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IS THE CITY OF NEW YORK AN "UNREASONABLE" PUBLIC OWNER? Let Me Count The Ways...

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The New York City Standard Construction Contract is chock full of what can only be described as draconian "traps" and "penalties" for the unwary contractor. It is hard to understand why NYC would go to such lengths to harm members of its tax-revenue generating and job-creating construction industry in the guise of "self-protection." The construction industry is unquestionably a major driving force in the City-wide economy. Aren't the ordinary construction-related financial risks burdensome enough for contractors and subcontractors to struggle to absorb? Regretfully, one need not look past the very first page of the City's standard construction contract to find a wholly one-sided "landmine."

Specifically, Article 1.2 of the City Contract states in part:

> "Should any conflict occur in or between the Drawings and Specifications, the Contractor shall be deemed to have estimated the most expensive way of doing the Work..."

No reasonable, informed person could read such a provision without a stream of appropriate adjectives coming to mind: indefensible, baseless, unjustifiable, etc. Who was it in City government that came to work one day and thought that such an outrageous provision could possibly be a good idea?

Article 1.2's requirement of the most expensive interpretation in the event of a contract interpretation conflict between contract drawings and specifications is, of course, wholly inconsistent with New York State's bidding statutes, which require contractors to sharpen their pencils and submit the lowest bid in order to achieve award. This mandated, lowest-price competition is completely anathema to the City's imposed "most expensive" requirement. If a contractor, for example, calculates its bid estimate based upon information provided in the City's specifications and, after the contract is awarded, is informed that the City agency believes the drawings call for a more expensive item or method of work, the contractor must provide the more expensive work or item without additional compensation.

A contractor typically only has a matter of weeks to estimate a (hopefully) low bid after dissecting hundreds of pages of drawings and specifications. The City and/or its consultants, on the other hand, have years to prepare the bid documents. Contractors are clearly disadvantaged and, in fact, exploited by the City's "most expensive" interpretation rule. It is the City that should write its own contract provisions in unambiguous and/or consistent terms.

Unfortunately, Article 1.2 is only the first of many destructive provisions throughout the City Contract. Article 1.2 demonstrates the City's fundamental lack of appreciation of the dynamics of the bidding process, and reflects a push-the-cost-on-the-contractor mentality that infects, on a larger scale, the City's entire construction procurement management process.

By way of dramatic contrast, both New York State and the federal government address contract interpretation assumptions in a more fair, reasonable and predictable manner. When two or more specifications and/or drawings

are in direct conflict, the conflict is resolved by the following of a commercially reasonable "order of precedence" expressly set forth in the New York State and federal bid documents:

Specifically, Section 102-02(b) of the New York State DOT Standard Contract states:

> "The following components of the contract documents complement one another in the declining order of precedence listed below. The intent of the contract documents is to include all items/aspects of the work that are necessary for the proper initiation, execution, and completion of the work.
>
> 1. Plans.
> 2. Proposal – Special Notes.
> 3. Proposal – Special Specifications.
> 4. Standard Specifications.
> 5. Standard Sheets.
> 6. Base Line Data."

Doesn't that make sense? No indefensible "most expensive" interpretation requirement exists on state projects. For example, applying the foregoing "order of precedence," any conflict between a New York State construction agency's plans and its bid specifications are resolved in favor of the plans and not necessarily the "most costly" item or method. Other conflicts among any of the six listed bid components are also fairly prioritized to avoid a one-sided result.

Additionally, in contrast to Article 1.2 of the City's contract, federal regulations (FAR 52.236-21-"Specifications and Drawings for Construction") similarly provide:

> "Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern." (Emphasis added)

Both the state and federal rules make sense. They are fair. A bidder knows how to consistently resolve any apparent inconsistencies in the bid solicitation documents in an orderly, predictable way. Whether more or less costly, the rules are clear and the bidding contractor has a consistent way to calculate the lowest, potentially winning bid. For the City to demand in each and every instance, that inconsistencies of its own making, are resolved in the most expensive manner, every time, is not only indefensible, but inconsistent with the public's interest in obtaining the lowest possible price for its capital projects.

Unfortunately, this is hardly a unique example. New York City's standard construction contract, as indicated above, and as we will be discussing in future articles, is replete with one-sided, inequitable contract provisions which show nothing but contempt for the welfare of its own citizen contractors and subcontractors.

Conversely, federal, and to a lesser extent, state government contracts, are replete with examples of more equitable rules regarding contract interpretation. It is well established that, under the rule of contract interpretation known as *contra proferentem* ("the matter shall be resolved against he who creates the ambiguity"), if some federal contract provision is fairly susceptible to a certain interpretation, and the contractor actually and reasonably so construed it in the course of bidding or performance, then that is the interpretation which will be adopted, unless the parties' intention was otherwise specifically memorialized to the contrary. In other words, as long as the contractor's interpretation is reasonable, and it employed good faith, it need not be the only acceptable interpretation for the contractor or subcontractor to prevail.

In addition, federal government contracts are fairly interpreted in light of the involved industry's "custom and trade usage." Federal courts have held that such evidence of usage may be considered, even though the language in the contract is superficially unambiguous. Trade usage or custom may be utilized to show that apparently unambiguous language has a industry-specific meaning different from its ordinary meaning, and that the special, construction-industry-specific meaning should apply.

In addition, evidence of a "prior course of dealing" between the federal government and a contractor may also be used in the interpretive process to establish the meaning of ambiguous language. That is, where the parties to a federal contract interpretation dispute have indicated, either expressly or by their actions, that a similar provision in a previously performed contract was interpreted in a certain manner, they will be presumed to have intended the same meaning in the current disputed contract.

G&C Commentary:

Regretfully, Article 1.2 of the New York City Standard Contract illustrates that, yes, the City of New York is an unreasonable public owner. It is fundamentally unfair to require a contractor to submit the lowest bid possible, but later require the contractor to perform in the most expensive manner, particularly where, as is always the case, the City drafted the Contract documents and is, therefore, responsible for creating the "conflict." The absence of an "order of precedence" provision is certainly consistent with the City's on-going efforts to have contractors waive and/or forfeit substantial claim rights and/or suffer penalties, in order for the City to avoid incurring additional costs.

The sad message of this article, however, is that this is just one example, right on the very first page of the City contract, of unacceptable, indefensible, and one-sided contract provisions throughout the City contract. Fairness in public contracting, the equitable handling of disputes, a sense of good faith and fair dealing, and a sense that the City and its contractors are in the process together, are goals we hope and expect the new City administration will address. It is incumbent upon all of us in the industry to hold it accountable. It is long past the time when the City contract must undergo a major overhaul to protect the interests of both the City and the contracting community.

As the economy improves, the City will have to compete for the best contractors. Right now, its contractual provisions, which are designed to only protect its interest at the expense of the contracting community, are a major impediment to its ability to compete in the market place, are extraordinarily harmful to its own citizen contractors, and are just plain unfair.

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