Goldberg & Connolly

ATTORNEYS AT LAW

CONSTRUCTION LAW E-UPDATE

AVOID FORFEITING VALUABLE CLAIMS AND OTHER RIGHTS IN EXTENSION OF TIME REQUESTS

By Henry L. Goldberg, Managing Partner, Goldberg & Connolly

JULY 2013

We continue to sound the alarm about the increasingly wide-spread use by public agencies of C.O.F.E.D.s ("Contractor Forfeiture Enhancement Devices"). The drumbeat of this campaign will warn of the land mines to which we have seen contractors and subcontractors repeatedly, and tragically, fall victim.

In this article, we alert you to New York City's efforts to have contractors waive valuable claim rights through the use of its standard extension of time ("EOT") request that City agencies routinely require contractors to execute in order to avoid the imposition of liquidated damages.

The New York City Standard Construction Contract's Article 13 provides that a contractor's EOT request shall include a statement that the contractor waives all claims except for those specifically delineated in the contractor's EOT request. The contractor, in a detailed bill of particulars, must include specific details concerning the claims being reserved.

City agencies have previously provided contractors with EOT forms that contain waiver and release language. What is new is that they are now taking these waivers seriously. A new generation of City attorneys and contract administrators are increasingly and shamelessly attempting to literally apply this dangerous language.

All mayoral agencies routinely require contractors to state in EOT requests that they "agree" to waive and release any and all claims including, but not limited to, damages for delay or any other cause whatsoever, which we may have against the City of New York in connection with this [the parties'] contract, except for claims affirmatively reserved in the written EOT request. Any claims that are not identified in the EOT request are deemed waived. This is, by its very nature, a classic example of a COFED and it is designed to trap the unwary.

The hallmark of a COFED is its unnecessary or gratuitous quality. Clearly the waiver of all contract rights is hardly necessary for the City to analyze an EOT request. There is simply no justification for the inclusion of this waiver language.

Moreover, the standard NYC EOT request form requires contractors to provide, per Contract Article 13.8.2: "the nature of each alleged cause of delay in completing the work," "the date upon which each such cause of delay began and ended," and "the number of days attributable to each such cause." Again, this level of detail should not be necessary at this stage of a project and in the context of an EOT request. More typically such details are reserved for an end-of-project formal claim. City agencies are now requiring a level of detail that may even exceed what is actually known at the time of the EOT request, particularly with regard to damages.

The language in the standard NYC EOT request form also purports to preclude contractors from entering into evidence at any subsequent preceding any papers or project records that underlie the delays set forth in an EOT request. Thus, a contractor must provide evidence to support its EOT request, but if it does so, it cannot use such evidence (business records)

again in any other proceeding! This is simply ridiculous, unenforceable and fundamentally unfair. Why would a public owner even attempt to impose such a constraint?

Be aware that City agencies are now demanding that contractor personnel strictly follow EOT request forms, without deviation, and will attempt to reject non-conforming requests. Push back and insist upon including reservation of rights language. Your reservation of rights language should also include "catch-all" provisions reserving the right to assert any and all claims and seek damages relating to delays, extra or additional work and events that may arise in the future (e.g., between substantial and final completion). It is also crucial to reserve your rights to use any and all project records in any future claim proceeding, in light of the form's language that absurdly attempts, as indicated above, to preclude the subsequent use of such critical evidence.

Understand that field personnel for the City will insist on the precise "magic waiver language" as a condition of granting the EOT request. At that personal level, however, the EOT request form is simply a "check list" item that must be complied with without modification; there is no discretion. Do not accept a representation that any deviations or qualifications are "impossible." Ultimately, you may have to have counsel address these issues with attorneys for the particular City agency.

G&C Commentary

Routine EOT requests can and are being used as COFEDs. Contractors must be mindful of the legal significance of the documents they sign and the possible consequences of submitting an EOT request that does not fully reserve, in sufficient detail, all delay-causing events and impacts, or claims for extra or additional work. Keep in mind that when used as a COFED, the EOT request is not simply an application for an extension of time to avoid liquidated damages. It is being used aggressively as an opportunity by the City to foster the waiver of your valuable rights. There is no reason for this other than to enhance contractor forfeitures. Reserve your rights or lose them.

Mr. Goldberg may be reached by email at hlgoldberg@goldbergconnolly.com or by telephone at (516) 764-2800.

Jeffrey I. Scott, an associate with Goldberg & Connolly, assisted with the preparation of this article.