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Cover Page Footnote

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RELETTING THE ABANDONED OR DEFAULTED PUBLIC WORKS PROJECT IN NEW YORK—TO BID OR NOT TO BID?

Bruce J. Bergman*

I. Introduction

The general requirement that contracts for public works be let pursuant to advertisements for bids to the lowest responsible bidder¹ has long been the law in New York and other jurisdictions.² The purpose is to prevent corruption, favoritism, and reckless expenditure, while obtaining the best contract terms;³ the intended beneficiary is the public entity involved.⁴

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1. There are scores of statutes mandating this requirement. See statutes cited in notes 30-35 *infra*.

2. See, e.g., *Sweet Associates v. Gallmon*, 36 App. Div. 2d 95, 318 N.Y.S.2d 528 (3d Dep't 1971), *aff'd*, 29 N.Y.2d 902 (1972); *Gottfried Baking Co. v. Allen*, 45 Misc. 2d 708, 257 N.Y.S.2d 833 (Sup. Ct. 1964); *Glen Truck Sales & Serv., Inc. v. Sirignano*, 31 Misc. 2d 1027, 220 N.Y.S.2d 939 (Sup. Ct. 1961); 10 E. McQUILLAN, MUNICIPAL CORPORATIONS § 29.29 (3d ed. 1966) [hereinafter cited as McQUILLAN]. See also N.Y. GEN. MUN. LAW § 100-a (McKinney 1965).

3. See *General Bldg. Contractors v. Board of Trustees*, 42 App. Div. 2d 660, 345 N.Y.S.2d 195 (3d Dep't 1973); *Warren Bros. v. Craner*, 30 App. Div. 2d 437, 293 N.Y.S.2d 763 (4th Dep't 1968); *Allen v. Eberling*, 24 App. Div. 2d 594, 262 N.Y.S.2d 121 (2d Dep't 1965); *Fonesca v. Board of Educ.*, 58 Misc. 2d 223, 294 N.Y.S.2d 952 (Sup. Ct. 1968); *Carroll-Ratner Corp. v. City Manager*, 54 Misc. 2d 625, 283 N.Y.S.2d 218 (Sup. Ct.), *aff'd mem.*, 36 App. Div. 2d 795, 320 N.Y.S.2d 715 (2d Dep't 1967).

4. Only contracts over a certain sum are included. N.Y. GEN. MUN. LAW § 103 (McKinney Supp. 1974) sets the amount at \$3,500.00, but this sum varies from statute to statute with amendments over the years increasing the figures. Furthermore there is wide variation with reference to the nature of contracts which are subject to bidding requirements. Some of the areas which have been the subject of opinion and litigation include: machinery operators hired on an hourly basis under supervision of village employees, 16 Op. N.Y. ST. COMP. 49 (1960); aggregate cost computations, 24 Op. N.Y. ST. COMP. 116 (1968); 18 Op. N.Y. ST. COMP. 354 (1962); work partially done by municipal employees, 23 Op. N.Y. ST. COMP. 252 (1967)

Uniformly, these bidding requirements have been held to be mandatory.⁵ After determining that the mandatory statutory pronouncements apply to a particular contract, there is an entire "second level" problem of the propriety of bids and the awarding of the contract pursuant thereto.⁶

(No. 67-310); 16 Op. N.Y. St. Comp. 49 (1960); combined purchases of items, 18 Op. N.Y. St. Comp. 483 (1962); rental agreements, 27 Op. N.Y. St. Comp. 186 (1971) (No. 71-872); 23 Op. N.Y. St. Comp. 567 (1967); book purchases, 19 Op. N.Y. St. Comp. 32 (1963); fire equipment purchases, *Signacon Controls, Inc. v. Mulroy*, 69 Misc. 2d 63, 329 N.Y.S.2d 175 (Sup. Ct.) (mem.), *aff'd*, 39 App. Div. 2d 1013, 335 N.Y.S.2d 256 (4th Dep't 1972); food purchases, 12 Op. N.Y. St. Comp. 169 (1956); gasoline purchases, 24 Op. N.Y. St. Comp. 490 (1968); office equipment, 23 Op. N.Y. St. Comp. 866 (1967); printing contracts, 25 Op. N.Y. St. Comp. 314 (1969); 18 Op. N.Y. St. Comp. 354 (1962); splitting work contracts, 18 Op. N.Y. St. Comp. 290 (1962) (No. 62-565); maintenance and repair contracts, 25 Op. N.Y. St. Comp. 336 (1969); 15 Op. N.Y. St. Comp. 130 (1959); cost-plus contracts, 9 Op. N.Y. St. Comp. 311 (1953); monopolies, 23 Op. N.Y. St. Comp. 500 (1967); 11 Op. N.Y. St. Comp. 502 (1955); professional service contracts, 24 Op. N.Y. St. Comp. 437 (1968); 17 Op. N.Y. St. Comp. 279 (1961); insurance policies, 17 Op. N.Y. St. Comp. 126 (1961); 10 Op. N.Y. St. Comp. 14 (1954) (No. 6528); and special skills, *Hurd v. Erie County*, 34 App. Div. 2d 289, 310 N.Y.S.2d 953 (4th Dep't 1970). *See also* McQUILLAN §§ 29.33-29.35, 29.40, 29.42; Annot., 15 A.L.R.3d 733 (1967); Note, *The Necessity of Competitive Bidding in Municipal Contracts*, 27 U. PITT. L. REV. 117 (1965).

5. *See* McQUILLAN § 29.30; Note, *The Necessity of Competitive Bidding in Municipal Contracts*, 27 U. PITT. L. REV. 117 (1965). Obviously though, the bidding requirements are not mandatory across the broad spectrum of contracts which have been held not to come within the contemplation of the statutes. *See* cases cited in note 2 *supra*. One example, of the many cited in note 2, is the monopoly situation. Where there is but one source of supply for an item, it has been held that the statutes could not have intended that a public body go through the motions of competitive bidding. The leading and clearly the most significant decision in this area is *Harlem Gas-Light Co. v. City of New York*, 33 N.Y. 309 (1865). *See also* 23 Op. N.Y. St. Comp. 502 (1955); 10 Op. N.Y. St. Comp. 323 (1954).

6. This raises issues far beyond the scope of this article. However, the bidding problems associated with the statutes in question are important to any contractor (or supplier), as well as to public bodies. Some of the topics that have been considered are: proper advertising media, *McDonough v. Board of Educ.*, 20 Misc. 2d 98, 189 N.Y.S.2d 401 (Sup. Ct.

With the probable exception of North Carolina,⁷ the courts⁸ consistently held that where a public contract is let improperly, the

1959); timeliness of bid, *Wiltom Coach Co. v. Central High School Dist. No. 3*, 36 Misc. 2d 637, 232 N.Y.S.2d 876 (Sup. Ct. 1962); *In re Mulhollen*, 77 N.Y. St. DEP'T OF EDUC. 95 (1956); bidding signature requirements, *In re Island Air Conditioning Co.*, 1 N.Y. EDUC. DEP'T REP. 482 (1960); 19 OP. N.Y. ST. COMP. 313 (1963); security requirements, *Rockland Bus Lines, Inc. v. Board of Educ.*, 43 Misc. 2d 1060, 252 N.Y.S.2d 712 (Sup. Ct. 1964); *In re J.N. Futia Co.*, 2 N.Y. EDUC. DEP'T REP. 143 (1962); 24 OP. N.Y. ST. COMP. 586 (1968); bidder responsibility, *Seacoast Constr. Corp. v. Lockport Urban Renewal Agency*, 72 Misc. 2d 372, 339 N.Y.S.2d 188 (Sup. Ct. 1972); *Harrow Transp. Co. v. Board of Educ.*, 71 Misc. 2d 139, 335 N.Y.S.2d 465 (Sup. Ct. 1972); *In re Laboratory Furniture Co.*, 1 N.Y. EDUC. DEP'T REP. 353 (1959); aggrieved bidder's burden of proof, *W. J. Gaskell, Inc. v. Maslanka*, 33 Misc. 2d 88, 225 N.Y.S.2d 94 (Sup. Ct. 1962); *Meyer v. Board of Educ.*, 31 Misc. 2d 407, 221 N.Y.S.2d 500 (Sup. Ct. 1961); extent of awarding authority's discretion, *Consolidated Sheet Metal Workers, Inc. v. Board of Educ.*, 62 Misc. 2d 445, 308 N.Y.S.2d 773 (Sup. Ct. 1970); *Caruci v. Dulan*, 41 Misc. 2d 859, 246 N.Y.S.2d 727 (Sup. Ct. 1964); *Hopkins v. Hanna*, 135 Misc. 750, 239 N.Y.S. 489 (Sup. Ct. 1930); acceptance of non-responsive bid, *Glen Truck Sales & Serv., Inc. v. Sivignano*, 31 Misc. 2d 1027, 220 N.Y.S.2d 939 (Sup. Ct. 1961); 16 OP. N.Y. ST. COMP. 439 (1960); rejection of non-complying bid, *Rockland Haulage, Inc. v. Village of Upper Nyack*, 13 App. Div. 2d 819, 216 N.Y.S.2d 308 (2d Dep't 1961); *Southern Steel Co. v. County of Suffolk*, 51 Misc. 2d 198, 273 N.Y.S.2d 99 (Sup. Ct. 1966).

7. See, e.g., *Hawkins v. Town of Dallas*, 229 N.C. 561, 50 S.E.2d 561 (1948); *McQUILLAN* § 29.41.

8. See, e.g., *Jered Contracting Corp. v. New York City Transit Auth.*, 22 N.Y.2d 187, 239 N.E.2d 197, 292 N.Y.S.2d 98 (1968); *Albany Supply & Equip. Co. v. City of Cohoes*, 18 N.Y.2d 968, 224 N.E.2d 716, 278 N.Y.S.2d 207 (1966); *Prosper Contracting Corp. v. Board of Educ.*, 43 App. Div. 2d 823, 351 N.Y.S.2d 402 (1st Dep't 1974); 13 OP. N.Y. ST. COMP. 278 (1957); 9 OP. N.Y. COMP. 431 (1953). There is possible conflict in ten other jurisdictions: Alabama, Arizona, Indiana, Louisiana, Minnesota, Nebraska, New Jersey, North Dakota, Texas, and Washington. Assuming that a public contract has been improperly let, all the authorities agree that the contract is void. To the extent that there is disagreement, it revolves around the theory that even though the contract is void, there may be some recovery under an equitable doctrine, such as quasi contract, contract implied in law or unjust enrichment. Only these ten states and North Carolina subscribe to this theory. A detailed discussion of these avenues of approach is

contract is void and the contractor cannot recover even though the public body has received the benefits of the contract.⁹

Because the volume of litigation on bidding statutes is considerable, contractors (or suppliers and materialmen) and their counsel are generally aware of the requirements. Thus, the extremely harsh New York rules¹⁰ imposing penalties upon contractors who are parties to public contracts violative of the bidding statutes can be avoided.

But suppose a contractor has defaulted or abandoned a valid public works contract? Must the public entity now readvertise for bids for the completion of the work? The answer in most instances is "no," and this raises the disconcerting specter of a single unsupervised public official having the power to let potentially huge contracts.

Of course the size of the relet contract is not the prime consideration. The key point is that the laboriously developed bidding laws can be circumvented in default and abandonment situations, resulting in favoritism for the contractor and a bad bargain for the taxpayers.

However, the other side of the question is equally vexing. An abandoned or defaulted contract may require immediate continuation or remedial action; *e.g.*, when a city's milk supplier is in default, or work on a vital sewer line is terminated. If such situations do not fit into the public emergency exception, must the public body expend the time, effort, and expense to analyze the supplies needed or work remaining,¹¹ formulate proposed contracts, and advertise for

beyond the scope of this article, but is discussed quite thoroughly at Annot., 33 A.L.R.3d 397 (1970) and Annot., 33 A.L.R.3d 1164 (1970). See also 55 MARQ. L. REV. 397 (1972); McQUILLIN § 29.112.

9. See Annot., 33 A.L.R.3d 397 (1970); Annot., 33 A.L.R.3d 1164 (1970).

10. See text accompanying notes 27-41 *infra*. The statement that the rules are harsh is not in and of itself to be construed as a value judgment on the part of the author. Where a contractor has knowingly done something illegal or morally reprehensible, or has in some manner affirmatively acted to take unfair advantage of a public entity or another contractor, he assumes the risks of his actions and is deserving of no sympathy. However the problem lies with the technical violation committed unintentionally which can have disastrous consequences upon the contractor if the contract is thereafter declared illegal.

11. See text accompanying notes 42-54 *infra*.

bids? Compounding this difficulty is the confusing and conflicting status of the legal requirements in New York for the reletting of abandoned or defaulted work.

II. Consequences of the Void Public Contract

If a relet contract is not advertised for bids when it should be, any contractor who accepts the contract, innocently or otherwise, exposes himself to the possibility that a court may find the contract void. This is particularly important in New York, where the implications of the void public contract are extended further than other states, *i.e.*, not only may the public body avoid paying the contractor, it may, in addition, recover all the money it had already paid under the contract.¹²

Since the prospective bidders wish to preclude the disastrous effects of a void public contract they should first examine those decisions that set the ground rules. The most frequently cited decision in this area is *Gerzoff v. Sweeney*,¹³ which was twice before the New York Court of Appeals. In *Gerzoff*, the court found that certain village officials illegally¹⁴ had drafted contract specifications favoring one bidder to the exclusion of others.¹⁵ As a result, the Village of Freeport purchased a generator more expensive than the one it otherwise would have bought. In declaring the contract null and void, the court enumerated these important principles:

The applicable statute, section 103 of the General Municipal Law, provides that a contract for public work, such as the one here in question, is to be awarded 'to the lowest responsible bidder . . . after advertisement for sealed bids.' The law is based, this court long ago declared, 'upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show

12. See *Fabrizio & Martin, Inc. v. Board of Educ.*, 290 F. Supp. 945 (S.D.N.Y. 1968); *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973); *Gerzoff v. Sweeney*, 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968); *Gerzoff v. Sweeney*, 16 N.Y.2d 206, 211 N.E.2d 826, 264 N.Y.S.2d 376 (1965).

13. 22 N.Y.2d 297, 239 N.E.2d 521, 292 N.Y.S.2d 640 (1968); 16 N.Y.2d 206, 211 N.E.2d 826, 264 N.Y.S.2d 397 (1965).

14. 16 N.Y.2d at 209, 211 N.E.2d at 829, 264 N.Y.S.2d at 379.

15. This is one of the abuses bidding statutes seek to cure.

that a contract made in violation of its requirements is null and void . . . ' Moreover, once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds is presumed and a taxpayer is entitled to have the contract set aside without showing that the municipality suffered any actual injury. . . . It is sufficient in such a situation that the public 'has been deprived of the protection which the law was intended to afford.'

If a municipality awards a contract without advertising for bids, when required, the contract would, concededly, be illegal. And . . . 'the contract likewise would be illegal' if the municipality 'had accomplished the same result by indirection, that is, had so fixed or manipulated the specifications as to shut out competitive bidding or permit unfair advantage or favoritism.'¹⁶

The court then postulated the general rule that where the contract is illegal, there is justification and precedent for the contractor to pay back to the municipality all sums received, while the public body retains the benefit of the work done and/or the materials received. The court's rationale was:

There should, logically, be no difference in ultimate consequence between the case where a vendor has been paid under an illegal contract and the one in which payment has not yet been made. If, in the latter case, he is denied payment, he should, in the former, be required to return the payment unlawfully received—and he should not be excused from making this refund simply because it is impossible or intolerably difficult for the municipality to restore the illegally purchased goods or services to the vendor. In neither case can the usual concern of equity to prevent unjust enrichment be allowed to overcome and extinguish the special safeguards which the Legislature has provided for the public treasury.¹⁷

Although the *Gerzoff* court endorsed this general rule, it did not require the contractor to return the entire consideration (\$757,625) received from the Village. It concluded that the purposes of the competitive bidding statutes would be fully vindicated if the contractor was required to pay the price difference between the generator the Village intended to purchase and defendant's generator plus the higher cost of installation. This computation totalled \$178,636.¹⁸

16. 16 N.Y.2d at 208-09, 211 N.E.2d at 827, 264 N.Y.S.2d at 378-79 (citations omitted).

17. 22 N.Y.2d at 305, 239 N.E.2d at 523-24, 292 N.Y.S.2d at 644.

18. The remedy chosen by the court consisted of the price difference between the generator the Village of Freeport intended to purchase and defendant's generator plus the higher cost of installation. This computa-

In short, the court's remedy was designed to place the municipality in the position it would have been in but for the illegality.

A particularly harsh application of the rule occurred in *S.T. Grand, Inc. v. City of New York*,¹⁹ in a 1973 decision of the court of appeals. In 1966, the plaintiff contractor and the defendant city contracted for the cleaning of a reservoir. The contractor bribed a commissioner to let the contract without competitive bidding; the commissioner invoked the "public emergency" exception to the general bidding requirements.²⁰ The contractor completed the work but together with its president, was convicted in a federal action of conspiracy to use interstate facilities with the intent to violate New York state bribery laws.

When the contractor sued the city for the unpaid balance due on the contract, the city interposed the defense that the contract was illegal because of the bribery, and counterclaimed for the entire sum (\$689,500) it had previously paid. The court of appeals granted summary judgment to the city both on its entire counterclaim and on the motion to dismiss the plaintiff's claim for the balance due.²¹ The court affirmed the stringent general rule which works a complete forfeiture of the contractor's interest as necessary to deter violation of bidding statutes. While acknowledging the *Gerzoff* deviation from the general rule, the court stated that the remedy applied there would not be available to the contractor in this case, in part because the illegality in *Gerzoff* "infected only the final stages of the municipal contracting process, while in the instant case, the illegality goes to the origins of that process."²²

The cases from *Gerzoff* to *S.T. Grand* contained some element of moral turpitude.²³ However, even though the final result may be somewhat affected by circumstance, 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 is found in *Fabrizio & Martin, Inc. v. Board*

tion totaled \$178,636 as compared to \$757,625. *Id.* at 307-08, 239 N.E.2d at 525, 292 N.Y.S.2d at 646.

19. 32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973).

20. See N.Y. GEN. MUN. LAW § 103(4) (McKinney 1965).

21. 32 N.Y.2d at 307, 298 N.E.2d at 109, 344 N.Y.S.2d at 944.

22. *Id.*, 298 N.E.2d at 109, 344 N.Y.S.2d at 943.

23. See text accompanying notes 14-23 *supra*.

of *Education*,²⁴ where the court, absent any hint of fraud, imposed a severe penalty upon an innocent contractor.

In 1963, a school board advertised bids for general construction of a school. Of the six bids submitted, the two lowest were from Rand and Fabrizio. Low bidder Rand was awarded the contract but was allowed to withdraw its bid when it discovered an error in computation. Fabrizio, as second low bidder, was awarded the contract. However, it too had miscalculated, underestimating its bid by some \$171,000. Accordingly, Fabrizio sought permission to withdraw or correct its bid. Extensive negotiations followed, and the parties agreed that the plans and specifications would be changed to compensate for the error. To effectuate the modification, a change order was issued and incorporated into the contract. In 1966, during the construction, a dispute arose between Fabrizio and the board; Fabrizio was declared in default when it refused to continue work when its demands were not satisfied.

Fabrizio sued for breach of contract. The board moved to stay the suit pending arbitration, at which time two taxpayers intervened claiming that the contract was illegal. The court agreed, ruling 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.

The board then answered Fabrizio's complaint, seeking recovery of all monies paid to Fabrizio together with damages caused by the contractor's alleged breach. The court dismissed the complaint, ruling that the contractor could not base any recovery upon an invalid contract. While the board in turn could not recover all the money paid to the contractor, the court ruled it could recover all the damages it could prove were suffered. Even though the trial to prove damages is still pending—with the likelihood that it will never occur²⁵—the point is clear. In a suit on a contract awarded by denying other bidders an opportunity to participate, the contractor can collect nothing and the public authority can collect all damages it can prove.

24. 290 F. Supp. 945 (S.D.N.Y. 1968). The factual background of *Fabrizio* that follows in the text is derived from *Board of Educ. v. Aetna Cas. & Sur. Co.*, 453 F.2d 264 (2d Cir. 1971).

25. This is based on personal investigation.

III. Reletting—The General Rule

To avoid becoming a party to an illegal contract, interested parties must carefully study the statutes, the authorities, and the case law. Unfortunately, the general rule is misleading in its emphasis:

If a contractor abandons the work, and the municipality has the power under the contract to finish it and charge the contractor with the expense, it has been held that the requirement for letting contracts on competitive bids does not apply.²⁶

In order to properly apply this rule, it is necessary to construe the contract. In the absence of a clear contractual provision, the general rule, cited in at least two opinions of the State Comptroller,²⁷ is that:

If there is no special provision in the statute or charter in regard to reletting, it is generally held that if the contract is abandoned the municipality may proceed to complete the work without again advertising for bids²⁸

Thus, the critical consideration which emerges is when is there a special statute or charter provision in regard to reletting public contracts?

The New York statutes referring to public contracts and their requirements are legion.²⁹ There are also requirements for the various public authorities found in various sections of the Public Authorities Law.³⁰

26. McQUILLAN § 29.39 (citations omitted). "In case of an emergency, where it is essential to the health, safety, or welfare of the people that immediate action be taken, the requirement [of bidding] may be dispensed with." *Id.* § 29.38 (footnote omitted).

27. 18 OP. N.Y. ST. COMP. 252 (1962); 16 OP. N.Y. ST. COMP. 140 (1960).

28. McQUILLAN § 29.39 (footnotes omitted).

29. *E.g.*, NEW YORK, N.Y., CHARTER §§ 343(a), (b); see N.Y. EDUC. LAW § 376 (McKinney 1969); N.Y. GEN. MUN. LAW § 103(1) (McKinney 1965); N.Y. STATE FIN. LAW § 135 (McKinney 1974); N.Y. TOWN LAW §§ 122, 176(23-a), 197, 222 (McKinney 1969).

30. See N.Y. PUB. AUTH. LAW §§ 530 (N.Y.S. Bridge Auth.), 559 (Triborough Bridge & Tunnel Auth.), 659 (Nassau Co. Bridge Auth.), 890 (Genesee Valley Regional Market Auth.), 1069 (Erie Co. Water Auth.), 1088 (Suffolk Co. Water Auth.), 1108 (Monroe Co. Water Auth.), 1166 (Onondaga Co. Water Auth.), 1181 (Buffalo Sewer Auth.), 1209 (N.Y.C. Transit Auth.), 1246 (Great Neck Water Auth.), 1349-j (Rochester-Monroe Co. Port Auth.), 1385 (Ogdensburg Port Auth.), 1431 (White Plains Park-

While the statutory intent is clear³¹—to avoid waste of public funds and require competitive bidding for contracts in excess of varying sums—the statutory requirements for reletting when an abandoned or defaulted contract previously advertised and let (pursuant to statute) is abandoned or defaulted are unclear.

IV. Reletting—Specific Statutory Authority

Although no state statutes specifically address the issue of advertising for bid requirements upon an abandonment or default, New York City has enacted a section of the Administrative Code which is directly applicable:³²

Performance of contracts—

- a. Each agency shall require and enforce the faithful performance of every contract made by it.
- b. If the contractor or contractors shall fail in any respect to fulfill the contract within the time limited for its performance, then the agency in charge thereof shall complete the same in the manner provided for in the contract. The cost of such completion shall be a charge against such delinquent contractor or contractors.
- c. If any work shall be abandoned by any contractor, the appropriate agency, if the best interests of the city be thereby served, and subject to the approval of the board of estimate, may adopt all subcontracts made by such contractor for such work. All subcontractors shall be bound by such adoption. The agency shall readvertise and relet the work specified in the original

ing Auth.), 1456 (Elmira Parking Auth.), 1481 (Syracuse Parking Auth.), 1506 (Peekskill Parking Auth.), 1531 (Fulton Parking Auth.), 1551 (Tuckahoe Parking Auth.), 1556 (Endicott Parking Auth.), 1569-g (Troy Parking Auth.), 1585-g (Port Jervis Parking Auth.), 1595-g (Owego Parking Auth.), 1596-g (Yonkers Parking Auth.), 1597-g (Ogdensburg Port Auth.), 1598-f (Poughkeepsie Parking Auth.), 1599-f (Niagara Falls Parking Auth.), 1599-g (Cohoes Parking Auth., Schenectady Parking Auth., Binghamton Parking Auth.), (McKinney 1970); *id.* §§ 1287 (N.Y.S. Environmental Facilities Corp.), 1425-g (Hudson Parking Auth.), 1708 (Brooklyn Sports Center Auth.), 1599-f (Olean Parking Auth.), 1599-g (Mount Vernon Parking Auth.), 1599-gg (Village of Spring Valley Parking Auth.), 1599-ggg (Jamestown Parking Auth., Village of Mt. Kisco Auth.), 1599-gggg (City of Long Beach Parking Auth.), 2312 (Auburn Indus. Devel. Auth.), 2469, 2508 (N.Y.S. Sports Auth.) (McKinney Supp. 1974).

31. See text accompanying notes 3-4 *supra*.

32. NEW YORK, N.Y., ADMIN. CODE ANN. § 343-1.0 (1971).

contract, exclusive of so much thereof as shall be provided for in the subcontracts so adopted.³³

This section is the general provision on reletting work under New York City contracts. Unfortunately, its interpretation presents some problems. First, subsection (a) *seems* to require a review of any special bidding statutes which *may* have been enacted in regard to contracts let by the various city agencies. Subsection (b) applies to the failure of a contractor to fulfill the contract in "any respect." What is a failure in any respect? Surely an abandonment is a failure. Yet, subsection (c) specifically applies to abandonments, and not to the other varieties of failure contemplated by subsection (b).

Assuming that there is some rational basis to distinguish between certain undefined failures and an abandonment, the Administrative Code reacts differently to them and still does not make its intent clear. If there is a failure other than an abandonment, subsection (b) permits the agency in charge to complete the work in the manner provided in the contract (whatever that may be), and charge the completion costs (or presumably the remedial costs as well, although that is not stated) to the account of the delinquent contractor. Several questions ensue:

- What exactly is a failure to fulfill the contract within the time limited for its performance?
- If the contractor is entitled to an extension of time to complete, does this subsection intend to deny to him that to which he would otherwise be entitled?
- Does completion by the agency in charge mean that the agency is to use its own personnel; or does it have the power to relet the work?
- If the agency does relet the work, must there be competitive bidding?
- Assuming the work is contracted to another firm without competitive bidding, may the cost of completion exceed the original contract price, or is this provision only operable when completion cost is less?³⁴

33. *Id.* To the extent that a local law does not conflict with N.Y. GEN. MUN. LAW § 103 (McKinney 1965), the local law may co-exist with it. See 10 OP. N.Y. ST. COMP. 323 (1954).

34. In *Simermeyer v. Mayor*, 16 App. Div. 445, 45 N.Y.S. 40 (1st Dep't

Subsection (c) distinguishes between an abandonment and other defaults; when there is an abandonment, all work which has not been adopted under subcontracts is to be readvertised and relet competitively.

What is confusing about the entire section is the unknown reason behind proposing different remedies for general defaults as opposed to abandonment. This is particularly disconcerting because Administrative Code provisions with respect to specific city agencies do not always recognize this separation. For example, the applicable Board of Water Supply statute provides as follows:

Public opening of bids; acceptance; rejection; readvertisement.—After the expiration of the time limited in the advertisement, such bids on proposals shall be publicly opened by the board of water supply and it may select the bid or proposal, the acceptance of which will, in its judgment, best secure the efficient performance of the work, or it may reject any or all of such bids. In case of the rejection of all bids, the board of water supply shall readvertise such contract, and shall receive and dispose of the bids tendered under such advertisement in the manner hereinbefore provided for. *In case any work shall be abandoned by any contractor, or his contract terminated pursuant to the provisions thereof, it shall be readvertised and relet in the manner provided for in this article for the original letting of such work.*³⁵

If there is any rhyme or reason for the adoption of the default-abandonment dichotomy in section 343-1.0 and its rejection in section K51-30.0 it is beyond comprehension. Given the confusion, each and every piece of local legislation which might in any way apply to the reletting of contracts in a given municipality must in every instance be reviewed and researched before the necessity of competitive bidding can be determined.

V. The Public Emergency Exception

Perhaps the most conspicuous exception to the requirement for

1897), there was a default which was not an abandonment. The court ruled that completion by the agency in charge, when the completion cost was less than the sum due the defaulting contractor, and when abandonment is not demonstrated, removes the completion from competitive bidding requirements. Whether this decision is merely an interpretation confined to NEW YORK, N.Y., ADMIN. CODE ANN. § 343-1.0 (1971), or is generally applicable to the reletting question is unclear. This writer has chosen to treat it as an apparent exception to bidding statutes.

35. NEW YORK, N.Y., ADMIN. CODE ANN. § K51-30.0 (1971).

public bidding—whether dealing with an original or an abandoned contract—is the public emergency situation.³⁶

Where a public emergency exists, normal advertising for bids is not required.³⁷ Section 103(4) of the General Municipal Law provides:

[I]n the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein, require immediate action which cannot await competitive bidding, contracts for public work or the purchase of supplies, material or equipment may be let by the appropriate officer, board or agency of a political subdivision or district therein.³⁸

While there are no cases specifically applying the public emergency exception to abandoned works, it is reasonable to expect that the same principle applies. Courts, however, have been quite strict in defining "public emergency."³⁹ Furthermore, the emergency exception is dangerous for the contractor. If the legality of the contract is challenged successfully⁴⁰ even the good faith of both the contractor and the municipality will not be a defense.⁴¹

*Grimm v. City of Troy*⁴² discusses some of the prerequisites necessary before a court will declare an emergency situation. The case involved garbage collection, the most common emergency situation

36. McQUILLAN § 29.38. As an example, McQuillan offers the proposition that there need be no bidding when a public official, acting in good faith to prevent the city from being left in darkness, contracts for temporary street lighting. *Id.*

37. N.Y. GEN. MUN. LAW § 103(4) (McKinney 1965).

38. *Id.*

39. *Rodin v. Director of Purchasing*, 38 Misc. 2d 362, 238 N.Y.S.2d 2 (Sup. Ct. 1963).

40. *Id.*

41. *Id.* See also *Prosper Contracting Corp. v. Board of Educ.*, 43 App. Div. 2d 823, 351 N.Y.S.2d 402 (1st Dep't 1974). Although an emergency question was not at issue, the contractor was not allowed to recover when it did work as directed by a public official because the school board had inadvertently failed to meet a purely ministerial requirement of its bidding statute. The contractor, though innocent of wrongdoing and having concededly done the work, could not recover in a court proceeding. *Id.* at 823, 351 N.Y.S.2d at 403.

42. 60 Misc. 2d 579, 303 N.Y.S.2d 170 (Sup. Ct. 1969).

reported. Ruling that there was an emergency affecting public health, the court refused to interfere with the City Manager's failure to submit work to bidding, and observed as follows:

The court is constrained to adopt a course which must give first consideration to the citizens of Troy. Section 103 of the General Municipal Law, which governs the city's conduct, provides in subdivision 4 for emergency situations. *An 'unforeseen' occurrence or condition is one which is not anticipated, which creates a situation which cannot be remedied by the exercise of reasonable care or which is fortuitous.* . . . Subdivision 4 provides an exception to bidding requirements where circumstances affecting the life, health or safety of the citizens of Troy require immediate action but situations of this kind must be such as cannot reasonably be foreseen in time to advertise for bids.⁴³

In *Rodin v. Director of Purchasing*,⁴⁴ the municipality, again relying on the emergency exception,⁴⁵ passed a resolution authorizing the purchase of garbage trucks without competitive bidding. The court enjoined the purchase, concluding that the need for the trucks, albeit immediate at the time the resolution was enacted, could have been foreseen months in advance. The importance of the decision lies in the court's definition of "unforeseen occurrence or condition" and its dictum on the effect of the municipality's good faith:

Whether there was an emergency of the type defined by the statute turns in the instant case on the meaning of the phrase 'unforeseen occurrence or condition.' An occurrence or condition is unforeseen when it is not anticipated; when it creates a situation which cannot be remedied by the exercise of reasonable care The court notes that its determination in no way impugns the good faith of the Town Board but that good faith does not validate acts beyond the power of the board.⁴⁶

Similarly the State Comptroller⁴⁷ has concluded that the imminent breakdown of a fire district ambulance was not such an emergency that would except the purchase of a new ambulance from

43. Significantly, the court implied that the result would have been different if fraud, conspiracy or other wrongdoing could be shown. *Id.* at 582, 303 N.Y.S.2d at 175.

44. 38 Misc. 2d 362, 238 N.Y.S.2d 2 (Sup. Ct. 1963).

45. N.Y. GEN. MUN. LAW § 103(4) (McKinney 1965).

46. 38 Misc. 2d at 364-65, 238 N.Y.S.2d at 5-6 (citations omitted).

47. 27 Op. N.Y. ST. COMP. 124 (1971).

competitive bidding. However, certain buildings have been found to be in such a state of disrepair as to require a contract for removal without competitive bidding.⁴⁸

VI. Apparent Exceptions

There are fact situations which give rise to additional apparent exceptions to the rule requiring public bidding. For example, *Simermeyer v. Mayor*⁴⁹ considered a statute⁵⁰ which provided that when work was necessary to complete or perfect a particular job and involved an expenditure in excess of \$1,000, it was to be done by contract, and, "[i]n case any work shall be abandoned by any contractor, it shall be readvertised and relet by the head of the appropriate department in the manner in this section provided."⁵¹

The city had engaged contractor Duffy to build a firehouse. The contract provided that if the work was abandoned, or if the fire commissioners, for reasons specified in the contract, should order Duffy to discontinue the work, the city could have the work completed in any manner it would choose, and Duffy would be fully liable for any costs in excess of the original contract price.

For an unexplained reason, Duffy's work was discontinued. The plaintiffs then contracted with the city to complete the work for a sum in excess of \$1,000. The contract was not advertised for bids. The trial court found a violation of the statute and denied recovery to plaintiffs. The appellate division reversed:

The only question is whether the provision . . . of section 64 of the consolidation Act applies to this particular case. There is nothing whatever in the evidence to show that the contract was abandoned by the contractor; all that the evidence seems to indicate is that the commissioners of the fire department, for some reason which is not disclosed, undertook to complete themselves the work for the contractor, and as his agent, under that stipulation of the contract which authorized the department so to do, if the work unnecessarily should be delayed or the contractor willfully violated any of the

48. For further discussions of the emergency exception in New York, see *Lutzken v. City of Rochester*, 7 App. Div. 2d 498, 184 N.Y.S.2d 483 (4th Dep't 1959); *Sheehan v. City of New York*, 37 Misc. 432, 75 N.Y.S. 802 (1902); 16 Op. N.Y. St. Comp. 9 (1960); 13 Op. N.Y. St. Comp. 201 (1957) (No. 60-905); Annot., 71 A.L.R. 173 (1931).

49. 16 App. Div. 445, 45 N.Y.S. 40 (1st Dep't 1897).

50. Law of July 1, 1882, ch. 410, § 64, [1882] N.Y. Laws 15.

51. *Id.*

conditions and covenants of the contract, or was executing it in bad faith, so that the work could not be done according to its terms, and to apply the contract compensation to the payment of the expense incurred in completing the work. In this case these plaintiffs were merely employed to complete the work specified in Duffy's contract at a cost less than the amount stipulated to be paid to Duffy. So far as appears it was not upon an abandonment of the contract by Duffy, but was under a contract made on his account, the expense of which was to be borne by him, and what was done by the fire commissioners was merely to complete, within the limit of cost of Duffy's contract, that work which they deemed it expedient to finish under Duffy's contract.⁵²

Permeating the decision is the court's desire to avoid imposing a forfeiture against the innocent plaintiffs who concededly had rendered the services sued upon, with the decisive factor being the conclusion that this "work" was not a new contract. Hence, to avoid the penalties of a violation of a bidding statute under these circumstances, it must be shown that no new contract was created, this then being an apparent exception to the rule.

A somewhat similar rationale is found in *City of New York v. Duffy*,⁵³ where the contractor for a public works project did abandon the job. Upon abandonment, the contractor's surety offered to complete the work under the contract. The city declined this offer, re-advertised for bids, and sued the contractor and the surety for the money spent over and above the original contract price. Defendants alleged that the city had been obligated to allow the surety to complete the project.

In ruling for the city, the court considered two factors: the original contract, which granted the city the power to complete the contract as prescribed by law upon abandonment; and a statute,⁵⁴ which required competitive bidding for completion work:

I see no escape from the express provision of the contract which gave the city the right to declare the contract abandoned and thereupon to contract for its completion in the manner prescribed by law. Perhaps the city might properly have allowed the surety to finish the work. But, under the contract it was not bound to do so. At most, the contract gave the city the right

52. 16 App. Div. at 448, 45 N.Y.S. at 41-42.

53. 129 Misc. 251, 221 N.Y.S. 247 (Sup. Ct. 1927), *aff'd mem.*, 232 N.Y.S. 715 (1st Dep't 1929).

54. Law of Apr. 22, 1901, ch. 466, § 419, [1901] N.Y. Laws 186, as amended, Law of Apr. 13, 1922, ch. 661, [1922] N.Y. Laws 1817.

to decide whether it would intrust the completion of the work to the surety, as such, or advertise for bids. It chose the latter course and, so far as appears, there was nothing to prevent the surety from either bidding or procuring a bid to be made on its behalf.⁵⁵

Again, even though the statute required competitive bidding for abandoned work, the surety *could* have brought in a contractor of its own choosing, *had* the city consented, and arranged for it to complete the work without competitive bidding. It did not happen in this case, but it remains possible that a surety's substitute is another (apparent) exception to the general rule.

VII. Further Exceptions and Their Relationship to General Municipal Law Section 103

General Municipal Law section 103 is the most important New York statute, at least insofar as volume of litigation is concerned, with reference to the letting of public contracts. Subdivision 1 delineates the most relevant "advertising-for-bid" requirements:

Except as otherwise expressly provided . . . all contracts for public work involving an expenditure of more than thirty-five hundred dollars and all purchase contracts involving an expenditure of more than fifteen hundred dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder, furnishing the required security after advertisement for sealed bids in the manner provided by this section. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his or its discretion, reject all bids and re-advertise for new bids in the manner provided by this section.⁵⁶

Nowhere does this section specifically address itself to abandoned or defaulted work. To be sure, it does speak of "all public contracts." But whether a contract based upon abandoned or defaulted work—*i.e.*, a reletting—is included in such apparently pervasive language is, or should be, arguable. Logically, the question is so

55. 129 Misc. at 252, 221 N.Y.S. at 248-49.

56. N.Y. Gen. Mun. Law § 103(1) (McKinney Supp. 1974).

postulated because abandoned work is an "extraordinary" situation, akin in part to an initial contract and in part to an emergency contract, falling somewhere in between as particular circumstances may dictate.

The principal element of the "mixed definitional nature" of abandoned or defaulted work is time. One illustration would be the construction of a public office building.⁵⁷ Once the project begins the public body may lease its existing office space to another party, relying on some completion target date, which is usually flexible given the normal vicissitudes of construction work. While an abandonment of the project prior to completion would not be an emergency under the terms of the statute and the relevant cases,⁵⁸ the obvious effect upon the public body may very well approach emergency proportions: its immediate need to occupy the building⁵⁹ may not permit the passage of time necessary to formulate the plans and specifications remaining, to advertise them for bids, and to include sufficient lead time for contractors to formulate their bids. Thus, the time that is available to a municipality when a project is conceived does not exist. Concurrently, rising construction costs and material shortages compound the problem.⁶⁰ Nonetheless, the emergency excuse is unavailable.⁶¹

Must the mandate of the General Municipal Law⁶² or other more general bidding statutes⁶³ apply? One authority, under very narrow circumstances, merely *assumes* that it does.⁶⁴ The remaining sources dismiss its applicability,⁶⁵ and provide other apparent exceptions to the general rule.

The State Comptroller's Opinion⁶⁶ which found the General Mu-

57. Similar although not necessarily identical arguments could be advanced for sewers, subways, highways, bridges, etc.

58. See text accompanying notes 42-54 *supra*.

59. Or to put the sewer or subway or bridge into use.

60. One could interpret the enactment of NEW YORK, N.Y., ADMIN. CODE ANN. § 343-1.0 (1971) as support for the view that the N.Y. GEN. MUN. LAW (McKinney 1965) does not cover the field.

61. See text accompanying notes 42-54 *supra*.

62. See N.Y. GEN. MUN. LAW § 103 (McKinney Supp. 1974).

63. See text accompanying notes 31-35 *supra*.

64. 18 OP. N.Y. ST. COMP. 252 (1962).

65. *Id.* at 395; 16 OP. N.Y. ST. COMP. 140 (1960).

66. *Id.* at 395; 16 OP. N.Y. ST. COMP. 140 (1960).

nicipal Law applicable, involved, in significant part, the terms of Town Law section 277,⁶⁷ providing that if a town declares a performance bond covering improvements in subdivisions to be in default, the town may:

[C]ollect the sum remaining payable thereunder and upon the receipt of the proceeds thereof the town shall install such improvements as are covered by such performance bond and are commensurate with the extent of building development that has taken place in the subdivision but not exceeding in cost the amount of such proceeds.⁶⁸

Given both a contract default and the statute, the Comptroller concluded that if the work to be contracted for is in excess of \$2,500, there must be competitive bidding.⁶⁹ The Comptroller noted the general rule that when work is abandoned and no special statute applies to reletting, completion may proceed without competitive bidding, but explained that in such situations, the performance bond usually gives the surety the right to complete. Nevertheless, he found that right inconsistent with the terms of the Town Law, and without further explanation, *observed* that the work must be submitted to competitive bidding.⁷⁰

An additional permutation of the rule is found in a 1960 opinion of the State Comptroller.⁷¹ A fire district had let a contract pursuant to competitive bidding; subsequently both the general contractor and a subcontractor defaulted, the latter having completed slightly in excess of 5 percent of its work.

The defaulting subcontractor's bonding company urged the fire district to sign a contract with a new electrician supplied by the

67. N.Y. TOWN LAW § 277(1) (McKinney Supp. 1974).

68. *Id.*

69. 18 OP. N.Y. ST. COMP. 252 (1962). This threshold amount has since been changed to \$3,500. N.Y. GEN. MUN. LAW § 103 (McKinney Supp. 1974).

70. 18 OP. N.Y. ST. COMP. 252 (1962). The comptroller also cited as support for this conclusion N.Y. GEN. MUN. LAW § 103 (McKinney 1965). Comparing this opinion to others, it seems that the Comptroller intended it to apply only to situations involving Town Law section 277, although even this hypothesis conflicts with the Comptroller's rejection of the applicability of General Municipal Law section 103(1). See 18 OP. N.Y. ST. COMP. 395 (1962); 16 OP. N.Y. ST. COMP. 140 (1960).

71. 16 OP. N.Y. ST. COMP. 140 (1960).

bonding company, the terms of the new contract were meant to fulfill the original specifications. Based upon these facts, the Comptroller stated that General Municipal Law section 103, requiring public bidding of municipal contracts, contains no provision for readvertising. The Comptroller noted that:

It is our opinion that where a subcontractor has defaulted, a municipality may, without readvertising, enter into a contract, for the completion of the work, with a contractor furnished by the bonding company. Conclusion: The fire district may enter into a new contract with the subcontractor without competitive bidding.⁷²

Unfortunately, by combining two concepts the Comptroller leaves the waters murky. The conclusion says the completion of an abandoned contract need not be submitted to competitive bidding. However, the body of the ruling contains an important distinction, which is most likely the actual meaning, that a new contractor *supplied by the bonding company* may be engaged without the constraints of competitive bidding.⁷³

An extension of this concept occurs in a later ruling,⁷⁴ involving school construction which was 98 percent complete when the contract was terminated due to abandonment by the contractor. The bonding company, while it would not propose completion by a contractor of its own choosing, did consent to the board's hiring a new contractor to complete the work. Finding the surety's consent essentially the same as the surety's substitution of its own contractor, the Comptroller affirmed the earlier decision,⁷⁵ stating that the completion contract need not be submitted to competitive bidding. To support this proposition, the Comptroller concluded that there was no statute authorizing a reletting pursuant to competitive bidding.⁷⁶ The Comptroller cited *In re Leeds*⁷⁷ as analogous, and quoted the following language from that decision:

The laws of 1859, providing for laying out sewer districts in the city of Brooklyn, authorizes commissioners to advertise and let the work to the lowest

72. *Id.*

73. *Id.*

74. 18 Op. N.Y. St. Comp. 395 (1962).

75. *Id.*

76. *Id.*

77. 53 N.Y. 400 (1873).

bidder, and contains the following provision: 'The said commissioners shall, in no case, proceed with the construction of any sewer except upon the advertisement for proposals for the construction of the same as herein provided.' This provision, I think, applies only to the contract for the original construction of the sewer. The language of the statute seems to contemplate that, and nothing else. The commissioners are to lay out and arrange the districts, then to advertise for the construction of any part of the work, and then to award the work so advertised to the lowest bidder; and then comes the prohibition above quoted, which does not, in terms at least, extend beyond the letting and advertisement before provided for. It does not say that no work shall be performed upon sewers unless it is advertised and let to the lowest bidders. The original contract expressly provides that in case the contractor unnecessarily delays the work, he may be turned off upon four days' notice, and the commissioners may complete the same by contract, or otherwise, and at the expense of the contractor. When the work is performed under this provision, it is not contemplated that it should be advertised, nor required to be let to the lowest bidder.⁷⁸

The Comptroller concluded that the effect of General Municipal Law section 103(1) was similar to the effect of the statute cited in *Leeds*.⁷⁹ The Comptroller stated that:

General Municipal Law § 103(1), as it relates to public work contracts, requires all such contracts in excess of \$2,500 to be awarded to the lowest responsible bidder after public advertisement.⁸⁰

Although the language in § 103(1) is not identical to that of the bidding statute in the *Leeds* case, it is our opinion that the reasoning of said case would, nevertheless, be applicable to contracts let pursuant to § 103(1).⁸¹

VIII. Conclusion

Because of the severe penalties upon contractors who have entered into illegal contracts⁸² the question of whether or not a completion contract for abandoned or defaulted work must be relet pursuant to competitive bidding is of considerable significance. While

78. *Id.* (citation omitted).

79. Law of Apr. 16, 1859, ch. 385, § 4, [1859] N.Y. Laws 908.

80. 18 Op. N.Y. St. Comp. 395 (1962).

81. *Id.* See also *Connelly v. City of Elmira*, 144 Misc. 282, 258 N.Y.S.2d 603 (1932): "[I]t has long been held that a common council or other municipal board or commission has the power and right to award a contract without calling for competitive bids, where no statutory or charter provision requires competitive bidding." *Id.* at 283, 258 N.Y.S.2d at 605 (citations omitted).

82. See text accompanying notes 27-41 *supra*.

the general rule states that competitive bidding requirements are dispensed with upon abandonment, if the municipality has the power under the contract to complete the work and charge the defaulting party, this rule ignores the more basic question of statutory analysis.⁸³

The statutes, in turn, which are more relevant to any discussion of the law in this area, may be divided into two categories for the purpose of analysis: (1) general—those which refer to bidding while ignoring the reletting question; and, (2) specific—those which address themselves to reletting.

The numerous general statutes essentially conform to the one most important legislative formulation, that of General Municipal Law section 103(1), which requires that public contracts be submitted to competitive bidding. This section, however, does not specifically set out its effect upon abandoned or defaulted work. All but one of the cases found conclude that, in the absence of such specificity, the statute does not apply. To the extent that they are convincing, the practicalities of municipal needs and the realities of construction and supply argue in favor of this interpretation. The one contrary result was based upon a comparative analysis of Town Law section 277,⁸⁴ but was, in any event, contra to the premises in all the other decisions.⁸⁵

As far as the specific laws are concerned, the existence of some reference to reletting in the New York City statutes leads to the conclusion that *all* local laws must always be consulted. There is considerable confusion in the specific New York City sections on this point on two grounds. First, the purportedly all encompassing section 343-1.0⁸⁶ has an inexplicable internal separation of procedures based upon default versus abandonment. Second, the presumably more specific section K51-30.0 does not adopt this distinction.⁸⁷

Whatever the foundation for this disparity may be, the obfuscation is further blurred by the various exceptions to the statutes, as follows:

83. See text accompanying notes 32-35 *supra*.

84. See text accompanying notes 66-70 *supra*.

85. See text accompanying notes 71-81 *supra*.

86. See text accompanying notes 32-34 *supra*.

87. See text accompanying note 35 *supra*.

- (a) public emergency;
- (b) no abandonment shown, completion construed to be a continuation of the initial contract;
- (c) the surety may substitute a contractor of its own choice;
- (d) a contractor *consented to* by the surety, although not necessarily supplied by the surety, may be substituted.

Thus, in New York City, to determine whether a discontinued public contract must be relet competitively, the following questions must be explored and answered:

- (1) Is the contract covered by section 343-1.0 or by some other Code section applicable to a specific agency?
- (2) If it comes within the purview of section 343-1.0, was the cessation caused by an abandonment specifically or by another default?
- (3) If the default was *not* an abandonment, subject to the confusion of section 343-1.0(b), it presumably need not be submitted to competitive bidding.
- (4) If there was an abandonment, it must be relet, unless the situation falls into one of the exceptions.
- (5) If there is a more specific Code section which rules, such as section K51-3.0, reletting is probably required unless one of the exceptions applies.

Outside New York City, where there is no local statute *specifically* applicable, neither General Municipal Law section 103(1) nor the other general statutes should prohibit the reletting without competitive bidding.

These conclusions raise two important questions. The first is whether a contractor who contemplates assuming a defaulted or abandoned public works contract, and hence the severe penalties for its possible illegality, must take on the risks that arise from the confusion on a question which is supposed to be a matter of long standing legislative and judicial policy.

The second question is a value judgment, which, like the first, deserves the attention of any legislative body concerned with public contracts. Except for New York City, the New York State policy of contracting abandoned or defaulted work free of the constraints and safeguards of bidding procedures, leaves room for favoritism or possible waste of public funds. At the same time, however, the bureaucratic morass is avoided when a public project needs to be rushed to a conclusion. Which is more important?