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Contractors and Subcontractors Beware

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Subcontractor's bids, when coupled with its backlog of uncompleted contracts, must not cause subcontractor to exceed aggregate rating limit in public school projects. If so, contractor's bid will be rejected due to subcontractor exceeding its aggregate rating limit.

On June 20, 2011, the Appellate Division decided Brockwell & Carrington Contractors, Inc. v. Kearny Board of Education, Hall Construction, Inc. and Dobco, Inc., Docket No. A-1806-10T4, ("Brockwell"), which may have a significant impact on bidding on public school contracts. Brockwell involved a bid for a public school contract in which the contractor's bid, which included a subcontractor's bid, was rejected because the subcontractor's bid exceeded the aggregate rating for the subcontractor for public school projects. As a result, the contract was awarded to the next lowest bidder.

In Brockwell, defendant Kearny Board of Education ("BOE") sought bids for the Kearny High School – Aircraft Noise Abatement and Renovations Project (the "Project"). Bids were opened for the Project on September 15, 2010.

Defendant, Dobco, Inc. ("Dobco"), was the lowest bidder, followed by plaintiff, Brockwell & Carrington Contractors, Inc. ("B&C"). The BOE awarded the contract to Dobco. Dobco's bid identified Environmental Climate Control, Inc. ("ECC") as the heating, ventilation and air-conditioning ("HVAC") subcontractor for the Project. The Division of Property Management and Construction

("DPMC") classifies contractors by permissible aggregate work volume based upon each contractor's submissions detailing financial ability. The purpose of this classification is to prevent contractors from taking on more work than they can handle. At the time the bid was submitted, ECC's aggregate limit with the DPMC was \$15,000,000. ECC submitted a proposal for its portion of the HVAC work at the Project of \$7,250,000. ECC also submitted a Form 701, which is required by the DPMC, indicating that it had a backlog of uncompleted contracts totaling \$3,500,000. Thus, the total amount charged against ECC's aggregate limit was \$10,750,000.

B&C challenged Dobco's bid, claiming that it had received a Form 701 from ECC a month earlier on an unrelated contract in which ECC disclosed a backlog of uncompleted contracts exceeding \$9,000,000. As a result, B&C claimed ECC, with its \$7,250,000 bid and \$9,000,000 backlog, exceeded its \$15,000.00 aggregate limit and could not work on the Project. After an investigation by the BOE, it was determined that ECC exceeded its aggregate limit.

B&C then filed a complaint seeking to disqualify Dobco's bid, as it was based on ECC's improper bid for the HVAC work. ECC and Dobco claimed that the aggregate limit did not apply to subcontractors and that, even if it did, much of ECC's backlog of uncompleted work was subcontracted out to others, which did not count against its aggregate limit. The trial court rejected Dobco's arguments and found that ECC was subject to the aggregate rating limit set by N.J.A.C. 17:19-2.13(a). The trial judge concluded that Dobco's bid was materially defective and denied Dobco the opportunity to correct its bid. The trial court also ordered BOE to award the contract to B&C, the next lowest responsible bidder.

On appeal, the Appellate Division rejected Dobco's arguments and concluded that both the Public School Contracts Law, N.J.S.A 18A:18A-1 to - 59 ("PSCL"), and prior case law, support the conclusion that any subcontractor's bid on a school project must not exceed the subcontractor's aggregate rating limit. The

Appellate Division further found that the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1 to - 48 (“EFCFA”), provides an independent basis for holding that ECC must meet the aggregate rating limit requirements set by N.J.A.C. 17:19-2.13(c). Thus, the Appellate Division affirmed that ECC’s non-compliance was a material defect that was fatal to Dobco’s bid.

The Appellate Division concluded that the aggregate rating limit applied to both subcontractors and contractors. The Court noted that when considering the applicable law, “it is clear that the Legislature intended to ‘ensure that only qualified bidders perform the work.’” To differentiate between subcontractors and contractors would not advance this goal.

The Appellate Division also held that any contractor, including a subcontractor, is entitled to the benefit of the eighty-five percent (85%) reduction provision of N.J.A.C. 17:19 2.13(a) and (c), which allows a contractor to reduce the value counted against its aggregate limit by the backlog of uncompleted contracts, provided that the backlog is limited to single prime contracts in which it subcontracted work to others. Here, ECC did not certify that its backlog included single prime contracts in which it subcontracted work to others. Thus, ECC was not entitled to the benefit of the eighty-five percent (85%) reduction. As it included ECC’s improper bid, Dobco’s bid was defective and “permitting a post-bid cure under these circumstances would afford Dobco an unfair advantage.” The decision of the trial court to reject the award of the contract to Dobco and award the contract to B&C was affirmed.

This decision may have a significant impact on the bidding process for public school projects as it makes clear that not only contractors, but subcontractors too, must comply with the aggregate rating limit of N.J.A.C. 17:19-2.13 and N.J.S.A. 18A:7G-37. In addition, contractors have to be clear when submitting Form 701 and any related certifications to disclose if they have prime contracts in which a portion of the work is subcontracted to others, thereby getting the benefit of the eighty-five percent (85%) reduction provided in N.J.A.C. 17.19-

2.13 (a) and (c) and reducing the amount counted against their aggregate limit. Lastly, contractors who are the second or third lowest bidder should consider a challenge to a bid result if they have questions as to the aggregate limit rating of the lowest bidder and/or its subcontractors.

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