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Review of Green County Jail Contracts

I am an attorney with my primary office in New York City. My practice for the past 36 years has included the representation of individuals, organizations and businesses in negotiations and before tribunals throughout the world in high stakes cases involving contract claims, individual and business liability claims, criminal charges and professional malpractice claims. Amongst the issues our firm addresses are construction issues and therefore I have familiarity with contracting issues and AIA contracts.

I have reviewed four (4) contracts related to the Greene County Jail Facility, including the Ashley, Danforth, Bellamy and Hummel Saratoga contracts. In terms of legal contractual language, all four contracts are identical. I have also reviewed the recording of the May 15, 2019 County Legislature meeting during which there was extensive discussion about whether to proceed with the contracts for the Greene County Jail construction.

Of particular interest, and deeply troubling, is the fact that none of these contracts were signed by County Attorney Edward Kaplan until AFTER the May 15, 2019 county legislative meeting at which discussion was had of delaying and/or not implementing these contracts. Despite those discussions, the contracts were signed by Mr. Kaplan on May 23, 2019, AFTER the state criminal justice reforms were passed – which, it is well known, will significantly reduce the number of individuals held in pretrial detention in county jails throughout the state.

During the May 15, 2019 county legislative meeting, County Administrator Shaun Groden – with Mr. Kaplan, his attorney, sitting at his side – spoke repeatedly about the existence of liquidated damages clauses in the jail construction contracts, which would be payable if the contracts were not implemented. There is no provision for liquidated damages in any of the four contracts. The suggestion that there are liquidated damages clauses in these contracts is simply a falsehood, and any attorney who does this work would or should know that.

Often, though not in these contracts, contracts that involve the exchange of money and the promise of performance have a liquidated damages stipulation. The purpose of this stipulation is to establish a predetermined amount that must be paid if a party fails to perform as promised. There are no liquidated damages terms in these contracts.

The four contracts identified above are written on AIA boilerplate term sheets. AIA contracts are drafted from the perspective of the contractor, not the owner. Typically, therefore, a competent owner's attorneys will negotiate the terms of an AIA contract to protect the interests of the owner. Unfortunately, that protection was not provided in this case.

Under these contracts, the ability of an owner to terminate the contract for some reason other than "for cause" is controlled by Article 14.4.3, which reads: *"In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed."*

Typically, owners' attorneys will protect the owner's position by negotiating a limit to the overhead and profits payable under these circumstances. The result of the utter failure to address the issue at all is that Greene County is left having to litigate what amount of profit, on contracts that have not been implemented at all, is "reasonably" payable in the event of a decision not to implement these contracts. In any event, there is no reason to expect that the entire profit or overhead on the entire contract would be payable as a windfall to a contractor who had not performed at all. Relevant caselaw supports this. In addition, there remains a legal issue, discussed below, of whether, under the current conditions, the contracts are yet even enforceable.

The contracts require the parties to enter into mediation to resolve these issues before resorting to litigation. The vast majority of these kinds of issues are resolved through rapid and inexpensive mediation.

Despite Mr. Kaplan having signed these contracts on May 23, 2019, they are still not in effect. Article 8 of each contract has an addition to it that requires that the Agreement cannot become effective until the Agency State Director or the State Director's delegate signs off on the contract. At this point, it is not clear which State agency must sign off, but what is clear is that none of the contracts have executed State Agency sign-offs attached. So, despite Mr. Groden's incorrect assertion on May 15 that the contracts are binding, they are not and cannot become binding until the State Agency signs off. Therefore, it is reasonable to believe that, at this point, in the absence of binding contract, no overhead and profit would payable to the contractors.

ARTICLE 8, MISCELLANEOUS PROVISIONS

Add the following subparagraph to paragraph 8.6:

8.6.1 This Agreement and any amendments to this Agreement shall not become effective until concurred with in writing by the Agency State Director or the State Director's delegate. Such concurrence shall in no way commit the Agency to render financial assistance to the Owner and is made without liability to the Agency for any payment thereunder. In the event such assistance is provided, the Agency's concurrence merely signifies that the provisions of this Agreement are consistent with Agency requirements.

Finally, the contracts all require that before any work may commence a "Notice to Proceed" must be issued. At this point, no "Notice to Proceed" has been issued. Therefore again, Mr. Groden's statement on May 15, 2019 that the county could be liable for work done by the contractors at this point is, again, simply wrong. No contractors are authorized to commence any work until a Notice to Proceed is issued and certainly, until the State Agency has signed off on the contacts, that cannot happen. Moreover, while the County Legislature contemplates whether to proceed with this contract at all, the County Administrator and his attorney should be instructed not to issue a Notice to Proceed.

In conclusion, it is apparent that no enforceable contact is currently in effect. Moreover, it is clear that the interests of the County have not been adequately protected and further, that the actions of the County Attorney in signing the referenced contracts on May 23, 2019 – after serious doubts were raised during a legislative session about whether there continues to be interest in pursuing those contracts – was beyond his authority, clearly designed to undermine the ability of those legislators who wanted to consider alternatives and likely contrary to the interests of his client.



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