



Construction Law News

November 2006

Introduction to Our Newsletter

One might assume that the construction of a church would be a project where all parties rally together for the common good to complete the job-on time, on budget, without delays. Construction is construction, however, whether for a religious organization or any other structure. It involves a complex series of relationships where conflicts can be and usually are ignited by any one of hundreds of daily urgencies.

In a local church construction project, specially designed roof trusses collapsed during construction. Most of the trusses were destroyed. One worker was injured. The trusses had to be replaced. The injured worker sought compensation for his losses. The truss manufacturer sought payment for the trusses. The subcontractor installer sought payment for his work and indemnification for any responsibility for the truss failure. Blame was cast in every direction: the design team, the truss manufacturer, the contractor and the installation subcontractor all took their turns in the circle of blame, with no-one accepting responsibility. Some parties had general liability insurance; others did not. In the mean time, the contract regime, which called for the resolution of disputes by the architect, broke down when the architect said, in essence, "It's too complex to handle." The project was delayed significantly.

Our legal experience was enlisted after the problems developed. We have found that most construction disputes can be avoided, or handled much less expensively than litigation, with "up-front" investments in thoroughly negotiating and administering the contracts.

This newsletter is the first in a periodic series of reports we will compile to promote more efficient use of our services during the planning, development and contract stages of construction. We will also provide updates about litigation activities. We recognize that there are times when both owners and contractors alike must "bet the company" on litigation to protect what they are entitled to. That is what we do best: litigate and

win complex, difficult cases. Ultimately, however, our business, our clients and our community are all best served through efficient, ambitious construction projects where disputes are minimized, or otherwise handled promptly and fairly. We hope that these reports help you accomplish these goals.

Form Agreements

Are you an owner contemplating new construction or renovation? If so, you will likely need a design professional and a construction contractor. You might also need a surveyor, geotechnical engineer, asbestos abatement consultant or a construction manager. You will likely enter into written agreements with each of them. Remember, even a simple "letter of intent" is a contract and can have significant legal implications.

The design professional or contractor might offer a "standard" form agreement. Several groups, including the AIA, EJCDC and AGC, offer large sets of form agreements. These make good starting points for design and construction related projects. They include many different forms tailored to different types of projects and entities. But Owners beware: such forms require modification to properly adjust the risks related to your project.

Anyone committing to an agreement is best served by investing in making their expectations clear at the outset. It allows both sides to better understand each other and reduces the likelihood of a failed relationship. It also reduces the risk of expensive litigation if things go wrong.

Beware of Ambiguous Contract Terms

A contractor who fails to seek clarification about ambiguous contract terms prior to the submission of its bid will be bound by the owner's reasonable interpretation of those terms.

In *Delicacies Constr. Co., Inc. v. City of New York*, 9 Misc.3d 517, 802 N.Y.S.2d 316 (2005), *aff'd* 29 A.D.3d 403, 815 N.Y.S.2d 76 (1st Dep't 2006), the contractor was the winning bidder for a public improvement construction project. As is typical, the Contract consisted of various documents, including the Proposal for Bids, the contractor's Bid, Technical Specifications, and the Agreement.

The contractor asserted that the City failed to design, administer and manage the construction project properly. As a result of the city's failures, it took the contractor four additional years, costs and expenses to complete the project. The contractor sought the value of additional labor, materials, equipment and services pursuant to the Contract.

The project was substantially completed, and the contractor's claim accrued on May 31, 1999. However, the contractor brought suit against the City on October 21, 2004, relying upon the well known six (6) year statute of limitations for contract claims. In response, the City argued that the contractor's claims were barred by the statute of limitations contained in the contract documents. The City pointed to Article 53 of the Agreement which required a claim to be brought within four months after the accrual of the claim. The contractor argued that the four-month statute of limitations did not apply because its claims for delay damages were based upon the Contract and not specifically the Agreement: the contractor argued that the four-month statute of limitations contained in Article 53 of the Agreement was to be applied only to "claims based on this Agreement."

The court rejected the contractor's argument. The court noted that Article 1 of Chapter I of the Agreement did not readily distinguish between the terms "Contract" and "Agreement." As a result, the court interpreted the statute of limitations provision contained in Article 53 of the Agreement to apply to both the claims based upon the Contract and the Agreement.

Importantly, the court determined that to the extent there

was some ambiguity caused by the term "Agreement" in Article 53, there was an additional contractual requirement that the contractor request clarification of such ambiguities. The court found that the contractor failed to clarify the meaning of the contractual language it claimed was ambiguous before submitting its bid; thus, it was bound by the City's reasonable interpretation of Article 53. As a result, the court ruled that the contractor's claims were time-barred because the contractor waited over five years to bring suit against the City after its claims accrued in May 1999.

This case illustrates that contractors must be aware of ambiguities in contract language. Contractors must document and resolve ambiguities prior to submitting their bids, or risk being held to the project owner's interpretation of the ambiguous language.

No Damage for Delay Legislation

Contractors who work for public owners often encounter "no damage for delay" provisions in their contracts. These provisions prohibit delay damage claims against public owners no matter who is at fault.

Several years ago, the New York State Senate and Assembly passed legislation requiring public contracts to include clauses authorizing contractors to sue for recovery of delay damages. This legislation was vetoed by Governor Pataki.

The Legislature recently reconsidered this bill. On June 19, 2006, the Senate passed S2893B prohibiting the use of no damage for delay clauses in public work contracts. The Bill was delivered to the Assembly for consideration by its Ways and Means Committee.

Governor Pataki has expressed sympathy with the purposes of the legislation. However, as in the past, public owner groups, including counties, school districts and towns, will lobby against this provision based on fears that "delay damage" claims will bust their municipal budgets.

We will advise you about developments on the progress of this legislation.

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