

“NO DAMAGE FOR DELAY” IN PUBLIC WORKS

- ALBANY TAKES ANOTHER LOOK

By: Henry L. Goldberg

In 1998, I had the privilege of co-chairing an industry-wide coalition to develop legislation which would prohibit the use of “no damage for delay” (NDFD) clauses in public works contracts in New York State. This important government reform legislation was well received in Albany at that time. Legislators quickly understood the need for greater public agency accountability. Having government entities artificially insulate themselves from their own negligence can hardly be in the public’s interest. The bill passed the Senate unanimously that year, and passed the Assembly by all but four votes.

After deliberating for over six months, Governor Pataki eventually vetoed the bill. In doing so, however, he expressed his agreement with its purpose and intent. As he stated in his veto message:

Conceptually, I am sympathetic with a central objective of the bill, allowing contractors to recover costs for damages unjustly caused by public entities. In fact, the State Office of General Services and the State Department of Transportation have already instituted policies that allow contractors to seek compensation, under specified, clearly-defined circumstances, for unreasonable delays that are the fault of the State. These voluntary “damages for delay” clauses are consistent with this Administration’s policy of making government more accountable and more business-friendly.

As Governor Pataki prepares to leave office at the end of this year, there is a strong sense among industry leaders that this is the year to revisit the issue in force. In this regard, the General Contractors Association (GCA) and the Subcontractors Trade

Association (STA) have taken leadership roles. Also on board is virtually every major construction industry association, including the New York Building Congress, Building Trades Employers Association, Construction Industry Council (CIC), Long Island Contractors Association (LICA), the Associated General Contractors (AGC), the General Building Contractors (GBC), and the Empire State Subcontractors Association (ESSA). Organized labor, including the Building and Construction Trades Council and individual unions too numerous to mention, have also provided strong support in Albany.

Efforts this year are off to an excellent start. On March 15, 2006, the New York Senate passed the 2006 bill (S2893B) unanimously. On May 9, 2006, I attended an industry coalition meeting, among representatives from the GCA, STA, New York Building Congress, CIC, LICA and ESSA, which met with Assembly Speaker Sheldon Silver in Albany. We also met with Government Operations Committee Chair RoAnn M. Restito of Utica and the Assembly bill's sponsor Paul D. Tonko of Amsterdam. It was clear that the Assembly, having overwhelmingly passed the bill before, is sympathetic and supportive of the current bill (A2723B). It was equally clear, however, that New York City lobbyists and those of other "owner" groups (counties, school districts, townships, etc.), have been spreading dire warnings about the potential impact of eliminating NDFD clauses from public contracts. Nonetheless, the Coalition firmly believes that with sufficient grass roots support from the entire construction industry and, if necessary, some minor amendments to the bill, Assembly passage appears to be likely.

The key component to a successful campaign, therefore, will ultimately be Governor Pataki. As indicated, he has publicly stated his agreement in principle with the

bill's purpose and intent. Furthermore, the 2006, version of the bill specifically deals with each and every technical concern the Governor expressed in his veto message.

We also believe it is imperative to emphasize the "government reform" aspect of the legislation. This is not about "greedy contractors" wanting to pursue delay claims. Rather, it is about assuring that public projects aren't delayed. Profit margins are maintained by government contractors when they can get into a project and get out on schedule. This legislation is about making construction agencies more efficient, more responsive and more accountable. How can that not be in the public interest?

Finally, the unyielding stance of New York City and the other public owners can only be helpful. This is all the more so, because, as stated, we in the Coalition are willing to make further technical adjustments in order to eliminate any possible justification for the criticisms voiced by the public owners. These possible amendments, which I collaborated in drafting, will in no way diminish the effectiveness of the bill, and will only "tighten up" certain of its provisions.

This is clearly one of the most important pieces of government reform legislation to directly impact public works contractors in years, perhaps decades. We will be looking for your support as the bill clears the Assembly and heads for the Governor's desk. This is not a time to sit on the sidelines and hope others carry the day. Call your trade association, your Assemblyman or the Governor's office today.