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NEW YORK CITY – SCHOOL CONSTRUCTION AUTHORITY

WHY HAVEN'T SUBCONTRACTORS ENJOYED THE BENEFITS OF “ALLOWANCE” CHANGE ORDER PROCEDURES?

The processing of change orders on public construction projects is all too often prolonged and arduous. Nowhere has this been more so than at the New York City School Construction Authority (“SCA”). Contractors have no choice but to perform the change order work before necessary forms and approvals both due to strict contractual requirements and in order to avoid delays and to keep their project on schedule. Furthermore, contractors and subcontractors alike often have to fund change order work themselves, despite the financial strain this causes and the fact that public owners are fully responsible for the costs and fully capable of financially underwriting their own projects.

Along with failed close-out procedures,¹ change orders have been the most frustrating aspect of doing business with the SCA. It has been estimated that there are between \$600 and \$800 million worth of unprocessed change orders on past and pending SCA projects. However, to its credit, the SCA has taken a step towards resolving the arbitrariness of its change order pricing and the seemingly insurmountable lag in change order processing.

In surprisingly unheralded fashion, the SCA has altered its procedures for the issuing and handling of change orders. Essentially, the new procedure is designed to relieve contractors/subcontractors of having to fund change orders and to give them more time to negotiate a fair and final price. The Subcontractors Trade Association (“STA”) was instrumental in effecting this change, which appears in Article 7.04 of SCA’s Standard Contract and became effective for contracts advertised for bid after March 19, 2008. It is genuinely surprising, therefore, to see how few contractors and subcontractors avail themselves of this reform. It is important, therefore, since this appears not to be occurring in many instances, that subcontractors requests/insist that their prime contractors, in turn, requests/insist of the SCA that an allowance change order be issued, without fail, upon the issuance of an NOD.

Pursuant to §7.04 of SCA’s General Conditions, whenever the SCA issues a Notice of Direction (“NOD”) for a change which increases the contract amount by \$50,000 or

¹ A future article will discuss recent reforms and closeout procedures at the SCA as well.

more, the SCA must prepare an “Allowance” Change Order in the amount of the SCA’s estimation of the increased cost.

The SCA will then make progress payments for up to 80% of the Allowance Change Order amount. The SCA will not, however, make any progress payments for the performance of any Allowance Change Order after ninety (90) days from the issuance of the NOD, unless and until the contractor submits a detailed cost proposal regarding the NOD within 90 days from the issuance of the NOD. (§7.04(E)).

Section 7.04(f) provides that a “fair and reasonable evaluation” of the contractor’s cost proposal will then result in negotiations over the final amount of the Change Order. That section further provides that “[a] Change Order will be issued to resolve the difference, if any, between the Allowance Change Order amount and the final amount negotiated between the SCA and the Contractor,” and that the finalized Change Order will constitute the total settled amount for the costs resulting from an NOD.

This is in stark contrast to the previous procedure whereby contractors themselves had to fund the work specified in change orders, and had only 15 days to respond to the SCA with a revised price. Now, under the new procedure, contractors can at least negotiate the final price with the SCA, with a significant percentage of the cost of the work already approved for payment.

G&C Commentary: Notwithstanding the SCA’s good intentions and the mandatory language of Article 7.04 that “an Allowance Change Order will be prepared” in the applicable circumstance, it appears that the SCA is not using Allowance Change Orders as extensively as intended. However, because many contractors and subcontractors do not fully understand their contractual rights, the SCA’s failure to follow its own new, mandatory procedures has gone virtually unchallenged. You, in concert with experienced counsel, need to be your own best advocate. Public contracting is difficult enough. You must affirmatively assert all of your known rights. If you are an SCA contractor or subcontractor, it is incumbent upon you to be aware of what is or is not available to you. If an NOD is issued that increases your contract amount by \$50,000 or more, that should trigger your efforts to implement Article 7.04 of the SCA Standard Contract. As indicated above, it is a mandatory provision not left to the discretion of the SCA’s Change Order Department.