

# Beware of What You Waive When You Are Reserving Claims

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Contractors are mindful that nearly all public contracts set forth the required time period, in consecutive calendar days, in which substantial completion must be achieved, in order to avoid costly liquidated damages. These public contracts also have mechanisms built in to enable contractors to obtain extensions of time of the substantial completion date.

In a recent decision, a court looked to what a contractor stated in its partial extension of time request to determine whether a claim for extra work had been waived. Yet again, a New York court issued a decision in favor of a public owner in what is nothing more than a “got ya” based upon the multiple waiver clauses in the standard form contract. The New York Supreme Court held that the City of New York did not have to pay for a contractor’s justifiable change order based upon the contractor’s failure to reserve the specific claim for extra work in its extension of time request.

Pursuant to Article 13 of the City’s standard construction contract, whenever a contractor is applying for an extension of time (partial or final), the contractor is required to include the statement “that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive.” As many contractors are aware, in order to have the partial extension of time approved, contractors are not permitted to alter the pre-printed form extension of time request provided by the agency; however, a contractor is permitted to list its pending/known claims.

As this recent case explains, the New York City Comptroller’s Office (the Comptroller’s Office), the second tier reviewer of contract based claims, will look to a contractor’s extension of time request to determine whether the claim before it was waived when the contractor submitted its partial extension of time request(s). Here, the contractor had submitted four requests for partial time extensions and, while the contractor did reserve certain claims related to additional costs arising out of delays, claims relating to proposed change orders and additional work due to changes, the extension requests did not reserve the specific claim that was being pursued with the Comptroller’s Office. As part of those extension requests, the contractor inserted the contract’s required waiver language. The Comptroller’s Office denied the contractor’s claim based upon the waiver language contained in the extension of time request.

The contractor further pursued its claim, as required by the contract, to the Contract Dispute Resolution Board (CDRB), which upheld the Comptroller’s Office decision that the claim was waived. The contractor then commenced an Article 78 proceeding in court challenging the CDRB decision. The court, in denying the contractor’s Article 78 petition, held that the CDRB determination was rational because Article 13 of the contract required the contractor to expressly reserve or waive any claims it had under the contract and the

contractor failed to reserve the claim in the four extension of time requests.

This case is yet another example of how courts will strictly construe public owners' agreements against contractors. Contractors must be mindful of the documents they are executing and the implications/ramifications that such documents may have on the project.

Based upon this decision, contractors should specifically include an exhaustive list of all pending/proposed change orders, extra work orders and disputed work items in their extension of time request. In order to be fully protected, this list should also include any items of work that have not even reached claims status (e.g., change order proposals that have not yet been denied). The contractor's list should be as specific as possible and include: the nature of the work; the amount allegedly owed (if known); operative dates; and a claim or change order number attributable to said work. This list should then be updated with each subsequent partial extension of time request.

For contracts that are subject to the City's pilot program for delay damages or new contracts that allow for the agency to pay delay damages, contractors must be mindful to reserve claims for delay in the partial extension of time requests. This means that the comprehensive list should not only list the specific items of work that are claimed, but also the delay and impact damages related to same.

Partial extension of time requests are very important on many levels and should not be an afterthought or haphazardly submitted to a public owner. Feel free to contact me to discuss and review what needs to be included in a partial and/or final extension of time request.