

## NEWSLETTERS

### Contractor Waives Claims By Failing To Strictly Adhere To Contract's Dispute Resolution Procedure

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#### **Barnes & Thornburg Construction Law Update, September 2016**

An Ohio appellate court recently held that a contractor had waived its claims against a state university by failing to follow the contract's dispute resolution procedure. Even though the issue at the center of the contract dispute was project delays, the court's ruling was based not on the substance of the contractual provision, but rather the contractor's failure to follow the provided dispute resolution procedures. In *IPS Electric Services, LLC v. University of Toledo*, 2016 Ohio 361, the court also ruled that strict compliance with the contractual provisions was required regardless of the likelihood of success under those contractual dispute resolution procedures.

IPS Electric Services, LLC, entered into a contract with the University of Toledo (UT) to perform electrical work on a project extending and remodeling buildings on campus. There were numerous problems that affected construction. IPS alleged that issues beyond its control were adversely impacting IPS' ability to perform the required work. Among the alleged reasons for delay were UT's late delivery of air handling units and slow responses to requests for information. In addition to the delays, UT imposed an accelerated compression schedule on the project. IPS alleged that it suffered damages from both the delays and the accelerated schedule.

IPS sent UT letters throughout the project complaining about the scheduling issues, and notifying UT of potential delays and associated cost impacts. Throughout, these letters expressed IPS' position that it was owed compensation as a result of these issues. IPS' letters provided detailed information on the unanticipated labor costs and other costs associated with the delays. After roughly four months of letters to UT, IPS submitted a certified claim under Article 8 of the contract, which outlined the contractual dispute resolution procedures.

Following a denial of the certified claim, IPS filed suit against UT in the Ohio Court of Claims, the statutorily required forum for a claim against a state university. IPS brought two claims against UT, unjust enrichment and breach of contract. The Court of Claims denied the unjust enrichment claim because the relationship between the parties was governed by the written contract between them. The Court of Claims also denied the breach of contract claim, finding that, while UT did breach the contract, IPS failed to adhere to the contractual dispute resolution procedures, which called for a contractor to begin the claim initiation process within 10 days of the event giving rise to the claim.

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In appealing the Court of Claims' decision, IPS did not contest its failure to comply with the contractual dispute resolution procedures. Instead, IPS argued that it was not required to comply with those procedures. IPS argued that it could not initiate a claim until it knew the amount of its damages for the claim after the conclusion of the project. However, given the contractual language, which identified the triggering event as the event giving rise to the complaint, the court rejected this argument, holding that the dispute resolution procedures did not hinge on IPS's ability to precisely calculate its damages.

The court also rejected IPS' argument that UT had waived strict compliance with the contractual dispute resolution procedures. This decision, IPS argued, created an unfair windfall for UT, but the court explained that courts cannot decide matters of contract interpretation issues simply on the basis of fairness.

Ultimately, much of the appellate court's decision centered on IPS's argument that the Court of Claims decision had erroneously enforced UT's "no damages for delay" policy. Such a clause precludes a contractor's recovery of delay damages even when such delay is caused by a public authority. Previously, no damages for delay clauses were very common in Ohio construction contracts; however, in 1998, the Ohio Revised Code banned such clauses as against public policy. Accordingly, the court explained that "an owner cannot cause a delay and then avoid the natural consequences for causing the delay by using boilerplate contract language." With this background in mind, the court rejected the argument that UT's contract language was improper. It found that the language limited contractor damages from delays caused by third party contractors, not UT itself. Thus, IPS failed to demonstrate that the contract violated Ohio's prohibition against no damages for delay clauses.

This case contains a few quick takeaways for contractors to consider:

- Contractors should develop and document a clear understanding about the procedures for resolving billing disputes.
- When in doubt, a contractor should submit a claim as soon as possible under the set guidelines.
- At the contracting stage, consider the possibility of delays and consider addressing contractually how the excess costs of completion will be allocated.
- Contracts can still contain "no damages for delay" provisions that limit damages from delays caused by third parties, but cannot contain "no damages for delay" provisions that limit damages from delay caused by a public authority.

Resolving these issues up front may avoid dilemmas such as the delays in this case presented.

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