

Beware – Claims Against NYC-SCA Can Legally “Expire” Even Before Denial By NYC-SCA

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If the title of this article seems strange to you, it should. There is a dangerous anomaly in the Public Authorities law which governs claims against the New York City School Construction Authority (NYC-SCA).

A verified notice of claim against the NYC-SCA must be presented to its board within three months after the “accrual” of such claim and suit must be commenced within one year after the events upon which the claim was based. These requirements are jurisdictional and cannot be waived by the NYC-SCA even if it desired to do so.

Under the strict guidelines imposed by New York Public Authorities Law §1744, a contractor must file a claim with the Authority irrespective of whether there is a dispute between the contractor and the NYC-SCA. Accrual under §1744 is based upon when damages are ascertainable. This means a claim may have “accrued”, even if a proposal has not yet been rejected by the NYC-SCA. In other words, there need not be a dispute, for an accrual to have occurred and for the three months for the filing of a verified notice of claim to start running.

Traditionally delay claims “accrue” upon substantial completion. Upon substantial completion a contractor will be able to fully calculate its delay claim and

determine whether issues like concurrent delay or intervening actions may affect its claim.

However, when a change order pricing proposal is submitted, an “accrual” may occur. The change order package is premised on the proposition that the contractor has fully quantified the claim. The danger is that a contractor or subcontractor may have only three months from the date the change order is submitted to formally file a verified notice of claim with the NYC-SCA or lose its ability to later pursue the claim if a dispute subsequently arises. Thus, the claim may be lost even if the NYC-SCA has not rejected the change order at the time the three months expires.

A recent decision of NYS’s highest court, the Court of Appeals, confronted the issue of when “accrual” occurs with regards to a contractor’s submittal of a detailed invoice to the NYC-SCA. The Court held that “[i]t is well settled that a contractor’s claim accrues when its damages are ascertainable.” The Court noted that although the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, “it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted.”

The issue arose when a contractor completed its work at some time before December 1993. The contractor submitted a detailed invoice for work done on December 3, 1993. The contractor served a notice of dispute in June 1994. The Court held that the contractor’s claims were ascertainable and accrued by the end of 1993 and that even if its

June 1994 notice of dispute could be viewed as a proper notice of claim, it failed to present the statutorily-mandated notice within three months of the accrual of its claims.

The contractor argued that its claims should be deemed to have accrued, at the earliest, when NYC-SCA denied payment in April 1994. In support of this argument, the contractor noted that the State Legislature has adopted this rule in Education Law §3813, which applies to claims against school districts. In 1992, the Legislature amended Education Law §3813 (1) to provide: “[i]n the case of an action or special proceeding for monies due arising out of contract, accrual of such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.” The contractor argued that instead of using the date that damages are ascertainable, the three-month notice of claim time period should not be triggered until the NYC-SCA denies payment.

The Court noted that Public Authorities Law §1744 (2) was in existence at the time of the amendment of the Education Law and was not similarly amended. The Court ultimately decided it could not accept the contractor’s argument given the current wording of the Public Authorities Law and that any such change must come from the Legislature.

In light of §1744, a contractor must take note of the potential triggering of the “accrual” date when it submits a claim to mediation with the NYC-SCA pursuant to §8.03 of the NYC-SCA Standard Contract. Although the contractor is following the procedures outlined in the contract, often more than three months will expire before the issue is resolved. At the end of three months, the contractor loses its right to the claim if it has not properly filed verified notice of claim with the NYC-SCA. This means that if the dispute resolution ends unfavorably to the contractor, it will have no further recourse.

G & C Commentary

The Legislature has created an unfair anomaly in the law. On the one hand, when you have a claim against a school district, a contractor's claim "accrues" when the claim is denied and, on the other, a claim "accrues" against the NYC-SCA when it is ascertainable.

Also, note that the current law mandates a very short one year statute of limitation, which requires a contractor to initiate suit against the NYC-SCA within this period even if the contractor has a number of years remaining until substantial completion.

Be certain to PRESERVE YOUR RIGHTS. When you submit your change order proposal/price package to the NYC-SCA be certain to watch the three month period for formal filing of a verified notice of claim. In fact, allow sufficient time for preparation, if need be with counsel, of the required verified notice of claim and for proper filing with the NYC-SCA.

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