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New Jersey Court Considers Retainage In Sewer Project Case

In a published decision, the Superior Court of New Jersey, Chancery Division held that a federal regulation requiring ten percent retainage from progress payments to a contractor on a federally funded sewer project was controlling, rather than a New Jersey law authorizing two percent retainage.

The Facts of the Matter

The opinion was written by the Honorable John F. Callinan, J.S.C., sitting in Cape May County, Superior Court, Chancery Division. The decision was rendered on January 31, 1990. Middle Township v. Public Developers Corp., The American Arbitration Association and Lowell F. Curran, Jr., 240 N.J. Super. 445 (Chan.1990).

The critical facts of the case were as follows: In July, 1988, Public Developers Corporation entered into a contract with Middle Township for the construction of a sanitary sewer collection system. The funding for the project was to be provided by the Farmers Home Administration (FHA), a federal agency.

The Bid Documents

The bid documents contained retainage

instructions from the FHA. The contract documents required ten percent retainage under a federal regulation of the FHA (7 C.F.R. 1942.18(n)(10)). This provision was entitled "PAYMENT TO CONTRACTOR" and provided:

The OWNER will within ten (10) days of presentation of an approved partial payment estimate, pay the CONTRACTOR a progress payment on the basis of the approved partial payment estimate less the retainage. The retainage shall be an amount equal to ten (10%) percent of the said estimate until fifty (50%) percent of the work has been completed.

Competitive sealed bids were accepted on May 11, 1988. On about July 15, 1988, Middle Township awarded the contract to Public Developers Corporation began work, it objected to the ten (10%) percent retainage provision claiming that it violated a New Jersey Statute, N.J.S.A. 40A:11-16.3, which provided:

With respect to any contract or agreement

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entered into by a contracting unit pursuant to section 1 of this act for which the contractor shall agree to the withholding of payments... two (2%) percent retainage of the amount due on each partial payment shall be withheld by the contracting unit pending completion of the contract or agreement.

The Legal Issue:
State Statute vs. Federal Regulation

The sole issue in this case was whether the ten (10%) percent retainage requirement of the FHA took precedence over the two (2%) percent retainage rule under the New Jersey Statute.

Both parties filed motions for summary judgment in order to obtain a decision without the necessity of trial. Since neither party disputed any facts in the case, the Chancery Division held the summary judgment procedure to be appropriate.

The contractor, Public Developers Corp., argued that the New Jersey law requiring two (2%) percent retainage applied. Further, Public Developers Corp. argued that the state law was designed to secure proper performance of public works without unduly restricting the flow of monies to thinly capitalized contractors. As a result of this philosophy, Public Developers Corp. argued, smaller and minority controlled businesses have been better able to enter the arena of public contract bidding.

Conversely, the owner, Middle Township, argued that the federal regulation requiring (10%) percent retainage applied. The owner stressed that the Farmers Home Administration

guidelines had been set to ensure the proper completion of federally funded public works.

The Federal Preemption Doctrine Applied

The court held that the New Jersey statute was preempted by the federal regulation. Preemption is a legal doctrine adopted by the United States Supreme Court holding that certain matters are of such national character (as opposed to local character), that federal laws take precedence over any conflicting state laws. In this case, the court noted that federally funded projects are spread over vast distances with little local control by federal overseers.

On the other hand, state funded projects occur within state boundaries and are subject to close state administrative oversight and scrutiny. Thus, the court concluded, it is not surprising that the standards for retainage as between state funded contracts and FHA funded projects might differ.

Copies of the court's written decision are available upon request.



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