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Subcontractors know your Contract & Your Rights! Contract Start Date Delays and Use of Special Equipment

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What rights does a subcontractor have as to the timely start of the project? The courts were recently presented with such an issue in the context of a subcontractor's claim for delay damages based upon an alleged late start of a project by the general contractor after the subcontract was executed. The subcontract agreement required the subcontractor to fabricate and install approximately 500 pre-cast concrete panels to the exterior of a building being constructed by the general contractor. The parties acknowledged that the work was to begin in May 1997, but did not actually start until September 1997, a three month delay.

Based upon the acknowledged change in the start date by the general contractor, the subcontractor's claim for delay damages seemed fair and plausible. The trial court, however, decided for the general contractor and the appellate court affirmed the trial court's decision. In this regard, the appellate court noted that the subcontract agreement required the subcontractor to perform work "in accordance with the project schedule developed by [the general contractor]" and, thus, the agreement gave the general contractor the right and authority to set and make changes to the project schedule, including the start date. The court also noted that the subcontractor was aware that the start date was slipping and, although they complained, they did not request a fixed start date and therefore the subcontractor "failed to reserve the right to limit

changes in the schedule” and thus the subcontractor was in no position to make a claim for a delay when the schedule changed.

In the same case, the subcontractor also sued the general contractor for its failure to provide the installer with “exclusive” use of an agreed upon tower crane for installation of the concrete panels. The court again looked to the parties’ agreement to deny the subcontractor’s claims for damages based upon the general contractor’s failure to provide the subcontractor with the exclusive use of a tower crane. The subcontractor explained that it had given the general contractor an \$80,000.00 credit on the contract price, based upon its understanding that it would have the “exclusive” use of the tower crane for its work. The court, however, found that the contract only allowed the subcontractor to use the crane but did not specifically provide for “exclusive” use. The court further found that the parties agreement was “clear and unambiguous” on the issue of the crane and thus it would not accept contrary evidence from outside the four corners of the agreement.

G&C Commentary

The Court’s strict application of the contract to the facts in the above matters underscores the importance of making sure that key contract terms clearly reflect the subcontractor’s understanding and expectation as to how the project will proceed and how the parties will conduct themselves. In this case, it is apparent that the subcontractor had a certain vision of its rights that were not clearly reflected in the contract and, as a result, important claims were sacrificed. Every effort should be made to ensure that key issues that impact the subcontractor’s ability to perform, such as the start date and the use of particular and “special” equipment, be included in the contract to properly protect the subcontractor’s rights and profitability.

The court was harsh here, but it can only be guided by what it sees in the contract. “If it wasn’t written, it wasn’t said.” Take the extra time and expend the cost necessary to build a firm foundation for your job, a fair contract that reflects all of your understandings.

Erik A. Ortmann, a senior associate with the firm, assisted with the preparation of this article.