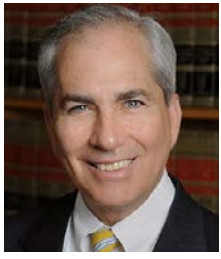


NYC-SCA CONTRACTORS: BE AWARE OF NEW EXCEPTION TO CATASTROPHIC WAIVER OF CLAIM PROVISION



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The SCA has modified its previous categorical forfeiture provision in its Standard Contract (General Conditions) by providing contractors with an avenue to preserve their claims and still accept payment after substantial completion. This is a significant change to the SCA's Contract, which contractors should be certain to use to their benefit.

Previously, the SCA had required that a contractor's acceptance of the first payment after substantial completion of a project operated as a complete release of all claims that the contractor had against the SCA in connection with work on a project.

Specifically, the prior (i. e., pre-September 12, 2013) version of §15.02(A) of the SCA's General Conditions had stated that:

The acceptance by the Contractor of the first payment pursuant to §15.01. E. [i. e., after substantial completion] shall be and shall operate as a release to the SCA of all claims by and all liability to the Contractor for all things in connection with the Work and for every act and neglect of the SCA and others relating to or arising out of the Work. (Emphasis added).

Accordingly, a contractor waived all of its claims against the SCA if the contractor accepted any payment after substantial completion. Contractors and subcontractors must be vigilant against such unfair waiver provisions, so common in public works contracts. In fact, we now derisively refer to these provisions as "COFEDs" (Contractor Forfeiture Enhancement Devices).

In a significant change to §15.02(A), however, the SCA Contract now allows a contractor to accept payment after substantial completion and still preserve all claims against the SCA. To preserve its claims, prior to accepting any post-substantial completion payment, the contractor must submit to the SCA a schedule (commonly called "Schedule A") that lists and describes all of the contractor's claims against the SCA.

The SCA's (2013) revised version of §15.02(A) now states, in relevant part, as follows:

The acceptance by the Contractor of payments after Substantial Completion shall each be, and shall operate as, a general release of the SCA of all claims by and all liability to the Contractor for all things in connection with the Contract and the Work, and of every act and neglect of the SCA and others relating to or arising out of the Contract and the Work, except for claims, if any, specifically listed and described in detail in a Schedule (including the dollar amount(s) and number of days of Schedule extension, if any) which is prepared by the Contractor, countersigned by the Chief Project Officer of the SCA, and attached to the general release referred to in this §15.02. (Emphasis added).

It is important for a contractor to remember that it cannot simply submit a "Schedule A" to the SCA. The SCA's Chief Project Officer must countersign the schedule. However, the act of the Chief Project Officer countersigning a contractor's "Schedule A" should be a ministerial act, merely acknowledging the receipt of the contractor's Schedule A.

Public Authorities Law §1744 Requirements

It is essential to also keep in mind that unaffected by the contractual change to §15.02(A), is a contractor's statutory obligation, pursuant to §1744(2) of the Public Authorities Law, to file with the SCA a verified Notice of Claim within three months of the accrual¹ of any contractor's claim. This is an independent, essential requirement.

Also unaffected by the contract change to §15.02(A), is the fact that under §1744 (2) of the Public Authorities Law, a contractor must still start a lawsuit to enforce its claims within one year.

G & C Commentary

The contractual revision to §15.02(A) of the SCA's General Conditions is an important change, and must be religiously followed to free up what might be considerable monies held by the SCA at the time of substantial completion. However, a contractor must still also be mindful of the three month statutory limitation period in which to file its Verified Notice of Claim, as well as the one year "Statute of Limitations" in which to start a lawsuit to enforce that claim. It should be noted that the one year period in which to bring a lawsuit under §1744(2) includes the three month period in which a contractor has to file its Notice of Claim, thus having the net effect of an even a "shorter" Statute of Limitations.

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¹ In legislation drafted by yours truly and successfully sponsored by the STA in Albany, the vague "accrual of claim" provision in §1744 to trigger the three month period had been modified to the much clearer trigger of "denial of claim." This reform will be available for all SCA contracts entered into after December 17, 2014.