

Damages Are Ascertainable After Completion of Work or Upon Substantial Completion

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Ordinarily, when performing work on a public or private improvement a contractor's damages accrue when its damages are ascertainable. Although the date on which damages become ascertainable vary based on the unique facts and circumstances of each project, often a claim does not accrue until the owner or entity charged with the task of making determinations denies a demand for payment, for example, when a change order request is submitted and denied. For public construction projects, formal notices of claim are often required when a contractor is seeking damages and the triggering event as to when the damages accrue are governed by statute and/or contract.

Prior to December 2014, the New York City School Construction Authority (the SCA), whose contracts are governed by the Public Authorities Law, had an unclear triggering point as to when damages were ascertainable. The courts, in interpreting the pre-December 2014 version of the Public Authorities Law, held that a claim accrues, once the work is substantially completed or a detailed invoice of the work is submitted. This resulted in requiring contractors to file formal claims before the specific demand for payment was denied, e.g., filing a claim for extra work before the request for a change order was denied by the SCA. Because the date of when damages were ascertainable was confusing and resulted in meritorious claims being denied, in December 2014, through the extraordinary efforts of the construction industry, the Public Authorities Law was amended to define the accrual of a claim as when the demand for payment is denied, e.g., a claim accrues when the request for a change order is denied.

Because the Public Authorities Law was amended in late 2014 and was not retroactively effective, contractors are still performing work pursuant to contracts governed by the pre-December 2014 version of the Public Authorities Law and, therefore, the triggering point as to when damages are ascertainable is still an issue being litigated.

In a recent case, a contractor brought an action against the SCA based upon the SCA's alleged breach of contract in failing to pay for work that was allegedly outside the scope of the original contract.

After work began, the SCA directed the contractor to perform certain work on the doors of a school and additional exterior masonry work. The SCA issued a notice of direction for the masonry work and, in response, on December 1, 2014, the contractor provided a cost estimate to perform the work. When the SCA and the contractor could not agree on pricing for the masonry extra work, the SCA executed a unilateral change order on February 24, 2015. After the SCA issued the unilateral change order for the masonry work, the contractor filed a notice of claim on April 6, 2015. Thereafter, the contractor performed the masonry change order. A separate notice of claim for the door work was filed on February 12, 2016.

In the contractor's complaint, it sought damages for the costs incurred to perform the masonry work and door work. The SCA made a motion to dismiss the complaint, among other things, based upon its belief that the notice of claim for the masonry was untimely. The SCA alleged that the contractor provided a detailed estimate for the work on December 1, 2014 and, based upon the date of that estimate, the time to file a claim expired on March 1, 2015, which was over a month before the contractor filed its claim. The contractor opposed the motion and alleged that it timely filed its claim and the time to file ran from when the project was substantially completed, and not from the time it submitted the estimate.

In reviewing the law on timelines of Public Authorities Law claims, the court noted that in most cases in which a notice of claim was untimely filed either one or both conditions for ascertaining damages had already occurred when the claim was filed, to wit, the project was substantially completed or a detailed estimate was submitted for the extra work performed. In this case, however, the contractor did not send an invoice based upon work it already performed. Rather, it sent a cost estimate for the masonry extra work to be performed in the future.

The court held that the fact that the contractor's estimate was detailed was insufficient to trigger the contractor's obligation to file a notice of claim as the work had not yet been performed. The court ultimately denied the SCA's motion to dismiss and deemed the notice of claim timely because the masonry work had neither been finished nor invoiced and the project had not been declared substantially complete when the contractor filed its notice of claim.

Commentary

Here, the contractor was successful in defeating the SCA's motion to dismiss the complaint because the statutory notice of claim was timely filed. The facts specific to this case as applied to the applicable version of the Public Authorities Law provided that the project was not substantially completed and the estimate submitted was for extra work to be performed. Because the old version of the Public Authorities Law governed, if the contractor's detailed estimate was submitted after the extra work was completed, then the claim would have been untimely filed.

Before performing any extra work on a project, public or private, a contractor must review the contract to determine the notice of claim/dispute provisions. Special attention should be given to any claims notice provisions and, in the case of public contracting, any statute that is applicable to the specific public owner.

Feel free to contact me to discuss filing claims and complying with contractual and statutory requirements.