

NAVIGATING DELAY DURING THE CORONAVIRUS OUTBREAK

By
Trent Cotney, NRCA General Counsel
Cotney Construction Law, LLP

With construction projects being suspended or terminated for convenience across the United States, roofing contractors are routinely faced with having to make claims for either additional time and/or costs as a result of delay to avoid costly liquidated damages provisions for missing scheduled completion dates. Owners routinely insert disclaimers and limitations of liability clauses in contracts that may limit or bar a contractor or subcontractor's ability to collect additional compensation for work performed because of unexpected conditions and delay.

Owners frequently insert "no damages for delay" provisions in construction contracts to prevent a roofing contractor (and any subcontractors) from obtaining additional compensation for delays that have been experienced on a project. Under the typical "no damages for delay" clause, the contractor or subcontractor is entitled to additional time, but not compensation for extra costs, incurred as a result of delays. Such clauses can be effective whether the delay is caused by the Owner, or by an act of God, such as COVID-19, unless contractually provided otherwise.

The standard "no damages for delay" clause typically provides something similar to the following:

The Owner shall not be liable to the Contractor for claims or damages of any nature arising out of or relating to delays. The sole remedy against the Owner for delays shall be the allowance of additional time for completion of the Work, the amount of which shall be subject to the claims procedures set forth in the Contract Documents.

The "no damages for delay" clause acts as a waiver of any additional compensation that the roofing contractor may be able to receive on a project as a result of delay.

"No damages for delay" clauses are generally upheld in court. However, case law provides that there are certain circumstances that may allow a contractor or subcontractor to pursue delay damages despite the existence of a "no damages for delay" clause in the construction contract. For example, the Acts of God/force majeure clause may allow a contractor to seek relief outside the normal delay provisions.

Similarly, if an owner has acted in bad faith, defrauded the contractor, or actively interfered with the contractor's ability to construct a project, then a "no damages for delay" provision will be deemed ineffective. For example, if an owner prohibits access to a project due to COVID-19 and that project is not subject to a government-induced shutdown or prohibition, the roofing contractor may argue that the "no damages for delay" provision is ineffective.

Prior to performing work on a project, a contractor or subcontractor must scrutinize the terms of the construction contract. Often, the bid documents contain liability disclaimers such as a disclaimer for differing site conditions or a “no damages for delay” clause that may limit or bar a contractor or subcontractor’s entitlement to additional compensation. If a roofing contractor or subcontractor is aware of these provisions prior to entering into the contract or performing work, they can understand the impact these provisions may have on their work and adjust their bids or work accordingly.

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Trent Cotney is CEO of Cotney Construction Law. He is General Counsel of NRCA. With 14 offices across the United States, Cotney Construction Law fights for the roofing industry nationwide. For more information, please visit www.cotneycl.com and www.roofinglawyer.com.