

NEW YORK STATE CONSTRUCTION PAYMENT FREEZE

A Q&A with Alfred B. DelBello

In response to New York State's current budget crisis, Governor David A. Paterson announced on March 30 that the state would suspend payments on many construction projects.

Recognizing the importance of this action to many of our clients, J.H. Cohn LLP submitted a series of questions to Alfred B. DelBello, former New York State lieutenant governor and partner with the law firm of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP. Mr. DelBello has been retained by a coalition of construction trade associations, including the General Contractors Association of New York, the Associated General Contractors of New York State, the Construction Industry Council, and the Long Island Contractors Association. In the wake of Governor Paterson's announcement of a construction funding freeze, a suit has been brought against the State of New York to clarify the rights of contractors working on impacted projects. Our questions and his responses follow.

Q: What is the primary goal of the suit brought against the State of New York on April 16?

A: On behalf of several New York construction associations, we initiated the lawsuit to establish what the rights of contractors working on impacted projects are during this budget impasse. Further, we are looking to ensure that contractors are paid for their work when they continue on the job with the encouragement of the New York State Department of Transportation (DOT).

Q: An Article 78 proceeding is used to appeal the decision of a New York State agency to the New York State courts. Could an Article 78 proceeding be considered premature by the court, especially since the State has not yet failed to pay a requisition when due?

A: No. The DOT has been clear that it will not pay on requisitions after April 1 so this is a timely response to their actions, not a premature one. Their stated policy violates the DOT's contracts and state law.

Q: In public statements, you have used the term "anticipatory breach of contract." Is there any precedence for this argument, or are you breaking new ground?

A: This is a well-established legal concept – one that is in fact quite simple. Two parties enter into a contract where one party agrees to pay the other for services rendered. If during the contract one party declares that they do not intend to fulfill their obligations under the contract, it is called an anticipatory breach. The performing party can file suit.

Q: Is there good standing for the four contractors' associations to bring action against the State when the associations themselves have no contracts with the State?

A: Most definitely yes. First, New York State has liberal standing rules that permit such action. Second, the suit claims not just that the State has breached their contracts with the contractor members of the associations, but also that the DOT has exceeded its authority in refusing to pay for requisitions submitted after April 1. The groups have clear standing to raise the issue of governmental authority.

Q: What is organized labor's role in this dispute?

A: We hope to have their support, and we believe we do.

Q: Some reports indicate that the Governor has stated publicly that contractors should continue to work and that, when payments are made late, the State will pay interest on balances due. What is your response to his comments?

A: We have no documentation that supports the Governor's comments. That position is inconsistent, at best, with what the Governor's appointees at the DOT have stated.

Others have made statements that they believe the DOT will not hold contractors in breach or that they believe the DOT will be receptive to claims for damages suffered as a result of payment delays. Given what is at stake, however, we cannot rely on predictions, guesses, and inconsistent, off-the-record statements that are not legally binding.

Contractors are in a quandary. If they shut down their sites, they may be held in breach of contract by the state. If they continue to work, however, they have no certainty if or when they will be paid for the work performed. Public works contractors want to know right now what their rights and duties are. That is why they are seeking a declaratory judgment in which the court will define the rights, duties, and obligations of the DOT and contractors.

Q: What is the next step after the Attorney General's office responds to your suit?

A: The case was submitted and oral argument took place on April 30. Our goal is to get a declaration from the court that the New York State DOT's actions are illegal and that the contracts' payment requirements will be enforced by their terms and under the State Finance Law. Other state contractors are being paid through the "emergency budget extenders." State employees are being paid. Why shouldn't public works contractors get paid if they perform work?

Profile of Alfred B. DelBello

Alfred B. DelBello served as lieutenant governor from January 1983 to February 1985 during the administration of former Governor Mario Cuomo. He is currently a partner at DelBello, Donnellan, Weingarten, Wise & Wiederkehr, LLP in White Plains, NY, and has been on the Board of Directors of Signature Bank since January 2003. He is the Chairman of the Board of Directors for the Westchester County Association.

During his term as Lieutenant Governor of the State of New York, DelBello served as President of the Senate and Vice Chairman of New York State Job Training Partnership Council. He created and administered ten regional economic development councils throughout the state, and coordinated a nuclear emergency planning strategy for the Indian Point nuclear facility. DelBello also spearheaded the Task Force on Aging-Out and the New York State Council for Youth Suicide Prevention.

He has been the recipient of numerous community service and professional awards and currently serves on the boards or is a member of numerous organizations, including the Senate Club of New York, the National Association of Former State Troopers and the Waccabuc Landowners Council. A graduate of Manhattan College, with majors in economics and political science, he received his law degree from Fordham University Law School and entered private practice before starting his political career as a Yonkers city councilman, before becoming Mayor of Yonkers in 1970.

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