

A Contractor Win at the CDRB ?

Yes, Contract Rules Apply Equally to Both Parties

by Henry L. Goldberg, Esq.

Over many years, New York City public works contracts have been modified to include increasingly onerous provisions governing the claim process. Often, these procedural provisions seem designed to penalize the unwary contractor. Such contract clauses, however, may not always work to the City's advantage. In a recent decision, the City's Contract Dispute Resolution Board ("CDRB"), a forum that has been much criticized for its weighted panels (i.e., two City representatives to one independent), ruled in favor of a contractor by wielding the procedural sword against the City. See *Lapeer Contracting Co., Inc. v. Dep't of Parks and Recreation*, OATH Index No. 817/03 (July 14, 2003).

The contractor was engaged by the Department of Parks and Recreation ("Parks") to build an asphalt roller hockey rink. Six months after completion and acceptance of the work, Parks, citing the contractor's one-year warranty obligation, issued a directive claiming that the asphalt did not meet the project specifications and ordered the contractor to remove and replace the top asphalt layer because the surface had become unplayable. The contractor timely responded in writing to the directive, stating that Parks had not shown that the work violated the specifications or was defective in any manner and that the work ordered should be considered extra work and compensated as such. After further correspondence and meetings in which the contractor and Parks continued to dispute the issue, Parks' Agency Chief Contracting Officer ("ACCO")

declared the contractor in default for failing to comply with the directive.

Pursuant to the contract, and on three separate occasions, the contractor requested a final determination from the Parks Commissioner regarding the ACCO's declaration of default and the contractor's claim that the agency's directive ordered work that was beyond the scope of the contract. The contractor never received any substantive response. Indeed, Parks' counsel sent a letter to the contractor (one year after the initial request!) stating that no further action could be taken by the Commissioner. The contractor proceeded to file its claim with the City Comptroller's office which denied it, citing the contractor's failure to comply with the agency directive to replace the asphalt as a waiver of the claim. The contractor then appealed the Comptroller's decision to the CDRB.

In its argument before the CDRB, Parks reiterated the Comptroller's position that pursuant to the notice and other procedural provisions of the contract the contractor's failure to comply with the directive was a waiver of any claim for compensation or for anything else that might relate to the agency's declaration of default. The Board rejected this argument and noted that the contractor had properly followed the required contract procedures by promptly seeking the Commissioner's review of the directive.

Significantly, the Board found that Parks itself did not follow the procedures set forth in the contract for declaring a contractor in default. In particular, the contract documents stated that only the Commissioner or his duly authorized representative may declare a contractor in default and that a default declaration can only be made if the contractor refuses to proceed with the work when ordered by the Commissioner. Nothing in the contract documents or correspondence between the parties designated the ACCO or any other Parks employee as the duly authorized representative of the Commissioner.

Thus, the directive and the default declaration were improper because they were not issued by the Commissioner. Further, the contract also required that all determinations include a reasonable explanation. In this case the Commissioner failed to make any determination whatsoever, despite the contractor's repeated requests. In short, the CDRB found that the agency had completely failed to adhere to its own contract procedures, both in issuing the directive and in declaring the contractor in default.

In support of its ruling the Board recognized that Parks' actions were inherently unfair to the contractor. By improperly declaring the contractor in default and then completely refusing to consider the claim (because according to Parks the default could not be appealed to the Commissioner), Parks deprived the contractor of its contractual right to be heard.

While it is somewhat surprising that the CDRB issued a decision so critical of the City's administration of a contract, it is gratifying that basic concepts of fairness in the application and interpretation of contract obligations won the day. Public owners cannot set notice traps for the unwary while expecting to be relieved themselves from the strictures of the contract.

The lesson here is obvious: contractors should continue to scrupulously follow the procedures outlined in the City's numerous contract dispute provisions, but at the same time should not hesitate to enforce those same provisions against the City. As demonstrated by the CDRB's decision, following the rules means the difference between winning and losing for contractors and the City alike.

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