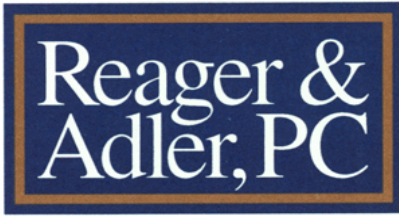

THE CONSTRUCTION LAW BULLETIN

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NO DAMAGE FOR DELAY: THE CLAUSE THAT DISTRESSES

For contractors, a no damages for delay clause is about as common as the sun setting in the west. It is something that one has to accept if they plan on doing any public work. However, because contractors can only base their bids on what is known, and because the duration and scope of the delay that may or may not occur in the future is unknowable, Pennsylvania Courts have carved out a series of exceptions to the no damage for delay clause. For the most part, these exceptions have provided a mechanism for contractors to receive payment for additional costs that were unforeseen and were, in some respects, caused by the actions or inactions of the owner.

For example, in Coatesville Contractors and Engineers, Inc., v. Borough of Ridley Park, 509 Pa. 553 (1986), the Supreme Court did not enforce a no damage for delay clause because the delay was caused by an undrained lake that prevented the contractor from obtaining access to the areas in which it needed to work. The responsibility for draining the lake, the Court held, was the owner's. In Gasparini Excavating Co., v. Pennsylvania Turnpike Comm., 409 Pa. 465 (1963), the owner had the responsibility to assure the cooperation of the various prime contractors working on the project. The Court allowed a claim against the owner for damages despite the presence of a no damage for delay clause and even though the delay was caused by another prime contractor. Simply put, the Court held that the owner had a duty to coordinate the work of the contractor and if it failed to do so then the owner would be liable for damages despite the presence of a no damage for delay clause in the contract.

The Coatesville and Gasparini cases have, over the years, provided contractors with a relatively firm structure on which to build a claim for delays and disruptions. If the owner failed to act on some essential matter necessary to the contractor's ability to perform its work, the owner could be held liable to the

contractor for the damages suffered as a result.

Guy M. Cooper, Inc., v. East Penn School Dist., 2006 WL 2057592 (Pa. Commw. Ct., July 26, 2006) may make it just a bit harder for contractors to recover damages if the cost of performance is increased because of delays or disruptions. In Cooper, the project was to be finished by September 9, 1998, which was 460 days after the notice to proceed was issued by the owner. Because of problems with the general contractor, the owner "terminated general contractor for a six week period." There is no explanation in the Court's decision as to why this action was taken. Similarly, there is no explanation as to why the general contractor was allowed to return to the project and complete its contract. In any event, none of the delays on the project were attributable to Cooper. The project was not substantially completed until January 27, 2000, 505 days late.

Cooper filed a lawsuit against the School District for damages. It alleged, among other things, that the School District did not timely respond to requests for information, didn't require the general contractor to coordinate its work with the other prime contractors, didn't require the general contractor to prepare and update the schedule, didn't make work areas available to Cooper on a timely basis, didn't issue extensions of time and failed to properly administer the contract. The trial court dismissed Cooper's complaint and Cooper appealed to the Commonwealth Court.

The Commonwealth Court characterized Cooper's complaint (incorrectly, we suggest) as being one seeking damages against the School District because the School District "failed to prevent delays by overseeing and controlling general contractor's work . . . and by defects in architect's work." Based on this characterization it affirmed the decision of the trial court dismissing Cooper's claim. Essentially, the Court held that the School District was not liable for the actions of the general contractor or the actions of the architect. It based this holding on two provisions that are commonly found in construction contracts.

First, the contract contained a provision stating that the contractor was solely responsible for its means, methods, techniques, sequences and procedures for coordinating all portions of the work under the contract. Second, there was a provision providing that the general contractor had the responsibility for coordinating the work among each prime contractor. According to the Court, this section placed the general contractor in charge of the project site from the beginning of work until the School District accepted the project. Because of this language, the Court held, the School District was not at all responsible for the actions of the general contractor.

With respect to the architect, the Court acknowledged that the

contract documents made the architect the School District's representative and that if delays were due to matters assigned to the architect then the School District could be liable to the contractor for the damages it incurred. However, in order for Cooper to succeed, the Commonwealth Court wrote, Cooper must prove, with expert testimony, "professionally unreasonable conduct" by the architect. Although there was evidence that the architect took inordinately long periods of time to respond to requests for information, the Court indicated that this was not enough. Unless there were specific provisions in the contract establishing the time within which the architect was to respond, a contractor could not prevail on its delay claim unless it presented testimony from an expert that the time it took for the architect to respond to communications and submissions from the contractor amounted to professional negligence.

At this point, we do not know if Cooper will take an appeal to the Supreme Court. It has until August 26, 2006, to do so. However, even if it does, contractors will be confronted with this decision by school district solicitors going forward, at least until, and if, the decision is reversed by a higher court.

Because of this decision it is extremely important that you contact counsel if you are confronted with a delay or disruption and your contract contains a no damage for delay clause. Notice letters, change order requests, requests for information and extension of time requests need to be crafted in such a way as to assure that all of your rights under the contract are protected. This is important given the Court's decision in *Cooper,* especially when it comes to the architect's response time. For projects where there is a pre-bid conference held, attend the pre-bid conference even if it is not mandatory. Normally, the contract documents provide that the architect is to respond with "reasonable promptness". At the pre-bid conference ask the architect what he or she considers to be a reasonably prompt response time for requests for information, change order requests, extension of time requests and submittal approval. Ask how many days the contractor should expect to receive a response. The AIA Form General Conditions establish a 15 day response provision unless agreed to otherwise by the parties. If there is no 15 day provision, ask that response timelines be provided in an addendum or, if the architect does not agree to issue an addendum, make sure that it is recorded in the pre-bid meeting minutes.

If you have questions about the *Cooper* decision or any other questions relating to delay claims and no damage for delay clauses, call us.

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