



It is still apparent that state-wide reform (i.e., elimination) of the “no-damage-for-delay” provision in public contracts must be implemented throughout New York State. The narrow coverage of New York City’s “Pilot Program” eliminating such counter-productive clauses is limited to only certain New York City-related projects. Broader reform is clearly needed that would apply to the hundreds of other public owners throughout New York State that regrettably still regularly utilize such provisions.

Nowhere is the urgent need for reform more clearly illustrated, than in a recent state appellate court decision. It held that an excavation contractor’s claim for delay damages against the City of New Rochelle was precluded by the contract’s no-damage-for-delay provision because New Rochelle and the contractor “contemplated” the possibility of project delay resulting from the presence of underground utilities.

In that case, the excavation contractor argued that the parties could not, and did not, contemplate such a delay. Particularly, the parties did not contemplate that the underground utility infrastructure, once found, would need to be moved. Under a well-settled exception to the enforcement of no-damage-for-delay clauses, unanticipated delays are entitled to be compensated in damages. The court, however, disagreed, holding that the provisions in the contract, along with the subsequent conduct of the contractor, demonstrated that the contractor contemplated the possibility of the project being delayed due to the presence of utilities. Demonstrating stunning ignorance of the construction process, the appellate court went further, holding that the contractor, an experienced excavator, must have reasonably foreseen the possibility that a utility company would be unable or unwilling to move its underground lines, pipes, or conveyances.

This decision is a perfect illustration of the inherent unfairness of categorical, risk-shifting, no-damage-for-delay contract provisions. Although, as indicated, New York State’s highest court has carved out clear exceptions to the enforcement of no-damage-for-delay clauses, such as when delays are unanticipated by the parties, there are now evidently lower courts and intermediate appellate courts finding new ways to avoid applying those exceptions. In this regard, the court went out of its way to hold that the parties “contemplated” delays by finding that, as the contractor was an experienced excavator, it should have

“reasonably foreseen the possibility” that: (1) there would be underground utility obstructions despite the lack of notice of same in the bid documents, and (2) that a utility company might object to moving the underground infrastructure thereby resulting in delays.

The court referenced no evidence that actually demonstrated that the City of New Rochelle or the contractor actually contemplated delays caused by utility interferences at the time they entered into the contract, or that the parties even discussed or noted the location of the underground infrastructure. Also absent from the court’s decision is any discussion as to whether the City breached a fundamental obligation by failing to properly and adequately inform the contractor as to the location of the underground infrastructure. Rather, the court, incredibly, based its decision not on actual facts, but on a mere “possibility.” How could any contractor prepare a bid that both protects it from the contingency of delays due to unknown underground utilities and is competitive?

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Enough is enough. This decision attempts to narrow the already limited exceptions to the enforcement of no-damage-for-delay contract provisions. The court’s misinterpretation of the “uncontemplated delay” exception is truly shocking. If courts continue to render decisions like this, public contractors will have no choice but to include substantial contingencies in their bids in order to protect themselves from the losses they may suffer due to delays.

This decision could be the poster child for the urgent need for uniform, statewide no-damage-for-delay reform. While New York City has taken a small step in the right direction by instituting its “Pilot Program” eliminating the no-damage-for-delay provision on certain New York City projects, such reform is limited, being neither City-wide nor permanent. Even within New York City, independent authorities or agencies do not come within the parameters of New York City’s Pilot Program. More importantly, it is not statewide, which means that outside of New York City, any city, town, municipality, independent authority or school district, could continue to unreasonably shift the risk of delay to public contractors. This is precisely why immediate statewide legislation of no-damage-for-delay reform is absolutely necessary for fair and competitive public contracting.

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