Clear and Unambiguous Language of the Contract Nixes Delay Claim

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Abstract: To many civil engineers, the legal aspects of contracts are confusing and the outcome of a court proceeding appears to be a chance circumstance. Nothing could be further from the truth. Legal decisions are guided by fundamental principles that are always applied. The recent case of Costello Construction of Maryland v. J. D. Long Masonry (Costello Construction of Maryland v. J. D. Long) affords an opportunity to discuss and reinforce several of these principles.

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Project

On September 15, 2003, Loudoun County awarded Costello Construction of Maryland, Inc. (Costello) a contract to construct a new administration building for $21,435,200. Costello subcontracted with J. D. Long (Long) to do the masonry work for a fixed sum of $1,435,000. The subcontract stated that J. D. Long had 50 days to complete the exterior masonry work, which entailed installing Arriscraft masonry units at the first level, cast stone above the Arriscraft, and above the cast stone, brick masonry with cast stone bands.

Long was originally scheduled to start work in April 2004, but the start date was delayed by several months due to problems beyond Long’s control. On August 11, 2004, Costello informed Long that the new completion date for the exterior masonry work was September 26, 2004. Long protested the end date, stating that the contract allowed 50 working days to complete the work. Long said that it would be unable to finish the work until the end of October.

Soon after Long started work, Costello expressed concerns about the quality of the exterior masonry work. Beginning in August 2004 Costello repeatedly advised Long, orally and in writing, that its work was deficient. Among other problems, Costello complained that the brickwork did not comply with the specifications, the cast stones were damaged, and the first-floor Arriscraft wall was improperly installed. Costello told Long on October 29, 2004, that it was in default of the subcontract, and it sent Long a 14 page notice-to-cure letter on November 1, 2004. The letter informed Long of the corrective action that it needed to take and stated that it had 3 days, as per Article 6.1 of the subcontract, to cure the default. Although Costello could have terminated the subcontract on November 4, it provided Long over a month to address the deficiencies. Long assured Costello that it would correct the problems, but said that it could not finish the work until the end of November. Costello decided not to take any action under the subcontract until that time. Long failed, however, to correct the deficiencies or to complete the work by the promised date.

On December 9, 2004, Costello hired another company, Bragunier Masonry, to take over the work on the building exterior. Long continued to work on the interior of the building. Long had substantial opportunity to cure its default by this date, and Costello concluded that extending more time to Long would result in additional damages. Costello barred Long from working on the exterior. It is unclear, but seems unlikely, that Costello terminated Long’s subcontract at this point in time because Long continued work on the building interior. It seems more likely that Costello issued a change order deleting the exterior work from Long’s subcontract.

In January 2005 Loudoun County threatened to terminate its contract with Costello, due in part to defects in the masonry work. Loudoun County then hired a masonry consultant, Wiss Janney, Elstner Associates, Inc. (Wiss Janney), to review Long’s work and identify the corrective action needed. On March 10, 2005, Costello notified Long of the county’s concerns with the masonry work. Costello stated that it would give Long another opportunity to cure its breach of the subcontract. Long denied that it was the cause of the county’s complaints. On May 20, 2005, after receiving the report prepared by Wiss Janney, Costello sent another notice-to-cure letter, which instructed Long to correct the deficiencies listed in the report. Long failed to remedy Costello’s and Loudoun County’s concerns, and Costello terminated the subcontract on June 22, 2005.

Subcontract

The prime contract provided for a substantial completion date of January 10, 2005, and a final completion date of February 10, 2005. The prime contract said that “time was of the essence” and provided that Costello would pay $2,500 per day in liquidated damages for delays to substantial completion and $1,000 per day...
for delays to final completion. There was no mention in the case of a pass through clause, although presumably, the subcontract contained such a clause. Two subcontract clauses are relevant. These are cited in the following.

Article 4.1.1.1 (“Time is of the essence”) of the subcontract states:

The Contractor has the right to direct the manner in which the Subcontractor performs its work. Subcontractor shall proceed with the performance of the work at such time and in such sequence as the Contractor may direct and/or as required by the Schedule of Progress, which may be updated and revised from time to time by the Contractor as working conditions require, including overtime or shift work performance as necessary. Subcontractor shall perform overtime work and/or provide additional shifts and/or increase crews and equipment to assure timely completion of the project at not [sic] cost to Contractor, unless and only if the costs therefore are paid by the Owner for the Subcontractor’s behalf.

Article 4.1.1.3 of the subcontract (“Damages for Delay”) states that:

[a] time extension shall be the sole and exclusive remedy of the Subcontractor for delays or suspensions caused by Contractor.

Article 3.3.1 of the subcontract states:

The Subcontractor shall be responsible for its proportionate share of liquidated damages... including all or a portion of any liquidated damages assessed by the Owner against the Contractor.

The subcontract clearly provided that Costello can recover liquidated damages from Long only if it (Costello) is required to pay liquidated damages to Loudoun County.

Decision


Long contended that its damages were caused by Costello’s delays. Long argued that these delay costs were $370,951 for additional scaffolding and $306,881 for additional labor. The district court determined that Long’s counterclaim for damages was precluded by Articles 4.1.1.1 and 4.1.1.3 of the subcontract. According to the court, the two subcontract provisions unambiguously prevent Long from recovering monetary damages from Costello, even for delays that Costello caused, unless Loudoun County agreed to pay the costs. As stated by the court:

Under Maryland law, which governs our interpretation of the contract, ‘[w]here a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed (Feick v. Thrutchley). We therefore affirm the district court’s grant of summary judgment to Costello on J.D. Long’s counterclaim for damages.

Fundamental Principles

The Costello court applied the following fundamental principles:

• You cannot ignore the clear and unambiguous language of the contract.
• Read the contract as a whole.

The court applied the first principle above-cited relative to two important issues in the case. First, the court said that the contract was clear that Long’s only remedy was a time extension. A previous decision (Feick v. Thrutchley) was cited as precedence for this position.

Second, the court stated that the contract was clear that Costello could only assign liability to Long for liquidated damages for Long’s proportionate share of the delay if the county “back charged” Costello for liquidated damages, something that was not done at the time of the trial. As per the court, the clear language of the contract prevented Costello from back charging Long for liquidated damages.

Courts will examine contracts to determine if an ambiguity exists. You must read the contract as a whole. The proper way to read a contract is to read it in its entirety and seek harmony and concord in the meaning, not discord. Contractors cannot create an ambiguity where none exists. You cannot focus on one clause where other clauses may provide a consistent or contrary meaning.

Inquiries

An analysis based on inquiries and fundamental principles offers a convenient way to predict the outcome of a dispute (Thomas et al. 2007). Relative to a no-damages-for-delay clause, the inquiries are listed in the following. Generally, to overcome the harsh effects of a no-damage-for-delay clause, the contractor must answer yes to the first inquiry or yes to the second.

• Are the causes of delay unusual and extraordinary?
• Was there reprehensible behavior on the part of the owner?

For delay causes to be unusual and extraordinary, they are generally thought of as not contemplated by the contract. A contract contemplates many causes of delay, and it may be very difficult for a contractor to provide an affirmative response to this inquiry.

With regard to reprehensible behavior, there may be different thresholds in different states. Some of the frequently applied yardsticks are:

• Fraud;
• Malice;
• Bad faith;
• Hindrance; and
• Active interference.

If a contractor is in a state or jurisdiction where fraud or malice is the standard, it may be nearly impossible to provide an affirmative response to this inquiry. Additionally, there may be statutory issues with which to contend. Thus, the outcome of a no-damage-for-delay claim may depend on where the project is located.

Are the Causes of Delay Unusual and Extraordinary?

In the Costello case, the causes of the delay (poor quality) were contemplated by the contract. Only the delay in starting the job is unlikely to have not been contemplated. The key facts here are whether a notice to proceed letter was prematurely given and the wording of the contract. With general, broadly worded clauses, many courts have determined that delays in site access were not
contemplated (Ace Stone, Inc. v. Township of Wayne 1966, McGuire and Hester v. City and County of San Francisco 1952, Sheehan v. City of Pittsburgh 1905, Thomas et al. 2007), and the response to this inquiry would be yes. As this issue was not discussed in the Costello case, it is assumed that delayed access was not an issue and the response to this inquiry is no.

Was There Reprehensible Behavior on the Part of the Owner?
If the owner (in this case, Costello) acted irresponsibly, then the clause will be set aside. Of course, the yardstick used is also at issue. But in this case, the court included limited discussion on hindrance and interference, so it is assumed that active interference is the yardstick that applies. The court noted that there was no interference or hindrance. Therefore, the response to this inquiry is no.

Synopsis
Based on the inquiry analysis, Long would unlikely recover delay damages. The court did not allow Long to recover delay damages, but did say that Long could not be assessed liquidated damages. Both determinations were based on the clear and unambiguous language of the contract.

List of Cases
McGuire and Hester v. City and County of San Francisco 247 P.2d 934 (1952).

References