**Survey of 90 Transit Authority Chief Engineer's decisions; or "What is a ZagatSurvey® for contractors?"**

*By Peter Kutil*

Recalling New York in the late 1970's, one may have distinct memories of former Mayor Ed Koch asking his fellow New Yorkers: "How am I doing?" That same question can be asked in the wake of the 1994 Court of Appeals ***Westinghouse v. New York City Tr. Auth.*** (82 NY2d 47), a case which upheld public owner's ability to select their own technical or legal personnel to resolve construction disputes. Here is the summary table that sheds light on the question:

| **Type of Claim Asserted** | Favorable to Contractor | Unfavorable Decision | Mixed Result |
|---|---|---|---|
| Scope of work disputes/extra work | 6 | 20 | 7 |
| Delay - Time &/or Time "Impact" costs | 0 | 20 | 5 |
| Access and/or Failure by T.A. to provide Services | 1 | 8 | 0 |
| Directed and Constructive Acceleration | 0 | 3 | 0 |
| Credit change order dispute | 4 | 5 | 7 |
| Differing site condition claim | 0 | 1 | 0 |
| Scope of release & accord and satisfaction issues | 2 | 2 | 0 |
| Payment terms | 0 | 1 | 0 |
| Contractor's rating | 0 | 0 | 1 |
| TOTAL S | 13 (14%) | 60 (65%) | 20 (21%) |

As background, in the ***Westinghouse*** case, the highest New York court found that the selection of the owner's own employee as an arbitrator to a construction dispute does not violate public policy even if the arbiter was involved on the project.

This article attempts to portray an objective picture of the decisions rendered by the Transit Authority's Chief Engineer during a recent two and a half year period. Access to the decisions was obtained using the Freedom of Information Laws (or "FOIL").

In total, from March 1999 to November 2001, the Chief Engineer rendered 90 written decisions (some decisions involved multiple claims). The disputes range from extra work disputes to disputed contractors' performance ratings. The number of pages of the written decisions ranges from one page to eight pages and the typical number of pages was no more than four. As a basis of comparison, the Federal boards of contract appeals decisions are significantly longer and significantly more detailed.

From the 93 claims reviewed, the average time for the Chief Engineer arbitrator to render a decision was about 10 months from the point in time when the dispute was first submitted for a decision by the contractor. Typically some time was allotted for briefing of the dispute. And, in most instances, a meeting with the arbitrator was held. There were 27 decisions that were issued more than one year after the first submission by the contractor. There was also a significant number of claims that were decided in less than five months.

Can any conclusions be drawn from this review? As a general comment, in many of the decisions there was no discussion of any distinguishing facts or factors which led the arbitrator to decide one way or the other. As an example, in a number of claims the contractor argued that there were ambiguities between the drawings. In one case, the arbitrator ruled favorably finding that the "dominant" drawing mislead the contractor and any ambiguity was not obvious. In another case, the arbitrator found that the contractor was responsible for work on all of the contract documents and any discrepancy should have been raised prior to bid. There was no explanation in the second case why the discrepancy was obvious triggering the contractor's duty to inquire.

In many instances the Chief Engineer was also critical of the Authority's handling of the claim. In one instance he stated that the Authority was "blindsiding" the contractor by seeking a credit at a

later stage in the project. In other instances, the Chief Engineer was equally critical to both sides finding they both "broke every rule in the book."

Overall, however, the brevity of the decisions leads to the question: Can one person do "justice" to approximately 40 cases or claims decided each year while maintaining his or her other "non-judicial" chief engineering design functions?

It would also seem prudent to provide access to these decisions to enable the owner and contractor project staff to make an assessment of the claim prior to its submission. Theoretically, this could possibly reduce the number of claims submitted.

This article is the first in a series of articles surveying prevailing "private" public contract dispute resolution in the New York region.

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**Case notes: *Koren-Diresta Construction Co. v. New York City School Construction Authority,*** __ A.D. 2d. __ (1st Dept., April 9, 2002)

In an April 9, 2002 decision, New York's Appellate Division First Department, was faced with the following question: At what point does the contractor have to file a 3-month statutory notice of claim under the New York Public Authorities Law § 1744(2). The choices considered were: (1) Upon completion of work, (2) When the breach occurred, or (3) When the damages became known. The appellate court's decision came after trial and the lower court's dismissal of the contractor's claim because the contractor had not filed its claim within the 3-month statutory period. The appellate court reversed and in doing so buttressed its decision by some of the most striking policy statements, which are not often found in construction cases.

The court ruled the contractor's notice of

claim timely, finding that the "accrual" of the claim occurs only when the agency rejects the claim. Only then does the 3-month period begin. In reaching this result, the court stated:

"Seemingly lost in the procedural morass in which plaintiff finds itself is the "salutary purpose" to be served by notice of claim provisions, which permit "municipal defendants to conduct an investigation and examine plaintiff['s] . . . claim. . . .

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. . . .

Should it generally be perceived that a party to an agreement with [the agency] is unable to obtain redress for the agency's breach of a construction contract, prudent economic practice dictates that an amount be added to bids submitted in connection with any school construction project as an allowance for such contingency. Second if it should be perceived that the agency has a reputation for failing to honor its contractual obligations (with apparent impunity), only contractors truly desperate for work will resort to submitting bids on any school construction project. . . . **The practical result of these effects is that the taxpayers of the City of New York will continue to pay inflated costs for poor quality facilities constructed by an inefficient bureaucracy.** Anomalously, this is exactly the situation the New York City School Construction Authority was designed to remedy." [emphasis added]

The court also explained that a prolonged delay by the agency to render decisions on change order requests and a harsh 3-month rule would in effect "obviate the need to justify its legal position in court." The appellate court reversed and sent the case back for re- trial. □