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LEGALLY SPEAKING

So You've Contracted Your way into a Pickle

by Nicole Sornsin and Jim Sienicki

Everyone has been there. Excited to obtain work and start a new project with a new contractor, you agreed to let the contractor use its form contract. You signed on the dotted line without much review (other than the scope of the work and the price) and without consulting an experienced construction lawyer. But, hindsight is 20/20 and now that there have been some significant delays, impacts, cumulative impacts, loss of productivity, acceleration and/or complications during the project, you realize the contract you signed is extremely favorable to the general contractor. Is there anything you can do going forward to protect yourself?[1]

Take comfort that all is not lost. There are many things you can do to protect yourself going forward and to prepare a claim against the general contractor and/or owner which could turn a losing project into a profitable project.

Step One—Document, Precisely Follow the Contract Provisions, and Do Not Waive Your Claim

Perhaps the most important thing you can do is begin or continue to document your activities on the project and the delays, impacts, cumulative impacts, loss of productivity, acceleration, and disruptions you are incurring. An experienced construction attorney can help you determine what is important, and can engage scheduling or other appropriate consultants to help you document and prove your claim and your damages. For example, did the general contractor or owner significantly expand the scope of your work or issue voluminous change orders affecting your work? Have there been numerous delays or impacts caused by the owner, general contractor or other subcontractors? These events should be documented, daily logs should be meticulously prepared, and photos should be taken and identified by date and location. All key documents should be saved in the event litigation becomes necessary.

Likewise, read the contract carefully and make sure you are following it to a "T" going forward. There may be remedies with strict timelines or that require you to take certain actions to preserve your claim. Most contracts have "notice" provisions, requiring you to give timely notice of changes and claims, or notice of events or conditions constituting a default or breach of the contract, among other things. These notice provisions should be studied carefully and complied with timely and completely. Otherwise, you will spend additional legal fees that are now necessary to attempt to overcome the lack of proper or timely notice defense to your claim.

In addition, thoroughly review the contract (or have your attorney do so) to find any ambiguities. For example, if a general contractor is seeking to enforce an unfavorable provision against you, read elsewhere in the contract to determine if there may be a conflicting or more favorable provision. If conflicting provisions exist, they may create an ambiguity that may be construed against the

[1] This article is also applicable to general contractors who likewise sign form contracts of the owner.

general contractor as the drafter of the form contract and that would prevent the general contractor from enforcing the unfavorable provision against you.

Finally, *do not* sign change orders, lien waivers, or payment applications without specifically reserving your rights to pursue your claims. Otherwise, the general contractor may assert you waived, released, or signed away your claim in one or more of these documents. Then, you will again be faced with spending additional legal fees to have your attorney attempt to overcome these defenses to your claim.

Step Two—Understand Your Options

You may have options to circumvent an unfavorable contract provision. First, there may be a statute or other legislation that specifically prevents or trumps the enforcement of an unfavorable provision. Second, there may be case law that likewise specifically prevents or trumps the enforcement of an unfavorable provision. Finally, there are implied terms in contracts that may help you prevent the enforcement of an unfavorable provision.

A. Was the General Contractor the First to Materially Breach the Contract?

Other options may change the tide for you. If the general contractor is the first to materially breach the contract, such actions might discharge your obligations or entitle you to compensation. Under the doctrine of "first material breach," a contractor that commits the first material breach discharges the remaining obligations of the subcontractor[2]. In other words, the subcontractor is relieved of any further contractual obligations due to the contractor's first material breach.

Prompt payment acts, which trump contractual provisions in most states, provide a strict payment schedule and structure, and a basis for arguing that a material breach occurred. See, e.g., A.R.S. § 32-1129.02(A) ([n]otwithstanding the other provisions of this article, performance by a ... subcontractor ... in accordance with the provisions of a construction contract entitles the ... subcontractor ... to payment from the party with whom the ... subcontractor ... contracts."). If you have not been timely paid for work performed, you may be entitled to remedies under your state's prompt payment acts. However, you may have obligations that you must timely meet under the controlling prompt payment act in order to preserve your right to payment, including possibly providing notice regarding the general contractor's failure to pay and its resulting material breach of the contract.

As another example, the general contractor or owner may have first materially breached its obligations under the contract by not timely and appropriately providing the materials, equipment and/or fixtures that were needed to be complete as a precursor to the scope of work you were to perform.

Another circumstance that may constitute a material breach is where the general contractor or owner makes a "cardinal change" to your scope of work. A cardinal change is a significant change or series of changes beyond the scope of your contract that constitutes a material breach.[3] The cardinal change doctrine serves "to provide a breach remedy for contractors who are directed ... to perform work which is not within the general scope of the contract" and which is therefore not redressable under the contract.[4] The premise of the cardinal change doctrine is that compensation for costs resulting from the general contractor's or owner's abuse of authority under the contract's changes clause[5] should not be limited by the terms of that changes clause. Essentially, if the changes are significant enough to constitute a cardinal change, which most likely is a question of fact, a subcontractor can refuse to perform or can perform and be paid the reasonable value for the work, and not just its contract price. [6]

B. Options Without a Material Breach.

Even if the contract was not materially breached first by the general contractor, you may have other remedies.

1. *Did the Contractor Breach One of the Implied Duties in the Contract?*

Many states imply into a contract as a matter of law a duty of good faith and fair dealing, an implied duty not to hinder or delay, and an implied duty to cooperate.

The implied mutual duties require that neither party to the contract will do anything to prevent performance by the other party or commit any act that will hinder or delay

[2] *E.g. Zancanaro v. Cross*, 85 Ariz. 394, 400 (1959) (the victim of a material or total breach is excused from further performance); *Gallagher v. Southern Source Packaging, LLC*, 564 F. Supp. 2d 503, 508-09 (E.D. N.C. 2008).

[3] *See, e.g., Greenlee County v. Webster,* 25 Ariz. 183, 192 (1923) (quoting *Cook County v. Harms,* 108 Ill. 151 (1883)).

[4] *J.A. Jones Contr. Co. v. Lehrer, McGovern Bovis, Inc.,* 120 Nev. 277, 293 (Nev. 2004) (quoting *PCL Contr. Servs., Inc. v. U.S.,* 46 Fed. Cl. 745, 804 (2000)).

[5] *J.A. Jones Contr. Co. v. Lehrer, McGovern Bovis, Inc.,* 120 Nev. 277, 294 (Nev. 2004).

[6] *See, e.g., Greenlee County v. Webster,* 25 Ariz. 183, 192 (1923) (quoting *Cook County v. Harms*, 108 Ill. 151 (1883)).

performance.[7] Specifically, the duty of cooperation dictates that the owner, contractor, and subcontractors will all act reasonably and timely as to elements of performance within their control.[8] For example, did the contractor actively engage in conduct to prevent you from receiving the benefits of the contract? Did the contractor actively interfere with your work? Did the contractor or owner deny you access to the site to perform your work? These are examples of conduct that may constitute a breach of the duty of good faith and fair dealing, or one or more of the other implied duties, and entitle you to damages.

2. *Are You Entitled to Payment for a Constructive Change?*

A constructive change exists when a subcontractor (1) performed work beyond the contract requirements and (2) additional work was ordered, expressly or impliedly by the owner or contractor.[9] For example, did the contractor or owner require you to comply with multiple design changes beyond your contract requirements? Did the contractor or owner require you to accelerate your work to comply with a new compressed schedule? These examples may entitle you to additional compensation since they may be constructive changes to your contract.

3. *Can You Circumvent a No Damages for Delay Clause?*

Finally, in response to your claim, the general contractor or owner may raise the defense that your contract has a "no damages for delay" clause. However, such a clause may be unenforceable if there is bad faith or active interference.[10] Courts have found several other generally recognized exceptions to a "no damages for delay clause" where the delay: (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies.[11]

As a subcontractor claiming active interference on the part of the owner or general contractor, you may just need to show that the owner or general contractor committed an affirmative, willful act that unreasonably interfered with your performance of the contract. For example, was other preceding work performed by the contractor or its subcontractors defective? Was the scheduling that was done by the general contractor deficient? Did the owner or contractor delay in sending you the revised design documents, or the materials or equipment that was necessary before you could begin your work? As discussed above, where these circumstances exist, you must carefully and thoroughly notify the general contractor and document them to preserve your rights and claims.

These claims, legal arguments and remedies are by no means exhaustive. Every contract is different, as is every project. However, hopefully this article will help you identify potential claims, issues and options in current or future projects that become contentious. Armed with the information in this article, you may be better prepared to preserve your rights and claims, and perhaps turn a losing contract into a profitable one by being more aware of your options.

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[7] Bruner and O'Connor Construction Law § 15:50 (March 2016).

[8] Id.

[9] See *Nova Group/Tutor-Saliba v. United States*, 125 Fed. Cl. 469 (2016).

[10] *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 114-16 (Tex. 2014), reh'g denied (Dec. 19, 2014); *Tricon Kent Co. v. Lafarge North America, Inc.*, 186 P.3d 155, 160-61 (Colo. App. 2008).

[11] *Zachry Const. Corp.*, 449 S.W.3d at 114-16.