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CONSTRUCTION LAW E-UPDATE

BREACH OF A FUNDAMENTAL CONTRACTUAL OBLIGATION
The Forgotten Exception to "No-Damage-For-Delay"

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For years, leading construction industry associations have valiantly fought against "no-damage-for-delay" clauses in public contracts. Such provisions have nonetheless become ubiquitous in public construction contracts and subcontracts. Generally, a "no-damage-for-delay" clause exculpates the owner from liability to a contractor for any damages resulting from delays in the performance of the work. Until the industry is successful in outlawing the use of such one-sided and counter-productive clauses in all public contracts in New York State, the following approach to avoiding their enforcement might be considered.

In the original, landmark New York Court of Appeals case of *Corinno Civetta*, four exceptions to "no-damage-for-delay" clauses were recognized: (1) delays caused by the owner/general contractor's bad faith, willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract, and (4) delays resulting from the owner/general contractor's breach of a fundamental contractual obligation.

The first exception (what I would call "owner bad acts") and the third (owner abandonment") are rarely of any utility. Therefore, typically, contractors allege that the delays encountered were not contemplated. Unfortunately, the "uncontemplated" delay exception has become weakened by several problematic judicial decisions in New York. These decisions, exhibiting a complete lack of understanding of public construction by the judiciary, have held that simply because a contract merely mentions issues such as, for example, change orders, differing site conditions, or coordination of activities, that any and all delays resulting from such "referred to" events were, by definition, "contemplated" by the parties and, therefore, not within the "uncontemplated" delays exception.

It's hard to imagine more foolish reasoning. Do these decisions mean that a change order representing fifty percent of a contract's original value is to be anticipated and, therefore, accounted for by a contingency in one's bid? If that is so, how could a contractor ever protect itself with a contingency in its bid for such an eventuality and still be "low"? These ridiculous court holdings cry out for legislative relief.

However, in the meantime, rather than pursuing an "uncontemplated" delay theory, utilizing the oft forgotten, fourth *Corinno Civetta* exception cited above, "breach of a fundamental contractual obligation," presents better possibilities. In fact, the *Corinno Civetta* court itself identified, as typical examples of breaches of such "fundamental obligations," failure by the ownerto obtain title to the work site or to make the work site available to the contractor to timely commence construction. In addition, the *Corinno Civetta* court cited to prior New York court holdings for further examples, such as failure of an owner to furnish temporary heat so that contractor could work through the winter, failure to appropriate funds for necessary prerequisite design, failure to obtain needed right of ways, failure to obtain

an excavation permit, and failure to furnish the foundation site for work by the contractor due to initial defective design of the foundation work by the owner.

Breaches of such fundamental contractual obligations of an owner occur in countless other circumstances. With a differing site condition ("DSC"), for example, the owner had a fundamental obligation to provide complete and accurate information in its bid package regarding subsurface conditions at the site. If this information turns out to be materially inaccurate, then the delays and impacts suffered by a contractor in performing extra work to address the undisclosed subsurface conditions actually encountered should be recoverable. Such recovery should include not just payment for the extra work necessitated by the DSC, but all resulting impacts and delay costs as well.

Similarly, an owner has the non-delegable, fundamental obligation to coordinate the work of all contractors on its site. If the owner fails to properly direct and schedule the work of all contractors, which impacts or delays the work of contractors on the job, such delays should be recoverable under this exception as well.

Since *Corinno Civetta*, other courts have also applied the breach of a fundamental contractual obligation exception to uphold the contractor's delay claim.

In one case, the contractor alleged that the owner deliberately concealed its pre-bid intention to issue, after work commenced, numerous complex, far reaching and time-consuming composite drawings, bulletin changes, bulletin drawings and supplements to the four prime contractors, which not only materially altered and increased the scope and cost of the work to be performed, but significantly impacted and delayed the job.

In another case, an owner was found to have breached its fundamental contractual obligations when it failed to timely obtain easements, failed to retain a construction manager to adequately supervise and coordinate the work of the contractors, failed to have coordinated construction schedules and drawings prepared, and, in fact, decided to hire thirty subcontractors on its own in lieu of simply replacing the general contractor that it had terminated in the middle of the project.

G&C Commentary

There are ways to cleverly confront no-damage-for-delay clauses. Such provisions do not necessarily preclude recovery for delay and impact damages. However, when faced with delays on a project, a contractor must, also, always preserve its rights by reviewing its contract for all applicable notice and damage recordkeeping requirements and strictly comply with each. This has become critical today.

Additionally, if a monthly schedule update is presented to you that does not accurately reflect all owner-caused delays, the contractor should object to the inaccuracies in writing. If the contractor is not allowed to accurately update the project schedule to reflect the extra work actually being performed due to owner-caused delays or interferences, the contractor should object in writing and maintain its own accurate project schedule in-house, that accurately reflects what is, in fact, occurring on the job site.

While a contractor bears the burden of proving that one of the "no-damage-for-delay"exceptions apply to the specific events it encounters, that burden is not insurmountable. With a bit of resourcefulness, you can be successful in pursing impact or delay claims against public owners and private developers.

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