GOVERNOR'S VETO OF STA COFEDS LEGISLATION UNJUSTIFIED

By Hank Kita, *Executive Director*

As I recently informed our STA membership, Governor Cuomo vetoed Senate Bill 6906 ("AN ACT to amend the public authorities law, the general municipal law, the public service law and the state finance in relation to notice provision in public works contracts") on December 31, 2016. This legislation, otherwise known as COFEDS (Contractor Forfeiture Enhancement Devices) was originated by the STA and was supported by a broad coalition of general and subcontractor organizations across the State of New York. This bill was opposed by various public agencies at the state and local level here in New York.

In an extraordinary effort led by the STA, S. 6906 passed both the State Assembly and Senate in June, after having been introduced for the first time in the 2016 legislative session. Passage of a bill introduced for the first time is unusual in the New York State Legislature and came only after a vigorous lobbying effort by the STA and its allies. S. 6906 called for a prohibition of the use of unfair requirements in public construction contracts that have unjustifiably resulted in the forfeiture by contractors and subcontractors of their right to be paid for millions of dollars of labor, materials and services. The reasonable solution proposed in this bill – that a public agency cannot unilaterally deny payment for work on the basis of non-compliance with a strict notice provision unless the public agency has been materially prejudiced by the untimely notice – is consistent with amendments made to the Insurance Law in 2009 regarding homeowner's liability contracts and federal contracting policy and procedures. The STA vigorously pushed this legislation in recognition of a growing problem in recent years among various agencies at different levels of government in New York, which included these unjustifiable "gotcha" notice provisions which when executed, could inflict deep financial injury to general contractors and subcontractors alike.

Governor Cuomo justified his veto of S.6906 with the following statement:

> "This bill would fundamentally alter well established notice provisions that ensure that public work projects are timely completed and avoid the waste of public funds… Not only would these provisions eliminate a public owner's ability to mitigate project delays and adhere to planned work schedules, but it would require public owners to accept and pay for work that was unnecessary and otherwise unauthorized. Moreover, litigating whether a public owner has been materially prejudiced will undoubtedly lead to increased claims and costs. For these reason, I am therefore constrained to veto this bill."

The STA is very disappointed in the veto of S.6906 and strongly disputes the justification used in the Governor's Veto Message. The veto message's justifications are wholly inaccurate representations of the intent and content of this legislation. In their opposition to this bill, the STA believes that the public owner community completely misrepresented the bills' letter and intent. In rebuttal to the Veto Message, S. 6906 does not in any way, shape, or form alter "well established notice provisions". The contention in the Veto Message that the bill eliminates public owners' ability to mitigate project delay and adhere to planned work schedules is inaccurate as well. The COFEDS bill language would only prevent the harsh imposition of forfeiture where the contractor does not timely inform the public owner of that which it already knows. Finally, contrary to the Veto Message, S.6906 does not require public owners to "accept and pay for work that was unnecessary or otherwise unauthorized." In fact, S.6906 has nothing to do with the merits of claim and whether a contractor would ultimately prevail after being fairly given an opportunity to be heard.

With the assistance of the STA's Legislative Counsel, the STA is in the process of gathering more information regarding the veto of S.6906 and will determine a further course of action on this issue. Along with members of our coalition of contractor associations, we are seeking a meeting with the Governor's Office to learn more on the rationale for this veto. My office will keep the STA's membership informed of developments in this regard. In the meantime, members of the STA are advised to carefully review any of their public contracts regarding these "gotcha" notice provisions and to proceed with great care in providing timely notice whenever necessary.

DO CONTRACTORS QUALIFY FOR THE FEDERAL RESEARCH CREDIT?

By Phillip Ross, CPA, CGMA, *Partner & Construction Industry Group Practice Leader*
and Christopher Kelly, CPA, *Partner–Anchin, Block & Anchin LLP*

Phillip Ross, CPA, CGMA

Christopher Kelly, CPA

Many companies overlook the research credit because they think it's limited to companies that conduct laboratory research, such as biotech, pharmaceutical, chemicals or high-tech manufacturing firms. But the credit is available to any company that invests in developing new or improved products or processes in most industries including architecture, engineering and construction.

The PATH legislation made in late 2015 was a game changer and made the credit more beneficial for businesses and start-ups for two primary reasons. First, the legislation allows small businesses to take the R&D tax credit against their alternative minimum tax (AMT), which often restricted or even eliminated the owners' ability to utilize the research credit. The AMT restriction has long been preventing qualified companies from utilizing the research credit, so this new legislation removes that hurdle for any companies with less than $50 million in gross receipts. Secondly, PATH allows startup businesses with gross receipts of less than $5,000,000 to take the R&D tax credit against their payroll taxes (essentially making it a refundable credit for up to 5 years) of up to $250,000 per year. If your business hasn't been claiming the research credit now may be a good time to revisit this valuable tax break.

To qualify, research activities must:

- Strive to discover information that's technological in nature,
- Relate to a new or improved "business component," such as a design, product, process, computer software, technique, formula or invention,
- Be designed to eliminate uncertainty concerning the development or improvement of a business component, and
- Be part of a "process of experimentation."

Many innovations unique to the construction industry are eligible for R&D credits, which can include:

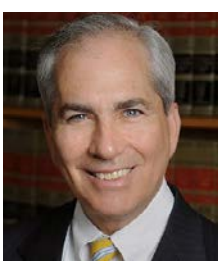
- Design/development/improvement/modification of buildings or structures to enhance performance, functionality, reliability or quality
- Design/development/implementation of new or upgraded electrical, mechanical, toxic waste disposal or HVAC Systems for better performance, safety or energy efficiency
- Design of master plans, building facades, or schematic drawings for integration of system components
- Design coordination and value engineering in plan-spec and design-assist projects
- Programming or testing of control systems
- System testing for site requirements including acoustics, air quality/balance, and false loading
- Foundation design or analysis for unique site conditions
- Testing, evaluation and analysis of new or improved building construction materials
- Construction equipment design, development or improvement
- CADD (Computer Aided Design and Drafting) and BIM (Building Information Management) Modeling
- Software development or IT initiatives related to product or process developments
- Building designs for LEED (Leadership in Energy & Environmental Design) certifications

The tax credits can be a significant tax benefit to your personal tax return if the business is structured as a flow through entity (i. e. S-Corporation, LLC, etc.). If the business is structured as a C-Corporation, the credits generate tax savings by offsetting taxes on the business's tax return.

Get the credit you deserve

R&D tax credits benefit many construction businesses and should benefit the company investing time and energy into the activities mentioned above. If your company commits resources to developing new or improved products or processes, it pays to consult your tax advisor to see if you qualify for research credits.

NYC DAMAGES-FOR-DELAY "PILOT PROGRAM" WAS NO REFORM AT ALL



By Henry L. Goldberg, *Managing Partner, Goldberg & Connolly & STA Legal Counsel*

The "Damages for Delay" provision (i. e., former Pilot Program) currently found in the New York City Standard Construction Contract (the "NYC-SCC"), at new Article 11, makes a mockery of any claim by City leaders of having implemented necessary reform regarding the availability of delay damages on City projects.

First: A Bit of History

As you may recall, in September 2008, NYC unilaterally implemented into the NYC-SCC the experimental "Pilot Program, " which was designed to test the effects of sporadically removing the "No Damages for Delay" clause from the NYC-SCC. The City's pre-existing and one-sided, "No Damage For Delay" clause (Article 13) had categorically disallowed any damages for delay on City projects. It dated back to before the notorious Kalisch Jarcho decision, wherein New York State's highest court authorized the enforcement of such harsh contract provisions, thereby precluding claims for delay damages.

The Court of Appeals, in its landmark Corrinno Civetta decision, revisited the issue shortly thereafter (in part due to the flurry of criticism of its original Kalisch-Jarcho decision). In doing so, it carved out four limited exceptions to the permissibility of such clauses. However, the effectiveness of the Corrinno Civetta decision's "exceptions" were wholly inadequate to protect the rights of delay damage claimants, as countless subsequent cases disallowing delay damages demonstrated.

As a result, the industry (in large part initially led by the STA), realizing that relief from the courts would never be satisfactorily forthcoming, developed legislation (in which I participated in drafting) to seek protection from the complete delay-risk-shifting provision of the original (pre-September 2008) NYC-SCC "No Damage For Delay" provision (Article 13).

The original STA effort galvanized into a broad-based, industry-wide coalition to outlaw, by legislation, these harmful no damage for delay clauses. To their credit, legislators in Albany readily "got it. " The unfairness was clear. As a result, an industry sponsored bill allowing for delay damages in all public contracts in New York State passed the New York Senate unanimously and the Assembly by all but four votes. However, after "sitting" on the bill for over six months, then Governor Pataki ultimately vetoed it.

Nonetheless, discussions with New York City continued, and the aforementioned experimental "Pilot Program" was eventually offered by the City to, in theory, enable the City to move away from its strict disallowance of delay claims. (Keep in mind that, at best, this Pilot Program only applied to delay claims on New York City projects, and not those of the countless other public owners throughout New York State. So, state-wide legislation is clearly the preferred way to implement meaningful reform.)

A Wholly Inadequate Contrivance

In September 2008, the delay damages "Pilot Program, " as it was called, was unilaterally implemented by the City. It was fatally flawed in many respects. I, for one, never believed it was adequate, and in fact, still firmly believe it actually made a bad situation worse. I believe its real purpose was to co-opt the justifiable criticism of the City's continuance of its sweeping no damages for delay clause. It took the "wind out of the sails" of real reform, and provided very little in return.

Among other problems, or inadequacies, of the Pilot Program "experiment" is the fact that it preserves intact the requirement that claimants show that the delay-causing event was "uncontemplated". (Article 11.5.2) This is clearly no better than the situation that existed with the Corrinno Civetta exceptions. Worse still, in consideration for this alleged reform, which still left the contracting community without adequate recourse, the City gained many benefits. Among these benefits were the elimination of any allowance for profit in any delay claim damage assessment, the elimination of the City's responsibility for the "acts or omissions of any third parties" (Article 11.5.1) such as utilities, and the elimination of statutory interest at nine percent which is available to all other litigants in New York State. In addition, there is a contractually agreed upon list of both "non-compensable delays" (Article 11.5) and "non-recoverable costs" (Article 11.7.3) in the new Article 11. So the City actually gave up nothing, and gained much, with its so-called Pilot Program. (The elimination of any right to lost profits is particularly irksome. Why would any contractor pursue a claim, just to have its expenses reimbursed? Is that why the considerable risk of public contracting is undertaken, just to have expenses churned without profit?)

Not surprisingly, in December 2013 the City adopted its own so-called "Pilot Program" provision, drafted by the City's attorneys, purportedly allowing for damages for delay in a new (2013) version of the NYC-SCC. This is hardly surprising; the Pilot Program was drafted unilaterally by the City's attorneys without meaningful participation by the industry.

Current Situation

However, it is now three full years since the pathetic "Pilot Program" was allegedly adopted, unilaterally, by New York City in December 2013. Since then, NYC contracting agencies have consistently resisted implementing this so-called reform, and adequate leadership to coordinate any organized implementation among the City's construction agencies, Corporation Counsel, the Mayor's Office of Contract Services (MOCS), and the Comptroller's Office never developed. Now the city contracting agencies and the Comptroller's Office, after three years of neglect, have gridlocked the implementation of the Pilot Program in an apparent bureaucratic turf dispute, further frustrating the contracting industry's efforts to be fully compensated for City-caused delays.

The following excerpt from a recent (10/28/16) memorandum from NYC-DEP confirms the state of dysfunction at the City:

> The City Law Department is currently evaluating how damage for delay claims will be processed under these contracts; therefore DEP will no longer issue any damage for delay change orders. Although DEP is not issuing damage for delay change orders, it may still issue determinations of compensable delay pursuant to Article 11.1.3... (Emphasis added.)

As indicated, this is a full three years after the alleged adoption and implementation of the Pilot Program (itself a wholly inadequate device).

The DEP memorandum goes on to state, incredibly, that "determinations of compensable delay" will not address damages at all, (other than their waiver by a contractor's failure to comply with the NYC-SCC's strict notice provisions (i. e., COFEDs*)). It will be incumbent upon the contractor to then start all over again at the Comptroller's Office "if" damages are sought. Yes, you read that correctly, the DEP memorandum contemplated contractor's pursuing claims without damages, as follows:

> The determination may assess all claims for which the Contractor has submitted statements of delay damages pursuant to Article 11.1.2 and state whether the claims are compensable pursuant to Article 11.4, taking into account notice, waiver, and concurrency issues, which may negate any one delay from being compensable. The determination will be limited to whether or not the delay is compensable. If the Contractor wishes to pursue compensation, it will be advised to pursue a claim with the Comptroller's Office.

Are you confused yet? Appalled?

So this is the pathetic state of affairs. The City's own inadequate reform effort, its so-called "Pilot Program, " is itself tied up in bureaucratic gridlock three years after its alleged implementation in December 2013. The current advice from the City is to file claims twice, once with the contracting agency, and then again with the Comptroller's Office! But this is, "only" if you seek an award of damages.

Thus, the City currently has no effective procedure to promptly and efficiently provide for the processing of delay claims awarding damages. Furthermore, even if it did, it would only be under the provisions of its one-sided Pilot Program, which still requires a showing that the delay-causing event upon which a claim is based was not foreseeable or contemplated, and still imposes a list of non-compensable types of delay claims and non-recoverable types of costs.

Rest assured that the STA will certainly be pursuing these issues. Please feel free to contact us for the latest developments or if you have current questions or comments.

*This is my derogatory acronym for "Contractor Forfeiture Enhancement Devices, " namely unfair and confiscatory construction contract notice provisions.