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CONSTRUCTION LAW E-UPDATE

DELAY CLAIMS MAY NOT ALWAYS BE GOVERNED BY CONTRACTUAL TIME LIMITATIONS

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Navigating a construction contract is often like attempting to traverse a minefield. This is not by accident; public owners draft them that way by design. Nowhere are there more contractual pitfalls than in the area of claims for delay. In a recent, interesting New York appellate case, however, one of these contractual traps was actually held to have neutralized another, at least in the case of claims for delay.

In that case, an electrical contractor submitted a notice of claim to the public owner (a school district), alleging that the owner breached the contract by causing unreasonable and uncontemplated delays. The public owner, in turn, tried to have the claim dismissed by arguing that it was not timely filed pursuant to a contract provision entitled "Time Limits on Claims", which provided that claims by either party had to be initiated within only 21 days after the occurrence of the event giving rise to the claim. This applied to not merely a notice of a delay causing event, but to the actual, formal claim itself.

Significantly, however, the New York appellate court held that the "Time Limits on Claims" provision did not apply to the contractor's delay claims because of the express "no-damage-for-delay" provision of the contract. In this instance, the contract originally included a provision which provided that claims relating to time would be governed by the terms of the "Time Limits on Claims" provision. In a modification to the contract, this provision was deleted in its entirety and replaced by the no-damage-for-delay provision. As such, the court concluded that the deletion of the referral of delay-related claims to the "Time Limits on Claims" section of the contract, together with the insertion of the new no-damage-for-delay provision, evidenced the parties' intent to remove claims based on delay from the ambit of the "Time Limits on Claims" provision altogether.

As further evidence that the parties did not intend for delay claims to be governed by the "Time Limits on Claims" provision, the court noted that the contract defined a claim as "a demand or assertion by one of the parties seeking, adjustment or interpretation of the Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract." As the no-damage-for-delay provision precluded any delay damage claims, the court further concluded that the contractor's request for delay damages was not a demand premised on the terms of the contract. The court held that the delay claim sought relief wholly outside the scope of the contract.

G&C Commentary:

After observing public owners adopting more and more onerous notice and/or damage reporting contractual requirements with strict, even confiscatory, waiver-of-claim provisions, we get a perverse sense of pleasure in seeing a public owner "trip up" for "piling it on."

Undoubtedly, you will encounter delays on a project, you will have to bring a claim for delay damages, and you will have

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to deal with not only "no-damage-for-delay" provisions, but contractual provisions that will limit the time in which to bring such a claim. Fortunately, however, as the foregoing appellate case illustrates, delay claims may not always be subject to the strict time limitations of your contract.

Keep in mind, however, that this case was based on specific and unique facts. It is still of the utmost importance that you read and understand each and every dispute-related time limitation in your contract. You do not want to waive your right to be properly compensated for delay or impact damages simply because you failed to file within the requisite time period.