Legal Counsel for the Design Professional
Winter 2020 E Newsletter

Legal Counsel for the Design Professional addresses current legal developments affecting architects, engineers, design professionals and related trades in the construction industry. Since its founding in 1981, LBC&C has been serving the design profession and has been a recognized leader in the field of architects' and engineers' professional liability defense. As a full service law firm, LBC&C provides legal counseling, as well as litigation services, on matters affecting its clients from business issues to employment and labor practices.

The MTA Debarment Statute Can Lead to Dire Consequences to Contractors and Design Professionals.

Douglas Halstrom, Partner in the Design Professionals Group, cautions contractors and design professionals to be thorough in their evaluation of the particular program on which they are bidding and to take extra steps to coordinate the timely completion of MTA projects or face dire consequences and stiff penalties.

The Time is Now for New York State to Enact a Meaningful Statute of Repose to Provide Local Design Professionals with Protection on Par with that Afforded by Other States.

New York is one of only two states which has yet to ratify a true statute of repose. Keith Stevens, Partner in the Design Professionals Group, addresses the ramifications of this to design professionals.

Will Wearable Technology Transform the Construction Site?

Daniel McFaul, Partner in the Design Professionals Group, describes how embracing wearable technology could help to limit potential exposure by improving productivity and preserve valuable evidence in the event of an injury.

The MTA Debarment Statue Can Lead to Dire Consequences to Contractors and Design Professionals

01.06.20 | BY DOUGLAS R. HALSTROM

On November 25, 2019, the Alliance for Fair and Equitable Contracting Today, Inc. ("AFFECT") filed lawsuits in the New York state and federal courts against the Metropolitan Transportation Authority ("MTA") seeking relief from the MTA's new debarment regulations established earlier this year. AFFECT is a coalition that includes ACEC New York, The Associated General Contractors, New York State, The General Contractor's Association of New York, The New York Building Congress and the Building Trades Employer's Association.

The new MTA debarment statute implemented regulations to mandate a five year period of debarment if (1) a contractor fails to achieve substantial completion of their contractual obligations "within the time set forth in the contract, or in any subsequent change order, by more than 10% of the contract term" or (2) a contractor claims entitlement to additional costs later deemed to be invalid by 10% or more of the total adjusted contract price "pursuant by the contractual dispute resolution process". For purposes of this regulation, the term "contractor" includes anyone entering into a contract with the MTA, including design professionals.

To make matters worse, the new MTA regulations permit the MTA to debar not only the contractor, but its parents, subsidiaries and affiliates, and the contractor's directors, officers, principals, managerial employees and any person or entity with a 10% or more interest in the contract, as well as any joint venture and members of a joint venture that include the contractor or the contractor's parents. The new regulations are alleged to be unconstitutional, as set forth in AFFECT's federal court Complaint, and are alleged to be unlawful, arbitrary and capricious under the State Administrative Procedure Act and violative of State Separation of Powers principles in the state court Complaint. While these new regulations may be founded over legitimate concerns relating to the need to confine contracting to qualified contractors, they also appear to punish qualified entities innocently caught in the web of potentially overreaching regulations. In a New York Law Journal article about the lawsuit published on November 26, 2019, a representative for Governor Cuomo was quoted as stating that "the law is designed to make sure that projects happen on time and on budget and that the taxpayers aren't getting ripped off."

Despite the litigation over the constitutional and statutorial legitimacy of this new regulation, the new debarment rules are currently in place and will apply for the time being, which means that all contractors and design professionals currently under contract with the MTA will be subject to the new regulation, as will future entities contracting with the MTA, for the foreseeable future. So what does this mean? This means that finishing projects on time and within budget are even more important now than they were before because this new regulation imposes stiff penalties on those contractors and design professionals who fail to do so, namely a five year debarment from being able bid on future MTA work. All entities doing business or hoping to do

The MTA Debarment Statue Can Lead to Dire Consequences to Contractors and Design Professionals *(cont'd)*

business with the MTA will need to pay closer attention to providing timely work product at a cost at or very near the contract price. This means taking all the appropriate steps to assure the proper coordination of project teams in order to deliver work on time and within the contract price.

Moreover, while delays are certainly a major focal point of this new regulation, cost is also a major consideration. This means that change orders will be more closely scrutinized insofar as excessive change orders under the meaning of this statute can also lead to debarment if "one or more of such claims are determined to be invalid under the contract's dispute resolution process . . . . and together the sum of any such invalid claims exceeds by 10% or more the total adjusted contract value." As a result, extra care is required on the part of the design professional to make sure that contract documents address all aspects of the project requirements and that those performing the work assure themselves that they understand the entire scope of the contract documents on which they are bidding so as to reduce the potential for excessive extra-contractual claims.

The consequences under this new regulation are dire and may very well not withstand the challenges posed by AFFECT's litigation currently pending in both the New York state and federal courts. In the meantime, contractors and design professionals working on MTA projects must be thorough in their evaluation of the particular program on which they are bidding and must take extra steps to coordinate the timely completion of MTA projects.

The Time is Now for New York State to Enact a Meaningful Statute of Repose to Provide Local Design Professionals with Protection on Par with that Afforded by Other States

11.20.19 | BY KEITH J. STEVENS

New York is one of only two states which has yet to ratify a true statute of repose. Certain groups continue to lobby for the enactment of a statute of repose similar to that passed by other states. However, the legislature has not demonstrated any inclination to adopt such a statute to date. When considering New York's claimed status as forward thinking and progressive, the absence of a meaningful statute of repose is nothing short of mind boggling.

§214-d of the New York Civil Practice Law and Rules requires wrongful death, personal injury and property damage claimants to provide design professionals with a written notice of claim, at least ninety days prior to commencing suit, when the conduct at issue occurred more than ten years prior to the date of the claim. §214-d is sometimes referred to as a statute of repose. However, it does not have nearly the same effect as the statutes of repose passed in 48 other states.

A meaningful statute of repose is akin to a statute of limitations in that it bars wrongful death, personal injury and property damage claims asserted against design professionals after the expiration of the fixed limitation of time. Under the current law, design professionals practicing in New York are subject to these third party claims for an indefinite period of time. These professionals are robbed of the peace of mind that comes with the knowledge that potential third party claims resulting from past troublesome projects are no longer actionable. Further, since they are subject to liability for third party claims in perpetuity, New York design professionals oftentimes are bereft of any documentary evidence and/or witnesses required to defend a claim resulting from a project completed long ago.

The design and construction communities in New York have been advocating for a meaningful statute of repose for years. In addition to the aforementioned issues, some groups argue that the absence of a statute of repose is one of the primary reasons behind the excessive cost of design liability insurance premiums. In this regard, indefinite exposure to potential claims results in an increase in defense costs which consequently leads to an escalation of insurance premium amounts. As a result of the relatively high cost of doing business in New York, some design professionals undoubtedly will relocate out of state.

Due in significant part to lobbying efforts, the New York Legislature is considering whether to repeal §214-d in its current form and provide a 10-year statute of limitations for wrongful death, personal injury, and real property damage claims asserted against design and construction professionals. In this regard, the Assembly's Standing Committee On Higher Education and the Senate's Judiciary Committee are each considering a bill (Assembly Bill A3595 and Senate Bill S5158) which provides a

The Time is Now for New York State to Enact a Meaningful Statute of Repose to Provide Local Design Professionals with Protection on Par with that Afforded by Other States *(cont'd)*

limitation period of ten years after the completion of improvements to real property. In the interest of fairness, each bill provides for a one year extension to assert a claim which accrues during the tenth year after the completion of the improvements. In the event one or both bills garner sufficient support, the bill(s) will be moved to the Assembly and/or Senate floor(s) for a vote.

The time is now for New York to level the playing field by adopting a statute of repose with teeth. Lobbying efforts, while certainly beneficial, only go so far. Absent the enactment of a meaningful statute of repose, the abundance of exceptional architects, engineers and land surveyors in New York may become a thing of the past.

Will Wearable Technology Transform the Construction Site?

01.03.20 | BY DANIEL A. MCFAUL, JR.

As technology advances, we see the increasing use of wearable devices in our everyday life. The most common example is a smart watch that provides instant feedback on our location, health, the distance we walk and even our most frequented locations. The introduction of wearable technology at construction sites could be a game changer.

Construction site accidents remain a significant source of potential exposure for all involved in a project including construction managers, contractors, owners and design professionals. Embracing wearable technology could help to limit potential exposure by improving site safety while boosting productivity and preserving valuable evidence in the event an injury ultimately leads to a lawsuit.

One such wearable is a tiny lightweight device that clips onto a helmet or belt and does not interfere with the work being performed. The device contains sensors which are connected to construction management software and it shares, collects, records and analyzes data. The embedded sensors can help track location and movement of workers, location of equipment or even monitor worker fatigue.

So the million dollar question is, “How can these devices actually transform the construction site?” All workers who wear such devices on a site can be tracked at all times. While that may sound “Big Brotherish”, it can be beneficial both during the course of the project and long after it is complete. During the project, the data can be used in real time to ensure that workers are performing at maximum efficiency and can alert workers instantly if they enter a restricted area or perhaps walk too close to the edge of a rooftop. Whether through a site meeting or immediate direction by a supervisor, behavior can be modified to prevent work site accidents including height related falls.

In the event an accident does occur, the stored data obtained from wearable clips will include the precise time of the accident, the location of the worker at the time the accident took place and who may have been in the immediate vicinity when the accident occurred. This information may be critical if a lawsuit is ever filed by the injured worker years later. By that time, memories fade, records are lost and incidents may not even have been reported. However, if the general contractor or construction manager utilizes wearable clips, the accident scene can be recreated to provide important evidence in a lawsuit. The data can also be analyzed for speed and impact of a claimed fall to assess whether the worker actually fell or simply threw the device on the ground to stage an accident.

In the not so distant future, insurance companies will likely embrace and perhaps even require their insureds to utilize these devices as insurers do in other industries. For example, some trucking insurers require insureds to equip trucks with dash board

cameras or other driver assistance devices. In the interim, general contractors and construction managers should consider investing in wearable clips in an effort to limit exposure and increase productivity. Notably, as technology advances and there is an increase in demand for wearables, the cost should continue to plummet making the cost more palatable for both large and small construction firms alike.

Similarly, owners and design professionals should consider retaining and recommending contractors who utilize wearables since it is in their own best interest to ensure the project moves forward both efficiently and safely. Inevitably, if a lawsuit is commenced after a project, whether for personal injury, property damage or delay, the data and information preserved during the project may just provide the necessary evidence needed for a successful defense.