

Notice of Extra Work Required Even When Public Owner Offers to Make Partial Payment on Proposed Change Order

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Notice and reporting requirements found in public contracts continue to be a major stumbling block for contractors and subcontractors. The law on notice and reporting is well settled in New York and, time and time again, courts will dismiss meritorious claims because of a perceived failing to strictly comply with contractual requirements, even when the public owner has actual knowledge of the events giving rise to the claim.

The public policy behind notice requirements is that timely notice provides public agencies with potential deviations from budgeted expenditures and, presumably, allows them to take early steps to avoid extra or unnecessary expense, make necessary adjustments, mitigate damages and avoid a waste of public funds.

In a recent appellate court decision, the timeliness of the notice of extra work became the central contention that ultimately led to the dismissal of an otherwise meritorious claim. In this case, it was undisputed that there was extra work that was required to be performed due to design issues for work to be performed in the ceiling of an existing building. After the work was substantially complete (almost two years after the work commenced), the contractor requested additional compensation for extra work that it allegedly performed, including the ceiling work. Thereafter, the public owner investigated the extra work claim and concluded that the contractor was due some additional funds for labor costs incurred in performing the extra work related to the ceiling and denied the contractor's other claims. The public owner then issued change orders allowing for proposed additional funds, however, the contractor refused to sign the change orders. Instead, the contractor submitted two proposed change orders requesting additional sums. In response, the public owner again issued change orders, but only in the lesser amount that it deemed was owed.

The contractor then commenced a breach of contract action seeking damages representing the unpaid contract balance (including its extra work claims) and delay damages. The public owner answered and asserted affirmative defenses claiming, among other things, that the contractor failed to comply with the contractual notice and reporting requirements. The contractor then moved for summary judgment on liability and the public owner cross-moved for summary judgment seeking dismissal of the complaint. The Supreme Court denied the contractor's motion, granted the public owner's motion and dismissed the complaint.

On appeal, the contractor claimed that it performed extra work in the ceiling due to design issues and had to perform certain cleanup work. The parties agreed that the contractor became aware of the ceiling issue soon after it commenced work. The court reviewed

the contract's notice requirements and found that, regarding extra work, the contractor was required to provide written notice within 15 days after being ordered to perform the extra work or beginning performance, whichever occurred earlier, and to submit documentation of anticipated costs for the extra work within 30 days. The contract also stated that the failure to comply with the notice and reporting requirements is deemed to be "a conclusive and binding determination on part of the contractor that the work in question does not involve extra work and not contrary to the terms and provisions of the contract and, also, a waiver of all claims for additional compensation or damages as a result of the work."

The contractor conceded that it did not provide the public owner with timely notice of the claims as required by the contract, but contended that the complaint should not have been dismissed because the public owner knew the contractor was performing the extra work and it waived the notice and reporting requirements by offering to make partial payments in response to the contractor's requests.

Ultimately, the court held that the contractor failed to comply with the notice and reporting requirements of the contract and, therefore, dismissal of the complaint was warranted. The court further held that, despite the public owner's conceded knowledge of the ceiling design issue, actual knowledge did not suffice to excuse the contractor's lack of compliance with a strict contractual notice requirement. The court also held that notwithstanding the public owner's offer to make partial payment on the extra work claims, it did not waive the contract's notice requirement. Indeed, the court noted that the contract provided the public owner with the authority to order extra work and compensate the contractor, however, partial payment and the issuance of change orders would not constitute a waiver of other contract provisions by the owner. In view of the reservation clauses and in the absence of any statement to the contrary, the court held that the public owner's willingness to compensate the contractor for a limited amount of extra work could not be construed as an express or unequivocal manifestation of its intent to waive reliance on the contract's notice and reporting requirements as to the extra work claims as a whole.

Commentary

This case outlines the harsh results of failing to comply with contractual notice provisions and the courts' continued reluctance to address the merits of otherwise proper claims to which the contract's notice and reporting requirements are not strictly adhered.

Here, following post-substantial completion, the contractor, for the first time, requested change orders for work that was identified early in the project as extra work. Although the public owner acknowledged that some amount was due and owing for the extra work, ultimately because the contractor did not timely submit a notice of extra work and also failed to submit documentation of anticipated costs thereafter, the contractor's claims were completely dismissed.

Providing notice to an owner is not a daunting task and must be done. A letter or email sent within the time prescribed in the contract will satisfy the written notice

requirement. Further, a follow up letter or email stating anticipated costs or damages is equally easily satisfied and can be sent under a full reservation of rights.

Complying with notice and reporting requirements takes a certain measure of discipline and should not be ignored. Sending that email or letter today can save a claim later and remove an owner's excuse for non-payment.

Feel free to contact me to discuss notice and reporting requirements and other contractual compliance issues.