

INSIGHTS

New Citywide Construction Fraud Task Force Promises Tough Enforcement

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On August 5th, the Manhattan District Attorney (the "DA's Office") announced the formation of a multi-agency Citywide Construction Fraud Task Force that will be spearheaded by prosecutors from the office.¹ Its mission is simple: identify and root out corruption and fraud in the construction industry. To implement these goals, the Citywide Task Force will rely on the cooperation of multiple agencies, including the Department of Investigation, Port Authority, the Metropolitan Transportation Authority, and the Business Integrity Commission for the City of New York. Unprecedented in scope, integrating each of these agencies to combat fraud will likely change the face of enforcement in New York as we know it today.

In other words, there's a new sheriff in town and the industry will have to take notice and adapt. By implementing new compliance protocols, with assistance from counsel, in response to this new enforcement regime, construction firm owners can save energy, time and money that can be better used to develop more business.

Not If, But When

The statistics speak for themselves. Construction in New York is a multi-billion dollar industry and, in 2014 alone, revenues totaled over \$42 billion.² According to the Department of Labor, New York employs nearly 400,000 people³ and countless third parties from around the globe, like equipment suppliers, manufacturers and property developers who are dependent on the industry. Let's not forget that banks, private equity firms and financial institutions all play a critical role in financing these large scale projects.

Construction in New York is a stand-alone economy that touches the lives of millions of people, and the DA's Office is acutely aware of it. Ironically, the industry has been left relatively unregulated given the general enforcement climate faced by other industries in the last 15 years.

The creation of the Citywide Task Force likely signals an end to this era. While the DA's Office has a long history of prosecuting construction fraud cases in conjunction with other investigative agencies, the Citywide Task Force will likely become a formidable "regulator" of the industry for both public *and* privately funded work.

Put simply, the DA's Office is sending a message that nearly all facets and phases of construction will come under close scrutiny. From investigating bid rigging to safety violations, the breadth of promised collaboration between the agencies – all staffed with former law

enforcement personnel – nearly guarantees this result. Consequently, referrals to prosecute criminal cases will likely increase in situations where enforcement was previously left to agencies to handle either through a period of debarment or civil penalties. That said, the number of criminal investigations will certainly rise, along with forfeiture and monetary penalties related to any misconduct.

Navigating The Road Ahead

Construction in New York City is fast paced and hectic. Complicated by myriad aboveground transportation issues, underground subway lines and a decaying infrastructure, building anything in New York is – at best – a difficult task. Add the tangled rules related to public works projects, such as VENDEX, Davis-Bacon and Minority / Women's Owned Business requirements ("MBE/WBE"), and companies and their owners that have not necessarily had to prioritize compliance issues, now find themselves in the cross-hairs. Today, more than ever, owners are routinely facing individual liability for their company's conduct.

Responding and adapting to this new environment, however, does not have to be an uphill battle. While the stakes are high, taking preventive steps before a subpoena reaches the doorstep will save time, expense and headaches down the road. Construction firm owners, Boards and management can implement a few basic compliance protocols to help protect the company – and themselves – from a protracted investigation.

Not only will these guidelines help the company manage issues, the Citywide Task Force likely expects organizations to take on these tasks. Additionally, more construction clients like banks and financial institutions have incorporated demanding compliance clauses in their construction agreements that have severe consequences if breached. Financing agreements contain similar requirements and penalties. In reality, adopting these compliance steps is a prudent and rational approach to business that other regulated entities have employed for a number of years. Some of these steps are outlined below:

1. Assess Vulnerabilities

The first step in helping to protect the company from an investigation is to take a close look at the company's existing legal risks and vulnerabilities – both civil and criminal. An objective survey of the pitfalls a construction firm faces in today's marketplace will serve two fundamental goals: (1) identify potential weak spots; and (2) assess whether existing controls are sufficient to prevent misconduct. Many times when conducting this type of internal review, owners and Boards are comforted to learn that their systems of checks and balances are working. However, there will undoubtedly be a handful of items – unique to the type of work the company performs – that keep ownership up at night.

2. Get a Handle on Operations

Once specific risk items have been identified, the organization should gather as much information as possible around specific processes. Getting boots on the ground to speak with employees, reviewing relevant policies and digging through project paperwork will provide the organization with a baseline on existing operations. For example, selecting a sample set of projects to analyze either the bidding process, procurement practices, accounts payable or MBE/WBE compliance ensures a proper reality check. Once completed, the organization will be informed and ready to implement any necessary changes.

3. Implementing New Controls

Typically, successful construction companies have been building projects and handling business operations the same way for many years. The adage, “if it ain’t broke, don’t fix it,” certainly works in the field, but sometimes that approach could present problems back in the office. Prosecutors and regulators will now be even more critical of a company’s affairs and business agreements with respect to its customers, third parties and competitors. If an assessment uncovers a compliance concern, organizations should take corrective steps by either implementing new controls, issuing new policies or conduct issue-specific training. Ignoring the matter will only make it worse down the road.

Don’t Be Surprised - Be Ready

As the Citywide Task Force begins its work, construction companies should take time now to get ready for inquiries or subpoenas. While construction is on the rise, criminal inquiries are distracting and often difficult to manage. But by implementing the guidelines laid out above, organizations will find themselves ahead of the curve and be able to quickly assess and respond to issues before they happen. An ounce of prevention can go a long way, and by utilizing counsel to help implement these protocols, construction firms can ensure a confidential and thorough approach.

¹ <http://manhattanda.org/press-release/citywide-construction-fraud-task-force-convened-investigate-misconduct-midst-historic->

² Bureau of Economic Analysis, 2014 data.

³ <https://www.labor.ny.gov/stats/cesemp.asp>