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CONSTRUCTION LAW E-UPDATE

TO WHOM TO GIVE THAT CRITICAL NOTICE -- ANOTHER "TRAP FOR THE UNWARY"

By Henry L. Goldberg

APRIL 2011

The New York City Standard Construction Contract and the standard form contracts for other New York State and local public agencies are riddled with time-sensitive "notice" requirements. As we have repeatedly emphasized, contractors must strictly comply with all of these in order to be entitled to compensation for extra or disputed work and owner-caused delays. However, as important as the timeliness of the "notices" is ensuring that the "notice" is sent to the correct government "representative." This is not always easy to do, particularly when no assistance, and, in fact, misinformation, is often provided by agency field personnel.

We had to address this issue recently after a contractor sent required notices to the president of New York City Health & Hospitals Corp. ("HHC"). HHC field representatives forcefully complained to the contractor that such correspondence should not be sent to the president of the agency, notwithstanding clear contractual language to the contrary.

In this instance, the construction management company ("CM") hired by HHC advised the contractor that, pursuant to the "Notice to Proceed" letter (which is, itself, a contract document), all correspondence should only be sent to the CM (as the HHC president's designated project representative) and HHC's project manager, and should never be sent to the HHC president. Was it in the CM's or project manager's interest to keep the president from knowing of the contractor's potential claim, particularly where HHC had failed to timely obtain proper building permits?

In reliance upon the notice provision of the contract and the language of the "Notice to Proceed," the Contractor rightfully forwarded notices to both the HHC president and field management (CM and project manager). Article 11 of HHC's 1999 version of its general conditions (which is based on the New York City's Standard Construction Contract) specifically requires all Notices of Delay be sent to the president of HHC. Furthermore, Articles 32 and 33 of HHC's contract specifically provide that the CM and the project manager shall not have the power to issue an extra work order. HHC's contract further explicitly states that "[t]he Contractor is warned that the Construction Manager [and project manager] has no power to change the terms of this Contract."

Should the contractor be caught in the middle?
Clearly, the CM and HHC's project manager were not reading their own contract correctly. Failure by the contractor to send its notice to HHC's president under these circumstances could have resulted in the contractor having waived all of its right to be compensated fairly.

Thus, not only were the HHC personnel giving the contractor the wrong information, they were doing so in a forceful and threatening manner.

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G&C Commentary

The most basic principles of fairness inform us that it shouldn't be this way. The work involved may absolutely have been extra work. The impact may absolutely have resulted from a delay caused by the owner. However, if the required notice was not sent by the required deadline to the required person, the contractor could have suffered the harsh result of unjust forfeiture.

Contractors must remember that, while the owner's field and supervisory personnel may direct a contractor to only send notices to them, or not to send notices at all and to simply "come over to the trailer to settle any issues," they rely on such advice at their own risk. The owner's upper management and legal department, not project level staff, will ultimately approve the resolution of any claims.

This is the sorry state of construction law today. If it is not in writing, and sent to the right party, it never happened. All verbal assurances by the owner's project staff that "we'll work it out amongst ourselves" will, when it counts, be meaningless and forgotten.

Inform agency field personnel that you are simply complying with the specific requirements of their contract. If someone from the owner with authority to change contract terms provides written confirmation (which will never happen) that the contractor does not have to follow the contract's strict notice and/or dispute provisions, then, and only then, should a contractor back off. Otherwise, the contractor must strictly comply with the contract's actual notice provisions.

The contract is the bible. Review, and have your counsel review, all contract terms so as to be fully aware of all aspects of the applicable notice and "recordkeeping" requirements. Never let these provisions frustrate your right to clear entitlements.

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