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Preserving your Article 27 contract rights

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Article 27 of the N.Y.C. Standard Construction Contract (city contract), provides a procedure for resolving most (not all) disputes regarding city projects. The procedure is quite straightforward: 1. The "engineer" for the city on the project makes a determination with which the contractor disagrees; 2. Within 30 days from the engineer's adverse decision, the contractor must submit a "notice of dispute" appealing the decision to the department's commissioner (with commissioner's invariably "rubberstamping" their Engineer's decision); and 3. The contractor must submit a "notice of claim" regarding its dispute to the Engineering Bureau of the N.Y.C. comptroller's office, a political body independently elected from the city administration.

Historically, one of the few protections for contractors found in the city's overwhelmingly one-sided contract is that article 27 prevented a commissioner from "sitting" on his decision. It permitted, but did not compel, a contractor to proceed to the comptroller's office to seek an independent review and settlement of its claim despite the absence of a timely commissioner's decision. This provision (Article 27.2) provides that:

Failure to make such determination (on the part of a commissioner) in a time required by this Article 27 (30 days) shall be deemed a non-determination without prejudice that will allow application to the next level."

This makes perfect sense. Since the contractor has 30 days from its receipt of a decision by a commissioner to submit a "notice of claim" to the comptroller, what would happen if a commissioner delayed, or even declined, to issue a timely decision? A contractor could not then follow the dispute procedure and would be "trapped" at the departmental level without access to the independent and expert comptroller's office.

This provision clearly addresses such a situation and provides a straight-forward remedy. A contractor could simply declare a commissioner as having made a "non-determination" and proceed in a timely fashion to the comptroller's office. For as long as I can remember, this provision was recognized for what it clearly was, a protection to be used by a contractor, when it considered it appropriate, to avoid being held up in the dispute process at the commissioner level. What else could "will allow" possibly mean?

Furthermore, in such circumstances, the delay in the resolution of the controversy, is, of course, completely the fault of the city since it was a city commissioner that did not proceed to make a decision in a timely fashion. To find a contractor delayed the process by not exercising this option, would be ridiculous.

This, of course, did not prevent the city's notorious "kangaroo court," the Contract Dispute Resolution Board (CDRB), consisting of two city employees and a third member chosen from a city-maintained list, to somehow find that a commissioner's delay was not the city's fault, but rather the contractor's. This CDRB decision resulted in a complete forfeiture of the contractor's claim where

it failed to opt to proceed to the comptroller's office based on a theoretical "non-determination" by a tardy commissioner.

As the CDRB inexplicably held:

Petitioner filed to his Notice of Dispute with (the agency)... because the agency took no action within 20 days, the claim was deemed rejected ...at that point, petitioner [only] had another 20 days to file a notice of claim with the comptroller. Thus, his time to file the notice of claim with the comptroller expired...petitioner did not file his notice of claim until ...well beyond the time provided for in the contract. (Please note that the time requirement under Article 27 of the Standard City Construction Contract is 30 days.)

Note the actual language of the CDRB decision: "The claim was deemed rejected." One must ask, by whom? The contractor evidently never elected to do so. How can the CDRB retroactively impose that action upon the contractor? Nonetheless, it did so and the contractor's claim was completely forfeited.

It also should be noted that an appellate court in New York has also adopted this perverse reasoning without basis. The court stated,"The lack of adverse determination by the responsible agency on plaintiff's claims did not preclude plaintiff from seeking administrative review in a timely manner since the contract provided that the agencies failure to render a decision within 20 days of the filing of the claim was deemed a rejection of the claim."

However, nowhere in the city contract does the "failure to render a decision" on-time automatically equate to a deemed rejection. Again, the contractor's claim was dismissed for failure to exercise its option.

G&C Commentary

The only common denominator I can see in these two dangerous decisions is obvious efforts by city attorneys to distort the meaning and proper application of this extremely clear provision of the city's article 27 dispute resolution procedure. Contractors today cannot let their guard down, even for a moment, regarding any aspect of contract management. As I often comment to clients, in the current legal environment, contract management has become as important in preserving your project's profitability as project management. The two must proceed hand in hand.

These decisions are "game changers," particularly since it is so common for commissioner's not to timely issue determinations under Article 27. (How long could it take to rubber stamp an engineer's decision?) No contractor can rely any longer on the clear language of Article 27.2 which merely "allowed" application to the next level at the option of the contractor. This must now be treated as a requirement. A contractor must err on the side of caution, deem such inaction a non-determination and submit a notice of claim to the comptroller's office within 30 days. Caveat contractor.

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