Is The City Of New York An "Unreasonable" Public Owner? Let Me Count The Ways...

By Henry L. Goldberg, Goldberg & Connolly

The New York City Standard Construction Contract is 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 contrast, both New York State and the federal government address contract interpretation assumptions in a more reasonable 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" set forth in the New York State and federal bid documents.

The state rules 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.

Regretfully, Article 1.2 of the New York City Standard Contract illustrates that, yes, the City of New York is an *un*reasonable 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 message of this article, however, is that this is just one example, on the 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 an impediment to its ability to compete in the market place, are harmful to its own citizen contractors, and are just unfair.

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