

NEWSLETTERS

Time Is Money: Ohio Supreme Court Weighs In On Liquidated Damages For Delayed Roadwork

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In a decision issued February 24, 2015, the Ohio Supreme Court for the first time applied its long-standing test for determining the validity of liquidated damages to a public works project. Among other things, the Court addressed the question of the point in time from which such damages for delays in completion should be assessed for reasonableness. Even outside Ohio, since the decision is from a state's high court, other courts are likely to reference this decision when assessing liquidated damages assessed for delay.

The Court was reviewing a \$277,900 liquidated damages award against Boone Coleman Construction Co. caused by its being 397 days late on a street construction project for the Village of Piketon, Ohio. The parties had contracted for a \$700 per day liquidated damages fee for each day the project was late. Ohio law requires liquidated damages for lateness in public works projects, and the \$700 figure was based on guidelines from the Ohio Department of Transportation. The contract also stated that "time was of the essence" and that the project should be substantially completed within 120 days. The Village had granted one extension of more than six months before it began assessing liquidated damages.

The Court noted that it had recognized the validity of liquidated damages since 1853, provided they do not amount to a penalty rather than a means of determining damages. Since 1984, the Court has applied the following three-part test to determine whether liquidated damages provisions are enforceable:

1. Actual damages must be hard to prove.
2. The contract must not be "unconscionable, unreasonable, and disproportionate" so as to indicate that it does not reflect a true agreement between the parties.
3. The contract should reflect the parties' intent that such damages should be paid in the event of a breach.

In reversing the court of appeals' decision that the amount was excessive, the Supreme Court found that the lower court misapplied the test. The lower court focused solely on the final figure of \$277,900, and found that it was disproportionate as a penalty in relation to the total value of the contract -- \$683,300. The Ohio Supreme Court said that the penalty should not be assessed after the fact in total, but rather it should be looked at as to whether the \$700 per day was reasonable at the time it was established. In other words, courts should not base their assessment

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on their understanding of the damages after the breach has occurred.

No matter what side of a contract you sit on, there are lessons to be taken from this decision. The Village likely benefitted from the fact that the contract said that “time was of the essence,” as well as the fact that the daily fee was not taken out of thin air but was obtained from an external source, in this case the Ohio Department of Transportation. Even where there is no such readily available source, the party that would be seeking liquidated damages should be prepared to articulate a reasoned basis for a liquidated damages amount.

From the contractor’s standpoint, of course hindsight is 20/20, but in light of this decision, consider trying to cap liquidated damages for delay or perhaps having the daily fee diminish over the passage of time. Also, the majority of the Court was not persuaded by the contractor’s argument that much of the delay was due to the Village providing inaccurate site plans. Again with the benefit of hindsight, a contractor should consider ensuring that a contract includes language that speaks to the cause of delay so that if the owner really is in whole or in part the cause of a delay, the contractor has the best contractual basis for asserting that and minimizing liquidated damages.

Finally, from the standpoint of both parties, query how much in legal fees have now been expended over these \$277,900 in damages – very possibly more than the amount at stake. Arbitration or another alternative to civil litigation might be able to resolve such a dispute more quickly and cost-effectively.

For more information about this topic and the issues raised in this article, please contact Bill Nolan in our Columbus office by telephone at (614) 628-1401 or by email at bill.nolan@btlaw.com.

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