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excavation work despite defendant's various remedial efforts. The excavator did not present any evidence suggesting that it complied with §27-1031(b)(1).

Interestingly, the court in the property owner's case denied the summary judgment motion, holding that a violation of §27-1031(b)(1) does not amount to strict liability, but constituted some evidence of negligence. The court in the commercial tenant's action held the exact opposite and granted the motion for summary judgment by imposing strict liability for violations of §27-1031(b)(1). In a consolidated appeal, a divided Appellate Division held that both summary judgment motions must be denied because a violation of §27-1031(b)(1) did not warrant imposing strict liability.

Consolidated appeals were submitted to the Court of Appeals, which reversed the Appellate Division and granted both motions for summary judgment. The Court held that, generally, violations of state laws constitute negligence per se and may create absolute liability, while violations of municipal ordinances constitute only evidence of negligence. An exception to this rule is violations of municipal ordinances that have origins in a state law. In this situation, strict liability will be imposed for those in violation of the municipal ordinance.

Section 27-1031(b)(1) originated from an 1855 State law that shifted the burden of protecting against potential harm of excavation from the landowners to the excavator and imposed strict liability. Because neither the wording nor the import of the statute was materially or substantively altered from the state law to §27-1031(b)(1), the Court held that those in violation of §27-1031(b)(1) will be strictly liable. To hold that a violation of §27-1031(b)(1) was merely evidence of negligence would "defeat the legislation's basic goal."

The Court of Appeals made a point of stating that §27-1031(b)(1) was unique and not every municipal ordinance with state law roots is entitled to statutory treatment. Still, it will be interesting to see if future court rulings use this decision to expand strict liability for violations of codes and ordinances that have some genesis in state law. In the meantime, excavators, and their insurance carries, must be aware that violations of certain administrative codes may result in strict liability. E&D

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Low Bidder's Letter Enough to Make Later Bid Unresponsive

BY NELL M. HURLEY

A New York appellate court recently upheld a Town's contract award to the second lowest bidder where the low bidder sent a letter, prior to bidding, that it would "not be held responsible for any damage" stemming from certain work included in the contract. The letter was sufficient to make its bid conditional and, therefore, non-responsive. The Court found that the unequivocal language of the letter provided the Town a rational basis for finding that the bid materially deviated from the bid specs.

In *Accadia Site Contracting, Inc. v. Anthony Caruana, Supervisor, Town of Tonawanda et. al.,* 2012 WL 2164467 (4th Dept. 2012), the Town of Tonawanda ("Town") solicited public bids on a sanitary sewer system project. At bid opening, Accadia Site Contracting, Inc. ("Accadia") was apparent low bidder but the Town awarded the contract to the second lowest bidder. The Town determined that a letter Accadia sent to the Town rendered its bid conditional and therefore unresponsive. Accadia petitioned the Court to restrain the Town from contracting with the next lowest bidder and require the Town to re-bid the project. The Court issued a temporary restraining order against the Town but, after a hearing was held, dismissed the proceeding. Accadia appealed.

The bid documents required that bidders agree to all contractual

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New York Takes Design-Build/Best Value For A Test Drive

BY TIMOTHY D. BOLDT AND JOHN W. DRESTE

Since the Infrastructure Investment Act was signed into law late last year, New York State's three-year test drive of design-build and best value selection has been moving ahead quickly. As one of the five State entities authorized to use alternative project delivery and award approaches, the Department of Transportation ("DOT") has implemented its Accelerated Bridge Program. This two phase plan is aimed at rehabilitating 2000 lane miles and 100 bridges, using both traditional design-bid-build project delivery and design-build. Already this year, proposals were evaluated and awards announced for several projects. In May, the DOT rejected all of the proposals submitted for Zone 3 as being over budget. To keep these projects moving, the Zone 3 projects will be split between design-bid-build and design-build project delivery approaches. Others, including the multi-billion dollar Tappan Zee Bridge project should be announced soon.

While the DOT is currently leading the way on public project design-build delivery and alternative contract award processes, the other authorized state entities – the New York State Thruway Authority, the Office of Parks, Recreation and Historic Preservation, the Department of Environmental Conservation and the New York State Bridge Authority – will no doubt follow. The Infrastructure Investment Act authorizes not only the use of design-build project delivery, but also the direct award of construction contracts based on lump sum, cost plus with a guaranteed maximum price as well as best value selection, without resort to traditional competitive bidding. Moving from a hard bid to an alternative procurement mindset will take time and effort.

As New York's test drive of public improvement design-build and best value selection continues down the road, more contractors and designers are trying to understand how they can join the ride. To do that, they need to understand not only the design-build approach, but the process of best value selection.

Best Value Selection

Under this new statutory business model for public construction projects, design-build contracts can be awarded without any bidding process. Instead of low-bidder procurement, contracts will be awarded to the design-builder that offers the "best value," an inherently more subjective basis for procurement but one that goes beyond just the consideration of price. The Infrastructure Investment Act defines the term "best value" as a basis that will optimize quality, cost and efficiency, price and performance criteria. Those considerations may include:

- The quality of the contractor's performance on previous projects;
- The timeliness of the contractor's performance on previous projects;
- The level of customer satisfaction with the contractor's performance on previous projects;
- The contractor's record of performing previous projects on budget and the ability to minimize cost overruns;

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- The contractor's ability to limit change orders;
- The contractor's ability to prepare appropriate project plans;
- The contractor's technical capacity;
- The individual qualifications of the contractor's key personnel;
- The contractor's ability to assess and manage risk and minimize risk impact; and
- The contractor's past record of compliance with Article 15-A of the Executive Law (minority and women owned business participation).

These criteria are further qualified by the caveat that their consideration reflect, wherever possible, "objective and quantifiable analysis."

One of the complaints raised against "best value" procurement is the subjective basis for selection. Contracts are awarded to the responsive, responsible entity that submits the proposal which, in consideration of the stated or other specified criteria deemed pertinent to the project, "offers the best value" to the State as determined by the authorized State entity. Further, the statute does not prohibit the State from negotiating the final contract terms and conditions, including cost, after they have received proposals from the qualified design-builders. Transparency is essential when a selection process considers subjective elements and not simply the objective low price. The more subjective considerations are precisely where the State hopes to realize better value in terms of innovations, efficiencies, use of available resources price, schedule and cost.

Except for this one, very important distinction ("best value" vs. "low bidder"), design-build projects awarded under the Infrastructure Investment Act should retain virtually all other hallmarks of a public project, including applicability of the prevailing rate, oversight by the Department of Labor, and the obligation to comply with the objectives and goals set for participation by minority and women-owned business enterprises. While the "Wicks Law" requirement of separate specifications for plumbing, HVAC and electrical work is specifically retained if "otherwise applicable," its application to a design-build project would seem counter-productive, though the Wicks Law requirements could be applied to a non-design-build project using an alternative contract award method.

The Best-Value procurement process involves two steps.

The RFQ

The authorized State entity will generate a shortlist of prospective design-builders that have "demonstrated the general capability to perform the design-build contract." Unless shortlisted by the State entity, design-builders will not be permitted to submit a proposal. This first step will involve a published Request for Qualifications ("RFQ") that will include a general description of the project, the maximum number of entities that can be shortlisted, and an explanation of selection criteria. By statute, the selection criteria must include:

- The qualifications and experience of the design and construction team;
- The organization, demonstrated responsibility, and ability of the team or of a member or members of the team to comply with applicable requirements including the provisions of Articles 145, 147, and 148 of the Education Law (design professional licensing laws);
- A past record of compliance with the Labor Law; and
- Such "other qualifications the authorized state entity deems appropriate," which may include, but are not limited to, project understanding, financial capability and record of past performance.

Design-Builder qualifications will be evaluated and rated by the State entity. Design-Builders that are deemed "qualified," will be invited to proceed to the second step. In the event a design-builder consists of a team of separate entities (such as a joint venture between contractor and design professional), the entities that comprise such a team must remain unchanged, absent approval. In addition to the qualification analysis, the State entity can limit the number of qualified design-builders that will be invited to submit a proposal.

The RFP

After generating the list of qualified design-builders, the State entity will issue an official Request For Proposal ("RFP"). The RFP will set forth the project's scope of work, and all other requirements. The RFP will also indentify the criteria that will be used to evaluate the proposals and the relative weight of each criteria. By statute, the criteria will include, at a minimum, the following:

- The proposal's cost;
- The quality of the proposal's solution;
- The qualifications and experience of the design-build entity; and
- Other factors deemed pertinent by the Authorized State Entity.

Criteria under the catch-all "other factors" will likely include the proposal's project implementation, the ability to complete the work in a timely and satisfactory manner, maintenance costs of the completed project, maintenance of traffic approach, and community impact.

Contractors that currently compete for public work should pay special attention to the projects awarded under the Infrastructure Investment Act, and should also keep a watchful eye on legislation that may open the doors for design-build project delivery on other types of projects (e.g. vertical construction). Among other reasons, it is unclear what the effect is going to be of the Act allowing agencies to create and maintain lists of prequalified design-builders. Although the Act states that entry into such a list shall be continuously available to prospective design-builders, there will undoubtedly be separate prequalification criteria, which may make it more difficult than some legislators originally appreciated.

For long-suffering advocates of design-build in New York, the State has seemed inhospitable and begrudging to its use even in the private sector. With the Infrastructure Investment Act, there is a sense that New York will no longer lag behind most of the rest of the country that has embraced design-build as a viable project delivery alternative. Some of the early bumps in the road, such as the rejection of all Zone 3 proposals, have led the AGC NYS to call for improvements in the process, including the payment of stipends to unsuccessful proposers, more description of price evaluations and a more open and timely selection procedure.

Still, if most all goes well with New York's three year design-build test drive, there is reason to anticipate that design-build will become more prevalent on other types of public projects. To avoid being left behind, contractors that work in the public sector should educate themselves about design-build work, explore potential relationships and have an active plan in place to help ensure future success if the State gives the green light for widespread use of design-build project delivery. D&D

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terms including a common provision that requires the winning bidder to indemnify the owner for any claims "arising out of or incidental to" work on the project. The bid book also informed prospective bidders that the Town would not accept "[c]onditional bids."

Prior to its bid, Accadia was concerned about property damage that could result from performing the "sheet piling" component of the project. It sent a letter to the Town's representative stating that "should [Accadia] be low bidder on the project, [it] would not be held responsible for any damage" stemming from the sheet piling work. Further, the letter stated that Accadia "wished to go on record prior to the bid [that it] will be held harmless should any damage claims [arise] from the piles being driven through the clay strata." Accadia subsequently submitted a compliant bid proposal that neither referenced not attached its pre-bid letter.

In its ruling, the appellate Court acknowledged that a municipality has the authority to waive a bid defect that is a "mere irregularity" but cannot do so where the variance is material, substantial or affects the competitive character of the bidding. The municipality's determination should only be disturbed if it is irrational, dishonest otherwise unlawful.

The Court went on to hold that, in this situation, the language of Accadia's letter provided a reasonable basis for the Town to conclude that Accadia was imposing a condition on its subsequent bid proposal with respect to the sheet piling work. Accadia's letter indicated that it did not intend to comply with the indemnification clause in the contract with respect to that part of the work. It was thus reasonable for the Town to conclude that this shift of liability back to the Town, were it accepted, would put the other bidders at a competitive disadvantage and was therefore a material variance. The Town's rejection of Accadia's bid and award to the second lowest bidder was proper, said the Court.

The fact that other bidders may not have intended to carry out the "sheet piling" component of the work as evidenced by, according to Accadia, estimating $.01 per square foot, did not change the outcome. Only Accadia expressly stated its intention to demand that the contract be altered to hold it harmless for that activity, according to the Court.

Accadia's argument that its pre-bid letter was sent under the terms of the "Information to Bidders" section of the bid book to notify the Town of discrepancies or omissions from drawings or contract documents, or where there was doubt as to their meaning, was also rejected. The Court found that Accadia's letter did neither of these things.

This case is a definitive reminder to contractors to be mindful that pre-bid correspondence, if any, be carefully reviewed for disclaimers or other qualifying or conditional language. The unintended result could be the loss of the contract. D&D

State-Law Based Municipal Ordinance Supports Strict Liability

BY THOMAS K. O'GARA

The New York State Court of Appeals has held that strict liability may apply to certain municipal ordinances, which generally establish only evidence of negligence. In *Yenem Corp., v. 281 Broadway Holdings,* 18 N.Y.3d 481 (2012), a unanimous Court held that a violation of the Administrative Code of the City of New York section relating to excavation carries strict liability due to its origins in state law.

The *Yenem* case started as two separate lawsuits commenced in separate trial courts; one by a property owner and another by a commercial tenant operating a pizzeria in the adjacent building. Both lawsuits were commenced against an excavator after excavations performed undermined the adjacent building's foundation and caused the building to lean approximately nine inches. The Administrative Code in question, §27-1031(b)(1), states that whenever there is an excavation of more than ten feet below curb level, the excavator must protect any adjoining structure from harm.

In the still separate actions, both the property owner and commercial tenant moved for summary judgment seeking to impose strict liability on the excavator for violating §27-1031(b)(1), meaning that no other proof would be necessary to demonstrate the excavator's negligence. The property owner and tenant submitted letters, affidavits, and a report from the excavator's structural engineer stating that the adjacent property shifted increasingly out of plumb during the course of defendant's

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Prohibition Against Pay If Paid Clauses Ruled Inapplicable If No Lien Rights Exist

BY JOHN W. DRESTE

In *Cives Corporation v. Hunt Construction Group, Inc.,* 91 A.D.3d 1178 (3rd Dept. 2012), the Appellate Division, 3rd Department held that New York's prohibition against strict "pay-if-paid" clauses only applies where an unpaid party has lien rights available. Here, the project related to the Oneida Indian Nation's Turning Stone Casino Resort, which was subject to the Oneida Nation's sovereign immunity. An unpaid sub-subcontractor challenged a strict pay-if-paid condition precedent, raised in defense of non-payment, and the court ruled that the "pay-if-paid" terms did not violate public policy, because the claimant had no mechanic's lien rights. Because the sub-subcontractor could not file a lien against the Oneida Nation's property, the prohibition against such clauses simply does not apply. In so ruling, the court discussed *West-Fair Elec. Contrs. v. Aetna Cas & Sur. Co.*, 87 NY2d 148 (1995), but refused to extend *West-Fair*, because that decision was based upon the need to preserve Lien Law rights.

We have discussed other circumstances in which Courts have distinguished between strict "pay-if-paid" and "pay-when-paid" clauses, the former being generally unenforceable while the latter may be acceptable under certain circumstances. Now, at least one court has jettisoned the strict prohibition against "pay-if-paid" altogether if it can be shown that the project is of a type that no mechanic's lien rights exist to begin with. Apart from Indian Nation cases, the Court's reasoning would also apply to federal projects for which no lien rights exist. D&D