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CONSTRUCTION LAW E-UPDATE

THE REGRETTABLE NEED FOR "CONSTANT CLAIMING" AGAINST EDUCATIONAL FACILITIES

JULY 2010

For those of you familiar with performing school district work in New York State, you are probably already aware that in order to preserve your right to commence a lawsuit against such an entity, you must first submit a verified Notice of Claim within three months after the accrual of your claim. [1] What you probably do not know is how strictly the courts have interpreted and applied this Notice of Claim requirement.

New York State's highest court, the Court of Appeals, has held that Educational Law § 3813 requires the filing of a new Notice of Claim every three months in order to challenge a New York City Department of Education's ("DOE") alleged on-going misapplication of a contractual payment formula for a transportation contractor. The Court of Appeals made this decision despite the fact that the plaintiff contractor had already properly filed a lawsuit seeking damages for the DOE's previous misapplication of the very same payment formula. Unquestionably, the DOE had actual knowledge of the dispute.

In this case, the plaintiff had a long-term contract with the DOE to transport students. Under the contract, the DOE was obligated to pay plaintiff for certain increases in the costs of providing monitors who supervised the students on buses. At issue was the interpretation of the contractual payment provision that prescribed a formula to calculate the increased costs. Although the plaintiff filed a Notice of Claim alleging that the DOE misapplied the formula for the 1995-96 school year and for the first three months of the l996-97 school year, the plaintiff did not file any further Notices of Claim, even though the DOE continued to misapply the same formula thereafter. The plaintiff had, however, timely filed a lawsuit against the DOE seeking damages for breach of contract and sought an injunction compelling the DOE to apply the formula according to plaintiff's interpretations.

Regrettably, even though the Court of Appeals actually agreed with the plaintiff's interpretation of the formula, it only awarded the plaintiff damages for the time periods for which the plaintiff had filed verified Notices of Claim. It refused to award plaintiff any damages for the time periods that came after plaintiff had already filed its lawsuit because the plaintiff "had failed to continue to file new notices of claim every three months during the litigation to cover the ongoing underpayments." The court rejected plaintiff's argument that the lawsuit itself served as adequate notice of future claims for damages, holding that Education Law § 3813 makes no exception to the strict notice rule for contract disputes already in litigation. According to the court, "statutory requirements conditioning suit against a governmental entity must be strictly construed," even where the governmental entity "had actual knowledge of the claim or failed to demonstrate actual prejudice" from the alleged lack of notice.

In other words, the plaintiff bus contractor was required to file a new notice of claim within three months of each

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of the DOE's misapplications of the payment formula. The Court reasoned: "[t]his allocation of responsibility is not overly burdensome on plaintiffs and avoids any possible confusion about which acts of the government the plaintiffs find unlawful."

G&C Commentary

There is no other way to describe it, this is an awful decision. The Court emphasized mere form over substance, and "nit-picking" over fairness. The judicial application of the law in this area has far exceeded the intended purpose of the Education Law, namely, to assure that school districts have adequate notice of all disputes.

In the public construction context, with disputed issues often reoccurring throughout the life of multi-year projects, this decision makes clear that the formality of verified Notices of Claim must be continually and repeatedly observed in order to preserve a contractor's basic rights. This strict compliance with claim notification requirements will, no doubt, encounter protests and objections of school district engineers and other construction field personnel. Contractors may be criticized for "excessive" claiming. Nevertheless, this is what the law requires and this is the standard a contractor must meet, notwithstanding the uninformed comments of school district personnel. It is the welfare of your company that is at stake, not theirs.

For further information contact:
Henry L. Goldberg, Esq.
hlgoldberg@goldbergconnolly.com

[1] This provision applies to any lawsuit against any board of education (school district) throughout the State of New York. However, actions against the major school construction agency in New York City, the NYC-School Construction Authority, are governed by Public Authority Law §1744, which requires the same three-month Notice of Claim as a condition precedent to any law suit. §1744 must, of course, be consulted with regard to any controversy with the NYC-SCA.