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Monday, May 26, 2003 12:00 AM

Within hours after the collapse of the World Trade Center towers, the New York City Department of Design and Construction agreed with four main contractors to begin the daunting clean-up. Due to the severity of the situation the department was unable to follow its typical construction contract guidelines. Most importantly, the department did not sign a written contract setting prices for how much money it would pay the contractors and their subcontractors for the work. To date, the department and the four main contractors have not inked a final contract as several issues, including liability insurance, remain in dispute.

When clean-up of the site ended on May 30, 2002, the department began reviewing subcontractors' invoices and bills for the work they had already done and amounting to over $650 million. Without a written contract setting specific prices for specific jobs, the department is left to determine which bills to pay and at which rates. As the department determines that a particular invoice is excessive and decides not to pay the invoice, there no doubt promises to be subcontractors who will challenge that determination. In what may be the first of many to come, on April 29, 2003 New York County Supreme Court Justice Diane S. Lebedeff decided that the department has the authority to review and reduce invoices that it deems excessive.

Subcontractor Submitted High Invoice

Tully Construction, Co., one of the four main contractors, had been working on a major State Department of Transportation construction project on lower Route 9A (West Street) on September 11th and was one of the first at the site. Tully, like all of the main contractors, entered into agreements with subcontractors for equipment. One of those agreements was with Massachusetts-based Great Northern Site Corporation for the lease of three (and later four) heavy excavating machines.

Tully and Great Northern agreed that Great Northern would be paid approximately $189 per hour per machine, amounting to approximately $100,000 per machine per month.

Shortly after the machines were delivered to the site, Tully and Great Northern agreed that the rates for the excavating machines would be subject to the Department of Design and Construction's approval.

By June 2002 the department had issued two memos stating that subcontractors would be paid for their work at a rate of 75 percent of the rate found in the construction industry's standardized suggested price index, the "Rental Rate Blue Book for Construction Equipment." The Department would only pay above 75 percent of the Blue Book rate if the subcontractor could provide documentation indicating that the rate was "usual and reasonable pre-September 11, 2001." The policy, the department stated, was to prevent "'opportunities for unscrupulous individuals to enrich themselves' in the wake of September 11th."

Great Northern's charge for each of its machines at $189 per hour rate came in at approximately $45 per hour higher than the Blue Book rate for similar machines. So the department asked Great Northern for proof that it charged as much per hour before September 11th. When Great Northern failed to submit the documents the city had requested, the department reduced the company's rate to $108 per hour.

Great Northern sued. It claimed the city agency did not have the authority to change the company's rates, since the equipment was being put to use on property of the Port Authority, which was created by the States of New York and New Jersey. It said it was entitled to a public hearing, because the city had created a new rule.

Justice Lebedeff dismissed Great Northern's complaint on April 29, rejecting all its arguments. The city had a right to take reasonable steps to make sure it is not overcharged, the judge ruled, and could so on the site owned by the Port Authority because the September 11th attacks "affected an area far beyond the site."

Controlling The Floodgates

Justice Lebedeff's decision has the potential to save the city millions of dollars in overpayment and/or fraud. The city is currently reviewing millions of dollars in unreconciled invoices billed from the World Trade Center clean-up. Pursuant to Justice Lebedeff's decision the Department has the authority to review these invoices and ensure that the city is not overpaying or paying false claims.

In reviewing the invoices the Department has been working with the Department of Investigations and an auditor, KPMG, who will supplement the auditing staff to reconcile paperwork and then provide it to the Federal Emergency Management before the end of the year. Upon FEMA's review, the city will be reimbursed for its payments.

As the department makes a determination as to the appropriate rate in each of these invoices, there promises to be litigation, which could prolong the end of the clean-up phase and put off the development.

Great Northern Site Corporation v. Department of Design and Construction, Index No. 122546/02 (Lebedeff, J.) (N.Y.Cty.Sup.Ct.) (Apr. 29, 2002).