



## CONSTRUCTION LAW E-UPDATE

### NYC NOW DEMANDING STRICT COMPLIANCE WITH EXTENSION OF TIME (EOT) REQUEST REQUIREMENTS

By Henry L. Goldberg, Managing Partner, Goldberg & Connolly and STA Legal Counsel

MAY 2012

We have previously sounded the alarm (at every reasonable opportunity) for the need of all contractors to ensure strict compliance with the notice and damage recordkeeping requirements of their construction agreements. This must not be just a “best practice,” but standard operating procedure for all contractors and subcontractors in today’s regrettably more legalistic construction industry environment. Failure to strictly comply with these provisions will result in the probable loss of a contractor’s right to seek payment for extra work, delays and changes. While we have repeatedly rallied against the unfairness of these contractor “forfeiture-enhancement-devices,” today they are increasingly being strictly enforced by the courts, often with extremely harsh results.

Recently we have seen NYC construction agencies extend their demands for strict compliance to routine extension of time (“EOT”) requests, once again, apparently seeking to trap contractors into waiving potentially valuable contract rights.

For years now, all interim “EOT” requests (i.e., all those prior to substantial completion) were submitted as relatively simple forms. For instance, an interim EOT request would typically state the total number of days being requested for a particular extension of time and the types of events that had caused this excusable period of delay. This would include items such as, denial of access to the site, design changes, failure of the owner to coordinate the work of the other contractors, failure of the owner to timely respond to RFIs or shop drawing submittals, etc. This type of submission had historically

always been accepted. This is no longer the case.

Article 13 of the NYC Standard Construction Contract has always required more detailed information for EOT applications. However, until now, the City’s construction agencies have not strictly enforced the submission of such detailed information on interim EOT requests.

Starting with the Parks Department, then DEP and now the Comptroller’s Office, our clients are being required, for all EOT requests, to provide, per Article 13.8.2 : “the nature of each alleged cause of delay in completing the Work;” “the date upon which each such cause of delay began and ended;” and “the number of days attributable to each such cause.” This means you should be prepared with a schedule analysis, not just for your substantial completion EOT request, as in the past, but for the very first interim EOT request, and all others you find necessary to make on the project.

To the extent that you can provide this information, be prepared to do so and draft your EOT requests accordingly. Also, and this is important, if you cannot provide this information, through no fault of your own, explain the circumstances in the EOT request being certain to reserve your right to provide further information when you can obtain it.

In a recent instance involving a client acting as a Wicks prime contractor on a City project, all of the delays that were the



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subject of their EOT request related to the agency's activities with the "G" contractor. The only source of information our client had for the nature, begin and end dates, and total number of days for each delay-causing event was the project schedule that was being kept by the agency's own resident engineer. The City's project schedule, however, did not provide complete information on these topics. Our client provided all the information it had available to it and explained this reason for not being able to provide any further information. The agency has yet to respond, but we feel any claim that the submission was inadequate, under these circumstances, would be unreasonable.

**G&C Commentary:**

Taking a step back to reflect, the issue here is not that the information required by Article 13 is terribly difficult or onerous for a contractor or subcontractor to provide. What

is noteworthy, rather, is that the ground has moved under the contracting community. Contract administration has, regrettably, become more legalistic. You must be aware that all of your EOT requests need to provide this level of detail and you must make the appropriate preparations, either internally or through outside consultants, to assemble them. In our recent experience from the front lines, the City has made it clear that it will now be carefully reviewing all interim EOT requests, and will not simply process them as a matter of course.

So we now see yet another obstacle in the way of contractors seeking to enforce their fundamental contractual rights. Do not be tripped up by this obstacle. Be aware that it exists and prepared, ahead of time, to fully comply. The alternative could be the catastrophic, but wholly avoidable, forfeiture of considerable contract rights.