Plumb LAW

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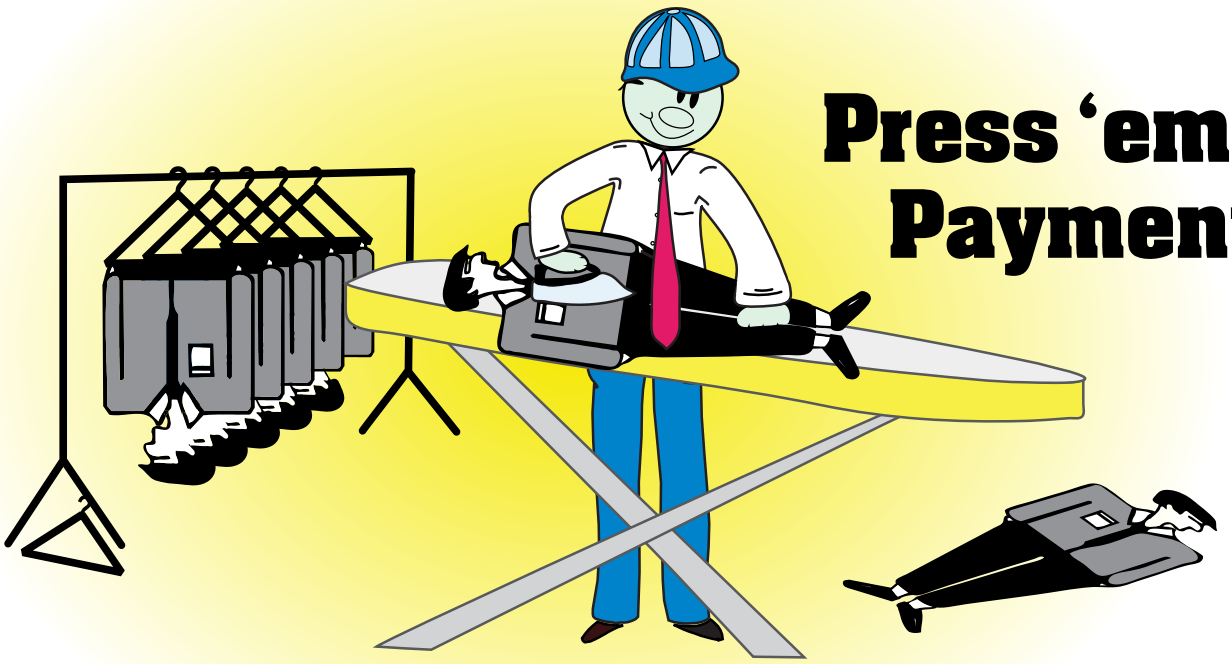

Press 'em for Payment!

"Press 'em for payment" ought to be the motto for every contractor in this lousy economy. To really get paid, however, requires a careful blending of two words into a simple phrase: "controlled aggression". Be aggressive by taking steps to make sure the debtor knows it cannot run from its bills, but, stay in control of your actions to conform to the law.

Uncontrolled aggression is one of the biggest mistakes any contractor can make. One poor maneuver is to remove installed equipment because that can trigger fines and legal proceedings over Code violations. Far more serious problems can hit contractors who angrily walk off the job over payment disputes when their contracts forbid it because that is a material breach of contract. The breach then shifts the law in favor of the other party, and that gives the other party the right to recover a small fortune in "wrongful termination" damages. Instead of the unpaid item at issue, the other party can now recoup its actual cost for a replacement contractor, delay damages, reprocurement costs, and almost anything else. We have seen these "wrongful termination" damages exceed 400% of the contractor's estimated cost to complete.

"I haven't paid you because..." is a common cry these days from lots of late payers. The following responses to those excuses which come with the crying should help drive home your right to timely payment:

1. "...Your work was no good/you delayed the project's completion." If this is the response to your requisition, first make sure the other side is wrong. If you did cause a problem, fix it. If not, send a disputing letter which explains your reasons. Be careful what you write because, one day, a judge might read it.

If the other side either ignores your response or continues to assert an inaccurate claim, press forward. First, see if the contract or the relevant Prompt Payment Act gives you the legal right to suspend work. At the same time, consider the immediate filing of liens or payment bond claims. In addition, comply with all contract procedures for dispute resolution so that a claim is not rejected on a technicality. If you take these steps, and a debtor does not contact you within two months, you can probably assume that the debtor will do nothing else unless you at least send a

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"lawyer's letter" or take more formal action like a lawsuit.

Claimants have improved their prompt payment rights under New Jersey's newly invigorated Prompt Payment Act, as well as the New York and Federal acts. In addition to the right to suspend work, they generally require the debtor to give a statement of reasons for nonpayment, within different amounts of time, together with the value of each deficiency. Violators face significant consequences if they do not follow the law. In a recent New Jersey case called *Shore Mechanical Contractors, Inc. v. W.G. Osborne Construction LLC*, A-1796-07t3, a contractor who was not given reasons for the non-payment of a debt was entitled to counsel fees, costs and interest at the prime rate plus 1%.

2. "... I will pay you when I get paid." "Pay-when-paid" clauses, like those in an AIA form, are interpreted to mean that a debtor can temporarily delay payment but not avoid it. A rarely encountered "pay-if-paid" clause can indefinitely bar recovery, but specific language like the phrase "condition precedent" must be used to create this right. Even these rare clauses are not enforceable in New York, except for one situation involving lenders, and several other states refuse to enforce them, too. We expect that New Jersey will also refuse to enforce them the next time a high New Jersey court rules on the subject.

3. "...You can't sue me because we have to go to mediation and arbitration." While parties can "waive" these requirements, mediation and arbitration are sometimes more effective than litigation. One of our earlier newsletters, which can be found at Plumblaw.com, compares the merits of arbitration and litigation. To speed things along, take advantage of the right to concurrently run mediation and arbitration together.

4. "...You signed a lien waiver." A "pure" lien waiver is harmless; it acts like a receipt by acknowledging that the party signing the form waives its right to file a lien for the amount on the form. But, most forms are loaded with other terms. For example, they cut off potential extra work claims, add indemnity obligations, or cut off future lien rights. For this reason, all lien waivers should be carefully reviewed before they are signed and they should only be signed if correctly written. If they are particularly noxious, consider a fight over their terms and a lien claim filing. Finally, lien waivers which try to force a surrender of future lien rights in New York are not enforceable. New Jersey clearly forbids them on private projects, but they may still be valid on public works projects.

5. "... I'm filing for Bankruptcy." Don't assume it has really happened without a notice from the bankruptcy court or a lawyer. If you have not received a written notice, and suspect a bluff, quickly file a lien in order to try preserving your legal rights as a "secured creditor". In a construction setting, bankruptcy usually leaves nothing to an unpaid contractor who had not filed a lien. Also, payment bond rights are still enforceable despite a debtor's bankruptcy. So, preserve them and prosecute them.

Whatever you do, make your presence known. It's "the squeaky wheel" which "gets the grease". Otherwise, some other "squeaker" may very well end up with your money.

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of whether an unlawfully restrictive specification had, in fact, been issued. So, the Court decided that Jen Electric could, indeed, fight the restrictions in the specifications based on their substance.

Everyone, from GC's to suppliers, will be affected by this blasting cap of a case. The decision will most obviously increase specification challenges by equipment manufacturers and their distributors. Prospective bidders who build their estimates around a favored product and who don't push an "or-equal" could also lose. They must still file a protest at least 3 days before bid opening, so a more aggressive competitor whose estimate is based on a later accepted substitute may win. Other specifications are also subject to challenge, like those which are written around union labor on projects with no project labor agreements. These could be attacked by non-union sub's.

Using this decision a a weapon requires strong action. First, the protester must bring a lawsuit before bid opening. In addition, a court will want to see a written record of vigorous attempts to have the government alter restrictive specifications, and probably, a failure by the government to fairly consider the proposed change.

Construction Liens

As one of the writers of the New Jersey Construction Lien Law, I am often asked why the law isn't "better" for contractors. The short answer is that this was the best the contractors' associations could negotiate. So, my personal thanks to the judges who wrote the decision of *Schadrack v. K.P. Burke Builder, LLC* because they willingly tortured the law's language to give contractors something we couldn't get by negotiation.

For "residential" construction, whose scope encompasses everything from homes to large condominiums, the law provides that a "Notice of Unpaid Balance", or NUB, and a special form of arbitration demand (or the equivalent), had to be filed and served "simultaneously". An arbitrator (or equivalent) would then have 30 days to determine the value of any lien claim to be filed. Like all liens, it must then be served within 10 days. Furthermore, the reason for "simultaneous" service was to encourage communication and a prompt resolution of disputes. Despite this clear language, the court decided that a contractor who first filed a NUB, and then waited about 40 days to serve an arbitration demand with an amended NUB, was in compliance. To support this analysis, the court referred to a section of the law governing the manner of serving a lien, not a NUB, and held that the absence of "prejudice" to the owner overcame "simultaneously".

Kids, don't try this trick at home. Always remember to simultaneously serve your arbitration demand and NUB, because this decision may get reversed if appealed.

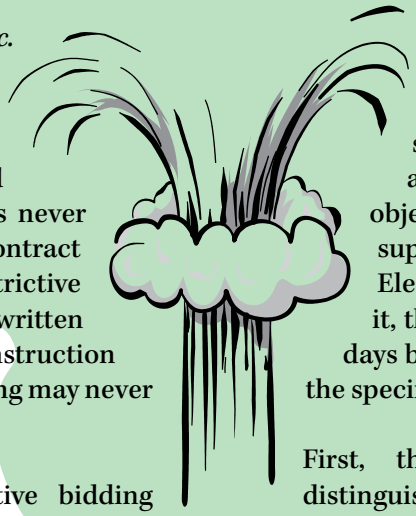
RFP Bidding

"Follow the rules" is a lesson which the courts taught both the New Jersey State Division of Purchase and Property along with several bidders in two separate cases involving RFP's. While the government does have more freedom to interpret RFP criteria than for IFB's, both the government and bidders are bound to the same tough rules governing responsive bidding for typical construction.

When seeking task order contracts for 7 site consultants to provide environmental remediation services, the RFP stated that the ranking of firms would be based on a series of weighted criteria. The RFP also provided for optional interviews in order to clarify technical or organizational information, and together, these were supposed to produce a single ranking of all bids. Instead, the Division first ranked all firms based on the Department's criteria, and then, developed a second ranking of the top 12 firms after a series of interviews. This violation of the Division's own regulations resulted in one consultant having been improperly excluded. To remediate the violation, the court ordered the Division to add the consultant to the list of potential awardees and increase the number to 8. *Van-Note Harvey Associates, P.C. v. New Jersey Schools Development Authority*.

In the second case, a solicitation for modular furniture stated that prices must be firm for 18 months. Moreover, bidders were told that no sticker price changes on published price lists were acceptable. Naturally, 4 bidders ignored the requirement, added stickers, and found their quotations rejected. One bidder, however, crossed out the sticker price increase and requested acceptance at the catalog price for the whole term. The Division said no, and the Court agreed, because crossing out the sticker would allow an improper post bid alteration of a quote. *In the Matter of Jasper Seating Co.*

Supreme Court Dynamites Public Bidding



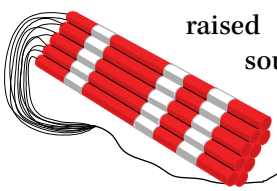
With its opinion in *Jen Electric, Inc. v. County of Essex*, the New Jersey Supreme Court has just thrown a stick of dynamite into public bidding. In the first known case of its kind in the United States, an equipment installer who was never a potential bidder on a public works contract was permitted to challenge a restrictive bidding specification which was "written around" a competitor's product. The construction community ought to love it; public bidding may never be the same.

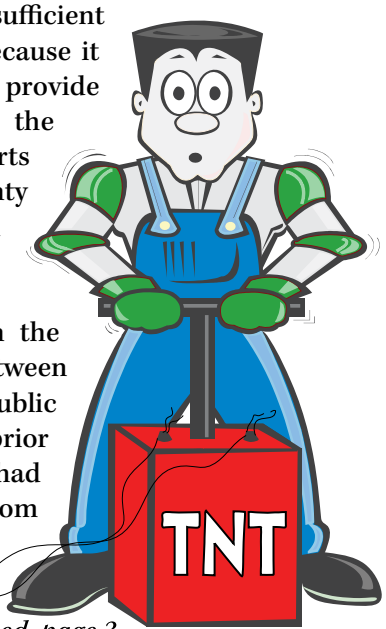
Before the *Jen Electric case*, restrictive bidding specifications could only be challenged by prospective bidders and taxpayers. The limitation was intended to prevent lawsuits over trival claims from tying up government contract awards, but the limitation also worked to prevent competing vendors with technical expertise from demonstrating why their product was an "or equal". This reduced competition and drove up bids. Furthermore, as the Supreme Court noted in its decision, the restriction on bid challenges "essentially [gave] public agencies *carte blanche* to write illegal specifications because, so long as the illegal portions of the specifications do not directly impact the general contractors, no one will have the incentive — or legal standing — to challenge them." With the stench of excessive cost, favoritism, and corruption in public bidding almost a daily news event, the Supreme Court has plainly had enough.

In its original bid specifications, Essex County required controllers from Econolite for its new traffic signal and video detection system. Econolite apparently had only one approved installer in the area. Jen Electric, the installer of a competing system, promptly raised written objections to the sole source designation. While the County revised the specifications to permit alternative controllers, the County later rejected all the bids. On rebidding, the County altered different technical specifications which once again left Econolite as the sole source. Again, Jen Electric objected. While the County claimed it would supposedly accept provable alternates, and Jen Electric made strong, fact-filled efforts to show it, the County refused their consideration. Two days before bid opening, Jen Electric sued to have the specifications declared unlawful.

First, the Supreme Court's analysis cleverly distinguished away a legal requirement under the Local Public Contracts Law. While that law states any "prospective bidders" must challenge a restrictive bid specification at least 3 days before bid opening, Jen Electric was never going to submit a bid. Thus, the Supreme Court decided the restriction did not apply.

Second, the Court held that Jen Electric had shown a significant enough interest to allow it the right to sue. Jen Electric plainly had a "sufficient stake in the outcome" because it wanted the opportunity to provide its own equipment, and the company's tenacious efforts to convince the County to change its position showed the seriousness of that interest. If Jen Electric were right, then the increased competition between vendors would help the public save money. Finally, the prior limitation on lawsuits had prevented the courts from getting to the core issue





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