No Damage for Delay Holds in Value Engineering Job

Executive summary. Value engineering, no damage for delay (a killer clause!), and cardinal change are all terms that seasoned construction professionals may know too well. Here's a case that talks about all three and ultimately decided against the Contractor. No damage for delay reigned supreme.

My attorney disclaimer. This article discusses a construction case. Do not use this information to make your own legal decisions. Consult your attorney. They're qualified to give you legal advice – I'm not.

The end, first. In the case of Tutor Perini Corporation v. City of New York Office of Administrative Trials & Hearings Contract Dispute Resolution Board (CDRB), the Supreme Court of New York stepped in to provide further and final opinion. And on May 12, 2020, Judge Edmead affirmed the decision against the contractor.

The VE. Value engineering (VE) is a common practice in construction. It is an opportunity for a contractor to provide a cheaper solution while maintaining the design intent. These cost savings are then shared by the two parties in a pre-determined proportion (for example a $10 million savings in a 50/50 cost sharing would result in $5 million to each party). This project was a VE in that it took a certain type of bridge and then changed it to a different type of bridge resulting in cost sharing between the parties.

This project. This project was to build a cable-stayed bridge over a small bay crossing, but the community stopped that design and changed it to a causeway-style bridge. The job's original completion date was successfully extended via change order from December 13, 2016 to December 28, 2018 after the bridge change was made.

The 4-part REA. However, just ten days before this revised completion date, the Contractor made four requests for equitable adjustment (REA) totaling approximately $22.9 million. This sum of money requested was based upon four causes: extended

Cable-stayed bridge. Image by Sergei Komarov from Pixabay.

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performance, escalation, loss of productivity, and acceleration.

Eight (8) days later, the Owner (New York City DOT, NYCDOT) denied all four of these requests.

And now the claim. After receipt of the denial, the Contractor filed a claim basically stating that when NYCDOT approved the extension requests (which included a reservation of rights to time related costs), the boilerplate language of the "no damage for delay" was then superseded.

Cardinal change alleged. The Contractor also went on to point out that the change in delivery method from design-bid-build to design/build, and the change in bridge type, were both cardinal changes to the project. The NYCDOT pushed back on this claim because it was still a bridge project which didn't make the project one that fundamentally altered the nature of the scope of work.

Image by Sang Hyun Cho from Pixabay.

The Court's decision. The Court decided that the Contractor's REAs were based on delay. And because the REAs were delay-based, the killer clause of *no damage for delay* was proper to apply. Regarding the existence of a cardinal change, the Court agreed with the CDRB's decision that cardinal changes did not exist as supported by precedent along with the opinion that the project was not fundamentally changed and its purpose was not changed (in other words, the bridge job turning into a bridge job did not merit a cardinal change). The project delay was caused by the court-issued injunction (to shake out a desired change in bridge type by the community).

My summary. As a practitioner for decades now, here are my takeaways as a construction professional (versus an attorney):

- Value engineering – this is a great way to increase profit for a contractor. Take a building made out of steel and redesign it in concrete. Or, take a cable-stayed bridge and turn it into a causeway-style bridge. The lesson here is to ensure that all costs are accounted for before executing the change

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order. In this project, only Tutor Perini Corporation knows what went wrong and caused this financial loss.

- Reservation of rights by the contractor – I've written hundreds of letters in which I have reserved my rights to claim later on time-related costs. The contractor should realize that a reservation of rights does not grant entitlement to time-related costs. Secondly, check the contract, because a broad statement like this may not hold up – you may have to list those reservations in much more detail.
- No damage for delay – this is a "killer clause" in contracts. It's terrible for the Contractor and great for the Owner. If the parties want to be fair, there needs to be compromise. For those that don't know this clause, this clause awards time but no money to the Contractor during a time extension. So, if the contract duration extends (at no fault of the Contractor), there is no payment made for extended performance (the cost to keep the trailer and portable toilets and management cost and utility power, et cetera, et cetera, month after month). The contractor eats these costs.
- Cardinal change – it can only happen when, in this construction case, this bridge job would have turned into a tunnel job or a wharf job. This job went from a bridge to a bridge; therefore, there was no cardinal change.

My story. I've done several VE projects and they were always winners for me. On a recent project I was involved in, there was a change in foundation system for a large diameter pipe. The work per original contract was deleted and a much simpler method of foundation for this pipe was suggested by the Contractor. I'm sure that the Contractor did well, but the Owner saved money too. It was a win-win.

Decision + Order on Motion for the case discussed herein.

In regard to the reservation of rights, be advised that the fancy letters you are writing reserving these rights to negotiate time-related costs sound good, but be careful when you go to sign the change order. The change order will govern and will waive *everything* else. The lesson here is to make sure your change order gets all the time and money you need, or is explicit on what it excludes. Otherwise you can tell the owner to go with a unilateral change order – this is in another article, or you can always ask your friend Chatty!

Work safe!

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