



LEGAL CORNER

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The Timeliness of a Bond Claim

Past articles have reviewed the importance of timely assertion of a claim against a payment bond. On public projects, the timing of such claims is set by statute (M.G.L. c. 149, §29). The statute requires that legal action be commenced within one year of the date of last performing work on the project. *(Note: Sub-subcontractors must have also given written notice to the general contractor of any claim within sixty five (65) days of last performing work.)*

A recent decision from the Massachusetts Appeals Court has addressed one component of what constitutes the "last work" as to when the clock begins to tick. According to the court, the one year statute of limitations period for a bond claim begins to run when a subcontractor completed the subcontract work in its entirety. The appellate court reversed a lower court decision dismissing a subcontractor's claim based on the one year requirement of M.G.L. c. 149, §29 based on its completion of change order work.

The plaintiff was a HVAC subcontractor that performed work on a public school construction project. Claiming it was owed payment for certain work performed on the project, the plaintiff brought suit against the general contractor and its surety seeking payment on the surety bond. After the plaintiff filed its action, it settled all of its claims with the surety except one claim, which was based on a change order request totaling more than one hundred thousand dollars.

The claim was based on allegedly misleading bidding documents, which failed to highlight certain changes to

HVAC work. Since the claim arose out of problems with the bid documents, the surety served a third-party complaint against the town, passing the subcontractor's claim through to the town. This third-party complaint was served after the one year statutory limitation period for bond claims had passed.

In defense, the town argued that the subcontractor's change order claim should be dismissed under the one year statute of limitations. According to the town, the sole claim against it was based on change order work, which the subcontractor had completed more than one year before the town was sued. Therefore, in the town's view, the statute of limitations period prevented the subcontractor from recovering against the town. The lower court agreed and dismissed the claim. As a result, the subcontractor appealed.

On appeal, the court rejected the town's view of the statute of limitations period. Rather than looking
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to the third-party complaint to determine whether the subcontractor's claim was time barred, the court looked to when the subcontractor filed its bond claim initially. The court noted that the subcontractor had, in fact, completed its change order work in March of 2000 and did not bring its bond claim until April of 2001, more than one year after completing the change order work.

The court, however, stated that the subcontractor continued to work under its contract until August of 2000, when it completed the subcontract work in its entirety. Thus, the subcontractor finished performance under the subcontract within one year of filing its bond claim. Therefore, the court concluded the subcontractor filed its bond claim within one year of completing its work under the subcontract.

According to the court, there was no evidence that the change order work was done under a separate or independent contract. Further, the court stated there was no evidence that the contract price could be apportioned so that an identifiable amount could be attributed to the change order work. If this were the case, the court noted, the one year statutory period might have begun when the change order work was completed. Since the change order work was done under a single contract, however, the court concluded that the statutory period began when the subcontractor completed performance of the subcontract in its entirety. Since the subcontractor filed its bond claim within one year of completing the subcontract in its entirety, the court ruled that the lower court committed error by dismissing the subcontractor's claim.

The surety's third-party complaint contained only one claim against the town, which was based on change

order work performed by the subcontractor, which had been completed more than one year before the suit was filed. For purposes of the statute of limitations period, however, the critical time was when the subcontractor filed its bond claim initially, not when the surety served its third party-complaint against the town. Since the subcontractor filed its bond claim within one year of completing the subcontract work in its entirety, the lawsuit was timely.

As a result, the subcontractor's claim was not extinguished merely because the surety passed the claim through to the town after the one year period had expired. This case illustrates the many nuances that can emerge in bond and other construction claims. It also illustrates the importance of getting a bond claim promptly filed to avoid any issue with the short limitations for filing bond claims. ■

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