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Law: The controversial Wicks Law - Only a matter of time before Court of Appeals has to rule once again

July 30, 2013 - Spotlights

The Wicks Law - a construction mandate dating back to 1912 - was put into place to promote competition. It is, to say the least, an extremely controversial law. Public entities complain that it makes the cost of construction more expensive and the process more burdensome. In 2008 the Wicks Law was amended. The new amendments require that, under General Municipal Law Â§ 101, all state and local government construction projects costing more than \$3 million in New York City, \$1.5 million in Nassau, Suffolk and Westchester counties, and \$500,000 in the rest of the state are subject to separate plumbing, heating/ventilation/air conditioning and electrical contracts. It also amended the apprenticeship provisions of the law.

In Empire State Chapter of Associated Builders and Contractors, Inc., et al., v. M. Patricia

Smith, et al., 2013 N.Y. LEXIS 1432, *; 2013 NY Slip Op 403 (Court of Appeals) decided June 6th, 2013. The 2008 amendments were challenged on New York and Federal Constitutional grounds.

The Plaintiffs claimed that the 2008 amendment violated the New York constitution by easing the restrictions of the Wicks Law for eight specific counties of New York State to a greater extent than the restriction in the rest of the State. They also claimed the changes to the apprenticeship provisions of the law violated the US Constitution's Privileges and Immunities Clause and the Commerce Clause. The Defendants moved, pursuant to CPLR 3211, to dismiss the Plaintiffs' case.

The trial court ruled that the 2008 amendment does not violate the New York Constitution and that none of the Plaintiffs had standing to challenge the amendment based upon the New York Constitution. The Appellate Division ruled that the County of Erie had standing to challenge the amendments under the New York Constitution but that the claim failed on its merits. The Court of Appeals agree with the Appellate Division and stated "where the Legislature has enacted a law of statewide impact on a matter of substantial State concern but has not treated all areas of the State alike, the Home Rule section of the State Constitution does not require an examination into the reasonableness of the distinctions the Legislature has made." Essentially, the court determined that because competitive bidding on public contracts is a matter of state concern, and not a local one, the legislature did not overstep its boundaries when it passed the 2008 amendment. The legislature has the latitude to determine that some counties require greater, or lesser, restrictions under the Wicks Law.

The Court reinstated the causes of action which claimed the apprenticeship provisions violated the U.S. Constitution. The 2008 amendment requires that each contractor and subcontractor participate in "apprentice training programs in the trades of work it employs that have been approved by the department [of labor] for not less than three years and shall have graduated at least one apprentice in the last three years and shall have at least one apprentice currently enrolled in such apprenticeship training program."

One of the Plaintiffs is a Pennsylvania based contractor. Their claims, specifically that the apprenticeship programs, which must be approved by the New York State Department of Labor, are not open to out of state contractors and therefore excludes them, and all other out of state contractors, from all public work construction projects above the Wicks Law thresholds was allowed to proceed and survived the Defendants' 3211 motion. The court allowed their claims, based upon alleged violations of the U.S. Constitution, to proceed, not on the merits,

but because the limited record the appeal was based upon did not provide sufficient information for the court to determine if the 2008 amendments violated the US Constitution. Its only a matter of time now before the Court of Appeals has to rule on the 2008 amendments to the Wicks Law once again.

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