No Damage for Delay Contract Clauses

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Construction contracts often have what are called "no-damage-for-delay" clauses. Here's an example: "Apart from granting extensions of time for unavoidable delays, no payment or allowance of any kind shall be made by way of compensation or damages on account of any hindrance or delay from any cause in the progress of the work or any portion thereof, whether such delay be avoidable or unavoidable."

For over 75 years California courts have refused to enforce such clauses when the delay was caused by an owner's breach of the contract (*Milovich v. City of Los Angeles* (1941) 42 CA2d 364; *McGuire & Hester v. City and County of San Francisco* (1952) 113 CA2d 186; *Hensler v. City of Los Angeles* (1954) 124 CA2d 71; *Maurice L. Bein, Inc. v. Housing Authority of the City of Los Angeles* (1958) 157 CA2d 670 [owner estopped from enforcing the clause]; D*.A. Parrish & Sons v. County Sanitation District No. 4 of Santa Clara County* (1959) 174 CA2d 406; *Hawley v. Orange County Flood Control District* (1963) 211 CA2d 708; *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.(*1998) 71 CA4th 38, 50 ["Even before the adoption of section 7102, California courts generally held that "no damage for delay" clauses in public contracts did not apply to delays arising from a breach of contract caused by the other party to the contract."]). Other jurisdictions have done the same, even refusing to enforce the clause for any delay caused by "active interference" in the contractor's work by the owner (*C&C Plumbing and Heating, LLP v. Williams County, North Dakota* (2014) 848 N.W.2d 709).

On the other hand, California courts would enforce contract clauses barring damages for delay in addition to any compensation and time allowed under a properly

issued change order (*K&F Construction v. Los Angeles Unified School District* (1981) 123 CA3d 1063).

In 1984, the California legislature intervened by enacting Public Contract Code section 7102. It expanded and codified restrictions on no-damage-for delay clauses for state and local public works contracts and subcontracts. As amended in 1987, the statute says:

"Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor.

"No public agency may require the waiver, alteration, or limitation of the applicability of this section. Any such waiver, alteration, or limitation is void. This section shall not be construed to void any provision in a construction contract which requires notice of delays, provides for arbitration or other procedure for settlement, or provides for liquidated damages."

Many contractors and claim consultants believe this statute totally wiped out no-damage-for-delay and limited-damage-for-delay clauses. It does not. First, the statute's scope is constrained by its language. Second, the statute does not apply to private works contracts. But note: even though the cases listed in the second paragraph of this article arose from public works contracts, the legal principle, that no-damage-for-delay clauses will not be enforced when the delay was caused by the owner's breach of the contract, should also apply to private works contracts, especially where the no/limited damages for delay clause was forced upon the contractor on a take-it-or-leave-it basis

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(Civil Code section 1635 says "All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code.").

The first paragraph of Public Contract Code section 7102 says that the statute applies to contract provision "which limit the [owner's] liability to an extension of time for delay for which the [owner] is responsible." That language could have been read to limit the statute to only NO-damage-for-delay clauses, thereby permitting any LIMITED-damage-for-delay clause. However, the second paragraph of the statute bars public agencies from requiring "the waiver, alteration, or limitation of the applicability of the section [and says] [a]ny such waiver, alteration or limitation is void." Construing those two paragraphs together, *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.(*1998) 71 CA4th 38, held that the statute also barred limited-damage-for-delay clauses like those in the *Standard Specifications for Public Works Construction* (Greenbook), sections 6-6.1 and 6-6.3.

On the other hand, the statute only voids no/limited-damage-for-delay clauses when the "delay is [1] unreasonable under the circumstances involved, and [2] not within the contemplation of the parties." Any material owner breach of the contract which causes delay meets those requirements. So will other owner-caused delays that are unreasonable and not within the contemplation of the parties when the contract was signed. But there are lots of owner-caused delays which would not satisfy those criteria; for example, a delay resulting from a change order that does "not unreasonably alter the character of the work or unduly increase its cost" (*Valley Construction Co. v. City of Calistoga* (1948) 72 CA2d 839).

Given the above, how does the following clause, which appears in the contracts of one southern California local public agency, fair:

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"No Damages for Reasonable Delay. The City's liability to Contractor for delays for which the City is responsible shall be limited to only an extension of time unless such delays were unreasonable under the circumstances. In no case shall the City be liable for any costs which are borne by the Contractor in the regular course of business, including, but not limited to, home office overhead and other ongoing costs. Damages caused by unreasonable City delay, including delays caused by items that are the responsibility of the City pursuant to Government Code section 4215, shall be based on actual costs only, no proportions or formulas shall be used to calculate any delay damages."

The first sentence actually may expand what the contractor could recover under Public Contract Code section 7102. Although it tracks the statute's "unreasonable under the circumstances involved" language, it omits the statute's second requirement that the delay be beyond the contemplation of the parties at the time the contract was signed. However, the second sentence runs afoul of the statute. It tries to limit delay damages by excluding overhead. Under *Howard Contracting, Inc. v. G.A. MacDonald Construction Co., Inc.(*1998) 71 CA4th 38, that limitation is void. It also probably violates Civil Code section 3300, which establishes the measure of damages for breach of contract to be "the amount which will compensate the party aggrieved for all the detriment proximately caused [by the breach], or which, in the ordinary course of things, would be likely to result therefrom." The same obtains for the 3d sentence, which seeks to bar recovery for overhead calculated using such generally recognized formulas as the one adopted in *Eichleay Corp*. (1960) ASBCA No. 5183, 60-2 BCA 2688 . Use of that formula was recently expressly approved in California in *JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc*. (2015) 243 CA4th 571.

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Any attempt to prevent its use would appear to be an effort to limit delay damages.

In sum, regardless of what the language in the contract says, damages for delay can be recovered when those damages are caused by the owner's material breach of the contract, or, if it is a public works contract, when those damages were caused by the owner and were both unreasonable under the circumstances and beyond the contemplation of the parties at the time the contract was executed.

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