Construction Law Section Newsletter

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New Law Expands P3 Access in New Jersey

by Aaron S. Brotman

After a long wait and a few false starts, public-private partnerships (P3s) are coming to New Jersey. This August, Governor Phil Murphy signed into law New Jersey's first comprehensive public-private partnership law (S-865/A-1299), entitled "An Act Concerning Public-Private Partnerships for Certain Building and Highway Infrastructure Projects, and Amending and Supplementing Various Parts of the Statutory Law." The act becomes effective Feb. 10, 2019. It authorizes any local government unit subject to the Local Public Contracts Law, school district, and any state government entity or any state/county college (collectively public entities) to enter into a P3 contract with a private entity. Under the act, the P3 contract is "to be referred to as a public-private partnership agreement, that permits the private entity to assume financial and administrative responsibility for a project of, or for the benefit of, the local government unit."

Like many other states, New Jersey is seeking ways to fund a wide scope of projects at all levels of government, from small recreational facilities to larger infrastructure. To overcome budgetary gaps, the Legislature has elected to allow public entities to 'partner' with private businesses to construct, operate, and/or maintain these projects. How such partnerships will function is broadly outlined in the act but will necessarily take greater shape as public/private projects are conceived, commenced, and completed.

The Act Seeks to Promote Private Investment through Flexibility and Incentives

The act seeks to lure private investment for public projects by making the process, and hopefully the result, more business friendly. Unlike New Jersey's prior, half-measure iterations of P3, including the existing but limited right for state/county colleges to enter into P3s, the act does not limit the type of facility subject to the agreement. Infrastructure projects, office buildings, athletic facilities, and other structures built for some public benefit are all included. While the state and quasi-independent agencies have significant flexibility to consider factors beyond price to enter into the most advantageous contract under the act, municipalities will now have similar freedom, so long as it is a P3 rather than a standard procurement.

The act does not require that private entities wait for public entities to seek out private partners. A private entity can take the initiative and propose a project that a public entity may have overlooked. The Legislature is betting that the private sector will see projects and opportunities that the public sector may not. One cannot know, of course, how many projects go undeveloped because a private developer cannot consolidate the land, develop its funding, or manage its operation without a dedicated public sector partner, but the act contemplates—probably correctly based on the popularity of P3 projects around the world, the nation, and even quasi-P3 projects in New Jersey—that the private sector will see the public sector as a reliable partner and will proceed where the development may otherwise have stalled.

The act also gives public entities remarkable freedom when entering into P3 arrangements. For example, the standard for determining the method by which the private entity will recover its initial investment is whatever arrangement is "deemed to be in the best interests of the public and the [public entity]" so long as the private entity operates the facility in accordance with the public entity's standards. Additionally, the act is designed to facilitate and promote P3s by easing restrictions and limitations on project financing and cost recovery. So long as the private entity provides financing in whole or in part, the agreement may provide for the public entity to lease back the site and make routine payments to the private entity so long as the project remains available for public use or allow the private entity to collect some or all of the revenue generated by the facility.

A P3 arrangement provides another distinct procedural advantage: The private partner that assumes financial and administrative responsibility for a project need not comply with the strict procurement and contracting requirements of the Local Public Contracts Law or other statutes that would otherwise apply to the public entity were it to undertake the project on its own. The potential benefit can be significant in accelerating the partnering process and in freeing up the private entity to more efficiently bring construction trades online and operating. The state is relaxing the more formalized process otherwise required in order to attract a larger pool of private partners—perhaps even those who might normally not consider working on public projects due to bureaucracy.

The act seeks to encourage private financing of projects that serve the public by allowing public entities, including the Economic Development Authority (EDA), to be the landlord or tenant on a project and issue bonds without having to adhere to procurement protocols and contracting requirements that would otherwise apply to the public entity. Additionally, because the P3 project is an essential public function, the act seeks to alleviate or eliminate tax liability, plus the P3 project is exempt from mechanic's lien liability.

Then there is the effort to incentivize not just private capital, but private ingenuity—and spark private entity interest. The act provides, at the public entity's option, for remuneration to the unsuccessful bidders where the public entity sees the opportunity for innovative but costly proposal development. The act understands that the private entity will not take part, may not even submit a proposal, without some clear way to recover its sunk costs.

The Act Seeks to Retain Real Public Benefits and Oversight

Lest the Legislature be accused of selling out the public trust to private interests, the act is not all pro-business. In exchange for tax benefits and eased restrictions, the act demands that benefits flow down to the labor force. All individuals employed in the construction, rehabilitation, or maintenance of a P3-related facility must be paid at least the prevailing wage. Also, all building construction projects must contain a project labor agreement designed to promote employment opportunities for local residents. Construction professionals and firms must also be approved to work on P3 projects by the Division of Property Management and Construction or the New Jersey Department of Transportation, as applicable. The general contractor, construction manager, or design-build team must post a performance bond and a payment bond for the project in exchange for lien immunity. Additionally, if stipends are paid to unsuccessful bidders on more unique, complex projects, the public entity will then own that work product. Finally, the P3 agreement must be reasonably able to be completed within five years of approval.

Strong, focused oversight by the public is a key component of the scheme contemplated by the act. The public entity does not have total freedom to enter into a P3 agreement, and significant EDA oversight and involvement is anticipated. All proposed projects must be approved by the EDA prior to procurement and should—though they are not required to—meet green and/or sustainable building standards and construction initiatives. The act sets out the required components of

the application to the EDA when seeking approval. The minimum requirements are: 1) a description of the P3 agreement; 2) a description of the lease, including any lease of a revenue-producing facility; 3) the estimated costs; and 4) a timetable for completion. Plus, of course, whatever else the EDA deems necessary. The EDA also has the authority to revoke approval should it feel the project has deviated too far from what was approved.

Because the P3 projects anticipated by the act tend to be larger, the act permits the public entity to dedicate an existing property interest—whether it be land, improvements, or tangible property—for use on the project. Eminent domain rights may not be delegated to the private partner, but nothing in the act precludes the public entity from using eminent domain to secure property in anticipation of a P3 or as part of it.

Though a private entity may propose an opportunity to the public sector, the potential windfall to the eagle-eyed private entity is not as great as it may seem. Before the public entity can partner with a private entity—even one that has reached out to it—it must turn around and seek proposals from other private entities to ensure a fair, open, and competitive bidding process. This represents a balancing of the public interests; reasonably, the state must further the interests of the public by ensuring that, at the very least, the public entity makes its selection of a project and private partner in a reasonable, responsible manner that represents the best value to the public. However, this is balanced against the interest of incentivizing private entities to come forward with viable, interesting, workable projects, as the first mover loses its edge on the competition with a more public process and the incentives tilt towards entities who sit and wait for others to do their research for them. The first mover will likely retain significant advantages, such as a more complete proposal and grasp of the project economics. Additionally, because the procurement process is much less rigid, P3s will effectively always be a negotiated procurement, even where there are multiple proposals and bidders for the same project. This leaves the public entity in position to determine what solution—and what partner—provides the best value long term, not just what is the least expensive at the time of proposal.

What to Make of it All

With the scarcity of large, developable parcels in high-demand areas across the state, a greater P3 presence should facilitate development by combining private ingenuity and capital with the governmental capability to coherently combine land into a format and circumstance that can spark the next great round of development across the state. The act is, like much legislation, a balancing act between private incentive, public flexibility, and oversight in the public interest. Whether it will encourage new, significant development projects around the state remains to be seen.

This author expects there will be significant private sector activity to take advantage of the act. P3 projects work best where there is a clear, relatively confident revenue stream discernable to the private entity, whose motivation is financial. From the public entity's perspective, while overall cost to the public is, and should be, a factor in the decision-making process, the review of potential projects will be much more holistic.

Finally, something to keep in mind is that the act directs the EDA to promulgate rules to support the implementation of a P3 scheme in New Jersey. Until those rules are firmly in place, the availability of P3 projects remains uncertain. The act is fairly clear in its purpose and general outline, but regulations will make or break the process.

Ultimately, this author believes, the act represents a positive step for the state. Some uncertainty remains, particularly how involved the EDA may become and how much cajoling and convincing public entities may need to not just accept that a P3 may be the best solution for a particular problem, but that they will need to treat them differently than a regular, competitive bid procurement. The potential for true, meaningful partnerships is real, and private entities that can see the opportunities and persuade the public side to take advantage of it may be in a position to create tremendous value for themselves and New Jersey as a whole. ■

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Inside this issue

NJ Supreme Court Adds Unanticipated Value to Mechanic's Liens (Maybe)

by Aaron S. Brotman

What is the real value of a mechanic's lien? On Aug. 2, the New Jersey Supreme Court issued a decision on standing under the Municipal Land Use Law (MLUL), which could have an impact on that value—and put significantly more power in a lienholder's hands. In *Cherokee LCP Land, LLC v. City of Linden Planning Board*,[1] the Court reversed the Appellate Division's decision dismissing a lawsuit brought by the holder of a tax lien on property adjacent to that which had just received planning board approval for a development project. Under the MLUL, specifically N.J.S.A. 40:55D-4, and the Court's decision, any party that can show its "right to use, acquire or enjoy property is or may be affected" has standing to bring suit to set aside an approval.

The Court's decision requires only that a plaintiff be a lien holder—there is no requirement even that any foreclosure action has begun—to have standing to challenge an approval. In fact, the dissent in the decision noted that a party that may never actually obtain a possessory interest in the neighboring property has the potential to completely derail an approval. This ability gives the lien holder significantly more power than ever before. More power also means the lien may be worth more than it was before, as assigning the lien could convey not just the right to recover on the lien itself but also affect the development of a neighboring property.

Because the Court's decision did not limit this right to the holder of a tax lien, it is not clear if the standing rights granted in the *Cherokee* decision should be so limited. Should, perhaps, the holder of a mechanic's lien have the same power? As it stands, the law is unsettled on this, but giving a mechanic's lien holder the ability to influence board decisions relating to an adjacent property greatly increases potential value of that lien if there are any parties who would not otherwise qualify as 'interested' but do have an interest in seeing an approval overturned. ■

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Endnote

1. 234 N.J. 403 (2018).

Both Sides' Playbooks: Knowing Offense is Important When Defending Whistleblower Suits in the Construction Industry

by Thomas J. Cotton

Whistleblower lawsuits, relative to other aspects of the legal profession, make for easy conversation at dinner parties. The practitioner either represents the courageous employee shining a light on a dangerous workplace, or the dutiful employer that is being shaken down by a sanctimonious worker. The good and evil labels are interchangeable, depending on who is telling the story.

Actually litigating a whistleblower lawsuit is more difficult. The issues are fact-specific. The most critical communications are often two-party conversations without witnesses. The law seems to issue guidance so broad that unpredictability is the only certainty.

Defending a whistleblower lawsuit in the construction industry comes with its own host of difficulties. Work is not consistently available, thus leading to layoffs that entrepreneurial plaintiffs are quick to deem terminations. Workplace safety is also a genuine concern, thus opening a door for whistleblowers to voice objections.

This article seeks to provide strategies for defending whistleblower lawsuits in the construction industry by examining the playbooks used by attorneys for both courageous employees and dutiful employers. This article is not a comprehensive roadmap. Entire books can be, and have been, written about whistleblower litigation. This article does, however, highlight the more universal strategies.

Background on Whistleblower Law in New Jersey

There are two common sources for whistleblower lawsuits in New Jersey. The first is statutory and the second is a product of common law. A plaintiff cannot have his or her cake and eat it, too. A plaintiff can raise the statutory claim or the common law claim, not both[1]

The first source is the New Jersey Conscientious Employee Protection Act (CEPA). A CEPA plaintiff must prove the following elements: 1) reasonable belief the employer was violating a law, rule, regulation, or clear mandate of public policy; 2) whistleblowing activity; 3) adverse employment action; and 4) causal connection between whistleblowing activity and adverse employment action.[2]

The second source is *Pierce v. Ortho Pharmaceutical Corp.*[3] A *Pierce* plaintiff must prove termination in violation of public policy.[4] Termination for notifying regulatory agencies, such as the Occupational Safety and Health Administration (OSHA), of employer violations can give rise to a *Pierce* claim.[5]

The differences among CEPA and *Pierce* are important. A CEPA claim must be filed within one year,[6] while a *Pierce* claim must be filed within two years.[7] CEPA allows for an award of attorneys' fees to the prevailing party,[8] while a *Pierce* claim is subject to the American Rule. CEPA claims also allow for a civil fine.[9]

The Defensive Coordinator's Playbook

In defending the diligent construction company against a rapacious construction worker, the client expects the practitioner to annihilate every aspect of the plaintiff's allegations. There are three strategies worth considering, each of which (or possibly all) are commonly available when litigating in the construction industry.

First, one should present the cessation of the plaintiff's employment as a layoff instead of a termination—provided the facts allow for such a presentation. A whistleblower is required to show a causal connection between the objections and the change in employment conditions. That requirement can be satisfied if the supervisor emails, "You're fired because you complained to OSHA." That requirement is more difficult to satisfy if, as happens in the construction industry, the whistleblower's last day on-site coincides with the crew's last day.

Second, one should secure testimony and documents

painting the plaintiff as a contrarian know-it-all. Employees who incessantly object to workplace conditions, solely by referencing their own opinions or experience, are not entitled to remain employees. An employee who complained about workplace safety also likely complained about scheduling, payroll, and suppliers. A whistleblower's claims will not survive dismissal if genuine objections are lost in a forest of trivial grievances.[10]

Third, one should investigate the plaintiff's employment record for the periods prior to and after the relationship with the client. If pre-employment misconduct (*e.g.*, misrepresenting qualifications) is identified during discovery, then the employer can use this "after-acquired evidence" to limit potential damages.[11] Post-employment malfeasance can likewise limit or kill a lawsuit if presented as a failure to mitigate damages. The opportunities within the plaintiff's pre- and post-employment record arise frequently in the construction industry, particularly where employees are hired through unions and work for many different firms over just a few years.

The Offensive Coordinator's Playbook

Defending against any claim requires foresight. The defense has a decisive advantage if it knows what plays the offense will call. Below are three common tactics to expect from attorneys prosecuting whistleblower claims in the construction industry.

First, expect OSHA will get involved no matter the litigation's stage. Once the OSHA complaint is made, any events that follow are more easily painted as retaliatory. No one has the power to go back in time and advise a client to write to OSHA at the earliest opportunity. But a post-layoff OSHA complaint can still be actionable if, as is the case in the construction industry, layoffs and re-hiring follow the tides of available work. An OSHA investigation also presents the chance an authoritative body will identify safety violations that lend support to alleged objections.

Second, expect plaintiffs will attempt to control the credibility game. This strategy is important in all whistleblower cases generally, because the inevitable dispositive motion can be defeated if the case turns on credibility.[12] This strategy is also important in construction cases specifically, because communications at a construction site are often face-to-face instead of written.

Third, expect plaintiffs will be counseled to remain ready and willing to work. This requires more than firing-and-forgetting job applications. For a construction worker, this typically requires maintaining good standing with the union. Plaintiffs will need to complete seemingly extraneous paperwork and routinely contact the hiring agent. Any failure to maintain 'occupational readiness' could be construed as a failure to mitigate damages.

Conclusion

Hopefully, this article will be of use to fellow defense attorneys in whistleblower lawsuits. At the very least, the strategies will move one's dinner party conversations away from cartoonish characterizations and toward the nuanced elements of a whistleblower claim. All party guests are likely to be thrilled by those topics! ■

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Endnotes

1. N.J.S.A. 34:19-8.
2. *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003).
3. 84 N.J. 58 (1980).
4. *House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 53-54 (App. Div.), *certif. denied*, 117 N.J. 154 (1989).
5. *LePore v. Nat'l Tool & Mfg. Co.*, 115 N.J. 226, 227, *cert. denied*, 493 U.S. 954 (1989).
6. N.J.S.A. 34:19-5.
7. *O'Lone v. N.J. Dep't of Corr.*, 313 N.J. Super. 249, 256 (App. Div. 1998).
8. N.J.S.A. 34:19-5 and -6.
9. N.J.S.A. 34:19-5.
10. *See Blackburn v. UPS*, 3 F. Supp. 2d 504, 517 (D.N.J. 1998).
11. *Cicchetti v. Morris Cnty. Sheriff's Office*, 194 N.J. 563, 590 (2008).
12. *Akhtar v. JDN Props. at Florham Park, LLC*, 439 N.J. Super. 391, 399 (App. Div.), *certif. denied*, 221 N.J. 566 (2015).

LLCs: How Limited is Your Liability?

by Jerry Gallagher

The New Jersey Legislature adopted the New Jersey Limited Liability Company Act in 1993,[1] and thereby ushered in a new form of business enterprise—the limited liability company (LLC). The 1993 act enabled business owners to "take advantage of both the limited liability afforded to shareholders and directors of corporations and the pass-through tax advantages available to partnerships."[2] Thus, LLC members reap the dual benefits of limited liability afforded to corporate shareholders and pass-through tax advantages available to partnerships.

After two decades of experience under the 1993 act, the Legislature adopted the Revised Uniform Limited Liability Company Act[3] in 2013. The revised act has been described as a comprehensive, fully integrated "second generation" LLC statute that takes into account the best elements of the 1993 act and two decades of experience in the field.[4]

The features of limited liability, operational flexibility and corporate income tax avoidance have made the LLC the entity form of choice for new businesses. Over the past several years, far more New Jersey LLCs have been formed than New Jersey corporations and partnerships combined.[5] Small and large business owners alike benefit from the LLC form of business. This article considers whether and under what circumstances an LLC member may become personally liable for debts or other obligations of the LLC.

New Jersey follows the well-established rule that a corporation is a separate entity from its shareholders, and that a primary reason for incorporation is to insulate or protect the shareholders from the liabilities of the corporate enterprise.[6] The revised act extends this important protection to members of LLCs. Section 30 of the revised act makes clear that "the debts, obligations, or other liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations, or other liabilities of the company" and "do not become the debts, obligations, or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager."[7] Section 30 also provides that the failure of the LLC to "observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability for the debts and obligations" of the LLC on its individual members and managers.[8]

Section 30 offers two significant protections: It creates a 'corporate veil' that insulates individual members against personal liability for obligations of the LLC solely because of their status as members and managers; and it bars using the LLC's failure to observe any particular corporate formalities as a basis for imposing personal liability upon individual members. LLC members should realize these protections are not absolute, and sometimes they can be held personally liable for the LLC's obligations.

The 1993 New Jersey Supreme Court *Ventron* decision established a two-part test to determine if a business entity's corporate veil should be pierced. First, the plaintiff must prove that the business was a mere instrumentality, or *alter ego,* of its owner; and the plaintiff also must show that the owner has abused the business form to perpetrate a fraud, injustice or otherwise circumvent the law.[9]

Piercing the corporate veil and imposing personal liability upon the dominant shareholder (of a corporation) or member (of an LLC) is a form of equitable relief employed by the courts "for remedying the fundamental unfairness that will result from a failure to disregard the corporate form."[10] While there has been scant published case law applying a veil piercing analysis to LLCs, several unpublished court decisions offer guidance.

D.R. Horton, Inc.–New Jersey v. Dynastar Development[11] was a breach of contract action seeking damages for construction delays and cost overruns incurred in a 400-acre residential development project. That court rejected D.R. Horton's effort to pierce the corporate veil and impose liability upon Melville Borne, Jr., the managing member of the LLC general contractor, concluding the plaintiff had failed to establish by clear and convincing evidence that Borne had used the LLC to perpetrate an injustice or circumvent the law. The court also modified the *Ventron* two-part test, given the general

contractor's status as an LLC rather than a corporation, to place lesser weight on the elements of domination and control, and adherence to corporate formalities, given the language of Section 30 of the revised act.

In *Brown-Hill Morgan, LLC v. Lehrer*,[12] however, the court applied the more traditional *Ventron* analysis, and cited several factors, including gross undercapitalization of the LLC, the owner's day-to-day involvement in the project, and the absence of an adequate remedy at law, to affirm the trial court's decision to impose an equitable mortgage upon the real property and personal liability upon the dominant individual for a $508,167 judgment entered against the LLC.

Factors the courts consider in determining whether or not to impose personal liability on an LLC member for a debt or obligation of the LLC include: is the LLC grossly undercapitalized; does the LLC maintain business records and observe corporate formalities; has the member made affirmative statements (or material misrepresentations) to the injured party; have assets of the LLC been co-mingled or transferred to the member; and are there other facts and circumstances that confirm the LLC is a façade or sham, or that require the court to remedy a fundamental unfairness that otherwise will result from a failure to disregard the corporate form.[13]

In *Cayuga Properties, LLC v. Pollard*,[14] a case involving a $20,930 home improvement contract, the New Jersey appellate court affirmed a judgment entered in favor of the homeowner and against the LLC contractor, but reversed the trial court's decision dismissing *alter ego* claims against the LLC's sole member. The trial court dismissed the claims against the member, concluding there was no proof the member had done anything other than in his capacity as an employee and officer of the LLC. The appellate court disagreed, finding that statements made by the member to the homeowner, including that he "was experienced….and would do a high quality job" and that the project would be completed "promptly and quickly," demonstrated sufficient affirmative conduct by the member to create fact questions for the jury to decide whether or not to hold him liable for the LCC's obligation. The potential impact of a ruling imposing personal liability upon the LLC member can be substantial, particularly where, as in the *Cayuga Properties* case, the injured homeowner recovered treble damages and attorneys' fees for the LLC's violations of New Jersey's Consumer Fraud Act.[15]

A similar result occurred in *Luma Enterprises, LLC v. Hunter Homes & Remodeling, LLC*.[16] *Luma* involved a $485,000 contract to renovate a pre-school and daycare facility. Luma sued the general contractor (GC) and individual members of the LLC after they accepted $388,000 in payments but then stopped work and walked off the job because the payments were late. The trial court dismissed all claims except the breach of contract claim against the GC. The appellate court upheld dismissal of claims the GC had violated the Consumer Fraud Act, but reversed the trial court's decision dismissing the claims against the individual LLC members: "The reality is that [the GC] had no underlying substance and no capital. Absent piercing of the corporate veil, Luma lacks an adequate remedy at law."[17]

In contrast, in *Okolita v. BBK Group*,[18] the trial court's dismissal of homeowners' claims seeking to impose personal liability upon Jerry Russo, for alleged breach of contract and Consumer Fraud Act violations by the LLC general contractor, was affirmed because the evidence confirmed Russo had no interactions with the homeowners and no role running the LLC.

In sum, New Jersey's Revised Limited Liability Company Act offers significant protections against individual liability to members and managers of LLCs. Those protections are not unlimited. New Jersey courts will pierce the corporate veil and impose personal liability upon individual members for debts and obligations of the LLC to prevent the LLC from being used to defeat the ends of justice, to perpetrate a fraud, to accomplish a crime, or to otherwise evade the law. ■

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Endnotes

1. N.J.S.A. 42:2B-1, *et. seq.*
2. New Jersey Senate Commerce Committee Statement, *S.* 890 (June 14, 1993).

3. N.J.S.A. 42:2C-1, *et. seq.*
4. Jan. 30, 2012, Assembly Regulatory Oversight and Gaming Committee Statement to the Revised Uniform Limited Liability Company Act, N.J.S.A. 42:2C-1, *et. seq.*
5. *Id.*
6. *State, Dept. of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500 (1983).
7. N.J.S.A. 42:2C-30.
8. *Id.*
9. *Ventron*, *supra*, 94 N.J. at 501.
10. *Verni ex rel. Burnstein v. Stevens*, 387 N.J. Super. 160, 199 (App. Div. 2006), *certif. denied*, 189 N.J. 429 (2007).
11. 2005 WL 1939778 (N.J. Super. Ct. Law Div. 2005) (unpublished).
12. 2010 WL 3184340 (N.J. Super. Ct. App. Div. 2010) (unpublished).
13. *Verni*, *supra.*, 387 N.J. Super. at 200.
14. 2014 WL 259018 (N.J. Super. App. Div. 2014).
15. N.J.S.A. 56:8-1, *et. seq.*
16. 2013 WL 3284130 (N.J. Super. App. Div. 2013) (unpublished).
17. *Id.* at 3284137.
18. 2014 WL 4997381 (N.J. Super. App. Div. 2014) (unpublished).

A Look at the Diane B. Allen Equal Pay Act

by Adrienne L. Isacoff

The newly enacted Diane B. Allen Equal Pay Act,[1] which became effective on July 1, imposes significant additional responsibilities on employers working in both the private and public sectors. The act requires equal pay for "substantially similar work," and prohibits pay differentials (including benefits) among members of various protected classes. The act modifies the Law Against Discrimination (LAD)[2] and portions of laws regarding contracts with public bodies.[3]

The act makes it an unlawful employment practice "for an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility."[4]

What is a "Protected Class"?

Employers must be aware of the expansive nature of the definition of "protected class." A protected class includes any category noted under LAD, such as race, creed, color, national origin, ancestry, age, marital status, civil union status, affectional or sexual orientation, pregnancy, sex, gender identity or expression, disability, and liability for service in the Armed Forces of the United States.

What is Included in "Compensation"?

Since the act defines compensation as including benefits, it covers all forms of remuneration, including commissions; bonuses; profit sharing; deferred compensation; paid time off; expense accounts; car and gas allowances; retirement plans; insurance; and other benefits.

What is "Substantially Similar Work"?

The requirement to pay the same rate for "substantially similar work" will be based on the skill, effort and responsibility of the position. It will not be determined based on job titles, but on the work and/or management level responsibilities of the employee. Responsibility involves the degree of discretion or accountability involved, amount of supervision received, whether the employee supervises others, and the degree the employee is involved in decision making.

It is important to bear in mind that the act does not, at this time, make any distinction among geographic areas within the state. It is possible that an employee in Cumberland County could demand compensation equal to an employee in Bergen County, even though those areas typically reflect geographic distinctions in wages.

When Does an Employer not Violate the Act?

Compensation practices do not violate the act if the employer can show that employees are paid differently for the same work pursuant to a seniority system; a merit system; or other *bona fide* factors such as training, education or experience, or the quantity or quality of production.

The employer must be able to demonstrate that the above factors are not based on and do not perpetuate a differential in compensation based on sex or any other characteristic of members of a protected class. The employer must also demonstrate, among other things, that the factors that justify a pay differential are job-related with respect to the position in question.

Protections for Female Employees

Female employees must be provided temporary reasonable accommodations for pregnancy and breastfeeding. Specifically, LAD now provides that it is an unlawful employment practice:

> For an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work. In addition, an employer of an employee who is affected by pregnancy shall make available to the employee reasonable accommodation in the

workplace, such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for need related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation; and, in the case of an employee breast feeding her infant child, the accommodation shall include reasonable break time each day to the employee to express breast milk for the child, unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer....[5]

Employee Protections Under the Act

On Jan. 16, Governor Phil Murphy issued Executive Order No. 1 (effective Feb. 1), which prohibits employers from inquiring about salary history during the interview process. Employers may not consider an applicant's refusal to volunteer compensation information in any employment decision. Similar legislation regarding compensation information with respect to private employment is expected in the near future.

The act prohibits employers from retaliating against workers for discussing their compensation with co-workers. Employers may not require an employee, as a condition of employment, to agree not to make these types of requests or disclosures. If there is a disparity in compensation that is prohibited under the act, the employer may not reduce the higher-paying position in order to achieve equal pay.

Workers can file a complaint about unequal compensation with the Department of Labor and Workforce Development (DOL). If a violation is found, the employee will be awarded compensatory damages, and may be awarded punitive treble damages and attorneys' fees if the conduct is found to be willful. An individual worker may join in class action litigation.

Work for Public Bodies

Employers who enter into contracts with public bodies to provide "qualifying services" must report to the DOL information regarding the compensation and hours worked by employees categorized by gender, race, ethnicity and job category. Qualifying services relates to the provision of any service to the state or other public body except for "public work."[6]

Public Work

"Public work" is defined in the act as meaning public work as defined in the Prevailing Wage Act,[7] that is: "construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work...done under contract and paid for in whole or in part out of the funds of a public body...." Certified payrolls must be submitted for employees subject to the Prevailing Wage Act. DOL has modified the form of certified payroll to include information regarding sex, race and ethnicity, which must now be reported.

Significantly, the types of employees who must be included on certified payroll has not changed. "Workman" or "worker" is still defined under the Prevailing Wage Act as a laborer, mechanic and apprentices employed by the contractor and engaged in the performance of services directly upon the public work.[8] At this point, there does not appear to be a legal requirement that employees such as estimators or administrative personnel must be listed on the certified payrolls. Based on the terms of the act, since "public work" contracts are distinct from contracts for "qualifying services" there is at least a good faith basis to conclude that those employees whose work is associated with public works contracts, but are not listed on certified payrolls (*i.e.*, not covered by the Prevailing Wage Act), do not fall into any reportable requirement by employers.

Employers on public works jobs are advised to keep records regarding those employees who are not listed on certified payroll, even though no submittals are required.

Best Practices

Clients may want to include language to this effect in their employee handbook:

The company prohibits employee compensation and benefits based on sex, race, age, sexual orientation and any other legally protected classification. The company strives to provide equal pay for substantially similar work, when viewed as a composite of skill, effort and responsibility. Factors taken into consideration when setting pay for employees at the company include job description, job responsibilities, managerial/supervisory status, seniority, performance, merit, productivity, disciplinary history, experience, training, education, ability

and physical or mental exertion requirements. Pay differentials based on lawful factors other than sex, race, age, sexual orientation or other protected classification shall not constitute a violation of this policy.

In addition, clients should consider formulating more detailed descriptions of the qualifications needed for each position.

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Endnotes

1. P.L. 2018, Chapter 9, approved April 24, 2018.
2. P.L. 1945, c.169 (C.10:5-12).
3. N.J.S.A. 34:11-56.13, effective July 1, 2018.
4. N.J.S.A. 10:5-12.t.
5. N.J.S.A. 10:5-12.s.
6. N.J.S.A. 34:11-56.14.
7. N.J.S.A. 34:11-56.25 *et seq.*
8. N.J.S.A. 34:11-56.26.

The Effect of Accutane Litigation on Qualifying Construction Experts

by James H. Landgraf

Construction cases routinely revolve around expert testimony. Whether the issues are delays, design errors and omissions, construction defects, determination of change orders or quantifying damages, practitioners all look to experts to provide crucial opinion testimony either in favor of or against the claims. On a good day, one would like to have the expert's opinions deemed admissible and be able to prevent an adversary's expert from mouthing nonsense in front of the judge or jury. The New Jersey Supreme Court chimed in on the continuing issues involving expert testimony with its Aug. 1 opinion in *In re Accutane Litigation*.[1] While the case does not deal with a construction expert, it will establish the standards for admissibility of construction expert testimony going forward.

The New Jersey courts have relied upon evidence rules 702 and 703 to control the admission of expert testimony. NJRE 702 states that:

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise.

The related provisions of NJRE 703 provide:

> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Both of these evidentiary rules require a degree of interpretation. Construction litigators are certainly aware that the presentation of an expert and opinions rendered by that expert will require a fair amount of scrutiny. As indicated in NJRE 702, use of expert testimony must meet the threshold question of whether or not it will "assist the trier of fact" to understand the evidence or determine the fact at issue. Second, that expert must by knowledge, skill, experience, training or education, qualify as an expert in the discipline in which the opinion is being rendered. In other words, if a window is installed horizontally, as opposed to vertically as depicted in the plans, the court may not require an expert to point out to the jury the difference between horizontal and vertical. In a more typical situation where the window was installed in a configuration that is consistent with the plans but is resulting in leaks, expert testimony with regard to whether or not the window was installed properly and consistent with industry standards, plans and specifications, and/or manufacturer recommendations, will typically justify the use of an expert and opinions rendered by that expert consistent with NJRE 702.

Moving further, that expert can be a licensed architect having the training or education, as well as the knowledge, as required under NJRE 702. Alternatively, the expert can be an experienced window installer or carpenter if it can be established that he or she, through practical and working knowledge, skill and expertise, may qualify to render an opinion.

Unless the expert has other things going for him or her, a Ph.D. in nuclear physics probably brings nothing to the table to allow the individual to render an opinion regarding the installation of the window despite having incredible overall educational credentials.

Assuming the NJRE 702 criteria are met, this brings the construction litigator to NJRE 703.

Are the facts or data in the specific case upon which the expert bases an opinion or inference of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject? Under this

rule, and as established by case law, the expert must rely upon something. The conclusions unsupported by factual evidence or other data are inadmissible under the "net opinion" rule.[2]

In *Taylor*, while the expert rendered an opinion that the architectural community recognizes a duty to make the site inspections of a "small site" the proffered expert did not support that conclusion by any document, reference or written custom or practice. This resulted in a rejection of that opinion as a net opinion.

The prohibition against net opinions has also been extended to situations where the data or facts upon which the opinion is based are deemed insufficient, unreliable or contrary to the proponents theory of the case.[3] Where the expert's conclusion was that an accident occurred as a result of negligent maintenance of an elevator but lacked any effort to exclude other causes, the opinion was deemed an inadmissible net opinion.

Beyond the net opinion limitation inherit within NJRE 703, the rule itself does not identify how the court is to gauge whether or not facts or data relied upon by an expert are "of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject." Instead, the courts are guided by historical rulings on how to assess the reliability of expert opinions.

The Supreme Court in *Accutane* discusses at length the history of the assessment of expert opinions. It then provides attorneys (including construction litigators) with additional guidance and criteria for the admissibility of an expert opinion. The Court reviewed the history of the rules and their interpretation under federal and New Jersey case law and concluded with a flexible adoption of the *Daubert* criteria[4] in New Jersey civil cases.

Up to the *Accutane* decision, the New Jersey courts had relied upon the fairly unstructured three-part test established by the court in *State v. Kelly*:[5]

(i) the intended testimony must concern a subject matter that is beyond the ken of the average juror;

(ii) the subject of the testimony must be at a state of the art such that an expert's opinion could be sufficiently reliable; and

(iii) the witness must have sufficient expertise to explain the intended testimony.

Historically, the Court had expanded on the *State v. Kelly* basic criteria in *Rubanick v. Witco Chemical Corp.*,[6] by instructing the courts that they should "consider whether others in the field use similar methodologies,"[7] and instructing that an inquiry should be made as to whether "comparable experts in the field would actually rely on that information."[8] The *Rubanick* holding was furthered by the decision in *Kemp ex rel. Wright v. State*,[9] requiring a Rule 104 evidentiary hearing to assess whether the expert's opinion is based on "scientifically sound reasoning or unsubstantiated personal beliefs couched in scientific terminology." [10] Nevertheless, the Court had not accepted the full *Daubert* criteria analysis.

In *Accutane*, the Court was faced with proffered testimony from a gastroenterologist and a statistician. Those experts opined that certain established analyses could not be properly used and, therefore, rejected those analyses and asserted their own methodologies, which had no known history as approved methodologies. The trial court had excluded the testimony. The Appellate Division had reversed, and, upon certification, the Supreme Court reviewed the issue taking into consideration a *Daubert* approach.

The Supreme Court restated the court's role as the gatekeeper:

> Difficult as it may be, the gatekeeping role must be rigorous. In resolving issues of reliability of an expert's methodology in a new and evolving area of medical causation, we cautioned that the trial court should not substitute its judgment for that of the relevant scientific community. The court's function is to distinguish scientifically sound reasoning from that of the selfvalidating expert, who uses scientific terminology to present unsubstantiated personal beliefs.[11]

The *Accutane* Court went on to state that it "can and should have more clear direction to courts on how the gatekeeper function is properly performed."[12] It concluded that to provide such direction, that the adoption of the *Daubert* factors should be considered. More specifically, the Court stated that it "expect[s] the trial court to assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion."[13] It went on to state "it is not for a trial court to bless new 'inspired' science theory; the goal is to permit the jury to hear reliable science to support the expert opinion."[14] "[T]he courtroom is not the place for scientific guess work even of the inspired sort." The Court noted that there was not "much light" between its standard and the *Daubert* instructions."[15] It noted that

both standards look to whether the reasoning or methodology properly can be applied to facts at issue.[16]

Although referencing the "non-exhaustive list" of factors identified in *Daubert*, the *Accutane* Court culled the list down to four general factors pertinent for consideration but not dispositive or exhaustive:

(i) whether the scientific theory can be, or at any time has been, tested;

(ii) whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review and is not a "*sine qua non*";

(iii) whether there is any known or potential rate of error and whether there exists any standards for maintaining or controlling the technique operation; and

(iv) whether there does exist a general acceptance in the scientific community about the scientific theory[17]

The Court concluded that it was "persuaded that the factors identified originally in *Daubert* should be incorporated for use by our courts. The factors dovetail with the overall goals of our evidential standard and would provide a helpful—but not necessary or definitive—guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony."[18] At the same time, the Court specifically stated that "we stop short of declaring ourselves a 'Daubert jurisdiction,'"[19] instead stating " [W]e hesitate to sweep in adherence to the various approaches taken among the circuits and state jurisdictions when applying the *Daubert* factors. Thus, we do not adopt a "standard" that we cannot fully discern in its application at this time. While the factors are helpful, and while individual cases may be persuasive in appropriate settings, we cannot ignore that there are discordant views about the gatekeeping role among *Daubert* jurisdictions. See ibid.; see generally David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence* 702, 57 Wm. & Mary L. Rev. 1, 26-36 (2015)."[20]

While *Accutane* dealt with medical testimony, that fact does not limit the broad-reaching parameters of the Court's decision. Construction experts must now pass the Court's gatekeeping responsibilities consistent with a *Daubert*-based approach (even if the Court said that it was neither conclusive nor exhaustive). As has been the practice, this analysis may be handled through a NJRE 104 hearing, as well as passing muster through *in limine* motions. The expert opinion, in addition to avoiding being excluded as a net opinion where it must provide the supporting facts, must go further. It should address any contrary facts or methodologies, if for no other reason but to 'rule them out' as being dispositive on the opinion.

The opinion should include a recitation of standards, including manufacturer specifications, code provisions, and other criteria upon which the expert may be basing the opinion. If the expert is deviating in some fashion from what may be considered a standard approach, effort must be made to fully explain the deviation and provide a scientific basis for the use of any alternate methodology. If the expert provides, as an example, an opinion with regard to a delay analysis and assessment, an effort should be made to address that delay analysis through multiple methodologies with the anticipated conclusion that under each methodology a similar result will occur. This can be used to show that the methodology has been 'tested.' If there are learned treatises that have been generally accepted within the industry, they should be relied upon and cited within the opinion.

In analyzing the proffered opinion, litigation counsel should themselves compare the opinion and report against *Daubert* criteria, or at least the culled down version set forth *In re Accutane*. While the Supreme Court has been very clear in stating that these criteria are neither dispositive nor exhaustive, the Court has made known that it expects the trial courts to perform an analysis that includes application of the *Daubert* criteria as appropriate to a given case. At the very least, in establishing that a proffered opinion is in compliance with a '*Daubert*esque analysis, rejection of admissibility of the opinion will be very difficult for a court to justify. Before an expert is proffered, it is incumbent upon litigation counsel to assure themselves that everything possible has been done to avoid the loss of the expert's testimony due to a failure to provide appropriate scientific support.

Conclusion

In re Accutane does not create a 'brave new world.' In many respects, it is simply a restatement of the provisions of NJRE 702 and 703, as well as the historical approach that the courts have used in assessing expert testimony in civil cases. It does, however, provide a better roadmap of the criteria the Court will assess on issues of the admissibility of expert testimony in construction and other cases. ■

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Endnotes

1. 234 N.J. 340 (2018).
2. *Taylor v. DeLosso*, 319 N.J. Super. 174, 180 (App. Div. 1999).
3. *Gore v. Otis Elevator Company*, 335 N.J. Super. 296, 303-304 (App. Div. 2000).
4. *Daubert v. Merrill Dow Pharmaceuticals. Inc.*, 509 U.S. 579, 113, S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
5. 97 N.J. 178, 208 (1984).
6. 125 N.J. 421 (1991).
7. 125 N.J. at 44950.
8. *Id.* at 452.
9. 174 N.J. 412 (2002).
10. *Id.* at 427.
11. 234 N.J. at 390 *citing to Landrigan v. Cellotex Corp.* 127 N.J. 404, 414 (1992).
12. *Id.* at 390.
13. *Id.* at 396-397.
14. *Id.* at 397, *citing to Rosen v. Ciba-Geigy Corp.* 78 F.3d. 316, 319 (7th Cir. 1996).
15. *Id.* at 397.
16. *Daubert*, 509 U.S. at 591.
17. *Id.* at 398.
18. *Id.* at 398-399.
19. *Id.* at 399.
20. *Id.* at 399.

Bid Protests: Important Procedural Steps to Utilize to Preserve Rights and Avoid Potential Mootness

by Damian Santomauro

Bid protests are a species of dispute that typically involve a challenge by an unsuccessful bidder to a public entity's decision to reject its bid[1] or to award (or issue a notice of intent to award) a contract to another bidder.[2] The law underlying the bid protest may differ depending upon whether the public entity is a local or state government entity or agency.[3] However, almost all bid protests have several things in common: 1) they move very fast (and almost always involve emergent applications); 2) they involve high stakes with a winner and loser and no realistic ability to settle,[4] and 3) they do not permit claims for money damages.[5] These characteristics implicate the processes by which bid protests are addressed at both the initial level and in any appeal, and highlight the importance of employing procedural mechanisms to preserve the bidder's rights as the protest proceeds. Specifically, as the New Jersey Supreme Court has cautioned,[6] prudent bidders should, at every step of the process, take steps to prevent the public entity from moving forward with the procurement to avoid a court finding that the protest has become moot.

Failure to Stay Public Entity Action Can Moot the Protest

Under New Jersey law, the doctrine of mootness bars an action "when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy."[7] Indeed, "[i]t is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed."[8] As the court observed in *Anderson v. Sills*:

> There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.[9]

In *Statewide Hi-Way Safety, Inc. v. Dept. of Transp.*,[10] the Appellate Division considered the application of these principles in the context of a bid protest regarding the New Jersey Department of Transportation's rejection of a contractor's bid on the grounds that its bid for the cost component of the subject highway project exceeded the maximum it could be in light of its bid rating classification, and the department's award of the contract to another contractor. The contractor filed an appeal of the department's determination with the Appellate Division, arguing its bid was improperly rejected and the contract awardee's bid should have been rejected. It also filed an emergent application to stay the department's award to the other contractor.

The Appellate Division denied the emergent application and the appeal was heard in the normal course. However, during the pendency of the appeal, the subject highway construction project had proceeded and, by the time of oral argument, was substantially completed.[11] Under such circumstances, the Appellate Division held that "we must dismiss the appeal as moot," stating:

> It is, thus, too late to order rebidding or to award the contract to another bidder. Any order of this court to terminate the project at this juncture would be contrary to the public interest.[12]

As the Court further noted, it "would be contrary to the public interest to void the contract already awarded even for any remaining uncompleted portion of the road construction."[13]

Despite finding that appeal was moot, the Appellate Division addressed, on public interest grounds, the substantive issue of whether the contract awardee's bid should have been rejected because it was not totaled when submitted and, therefore, was not read by the department at the bid opening. Ultimately, the court held that this failure was a material deviation of the department's statutory procurement requirements that would have compelled rejection of the contract awardee's bid had the appeal not been mooted[14]—undoubtedly of small consolation to the appellant. Interestingly, the court's opinion appears to second guess its earlier decision to deny the appellant's emergent application for a stay, and, importantly, provides guidance for courts confronting such applications in cases involving bid protests.

Specifically, the court closed its opinion by stating:

> We denied emergent relief to Statewide when a remedy was available, undoubtedly due to the deference we must give to the Commissioner's determination concerning its pre-bid qualification status and because we then thought the electronic bulletin board evidenced the absence of any possibility of fraud or corruption with respect to this award. We note, however, that we are cognizant of the need to grant stays, pending appeal, in cases like this which reflect a statutory deviation from the required bidding process. As the authority with jurisdiction to review final actions of a State administrative agency, we recognize our obligation to enter a stay to prevent some threatening, irreparable mischief which should be averted until opportunity is afforded for a full and deliberate investigation of the case.[15]

New Jersey courts have often followed this guidance and granted stays pending appeals in bid protest matters.[16]

Whereas the Appellate Division's decision in *Statewide Hi-Way Safety, Inc.* regarding stays in appeals of bid protest matters was directed at courts, the New Jersey Supreme Court's decision in *Barrick* directed its ruling at parties. The *Barrick v. State* decision involved the New Jersey Division of Property Management and Construction's award of a contract for the lease of office space to the lowest bidder even though it had not complied with the bid specification's requirement that the site location be within one-quarter mile of public transportation. After an unsuccessful bidder's protest was denied by the division, that bidder filed an appeal with the Appellate Division without seeking a stay.[17] The Appellate Division reversed the division's determination, but, in the interim, the state had expended resources in the performance of the contract with the successful bidder.[18] Ultimately, the New Jersey Supreme Court reversed the Appellate Division's decision on the grounds that the division's decision "was not arbitrary and capricious and that it was error for the appellate panel to have substituted its judgment for that of the [Division's] Director."[19]

The Supreme Court's decision is noteworthy not for its ruling on the substance of the bid protest, but for its strong cautionary language regarding the need for appellants in a bid protest appeal to seek a stay pending appeal. Although the Court declined to issue a "bright-line rule in favor of mootness" when an unsuccessful bidder fails to seek a stay in an appeal of a bid protest, it expressed significant concern regarding bidders who fail to do so and emphasized that "an unsuccessful bidder, who does not promptly seek a stay of a lease bid award under Rule 2:9-8 when appealing an award determination, acts at his, her, or its peril."[20] The Court further noted:

> For example, if the bidder does not seek a stay, by the time the unsuccessful bidder's appeal is heard the process of securing multi-Branch approvals and expenditure of funds on a building project—whether it involves a lease or other construction work—likely will have proceeded apace and the equities will be against the provision of relief on the merits. We caution against any expectation that a merits review will be readily available to such unsuccessful bidders who sit on their right to seek a stay and simply hope for a remedy down the road. The appellate process is equipped for stay applications in bidding disputes and that relief ought to be pursued as a matter of course.
>
> Contractual matters in which the State and its public entities engage must proceed with alacrity. The bidding administrative process is premised on prompt identification, review, and correction of any contracting process errors. The State's business and the public interest in the State's contractual endeavors should not be unreasonably delayed while an unsuccessful bidder seeks

> another level of review. Appellate review should be pursued with similar alacrity. Rule 2:9-8 provides an avenue to accommodate the interests of all parties in a swift and fair review of alleged improprieties in the bid award process.[21]

Certainly there are public procurements where the absence of a stay of the contract award will not moot the bid protest because of the subject matter of the contract at issue, the length of time of the contract, or the weighing of public interests favoring the protection of the integrity of the public bidding process over the potential impact in disrupting an existing contract. Relying on such grounds, the Appellate Division recently issued a pair of decisions reversing decisions by state entities even though no stay of the contract awards had been granted (although stays were sought in both cases).[22] Nevertheless, the New Jersey Supreme Court's decision in *Barrick* strongly militates in favor of seeking a stay whenever appealing a decision in a bid protest matter to mitigate the risk that the protest could become moot. Indeed, whether at the initial phase of a bid protest or during the appellate process, parties challenging the actions of a public entity should, at every available opportunity, endeavor to stay the subject procurement from proceeding further until the protest is fully and finally resolved.

Practice Tips

The appropriate forum for bid protests will depend upon the specific public entity involved (*i.e.*, whether it is a local or state public entity). As the Supreme Court stated in *Infinity Broadcasting Corp. v. New Jersey Meadowlands Comm'n*:

> The overarching rule in New Jersey has long been that every proceeding to review the action or inaction of a local administrative agency [is] by complaint in the Law Division and that every proceeding to review the action or inaction of a state administrative agency [is] by appeal to the Appellate Division.[23]

However, regardless of the forum for the protest, it is important that the unsuccessful bidder attempt to forestall the public entity from proceeding with the award of a contract to another bidder. As noted above, contract award, followed by contract performance, can undermine a bid protest because courts, depending upon the nature of the procurement, are often reluctant to disrupt ongoing public contracts because of the potential costs and adverse impact on the public interests. Thus, bidders should initiate a protest as soon as a basis to challenge the public entity's decision is identified, and should seek to restrain or stay the public entity's action at every opportunity.

In matters involving local agencies, a bid protest is typically initiated by way of filing an action in lieu of prerogative writs[24] in the Law Division.[25] Such actions should be accompanied by an order to show cause application[26] seeking to temporarily restrain the local public entity from proceeding with the contract award during the pendency of the action.[27] The application for temporary restraints will be governed by the well-settled standards for interlocutory injunctive relief set forth in *Crowe v. De Gioia*.[28] However, application of the *Crowe* factors is less rigid in most bid protest cases because the unsuccessful bidder is simply seeking to preserve the *status quo*.[29]

Conversely, in matters involving state entities, a bid protest is made in the first instance to the state entity pursuant to procedures set forth in the bid solicitation or the public entity's regulations.[30] Even in instances where state entities have not enacted formal protest procedures, bidders have a right to protest the decision under due process principles.[31] Under the principles enunciated by the New Jersey Supreme Court in *Commercial Cleaning Corp. v. Sullivan*, the state entity should restrain proceeding with the contract unless and until it has made a final decision on the protest.[32] Certainly, when making a protest to the state entity it is prudent practice to request that any contract award be stayed pending the outcome of the protest.

If the initial phase of the bid protest results in an adverse decision by the Law Division (in the case of a protest of a public entity procurement)[33] or the state agency (in the case of a state procurement), an unsuccessful bidder may want to engage in the next phase of the protest—an appeal to the Appellate Division. In the case of the former, the appeal is of the trial court's decision pursuant to N.J. Ct. R. 2:2-3(a)(1), while the latter involves an appeal of final agency decision pursuant to N.J. Ct. R. 2:2-3(a)(2).

It is imperative that the protesting bidder who seeks appellate review seek a stay pending appeal. If the appeal is from an interlocutory order of the trial court, the bidder should seek a stay of the matter pending appeal with the trial court. Similarly, if the appeal is from a final decision of the state agency, the bidder must first request

that the state agency stay the final agency decision.[34] This is often done in the protest submission by requesting that the state agency stay the final decision if it is an adverse to the protester.

At the time the appeal is filed, the bidder should also seek an emergent stay from the Appellate Division. The procedure for seeking an emergent stay pending appeal involves filing an application for permission to file an emergent motion pursuant to N.J. Ct. R. 2:9-8.[35] In effect, this emergent application seeks a temporary stay while the Appellate Division considers a more formal motion for a stay pending appeal pursuant to N.J. Ct. R. 2:8-1, although the Appellate Division may collapse the two into one decision that grants or denies a stay pending appeal. The application is typically filed with the Appellate Division judge on emergent duty who can issue a temporary stay without notice until the Appellate Division acts upon the motion for a stay pending appeal.[36] If the application is denied, the bidder can seek review by the New Jersey Supreme Court. Any appeal to the New Jersey Supreme Court should, again, include an emergent application for a stay pending appeal pursuant to N.J. Ct. R. 2:9-8.[37]

Applications for stays pending appeal are governed by the *Crowe* factors and a party seeking such a stay "must demonstrate that (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were."[38] The public interest may also be considered in cases of significant public importance.[39]

As is the case with other types of applications for injunctive relief, a more relaxed standard is applied in cases, such as bid protests, where the stay application seeks to preserve the *status quo*.[40] Moreover, as the Appellate Division noted in the *Statewide Hi-Way Safety, Inc.* decision, New Jersey courts should not hesitate to grant such emergent applications for a stay pending appeal to prevent mootness and ensure the integrity of the public procurement process is maintained. Thus, there is little reason not to make such applications when filing an appeal in a bid protest matter—particularly in light of the potential adverse consequences that can arise when a stay is not sought.

Conclusion

Bid protests are high-stakes matters that often proceed swiftly because of the public interest involved in proceeding with the subject procurement. Public entities and winning bidders often want to move forward with the procurement despite the pendency of a protest, and an unsuccessful bidder who ignores this reality exposes itself to the risk that their protest may become moot before it is finally adjudicated on the merits. However, New Jersey's Court Rules provide for certain procedural mechanisms that a bidder can utilize in an effort to preserve their protest. While a variety of factors (including, for example, cost, likelihood of success, value of the procurement, etc.) can impact the strategic decisions that an unsuccessful bidder may make, the following procedural actions should be considered:

- Complaints filed in the Law Division should be accompanied by an order to show cause application seeking temporary and permanent injunctive relief preventing the local public entity from proceeding with its decision;
- A protesting bidder should closely adhere to a state entity's protest procedures to avoid the state entity invalidating the protest on technical grounds;
- A bid protest filed with a state entity should request that any contract award be stayed until the state entity issues a final agency decision resolving the protest in favor of the bidder (or pending appeal in the event the final agency decision is adverse to the bidder); and
- Any appeal of a trial court's decision or a final agency decision regarding a bid protest should be accompanied by an emergent application for a stay pending appeal.

The foregoing steps do not guarantee success on the ultimate merits of the protests, and there is the potential for adverse rulings each step of the way. However, failure to employ these steps may result in the premature resolution of the bid protest or Pyrrhic victory in which an appellate court technically rules in the bidder's favor on the merits of an issue even though the issue on appeal is moot. ■

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Endnotes

1. *See, e.g., In re Jasper Seating Co., Inc.*, 406 N.J. Super. 213, 217 (App. Div. 2009) ("Plaintiff Jasper Seating Company (Jasper) appeals from the Final Agency Determination of the Division of Purchase and Property (Division) to reject Jasper's bid as non-conforming for the State's purchase awards under its publicly-bid contract for furniture. We affirm the Division's determination.").
2. *See, e.g., Suburban Disposal, Inc. v. Township of Fairfield*, 383 N.J. Super. 484, 487 (App. Div. 2006) ("This is an appeal by an unsuccessful bidder, Suburban Disposal, Inc., from a summary judgment upholding the award by defendant Township of Fairfield of a three-year trash collection contract to defendant Waste Management of New Jersey, Inc.") *In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Management Services*, 436 N.J. Super. 350, 358 (App. Div. 2014) ("After DPP issued a notice of intent to award the contract to Northstar, the CWA filed its protest on April 17, 2013.").
3. The underlying law governing a public procurement will depend on the nature of the public entity. Most procurements at the local level is governed by the Local Public Contracts Law, N.J.S.A. § 40A:11-1 *et seq.*, (in the case of municipalities or counties), or the Public School Contracts Law, N.J.S.A. § 18A:18A-1, *et seq.* (in the case of public schools). At the state level there are a variety of procurement statutes depending on the state entity involved. *See* N.J.S.A. § 52:34-6, *et seq.* (the Division of Purchase and Property in the Department of the Treasury), N.J.S.A. § 18A:64-52, *et seq.* (New Jersey state colleges); N.J.S.A. § 27.23-6.1 (Turnpike Authority).
4. Any settlement of a dispute with the public entity or as between bidders would adversely impact the public interest in a fair and competitive bidding process. *See, e.g., In re Coulson Aviation (USA) Inc.*, 2014 U.S. Comp. Gen. LEXIS 84, at *37 (Comp. Gen. March 31, 2014) ("A settlement agreement promising award of a contract on a sole-source basis in exchange for abandoning ongoing litigation, such as a bid protest, is not a permissible basis for restricting competition and excluding potential offerors....Quite simply, the existence of a settlement agreement does not permit a contracting agency to act in ways not otherwise permitted by applicable statutes and regulations.").
5. *See Delta Chemical Corp. v. Ocean County Utilities Authority*, 250 N.J. Super. 395 (App. Div. 1991) ("An unsuccessful bidder may attack the award of the contract but may not recover money damages, even if the challenge succeeds. To permit the low bidder to recover damages would simply twice penalize the public. Submission of the lowest bid in answer to an advertisement for bids by the State for public work cannot be the basis of a claim for damages based upon the failure or refusal to accept such bid."); *Brockwell & Carrington Contrs., Inc. v. Dobco, Inc.*, 2013 N.J. Super. Unpub. LEXIS 3029, at *14 (App. Div. Dec. 26, 2013) (The purpose of competitive bidding for local public contracts is...not the protection of the individual interests of the bidders but rather the advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis....Thus, as a salutary measure to protect the integrity of the public bidding process, courts have conferred standing on unsuccessful bidders to challenge contract awards. The point is not to make the challenger whole, but rather to vindicate the goal of competition, and its beneficial consequences to the taxpayers.") (internal citations and quotation marks omitted).
6. *See Barrick v. State*, 218 N.J. 247 (2014).
7. *Redd v. Bowman*, 223 N.J. 87, 104 (2015) (citation and internal quotation marks omitted).
8. *Cinque v. New Jersey Department of Corrections*, 261 N.J. Super. 242, 243-44 (App. Div. 1993).
9. 143 N.J. Super. 432, 437 (Ch. Div. 1976).
10. 283 N.J. Super. 223 (App. Div. 1995).
11. *See id.* at 225.
12. *Id.* at 226.

13. *Id*. at 232. Other courts have similarly found appeals in bid protest matters were moot because the subject contract had proceeded—in some cases dismissing the appeal and in others issuing a ruling on the merits because of the public importance of the issues raised and their likelihood of repetition. *See, e.g., Gross v. Ocean Tp.*, 92 N.J. 539, 541 (1983) ("Although the question of whether the 'negative charge public bidding device fashioned by Ocean Township is beyond the limits of municipal power is technically moot, inasmuch as the one-year period of the contract for which bids were sought has long since expired, the portentous nature of the problem creates the need for this Court to decide it."); *Advance Elec. Co., Inc. v. Montgomery Tp. Bd. Of Educ.*, 351 N.J. Super. 160 (App. Div. 2002) (finding that the appeal was "technically moot" because the construction contract at issue had been completely finished, but nevertheless addressed electrical subcontractor's claim regarding Public School Contracts Law); *In re Protest of Denial of Pre-Qualification Application of ABC Towing*, 2015 N.J. Super. Unpub. LEXIS 2715, at *7-8 (App. Div. Nov. 25, 2015) (noting that the protestor would normally be entitled to relief, but it did not seek a stay of the Turnpike Authority' decision when it filed its appeal, the towing contracts at issue had already been awarded to other qualified bidders, and the matter was, therefore moot); *P&A Constr., Inc. v. Township of N. Brunswick*, 2010 N.J. Super. Unpub. LEXIS 808, at *6, 10 (App. Div. April 13, 2010) (dismissing contractor's appeal because subject road improvement contract was nearly completed by the time the appeal was heard).
14. 283 N.J. Super. at 232.
15. *Id.* at 232-33.
16. *See, e.g., In re Bid Protest of Agate Constr. Co.*, 2017 N.J. Super. Unpub. LEXIS 759, at *1 (App. Div. March 29, 2017) ("We stayed the award of a multi-million dollar contract to repair and reconstruct the stone seawall in Sea Bright and Monmouth Beach (the Project) made by the New Jersey Department of Environmental Protection (DEP), Division of Coastal Engineering (DCE), to J. Fletcher Creamer & Son, Inc. (JFC), pending appeal by an unsuccessful bidder, Agate Construction Co., Inc. (Agate). Given the public interest, we accelerated the appeal."); *Brahma Constr. Corp. v. E. Brunswick Pub. Schs*, 2015 N.J. Super. Unpub. LEXIS 960, at *6 (App. Div. March 24, 2015) ("Brahma filed a motion for leave to appeal the denial of preliminary injunctive relief. We granted Brahma's motion, issued a stay pending appeal, and accelerated this appeal.").
17. 218 N.J. at 251-52.
18. *See id*. at 252.
19. *Id*.
20. *Id.* at 263.
21. *Id*. at 263-64 (internal citation omitted).
22. *See In re Request for Proposals ##17DPP00144*, 454 N.J. Super. 527, 577 (App. Div. 2018) (reversing decision by the Division of Purchase and Property to award a $6 billion contract for pharmacy management even though the Appellate Division had vacated its prior stay pending appeal order, stating: "Although the absence of a stay has presumably permitted the State to secure the first-year savings in the SHBP/SEHBP the procurement promised, no savings can justify the impairment to the integrity of the bidding process caused by an irregular proceeding. Accordingly, the Division must proceed to rebid the Contract as expeditiously as possible.") (internal citation omitted); *In re Motor Vehicle Comm'n Surcharge Sys. Accounting & Billing Servs.*, 2018 N.J. Super. Unpub. LEXIS 285, at *34 (App. Div. Feb. 8, 2018) (reversing decision by the Division of Purchase and Property to award contract for development and implementation of new billing and collection system and ordering rebidding of contract despite no stay, stating: "We were advised at the recent oral argument on the appeal that the implementation of the new billing and collection system is already substantially complete. Even if that is true, as MSB correctly pointed out in opposing a stay in the fall of 2017, there are over six more years of operation and revenue collection to occur under the contract. The appeal has not become moot in the interim.").
23. 187 N.J. 212, 223 (2006) (citation and internal quotations marks omitted).
24. N.J. Ct. R. 4:69-1 to -7.

25. In the context of a decision by a local public entity, bidders can attempt to protest the local public entity's decision by way of a letter or some other attempt to be heard by the public entity. *See Bodies by Lembo, Inc. v. County of Middlesex*, 286 N.J. Super. 298, 302 ("On December 12, 1994, prior to any announcement of an award, Norcia sent a 'letter of protest' to Jack Garber requesting a hearing in the event that its alternate bid was not accepted. A purported hearing took place on December 14, 1994, between the County and Norcia. That hearing apparently caused Norcia to make numerous changes to its alternate bid which either corrected or bettered the non-conformities. Thereafter, on January 19, 1995, the Board awarded the contract (Contract) to Norcia."). However, there is often no time to raise issues with the local public entity and, unlike the protests to State public entities, no formal protest procedure. As a result, unsuccessful bidders' first action to challenge the decision of the local public entity is to file an action in the Law Division.
26. Such applications are explicitly authorized by N.J. Ct. R. 4:69-3 ("Upon or after the filing of the complaint, the plaintiff may, by order to show cause or motion supported by affidavit, and with briefs, apply for ad interim relief by way of stay, restraint or otherwise as the interest of justice requires, which relief may be granted by the court with or without terms. When necessary, temporary relief may be granted without notice in accordance with R. 4:52-1.").
27. *See, e.g., Star of Sea Concrete Corp. v. Lucas Bros., Inc.*, 370 N.J. Super. 60, 66 (App. Div. 2004) ("The Freeholders subsequently adopted a resolution awarding the contract to Lucas Brothers, and the next day Star of the Sea filed an order to show cause, with temporary restraints, and a verified complaint in lieu of prerogative writs, attempting to have the Freeholder's action reversed and Star of the Sea's bid recognized as the lowest bid complying fully with the bid solicitation."); *Palamar Constr., Inc. v. Pennsauken*, 196 N.J. Super. 241, 244 (App. Div. 1983) ("Palamar filed a complaint in lieu of prerogative writ on October 3 with the Superior Court, Law Division challenging the decision of the Township Committee. On that date, the Law Division judge issued an order to show cause and an interlocutory restraint enjoining the execution of the construction contract with Taylor and the initiation of any construction on the project pending final resolution.").
28. 90 N.J. 126, 132-144 (1982) (injunctive relief requires a showing of irreparable harm, reasonable probability of ultimate success on the merits, a claim based on a settled right, and a balancing of relative hardships).
29. *Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority*, 433 N.J. Super. 445, 453-54 (App. Div. 2013) ("The power to impose restraints pending the disposition of a claim on its merits is flexible; it should be exercised whenever necessary to subserve the ends of justice, and justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit. This less rigid approach, for example, permits injunctive relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.") (internal quotation marks and citation omitted).
30. *See, e.g.*, N.J.A.C. 17:12-3.1, *et seq.* (providing the Division of Purchase and Property's procedures for protesting bid specifications, rejection of bids, and contract award or notice of intention to award a contract).
31. *See Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority*, 369 N.J. Super. 175, 188 (App. Div. 2004) ("We appreciate...that there are no agency rules governing the conduct of a bid protest hearing, and undoubtedly NJSEA would be wise to adopt such rules. But,...the absence of rules does not vitiate the protest proceeding provided basic due process is accorded.").
32. 47 N.J. 539, 552 (1966) ("Therefore the advertising for bids and the time specified therein for their receipt ought in fairness to be sufficiently in advance of the projected contract date to give a rejected bidder, upon timely request, a conference or informal hearing at which his protest can be presented."). The Division of Purchase and Property's regulations specifically prohibit a contract from being awarded until the division's director issues a final decision on the merits of the protest unless the failure to award the contract will result in substantial cost to the state or there is a public exigency. *See* N.J.A.C. 17:12-3.3(c).

33. In a protest involving a local public entity procurement the initial adverse decision may not be a decision denying the protest on the merits. Indeed, the Law Division judge could deny the application for temporary restraints with the intention of addressing merits of the protest at a later date in the normal course. If that occurs, the protesting bidder should strongly consider pursuing an emergent interlocutory appeal seeking to reverse the denial of temporary restraints to protect the *status quo*.
34. N.J. Ct. R. 2:9-7.
35. The application is available on the Appellate Division's website along with guidelines for such applications, which were recently updated. *See* https://www.njcourts.gov/forms/10498_appl_perm_file_emerg_motion_portal.pdf?cacheID=1I1WYv9.
36. N.J. Ct. R. 2:9-8.
37. The New Jersey Supreme Court has published guidelines on the emergent application process, see https://www.njcourts.gov/forms/11644_sc_emergent_appl_public_guide.pdf, and an emergent matter intake form, *see* https://www.njcourts.gov/forms/11641_sc_emergent_intake.pdf.
38. *Garden State Equality v. Dow*, 216 N.J. 314, 320 (2013) (citation and internal quotation marks omitted).
39. *See id*.
40. *See United Servs., Inc. v. City of Newark*, 2017 N.J. Super. Unpub. LEXIS 934, at *10-11 (App. Div. April 17, 2017) (discussing standard, granting stay, and remanding to trial court to resolve bid protest complaint).