CONTRACTS LET IN VIOLATION OF THE COMPETITIVE BIDDING STATUTES OR LET THE BIDDER BEWARE

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There are many times when contractors in order to be awarded a contract for public work negotiate after a bid opening with New York State, an agency thereof or some other public body. The general practitioner should be aware that due to the public bidding statutes such conduct may render the contract illegal and prevent the contractor from recovering for work performed.

There are a myriad number of statutes in New York referring to public contracts and the requirements attendant thereto. The most important of these, at least insofar as volume of litigation is concerned, is General Municipal Law Section 103. Subdivision 1 of Section 103 provides for certain contracts to be let to the lowest responsible bidder.

The applicable law concerning contracts of the State of New York is found in State Finance Law Section 135.

The City of New York has enacted legislation relative to letting of public contracts which can be found in Subsections a. and b. of Section 343 of the New York City Charter.

Contracts let by the New York City Transit Authority are governed by Public Authorities Law Section 1209.

The New York State Pure Waters Authority may only award contracts to the lowest bidder pursuant to Public Authorities Law Section 1287.

There are similar contract letting provisions for most of the Public Authorities in the State of New York. The following list, which is by no means exhaustive, enumerates some of the Public Authorities whose contract lettings are controlled by law:

Adirondack Mountain Authority
Jones Beach State Parkway Authority
New York State Thruway Authority
East Hudson Parkway Authority (refers to Highway Law Section 38)
New York State Bridge Authority (refers to Highway Law Section 38)
Triborough Bridge and Tunnel Authority (refers in part to New York City Charter)
Nassau County Bridge Authority (refers to Nassau County Projects)

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Assuming the unlikely, though very real possibility that a non-responsive bid is accepted, or where there is some fraud or collusion involved, or some other violation of the bidding process even if it is done in good faith, the resultant contract is void. This has long been the position taken in New York. In *Application of Caristo Construction Corp.*, 30 Misc. 2d 185, 221 N.Y.S. 2d 956, modified on other grounds, 15 A.D. 2d 561, 222 N.Y.S. 2d 998, affirmed 10 N.Y. 2d 538, 225 N.Y.S. 2d 502, the court found that an agreement between contractors bidding on board of education contracts are against public policy and are void, if the contracts tended to suppress or stifle competition.

Similarly, opinions of the State Comptroller have noted that a contract illegally let without competitive bidding is void, and no payment whatsoever may be made, either under the contract or on *quantum meruit*. 18 Op. State Compt. 302 (1962). [See also: 13 Op. State Compt. 278 (1957); 9 Op. State Compt. 431 (1953)]. See also *Albany Supply and Equipment Company v. City of Cohoes*, 18 N.Y. 2d 968, 278 N.Y.S. 2d 207.

Significantly, in recent years there have been a series of decisions, most by New York's highest court, the Court of Appeals, strongly reaffirming the doctrine that contracts violative of bidding statutes are void and provide no basis for recovery by the contractor, even in *quantum meruit*.

Perhaps the most oft cited of these is *Gerzoff v. Sweeney*, 16 N.Y. 2d 206, 264 N.Y.S. 2d 376. In *Gerzoff*, the Court of Appeals found that certain city officials had, in violation of General Municipal Law Section 103, drafted contract specifications which were designed specifically to favor one bidder to the exclusion of others. The Court declared the contract null and void and stated the general rule that where the contract is illegal, there is justification and precedent for the contractor to be forced to pay back to the municipality all sums it received, while allowing the public body to retain the benefit of the work done and/or the materials received.

While the Court in *Gerzoff* endorsed the general rule, it chose to fashion an exception thereto, designed to place the municipality in the position it would have been in, but for the illegality.

Three years after *Gerzoff*, in 1968, in *Jered Contracting Corp. v. New York City Transit Authority*, 22 N.Y. 2d 187, 292 N.Y.S. 2d 98, the Court of Appeals reaffirmed its prior position. Plaintiff painting contractor had entered into a written contract with the New York Transit Authority. When an officer of plaintiff corporation refused to waive immunity when subpoenaed to testify before the Grand Jury of New York County investigating bid rigging, the Transit Authority exercised its right to terminate the contract, basing its termination on fraudulent and collusive bidding engaged in by plaintiff. Thereupon, plaintiff sought recovery based upon *quantum meruit*. The Court denied any recovery to plaintiff. See also *Marino v. Town of Ramapo*, 68 Misc. 2d 44, 326 N.Y.S. 2d 162.

A particularly harsh application of the rules heretofore cited

is to be found in the 1973 decision of the Court of Appeals in *S. T. Grand, Inc. v. City of New York,* 32 N.Y. 2d 300, 344 N.Y.S. 2d 938.

The facts arise out of a 1966 contract between the plaintiff contractor and the defendant City of New York for the cleaning of a reservoir whereby a certain commissioner was bribed by the contractor to let said contract without competitive bidding, the commissioner having invoked the "public emergency" exception to the general bidding requirements (General Municipal Law, Sec. 103, subd. 4). Thereafter, the contractor completed the work but it, together with its president, were convicted in a Federal action of conspiracy to use interstate facilities with intent to violate New York State bribery laws.

When the contractor sued the City for the unpaid balance of $148,735 due on the contract, the City interposed the defense that the contract was illegal by reason of the bribery, and counterclaimed for the entire sum it had previously paid under the contract, $689,500. The Court of Appeals, affirming the Appellate Division, granted summary judgment to the City both on its entire counterclaim and as to the dismissal of plaintiff's claim for the balance due.

The relevant element of the case was the form of sanction or remedy for the illegality. The Court noted, and affirmed, the harsh general rule which works a complete forfeiture of the contractor's interest, and, explained the purpose thereof being to deter violation of bidding statutes. While acknowledging its deviation in *Gerzoff* from the general rule, the Court stated that the equitable remedy applied in that case would not be available to the contractor in this case, in part because the illegality in *Gerzoff:*

> ". . . infected only the final stages of the contracting process, while in the instant case, the illegality goes to the origins of that process."

The line of decisions from *Gerzoff,* to *Jered* to *Grand* contained to some degree at least, elements of moral turpitude. However, even though the final result may be somewhat affected by circumstance, as in *Gerzoff,* one cannot, and indeed, must not, conclude, that if the contractor violates a bidding statute innocently, he will emerge unscathed. Quite the opposite is true, and a rather startling example thereof is the decision in *Fabrizio & Martin, Inc. v. Board of Education Central School District No. 2,* 290 F. Supp. 945, wherein a severe penalty was imposed upon an innocent contractor where no hint of fraud was involved.

In 1963 a school board advertised bids for general construction of a school. Of the six bids submitted, the three lowest were bid by Rand, Fabrizio and Stanley. Low bidder Rand was awarded the contract but subsequently was allowed to withdraw its bid when it discovered an error in computation. Thereupon, Fabrizio as second low bidder was awarded the contract. However, it, too, had miscalculated, underestimating its bid by some $171,000. Accordingly,

Fabrizio asked to be allowed either to withdraw or correct its bid. Extensive negotiations between Fabrizio and the school board, including the latter's counsel and architect, followed and it was agreed that the plans and specifications would be changed to compensate for the error. To effectuate same, a change order was issued which was then incorporated into the actual contract as signed. In 1966 during the course of construction, a dispute arose between Fabrizio and the board and Fabrizio was declared in default when it refused to continue work when its demands were not satisfied.

Thereupon, Fabrizio sued the board for breach of contract, seeking damages in *quantum meruit*. The board noticed a motion to stay the suit pending arbitration, at which time two taxpayers intervened in the suit claiming that the contract was illegal. The Judge of the Federal District Court ruled that the effect of the change order on the original plans and specifications was such that new bids should have been requested on what was in fact a new contract. Since other bidders were denied an opportunity to change their bids, the contract was held illegal and void. Then, the board answered Fabrizio's complaint, seeking recovery of all monies paid to Fabrizio and damages caused by Fabrizio's alleged breach. Upon motion, Fabrizio's entire complaint was dismissed, with the ruling that the contractor could not base any recovery on an invalid contract. While the board in turn may not recover all the money paid to the contractor, the Court stated it may recover all the damages it can prove were suffered. After 12 years of litigation the Circuit Court of Appeals held that the contract was not illegal and remanded the case for a further trial on damages, 523 F. 2d 378 (2d Cir. 1975). The point of the case is still clear however and that is where the contract is based upon a bid which was a denial of opportunity to other bidders, the contractor can collect nothing and the public authority can collect all it can prove.

(See also *Prosper Contracting Corp. v. Board of Education of City of New York,* 73 Misc. 2d 280, 341 N.Y.S. 2d 196, aff'd. 43 A.D. 2d 823, 351 N.Y.S. 2d 402, where the error was by the Board in failing to advertise bids properly, but contractor could not obtain payment for its work; *Albert Elia Bldg. v. N. Y. St. Urban Development,* 54 A.D. 2d 337, 388 N.Y.S. 2d 462, where the error was in awarding a change order instead of advertising for bids and *General Bldg. Contractors, Etc. v. State,* 89 Misc. 2d 279, 391 N.Y.S. 2d 319, where the error was awarding a job without competitive bidding on the grounds of an alleged emergency.)

Innumerable statutes exist in New York State which govern the letting of public contracts. Though the literal terms of these legislative pronouncements may vary, their effect is uniform and the courts have endorsed and supported the intent thereof, which is encourage honest competition so the public body and its citizens may obtain the best work, labor and services at the best price. The general practitioner should know of all the pitfalls involved so he can advise his client sometimes the job is just not worth it and the bidder should beware.