LITIGATING PUBLIC CONSTRUCTION CASES:  You Can Handle the Truth

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Presented at the 2019 Mid-Winter Program
January 30-February 1, 2019
Millennium Biltmore Hotel, Los Angeles, CA

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Claims and Disputes Against a State or Local Government Owner: A Brief Discussion of Salient Points Related to Public Projects that Construction Attorneys Should Know

INTRODUCTION

Winning a public project can be a significant victory for a contractor. But if a dispute arises, the contractor may face challenges in pursuing a claim against the government owner that do not arise on private projects. This paper discusses some of the more significant issues construction professionals face when bringing a claim against a state or local government owner.¹

I. In Disputes Against a Government Owner, Sovereign Immunity May Bar Some Claims.

Public works contracting involves many potential pitfalls for a contractor. One of the most substantial risks might be a basic inability to sue a public owner in the event something goes wrong. Whether dealing with a federal agency, or a state or local government, the concept of sovereign immunity includes both immunity from suit and immunity from liability.² While a government owner’s right to immunity from liability is generally waived by entering into a contract, this does not automatically mean a public owner may be sued in the same way a private owner could in the event of a dispute. In the state and local contracting process, state legislatures provide the rules by which public owners may be sued. Many, but certainly not all, states have enacted laws waiving immunity for certain types of claims. Therefore, anyone contracting with a

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¹ For purposes of this paper, government owners include, but are not limited to, states, counties, municipalities, special districts, public schools, airports, public transportation departments, and the like.

² “The term ‘sovereign immunity’ generally refers to the immunity of the state or federal government whereas the term ‘governmental immunity’ refers to the immunity of all levels of government.” Bertrand v. Bd. of City Comm’rs., 872 P.2d 223, 225 n.1 (Colo. 1994) (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts, § 131, at 1033 (5th ed. 1984)). For purposes of this paper, we use “sovereign immunity” to include “governmental immunity.” There are, however, distinct differences between the two and each should be considered when evaluating a claim against a public owner.
public entity should pay close attention to the terms of the agreement as well as any state or local statutes governing suits against public entities. While a comprehensive report on each state’s sovereign immunity laws and exceptions is beyond the scope of this paper, the authors provide a brief overview of various approaches to sovereign immunity in public contracts across a number of states.

A. Waiver of sovereign immunity

Alabama

Section 14 of the Alabama Constitution bars suits against State agencies.\(^3\) For example, in *Ex parte Jackson County Board of Education*, the contractor and the County Board of Education entered into a contract for renovations. The State of Alabama Building Commission subsequently stopped the work. The contractor sued the Board of Education for breach of contract and unjust enrichment. The Court found that the trial court lacked jurisdiction because the Board was an agent of the State and therefore immune from suit under Alabama’s Constitution.\(^4\)

Alabama State officials, however, are not immune from action seeking to compel performance of their legal duties.\(^5\) But, actions against State officials are barred if it is in substance an action against the State for damages.\(^6\) A State official may also not be sued if a result favorable to the plaintiff would “directly affect the financial status of the state treasury.”\(^7\)

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\(^3\) *Ex parte Ala. Dep’t of Transp.*, 978 So. 2d 17, 23 ( Ala. 2007) (holding that state’s sovereign immunity precluded recovery by a contractor for negligence and unjust enrichment claims).


\(^5\) *Ala. Dep’t of Transp.*, 978 So. 2d at 21.

\(^6\) *Id.* at 22.

\(^7\) *Id.*
Contractors have had success compelling State officials to pay money wrongfully withheld. In *Milton Construction Co. v. State Highway Department* for example, the court held that sovereign immunity did not bar an action to compel State officials to perform their legal duties, and compelled the Director of the State Highway Department to pay money previously withheld under the incentive/disincentive clause in its contract with the contractor.\(^8\)

**Georgia**

The Georgia Constitution limits the State’s waiver of sovereign immunity for actions arising from written contracts.\(^9\) Aside from the constitutional waiver of sovereign immunity, only an act of the General Assembly can waive sovereign immunity in the State.\(^10\) Also, under Georgia statute, all county government contracts must be in writing and entered into its minutes.\(^11\) Thus, general common law contract rules cannot be applied in a manner that creates State liability for an agreement that fails to meet the writing requirement for waiver of sovereign immunity.\(^12\) For example, Georgia courts have declined to extend the waiver to suits pertaining to implied contract theories such as claims of *quantum meruit* for the value of work performed.\(^13\)

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\(^10\) *Fulton Cty. v. SOCO Contracting Co., Inc.*, 343 Ga. App. 889, 892-93 (2017) (“The sweep of sovereign immunity under the Georgia Constitution is broad, [and its] plain and unambiguous text . . . shows that only the General Assembly has the authority to waive the State’s sovereign immunity.”) (citing *Olvera v. Univ. Sys. of Ga.’s Bd. of Regents*, 298 Ga. 425, 426, 782 S.E.2d 436 (2016)).


\(^12\) *Ga. Dep’t of Labor v. RTT Assocs., Inc.*, 299 Ga. 78, 82 (2016) (holding that waiver of sovereign immunity applies only to written contracts and may not be extended orally or by conduct).

\(^13\) *PMS Constr. Co. v. DeKalb Cnty.*, 243 Ga. 870, 872 (1979) (holding, sovereign immunity bars suits for *quantum meruit* because it applies to implied contracts, but does not bar suits for restitution because it applies to express contracts); *see also Oceana Sensor, Inc. v. Fulton Cnty.*, *Georgia*, No. 1:08-CV-2981-BBM, 2009 WL 10664810, at *4 (N.D. Ga. Apr. 8, 2009) (claims for restitution based on a breach of contract are not barred by the doctrine of sovereign immunity); *Cf., Dep’t of Transp. v. APAC-Georgia, Inc.*, 217 Ga. App. 103 (1995) (holding
The waiver of sovereign immunity also does not extend to suits associated with change orders not executed in compliance with the contract and local regulations. In *Fulton County v. SOCO Contracting Co.*, the contractor sued the county for breach of contract. The contract—and county regulations—required change orders to be bilateral, written agreements. The contractor argued that the county ordered changes to the work that delayed the project and for which the contractor was not paid. The contractor, however, failed to produce change orders executed in accordance with the county regulation change-order requirements. The County argued that the claims were barred by sovereign immunity, which was waived only to contract claims, and not as to claims “rising from modifications to the written contract that failed to follow the written change order policy.” The Georgia Court of Appeals agreed and found that sovereign immunity barred claims associated with the change orders not executed in compliance with the contract and the county’s regulations.

**Florida**

Similar to Georgia, Florida distinguishes between claims associated with work outside and within the contract. The doctrine of sovereign immunity bars claims associated with work outside of the expressed terms of the contract if strict notice or written change order claims against the state based on implied duties — such as the duty of good faith and fair dealings — are ex contractu, thus not bared by sovereign immunity).


15 *Id.* (“The County argues that although the State has waived sovereign immunity for the breach of any written contract, it did not waive immunity for causes of action arising from modifications to the written contract that failed to follow the written change order policy outlined in the contract.”).

16 *Id.* at 896.
requirements have not been adhered to by either the contractor or the sovereign. For example, in *County of Brevard v. Miorelli Engineering, Inc.*, the contractor claimed the county waived written change-order requirements by directing the contractor to perform work outside of the scope of the contract. The court disposed of the contractor’s claims based on waiver and estoppel holding sovereign immunity bars a contractor’s claims for work outside of the scope of the contract unless the extra work is memorialized in a written change order.

Similarly, in *Frenz Enterprises, Inc. v. Port Everglades*, the court disposed of the contractor’s claims for extra work finding that the no-waiver clause in the contract required the Port’s waiver of written notice requirements to be in writing and without a written change order, sovereign immunity bars recovery of the “costs of extra work totally outside of the terms of the contract.”

Sovereign immunity, however, does not bar claims for damages associated with extra work directed by the State and in furtherance of expressed or implied contractual covenants even when the contractor fails to obtain a written change order. For example, in *Town of Palm Beach v. Ryan Inc. Eastern.*, the court found that sovereign immunity did not bar the contractor’s

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18 *Cnty. of Brevard v. Miorelli Eng’g, Inc.*, 703 So. 2d 1049 (Fla. 1997).

19 *Id.* at 1051.


21 *Posen Constr., Inc. v. Lee Cnty.*, 921 F. Supp. 2d 1350, 1356 (M.D. Fla. 2013) (contractor’s *quantum meruit* claim is not barred by sovereign immunity if the additional work at issue is covered in part by the contract); *Ajax Paving Indus., Inc. v. Charlotte Cnty.*, 752 So. 2d 143 (Fla. Dist. Ct. App. 2000) (sovereign immunity does not preclude breach of contract claims for damages stemming from an increase in material quantified and addressed in contract); *Miorelli Eng’g, Inc.*, 703 So. 2d at 1051 (“Binding the sovereign to the implied covenants of an express contract is quite different from requiring a sovereign to pay for work not contemplated by that contract.”).
suit against the county to recover damages associated with repairing defective work caused by the county. The court found that a change order was not required because the repairs were necessary to bring the project into conformity with the contract and were therefore not outside of the scope of the contract.

**Texas**

In Texas, the government has waived local government immunity, but limited the categories of damages in connection with construction contracts under the Local Government Contract Claims Act. The waiver is limited to damages for the balance due and owed; delay and acceleration damages; damages stemming from change orders and additional work directed by the entity in connection with the contract; attorney’s fees; and interest. The government entities are not liable for consequential, exemplar, and unabsorbed home office overhead damages. Waiver of governmental immunity therefore does not extend to suits on claims for damages not recoverable under the Act.

Claims against the government entities are not limited by statute when the government entity is performing a “proprietary function.” Generally, government immunity depends on whether the contract claim arises from a government entity’s performance of a governmental or proprietary function. Governmental immunity does not bar contract claims when the

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23 *Id.*
government entity is engaged in a proprietary function, but does bar suit when the entity is engaged in a government function. Largely, government functions are performed by a government entity “in the performance of purely governmental matters solely for the public benefit.” Whereas, proprietary functions are performed by a government entity in its discretion for the benefit of those within the corporate limits of the entity, and not “as an arm of the government.”

In Wheelabrator Air Pollution Control v. City of San Antonio, the court held that a municipality’s operation of its own public utility is a proprietary function. Therefore, the City’s actions in entering into a contract to improve the related facilities were also proprietary and the contractor’s claims for breach of that contract were not barred by governmental immunity.

In Wasson Interests, Ltd. v. City of Jacksonville, the court held that governmental immunity did not bar a claim based on a breach of a lease because the City was engaged in a proprietary function when it leased lots, and governmental immunity did not bar the lessee’s claim.

**Maryland**

In Maryland, the State waives sovereign immunity for civil actions based on a written contract. Whether an entity qualifies as a State entity may depend on the source of funding for

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29 Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, 489 S.W.3d 448, 451 (Tex. 2016).


31 Id. at *3 (Tex. June 1, 2018) (citing Gates v. City of Dallas, 704 S.W.2d 737, 738 (Tex. 1986)).

32 Wheelabrator, 489 S.W.3d at 452.

33 Wasson Interests, Ltd., 2018 WL 2449184, at *8.

the contract at issue. For example, in *Beka Industries, Inc. v. Worcester County Board of Education*, the court found that the county school district qualified as a State entity for purposes of construction contracts because the majority of the project was funded by the State.\(^{35}\)

A contractor’s claims related to a state-construction contract are barred if not submitted within thirty days of when the contractor knew or should have known of the basis of the claim.\(^{36}\) The contract in *Manekin Construction, Inc. v. Maryland Department of General Services* contained a provision incorporating this regulation.\(^{37}\) The contractor submitted a proposed change order (“PCO”) during the project and then later submitted a claim for the issues encompassed in the PCO at the end of the project. The board dismissed the claim finding that the contractor failed to submit the claim within thirty days of when it knew or should have known the owner rejected the PCO.\(^{38}\) On appeal, the court held that the thirty-day limitation began when the contractor had notice that the PCO was rejected and remanded to the Board to determine when the contractor had notice that the PCO was rejected and if the claim was submitted within thirty days after rejection.\(^{39}\)

**Mississippi**

In Mississippi, the County’s Board of Supervisors contracts on behalf of the County and the Board can act only through its minutes.\(^{40}\) As a matter of public policy, courts ordinarily do

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36 *Md. Code Regs. 21.07.02.05-1.*


38 *Id.* at 160.

39 *Id.* at 177, 230.

40 *Williamson Pounders Architects PC v. Tunica Cnty.*, 597 F.3d 292, 296 (5th Cir. 2010).
not recognize oral contract modifications as binding and require valid contract modifications to be entered into the board’s minutes. 41 For example, in Williams Pounders Architects PC v. Tunica County, a county employee and the plaintiff-architect orally agreed to a cost increase for additional work. The County refused to pay for the additional work and the architect sued. The court disposed of the architect’s claims, finding that the oral agreement was invalid because contract modifications must be in writing and be entered into the County Board of Supervisors’ minutes. 42

Conversely, Mississippi courts have not enforced strict written change-order requirements when cities waive the requirement by a pattern of conduct, breach the duty of good faith and fair dealing, or the contractor reasonably relies on a city’s representations in performing extra work. 43

**Colorado**

The Colorado legislature has waived sovereign immunity for breach of contract claims. 44

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41 Id. at 298; see also CDM Smith Inc. v. Hancock Cnty. Bd. of Supervisors, No. 1:15-CV-81-KS-RHW, 2015 WL 7313412, at *4 (S.D. Miss. Nov. 19, 2015) (finding that the contract was not orally modified because the modifications were not entered onto the Board of Supervisors’ minutes and disposing of engineer’s claims associated with oral change orders).

42 Williamson Pounders, 597 F.3d at 298.

43 City of Mound Bayou v. Roy Collins Constr. Co., 499 So. 2d 1354, 1360 (Miss. 1986) (“The contractors should recover… because [the engineer] and [the owner] by a persistent pattern of conduct waived the contractual provision requiring changes to be executed in writing, and moreover [the engineer] and [the owner] failed to act in good faith in performing their contractual obligations.”); PYCA Indus, Inc. v. Harrison Cnty. Waste Water Mgmt. Dist., 177 F.3d 351, 43 Fed. R. Serv. 3d 1258 (5th Cir. 1999) (finding that absence of prejudice did not permit enforcement of untimely change request).

44 Denny Constr., Inc. v. City & Cnty. of Denver, 199 P.3d 742, 750 (Colo. 2009) (citing C.R.S. § 24–10–106(1) (2008) (“A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort . . . .”) (emphasis in original); Robinson v. Colo. State Lottery Div., 179 P.3d 998, 1003 (Colo.2008) (“[T]he [Colorado Governmental Immunity Act] was not intended to apply to actions grounded in contract.”)).
This waiver extends to the damages a contractor may seek in Colorado against a public owner, including lost profits.\textsuperscript{45} That is, a contractor may pursue the same types of contract claims and damages against a public owner in Colorado that it could pursue against a private owner. Colorado’s waiver of immunity, however, like in most states, does not extend to tort claims. For instance, there is no immunity from a tort claim against a public owner arising from a dangerous condition on a public building that is “associated with construction” of the building.\textsuperscript{46} A public owner is not immune from a tort claim for negligent constructions by simply hiring a contractor to complete the work.\textsuperscript{47} Moreover, the public owner may seek indemnity from the contractor if the agreement between the public owner and contractor contains an indemnity provision.

II. A Contractor Must Know and Follow the Claim Procedures.

Where sovereign immunity is not a barrier to a claim against a public owner, a contractor generally can bring any claim against a public owner that it could assert against a private owner.\textsuperscript{48} The contractor, however, must pay careful attention to contractual and statutory claim requirements.

A. \textit{Contractors must adhere to notice requirements as a condition precedent to bringing a claim.}

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\textsuperscript{45} See Denny Constr., 199 P.3d at 750 (“the General Assembly has not exempted the state or its subdivisions from breach of contract claims, nor has it otherwise limited damages available in cases such as this”).

\textsuperscript{46} Springer v. City & Cnty. of Denver, 13 P.3d 794, 799 (Colo. 2000). “[I]f the dangerous physical condition was proximately caused by the City’s negligent construction . . . the statute’s waiver of immunity applies.” \textit{Id.} at 800. This waiver of immunity, however, does not apply to dangerous conditions that exist based solely on the building’s design. \textit{Id.} at 799.

\textsuperscript{47} \textit{Id.} at 802.

On essentially every public project, a contractor will be required to provide notice to the owner prior to submitting a claim. In many circumstances, failure to provide such notice in strict accordance with the contract documents and any applicable statutes or regulations could result in the loss of the claim.49

The first consideration of a notice requirement is timing. Public contracts, like most contracts on private projects, ordinarily require that a contractor provide the owner with notice of a claim within a set period of time.50 For example, a contract may require that the contractor provide the owner with written notice of a claim within twenty-one days of the event giving rise to the claim. Where a contract is silent on the timing of notice, however, the contractor must still consider whether there are any statutes or regulations that may impose a timing requirement.51 For example, a New York statute requires notice of claims on school-construction projects be provided within three months of the accrual of the claim.52 Some jurisdictions may also require a contractor to submit claims on public projects within a set time period after substantial completion.53 In the absence of a contractual provision, statute, or regulation, a contractor may still be required to provide notice of a claim within a “reasonable” amount of time, which may

49 See e.g., Fulton Cnty. v. SOCO Contracting Co., Inc., 343 Ga. App. 889 (2017) (discussing local change order regulations, which were a prerequisite to later bringing a claim).

50 See, e.g., Balfour Beatty Infrastructure, Inc. v. Mayor & City Council of Baltimore, 855 F.3d 247, 249 (4th Cir. 2017) (noting a contractor on a public project was required to provide “prompt notice” of any claim).

51 See PHILIP L. BRUNER & PATRICK J. O’CONNOR, BRUNER & O’CONNOR CONSTRUCTION LAW § 4:35.


53 BRUNER & O’CONNOR, supra note 51, at § 8:30.
vary depending on the circumstances and jurisdiction. In short, contractors have to pay attention to the time requirements for notice or risk losing their claim.

Contractors should also consider the adequacy of the notice of the claim. What constitutes adequate notice is usually a fact question. A notice that provides enough information for the owner to reasonably understand the claim will often suffice. On federal projects, courts have found “a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim” is sufficient. To mitigate challenges to the sufficiency of the notice, the contractor should provide unambiguously that a communication is a notice of a claim and state the specific claim being made and the relief sought. The contractor should also ensure that the claim is sent to the appropriate person listed in the contract, statute, or regulation.

A number of courts have found that strict compliance with the applicable notice requirements is a prerequisite to filing a claim and that failure to comply with the requirements bars the claim. In A.H.A. General Construction, Inc. v. New York City Housing Authority, for

See Bruner & O’Connor, supra note 51, at § 4:35.

See Bruner & O’Connor, supra note 51, at § 4:35; see also Welding, Inc. v. Bland Cnty. Serv. Auth., 261 Va. 218, 541 S.E.2d 909 (2001) (finding architect’s meeting minutes provided adequate notice).


See McMillan, supra note 48, at 511.

See McMillan, supra note 48, at 511.

See generally Bruner & O’Connor, supra note 51, at § 4:35.
instance, the contract required the contractor to provide written notice for all claims within five
days of the “act or omission” giving rise to the claim.\textsuperscript{61} After completing its work on the project,
the contractor submitted a notice of claim to the government owner for nearly $1 million, which
the government refused to pay.\textsuperscript{62} The contractor filed suit, and the trial court granted summary
judgment in favor of the owner. The contractor appealed, and the appellate court affirmed the
lower court’s award of summary judgment against the contractor, noting that contractor failed to
satisfy the conditions precedent—namely, timely notice of a claim—for bringing a claim as
required by the contract.\textsuperscript{63}

Other courts, however, have taken a less harsh view. In a number of jurisdictions—
following the lead of the U.S. government—courts have found sufficient notice despite a lack of
strict adherence to the notice requirements.\textsuperscript{64} In \textit{James Corporation v. North Allegheny School
District}, for example, the court rejected the school district’s notice defense where the District
knew the underlying facts and was not prejudiced by the contractor’s failure to give formal
notice of claims.\textsuperscript{65} As illustrated by the \textit{James Corporation} case, the key consideration where
there is a lack of strict adherence to notice requirements is often whether the government owner


\textsuperscript{62} Id. at 372.

\textsuperscript{63} Id. at 375; see also Baker Heavy & Highway, Inc. v. New York State Thruway Auth., 26 Misc. 3d 1204(A),
906 N.Y.S.2d 777 (Ct. Cl. 2006) (“It is well established that strict compliance with the notice and damage
documentation terms of municipal construction contracts is a condition precedent to recovery for such causes of
action.”).

\textsuperscript{64} See New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 101 (1985) (contractor’s failure to provide formal
notice does not bar claims when the governing body has actual notice and is not prejudiced by the contractor’s
failure to provide formal notice).

was prejudiced by the lack of strict adherence. The government owner has the burden to prove prejudice; the contractor is not required to prove a lack of prejudice. If the government meets its burden, the contractor’s failure to adhere to the contract or statutory requirements will bar the contractor’s claim.

B. Contractors must also timely submit their claim.

Not only are contractors required to give timely notice of a claim, they may also be required to submit the claim itself within a specified period of time. These requirements may be set by contract, statute, or regulation, which may lead to confusion and disputes if the requirements are inconsistent. A prudent contractor will submit the claim within the shortest potentially applicable period of time to avoid such disputes.

III. In General, Contractors Must Comply with Change Order Procedures.

State and local governments also put substantial procedural requirements on contractors to comply with change-order procedures in order to be eligible for additional compensation or extra time. These requirements closely mirror—and often overlap—the claims procedures discussed above. In many cases, strict compliance with these procedures is a condition precedent for entitlement to additional time or compensation from a public owner. Many states have a

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66 See id.; Bruner & O’Connor, supra note 51, at § 4:35.
67 Bruner & O’Connor, supra note 51, at § 4:35.
68 1A Bruner & O’Connor Construction Law § 4:36 (discussing Westates Constr. Co. v. City of Cheyenne, 775 P.2d 502 (Wyo. 1989) where a contractor’s claim was barred due to its failure to submit the claim within the prescribed time period).
69 See 1A Bruner & O’Connor Construction Law § 4:36; see also, e.g., City and Cnty. of Denver, Dept. of Aviation and Dept. of Pub. Works, Standard Specifications for Construction, General Contract Conditions, §1202.1, available at https://www.denvergov.org/content/dam/denvergov/Portals/705/documents/rules-regulations/PWR-032.1-Standard_Specifications_for_Construction_General_Contract_Conditions.pdf, (last visited Nov. 13, 2018) (requiring submission of claim within twenty days of submitting the notice of claim, or within ten days if it is a delay claim).
wholesale bar on a contractor’s change-order request if the contractor does not comply with change-order procedures. This includes, among others, California,\textsuperscript{70} Connecticut,\textsuperscript{71} Hawaii,\textsuperscript{72}

\textsuperscript{70} \textit{P&D Consultants, Inc. v. City of Carlsbad}, 190 Cal. App. 4th 1332, 1344 (2010) (holding the contractor not entitled to payment for extra work because a change order for the associated work was not executed in writing); \textit{see also Katsura v. City of San Buenaventura}, 155 Cal. App. 4th 104, 110, 65 Cal. Rptr. 3d 762, 765 (2007) (holding the contractor was not entitled to payment for additional work because the change order was not reduced to writing and executed pursuant to the contract and the town charter. “[A] private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations.”).


\textsuperscript{72} \textit{Koga Eng’g & Constr., Inc. v. State}, 122 Haw. 60 (2010) (finding that the State did not waive contractual notice provisions requiring timely notice of claim unless the State would not be prejudiced by an untimely submission by assessing and denying the claim on the merits).
Kansas, 73 Michigan, 74 Oklahoma, 75 Massachusetts, 76 Minnesota, 77 New York, 78 North Carolina, 79 North Dakota, 80 Virginia, 81 Washington, 82 Wyoming, 83 and Louisiana. 84

73 Razorback Contractors of Kan., Inc. v. Bd. of Cty. Comm'rs of Johnson Cnty., 43 Kan. App. 2d 527 (2010) (enforcing strict written and prompt notice of claim provisions and holding that the Board did not waive the notice provisions in an intentional and unequivocal manner).


75 M.J. Lee Constr. Co. v. Okla. Transp. Auth., 2005 OK 87, ¶ 32, 125 P.3d 1205, 1214 (stating "the contractor's failure to give timely notice of a claim may waive the claim, a defense which the Authority must plead").


77 Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minn., 298 Minn. 328 (1974) (finding that written notice of claim is a condition precedent to contract action).

78 Wenger Constr. Co. v. City of Long Beach, 152 A.D.3d 726 (N.Y. App. Div. 2017) (barring contractors claims for change orders not in writing as required by the contract); A.H.A. Gen. Constr., Inc. v. N.Y.C. Hous. Auth., 92 N.Y.2d 20 (1998) (finding that the city's breach of contract by issuing change orders and subsequently rescinding the change orders did not relieve the contractor from complying with contractual requirements requiring the contractor to submit extra work tickets and daily reports as a condition precedent to recovery of the extra costs).

79 Blankenship Constr. Co. v. N.C. State Highway Comm'n, 28 N.C. App. 593 (1976) (denying contractor's claims for unforeseen conditions because the contractor failed to provide proper notice to the commission and keep records to support the claim.); see also Inland Bridge Co. v. N.C. State Highway Comm'n, 30 N.C. App. 535 (1976).

80 Johnson Constr., Inc. v. Rugby Mun. Airport Auth., 492 N.W.2d 61 (N.D. 1992) (finding the contractor waived claims for failing to provide written notice).

81 Com. v. AMEC Civil, LLC, 280 Va. 396 (2010) (reversing lower court ruling that actual notice satisfied contractual and statutory written notice requirement); Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth., 745 F.3d 703 (4th Cir. 2014) (denying the contractor's claims for failure to comply with Virginia statute requiring the contractor submit a notice of intent to claim identifying each claim); Welding, Inc. v. Bland Cnty. Serv. Auth., 261 Va. 218, 229 (2001) (finding that the notice provided through the project meeting minutes satisfied the contractual notice requirements).

82 Gen. Constr. Co. v. Pub. Util. Dist. no. 2 of Grant Cnty., 195 Wash. App. 698, 380 P.3d 636 (2016) (holding that writing on a chalk board is not sufficient to comply with written notice requirements, also, the contract did not give the engineer authority to waive the contractual notice provisions for District); Mike M. Johnson, Inc. v. Cty. of Spokane, 150 Wash. 2d 375 (2003) (providing actual notice of claim to the owner does not excuse the contractor from complying with mandatory claim procedures and only the owner may waive the contractual notice of claim requirements by unequivocal acts demonstrating their intent to waive the provision); Absher Constr. Co. v.
A smaller, but significant number do not bar contractor change orders for failure to comply with the change-order procedures if the government entity waives the requirements orally or by conduct. These include Indiana, Colorado, Iowa, New Jersey, Illinois, and others.  

Kent Sch. Dist. No. 415, 77 Wash. App. 137, 145, 890 P.2d 1071, 1075 (1995) (“Washington does not require an element of prejudice to enforce contractual notice provisions.”); but see Bignold v. King Cnty., 65 Wash. 2d 817 (1965) (holding that the contractor was entitled to costs associated with changed conditions because the contractor gave prompt notice and the County directed the contractor to perform the extra work even though the contractor did not provide written notice pursuant to the contract).  

Jackman Constr., Inc. v. Town of Baggs, 2012 WY 80 (Wyo. 2012) (finding a provision providing that the contractor waives all claims by accepting final payment unless the Town acknowledges unsettled claims in writing valid even though the contractor orally objected to the town’s liquidated damages assessment in a town council meeting); Rissler & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1234 (Wyo. 1996) (owner did not waive notice requirements by using field directives and issuing prior change orders based on verbal notice); see also Dan Nelson Constr., Inc. v. Nodland & Dickson, 2000 ND 61, 608 N.W.2d 267, 275 (N.D. 2000) (applying Wyoming law) (finding contractors must strictly adhere to the prompt written notice requirements under change of contract price provisions of construction contracts).  

O & M Constr., Inc. v. State, Div. of Admin., 576 So. 2d 1030 (La. Ct. App) (denying the contractor damages for failing to provide timely notice pursuant to the contract); see also Camo Constr. Co. v. Town of Vidalia, 2007-354 (La. App. 3 Cir. Oct. 3, 2007), 966 So. 2d 796, 810; C.R. Humphreys Gen. Contractor, Inc. v. Tangipahoa Par. Sch. Sys., 2007-0993 (La. App. 1 Cir. Dec. 21, 2007) (denying the contractor’s claim for failing to itemize the costs associated with the claim as required by the contract).  

Miami Valley Contractors, Inc. v. Town of Sunman, 960 F. Supp. 1366, 1372 (S.D. Ind. 1997) (contracts requiring modification to be made in writing may be modified orally or by the parties’ actions if the evidence supports the parties intended to modify the contract.); see also City of Indianapolis v. Twin Lakes Enter., Inc., 568 N.E.2d 1073, 1084 (Ind. Ct. App. 1991) (“Parties to a contract may mutually modify their contractual undertakings, and it is not always necessary to prove a written or oral modification of a contract because modification of a contract can be implied from the conduct of the parties . . . . Even a contract providing that any modification thereof must be in writing may nevertheless be modified orally.”).  

Metro. Paving Co. v. City of Aurora, 449 F.2d 177, 182 (10th Cir. 1971) (finding that failure of the contractor to comply with prompt written notice requirements did not bar the claim because the City waived the prompt notice requirements by considering and denying the claim on its merits).  

See Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 359–60 (Iowa 1983) (stating that the waiver of sovereign immunity applied to unwritten contracts and contract theories such as quasi-contract and unjust enrichment); Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216 (Iowa 1988) (general exculpatory clauses and sovereign immunity does not bar third party subcontractor claims against the State for breach of contract.); Star Equip., Ltd. v. Iowa Dep’t of Transp., 843 N.W.2d 446, 450 (Iowa 2014).  


Missouri, Pennsylvania, Utah, West Virginia, and South Dakota. A key consideration in determining whether a government entity has waived an aspect of the change-order—or claims—procedure is whether the individual government employee involved has the authority to waive such requirements. Thus, even in jurisdictions that recognize waiver by a government entity, the contractor may still face the challenge of showing that the person that waived a requirement had that authority.

Only a small minority of states excuse a contractor’s failure to comply with change-order procedures if the government entity has actual notice or is not prejudiced by the contractor’s

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*Greater Chicago*, 52 Ill. 2d 187 (1971) (finding that the District waived the change order writing requirement because the chief engineer verbally authorized the work).

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90 *Gill Constr., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699 (Mo. Ct. App. 2004), as modified (Feb. 1, 2005) (holding that the evidence raised a fact issue for the jury as to whether the authority waived the timely notice of claim provision in the contract).

91 *E. Coast Paving & Sealcoating, Inc. v. N. Allegheny Sch. Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (finding that the district is liable for claims associated with change orders by verbally directing the work and receiving reports on the progress).

92 *Procon Corp. v. Utah Dep’t of Transp.*, 876 P.2d 890, 893 (Utah Ct. App. 1994) (“Although the trial court did not reach the merits of the failure-to-provide-notice issue, UDOT’s review of the possible merits of [the contractor’s] claim arguably waived [the contractor’s] obligation to conform to the Contract’s strict notice procedures.”).


94 *N. Imp. Co. v. S.D. State Highway Comm’n*, 267 N.W.2d 208 (S.D. 1978) (holding that the State was estopped from raising the lack of a written agreement for extra work as a defense to contractor’s claim for extra compensation for extra work which project engineer ordered or required contractor to perform); *Cf., Prunty Constr., Inc. v. City of Canistota*, No. 03-46, 2003 WL 25537538 (S.D. Cir. Ct. 2003) (holding the City was not liable for costs because the contractor failed to comply with the notice requirements).

failure to strictly comply with the applicable requirements. These include Alaska, Arizona, New Hampshire, Ohio, Wisconsin, and Maine. The best approach for a contractor, of course, is to adhere to the contract or statutory change-order requirements.

IV. Contractors may be Required to Exhaust Administrative Remedies Prior to Filing a Civil Action.

96 Neal & Co. v. City of Dillingham, 923 P.2d 89, 92 (Alaska 1996) (oral communication about differing site conditions constitutes actual notice sufficient to meet written notice requirements if it is clear and alerted or should have alerted the City of changes site conditions. “[C]ase law establishes that under certain circumstances timely actual notice, even in the absence of written notice, will be considered sufficient notice under the clause.”); North Pac. Erectors, Inc. v. Dept. of Admin., 337 P.3d 495 (Alaska 2013), cert. denied, 134 S. Ct. 2146, 188 L. Ed. 2d 1126 (2014) (affirming denial of a contractor’s claim because the contractor failed to provide adequate records required by the contract to support a differing site condition claim).

97 New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 101 (1985) (finding contractor’s failure to provide formal notice does not bar claims when the governing body has actual notice and is not prejudiced by the contractor’s failure to provide formal notice); see also Chaney Bldg. Co. v. Sunnyside Sch. Dist. No. 12, 147 Ariz. 270, 273 (Ct. App. 1985) (finding that the school district waived notice requirements by considering the contractor’s claim based on its merits and having actual notice).

98 H.E. Contracting v. Franklin Pierce Coll., 360 F. Supp. 2d 289, 294 (D.N.H. 2005) (“Contract provisions requiring that change orders be in writing have been upheld by New Hampshire courts unless the owner has actual knowledge of the additional work and is not prejudiced by the contractor’s failure to comply with the writing requirement.”).

99 Roger J. Au & Son, Inc. v. Ne. Ohio Reg’l Sewer Dist., 504 N.E.2d 1209 (Ohio 1986) (finding failure to provide written notice does not bar claims where the owner had timely actual notice “as the purpose of the formal notice would thereby been fulfilled); IPS Elec. Servs., L.L.C. v. Univ. of Toledo, 2016-Ohio-361 (finding the contractor waived its claims by failing to provide timely notice as required by the contractual claims procedure).

100 Metro. Sewerage Comm’n of Milwaukee Cnty. v. R. W. Constr., Inc., 72 Wis. 2d 365 (1976) (finding contractor did not waive claims because the engineer had actual notice and the county was not prejudiced by the contractor’s failure to provide notice).

101 Frederick Snare Corp. v. Maine-New Hampshire Interstate Bridge Auth., 41 F. Supp. 638 (D.N.H. 1941) (finding contractor’s claims were not bared for failing to provide written notice because the State had actual notice and was not prejudiced by the contractor’s failure to provide written notice).
In a number of jurisdictions, the contractor may also be required to exhaust all available administrative remedies prior to pursuing a claim in court. Failure to exhaust available administrative remedies may result in a claim being dismissed.102

A typical administrative-remedy process will require that disputes between a contractor and public owner be submitted to the applicable public agency in writing for a review of the claim.103 If the contractor is dissatisfied with the result of the administrative review, it may petition the agency for a hearing.104 The hearing will usually be held before an agency officer or administrative law judge.105 The determination by the hearing officer or ALJ is generally

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102 See Balfour Beatty Infrastructure, Inc. v. Mayor & City Council of Baltimore, 855 F.3d 247, 253 (4th Cir. 2017).


Any person who disputes the amount of a charge or rate of charge made against his property or otherwise billed to or alleged to be owing from such person may request a revision or modification of such charge or rate from the agency or division of the department of public works assessing such charge. Such request shall be made in writing not later than one (1) year after having been billed for any such charge. Compliance with the provisions of this subsection shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action.

Such agency or division shall issue a written determination granting or denying such request in whole or in part, which determination may be appealed pursuant to the remaining provisions of this section.

104 See DRMC 56-106(b) (“Any person who disputes any determination made by or on behalf of the city pursuant to the authority of the manager, which determination adversely affects such person, may petition the manager for a hearing concerning such determination no later than thirty (30) days after having been notified of any such determination. Compliance with the provisions of this subsection shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action.”).

105 See DRMC 56-106(c)-(d).
considered a final order, which may be appealed to a court of law.\textsuperscript{106} The appellate courts typically give significant deference to administrative orders and will usually reverse such an order only where there is an abuse of discretion, lack of jurisdiction, or the result is not supported by substantial evidence.\textsuperscript{107} It can therefore be difficult for a dissatisfied contractor to

\textsuperscript{106} See DRMC 56-106(f) (“The district court of the second judicial district of the state shall have original jurisdiction in proceedings to review all questions of law and fact determined by the manager of public works by order or writ under Rule 106(a)(4) of the state rules of civil procedure.”).

\textsuperscript{107} See, e.g., Colorado Rule of Civil Procedure 106(a)(4), providing:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within 21 days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the court. The cost of preparing the record shall be advanced by the plaintiff, except that the court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.
successfully appeal a government agency’s order. The contractor, however, must exhaust the administrative remedy process or risk losing the claim altogether.

In *Balfour Beatty Infrastructure, Inc. v. Mayor & City Council of Baltimore*, the Fourth Circuit Court of Appeals was faced with the question of whether a contractor must first exhaust its administrative remedies against a government-project owner before pursuing a claim in court. There, the City of Baltimore assessed liquidated damages on the contractor at a rate of $40,000 per day. The contractor sued the City in federal court, claiming that the City was in breach of contract by unlawfully assessing liquidated damages.

Applicable City regulations required the contractor to exhaust available administrative remedies before pursuing a claim in court. The administrative review process required that, after the contractor provided the Department of Public Works engineer “prompt notice” of a claim, the engineer and others from the Department of Public Works would provide an initial review of the claim. If the contractor was dissatisfied with that review, it could appeal to the head of the Department of Public Works, who would act as a hearing officer for the claim.

(VIII) The court may accelerate or continue any action which, in the discretion of the court, requires acceleration or continuance.

(IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

*Balfour Beatty*, 855 F.3d at 249.

*Id.* at 249, 250.

*Id.* at 249.

*Id.*. The City regulations were also incorporated into the parties’ contract.

*Id.*

*Id.*

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The bureau head would then hold an on-record hearing and issue a “final decision,” after which the contractor could then pursue a claim in court.\(^{114}\)

The contractor, however, failed to use this administrative process before filing suit.\(^{115}\) The City moved to dismiss all claims based on the contractor’s failure to exhaust administrative remedies. The contractor in response, argued that the City had abandoned the administrative process when it assessed liquidated damages without first using the administrative process. The trial court was unpersuaded and granted the City’s motion to dismiss.\(^{116}\) The contractor appealed.\(^{117}\)

The Fourth Circuit Court of Appeals affirmed, finding that the parties’ contract was for a public project subject to the exhaustion requirement and that no exception to the exhaustion requirement applied.\(^{118}\) The court therefore affirmed the lower court’s dismissal of the contractor’s claims.\(^{119}\)

As the *Balfour Beatty* case illustrates, contractors must be cognizant of the applicable administrative remedies available to them and must exhaust those remedies before filing suit or risk having their claims dismissed.

\(^{114}\) *Id.*

\(^{115}\) *Id.* at 250.

\(^{116}\) *Id.*

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 251-52. Exceptions to the requirement to exhaust the administrative process would include circumstances such as a lack of jurisdiction, futility, etc.

\(^{119}\) *Id.* at 253.

Assuming one gets past sovereign immunity, follows the applicable notice and claim requirements, and exhausts all administrative remedies (if any), a question may arise of whether the dispute can be submitted to arbitration.120

Most states allow a public body to submit a claim to arbitration.121 A governmental entity will be required to arbitrate, however, only if the individual that entered the arbitration agreement had the authority to do so.122

There is also some question as to whether an arbitration award is binding on a state or local agency in some jurisdictions.123 A sensible contractor should consider whether arbitration is binding on the government owner before agreeing to an arbitration provision. Otherwise, a contractor may expend a lot of time, effort, and money on an arbitration award that is unenforceable.

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120 A separate question is whether a public owner will agree to an arbitration provision. While most jurisdictions permit arbitration of claims with a public owner, the contracting authority for that public owner, as discussed below, may not be willing to agree to arbitration for a number of reasons. See infra Section IX(D).


123 See McMillan, supra note 48, at 526 (citing Va. Code Ann. § 2.2-4363(C)).
VI. **Damages a Construction Professional may be Awarded Against a Public Owner.**

Damages on a state or local project work much the same way as they do on private projects. Compensatory damages that were reasonably foreseeable at the time the contract was entered are generally recoverable.\(^{124}\) Consequential damages are also ordinarily recoverable where such damages were within the parties’ contemplation at the time of contracting. Such damages, of course, may be waived or limited by contract.

Contractors should, however, check local regulations and state statutes for any limitations on such damages. For instance, Texas places certain, albeit limited, restrictions on the damages that may be recovered by a construction professional in an action against a public-entity owner.\(^{125}\)

Punitive or exemplary damages are often not recoverable against a public owner even under circumstances where they would be recoverable against a private owner. The general rule is that punitive damages are not recoverable in a breach of contract case except in special circumstances such as malicious acts or fraud.\(^{126}\) However, even in such circumstances on a public project, a number of jurisdictions do not allow punitive damages against a government owner.\(^{127}\)

Another common type of damages in construction disputes are delay damages. Delay damages, which are a form of compensatory damages, are ordinarily recoverable on a private project, but may be limited by “no-damages-for-delay” clauses. On public projects, however, no-damages-for-delay provisions are often unenforceable.

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\(^{124}\) See McMillan, *supra* note 48, at 516-17.

\(^{125}\) Tex. Loc. Gov’t Code Ann. § 271.153(a)(1)-(4) (limiting damages to the balance due and owed; delay and acceleration damages; damages stemming from change orders and additional work directed by the government-entity owner; attorney’s fees; and interest).

See McMillan, supra note 48, at 526 (citing as an example, Cal. Gov’t. Code § 818, which bars any damages against a public entity “imposed primarily for the sake of example and by way of punishing the defendant”).
In Arizona, for example, the State legislature has rendered such clauses unenforceable in public-construction contracts. In Colorado, and several other states, the legislature has made no-damages-for-delay provision in public-construction contracts void as against public policy. Thus, a contractor’s delay damages, despite a no-damages-for-delay provision in the contract, may well be recoverable as a matter of public policy. Thus, contractors should not only consider the provisions of their contracts, but should also look to state law to determine whether they may recover delay damages on a public project.

VII. A Contractor Generally is Required to Obtain a Payment Bond and a Performance Bond on Government Projects.

128 Ariz. Rev. Stat. § 34-221(F) provides:

A contract for the procurement of construction shall include a provision that provides for negotiations between the agent and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the agent is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provision in the contract that requires notice of delays or provides for arbitration or other procedure for settlement or provides for liquidated damages.

See also Tech. Constr., Inc. v. City of Kingman, 229 Ariz. 564, 567, 278 P.3d 906, 909 (Ct. App. 2012), interpreting Ariz. Rev. Stat. § 34-221(F) and finding delay damages, by statute, are recoverable on public construction projects.


On private projects, it is common for a contractor to place a mechanic’s lien on the owner’s real property to ensure payment of sums owed. Mechanic’s lien rights, however, are typically not available on a public project. Instead, a contractor that is not paid by a public owner may usually place a lien on the funds within the government agency’s control. This right is typically provided by statute, and the rule is generally “that a lien for public improvements attaches solely to the funds of the public entity that are due under the contract for the improvement.” Some states, however, provide no lien rights to prime contractors on public construction projects.

To protect subcontractors and suppliers, government owners often require the contractor to provide a payment bond and a performance bond for the project. The requirement to provide such bonds are often found in “Little Miller Acts,” which are modeled on the federal Miller Act. These statutes set forth the requirements for the bonds, and the statutory requirements are incorporated into the bond, and the bond must be construed in accordance with

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131 See, e.g., Colorado Revised Statute § 38-22-101, et seq. (Colorado’s mechanic’s lien statute).

132 E.g., N.J. Stat. Ann. § 2A:44-126; see also FIFTY STATE CONSTRUCTION LIEN AND BOND LAW, § 33.03 Public Sector (noting that in New York, a contractor may attach liens “to the funds appropriated to the project”).


134 FIFTY STATE CONSTRUCTION LIEN AND BOND LAW, § 25.03 Lien Law (“Mississippi does not recognize lien rights on public construction projects.”) (citing Mississippi Fire Ins. Co. v. Evans, 120 So. 738, 744 (Miss. 1929); National Sur. Co. v. Hall-Miller Decorating Co., 61 So. 700, 702 (Miss. 1913)).

135 For example, in Florida, a contractor is required to provide both a performance bond and a payment bond on public projects. JOHN S. VENTO, PATRICK J. POFF, GREGG E. HUTT, & AARON H. REICHELSON, FIFTY STATE CONSTRUCTION LIEN AND BOND LAW, § 10.03 Public Projects (noting “the amount of a bond of a contractor constructing a public building must equal the contract price unless the price exceeds $250 million”).

136 See BRUNER & O’CONNOR, supra note 51, at § 8:155.
the statute. The requirements vary from state to state, and a contractor should familiarize itself with the requirements in the jurisdiction in which it will be engaged on a public project.

VIII. Statutes of Limitations and Repose Must be Carefully Considered, Including Whether they Apply to Counterclaims by Government Entities.

In addition to the timing concerns discussed above, statutes of limitation and repose are also important considerations on public projects. The length of statutes of limitation and repose on public projects will vary from jurisdiction to jurisdiction, with typical statutes of limitation ranging from two to four years and statutes of repose ranging from seven to ten years. As with all claims, contractors and their attorneys must pay attention to the limitations periods applicable to their claims to ensure that they are timely filed.

Construction professionals should also be aware of the statutes of limitations and statutes of repose as they apply to claims by the government owner against them. In some jurisdictions, there are no statutes of limitation or repose on claims by a public-project owner against a contractor or other construction professionals providing services or materials on a public project. For instance, in State v. Lombardo Brothers Mason Contractors, the Connecticut Supreme Court found that the common-law doctrine of *nullum tempus occurrit regi* (no time runs against the king) prevented the statute of limitations from running against a public owner in

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137 *Id.* (citing *A.C. Legnetto Constr., Inc. v. Hartford Fire Ins. Co.*, 702 N.E.2d 830 (1998) (bond construed to include terms mandated by statute); Restatement Third, Suretyship & Guaranty § 71(2) (“[A] legally mandated bond is deemed to contain terms set forth in the law that required it to be provided [and] the legally mandated bond is treated as containing those terms.”); *Fastrack Crushing Serv., Inc. v. Abatement International/Advatex Assoc., Inc.*, 149 N.H. 661, 827 A.2d 1019 (2003) (denying the subcontractor’s payment bond claim for failing to comply with statutory notice requirements, even though complying with different notice requirements contained in the bond itself)).


Connecticut. The Connecticut court further found that a provision in the parties’ contract that would have imposed a statute of repose on a government owner was unenforceable. The Court reasoned that State’s agent may have been authorized to enter contracts on behalf of the State, but the agent had no legal authorization to agree to impose a statute of repose as such action would have been tantamount to a waiver of sovereign immunity.

The case City of Phoenix v. Glenayre Electronics, Inc. provides another interesting illustration. There, the City of Phoenix, after being sued by an individual that had worked on a number of public works projects, sued several contractors and developers for indemnity. The contractors had entered agreements with the City under which they agreed to indemnify and hold

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140 Id.
141 Id. at 1034.
142 Id. at 1036-37; see also Rutgers, 634 A.2d at1056 (applying nullum tempus and finding statute of limitations did not run against a State entity); Rowan Cnty. Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992) (nullum tempus applies not only to statutes of limitations but to statutes of repose as well since such statutes are still time limitations); but see City of Colorado Springs v. Timberline Assocs., 824 P.2d 776, 781 (Colo. 1992) (“we find that the principles supporting abrogation of sovereign immunity from liability, and principles supporting statutes of limitations, mandate abrogation of immunity from limitations as applied to political subdivisions of the state, unless the General Assembly sees fit to do otherwise.”); Enroth v. Mem’l Hosp. at Gulfport, 566 So.2d 202, 206 (Miss. 1990) (statutes of limitations do not run against the State or any subdivision, including municipal corporations); City of Medford v. Budge-McHugh Supply Co., 91 Or. App. 213, 754 P.2d 607 (1988) (statutes of limitations do not run against government bodies unless they expressly apply or apply by necessary implication); Wash. Pub. Power Supply Sys. v. Gen. Elec. Co., 113 Wash.2d 288, 778 P.2d 1047, 1049 (1989) (limitations run against municipalities unless actions arose out of exercise of powers traceable to the State’s sovereign powers); San Marcos Water Dist. v. San Marcos Unified Sch. Dist., 190 Cal.App.3d 1083, 235 Cal. Rptr. 827, 830 (1987) (common law rule of immunity from statutes of limitation does not generally apply to local government agencies such as municipalities); Bd. of Educ., Sch. Dist. 16 v. Standhardt, 80 N.M. 543, 458 P.2d 795, 801 (1969) (statutes run against counties and other political subdivisions of the State unless action is in reality one for the State); Lakeville Township v. Northwestern Trust Co., 74 N.D. 396, 22 N.W.2d 591, 592 (1946) (townships are bodies corporate and are therefore amenable to statutes of limitations); Guaranty Trust Co. v. U.S., 304 U.S. at 135 n. 3, 58 S.Ct. at 790 n. 3 (nullum tempus rule has never been extended to agencies of a sovereign, such as municipalities); Anne Arundel Cnty. v. McCormick, 322 Md. 688, 594 A.2d 1138, 1141 (1991) (nullum tempus doctrine has more limited effect when the plaintiff is not the State, but one of the State’s political subdivisions); Laramie Cnty. Sch. Dist. No. One v. Muir, 808 P.2d 797, 801 (Wyo.1991) (statutes of limitations do not run against local agencies if public rights are being protected); Sch. Dist. of Aliquippa v. Md. Casualty Co., 402 Pa. Super. 569, 587 A.2d 765, 771-72 (1991) (statutes of limitations run against municipalities unless the cause of action accrued in the governmental capacity).

143 City of Phoenix v. Glenayre Elecs., Inc., 242 Ariz. 139, 141, 393 P.3d 919, 921 (2017) (“alleging that they had agreed to defend and indemnify the City against negligence claims arising from the construction projects”).
the City harmless from all suits arising from the contractors’ work on certain water-infrastructure projects. The developers, on the other hand, obtained right-of-way permits from the City to develop their own water-system infrastructure, under which the developers agreed to indemnify and hold the City harmless from all suits arising from their projects.

After being sued by the City, the contractors and developers moved to dismiss the action, arguing that the City’s claims were time barred by the State’s eight-year statute of repose for claims arising out of construction contracts. The City argued that the statute of repose did not apply to claims brought by a government entity. The trial court, however, granted the developers and contractors’ motions to dismiss, and the City appealed.

On appeal, the Arizona Supreme Court affirmed in part and reversed in part. The court first noted that “Arizona case law has consistently recognized the common law doctrine ‘nullum tempus occurrit regi’—time does not run against the king.” The court found, however, that the statute of repose, which expressly provided that it applied “[n]otwithstanding any other statute,” controlled over the statute that partially codified the nullum tempus doctrine in

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144 Id.
145 Id. at 141-42.
146 Id. at 142.
147 Id.
148 Id.

> Notwithstanding any other statute, no action or arbitration based in contract may be instituted or maintained against a person who develops or develops and sells real property, or performs or furnish the design, specifications, surveying, planning, supervision, testing, construction or observation of construction of an improvement to real property more than eight years after substantial completion of the improvement to real property.
Thus, the court found that the City’s claims against the contractors were time barred.151

The City’s claims against the developers, however, were another matter. Arizona’s statute of repose applied to actions “based in contract.”152 The court therefore found that the City’s claims against the developers were not barred by the statute of repose because the indemnity agreement between the developers and the City arose from the developers’ permits, not from a contract between the parties.153 The court noted that even if the permits were a contract between the City and the developers, the City Code independently created the indemnity obligation as a matter of City regulation.154 Thus, the statute of repose did not apply to the City’s claims against the developers.155

IX. Practice Points for Dealing with Claims on State and Local Government Projects.

A. Communication protocols with government owners

Government-project contracts may include a section or attachment on communication protocols, and if not, the owner should establish communication protocols early on in the project. These protocols should list who can approve what and who has the authority to bind the

150 Id. at 144.
151 Id. at 144-45.
152 Id. at 146 (citing Ariz. Rev. Stat. Ann. § 12-552(F)) (“In this section an action based in contract is an action based on a written real estate contract, sales agreement, construction agreement, conveyance or written agreement for construction or for the services set forth in subsection A of this section.”).
153 Id.
154 Id. at 147-48.
155 Id. (“we conclude that the City Code, which applies solely based on an indemnitor’s status as a permittee, does not constitute a written agreement for the services listed in § 12–552(A). The City’s issuing a permit and the corresponding, independent indemnity obligation arising under Code § 31–40 do not create an agreement between the City and the Developers for either party to perform any of the services listed in subsection (A).”)

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government owner. The importance of these protocols is obvious, but if they are not established early in the project, it can lead to misunderstandings, uncertainty, and the possibility of a valid claim being denied.

A common example is establishing who is authorized to approve change orders on behalf of the owner. In *Massachusetts Bay Transportation Authority v. H.W. Moore Associates, Inc.*, for instances, the Regional Project Manager had authority to approve change orders if the amount was below $150,000 and the increase in the contract price did not exceed an established maximum prices. The contractor submitted a proposed change order that was in excess of $150,000 and would have increased the contract price above the set maximum price. After submitting the request, the contract proceeded with the additional work at the direction of the Regional Project Manager. The Transportation Authority, however, refused to pay the contractor for the work, and the contractor filed suit.

The contractor filed a motion for summary judgement, arguing that the Transportation Authority was in breach of contract because it completed the work at the direction of the Regional Project Manager, who was authorized to approve change orders. The Superior Court of Massachusetts disagreed. The court found the Regional Project Manager lacked authority to

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156 E.g., *Mass. Bay Transpn Auth. v. H.W. Moore Assoc., Inc.*, No. CA80703, 1995 WL 808627, at *2 (Mass. Super. Feb. 14, 1995) (“For a municipality to be bound … there must be a contract and not only must there be an underlying authority in the municipality to make that contract, but . . . it must be made on its behalf by a duly authorized agent.”) (quoting *Lord v. Winchester*, 355 Mass. 788, 789 (1969)).


158 *Id.*

159 *Id.*

160 See *id.* at *1-3.

161 *Id.* at *2.*
approve the change order request and thus the Transportation Authority was not obligated to pay the contractor the requested sum.\textsuperscript{162}

As the \textit{Massachusetts Bay Transportation Authority} case makes clear, contractors must understand and adhere to the communications protocols, or as happened to the contractor in that case, failure to submit requests to the authorized person may result in denial of a claim.

\textbf{B. \textit{Contractors must be aware of political sensitivities and should not publically criticize governmental officials.}}

In a dispute with a public owner, particularly on a high-profile project, the contractor and its attorney may be tempted to try the case “in the court of public opinion” in an attempt to gain leverage. The contractor and the attorney, however, should carefully consider such an approach. While there could be circumstances where a public owner would be susceptible to public pressure, such instances will be rare. And more often than not, such tactics will have little positive effect and likely backfire.

In a dispute between a contractor and a public owner, the contractor’s objective is to get a favorable outcome, which usually means that the government entity pays the contractor on a claim. Publicly criticizing or even embarrassing the public officials involved is unlikely to help achieve that goal.

Public owners may also want to keep disputes out of the public eye—even though the public agency’s actions are almost certainly public record—for at least two reasons which align with the contractor’s interests. First, the owner may not want to draw attention to settling or paying a claim—even a meritorious one—for fear of a public backlash. The owner may fear that members of the public, without the benefits of the details of the dispute, may view paying or

\textsuperscript{162} \textit{Id.} at *3.
settling a claim as unnecessary government spending. Second, the owner may want to avoid publicity of a settlement or payment of a claims for fear that such a payment may invite more claims from other contractors. Consequently, it is likely in the contractor’s interest to avoid needlessly publicizing a dispute with a government owner.

C. **Litigating a claim against a public owner may invite a counterclaim, including the assessment of liquidated damages.**

If a contractor asserts a claim against a public owner, the contractor should anticipate a counterclaim. These counterclaims may include claims under a state false claim act, liquidated damages, and other claims. While false-claim actions are beyond the scope of this paper, as a practical matter, if a contractor litigates a claim against a public owner, the owner’s attorneys will likely scrutinize the project records looking for a basis to assert a counterclaim under an applicable false-claim statute.\(^{163}\)

A public owner may also invoke its audit rights in response to a claim by a contractor. Not only are audits by a government owner inconvenient for a contractor, they may also serve as a discovery tool for the government owner seeking a basis for a counterclaim under a false claim act or another basis for a counterclaim against the contractor.\(^{164}\)

A claim by a contractor may also provoke the assessment of liquidated damages.\(^{165}\) In *Boone Coleman Constr., Inc. v. Piketon*, a contractor sued the Village of Piketon claiming the

\(^{163}\) *See Bruner & O’Connor Construction Law* § 8:65 (“Contractors doing business with the federal government must take care to avoid submitting invoices, statements or claims containing false information. The submission of false information to the government can subject a contractor to civil and criminal penalties.”). The same applies at the state and local level in many jurisdictions. *See Bruner & O’Connor Construction Law* § 8:76.


\(^{165}\) *See generally Boone Coleman Constr., Inc. v. Piketon*, 50 N.E.3d 502 (Ohio 2016).
Village failed to pay $147,477 due under its contract for a roadway-improvement project. In response, the Village brought a counterclaim for $277,900 in liquidated damages.  

The Village moved for summary judgment on its claim, which the trial court granted.  

The Ohio Court of Appeal reversed the trial court, finding the amount of liquidated damages to be “manifestly inequitable and unrealistic” and to be a “penalty.” The Ohio Supreme Court disagreed, and reversed the Court of Appeal. The Ohio Supreme Court noted that a contractor on a public project “may not avoid the result of [a] valid liquidated-damages provision” in a contract with a public entity.

As the Boone Coleman case illustrates, bringing a claim against a government owner is likely to provoke the assessment of liquidated damages. While there may be circumstances where the public owner will seek liquidated damages regardless of whether the contractor files suit, a contractor should consider what counterclaims an owner may assert, including assessment of liquidated damages before litigating a claim.

**D. Even in jurisdictions that allow binding arbitration for disputes on public projects, contractors may have a difficult time getting a public owner to agree to arbitration.**

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166 Id. at 506-07. The parties’ contract provided for liquidated damages at $700 a day, and the contractor completed the project 397 days late.

167 Id. at 507.

168 Id.

169 Id. at 515.

170 Id. The court also provided, “‘There is no sound reason why persons competent and free to contract may not agree upon this subject [of liquidated damages] as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.’” Id. (citing Wise v. U.S., 249 U.S. 361, 365 (1919)).

171 Whether the Village would have brought a claim for liquidated damages had the contractor not filed suit is not clear from the opinion. The Village had given notice that it would seek liquidated damages after it rejected a request from the contractor for an extension of the completion date. After contract completion, however, it was the contractor that brought suit, not the Village.
As discussed in Section V above, most jurisdictions allow mediation and arbitration regarding disputes on public projects. While most government owners will have no objection to a mediation provision in a contract on a public project, contractors may find it difficult to get a public owner to agree to arbitrate.

One of the principal reasons that public owners tend to dislike arbitration appears to be the belief by the owners that, if a matter cannot be settled quickly, a court proceeding is more advantageous to the public owner than a more private arbitration. While somewhat contradictory to Section IX(B) above, the thinking appears to be that if the dispute reaches the point of hearings and a trial, the public owner will get more favorable treatment by a judge than an arbitrator.

Some public owners seem to believe that judges will be more sensitive to public sentiment than an arbitrator, and that the public sentiment will most likely be in favor of the government owner. This may be particularly true in states where trial court judges are elected. As a result, contractors may find it difficult to get a public owner to agree to arbitration.

CONCLUSION

By and large, the claims process on public projects works much like the process on a private project. But, as discussed above, there are some important differences that contractors must consider or risk losing their claims.

In most states, even where governmental entities have waived their immunity, strict compliance is still required to overcome the procedural hurdles to prosecuting a claim against a public owner. Contractors must consider not only the contract documents, but also statutes, regulations, and local agency procedures. Contractors should also be vigilant about the notice and other prerequisites in place regarding each agency they do work for.
Contractors should also be cognizant of statutes of limitation and repose and how they apply to their potential claims as well as possible claims against them by the government owner. Contractors must also consider and comply with any applicable administrative-remedy procedures before filing suit. And finally, contractors need to know what damages they may recover against public owners, and whether they can seek such damages in binding arbitration, if the contractor is able to get the owner to agree to arbitrate.

The considerations discussed in this paper are not exhaustive, and there are other potential challenges to claims on a public project that may arise. Construction professionals should consult with counsel early in the claims process to not risk potentially losing the opportunity to pursue otherwise valid claims against public owners.