LEGAL CORNER

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Salt Contractor Gets A Legal Licking

Editor's Note: I would like to acknowledge the assistance of my colleague, Robert Lizza, who prepared this article. Bob is a Partner in Hinckley, Allen & Snyder's Construction and Public Contracts Group.

A recent decision by the United States Court of Appeals for the First Circuit regarding a road salt contract serves as a reminder that public contractors in Massachusetts must comply strictly with the law regarding the formation of a contract with the government, or risk being left out in the cold.

International Salt Company, LLC was the low bidder on a City of Boston road salt procurement for the winter of 2004-05. Under the contract, International agreed to deliver 75,000 tons of salt for what it understood to be a lump sum price of $2,731,500 (based on a cost of $36.42 per ton). The City Auditor made the certifications required by law and the Mayor approved the contract in writing.

In February 2005, City officials, concerned that salt usage might exceed their expectations due to a large number of storms, demanded that International provide an additional 25,000 tons at the same price per ton. In the meantime, however, the costs of shipping had increased significantly, so International advised the City that it would provide the added amount, but at $46.36 per ton. The City pushed back, claiming that the contract was, in effect, a requirements contract that allowed them to order any amount at the original price per ton for the duration of its term.

International asserted that the original contract was a lump sum deal for 75,000 tons, and that any excess amount was a separate undertaking. The bid forms, written by the City, said that the "[p]rice will be held for term of the contract and shall not be limited to the estimated number of items," but the word "estimated" appeared nowhere else in the documents. The contract also provided that "the total amount [of the contract is] not to exceed $2,731,500." Elsewhere on the forms, whenever it had to write in the bid amount, International included the full amount of $2,731,500 and words such as "total contract. Based on 75,000 tons."

But City officials were unmoved. Their only response was to escalate their demands that International provide more salt. Eventually, the Commissioner of Public Works himself telephoned International's CEO and threatened to hold the supplier responsible for streets rendered unsafe by the lack of salt. In the face of the City's unyielding pressure, International's resolve melted away. It decided that it would provide the added tonnage, but did so subject to a purported reservation of rights to the effect that if the parties could not agree on a price, International would seek fair market value as determined by a court or through mediation.

Over the course of the next several months, International delivered over 27,000 additional tons of salt for which the City paid $36.42 per ton. Based on the increased market costs, International demanded to be paid $56.37 per ton, for a total claim

continued on page 9

Legal Corner *continued from page 7*

of $1,523,221.10, and the dispute eventually reached the U.S. District Court. International's theory was that the added salt was delivered under a separate contract formed at the time it succumbed to the political pressure to provide the extra tonnage. International also argued that the higher rate was justified under the emergency provision of the Massachusetts version of the Uniform Procurement Act, M.G. L. c. 30B, as well as by the doctrine of equitable estoppel.

Neither the District Court nor the First Circuit could be persuaded that International had a claim worth its salt. The only way to form a contract with the City, the courts ruled, was to comply strictly with both the City Charter and Chapter 30B, which set forth explicit procedural requirements on making public contracts. Under the City Charter, a contract in excess of $10,000 has to be in writing and have both the Mayor's approval and the City Auditor's certification of funds, and International could not prove all three elements for the later deliveries.

The court also rejected International's argument that the emergency provision of Chapter 30B provided relief. That provision allows a procurement officer to make emergency purchases for public health or safety reasons, but such purchases "shall be limited to only supplies or services necessary to meet the emergency," and the Secretary of State must be notified of any emergency procurement. The court held that, while International may have been bullied by City officials, it failed to demonstrate that a true emergency existed since the City did not have an *immediate* need for the extra tons of road salt and it certainly never notified the Secretary of State of any "emergency" purchase as required by statute.

Finally, responding to International's estoppel claim, the First Circuit rubbed salt into the wound, citing the "inherent risk in doing business with the City." Starting with the observation that any party contracting with a municipality in Massachusetts is presumed to know the limitations on a city or town's contracting power, the court noted that our courts have consistently refused to permit equitable recovery to a plaintiff who furnished goods or services but failed to comply with the material requirements of the public bidding laws. No matter how much sympathy a court might have for a public contractor, there is no "good faith" exception to this rule, and any windfall to the City is irrelevant.

So, once again, the primacy of following public procurement law strictly has been made manifest by the courts, and any contractor that assumes otherwise is bound for a winter of discontent. ■