

Presented:

2011 Construction Law Conference – CL11

September 22-23, 2011
Belo Mansion - Dallas, Texas**“NO DAMAGES FOR DELAY” CLAUSES:
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“NO DAMAGES FOR DELAY” CLAUSES: KEY ISSUES AND DRAFTING CONSIDERATIONS

To subcontractors and other downstream contractors, "no damages for delay" clauses seem inherently unfair but are a part of doing business in the construction industry. For instance, the subcontractor, through no fault of his/her own, is delayed on a project. The subcontractor may incur additional expenses due to this delay that are simple to calculate and straightforward. Many costs, however, are less apparent. Overhead expenses are incurred regardless of the volume of work being performed. Salaries, rent, utilities, and interest continue, while the idle subcontractor continues to accrue losses and expenses. In addition, the subcontractor may lose potential profits and be unable to take advantage of other business opportunities.

The subcontractor is at a loss because none of those expenses are recoverable from the general contractor or owner. Usually, the only recourse allowed in a "no damages for delay" clause is additional time to complete the subcontractor's scope of work.

On the other hand, owners and upstream contractors generally benefit from Texas courts' enforcement and acceptance of these clauses---so long as they avoid egregious behavior or creating an impression of extreme unfairness.

Owners argue in favor of "no damages for delay" clauses in their contracts to protect against overblown and unjustified reimbursement requests or extravagantly high delay claims from contractors and their subcontractors. Contractors also defend these clauses to avoid paying numerous subcontractors when owners issue defective plans and specifications, take unreasonably long amounts of time in responding to requests for clarification, and ultimately delay the project for months.

This paper discusses both positions and summarizes key cases that provide a framework for navigating the impact of these clauses.

Introduction to “No Damages for Delay” Clauses

Construction contracts frequently contain "no damages for delay" clauses such as the one below:

If the subcontractor's work is delayed in any manner or respect, the subcontractor shall have no claim for damages and shall have no right of additional compensation from the contractor by reason of any delay or increased expense to the subcontractor's work, except for an extension of time as provided in this provision.

The sole remedy of the subcontractor shall be to receive from the contractor an extension of time for each day of proven actual, excusable, and non-concurrent delay to the subcontractor's work.

While most subcontractors generally understand that "no damages for delay" clauses can be very unfair, they often sign contracts containing such clauses given the reality that they generally have little negotiation leverage over their subcontract, especially when many subcontractors bid for the same project. Further, they may not want to anger their customer.

The subcontractor, accepting the "no damages for delay" clause in order to secure the contract, may be unaware of its potentially harsh consequences. Since these clauses are routinely enforced by courts throughout the country, recourse can be scarce.

There are, however, some exceptions to the unforgiving application of this type of clause. Two of the most widely recognized exceptions to the enforcement of these clauses include: 1) when the delay was not intended or contemplated by the parties to be within the scope of the clause; or 2) when the delay was the result of active interference by the owner or upstream contractor. These exceptions are discussed later in this paper.

What are Delay Damages?

In general, delay damages are those which impact the construction project's Critical Path. The Critical Path becomes the longest possible "path" through all the different construction activities that make up the project and gives the minimum amount of time that will be needed to finish each participant's scope of work. It is calculated by totaling the various activities' time needs. If a delay impacts the project's Critical Path, then it causes the project to be finished later than the established deadline.

Construction contracts usually address delays caused by Acts of God or bad weather separately from a "no damages for delay" clause. In the event of a hurricane or relentless rainfall, the contractor is usually given an extension of time to complete the project. By extending the deadline, these events technically don't cause a delay in construction.

Construction projects are filled with errors and mistakes, but not all impact the Critical Path and cause delay. For example, if the wrong electrical fixtures are delivered before finish-out has begun, it will not impact the Critical Path and is, therefore, not delay damage.

Texas Courts Give Validity and Enforcement to "No Damages for Delay" Clauses

The subcontractor should expect that the "no damages for delay" clause will be drafted broadly and will bar recovery for damages for any type of delay, including unforeseen conditions, owner or contractor delay, and weather, among others. Time is the sole remedy for proven, actual, excusable, and non-concurrent delay to the subcontractor's work.

These contract provisions that prohibit delay damages have been given effect by courts in many states, including Texas. The Texas Supreme Court has held that a "no damages for delay" clause in a construction subcontract is not required to be set forth conspicuously to be enforceable where the contractor and subcontractor were both experienced and familiar with industry custom of allocating risk for delays. *See Green Intern., Inc. v. Solis*, 951 S.W.2d

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First appeared as part of the conference materials for the
2011 Construction Law session

"No Damages for Delay Clauses: Key Issues and Drafting Considerations"