



STATE CONTRACTORS AND BOND PRODUCERS

Members of the construction industry should take a proactive approach when informing legislators of the consequences of *State v. Lombardo*.

NEED TO “GET IN THE GAME” TO REVERSE COURT DECISION

JOE NATARELLI AND MATTHEW HALLISEY

Legislatures rarely enact laws proactively to prevent problems. While the reasons may vary, they tend to instead react to significant events or scandals. For example, in Connecticut, the mass shooting of children and teachers in a Newtown elementary school last December spawned stringent firearms regulations. Allegations that former Connecticut governor John Rowland accepted gifts and favors from state employees and private contractors led to changes in state contracting, ethics, and campaign finance laws.

One such notable exception occurred this year when the legislature did not act in the wake of a seminal decision by the Connecticut Supreme Court late last year. The decision, *State v. Lombardo Brothers Mason Contractors, Inc.*,

et al., 307 Conn. 412 (2012), effectively exposes architects, engineers, designers, and contractors who perform work under a state contract to unending liability for allegations of defective workmanship.

As the commercial construction industry recovers all too slowly from the worst recession since World War II, state contractors and their insurers and bonding companies should be concerned about the implications of the decision. Indeed, they may need to personally “get in the game” and inform lawmakers about the consequences of the decision if they want the legislature to act.

One reason lawmakers have not acted, officials have said, is that there has been little evidence that the decision is having a negative practical effect on the

JOE NATARELLI is the partner-in-charge of Marcum LLP's New Haven office as well as their National Construction Industry group leader.

MATTHEW HALLISEY is the founder and managing principal of Matthew Hallisey Government Affairs, LLC, a full-service government relations and lobbying firm in Glastonbury, Connecticut.

construction contracting industry. Contractors continue to bid on projects, the reasoning goes, and insurance for contractors working on state projects has not skyrocketed, as some predicted. That may be so, but that is not a reason that the court's decision should stand or not be addressed by the legislature. The legislature can act proactively, and contractors and insurers can play an important role and inform the deliberations.

The legislature has not acted because those most affected by it — individual contractors and bonding companies — have not asked it to do so. For the same reasons, they can be the most effective advocates for change. Industry trade associations representing construction contractors filed briefs with the Supreme Court in support of

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contractors; they have presented a strong case for the legislature to change the law. But this may be a case where individual con-

tractors can present the practical implications of the decision on their business most effectively and how, in turn, it affects Connecticut's economy.

In *Lombardo*, the court found that the ancient legal doctrine of *nullum tempus* ("no time runs against the king") is well-established in Connecticut's common law. The court, as a result, exempted the state from the operation of statutes of limitation and repose and granted the state authority to sue contractors, design professionals, and others for alleged defects in the design and construction of the University of Connecticut Law School library 12 years after the project was completed.

The decision will have a significant impact on those who contract with the state. State contractors will have serious, unending exposure for projects, years after completion and delivery. As a result, commercial general liability insurance will become more costly. Surety bonds will be more difficult to obtain, particularly for smaller,

specialty contractors. Construction costs will likely increase. General contractors, construction managers, and subcontractors will be exposed to the threat of perpetual litigation on state projects. In short, the decision puts state contractors at greater risk and creates significant uncertainty in the marketplace.

Contractors are generally reluctant to participate in the legislative process, and understandably so. Officials often attack the industry for contracting failures. In this case, it would highlight a project with substantial defects. Many view their industry support and participation as limited to attending events periodically or membership on a committee. Testifying and lobbying lawmakers is not for them. They are busy running their businesses.

But many contractors know their local lawmakers and are active in the community. When summoned, they engage. And they can be effective advocates. They understand their businesses well. They are "regular" people who often support the local Rotary Club, Little League, Chamber of Commerce, or other civic organizations. They can explain the practical consequences of the decision and the failure to address it for their businesses as well as for the state. Fewer bids, for instance, will only reduce competition and raise prices for public owners. The court all but invites the legislature to intervene. Its opinion repeatedly disclaims the authority to say whether *nullum tempus* is still sensible public policy and recognizes the separation of powers, stating that it is for the General Assembly, not the court, to say when the state's sovereign immunity should be waived.

Insurers and surety bond producers can help as well. The decision raises a number of concerns for them. It could inject a dangerous amount of uncertainty into underwriting insurance for state projects and increase the cost of insurance for companies that do business with the state. There is nothing to prevent the state from suing over an alleged defect in a project 20, 30, or 100 years after construction.

Addressing the decision in the legislature will be challenging; it will take resources and time. It may be a multi-year process. A change, such as requiring the state to adhere to the same statute of limitations that it imposes on contractors, may seem simple enough, but there will be opposition. Lawmakers control the budget. The decision, as it stands, gives the state substantial leverage over contractors. But lawmakers need to be educated as to why it is not in the state's long-term interest for the decision to remain. It will only make the state a less favorable environment in which to do business, which policy-

makers do not want in the current economy.¹ ■

NOTES

¹ Complete contact information for the authors of this article is as follows:

Joe Natarelli, CPA Profile, Partner in Charge New Haven Office, Marcum LLP, 555 Long Wharf Drive, New Haven, CT 06511

P: (203) 401-2102

Joe.Natarelli@marcumllp.com

www.marcumllp.com

Matthew Hallisey, Managing Principal, Matthew Hallisey Government Affairs, LLC, 2389 Main Street, Glastonbury, CT 06033

P: (860) 978-7346

mhallisey@mhga.net

www.mhga.net