



C. Allan Reeve, Esq.
Marc S. Brown, Esq.
Christian M. Nadler, Esq.

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VIA EMAIL (Legislative.Secretary@exec.ny.gov) AND FIRST-CLASS MAIL

Mr. Alphonso David
Counsel to the Governor
Executive Chamber
State Capital
Albany, NY 12224

RE: A.10136/S.6906 – AN ACT to amend the public authorities law, the general municipal law, the public service law and the state finance law, in relation to notice provisions in public works contracts.

Dear Mr. David:

I am writing to you as the current Chair of the Construction & Surety Law Division of the New York State Bar Association in support of SB6906.

As has been advocated by representatives of the construction industry, and exemplified by numerous reported cases which have been provided to your office, contractors are subject to having valid and valuable claims lost due to the contractors' failure to strictly comply with notice requirements in their contracts with public owners.

Public owners (or more previously their counsel) have learned to craft contracts to require notice provisions requiring strict compliance as a condition precedent to recovery of claims for either payment for extra work or an extension of time. Faced with such language, courts basically have no choice but to enforce the contract as written, regardless of how harsh the consequences are to the contractor.

As noted in several court cases, the fact that a public owner had actual knowledge of the facts and circumstances pertaining to the contractor's claim does not excuse the contractor from strict compliance with the notice requirement. Thus, due to the failure of the contractor to strictly comply with a mere formality, which has caused no prejudice to the owner, the owner has reaped a windfall at the contractor's expense.

There can be good and valid reasons why a contractor would not want to initiate a claim against the owner immediately. For example, the contractor may be reluctant to put the owner on formal notice of a claim for fear that that the notice will exacerbate an already difficult

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relationship with the owner. Also, bringing a claim may force the contractor to begin incurring legal fees and expenses.

The contractor may also be holding off on submitting the notice based on the verbal assurances of the owner's representative that the claim will be equitably adjusted. But later, and after the time to file the notice has expired, the owner disclaims liability on the grounds that its representative acted outside of its authority.

Along with a very short notice period, the contract may also require a long and involved list of documents which the contractor must submit in support of its claim, and which must also be strictly complied with in a short period of time. This additional strict time requirement poses another undue burden on the contractor.

The stated purpose of a notice provision is to give the public owner timely notice of a claim against it by the contractor to ensure that the owner can thoroughly investigate claims in a timely manner. In reality, owners are usually aware of problems being encountered by contractors, thus the claim against them comes as no surprise.

Furthermore, being aware of the notice requirement owners are less likely to raise up and address situations which may give rise to a claim because they do not want to act in such a way as will perhaps bring the notice requirement to the contractor's attention. Thus the notice provision can actually defeat the purpose for which it was intended, namely prompt identification and resolution of problems with the project.

The solution proposed by SB6906 to unwarranted exposure of contractors to "gotcha" notice provisions is fair and balanced. The requirement in SB6906 that an owner demonstrate that it has been "materially prejudiced" in order to reject a claim due to late notice serves the dual purposes of protecting the public owner from a stale and difficult to investigate claim, while at the same time not penalizing the contractor for a technical non-compliance with the contract.

It should also be noted that removing the onerous notice provisions from the contract will reduce the risk that contractors face when dealing with public owners. **Notifying contractors of this reduction in their risk may and should help to reduce their bid prices.**

For the foregoing reasons, I urge on behalf of the Construction & Surety Law Division of the NYSBA that the governor sign SB 6906 into law. If I can be of further in this regard, please do not hesitate to contact me.

Very truly yours,



C. Allan Reeve

Direct Dial: (585) 310-1610

careeve@reevebrownlaw.com