The Soto Law Group, P.A.

CONSTRUCTION PRACTICE GROUP

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TOP TEN CONSTRUCTION CLAUSES
PART VII—NO DAMAGES FOR DELAY

This is the seventh installment in a ten-part series analyzing critical construction clauses. This installment analyzes the "No Damage for Delay" provision. My first six articles can be found on our blog at http://sotolawgroup.blogspot.com/.

A. Overview and Background

Most construction contractors and subcontractors assume that if they encounter a delay on the project that is not attributable to them, for example, changes in the sequencing of the work ordered by the project owner, discovery of hazardous materials or unknown conditions at the project, or adverse governmental actions, that they would entitled for reimbursement for damages caused by those delays. Such damages could include unabsorbed home office overhead, remobilization/acceleration costs, or increased materials costs.

However, an increasingly common contract provision, known as the "No Damages for Delay Provision" bars recovery of these damages and poses a substantial risk. It is important to recognize a "No Damage for Delay" provision in a potential contract, understand how and when such a provision can be enforced, and how to protect yourself if such a provision is included in your contract.

B. Sample "No Damage for Delay" Provision

Neither the American Institute of Architects nor ConsensusDocs—two of the foremost authorities on construction contracting—contain a model "No Damages for Delay" provision in their form contracts between owners and general contractors. In fact, both expressly authorize recovery of damages caused by delay.

A sample provision previously used by Broward County that was the subject of an oft-cited Florida appellate court opinion (discussed in further detail below) is:

> NO CLAIM FOR DAMAGES OR ANY CLAIM OTHER THAN FOR AN EXTENSION OF TIME SHALL BE MADE OR ASSERTED AGAINST THE COUNTY BY REASON OF ANY DELAYS. The CONTRACTOR shall not be entitled to an increase in the Contract Sum or payment or compensation of any kind from the COUNTY for direct, indirect, consequential, impact or other costs, expenses or damages, including but not limited to costs of acceleration or inefficiency, arising because of delay, disruption, interference, or hindrance from any cause whatsoever, . . . ; provided, however, that this provision shall not preclude recovery or damages by the CONTRACTOR for hindrances or delays due solely to fraud, bad faith, or active interference on the part of the COUNTY or its agents. Otherwise, the CONTRACTOR shall be entitled only to extensions of the Contract Time as the sole and exclusive remedy for such resulting delay, in accordance with and to the extent specifically provided above.

Triple R Paving, Inc. v. Broward County, 774 So. 2d 50 (Fla. 4th DCA 2000).

C. "No Damage for Delay" provisions are generally enforceable, but beware of exceptions.

As you can see from the "No Damage for Delay" provision in the *Triple R Paving* case, these provisions are typically extremely broad and insulate the owner (or upstream contractor) from a wide array of damages that would be otherwise recoverable. Although clauses providing for "no damages for delay" are generally enforceable, there are a couple of important exceptions. For example, the courts in Florida have found that "No Damages for Delay" provisions are invalid in cases of fraud, bad faith, or active interference by the owner. *See Triple R Paving*, 774 So. 2d at 54.

In *Triple R Paving*, the appellate court found that the contractor submitted sufficient proof that the county's engineer knew that his plans did not meet horizontal sight distance standards but failed to notify the contractor, despite the fact that the engineer personally agreed to check the sight distance against standards at the time in question. The court found that the facts submitted in support of this claim were sufficient to allow a jury to decide the question of fraud, bad faith, or active interference, despite the existence of an otherwise enforceable "No Damages for Delay" provision.

Newberry Square Dev. Corp. v. Southern Landmark, Inc., 578 So. 2d 750 (Fla. 1st DCA 1991) involved an even more egregious example of active interference, leading the court to invalidate the "No Damages for Delay" provision. In that case, the contractor submitted evidence that the developer delayed in providing approved plans and specifications, delayed in executing change orders and required that construction not proceed without such orders. It was also indicated that the developer repeatedly failed to make timely payments required by the contract. Most significantly, the contractor testified that the developer actually threatened that "he would break me before he'd pay . . . ." Under these circumstances, the court held that there was adequate evidence to present a jury question as to whether the developer actively impeded, or willfully and knowingly delayed, the contractor's ability to timely perform under the contract, and in those circumstances, the "No Damages for Delay" provision did not preclude the contractor's recovery.

D. Conclusion

The "No Damage for Delay Provision" is an effective tool for the owner (or any upstream contractor) to limit exposure to damages caused by unforeseen or unexpected project delays. These protections, however, are not absolute and the owner should ensure that its conduct complies with the implied duties of good faith and fair dealing that are applicable to every contract. Otherwise, the "No Damages for Delay" provision may be invalidated based upon one of the well-established exceptions.

A contractor (or downstream subcontractor) should avoid the "No Damages for Delay" provision where its bargaining position enables contract negotiation. If a contractor cannot eliminate the provision, it should ensure that all of its downstream contracts contain the provision so that it is not liable for damages to its subcontractors that it cannot recover from the owner.

In addition, a contractor (or downstream subcontractor) must comply with the notice provisions of the contract to be entitled to an extension of time or damages (in the event that the "No Damages for Delay" provision is invalid). *See, e.g., Marriott Corp. v. Dasta Constr. Co.*, 26 F.3d 1057 (11th Cir. 1994). In *Dasta Construction*, the 11th Circuit held that the contractor's failure to avail itself of its right to request an extension of time based on project delays precluded it from recovering for damages, *even for delays allegedly resulting from the property owner's active interference*. Accordingly, it is critical that the contractor adheres to the notice requirements of the contract, which often requires written notice served in a particular manner within a short period of time after discovery of the delay.

The foregoing is not meant to be an exhaustive discussion of the "No Damages for Delay" Provision and is intended only as a general primer regarding some of the primary issues involving this clause. Consult with an attorney experienced in drafting "No Damage for Delay" provisions so that together you can negotiate a provision suitable for your business.

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