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ContrACT

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LOW BIDDER, OR NOT?
Award on Base Bid Not Including Elected Alternate Violates Public Bidding Laws

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Sometimes the question a court is asked is not the one the court decides to answer. What began as a dispute over an apparent low bidder's qualifications and experience for the project became, instead, a question of whether a bid specification violated public bidding laws so as to be disregarded entirely, rendering the original question moot. In the end, the apparent second lowest bidder was held to be the low bidder all along, and a petition to review the owner's determination against the initial low bidder was dismissed, without reaching the qualification issue.[1] The violative bid specification required that the price of the base bid determine the low bidder, without consideration of prices bid for alternate work.

In July 2021, the Olympic Regional Development Authority ("ORDA") sought bids for construction of a new ORDA administration building as part of its preparation for the Lake Placid 2023 Winter World University Games. Cutting Edge Group, LLC ("Cutting Edge") and Bast Hatfield Construction, LLC ("Bast"), among others, submitted bids for the "General Trades" contract of the project, which included one alternate for a parking structure that could be added to the contract, if ORDA so chose. The instructions to bidders provided that, in determining which bid was the lowest, the bid price for the alternate work "shall not be used in combination with the Base Bid to determine low bidder." Cutting Edge had the lowest base bid. Bast had the second lowest base bid. If the bidders' prices for the alternate work were combined with their base bids, however, the order was reversed, and Bast had the lowest combined bid.

ORDA elected to add the alternate work to the contract but, per its methodology, declared Cutting Edge to be low bidder. Cutting Edge submitted its pre-award submittal package including the required references for three projects and resumes for its supervisory personnel. ORDA found that Cutting Edge's projects were not similar in scope and size to the ORDA administrative building project, and its supervisory personnel were insufficiently qualified. Although Cutting Edge argued to the contrary and submitted more information, ORDA concluded that it did not meet the mandatory pre-award submittal requirements. Cutting Edge "failed to provide sufficient references for projects of similar scope and size and qualified staff/supervision," said ORDA, which rendered it a non-responsible bidder, and the bid non-responsive. ORDA then awarded the General Trades contract to Bast. Cutting Edge objected, unsuccessfully argued its case with ORDA, and thereafter commenced an Article 78 proceeding seeking an immediate temporary restraining order (which was denied), annulment of the ORDA contract with Bast and its award to Cutting Edge, or a re-bid of the contract.

The petition and responses of the parties focused on issues surrounding ORDA's rejection of Cutting Edge's bid, including its specific requirement of three project references,

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Refusing to Proceed with Changed Work Can Be Risky Business

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A subcontractor bids a concrete job that requires that the concrete be poured rather than pumped, which is more costly. Part way through the job, the subcontractor is told that the remaining concrete must be pumped instead, and it seeks a price adjustment. The contractor is in general agreement, but the parties have difficulty reaching price terms. Despite the dispute, the contractor orders the subcontractor to proceed with the work, which the subcontractor refuses to do. The contractor terminates the subcontract and completes the work by other means. The parties end up in court, with the subcontractor seeking compensation for materials left on the job and its retainage, claiming wrongful termination. The contractor asserts a breach of contract counterclaim for the additional costs incurred to complete the subcontract work. Who wins?

This recent case[1] stems from a large train station construction project in Rensselaer County. Banton Construction Co. ("Banton") was a subcontractor to the general contractor on the Amtrak job. Banton subcontracted with McCarthy Concrete, Inc. ("McCarthy") for the concrete work. The unit price subcontract specifically excluded "concrete pumping" and the installation of "tactile warning strips." McCarthy performed subcontract work in 2015 until an overall work suspension by Amtrak compelled McCarthy to demobilize. McCarthy filed suit against Banton in

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its conclusion that referenced projects were not of "similar scope and size," its determination as to the experience of Cutting Edge personnel, and Cutting Edge's entitlement to injunctive relief. At oral argument, however, it became clear that the court was more concerned about the manner in which ORDA determined low bidder for the contract and, specifically, its instruction to bidders that low bidder be determined by base bid only, without consideration of the prices for the included alternate work.

In its March 17, 2022 decision, the court held that the provision "violates the clear language of New York Public Authorities Law § 2620(2)" which prohibits ORDA from "award[ing] any construction contract except to the lowest bidder who, in its opinion, is qualified to perform the work required and who is responsible and reliable." Construing the statute, the court found the intention of the legislature to be two-fold:

(1) Protection of the public fisc by obtaining the best work at the lowest possible price; and

(2) Prevention of favoritism, improvidence, fraud and corruption of public contracts.

Since an administrative agency can only promulgate rules to further the implementation of the law as it exists, the court stated, it has no authority to create a rule out of harmony with the statute. The court explained:

> The clear and unambiguous language of the [the statute] does not afford any discretion to ORDA to only consider the base bid price in determining the lowest bidder…when [it] has elected to include [the alternate in the awarded contract].

The court reasoned that the "fallacy and danger of implementing the contract language employed by ORDA is shown by the bid prices." Had ORDA found Cutting Edge to be qualified, it would have expended more money on the General Trades contract (which included the alternate) than if the contract was awarded to Bast. Thus, the court concluded, ORDA properly awarded the contract to Bast, albeit for the wrong reason. Under the doctrine of judicial restraint the court declined to consider ORDA's disqualification of Cutting Edge or its request for a re-bid.

What this decision means for public bidders and owners going forward is not entirely clear. This type of provision has been used in ORDA (and other public) contracts for years. While public owners have not historically been required to award a contract based solely on a base bid or to prioritize alternates, they have also not been precluded from doing so. The risks of fraud, improvidence[2], favoritism or corruption seemingly exist with equal measure under either scenario, with the standards against such conduct offering protection while requiring actual evidence of it.

The question of bidder qualifications aside, timing would seem to be a factor. Had the election of the alternate been made after contract award rather than as part of it, the matter might not have reached the court. The decision does not represent a black letter ruling that all alternates must be included in determining the low bid. But if the contract award includes an alternate, that should be factored into determining who is the low bidder – at least according to one court. The problem for bidders is the uncertainty at bid time whether alternative pricing will or will not be used to determine the low bid. The goals of protecting the public fisc and preventing improvidence and other risks are best served by clarity in the bid process. Had ORDA stated in the bid documents that alternates included with the contract award would be factored into determining the low bid, the process might have withstood judicial scrutiny. But if, indeed, the process used by ORDA was void as a matter of law, as the court determined, ORDA should not have been "saved" (rewarded?) by its disqualification of Cutting Edge. The ORDA specification presented the type of inherent unfairness to bidders that would justify a re-bid. Rather than ending with the same result for a different reason, this case should have started over with a new beginning. E&D

1 *Cutting Edge Grp., LLC v. Olympic Reg'l Dev. Auth.*, 75 Misc.3d 208 (Sup Ct, Essex County 2022).

2 Meaning not planning carefully for the future, particularly spending money unwisely. Some taxpayers might complain that "improvidence" is a feature of the system, not a bug.

Among those celebrating E&D founding member Bill Ernstrom's receipt of the **AGC NYS Distinguished Service Award** on May 4, 2022 in Albany, NY were (L to R) E&D's Brian Geary, Brian Streicher, John Dreste, Kevin Peartree, Bill Ernstrom, Todd Braggins, Clara Onderdonk, and Martha Connolly.

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Connecticut over payment issues. As the project was being remobilized in 2016, the parties reached a settlement in that action. But when McCarthy returned to the job, issues arose as to whether the settlement covered the rebar left at the site, and McCarthy refused to complete the work until it was paid for the rebar.

Thereafter, Amtrak issued changes to the concrete work, requiring concrete pumping and the installation of tactile strips. McCarthy provided proposals for the cost of the changes, but Banton did not agree to them, instead stating that it would fund the alleged added costs under a reservation of rights. At an impasse, Banton advised that if McCarthy failed to commence the work within three days, it would terminate the subcontract for default. McCarthy declined to return to work without an agreement on price, and Banton completed the work.

In 2018, McCarthy sued Banton in New York for its retainage on the subcontract work and the value of the rebar. Banton asserted a counterclaim for breach of contract, demanding reimbursement for costs to complete the subcontract work. A non-jury trial resulted in a ruling in favor of McCarthy, finding the subcontract changes were material, and dismissing Banton's counterclaim. Banton appealed.

The appellate court reversed, relying on subcontract language that permitted changes in the work but also required performance of the changed work. The court cited the contract provision stating that "[p]ending resolution of any claim, dispute or other controversy, nothing shall excuse [McCarthy] from proceeding with the prosecution of the [w]ork." With that subcontract language, the court concluded, even if the change to the work was a "material" change, as the trial court found, it was not a "cardinal" change that would relieve McCarthy of its obligation to perform. A cardinal change "affects the essential identity or main purpose of the contract, such that it constitutes a new undertaking," the court explained. Here, reasoned the court, the main purpose of the subcontract was to complete the concrete work, and the change from pouring to pumping did not alter that.

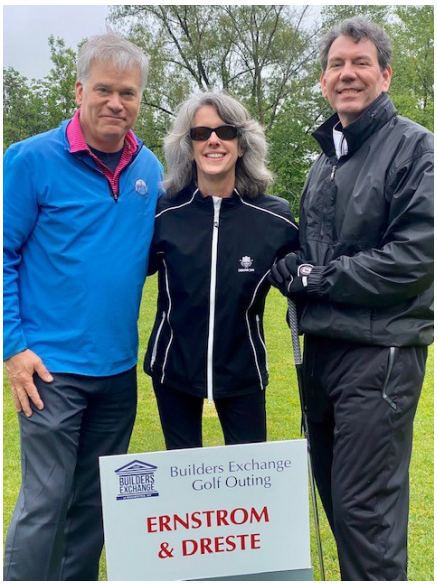
The court noted that McCarthy was "ready, willing and able" to implement the subcontract changes, but only if its price was met. Given that Banton had already agreed to pay for costs of the pump equipment, and at least some of the increased labor costs, there was no breach by Banton for failure to come to full payment terms, the court held, especially in light of the subcontract language requiring work during dispute resolution. The court stated:

> [McCarthy's] refusal to perform the changed work without an express agreement as to increased costs has the effect of holding Banton hostage [because] the work, which was part of much larger project, was stalled.

Therefore, the court concluded, it was McCarthy that breached the subcontract by refusing to perform the work as required by the subcontract. The court granted Banton's counterclaim, allowing Banton to set off its completion costs against the subcontract retainage due to McCarthy resulting in an affirmative judgment against McCarthy for over $60,000. The court further held that McCarthy's claim for the rebar was included in the Connecticut case settlement and was thus released, requiring dismissal of that claim.

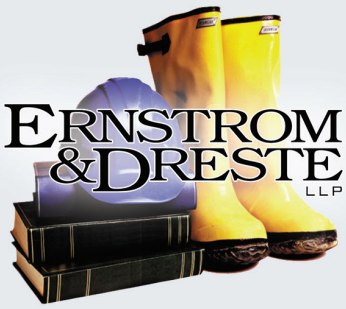
This decision is a stark reminder that any decision to stop work (or fail to return to it), is fraught with risk, especially related to changed work. Contract language that requires continuation of the work while disputes are resolved means just what it says. Successfully arguing that this obligation is excused will require demonstrating that the nature of changed or extra work alters the main purpose of the contract and constitutes a new undertaking. That can be a herculean task, and should not be undertaken without careful consideration of the risks. In most cases, better advice is to proceed with the work, perhaps under a reservation of rights as to cost (especially if the contractor agrees to fund the work in the first instance), and keep the right to pursue claims later, if necessary. E&D

1 *McCarthy Concrete, Inc. v. Banton Constr. Co.*, 203 AD3d 1496 (3d Dept 2022).



(L to R) Kevin Peartree, Martha Connolly, and Todd Braggins at the Builders Exchange of Rochester & CSI Annual Golf Tournament on June 9, 2022, where E&D was a Platinum Sponsor. Brian Streicher also participated.

E&D founding member Bill Ernstrom addressing the audience as he accepts the **2022 AGC NYS Distinguished Service Award**.



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Ernstrom & Dreste, LLP also publishes the Fidelity and Surety Reporter. If you would like to receive that publication as well, please contact Clara Onderdonk at conderdonk@ed-llp.com. Copies of ContrACT Construction Risk Management Reporter and The Fidelity and Surety Reporter can also be obtained at Ernstrom & Dreste, LLP's website (ernstromdreste.com).

FIRM NEWS

Ernstrom & Dreste has been named a Tier 1 firm in Rochester, New York for Construction Law by *U.S. News - Best Lawyers*® "Best Law Firms" in 2022.

Kevin Peartree served as the Master of Ceremonies for the Builders Exchange of Rochester's Craftsmanship and Lifetime Achievement Awards Dinner held at Monroe Golf Club on May 14, 2022.

Brian Streicher recently joined the Board of Directors of the Junior Builders Exchange of Rochester (JBX).

In May, Kevin Peartree, Martha Connolly, and Brian Streicher presented on "*Controlling Risk in Construction and Project Delivery Systems*" to the AGC Future Construction Leaders of New York State at a session in Rochester, New York.

E&D sponsored a foursome at the 2022 Bivona Child Advocacy Center Golf Tournament at Midvale Country Club in which Todd Braggins participated.

Brian Streicher joined in the Monroe Community College Foundation's 2022 Annual Scholarship Golf Open at the Country Club of Rochester in June. Brian also attended the Annual Isaiah House Golf Tournament Sponsored by Schuler-Haas Electric Corp. held at Monroe Golf Club in July.

Brian Streicher was a speaker at the Pearlman Association Annual Conference in Woodinville, Washington, September 7-9, 2022, chairing the topic "*Ethics: Joint Defense Agreements and the Common Interest Privilege*."