Do No Damages for Delay Clauses Cover Acceleration Costs?

By Michael C. Loulakis and Lauren P. McLaughlin

One of the more onerous terms that owners (and contractors) insist upon is a no damages for delay, or NDD, clause in their contracts. As many readers know, this clause is an express, absolute bar to any recovery of time-related costs for excusable delays, and it limits the contractor's remedy to a time extension only. To put it simply: A contractor gets time but no money for any delays that are not its fault on a job. Because time is money to contractors, most of them consider NDD clauses unfair in that they inappropriately shift the financial burden of excusable delays to those least able to control the risk of excusable delays. Some state legislatures agree and have enacted statutes holding these clauses to be void as against public policy. Likewise, there are many court decisions that create exceptions to the types of delays that can be covered by NDD clauses.

This issue's column looks at the NDD clause from a different perspective. Contractors often argue that if they incur costs accelerating the work — i.e., by trying to mitigate the delay — they should be able to recover those costs. The party defending that claim will frequently argue that acceleration costs are by their very nature "delay damages" and are precluded under an NDD clause. This month's case, *Luse Thermal Technologies LLC v. Graycor Industrial Constructors Inc.*, provides an excellent example of how some courts evaluate this question.

THE CASE

The dispute involved a $385 million industrial project at the Whiting, Indiana, refining facility of BP Products North America. BP hired Graycor as its general contractor, and Graycor subcontracted the project's insulation work to Luse. Luse's insulation work was to be performed in two phases. The first phase involved insulating several large pieces of equipment upon Luse's mobilization in May 2018. Once that was done, Luse was expected to leave the site and return in spring 2019 for the second phase, which entailed insulating the project's pipe over a four-month duration. Pipe insulation was one of the last activities on the project and was dependent on other Graycor subcontractors performing their parts of the work on time.

The project experienced numerous delays, and, by August 2019, Graycor had released a small fraction of pipe for Luse to insulate. The delay was caused by a variety of factors, including constraints at BP's plant, concrete placement delays that delayed steel erection, and "added fireproofing scope." In December 2019, Graycor requested Luse "increase manpower" to achieve a new completion date of January 2020 and asked Luse to provide a cost proposal, which Luse did. During the subsequent weeks, Luse responded to Graycor's requests for further substantiation of its costs and issued several revised versions of its cost proposal. Graycor never agreed to any of Luse's cost proposals. Luse ultimately performed its work over a two-month period during winter conditions, and the project was operational in summer 2020.

Luse submitted a claim for approximately $1.63 million for costs associated with accelerating its work. When Graycor rejected the claim, Luse filed a lien against the property and sued Graycor and BP. Luse's complaint alleged that Graycor had materially and substantially changed Luse's scope of work under the subcontract by unilaterally rescheduling the work from the "more productive summer and fall months to the challenging, less productive, and more costly winter months." Luse also alleged that Graycor unilaterally modified when areas of the project would be released to Luse to commence its services. This caused Luse to perform work in a substantially different and much more costly manner than envisioned under the subcontract.

Graycor moved for summary judgment on the acceleration claim, contending that it was barred by the subcontract's NDD clause. The trial court agreed with Graycor, prompting Luse to appeal to the Court of Appeals of Indiana.

THE RULING

Luse argued to the appeals court that it did not incur delay damages but rather incurred acceleration costs based on Graycor's instructions during the December 2019 meeting that called for Luse to increase its workforce. Luse claimed that its additional costs were derived from productivity impacts resulting from a variety of causes but "predominantly winter weather, absenteeism, low morale, and worker fatigue stemming from being directed to work at a breakneck pace from December 2019 until the finish."

The appeals court rejected Luse's position under the NDD clause. The court stated that while there might be some circumstances under which there is a distinction between delay and acceleration, most accelerations are caused by delays, as was the case here. "Because the early stages of the project were not completed as expeditiously as planned by other contractors, Luse's work could not commence until later than expected. Thus, Luse was delayed and thereby forced to accelerate the pace at which it performed its work in order to meet the project's deadline." Because it found that Luse's acceleration costs were the result of delay, and delay damages were not recoverable under the unambiguous NDD clause, the appeals court concluded that Luse's claim must fail.

Luse also argued that Graycor's direction in December 2019 was covered by the change order clause of the subcontract, which entitled Luse to a price adjustment when Graycor changed the scope of work or conditions under which the work was to be performed. Luse specifically highlighted that Graycor had requested Luse provide a proposal based on the December 2019 instructions. Again, the appeals court ruled against Luse, citing the change order clause's requirement that the "subcontractor will not proceed with furnishing or providing any changes without receiving, in advance, the contractor's written authorization to perform the changes."

There was no evidence of such a signed change order.

THE ANALYSIS

Many readers may find the appellate reported decision unfair or wrong. For instance, this was not a case in which the general contractor and subcontractor were at odds over the cause of delays to the subcontractor's work. Luse was clearly delayed by events beyond its control, and Graycor directed it to perform in a different season (i.e., winter) and complete its work in two months as opposed to four months. That type of direction is generally compensable under a contract's changes clause. Additionally, Luse had not claimed classic "time-related" costs, such as extended overhead and site management but focused instead on additional direct costs of the work. Both the trial and appeals courts could have found that these were not covered by the NDD clause, but ultimately they did not.

The decision raises the question of what contractors in similar situations should do to protect themselves. Because an NDD clause can be indicative of a "one-sided" contract, contractors should do everything possible to strike this provision prior to executing a deal with owners. Subcontractors should identify whether an NDD is part of a prime contract and incorporated into any "flow-down" provision. Under this particular set of facts, should Luse have refused to abide by Graycor's instructions unless a change order was issued (and potentially breach its obligation to continue work, pending a dispute)? Should it have demanded a time extension or the right to finish the work in four months? It is hard to imagine Luse taking either of those positions when Graycor's instructions were intended to compress the duration of the pipe insulation and finish as early as possible. The appeals court decision provides no guidance on that whatsoever.

We have reported in past columns that proving damages on an acceleration claim is a very high bar. Irrespective of the burden of proof, however, many readers may question whether Luse should have at least been given the chance to do so, and more importantly for those in Indiana, whether it might appeal this decision to the state supreme court. **CE**

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