"No Damage for Delay" Clauses (Part 1): A Primer

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This is the first of a two-part post concerning the "No Damage for Delay" (or "No Pay for Delay") clause. "No Pay for Delay" clauses are commonly found provisions in subcontracts and prime contracts.

1. Effect of "No Damage for Delay" Provisions. As a general rule, in the absence of a contractual provision, a contractor or subcontractor delayed in performance of its contract may recover damages resulting in delay from the owner or general contractor, if the delay was caused by the owner or general contractor. "No Damage for Delay" clauses, therefore, commonly appear in construction contracts to prevent contractors or subcontractors from seeking these damages due to delays encountered on the project.

2. Examples of "No Damage for Delay" Provisions. Some examples of "No Pay for Delay" clauses taken from case law are:

- In the event the Subcontractor's performance on this subcontract is delayed or interfered with by acts of the Owner, contractor or other subcontractors, he may request an extension of time for the performance of same, as herein provided, but shall not be entitled to any increase in the subcontract price or to damages or additional compensation as a consequence of such delays or interference, except to the extent the prime contract entitled the Contractor to compensation for such delays, and then only to the extent of any amounts that the Contractor may, on behalf of the subcontractor, recover from the Owner for such delays. *Tricon KentCo. v. Lafarge North American, Inc.*
- "Contractor shall not be liable for any damages that may occur from delays…" *U.S. Industries Inc. v. Blake Const. Co.*
- "No claims shall be made or allowed to the contractor for any damages which may arise out of any delay caused by the United States." *Wells Bros. Co. of New York v. United States.*
- "Contractors working on the same project shall assume all liability, financial or otherwise, in connection with his [sic] contract and shall protect and save harmless [the owner] from any and all damages or claims that may arise because of inconvenience, delay, or loss experienced by him [sic] because of the presence and operations of other contractors working within the limits of the same project." *Holloway Const. Co., v. Department of Transp.*

Most frequently, the clause is written to renounce liability for delay likely caused by specific events **unforeseeable** at the time of contracting, such as difficulties in acquisition of required right-of-way, delay in obtaining owned or furnished materials, potential delay that might be caused by other contractors working on the same project, delay due to changes in scheduling or sequencing of the work, delay due to underground obstructions, delay due to utility relocations, or delay for which the contract otherwise affords a remedy. *Two Port Chester Elec. Const. Corp. v. HBE Corp.* ("Contractor may, from time to time, modify or

alter the work schedule, but, in such an event, no such modification or alteration shall entitle subcontractor to any increase in the consideration of the subcontract").

The purpose of a "No Damage for Delay" clause is to allocate risk of delay between the parties, since the cost of delays may be difficult, if not impossible, to measure at the time of contracting.

3. Narrow Judicial Scrutiny of Forfeiture Clauses

It is a well-accepted principle that judicial scrutiny begins with the "strict construction" of the language of a forfeiture clause, and enforcement is only permitted within its clear terms. *Tricon KentCo. v. Lafarge North America, Inc.* Where a "no damage for delay" clause is found to be ambiguous, the ambiguity ordinarily will be construed under the laws of contract interpretation and generally as a last resort, against the drafter. Strict construction supports the recovery of delay damages not clearly and unequivocally barred by a "no damages for delay" clause. Thus, delaying commencement of the work due to the owner's fault to acquire right-of-way was held not to fall within the scope of the clause barring damages for delay from any cause whatsoever in the progress of the work. *JWP/Hyre Elec. Co. of Indiana. v. MentorVillage Sch. Dist.*

When clearly written to expressly allocate the time-impact risk of an owner-caused delay to the contractor, which the contractor in turn is expected to factor into contract price, the clause may be enforced under the doctrine of "freedom of contract." Given the common law's traditional aversion to harsh forfeiture provisions in contracts, the courts have carved out significant exceptions to the enforceability. Some state legislatures have gone further to enact statutes that limit severely or bar entirely the enforceability of a "no damages for delay" clause.

4. Washington and Oregon Statutes Addressing the "No Damage for Delay Clause."

Washington and Oregon have passed legislation which provides that "No Damage for Delay" clauses in construction contracts are against public policy.

> **Washington – RCW 4.24.360 Applies to Public and Private Contracts:** "Any clause in a construction contract, is defined in RCW 4.24.270, which purports to waive, release or extinguish the rights of a contractor, subcontractor or supplier to damages for an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or person acting for the contractee is against public policy and unenforceable."

When parties to the contract provide a remedy in the event of an Owner-caused delay, that delay may be construed as "reasonable" under RCW 4.24.360. When a condition arises that was expressly provided for in the parties' contract, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition.

There is a line of Washington cases pre-dating RCW 4.24.360 that addresses contracts that provide "no damages for delay." These decisions strictly construe contract provisions, granting a time extension without mention of delay compensation. Washington Courts struggled with "No Pay for Delay" clauses in *Goss v. Northern Pac. Hosp. Ass'n of Tacoma*,

50 Wash. 236, 96 P. 1078 (1908), *City of Seattle v. Dyad Constr. Inc.*, and *Lester N. Johnson v. City of Spokane,* 22 Wn. App. 265, 588 P.2d 1214 (1970)before enacting RCW 4.24.360 in 1979. These cases provide some guidance as to how the courts will interpret what constitutes the statutory term "unreasonable delay." Oregon also has a "No Damage for Delay" statute, which applies to public contracts only.

> **Oregon – ORS 279.C.315 Applies to Public Contracts Only – Not Private Contracts:** "Waiver of unreasonable delay of public agency against public policy. (1) Any clause in public improvement that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the public contracting agency or persons acting therefore, is against public policy and is void and unenforceable."

For almost 100 years, "No Damage for Delay" provisions were**enforceable** in Oregon in all construction contracts (*see Manerude v. City of Eugene,* 62 Or 196, 205, 124 P. 662 (1912)).In 2005, however, the Oregon legislature in ORS 279C.315 (previously ORS 279.063) declared "No Damage for Delay" clauses void as against public policy and unenforceable in **public** prime contracts. The law in Oregon is unsettled as to what may occur on a public contract involving the subcontractor. The legislation was silent as to subcontracts (the statute on its face only refers to "public improvement"). If general contractors include a "No Damage for Delay" clause in their subcontracts, legal precedent has not yet answered the question as to how Oregon courts may interpret that provision.

The Courts have some leeway in interpreting the phrase "unreasonable delay," which could preclude full recovery for "reasonable" Owner-caused delays. What is considered "reasonable delay" foreseeable at formation of the contract may vary from judge to judge or from fact finder to fact finder.

Topics to be covered in Part II of this post include the only Washington court to interpret RCW 4.24.360, *Scoccolo Construction v. City of Renton*,