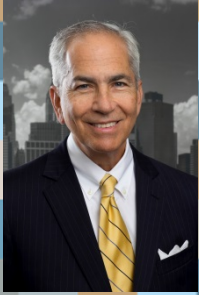


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SCA's Attempted Dismissal Of Contractor's Claims Defeated - Claims Survived!

By: Robert J. Fryman & Henry L. Goldberg

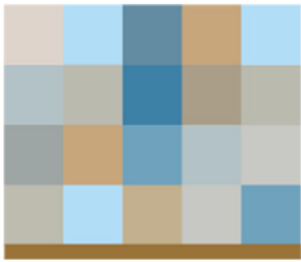
In a highly significant recent case, the New York City School Construction Authority (“SCA”) attempted to dismiss a subcontractor’s claims seeking nearly \$2.9M in extra work and \$2M in delay damages. However, the state court hearing the case rejected the SCA’s lack-of-notice arguments.

The SCA’S “COFED” Arguments

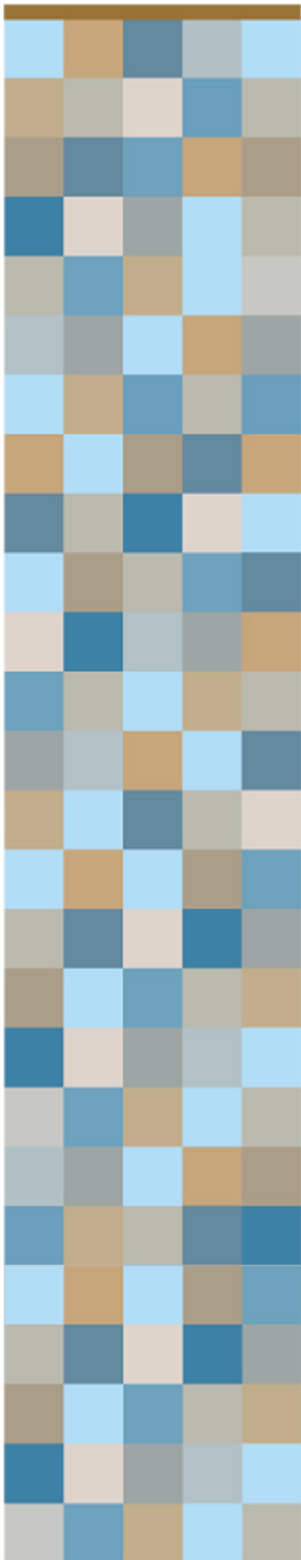
In the current case, the SCA’s argument was a litany of typical “lack of notice” type arguments based on when the SCA contended that the contractor knew or should have known that its demands for payment had been denied (*i.e.* when the claims “accrued”). The SCA, as well as many other public owners, use these “lack of notice” type defenses so often we coined the derisive acronym “COFED” (“Contractor Forfeiture Enhancement Device”) to disparagingly refer to such abusively used notice provisions.

For example, in this case, the SCA, without success, argued:

- 1) SCA’s issuance of a unilateral change order, together with copies of the email exchanges and correspondence between the SCA and the contractor, showed that they had failed to reach an agreement on the proposed change order, which constituted a denial of payment;
- 2) SCA’s response to the contractor’s request for information (“RFI”), seeking direction as to whether it was to demolish certain structural steel contained within a stone parapet, which directed the contractor to remove the parapet wall down to the existing roof deck, constituted a denial of any claim for payment for the removal of the structural steel; and
- 3) SCA’s response to contractor’s RFI seeking direction as to whether it was to remove all steel plates and concrete that had been found beneath the roofing surface, directing the contractor to perform the work “per contract-based scope” constituted an express denial for payment of any additional funds.



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Court Rejects SCA's Arguments of Early Claim "Accrual" for Notice Purposes

However, in its decision, the court rejected all of the SCA's arguments as to when the contractor's claims "accrued." The court held, "contrary to SCA's contentions, a change order proposal is not a request for final payment and, therefore, its rejection does not trigger the running of the applicable limitations." The court continued, stating, "even less does an answer to an RFI, directing the contractor to perform certain work, allow the contractor to ascertain its damages, and a claim does not accrue until damages can be ascertained."

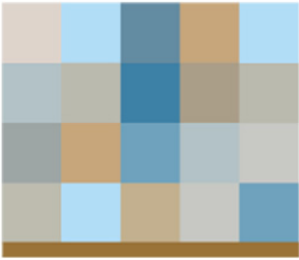
Interestingly, with regard to the SCA's contentions that its frequently used "unilateral" change order constituted a denial of a contractor's demand for payment, the court rejected the SCA's argument stating that it "ignores the fact that, pursuant to the governing contract, a unilateral change order is not a denial of payment but is, rather, a preliminary cost estimate, pending negotiation of a final change order."

The court also rejected the SCA's contentions that the contract documents unambiguously provided that the stone parapets on the roof, together with their embedded and hidden structural steel, were to be razed. The court noted that there was no indication from the contract documents that there was embedded structural steel which was to be removed and that contractor had no reason to ask "whether a hidden impediment, that would raise the cost of such removal, was present."

Lastly, the court also rejected the SCA's argument that several of the claims brought by contractor were untimely because they were not commenced within the one-year limitation period set forth in Public Authorities Law §1744. The court rejected this SCA argument, finding that it rested entirely upon the SCA's other unsuccessful arguments discussed above, as to when the claims "accrued," which the court had otherwise rejected (*e.g.*, that a unilateral change order and the SCA's response to an RFI constituted denial to a demand for payment).

MHH Commentary

This case is noteworthy for its thorough analysis, and detailed rejection, of commonly used SCA contractual notice defenses regarding timeliness of contractor claims. Public owners, particularly the SCA, often do not strictly follow the procedures of their contracts, but do not hesitate to raise arguments as to a contractor's failure to precisely follow and fully satisfy their contract requirements, particularly as to notice.



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Cases such as this are highly fact specific, but often arise in the same, or virtually identical, construction contexts as meticulously described by the court in its decision.

This case truly provides a breath of fresh air. The court even refused to dismiss the contractor's claim against the SCA for breach of the implied covenant of "good faith and fair dealing" which, as a matter of law, is read into every contract, public or private. The court also rejected the SCA's argument that it could freely issue unilateral change orders. Rather, it accepted the contractor's argument that the SCA's right to issue unilateral change orders was limited to situations where the additional work would cost less than \$50,000 and that the SCA, in bad faith, issued unilateral change orders which required the contractor to expend/advance sums greatly in excess of that amount.

For those who are in the trenches every day doing battle with public owners, cases such as this are far too infrequent. This judge "got it". Going forward, judicial precedent such as this should provide an expanded opportunity for any contractor or subcontractor doing work for the SCA to seek a fair and just resolution of its claims.

If you have any questions relating to the preservation and/or timeliness of claims against the SCA or any other public agency, please feel free to contact us. Keep in mind that most public (and many private) contracts are permeated with COFEDs of all types, whether related to notice issues or other obstacles to having a claim fairly resolved. Review and be familiar with your contract requirements and be vigilant in ensuring your careful compliance.

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