

THE NEW NYC STANDARD CONTRACT

BEWARE OF ARTICLE 30's REQUIREMENT OF MONTHLY DAMAGE DOCUMENTATION

By Henry L. Goldberg, Esq.

We have long warned contractors of the notice forfeiture enhancement clauses in New York City public works contracts. These notice provisions often seem to be thinly-veiled forfeiture enhancement clauses, aimed at facilitating the waiver of contractor claims, rather than the protection of legitimate City interests.

Courts have struggled to avoid harsh results these clauses may cause when strict enforcement is sought by the City. Claim forfeiture seems unjust when a contractor can prove, for example, that City engineers and consulting engineers are aware of problems giving rise to a particular claim. Often, the project's job meeting minutes establish the City's awareness of the conditions giving rise to the claim. Such facts have not deterred the City from later seeking proof of written notice, in strict compliance with standard Article 11, A Notice of Conditions Causing Delay, or Article 27, A Notice of Dispute.

Fairness and flexibility in applying notice requirements suffered a serious blow in A.H.A. General Construction, Inc. v. New York City Housing Authority,¹ in which New York's highest

¹A.H.A. General Construction, Inc. v. NYCHA, 92 N.Y.2d 20 (1998).

court held that strict compliance means precisely that. More recently, at least one New York lower Court has fallen into line, stating A... it is well settled that strict compliance is required with contract provisions requiring notice and itemization of damages...@.²

Contractors have sought to avoid the strict dictates of contractual notice provisions by alleging Asubstantial compliance,@ or that the owner orally directed the disputed work, or otherwise had actual knowledge of the condition. At present, the only exception to strict compliance recognized by New York courts is where the owner=s wrongful acts specifically impact the contractor=s ability to give the required notice. Thus, no matter how abusive or unconscionable an agency=s actions, unless those actions specifically prevent the contractor from giving notice, the agency is entitled to timely receipt of its A little piece of paper,@ failing which the contractor=s claim is subject to dismissal. As a result, since AHA v. NYCHA, our warnings about the importance of strict compliance with notice and claim itemization provisions have become all the more urgent.

New Article 30

Article 30 of the new NYC standard construction contract, ANotice and Documentation of Cost and Damages; Production of Financial Records,@ builds upon the City=s forfeiture strategy. It imposes new notice requirements with which contractors must now strictly comply, presumably

²Heckler Electric Company, Inc. v. City of N.Y., 186 Misc.2d 77 (Sup. Ct. N.Y. Co. 2000).

in addition to those of Articles 11 and 27 and the daily Aforce account@ for extra or disputed work required by Article 28. Article 30 requires that contractors wishing to preserve their claims submit to the agency commissioner, within 45 days from the time damages are first incurred and every 30 days thereafter for as long as the damages are incurred, a verified statement of the details and amounts of damages, together with supporting documents.

Article 30 is notable both for the practical difficulties of compliance, and the severity of the consequences for failure to comply. Paragraph 30.1 states: A. . . On failure of the Contractor to fully comply with the foregoing [notice] provisions, such claims shall be deemed waived and no right to recover on such claims shall exist.@ That the City is aware of the impracticality of this requirement is evidenced by the long-standing policy of the Bureau of Engineering of the New York City Comptroller=s Office, which routinely declines to review delay claims until Asubstantial completion@ is achieved. This practice demonstrates the City=s understanding that delay damages cannot be quantified, or meaningfully reviewed, until the substantial completion milestone is reached.

Why then would the City put such a provision in this contract? Why, indeed. The answer is clear from sub-paragraph 30.4 of Article 30, which states AUnless the information . . . required . . . is provided . . . the City shall be released from all claims arising under . . . this contract.@ The provision=s forfeiture-promotion intent is further underlined in sub-paragraph 30.4, which provides that Ano person has the power to waive any of the foregoing provisions.@ The purpose of this language, obviously, is to prevent a fair-minded City employee from softening the harshness of this

provision.

The City appears determined to extract every advantage from the multiple notice provisions in its construction contracts. Given the present state of the law mandating strict compliance, it is critical that contractors know exactly what the City's contract requires in terms of timely, written notice, and what each such notice must contain.

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