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Typical Contract Clauses Regarding Claims

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CHAPTER IV

TYPICAL CONTRACT CLAUSES REGARDING CLAIMS

A central theme of this seminar is that parties to a construction contract must know and understand their contracts. Parties should not fail to read contracts simply because they are standard forms. In Mississippi, the Courts make it clear that a party is not excused for failure to read the contract. McCubbins v Morgan, 23 So. 2d 926 (Miss. 1945). As a general rule, the Courts have no power to rewrite the terms of the contract. Citizens National Bank of Meridian v L.L. Glascock, Inc., 243 So. 2d 67 (Miss. 1971).

These points are especially important when considering claims for additional work, additional time, or breach of contract. In Farrish Gravel Co. v Mississippi State Highway Commission, 458 So.2d 1066 (Miss. 1984), the Mississippi Supreme Court indicated a lack of sympathy for contractors who fail to read and understand their contracts. The Court stated:

> When the State opens a project for bids, a contractor decides what the project is worth. If he cannot make money on it, he does not have to bid on it and good business judgment would dictate that he not enter a bid.…While sympathy may be extended to the contractors who lost large sums of money in failing to perform those contracts, the blame must fall upon them. Apparently, before submitting their bids neither these contractors nor any other contractors contacted or approached the Commission about modifying the restrictive provision. Only after the contracts had overrun and the contractors had incurred losses did they approach the Commission for help. The time was too late. Action should have been taken before the bids were submitted. Id. at 1070.

With respect to changes and claims, the standard forms of the American Institute for Architects ("AIA") provide some excellent models. For example, under the 1987 edition of the General Conditions of the Contract for Construction, AIA Document A201, [1] provides

[1] There are subsequent additions of the AIA Documents. The author refers to the 1987 edition as an example only and because the 1987 edition continues in wide use. Since the contract language varies from

for "claims and disputes" at section 4.3. An essential part of any claim under the AIA documents is that it be in writing.

Claims are defined as follows:

> **4.3.1 Definition.** A claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. **Claims must be made by written notice.** The responsibility to substantiate claims shall rest with the party. (emphasis added).

Under the AIA contract, claims can be made by the owner or the contractor and must be made in writing. Further, the clause puts time limits on the written notification of the claim as follows:

> **4.3.3 Time Limits on Claims.** Claims by either party **must be made within 21 days** after occurrence of the event giving rise to such claim or within 21 days after the claimant first recognizes the condition giving rise to the claim, whichever is later. Claims must be made by written notice. An additional claim made after the initial claim has been implemented by change order will not be considered unless submitted in a timely manner. (emphasis added).

If the contractor fails to comply with the notice requirements, he may be unable to recover for changes and other types of claims including delays and disruptions unless the owner waives the written notice requirements. See*, e.g.,* Able Construction Co v. School Dist. of Seward, 195 N.W. 2d 744 (Neb. 1972). On the other hand, prompt written notice of particular delays or disruptions on a project will not only increase the Contractor's chances of recovering its cost, but also motivates the Owner to correct problems when they occur.

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edition to edition, those who utilize the standard form of agreements should pay particular attention to the various differences in the respective editions.

Final payment provisions of the contracts can also constitute a bar to unresolved claims. Not infrequently, construction contracts stipulate that final payment constitutes a waiver of all claims which are unsettled at the time of final payment. The AIA contract contains at least two such clauses. One applies to the Owner and the other applies to the Contractor:

> **4.3.5 Waiver of Claims: Final Payment.** The making of final payment shall constitute a waiver of claims by the owner except those arising from:
>
> .1 liens, claims, security interest, or encumbrances arising out of the contract and unsettled;
>
> .2 failure of the work to comply with the requirements of the contract documents; or,
>
> .3 terms of special warranties required by the contract documents.

Under section 9.10, Final Completion and Final Payment, subsection 9.10.4 provides the following:

> **9.10.4** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. Such waivers shall be in addition to the waiver described in Subparagraph 4.3.5.

The Courts have held that such clauses are enforceable. See Mingus Constructors, Inc. v United States, 10 Cl. Ct. 173, 178 (1986). This rule has been followed in Mississippi. In fact, in a case involving a subcontractor's claim, the Court held that acceptance of final payment by the prime contractor and the subcontractor constituted a release of the subcontractor's claims by virtue of the fact that the prime contract was incorporated by reference into the subcontract. See Mississippi State Highway Commission v Patterson Enterprises, 627 So.2d. 261 (Miss. 1993).

When dealing with claims, another common clause of concern to contractors is the "no damage for delay" clause. Engineers and architects for various agencies in the state are

more and more inclined to modify standard contract forms to limit the kinds of damages available to contractors. The typical language of such clauses might read as follows:

> No payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work whether such hindrance or delays be avoidable or unavoidable.

Similarly, some contracts will attempt to limit the contractor's claim for delays to the recovery of time only and not damages. Such clauses purport to have the contractor waive its rights to seek additional compensation due to delays caused by the other party and limit the delayed party to a time extension for the delays. The Mississippi Department of Transportation uses such a clause in the Mississippi Standard Specifications for Road and Bridge Construction, commonly referred to as the "Red Book." With respect to the removal of utilities in highway work, Section 105.06 of the Red Book (1996 edition) provides as follows:

> All utility appurtenances are to be relocated or adjusted by others unless provided otherwise in the contract. All known utilities within the project are shown on the plan. It is understood and agreed that all of the utility appurtenances in their present or relocated positions have been considered in the contractor's bid and that **no additional compensation will be allowed for delays, inconvenience, or damage sustained by the contractor's (sic) due to interference from the said utility appurtenances or the operation of moving them**. The engineer's determination that removing, relocating, or adjusting of utility appurtenances or failure of others to do so is causing a delay in major phases of construction which normally should be in progress will be considered a delay by the State in the determination of extension of contract time. In the event the utility owners fail to comply with their responsibility in relocating or adjusting their facilities, the engineer may require the contractor to make adjustments as extra work. (emphasis added).

The Highway Commission clause has been reviewed on a couple of occasions in recent years by the Mississippi Supreme Court. First, in Mississippi Transportation Commission versus SCI, Inc., 717 So.2d. 332, the Mississippi Supreme Court stated:

> Despite the apparent commonness of them, this Court has only once addressed and upheld the validity of a "no damage for delay" provision in a construction contract. *Edward E. Morgan Co. v. State Highway Comm'n,* 212 Miss. 504, 54 So.2d 742 (1951). Contractual no-damage-for-delay clauses are enforceable, though they are construed strictly against those who seek their benefit. *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.,* 162 Ill.2d 265, 205 Ill.Dec. 98, 642 N.E.2d 1215, 1221 (1994). However, even with a "no damages for delay" clause, many jurisdictions have determined that damages may be recovered for any delay that: (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 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. *See, e.g., Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 387 (Tex.1997); *United States v. Metric Constructors, Inc.,* 325 S.C. 129, 480 S.E.2d 447, 448 (1997); *J & B Steel,* 205 Ill.Dec. 98, 642 N.E.2d at 1221; *see also* Maurice T. Brunner, Annotation, *Validity and Construction of "No Damage" Clause with Respect to Delay in Building or Construction Contract,* 74 A.L.R.3d 187, § 2[a] (1976). Id. at 338-339.

In the SCI case, the jury was instructed concerning the above exceptions to the "no damage for delay clause" and returned a verdict for the Contractor. The Mississippi Supreme Court decided that the Owner in the SCI case had actively interfered with the Contractor or acted in bad faith based upon the jury's award of damages which the Mississippi Supreme Court affirmed.

In a subsequent case involving the Mississippi Department of Transportation, the Court again refused to enforce the Red Book no damage for delay clause against a contractor. In that case, the Mississippi Supreme Court held:

> Courts have traditionally held that "no damages for delay" provisions are valid and enforceable. *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas,* 551 F.2d 1026, 1029 (5 th Cir.1977) (holding that "no damages for delay" clauses will generally be enforced absent a delay not contemplated by the parties, amounting to an abandonment of the contract, caused by bad faith, or amounting to active interference). This Court has held that such clauses are enforceable, but are to be strictly construed against those who seek their benefit. *Mississippi Transp. Comm'n v. SCI, Inc.,* 717 So.2d 332, 338 (Miss.1998).

Mississippi Transp. Com'n v. Ronald Adams, 753 So.2d 1077 (Miss. 2000).

When faced with a no damage for delay provision in Mississippi, the contractor should be aware of the four possible exceptions to such clauses and develop facts which support one of the exceptions. Additionally, another exception which has been recognized in other jurisdictions is a waiver of the no damage for delay clause. See, e.g., Finland v Winchendon Housing Authority, 553 N.E. 2d 554 (Mass. App. Ct. 1990). In the Finland case, the Court held that the no damage for delay clause had been waived where the Housing Authority had made payments to the contractor for such delays and there had been numerous letters between the Owner and the Contractor referring to the delays and the payments which were due to the Contractors.

Finally, if the Owner is negligent in its delay of a contractor, Miss. Code Ann. § 31-5-41 (1972) may prohibit the enforcement of the clause by the owner. That statute prohibits a party from contracting away its own negligence. It states:

> With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable.
>
> This section does not apply to construction bonds or insurance contracts or agreements.

Whether strictly a no damage for delay clause or a limitation to time extension only, such clauses are generally enforceable. See, e.g., Edward E. Morgan Co. v State Hwy. Comm'n., 54 So.2d 742 (Miss. 1951).

The changes clause used by the federal government as prescribed by the Federal Acquisition Regulations, F.A.R. 52.243-4 (Aug. 1987), also discusses and limits how claims may be made under the clause. It provides:

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes --

(1) In the specifications (including drawing and designs);
(2) In the method or manner of performance of the work;
(3) In the Government-furnished facilities, equipment, materials, services, or site; or
(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under the clause; **provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order**.

(c) **Except as provided in this clause, no order, statement, or conduct of the contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment**.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. **However, except for an adjustment based on defective specifications, no adjustment of any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required**. In the case of defective specifications for which the government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) **The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause by submitting to the Contracting Officer a written statement describing the general nature and amount**

of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under Paragraph (b) of this clause.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract. (emphasis added)

Under federal contracts, claims are clearly limited to those stated by the contractor in writing and asserted within 30 days after receipt of any direction, instruction, interpretation, or determination by the contracting officer which the contractor considers to be a change. The clause also provides that no claim for equitable adjustment can be allowed if asserted after final payment. Thus, most of the restrictions discussed above are included in a single clause for Federal Contracts.

Whether State or Federal, public or private, contractors should follow certain general guidelines when giving notice to the Owner of a claim. This is particularly true where the owner and/or its representative have not acknowledged that a change has occurred.

The Contractor's notification to the Owner should always do the following:

1. Confirm the directive, instruction, or interpretation received from the Owner or its representative;
2. Identify the provisions of the contract which apply to the situation;
3. Give the contractor's interpretation of the contract and its plan of performance based on that interpretation;
4. Describe how the extra work will impact the cost and time of the contractor's performance;
5. Request a change order or a written directive from the owner that the contractor should proceed with the work in question.

Due to the significant economic impact that changes can have on a contractor's performance, it is difficult to imagine any situation where the contractor would not provide such a notice to the owner before the extra work actually is performed.

In Mississippi, parties to construction contracts have long been enabled by statute to have their claims resolved by arbitration. The Mississippi Construction Arbitration Act, Miss. Code Ann. § 11-15-101 to 11-15-143 was first enacted in 1981. Under the act, the Court's are required to give binding effect to arbitration provisions in construction contracts and related agreements. The Federal Arbitration Act, 9 USC § 1-14, as amended, also enforces written arbitration agreements in contracts or transactions involving interstate commerce, which usually includes in modern practice construction contracts.

The topic of arbitration and litigation of claims will be discussed in a subsequent chapter. However, it is important to note here that many state agencies will utilize special conditions to their standard form contracts to eliminate any standard form agreements to arbitrate disputes. Such provisions in contracts are subject to negotiation, and contractors should be aware of possible modifications of arbitration provisions by the owner in the bid documents.

Under the AIA documents, claims as defined by the contract are initially submitted to the architect for review and decision, and the architect is given a set amount of time within which to act on the claim. Once the architect decides the claim or the time allowed for his consideration has passed (typically 45 days), the contractor may then resort to arbitration if the contract so provides. If there is no arbitration clause or it has been deleted by the owner, then the contractor's resort is to litigation.

In federal contracts, the claims procedure is governed by the Contract Disputes Act of 1978. 41 U.S.C. §§ 601 et seq. The typical claims clause in federal construction contracts, which follows the language of the Contract Disputes Act, reads as follows:

> 52.233-1 Disputes.
> (a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).
> (b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.
> (c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified as required by paragraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.
> (d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.
> (2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding $100,000.
> (ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.
> (iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."
> (3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.
> (e) For Contractor claims of $100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $100,000, the Contracting

> Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.
> (f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.
> (g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.
> (h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.
> (i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Once a claim enters the dispute stage in a federal contract, the contractor must follow the procedures outlined in the Contract Disputes Act in order to move the claim along to a conclusion or a remedy in Court. Under the Contract Disputes Act, and the Disputes Clause quoted above, the contractor is required to make its claim in writing.

If the claim exceeds $100,000, then the contractor must certify the claim. This means that the written claim must be signed by a person duly authorized to certify the claim on behalf of the contractor. The certificate must state that the claim is made in good faith, that the supporting data are accurate and complete to the best of the person's knowledge and belief and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. 41 USC § 605(c)(1).

If the claim exceeds $100,000 and is not certified, then the contracting officer has no obligation to render a final decision on the claim. If the written claim is less than $100,000 or a certified claim is more than $100,000, then the contracting officer is required to issue a decision concerning the claim within 60 days of its receipt.

With respect to certified claims, the contracting officer may issue a decision within 60 days or notify the contractor of the time within which a decision will be issued. 41 USC § 605(c)(1)(2). Within 90 days from receiving the contracting officer's decision, the contractor may appeal that decision to the contracting agency's board of contract appeals. 41 USC § 606. A decision of the agency board of contract appeals is final unless the contractor appeals that decision to the United States Court of Appeals for the Federal Circuit within 120 days after the date of receipt of the board's decision. 41 USC § 607(g).

Alternatively, the appealing contractor may bypass the agency board of contract appeals altogether. The Contract Disputes Act offers the contractor the option to appeal a contracting officer's decision directly to the United States Court of Federal Claims. Such an appeal must be perfected within 12 months following the date of the receipt of the contracting officer's decision. Actions in the Court of Federal Claims proceed much like any lawsuit in any other federal court except subject to the rules of the United States Court of Federal Claims. 41 USC § 609.

The contracting officer is required to render his or her decision in writing and to mail or otherwise furnish a copy of the decision to the contractor. 41 USC § 605(a). It is not uncommon for contracting officers to fail to render timely decisions on contractor claims. In the event of such failure, the Contract Disputes Act permits the contractor to appeal or file suit on the claim as if the contracting officer had denied the claim. In that

event, the appeal board or Court may, at its option, stay its proceedings and require a written decision on the claim by the contracting officer. 41 USC § 605.

A failure by the contractor to certify a claim in accordance with the provisions of the Contract Disputes Act does not prevent a Court or an agency board of contract appeals from having jurisdiction over that claim. However, the Court or board must require the correction of the defective certification prior to the entry of a final judgment. 41 USC § 605(6). The Contract Disputes Act also provides the contractor and the contracting officer with the option to submit claims to alternative dispute resolution if both parties agree. 41 USC § 605(d).

Claims against the Federal Government under the Contract Disputes Act must be filed within 6 years after the accrual of the claim. 41 USC § 605(a). In Mississippi, breach of contract claims are subject to a 3 year limitation. M.C.A. § 15-1-49. Additionally, Mississippi has a special statute of limitations which relates to claims for construction defects. M.C.A. § 15-1-41 provides:

> No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, and no action may be brought for contribution or indemnity for damages sustained on account of such injury except by prior written agreement providing for such contribution or indemnity, against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof. This limitation shall apply to actions against persons, firms and corporations performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property for the State of Mississippi or any agency, department, institution or political subdivision thereof as well as for any private or nongovernmental entity.

> This limitation shall not apply to any person, firm or corporation in actual possession and control as owner, tenant or otherwise of the improvement at the time the defective and unsafe condition of such improvement causes injury.
>
> This limitation shall not apply to actions for wrongful death.
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> The provisions of this section shall only apply to causes of action accruing from and after January 1, 1986; and any cause of action accruing prior to January 1, 1986, shall be governed by Chapter 350, Laws of 1972.

The above statute is deemed a statute of repose. Any claim involving construction defects as defined in the statute must be filed within six years after the written acceptance of the project or its actual occupancy or use, whichever occurs first. Originally, this statute provided a ten year limitation, but it was amended to make the limit 6 years. It has been held to be constitutional. See Reich v. Jesco, Inc., 526 So. 2d. 550 (Miss. 1988); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320 (Miss. 1981).

In some instances, construction contracts will attempt to limit the time within which a contractor may pursue its legal or equitable remedies. For example, AIA Document A201, General Conditions (1987 ed), Section 4.5.4.2 provides:

> A demand for arbitration shall be made within the time limits specified in subparagraphs 4.5.1 and 4.5.4 and clause 4.5.4.1 as applicable and in other cases within a reasonable time after the claim has arisen and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim would be barred by the applicable statute of limitations as determined pursuant to paragraph 13.7.

In Mississippi, parties to a contract may not alter the statutorily imposed limitations on filing of actions on claims. M.C.A. § 15-1-5.

As can be seen above, it is important for contractors to have a clear understanding of what their contracts provide and whether they are governed by state or federal law in order to properly present and pursue their claims in a timely fashion.