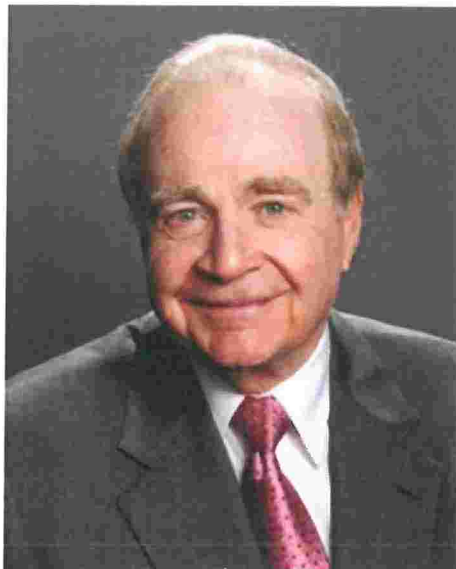


ENR New York

Practical Legal Strategies: Using the Freedom of Information Statutes



Jack S. Kannry. Photo Courtesy of Warshaw Burstein, LLP.

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In today's public sector, construction contracts are often for renovation work, which can create interface delays not found in new construction projects. Federal and state freedom of information laws are an overlooked tool for contractors facing delays with ongoing contracts.

These laws can provide paper and electronic documents concerning the causes of such delays and their disposition during the course of the work.

There are drawbacks in using such resources. For example, some documents are exempted from availability by the freedom of information statutes (e.g., deliberative process and non-final determination documents of a public agency), which are more restrictive than discovery in litigation or arbitration.

There is also the time and cost of wading through a multitude of writings to find a solitary kernel of gold. And then sometimes there is the obstacle of an overzealous government official seeking to limit such documents' availability beyond that contemplated under the applicable statute.

However, this author has found that the use of freedom of information statutes at the federal, state and municipal levels is often a worthwhile undertaking for a contractor delayed by causes not of its own

making.

Here are some illustrative examples from actual cases successfully prosecuted, largely based on obtained freedom of information documents.

A Superfund Project

On a federal Superfund environmental remediation project, a delay occurred in backfilling operations of a large area, related to specified compaction equipment, which appeared outdated and not suitable for the intended tasks. A dispute arose as to how best the compaction was to be performed.

The federal agency, for which the contractor was performing this project, had design and implementation responsibilities, both at its headquarters and regional project levels. Through documents obtained by a Freedom of Information Act request, it was learned that each of those offices was essentially blaming the other for the problem at hand. That internal skirmish clearly pointed to the federal agency as the delay cause, and the documents so obtained were instrumental in disposition of the contractor's claim.

A Bridge Rehab

On a state bridge rehabilitation project, the structure spanned existing active railroad tracks, requiring access through limited outages in cooperation with the railroad. Substantial delay in the contractor's performance occurred due to the locations and magnitude of deteriorated steel members on the bridge being far in excess of that represented in the contract documents.

Yet, the extent of such deterioration should have been relatively visible to the design firm during its supposedly extensive inspection prior to preparing the final contract documents. A Freedom of Information Law documents request revealed that, at the time of the design firm's inspection of the bridge to determine the extent and locations of deteriorated structural steel, it was not able to obtain railroad outages for access. It then had to visit the project at night and view the structural steel from the railroad tracks below, when there was no train service, in the dark, using flashlights. Counsel's argument as to this cause of delay to the contractor's work performance did not fall on deaf ears.

A State Highway Project

On a state arterial highway project, performance of the contractor's work was substantially delayed by subsurface utility interferences, largely caused by a local electric utility expansion, which was sprung on the contractor in the midst of its roadway work. The state took the position that the exculpatory provisions of the contract precluded any damages for utility interferences. However, through a freedom of information documents search, counsel was able to determine that, during the pre-bid planning and design phases for this project, the electrical expansion has been discussed during a series of meetings

between the state and the utility. Since not a word about this planned program appeared in the contract documents, such misrepresentation, in withholding that known information from bidders, tipped the scale in favor of a positive settlement of this contractor's delay claim.

A Water Tunnel Shaft

At the municipal level, the construction of a deep shaft for a water tunnel, which required a frozen soil operation, was delayed due to the contractor having encountered nests of boulders which interfered with the driving of the brine pipes for the needed freezing operation. The engineer's subsurface boring logs provided with the contract documents did not show that condition. However, a freedom of information documents request uncovered the initial driller's logs, which in fact did show the nests of boulders, but somehow never made their way to the boring logs furnished to bidders for this contract. That misrepresentation, once disclosed, led to an early disposition of the contractor's delay claim.

Clearly, not every contractor delay claim can be buttressed by freedom of information documents, and the time and effort required in that process can be frustrating and sometimes futile. Yet, in light of the achievable results in cases such as the ones cited above, coupled with the fact that, unlike litigation discovery, freedom of information documents requests can be made during the early formative stages of a claim, value can be found in the long term.

Certainly, this often ignored and potentially invaluable asset for a public sector contractor, encountering construction delays believed attributable to the owner, merits consideration with counsel at an early stage for maximum impact.

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