Construction & Infrastructure Law Blog

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Federal Court Holds "No Damage for Delay" Clauses Are *Per Se* Enforceable on Federal Public Works Projects in California

By Robert T. Sturgeon

Harper/Neilsen-Dillingham, Builders, Inc. v. United States, 81 Fed. Cl. 667 (2008)

California has long followed a public policy which limits the enforcement of so-called "no damage for delay" clauses in construction contracts on public projects. The policy is embodied in part by section 7102 of the Public Contract Code, which limits the enforcement of such clauses contained in both public contracts between contractors and public entities, and in subcontracts between private parties relating to public projects. The rule against "no damage for delay" clauses is based on the common law principle that courts should strictly construe clauses which work a forfeiture, a policy which arguably applies with equal force to both public and private contracts. In this regard California Civil Code section 1635 provides that public and private contracts are to be interpreted by the same rules. Thus, many California practitioners believe that the rule does or should extend generally to all construction contracts, both public and private. The case of Harper/Nielson-Dillingham Builders, Inc. v. United States is significant because it presents a potential exception to this long-standing rule. In Harper/Nielson-Dillingham, the United States Court of Federal Claims held that under California law, "no damage for delay" clauses in contracts between private parties on federal public works projects are *per se* enforceable, and that a federal agency may successfully defeat a subcontractor's pass-through delay claim by relying on a "no damage for delay" clause in the subcontract between the general contractor and subcontractor.

Harper/Nielson-Dillingham Builders, Inc. ("Harper") was the general contractor under a contract with the Air Force for the demolition and replacement of over 140 base housing units, removal of several underground storage tanks, and associated site work. As part of its work, Harper subcontracted with Karleskint-Crum, Inc. ("KCI") to perform landscape and irrigation work for the project. During the course of the work, KCI claimed it had been delayed by the government and by the work of other subcontractors on the project. KCI contended that delays by the

subcontractor performing the underground storage tank removal work had caused a "domino effect" which pushed KCI's work into the rainy season, and resulted in its work being delayed over 200 days beyond its scheduled completion date.

Because KCI was not in privity with the government, KCI asserted its delay claims against Harper, the general contractor with whom it was in privity. In turn, Harper filed a lawsuit against the government and asserted the delay claim on behalf of KCI on a "pass-through" basis pursuant to the *Severin* doctrine. Under the *Severin* doctrine, "a prime contractor may 'sue the government on behalf of its subcontractor, in the nature of a pass-through suit, for costs incurred by the subcontractor [due to the government's conduct] . . . [i]f the prime contractor proves its liability to the subcontractor for the damages sustained by the latter . . . a showing [which] overcomes the objection to the lack of privity between the government and the subcontractor. Harper/Nielson-Dillingham Builders, Inc., 81 Fed. Cl. at 674-675; see also E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999).

To prevail under the *Severin* doctrine, the general contractor must show, at a minimum, that it had potential liability to its subcontractor on account of the government's actions. Id. In Harper/Nielson - Dillingham, the government argued that Harper could not establish that it had potential liability to KCI for the alleged delays because a "no damage for delay" clause in the Harper-KCI subcontract precluded any such liability. The Harper-KCI subcontract provided:

> "A. In the event of any delays, entailed as a result of the fault of Contractor or Owner, then Contractor shall grant Subcontractor an extension of time equal to the delay and Subcontractor shall be entitled to no other or further damages against Contractor or Owner.
> B. Any delays or additional work entailed as a result of weather conditions, storms, acts of God, delay in construction, delays by governmental bodies will not entitle Subcontractor to any extras whatsoever."

The subcontract also provided that any claims arising under it would be governed by California law. 81 Fed. Cl. at 669.

In opposition, Harper contended that "no damage for delay" clauses are not strictly enforceable under California law generally, and therefore that the clause did not immunize Harper from any potential liability to KCI. Harper relied on California Public Contract Code section 7102, which generally bars enforcement of "no damage for delay" clauses "in construction contracts of public agencies and subcontracts thereunder" where the delays are (i) caused by a contracting party and (ii) are "unreasonable in the circumstances." Harper also relied on Hawley v. Orange County Flood Control District, 211 Cal. App. 2d 708 (1963), a case which was decided prior to the 1984 enactment of section 7102. Hawley held that "no damage for delay" clauses, like all clauses in public or private contracts which may result in a forfeiture, are to be strictly construed against enforcement, and should only be enforced where all of the circumstances show that the parties

intended the clause to apply to the particular delays and facts at issue.

The Harper/Nielson-Dillingham court agreed with the government, and held that "no damage for delay" clauses in contracts between private parties on federal projects are *per se* enforceable under California law. The court further held that that because the "no damage for delay" clause insulated Harper from any liability to KCI for the alleged delays, Harper could not recover against the government under the *Severin* doctrine. In reaching this conclusion, the court held that outside of Public Contract Code § 7102, "neither the California legislature nor the California Supreme Court has set forth any exceptions to enforceability of express 'no damage for delay' clauses in agreements between private parties." 81 Fed. Cl. at 677.

The court further explained that Public Contract Code 7102 applies to contracts by "public agencies," and that under Government Code section 4401, "public agencies" are defined to include state agencies only, and the statute makes no reference to federal agencies. Thus, the court concluded, section 7102 does not apply to subcontracts between private parties on federal projects in California. The court stated that

> "the only exception to enforceability of such clauses has been codified at Cal. Pub. Contract Code § 7102, … [but that section] does not apply to the subcontract in this case because the federal government is clearly not a 'public agency' as defined in Cal. Gov't Code § 4401 . . . Thus, the court finds that under California law, the express and unambiguous 'no damage for delay' clause in the subcontract in this case provides an iron-bound bar against any potential liability on the part of Harper to KCI for all of its delay-related damages."

81 Fed. Cl. at 678-679. The court further held that, even assuming *arguendo* that California law provided that "no damage for delay" clauses are not enforceable if the parties did not contemplate the type of delay at issue, any such exception would not apply to KCI's claim because it was aware of the delays caused by the other subcontractors at the time it entered into its contract with Harper. 81 Fed. Cl. at 679.

Based on Harper/Nielson-Dillingham, contractors and subcontractors performing work on federal projects in California should be aware that, unlike the case on state projects, "no damage for delay" clauses in their subcontracts may be enforceable. However, it is not clear that the Claims Court correctly interpreted California law, or whether a California court deciding the issue would reach the same conclusion.

First, the federal court's reliance on Government Code section 4401 is not necessarily well-founded. As noted above, the court relied heavily on the definition of "public agency" found in Public Contract Code section 4401, specifically noting that the definition includes only state agencies, and not federal agencies. However, the Claims Court apparently ignored, or was not aware, that the definition contained in section 4401 is not a general definition applicable to all

California statutes, but by its own terms is applicable only to the California "Emergency Termination of Public Contracts Act," of which it is a part. Section 4401 expressly provides:

> "'Public agency,' *as used in this chapter*, includes the State, its various commissions, boards and departments and any county, city, district or state agency . . . (emphasis added).

The reference in the statute to "this chapter" refers to Chapter 5 of Division 5, Title 1 of the Government Code, which constitutes "The Emergency Termination of Public Contracts Act," Cal. Gov't Code § § 4400-4412. As the name implies, that Act concerns grounds and procedures for the emergency termination of public contracts. In quoting section 4401, however, the Harper/Nielson-Dillingham court omitted the "as used in this chapter" language, and inserted ellipses in its place. See Harper, 81 Fed. Cl. at 677 n.11.

Second, some California construction lawyers believe that a California court might be more restrictive in applying a "no damage for delay" clause in a private subcontract than was the federal court. As set forth in the Hawley case, the California courts apply a broader test in assessing whether a "no damage for delay" clause is enforceable, based largely on the principle, applicable to both public and private contracts alike, that a "clause which in ultimate result has the effect of imposing a forfeiture will be strictly construed, especially where the contract . . . was prepared by the one seeking to impose the forfeiture." Hawley, 211 Cal. App. 2d at 713. Other California courts have reached the same conclusion as Hawley, again based on the general common law rule that "the law abhors a forfeiture." See, e.g., McGuire & Hester v. City and County of San Francisco, 113 Cal. App. 2d 186 (1952). California Civil Code sections 1442 and 3275 also express a strong statutory policy against enforcement of contractual clauses which operate to cause a party to forfeit its rights or claims. And finally, as noted above, California Civil Code section 1635 provides that public and private contracts are to be interpreted by the same rules. Taking all of these factors together, a California court might be less inclined to enforce a "no damage for delay" than was the federal court in Harper/Nielson-Dillingham.

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