

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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CONSTRUCTION INDUSTRY COUNCIL OF  
WESTCHESTER AND HUDSON VALLEY, INC.;  
LONG ISLAND CONTRACTORS' ASSOCIATION;  
THE GENERAL CONTRACTORS ASSOCIATION OF  
NEW YORK, INC.; and ASSOCIATED GENERAL  
CONTRACTORS OF NEW YORK STATE, LLC,

Index No.: 2436/2010

Plaintiffs-Petitioners,

For a Judgment Pursuant to Article 78 of the Civil  
Practice Law and Rules and other relief

-against-

STANLEY GEE, in his official capacity as Acting  
Commissioner of the Department of Transportation of the  
State of New York; and RONALD EPSTEIN, in his  
official capacity as Chief Financial Officer of the  
Department of Transportation of the State of New York,

Defendants-Respondents.  
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**MEMORANDUM OF LAW OF THE NEW YORK BUILDING CONGRESS AS AMICUS  
CURIAE IN SUPPORT OF PETITIONERS' REQUEST FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND IN OPPOSITION TO RESPONDENTS' MOTION TO  
DISMISS**

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**PRELIMINARY STATEMENT**

This Memorandum of Law is respectfully submitted on behalf of The New York Building Congress ("NYBC") as a friend of this Court in support of Petitioners' request for declaratory and injunctive relief and in opposition to Respondents' motion to dismiss. As ably established by Petitioners, the March 30, 2010 policy adopted by the New York State Department of Transportation ("Department") not to approve payments to contractors and consultants ("Construction Professionals") who are working on Department jobs (the "Policy")

violates State law, constitutes a breach of contract, exceeds the Department's authority, is arbitrary and capricious and constitutes an abuse of discretion.

For purposes of this memorandum, the NYBC adopts and incorporates herein by reference the legal contentions and authorities set forth in Petitioners' submissions. Furthermore, the NYBC fully agrees with Petitioners that the Policy will have a dramatically deleterious effect upon the members of the contracting associations which Petitioners represent. Indeed, failure to grant the proposed declaratory and injunctive relief prejudices the entire New York construction community — not to mention the general public who possess a keen interest in the orderly administration of public works and infrastructure maintenance and improvement.

#### **INTEREST OF AMICUS**

The NYBC has a significant interest in the outcome of this case because of its intimate involvement in the New York State construction industry. Indeed, as it states on the NYBC's website<sup>1</sup>, the NYBC:

is a "broad based membership association celebrating its 88<sup>th</sup> year, [ ] committed to promoting the growth and success of the construction industry in New York City and its environs. The [NYBC] provides a unique forum to advance an industry-wide agenda focusing on economic and infrastructure investment, job creation and professional exchange. These goals require the dedicated involvement and cooperation of the contractors, architects, engineers, unions, real estate managers, developers and owners who comprise the building community. On behalf of 400 constituent organizations comprising more than 250,000 skilled trades people and professionals, the [NYBC] supports sound public policy; promotes productive capital spending; encourages public/private partnerships, and evaluates the implementation of major government projects.

The Department's Policy will negatively affect the NYBC's members, many of whom contract with the Department in conjunction with public works projects. As discussed at

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<sup>1</sup> <http://www.buildingcongress.com/code/about.htm>

length in Petitioners' memorandum, those Construction Professionals who continue to work between April 1, 2010 and the date a budget is enacted (which is still unknown) do so at the risk of not being paid. Alternatively, Construction Professionals could stop working but would be doing so at the risk of being defaulted and/or terminated.

As compellingly explained in Petitioners' submissions, if Construction Professionals work without payment, they will still have to pay their laborers, suppliers, (sub)consultants and subcontractors (collectively "Subs"). In this economy, where the very existence of many firms is already precarious, this is likely to sound the death knell for many. If Construction Professionals choose not to make such payments, in violation of their legal and contractual obligations, they will risk having Subs and/or laborers walk off the job, will irreparably harm those relationships and will face a barrage of lawsuits. Furthermore, if contractors, consultants, Subs or laborers walk off projects because they can no longer support the work without funding, projects will likely be forced to shut down. Such a result will weaken a battered economy even further and place the quality and safety of New York State's infrastructure at substantial risk. In addition, the Construction Professionals will be at risk of debarment from future New York State projects.

### **ARGUMENT**

Rather than burdening the Court with duplicative statements of the applicable law, the NYBC respectfully refers this Court to the legal arguments and authorities adduced by Petitioners in their memoranda of law. Whether working for the State or other clients, Construction Professionals, like other professionals and wage earners, are entitled by statute and contract to prompt payment for their work. In placing Construction Professionals in an untenable position by "asking" them to continue to work without payment, the Department has

breached its contracts, has exceeded its authority and has abused not only its discretion but its public responsibility.

**CONCLUSION**

For the foregoing reasons as well as those set forth in Petitioners' submissions, the declaratory and injunctive relief sought by Petitioners should be granted in all respects.

Dated: New York, New York  
May 7, 2010

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