

 CAPITAL

Editor: Kate Glaze



2014 Issue Three

## Texas Supreme Court Rules That Some Common Law Exceptions Apply to the “No Damages for Delay” Clause in Your Construction Contract



By Cathy Altman

214.855.3083 | [caltman@ccsb.com](mailto:caltman@ccsb.com)

On August 29, 2014, the Texas Supreme Court, in a 5-4 decision, issued a much-anticipated opinion resolving uncertainty regarding the application of common law exceptions to the typical no-damage-for-delay provision found in construction contracts, including contracts involving public owners. *Zachry Construction Corporation v. Port of Houston Authority of Harris County*, Texas Supreme Court, No. 12-0772.<sup>1</sup> We covered the case in the Winter 2013 issue of the Capital Newsletter. Reversing the Houston Court of Appeals, the Texas Supreme Court brought Texas back in line with the majority of American jurisdictions, concluding that a no-damages-for-delay provision cannot shield a private or public owner from liability “for deliberately and wrongfully interfering with the contractor’s work.” *Id.*, slip op. at 1.

The Court recognized that it first had to resolve the sovereign immunity issue under the Local Government Contract Claims Act (the “Act”), which defines the extent to which local governments waive sovereign immunity to suits on contracts. The Court found the Act does not waive immunity on claims for damages for which Texas Local Government Code Section 271.153 does not allow recovery, such as consequential damages. *Id.* at 10–17. The Court went on to conclude, however, that the direct delay damages claimed by Zachry were in fact recoverable under 271.153(a)(1) as part of “the balance due and owed” under the contract, as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration. *Id.* at 18–23. Rejecting the Port’s argument that no balance can be “due and owing” unless the contract expressly calls for payment, the Court explained the Act does waive immunity for a contract claim for delay damages, even when the contract does not expressly provide for such damages. *Id.*

The Court then considered whether the broadly-written no-damages-for-delay provision in the contract barred Zachry’s claim. *Id.* at 23. That provision stated Zachry could not recover “any damages arising out of or associated with any delay or hindrance,” even if it were due to the Port’s own “negligence, breach of contract or other fault,” and it provided that the sole remedy would be an extension of time. *Id.* at 24–25. The Supreme Court rejected that holding, noting that freedom of contract does not extend to provisions that incentivize wrongful conduct and damage contractual relations. Consequently, the Court found the no-damages-for-delay provision at issue void as against public policy because it purported to exempt the Port from contractual liability for harm it caused intentionally or recklessly. *Id.* at 26–28.

Although the Court did not address whether earlier cases had correctly stated other commonly-recognized exceptions to no-damages-for-delay provisions, parties negotiating delay provisions should carefully consider whether those exceptions reflect public policy concerns as discussed in *Zachry*. These other exceptions include: (1) delays not intended or contemplated by the parties to be within the purview of the provision, (2) delays that extend for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract, and (3) delays not within the specifically enumerated delays to which the clause applies. While parties may still wish to negotiate these types of provisions into their contracts, they should be aware that *Zachry* raises questions about whether they will ultimately be enforceable. ■

<sup>1</sup> The Port has filed a motion for rehearing.