

**FEBRUARY 2008**

**CONTRACTORS: PROCEED AT YOUR OWN RISK  
WITH ORAL NOTICES TO PROCEED**

A recent New York Appellate Division case denied a subcontractor's right to claim money damages even though the contractor orally stated that the subcontractor had won the bid and could commence working.

A contractor and subcontractor entered into a term sheet prior to the awarding of a bid. The subcontractor then began performance relying on the contractor's oral statement during a conference call that the bid was awarded to them. However, the contractor later told them that the bid was awarded to someone else. In the ensuing dispute between the contractor and subcontractor, the court held in favor of the contractor because in the term sheet, the parties agreed that they could only be bound by a written agreement that was executed by both parties. The court reasoned that in spite of the fact that the subcontractor was relying on an oral representation by the contractor, "[w]e think it is preferable to allow sophisticated parties operating in the business world to decide when and how they wish to enter into legally enforceable contracts."<sup>1</sup>

The ramifications of this decision, particularly to those involved in the construction industry where timing deadlines are crucial, are significant. Subcontractors are often told that they have won a particular bid and that they should commence work immediately while the final documentation is being prepared. Demanding receipt of a fully executed agreement by the subcontractor could result in the loss of a bid altogether, while commencing work in reliance on the contractor's oral statement could result in failure to obtain proper compensation or monetary damages if such bid is subsequently revoked. The most important thing to remember, however, is to honor the terms of any written agreement between the parties. If the term sheet says an executed writing is required for a definitive agreement, understand your risk before moving

---

<sup>1</sup> Jordan Panel Systems, Corp. v. Turner Construction Company, 45 A.D. 3d 165 at 174 (N.Y.A.D. 1<sup>st</sup> Dept. 2007).

forward with the project.

We can assist you in preparing new agreements and reviewing your existing term sheets and business relationships to determine if an executed writing is required for further action to be taken. We can help you determine who would be protected by this decision and who is not. We can also discuss with you other provisions that could be drafted in your agreements to provide further protection to your company.



*Moritt Hock Hamroff & Horowitz LLP is a broad based commercial law firm with 35 lawyers and a staff of paralegals. The firm has extensive experience in litigation; creditors' rights and bankruptcy; real estate law; trusts, estates & taxation; direct marketing, advertising & new media; intellectual property & unfair competition; employment law; healthcare law; corporate & securities law; equipment & vehicle leasing; financial services & secured lending; and not-for-profit law.*

*This Alert was written by Eric M. Mencher and Kyle M. Lawrence. Mr. Mencher, a partner with the firm, heads up the firm's corporate and securities group where he concentrates his practice in all phases of corporate and commercial matters including corporate formation and structuring, transactions, general commercial contracts and employer/employee relations. Mr. Lawrence, an associate of the firm, practices in our corporate, securities, and financial services group where he focuses his practice in the area of corporate transactions, corporate financing, securities, and mergers and acquisitions.*

*Any questions concerning the matters raised in this Alert should be addressed to either Mr. Mencher or Mr. Lawrence. They can be reached at (516) 873-2000 or by e-mail at [emencher@moritthock.com](mailto:emencher@moritthock.com) or [klawrence@moritthock.com](mailto:klawrence@moritthock.com).*

*400 Garden City Plaza • Garden City NY 11530  
Tel: (516) 873-2000 • Fax: (516) 873-2010  
[www.moritthock.com](http://www.moritthock.com)*