

New Jersey's Bid-Naming Statute Bars Substitution of Subcontractors

by Edward J. Frisch and Bruce P. Ogden

In public single prime construction contract bidding, New Jersey's various public bidding statutes require each bid to "name" the major trades subcontractors "to whom the bidder will subcontract" for trade work. (The statutory major trades are plumbing, HVAC, electrical, and steel/iron.) Recently, the Appellate Division held that a successful bidder/awardee, after receiving the contract award, could not substitute a named subcontractor with one not listed in the bid.

*O'Shea v. New Jersey SCC*¹ addressed the specific language of N.J.S.A. 34:1B-5.7b(2), which requires the naming of major trade subcontractors by bidders to the New Jersey Economic Development Authority's (NJEDA's) delegate for public schools construction, the New Jersey Schools Construction Corporation (SCC). Although the ruling was expressly based upon this statute, the Appellate Division indicated that its holding would apply to similar provisions found in the various public bidding statutes applicable to public works projects in New Jersey, including those for state government, boards of education, state colleges, county colleges, the New Jersey Building Authority, and entities subject to the Local Public Contracts Law.

At issue in *O'Shea* were certain provisions of the SCC's standard bid and contract forms, its general practices, and the "substitution policy" identified in a written SCC policy statement issued mid-litigation, all allowing the winning contractor to replace subcontractors after the bid

award was given, subject only to approval of the SCC.

The SCC maintained that it had the discretion to implement such a substitution policy. The policy statement also added standards for SCC approval by identifying certain instances where substitution was permitted, such as if the bid-named subcontractor was going out of business, was too busy to perform, or ultimately any "rational basis for the substitution."

The plaintiff, the Mechanical Contractors Association of New Jersey, Inc. (MCANJ), is an association of most of the larger New Jersey-based mechanical contracting firms that regularly vie for the HVAC and/or plumbing subcontracts under single prime public construction contract bidding. It was alerted to abuses of the "anti-bid shopping" legislation occurring on SCC single prime projects through anecdote and public records (OPRA) monitoring. The MCANJ documented close to 20 of these substitutions, and presented them to the SCC for action. These abuses involved situations such as: an awardee blatantly bid-shopping the trade work among its bid-named subcontractors and others; awardees having bid-named subcontractors without the subcontractors' knowledge or permission (let alone without their pre-bid prices) and then substituting for them; awardees seemingly inducing bid-named subcontractors to claim to have become too busy or the like and then substituting for them; and even awardees having bid-named themselves for the trade work and then substituting actual subcontractors after the awards.

Although a few abuses were corrected, the SCC continued to maintain that it and its regional project managers could permit substitutions where a rational basis existed. The plaintiffs maintained that under the applicable statute, no substitution was permitted.

The purpose of the public contract bid-naming statute is to benefit the taxpayers, since in order to be named, the subcontractor will quote its lowest price at the time of bidding. In contrast, savings from any subcontractor price competition after-bidding or post-award bid shopping will not pass through to the public, but will be pocketed by the awardee as added profit. Since the major trade subcontractors will be providing upwards of 85 percent of the total contract work, the price consequences are substantial to taxpayers.

O'Shea found that allowing post-award substitutions—for any reason—would detract from the public benefit by opening the door to post-award bid shopping, contrary to the legislative purpose in enacting strict bidding procedures. Thus, the court held that the public contracting entity was barred by the bid-naming statute from having any power or discretion to allow a post-award substitution. The Appellate Division stated that: "we conclude that such a practice is contrary to public bidding laws and their underlying policy."

The Appellate Division ultimately reversed and remanded to the trial court to enter judgment consistent with its opinion. The later judgment

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ment project. The developer asserted that the lien was invalid because the claimant failed to file and serve a NUB. The court agreed with the developer and ordered that the lien claim be immediately discharged, noting that "in this case plaintiff's materials benefited, arguably, all of the residential township units yet to be built on the project site, not just a single unit, much as a lumber, steel or brick supplier ordinarily could not describe which particular unit or units were to 'benefit' directly from materials provided to a site."

The fact that some of the units were not yet built and the site was still owned by the developer was irrelevant; the materials for which the claim was being made were furnished in connection with a contract for the construction of residential property. That fact is all that is required to trigger the statutory requirement of filing a NUB and demanding arbitration before a lien may be filed.

The *A. Fiore* case is particularly significant since it deals with the supply of materials that will be incorporated into the site-work portion of the project, not into the residential units themselves. Just as the question of the status of title to the subject property had no bearing on the applicability of the extra procedures required for residential construction contracts, the fact that the work for which the lien is being claimed will not be incorporated into the residential structures also is irrelevant.

BEST PRACTICES

Contractors, subcontractors and suppliers must be aware of the stringent requirements that the Construction Lien Law imposes on all residential construction contracts, and take the appropriate steps timely, including filing a NUB and an arbitration demand in order to assure compliance with the law. Developers and other owners of residential property should consider the best strategic measures to take if a lien claim is threatened or filed, but the claimant fails to undertake the required pre-lien conditions. ■

ENDNOTES

1. The Construction Lien Law is codified at N.J.S.A. 2A:44A-1 *et seq.*
2. The Construction Lien Law includes certain legislative findings about the significance of purchasing residential housing, and concludes that the "Legislature declares that separate provisions concerning residential construction will provide a system for balancing the competing interests of protecting consumers in the purchase of homes and the contract rights of contractors, suppliers and subcontractors to obtain payment for goods and services provided." N.J.S.A. 2A:44A-21.a.
3. N.J.S.A. 2A:44A-21.b.

4. N.J.S.A. 2A:44A-6.
5. N.J.S.A. 2A:44A-2.
6. Law Div. 2005.

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entered below specifically provided that final judgment was entered for the plaintiffs

declaring and determining that a bid-named subcontractor for any of the work described in N.J.S.A. 34:1B-5.7a and bid-named in accordance with N.J.S.A. 34:1B-5.7b(2) cannot for any reason be substituted for after the bid submission and until the time the bidder and the named subcontractor have signed the contract for such work.

The final judgment also ordered and directed the SCC to cease, desist and refrain from any conduct approving, allowing, permitting or condoning any substitution.

O'Shea's holding prohibits substitution only until a subcontract is entered into. A footnote in the opinion affirms that it is not intended to affect a general contractor's remedy, if, after the subcontract is entered into, the subcontractor, for whatever reason, breaches the subcontract. Thereafter, a materially nonperforming subcontractor might legitimately be default-terminated pursuant to the subcontract, and then be replaced by a completing subcontractor.

The *O'Shea* decision also

addressed the litigation prerequisites of justiciability and standing to sue. The court's conclusory statements about justiciability should not mask the fact that there was an extensive factual record of SCC standard form documents and numerous SCC instances of allowing substitutions, as well as of the parties' lengthy pre-litigation debate over the illegality.

The court found that both plaintiffs had standing as taxpayers, and the plaintiff MCANJ as an organization whose members regularly vie for the plumbing and HVAC subcontracts on SCC jobs. On the former, these public contract bid-naming statutes are meant to benefit the taxpayers, so any taxpayer should have standing to enforce them—at least by prerogative writ/mandamus-type relief ordering future compliance. ■

ENDNOTE

1. 388 N.J. Super. 312, 908 A.2d 237 (App. Div. 2006).

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