



## CONSTRUCTION LAW E-UPDATE

### NYS BUDGET CRISIS- Non-Payment to Contractors

### Preserve Your Rights Against NYSDOT

MAY 2010

Last Thursday, May 20, 2010, Ron Epstein, Chief Financial Officer of the New York State Department of Transportation (“NYSDOT”) issued the following statement. It contains some positive remarks with regard to the NYSDOT’s stated awareness of the impact that the failure of NYSDOT to make payments since April 1, 2010 is causing contractors. However, as discussed below, it is imperative that contractors working on NYSDOT projects take steps to affirmatively preserve their rights.

Mr. Epstein’s statement on behalf of NYSDOT was as follows:

*“NYSDOT understands that project schedules may be affected by the lack of a State budget and the State’s ability to make timely payments. As a result, contractors have expressed concerns about meeting contract completion dates and other milestone dates in contract special provisions, e.g., incentive/disincentive clauses. All contracts include a provision for resolving issues like time extension, penalties for lateness and compensation for additional costs. Please refer to Section 105-14, Disputed Work and Dispute Resolution, under the current NYSDOT’s Standard Specifications. For any contractor who chooses to shut down a project as a result of the absence of funds available for their contract due solely to the lack of the State budget, NYSDOT will consider requests for time extensions on a project by project basis. NYSDOT will not declare the contractor in breach of their contract with the State. It is NYSDOT’s goal to resolve disputes under this provision in a timely and fair manner. Once the State budget is enacted, we plan to issue guidance to our engineers that will facilitate resolutions of any schedule impacts which may have resulted from the payment delays due to the budget*

*situation. Contractors can be assured that NYSDOT recognizes the hardship the payment delays may have caused and will act fairly in the application of the contract provisions.”*

Although Mr. Epstein referred contractors to Section 105-14, “Disputed Work and Dispute Resolution,” of NYSDOT’s Standard Specifications to presumably resolve issues of time extensions, penalties for lateness and compensation for additional costs, he failed to mention the myriad of notice and recordkeeping requirements that must be followed in order for contractors to properly preserve their rights against the NYSDOT.

Please be aware of the following notice and recordkeeping requirements that must be satisfied in order to fully preserve your rights with regard to time related issues and damages:

#### **1. §105-14(B) – Time Related Disputes**

If the Contractor believes that it is or will be entitled to additional compensation for time-related disputes due to delay, the Contractor must notify NYSDOT via written notice to the Engineer, within ten (10) work days of the event. (See also, §108-04(A) “Compensable Delays” which requires, “[a]ny dispute to be promptly submitted to the Engineer in writing, pursuant to §105-14 ‘Disputed Work and Dispute Resolution.’”)

#### **2. §104-06 – Notice and Recordkeeping**

The Contractor shall provide the Engineer written notice of its contentions regarding Differing Site Conditions (§104-



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03), Significant Changes in the Character of Work (§104-04), Suspensions of Work Directed by the Engineer (§104-05), disputed work, time related disputes or any other dispute in accordance with the notice provisions of the pertinent subsection that establishes the notice requirements. Failing to timely provide written notice to NYSDOT will be grounds for denial of the dispute.

#### 3. §104-06(B) – Time Related Disputes

After providing the NYSDOT with written notice of a dispute for time related damages, the Contractor shall keep daily records of all labor, material and equipment for effected work incurred due to the delay. (We recommend using MURK forms, although not specifically required.) If it is agreed that a delay has or is occurring, beginning the week following the date written notice was provided of a time related dispute, the Contractor shall compile and submit records on a weekly basis for the preceding week. If a delay has not been determined until after it occurs, the Contractor shall compile records on a weekly basis. Costs that are incurred on a monthly basis, such as field office expenses, must be submitted within one week following the week of the receipt.

#### 4. §108-02 – Completion Date

If the Contractor desires an extension of time, an Application for Extension of Completion Date shall be submitted to the Engineer sufficiently early for the Engineer to make a recommendation and forward the application so that it may be filed with the Regional Director at least 15 days prior to the contract completion date.

In addition to the foregoing, you must also be mindful of your further obligation to strictly comply with NYSDOT's formal dispute resolution procedures set forth in the Standard Specifications. (See §105-14(D))

While we appreciate the NYSDOT's acknowledgement of the effect that the lack of payments has had on contractors, as well as Mr. Epstein's comments regarding the stated goal of resolving disputes "in a timely and fair manner," in light of the many requirements of the NYSDOT's "Standard Specifications," such statements will not be sufficient to fully preserve your rights.

The foregoing notice and recordkeeping requirements must be tracked carefully and strictly adhered to. Otherwise, you may be deemed to have waived your claims when you eventually seek to resolve same with the NYSDOT.

Finally, with regard to Mr. Epstein's extraordinary comments regarding the decision of a contractor to shut down a project, please be advised that such an approach is highly fact dependent and fraught with complexity and legal considerations. Therefore, before making any such decision, it is important that you consult with knowledgeable legal counsel to: (1) adequately protect/preserve your rights; and (2) make the appropriate, informed decision