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CONSTRUCTION LAW ALERT

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Construction *Claim Notice* Travesty -Hope on the Horizon?

by: Henry L. Goldberg

Many of you who follow our Construction Law Alert know of the acronym I derisively coined on behalf of the industry, namely "COFED" (for "Contractor Forfeiture Enhancement Device"). It refers to the epidemic of wholly unfair and unnecessary contractual notice provisions in public (and increasingly) private sector construction contracts.

The term COFED has become synonymous with public owner disinterest in fundamental fairness in construction contracting and with the resulting contractor and subcontractor forfeiture of extremely valuable contract claims. Should a multi-million dollar claim be forfeited for want of an unnecessary 10 day or 30 day notice? Are these notices even used by contracting agencies?

The extent of outrageous COFEDs in construction contracts today had led to proposed reform legislation. I had the privilege of participating in the origination and drafting of the legislative bills designed to address this problem. The proposed new legislation would have outlawed COFEDs in public construction in New York.

The concept gained wide acceptance in Albany, with the bill passing unanimously in the Assembly and in the Senate by all but four votes! Regretfully, however, the passed bills were ultimately vetoed by Governor Cuomo after sitting on it for six months.

Such near legislative success (particularly for a first attempt!) was in large part due to a unified and truly statewide coalition of construction industry-based trade associations, which effectively mobilized in support of a legislative prohibition of COFEDs in public construction.

Now it appears that New York courts, which have been completely complicit in their strict enforcement of COFED-type notice provisions, may be beginning to reconsider the harshness of their prior decisions. Recently (6/15/18), a New York appellate court found the outrageous circumstances of a particular COFED unenforceable. This was after the lower (trial) court in the case had already

dismissed the contractor's case for its alleged failure to strictly comply with a COFED requirement that all notices be verified (*i.e.* sworn to).

In this potentially landmark case, the public agency's General Conditions had stated:

> Any decision or determination of the Consultant, Owner or Owner's Representative shall be final, binding and conclusive on the Contractor unless the Contractor shall, within ten (10) working days after said decision, make and deliver to the Owner a written verified statement of the Contractor's contention that said decision is contrary to a provision of the Contract.

The public agency had challenged the claimant's entitlement to additional payment for 56 specific change orders. It argued that the contractor completely waived its right to seek additional payment by violating the aforementioned COFED by failing to verify its claim.

Interestingly, both the contractor and the government's court papers were "devoid of material factual disputes" regarding the actual performance of the contractor under the terms of the contract. The public agency simply argued that the plaintiff waived its rights to its claims by allegedly failing to strictly comply with the verification provision set forth in the public contract. Stripped to the essentials, the public agency shamefully sought to dismiss the claimant's entire claim merely for its failure to submit its extra work request in "verified" form. In other words, because the contractor did not swear under oath to the validity of all of its claim, the entire claim was sought to be, and was, dismissed.

The trial court had also pointed out, as purported justification for its harsh decision, that NYC-based appellate courts had consistently dismissed contractor claims for extra work payments where a contractor failed to strictly comply with COFED-like notice and other reporting requirements.

In fact, the trial court pointed out in justification for its decision in this case that in yet another, earlier, New York appellate decision, the appellate court had faced the very same absence-of-verification issue and held that failure to "verify" all requests for additional payment constituted a waiver and resulted in a forfeiture of all rights by the contractor.

However, in the recent appellate decision of June 5, 2018 discussed herein, the contractor reasonably argued that it should not be severely penalized for simply failing to submit its notice to the agency in "verified" form. There was no allegation that the claim documents were in any way inaccurate.

Although reprehensible, the trial court's original decision of May 8, 2017 was basically "correct" given the current obnoxious state of the law. The June 2018 appellate court's reversal of the trial court's decision appears to be an outlier, and inconsistent with prior holdings of the very same appellate court.

For its part, the appellate court's June 5, 2018 decision was as interesting, as it was brief. It stated that:

> It is undisputed that plaintiff failed to satisfy a condition precedent to recovering disputed costs for extra work on which defendant forced price reductions. Although contractor gave detailed written statements contesting [Owner's] determinations of the fair and reasonable value of the extra work… it failed to give verified statements pursuant to the contract's General Conditions.

The appellate court further noted that:

> [The agency] does not argue that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of its claims for extra work, or to provide timely notice of its objections to defendant's rejections of, and price reductions on, the claimed extra work.

The appellate court also observed that the agency did not contend, other than in "conclusory terms," that plaintiff's failure to submit verified written notices was in any way prejudicial to it.

Finally, the appellate court pointed out that the cases upon which the public agency relied in court did not consider whether the failure to strictly comply with the condition precedent of verified notice should be excused to avoid a "disproportionate forfeiture" under circumstances where the noncompliance was de minimis and the defendant-public agency had shown no prejudice.

MH&H Commentary

It's hard to explain why this intermediate appellate court "found its conscience" in this case. As stated, this very same appellate court has repeatedly enforced hyper-strict enforcement of COFED notice provisions. Was it simply unable to reconcile how far the pendulum had swung in favor of public agencies in their blind enforcement of COFED's? The appellate court's decision found the failure to verify the claim notices an inconsequential and de minimis noncompliance, with no resulting prejudice to the agency specifically alleged.

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Under such extraordinary facts, and despite the well settled law, this particular intermediate appellate court, at this particular time, based on these facts, could not in good conscious enforce the COFED involved. Is this appellate decision establishing a "lack of prejudice" and/or a "*de minimis*/inconsequential noncompliance" exception to the enforcement of COFEDs? Will "disproportionate forfeiture" be a new litigated concept for consideration?

What the future holds for this sorry state of affairs, and this outlier case, remains to be seen. For now, the industry must continue its legislative reform efforts. COFEDs, after all, challenge the very survival of contractors and subcontractors. There is no assurance that other courts, or this court, will in the future do the right thing in confronting COFED abuse.

Have you lost a valuable claim against a public agency due to a COFED? Is the public agency against which you asserted a valuable claim, asserting a COFED as a bargaining tool for you to substantially waive your valuable rights? This appellate case raises the hope that in the right hands, and under the right circumstances, COFEDS can be successfully challenged.

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.

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