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Litigation of Construction Claims: Planning for Change — Unforeseen Circumstances, Change Orders and Design Defects

by Theodore M. Baum

It is a veritable certainty that any given construction project, whether public or private, will require changes between the time the first shovel of earth is turned and the time when the last piece of metal is polished. However, while the problems related to changes in the work can be similar in both the public and private sector, the public owner is shackled with many more restrictions on its ability to effect such changes. This article will examine some of those restrictions.

Changes in General

Construction contracts are among the most complex of commercial contracts. The use of standard industry forms are quite common, such as the contract forms promulgated by Associated General Contractors ("AGC"), the American Institute of Architects ("AIA"), and the Engineers Joint Contract Documents Committee ("EJCDC"). However, many New York State agencies, authorities, municipalities and other public entities have also generated their own standard forms of agreement, general conditions, and technical specifications. The requirements of such contracts may vary with respect to the proper procedures for changes in the work. Differences may also be presented depending on the project delivery method. This refers to whether the hierarchy of the contract is the traditional method, the construction manager method, or the design build method. Therefore, the prudent owner and contractor will carefully examine the changes provision in the contract at issue.

The traditional method of project delivery is where the owner hires a design professional (architect or engineer) to provide design services, and then separately enters into a contract with a contractor, who constructs the project according to the plans and specifications prepared by the owner's design professional. Thus, the owner has privity of contract with both the architect and the contractor, but the architect and contractor do not have privity with one another. In the public sector, this typically involves the preparation of plans and specifications as part of a bid package which is publicly bid in accordance with certain New York statutes. The competitive bidding process also impacts changes in the work and is discussed in more detail in this article.

A twist on the traditional method involves the insertion of a construction manager. There are two kinds of construction management: construction manager as agent, also known as "pure" construction management, and construction manager as constructor. The construction manager as agent, or CMa, acts as an advisor to the owner, but does not enter into any contracts with any contractors. Thus, the owner remains the party having privity of contract with the contractor or contractors. The CMa construction delivery method has been extremely popular with school districts throughout New York State. The construction manager as constructor, or CMc, is where the construction manager serves not only as advisor to the owner, but also enters into subcontracts directly with subcontractors.

Unforeseen Circumstances

Changes in the work may arise for several reasons. One reason that necessitates changes in the work is unforeseen circumstances. The quintessential unforeseen circumstance is the ***differing site condition.*** Differing site condition claims are those which arise from conditions which are not anticipated by the contractor and which lead to additional costs in performing the contract work. Such conditions may be unknown because they are below the surface of the ground, or because they are behind walls, under floors, or otherwise concealed within existing structures.

Under New York law, there are two types of differing site condition claims, known as Type I and Type II. Type I claims arise from a misrepresentation made by the owner or its agent (such as a design professional) on the plans and/or specifications for the project. The misrepresentation need not be intentional in order to be actionable. To the contrary, even an unintentional misrepresentation of the plans or specifications may constitute a basis for a Type I claim.

There are six elements which must be shown in order for a contractor to recover on a Type I differing site condition claim. These elements are described in the court's decision in *Fruin-Colnon Corporation v. Niagara Frontier Transportation Authority,* 180 A.D.2d 222 (4th Dep't 1992).

"In order to prevail on its differing site condition claim, plaintiff was required to prove six elements: the contract documents must have affirmatively indicated the subsurface conditions; plaintiff must have acted as a reasonably prudent contractor in interpreting the contract documents; plaintiff must have reasonably relied on the indications of subsurface conditions in the contract; the subsurface conditions actually encountered must have differed materially from those indicated in the contract; the actual subsurface conditions encountered must have been reasonably unforeseeable; and plaintiff's claimed damages, excess costs associated with extra work and delays allegedly incurred as a result of the unforeseen need to use steel ribbing for temporary support of the tunnel during excavation, must have been solely attributable to such materially different subsurface conditions." *Fruin-Colnon,* 180 A.D.2d at 226.

A Type II differing site conditions claim arises from the simple fact that the existing conditions are not what may be normally expected. The elements required for a contractor to recover on a Type II claim are (1) the contractor did not know of the condition; (2) the contractor could not anticipate the condition from inspection of the site, or from the contractor's own experience; and (3) that the condition varied from the norm in similar operations. *See Reliance Insurance Company v. County of Monroe,* 198 A.D.2d 871 (4th Dept 1993). The failure to establish all of these elements is fatal to the claim. *See, e.g., Graham Construction & Maintenance Corp. v. Village of Gouverneur,* 229 A.D.2d 815 (3rd Dep't 1996).

Not every condition can be anticipated in advance of construction. However, one important way that public owners may protect themselves from construction claims is to impose a duty to disclose in the bid documents. Most construction contracts incorporate the bid documents, and some bid

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"Flow Control" Revisited — The Local Government *Can* Control Its Citizens' Trash

by Michael D. Diederich, Jr.

This article is intended to place into context the recent Second Circuit decision, *United Haulers Ass'n. v. Oneida-Herkimer Solid Waste Management Authority,* 261 F.3d 245 (2d Cir. 2001), *cert denied,* __ U.S. __ (2002), where the court held that regulatory "flow control" can permissibly be used by local government to direct solid waste to publicly owned facilities without running afoul of the Commerce Clause to the United States Constitution. This is a precedent of national importance, because it provides a sound legal rationale for municipal control of local citizens' trash—a traditional power which many observers had regarded as lost when, in *C&A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), the Supreme Court invalidated flow control to a municipally-preferred local entrepreneur.

1. Background

A battle has been waged in the courts and in Washington as to whether the waste industry or local government should have the right to control municipal solid waste—commonly referred to as garbage or trash. To the waste industry, garbage is seen as a profitable "article of commerce." To municipalities, garbage is a public health problem and noisome pollutant which requires costly and often complex solutions.

One method used by municipalities to manage their garbage has been waste "flow control," whereby solid waste is directed by ordinance to designated facilities, commonly to waste-to-energy incinerators. Broadly speaking, there are several types of flow control:

- municipal collection—a city's garbage trucks collect trash and dispose of it at, for example, its municipal landfill;
- economic—"free" or subsidized disposal services offered by local government (e.g., free household hazardous waste collection/disposal) causes waste to "flow" by force of economics;
- franchise/contractual—waste flows per the conditions of governmental franchise or contract;
- regulatory—where local law directs waste to designated facilities. This species of flow control has been the most common subject of legal challenge.

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2. *C&A Carbone v Town of Clarkstown*

In *Carbone, supra,* the United States Supreme Court invalidated a town flow control ordinance, holding that the regulation impermissibly discriminated in favor of the town's preferred local vendor in waste management services. After the town dump closed, the Town of Clarkstown, New York, enacted its ordinance directing all "acceptable waste" (essentially ordinary trash) found within its borders to a town-sponsored waste transfer station owned by a private company.

The *Carbone* case involved a Town of Clarkstown ordinance which basically required that all ordinary garbage found within the town, even imported garbage, be delivered to a privately run transfer station for ultimate disposal elsewhere. The town guaranteed this transfer station a minimum volume of waste, and thus an assured profit amortizing the cost of the facility which the town could eventually purchase for $1. The town's promise of waste delivery was backed by its flow control ordinance which, in this case, required that the non-recycled waste from plaintiff C&A Carbone's recycling facility be brought to the town-designated facility. Thus, plaintiff C&A Carbone's (non-recycled) garbage, both locally generated and imported, was effectively co-opted by the town by requiring delivery to its preferred vendor. The ordinance forced C&A Carbone to lose control over its stock-in-trade, the local and interstate garbage it was processing, by requiring it to deposit its garbage with the town's higher priced vendor.

In effect, Clarkstown created one point of exit for all garbage generated or coming into the town, with a private toll gate attached. Only the town's preferred vendor could "package" the garbage for export, and to exact any toll it wished. Under its arrangement with its preferred local vendor, Clarkstown was assured the presence of a transfer station to service the town (certainly a legitimate waste management purpose), and would eventually receive title to the facility, all without the political burden of directly levying taxes to pay for this assurance.

The justices in *Carbone* debated over whether the monopoly which the Town created in favor of the local vendor should be viewed in Commerce Clause terms, and whether the preferred vendor should be viewed as acting as a "quasi-public" agent for the Town. Ultimately, the Court determined that the Town's ordinance impermissibly discriminated against interstate commerce in favor of the local entrepreneur.

a. *Carbone's* "Local Grab" Benefiting Private Sector *Ratio Decidendi*

The Supreme Court, in a 6-3 decision, found the town's ordinance unconstitutional as protectionist discrimination. The Court viewed the town's flow control ordinance as imposing a "local grab" (local processing) requirement, a type of favoritism historically found to violate the Constitution's Commerce Clause. *See generally,* Tribe, AMERICAN CONSTITUTIONAL LAW (2d Ed. 1988)(discussing "local grab" cases) § 6-9.

The legal argument centered around the Constitution's Commerce Clause. Basically, the Commerce Clause has been interpreted to prohibit State or local governmental impediments to trade between States. The issue framed by the parties in *Carbone* was whether the Clarkstown ordinance, directing all acceptable waste to the preferred private transfer station, imposed an unconstitutional restriction on interstate commerce. The Supreme Court's invalidation of the Town's flow control ordinance made sense. If every community attempted to grab and tax trash already being managed by the interstate solid waste industry, the interstate solid waste marketplace would be impaired and commercial transactions (not to mention public outsourcing) severely disrupted. *Cf., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon,* 511 U.S. 93 (1994)(Oregon's surcharge on waste entering the state violated Commerce Clause).

Simply put, local government cannot permissibly "grab" for a local business's profit commerce which is properly moving in interstate channels. The Court has a tradition of invalidating such parochialism. *See, e.g., Dean Milk Co. v. City of Madison, Wisconsin,* 340 U.S. 349 (1951).

b. The Disposal Service, not the Trash, is the "Article of Commerce"

In addition to its local grab constitutional analysis, the other aspect of *Carbone* of particular significance to the *United Haulers* decision is its re-characterization of the "article of commerce" as the waste processing service, not the trash itself.

Because both endemic and out-of-state garbage was affected by the Clarkstown ordinance, neither the parties nor the Court in *Carbone* focused on whether locally-generated municipal waste, as such, is an "article of commerce" subject to constitutional protection. Nevertheless, Justice Kennedy, in his majority opinion, specifically characterized the "article of commerce" involved in *Carbone* as "not so much the waste itself, but rather the service of processing and disposing of it." 511 U.S. at 393; *see also,* Diederich, *Does Garbage Have Standing?: Democracy, Flow Control and a Principled Constitutional Approach to Municipal Solid Waste Management,* 11 PACE ENVT'L L. REV. 157, 198-201, 208-215 (Fall 1993)(hereinafter "*Does Garbage Have Standing*").

This is an important distinction, for many reasons. If solid waste is itself a commodity, then what is the propriety of governmental policies seeking its elimination, reduction, recycling, and proper disposal? If solid waste is a commodity,

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are other wastes, such as air and water emissions, also commodities? If wastes are commodities, should we adjust international law? For example, if Canada self-manages all its solid waste locally, is this an act of trade aggression by depriving American or Mexican landfills of those countries trash? Do we favor international "pollution havens" because they most cheaply accommodate the byproducts of human activities? To classify locally-managed garbage as, in itself, an article of commerce has no principled basis in law or logic, and is unlike the situation where waste has already been placed into and is moving within the channels of commerce. *Cf., Philadelphia v. New Jersey,* 437 U.S. 617 (1978). Common sense dictates that individuals, alone or collectively, should be allowed to reduce and eliminate waste; that waste is not some type of sacrosanct object. After all, what right does an interstate waste disposal firm have to lay claim to a community's trash, whether sitting in the home, curbside, or in a garbage truck destined to a public waste facility?

There is a widespread perception that waste itself is protected commerce—a perception nurtured by those in the solid waste industry who stand to profit in trash management. However, this theory was argued to the Supreme Court in *Carbone*, citing several lower court rulings holding that trash is an "article of commerce." *See, Waste System Corp. v. County of Martin, Minn...*, 985 F.2d 1381 (8th Cir. 1993); *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775, aff'd 947 F.2d 1004 (1st Cir. 1991); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom. Waste Recycling v. SE AL Solid,* 29 F.3d 641 (11th Cir. 1994). The Supreme Court did not adopt this rationale.

The fact that the Supreme Court did not rely on the "waste is commerce" argument, but instead, as discussed above, relied upon traditional "local grab" Commerce Clause jurisprudence, is of immense significance. If the Supreme Court had not employed its traditional, and narrow, local grab analysis in *Carbone,* but instead used a "waste is commerce" rationale, this may have defeated State and local governments in subsequent Commerce Clause challenges. Instead, as the cases unfolded in the appellate courts, public systems which did not discriminate in favor of locally-preferred business have survived judicial scrutiny.

3. Post-*Carbone* cases

Nevertheless, in the immediate wake of *Carbone*, there was wide concern amongst municipal officials that regulatory flow control was unconstitutional. The federal Environmental Protection Agency was asked to prepare, and did prepare, an extensive report on the subject. *See,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS: FLOW CONTROLS AND MUNICIPAL SOLID WASTE (Mar. 1995) Several "fixes" were proposed in Congress, since Congress is the final arbiter under the Commerce Clause as set forth in Article I, § 8.

Nevertheless, the dire predictions were overblown. Appellate courts found ways to allow the public to manage its trash, such as where "open and competitive" procurement was employed (so as not to discriminate against out-of-state firms). *See, e.g., Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d 178 (1st Cir. 1999); *Harvey & Harvey v. County of Chester,* 68 F.3d 788 (3d Cir. 1995). Similarly, municipalities could use the so-called "market participant exception" to the Commerce Clause to contract for services. *See, SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995); *USA Recycling v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995).

On the other hand, where New Jersey drew preferential waste management lines at its state border, the Third Circuit regarded this as discrimination in violation of the Commerce Clause. *See, Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3d 701 (3d Cir. 1995).

4. Permissibility of Public Self-Management of Local Trash

Notwithstanding that *some* means were available for local government to take a modicum of control over local trash, none of the above cases addressed whether a local community has the fundamental democratic right to publicly self-manage its own trash. Legislative solutions were sought. In the New York State legislature there was a proposal, drafted by the author, to allow municipalities to "take title" to their own trash, to allow proper trash self-management. Basically, the concept was that the people own their own trash, and can collectively allow their own government to manage it (notwithstanding the desires of outside waste vendors).

In Washington, D.C., far less attractive solutions were proposed. In reality, the "solutions" being proposed in Congress would be a "cure" which would cause the patient's demise, by permitting some existing flow control, but eventually eliminate this local community right forever. Moreover, at the same time "waste transport" legislation was proposed which would impede the flow of waste legitimately placed into commerce by municipalities needing such solution. Both these proposed Congressional "solutions" were contrary to the spirit and intent of the Commerce Clause, both would promote waste management "balkanization," and both remain undesirable legislative possibilities.

Thus, through the post-*Carbone* years, there remained no answer to the fundamental question of whether the public could democratically self-manage its own garbage. This question was finally answered, thoughtfully and positively, in the Second Circuit's *United Haulers* decision.

5. Importance of *United Haulers* case

In *United Haulers*, the Second Circuit accepted the arguments of the *amicus* N.Y.S. Association of Solid Waste Management in holding that flow control to a public entity is not impermissible discrimination under the Commerce Clause. The Court saw the debate between the justices in *Carbone* about whether or not the

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documents require the contractor to notify the owner in the event it discovers any conflict, error or discrepancy in the plans or specifications. In one case, a public owner challenged a contractor's claim for approximately $1,000,000 in extra costs on a $7.5 million project arising from a design professional's error in the plans and specifications. Discovery in the action revealed that the contractor was aware of the error in the plans and specifications *before* it submitted its bid, but failed to reveal the error to the owner as required by the bid documents. The contractor's entire claim was denied. *Green Island Construction Co., Inc. v. County of Chenango,* 212 A.D.2d 853 (3rd Dep't 1995).

Change Orders

Notwithstanding the important differences between the different forms of agreement and project delivery method, three concepts appear in most construction contracts. Although different terms may be used, the change order, constructive change directive, and the claim, or similar concepts, appear in most construction contracts.

A ***change order*** is an agreement to make a change in the scope of the contract work, the contract price, the contract time, or a combination of any or all of the three. The change order is a document signed by all parties: the owner, contractor, design professional and, where applicable, construction manager. Because change orders reflect mutual agreement by the parties to a change in the work, they generally do not give rise to disputes, unless there is a dispute as to the scope of work covered by the change order itself. Significantly, however, change orders may be impacted by the competitive bidding laws, or may have an impact upon the surety bonding for the project.

A ***construction change directive*** is where agreement cannot be reached among the parties. The construction change directive is the vehicle which allows the public owner to require the contractor to perform certain work, even if a dispute exists as to whether the performance of such work constitutes extra work, thus entitling the contractor to additional compensation, additional time or both. The construction change directive usually provides for the dispute to be resolved in accordance with the dispute resolution provisions of the contract.

A ***claim*** may arise, among other reasons, as a result of a construction change directive. It is important to note than under some contracts, a claim may be asserted either by the contractor ***or*** by the owner. This is important to public owners because it may mean that the public owner is subject to the same requirements of time and/or notice that a contractor may be subject to in the preservation of a claim. An owner's claim may arise from work which the owner believes to be part of the contract scope, but which is either not performed or not properly performed by the contractor.

Design Defects

Due to the complexity of modern construction, it is not uncommon for problems to arise during construction. Frequently, where such problems

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arise, the owner will claim that the problem arises from the contractor's improper construction, and the contractor will claim that the problem is the result of improper design.

In virtually every public work contract, a design professional employed by the owner will provide the design for the project. Such design professional may be a private firm hired as an independent service provider, or by individual architects or engineers working directly for a public department of engineering or architecture. By virtue of this arrangement, as between owner and contractor, the owner will be responsible for any defects in the design of the project. *See, e.g., Ferrari v. Barleo Homes,* 112 A.D.2d 137 (2nd Dep't 1985) (holding the homeowner, not contractor, responsible for defective design where design professional hired by homeowner); *see also Northeastern Plate Glass Corp. v. Murray Walter, Inc.*, 147 A.D.2d 786, 788 (3rd Dep't 1989), and cases cited therein. In *Northeastern Plate Glass,* the court held that the project owner retained responsibility for design, and therefore neither the contractor nor its surety were liable for changes in the design.

Thus, a problem that may be the result of defective design can put the owner in a difficult position from a lawyer's perspective. On the one hand, the owner may wish to take the position that the design was proper and that poor construction is to blame for the problems on a project. Taking this position may come back to haunt the owner in a subsequent action against the design professional, or could result in inconsistent determinations. Therefore, the prudent course of action for an owner where it is unclear whether the root of a problem is design or construction is to include both design professional and contractor as parties. However, if the contract with the contractor requires some sort of alternate dispute resolution, such as arbitration, but the contract with the design professional does not, the owner may be forced into separate fora. Because of this possibility, it is critical that the owner ensure that its contracts with both entities are consistent and integrated with respect to dispute resolution.

Dispute Resolution

Many construction industry contracts have dispute resolution procedures. For example, many New York State agency contracts require that a claim work its way through an administrative process before litigation. This process typically starts with the on-site representative of the agency, such as an engineer-in-charge, or EIC. The decision of the EIC might then be appealed to the regional head of the agency, and then the lead engineer for the agency statewide. If the administrative claims process does not result in a satisfactory result for the contractor, the matter may then be taken into litigation through the New York Court of Claims, for a state agency, or through New York State Supreme Court, for other municipal entities.

Most standard industry documents published by the AGC, AIA, or EJCDC provide for mediation and/or arbitration as a compulsory means for dispute resolution. Frequently, however, such provisions are stricken from the contract general conditions by supplementary conditions prepared by the architect. Therefore, where standard industry forms have been utilized, it is important to review supplementary conditions to see what changes have been made to the dispute resolution provisions.

Another early dispute resolution method which has seen some use in public contracts is the dispute review board ("DRB"). The typical DRB is a panel of experts, usually one lawyer, and some construction professionals. The DRB will convene on a regular basis to receive project updates, perform site inspections, such that the DRB is familiar with the project and may resolve issues whenever they may arise on a construction project in "real time." Generally, DRB determinations are non-binding, but in some instances the DRB findings may be used in subsequent litigation or other dispute resolution. An ancillary benefit of the DRB is that it forces the parties on the project to partner and resolve issues independently because they know DRB panel members are experts and have a detailed understanding of the project itself.

Under most public contracts, a court challenge to a determination is available after administrative remedies under the contract have been exhausted. However, it is important to note that claims against most public entities are subject to statutory conditions precedent. For example, a claim for breach of contract which may be brought in the Court of Claims, must be filed with the Clerk of the Court *and* served upon the Attorney General of the State of New York, within six months after the accrual of the claim. However, if within six months of the accrual of the claim, the claimant serves upon the Attorney General of the State of New York a written Notice of Intention to File Claim, which requires substantially less detail, the claim shall be filed with the Clerk of the Court and served on the Attorney General of the State of New York within two years of the accrual of the claim. Claims must be verified in the same manner as a complaint, and must contain the following information, among other information: time when and place where claim arose; nature of the claim; summary of items of damages on total sum claimed. Court of Claims Act §11-a. It is important to note that this procedure is for breach of contract claims only, and a different procedure is prescribed for personal injury, property damage and other types of claims.

Similarly, Town Law § 65 provides that a written verified notice of claim must be filed with the town clerk within six months of the accrual of the claim, and that any action must be commenced no sooner than forty days after filing the claim, but no later than eighteen months after accrual. The concept is to allow the town to review and adjust the claim.

Similar requirements are imposed for villages pursuant to CPLR §9802, and for school districts pursuant to Education Law §3813. However, the timing for each is slightly different. Under CPLR §9802, a notice of claim to a village has essentially the same requirements as those for a town under Town Law §65, except that the verified notice of claim must be filed with the village clerk within one year of the accrual, as opposed to six months for a town. The Education Law's requirements are also slightly different. Section 3813 of the Education Law requires a written verified claim, as opposed to a ***notice*** of claim. Thus, a written verified claim under the Education Law must provide more detail than a mere notice of claim. The difference is similar to the difference between a summons with notice and a summons and complaint. Once again, the timing is different, and must be presented to the school board for adjustment within three months of the accrual of the claim. The action itself must be commenced within one year of the accrual of the claim, but no earlier than 30 days after the officer or body having the power to adjust the claim has failed to do so. The failure to comply with such notice requirements is fatal to the claim. *See, e.g., Spoleta Construction and Development Corp. v. Board of Education of the Byron-Bergen Central School District*, 221 A.D.2d 927 (4th

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Dep't 1995). Requirements similar to those set forth in the Education Law are also set forth in the N.Y. Public Authorities Law §1744(2) for contracts with the New York City School Construction Authority.

Because the failure to comply with statutory and/or contractual notice provisions can be fatally defective, it is critical to understand when construction claims accrue. Generally, a breach of contract claim on a construction project accrues upon substantial completion:

"In actions involving construction contracts, a claim accrues at the time the contractor's damages become ascertainable (*see, Matter of Board of Educ. [Wager Constr. Corp.]*, 37 N.Y.2d 283, 290; *Castagna & Son v. Board of Educ. [New Dorp High School]*, 151 A.D.2d 392. It generally has been recognized that a contractor's damages are ascertainable once the work is substantially completed or a detailed invoice of the work has been submitted and not, as Supreme Court determined, when each discrete item of work was performed and completed (*see, Eastern Envtl. Servs. of Northeast v. Brunswick Cent. School Dist.*, 188 A.D.2d 777; *G.A. Contrs. v. Board of Educ. of City of N.Y.*, 176 A.D.2d 856." *In the Matter of the Arbitration between Board Of Educ. Schenevus Cent. School Dist. [Merritt Meridian Const.]*, 210 A.D.2d 854, 856 (3rd Dep't 1994); *see also In the Matter of the Arbitration between Town of Albion and 34 & Company, Inc.*, 262 A.D.2d 1006 (4th Dep't 1999) (breach of contract did not occur when the Town issued change orders and delayed in giving approvals, as argued by the Town, but rather when the Town refused respondent's demand for compensation for extra costs incurred as a result of those changes and delays); *see also, Sevenson Environmental Services, Inc. v. New York State Thruway Authority*, 149 Misc. 2d 268 (Ct. Claims 1990) (holding that for purposes of determining timeliness of claim against New York State agency, general rule was that claim accrued when "final payment was issued.").

However, some cases have held that claims against municipalities arising out of construction contracts accrue on the date upon which the payment sought by the contractor was denied. *Spoleta Construction, supra; see also Morano Construction Corp. v. Village of Highland Falls*, 213 A.D.2d 528 (2nd Dep't 1995). Therefore, some support exists for the proposition that the accrual of a contractor's claim can actually occur during the course of construction.

A recent case provides a detailed analysis of the notice of claim requirement for the New York City School Construction Authority ("SCA") pursuant to N.Y. Public Authorities Law § 1744(2). In its decision in *Koren-DiResta Construction Co., Inc. v. The New York City School Construction Authority*, 293 A.D.2d 189 (1st Dep't 2002), the Second Department reversed the trial court's dismissal of a contractor's claim based upon a notice of claim which the trial court found was untimely. The contractor, Koren-DiResta, sought $1.3 million in contract balance, $650,000 in acceleration and impact costs (or delay damages), and $1.7 million in extra work. Following a trial, the lower court dismissed the complaint on the grounds that the March 15, 1995 notice of claim was untimely pursuant to N.Y. Public Authorities Law § 1744(2), because the trial court determined that all three categories of damage were "ascertainable" before December, 1994, or more than three months before the notice of claim.

The appellate division reversed the trial court's determination that the notice was untimely. The appellate division found that the language of the contract itself defined the time of accrual. The appellate division observed the general rule that a contractor's claims for damages accrue upon completion of the work, and that when substantial completion under this particular contract occurred was defined by the contract. Specifically, the appellate division found:

"Fittingly, the agreement in this area expressly defines 'substantial completion' as 'the date certified by the Authority when construction is sufficiently complete, in accordance with the Contract Documents, so that the occupant can occupy or utilize the Work for the use for which it is intended.' Article 2, entitled 'Contract Documents', provides that notices required by the contract shall be given by hand or by certified or registered mail, return receipt requested." *Koren-DiResta*, at 195-196.

Since the SCA never issued a notice of substantial completion on the project at issue in the case, the appellate division held that the SCA "failed to abide by the contractual requirement to declare the project substantially completed. As a result of that omission, the work was not substantially complete at the time plaintiff served its notice of claim, which is therefore timely under the terms of the agreement between the parties." *Koren-DiResta, supra.* In short, the court held that the SCA deserved to be "hoist by its own petard."

In its decision, the court blasted the SCA for what the court apparently perceived as the SCA's misuse of the notice requirements. The court observed:

"The School Construction Authority should bear in mind that the relationship between parties to a commercial venture is not governed primarily by rules of law. Rather it is governed, first and foremost, by rules of economics. And one of the primary tenets of the dismal science is that there is no such thing as a free lunch. The agency seeks to avoid litigating the extent of its obligation to pay some $3.8 million to the contractor, an amount in excess of 15% of the contract price. It is immediately apparent that defendant's success would visit "a harsh result" upon plaintiff (*P.J. Panzeca, Inc. v. Board of Educ., supra*, at 510, 323 N.Y.S.2d 972, 272 N.E.2d 488). However, should defendant prevail, its apparent success would be a Pyrrhic victory, the unfortunate consequences of which will ultimately inure to the people of the City of New York." *Koren-DiResta, supra*, at 194. The court warned that unfairly subjecting contractors to notice requirements in an effort to obtain a "free lunch" would be short-sighted, because such practices would result in either (1) bids for such work being artificially inflated to account for such unfair treatment; and/or (2) making SCA jobs so undesirable that bids would only be submitted by unqualified contractors.

Changes in the work for public work contracts are further complicated by the requirements for competitive bidding. The general requirements for competitive bidding are contained in N.Y. Gen. Municipal Law §103 *et seq.* The long-standing principle behind the competitive bidding theory is that the blind selection of the lowest bid to perform the work leads to the fairest way to construct public improvements. As the Court of Appeals has stated:

"The provisions of the statutes and ordinances of this State requiring competitive bidding in the letting of public contracts evince a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption. They 'are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably *with sole reference to the public interest'* (10 McQuillin, *op. cit.*, s 29.29, p. 322; emphasis added). To this end, in a long line of cases starting with *Brady v. Mayor, etc., of City of N.Y.*, 20 N.Y. 312 and ending most recently with *Albany Supply & Equip. Co. v. City of Cohoes*, 18 N.Y.2d 968, 207, 224 N.E.2d 716, we have consistently held, primarily on public policy grounds, that, where the city fathers have deviated from the statutory mode for the expenditure of funds and letting of contracts, the party with whom the contract was made could not recover in *Quantum meruit* or *Quantum valebant*. The result should not differ where the due administration of the bidding statute is interfered with and competitive bidding thwarted by the unlawful collusion of the bidders themselves, resulting in a gross fraud upon the public. A contract procured through fraudulent and collusive bidding is void as against public policy and recovery cannot be had upon any theory." *Jered Contracting Corp. v. New York City Transit Authority*, 22 N.Y.2d 187, 192-193 (1968).

While laudable in its intent, the competitive bidding statutes also create certain unintended problems. For example, in theory, the competitive bidding process should result in the lowest and presumably correct price for the work. In reality, all too often the lowest bidder has left something out of the bid, intentionally or unintentionally. The statutes give some small leeway with respect to the award of a contract by providing that the contract may be awarded to the lowest *responsible* bidder.

The competitive bidding may also impact changes in the work. As noted above, some degree of change on a construction project is anticipated and necessary. Therefore, it is important that a public owner has the ability to make minor changes in the work without invalidating the contract. This ability is not without limits:

"The competitive bidding statutes, however, do not apply where the changes involved are merely incidental to the original contract (Annot.

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135 A.L.R. 1265, 1274). The law recognizes the necessity for changes in public contracts as construction goes forward. Change orders may be issued without competitive bidding as to details and minor particulars. However, no important general change may be made which so varies from the original plan or is of such importance as to constitute a new undertaking (16 Op.St.Compt. 265, 267; 1957 Inf.Ops.Atty.Gen. 108, 109). Thus, [the public owner] could modify or change the work required under the general construction contract so long as such modification did not 'alter the essential identity or the main purpose of the contract' (*Del Balso Construction Corp. v. City of New York*, 278 N.Y. 154, 160; *Trimpoli v. State of New York*, 20 A.D.2d 933; *see also, Kingsley v. City of Brooklyn*, 78 N.Y. 200)." *Albert Elia Building Co., Inc. v. New York State Urban Development Corp.*, 54 A.D.2d 337, 342-343 (4th Dep't 1976).

Accordingly, provided that the change does not alter the essential identity or main purpose of the contract, a change is permitted by the changes provisions of a public contract. However, utilizing a change order to make a dramatic change to a contract is prohibited.

The *Elia* case concerned the construction of the $17 million City of Niagara Falls Convention Center. To connect the convention center with other buildings, the City Council negotiated a $428,100 change order with the contractor, Piggott, to build a tunnel under the street, in lieu of the pedestrian bridge over the street as the project was originally designed. Elia, a competitor of Piggott's, challenged the legality of the change order. The court agreed that the nature of the change was so dramatic that it violated New York's competitive bidding laws. Accordingly, Piggott was not entitled to be paid for the work.

However, rather than applying the drastic result of forfeiture, the court fashioned a creative remedy of having the trial court determine how much the City could have saved if the tunnel was put out to public bid, rather than negotiated as a change order. Piggott would then have to refund the difference. Because of a lack of reported decisions following this case, it is unclear how the matter was ultimately resolved. The decision certainly had "settlement" written all over it once the liability of Piggott was established.

Conclusion

People tend to be creatures of habit who do not like change. But change in a construction contract is almost impossible to avoid. Because of the complexities of construction contract documents, properly processing changes is a challenge. On public projects, the magnitude of that challenge is increased due to the addition of statutory requirements. Public owners and construction contractors on public improvements must be mindful of all these requirements in order to ensure a smooth and successful project. An essential ingredient for the public owner's success in such projects is to utilize contract documents which will allow the owner sufficient protection to navigate the seas of change within the statutory parameters.

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"Flow Control"

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preferred local vendor was "quasi-public" or "private" as an indication that this was a distinction of constitutional dimension. The Second Circuit did not stop there, but rather went on to explain how the Supreme Court's local grab analysis caused the inescapable conclusion that government preferring its own *public* facilities does not constitute discrimination against interstate commerce, because it is not discrimination in favor of local business.

If the public were not permitted to self-manage the traditionally local function of waste management (a form of sanitation), one might ask whether other traditional local activities of government—police or fire protection—might be subject to Commerce Clause challenge by a potential private service provider.

While the Second Circuit felt constrained, as a matter of legal formality based upon the procedural posture of the case, to remand *United Haulers* to the district court, it appears that victory for the public's waste management system is virtually assured. The district court must undertake a "Pike balancing test," to determine whether the comprehensive waste management system of Oneida and Herkimer counties creates an undue burden on interstate commerce. However, "Pike balancing" generally means municipal win, and here the Second Circuit made expressly clear its view that the traditional power of local government to manage its own citizen's waste must be considered.

The principle challenge now is to overcome eight years of indoctrination that "flow control is unconstitutional." Public waste officials should be educated with *United Haulers*, and informed that public self-management of trash is not perilous. Rather, especially when combined with fair, open, competitive and geographically non-discriminatory out-sourcing of service providers, municipal flow control can be a viable means of managing the public's waste.

6. Concluding Thoughts

Local democratic rule over waste should not be a revolutionary idea. Local government can manage crime, fire and education without Commerce Clause scrutiny. Garbage, a form of pollution, should be viewed no differently. It is a traditional local activity for purposes of the Tenth Amendment and of federalism. Moreover, Congress has stated its policy regarding garbage management, in Subtitle D of the federal Resource Conservation and Recovery Act ("RCRA"), where it expressly states that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." *See*, RCRA § 1002(a)(4); 42 U.S.C. § 6901(a)(4).

United Haulers is a crucial precedent of national, and perhaps international, importance. Depriving local government of the ability to control its own citizens' wastes could have had far-reaching consequences. If garbage were held to be a protected "article of commerce" even before its movement into the interstate waste stream, then local government would have lost a means to control sanitation. Localities would be forced to rely on free market economics, which can result in garbage flowing to "pollution havens"—the cheapest available waste repositories (where long-term costs and environmental consequences are not considered). The profitable segments of the waste disposal and recycling business would flow to the waste industry, while the less profitable segments (the wastes posing the greatest public health dangers) would be left for municipalities to manage at taxpayer expense.

By permitting local government to self-manage its own citizens' trash, by allowing solid waste to be directed to public facilities, the Second Circuit in *United Haulers* has created a sound precedent for municipal solid waste management, fully consistent with the dictates of federal environmental law and the Constitution.

Mr. Diederich's law practice includes environmental law. He wrote Rockland County's *amicus curiae* brief for the County of Rockland in the *Carbone* case. He submitted, for the N.Y.S. Association for Solid Waste Management (NYSAWSM), an *amicus curiae* brief in the *Smithtown* case. He submitted *amicus curiae* briefs and presented oral argument in the *United Haulers* case, which persuaded the Court.