

Statutory and Contractual Limitation Periods Can be Tolloed by Agreement

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The reservation of claims and pursuit of disputes on public improvement projects often require a contractor to file multiple written claims with the public owner and sometimes also require the separate filing of written claims with the State or other public agencies. On public improvement projects, a contractor must look to the contract with the public owner for operative claims and dispute provisions, but it must also look to and comply with applicable laws, rules, codes and statutes governing the public owner. The failure to comply with such laws, rules codes and/or statutes could result in the complete loss of an otherwise meritorious claim.

In a recent case, a contractor was pursuing claims against the New York City School Construction Authority (SCA) in connection with the construction of a new school. Claims against the SCA are governed by New York Public Authorities Law, and, in particular, Section 1744. Under the version of Section 1744 in effect when the contractor executed the contract, a contractor is required to submit a “detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded [and be] presented to the [SCA] within three months after the accrual of such claim.” Under that version of Section 1744, “[w]hile the determination of the date on which damages are ascertainable may vary based on the facts and circumstances of each particular case, it generally has been recognized that damages are ascertainable once the work is substantially completed or a detailed invoice of the work performed is submitted.” In the recent case, the Court was asked to determine whether a contractor complied with the requirements of Section 1744 and whether the claims were timely brought in the litigation.

The contractor entered into a design build contract with the SCA to construct a new school. Over the course of construction, the SCA directed the contractor to complete extra work, resulting in extra costs. The contractor submitted proposed change orders (PCO) to the SCA to increase the contract price to recoup the increased costs. The SCA agreed to some, but not all of the contractor’s proposed increases.

In November 2003, the contractor executed a Certificate of Substantial Completion and served a Notice of Claim. The November 2003 Notice of Claim itemized the claims for extra work and/or delays in an attached schedule. Thereafter, between August 2004 and August 2011 the contractor and SCA entered into a series of agreements extending the time for the contractor to commence legal proceedings and/or serve additional notices of claim. The last agreement in this series specified that, “[o]ther than the extension of time to commence an action and/or serve notices of claim and the raising of any notice of claim defenses, the parties hereto do not waive any rights or remedies that they may have under applicable laws.” The agreement, however, did not make a distinction between claims that were already untimely when the Notice of Claim was served in November

2003, and claims that were not.

The contractor commenced the action against the SCA in August 2012 and sought damages representing the unpaid portion of the contract price plus all unresolved PCOs. The SCA then moved to dismiss specific portions of the contractor's claim which sought to recover damages for extra work and delay costs, arguing that the contractor's claims were untimely because the claims accrued more than 3 months before the filing of the Notices of Claim. The contractor opposed the motion arguing that the claims were timely because they accrued on the date of Substantial Completion. The motion Court granted the SCA's motion dismissing the complaint and the contractor appealed.

On appeal the court analyzed Section 1744 and looked to the various extension agreements to determine which claims the agreements covered. The court determined that the contractor's claims accrued when it submitted each PCO detailing how much it believed the SCA should increase the contract price, why it believed such an increase was warranted and how it arrived at the amount it requested. The fact that the contractor did not know whether the SCA would reject the PCOs or that the project had not reached substantial completion, did not obviate the statutory obligation to serve a notice of claim within three months of the date the Contract actually ascertained its damages. The Court, however, determined that the SCA and contractor agreed to extend the time for the contractor to serve notices of claim and commence an action without distinguishing between timely and untimely claims. The court held that the contractor's complaint was improperly dismissed because the extension agreements were subject to more than one reasonable interpretation, as they may have intended to apply to the contractor's untimely claims as well as its timely claims. In reaching this decision, the court noted that absent a strong countervailing public policy, parties may stipulate away statutory and even constitutional rights and the courts are bound to enforce such stipulations.

Commentary

This recent case is an important lesson that compliance with statutory claims requirements should not be ignored. In this case, the contractor was fortunate that the SCA agreed to extend the claims filing deadline required by statute and that those agreements were subject to multiple interpretations. Although the court reinstated the complaint, the contractor still has a tough road ahead of it. In the reinstated action, the contractor will have to convince the court or the jury that its interpretation of the extension agreements is reasonable and that all of its claims were timely filed based upon the extension agreements. If it is unsuccessful, any claim that accrued more than three months prior to the filing of the November 2003 will be deemed waived.

This case also highlights an often-underutilized option of the contractor proactively reaching out the public owner to enter into agreements to extend the statutory or contractual time period to file claims or commence litigation. This option, if successful can extend the time for contractor to resolve disputes short of litigation. To fully protect itself, a contractor must make sure that this agreement is in writing and executed by an individual at the public owner that has the authority to bind the public owner.

As a project reaches substantial completion, a contractor may want to reach out to the public owner to open a dialogue on the resolution of claims and see if the statutory or contractual limitation periods can be extended by agreement, subject to good faith negotiations on the contractors claims. A public owner may agree to extend the time to commence litigation, but not the filing of the underlying claim, because the public owner may need to receive the contractor's written claim in order to evaluate its merits. Any agreement reached is a step in the right direction in resolving claims and avoiding costly litigation.

Feel free to contact me to discuss written notice of claim requirements on public projects.