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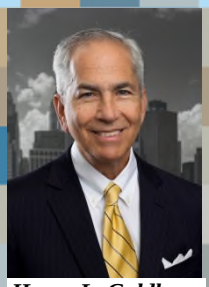
CONSTRUCTION LAW ALERT

February 2019

Damages For Delay-An Update

by: Henry L. Goldberg


Henry L. Goldberg

One of the most significant developments in construction law of late concerns an issue I have been actively involved in for some time. It is a coordinated, industry-wide effort to eliminate "no damages for delay" clauses for public construction. As with the federal government, and many other states, delay damages must be recognized when the acts and omissions of the public owner interfere with the progress of work.

I have good news and bad news on this front. First, the current industry legislative bills to "outlaw" no damages for delay (modeled in large part from the language of the current New York State Office of General Services contract) was very well received in Albany.

Both Houses of the legislature clearly "got it." The bills passed both the Senate and Assembly overwhelmingly. In fact, the Senate vote was unanimous!

The bad news is that Governor Cuomo just vetoed the bills on December 28, 2018. This cannot be tolerated! The Governor's veto message was largely predictable: much rationalization and misunderstanding concerning the unfair abuse of "no damages for delay." Why does the State fear the recognition of delay damages caused by its own acts and omissions? Should not the party causing damages bear its fair share of this burden? Is it not the government in a better position to take the financial hit, particularly of its own making, rather than a private company?

Take, for example, these meaningless statements from the heart of the Governor's veto message. None of the statements are true:

> This (vetoed) bill also suffers from certain technical deficiencies. For example, it would broadly permit recovery for delays "caused by the owner's acts or omissions" regardless of whether costs claimed are reasonable. By requiring public entities to place such clauses in all construction contracts, with no ability to define the terms or negotiate the circumstances under which certain costs may be compensable, the State and other public entities would be exposed to costly and complex litigation over the meaning and

application of these terms and further delay projects while these issues are arbitrated or litigated.

One can only wonder if statements such as these are caused by an actual or feigned lack of understanding. I fear the latter. However, the harsh results are the same either way.

It is our plan now not to let the strong support of the legislature be dissipated and wasted. We will not wait for this year's new legislative session to progress, but will immediately reach out to the Governor's staff to see if some accommodations can be worked out politically. I can attest to the fact that the Governor's legal staff failed to accept our repeated offers to help them become better informed on the issue. We will again be reaching out to them, perhaps using the veto message as a road map, laying out the foibles of the message and the absolute need for relief. Any politician who claims to be a friend of the industry should do no less. They should want to be assured that they are well-versed before taking the drastic action of vetoing such critically necessary remedial legislation. The construction industry is far too important throughout the state.

While on the topic, and in case there's any doubt as to the urgency of this reform legislation, a New York appellate court recently ruled in the matter WDF, Inc. v. Columbia University and Lend Lease and callously affirmed the dismissal of the contractor's entire delay claim based solely on the "no damages for delay" clause provision of the contract. The dismissal was narrowly based on the argument that the claimant did not set forth sufficient factual allegations supporting its claim that such "alleged delays fell within the exceptions to the 'no damages for delay' rule." This was extremely harsh. Before a court deprives a party of its day in court, it should tread very carefully. Strict lawsuit pleading requirements have never been the modern rule in New York State, but rather, what we lawyers call "notice pleading," which merely requires giving the adverse party a fair sense of what the claim against it involves.

Ill-founded, or just plain wrong, decisions such as this would be completely obviated if the legislation we seek was enacted. We need a declaration that "no damages for delay" clauses are unenforceable in New York as against public policy.

MH&H Commentary

The industry must and will continue its efforts to combat the harm caused by sweeping "no damages for delay" clauses in public contracts. That effort (coupled with opposition to strict claim notice and damage record keeping requirements which I have referred to on these pages as "contractor forfeiture enhancement

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devices" or "COFEDs") have changed the legal environment in the industry. The risks are too great for the contracting community to allow the government to shift all risk to contractors or subcontractors. This is particularly so, when the government is usually the source of the problem with deficient plans and specifications, as well as, sub-standard project supervision and coordination.

Finally, I would like to extend our sincere thanks to all of you who responded to the call to reach out to your own Assemblymen or Senator at the grass roots level. The overwhelming votes in support of our bills were hard fought and your efforts were indispensable. Thanks. I promise you'll be hearing from us again soon.

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com.

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Mr. Goldberg, a partner of the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

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