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Saul Ewing LLP

Construction Law Advisory

The Newsletter of the Construction Practice

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Saul Ewing LLP is sponsoring AGC Build New England Awards Gala

Saul Ewing LLP is a proud sponsor of the 2015 Build New England Awards Gala on October 8, 2015 in Boston, Massachusetts. Firm attorneys who support the construction industry will join with members of the Associated General Contractors of Massachusetts and other professionals in the industry to celebrate teamwork in building.

Winning teams are recognized for their collaborative approach to planning, designing and building facilities that meet the vision and goals of owners and enhance the community where projects are built.

The gala is from 6:00 p.m. to 9:30 p.m. at the Intercontinental Hotel, located at 510 Atlantic Avenue. Please visit http://tinyurl.com/ACG-NEA for more information.

Beware of penny bidding: Contractors could be stuck footing the bill for differing site conditions

By Doreen M. Zankowski

Bid a penny per unit and you may be stuck, despite differing site conditions. A Massachusetts Appeals Court ruled in March 2015 that a contractor who submitted a penny per cubic yard to excavate rock is stuck with its bid price, despite encountering 250 percent of the expected rock stated in the bidding documents and a Massachusetts statute that permits for an equitable adjustment for differing subsurface or latent site conditions. See *Celco Const. Corp. v. Town of Avon*, - N.E.3d - (2015), 2014 WL 7928217.

Celco Construction Corp. ("Celco") was the successful bidder on a Massachusetts town construction project. As part of its bid, Celco bid a unit price of $0.01 per cubic yard to excavate rock. The bidding documents estimated that 1,000 cubic yards of rock would require excavation, but made clear that 1,000 was an estimate. Celco made its penny bid with the expectation that the town's estimate was high and that it could make up the loss in other areas. However, the project required Celco to excavate approximately 2,500 cubic yards of rock at a substantial loss to Celco.

After the town rejected Celco's request for an adjustment of the contract price, Celco filed a lawsuit demanding an equitable adjustment under Massachusetts General Laws, Chapter 30, Section 39N, which allows for an equitable adjustment of public contracts for subsurface and latent site conditions that differ from the bidding documents. Both the Massachusetts Trial Court and Appeals Court rejected Celco's request for an equitable adjustment. The Appeals Court found that there was no differing site condition. The town's bidding documents clearly stated that it **estimated** the amount of rock to excavate. As a result, there could not be a differing site condition simply by the volume of rock differing from the estimate in the bidding documents. Of note, the court left open the possibility that there could be a differing site condition if the physical characteristics of the subsurface rock materials differed from what was expected at the time of bidding.

While penny bidding is allowed, and is not an uncommon practice, contractors should think twice before submitting a penny bid on a public project. While the case is binding only in Massachusetts, it can be cited for persuasive authority in any state. Courts do not have sympathy for a penny bidder. Here, the Massachusetts Appeals Court stated that "it defies logic" for an equitable statute to adjust a penny bidder's contract price. Furthermore, a public entity who decides who is the lowest and responsible bidder may shy away from bids with penny line items because such bids are not responsible.

Pennsylvania Supreme Court weighs whether good faith refusal to pay is a factor in awarding attorneys' fees under state Contractor and Subcontractor Payment Act

By George E. Rahn, Jr. and Gregory J. Wartman

The Pennsylvania Supreme Court is poised to decide an important question under Pennsylvania's prompt payment Act – whether a good faith refusal to pay a contractor is a factor to consider in awarding attorneys' fees under the Act?

Pennsylvania's Contractor and Subcontractor Payment Act

The Act is designed to protect contractors and subcontractors. It provides that a contractor who has performed under a contract is entitled to prompt payment, and it establishes rules to discourage unreasonable withholding of payments.

The Act authorizes courts to impose a 1 percent monthly penalty against owners or contractors who "wrongfully withh(o)ld" payment. A good faith withholding is not subject to the penalty.

The Act also provides that the "substantially prevailing party ... shall be awarded" reasonable attorneys' fees. The Act does not state, however, whether "good faith" is relevant to the attorneys' fee issue, as it is to the statutory penalty.

The Waller case

This issue arose in *Waller Corporation v. Warren Plaza, Incorporated* in the context of the owner's refusal to pay two unapproved change orders. The contractor sued, asserting claims for breach of contract and violation of the Act.

After trial, judgment was entered for the contractor, including an attorneys' fee award. The court, however, did not impose the statutory penalty because it found that the owner had a good faith – albeit incorrect – basis for withholding payment.

The owner appealed, contending that the good faith finding should preclude an attorneys' fee award.

The Pennsylvania Superior Court, however, held that the Act does **not** provide a "good faith" exception to the attorneys' fee award to a "substantially prevailing party." The court found that while good faith is relevant to the penalty determination, there is no statutory language supporting an exception to the award of attorneys' fees.

The Court's decision conflicts with a 2009 decision issued by a different panel of the Superior Court in *Zimmerman v. Harrisburg Fudd I, L.P.* That court ruled that if the owner did not wrongfully withhold payment, the contractor could not be the "substantially prevailing party."

The owner in *Waller* appealed to the Pennsylvania Supreme Court asking the court to resolve the split between *Zimmerman* and *Waller* and determine that a good faith refusal to pay is a factor to be considered in deciding whether to award attorneys' fees under the Act. The appeal is in the briefing stage, and the court is expected to issue a decision later this year.

Industry impact

The Pennsylvania Supreme Court's decision will have important implications for the way that owners, contractors and subcontractors handle payment disputes. If the court rules that non-paying parties can be responsible for attorneys' fees even though they withheld payment in good faith, non-paying parties may be more motivated to resolve those disputes before litigation or pay disputed amounts under a reservation of rights.

Alternatively, if the court rules that attorneys' fees may not be assessed under the Act where payment was withheld in good faith, non-paying parties may be more likely to take a hard line and litigate such disputes.

Washington, D.C.'s new P3 law paves the way for new public-private partnerships in the District

By Nicholas V. Fox

P3 projects in Washington, D.C. are now much more viable after new legislation took effect on March 11, 2015. The Public-Private Partnership Act of 2014 establishes a defined procurement process for P3 projects and a new office to administer them in the nation's capital. The legislation was unanimously passed by City Council on December 3, 2014, and was approved by Mayor Muriel Bowser a few weeks later. While P3 projects have been previously developed in the District under special legislation and procurement laws, they have been limited by a dearth of legislative and regulatory guidance.

The new law establishes the Office of Public Private Partnerships to administer the P3 Act. This new office is housed within the Office of the City Administrator and will serve as the contact hub for stakeholders. The new office will establish procedures for both solicited and unsolicited proposals, along with the evaluation, selection, and oversight of all P3 projects in the District. Developers and contractors are encouraged to submit unsolicited proposals, and the new office will develop RFI and RFP forms to solicit interest in new P3 projects.

Washington, D.C.'s new P3 law authorizes an array of public-private partnerships in the city. A qualified P3 project includes the planning, acquisition, financing, development, design, construction, reconstruction, rehabilitation, replacement, improvement, maintenance, management, operation, repair, leasing, or ownership of:

- Education facilities;
- Transportation, including roads, bridges, highways and tunnels;
- Cultural or recreational facilities, including parks, theaters, museums, community centers, convention centers, golf courses and stadiums;

- Utility facilities, including sewers, water treatment, storm water management, energy, telecommunications, information technology, recycling and waste management;
- Any building or facility that is beneficial to the public interest and developed or operated by or for a public entity;
- Improvements necessary or desirable to any unimproved District-owned real estate; and
- Any facility or building that the new office deems beneficial to the public interest.

The new P3 program is positioned to establish a more predictable and effective platform for private partners to work with the District to develop new projects. The P3 law is designed to attract private investors, and places the District on equal footing with its neighboring jurisdictions – Virginia and Maryland – each of which already has P3 laws in place.

Appeal of arbitrator's determination in county construction contract disputes in Maryland limited to judicial review

By Joey Tsu-Yi Chen

In *Ross Contracting, Inc. v. Frederick County, Maryland*, No. 977, Sept. Term 2013 (Md. Ct. Spec. App. Feb. 25, 2015), the Court of Special Appeals of Maryland found no right of appeal from the judicial review of an arbitrator's decision in cases arising out of construction contracts with a county. Contractors should be aware that under *Ross*, they are entitled only to judicial review of the arbitrator's decision, and not to a further appeal. This is particularly important given that, under the applicable statute, the county selects the arbitrator.

Ross arose out of a construction contract between Ross Contracting, Inc. and the Board of County Commissioners of Frederick County to replace a bridge structure and supporting abutments. During the project, Ross encountered differing site conditions and sought an equitable adjustment.

The county denied the request, and the parties proceeded to arbitration under the contract's dispute resolution clause, which called for arbitration under a statute pertaining to construction contracts with a county. (The statute in effect at the time of contracting was a predecessor to the current statute, Md. Code Ann., Cts. & Jud. Proc. § 5-5A-02(e).) Under the statute, the county appointed an arbitrator whose findings would be subject to judicial review by the Circuit Court for Frederick County.

The arbitrator granted part of Ross's claim, and denied the remainder, reasoning that, for the most part, Ross was or should have been on notice of the site condition. Ross petitioned for judicial review in Frederick County, and the Circuit Court affirmed the decision.

Ross then appealed to the Court of Special Appeals, which held that it lacked jurisdiction to hear the appeal. The court based its decision on its determination that the Circuit Court's decision affirming the arbitrator's decision constituted an exercise of appellate jurisdiction, and that there was no statute authorizing any further appellate review.

Under Maryland law, parties have a right of appeal from a final judgment entered by a Circuit Court. But this right is subject to exceptions, including an exception that applies to an appeal from a final judgment of a court made in the exercise of appellate jurisdiction in reviewing a decision of a local legislative body *unless a separate right to appeal is expressly granted by law*. The court found that the Circuit Court exercised appellate jurisdiction when it reviewed and affirmed the hearing officer's findings, and that no other statute permitted further appellate review.

The court reaffirmed the oft-stated principle of Maryland law that "appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute." Md. Code Ann., Cts. & Jud. Proc. § 5-5A-02 applies specifically to dispute resolution of construction contracts to which the county is a party and provides only for judicial review of an arbitrator's findings, nothing more. For county construction contracts, contractors should be aware of this statutory provision and understand that, in view of Ross, invoking this provision gives only one bite at the "apple of appeal." Until the legislature speaks otherwise, there is no second bite.

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