



Contractor Claims: Notice & Damages Recordkeeping Requirements Reach Absurd Levels - "Drive Defensively"

HENRY L. GOLDBERG, MANAGING PARTNER, GOLDBERG AND CONNOLLY AND STA LEGAL COUNSEL

The "old days" are gone. In the past, project changes and claims were resolved on the job site memorialized only by a handshake or a "gentlemen's agreement." Today's harsh reality is that public owners' handling of change orders and claims is far more formal and rigid. Reductions in construction budgets have encouraged public owners to utilize any and every factual or legal justification available to avoid paying claims, regardless of merit. This is so even where there is no doubt that a contractor has contributed labor and/or materials far in excess of contractual requirements.

Welcome to the new age. Meticulous paper trails are now the essential norm for any competent and successful public contractor.

Contractors, however, can protect themselves and receive substantial payment for valid claims. To do so will require them to fully understand the obligations spelled out in the provisions of their contracts. They must diligently and precisely comply with notice and damages recordkeeping requirements. Contract management is becoming as important as project management, at least for those that want to preserve the profitability of their projects.

Courts in New York, being a highly "commercial" state, tend to strictly enforce business contracts. They will enforce clear and unambiguous contract terms contained in commercial agreements entered into by sophisticated parties, regardless of what might otherwise seem reasonable or fair.

Following this rule, in 1998, the Court of Appeals, New York's highest court, issued a landmark decision

in a lawsuit involving the N.Y.C. Housing Authority (NYCHA), strictly enforcing its contractual notice provision. The Court held that the plaintiff contractor was required to carefully comply with the contract's requirement that written notice of a delay-causing event and/or claim within the specified time period was a "condition precedent" to the contractor's ability to be paid for the claim.

In legal terms, there is no right to payment until a contractual "condition precedent" is performed. Because NYCHA's contract specifically made the contractor's written notice a "condition precedent," the contractor's failure to provide the required notice barred its claim. It did not matter whether the contractor was actually entitled to be paid for the claim. According to the Court, the contractor's failure to provide the required notices waived the claim and NYCHA was excused from paying the claim as if it never existed.

Standard construction contracts for New York State, New York City and other public agencies contain numerous, often repetitive, conditions precedent concerning claims for extra work, changed conditions and delay. These contracts dictate, among other things, specific deadlines for service of notices and precisely what information must be provided in the notices. Deadlines for issuance of such notices are typically fixed within a specified number of days after the contractor is aware of project conditions that may lead to additional costs, materially change the conditions or nature of the project and/or cause completion delays.

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Initial notice is just the first step. Within a specified time thereafter, most public agency contracts also require the contractor to submit project records and other claims documentation. Many contracts require additional updates on a periodic basis.

Failure by the contractor to fully comply with each and every one of these requirements may provide the owner a basis for denying the entire claim. We cannot emphasize enough that you must be proactive and make it a top priority to understand each contract's obligations and to timely meet these requirements.

These "forfeiture enhancement" provisions are traps for the unwary. They may prevent a contractor from pursuing valid claims, and turn a profitable job into a financial nightmare. By example, a new client recently came to us, at the end of a very difficult project. Unfortunately, it had been more concerned about meeting the challenges of the job, than protecting its rights. The New York State DOT took the position that this company's claim for tens of millions of dollars on a major highway project was "waived" and invalid for failure to provide the contractually required notices concerning huge amount of extra work and delay-caused damages. The agency denied the claim despite the fact that almost 700 separate design changes had been made by the agency after the award of the contract and that no one truly disputed that the extra work and delay causing events had, in fact, occurred.

G&C COMMENTARY:

In our daily practice we preach "Goldberg's Law": If it's not in writing, it never was said. You must strictly comply with notice and recordkeeping requirements. In this environment, you may want to consider including a budget in your bid (yes, you still have to win the bid) to cover the cost of specific personnel to track and process required notices. It's that important. Far too often, clients are genuinely stunned when agency engineers and project managers – the very same individuals who told our clients "not to worry" about resolution of their claims, sit absolutely silent, or worse; vocally oppose

recognition of claims, when the contractor presents its claims at an end-of-job settlement or closeout meeting. It is disheartening. These field level personnel often complain when they receive your notices and supporting documentation. They may even request that you to stop sending the repetitive information required by the contract. Don't do it. Despite good intentions, these are not the individuals who will decide the validity of your claims. They cannot be expected to put their jobs at risk to support your claims, when upper level management and legal department attorney's deny the claims for failure to meet strict notice and recordkeeping conditions precedent.

Today, you must "drive defensively" and have a complete and professional paper trail to avoid a tragedy.

Henry L. Goldberg is managing partner of Goldberg & Connolly. The firm provides legal counsel in the areas of construction, government contracts, surety law and commercial litigation. From bid pre qualifications and protests to contract interpretations and claims prosecution, the firm works closely with its clients to either prevent disputes or develop creative solutions to them. If necessary, the firm will aggressively and effectively litigate its clients' claims. He can be reached at 516 764-2800 or hlgoldberg@goldbergconnolly.com

