



Legal Brief

by Timothy J. Woolford, Esquire

Beating “exculpatory” contract clauses to recover on your claim

As all contractors know, the construction industry has been a victim of the lousy economy. Decent projects are few and far between. When a good project does come around, there are usually dozens of bidders. In this economy, owners enjoy a great deal of bargaining power. Many are well aware that no matter how one-sided the contract, there will still be dozens of companies vying for the work and willing to sign the contract without objection.

Many owners have taken advantage of this increased bargaining power to beef up their contracts with exculpatory provisions designed to cut off claims for additional compensation. An exculpatory clause is a clause that attempts to relieve one party of liability for action occurring in the performance of the contract.

For example, some contracts include “no damages for delay” or “no pay for delay” clauses. These clauses provide that the contractor’s only remedy for a delay is a time extension and no additional monetary

compensation will be afforded. Many contracts go even further and attempt to bar claims for inefficiency, lost productivity, acceleration and other impacts.

An example of such a clause is as follows:

No claim for damages shall be made for any delays or hindrances from any cause whatsoever in the progress of the Work . . . The Contractor’s sole remedy for delays shall be an EXTENSION OF TIME ONLY. . . In no event shall Contractor be entitled to any other remedy or compensation or recovery of any damages in connection with any delay, including, without limitation, acceleration costs, impact damages, inefficiency damages or other similar claims for remuneration.

On their faces, these clauses would appear to bar many requests for additional compensation. However, courts have created exceptions to the enforcement of these

clauses based on the theory that where the author of an exculpatory clause has failed to perform its contract duties, it should not be able to escape liability. Thus, in certain situations, courts will not allow the owner to defeat recovery to a contractor based on the clause.

For example, where the owner or its consultants have failed to act in some essential manner, have made material omissions, or have actively interfered with the contractor’s work, exculpatory clauses will not bar recovery.

Providing inaccurate design drawings, failing to timely provide design information or failing to coordinate the work of contractors have all been held to constitute active interference which prevents the owner from relying upon exculpatory provisions to defeat recovery.

In one of the leading cases, a contractor

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was required to remove silt and debris from an area in the vicinity of a dried-up lake. The owner was required to keep the lake drained during the project. Unfortunately, the lake refilled just before the work began and the owner directed the contractor to start work while the owner’s repeated efforts to drain the lake failed. When the contractor requested compensation for the delays, the owner cited to the no damages for delay exculpatory provision in the contract claiming that the only remedy was a time extension.

The court held that the owner had failed to act in a matter essential to the contractor’s performance, and that the issue was not within the contemplation of the parties at time of the contract.

Accordingly, the court set aside the no damages for delay clause and recovery was permitted.

In another case, the owner’s reliance on an exculpatory provision was denied where the owner knew, but did not disclose to the contractor, the fact that the contractor would be delayed by utility conflicts.

In yet another case, the owner’s failure to promptly relocate a water line amounted to interference with the contractor’s work.

There are other examples of facts which amount to affirmative or positive interference by the owner or a failure by the owner to act in some essential matter. The point is that an owner’s reliance on

an exculpatory provision to deny recovery will not always be iron clad and you should keep pressing your claim if there are facts that might constitute interference or failure to act.

Pennsylvania courts like to enforce contract terms entered into at arm’s length by sophisticated parties. Thus, a court or arbitrator will be tempted to deny recovery based on the exculpatory clause. However, in the appropriate case, the law requires them to do so. The burden is on the contractor to demonstrate that the clause should not be enforced.

Accurate records will help you prove the owner’s active interference or the failure to act. Without good records, the owner and its agents are more likely to dig in their heels in response to your claim.

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