



Good News: NYC Recognizes Delay Claims

Many contractors on New York City construction projects have mistakenly come to believe that the “no-damage-for-delay” clause in their contract creates an absolute bar to recovery of delay damages. Unfortunately, some judges believe that too.

This may change. The efforts of the General Contractors Association have produced a potentially excellent result for contractors. The City has agreed to amend its standard contract language on a pilot basis, on select projects, to include language recognizing a contractor’s right to recover delay damages. The language will allow contractors to negotiate change orders for delay costs during the course of a project while preserving, if negotiation is unsuccessful, the right to seek redress in court.

New York contractors have long had the right to pursue valid delay claims. In *Corinno Civetta Constr. Corp. v. City of New York*, a case members of this firm took a leading part in, the Court of Appeals recognized a contractor’s right to delay damages if it is shown that the delay is the result of either: (a) the contractee’s bad faith or its willful, malicious, or grossly negligent conduct; (b) unanticipated delays; (c) delays so unreasonable that they constitute the contractee’s intentional abandonment of the contract; or (d) delays resulting from the contractee’s breach of a fundamental obligation of the contract.

The City’s pilot language repeats the *Civetta* exceptions and borrows from language in New York State contracts to further define compensable delays to include: the “failure of the City to take reasonable measures to coordinate and progress the Work;” “extended delays attributable to the City in the review or issuance of change orders, in shop drawing reviews and approvals or as a result of the cumulative impact of multiple change orders;” the unavailability of the site for an extended period of time that significantly affects the scheduled completion of the contract;” stop work orders exceeding thirty days; and “differing site conditions that were not known or reasonably ascertainable.”

As under current case law, the City will not be responsible for delays caused by others, including utilities, non-City agencies or authorities, other contractors, labor disputes, shortages in supplies of materials, or other acts or omissions that might be considered within the contemplation of the parties at the time of entering into the contract.

It is the City’s stated hope that by instituting this program they will change the behavior of the agencies, making them more responsive to issues that cause delay.

A heavy burden remains on the contractor. A contractor seeking delay damages bears the burden of proving that the delay fits within one of the stated exceptions.

Perhaps most burdensome, contractors must vigilantly and timely notify the agency of every condition causing a delay and the specific impact of that delay on the project schedule and costs.

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The pilot language continues the current contract's requirement for notice to the City's engineer of each delay within 7-days; and will still require notice to the Commissioner of the damages incurred, in the form of a sworn written statement with supporting documentation "within forty-five (45) days from the time such damages are first incurred, and every thirty (30) days thereafter for so long as such damages are being incurred." The contract expressly provides that failure to comply with the notice requirements will be a waiver of the claim.

Previously the City left unsaid what the statement of damages had to include. The pilot language provides that the statement must include the dates of and reasons for the delay, the operations impacted, including the locations and items of work affected, with the amount of additional compensation sought detailed in the same manner as required for an extra work claim.

This will be no easy task. Contractors will have to have cost, schedule and notice control systems in place to preserve their rights.

Client Alert