North Carolina: No Damages for Delay

Introduction

No one favors paying added costs for construction project delays. Delay damages can accumulate quickly and reach substantial amounts. Contractually excluding delay damages is one way that parties address the financial risks of construction delay. Such contract provisions are known as “no damages for delay” clauses. Courts generally do not favor such clauses because these exculpatory provisions may allow a party to escape liability for damages caused by its own acts or omissions.

Read literally, a “no damages for delay” clause can prevent a party’s, e.g., subcontractor’s recovery for a compensable delay caused by the upstream contractor’s breach of contract. As a matter of public policy, though, some legislatures have enacted statutes precluding such literal applications. In response to such statutes and the courts’ strict reading of these clauses, contracts may contain clauses not expressly labeled “no damages for delay” – even though the advantage gained by the upstream party’s use of such clauses is woven throughout the contract.

By blending the effects of a no damages for delay clause with other clauses appearing to give a subcontractor remedies, an upstream party can defeat a subcontractor’s claim for “extra” compensation. However, a court may negate this blending effort by parsing out the no damages for delay clause from other clauses that offer the subcontractor remedies. Then, the upstream party may find itself having to compensate the subcontractor without equal compensation flowing down to that contractor.

Although parties often seek to avoid liability for delay damages, contracting parties also expect to be paid consistent with their contracts. To address the risk that contract pricing rests unfairly on mistaken assumptions, parties to a construction contract may include an equitable adjustment clause providing for a contract price adjustment when unforeseen events beyond a party’s control cause a change in construction costs. Equitable adjustments are particularly significant in long term unit price contracts because many unexpected events can impact the original unit pricing.

When an unforeseen construction delay results in increased costs in a unit price contract, a no damages for delay clause may collide with an equitable adjustment clause. Whether the cost increases associated with such events are delay damages or whether they justify an equitable adjustment in the contract price may not be easy to determine. A recent North Carolina case, Southern Seeding Serv., Inc. v. W.C. English, Inc., 719 S.E.2d 211 (N.C. Ct. App. 2011), illustrates the importance of distinguishing a claim for an equitable adjustment from a claim for delay damages when the contract includes both a “no damages for delay” clause and an equitable adjustment clause.
The $101 million North Carolina Department of Transportation ("NCDOT") project at issue in the Southern Seeding case involved widening, drainage, paving, and lighting work contracted to APAC-Atlantic, Inc. ("APAC"). APAC subcontracted the grading and grass work to W.C. English ("English"), who then subcontracted a portion of this work to Southern Seeding Service, Inc. ("Southern"). Southern’s subcontract incorporated unit pricing, and the scope of work was to be completed according to the stated July 1st, 2007 completion date and an attached equitable adjustment clause.

The project was scheduled to take four years, and the seeding subcontractor was concerned about the risk of cost escalations affecting its unit pricing if the work took longer than expected. The seeding sub proposed, and the grading contractor accepted, an equitable adjustment clause that provided:

Unit prices are based upon the assumption that the contract will be completed within time as specified … at time of bidding. Should our work be delayed beyond said time without fault on our part, unit prices herein quoted shall be equitably adjusted to compensate [seeding subcontractor] … for increased cost ….

The grading subcontractor, on the other hand, was concerned about the risk of liability for delay damages, particularly if it was not able to receive compensation from the project owner. Thus, the subcontract also contained a no damages for delay clause that provided:

Should [Plaintiff], without fault or neglect on its own part, be delayed in the commencement, prosecution, or completion of the Work by the fault or neglect of [grading sub], [seeding sub] shall be entitled to a reasonable extension of time only…. In no event shall [seeding sub] be entitled to compensation for any delay in the commencement, prosecution, or completion of the Work, except to the extent that [grading sub] shall receive such compensation or damages from Owner or other third party.

As fate would have it, the project was delayed. There were problems with the grading sub’s performance and the seeding sub complained about incurring “extreme extra expense” due to the grading sub’s poor management of erosion control work. The project owner and the general contractor also complained about the grading sub’s delays. Additionally, thirteen change orders contributed to causing the project to continue long past the scheduled completion date. Once the scheduled completion date was reached, the seeding sub duly notified the grading sub that it was “keeping detailed records” of costs, and quantities in order to furnish information for equitable adjustments in its unit prices.
After the seeding sub completed its work some 256 days beyond the scheduled completion date, it invoiced the grading sub for $194,941.39 for the increased costs. The grading sub offered to pay completion date but offered no adjustment for price increases incurred during the originally scheduled contract time. The seeding sub eventually sued the grading sub claiming that the grading sub breached the subcontract by failing to pay $194,941.39 under the equitable adjustment clause.

At a bench trial, the judge decided against the seeding sub. The trial judge reasoned that the equitable adjustment clause conflicted with the no damages for delay clause. The trial judge found that, to the extent “equitable adjustments” compensated the seeding sub for increased costs for delay, the grading sub was not obligated to equitably adjust unit prices, except to the extent it received compensation from the owner. The grading sub proved it had not received compensation for delays from the owner and thus it had no obligation to pay the seeding sub’s increased costs.

The North Carolina Court of Appeals, however, disagreed with the trial judge. The court of appeals saw the issue as a matter of contract interpretation. The subcontract between the grading sub and seeding sub was to be construed as a whole. An interpretation giving reasonable meaning to all provisions in the subcontract was preferred to an interpretation leaving a portion of the contract, such as the equitable adjustment clause, superfluous. The court of appeals found just such an interpretation. “Delay damages,” it decided, were distinguishable from equitable adjustments.

Under North Carolina law, delay damages include a contractor’s “extended general conditions” expenses, such as keeping equipment on site for an extended period. Those are duration driven expenses. Equitable adjustments, in contrast, address increased costs when unforeseen circumstances present conditions differing significantly from those indicated in the contract. Even when they arise out of the same delay circumstances, said the court, duration-driven “delay damages” are different from market-driven cost increases. Thus, the subcontract’s equitable adjustment clause and no damages for delay clause allocated two distinct risks. In blending the separate provisions, the trial court had failed to give effect to the contract as a whole and frustrated the expressed intent of the parties. The no damages for delay clause may have foreclosed the seeding sub from recovering duration-driven delay damages (i.e., extended general conditions), but it did not foreclose the seeding sub from recovering for market driven increases associated with cost increases after the scheduled completion date.

**Practical Tips**

*Southern Seeding* illustrates the narrow view courts often take toward no damages for delay clauses. Because such clauses relieve a party from liability caused by its own acts or omissions, courts do not favor them. Thus, when offered a basis for limiting the reach of such a clause, such as the equitable adjustment provision in the subcontract at issue in *Southern Seeding*, the court gave the no damages for delay clause a much more limited legal effect. As this case shows, a contracting party intending to avoid risk of liability for delay-related cost increases should consider the contract as a whole. Otherwise, delay-related damages that a party believes have
been excluded under the no damages clause may find their way back into consideration through an equitable adjustment provision.

Beyond the literal reading of a no damages for delay clause, a contractor should also be aware of how its jurisdiction treats these clauses. Not every state has enacted statutes addressing no damages for delay clauses, and indeed some states enforce such clauses since doing so gives effect to the contracting parties “benefit of the bargain.”

Still, as demonstrated in *Southern Seeding Serv*, the contractor’s documentation efforts tracking costs along with its notice to the upstream party is crucial. This practice may allow a court to parse out the parties’ true intent behind the contract and afford relief to the requesting contractor – despite that upstream party’s drafting efforts in preventing recovery for its breach of contract.