

NEWSLETTERS

Contractor Assessed Significant Liquidated Damages On Mackinaw Bridge Restoration Project

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The Michigan Court of Appeals recently affirmed a trial court's award of nearly \$2 million dollars in liquidated damages even though the owner and severe weather conditions contributed significantly to the overall delay on the project. In *Abhe & Svoda Inc. v. State of Michigan, Department of Transportation*, 2017 WL 3722001 (Mich App 2017), the contractor disputed liquidated damages imposed by the Michigan Department of Transportation (MDOT) claiming that dilatory conduct by MDOT and environmental circumstances beyond its control precluded enforcement of liquidated damages. The trial court disagreed and found that the liquidated damages clause was not an unenforceable penalty and that the contractor failed to make a proper request for an extension of time in accordance with the parties' contract. The court of appeals agreed and affirmed the trial court's ruling.

The project was challenging from its inception. The scope of work entailed sandblasting and painting portions of the Mackinaw Bridge, which extends five miles from Michigan's Upper Peninsula to the Lower Peninsula. Once the world's largest suspension bridge, the Mackinaw Bridge extends hundreds of feet into the air over Lake Michigan and Lake Huron. Working on the bridge can be treacherous and delays are common due to strong winds and adverse weather conditions. The contract was awarded on December 7, 2007, and the work was to be completed by October 30, 2009. The contract provided for liquidated damages in the amount of \$3,000 per day for each calendar day by which completion of the project was delayed.

The project was indisputably late and MDOT assessed liquidated damages against the contractor from October 30, 2009, to August 5, 2011, a period of 644 days which amounts to \$1,932,000. The contractor argued that 515 of those days were improper because of winter shutdowns during which it was impossible for MDOT to have any losses and that the liquidated damages provision was void for failing to estimate in good faith the damages suffered by MDOT.

The contract included a provision that allowed the contractor to request an extension of time. The standard specifications provide a mechanism for seeking an extension due to poor weather conditions. Such a request must be made within 14 days "following the end of the calendar month in which the delay occurred" to be valid under the contract. While no formal request was made pursuant to this provision, the contractor claimed that it engaged in numerous discussions throughout the project with MDOT that

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led it to believe that MDOT would fairly and equitably adjust the project schedule at the end of the project and that the contractor asked MDOT, in writing, by telephone, and in person, to waive the liquidated damages provision.

The trial court concluded that the contractor failed to follow the contractually mandated process for submitting a request for extension of time, thereby waiving any right to relief. Although the contractor made several requests to MDOT to waive the liquidated damages provision, the trial court pointed out that the contractor never specifically requested an extension. The court also rejected the contractor's argument that the liquidated damages provision was an unenforceable penalty.

On appeal, the Court of Appeals focused on the total delay to the project as a basis for rejecting the contractor's argument that the liquidated damages provision was an impermissible penalty. Because the project anticipated a "winter shutdown," the court rejected the contractor's argument that the owner was not damaged during the months in which no work could be performed. The court reasoned that MDOT's harm was derived from the total delay to the project, rather than some particular harm ostensibly suffered on any particular day the project was pending. The court explained "the liquidated damages clause reflects the parties' agreement that defendants would suffer harm if the project was incomplete after a certain date, irrespective of how or why it was incomplete."

Perhaps the more important point to take from this case is the strict requirement that the contractor follow the claims procedure set forth in the parties' contract to extend the project schedule. The contractor claimed that MDOT's own dilatory conduct in approving a scaffolding plan to perform the work contributed significantly to the contractor's failure to complete the project timely. According to the Court of Appeals, if MDOT unreasonably delayed its approval of the contractor's scaffolding plan, that contribution would waive application of liquidated damages.

However, the appeals court distinguished this case because the contractor had the power to extend the time for completion pursuant to the parties' contract. "If a contract permits an extension of time upon request, but no such request was made . . . liquidated damages are not waived." *Id.* *3. The court further reasoned that the "delay" provision of the parties' contract refers to individual, specific, discrete impediments to ongoing work such that the contract contemplates multiple delays that will occur during the course of the project. The court reasoned:

The only sensible reading is that each and every time any impediment to ongoing work occurs, a contractor seeking to extend time for completion of the project on the basis of such an impediment must make a request within 14 days after work resumes (or 14 days after the end of that calendar month, if the delay was caused by weather). *Id.* at *4.

This case illustrates the importance of following the notice and claims procedures set forth in a construction contract. The failure to follow the claims procedures set forth in a construction contract could preclude a contractor from seeking additional time or compensation – even when the owner is unquestionably the cause of the delay or increased cost of the

project.

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