

## NDFD CLAUSES

# Know Your Contracts

## no damages for delay clauses

By Danielle Waltz and Alexis Hailpern

“Except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project ... Even the most painstaking planning frequently turns out to be mere conjecture, and accommodation to changes must necessarily be of the rough, quick and hoc sort, analogous to ever changing commands on the battlefield.” ~ *Blake Constr.Co. v. C.J. Coakley Co.*, 431 A.2d 569 (D.C. App. 1981).

Construction is a battlefield, and in construction projects, two things are inevitable: uncertainty and delay. Although construction contracts are considered “advanced contracts” in the legal community, the reality is that it is a mere blueprint of what the parties think they want and how they think they will get there. The parties cannot predict weather, manufacturing issues, delivery times, or even world events such as tariffs or a global pandemic. Schedules change. Suppliers become insolvent. While the multiple parties to a construction project cannot remove uncertainty from looming over a construction project, the parties can control how those uncertainties are treated when they lead to delays through contract provisions.

In construction, practitioners pay special attention to the clauses governing the treatment of delays as agreed to by the parties. Some construction contracts simply call for monetary damages for delays, often off-set by liquidated damages. However, some contracts—an increasing trend—contain a provision that construction professionals need to be aware of: the “no damages for delay” clause (NDFD clauses).

NDFD clauses are usually imposed on contractors and subcontractors by project owners. Commonly, such a clause will state that in the event of a delay, the only remedy is an extension of time. NDFD clauses, as it follows, also logically remove the liquidated damages offset that some contractors rely upon at the conclusion of a project.

The age-old, common law principle of “freedom of contract” affords the parties flexibility to contract to whatever terms they see fit to govern the relationship. The parties have the freedom to negotiate terms of their choosing, but often times, the project owner has the natural leverage in determining the terms of the contract. Negotiating away from a NDFD clause is difficult and more often than not, contractors have to live with and work around NDFD clauses. However, NDFD clauses can be overcome in a court of law through certain exceptions that every contractor, owner, project manager, and project executive should be aware of.

### DELAYS RESULTING BAD FAITH

Courts have invalidated NDFD clauses when the delay is caused by overt bad faith (an intention act) or gross

negligence (an unintentional act) on the part of the party enforcing the clause. Because NDFD generally favor the project owner, the project owner is usually the party enforcing the clause. Courts may look to the behavior of the project owner and its employees to see if intention or unintentional acts create a reason to invalidate a NDFD clause.

### DELAY IS OUTSIDE OF CLAUSE

NDFD clauses can be broad or specific. The broad clauses usually contain language with catch-all phrases such as “without exception” or “for any cause not contemplated by the agreement.” Broad clauses can be unbreakable. On the other hand, narrow clauses may afford relief. NDFD clauses are not necessarily absolute if the language is specific. For example, an NDFD clause may be specifically directed at one precise facet of delay such as manufacturing delays. In this instance, a project owner does not want to take monetary accountability for mechanisms outside of its control such as manufacturing delays, but there may be a different delay clause relative to acts or omissions by the owner within the same contract allowing for monetary recovery.

## UNREASONABLE DELAY

Courts have held that NDFD clauses are unenforceable when the delay is “unreasonable.” Courts, in invalidating NDFD clauses, have found that unreasonable delays are not contemplated by the parties. This is especially true when the contract contains a “time is of the essence” clause and/or when a contract contains a specific schedule or completion date. While this exception can appear as a “slam dunk,” the court’s discretion to decide what is reasonable or not leaves this exception as the least predictable. What is deemed unreasonable in one court may be different than what is considered unreasonable in another court. There is no predictability.

## ABANDONMENT OF CONTRACT

Along with unreasonable delays leading to lack of contemplation, as asserted by some courts, unreasonable delay can also lead to invalidation of NDFD clauses based on the principle of abandonment of contract. Courts have held, in certain circumstances, that long delays are an effective abandonment. Contract abandonment occurs when parties to a contract behave or engage in dealings that are either in conflict with a contract or the purpose of the contract becomes frustrated. Absent an abandonment clause in a construction contract, a contractor may have cause for a breach of contract suit against the abandoning party to the contract.

## LACK OF TIME EXTENSION

When a contract contains a NDFD clause with a sole remedy of time extensions for delay, courts have held that failing to afford time extensions, when warranted, can invalidate the clause in totality. In this situation, a court may find that a project owner’s failure to uphold the entirety of the contract waives the clause in totality.

## LEGISLATION

Beyond exceptions granted by the courts, as noted above, some states enacted NDFD legislation as a matter of public policy. Naturally, legislation will differ from state to state. Overall, two types of legislation are common in those states where this issue is written into the law. First, many states disallow for NDFD clauses where the project is a public project or where the project is government-initiated. The second major category of legislation seeks to eliminate bad-faith by project owners and project executives. While “freedom of contract” does exist, legislation in conflict with a contract or contract provisions will be victorious. Arizona, California, Colorado, Missouri, and North Carolina enacted statutes limiting and/or abolishing time extensions as the sole remedy for delay—effectively prohibiting blanket NDFD clauses in public projects. Ohio and Washington, among others, enacted legislation to protect contractors and subcontractors against bad-faith on the part of owners relative to NDFD clauses.

## CLOSING THOUGHT

Although certain exceptions exist to overcome no damages for delay clauses, construction professionals should absolutely understand a contract before signing it and before beginning a project. While delays were always typical in a construction project, delay issues and delay litigation are evermore present in today’s world due to complexities—both across the construction industry and outside of the industry. Mitigation or avoidance of delay litigation can be accomplished through contract negotiation, understanding one’s contract and acting in compliance with the rules governing the relationship. ■

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