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ContrACT

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Service Disabled Vet Company Withstands Bid Protest for VA Contract

THOMAS K. O'GARA

After a service-disabled Veteran-owned small business ("SDVOSB") had its low bid disqualified and its status as a SDVOSB removed, Ernstrom & Dreste ("E&D") secured a victory reinstating the bid and restoring the contractor's status as a SDVOSB. The process resulted in a U.S. Court of Federal Claims decision in favor of the SDVOSB contractor finding that the federal government violated the SDVOSB contractor's due-process rights and that the government's actions were otherwise arbitrary and capricious. The decision is one that Vetslikeme.org called "an important victory not just for AmBuild, but for all SDVOSBs."

AmBuild Company, LLC ("AmBuild") is a verified SDVOSB, eligible to bid on federal set-aside projects. AmBuild was the lowest bidder on a set-aside project at the Syracuse VA Hospital. A disappointed bidder protested the award. The protest alleged that AmBuild did not meet the requirements for a SDVOSB because it was allegedly

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The Price of An Exaggerated Lien

TIMOTHY D. BOLDT

Be careful what you lien for. Mechanics' liens should not be filed without first analyzing the amount claimed to be due and also confirming that New York law allows such sums to be included in the lien amount. Liens which are determined by a court to be willfully exaggerated are null, void and unenforceable. Not only does the exaggerating party lose the security device of the lien, they risk an order from the court forcing them to pay for the costs and attorneys' fees incurred by the defending party. This was the recent fate a material supplier on a public project in Onondaga County.[1]

The supplier had a contract to provide fiberglass reinforced plastic products for a project. The general contractor refused to pay the final invoice, claiming that a number of required products were never supplied and/or were defective. The supplier was ultimately terminated from the project after failing to comply with a contract term which allowed the general contractor to demand adequate assurance of performance. To complete the project, the general contractor used a different supplier to provide the missing fiberglass reinforced products and to replace the defective ones.

The supplier filed a mechanics' lien against the public project for the entire amount of its final invoice and then sued for, among other things, foreclosure on the mechanics' lien and breach of contract.

At the conclusion of a bench trial, the Judge dismissed the supplier's claims, discharged the mechanics' lien from the public record, and ordered the supplier to pay for the costs incurred by the general contractor to bond off the mechanics' lien and for the costs incurred by the general contractor to defend the lawsuit. This decision was upheld in all respects, by the appellate court.

It is important for contractors preparing a mechanics' lien to understand that there is a difference between sums which may be recoverable in a lawsuit for breach of contract, and sums which may be properly included in a mechanics' lien. Mechanics' liens are best viewed as a narrow and confined tool, which should be approached cautiously, lest you suffer a fate similar to the supplier discussed above. For example, mechanics' liens cannot include the costs associated with delay claims. Costs incurred with consultants and many professionals are also not typically lienable. Lost profits are also not a lienable item, nor are items such as the cost for employees to travel to and from a work site, items of work which have not yet been provided to the project, or items of work which have been provided, but which are not properly due and owing.

In general, the cost of labor is properly included in the lien amount, including the costs incurred for employee benefits and wage supplements. However, even labor has nuances which complicate the analysis. The general rule on labor is that it is lienable

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so long as the labor was done for the direct benefit of the property being improved. Whether labor is done *for the direct benefit of a property* may be a bit "grey." At least one court has differentiated between physical construction work on the project and work which is done off site, holding that labor expended to manufacture materials to be used in an improvement is not properly included in a lien.[2]

Lienable material costs are generally described as "materials furnished for the permanent improvement..." and specifically include some items such as architectural plans and specifications; gas lines; electric supply; rental tools and equipment;[3] fuels, lubricants, and compressed gases; transportation of materials to the project; and material manufactured for the project, but not yet supplied to a project.[4]

In addition to the New York statutes, there is an ever-expanding body of court decisions, which dates back more than a hundred years and provides lienors with guidance about what items of work can be included in the lien sum. The lesson for contractors to learn from court cases like *Fiberglass Fabricators, Inc.*, is to take a slow, methodical approach when filing a mechanics' lien and if accused of filing an exaggerated lien, thoroughly assess the risks of a court agreeing with such accusation. E&D

1 *See Fiberglass Fabricators, Inc. v. C.O. Falter Const. Corp.*, 117 A.D.3d 1540 (4th Dept. 2014).

2 *MXP Realty Corp. v. Angrisani*, 152 Misc. 2d 458 (Suffolk County Sup. Ct. 1991).

3 Only applies to the period that such items were actually used on the project. New York Lien Law 2(4).

4 New York Lien Law 2(4).

Don't Rely — Verify or Be Denied

KEVIN F. PEARTREE

"Measure twice, cut once" is the carpenter's maxim. For those who ignore this wisdom, or who just find cutting more fun than measuring, the lesson could be "measure never, cut your profits." To those who ignore these lessons, the courts will provide remedial instruction, as the Appellate Division, Third Department did in *Mid-State Industries, Inc. v. the State of New York*.[1]

The contractor in *Mid-State* was low bidder on a project to replace the roof of a State University of New York college library. Prospective bidders were provided an architectural drawing of the roof with the project manual, along with an addendum noting that the drawing scale should be one sixteenth rather than one eighth. After completing a significant amount of work the contractor noticed it was short on materials. The contractor measured the remaining part of the roof and determined that the supposedly corrected scale on the drawing was still incorrect. SUNY rejected the contractor's request for additional compensation for "extra work". The New York Court of Claims did likewise, dismissing the contractor's claim, a ruling upheld by the Appellate Division, Third Department.

The contract contained language familiar to all contractors. By the provision "Examination of Contract Documents and Site," the contractor agreed that it had carefully examined the contract documents and work site, and that it was "fully informed regarding all the conditions affecting the work to be done and the labor and materials to be furnished . . .[,] and that its information has been acquired by personal investigation and research and *not* in the estimates and records of [SUNY]". In its successful proposal the contractor declared that it had "carefully examined all Bidding and Contract Documents and that it has personally inspected the actual location of the work, . . . has satisfied itself as to all the quantities and conditions, and understands that in signing this Proposal, it waives all right to plead any misunderstanding regarding the same."

Yet during a pre-bid meeting, when all bidders were given access to the roof and some took measurements, the contractor did not. The contractor did not even use measurements on project plans to calculate the square footage of the roof. Instead, it relied upon the scale drawing. The court would have none of the contractor's argument that the drawing addendum "correcting" the scale superceded all of the contract requirements that the contractor rely upon its own personal investigation. By definition, the contract documents were "complimentary", with the requirements of one "binding as if called for by all." The contract, and the parties' intent, was clear – the contractor was to rely on its own investigation. "Where an inspection would have revealed the true conditions, a contractor is deemed to have knowledge of facts which it would have discovered had it made a reasonable inspection."[2]

There is another maxim to be gleaned from the *Mid-State* decision – one constantly exhorted by E&D: "RTFC – Read the [fill-in your own adjective] Contract". Know what the contract requires of you and abide by it. The contractor in *Mid-State* had a contractual duty to investigate, measure and verify. It chose not to measure and in the end was the one who got cut. E&D

1 117 A.D.3d 1255, 986 N.Y.S.2d 637 (3d Dept. 2014).

2 Beltrone Constr. Co. v State of New York, 256 AD2d 992, 682 N.Y.S.2d 299 (3d Dept. 1998)

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affiliated with other companies. AmBuild submitted a response to the protest to the U.S. Small Business Administration ("SBA") and the Department of Veterans Affairs ("VA").

Both the VA and the SBA found every allegation in the protest to be without merit. That should have been the end of the inquiry. Instead, the VA unilaterally expanded the scope of the bid protest and ruled against AmBuild on other grounds, which were never previously disclosed to AmBuild. The VA's ruling was based on an outdated, inoperable Operating Agreement that was no longer in effect.

As a result, the VA also stripped AmBuild of its SDVOSB status, preventing it from bidding for other federal set-aside contracts. An administrative appeal followed, with the VA Executive Director upholding the initial VA determination, on yet another ground not specified in the bid protest.

E&D immediately brought suit in the U.S. Court of Federal Claims, challenging the VA's actions on the grounds that AmBuild's due-process rights had been violated. At the request of E&D, the court heard the matter on an expedited basis. AmBuild argued that the basic requirements of due process required that the VA give AmBuild notice of the new allegations and an opportunity to respond. AmBuild also argued that the VA misapplied AmBuild's Operating Agreement in a manner that was inconsistent with practical business arrangements and therefore, could not be upheld. AmBuild faced a heightened standard of establishing that the VA's actions were arbitrary or capricious.

The court agreed with AmBuild on every account. The court held that the VA could unilaterally expand the scope of a bid protest, but only if it first notified the company of the new allegations and provided an opportunity to respond, before a decision was made. A failure to provide notice and an opportunity to respond violates the minimal requirements of due process as mandated by federal law.

Turning to the substance of AmBuild's argument, the court held that AmBuild's Operating Agreement did not violate any provision of the VA's regulations. The VA argued that AmBuild's service-disabled Veteran owner did not unconditionally own AmBuild due to certain provisions in its Operating Agreement. The court held that VA's interpretation of the Operating Agreement was incorrect, impractical, and could not be sustained.

As a result, the court ruled that the VA should accept AmBuild's low bid and restore AmBuild to the list of verified SDVOSBs. This permitted AmBuild to begin bidding on federal set-aside contracts immediately. In addition, AmBuild's low bid on the Syracuse VA Hospital was restored.

The victory in AmBuild was important for all SDVOSBs. The court's decision should deter the VA from disqualifying bidders without first providing notice of all allegations and an opportunity to respond. E&D

NY Gets On Board with Contracts for Disabled Vets

NELL M. HURLEY

In May 2014, the New York Service Disabled Veteran-Owned Business Act (the "Act") was signed into law, establishing a six percent goal for participation on state contracts, together with other measures to support disabled veteran-owned small businesses. The program will be run by a newly created agency called the Division of Service Disabled Veterans' Business Development within the Office of General Services ("OGS").

The purpose of the Act is to encourage and support eligible businesses, known as SDVOBs, to grow their role in the state economy by increasing participation in contracting opportunities with the state, including construction contracts. Contracts with state agencies and authorities such as SUNY and CUNY are included. While language of the Act limits application to contacts where a participation goal is determined to be "feasible, practical and appropriate," the six percent contracting goal is an aggressive one. The goal in the corollary federal set-aside program is only three percent. Eligible contracts under the Act include:

- Any state contract expected to be $25,000 or more for labor, services, supplies, equipment or materials.
- Any state contract expected to be $100,000 or more for construction related contracts, including the acquisition, construction, demolition, major repair or renovation of real property. This includes construction-related work for any state-assisted housing project.

SDVOBs must be certified through the new administering agency at OGS in order to participate in the program under the Act. If a business is already certified under the federal program, it is eligible for an expedited application process requiring less supporting documentation. Information about the program, including certification criteria, can be found at veterans.ny.gov/business. E&D

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Ernstrom & Dreste 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's website (ernstromdreste.com).

FIRM NEWS

E&D attorneys Named Super Lawyers

Ernstrom & Dreste, LLP is pleased to announce that John W. Dreste, Todd R. Braggins, Martha A. Connolly, and Kevin F. Peartree have been named 2014 New York Super Lawyers. Timothy D. Boldt and Thomas K. O'Gara have both been named 2014 New York Super Lawyers Rising Stars.

Hurley Attends Fidelity Seminar

Attorney Nell M. Hurley recently attended the fidelity seminar sponsored by the ABA titled "Commercial Crime Insurance Coverage" in Philadelphia, Pennsylvania in November 2014.