



CONSTRUCTION LAW E-UPDATE

CHANGE ORDER CRISIS AT THE SCA – Protecting Your Company

By **Henry L. Goldberg**

NOVEMBER 2010

It has been estimated that there are over 5,000 outstanding, unresolved change orders pending at the New York City School Construction Authority (“SCA”) totaling \$600-800 million dollars. Even if the actual number is only a fraction of that regrettable amount, it still means that hundreds of companies are being seriously harmed by the SCA’s unacceptably slow resolution of extra work and other disputes. This situation is exacerbated by the fact that many SCA contractors and subcontractors are not properly protecting their rights against the SCA because they either: (1) do not know how to; or (2) are reluctant to do so for some other reason. The purpose here is to eliminate the former and facilitate the prompt and fair resolution of claims against the SCA. [1]

Article 8, of the SCA General Conditions, entitled “Disputes,” seems to only protect the SCA by requiring a subcontractor claiming compensation for extra work to promptly comply with the SCA’s direction to perform such work (NOD).

Furthermore, the SCA’s General Conditions make no mention that under Public Authorities Law §1744, a contractor is precluded from bringing any lawsuit against the SCA unless: (1) it had submitted a detailed, written, verified notice of claim upon which such action is based to the SCA within three months after the “accrual of such claim”; and (2) a lawsuit is commenced within one year after the happening of the event upon which the claim is based.

Additionally, in Appendix “A” (21 NYCRR §9603.3) to the SCA’s Standard General Conditions, the SCA “allows” contractors who have filed a Notice of Claim under §1744 to submit the matter to optional and non-binding mediation by submitting a written notice of dispute to the SCA’s corporate secretary within fifteen working days of the filing of the Notice of Claim.

The problem is that usually a contractor may not know that it even has a dispute until long after the time to submit a Verified Notice of Claim under §1744 has passed. Under the pertinent case law, the “accrual of a claim” against the SCA occurs when your “damages are ascertainable.” The SCA might argue, therefore, that a contractor’s claim for extra work accrues when it first submits its change order proposal. At that point, the damages appear to be known, since the proposal values the work. At the same time, however, a contractor will not know of a dispute until the SCA denies its change order proposal or offers an amount that cannot reasonably be accepted. Given the fact that there are hundreds of millions of dollars of unresolved change orders pending, this will undoubtedly take longer than the statutory three months in which one must submit a Verified Notice of Claim under §1744. Thus, as indicated, the time to submit a claim may pass before a contractor is even aware it has a dispute with the Authority.



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G&C Commentary

Remedial legislation to amend Public Authorities Law §1744 is essential to address this terribly unfair provision. The time to file claims against the SCA should run from a denial of a claim [2]. We have drafted proposed legislation to accomplish just such a correction, and groups, such as the Subcontractors Trade Association have indicated a willingness to “carry this ball” in Albany.

In the meantime, however, what should a contractor do to avoid waiving its claims against the SCA for extra work (or other claims)? First, the only safe way to protect your company is to immediately submit a Verified Notice of Claim to the SCA at the same time you first submit your change order proposal. Second, you must carefully track the one year period within which you must commence a lawsuit against the SCA or forever waive your claim rights. Remember, this period runs from the date of the “happening of the event upon which the claim is based.”

Additionally, initiating mediation (which, as indicated, is optional) will not toll the one year period within which you need to commence a lawsuit against the SCA, nor will any settlement discussions. Thus, always file within the strict time periods (three months for a Verified Notice of Claim; and one year to sue) regardless of the status of the SCA’s review of your proposal. You can always withdraw a timely filed lawsuit later as a result of any settlement.

Finally, two additional thoughts. First, a warning. Beware of “stealth” releases in the SCA change order settlement forms and protect your schedule. Reserve your right to additional time and/or delay or acceleration claims to which you are independently entitled, in addition to compensation for any extra work. Fill out any Change Order forms carefully, being certain to reserve rights to additional time necessitated by the change order, as required, and to any and all other claims. Do not be bullied into putting a “zero” into the number-of-days reserved space on the Change Order form. Secondly do not let change order or other dispute-related processing drag on. Low ball offers from the SCA, not even worthy of a counter-offer, should mobilize you into action. Do not wait until economic circumstances compel you to accept a clearly inadequate offer. Be pro-active and protect your company!

[1] This is all the more important for subcontractors because under the original enabling legislation that created the SCA, the SCA is exempt from the Wicks Law. Therefore, subcontractors have to file their claims through their GCs, who may not know the proper procedure for presenting and resolving claims with the SCA.

[2] Note that the New York State Legislature has already amended Education Law §3813, which previously was as unfair as the SCA’s current claim procedures under the Public Authority Law, §1744. For every school construction project in New York State (outside New York City) a newer and fairer

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rule applies. A contractor is required to file a Verified Notice of Claim against the School District after its claim is denied . That's a clear and understandable trigger. The procedures for the SCA must be brought into line with this reform. To discover that one's claim has expired within a mere 90 days from the filing of a dispute proposal package, and before one even knows whether or not its proposal has been denied, would be a travesty.

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