

## **Doing Business with the NYC SCA: Absence of Notice of Direction Does Not Preclude Claim**

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The processing of change orders by many New York public agencies can be challenging. This is particularly so with the NYC School Construction Authority (SCA).

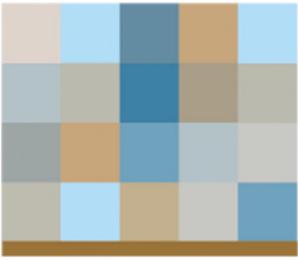
For example, when it comes to extra or additional work, SCA personnel often informally direct the work to be performed either verbally at the project level or in meeting minutes or by email. However, this procedure often degenerates into an adversarial demand to perform, threats of back charges, or even threat of default and a premature calling upon a contractor's surety.

The "disputed work" provision of the standard SCA contract appears to leave the contractor with little alternative but to promptly perform the disputed work in the hopes of being fairly compensated later. Inconsistently, however, the SCA contract speaks of the contractor's need for a written Notice of Direction (NOD) in order to pursue a claim.

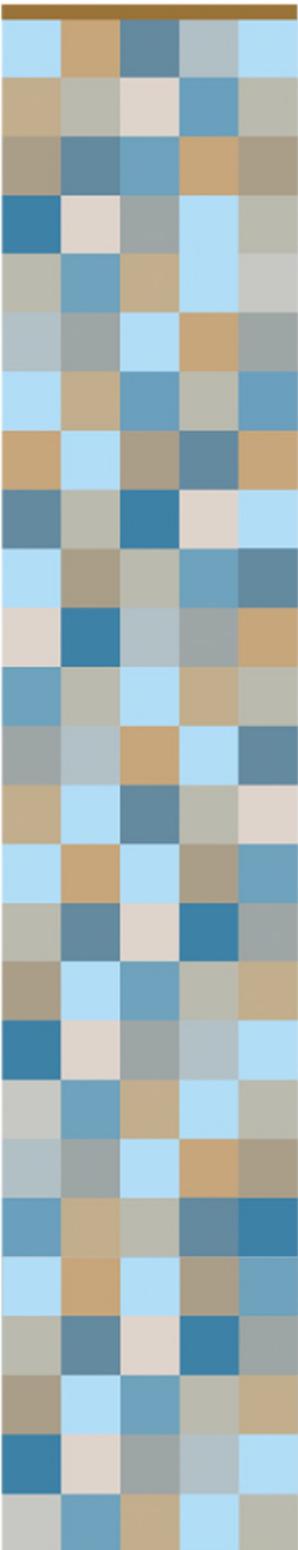
The problem with this is fundamental. NODs are rarely issued contemporaneously with the SCA's directive to perform disputed work. They are often issued well after the work has already been performed. In an unfair "Catch 22," therefore, a claim for the disputed work will be deemed waived if an NOD was not issued at the outset of the work.

Does the public owner actually have the right to compel performance of disputed work before issuing an NOD? The SCA believed so.

Under Article 8 ("Claims for Extra Work"), Section 8.01 (B) of the standard SCA Contract General Conditions, a contractor must obtain an NOD from the SCA in order to file a claim for compensation for any disputed work. However, Section 8.01 (A) would seem to support the SCA's position that a contractor must immediately respond to any order of the SCA, even without the issuance of an NOD.



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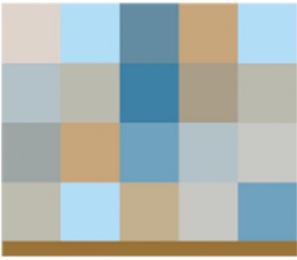
However, in a recent New York appellate court decision, this was reconciled by the court finding that the disputed work provision of the SCA contract requires the issuance by the SCA of a formal NOD before a contractor could be terminated for refusing to perform disputed work.

In this case (handled by Rob Fryman), a general contractor had entered into a contract with the SCA for the modernization of a school, which included replacement of the existing roofing system. After much of the roofing work had already been completed, the SCA determined that extensive areas of the new roof were installed improperly and directed the general contractor to remove and replace these areas of the roof. The direction from the SCA came in the form of a 72-hour notice by which the SCA threatened to have the work performed by an emergency contractor if the contractor did not proceed immediately, in which case the SCA would back charge the general contractor for all costs.

The general contractor disagreed with the SCA's contentions that the roof was installed improperly. However, it provided the SCA's 72-hour notice, together with its own order, to its subcontractor to commence the work ordered by the SCA. However, the subcontractor refused to perform until the general contractor provided a change order for payment of the disputed work. Caught between the SCA's insistence that it proceed and the subcontractor's refusal to perform the disputed work, without a change order, the general contractor terminated the subcontractor for default and engaged another roofing subcontractor to correct and complete the subcontractor's scope of work. The subcontractor sued the general contractor and its labor and material payment bond surety for wrongful termination.

As the subcontract between the general contractor and its subcontractor expressly incorporated the contract provisions between the SCA and the general contractor (i.e., in the prime contract), and, since the subcontract imposed upon the subcontractor the same obligations that the general contractor owed to the SCA, it also conferred upon the general contractor the same rights and remedies provided to the SCA under the prime contract. Thus, the appellate court interpreted the SCA's own "disputed work provision" to ascertain whether the subcontractor was properly terminated for refusing to perform the disputed work in the absence of an NOD. In this recent case the appellate court did not think so.

There is no mention in Section 8.01 (A) (the SCA's "disputed work" provision) of the need for an NOD to trigger the contractor's obligation to perform disputed work. It only states that the contractor shall "promptly comply with the SCA's direction to perform the Work...and...proceed diligently with respect to any...disputed matter." However, the appellate court focused instead on the second paragraph of Article 8,



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Section 8.01 (B), which sets out the contractor's need for an NOD in order to pursue a claim. The Court found that the subcontractor:

was justified in refusing to continue performing work that it deemed outside the scope of the contract, absent a notice of direction (NOD) from the SCA, or in this case, the general contractor. This would have fairly protected the subcontractor's right to claim additional compensation for that work.

This decision is the first of which we are aware to establish that the SCA must first issue an NOD in order to compel performance of disputed work. It could be a “game-changer.” Even if the SCA attempted to modify the language of its contract in an attempt to avoid this “ray of fairness” from seeping into the administration of its projects, the court’s decision, based on fundamental fairness and sound logic, should survive.

**MH&H Commentary:**

In view of this significant appellate decision, to preserve your claim rights, we recommend that you always issue a clear, written demand for a formal NOD before commencing disputed work ordered by the SCA.

Refusing a public owner's order to proceed with disputed work is never an easy issue to address, whether at the field or home office level. However, this appellate court recognized the fundamental inconsistency of requiring the contractor to proceed with the disputed work immediately, without an NOD, while requiring that an NOD must have been issued for a claim to be later pursued. The prospect of a contractor being without any recourse in the absence of an NOD, after the ordered work was satisfactorily performed, was simply unacceptable to the appellate court. We agree.

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