

Private Improvement on Public Land – Needs Improvement

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The New York City Building Code contains the legislatively mandated rules for new building construction and building renovation in New York City (the City). The original Building Code, which was enacted in 1968, served as the bible for building construction in the City until 2008. In 2008, the Building Code was updated and streamlined to address, among other things, modern advancements in construction.

The 2008 Building Code was incrementally implemented and, during a cusp period, owners and/or developers were able to elect which version of Building Code would govern the construction. That election was required to be noted on the plans submitted to the New York City Buildings Department (Building Department) for plan review and clearly posted on building permit(s).

Regardless of whether the proposed work was to be performed under the 1968 Building Code or the 2008 Building Code, certain protections for the safety of the public and those performing construction were required to be met, including sidewalk shedding and scaffolding. A sidewalk shed is the overhead protection that often times straddles a public sidewalk, walkway or ingress/egress of a building under construction, and protects the public from falling objects from the building construction overhead.

In a recent case, the court was asked to interpret a public owner's plans to determine, first which version of the Building Code applied to the project (1968 or 2008) and second, whether certain additional owner-requested sidewalk shedding was required to be erected by the contractor under the contract and/or the applicable version of the Building Code. The contractor claimed that the public owner elected to build the project under the 1968 Building Code and that the 1968 Building Code did not require the contractor to erect sidewalk shedding in an area around an existing building on the project site. The contractor further alleged that the public owner's construction plans did not require sidewalk shedding around the existing building. Additionally, the owner approved the contractor's site safety plan, which plan was in accordance with the 1968 Building Code, and did not require sidewalk shedding around the existing building. After the building permit was issued (under the 1968 version of the Building Code) and construction commenced, the public owner directed the contractor to erect additional sidewalk shedding around an existing building on the project site. The contractor complied with the direction and then requested a change order for the increased costs to erect and maintain the additional sidewalk shedding. The owner denied the change order request.

The contractor then commenced an action to recover damages for breach of contract, alleging that it was entitled to compensation for the additional sidewalk shedding that it erected around the existing building. The public owner asserted that the contractor was obligated to install the sidewalk shedding because the contract required the contractor to

“install and maintain sidewalk sheds” in “areas within the property lines . . . [where] necessary to provide proper protection to the [occupants of the existing building], workers and pedestrians,” and to comply with “the provisions of all applicable State and City laws, rules, regulations and requirements pertaining to building code safety requirements,” including the New York City Building Code. The public owner moved for summary judgment dismissing the complaint, and the contractor cross-moved for summary judgment on the complaint. The trial court granted the public owner’s motion and dismissed the action. The contractor appealed.

In overturning the trial court’s decision, the appellate court held that regardless of whether the public owner elected to perform the work in compliance with the 1968 Building Code or the 2008 Building Code, the public owner failed to submit evidence demonstrating that the scope of work performed at the existing building required sidewalk shedding. Therefore, the public owner failed to establish that the contractor was obligated under the contract to install the sidewalk shed around the existing building.

The court further held that the contract provision requiring the contractor to install sidewalk shedding “to provide proper protection” was ambiguous with respect to whether it obligated the contractor to install a sidewalk shed around the existing building. The case has been sent back to the trial court to determine factual issues, including whether the specific work performed at the existing building required sidewalk shedding under the contract and/or Building Code.

Commentary

What saved the contractor in this case was the court’s finding that the public owner’s contract was ambiguous and subject to interpretation. A contractor, however should not rely upon a court finding that a contract is ambiguous. Most often, the court will enforce the terms of an agreement, when those terms are clear and complete. It is only in limited instances when there is an ambiguity and the contract language is written so imperfectly that it is susceptible to more than one reasonable interpretation. In these limited cases, the courts will allow extrinsic evidence to aid in resolving the ambiguity. With regard to public contracting, a contractor cannot rely on an ambiguity to support a claim after the contract is awarded. The general rule is that a contractor is required to seek clarification from the public owner regarding a perceived patent ambiguity pre-bid and the failure to do so prevents the contractor from raising an ambiguity argument after the contract is awarded. It is only in limited situations where there is a latent ambiguity that the contract can show reliance on its “reasonable interpretation” of the allegedly ambiguous provision.

This case highlights the need for contractors and subcontractors to pay close attention to the details contained in the owner’s construction plans and compare those details against the Building Code. While the Building Code does not change yearly, since 2008, the Building Code has been further updated. Contractors and subcontractors should regularly check the Building Code before they bid a project to ensure that their respective bids include the costs to build the project in accordance with the existing and potentially changing Building Code. If there is doubt regarding which Building Code applies for the

perspective project, the contractor and/or subcontractor should inquire pre-bid.

Feel free to contact me to discuss public construction projects and the special and/or different rules regarding same.