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***16 A COMPARATIVE LOOK AT A CONTRACTOR'S RIGHT TO RECOVER DIRECT COSTS versus UNABSORBED HOME OFFICE OVERHEAD IN THE EVENT OF FRUSTRATED EARLY COMPLETION**

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Contractors occasionally find themselves in a position to complete a construction project earlier than the contractual deadline. A contractor may obtain economic benefit from early completion by avoiding additional expenses such as material and labor cost escalations, seasonal increases in cost of work, extended equipment use, and extended home office overhead. But not every owner is aware of the contractor's intention to achieve early completion, and more importantly, not every contractor that achieves an early completion originally intended to do so. Accordingly, it is important for parties to a construction contract to know whether the law requires such knowledge or intent as a condition to an action for the recovery of damages caused when an owner impedes the contractor's ability to achieve early completion.

Because the federal courts and tribunals have led the way in this area of construction law this article explores the "special" requirements imposed by federal law for the recovery of such damages. Specifically, this article analyzes the divergence in federal "early completion" law in relation to two traditional elements of damages: (a) direct on-site costs, and (b) unabsorbed home office overhead.

The Right to Recover Direct Costs Due to Owner-Caused Frustration of Early Completion

The parameters of a contractor's right to early completion have been the subject of some debate. Some commentators argue that a contractor's unchecked right to surreptitiously and unilaterally change the date of completion cannot be reconciled with other common construction concepts. [FN1][FN1] To permit a contractor to change the date of construction, some posit, would be to permit the contractor to "take over ownership of schedule 'float' that otherwise would be available for use by either the contractor or owner on a 'first come' basis." [FN2][FN2] A careful examination of federal case law, however, suggests that an action for damages associated with an owner's delay of an early completion date does not require proof of the owner's consent to such a date. [FN3][FN3] In fact, in many instances, the law does not even require that a contractor prove an original intention on its part to reach early completion. If the contractor's claim is solely for direct costs, the analysis is considerably less complicated.

In the early development of the concept of frustrated early completion, it appeared that the law was poised to preclude a contractor from unilaterally advancing the contractually stated date of completion. In *United States v. Blair*, a contractor sued the government for damages occasioned by the government's delay of the contractor's intended early completion. [FN4][FN4] The contractor argued that the government was liable for early completion delay damages caused by its failure to timely terminate a separate prime contractor that had delayed the project through the improper performance of its contract. [FN5][FN5] In deciding that the government was not taxed with an affirmative duty to assist the plaintiff in reaching its early completion date, the court stated:

Respondent [Blair] had the undoubted right to finish his construction in less time than the stipulated 420 days, but he could not be forced to do so under the terms of the contract. To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract. [\[FN6\]](#)[\[FN6\]](#)

But *Blair* left open the question of whether frustrated early completion damages are properly recoverable in the event that an owner *does* breach an affirmative contractual obligation. The United States Court of Claims eventually tackled this open issue in *Metropolitan Paving Company v. United States*. [\[FN7\]](#)[\[FN7\]](#) That court concluded that in the event of active interference on the part of the owner, a contractor is entitled to recover the actual damages incurred as a result of a consequent delay even where the contractual deadline is met. [\[FN8\]](#)[\[FN8\]](#) The court further held that where there is evidence of interference and dilatory tactics on the part of the government, “[i]t would seem to make little difference whether or not the parties contemplated an early completion, even whether or not the contractor*17 contemplated an early completion.” [\[FN9\]](#)[\[FN9\]](#) This statement has been cited frequently in subsequent cases. [\[FN10\]](#)[\[FN10\]](#)

In *Weaver-Bailey Contractors, Inc. v. United States*, the United States Claims Court expanded the *Metropolitan Paving* holding to apply generally to instances of breach on the part of the owner. [\[FN11\]](#)[\[FN11\]](#) *Weaver-Bailey* involved a federal contract to construct certain recreational facilities in Oklahoma. [\[FN12\]](#)[\[FN12\]](#) Shortly after commencing the project, the contractor discovered that the Corps of Engineers had severely miscalculated the amount of unclassified excavation necessary to complete the project. [\[FN13\]](#)[\[FN13\]](#) The government issued a change order to compensate the contractor for the increase in work, but the contractor nevertheless suffered damages as a result of the consequent delay. [\[FN14\]](#)[\[FN14\]](#) While finding that the contractor clearly intended to work on an accelerated schedule, [\[FN15\]](#)[\[FN15\]](#) the court nevertheless held that the contractor's intent at the time of contracting was immaterial to the analysis. [\[FN16\]](#)[\[FN16\]](#) According to the *Weaver-Bailey* court, the focus in an early completion case “is not whether [the contractor] informed the [owner], at the inception of the contract that it *intended* to complete the project [early],” but, rather, whether the contractor would have actually reached an earlier completion, “but for” the owner's delays. [\[FN17\]](#)[\[FN17\]](#)

The foregoing decisions suggest that in the event that an owner breaches its obligations under the contract, causing the contractor to incur direct costs that it would not have otherwise incurred, the contractor is generally entitled to recover such costs.

Implicit in these opinions is the recognition that while a project completion date may not be extended absent a bilateral agreement, contracts are often silent as to a contractor's right to accelerate a schedule at its own cost. As discussed above, there are many reasons why a contractor may choose to advance the completion date and in most instances such acceleration is both mutually beneficial and reasonably foreseeable.

These considerations notwithstanding, it should be noted that the courts have not expressly addressed the issue of “anybody's float,” and a future tribunal may be persuaded by the argument that to allow a contractor to work off an accelerated schedule would be to sanction the rearrangement of the originally conceived risks built into the contract. But project deadlines are usually intended as a threshold of the contractor's liability, not as a bar to a mutually beneficial early completion. Moreover, a contractor seeking to recover early completion damages caused by an owner's delay must still prove the element of causation. [\[FN18\]](#)[\[FN18\]](#) That is, a contractor must show that, but for the owner's breach, the contractor would have reached early completion and would not have incurred the claimed damages. [\[FN19\]](#)[\[FN19\]](#) In addition, the contractor must also prove that the damages incurred were proximately caused by or were the reasonably foreseeable result of the owner's breach. [\[FN20\]](#)[\[FN20\]](#) Both of these requirements work towards preventing and mitigating inequitable results.

Accordingly, perhaps, future decisions involving frustrated early completion issues will focus on whether the parties had reason to believe that the contractor would eventually work to accelerate the schedule. [\[FN21\]](#)[\[FN21\]](#) This “foreseeability” approach places a reasonable “cap” on the owner's liability while, in most instances, keeping

intact a contractor's general right to recover the actual direct costs caused by an owner's breach. Moreover, this approach may reconcile concerns about an unperceived shifting of risk with the undeniable fact that “[c]osts due to delay are no less damaging merely because they occur fortuitously before a contract deadline rather than after.” [\[FN22\]](#)[\[FN22\]](#)

The Right to Recover Unabsorbed Home Office Overhead Due to Owner-Caused Frustration of Early Completion

Unlike the requirements for the recovery of direct costs, proof of intention of early completion on the part of the contractor *is* the condition sine qua non for recovery of unabsorbed home office overhead in federal frustrated early completion cases. [\[FN23\]](#)[\[FN23\]](#)

Unabsorbed home office overhead damages consist of the general costs associated with the running of a business including such costs as “accounting and payroll services, general insurance, salaries of upper-level management, heat, electricity [and], taxes.” [\[FN24\]](#)[\[FN24\]](#) These costs are paid for by the revenues that are generated through the contractor's various ongoing projects. [\[FN25\]](#)[\[FN25\]](#) For each project, revenues are generated in proportion to the original bid that is based, in part, on the overhead costs projected at the time of bidding or contracting. Therefore, where a project is delayed beyond the expected day of completion and the contractor is unable to generate new revenues from new projects, or to absorb the overhead, the contractor will incur unabsorbed home office overhead damages for the period of the delay beyond the expected date of completion. [\[FN26\]](#)[\[FN26\]](#) That is to say, the contractor will incur continuing overhead costs that are not accounted for in its bid.

To prove entitlement to such damages, the contractor must show that the owner's delay “disrupted the relationship between the contractor's revenue and its overhead costs.” [\[FN27\]](#)[\[FN27\]](#) Generally, the law will presume a contractor's entitlement to unabsorbed home office overhead damages where the contractor shows that: (1) an owner caused a compensable delay; (2) such delay extended the contractual completion date; and (3) the contractor was placed on standby. [\[FN28\]](#)[\[FN28\]](#) However, in *Interstate General Government Contractors, Inc. v. West*, the United States Court of Appeals for the Federal Circuit adopted an additional test for cases involving early completion. The *Interstate* court held that in order for a contractor to prove that it incurred overhead costs in excess of what was accounted for in its bid, the contractor must show that it: (1) intended to reach early completion of the contract; (2) had the capability to do so; and (3) actually would have reached early completion, “but for” the government's actions. [\[FN29\]](#)[\[FN29\]](#)

The *Interstate* test has been widely accepted and has been incorporated into the general test for recovery of unabsorbed home office overhead in federal contract *18 cases. [\[FN30\]](#)[\[FN30\]](#) For the reasons discussed above, the “intention” component of this test has a reasonable basis. Because these damages are, by their nature, directly related to the amount of time a contractor spends on a project beyond that which it projected at the time of contracting, a contractor's intention is particularly germane to the analysis. [\[FN31\]](#)[\[FN31\]](#) An owner's acquiescence in or knowledge of such intention, however, continues to be irrelevant. [\[FN32\]](#)[\[FN32\]](#) Accordingly, while proof of communication of the contractor's intention to reach early completion is relevant as proof of the existence of such an intention, it is not, by any analysis, a required element in these cases.

Conclusion

At least where federal law is implicated, a contractor seeking to recover damages occasioned by an owner's frustration of an otherwise achievable early completion should be aware of the dichotomy in standards in relation to two different elements of damages.

Federal courts seem to be in agreement that an owner's knowledge is not an absolute condition to a contractor's recovery of either actual direct damages or unabsorbed home office overhead in an action relating to a frustrated

early completion. The reasoning behind this rule is quite simple: Where an owner breaches a contract and thereby delays the project, the contractor will likely suffer damages whether the delayed completion date would have taken place before or after the date that was projected by the contract. Accordingly, the issue of whether a contractor intended to finish early is substantially less relevant than the question of whether the contractor *would* have finished early “but for” the owner’s breach.

Conversely, an original intention on the part of the contractor to achieve early completion *is* an absolute prerequisite to an early completion action where the contractor seeks to recover unabsorbed home office overhead. This inconsistency is due to the very nature of overhead damages. Because such costs are incurred continuously and are paid for by incoming revenues, a contractor will suffer damages where its revenues are not received in accordance with its projected timetables. Therefore, in such cases the contractor is obligated to prove not only that it would have accomplished an early completion *but for* the owner’s delays, but also that it *intended* to do so at the time of contracting.

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[FN1]. PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER AND O’CONNOR ON CONSTRUCTION LAW, § 15:21 (2007).

[FN2]. *Id.*

[FN3]. It should be noted that this general rule may be expressly changed through the implementation of certain contractual language to the contrary or impliedly modified through the use of certain provisions such as “float allocation” clauses. For a discussion on “float allocation” provisions, *see* Judah Lifschitz & Michelle A. Scott, *Who Owns the Float?* CONSTRUCTION BRIEFINGS No. 2005-2 (2005).

[FN4]. [United States v. Blair, 321 U.S. 730 \(1944\).](#)

[FN5]. [Id. at 732.](#)

[FN6]. [Id. at 734.](#)

[FN7]. [Metropolitan Paving Co. v. United States, 325 F.2d 241, 240 \(Ct. Cl. 1963\); see also Sun Shipbuilding & Dry Dock Co. v. United States Lines, Inc., 439 F. Supp. 671, 682 \(E.D. Pa. 1977\).](#)

[FN8]. [Metropolitan Paving, 325 F.2d at 242.](#) Note that the *Metropolitan Paving* court denied the contractor damages because it failed to prove that the alleged delay was caused by government action. *Id.* at 243.

[FN9]. [Metropolitan Paving, 325 F.2d at 242.](#)

[FN10]. [Gardner Displays Co. v. United States, 171 Ct. Cl. 497 \(1965\); Weaver-Bailey Contractors, Inc. v. United States, 19 Cl. Ct. 474 \(Cl. Ct. 1990\); Sun Shipbuilding, 439 F. Supp. at 682; Housing Authority of City of Texarkana v. E. W. Johnson Constr. Co., Inc., 573 S.W.2d 316, 323 \(Ark. 1978\); Appeal of Emerald Maintenance, Inc., 1998 WL 414697 \(A.S.B.C.A. 1998\); Appeal of Montgomery-Ross-Fisher, Inc., 1984 WL 13453 \(P.S.B.C.A. 1984\).](#)

[FN11]. [19 Cl. Ct. 474 \(Cl. Ct. 1990\).](#)

[FN12]. *Id.*

[FN13]. *Id.* at 476.

[FN14]. *Id.*

[FN15]. The *Weaver-Bailey* court noted that a contractor may submit an “as planned” schedule based on a project deadline in order to prevent the owner from withholding progress payments in the event the contractor falls behind its actual accelerated schedule. [19 Cl. Ct. at 479](#).

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. [Wickham Contracting Co. v. Fischer, 12 F.3d 1574 \(Fed. Cir. 1994\)](#); [40 Government Contractor 484](#).

[FN19]. *Id.*

[FN20]. [Wilner v. U.S., 24 F.3d 1397 \(Fed. Cir. 1994\)](#) (successful delay claim requires contractor to show, inter alia, “that the delay was proximately caused by government action”).

[FN21]. *See Metropolitan Paving* (reasoning that government should have been on notice that the contractor would seek to accelerate the schedule because of the difficulty of working through an Oklahoma winter).

[FN22]. [Sun Shipbuilding, 439 F. Supp. at 682](#).

[FN23]. [Interstate General Government Contractors, Inc. v. West, 12 F.3d 1053 \(Fed. Cir. 1993\)](#) (contractor must show original intention to complete project early in order to prove its claimed home office overhead damages were unabsorbed); *see also* [P.J. Dick Inc. v. Principi, 324 F.3d 1364 \(Fed. Cir. 2003\)](#) (incorporating *Interstate* test into general test for recovery of unabsorbed home office overhead).

[FN24]. *Interstate*.

[FN25]. *Id.*, 12 F.3d at 1058.

[FN26]. *Id.*

[FN27]. *Id.*; *see also* [Jackson Construction Co. v. United States, 62 Fed. Cl. 84 \(2004\)](#) (“once the *expected* time period for contract performance is shortened, a subsequent lengthening of the actual contract performance period causes a mismatching of revenues and home office overhead costs”).

[FN28]. *P.J. Dick*.

[FN29]. *Interstate*.

[FN30]. *See P.J. Dick*, 12 F.3d at 1373.

[FN31]. To the extent that *Weaver-Bailey* permitted the recovery of unabsorbed home office overhead damages without a showing of the additional elements discussed above, that holding has been partially abrogated by *Interstate* and its progeny.

[\[FN32\]](#). *See Interstate.*

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