

DAMAGES FOR DELAY

Two Appellate Decisions Favor Contractors

As every contractor should know, “no damage for delay” clauses are generally valid and enforceable. While there are certain “exceptions” to the enforcement of these clauses, generally these exceptions have been narrowly interpreted by the courts. Damages for delay may still be recovered for: (1) delays caused by the owner’s bad faith or its willful, malicious, or grossly negligent conduct, (2) unanticipated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee’s breach of a fundamental obligation of the contract.

A contractor seeking delay damages in the face of a “no damages for delay” clause an uphill battle, to say the least. However, in two recent appellate cases in New York, the delay damage claimant was able to successfully meet this challenge.

In the first case involving a school district project, the appellate court affirmed the trial court’s judgment awarding the contractor damages for extended site overhead, labor rate increases, loss of labor productivity, expenses for small tools and consumables, and for lost profit.

This was despite the fact that the defendant school district’s contract contained a standard “no damage for delay” clause.

Among the various causes of the delays identified by the trial court were defendant’s failure to timely obtain easements for electrical and drain sewer installations, the failure of the school district’s construction manager to adequately supervise and coordinate the work of the various contractors, including the failure to prepare the coordinated construction schedules and drawings, the termination of both the construction manager in December 1994 and the general contractor in June 1995 [the plaintiff was the Wicks electrical prime] and defendant’s decision to hire 30 subcontractors in lieu of replacing the general contractor.

In holding that the “no damages for delay clause” did not bar this claim, the appellate court explained that under the totality of the circumstances, finding an ample basis in the record for the court’s factual conclusion that the project delays were uncontemplated and that defendant was responsible for a breach of fundamental contractual obligations, we decline to disturb the holding that the “no damages for delay clause” did not bar plaintiff’s claim for money damages.

In the second New York appellate case, the general contractor was granted leave to amend its complaint to assert claims for delay damages, despite the inclusion of an exculpatory “no damage-for-delay” clause in the contract. The appellate court permitted this amendment, and modified the lower court’s decision which had denied the claim, because:

“Here, the evidence presented by plaintiff in opposing defendant Lehrer McGovern Bovis’s motion, demonstrating over 600 days in delays, including a substantial period during which the Lehrer McGovern Bovis, as Contract Manager, suspended work, is sufficiently indicative of delays beyond the contemplation of the contracting parties or of an abandonment by the contractee, and thus a meritorious cause of action for delay damages notwithstanding the cited exculpatory contract provision, as to warrant ... claims for delay damages predicated upon uncontemplated delays and abandonment.”

G&C Commentary

Clearly, these cases did not involve “ordinary, garden-variety” construction delays contemplated by the parties when they entered into their agreement and, therefore, were beyond the scope of the “no damage for delay” clause. The owner’s termination of both the construction manager and the general contractor within a six-month period and the hiring of thirty subcontractors in lieu of replacing the general contractor in the first case, and 600 days of delay, which included a construction-manager imposed suspension of work, in the second case were justifiably viewed by the courts as extraordinary circumstances. In fact, they represent outrageous behavior. However, delay in public construction is epidemic and contractors are seriously hurt due to the actions or inactions of public owners or their representatives on a daily basis. Only through legislative reform of public contracting laws to prevent public owners from

hiding behind unqualified no damage for delay clauses will this issue ever be equitably resolved.

In the meanwhile, skillful use of existing exceptions to such clauses can provide relief to seriously impacted contractors or subcontractors.