NEW YORK COUNTY NYCLA LAWYERS' ASSOCIATION

NYCLA CONSTRUCTION LAW JOURNAL

A publication of the NYCLA Construction Law Committee **Volume II, Issue I** **Spring2012**

Letter From the Vice Chair

Dear colleagues, in our last issue of this Journal, we recognized that there appeared to be a blossoming of construction activity in the City (in large part due to Local Law 11 requirements). Pleasantly, this trend of new construction activity may not only be continuing, but may be on the rise. Recently, the New York Post reported that new permits issued in Brooklyn are up more than sixty percent, year over year, for the first third of this year. This translates into over 110 new construction projects in just one Borough.

As we head into the summer, the NYCLA Construction Law Committee is looking forward to our full slate of meetings and programs that will take us through 2012 and we proud to be publishing another edition of our Construction Law Journal. Our sincerest thanks go out to those who continue to support and encourage the efforts of this Journal and the Committee.

As always, we look forward to seeing all of you again at our upcoming events and we encourage those of you thinking about membership to join our Committee.

Statement of the Editor In Chief

Dear construction law colleagues, the Spring 2012 Journal provide a potpourri of interesting construction law topics ranging from public bidding laws, insurance issues for contractors, analysis of contract language, as well as case summaries. As we strive to make the journal the best it can be we are always looking for new articles and/or themes that would interest construction lawyers in the tri-state area. Any case, new law, or statute that may interest you and/or your client may have the same appeal to the rest of the construction bar.

INSIDE

ARTICLES

CASE SUMMARIES

Crossing State Lines: A Comparison Of Competitive Bidding Laws In New York And New Jersey

By John A. Greenhall, Esq. and Susan A. Shaw, Esq.

While close in proximity, New York and New Jersey are far apart when it comes to public bidding laws. On their face, the two states' various procurement statutes concerning public construction projects do not appear all that different. Both states' laws require, in most instances, competitive bidding for contracts costing more than a designated bid threshold and the award of contracts to the lowest responsible and responsive bidder. Scratch below the surface, however, and the differences will surprise you.

For contractors and construction law practitioners who are venturing from well known grounds in New York to new found territory in New Jersey, or vice versa, the seemingly minor, yet actually significant differences between the states' laws add to the difficulties associated with navigating each state's maze of statutes and local laws. Knowledge of certain key differences between the two, however, can help one avoid what some would consider traps for the unsuspecting.

First, one should note that public bidding statutes are not consolidated in either New York or New Jersey and that each state provides upwards of fifteen different statutes that apply to public construction projects depending on the nature of the work being bid. Additionally, state, county and municipal agencies in both states have implemented separate contracting requirements by way of rules and policies. As such, it is incredibly important for prospective bidders to identify the specific requirements of the particular entity letting the bid before submitting a bid or lodging a protest.

For the purpose of brevity, this article will focus on New York's and New Jersey's competitive bidding statutes that relate to the letting of contracts by municipalities.

The Law

In both New York and New Jersey, competitive bidding is intended to guard against favoritism, improvidence, extravagance, fraud and corruption and to foster honest competition in order that the public entity might obtain the best goods and services at the lowest possible price.

NEW YORK: In New York, the negotiation of contracts for public works and public purchases by a municipal corporation is regulated by the New York General Municipal Law ("NY Gen. Mun. Law").[1] Pursuant to §103 of the NY Gen. Mun. Law, "all contracts for public work involving an expenditure of more than [$35,000] and all purchase contracts involving an expenditure of more that [$20,000], shall be awarded . . . to the lowest responsible bidder furnishing the required security after advertisement for sealed bids."

NEW JERSEY: New Jersey's equivalent of the NY Gen. Mun. Law is the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. ("LPCL").[2] The LPCL requires that all contracts for the procurement of goods or services by municipalities that, in the aggregate, exceed the bid threshold of $17,500 must be awarded through public bidding to the lowest responsible bidder.[3] The procurement of goods and services includes contracts for "the construction, alteration or repair of any public building by any contracting unit,

[1] NY Gen. Mun. Law §103 controls the award of contracts by school districts, district corporations and boards of cooperative educational services in addition to municipal corporations. *See* NY. Gen. Mun. Law §§ 100-a and 103. NY Gen. Mun. Law §2 defines a "municipal corporation" as including a county, town, city or village. In addition, New York's Town Law, which applies to the advertisement of bids and letting of contracts by towns, incorporates the bidding requirements of Gen. Mun. Law. *See* New York Town Law §122.

[2] In addition to governing the purchase of goods and services by municipalities, the LPCL also governs procurement by any county or non-state board, commission, authority or agency. *See* 40A:11-2(1) (defining "contracting unit"). Notably, however, while NY Gen. Mun. Law also covers procurement of contracts by school districts, the LPCL does not. In New Jersey, school districts are subject to the Public School Contracts Law. State public contract law covers "contracts or agreements for the erection, construction, alteration, or repair of any public building or facility." *See* N.J.S.A. 52:34-7.

[3] As of January 1, 2011, the "lower" and "higher" bid threshold distinctions for the LPCL were eliminated and the bid threshold set at $17,500.00 for contracting units without a qualified purchasing agent. A contracting unit with a qualified purchasing agent can increase the bid threshold to $36,000.00, by resolution. *See* N.J.S.A.40A:11-3(a) and (c). Additional information on bid thresholds is available at New Jersey's Division of Community Affair's website: http://www.nj.gov/dca/lgs/lpcl/contracting_thresholds.htm.

when the entire amount of the work exceeds the bid threshold."[4]

An Additional Threshold Consideration: Multi-Prime Contracts

NEW YORK: §101 of the NY Gen. Mun. Law sets forth the "Wicks Law." Under New York's Wicks Law, where the entire cost of a contract for the erection, construction, reconstruction or alteration of a public building exceeds a certain amount, municipalities must, in addition to a general contract, independently and separately bid and award plumbing, HVAC and electrical contracts.[5]

Currently, the Wicks Law's threshold amounts triggering the requirement of multiple prime contractors are:

(a) $3 million in the counties of the Bronx, Kings, New York, Queens, and Richmond;

(b) $1.5 million in the counties of Nassau, Suffolk and Westchester; and

(c) $500,000 in all other counties.[6]

Notably, the Wicks Law permits a municipality to opt out of the requirement of multiple primes by including in its bid requirements a Project Labor Agreement ("PLA") that satisfies certain criteria.[7]

Further, for contracts that do not meet the Wicks Law threshold, bidders are required to submit a separate sealed list that names each plumbing, HVAC and electrical subcontractor that the bidder will use in performance of the contract and the amount to be paid to each. This list is opened after the low bid is announced. After bid, the contractor may seek to change any listed subcontractor upon a showing of legitimate need.

[4] *See* 40A:11-4, -16.

[5] Specifically, New York's Wicks Law requires that municipalities separately bid and award the following three subdivisions of the work: (1) Plumbing and gas fitting; (2) Steam heating, hot water heating, ventilating and air conditioning equipment; and (3) Electric wiring and fixtures.

[6] Prior to July, 2008, the threshold for was $50,000.00 for all counties.

[7] A PLA is a pre-hire collective bargaining agreement between a contractor and a labor organization establishing the terms and conditions of employment for a project. Where a PLA is in place on a project, only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform work on the project. PLAs are permitted on public projects in New York and New Jersey.

NEW JERSEY: Unlike New York's Gen. Mun. Law, New Jersey's LPCL allows, but does not require, multi-prime bidding – regardless of contract price. In fact, under the LPCL a municipality may advertise and receive separate bids, bids for all of the work, or both.[8] In situations in which a contract is advertised under both schemes, a contract will be awarded as a single contract where the bid for all work is less than the sum total of the amounts bid by the lowest responsible bidder for each branch of work and vice versa. Thus, in New Jersey, a contractor that bids separately may have the low bid in a particular trade, but still lose out to a competitor bidding the project as a whole.

Rejection of Bids: Responsiveness and Mandatory Requirements

Under Gen. Mun. Law §103 and the LPCL, a bidder may submit the lowest bid and still not win the bid if it is not responsive – i.e., if the bid fails to conform to the advertisement in all material respects.

NEW YORK: As a general rule, due to the concern for the integrity of the public bidding process, the waiver of a material noncompliance with a bid specification is not permitted under Gen. Mun. Law §103.[9] Notably, however, Gen. Mun. Law §103 does not provide a list of non-waivable or mandatory requirements. Rather, Gen. Mun. Law §103 provides the public entity with discretion in determining whether noncompliance with a bid specification is a non-material or material defect and, thus, waivable or non-waivable.

In such circumstances, the test is whether it is in the best interest of the public owner to waive the defect. In making this determination, an entity must consider whether the waiver will give the bidder a substantial competitive edge or impact the integrity of the bidding process. The determination of a municipality that a variance from the bid specification is material or waivable as a mere irregularity will be upheld if supported by any rational basis.[10] As a result, in order to challenge such a determination, a bidder must show that the

[8] *See* N.J.S.A. 40A:11-16.

[9] *Le Cesse Bros. Contracting, Inc. v. Egan*, 89 A.D.2d 640 (3d Dept. 1982).

[10] *T.F.D. Bus Co., Inc. v. City School Dist. of Mount Vernon*, 237 A.D.2d 448 (2d Dep't 1997).

decision was arbitrary and capricious – a very difficult standard to meet.[11]

Notable irregularities that have been upheld as non-material and thus, waivable, under Gen. Mun. Law §103 include the failure of a bidder to include a certificate of non-collusion where the document was signed and provided immediately upon opening of the bid;[12] the failure to supply the required security in the form specified by the specifications;[13] and the failure of a bidder to supply evidence of the bidder's ability to perform the contract.[14]

Courts often find that the failure to include information and/or the inclusion of inaccurate information relating to a bidder's responsibility constitutes a material and non-waivable defect under Gen. Mun. Law §103. For example, courts have held that omissions as to a statement of the bidder's experience and performance history, current and recently completed contracts and bank references constitute material and non-waivable defects.[15] In fact, in at least one case, a Court upheld the rescission of a contract after award on the ground that the bidder lacked financial and business integrity where the bidder failed to disclose tax and corporate status and ownership information both before and after award of the contract.[16]

NEW JERSEY: Unlike New York's Gen. Mun. Law, the LPCL provides that, when required by the bid specifications, submission of certain items is mandatory and that the failure to submit any of the mandatory items at the time specified shall be deemed a fatal defect that is not waivable or curable.[17] Mandatory requirements are listed directly in the statute itself and include:

(a) A bid bond (pursuant N.J.S.A. 40A:11-21);

(b) A certificate from a surety company (pursuant to N.J.S.A. 40A:11-22);

(c) A statement of corporate ownership (pursuant N.J.S.A. 52:25-24.2);

(d) A listing of subcontractors (pursuant to N.J.S.A. 40A:11-16); and

(e) An acknowledgment of receipt of notice of revisions or addenda to the advertisement.

A bid that fails to comply with the specifications in this regard must be rejected as unresponsive and invalid.[18]

Thus, while the LPCL, like Gen. Mun. Law §103, permits a municipality to waive an irregularity that is merely technical and non-material, municipalities and courts in New Jersey have considerably less discretion than their brethren in New York in determining what is waivable.

<u>Withdrawal: Mistake</u>

The laws in the two states also contrast on various aspects relating to bid withdrawal documents to a unilateral mistake in the contractor's bid.

(*continued*)

[11] *Matter of Varsity Tr. v. Board of Educ.*, 130 A.D.2d 581, 582 (2d Dep't 1987); *See also, Woods Advertising, Inc. v. Koch*, 577 N.Y.S.2d 22 (1st Dep't. 1991) (upholding finding that it was unreasonable for city to reject low bid on contract to furnish all labor and material necessary for city's help wanted advertising without conducting thorough examination of low bidder's computer system and its capabilities).

[12] *A.J. Beaudette Const. Co. v. City of Syracuse*, 62 Misc. 2d 564 (N.Y. Sup. Ct. 1970); *aff'd*, 34 A.D.2d 734 (N.Y. App. Div. 1970) (finding that the failure to include certificate of non-collusion with bid was non-material where the bidder supplied the same after bid opening); *Consol. Sheet Metal Works, Inc. v. Board of Ed., Enlarged City School Dist., City of Watertown*, 62 Misc. 2d 445 (N.Y. Sup. Ct. 1970) (same).

[13] *Le Cesse Bros. Contracting, Inc. v. Egan*, 89 A.D.2d 640 (3d Dep't 1982) (upholding a municipality's designation of a bidder's submission of security in the form of a certified check despite the specifications requirement for a bid bond as waivable); *Cataract Disposal, Inc. v. Town Bd. of Town of Newfane*, 53 N.Y.2d 266 (1981) (holding that "when the bidding specifications call for a 'performance bond', it lies within the province of the contracting municipality to consider the requirement to have been met when the bidder offers to post a cash deposit and an indemnity agreement permitting the municipality to appropriate the collateral directly in the event of a breach").

[14] *See Nathan v. O'Brien, 158 A.D.2d 454 (N.Y. App. Div. 1907)* (holding that a city was not required to reject a bid that failed to submit evidence to prove that the bidder was able to perform the contract because the provision was for the benefit of the city, and not for the benefit of other bidders).

[15] *See A.I. Smith of Long Island, Inc. v. City of Long Beach*, 158 A.D.2d 454 (2d Dep't 1990).

[16] *See Cipriettti-Tolisano Associates, Inc. v. Karnovsky*, 268 A.D.2d 234 (1st Dep't 2000).

[17] *See* 40A:11-23.2.

[18] *See* 40A:11-23.2.

NEW YORK: New York's Gen. Mun. Law §103 specifically provides that a bidder may withdraw a bid containing a unilateral mistake where:

(a) the mistake was made known prior to an award of the contract or within three (3) days after the opening of the bid, whichever period is shorter;

(b) the bid was submitted in good faith;

(c) the error was of such magnitude that enforcement would be unconscionable;

(d) there is credible evidence that the error was clerical in nature;

(e) there is objective evidence to show that the mistake was an arithmetic error or an unintentional omission of a substantial quantity of work; and

(f) the public agency will not be harmed by the withdrawal.[19]

Any amendment of a bid or a contract to correct an error or mistake is strictly prohibited.

Upon a bidder's withdrawal of bid on the basis of mistake, the municipality is required to return the bidder's bid bond or other security. Thereafter, the municipality may, in its discretion, either award the contract to the next lowest responsible bidder or re-bid the contract.

NEW JERSEY: In early 2011, the New Jersey Legislature amended the LPCL to include a formal bid withdrawal process. Now, under the LPCL, a bidder may request a withdrawal in writing, by certified or registered mail, within five business days after either a bid opening or a scheduled pre-award meeting, whichever comes later. The request for withdrawal must include evidence demonstrating that:

(a) An error, clerical in nature and not judgmental, occurred in the computation of the bid, which is verifiable by written evidence;

(b) the error is either an unintentional and substantial computational error or an unintentional omission of a substantial quantity of labor, material, or both, from the final bid computation; and

(c) there is no gross negligence in the preparation of the bid.

It is important to note, however, that under the LPCL, the withdrawal of a bid will result in a contractor being barred from bidding the project again in the event of a re-bid.

<u>Timing: The Award and Contract</u>

Gen. Mun. Law §103 and the LPCL differ dramatically when it comes to the time that a municipality has to award a contract.

NEW YORK: Gen. Mun. Law §103 does not provide a specific requirement regarding the time within which a municipality must award a contract following its acceptance of bids. As such, bidders must rely upon the specifications to determine when their bid will expire or if it will expire at all.

While Gen. Mun. Law §103 does not mandate the award of a contract within a specified period of time, Gen. Mun. Law §105 relating to the "disposition of deposit accompanying bid" affords bidders with the right to withdraw a bid following a firm offer period of forty five days. Pursuant to §105, if a municipality fails to award a contract within forty five days of bid opening, a bidder is entitled to withdraw its bid and receive a refund of its deposit. Notably, an award must be unequivocal in order to bind a contractor within the forty five day period and to prevent a bidder from executing its right to withdraw. Thus, a bidder must rely upon the language of the specifications to determine when the municipality is bound by the award.[20] Further, this forty five day firm offer period cannot be expanded by the inclusion of a longer firm offer period in the specifications or by any other act of the municipality.

NEW JERSEY: Under the LPCL, a municipality is required to "award" the contract within sixty days of the bid opening date or within the time period specified in the bid documents, if shorter. The failure to do so results in the automatic rejection of all bids – unless the bidders agree to hold their bids open for an additional period of time. In other words, unlike Gen. Mun. Law §103, pursuant to which the life of a bid is, by

[19] *See* Gen. Mun. Law §103, subd. 11.

[20] *See Guy Pratt, Inc. v. Town of North Hempstead*, 127 A.D.2d 592, 511 N.Y.S.2d 650 (N.Y.App. Div. 1987) (holding that Gen. Mun. Law §105 permits the withdrawal of a bid even after notice of award and the bidder's execution and return of the contract where the specifications provided that the town was not bound by the contract until it delivered a fully executed copy of the bidder).

default, perpetual until terminated by a bidder, under the LPCL, a bid automatically expires after a period of sixty days unless some action is taken.

In the context of the LPCL, the award of a contract, without execution of a contract, is sufficient to avoid automatic expiration of a bid. However, the parties must execute a contract within twenty one days after the award of the contract or such shorter period of time as designated in the specifications. Again, the parties may agree to enlarge this time frame.

Consequences of the Void Public Contract

Courts have consistently held that where a public contract is let improperly, the contract is null and void – New York and New Jersey included. In such situations, the issue of real concern to the contractor involves the consequences of an improperly let contract.

NEW YORK: In New York, courts have held that municipal contracts awarded without resort to competitive bidding, other than those exempted by statute from such requirements, are void and unenforceable.[21] Where a contract has been awarded in violation of competitive bidding statutes, the contractor may not sue in contract and/or recover in quantum meruit.[22] This is true regardless of the contractor's lack of involvement in the violation or the fact that the municipality has received the benefit of the contractor's work. For example, New York courts have upheld the dismissal of claims in cases brought by contractors on these grounds even though the violations involved illegal specifications and non-compliance with charter requirements for which the contractor had no responsibility. Further, to add injury to insult, the municipality may recover from the contractor amounts already paid to it pursuant to the illegal and/or void contract.[23]

In one rare case, a contractor installing a generator was allowed partial compensation despite the Court's finding that the specifications were illegally designed to ensure award of the contract to a contractor.[24] In that case, the court declined as a matter of equity to enforce the general rule due to the large sum involved, the unjust enrichment of the city and the financial harm to the contractor that would result if the general rule were applied.

While harsh, the consequences of complete forfeiture are viewed as necessary to deter illegal contracts.

NEW JERSEY: Although following the general rule that contracts entered in violation of the competitive bidding statutes are void and unenforceable, the instance of cases involving forfeiture or repayment are rare in New Jersey.[25]

Further, New Jersey courts have permitted recovery, albeit recovery limited to the cost of the work, in more than one instance involving a void contract.[26] In fact, in a situation not involving construction but involving a contract for services let under the LPCL, one court allowed an improperly awarded contract to remain in effect until its termination date where re-bid would be inequitable and inappropriate.[27]

Conclusion

As can be seen through the various comparisons above, the lack of knowledge of a particular state's bidding statute can have dire consequences. As such, whether a contractor is bidding in New York or New Jersey, the procedures spelled out by the relevant statues and bid documents must be complied with when bidding a public contract. Thus, in order to ensure that a bid is not thrown out because of an available error, it is important for contractors to identify the applicable statute and, above all else, to read the bid documents with caution. In addition, while there is some discretion

[21] *JLJ Recycling Contrs. Corp. v Town of Babylon*, 302 A.D.2d 430 (2d Dep't 2003).

[22] Quantum Meruit is a theory that allows a contractor to recover the value of the work it performed even in the absence of a written contract.

[23] *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300 (N.Y. 1973).

[24] *Gerzof v. Sweeney*, 16 N.Y.2d 206 (N.Y. 1965).

[25] In *North Bergen Twp. v. Clinton Asphalt Co.*, 169 A 818 (N.J. 1933) (It is elementary, if moneys are fraudulently and collusively paid upon an illegal or ultra vires contract, they generally may be recovered by a municipality in an action for money had and received"); *See Also, Scatuorchio v. Jersey City Incinerator Auth.*, 100 A.2d 869 (N.J. 1953) (Where garbage disposal contracts between incinerator authority of city and private corporation were ultra vires, they were unenforceable against the incinerator authority).

[26] *See Hudson City Contracting Co. v Jersey City Incinerator Authority*, 111 A2d 385 (N.J. 1955) (recognizing recovery of the reasonable expense of services rendered, but not in excess of actual expense, and deleting profits).

[27] *See Alaska Servs., Inc. v. County of Morris*, 2007 WL 2385941 (N.J. Super. Ct. App. Div. Aug. 23, 2007).

on the part of the contracting entity, strict compliance with bid requirements is always recommended. Further, where questions arise, the contractor should contact the contracting agency pursuant to the Instructions to Bidders before submitting its bid. Regardless of the state in which the contractor is bidding, it is always better to be safe rather than sorry.

John A. Greenhall, Esq. *is a Partner and* ***Susan A. Shaw, Esq.*** *is an Associate at Cohen Seglias Pallas Greenhall & Furman PC. Both are members of the construction group and can be reached at 215.564.1700 or jgreenhall@cohenseglias.com and sshaw@cohenseglias.com Cohen Seglias is a full service firm, with offices throughout the Mid-Atlantic region including, Philadelphia, Pennsylvania and Haddon Heights and Parsippany, New Jersey. www.cohenseglias.com.*

Common Law Indemnification May Only Be Imposed Against A Party That Actually Supervised

By Melaine C. Alphonso, Esq.

In *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369 (June 28, 2011), the Court of Appeals held that a property owner is not entitled to common law indemnification from a general contractor who did not actually supervise the injury-producing work at the site.

Here, the defendant-property owners leased a retail storefront to non-party, Ann Taylor, Inc. In order to build out its space, Ann Taylor contracted with general contractor, John Gallin & Son, Inc. Thereafter, the general contractor engaged subcontractor, Linear Technologies, Inc. to install telephone and data cables. The actual cable installation was performed by Samuels Datacom, LLC, subcontractor to Linear Technologies, Inc.

Plaintiff, an electrician, employed by Samuels Datacom, LLC was injured while working at the project site. As a result, Plaintiff and his wife derivatively brought a personal injury suit against, inter alia, the property owners and the general contractor asserting claims under Labor Law §§ 200, 240(1), 241(6) and common law negligence. In their answer, the property owners asserted, inter alia, a cross claim for common law indemnification against the general contractor.

Subsequently, the property owners moved for summary judgment on its cross claim for common law indemnification against the general contractor. The Supreme Court denied the motion and dismissed the property owners' claim against the general contractor for common law indemnification because the property owners failed to establish that the general contractor had direct control over the work giving rise to the injury. The Appellate Division affirmed stating that the general contractor did not directly supervise and control the Plaintiff's work. The Court of Appeals affirmed.

This decision, by the Court of Appeals, serves to harmonize discord with some of the Appellate Division decisions suggesting that a party may be obligated to indemnify under the common law solely on the basis of that party's authority to supervise the work at a site. This is not the case. The duty to indemnify is only imposed on a party who actually supervised and controlled the injury-producing work.

Here, the Court of Appeals clearly announces that a party's authority to supervise the work and implement safety procedures is not by itself a sufficient basis for requiring common law indemnification. Liability for indemnification may only be imposed against those parties who exercise actual supervision. Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common law indemnification claim will not lie against that party on the basis of its contractual authority alone.

Ms. Alphonso, Esq. *is a member of the NYCLA Construction Law Committee. Since graduating from Quinnipiac University School of Law in 2003, Ms. Alphonso has focused her practice in the areas of real estate and construction law and currently performs per diem work in those areas.*

Condo/Co-op Help Line: Practical Considerations In Benchmarking

By Carol A. Sigmond, Esq.

Welcome to the 'brave new world' of benchmarking energy and water use. Like most new government initiatives, this one has many start-up complications. Today's column will provide you with an overview of the intent of the legislation (Local Law 84 of 2009), familiarize you with key terminology and suggest some pit-falls that may yet develop.

The purpose of Local Law 84 of 2009 is to develop information for use in reducing energy and water use in New York City over the next 30 years. The theory of this program is that the greatest reductions in energy usage will come by reducing demand in large residential and office buildings. Therefore, the burden of this energy reduction will be falling on residential buildings, including condos and co-ops. Not all buildings are implicated, only those over 50,000 square feet. Overlooked in this plan is that the average energy use by apartment dwellers is significantly below that of single family homes, but the latter are not being asked to undertake any steps to reduce energy or water use or any of the cost or inconvenience of "benchmarking" or the rest of the program.

"Benchmark" is a simply a means of determining the use of energy and water in 2011. The computation of the base line is to be performed in accordance with the New York City Environmental Protection Agency (NYCEPA) regulations. The "Benchmark" will be for a full year and apply to gas, electric, fuel oil, steam and water. Con Edison will provide information for its services provided to your building for a fee of $102.50 per building.

If you have natural gas, the base line information should be available from the National Grid. NYCEPA will provide you with base line information about your building's water use. Your fuel oil supplier will have to provide you with the amounts of fuel oil and the cost or you may consult your invoices.

For those of you with separately metered electric service for apartments, at present, only the building common areas need to be 'benchmarked." Whether that will continue to be the case is not clear. In any event, if your building is separately metered, you will need to be alert to changes in the regulations.

Once the building has a base line of energy and water usage e.g. "benchmarked," the next step will be "retro-commissioning." This is a three part process that is being analogized to 'tuning up a car.' The idea is, first, to have each base line system reviewed by professionals to verify the operating systems are functioning properly, e.g. the building hot water settings are appropriate, the HVAC system is balanced and operating properly and light levels are set appropriately.

The second part of "retro-commissioning" relates to cleaning and repair of the various systems. For example, filters on HVAC systems should be cleaned or replaced as recommended by the manufacturer. Steam-traps need to be replaced or rebuilt, periodically, in order to maintain them at peak efficiency. Pipes should be insulated to maintain the desired temperature, either hot for heat and hot water or cold for chilled water for air conditioning systems.

The third part of "retro-commissioning relates to continuing current operating permits for all equipment, and ensuring that the building staff is properly trained to maintain and operate the building equipment.

There are certain improvements that are mandated as well, including lighting upgrades. Regular readers of this column know that over the long term, substituting LED bulbs for incandescent bulbs or florescent bulbs will save anywhere from 40% to 90% per bulb in energy use, as well as in reduce bulb costs over time. Although not required, another low cost option to reduce water use is to require water saving appliances and fixtures whenever unit owners upgrade kitchens or bathrooms.

Finally, certain buildings will have the option of having energy audits or undertaking pre-approved energy efficiency programs. Energy audits will cost anywhere from $0.15 per foot or higher. At this point, there is a major demand for this work and you will need to proceed carefully to obtain a qualified professional who will actually be able to help you reduce energy costs. You should consider the pre-planned option before having an energy audit, at least until the peak demand passes.

This column presents only general discussion on topics of interest to condo and coop boards and managing agents. This column is not intended to provide legal advice to anyone. You should consult your attorney for specific legal advice respecting your issues.

Carol A. Sigmond, Esq. *is a partner with Dunnington, Bartholow & Miller LLP, 1359 Broadway, Suite 600, New York, NY 10018. Telephone: 212-682-8811. Email address: csigmond@dunnington.com. Ms. Sigmond was Chair of the New York County Lawyers Association (NYCLA) Construction Law Committee from 2007 to 2010 and a member of the New York State House of Delegates (2007-2011) and is Chair of the NYCLA Foundation, and a member of the NYCLA Board of Directors and the American Arbitration Association Construction Industry Arbitration Panel.*

The Inconvenient Termination For Convenience

By John Caravella, Esq.

For practitioners representing construction clientele, it is typical to find various forms of termination contained in New York construction contracts. Unlike terminations for cause, the termination for convenience can represent a significant risk to contractors for termination on factors beyond the contractor's control. This risk to contractors can occur working under federal contracts as well as privately negotiated contracts and form contracts such as AIA contracts.

Typically these types of provisions can impact the contractor in three major areas: (i) their continuation on the jobsite can be terminated at any time for any reason; (ii) their ability to recover damages for termination are highly restricted; and (iii) an otherwise wrongful termination can be permissible.

There is no requirement in contract enforcement that there be any mutuality of obligation between the parties, and as such, a unilateral right to terminate for convenience will otherwise be enforceable.[1] Often it is the contractor who finds himself working under the cloud of potentially resulting hardships should this termination be exercised against him.

Although New York does imply a covenant of good faith in contract interpretation, this good faith has been limited to apply to the working environment between the parties under the contract, not with respect to a party's exercise of a clear and unambiguous contract right.

In *Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co.*, 470 F.Supp. 1308 (1979), the U.S. District Court Northern District of New York was asked to determine whether any good faith requirement applied with respect to unilateral termination for convenience clauses. Having found no New York law directly on point, the Court had to make a determination on what New York law would be. Examination of existing New York precedent found that no such good faith requirement would likely be required in exercising a unilateral termination for convenience clause.

This holding is in contrast to the approach applied in the Federal context, where courts will not typically uphold termination for convenience provisions on a federal project where the contractor can show that the federal government acted in bad faith. *See Krygoski Construction Co., Inc. v. United States*, 94 F.3d 1537 (C.A. Fed.,1996) (although "the contractor's burden to prove the Government acted in bad faith … is very weighty.")

The reluctance on the part of the Court in *Niagara* to imply this good faith requirement on the state level is consistent with the right of parties to contract. "Generally, parties . . . are free to tailor their contract to meet their particular needs and include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck." *Grace v. Nappa*, 46 N.Y.2d 560 (1979). The termination for convenience therefore makes the contractor's continued performance under such a contract subject to receiving a Notice of Termination at any time.[2]

When examining the effect on damages owed to a contractor as a result of a convenience termination, this serves as a restriction on claiming consequential damages, overhead and profit. The Court of Claims, in *G&R Elec. Contrs. v. State of New York*, 130 Misc. 2d 661 (N.Y. Ct. Cl. 1985), found that claims for overhead and profit "reasonably anticipated" upon the full performance of the contract work must be rejected, and instead allowed limited recovery of damages pursuant to the terms of the contract termination clause.

Unless otherwise specified in the contract itself, recovery is limited to the actual costs incurred up to the effective date of termination, actual costs for settling and paying claims arising from the

[1] Corbin on Contracts § 27; J Calamari & J. Perillo, The Law of Contracts § 55 (1970).

[2] In New York, the requirement for providing prior written notice of intent to terminate prevents a unilateral termination for convenience from making the contract illusory and unenforceable.

termination, and any rate of profit and overhead on them as may be provided by contract.

Often, where a contract includes a termination for convenience clause you will also find a provision that converts any potential wrongful owner termination into one of convenience. One typical such clause states “If the owner terminates the contract for default or cause, and it is later determined that none of the grounds set forth in the termination for default or cause exist, then such termination shall be deemed a termination for convenience.”

What this means is that there is little point in a contractor going through the time and expense in establishing whether or not a termination was wrongful, as it will only be entitled to the amounts provided by contract for termination for convenience.

One way for non-federal contractors in New York to alleviate some of these harsh possibilities would be for them to negotiate into such a contract a good faith requirement on termination. Where such a term is expressly included into the contract, the contractor is then in a position to guard against any potential termination by delivering timely conforming work to the owner. The potential risks of a termination are then within the ability of the contractor to control. Further, inclusion of terms providing for overhead and profit should be explored and included.

John Caravella Esq. *is a construction attorney as well as a trained and formerly practicing project architect at* ***The Law Offices of John Caravella, P.C.*** *He concentrates on construction contract negotiations and preparations, litigation, and arbitrations throughout New York and Florida. Typical matters include defective construction, lien, trust fund and bonding claims. He also serves as a neutral to the American Arbitration Association Construction Industry Panel.*

Design Professionals Beware: The Martin Act Does Not Preempt All Private Rights Of Action For New York State Condominium And Cooperative Owners

By Gary Strong, Esq.

The recent New York State Court of Appeals decision in *Assured Guaranty (UK), Ltd. v. J.P. Morgan Investment Management, Inc., No. 227*, 2011 N.Y. LEXIS 3658 (2011) concerning alleged fraudulent practices in the marketing of stocks, bonds, and other securities and its interplay with the Martin Act (General Business Law §352, 353) could have far reaching affects on design professionals who perform work on condominiums and cooperatives in New York.

In *Assured Guaranty,* a financial guarantee company alleged fraud and negligence against J.P. Morgan for mismanaging the portfolio of a company. J.P. Morgan, the entity being sued by Plaintiff, Assured Guaranty ("Plaintiff"), for the alleged fraud, took the position that Plaintiff's common-law breach of fiduciary duty and gross negligence claims must be dismissed because they are preempted by the Martin Act under *CPC Int'l v. McKesson Corp.,* 70 N.Y.2d 268 (1987) and *Kerusa Co., LLC v. W10z/515 Real Estate Ltd. Partnership,* 12 N.Y.3d 236 (2009). Contending that the Martin Act vests the Attorney General with exclusive authority over fraudulent securities and investment practices, J.P. Morgan claimed that it would be inconsistent to allow private investors to bring overlapping common-law claims. Alternatively, Plaintiff asserted that *CPC* and *Kerusa* favor its argument that common-law claims not predicated exclusively on violations of the Martin Act may proceed in private actions.

In affirming the Appellate Division's decision, the Court of Appeals held that while "a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute[,] an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies." *Assured Guaranty*, 2011 N.Y. LEXIS 3658 at 2. The Court of Appeals agreed with the Plaintiff's position that a common law claim under the Martin Act is permissible.

Although *Assured Guaranty* is a case dealing with facts specific to the financial securities arena, its interpretation of the Martin Act goes beyond one industry. In 1960, the Martin Act[1] was expanded beyond financial regulations to include regulations related to the real estate industry. The goal of the amendment was to prevent fraud in the sale and transfer of condominiums and cooperatives. Consequently, "[t]he Martin Act makes it illegal for a person to make or take part in a public offering of securities consisting of participation interests in real estate unless an offering statement is filed with the Attorney General" and numerous disclosures are made pursuant to the statute and its implementing regulations. *Kerusa,*12 N.Y.3d at 243.

In a case where a design professional performs services relating to the offering plan as well as design professional services such as approving contractor pay applications and providing project oversight for the owner, a plaintiff can assert a private common law claim (fraud or otherwise) along with a Martin Act claim because the design professional's services include work outside that of solely the offering plan. Indeed, a design professional may face greater exposure when a plaintiff brings a private right of action as opposed to a claim brought only under the Martin Act.[2] The reality is that is when a design professional is

[1] When originally enacted in 1921, the Martin Act authorized the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities with-in or from New York State. *See* General Business Law §§ 352, 353. At the time of its enactment in 1921, "no one realized" that the statute would eventually "come to embrace a then-unknown species of investment activity"; namely, "the offer and sale of cooperative apartments ('coops') and condominiums". *See* Kaufmann, Introduction and Commentary Overview, McKinney's Cons Laws of NY, Book 19, General Business Law, Article 23-A, at 9.

[2] The Attorney General is more concerned with the "public well-being" than a particular monetary recovery by a particular plaintiff. An individual plaintiff usually seeks to recover the most amount of money to satisfy losses and may, in certain instances, seek recovery of attorneys' fees.

already providing services relating to the offering plan, that design professional will likely be called upon to perform services above and beyond the offering plan, and the services above and beyond that for the offering plan open up the design professional to private common law claim. Thus, based upon *Assured Guaranty*, now more than ever, attorneys who have a claim only concerning the offering plan will make the allegations in their complaint general enough to be able to assert a private right of action.

Gary Strong, Esq. *is an Associate at Lewis Brisbois Bisgaard & Smith, LLP. He focuses on construction law in New York and New Jersey including, but not limited to, Lien Claims, Surety/Fidelity law, and Errors and Omissions Defense of Design Professionals.*

New York Court Green-Lights Bad Faith Claim In Alleged Breach Of Duty To Defend[1]

By Mark Garbowski, Esq.

Bad faith claims against insurance companies rarely survive motion challenges in New York State, so it is noteworthy when a state Supreme Court ruling allows such a claim to proceed. That just happened in February of this year in *Estee Lauder Inc. v. One-Beacon Insurance Group, LLC,* when the policyholder Estee Lauder sought leave to amend its complaint against OneBeacon by adding two counts for bad faith: one concerning a bad faith coverage denial regarding the duty to defend, and another involving a bad faith duty to pay undisputed defense costs.

The Appellate Division of the Supreme Court's different treatment of the two claims highlights just how difficult it still is to plead bad faith in New York, while underlying the evergreen truth that the defense obligation can be a policyholder's most potent weapons in a dispute with its insurance company.

The specifics concerning the bad faith denial of the coverage claim are complex, but the theory is simple. The insurance company fought coverage based on a disputed provision of a missing policy. After Estee Lauder prevailed on the point, it sought to add a claim for bad faith. Essentially, Estee Lauder argued that, given the facts of the case and the burden of proof under New York law, it was bad faith for the insurance company to have argued the point at all. The court refused to allow Estee Lauder to amend to add this bad faith claim, stating that although the Appellate Division ultimately ruled in favor of Estee Lauder regarding the missing policy, it was not bad faith for the insurance company to have argued and litigated the point.

In contrast, the court allowed Estee Lauder to amend and add a count for bad faith for failure to pay defense costs for three actions after Estee Lauder won summary judgment regarding two of the actions, and the insurance company acknowledged its defense obligation regarding the third. Despite those circumstances, the insurance company refused to pay because it maintained that some of the defense costs went toward defending an uninsured entity, and because some of the costs were unreasonable. It refused to pay anything until those issues were resolved. Estee Lauder's second bad faith claim was based on the idea that the refusal to pay any costs at all under those circumstances constituted bad faith. The court allowed this claim to go forward.

In sum, this decision does little to dispel the standard notion that New York courts are hostile to bad faith claims against insurance companies. The case was in an unusual situation, in that it had already been up on appeal over summary judgment decisions, so the decision of whether to allow the new claims to go forward was made on a fairly developed record. Nevertheless, the refusal to allow the first bad faith claim to proceed indicates that the court believed that there was no set of possible facts that would support a bad faith claim based upon an unreasonable coverage position.

Where the court did allow the bad faith claim to proceed, there was already a decision in favor of coverage and a subsequent refusal to pay. This will not be true for most policyholders hoping to allege bad faith in New York going forward.

What the case does emphasize, however, is the continued importance of the defense obligation and the classic policyholder strategy of filing early summary judgment motions on the issue of the duty to defend or to pay defense costs. Once Estee Lauder won its defense cost motion it moved to a position of strength from one of weakness, while the options facing its insurance company were restricted. The ruling makes it clear that insurance companies cannot use even potentially legitimate disputes over the amount of defense costs as an excuse to pay no defense costs.

Mark Garbowski, Esq. *(mgarbowski@andersonkill.com) is a senior shareholder and member of Anderson Kill's Insurance Recovery Group, with particular experience in professional liability insurance, directors and officers (D&O) insurance, fidelity and crime-loss policies, Internet and hi-tech liability insurance issues.*

[1] Originally published in Anderson Kill's Policyholder Advisor newsletter (March/April 2012)

Who Will Step Up To Protect Policyholders?[1]

By Neal Eiseman, Esq.

Litigation is expensive and the cost of pursuing your rights in court are all too frequently pyrrhic. Consider the plight of an employee who is forced to sue his or her insurance company because it refuses to pay for certain medical costs due to a dispute over whether hospital procedures are covered by its insurance policy. After a long and time-consuming legal battle, even if the employee ultimately wins, the attorney's fees incurred along the way may equal or even dwarf the recovery. The same can be said of a contractor who is forced to sue its insurance carrier because it refuses to defend and indemnify the contractor against water damage claims that arose during a construction project. While the contractor contends the water damage was a covered "occurrence" under its comprehensive general liability policy, the carrier disagrees and litigation ensues to determine what is (and is not) covered. At the end of the day, even if the contractor prevails, the contractor will never be made whole and in retrospect, perhaps the contractor's dollars would have been better spent trying to settle directly with the building owner rather than fighting it out with its insurance carrier.

Life is not always fair, but it ought to be, particularly in the case where an insurance company wrongfully refuses to honor the insurance policies it issues. Except in the rare case where the insurance company's failure to insure constitutes a clear case of bad faith, in New York, carriers benefit from the existence of the "American Rule."[2] It provides that absent a statute, agreement or court rule permitting an award of attorney's fees, a successful litigant may not recover its own attorney's fees as damages even when the litigant prevails at trial. In the United States, unlike England, attorney's fees are largely seen as a non-recoverable cost of doing business. As a result, a policyholder who sues its carrier and wins still loses because the policyholder is out-of-pocket for all of its attorney's fees. While arguments exist--pro and con--regarding the fairness and utility of the American Rule, its wholesale application to policyholders' lawsuits against their insurance carriers stacks the deck against the policy holder and bestows an unnecessary gift to the insurance industry.

A 1979 case from New York's highest court, known as *Mighty Midgets*[3], purports to create an exception to the American Rule, but, practically speaking, it does not. This so-called exception permits a policyholder to recover attorney's fees when it "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations." The court observed that a policyholder having to defend an insurance coverage lawsuit filed by its own carrier has been placed in a "defensive posture." Unfortunately, however, in the same breath, the Court also declared that a policyholder who sues as a plaintiff "has taken the offensive" and cannot be seen as having been cast in a defensive posture. Therefore, strategy-wise, it makes no sense for an insurance company to throw the first punch by filing a lawsuit because if its insured wins, the carrier will be required to pay for its insured's attorney's fees. Clearly, from the carrier's perspective, the better strategy is to "sit tight" when a coverage dispute arises. If the policyholder elects not pursue the issue and file suit, it's a win for the carrier. When the insured hires an attorney to file a lawsuit, worse-case scenario from the carriers' perspective, it will end up having to pay for what its policy requires, but not the attorney's fees its policyholder incurred to file and prosecute its lawsuit.

This is nonsensical. As a federal court noted in 2004, New York seems to provide "a perverse incentive for the insurer to refuse to defend in the underlying suit, thereby leaving it up to the insured to bring a declaratory action seeking coverage."[4] As a New York State court astutely noted early last year, "[t]here is the potential that insurers might shrink from their defense obligations under their

[1] Originally Published in the New York Law Journal.

[2] *Baker v. Health Management Systems, Inc.*, 98 N.Y.2d 80, 745 N.Y.S.2d 741, 772 N.E.2d 1099 (2002).

[3] *Mighty Midgets v. Continental Insurance Company*, 47 N.Y.2d 12, 416 N.Y.S.2d 559, 389 N.E.2d 1080 (1979).

[4] *Folksamerica Reinsurance Company v. Republic Insurance Company*, 2004 WL 2423539 (S.D.N.Y. 2004).

policies and categorically deny their insureds' tenders of defense in an effort to reduce their financial exposure, without risk of incurring any additional liabilities or expenses associated with issuing and maintaining policies."[5] Clearly, cost-benefit wise, there is no upside for an insurance carrier to initiate litigation to resolve *bona fide* insurance coverage disputes in good faith.

Carriers assert that the "American Rule" is even-handed because its application also prevents them from recovering attorney's fees when they prevail in coverage disputes with policyholders. This point is well-taken, but it disregards the chilling effect the current law has on individuals with no alternative except to sue their insurance company to honor its policy, but who lacked the financial wherewithal to hire an attorney to do so. Since insurance policies are considered "contracts of adhesion" (i.e. they are always drafted by the party with superior bargaining position, to wit, the carriers), the courts construe any ambiguity in the policy's language against the carrier. The spirit behind this rule of construction supports the notion that no matter who initiates an insurance coverage lawsuit, if the policyholder wins, he or she should be put back in the position they would have been had the carrier initially honored its policy. To address the carriers' point that any possible award of attorney's fees in coverage lawsuits should cut both ways, the court can act as a gatekeeper to determine whether the policyholder initiated its lawsuit in good faith. If the policyholder did, even if the insurance company prevails, it would not be awarded attorney's fees. However, if the court determined that the policyholder's lawsuit lacked sufficient merit, then the policyholder would be required to reimburse the carrier for its reasonable attorney's fees.

New York is accurately seen as a progressive state, but it lags behind on this important consumer issue. Approximately 27 other states, including New Jersey and states generally seen as conservative (i.e. South Carolina, Tennessee, Texas and West Virginia), permit successful policyholders to an award of attorney's fees in insurance coverage lawsuits.[6] These states recognize that an insurance company which improperly refuses to defend its insured should bear the consequences of its wrongful conduct. This means not only being required to pay benefits to the insured for the covered loss or to defend and possibly indemnify its policyholder from third-party claims. It also means having to reimburse its insured for the legal expenses that arose because the carrier refused to do what it should have done from the start.

As one judge aptly noted, until the New York legislature takes action, the courts are constrained to "interpret the law as it currently stands."[7] This begs the question, "Who among our politicians will recognize this inherent fairness in the law and sponsor legislation to protect policyholders?"

Neal Eiseman, Esq. *(neiseman@goetzfitz.com) has provided legal services to a wide variety of corporate clients in both the transactional and litigation aspects of the construction and commercial real estate industries for 30 years. Neal serves on several arbitration and mediation panels of the AAA, and as an arbitrator for NYC's Small Court. Neal is an Adjunct Professor at NYU teaching masters courses in construction and real estate law and negotiation and dispute resolution.*

Neal is currently Co-Chair of the ABA's Committee on Arbitration, a member of the NYU Schack Institute of Real Estate/Construction Management Advisory Board, and founded the Bergen County Bar Association's Construction Law Committee.

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[5] *Lauder v. OneBeacon Insurance Group, LLC*, 918 N.Y.S.2d 825, 31 Misc.3d 379 (New York Co. 2011).

[6] *See* 87 A.L.R.3d 429, "Insured's right to recover attorneys' fees incurred in declaratory judgment action to determine existence of coverage under liability policy" (2011).

[7] *Lauder v. OneBeacon Insurance Group, supra*, at 393.

The New York Court Of Appeals Appears To Severely Limit A Municipality's Discretion In Evaluating A Lowest Responsible Bidder

By Melaine C. Alphonso, Esq.

In the *Matter of AAA Carting and Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136 (June 9, 2011), the Court of Appeals held that the Town Board of Southeast (the "Town Board") acted arbitrarily and capriciously and in violation of the applicable competitive bidding statutes with regard to its award of a public bidding contract for waste removal services.

In July, 2009, the Town Board sought competitive bids to handle its residential waste removal needs. It received the following bids: (s) AAA Carting and Rubbish Removal, Inc. ("AAA") submitted a bid for $1,210,500 per year; (b) Sani-Pro Disposal Services Corp. d/b/a Suburban Carting ("Suburban") submitted a bid for $1,496,205 per year; and (c) the Town's existing waste removal contractor, Advanced Waste Systems, submitted a bid for $1,692,306.80 per year.

In its due diligence report, the Town Board noted that while AAA has the experience, capital and infrastructure to execute the contract, Suburban's operation, cleanliness and professionalism was head-and-shoulders superior to AAA. In addition, the Town Board noted that Suburban's fleet of trucks was newer that AAA's and that Suburban had a strong commitment to safety. A due diligence report was not prepared on Advanced Waste Systems as it was the highest bidder and the Town was well aware of its operations as it was the Town's existing waste removal contractor.

As a result of its due diligence, the Town Board awarded the contract to Suburban on the basis that qualitative factors such as safety, professionalism, and the availability of spare vehicles are critical to ensuring that the contract is executed in a consistent, safe and quality manner. Additionally, one of the councilmember's noted that the lowest responsible bidder, when taking into consideration all the other qualitative factors is Suburban.

Subsequently, AAA filed a petition, pursuant to CPLR Article 78, to set aside the award and direct the Town to award the contract to it.

The Supreme Court granted the petition finding that the Town Board acted arbitrarily and capriciously. The Appellate Division reversed holding that the Town did not act arbitrarily and capriciously. The Court of Appeals reversed.

In its reasoning, the Court of Appeals noted that in determining the responsibility of a bidder, an administrative agency or municipality should consider the bidder's skill, judgment and integrity and where good reason exists, the low bid may be disapproved. The Court of Appeals concluded that while a municipality enjoys flexibility and discretion, the Town accepted the higher bid based on subjective and/or additional criteria not specified in the bid request.

However, it appears from the record that the Town Board did base its decisions on the requirements set forth in the bid requests, which requirements are as follows: "that the work of the contractor be done in a prompt, proper, and workmanlike manner, that the contractor provide operating and safety training for its personnel, that the contractor's equipment be maintained in safe and sanitary condition, and that there is reserve equipment that can be put into operation within two hours of a breakdown."

As noted by the dissent, this decision seems to be a mistake and defies precedent and good policy, which affords a municipality to exercise its sound business judgment in determining the lowest responsible bidder. This decision appears to force municipalities to accept subpar work from less competent contractors because they offer the lowest price.

Perhaps this decision may be limited to its facts as the Court of Appeals focused on the fact that the Town Board never made an affirmative statement that AAA did not adequately fulfill any of the requirements as set forth in the bid request. Also, the Court of Appeals made much of the fact that the Town Board compared AAA and Suburban to each other. Thus, the manner in which the Town Board conducted its analysis lead the Court of Appeals to conclude that the Town Board chose the "more" responsible bidder – not that AAA was not the lowest responsible bidder.

Ms. Alphonso, Esq. *is a member of the NYCLA Construction Law Committee. Since graduating from Quinnipiac University School of Law in 2003, Ms. Alphonso has focused her practice in the areas of real estate and construction law and currently performs per diem work in those areas.*

American: When The Jury's Decision Needs A Second Look

By David Joyandeh, Esq.

After the City of Syracuse lost a jury trial against a lead contractor regarding a breach of contract case for the construction of a parking garage, the City brought a post trial motion which is the focus of *American Underground Engineering Inc. v. City of Syracuse*.[1] The City brought the post trial motion in order to overturn what it felt was excessive quantum meruit damages of $7,306,021.64 that the jury awarded the lead contractor in the jury trial. In the post trial motion, the City requested in the alternatives a judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or a new trial pursuant to Federal Rule of Civil Procedure 59, or for separate findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1). In addition, the City also moved for remittitur of damages.

In explaining the standard for Rule 50, the Court in *American* pointed out that a judgment as a matter of law should only be granted where the jury's finding could only have been the result of "sheer surmise and conjecture" because of the complete absence of evidence, or there is an overwhelming amount of evidence in favor of the movant that a reasonable and fair minded person would not decide against it.[2] Although there is a less stringent standard for Rule 59, the Court concluded that in order to prevail the jury must have reached a seriously erroneous result or that the jury's verdict was contrary to the weight of the evidence. Still, the Court pointed out that "[w]hen a party moves for a new trial 'on the ground that the amount of damages awarded is excessive, a court may require a plaintiff to elect between remitting a specified amount of the damage award, or submitting to a new trial.'"[3] Because the City wrongfully terminated the contract by failing to pay the lead contractor and caused delays by barring them from the work site, the Court found that the lead contractor was entitled to the quantum meruit damages that was awarded to them. Since the jury did not reach a seriously erroneous result when awarding them the quantum meruit damages, the court denied the City's motion for judgment as a matter of law and for a new trial with respect to this issue.

Additionally, the Court found that lead contractor not choosing between contract and quantum meruit damages in their motion for summary judgment did not preclude them from pursuing quantum meruit damages at trial. The Court explained the reason being that the motion for summary judgment did not contain a discussion of damages and the case was regarding the existence and/or application of a contract. Therefore, there was never a requirement by the lead contractor to elect a remedy.

Furthermore, the Court explained that the City was incorrect in arguing that the jury's verdict was advisory and therefore the court would not be bound to it regarding the lead contractor's equitable claim. Both parties agreed to a jury trial, the court never notified either party that the jury would function as an advisory, and the City objected to the use of the jury only after the lead contractor prevailed in the original case. In addition, the Court found that lead contractor lacked an adequate remedy at law and, to fully recoup its losses, had the right to seek quantum meruit damages. Therefore, the court decided that the lead contractor had a right to a jury trial in this matter and denied the City's motion for separate findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).

Nevertheless, the Court found that remittitur was appropriate in this case and the lead contractor had to choose between accepting the new award or having a new trial. The Court explained that the Second Circuit had found remittitur appropriate "(1) where the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken, . . . and (2) more generally, where the award is 'intrinsically excessive' in the sense of being greater than the amount a reasonable jury could have awarded,

[1] 2001 U.S. Dist. LEXIS 117102 (N.D.N.Y. October 11, 2011).

[2] *Benson v. Yaeger*, 2010 U.S. Dist. LEXIS 122966, 2010 WL 4703419, (W.D.N.Y. Nov. 19, 2010); *quoting Galdieri-Ambrosini v. Nat'l Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998).

[3] *Malmsteen v. Berdon, LLP*, 595 F. Supp. 2d 299, 304 (S.D.N.Y. 2009).

although the surplus cannot be ascribed to a particular, quantifiable error . . . ."[4]

The Court highlighted five areas where the jury may have erred in calculating damages. The first was the jury's mathematical error in double counting profits—the lead contractor included 15% for profit and overhead in its overall expenses yet the jury awarded another 15% on the verdict form for profit and overhead. The Court found here that a remittitur of the additional 15% in profit that the jury awarded was justified. However, the Court found no error regarding overhead as it found it to be within reasonable and accepted industry standards. The Court also found no error with regard to the workers comp, bond costs, or payroll. Nevertheless, since the lead contractor did not show a correlation between the City's breach and the lead contractor's higher home office overhead costs, the Court concluded that a remittitur for this portion of the jury's award was justified.

American displays the Court's hesitance to overturn the jury's decision unless there are clear indications of error or miscalculation. However, when the court actually does decide to tweak the jury's decision, such as in the case of a remittitur, then there is not always a clear choice to be made by the party who won the jury trial. While accepting the reduced award might be less then what the prevailing party had won at trial, having a new trial might result in an even lower award amount as new issues might arise and a different jury might cause a different outcome at trial.

David Joyandeh, Esq. *is a member of the NY and NJ Bar.*

[4] *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 49 (2d Cir. 1984).