



THE CONSTRUCTION LAW BULLETIN

MARCH 2008

Group News

- John Pietrzak and Rich Joyce will be part of a group of attorneys facilitating the **Contract Study Group** sponsored by the Central PA Regional chapter of the **American Subcontractors Association**. The group will meet the first Thursday of every month at ASACP's offices in Harrisburg.
- John Pietrzak will be a panelist at two daylong presentations on "AIA Contracts" hosted by Lorman Education Services on June 25, 2008 in Harrisburg and in September 2008 (date to be determined) in Lancaster. Additional information on registration for this program may be obtained by contacting the firm, or emailing John directly at: JPietrzak@ReagerAdlerPC.com

Recent Developments

In *James Corporation v. North Allegheny School District*, the Pennsylvania Commonwealth Court reviewed what it termed a "a matter of first impression"; to wit, whether a contractor could be awarded acceleration damages under a "measured mile" approach to calculating damages.

A project to renovate an elementary school was the subject of the lawsuit initiated by the Contractor for payment for acceleration costs, resulting from delays on site, and payment for additional work directed by the School District.

From the outset, the Project suffered significant delays. The first delay occurred as a result of the School District issuing Contractor's notice to proceed two-weeks late. Subsequently, the Project suffered multiple delays, including: delay in issuance of an E&S permit; project reconfiguration; discovery of asbestos; and delays caused by other contractors on site.

The impact of these delays was exacerbated by the failure of contractors on site to submit proposed schedules for the Construction Manager to create a sequencing schedule. Contractor was the only one on site compliant with this requirement.

Based on the circumstances on site, the Construction Manager recommended to the School District that the final completion date would need to be extended. However, despite Construction Manager's recommendation and Contractor's adherence to its contract, the School District refused to extend any deadlines.

In fact, the School District indicated to Construction Manager that it could not “give [Contractor] any more time to complete the project, and don’t tell them we know they need more time because that will open [School District] to claims[,]” and School District terminated Construction Manager.

Ultimately, despite all of the delays and the additional work on site, the Project was completed on time, and a timely occupancy permit was issued by the Township. More than a year after occupancy of the Elementary School, the School District terminated Contractor for “refusal to perform outstanding punch list work.”

Contractor filed suit against School District to recover for its additional costs associated with acceleration, the additional work that it performed on site, and attorney’s fees and costs under the Commonwealth Procurement Code. At trial, Contractor was awarded \$520,550 in damages, including attorney’s fees and costs under the Procurement Code.

School District appealed the award to Contractor, challenging the award based on the “no damage for delay” clause in the Contract, failure by Contractor to give proper notice of its claims, and Contractor’s failure to obtain change orders for its additional work. We will review these issues in turn.

School District held Liable for Acceleration Damages Despite “No Damages for Delay” Clause.

On appeal, the School District asserted that Contractor was barred from collecting delay/acceleration damages by the supplementary conditions to the Contract, which contained a “no damage for delay”

clause. Our Commonwealth Court disagreed.

While the Commonwealth Court acknowledged that Pennsylvania courts will enforce “no damage for delay” clauses where mutually bargained for by two parties, such provisions cannot be raised as a defense where the owner either actively interferes with the contractor or fails in some essential manner necessary for the contractor to complete its work.

Here, the Court held that the School District’s failure to obtain the E&S permit, the School District’s agents’ failure to issue a sequencing schedule until four months into the project, and School District’s unjustified refusal to extend any deadlines, among other problems, prevented School District from seeking protection under the “no damage for delay” clause. Further, the Court found “disingenuous” the School District’s argument that Contractor was limited in its remedy for delay to an extension of time, as School District made clear that any such requests would be categorically denied.

Actual Knowledge of Delay Serves as Constructive Notice.

Next, School District argued that Contractor waived its claims because it failed to provide timely notice of its damages claim pursuant to the Contract.

The Commonwealth Court dealt with the notice issue in two parts: liability and damages.

With regard to damages, the Court agreed with Contractor’s legal argument that it could not have given School District notice of its damages from the delaying events within the contractually required twenty-one

days, as the full extent of the damages was not realized until the end of the Project.

As to liability, the Court held that the School District was provided at least constructive notice of Contractor's claims, since the School District possessed actual knowledge of the delaying events. Beyond knowledge of the delaying events, the Court noted, the School District caused, or contributed to, a number of the delays. The Court summarized its analysis as follows: "School District here clearly knew of the operative facts giving rise to the construction delays and Contractor's claims for accelerated work. Noted above, School District's failure to act caused the delays. Thus, the notice provisions of the contract, albeit informally, were satisfied."

***Contractor Entitled to Payment for
Extra Work Performed at
School District's Direction Without
Formal Change Orders.***

School District's final defense based on the Contract, was that the trial court erred in awarding Contractor damages for "extra" work, since Contractor was never issued change orders for such work, as required under the Contract. The Commonwealth Court affirmed the trial court's award of damages for the "extra" work.

First, the Court noted that the work for which there was no change order was performed at the explicit direction of the School District. Second, the Court was persuaded by the fact that Contractor submitted a change order for some of the work, albeit after the work was performed, in reliance on the School District's verbal direction to perform the work, which Contractor considered binding. Thus, the Commonwealth Court stated that, "School

District, having directed Contractor to perform the additional work asserting it was required by contract, cannot now disavow liability for costs incurred by claiming Contractor did not have written authorization."

As you can see, this case considered a lot of the issues that construction professionals, both owners and contractors, face during construction projects. Accordingly, we felt it is important to cover this case in depth. Thus, in the April 2008 edition of the Construction Law Bulletin, we will discuss the Court's consideration of the School District's challenge to the award of damages under the Commonwealth Procurement Code. Then, in May, we will analyze the Court's discussion on calculation of damages, including the "measured mile" approach. So, stay tuned

THE CONSTRUCTION LAW BULLETIN is intended to inform and not to advise. While this periodical is based on existing law, the statements herein are general, and the status of the law is subject to change. Individual facts may alter the procedural or substantive issues involved in prosecuting or defending a claim. Should you have an issue that you believe is similar to any of those discussed here, you should contact legal counsel for a consultation.

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