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CONSTRUCTION LAW E-UPDATE

ENOUGH WITH THE COFEDS!

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

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Much is being observed today regarding how one-sided basic contract language has become in the construction industry. This occurs at all levels: between Owner/Developer and CM/GC, CM/GC and Subcontractors and Subcontractors and their second tier specialty trade subcontractors and suppliers. It has really gotten nasty.

When I started in this industry, many bemoaned the disappearance of a culture of honor in the construction industry, which once did business with an honest handshake. The common complaint was that everything was beginning to require a formal "contract" and, of course, that the lawyers were ruining the industry. That seems quaint now. From today's perspective, strict, but fair, formal contract requirements seem like the "good old days."

This article is devoted to one type of these current "nasty" contract provisions which are as pathetically misguided as they are unnecessary. In fact, I am going to coin a phrase to categorize them, namely, "C.O.F.E.D." Hopefully this term will become an epithet in the industry. Once a provision is labeled as such, it should embarrass more prudent parties not to continue to employ them.

Certain of these offensive provisions are related to a very unhealthy trend in the construction industry regarding delay and impact controversies. These have to do with the absurdly strict enforcement of contract provisions requiring notice of delay-causing events and of potential delay/impact damages. These unjustifiable contract provisions are nothing more than "contractor forfeiture enhancement devices" or "COFEDS." The time to stop this cancerous spread of COFEDS is now.

Allow me to explain by example. One of the most unjustified COFEDS is found in the New York State – Department of Transportation ("NYSDOT") Standard Specifications, which states at Section 104-06, entitled "Notice and Recordkeeping" in pertinent part: "The notification and recordkeeping provisions in this Contract shall be strictly complied with for disputes of any nature and are a condition precedent to any recovery."

However, Section 104-06 goes on to state at Subsection C "Failure to Comply":

Failure of the Contractor to provide such written notice in a timely fashion will be grounds for denial of the dispute and the Department does not have to show prejudice to its interest before such denial is made. In the event the Contractor fails to provide a required written notice within the required time limits, or fails to maintain and submit the records specified above, any claim for compensation shall be deemed waived, notwithstanding the fact that the Department may have had actual notice of the facts and circumstances comprising such dispute and is not prejudiced by such failure of notice or recordkeeping.

So what does this COFED mean? If you are late in giving any required contractual notice, your claim shall be deemed waived, even if the NYS-DOT is not prejudiced by such failure on your part. Let's let that sink in. The Contractor fails to give a notification to NYS-DOT that causes no harm whatsoever to the NYS-DOT and the contractor forfeits all of its rights to its valuable claim.

Worse still, this is also "notwithstanding the fact that the NYS-DOT may have had actual notice of the facts and circumstances comprising such dispute and is not prejudiced." What does this mean? A contractor suffers forfeiture of its valuable claim, even where the notice is not necessary because the NYS-DOT already knew about the matter or incident?! Complete forfeiture of a contractor's rights and for no reason.

Why would any "public servant" working for New York State be motivated to write such an unfair and one-sided contract clause? Isn't the NYS-DOT embarrassed by this? Does our New York "Open for Business" governor, Andrew Cuomo, know such COFED language is in his Department's contract?

In law school, I was taught that, "the law disfavors forfeiture." If there was a way to interpret a contract so as to avoid such a harsh or one-sided result, it should be so interpreted. Too many contracts today do just the opposite. In fact, this NYS-DOT COFED requires forfeiture for no reason, where the Department already is aware of the pertinent facts.

New York City's Standard Construction Contract at Article 11.2 states:

"Failure of the Contractor to strictly comply with the requirements of Article 11.1.1 may, in the discretion of the Commissioner, be deemed sufficient cause to deny any extension of time on account of delay arising out of such condition. Failure of the Contractor to strictly comply with the requirements of Articles 11.1.1 (notice and recordkeeping) and 11.1.2 (recordkeeping of damages) shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition and no right to recover on such claims shall exist."

So what does this COFED mean? Firstly, as with the NYS-DOT contract provision, the contractor must strictly comply with the notice, damage and recordkeeping provisions or lose all rights to any recovery ("no right to recover on such claims shall exist"). This certainly seems like an unnecessarily excessive exercise of governmental authority. What if the City agency had actual notice of the facts and circumstances? No exceptions are made for that.

Until recently, the courts of New York State had been very interested in learning whether the contracting agency had actual knowledge of the relevant facts. What right did an agency have to demand an additional notice (or monthly notices every thirty days) from the contractor?

Note, furthermore, that in NYC Contract's Article 11.1.2, the City states that the information presented within the thirty day periods for reporting must be 100% accurate because the damages that the contractor claims "shall not be different from or in excess of statements made and documentation provided pursuant to this article." Thus, not only must the contractor respond with damage calculations every thirty days, they must be completely accurate.

This flies in the face of what has always been allowed in courts of law namely, the free amendment of claims in any legal proceeding to conform to the proof developed at trial. If you showed greater damages at trial, you were entitled to same. Claims were freely amendable. Here, the City is imposing perfection on the contractor, or all rights are, again, waived. This is a classic COFED, with no real purpose other than to foster forfeiture of contractor and/or subcontractor rights.

So why do I use the term COFED? Because stringent contractual demands such as these are so over-the-top, so one-sided, and so unnecessary for the fair and equitable administration of these contracts, that they clearly could have been motivated by only one, inescapable purpose, namely, to impose waiver and forfeiture upon the people who build this City.

Why must a contractor provide ten days (NYS) or seven days (NYC) or two days (NYS-SCA) notice or lose all rights? Because the owner and/or GC actually need such strict or prompt notice? Clearly not.

Some cynically might say, as I have observed, that these provisions afford the upstream party "the opportunity to institute measures that will mitigate damages to all parties and/or to agree to terms and conditions for timely payment for any eligible added costs." Really? So the upstream parties only want to pay you fairly, if only you would give prompt notice? Interesting. Have you ever seen that happen? I am certain you have not.

These are true COFEDS. It is really quite clear when they are stripped naked to their essentials. They should be an embarrassment to any public agency. Unfortunately, they are only examples of an epidemic of such unreasonably onerous provisions. They are "gotcha" provisions on steroids, and they have to stop now.

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