Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW
STRENGTH IN PARTNERSHIP®

CONSTRUCTION LAW ALERT

June 2018


Henry L. Goldberg

Taking On The NYC-SCA

by: Henry L. Goldberg

As I have often maintained on these pages, public construction is a rough business. All too often, public owners take positions that unfairly burden contracting parties, with significant, often dire, consequences. That is why, recently, it was particularly satisfying to successfully challenge on appeal the wrongful actions of a public owner. This enabled the contractor to stand up for what is right, and not just accept what the agency would deign to pay, if anything.

The matter in controversy involved the renovation of a public school and the construction of a 5-story addition to that school.

The dispute was concerned with the installation of sidewalk shedding. The "as bid" plans and specifications, in the opinion of our contractor-client, clearly delineated where scaffolding and sidewalk shedding was to be placed. However, the NYC School Construction Authority ("SCA"), despite the clear content of the project drawings and specs, arbitrarily directed the contractor to install significant sidewalk shedding around the entire existing school building while work was being performed on its roof. Per the direction of the STA, the contractor had no choice, initially, but to install the shedding and later challenge the SCA's direction.

Was the contractor actually responsible under the contract to install the sidewalk shedding? It fairly asserted that the shedding constituted extra work and requested that the SCA either dispense with this work, or issue a change order to compensate the contractor for the installation, maintenance and dismantling of the sidewalk shed. The SCA refused to do so. We successfully appealed the initial ruling, which was in favor of the SCA and had actually resulted in the dismissal the contractor's entire case.

The SCA had asserted that the contractor was obligated to install the sidewalk shed because the contract required the contractor to "install and maintain sidewalk sheds" in "areas within the property lines….[where] necessary to provide proper protection to the school population, workers and pedestrians," and to comply with "the provisions of all applicable State and City laws, rules, regulations and requirements pertaining to building code safety requirements," including the NYC Building Code. How imprecise is that?

Contract Plans & Specs Were Clear

We asserted on appeal that the shedding was clearly extra work and outside the base contract, and that the plans and specifications of the contract were clear, as well as consistent with longstanding industry practice. The 1968 NYC Building Code also supported the contractor's position as to where shedding needed to be placed. It did not require shedding for repair work on a roof, behind parapet walls (as distinguished from work being done, for example, on a building's façade). In addition, the contractor's safety plan was already approved by the SCA without shedding being shown for the existing building. Finally, although the SCA clearly indicated in the contract documents that the project would be run under the 1968 NYC Building Code, the Authority, incredibly, later argued the work was required under the 2008 Building Code. (Ironically, the 2008 code might have applied if the SCA had not specifically designated the 1968 Code as applicable for the project.)

A contractor should be able to recover payment for extra work that is not contemplated by the terms of the original agreement, and which is performed at the direction of an owner. Alternatively, a contractor may not recover for any alleged extra work that was actually covered by the terms of the original contract.

When parties set down their agreement in a clear, complete document, their writing should be enforced according to its plain terms. Other "outside" evidence may not be considered unless the document itself is ambiguous.

Both the 1968 Building Code and the 2008 Building Code require the installation of sidewalk shedding when certain, specific (but different) construction work is performed.

Consistent with our arguments, the appellate court held that the SCA failed to establish, *prima facie*, that the contractor was engaged in the kind of construction work that required a sidewalk shed under either the 1968 Code or the 2008 Code, nor that the contractor was obligated to install the sidewalk shed at all.

Further, we argued, and the appellate court agreed, that the contract provision that required the plaintiff/contractor to install sidewalk shedding "to provide proper protection to the school population, workers and pedestrians" was "ambiguous" with respect to whether it obligated the contractor to install a sidewalk shed around the existing building being repaired. Finally, contrary to the lower court's conclusion, the provision in the contract providing that the plaintiff must install "sidewalk sheds and/or fences… in the most conservative manner" was also "ambiguous" as to whether the contractor was required to install a sidewalk shed around the existing building and was subject to different interpretations.

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

STRENGTH IN PARTNERSHIP®

CONSTRUCTION LAW ALERT

This Alert was written by Henry L. Goldberg.

Mr. Goldberg, a partner with the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

Moritt Hock & Hamroff LLP is a broad based commercial law firm with more than 70 lawyers and a staff of patent agents and paralegals. The firm's practice areas include: alternative dispute resolution; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate & securities; creditors' rights & bankruptcy; cybersecurity; employment; equipment & transportation leasing and finance; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; mergers, acquisitions & private equity; not-for-profit; patents; real estate; tax; and trusts & estates.

Attorney Advertising

Goldberg Commentary

How often are contractors treated in an arbitrary and unreasonable manner by public owners? How often is the issue considered not worth the fight so that the contractor just "takes the hit?" This is a path all too often followed, both as a practical matter of expense or in the "hopes" of preserving some modicum of a tortured relationship with the public agency. This occurs on projects large and small. How many mega-jobs, in the hundreds of millions of dollars, suffer the same fate? It's the case of the disappearing profit margin.

But "a pound of feathers is still a pound." Every day in our practice we see serial inequities perpetrated by public owners. It's often a case of a "death by a thousand cuts." This appellate victory provides a breath of fresh air. The contractor didn't simply take it on the chin. We successfully fought back defeating, on appeal, the SCA's motion for summary judgment. The contractor's case survives.

While we recognize there is a cost/benefit analysis to be undertaken in pursuing any dispute. Here the contractor, with our support, took a stand and was vindicated by the independent power and authority of the courts. If you don't stand up for yourself, who will?

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com.

◆ ◆ ◆ ◆ ◆