

Professional Services

Removal of “no damage for delay” clause spells change on the contractual landscape

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Reversing more than 30 years of rigid insistence that the “no damage for delay” provisions of its standard construction contract should preclude contractors from recovering damages for project delays, the city of New York adopted ground-breaking changes to its contract language in December 2013. Construction lawyers, contractors, the real estate

community, and the city itself are now scratching their heads to understand the new contractual landscape and decide what the revised language will mean in the real world.

In a landmark decision in *Kalisch-Jarcho, Inc. v. City of New York* (1983), the New York State Court of Appeals held that the “no damage for delay” provisions of the city’s construction agreement meant contractors could recover delay damages only where the city was shown to have committed “willful or grossly negligent acts” exhibiting “reckless indifference” to the contractor’s rights. Three years later, in *Corinno-Civetta Construction Corp. v. City of New York* (1986), the Court of Appeals explained that the

city’s “no damage for delay” clause barred delay claims where project delays were “contemplated” by the

in order to avoid having their claims dismissed without a trial.

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parties when they entered into their contract. As a practical matter, these decisions authorized lower courts to reject “garden variety” delay claims against the city, requiring contractors to demonstrate truly egregious events

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losses without judicial remedy. Debates raged as to whether the city’s “no damage for delay” position saved money for taxpayers, or whether it caused prospective contractors to inflate their bid prices or avoid bidding at all.

In 2008 the city started a five-year pilot program in order to test possible ways of reducing its construction costs. As part of the pilot program, six agencies awarded contracts with revised “no damage for delay” provisions. At the conclusion of the pilot program in December 2013 (about a week before mayor DeBlasio took office), the city announced that it was issuing a new standard construction contract with revised “no damage for delay” provisions based on the pilot program.

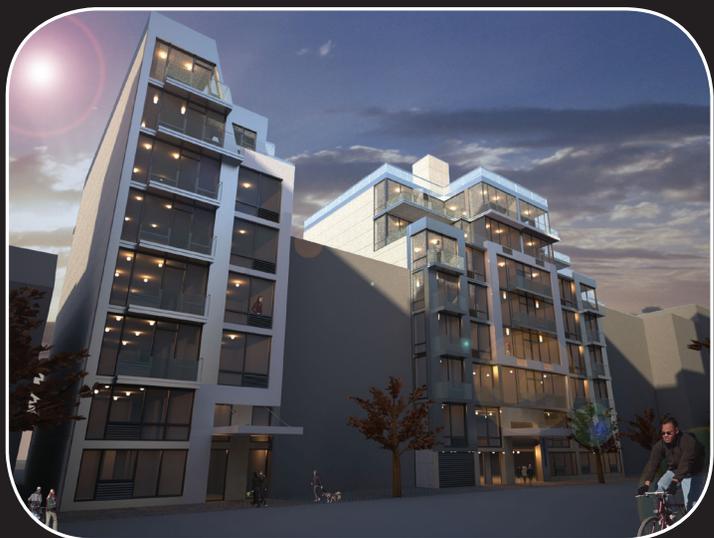
The city’s revised “no damage for delay” provisions are contained in Article 11 and Article 13.10 of the new standard form. Essentially the city has decided to allow recovery of some categories of delay damages (as described in Article 11), but only if stringent notice requirements are met. Categories of compensable delay now include (among other things) “failure of the city to take reasonable measures to coordinate and progress the Work,” “extended delays attributable to the city in the review or issuance of change orders,” “unavailability of the site for an extended period of time that significantly affects the scheduled completion of the contract,” “issuance by the engineer of a stop work order relative to a substantial portion of the Work for a period exceeding thirty days,” and “differing site conditions that were neither known, nor reasonably ascertainable on a pre-bid inspection of the site or review of the bid documents or other publicly available sources, and that are not ordinarily encountered in the project’s geographical area or neighborhood or in the type of work to be performed.”

The revised contract form also lists categories of non-compensable delay, including “the acts or omissions of any third parties, including but not limited to other contractors, public/governmental bodies (other than city agencies), utilities or private enterprises, who are disclosed in the contract documents or are ordinarily

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Professional Services

Steps for assessing new software: Upgrade guidelines to help navigate the process

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Yardi

Your current property management software has served long and well, but you're finding that the system is simply no longer powerful enough to handle all the new tracking, reporting, and transparency requirements that your business demands. You know it's time for a change because your bottom line is starting to suffer – maybe you have to keep hiring new accounting staff just to handle the issues that keep popping up or critical and costly errors are happening due to your outdated system. And in the never-ending battle for capital, many of your competitors have probably already upgraded to a cutting-edge solution and are advertising their capabilities to institutional investors.

In the long run, sticking with your system would be loyal. Do you remember the pager you loved to carry on your belt? Sticking with your pager would be loyal, but you could be hamstrung by technology that is no longer supported and having to compete with industry players who had long since moved on to smart phones. Isn't this the same thing? Once you concede the need to upgrade, what's next? Many companies seek a solution that minimizes risk, delivers a competitive edge, and serves all their needs and those of their clients and investors at a reasonable price while being accessible everywhere—not just in the office.

You'll learn about current software platforms featuring fully integrated solutions that consolidate portfolio, financial, lease, and other information into one database, giving all network users instant, secure access through any Web browser or tablet anywhere in

the world. That means a new software suite can help you increase accuracy, streamline work flows, mitigate risk, create transparency for users and investors, improve communications among stakeholders, and deliver enterprise-wide solutions.

Upgrading to a system that manages from property to portfolio to investor represents a smart strategic move—but it comes with execution risk. You need to make the best decision for your organization and consider the impact of an implementation on your team and their workload. Below are some guidelines to help you navigate the process, look ahead and ensure a successful upgrade.

- **Plan ahead:** The complexity of software systems means it's critical to approach implementation in a comprehensive manner. Creating a viable plan with a clearly defined purpose and anticipated outcome will minimize disruption to your operations. That involves defining and prioritizing your technical and functional requirements, and separating need-to-have features from nice-to-have. Also, seek expert advice. Admit you don't know everything and ask the hard questions: What systems should we upgrade, and why? What are all the options and which best meet my needs? Should I implement in phases or all at once?

- **Evaluate potential suppliers:** Who has the best record of success? Who offers the best value for your money? Who's well-established, financially stable, and experienced in the real estate industry? When you ask how much disruption, training, and other adjustments the implementation of a new system entails, do you get straight answers? Do any of your candidates have a history of making midstream changes to the implementation scope or cost estimate? And, most important, as technology advances continue unabated in this industry, who can act as your technology partner as your business needs expand?

- **Prioritize low risk:** Keep in

mind that well-designed real estate management systems diminish risk in multiple ways. Comprehensive system transparency gives managers a complete picture of investment activity across their portfolios, helping them anticipate and avoid high-risk situations. For example, dashboards can improve asset management by offering every real estate practitioner—from property and maintenance managers to top executives—an unprecedented degree of operational visibility. Likewise, automation of accounting processes eliminates errors common to outdated accounting practices, such as multiple spreadsheets and manual data entry, and provides accurate, up-to-date information for reliable risk analysis.

- **Seek versatility:** Your upgrade might well need to handle remote users, multiple real estate market segments, differing investment types, a diverse array of clients, different sets of accounting rules, multinational portfolios, and other complex requirements of your business. Also, can the software scale to meet your needs as they grow? How flexible is the software in terms of ability to configure or customize?

- **Ask how deep you can drill:** First-rate real estate software systems allow drill-down into financial data and review of accounting practices at the transaction level. Always important, this capability has assumed new urgency with Sarbanes-Oxley requirements and increased scrutiny of corporate practices. The most advanced software solutions on the market take these factors into account and track every aspect of even the most complex transactions.

- **Decide on hosting—your place or mine?** Are your IT folks up to handling the complex new software? If not, consider choosing a supplier that offers application hosting services. Many companies consider this choice much more cost-effective than maintaining their own IT network infrastructure and handling licensing, disaster recovery, network security, and so on.

- **Consider external stakeholders' viewpoints:** Which solutions enable you to provide the best reporting and services to your tenants, suppliers, and investors? Remember, your competitive edge is driven by more than best operating practices. Other key factors include your ability to provide on-line access for tenant rent payment and ledgers, electronic payables and investor reporting, as well as impressive, dynamic property marketing on your website for availability, on-line application and leasing. Choosing the right solution will shape the perception of you among clients and prospects as a technologically advanced, reliable, and efficient business. The more dynamic your new system, the more you'll be appreciated by its internal and external users and stakeholders.

- **Prepare your employees, brief your clients:** It's important to remember that rolling out a new en-

terprise-level software requires time and resources commensurate with the size and scope of your business. Furthermore, your users might also be comfortable with and loyal to your old system, making change management essential for a smooth adoption. Educate them about the advantages of a new system and help them understand how it will improve business and enhance their daily routine. Alerting your stakeholders about your new system and how it will create a better experience for them will also build enthusiasm for the project.

Plan carefully, do all of these things, accept that a new system implementation will require time, resources, and change management, and your implementation should roll out with a minimum of hassle.

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Thinking about starting your own A/E firm? by Harris of LicenseSure LLC

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more valuable to spend your time on business development than to work for free or rain trouble down on your new business.

7. Office Space. The variations on office space available, particularly in urban areas, are manifold. Direct leases for your own space will often require a 7-10 year commitment, particularly if the landlord is going to do any work, and a personal guaranty. Subletting space can often be had for shorter terms than a direct lease; consider whether it is beneficial to include in the sublease options and rent rates for after the initial term concludes. Some start-ups are attracted to office suites or co-working spaces, which offer short-term arrangements, space flexibility and, often, administrative business support. In all cases, consider physical presentation of the space to potential clients, special needs like whether your operations require natural light, access to large table surfaces, how and where you are going to keep physical records and any confidentiality concerns.

8. Office Technology and Record Keeping. A bad place but an easy one to skimp on at the outset. Invest in hardware and software for the business that you want to be and are holding yourself out as. Technical software is beyond my scope but buy Quickbooks so that you can keep track of your finances and send out invoices. Set up a document management system and, more importantly, develop guidelines about recordkeeping on your projects. Again, one person on one project is relatively easy, but it is a good time to develop a records management system for when your business has five people

working on 20 projects, and beyond.

9. Hiring. Know what you do and what you don't do. Trying to do what you don't know "on the cheap" often becomes costly in terms of time and problems. Coghlan advises, "Seek out design/construction consultants, i.e. legal, accounting, IT, insurance, who are active in the marketplace and who are familiar with the needs of start-up practices." In terms of hiring employees, ease in if you can but do not imperil the service provided by your firm by waiting too long. Management of people, payroll, taxes and benefits is time consuming and complicated. Many firms start with independent contractors to help both with ministerial office activities and project work. While this solution may seem simple, be very careful that you in fact have independent contractors and not employees as defined by the I.R.S.

10. Enjoy yourself. Entrepreneurs are passionate both about building a business and about what they do. Make sure you are gravitating to the joys and challenges of running your own business, and not simply running away from your current employment circumstances. Advance preparation establishes a strong foundation for a new business. Coghlan sums it up well, "Preparing for these benchmark events at the outset of your new practice will reduce your stress level in complying with these issues and free you to focus on what your clients hired you for in the first place – providing excellent design solutions to their project requirements."

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encountered or generally recognized as related to the work," and "any situation which was within the contemplation of the parties at the time of entering into the contract, including any delay indicated or disclosed in the contract documents or generally recognized as related to the nature of the work..."

Article 11 requires written notice of a claimed delay condition within seven days after the commencement of such condition, together with verified written statements of the details and amounts of claimed delay damages within 45 days from the time such damages are first incurred, and every 30 days thereafter for as

long as such damages are being incurred. Detailed requirements for the content of delay claim submissions are set forth in Article 11.6. Failure to strictly comply with submission requirements "shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition and no right to recover on such claims shall exist" (Article 11.2).

Under the city's standard form construction contracts issued before December 2013, department commissioners were not authorized to resolve contractor delay claims and such claims could be settled or paid only after audit by the comptroller's chief engineer and with

legal concurrence by the corporation counsel. On its face, the city's revised standard construction contract authorizes department commissioners to resolve delay claims otherwise properly preserved, and thus provides a possible mechanism to avoid bureaucratic bottlenecks so prevalent in the past. With a new mayor, a new comptroller, a new corporation counsel, and new department commissioners in place, the situation is remarkably fluid and the city's future treatment of contractor delay claims is a chapter yet to be written.

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