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REPORT ON LEGISLATION
CONSTRUCTION LAW COMMITTEE

A.5443 **M. of A. Brennan**
S.3551 **Sen. Ranzenhofer**

AN ACT to amend the public authorities law, in relation to claims and actions against the New York city school construction authority arising out of contracts

THIS BILL IS APPROVED

The Construction Law Committee (the "Committee") of the New York City Bar Association addresses the legal and policy issues affecting the construction industry. The Committee respectfully submits this report concerning School Construction Authority ("SCA") projects and the notice requirements under Public Authorities Law §1744(2) ("PAL"). The Committee has concluded that under current law, an unsuspecting contractor can suffer a loss of claim rights before the contractor even has reason to know that a dispute exists. Therefore, we support A.5443/S.3551, which would amend the Public Authorities Law to clarify that the statutory limitations period governing a contractor's claim rights does not begin to accrue until such time as a request for payment has been denied, in writing.

ISSUE

New York's Public Authorities Law §1744(2) has often proven problematic to contractors engaged on SCA projects due to the 3-month limitations period ascribed to the "accrual of claims." This 3-month period has been judicially interpreted to commence "when [the contractor's] damages are ascertainable," and "ascertainable" has, in turn, been interpreted to mean "once the work is substantially completed or a detailed invoice of the work performed is submitted." See, C.S.A. Contr. Corp. v. NYC School Constr. Auth., 5 N.Y.3d 189, 192, 800 N.Y.S.2d 123 (2005).

In everyday practice, this means that once a contractor submits an invoice for payment or a change order proposal, the statutory limitations period under PAL 1744(2) has automatically begun to accrue. If, however, the SCA does not respond to that contractor's invoice or change order proposal for several months (not an atypical occurrence), and, in doing so denies the contractor's request, that contractor will be deemed to have waived its right to payment for failure to timely serve a notice of claim, notwithstanding the fact that it had no reason to know that a claim existed any earlier. See, id., at N.Y.3d 193, concurring opinion (R.S. Smith, J.).

PUBLIC AUTHORITIES LAW §1744(2)

As currently drafted, Public Authorities Law §1744(2) reads:

> No action or proceeding for any cause whatever * * * relating to the design, construction, reconstruction, improvement, rehabilitation, repair, furnishing or equipping of educational facilities, shall be prosecuted or maintained against the authority or any member, officer, agent, or employee thereof, unless (i) it shall appear by and as an allegation in the complaint or moving papers, that a detailed, written, verified notice of each claim upon which any part of such action or proceeding is founded was presented to the board within three months after the accrual of such claim, that at least thirty days have elapsed since such notice was so presented and that the authority or the officer or body having the power to adjust or pay said claim has neglected or refused to make an adjustment or payment thereof, and (ii) the action or proceeding shall have been commenced within one year after the happening of the event upon which the claim is based; provided, however, that nothing contained in this subdivision shall be deemed to modify or supersede any provision of law or contract specifying a shorter period of time in which to commence such action or proceeding, or to excuse compliance with any other conditions required by contract to be satisfied prior to the commencement of such action or proceeding.

N.Y. Public Authorities Law §1744(2) (McKinney's 2011).

COROLLARY UNDER EDUCATION LAW §3813

Prior to 1992, Education Law §3813(1), which applies to school districts outside the City of New York, was interpreted in the very same manner as PAL §1744(2), resulting in the same types of problems described above. In 1992 the legislature amended the Education Law to clarify that "accrual of claims" does not occur until a contractor's claim has actually been denied:

> In the case of an action or special proceeding for monies due arising out of contract, accrual of *such claim shall be deemed to have occurred as of the date payment for the amount claimed was denied*.

L.1992, c. 387, §1 (emphasis added)[1].

[1] Incidentally, the 1992 amendments to Education Law §3813 were supported by the New York State School Boards Association, which issued a memorandum of support, stating "This legislation would clarify for the school district and the contractor involved when a contract claim does accrue, therefore lessening any confusion or animosity which may occur under these circumstances."

Not surprisingly, disputes subsequently arose over precisely what was needed in order to satisfy the denial requirement under the amendment, with school districts and contractors arguing, respectively, for informal and formal standards.[2]

In his concurring opinion in C.S.A. Contr. Corp., Justice Smith explores the history of Education Law §3813(1) and Public Authorities Law §1744(2), and the amendment of the former. He also notes the continuing potential for inequity under the Public Authorities Law in its present form. In closing, Justice Smith appears to encourage the amendment of Public Authorities Law in the same manner that Education Law §3813 was revised, stating: "There is no obvious reason… why the Legislature should not amend [Public Authorities Law §1744] in the same way it amended [Education Law §3813(1)]…" Id., 193-195, N.Y.S.2d at 126-127.

Our Committee agrees with Justice Smith.

PROPOSED AMENDMENT TO PUBLIC AUTHORITIES LAW §1744

In an effort to ameliorate the current harshness of PAL §1744(2) as currently interpreted, and in order to provide a more definite (and equitable) claims accrual guidepost for contractors, A.5443/S.3551 has been introduced with the purpose of: (a) clarifying that "accrual of claim" under PAL §1744(2) occurs when a contractor's claim is denied; and (b) requiring that such denial be presented to the contractor in writing. The Committee supports this bill and urges its enactment.

Reissued April 2013

[2] In an effort to put the matter to rest, in 2009, Senator Klein and Assembly Member Reilly introduced S.5943/A.10215, which proposed that such denials must be in writing. The bill was never discharged from committee. The bill was reintroduced in the Assembly as A.2270 in January 2011.