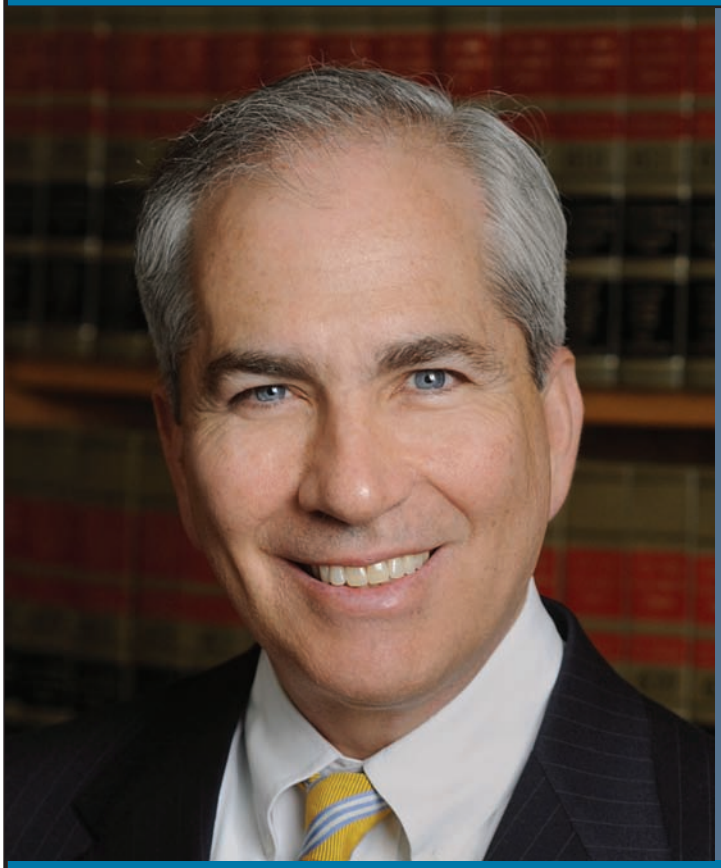

"DAMAGES FOR DELAY"

Major NYC Reform A Good Start— Further Reform Is Necessary

BY HENRY L. GOLDBERG, MANAGING PARTNER, GOLDBERG & CONNOLLY

An epic battle of at least ten years in duration has taken a positive turn for the contracting community. In 1998, the STA played a leadership role in an industry-wide coalition to promote fairness in public contracting. Its goal was to outlaw the notorious No Damage for Delay (NDFD) clause from all public works construction contracts in New York State and to render them unenforceable. The public owners' "risk shifting" game was being directly challenged.

Sound like a pipedream? In fact, the bill I helped draft in l998 passed the New York State Senate unanimously and passed the Assembly by all but four votes! Governor Pataki, completely surprised by this turn of events, sat on the bill for over six months before ultimately vetoing it in the closing days of the year.

There have been other close calls, but this past summer the Bloomberg Administration took a significant step towards fairness regarding these categorical, risk-shifting, NDFD contract provisions. The City didn't go far enough, as will be discussed below, but I for one will give "the devil its due" and publicly acknowledge a major step in the direction of reform. It has been a long time in coming.

Arguments that NDFD reform would be a win/win proposition, protecting contractors from owner-caused delay, while enhancing competition and sharpening bid prices, have historically been met with misplaced cynicism by NYC. However, the City has now seen the light. Perhaps motivated by the "buyers' market" caused by the public construction boom in NYC and/or the resulting marked diminution in competition at City bids, NYC has been looking for ways to attract more bidders.

The NDFD reform is part of a series of reforms first announced by Mayor Bloomberg in July. The City's reform of its notorious NDFD provision (Article 13) is part of a three year pilot program designed to improve its contracting efforts. The goal is to increase competition in the building of the City's infrastructure and to drive down the cost of the City's construction. City officials estimate that with just two or three more contractors bidding on every City project, the City could save more than $330 million dollars each year.

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With regard to the elimination of NDFD from their construction contracts, all capital projects solicited by the City's major construction Departments (DDC, DOT, DEP, and Parks) between $5 million and $200 million (and in some cases in excess of $200 million) will be eligible. About 100 projects per year should benefit from this reform. Therefore, not all NYC projects will have the new provision (Article 11) and, regrettably, the current NDFD provision (Article 13) will continue to be in force for a significant number of projects. For participating projects, City officials will be monitoring bid prices, the level of competition, project costs and schedule performance, as well as claim volume and values.

Another major, commendable goal of the City, of course, will be to modify the well-entrenched behavior of its own Departments so that construction issues can be resolved in a timely fashion and with fewer formal disputes. This will not be easy, but with the first financial accountability for delay in decades being imposed upon NYC employees, City construction managers should eventually begin responding.

RECOGNIZED DELAYS - "THE GOOD NEWS"

Under the new provisions, the City of New York, on certain clearly identified projects, will pay for delay and impact damages caused by:

- The failure of the City to take reasonable measures to coordinate and progress the Work, except that the City shall not be responsible for the Contractor's obligation to coordinate and progress the Work of its subcontractors.
- Extended delays attributable to the City in the review or issuance of change orders, in shop drawing reviews and approvals or as a result of the cumulative impact of multiple change orders, which constitute a material change to the Work and which have a verifiable impact on project costs.
- The unavailability of the site for an extended period of time that significantly affects the scheduled completion of the contract.
- The issuance by the Engineer of a stop work order relative to a substantial portion of work for a period exceeding thirty days that was not brought about through any action or omission of the Contractor.
- Differing site conditions that were not known or reasonably ascertainable on a pre-bid inspection of the site or review of the bid documents or other publicly available sources and that are not ordinarily encountered in the Project's geographical area or neighborhood or in the type of work to be performed.
- Delays caused by the City's bad faith or its willful, malicious, or grossly negligent conduct;
- Delays not contemplated by the parties;
- Delays so unreasonable that they constitute an intentional abandonment of the Contract by the City; and
- Delays resulting from the City's breach of a fundamental obligation of the Contract.

SIGNIFICANT LIMITATIONS – "THE BAD NEWS"

Of course, the most significant limitation is the "pilot project" aspect of this reform. It is neither City-wide nor permanent. Therefore, before bidding on any NYC project, inclusion of the new provision (Article 11) allowing for damages for delay compensation in the particular project's contract should be confirmed.

Significantly, a glaring loophole in the reform is the specific exclusion of delays caused by "acts or omissions of any third parties." This excludes from coverage, for example, utility company-caused delays, an extremely important delay/impact factor in New York City.

In addition, new Article 11 precludes the award of "profit, or loss of anticipated or unanticipated profit", as well as "interest on monies in dispute." This is contrary to well accepted construction claim practices which routinely allow for reasonable overhead and profit markups on claims, as well as interest on sums due.

COMMENTARY

All told, this is real progress. But we are not fully there yet. This important reform should apply to all New York City projects. Furthermore, it should allow for third party-caused delays, as well as for lost profits and interest on claims, as virtually every other public owner category -federal, state, authority and municipal-routinely allow. Third party causations are a huge problem in NYC and it is wholly untenable for the City to expect contractors to assume the risk of this eventuality. This is no way to aggressively solicit lower bids.

We applaud the City for its effort and its intentions. While it was self-motivated in attempting to obtain: (1) improved bidder competition with resulting lower prices, and (2) earlier completions as its own Department's become directly accountable financially for delay, this reform is very much welcomed. In theory, this could provide both better managed NYC projects and greater protection for contractors eligible for fair compensation for NYC-caused impact and delay on applicable projects.