

Viewpoint: No Damage for Delay Clause in Construction Contracts

Description

The Massachusetts Appeals Court recently shed light on the parameters of “no damage for delay” clauses in *Central Ceilings, Inc. v. Suffolk Construction Company, Inc.* The March 29 decision is a “must read” for everyone drafting construction contracts to ensure the language used comports with the intended result.

Before diving into the facts of that case, it’s important to note that “no damage for delay” clauses prohibit project participants from entitlement to damages caused by delay. In lieu of damages, project participants typically are only entitled to an extension of time to complete their work. These clauses are vitally important (and often the subject of terse negotiations) because they protect some project participants from potentially catastrophic damages and, correspondingly, expose others to the same.

Now on to the facts. The Massachusetts State College Building Authority hired Suffolk as general contractor for the construction of three dormitories at what is now known as Westfield State University. As the students were slated to occupy the dormitories in the Fall of 2006, MSCBA established a strict substantial completion deadline of July 1, 2005. If Suffolk achieved the deadline, it could earn a \$200,000 bonus. If, however, Suffolk missed the deadline, it would be subject to hefty liquidated damages.

Suffolk accepted Central’s bid of \$3,606,476 to perform, among other work, exterior heavy metal gauge framing and sheathing, interior light gauge framing, drywall, and hollow metal door frames. Critical to Central’s ability to achieve the project deadline was Suffolk’s ability to sequence and coordinate the work of the various subcontractors.

Central claimed Suffolk failed to properly sequence and coordinate such work. As a result, Central claimed it suffered numerous inefficiencies and costs such as taking work out of sequence, working too closely to other trades, excessive mobilizing and demobilizing and increasing manpower. Central also said its project manager and supervisory personnel were forced to spend an inordinate amount of time coordinating all of the changes and filling out related paper work. Suffolk, however, refused to grant any extensions of time despite the fact it allegedly caused the delays. Ultimately, Central completed its work timely, but at an increased cost.

Central filed suit in October of 2006 alleging loss of productivity. Suffolk countered that Central was not entitled to damages given the “no damage for delay” clause in their subcontract. The “no damage for delay” clause provided, in pertinent part, “The Subcontractor agrees that it shall have no claim for money damages or additional compensation for delay no matter who caused [but shall instead] be entitled only to an extension of time for performance.” Central argued it was not delayed. Indeed, the project was completed timely. Rather, Central said Suffolk’s numerous breaches caused it to suffer numerous inefficiencies and loss of productivity.

The court focused on the meaning of “delay damages.” Central argued delay damages means “the cost of an idle workforce” while Suffolk argued delay damages encompassed all damages “caused by delays.” The court agreed with Central’s definition and awarded Central \$321,315 in damages.

Such nuances can be easily avoided by a properly drafted “no damage for delay” clause. For example, a comprehensive clause would include a broad variety of delay damages such as lost productivity, impact damages, increased costs to perform, interferences and hindrances. A less comprehensive clause would include some but not all of the foregoing.

Unquestionably, “no damage for delay” clauses generate some of the most “robust” contract negotiations. If, however, a lack of consensus on a typical “no damage for delay” clause threatens the parties’ ability to enter

into a contract, these clauses can be modified in many respects (e.g., grace period before such damages become compensable, scaling damages to duration, capping damages, etc.). If despite such modifications the parties still cannot reach consensus, then other clauses can be modified to bridge the disagreement gap (e.g., liquidated damage clause, early completion bonus, payout of residual contingencies, etc.).

Before entering into any construction contract, it's important to consider how "no damage for delay" clauses can impact your project. Contract drafters must ensure the language they use effectively accomplishes their objectives. If negotiations stall over the typical clause, changes can be made to such clause or other clauses to reach consensus.

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