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CONSTRUCTION LAW

Revisiting ‘No Damage For Delay’ Clauses



By
**Kenneth M.
Block**



And
**Joshua M.
Levy**

ate last year, Governor Andrew Cuomo vetoed legislation to amend the state finance law (Senate Bill Number 6686) requiring every contract for design and construction of any public works to include a “damage for delay” clause. Such a clause would allow any contractor, subcontractor or supplier to seek costs from the public entity due to excusable delay, disruption, interference or inefficiencies in the performance of the contract as a result of the act or omission of the public entity.

In his disapproval memorandum, the governor noted that, while many public construction contracts contain “no damage for delay clauses,” which provide that a contractor will not be entitled to additional compensation or reimbursement for losses stemming from construction delays, certain

exceptions have been recognized by the courts, such as delays arising from a public owner’s bad faith, interference, intentional abandonment, breach of contract or delays which were not contemplated, and that those exceptions give protection to contractors without the need for legislation. He stated: “Overturning well-settled law at this juncture would have the impact of increasing the liability to the public entities.”

Cuomo also noted that the bill suffered from “certain technical deficiencies,” such as permitting recovery for an owner’s delays regardless of whether such costs are reasonable; depriving the public owner of the ability to define the terms and circumstances under which damages would be compensable; and exposing the public entity to the claims of lower-tier contractors with which the owner lacked privity. According to the governor, “This proposed legislation could result in a large quantity of

claims being raised by individual subcontractors and materialmen under just one prime contract, thus exposing the public entities to an increased volume of claims and litigation costs.”

Careful Drafting

The bill and the governor’s veto give a good starting point for a discussion of “no damage for delay” clauses in construction contracts in general and for offering recommendations as to how they should be handled in private contracts.

The goal of an owner should be to restrict, in a reasonable manner, a contractor (and its subcontractors) from asserting claims against the owner for delays for which the owner may be responsible. As noted in the governor’s memorandum, even where a “no damage for delay” clause is included in a contract, the courts will not enforce the clause if the delay was due to the owner’s intentional wrongdoing or was not contemplated, such as

KENNETH M. BLOCK and JOSHUA M. LEVY are partners of Tannenbaum Helpert Syracuse & Hirschtritt.

an unforeseen site condition preventing the work from proceeding.

The issue of what is “contemplated” can be problematic. A general “no damage for delay” clause will not be read literally by the courts and will not prevent recovery of unanticipated owner-caused delays. Thus, where it is expected that a particular type of delay may occur, such as a delayed regulatory approval, owners would be well advised to identify such delays specifically in the clause. Such specific clauses have been relied upon in court holdings that the delay was contemplated and would not warrant additional compensation to the contractor.

Even where one of the exceptions to the enforcement of a “no damage for delay” clause exists, the clause may restrict the type of damages which may be recoverable. For example, the clause may provide that the contractor’s compensation for a delay for which the owner is responsible is limited to the contractor’s direct out of pocket costs, not other damages, such as loss of productivity, lost profits or extended home office overhead.

Types of Delays

Our approach to a “no damage for delay” clause is first to identify types of delays which the contractor may encounter, including force majeure delays and owner driven delays, collectively referred to as “unavoidable delays.” Examples of

force majeure delays are unusually severe weather, industry-wide strikes, and civil disturbances. In the case of this category of delay, the contractor is entitled to an extension of time equal to the impact on the substantial completion of the project, but not greater than day for day.

The contractor is not, however, entitled to additional compensation. This limitation often becomes a business issue subject to negotiation and may result in some form of risk sharing, such as allowing the

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contractor compensation for general conditions costs after a grace period, during which the contractor would not be entitled to such costs.

The second category of delay involves owner driven delays, i.e., resulting from the improper or negligent acts, omissions to act, or failures to timely act by the owner. In this situation, the contractor is entitled to an extension of time, as with a force majeure delay, but also may recover direct subcontract and general conditions costs directly attributable to the delay. The contractor

may not, however, make any claim for other delay costs, such as loss of productivity or efficiency, lost profits or extended home office overhead on account of any delay, or obstruction or hindrance for any cause whatsoever, whether or not foreseeable, and whether or not anticipated.

In both instances of delay, the contractor is obligated to advise the owner promptly of the delay (we require five business days) and recommend strategies to mitigate the effect of the delay. As required by case law, we also state that failure to provide this notice is deemed a waiver of any claim for additional time and cost. Finally, we require that these provisions relating to relief for delay be incorporated in all subcontracts.

Conclusion

A “no damage for delay” clause is enforceable in New York subject to certain well-acknowledged exceptions. The clause, however, must be drafted with care in order to address all types of delay and provide for limited reasonable compensation to the contractor if one of the exceptions is met.