



CONSTRUCTION LAW E-UPDATE

BE CERTAIN NOT TO WAIVE YOUR RIGHTS WHEN DEALING WITH NEW YORK CITY PUBLIC AGENCIES

By Henry L. Goldberg & Mitchell B. Reiter

SEPT 2012

Unfortunately, public agencies in New York City appear driven to coerce contractors into waiving valuable rights and valid claims at every possible opportunity. The contracting community must be increasingly vigilant to avoid the serious consequences of unknowingly forfeiting claims based upon “waiver of claim” mechanisms contained in New York City’s Standard Construction Contract and within the so-called “standard language” in other forms utilized by City agencies for payment and time extensions.

Recently, we encountered yet another example by City personnel to limit a contractor’s “reservation of claims.” Now, in an unjustified effort to further facilitate claim waivers, City agencies are attempting to require contractors to waive claims in return for approval of Extension of Time (EOT) requests. Do not be bullied into agreeing to any alleged “standard” language in an EOT request or accepting representations by City personnel that the City’s waiver language must be included in your EOT request for it to be processed. If you succumb to such pressure, you may lose your right to be compensated for valid claims. Before you execute any document containing language limiting your ability to make claims, consult with your legal counsel.

EOT Requests

EOT requests are governed by Article 13 of the City’s

Standard Contract. Article 13 provides that the contractor’s EOT request will include a statement that the contractor waives all claims except for those specifically delineated (i.e., reserved) and will also include details concerning the claims that the contractor is reserving (i.e., a Bill of Particulars). All EOT requests submitted prior to the Final Payment EOT request should include reservation of rights language for all claims related to project events that are the basis for the EOT request and all prior EOT requests. Any pending claims submitted pursuant to the contract’s dispute resolution procedures (Article 27) should be listed. The reservation of rights language should also include “catch-all” provision(s) reserving the right to assert claims relating to any and all delays, extra work, events that may arise in the future, additional costs for previously asserted claims, etc.

Bill of Particulars Filed with Extension of Time Requests

The City of New York has a “form” Bill of Particulars that must be included with substantial completion and final payment EOT requests. Significantly, the City’s form document includes a provision whereby the contractor, after listing the details of its reserved claims, affirms that the contractor has “no other claims in connection with the contract” and the contractor agrees it “will not assert any other claims against the City of New York, in connection with this contract.” In other words, except for the claims specifically reserved, the City will contend



CONSTRUCTION LAW E-UPDATE

BE CERTAIN NOT TO WAIVE YOUR RIGHTS WHEN DEALING WITH NEW YORK CITY PUBLIC AGENCIES

By Henry L. Goldberg & Mitchell B. Reiter

SEPT 2012

that, by executing the Bill of Particulars, the contractor has expressly waived all claims.

Reserving Claims at Substantial and Final Completion

All known and potential claims and the amount of costs and/or damages caused by such claims for a project cannot be identified with the precision being imposed by the City agencies until Final Completion. As such, it is entirely inappropriate and unfair for City agencies to require a contractor to waive any and all “other” claims before the work is completed. As many contractors know all too well, extra work disputes and additional costs/damages can and do arise after Substantial Completion.

Substantial Completion Requisition

EOT requests and accompanying Bill of Particulars are not intended by the City’s contract to be the penultimate reservation/waiver of claims document. Instead, pursuant to the City’s Standard Contract (2006 version), that function is fulfilled by the Verified Statement of Claims that must be provided by the Contractor with its Substantial Completion Payment Requisition. The Verified Statement of Claims at Substantial Completion must detail all of the contractor’s claims on the project and include all supporting project records and other backup documentation. Claims not included in the Verified Statement of Claim are deemed waived.

Final Requisition

A contractor is also permitted (and should always) submit an Amended Verified Statement of Claims with its Final Payment Requisition. The Amended Verified Statement of Claims is the final document that must include all claims and all final calculations of the costs and/or damages associated with such claims. Any claim or cost/damage not included is waived. As such, a contractor should be certain to update claims previously raised, update the costs and damages incurred and include any new claims that have arisen and/or been discovered since filing the initial, Verified Statement of Claims. The Amended Verified Statement of Claims is the last and final chance a contractor has to assert all of its claims, costs and damages.

G&C Commentary

The City’s attempt to impose a waiver of claims not specifically reserved by the contractor at Substantial Completion is inappropriate and contradicts the City’s own contract. As discussed above, the City’s standard construction contract expressly permits the contractor to amend its Statement of Claims at Final Completion. Nonetheless, we are aware of instances where the City has refused to approve Substantial Completion time extension requests (and also refused to pay requisitions or register and pay change orders) because the contractor correctly refused to execute forms provided by the City



CONSTRUCTION LAW E-UPDATE

BE CERTAIN NOT TO WAIVE YOUR RIGHTS WHEN DEALING WITH NEW YORK CITY PUBLIC AGENCIES

By Henry L. Goldberg & Mitchell B. Reiter

SEPT 2012

that would have prematurely waived claims and unfairly limited reservation of claims language.

In discussions with the Comptroller's Office concerning these issues, we have been successful in convincing them that imposing waiver language at Substantial Completion is inappropriate. To its credit, the Comptroller's Office has accepted properly modified waiver and reservation of claims language in Substantial Completion EOT Requests and Bills of Particular. We hope that personnel dealing with these issues at the agency level will follow suit once they are better informed.

In many instances, contractors are fully aware of their claims and resulting damages by Substantial Completion. Nonetheless, agreeing to waive future claims or damages before Final Completion is not required by the City's contract and could result in a waiver of additional unforeseen claims and costs not realized until the end of the project. There is simply no excuse whatsoever for City officials to attempt to limit a contractor's reservation of rights language in EOT Requests, especially if the request is for an interim as opposed to a final EOT.

Reservation of rights and waiver provisions are not and should not be utilized as "contractor forfeiture enhancement devices." Instead, they are merely provisions to require the cataloging of outstanding

reserved and known claim issues at the time the particular document is submitted. As such, do not accept the City's attempts to force you execute documents that will be construed to waive your contract rights in return for the City to grant an EOT request or to issue payment. Insist on your contractual right to preserve and reserve all of your claims until your final payment documentation is submitted.