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CONSTRUCTION LAW

Negotiating Unavoidable Delays In Construction Contracts



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The three key elements in construction contracting are cost, time and performance of the work, and an unambiguous agreement on these elements is essential to a successful project. Reaching an agreement on the element of time involves more than an agreement on the project schedule. It also requires an agreement on the consequences and treatment of delays. In this article, we will examine the concept of "unavoidable delays," i.e., a delay for which the contractor is not responsible and may be entitled to an extension of time, additional compensation or both.

The term "unavoidable delay," when used in construction contracts, means any matter beyond the contractor's reasonable control that demonstrably impacts the project schedule, including the date of substantial completion. Unavoidable delays are categorized as "excusable" or "compensable." An excusable delay entitles the contractor to an extension of time; a compensable delay entitles the contractor to

additional compensation, usually in the form of extended general conditions costs.

Of course, there is much more nuance in determining the cause and consequence of an unavoidable delay, and each party must carefully negotiate this provision, since an unavoidable delay under one contract may not necessarily be an unavoidable delay under another contract. For example, a general construction contract could provide that if the work is delayed due to the presence of hazardous materials, the occurrence would constitute an unavoidable delay, while an asbestos abatement contractor might agree that because its scope of work includes abatement of hazardous materials, the presence of such materials would not constitute an unavoidable delay.

When representing the owner, it is also imperative that counsel includes in the construction contract an affirmative obligation of the contractor to promptly notify the owner of an unavoidable delay to allow the owner to assess contemporaneously whether a claimed unavoidable delay in fact exists. On the other hand, when the contractor believes that an unavoid-

able delay exists, the contractor should promptly notify the owner in order to ensure that the schedule is properly adjusted to avoid a claim by the owner that the contractor is behind schedule. Among other things, if the contractor is behind schedule, the owner could terminate the contract based on the contractor's breach, or if the contract so provides, the owner could seek to recover delay damages from the contractor.

Compensation To the Contractor

In negotiating the construction contract, the owner and contractor also need to determine to what extent, if at all, the contractor will be compensated for unavoidable delays. That is, is the unavoidable delay compensable or non-compensable? Typically, compensable delays are delays caused by the improper or negligent acts, omissions to act, or failures to timely act of the owner and those other parties for whom the owner is liable. Non-compensable delays are all other delays beyond the contractor's reasonable control, although this limitation may be subject to negotiation.

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In addition to the foregoing, if the parties agree that the contractor will not be entitled to any damages in the event of unavoidable delays, while such a provision is uniformly enforced in New York, the courts have upheld multiple exceptions to enforcement of these clauses, such as: (i) delays resulting from the owner's wrongful acts, including active interference and material breach of the contract; (ii) delays that were not contemplated by the parties; and (iii) the owner's constructive abandonment of the project.

If we were to assume that the owner were amenable to paying some compensation to the contractor in the event of unavoidable delays, the parties would then have a number of issues to consider. First, the owner may insist upon a grace period, that is, a number of days of delay caused by unavoidable delays before any compensation would be payable to the contractor.

Second, the parties would need to determine those categories of cost for which the contractor would be entitled to compensation. It is important to note that, typically, only agreed costs are paid by the owner to the contractor, without any markup for the contractor's fee or profit.

By way of example, when the form of construction contract is a cost plus agreement with a guaranteed maximum price, the contractor's compensation for unavoidable delays is usually limited to its general conditions costs; that is, the costs of the contractor's additional and extended personnel due to the delays. Price escalations for materials are usually not compensable because the subcontracts between the contractor and its subcontractors almost always provide that the

subcontractor's costs are fixed and not subject to adjustment. It is best practice for an owner to include analogous language in its contract with its contractor.

The foregoing also illustrates that it is of the utmost importance for an attorney, whether representing an owner, contractor or subcontractor, to be attuned to the client's needs and concerns. While a subcontractor may not have been concerned with inflation or supply chain issues, for a myriad of reasons, including the COVID-19 pandemic, at the very least,

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counsel for a contractor or subcontractor should confirm that a provision that provides that pricing is not subject to adjustment is agreeable in these chaotic times.

Additional Provisions

There are two other related provisions to which the parties should agree.

First, the construction contract should require the contractor to use its best efforts (or language of similar import) to mitigate any unavoidable delay, provided that any specific methods of mitigation and the cost thereof, including any reasonable actual out-of-pocket costs incurred by the contractor in mitigating such unavoidable delay shall be subject to the owner's prior written approval. Presumably, the owner will approve such costs

because they will pale in comparison to the costs arising from an extended delay. The construction contract should also provide the owner with the right, at its cost and expense, to cure or mitigate an unavoidable delay, in which case, the contractor should use its best efforts to cooperate with the owner with regard to such cure or mitigation.

Second, assuming there is compensation that is payable by the owner to the contractor under the construction contract, the contract should provide that to the extent any unavoidable delay is concurrent with any delay that is not an unavoidable delay (that is, a delay for which the contractor is responsible), the contractor would be entitled to an extension of time, but not additional compensation, for the period of concurrency.

Conclusion

When negotiating construction contracts, owners and contractors need to be mindful of unavoidable delays and the consequences thereof. Otherwise, either party may find itself subject to significant cost and schedule implications.