

New Jersey School Agency Could Not Allow Sub Changes

New Jersey's school construction agency had no authority to allow bidders on projects to substitute the mechanical subcontractors they named in their bids with others, a state appeals court has ruled.

The Mechanical Contractors Association of New Jersey filed a lawsuit against the state's Schools Construction Corp. over its practice of allowing general and prime contractors that were awarded school contracts to change the mechanical subcontractors that were listed in their bid documents. New Jersey law allows SCC, when it solicits bids, either to obtain separate bids for the plumbing, HVAC, electrical and structural steel work, or to obtain bids from general contractors. Under the law, general contractors are required to include the names of all subcontractors

to which they will subcontract the mechanical work.

SCC bid forms required bidders to submit the names of their subs, and stated that bidders were not permitted to substitute subs prior to the execution of the contract. However, the form indicated that substitution was permissible, stating that "any substitution of subcontractors after the award of the contract shall be made only with written approval of the SCC in accordance with the General Conditions."

SCC admitted that it allowed prime contractors to substitute subs for those named in their bids, but contended that it was within its discretion to do so. SCC claimed substitutions were permitted under a written policy that it

had implemented, which allowed substitutions under certain named circumstances, or under "any other circumstance where [SCC] deems there to be a rational basis for the substitution."

When the New Jersey trial court dismissed the complaint, MCA appealed to the judiciary's Appellate Division. That court reviewed state court decisions involving public contracts and concluded that the state law governing SCC prevented it from allowing general contractors to substitute subs named in their bids.

According to the court, the law forbidding substitution furthered the public

Schools Construction Corp. was bound by law to have general contractors name subs.

policies underlying public bidding because it fostered competition and decreased the chances of bid shopping. *O'Shea v. New Jersey Schools Construction Corp.*, 908 A.2d 237 (N.J. Super. 2006). ■

Warranty Disclaimers for Window Parts Were Binding

Disclaimers of warranties contained in a window parts manufacturer's catalogues and invoices protected the manufacturer in a lawsuit by a buyer over alleged defects in the parts, an Illinois court ruled.

R.O.W. Window Co. is an Illinois company that manufactures insulated glass windows for use in new construction. From 1994 to 1998, R.O.W. bought spacers and corner keys for its windows from Allmetal Inc. During that period, the glass in thousands of windows failed due to a problem with Allmetal's products.

Because R.O.W. sold its windows to its customers with a 10-year warranty, it had to pay to replace the glass in the windows. Seeking to recover its replacement costs and lost profits, R.O.W. sued Allmetal, charging the company with breach of the implied warranty of fitness for a particular purpose and breach of the implied warranty of merchantability.

Allmetal asked the Illinois trial court to grant judgment for it, arguing that it had disclaimed

any implied warranties. Allmetal's product catalogue included a notice in capital letters that stated: "THE SELLER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE." The disclaimer included language that limited Allmetal's liability for product defects to the purchase price of its product. Allmetal's standard invoice also contained the identical language in capital letters.

R.O.W. argued that the disclaimers were not valid because they were not conspicuous. After the trial judge ruled for Allmetal, R.O.W. appealed to the Illinois Appellate Court, which concluded that the disclaimers were conspicuous. In the catalogue, the disclaimers were contained in a section entitled "Terms and Conditions of Sale," were in capital letters and set off in a separate box, the court noted. The court acknowledged that the disclaimer in the invoice was in small print, but

noted that it was set in capital letters and was set off by open space above and below it. "The disclaimers were presented in a manner reasonably sufficient to draw attention to them," the court concluded.

R.O.W. also argued that the disclaimers were not binding because they were not part of the sales contract. The court disagreed, stating that an implied warranty may be excluded by a course of dealing. R.O.W. was a customer of Allmetal for several years, and during that period, all of

Disclaimers in catalogues and invoices were conspicuous and consistent.

Allmetal's invoices and catalogues contained a conspicuous disclaimer of implied warranties, the court noted. As a result, the disclaimers were made a part of the parties' agreement by the course of dealing, said the court. *R.O.W. Window Co. v. Allmetal Inc.*, 856 N.E.2d 55 (Ill. App. 2006). ■