SCORE TWO FOR THE GOOD GUYS! – Contractors Recover Damages for Owner-Caused Delays!

In a pair of related decisions, a New York trial court recently made highly important and influential findings regarding two contractors' claims for delay damages against DASNY that could change the way such delay claims on public projects are handled by courts in New York.

In both of the lawsuits, the contractors were seeking damages for the additional costs associated with delays (that extended the work more than 40 months more than the original 22 month contract period) caused by DASNY's excessive design revisions, deficient plans and specifications, and improper scheduling. In both cases, DASNY attempted to have the delay claims dismissed on the grounds that: (1) they were barred by the no-damage-for-delay provision in the contract; (2) they were barred by the contractors' failures to comply with the written notice requirements regarding delays; and (3) they were barred by the terms of the releases signed by the contractors in connection with the issuance of change orders.

No Damage-For-Delay Clause

With regard to the no-damage-for-delay provision, the court, to the satisfaction of all public contractors, found that a trial was required to determine if the facts in dispute might meet one or more of the *Corinno Civetta* exceptions to the enforcement of the no-damage-for-delay provision.

First, despite DASNY's argument that the language of the agreement itself, particularly the no-damage-for-delay provision, indicated that the parties contemplated delays on the project, the court held that "[t]he no-damage-for-delay clause itself, however, cannot suffice to establish that [the contractors] contemplated that the delays at issue might occur. The inquiry to be made under [Corinno] is whether the delays were contemplated despite the presence of the no-damage-for-delay clause." The court also rejected DASNY's argument that delays in processing change orders were contemplated because a provision of the contract included language addressing how to correct the plans by issuing change orders. In agreeing with the contractors, the court specifically recognized that the contractors did "not simply claim a delay in processing change orders, but cardinal changes and errors in the designs and construction details," the extent of which could not possibly have been contemplated by the parties at the time of contracting.

Second, the court also found there to be issues as to whether DASNY breached a fundamental obligation under the contract by failing to coordinate, schedule and progress the work in accordance with the contract. In one of the cases, the court also noted that DASNY's failure to issue a proper CPM schedule and updates thereto could constitute a breach of a fundamental obligation, as a CPM schedule is absolutely necessary to the timely completion of a project.

Third, the court held that the contractors had shown that there was an issue as to whether DASNY acted in bad faith or was at least grossly negligent in ignoring design deficiencies and directing the contractors to proceed with work without proper plans, specifications and a CPM schedule in place.

Finally, the court found that a trial was required to determine if DASNY's changes were so unreasonable that they constituted an abandonment of the contract. Specifically, the court held that "[a]n intentional abandonment that renders unenforceable a no-damage-for-delay clause may be found when an owner makes design changes that substantially alter the work and cause such significant delay that the terms of the original contract no longer control." In light of the excessive number of change orders (254), excessive design clarifications (467 RFIs) and sketches (500 sketches), and the redesign of the mechanical system, the court held that DASNY's substantial design changes "fundamentally changed the project and constituted a 'cardinal change' so as to be equivalent to an abandonment of the Contract by DASNY."

Additionally, the court held that there was an "issue of fact as to whether DASNY waived the no-damage-for-delay clause by issuing . . . change orders [for extended costs associated with the delays] and making partial payments to [the contractors] for the delays, rather than merely extending the time to complete without an increase in the Contract price as provided in the no-damage-for-delay clause."

Notice and Recordkeeping

DASNY's argument that the contractors' failure to comply strictly with the written notice requirements for delay claims precluded them from recovering any delay damages was likewise found to be unavailing. Following what we hope to be a growing trend amongst courts to find exceptions to strict compliance with written notice requirements concerning delays, the court held that the substantial correspondence from the contractors sufficiently made DASNY aware of the delays being experienced and constituted substantial conformance to the notice provisions. According to the court, "where claims have been the subject of sufficient correspondence to make them well known to the contract manager, complete technical compliance with . . . notice of claims requirements [is] not necessary." Moreover, based upon DASNY's continued representations that the delay claims would be reviewed, verified and paid upon the completion of the Project, the court found DASNY to have effectively waived compliance with the notice provisions.

DASNY's Stealth Change Order Releases

DASNY's final desperate act to have the contractors' delay claims dismissed was likewise shot down by the court. DASNY argued that the delay claims were barred by the release language contained in the change orders issued to and signed by the contractors. These releases, however, pertained only to the direct costs for such extra work, which was concededly paid to the contractors. According to the court, the releases were limited to claims "arising out of this change" by their terms, and therefore, did not encompass all of the additional costs incurred by the contractors, including the total impact of the actual delays and interferences encountered on the project.

G&C Commentary

These two cases are prime examples of a public owner pulling out all the stops to deny payment for delay damages. For years, public owners have consistently and predictably raised the no-damage-for-delay clause and/or written notice requirements and/or releases signed in connection with change orders to avoid having to fairly pay for delay damages suffered by public contractors. Such exculpatory clauses are the weapons public owners have wielded against contractors in countless battles for delay damages. Fortunately, these two recent decisions have armed contractors with additional weapons to confront public owners, carving out exceptions to the preclusive operation of these exculpatory clauses and allowing contractors to rightfully collect for the costs they incurred as a result of owner-caused delays.

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