

## Demolition Contract: New York Appellate Court Addresses Whether Imposition of Flow Control Constitutes a Significant Change



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01/11/2019

A New York Appellate Court (“Court”) addressed in a January 9th opinion the effect of flow control by a local governmental authority on a demolition contract.

The focus of the decision was whether a general contractor was entitled to additional compensation because of the imposition of flow control fees after the contract was executed.

Stephen J. Mignanao (“Contractor”) was hired as the general contractor for a New York State Department of Transportation (“DOT”) bridge reconstruction/replacement project. Demolition and disposal related work was subcontracted to L.M. Sessler Excavating & Wrecking, Inc. (“Subcontractor”).

Demolition debris were initially deposited in a permitted solid waste landfill by the Subcontractor. The Subcontractor was paid for the recycled value of the material. The Rockland County Solid Waste Management Authority (“Authority”) subsequently enacted Local Law No. 2-2008 (“Law”) which instituted “flow control.”

Flow control is a legal provision that allows governments to designate the places where municipal solid waste and recyclables are taken for processing, treatment, or disposal. Governments often engage in flow control for economic reasons.

The Law required that the Subcontractor dispose of the demolition material at the Authority facility and imposed a fee for disposal. The Contractor sought additional compensation from DOT on behalf of the Contractor. DOT refused.

The Contractor argued that:

... enforcement of the Flow Control Law constituted a “significant change in the character of work,” entitling the claimant to additional compensation under the general contract.

The Contractor commenced a claim alleging DOT breached the general contract by failing to pay for cost of compliance with the Law.

The Court of Claims granted DOT’s Motion for Summary Judgment and the Contractor appealed.

The Court stated it disagreed with a determination of the Court of Claims that the claim failed to state a cause of action to recover damages for breach of contract. The claim was held to have adequately specified the provision allegedly breached. It stated that the Contractor’s submissions in opposition to

DOT's Motion "clearly identified the contractual provision allegedly breached." As a result, any defect in the claim was deemed to be cured.

The Court then noted that the parties' intent is determined from the four corners of the document. As a result, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms." However, where the contract is ambiguous, extrinsic evidence is permitted to determine the parties' intent as to the meaning of that language.

The Court noted that the contract both required the Contractor to comply with all applicable laws (with the costs of compliance included in the contract price) and addressed the disposal of waste at permitted facilities. The reference to the disposal of waste was deemed an acknowledgement as to the value of removed waste to the claimant (i.e., Contractor) as a commodity that could be sold to permitted facilities for beneficial reuse, recovery, or recycling purposes.

Also referenced was language indicating that nothing prevented the Contractor from removing the waste to appropriate facilities for such purposes and limited reference to other disposal site requirements. Such provisions were deemed to raise some ambiguity as to whether the Contractor would be required to deposit waste at the Authority since it had no such facilities at the time the parties entered into a contract. Therefore, the Court determined that extrinsic evidence of the parties' intent could be considered.

The Contractor was also noted to have submitted evidence that the Authority had no facility at the time to recycle concrete and was not enforcing the Law in regard to any DOT projects. DOT apparently initially believed it was immune from the Law. Also, a change order issued by DOT provided for the alteration of contracts due to:

. . . "unforeseen cause[s]," expanded the project site to permit on-site disposal so as to avoid the costs of compliance with the Flow Control Law.

DOT is stated to have failed to controvert the previously referenced evidence raising a triable issue of fact regarding the scope of the work and whether there was a significant change in the character of the work triggering entitlement to compensation.

The Court therefore reversed the Court of Appeals granting of DOT's Motion for Summary Judgment.

A copy of the opinion can be found [here](#).