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Design-Build/EPC Contracts

EPC Claims, Clauses and Court Decisions

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EPC Contracts, Claims and Trends in EPC Clauses

■ U.S. Experience

- EPC contracts are typically prepared and negotiated for specific projects
- Form contracts are not used
- Many risks allocated to Contractor, but claims persist
- Examples of pro-contractor/pro-owner provisions in recent EPC contracts for two major power projects
- U.S. Federal Court decisions on EPC Claims

Contractor Claims that Persist in Design/Build & EPC Contracts

- Differing Site Conditions
- Owner Caused Delays
- Owner Changes
- Force Majeure Events

Clauses that Constrain and May Limit the EPC Contractor's Recovery

- Means & Methods/Owner Review of Contractor's Documents
- Schedule Updates and Revisions/Ownership of Project Float
- Limitations on Recovery for Concurrent Delay
- Limitations on Recovery for Changes

Pro-Owner or Pro-Contractor: You be the Judge

Differing Site Conditions

Based on the information provided to Contractor, Contractor has conducted a reasonable investigation of the Site, has notified Owners of any Site conditions that were discernible from such investigation that will affect the cost or schedule for the construction of the Facility and has factored such Site conditions into the Documentation for the Facility. **Following the Effective Date, any subsurface or other site conditions discovered at the Site or changes in the Site parameters that do not conform to the information provided by Owners (or not discernible from Contractor's investigation) shall constitute a Change and shall entitle Contractor to seek a Change Order. Owners shall be responsible for the accuracy and completeness of the Site information provided to Contractor.**

Differing Site Conditions

The contractor further covenants and warrants that he has had sufficient time to . . . examine the site of the project to determine the character of the subsurface materials and conditions to be encountered; that he is fully aware and knows of the character of the subsurface materials and conditions to be encountered; that he has compared the actual site conditions with those reflected in the contract documents; . . . **and that no additional compensation will be paid as a result of unforeseen site conditions.**

Differing Site Conditions

Current US Law

- Site investigation requirements do not allocate risk of errors in Government-provided information to the contractor
- “Preliminary” nature of pre-bid information did not insulate Government from liability
 - *Metcalf Constr. V. United States*, 742 F.3d 984 (Fed. Cir. 2014)

Owner Control

Schedule, Means & Methods and Design

In an EPC Contract, Owner's control over Project Schedule, Contractor's Means & Methods and Design should be Limited; however...

Contractor's Design Means & Methods & Owner Oversight

Contractor shall keep Owner informed of the arrangements and methods which Contractor proposes to adopt for the execution of the Work. **No significant alteration to the Project Schedule, or to such arrangements and methods, shall be made without informing Owner** and any alterations made shall reflect the requirement for coordination of the Work with the actions and obligations of Owner and the work to be carried out by Owner's other contractors. **If any alteration affects any such actions, obligations or Work, it shall not be made without the prior approval of Owner not to be unreasonably delayed or withheld.**

Contractor's Design Means & Methods & Owner Oversight

Review and Acceptance of Design and Construction Documents

Contractor's P&IDs, general arrangement, one-line drawings, system design specifications and procurement specifications shall be submitted to Owners for review and acceptance of general design, and apparent suitability in accordance with this Agreement, such acceptance not to be unreasonably withheld. **Contractor shall make changes to such documents that Owners determine in their reasonable judgment are necessary and any such change shall be deemed to be a Change and shall entitle Contractor to seek a Change Order if the change to the document impacts the Project Schedule, increases the costs of Equipment or materials or requires additional labor hours for installation;** provided that if the change is required so that the Work conforms to the Contract, Contractor shall not be entitled to a Change Order.

Contractor's Design Means & Methods & Owner Oversight

Owners' acceptance of Documentation shall not in any way be deemed to release the Contractor from full responsibility for complete and actual performance of the Work in accordance with the terms of this Agreement; **however, if (i) Owners direct Contractor to use documentation or data to which Contractor has raised reasonable objections or (ii) Owners supply documentation or data to Contractor on which Contractor is entitled to rely and such documentation or data is in error and such error would not have been reasonably discernable from a review of such documentation or data by a contractor, Contractor shall not be responsible for any errors or omissions that result from the use of such documentation.**

Construction & EPC Contracts - *Trends in Time Extensions & Changes*

- Owner access & review of electronic CPM schedule
- Owner access to project float
- Owner ban on finish early claims
- Owner limits on liability for delay, changes & force majeure

Project Ownership of Float

All float contained in the Project Schedule shall be considered a Project resource available to either Owner or Contractor as needed to achieve milestones and/or the Guaranteed Completion Dates. Project float is considered an expiring resource available to both Parties, and the Parties shall act in good faith in utilizing such float to resequence activities and work in the best interest of completing the Project on time. Project float shall be clearly identified, accounted for as it impacts the critical path, and maintained in accordance with customary CPM methodology which information shall be updated and provided to Owner.

Project Ownership of Float

The baseline Project Schedule shall provide for mutually agreed float. To the extent Contractor can demonstrate that the date that the Project is delayed as a result of project float being utilized which impacts the critical path for reasons other than by the Contractor, **Project float shall be available to Contractor as a claw-back for the purpose of calculating Delay Liquidated Damages or for determining entitlement to a schedule acceleration.**

Changes

Limits on Time Extensions

The Guaranteed Completion Dates and the Project Schedule shall be adjusted by the amount of time Contractor is actually delayed, provided that: (a) Notice is given; **(b) such adjustment shall be made only to the extent the delay impacts the critical path activities (as reflected on the most recent monthly Project Schedule) and is outside the reasonable control of Contractor; (c) Contractor's performance would not have been concurrently delayed by an event for which Contractor is responsible, and (d) Contractor exercised reasonable efforts to avoid the delay and did not cause it.**

Time Extension Computation

Any adjustment of time to the Project Schedule shall be the number of Days, at a maximum, **equal to the number of Days of delay in the sequence of the impacted Work demonstrated by Contractor as resulting from the event or events necessitating the time extension**, with due regard for reasonable mitigating measures available to Contractor.

Bar to Damages for Failure to Achieve Finish Early Plan

The Contractor shall have the right to finish early; however, **no events of delay shall entitle the Contractor to an adjustment in the Firm Fixed Price relating to the right to finish early.**

Updated and Realistic Schedules Necessary to Establish Entitlement

- Schedules should be contemporaneously updated during the performance of the contract. See *KBJ, Inc.*, ASBCA No. 58512, 16-1 BCA ¶ 36,289
 - Courts and boards will be skeptical of testimony based solely on retrospective analysis
- Schedules should be realistic
 - Failing to meet unrealistic deadlines may not give rise to a delay claim. *Clark Construction Group, Inc.*, GAOCAB No. 2003-1, 2004 WL 5462234 (Nov. 23, 2004)
 - Courts and boards may discredit expert CPM Analysis if it fails to attribute responsibility for delays to the appropriate cause in an objective manner. *Webb Electric Company of Florida, Inc.*, ASBCA No. 54293, 07-2 BCA ¶ 33,707

Concurrent Delay

- Difficulty in Apportionment
- Reliance on Contemporary Schedules
 - “the only way to accurately assess the effect of the delays alleged. . . on the . . . Project’s progress is to contrast updated CPM schedules prepared immediately before and immediately after each purported delay.” *George Sollitt Construction*, 64 Fed. Cl. 229 (2005)

Treatment by Courts

- Courts and Boards have generally considered concurrent delays to fall within the excusable but not compensable category of delays, based on the theory that, “where both parties contribute to the delay, neither can recover damages.” *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982).

To Apportion or not to Apportion

- Traditional rules provide that neither party can recover damages when both parties have contributed to the delay, unless a clear apportionment of the delay and the expense attributable to each party can be proven. See *Blinderman Constr. Co. Inc. v. United States*, 695 F.2d 552 (1982); *Commerce International Co. v. United States*, 167 Ct. Cl. 529 (1964); *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944)
- Therefore, concurrent delay is frequently raised as a defense by the party seeking to avoid liability for delay damages. *CCM Corp. v. United States*, 20 Ct. Cl. 649 (1990)

Rule Against Apportionment Increasingly Disfavored

- Decisions by the United States Court of Appeals for the Federal Circuit have put the rule in doubt
- In *Sauer Inc., v. Danzig*, the Court determined that apportionment of delay was appropriate, with divided monetary damages as the remedy. 224 F.3d 1340, 1347 (2000)
- Subsequent cases have acknowledged the law on apportionment is unsettled, cases appear to favor the rationale of “clear apportionment” for sequential delay and “no apportionment” for truly concurrent delay. Sunshine Const. & Engineering, Inc. v. U.S., 64 Fed.Cl. 346 (2005); R.P. Wallace, Inc. v. U.S., 63 Fed.Cl. 402 (2004).

Changes

Limits on OH, Inefficiency & Markup in Changes Clause

Contractor's price for any Change shall reflect its good faith estimate of incremental Direct Costs it believes will be associated with the proposed change, with a markup for fee, as well as an appropriate contingency for costs that are too uncertain to be forecast at the time of submission of the estimate. **Other than the agreed upon mark-ups, Contractor shall not be entitled to a markup on changes for its overhead or general and administrative costs.**

Changes

Waiver of Cumulative Impact

Contractor agrees that the mutually agreed upon adjustment in the Firm Fixed Price, Project Schedule and/or other provisions as set forth in each Change Order shall constitute the final and complete compensation and satisfaction for all costs and schedule effects and **the cumulative impacts of effects resulting from the stated changes on all prior Work, on unchanged Work, and changes in the Work to be performed as scheduled.** Contractor expressly waives any claims for additional compensation, damages or time extension in connection with the stated changes once a mutually agreed upon Change Order has been executed.

Changes

Changes to *Contract Price*

Any increase in the Contract Price, if any, resulting from a Change shall be determined **and payable by Owners if the Parties do not agree, then until such matter is resolved and the payment for such Change is determined, the Work resulting from the Change shall be performed on a Time and Materials Basis (including Profit and Overhead).**

Changes

Force Majeure Limitations

If any Force Majeure Event occurs on the Site that affects Contractor's cost of performance, then Contractor shall, in addition to the schedule relief, **only be entitled to an equitable adjustment to the Firm Fixed Price that reflects Contractor's incremental Direct Costs incurred as a result of Force Majeure Event(s) occurring on the Site in excess of FIVE MILLION DOLLARS (\$5,000,000)** such amount to be comprised of the cumulative total of the incremental Direct Costs incurred as a result of Force Majeure Event(s) occurring on the Site.

Changes

Force Majeure Limitations

Excused Performance

To the extent that the Affected Party is rendered wholly or partly unable to perform its obligations under this Agreement because of a force majeure event, **such event shall constitute a Change and shall entitle such Affected Party to seek a Change Order.**

Delays – Directives to Accelerate

Owners may request that Contractor accelerate any aspect of the Project Schedule via a request for a Change Order.

Contractor shall use commercially reasonable efforts to meet Owners' request; however, the extent of any acceleration and the means for achieving such acceleration shall be subject to the mutual agreement of the Parties.

Fraser v. United States

- In 2004, the United States Court of Appeals for the Federal Circuit established the elements of a constructive acceleration claim. *Fraser*, 384 F.3d at 1356.
- The Court explained that the claim arises under the “changes” clause of the contract, and the basis for the claim is that the government or private party has modified the contract by shortening the time for performance. *Id.* at 1360
- Thus, under the changes clause, the government is required to compensate the contractor for the additional costs incurred.

Constructive Acceleration – The Fraser Test

- Contractor must prove that:
 - The contractor encountered a delay that is excusable under the contract
 - The contractor made a timely and sufficient request for a time extension
 - The government denied the contractor's request for an extension or failed to act within a reasonable time
 - The government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract
 - The contractor was required to expend extra resources to compensate for the lost time and attempt to remain on schedule.

Conclusion

- Recommended Practice
 - Pro-contractor
 - Pro-Owner
 - Anti-lawyer?