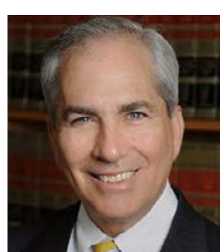
"C.O.F.E.D. REFORM" – SEE IT THROUGH TO THE GOVERNOR'S DESK!



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

As I prepared to write this month's *Legal Log*, the choice of topic was clear. The STA is well on its way to accomplishing one of the most important, state-wide legislative victories for the construction industry in years.

The STA's "C. O.F. E.D. Reform" bill, conceived and authored by yours truly, has now passed both houses of the NYS legislature in Albany. In fact, the "C. O.F. E.D. Reform" bill rolled through Albany like a Sherman tank, passing the Assembly *unanimously*, and the Senate by *all but two votes*!

There are many people to thank, but special congratulations go to Arthur Rubinstein, the Chair of the STA's Legislative Committee, Perry Ochacher, STA's Legislative Counsel, and Hank Kita, STA Executive Director, for educating and leading a broad-based industry coalition of all of our "partner" construction trade associations that made such a sweeping legislative victory possible.

The serious legal challenge caused by the out-of-control use of C. O.F. E.D. s by New York public agencies was clear to the STA, and it met that challenge in the best way possible, "it did something about it"! The epidemic of over-the-top contractual notice provisions in public contracts regarding delay and all other contract claims had to be stopped. They are as unfairly harmful, as they are typically unnecessary. They are, indeed, nothing more than "Contractor Forfeiture Enhancement Devices. "

I brought this issue to the STA, as well as the suggested remedial legislation that came to be known as the "C. O.F. E.D. Reform" bill, and the STA leadership "got it. " It is not surprising. This victory is the latest in a long line of essential, industry-protective legislation achieved by the STA over decades. The STA's legislative track record is second to none.

A Classic "C. O.F. E.D. "

Allow me to explain C. O.F. E.D. s by example. One of the most unjustified C. O.F. E.D. s is found in the New York State Department of Transportation ("NYS-DOT") Standard Specifications, which states at Section 104-06 ("Notice and Recordkeeping") in pertinent part:

> The notification and recordkeeping provisions in this Contract shall be strictly complied with for disputes of any nature and are a condition precedent to any recovery.

Furthermore, Section 104-06 goes on to state at Subsection C ("Failure to Comply") :

> Failure of the Contractor to provide such written notice in a timely fashion will be grounds for *denial of the dispute* and the Department *does not have to show prejudice* to its interest before such denial is made. In the event the Contractor fails to provide a required written notice within the required time limits, or fails to maintain and submit the records specified above, *any claim* for compensation shall be deemed *waived*, *notwithstanding* the fact that the Department may have had *actual notice* of the facts and circumstances comprising such dispute and is not prejudiced by such failure of notice or recordkeeping.

So what does *this* C. O.F. E.D., typical of that found throughout public contracting, *actually* mean? If you are late in giving any required contractual notice, your claim *shall* be deemed waived, even if the NYS-DOT is not prejudiced by such failure on your part. Let's let that sink in. The Contractor fails to give a contractually-required notification to NYS-DOT that causes *no* harm whatsoever to the NYS-DOT and the contractor *forfeits all of its rights* to its valuable claim.

Worst still, this is also "notwithstanding the fact that the NYS-DOT may have had *actual notice* of the facts and circumstances comprising such dispute and is not prejudiced. " What does *this* mean? A contractor suffers forfeiture of its valuable claim, even where the notice is not necessary because the NYS-DOT *already* knew about the matter or incident?! This is a complete forfeiture of a contractor's rights and, *admittedly*, for no reason.

Why would any "public servant" working for New York State be motivated to even write such an unfair and one-sided contract clause?

So why do I use the term C. O.F. E.D.? Because stringent contractual demands such as these are so excessive, so one-sided, and so unnecessary for the fair and equitable administration of public contracts, that they clearly could only have been motivated by one, inescapable purpose: to unfairly impose *waiver* and *forfeiture* upon the people who actually build our state and cities.

Desperately Needed Reform

I can tell you from the front lines of this battle that the courts have been, and will always be, worthless. Barring illegality, courts are bound to enforce contract provisions, no matter how severe. If you build bridges, you sign the contract of the party that owns the bridges: the government. As a result, public contractors were effectively defenseless against these clauses.

It occurred to me that the industry must seek *legislative* intervention to stop the abuse. Therefore, I decided to attempt to draft legislation that would address the problem. I'm pleased to report that this legislation received the endorsement and "full bore" support of all of the leading construction trade associations. I urge each Association in the industry to now make Governor Cuomo's signature a top legislative priority.

In conceptualizing this legislation, I sought an industry-wide solution that could be applied to any and all public works contracts, not a piecemeal, public-agency by public-agency approach. To do so, I developed a "Prejudice Rule" for all public construction contracts, using the model of what the legislature did in 2008 with regard to liability insurance policies in New York State. Since the legislature had already acknowledged and reformed this specific type of "notice" abuse with regard to claims under liability insurance policies, this precedent, I reasoned, should be available for the construction industry with regard to contract claims.

As explained by Senator DeFrancisco in support of amending the NY Insurance Law (Section 3420) in 2008:

> Current law, therefore, leads to an inequitable outcome with insurers collecting billions of dollars in premiums annually, and declining coverage over an inconsequential technicality. This bill would prohibit insurers from denying coverage for claims based on the failure to provide timely notice unless the insurer has suffered "prejudice" as a result of the delay. Under the bill, the insurer's rights would not be deemed prejudiced unless the failure to timely notice materially impairs the ability of the insurer to investigate or defend a claim.[1]

Our "C. O.F. E.D. Reform" bill was based on the very same language, applied to public construction contracts, rather than insurance policies. It creates a "Prejudice Rule" so that if, on the rare occasion, a public owner is actually prejudiced by a lack of notice, the clause would be enforceable; but in the typical situation, where there is absolutely no prejudice and simply an unfair windfall to the government, the notice provision would not be enforceable.

One last thought…

It has long troubled me that the construction industry is so poorly treated in New York by its own government. How can an industry so important to the health and welfare of New York's economy be so abused by indifferent, even hostile, public agencies, not the least bit concerned about the welfare of the construction industry, nor even basic principles of fairness? What this C. O.F. E.D. victory has demonstrated is that when united behind worthy and necessary reform, the plight of the industry can be successfully addressed in very important and targeted ways.

Finally, as indicated, the job is not done. The STA is asking for your 100% support in the effort to obtain the signature of Governor Cuomo on this historic C. O.F. E.D. Reform legislation. The STA will be forwarding sample letters-in-support for you to send to the Governor on behalf of your company. When you receive this information, please proceed *immediately* to advise the Governor of your firm's unqualified support for this reasonable and fair reform legislation. Your very future as a public (and private) contractor may depend on it.

[1] Sponsor memo in support of S.8610 (2008) subsequently enacted as Chapter 388 of the Laws of 2008.