bloomsburg, Pa., they believed that they could install an individual sewer system on the property based on a lapsed permit originally issued in 1995. When plaintiffs were unable to secure a sewage permit and suffered a loss in the value of the lot, they sued the township. The Commonwealth Court concluded that a lapsed permit cannot be construed as a promise by the township that a permit will be reissued, and that plaintiffs could not prove their promissory estoppel claim since there was no contract-like promise.

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A REFRESHER ON PENNSYLVANIA SALES AND USE TAX IN CONTRACTING ARRANGEMENTS

by Kevin S. Koscil, Esq. and William C. Hussey II, Esq.

As state and local governments look to close ever-widening budget gaps in the current economic climate, sales and use tax increases appear to be a favorite weapon in government tool chests. Thus, it is an opportune time to review the current state of such obligations under Pennsylvania law in preparation for any potential increases in those taxes.

Pennsylvania (and Philadelphia) sales and use taxes are imposed on each separate sale at retail of tangible personal property or services. A "sale at retail" is usually any transfer of property for use by the purchaser (other than a so-called "sale for resale"). In other words, only the end-user of the taxable property or service is taxed. The sales tax is typically collected by the vendor (as a mere collection agent) from the purchaser (as the tax-liable party). If the vendor does not have sufficient nexus with Pennsylvania to require it to collect and turn over the sales tax to the state, then the purchaser is nevertheless liable for use tax on such purchases, and must self-report and remit the tax due to the taxing authority.

Generally, a construction contractor will pay sales or use tax on the purchase price of all tangible personal property, which it furnishes and installs in the performance of its construction contract, whether or not the items are transferred.

Under this tax scheme, contractors must pay tax on all tools, equipment and supplies used in performing contract services, including materials, equipment, components, and supplies furnished and installed in the performance of a construction contract.

However, the purchase of so-called "building machinery and equipment" will be exempt from tax when a construction contractor buys such items pursuant to a construction contract entered into with a government agency or purely public charity after June 30, 1998. In this situation, the contractor will issue an exemption certificate to its supplier, allowing the contractor to purchase the goods without paying sales tax up front. Likewise, a contractor may claim exemption on the purchase of property pursuant to a construction contract with a qualifying business, landowner, or lessee located within a Keystone Opportunity Zone. The contractor should procure the appropriate exemption certificate from its customer in these situations.

Sales of machinery, equipment, parts and supplies to be used or consumed directly in manufacturing or certain other "producing" activities are excluded from tax. This exclusion is available in the context of a construction contract only for directly-used machinery, equipment and parts and foundations that become affixed to the realty. A contractor relying on this exclusion must have an exemption certificate (from the customer) and a special certification of use.

On the collection side, all persons maintaining a business in Pennsylvania must collect sales tax on taxable transactions and remit the tax to the Commonwealth. Additionally, every person required to pay tax to the department or collect and remit tax to the department must file sales and use tax returns with the department either monthly, quarterly or semiannually depending on previous levels of tax liability. They must also maintain certain records, as required by department regulations, for at least three years from the year to which they relate.

In the absence of an exemption certificate or direct payment permit from the purchaser, a vendor has a duty to collect and remit the tax and is personally liable for failure to collect the proper amount. Nevertheless, the purchaser is ultimately the tax-liable party — vendors are not permitted to absorb or fail to collect the tax. Therefore, the ultimate burden of an increase in the sales tax rate would fall on the purchaser in a taxable transaction. By way of example, absent a specific provision in a supply contract, a purchaser

would normally bear the risk of an increase in the sales tax rate. Just as a customer in an electronics store is liable for sales tax at whatever rate is set by the statute in effect at the time of a sale, contractors that are the tax-liable party in a supply contract bear the same burden of a sales tax increase absent a contrary provision in the contract. In any case, such contracts should be drafted to include a provision allocating the Pennsylvania sales and use tax burden to the appropriate party.

Although seemingly straight forward in most contexts, complex issues often arise regarding sales and use tax obligations, including construction and other contractual obligations between sellers and buyers of tangible personal property and taxable services. Accordingly, it is advisable that potential parties to a transaction identify and resolve these tax issues prior to reporting and accounting for such sales or other transfers to the Commonwealth of Pennsylvania.

If you would like to discuss how any of these sales and use tax provisions, or any proposed changes to such laws, may affect your business or tax planning, or have any other tax or estate planning questions, please contact Kevin Koscil (215.864.6827; koscilk@whiteandwilliams.com) or Bill Hussey (215.864.6257; husseyw@whiteandwilliams.com).

Kevin Koscil and Bill Hussey practice in the Business Department from our Philadelphia office where they focus on taxation and estate planning issues.

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CONSTRUCTION COURT CASES CONTINUED...

* The benefits of the New Jersey Construction Lien Law (CLL) may still inure to contractors who do not strictly comply with its procedural requirements for arbitration demands. In Schadrack v. K.P. Burke Builder, LLC, 407 N.J. Super. 153, 970 A.2d 368 (N.J. Super. App. Div. 2009), a contractor and subcontractor sought to protect their interests under the CLL when they were not paid for residential work they performed. The CLL provides that a contractor or subcontractor is entitled to a lien for the value of services performed. The contractor filed a Notice of Unpaid Balance and Right to File Lien, but did not file the required demand for arbitration. Plaintiffs claimed that the subcontractor's actions were also procedurally deficient because it did not accompany its demand for arbitration with supporting documentation and it identified "K.P. Burke" and not "K.P. Burke Builder, LLC." Despite these deficiencies, the court concluded that arbitrators rightly decided that both the contractor and subcontractor were entitled to file lien claims.

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