UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

D.A. ELIA CONSTRUCTION CORP. Case No. 94-10866 K

Debtor

DECISION

The question before this Court is whether the New York State University Construction Fund (the "SUCF") may recover liquidated damages of $200,500.00 as a result of the D.A. Elia Construction Company's ("Elia" or "Debtor") failure to obtain a performance bond which, under NY Finance Law § 137(1), must be in place before the SUCF may accept any construction bid.

There is no need to detail greatly the facts surrounding the Debtor's objection to the claim of the SUCF. Briefly stated, prior to filing for bankruptcy protection, Elia responded to a solicitation for bids to perform construction work for the SUCF. Prior to making its bid, Elia received a packet from SUCF which included three documents, two of which are relevant to this Court's determination of Elia's liability: the "Information for Bidders" and the "Bid Proposal."

The Information for Bidders included three sections which are relevant to the background of this case: first, § 6(1), which states that each bidder must supply a bid deposit in either a check or a bid bond; second, § 10, which states that a party must procure, execute and deliver bonding by a surety company approved by the SUCF within ten days after notice of award of the bid; and third, § 3(8), which states that permission will not be given to modify or cancel

any bid proposal after the time designated in the bidding or contract documents, unless such a modification, or cancellation is permitted by law and the Fund believes that such a modification or cancellation is in the public interest.

In the Bid Proposal there is a "paragraph 11" which provides:

> The undersigned submits herewith bid security in an amount not less than 5 percent of the Total Bid. In case the proposal is accepted by the Fund and the undersigned shall refuse to neglect (sic) within ten (10) calendar days after the date or receipt of Notice of Award, to execute and deliver an agreement in the form provided herein, or to execute and deliver a performance bond and a labor and material bond in the amounts required and in the form prescribed, the undersigned shall be liable to the Fund, as liquidated damages, for the amount of the bid security or the difference between the Total Bid of the undersigned and the Total Bid of the bidder submitting the next lowest bid, whichever sum shall be higher, otherwise the total amount of the bid security will be returned to the bidder in accordance with the provisions set forth in the Information for the Bidders.

After submitting the lowest bid and a deposit check, the Debtor did not deliver a performance bond to the SUCF because its regular insurer, United States Fidelity and Guaranty ("USF&G") terminated its bonding and (as it turned out) did so wrongfully. The SUCF returned the Debtor's deposit through what the SUCF claims was a clerical error, re-let the contract to the next lowest bidder for $200,500.00 more, and now seeks liquidated damages in that amount under paragraph 11 as a result of the Debtor's failure to obtain bonding. The Court reaches the following conclusions after considering the briefs:

First, the clearly stated intent of paragraph 11 of the Bid Proposal was to leave the Fund free to go to the next lower bidder after 10 days, and to provide for liquidated damages

if recourse to the next lowest bid results from the "neglect" or "refusal" of the lowest bidder to ante-up within those ten days. (Of course, "refuse to neglect" is a mere typographical error, and the SUCF's effort to elevate it to an "ambiguity" so as to permit parol is rejected.)

The case of *Davin v. City of Syracuse*, 126 N.Y.S. 1002 (County Ct. Onondaga, 1910) is clearly correct in its view that the purpose of such a provision is to assure good faith and prevent "experimental" bidding.[1] If the low bidder acts in good faith but was incapable of anteing up, the SUCF has only lost 10 days. Thus, a bidder is not an insurer of its ability to obtain a bond, but is only an insurer of its own good faith. Indeed the case at Bar is the paradigmatic case of how events may cause a good faith bidder to be rendered unable to obtain the bond it had been relying upon. Elia's long-time bonding company terminated the blanket bond (wrongfully, a jury ultimately concluded) after the bid and before the award.

The SUCF's reliance on state law that requires such bonds and its reliance upon the Debtor's knowledge of the "risks" of bidding are misplaced. The fact that a bond must, under law, be obtained, does not mean that an inability to obtain a bond that a bidder thought it had, bears a paragraph 11 liquidated damages risk. Rather, the risk the bidder who does not "refuse" or "neglect" takes is that if it cannot obtain the bond despite a good faith effort, it loses the award

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[1] In *Davin*, the court was presented with a "bald refusal to abide by the terms of [the] agreement." Both in *Davin* and in *City of Philadelphia v. American Coastal Industries, Inc.*, 704 F.Supp. 587 (Dist. Ct. E.D. Pa. 1988) it is clear that the courts were dealing with breaches of contract. In the earlier, the court found that the "bald refusal" constituted a breach, and in the latter the court found there to have been an "agreement" to provide a bond, from documents separate and apart from paragraph 11. The present court finds that there never was any contract between the parties other than the undertaking in paragraph 11, and that the SUCF has been very careful to avoid claiming that there was a contract.

and has lost what it spent in "bidding" the job. Paragraph 11 deals only with a very specific consequence of very specific actions.

The Court, therefore, rejects the SUCF's effort to equate "neglect" with "fail" or "omit" where there has been diligent, but unsuccessful, effort. There simply is nothing that links the various mandates and obligations to the damages specified in paragraph 11 other than the "refusal" or "neglect" specified in paragraph 11 itself. Indeed, the SUCF's own nomenclature seems to have significance. The SUCF does not suggest that a bid is an "offer" and an award is an "acceptance," in hornbook terms. Rather, SUCF concedes that no "contract" may be "approved" before the bond is in place. See Finance Law § 137(1); SUCF brief at p. 6. ("Without those bonds, SUCF can not award a contract.") And the SUCF expressly states "[c]learly then, a contract is not created by the acceptance of the bid proposal standing alone." See *id.* at p. 13.

No statute or regulation is cited that punishes bidding without a bond and paragraph 11 is the only "agreement" by a bidder to answer in damages for what has not yet become a contract. As the Debtor argues, its terms are not vague or ambiguous (despite the typographical error), and they favor the Debtor here.

Second, despite SUCF's protestations to the contrary, it is neither unjust nor inequitable "for Elia to recover money for USF&G's conduct regarding, *inter alia*, the SUCF project and not be required to pay SUCF for the damages SUCF suffered[2] and what are deemed

[2]If by "damages . . . suffered" the SUCF is referring to liquidated damages rather than actual damages then the argument is puzzling, since liquidated damages are always creatures of

part of the recovery Elia obtained from USF&G." (p. 16) This is because even if it were to be assumed that the settlement with USF&G did include lost profits to Elia on account of the SUCF project, and also any liability of Elia to SUCF, such a settlement does not give rise to a claim by SUCF against Elia that would not succeed on its own merits. Nor does it lead to a finding that SUCF suffered "damages" that it did not actually suffer. Taking the second point first, there were no actual damages. Apparently, Elia sought and received from SUCF a number of extensions of time to comply with paragraph 11. If those extensions posed a risk to SUCF, then SUCF needn't have granted the extensions, and any "damage" arising from delay was SUCF'S self-inflicted wound. Moreover, there is no suggestion that there was any loss. The contract was let to the next lowest bidder just as it would have if SUCF had asserted its right to do so 10 days after Elia was notified of the award. There was no rebid or price-creep. The SUCF did not lose any benefit that the 10-day "escape" of paragraph 11 gave it, except a delay that the SUCF chose to grant.

As to what Elia recovered from USF&G, the possibility that Elia might have parlayed as against USF&G an argument that Elia might have some liability to SUCF, does not translate into an otherwise non-existent liability of Elia to SUCF. Were this not so, then every baseless claim would be elevated to a right of recovery whenever the baseless claim is considered in connection with settling a claim against any third party surety, contributor, indemnitor, or

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express contract, not equity or quasi-contract. Hence, the Court presumes that it is actual damages that the SUCF refers to.

other obligor.[3]

Third, in light of the above, there is no need for the court to determine whether SUCF waived its claim by returning Elia's deposit.

Lastly, the SUCF is correct that there is no evidence before the Court to suggest that Elia sought unsuccessfully to obtain bonding from some other source other than USF&G in connection with its duty under paragraph 11. Furthermore, the Debtor is incorrect in suggesting that it is SUCF's burden to demonstrate that there was "neglect" or "refusal" vis-a-vis the possibility of obtaining bonding from another source. No claimant in a bankruptcy case is required to do more investigating that is necessary to conclude that it is fair to assert that money is owed. SUCF has pointed out that Elia pursued only USF&G, and Elia does not respond to this assertion, and in light of the Court's detailed knowledge of the importance of the USF&G relationship to Elia's pre-bankruptcy existence, it would not be surprising if Elia did not pursue any option other than USF&G. The SUCF project was only one of many projects for Elia, and it seems to the Court that Elia's foremost concern was the many projects already underway.[4]

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[3]If I physically injure and incapacitate you, and you by "puffing" convince me that you might conceivably be held liable to others as a result of your being unable to perform certain "obligations," those who might in fact seek to assert baseless claims against you are not suddenly vested with a right of recovery from you by the mere fact that you recovered something from me for that potentiality.

[4]A large portion of the numerous claims objections heard by the Court previously in this case involved amounts paid by USF&G to others to complete projects after USF&G terminated Elia's bond. The liabilities of Elia that USF&G paid were taken into account in USF&G's net settlement payment to Elia. Thus, although the settlement computations have never been before this Court, the scope of Elia's obligations to others in numerous projects, satisfied eventually by USF&G and credited in some manner both in the settlement and in the resolution of claims

If Elia could demonstrate that it made all reasonable efforts to obtain a bond for the SUCF project, then that would lay the matter to rest. But even if it cannot do so the court is satisfied that under the undisputed circumstances of this case, such a showing is not a prerequisite to taking the matter outside the liquidated damages provided for in paragraph 11. As noted above, the SUCF asks the Court to define "refuse or neglect" to mean "fail to obtain." But even if one views the request to be less extreme – to view it as a request that "refuse or neglect" be defined to mean "refuse or fail to exercise reasonable effort to find a bonding source other than your usual one" – that is an invitation that the Court does not accept. We are not dealing here with unsophisticated parties who lack legal counsel. Government contracting at the seven-digit level (over a million dollars) is highly sophisticated and counseled. The notion that to "neglect" to provide a bond within such a context must be interpreted as the legal equivalent of "fail despite exhausting all reasonable opportunity to obtain" simply belies what lawyers think they labor toward. Though courts often hear and respect lawyers' efforts to attribute a post hoc and profound meaning to the otherwise-puzzling actions or words of lay persons, lawyers will not be heard here to claim that their unambiguous language should be construed to stand not merely for something different than what they drafted, but to stand for that other position to a degree of articulation and refinement that would be a glowing achievement by a lawyer who set out to achieve such other purpose. In other words, had the state sought to draft language that would have given rise to liquidated damages against Elia under the circumstances present here,

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against this Chapter 11 estate, are well-known to this Court.

the language might well have failed in that objective.[5] Consequently, language that is not even remotely in the realm of application to the facts here, will not be construed to have presaged such facts and resolved the matter of damages in the Fund's favor. The Debtor's Objection is sustained. Claim # 36 is disallowed.

SO ORDERED.

Dated: Buffalo, New York
May 14, 1999

/s/ Michael J. Kaplan

U.S.B.J.

[5]As noted in *In re Ondrey*, 227 B.R. 214, n.8, this writer has often ruled that one "will not be found to have successfully attained a status, as against creditors, which he or she, without compelling reason, did not even seek." Thus, for example, equitable liens or constructive trusts are not upheld where a creditor knew full well how to obtain a perfected lien, but for some excuse that did not involve wrongdoing by the debtor, failed even to try to perfect; and a foreign pension fund is not "deemed" to be exempt property because it is "like" an exempt IRA where no effort was made to have the fund qualified as an IRA; and words used by lawyers or non-lawyers to address perceived issues are not be construed to favor one party over the other in connection with an unperceived eventuality; and agreements which are clearly something other than what they are labeled to be will not be treated as if they exquisitely achieved the labeled purpose.