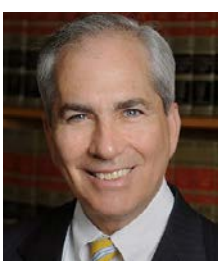
NYC DAMAGES-FOR-DELAY "PILOT PROGRAM" WAS NO REFORM AT ALL



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The "Damages for Delay" provision (i. e., former Pilot Program) currently found in the New York City Standard Construction Contract (the "NYC-SCC"), at new Article 11, makes a mockery of any claim by City leaders of having implemented necessary reform regarding the availability of delay damages on City projects.

First: A Bit of History

As you may recall, in September 2008, NYC unilaterally implemented into the NYC-SCC the experimental "Pilot Program, " which was designed to test the effects of sporadically removing the "No Damages for Delay" clause from the NYC-SCC. The City's pre-existing and one-sided, "No Damage For Delay" clause (Article 13) had categorically disallowed any damages for delay on City projects. It dated back to before the notorious Kalisch Jarcho decision, wherein New York State's highest court authorized the enforcement of such harsh contract provisions, thereby precluding claims for delay damages.

The Court of Appeals, in its landmark Corrinno Civetta decision, revisited the issue shortly thereafter (in part due to the flurry of criticism of its original Kalisch-Jarcho decision). In doing so, it carved out four limited exceptions to the permissibility of such clauses. However, the effectiveness of the Corrinno Civetta decision's "exceptions" were wholly inadequate to protect the rights of delay damage claimants, as countless subsequent cases disallowing delay damages demonstrated.

As a result, the industry (in large part initially led by the STA), realizing that relief from the courts would never be satisfactorily forthcoming, developed legislation (in which I participated in drafting) to seek protection from the complete delay-risk-shifting provision of the original (pre-September 2008) NYC-SCC "No Damage For Delay" provision (Article 13).

The original STA effort galvanized into a broad-based, industry-wide coalition to outlaw, by legislation, these harmful no damage for delay clauses. To their credit, legislators in Albany readily "got it. " The unfairness was clear. As a result, an industry sponsored bill allowing for delay damages in all public contracts in New York State passed the New York Senate unanimously and the Assembly by all but four votes. However, after "sitting" on the bill for over six months, then Governor Pataki ultimately vetoed it.

Nonetheless, discussions with New York City continued, and the aforementioned experimental "Pilot Program" was eventually offered by the City to, in theory, enable the City to move away from its strict disallowance of delay claims. (Keep in mind that, at best, this Pilot Program only applied to delay claims on New York City projects, and not those of the countless other public owners throughout New York State. So, state-wide legislation is clearly the preferred way to implement meaningful reform.)

A Wholly Inadequate Contrivance

In September 2008, the delay damages "Pilot Program, " as it was called, was unilaterally implemented by the City. It was fatally flawed in many respects. I, for one, never believed it was adequate, and in fact, still firmly believe it actually made a bad situation worse. I believe its real purpose was to co-opt the justifiable criticism of the City's continuance of its sweeping no damages for delay clause. It took the "wind out of the sails" of real reform, and provided very little in return.

Among other problems, or inadequacies, of the Pilot Program "experiment" is the fact that it preserves intact the requirement that claimants show that the delay-causing event was "uncontemplated". (Article 11.5.2) This is clearly no better than the situation that existed with the Corrinno Civetta exceptions. Worse still, in consideration for this alleged reform, which still left the contracting community without adequate recourse, the City gained many benefits. Among these benefits were the elimination of any allowance for profit in any delay claim damage assessment, the elimination of the City's responsibility for the "acts or omissions of any third parties" (Article 11.5.1) such as utilities, and the elimination of statutory interest at nine percent which is available to all other litigants in New York State. In addition, there is a contractually agreed upon list of both "non-compensable delays" (Article 11.5) and "non-recoverable costs" (Article 11.7.3) in the new Article 11. So the City actually gave up nothing, and gained much, with its so-called Pilot Program. (The elimination of any right to lost profits is particularly irksome. Why would any contractor pursue a claim, just to have its expenses reimbursed? Is that why the considerable risk of public contracting is undertaken, just to have expenses churned without profit?)

Not surprisingly, in December 2013 the City adopted its own so-called "Pilot Program" provision, drafted by the City's attorneys, purportedly allowing for damages for delay in a new (2013) version of the NYC-SCC. This is hardly surprising; the Pilot Program was drafted unilaterally by the City's attorneys without meaningful participation by the industry.

Current Situation

However, it is now three full years since the pathetic "Pilot Program" was allegedly adopted, unilaterally, by New York City in December 2013. Since then, NYC contracting agencies have consistently resisted implementing this so-called reform, and adequate leadership to coordinate any organized implementation among the City's construction agencies, Corporation Counsel, the Mayor's Office of Contract Services (MOCS), and the Comptroller's Office never developed. Now the city contracting agencies and the Comptroller's Office, after three years of neglect, have gridlocked the implementation of the Pilot Program in an apparent bureaucratic turf dispute, further frustrating the contracting industry's efforts to be fully compensated for City-caused delays.

The following excerpt from a recent (10/28/16) memorandum from NYC-DEP confirms the state of dysfunction at the City:

> The City Law Department is currently evaluating how damage for delay claims will be processed under these contracts; therefore DEP will no longer issue any damage for delay change orders. Although DEP is not issuing damage for delay change orders, it may still issue determinations of compensable delay pursuant to Article 11.1.3... (Emphasis added.)

As indicated, this is a full three years after the alleged adoption and implementation of the Pilot Program (itself a wholly inadequate device).

The DEP memorandum goes on to state, incredibly, that "determinations of compensable delay" will not address damages at all, (other than their waiver by a contractor's failure to comply with the NYC-SCC's strict notice provisions (i. e., COFEDs*)). It will be incumbent upon the contractor to then start all over again at the Comptroller's Office "if" damages are sought. Yes, you read that correctly, the DEP memorandum contemplated contractor's pursuing claims without damages, as follows:

> The determination may assess all claims for which the Contractor has submitted statements of delay damages pursuant to Article 11.1.2 and state whether the claims are compensable pursuant to Article 11.4, taking into account notice, waiver, and concurrency issues, which may negate any one delay from being compensable. The determination will be limited to whether or not the delay is compensable. If the Contractor wishes to pursue compensation, it will be advised to pursue a claim with the Comptroller's Office.

Are you confused yet? Appalled?

So this is the pathetic state of affairs. The City's own inadequate reform effort, its so-called "Pilot Program, " is itself tied up in bureaucratic gridlock three years after its alleged implementation in December 2013. The current advice from the City is to file claims twice, once with the contracting agency, and then again with the Comptroller's Office! But this is, "only" if you seek an award of damages.

Thus, the City currently has no effective procedure to promptly and efficiently provide for the processing of delay claims awarding damages. Furthermore, even if it did, it would only be under the provisions of its one-sided Pilot Program, which still requires a showing that the delay-causing event upon which a claim is based was not foreseeable or contemplated, and still imposes a list of non-compensable types of delay claims and non-recoverable types of costs.

Rest assured that the STA will certainly be pursuing these issues. Please feel free to contact us for the latest developments or if you have current questions or comments.

*This is my derogatory acronym for "Contractor Forfeiture Enhancement Devices, " namely unfair and confiscatory construction contract notice provisions.