

City of New York's Delay Damage Initiative Does Not Provide Damages for 3rd Party-Caused Delays

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A new era of fairness was ushered in by the City of New York (the City) when it altered its standard construction contract to allow for compensation for certain City-caused delays encountered during a project. This change and enumerated list of compensable delays expanded upon the limited exceptions to the City's traditional no-damage-for-delay clause that was judicially created.

Contractors are probably familiar with the judicially created exceptions to the traditional no-damage-for-delay clause, which include: (i) delays caused by the City's bad faith, willful, malicious or grossly negligent conduct; (ii) delays not contemplated by the parties; (iii) delays amounting to abandonment of the contract; and (iv) delays resulting from a fundamental breach by the City. Recent cases have eroded these exceptions making it more difficult for a contractor to obtain delay damages. It is for that reason the change to the City contract was appreciated – in its principle.

Under the City's initiative, it agreed that in addition to the four exceptions listed above, it would compensate contractors for five additional categories of events where the contractor incurred additional costs "as a result of acts or omissions of the City agency or its representatives". The contract now provides for delay compensation based on: (i) the City's failure to take reasonable measures to coordinate and progress the work; (ii) the City's failure to promptly review and issue change orders, respond to shop drawings and/or issue approvals, including impact delays from multiple change orders; (iii) the unavailability of the site; (iv) issuance of stop orders; and (v) differing site conditions.

The City's new contract has now come under scrutiny as contractors attempt to enforce their rights to obtain delay damages based upon site access issues.

After substantial completion of a project was declared, the contractor filed a claim with the City Comptroller and commenced an action against the City seeking, among other things, delay damages. Rather than answer the contractor's complaint, the City moved to dismiss the complaint on the basis that it was not responsible for the contractor's alleged delay. The City argued that any delays encountered was the result of other entities over whom the City had no control. Pursuant to the contract with the City, the contractor was required perform certain work from adjoining property owners' property to complete the contract work. The crux of the dispute in the litigation was whether the City or the contractor was responsible for any delays based upon access.

The contractor argued that the City breached its fundamental obligations under the contract by not negotiating with the adjoining property owners to provide access to the property to enable the contractor to perform its work in a timely manner. The contractor

notified the City of these and other delays after the delays occurred. In opposition, the City contended that it could not guarantee the access because the contract explicitly provided that access was, at all times, subject to availability based upon the adjoining property owner's operations. Therefore, the City contended that access was not guaranteed at any time.

While the City entered into agreements with the adjoining property owners to provide access to their property and the availability to provide certain support services to facility access, the court determined that the agreements did not guarantee the availability of the adjoining sites at any particular time and that the contractor's work had to be performed in such a manner as to not interfere with the adjoining property owners' operations. Based upon these agreements, the court held that although the City negotiated access for the contractor, the agreements with the adjoining property owners provided that access could change at any time. The court further held that because the City was not solely responsible for the access delay such delays were not compensable under the contract.

The contractor also sought delay damages based upon the City's failure to coordinate and ensure timely closure of the water valves. The contractor alleged that the unavailability of the water main shutdown on a few occasions resulted in the unavailability of the project site and delays in work. The City argued that the water valve delays were not compensable delays under the contract because the delays were contemplated by the parties at the time the contract was executed. Specifically, the City relied upon a specification in the contract that stated that in the event of a failure of shut down of any main due to any difficulty encountered or to any act or omission on part of the City, no claim for delay would be allowed and that only an extension of time would be granted. The court agreed with the City, resulting in a full dismissal of the contractor's delay claim.

Commentary

While the City's initiative was meant to usher in a new era of fairness and compensate contractors for City-caused delays, the City in this recent case and others are seeking to avoid any obligation to pay delay damages. Here, the contractor's claims for delay were held to be non-compensable under the contract based upon third-party causation and another clause in the contract that specifically provided that no claim for delay would be allowed.

This case is a lesson to contractors. A thorough reading of the contract and contract documents should be undertaken prior to execution in order to determine whether there are any clauses that invalidate and/or limit claims for delay. Claims should also be framed to fit squarely into a compensable category.

One bastion of hope for contractors is that there is proposed legislation to make damages for delay compensable on all New York public projects. That legislation has passed both houses and, according to the New York State Senate website, is on Governor Cuomo's

desk awaiting signature. Note, however, any damage for delay legislation will be, like the City's contract, limited to enumerated events and will likely see the public owners' push back to pigeon-hole delay claims into non-compensable categories.

Feel free to call me regarding claims and delay claims.