

# Waiver Language in Extension of Time Request Results in Waiver of Pending Claim

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During the course of a project, contractors are often required to sign documents in order to, among other things, obtain payment (including change order payments) or obtain extensions of the project completion date. Contractors often sign these documents without reviewing them and fail to fully grasp and/or appreciate the full ramifications of executing these documents.

An extension of this “blind” signing is the fact that on many public improvement projects, public owners require contractors to include certain language in extension of time requests (and sometimes change orders) that, if not included, will result in the denial of an extension of time request and potentially exposes the contractor to liquidated damages. However, in signing these requests for additional time, contractors should also be wary of the public owner’s inclusion of language which could result in a contractor’s waiver of pending change orders or claims for extra-contractual compensation.

In a recent court case the court was asked to review the language in an extension of time request to determine whether the contractor waived a claim that was pending with the City of New York (the City) in the contract’s alternative dispute resolution (ADR) process.

A contractor, during the course of a public improvement project with the City, disputed the City’s contention that the replacement of certain contaminated soil work was not a change order to the contract that entitled the contractor to additional compensation. As a result, the contractor pursued its rights through the mandated ADR procedures in its contract with the City. First, it filed a notice of dispute with the Commissioner of the City agency disputing the engineer’s determination that the work was not a change order and, therefore, that the contractor was not entitled to additional compensation. When the Commissioner denied the dispute, the contractor filed a claim with the Comptroller’s Office of the City of New York. Ultimately, the Comptroller’s Office denied the contractor’s claim and the contractor filed a petition with the City’s Contract Dispute Resolution Board (CDRB).

In reviewing the contractor’s claim, the CDRB held that the contractor waived the extra work claim when it requested an extension of time which included a statement by the contractor that it “waives all claims except for those delineated in the application [for additional time], and the particulars of any claim which [the contractor] does not agree to waive.” The contractor’s soil removal extra work claim, while pending, was not exempted from the waiver language in the extension of time request.

Upon denial of its claim by the CDRB, the contractor then commenced an Article 78 petition with the court to annul the determination of the CDRB. Usually, the court is constrained in an Article 78 proceeding to only determine whether the decision of the

public owner, here the CDRB, had a rational basis or whether the decision was arbitrary and/or capricious. Ultimately, in this case, the trial and the appellate courts affirmed the CDRB decision as rational that the contractor had waived its pending claim when it executed the extension of time request that contained the waiver language. The contractor argued that the agency's course of conduct on the project in connection with the contractor's five previous extension of time requests evidenced that the contractor had not intended to waive its claim. The appellate court found this argument unavailing and stated that the City cannot be estopped by any decision made by its agents.

### Commentary

This case is an object lesson that every single document executed on a project must be scrutinized. Here, the contractually required language inserted into an extension of time request resulted in a waiver of a claim that all parties understood the contractor was, in fact, pursuing. Had the contractor reviewed the waiver language when executing the extension of time request, it could have taken appropriate measures to specifically exempt the pending contaminated soil removal claim.

The ramifications of this case on the contracting community, however, are more troubling than the single claim that the courts and CDRB held that the contractor waived. In the future, when presented with this same scenario, the City may take the position that all pending and unapproved change orders are also waived when a contractor executes an extension of time request that contains waiver language. Therefore, in practice, all extension of time requests should include language that specifically exempts pending disputes/claims, as well as pending and unapproved change orders and a list of other categories of damages that the contractor does not intend to waive.

Feel free to contact me to discuss how to properly reserve claims in extension of time requests and to avoid surreptitious releases in contract documents.