IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

J. W. WALKER & SONS, INC., a Delaware corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. 7C-09-034 MMJ
CONSTRUCTION MANAGEMENT SERVICE, INC., a Delaware corporation,	)	
Defendant.	)	

Submitted: December 16, 2007
Decided: February 28, 2008

On Defendant Construction Management Service, Inc.'s, Motion to Dismiss.
GRANTED IN PART; DENIED IN PART.

MEMORANDUM OPINION

Donald L. Logan, Esquire, Victoria K. Petrone, Esquire, Logan & Associates, LLC, Wilmington, Delaware, Attorney for Plaintiff.

Paul G. Enterline, Esquire, Georgetown, Delaware, Attorney for Defendant.

JOHNSTON, J.

PROCEDURAL CONTEXT

On August 6, 2007, J.W. Walker & Sons, Inc., filed a complaint against Construction Management Service, Inc. ("CMSI"), claiming: (1) breach of contract; (2) negligence; and (3) violation of 29 *Del. C.* § 6962(d)(10)(b)(3). On October 27, 2007, CMSI filed a Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). Walker filed an answer on November 28, 2007. On December 14, 2007, CMSI filed a reply memorandum. The Court heard oral argument on December 16, 2007.

STATEMENT OF FACTS

Walker, a subcontractor, submitted a bid to provide masonry work for a construction project at Delmar Middle & Senior High School. Walker claims that CMSI, a contractor, named Walker as the specified masonry subcontractor in its bid to the owner of Delmar. Walker believes this formed a contract between the two parties, which CMSI subsequently breached.

MOTION TO DISMISS

CMSI filed a 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. The Court must determine whether Walker has a viable cause of action.[1] Walker's claim may not be dismissed

[1] *Proctor v. Taylor*, 2006 WL 1520085, at *1 (Del. Super.).

"unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."[2] When applying this standard, the Court will accept as true all well-pleaded allegations.[3] If Walker may recover, the Court must deny the motion to dismiss.[4]

CMSI claims: Count I should be dismiss for failure to allege sufficient facts, *i.e.*, whether the parties entered into a "satisfactory contract;" Count II, negligence, is barred by the economic loss doctrine; and Count III, violation of 29 *Del. C.* § 6962(d)(10)(b)(3), should be dismissed because the statute does not create a private cause of action for subcontractors. During oral argument, CMSI conceded that Count I, breach of contract, should not be dismissed. Therefore, the Court will consider Counts II & III.

ANALYSIS

Economic Loss Doctrine

CMSI argues Count II should be dismissed because Walker's negligence claim is based on economic losses and barred by the economic

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[2] *Plant v. Catalytic Constr. Co.*, 287 A.2d 682, 686 (Del. Super. 1972).

[3] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[4] *Id.*

loss doctrine. Walker admits the losses are purely economic, but argues the economic loss doctrine is not applicable.

Pursuant to the economic loss doctrine, a recovery in tort is prohibited where a "product has damaged only itself (*i.e.*, has not caused personal injury or damage to other property) and, the only losses suffered are economic in nature."[5] Economic loss is "any monetary loss, costs of repair or replacement, loss of employment, loss of business or employment opportunities, loss of good will, and diminution in value."[6] The economic loss doctrine was adopted to prohibit "certain claims in tort where overlapping claims based in contract adequately address the injury alleged."[7]

Walker's economic injury is based purely on the alleged breach of contract by CMSI. The Court will not extend tort law into areas adequately addressed by contract law.[8] The economic loss doctrine excludes Walker from bringing a negligence claim where the damages are based solely on economic losses.

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[5] *Danforth v. Acorn*, 608 A.2d 1194, 1195 (Del. 1992).

[6] *Christiana Marine Serv. Corp. v. Texaco Fuel & Marine Mktg*., 2002 WL 1335360, at *5 (Del. Super.).

[7] *Brasby v. Morris*, 2007 WL 949485, at *6 (Del. Super.).

[8] *Id.* at 7.

Private Right of Action

CMSI argues Count III should be dismissed because 29 *Del. C.* § 6962(d)(10)(b)(3) does not create a private cause of action for subcontractors. Specifically, CMSI argues Walker is not in the class of persons intended to be protected by the statute. Instead, the statute was intended to benefit State agencies and the public at large.

29 *Del. C.* § 6962(d)(10)(b)(3) provides:

> After such a contract has been awarded, the successful bidder shall not substitute another subcontractor for any subcontractor whose name was set forth in the statement which accompanied the bid without the written consent of the awarding agency. No agency shall consent to any substitution of subcontractors unless the agency is satisfied that the subcontractor whose name is on the bidder's accompanying statement:
> A. Is unqualified to perform the work required;
> B. Has failed to execute a timely reasonable subcontract;
> C. Has defaulted in the performance on the portion of the work covered by the subcontract; or
> D. Is no longer engaged in such business.

To determine whether a private right of action has been created, the Court will assess: "(1) whether the plaintiff is a part of a class of specific persons the statute was enacted to protect; (2) whether there is any evidence of legislative intent to grant or deny a private cause of action under the statute; and (3) whether the presence of a private cause of action is

consistent with the purpose of the legislation."[9] "In some cases, the intent to create a private remedy may be inferred where a statute was obviously enacted for the protection of a designated class of individuals."[10] When not expressly created or denied by the statute, "the issue is whether or not the requisite legislative intent is implicit in the text, structure or purpose of the statute."[11]

Walker claims the purpose and clear intent of the statute is to protect the named subcontractor from bid shopping, undercutting, and negotiations after the public bid opening. CMSI argues the statute was enacted to ensure the State agency is informed of the identity of the subcontractors in order to determine if they are properly qualified to do the work.

29 *Del. C.* § 6962, Large Public Works Contract Procedures, is applicable to State agencies involved in large public works contracts. Section 6962 details procedures an agency must follow prior to accepting a contract. For example, pursuant to section 6962(c)(1) an agency must establish a two-step process for the prequalification of contractors and subcontractors. Pursuant to section 6962(d)(1), an agency must have all

[9] *Eller v. Barrton*, 2007 WL 4234450, at *7 (Del. Super.).

[10] *Brett v. Berkowitz*, 706 A.2d 509, 512 (Del. 1998).

[11] *Id.*

specifications and plans prepared by a licensed architect or engineer. The section also lists various reasons an agency may deny or cancel a contract.

Section 6962(d)(10)(b) specifically deals with subcontracting requirements. Section 6962(d)(10)(b)(1) states that all bids must specify the name, address, material and work to be performed by subcontractors. Pursuant to section 6962(d)(10)(b)(2), an agency must not accept a bid in which the contractor has listed itself as the subcontractor. The subsequent and disputed section deals with the substitution of subcontractors after a bid has been accepted.

Reading section 6962 as a whole, it is clear section 6962(d)(10)(b)(3) was enacted so an agency can nullify a contract when a subcontractor is replaced after acceptance of a final bid. The pertinent language in section 6962(d)(10)(b)(3) states that "[n]o agency shall consent to any substitution of subcontractors unless…." Additionally, pursuant to section 6962(d)(10)(b)(4), agencies must include a penalty clause against the successful bidder for its failure to utilize any or all of the subcontractors listed in the bid.

The statute does not explicitly create or deny a private right of action for subcontractors. Having reviewed the text, structure and purpose of the statute, the Court finds no implicit legislative intent to create a private

remedy for subcontractors aggrieved during the bidding process. Therefore, the Court finds that section 6962(d)(10)(b)(3) does not create a private right of action for subcontractors.

CONCLUSION

The Court finds Plaintiff's negligence claim is barred by the economic loss doctrine. The Court finds subcontractors do not have a private right of action pursuant to section 6962(d)(10)(b)(3).

THEREFORE, CMSI's Motion to Dismiss Counts II & III is hereby **GRANTED.** CMSI's Motion to Dismiss Count I is hereby **DENIED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston