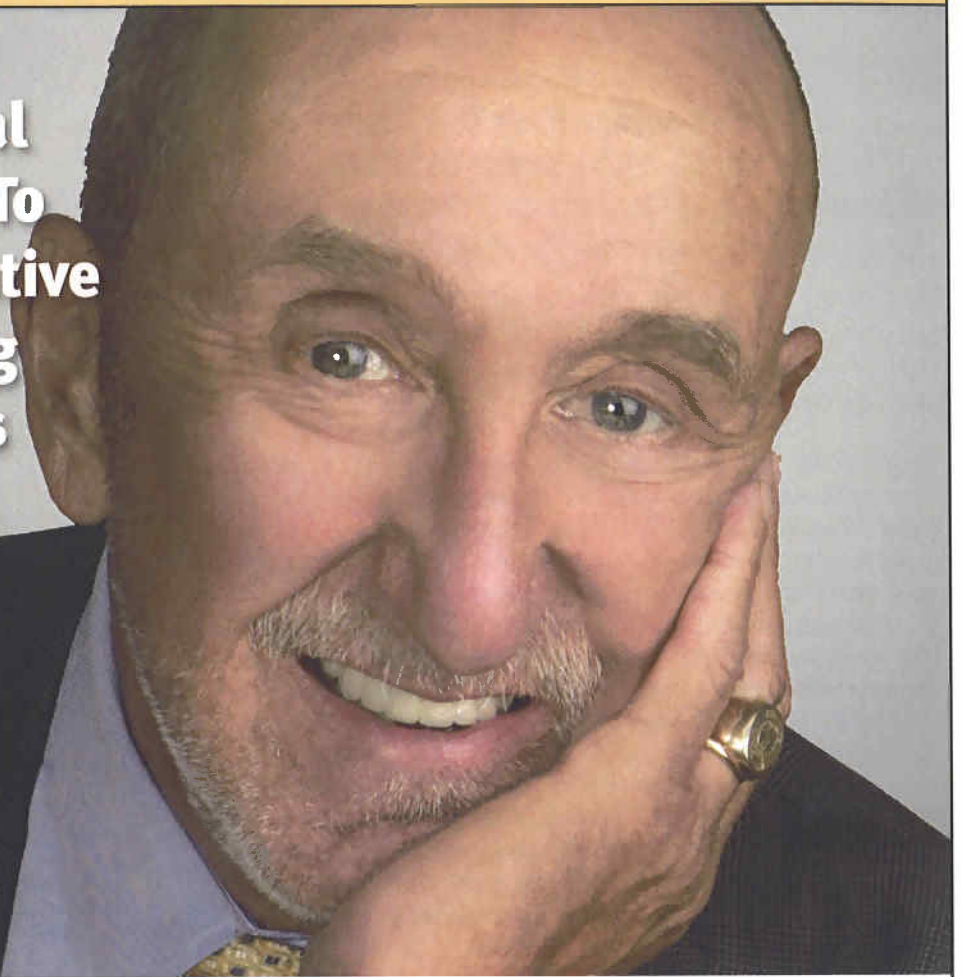


# Subcontractors May Not Have Legal Standing In Court To Review Administrative Decisions Affecting Their Subcontracts Issued By Public Agencies

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THE EFFECT OF THE DECISION REFERRED TO IN THIS ARTICLE may very well influence the courts of New York and New Jersey. Subcontractors submitting multi-million dollar bids for public works projects should be aware of a recent Connecticut ruling which shielded the Connecticut State Department of Public Works ("Department") from litigation involving a listed subcontractor's appeal of a Department decision. In *Ferguson Mechanical Co., Inc. v. Department of Public Works*, 282 Conn. 764, 924 A.2d 846 (2007), the Supreme Court of Connecticut held that once the Department approves a General Contractor's (GC's) request to replace a listed subcontractor on a bid for a public improvement project, the aggrieved listed subcontractor cannot appeal the Department decision in court.

The listed subcontractor, Ferguson Mechanical Company, Inc. ("Ferguson") submitted a \$12.2 million bid to the General Contractor, O&G Industries (O&G) for the installation of the HVAC system for the East Connecticut State University Science Center. Subsequently, the Department accepted O&G's bid on the general contract which listed Ferguson as the HVAC subcontractor.

Ferguson did not immediately sign the subcontract and tried to negotiate the terms and conditions of the subcontract regarding the requirement that it obtain surety bonds. Under

Connecticut law, a listed subcontractor has five days to sign the subcontract from the time the General Contractor serves it. O&G felt it had good cause under Connecticut's statutory law to replace Ferguson with another subcontractor due to Ferguson's delay in signing the subcontract. Without giving notice to Ferguson, O&G requested the Department's approval to substitute another contractor for Ferguson because it had refused to sign the subcontract. O&G was granted the requested relief. The Department then notified Ferguson that it was no longer the HVAC subcontractor on the project and that it had authorized a substitution. Thereafter, Ferguson filed a petition with the Department. The Department conducted an informal conference where it, not surprisingly, upheld its decision approving the substitution.

Ferguson went to court asking for a reversal of the Department's decision to replace Ferguson as the listed HVAC subcontractor. The Department then moved to dismiss the action on grounds that Ferguson had no right to an appeal and the Department won its motion. Ferguson appealed to the Supreme Court of Connecticut which affirmed the trial court's decision on grounds that Ferguson did not have standing to appeal the Department's ruling. That court found that Connecticut law only allows for an appeal of an agency decision in certain limited and well-defined circumstances. Both the trial court and the Supreme Court of Connecticut

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found that the state legislature did not intend to authorize a right of appeal to the courts from every determination of an administrative agency.

Significantly, only a party who has received a final decision in a contested case is allowed to appeal the decision in court. Connecticut law narrowly defines a contested case as a proceeding in which the legal rights, duties or privileges of a party are required by state statute, or regulation to be determined after a hearing. A listed subcontractor, like Ferguson, did not possess this legal right because the Department was not required by statute or by regulation to determine Ferguson's legal rights or privileges in a hearing. As stated, the Department is only required to establish a procedure for addressing claims that the public bidding statutes were violated. The procedures that the Department's Commissioner adopted provided only for quick, informal and conclusive conferences allowing the parties an opportunity to argue their respective positions regarding the alleged violations of the public bidding statutes.

Connecticut's legislation was clearly not designed to protect aggrieved subcontractors but as the court noted to promote the public interest in the efficient completion of public works projects.

There is an old saying amongst legal scholars: bad facts make bad law. In this instance, clearly Ferguson dallied in signing the subcontract. The court's sympathy did not lie with Ferguson. On the other hand, if we had a subcontractor who acted promptly in signing the subcontract, but the contractor refused to sign because it wanted to buy the work cheaper from another subcontractor, there is a good likelihood that the results may have been different. ●

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