MASSACHUSETTS DIFFERING SITE CONDITIONS, CHANGES AND DELAYS (WITH EMPHASIS ON PUBLIC CONSTRUCTION CONTRACTS)

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I. MASSACHUSETTS LAW APPLICABLE TO CHANGES

1. There are just four things to know about "changes" in construction projects, only the first three of which are iron-clad in protecting your rights.

The following three things should always be done by your company when reading contract documents for the purposes of estimating, before executing your contract and before a change comes up.

1. Read the disputes clause and the changes clause and commit the same to heart.

2. Same as number 1, but more so!

3. Same as number 2, except twice as much!

4. Hopefully, you are beginning to sense a trend . . . .

We all know that, for better or worse, contractors frequently are in situations where either they have not read and/or have not complied with the changes clause and/or the disputes clause on a construction project and are still, nonetheless, hopeful of protecting and enforcing their rights. What does one do when more than air has hit the fan?

There are two things to keep in mind when approaching a construction project which involves, in some fashion, either a public building or a public work.

2. First of all, generally speaking, the law applicable to public contracts is the same as that applicable to private contracts.

Cited authority for this proposition includes School Committee of Boston vs. Board of Education, 363 Mass. 20 (1973).

At the same time, there are numerous things which separate public construction projects from private construction projects, including, without limitation, some of the various statutes which we are going to discuss later in this article which bear on differing site conditions, changes and delays. There are also numerous regulations which bear on public construction. Also, procurement is highly-regulated with issues such as prequalification and debarment, which are absent in a formal sense in private construction. Moreover, there are certain payment facilities applicable to public work not applicable to private work. For example, there is a statutorily-prescribed payment bond which all general contractors on all but the smallest of Massachusetts public projects must have. Similarly, there are mechanisms for some subcontractors to be paid directly by awarding authorities on private projects.

In the case of Glynn v. Gloucester, 9 Mass. App. Ct. 454, 460-462 (1980), the Appeals Court provides a kind of handy summary of some of the things to keep in mind when one gets involved with a contract modification for public work:

"On a public construction contract, if actions or requirements of the public agency necessitate changes in the work as it progresses, thereby causing the contractor to perform extra work or incur added expense, or if the contractor encounters materially different conditions from those predicted by the plans, specifications, preliminary borings and estimates, the contractor must follow the procedures spelled out in the contract and in the Blue Book, if incorporated in the contract, to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or *quantum meruit* theories. (Cases cited) . . . The public authority is expected to address the contractor's legitimate problems in good faith in an effort to formulate an adjustment of the price which will equitably compensate the contractor for bona fide extras. Generally, a failure by the contractor to invoke its remedies under the agreement and Blue Book will preclude all relief (cases cited) . . . unless the contractor can demonstrate that the particular claim falls outside the contract, and because of the agency's conduct, constitutes a true breach (case cited). If any claim arises from the contractor's willful and substantial deviation from the plans and specifications, there can be no recovery without a showing of compliance with the requirements of G.L. c. 30, s. 391 (cases cited). This statute establishes a clear legislative policy that "those who engage in public contracts . . . [must] act in strict accord with their undertakings. . . " (case cited). To the degree, however, that the claim does not arise from such a willful and substantial deviation, the contractor may recover if he can show that the public agency has waived or excused compliance with the terms of the contract (cases cited). If the claims are found to involve changes in or additions to the work under the contract, inquiry must also be made whether the appropriation requirements of G.L. c. 44, s. 31 have been complied with (cases cited).

Moreover, if the contractor argues (as it does here) that the agency waived compliance with the contract's provisions, it is incumbent on it to show not only that G.L. c. 30, s. 391 is inapplicable, but also that there was clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the agreement (cases cited) . . . ."

One of the biggest problems with changes is that one or both parties act in derogation of provisions of the contract which say that only changes which have been executed in writing before the work is performed will be honored and recognized.

3. What happens when "everything is oral"?

Fortunately, there is *some* common sense - believe it or not - in the law.

In the case of M.L. Shalloo, Inc. v. Ricciardi & Sons Construction, Inc., 348 Mass. 682 (1965), one of the issues involved was what would be the result when there was a provision in the plaintiff's subcontract that: "no extra work . . . under this contract will be recognized or paid for, unless agreed to in writing before the work is done . . . . "

The Supreme Judicial Court commented on the fact that either the general contractor (the defendant) or the owner's architect directed the plaintiff subcontractor to do each of the first four items of extra work and that the general contractor know of such extra work. As stated by the Supreme Judicial Court of page 685 of the decision:

"Paragraph Fifth of the subcontract "obviously could not prevent oral contracts for extra work, for the parties had power to waive or alter that provision orally at any time."

The Appeals Court essentially held the same thing nine years later in the case of General Electric Company v. Brady Electrical Co., Inc., 2 Mass. App. Ct. 522 (1974).

As stated by the Appeals Court:

"The trial judge found that on three occasions Brady performed extra work on oral orders from Rugo and credited Brady in the amount of $3,439.28 by reason thereof. Rugo and Maryland do not question the amount of this credit, but rather contest it on the ground that the contract between Rugo and the Authority, as incorporated by reference in Brady's subcontract, permitted payment for extra work only when authorized by written change order. Their argument overlooks the fact that such formalities may be waived (cases cited) . . . The judge found that Rugo did waive the requirement that extra work be the subject of a written order in these instances, and that finding is not contested in this appeal."

The same result obtained some eight years later in the Appeals Court case of Worcester Air Conditioning Co., Inc. vs. Commercial Union Insurance Company, 14 Mass. App. Ct. 352 (1982). This was an action by a plaintiff sub-subcontractor against a general contractor's statutory payment bond. The defendant in this case was the general contractor's payment bond surety. The dealings between the plaintiff sub-subcontractor and its contracting party, a subcontractor, were often oral; although there was one written change order, there were two oral change orders. The judge trying the case found that it was the practice of the subcontractor and the plaintiff sub-subcontractor to proceed on extra work requests "without the benefit of a written change order where things had to be done in a hurry."

As stated by the Appeals Court on page 357 of the decision;

"Finally, the defendant contends that the performance of extra work at the request of the subcontractor was not within the protective scope of the payment bond because contract documents required that change orders be in writing. However, as between the parties to the sub-subcontract, such a provision "obviously could not prevent oral contracts for extra work, for the parties had power to waive or alter that provision orally at any time. (authorities cited) The judge's finding that it was the practice of the

subcontractor and plaintiff to proceed without a written change order where something had to be done quickly justifies the conclusion that they impliedly waived the requirement of a written change order. The surety's argument that there was no finding that the contractor and the owner varied the requirement does not affect the surety's liability on the bond to the plaintiff . . . . "

These helpful cases notwithstanding, please follow in sequential order cardinal rule numbers 1, 2 and 3 set forth above! If it were me? I'd keep on number 4, as well.

I have included some cases to show that a failure to comply with a written change order procedure can be fatal in certain circumstances. But also later in this article, I have summarized eight potential strategies that will work in some situations when compliance with the contract provisions is less than complete.

For instance, in the case of Chiappisi v. Granger Contracting Co., Inc., 352 Mass. 174 (1967), the plaintiff brought an action against the defendant general contractor and against the general contractor's surety.

It became clear fairly quickly that the plaintiff would need to provide more materials than had been estimated due to an arguable error in the drawings. The plaintiff's principal went to the school in question and told Granger's job superintendent that as to the additional materials "this is an extra." The superintendent - a wise and sagacious individual - told the plaintiff that this would have to be taken up with "the office." The plaintiff subcontractor put more material on the project and after the work was done wrote to Granger seeking additional monies. This was the first notice to Granger other than to the job superintendent that the plaintiff intended to make a claim for the extras.

Under Article 16 of the general conditions, written notice must be given to the architect "within a reasonable time" after receipt of "instructions by drawing or otherwise" concerning work claimed to constitute extra work. The Supreme Judicial Court held on page 178 that: "There was no emergency requiring Chiappisi to proceed at once without giving written notice. Because Chiappisi proceeded without such notice and postponed until after the work was completed all written mention of any claim for extra work, there can be no recovery."

Perhaps a telling part of the Court's decision was that if notice had been given by the plaintiff subcontractor, Granger might have taken steps to protect itself by seeking an extra in its own right, which opportunity apparently was lost to Granger.

Therefore, a word of warning to the subcontractors reading these words. In situations where there is an error in the drawings and/or additional materials or labor or both are required not due to the fault of the subcontractor, in many circumstances a general contractor would like to see the subcontractor get a change order, as the general contractor will be entitled to the markup. In the *Chiappisi* case, I am making the inference that at least part of the rationale for denying recovery to the subcontractor was that by the subcontractor's failure to comply with the changes requirements, this effectively precluded the general contractor itself from seeking an extra to the general contract, which would not only have provided the general contractor a markup, but which would have indemnified the general contractor for an error in the drawings which was not the general contractor's responsibility, but which could be a legal liability to the general contractor under the public payment bonds statute. In other words, by

giving late notice, the general contractor was prejudiced and because this was caused by the subcontractor's acts of omission, the subcontractor loses.

A similar result obtained in a case where a general contractor brought a claim against the Commonwealth of Massachusetts in the case of D. Federico Co., Inc. v. Commonwealth, Mass. App. Ct. 248 (1981).

In this case, the Commonwealth's designer substantially underestimated the amount of excavation and replacement fill that would be required to lay a proper base for roads to be constructed within this project. The contract documents seem to preclude any warranty as to quantities required by saying, *inter alia* that: "estimated quantities shown for unit price items . . . are not guaranteed."

The Court pointed out that Massachusetts cases have recognized the possibility of an implied warranty of estimates in some possible circumstances but not where the contract terms specifically precluded a warranty of or reliance on furnished estimates.

The Appeals Court affirmed the judgment against the plaintiff, stating on pages 252-253:

"There is a further reason that the plaintiff may not recover. It is a general rule in public construction contracts that, "if the contractor encounters materially different conditions from those predicted by the plans, specifications, preliminary borings and estimates, the contractor must follow the procedures spelled out in the contract . . . to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or quantum meruit theories." (Case cited) The present contract is not an exception. No timely claim for extra compensation was made, and the master found that there was no justification for the failure. In these circumstances any right the plaintiff may have had to extra compensation was not perfected, and the subsequent claim was barred. (Cases cited) The master's finding that unspecified "representatives of the commonwealth agreed that 'additional compensation would be agreed to where necessary'" fell short of finding a clear, decisive and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the [extra compensation provisions of the] agreement" (case cited). Moreover, the contract provided that "no oral . . . conversations with any officer, agent or employee of the Commonwealth . . . before or after the execution of the contract shall effect [sic] or modify any of the terms or conditions of the contract. . . ."

Article 16 of the contract in question requires a contractor if he planned on making any claim for compensation for a change not ordered or for any damages sustained to submit on or before the first working day to the architect, the clerk of the works and the owner a written statement of the nature of such work or damage sustained: any work performed prior to the time specified above will not be considered in warranting compensation. The master found that no claim for extra compensation was submitted.

It appears in the *Federico* case that the contract, as a whole, was not a unit price contract, although there were unit prices for excavation and for borrow. A contractor's burden would appear to be lighter in the case of a pure unit price contract.

In the case of J. D'Amico, Inc. v. Town of Saugus, 9 Mass. App. Ct. 809 (1980), the parties had a unit

price contract with estimated approximate quantities with a provision that the defendant town reserved the right to increase or decrease the amount of any item of work as might be desirable or necessary. The master found that the actual quantity used was determined by the field conditions found to be desirable or necessary during the carrying out of the construction work. As stated by the Appeals Court on page 880 of the decision, "In these circumstances written change orders were neither contemplated nor required to authorize the use of materials in quantities greater than those amounts initially estimated for the construction of the facility; provision for such additional quantities and the unit price to be paid for them was incorporated in the work plan by the contract documents."

Important to the Appeal Court's holding in the *D'Amico* case is the finding that the item increases were not deviations from the contract specifications but were consistent with them.

Other than performing oral change order work and not giving the appropriate notices, another key issue in this area is who has authority to authorize extra work.

The following comments are within the context of a public work project, but the philosophy applies equally to a private construction project: be very sure that the person authorizing extra work in the field is recognized/will be recognized by his office as having the authority to direct a subcontractor (when you are dealing with a general contractor) or the general (when you are the general contractor). Remember, that the *Glynn* decision referenced above requires a waiver of compliance with the contract's provision with: "clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency." There is at least one Massachusetts case holding that a general contractor's job super does not have inherent authority to order extra work unless the contract in question specifically provides for this.

4. What is a waiver?

In Data Concepts International, Inc. v. Continental Insurance Company, (United States Bankruptcy Court, District of Massachusetts) 73 B.R. 406, 413 (1987) the Court said concerning waiver:

"A waiver is the unconditional relinquishment of a known right. In re Idak Corp., 19 B.R. 765, 770 n. 7 (Bankr.D.Mass.1982) Niagara Fire Insurance Co. v. Lowell Trucking Corp., 316 Mass. 652, 657, 56 N.E.2d 28 (1964). The determination of whether a waiver has taken place involves resolution of factual questions. Mayer v. Boston Metropolitan Airport, Inc., 355 Mass. 344, 353, 244 N.E.2d 568 (1969)."

For example, in the case of Lawrence-Lynch Corp. v. Department of Environmental Management, 17 Mass. App. Ct. 901 (1983), the Appeals Court affirmed a judgment for the plaintiff general contractor. The engineer for the project orally authorized the plaintiff to obtain necessary fill from a site approximately 600 yards from the area specified in the contract, which contract provided in several places that approval for extra work must be obtained from the defendant in writing. Discussing the issue of authorization, the Court said that where the contract gave the architect the right to decide "all questions which may arise as to the interpretation of the plans and specifications and as to the fulfillment of the contract on the part of the contractor" and where the contract also stated that the word 'architect' is used as synonymous with the word 'engineer', and where Lang was designated by the defendant as the project engineer under the contract, he had authority to waive that provision of the contract which stated that authority for extra work must be in writing.

Apart from issues pertaining to the 'common law' issues discussed above, there are certain statutes to be aware of relative to change orders for public work.

One of the principal such statutes is Chapter 30, section 39I of the General Laws.

That statutory section provides as follows as might apply to change orders:

"Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to, any public building or public works for the commonwealth, or of any political subdivision thereof, shall perform all the work required by such contract in conformity with the plans and specifications contained therein**. No wilful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations**. In order to avoid delays in the prosecution of the work required by such contract such deviation from the plans or specifications may be authorized by a written order of the awarding authority or such engineer or architect so authorized to approve such deviation. Within thirty days thereafter, such written order shall be confirmed by a certificate of the awarding authority stating: (1) If such deviation involves any substitution or elimination of materials, fixtures or equipment, the reasons why such materials, fixtures or equipment were included in the first instance and the reasons for substitution or elimination, and, if the deviation is of any other nature, the reasons for such deviation, giving justification therefor; (2) that the specified deviation does not materially injure the project as a whole; (3) that either the work substituted for the work specified is of the same cost and quality, or that an equitable adjustment has been agreed upon between the contracting agency and the contractor and the amount in dollars of said adjustment; and (4) that the deviation is in the best interest of the contracting authority. . . " (Emphasis added)

There are also extensive requirements under projects having to deal with 'capital facility projects'.

From a legal standpoint, it is hard to visualize a situation where a subcontractor should perform changed work of any significance without having, at minimum, written direction from the general contractor to do so. If there is no written direction to do what the subcontractor considers as extra work, there might be a difference of opinion at some later point in the job between the general and the sub as to whether or not that piece of work was extra work or not. If at all possible, there should be a fundamental agreement on price and any extra conditions involved with performing the changed work - including any necessary extension of time to complete the subcontract work, including the change - before the work is actually done.

I recognize, after saying this, that the realities of the construction business are going to dictate in many instances - probably the majority of instances - against having the proper paperwork in place prior to doing the work. In my view, simply having a general contractor's superintendent sign a so-called "extra work order" indicating the names of individuals, times of performance and materials used in performing an alleged extra item of work is not sufficient for these purposes. General contractors may later argue that a superintendent in signing these types of documents is simply acknowledging that labor and materials were performed by a subcontractor on the date indicated and that such signature does not constitute an acknowledgment that the performance of such labor and materials was extra work and/or that the prices added on to the labor and material (whether in the field or, as more usually happens, later

in the office).

What do you do? If it's major money, my best advice is to do what the contract (or general conditions say). But, at least:

5. **Get at least an acknowledgment by the general contractor that the item of work is an extra, which is what a Construction Change Directive under the AIA contracts provides, in part**.

If you are going to begin supplying extra work and materials and you don't have either a change order or some written acknowledgment that this is a changed condition, *for any significant amount of money* don't do the work. Consult with an attorney of your choosing and get some advice. At least get a written direction from your contracting party to do the work (to help resist the defense, down the road, that you either acted as a 'volunteer' or performed the work without question because you accepted the fact that such work was included within your contractual scope of work.) In the AIA documents, there is a concept known as a 'construction change directive'. This can be an acknowledgement that you are being ordered to do a piece of extra work which isn't ready for a change order at this point, primarily because the pricing isn't ready/can't be completed at this time. In any claim on a contract, there are two basic underlying concepts: liability and damage. Liability means that the other side is liable for the claim, which can include an acknowledgement of that liability, such as through a construction change directive. And, damage, of course, is what you are entitled to. Usually, proving liability is the more complicated part of this and having an acknowledgement of liability before you commence performing the work gets you half-way there.

6. When all else fails, at least do the following.

If, for whatever reason, you feel you have to do the item of work and you have neither a change order or a written directive to do the work, then at least send a fax letter or email to the general (or owner) **prior to doing the work stating**: (a) that you are doing the item of work under protest and with full reservation of your rights to seek an equitable adjustment; (b) that the item of work is an extra having a value of approximately (whatever it might be); (c) that you will be performing the item of work in the next several days on this basis unless you are directed in writing not to. Give your contracting party enough time to receive and process this letter. Make sure your fax machine is one that prints a report using the first page of the document, as do many of the HP machines. As a practical matter, today, most folks either don't use fax machines or don't remember how to use theirs, since nearly everything today is done by email.

7. The three most important kinds of documents in this type of litigation are notice letters, dated pictures and videos and detailed daily reports.

Ironically, the *better* your paperwork is, the less likely that you will actually have to put it to the (complete) test of an entire trial. That bears some truth, generally, with regard to contract litigation in court. Less so in arbitration where it seems to us, by our subjective experience, that more cases get tried than don't because no one can ever predict how any arbitrator will decide any matter and cases go to

hearing more quickly.

8. If, for some reason, it is not possible to follow one or more of these cardinal rules, try to establish facts which would justify a court finding waiver of any contractual provision requiring advance written authorization.

Try to avoid dealing exclusively with oral change orders. If the other party requests the work orally, confirm it in writing. Also, if at all possible, ascertain in advance of performing the extra work the authority to speak for your contracting party of that individual directing you to perform the work. In other words, dealing with project managers is better than dealing with job superintendents. Dealing with principals is best. Try to create evidence of 'waiver', meaning that either for the purposes of this change order or for other issues in the job, the parties didn't follow closely the contract documents. Remember that these rules are relaxed significantly when dealing with emergency situations.

Also, if you are a subcontractor, make sure you know what the general contractor's change and disputes clauses say and provide for. More likely than not, they are 'incorporated by reference' into your subcontract as a matter of contract or, when dealing with public construction, as a matter of law. As a *practical* matter for subcontractors, since general contractors don't usual warrant to subcontractors the sufficiency of the plans and specifications, complying with the general's requirements is as important - maybe, *more* important - as complying with those provisions in the subcontract because of the fact that one way or another, the money will be coming from the owner to fund the change.

Lastly, neither the architect nor the general contractor - nor his super - is either your friend or is *supposed* to be your friend. You are a contractor and the root word of this word is 'contract'. Do what the contract says. *Don't* leave the paperwork until the end because there is no reason to, you put yourself in a position of jeopardy when someone else's recollection gets 'vague' and there are some general contractors who might just make sure "Mr. Nice" is replaced ninety to ninety-five percent of the way through the job with "Mr. Pit Bull", who neither knows nor cares about the 'oral deals'.

9. Other Strategies for Handling Change Order Claims Where The Notice Given (Or Not Given) Doesn't Meet Contractual Requirements.

The following are some strategies from another paper I have written on this subject. There might be a bit of repetition but some of the material is new and this gives a good summary of what strategies might be available under these circumstances.

Recognizing that no contractor is perfect, however, here are some ideas:

1. Try to prove that giving notice would be (would have been) futile.

A failure to comply with notice provisions is not fatal when giving the notice would only be an empty exercise. In other words, if you can convince a court that even if you had given some notice the result

wouldn't have been any different, then your failure to not give notice in any particular case may be excused. So held the Appeals Court in the case of D. Federico Company, Inc. v. New Bedford Redevelopment Authority, 9 Mass. App. Ct. 141 (1980). As stated by the Court on pages 143-144 of the decision:

"Thus, the dispute concerning payment of line item 36 did not mature until the job was finished, and the NBRA had made it abundantly clear that it was going to resist paying for traffic protection and maintenance. . . . At that point, it was an exercise in futility by the plaintiff to file notice of a dispute with the NBRA. "Although performance of a particular act by one party is contractually specified to be precedent to the arising of any obligation in another, the prior act need not be performed where it would be a hollow gesture sure to be disregarded by the other party." *Trustees of Boston & Maine Corp. v. Massachusetts Bay Transp. Authy.*, 367 Mass. 57, 61-62, 323 N.E. 2d 870, 873 n.3 (1975) and cases cited. See by analogy *Pupecki v. James Madison Corp.,* 382 N.E.2d 1030 (1978), which states the familiar rule that although, in order to maintain a derivative suit, a shareholder must make a demand on the directors that they cause the corporation to file the action, the requirement does not apply if it appears that demand would be futile."

This case was cited with approval or recognition of this principle in Sutton Corporation v. Metropolitan District Commission, 38 Mass.App.Ct. 764, 652 N.E.2d 627 (1995).

In the case of Cheschi v. Boston Edison Company, 39 Mass. App. Ct. 133, 142, 654 N.E.2d 48 (1995), the Appeals Court considered the issue of whether or not the failure to give notice as a condition precedent can be excused:

" "A condition precedent defines an event which must occur before a contract becomes effective or before an obligation to perform arises under the contract [citations omitted]. If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced. See generally 5 S . Williston, Contracts S 663 (3d ed. 1961 & Supp.1990); Restatement (Second) of Contracts S 225 (1981)." Id. at 45, 577 N.E.2d 283.. . **.** A party may be excused from complying with a condition precedent if it has proven that performance of the condition would be futile: "The law does not require useless acts." Fortune v. National Cash Register Co., 373 Mass. 96, 107-108, 364 N.E.2d 1251 (1977), and cases cited. See also D. Federico Co. v. New Bedford Redev. Authy., 9 Mass.App.Ct. 141, 143-144, 399 N.E.2d 1103 (1980)." (Emphasis added)

Fortune, supra, on page 107 cites a wide variety of cases supporting this provision: "See Leigh v. Rule, 331 Mass. 664, 668, 121 N.E.2d 854 (1954); Nevins v. Ward, 320 Mass. 70, 73, 67 N.E.2d 673 (1946); Schayer v. Commonwealth Loan Co., 163 Mass. 322, 324, 39 N.E. 1110 (1895); Restatement of Contracts s 306 Comment a (1932); 5 S. Williston, Contracts ss 676, 699 (3d ed. 1961). A refusal to pay a sum due under a contract excuses performance of a condition requiring notice. Jackson & Co. v. Great Am. Indem. Co., 282 Mass. 337, 342, 185 N.E. 359 (1933) (proof of loss to insurance company). United States v. Conti, 64 F.Supp. 187 (D.Mass.), aff'd 158 F.2d 581 (1st Cir. 1946) (notice of contract termination). Where an employer repudiates or nullifies procedures established by the contract, the employee is excused from performance of the conditions imposed on him. Balsavich v. Local 170, International Bhd. of Teamsters, --- Mass. ---, --- [FNe], 356 N.E.2d 1217 (1976). See Restatement of Contracts s 302 (1932); 3A A. Corbin, Contracts s 759 (1960)."

2. Try to prove that your contracting party waived the change order notice requirements.

A claim for a changed condition might be possible when the notice provision has not been complied with when there is demonstrable ***waiver*** of that provision or of the contract provisions dealing with changed work or other notice provisions by someone authorized to waive that provision (i.e. a project manager rather than a superintendent). "Waiver" is defined as the 'intentional relinquishment of a known legal right'. Thus, for example, if you could demonstrate a ***course of dealing*** or ***custom*** or***usage*** for a particular job to be that various prior change order work was done with no paperwork which was subsequently recognized and paid for without complying with the 'changes' clause, this might justify a contractor in not providing prior notice and submitting appropriate paperwork for later change order requests of a similar nature. A big problem in this situation is that waiver will not ordinarily be found unless it can be attributed to one in a position of authority. For example, there is some case law in Massachusetts to suggest that a superintendent for a general contractor does not have inherent authority to even order change order work. Thus, the person who 'waives' the compliance had better be someone with contractual significance: an architect, a project manager, a corporate officer.

3. Try to get (at least) a Construction Change Directive before performing the work.

A Construction Change Directive is a change order mechanism, largely found in the AIA documents, which allows there to be an issuance of a direction to perform work with an acknowledgment that this is a changed condition but without an advance agreement as to the price. Typically, this will issue under the following conditions: (a) the plans and specifications have changed, perhaps dramatically, and with the press of time constraints, there is insufficient time to price the work, particularly where the changes are being designed as the project proceeds and it is not clearly understood at the go-in exactly what units of labor and material are likely to be required; (b) there is no dispute that there is a 'changed condition' but the owner or general contractor is unwilling or unable or both to take the time and price it.

The advantage of getting this is, at least, you have an acknowledgment on the part of your contracting party that there is or has been a changed condition. In trying to prove any civil case, a plaintiff needs to prove that it is entitled to recover (liability) and what the amount of the recoverable damages are (damages). Having a construction change directive is a help in establishing (at least) that there is liability for the changed condition, as opposed to having to deal with the issue down the road that the claimed 'changed work' is nothing other than contractually-required work or is otherwise non-compensable.

War stories on this one, however. One of our best general contractors helped a public authority out with a serious problem. This company had the obligation of building an emergency building and police station addition for a municipality, which required building locker rooms and other usable facilities in the basement. Once construction started, it was discovered that the basement would be under water because of a high water table. By various letters between the parties - and by the issuance of a construction change directive - it was agreed to take this space out of the basement and install these rooms in the attic, which was going to be for future expansion only. Of course, when the architect drew the attic, he changed the slope of the roof, added dormers, expensive windows - you know the tune. The contractor went ahead and did this work - which had a fair market value of

somewhere between forty-five and ninety thousand dollars - only to have the owner contend once the job was successfully concluded that because of the deletion of the work in the basement - which would have to be given as a credit to the owner - the value of the new work was only three thousand dollars. An arbitrator saw this the contractor's way but only after several expensive days of trial and legal proceedings.

4. Try to obtain some other acknowledgment that the work in question is a changed condition.

This is only common sense. If we cannot get an agreement on both liability and damages - which would be reflected by a change order, in the ordinary course - at least get *something* in writing. Even a letter from your contracting party acknowledging that the condition in question is not contractual work but change order work is better - sometimes a *lot* better - than nothing. Statements by a party to a case are deemed as 'admissions' later on in litigation between the parties, which is tantamount to proving the point in court.

5. If you have been ordered to do extra or change order work orally – and you can't get any change order or other paper – send a fax or email to your contracting party before doing the work.

Remember, that the dance between the subcontractor and the general contractor – and the one between the general contractor and owner – is an eternal, highly-scripted dance. Namely, the party who gives you the contract which says that you can't do change order work without a signed change order before doing the work will also be the party who will try to get you to do the change order work without having anything in writing and then throw this in your face at the appropriate time, which would be – from their perspective - after the work is done and you then discover you've got *bupkes* for paperwork.

An example. You are ordered to put an extra few windows in a building by the superintendent for the general. Nothing in writing. Before doing the work, send the project manager a letter to the following effect: that you have been directed by the superintendent to do the work; that it is extra work; and, that you will bill for the windows at the contract rate - or at a fair and reasonable price - and that you will proceed with the work in three days unless you tell me not to do so in writing. The law requires parties in certain circumstances to take action or to suffer the consequences of remaining silent. *If* you send such a letter by fax (or email) - make sure that you have one of those machines which prints a transmittal report on the first page of the fax, like many of the HP machines - and give the project manager a *reasonable* time to respond to this, you have *something* down the road in the nature of an implicit authorization to do the work under the specified circumstances. Note: give your recipient a reasonable amount of time within which to receive and respond to your letter. Sending such a fax on the morning you start the work is not likely to do you much good, as a court wouldn't consider this as having been 'reasonable' in that it didn't afford the other side a reasonable amount of time within which to object or respond. Today, most folks use emails. Faxes are, like *so twentieth century!*

6. If you are ordered to do some work which you don't consider to be contract work, send them a letter back that this is being done 'under protest' and that you reserve

your rights to seek extra compensation for this changed condition.

Again, if you are ordered to do work and don't object to doing so prior to doing the work, an inference can and may be taken that you didn't object to the work because you realized that it is contract work. Not a good idea, if that is not the case. Remember, when you are dealing with a changed condition, you had better think of the issue of 'notice' within the same sentence (or breath). If you tell someone that you are doing this under protest, the other side will have less ability to claim that: "Gee, we didn't know that you considered that to be an extra. Had we known, we might have been able to work something out." Also, even when you will be doing something under protest, insist on written direction from your contracting party directing you to do this work so that it is clear you are not a volunteer.

7. In certain circumstances, refuse to the changed work without a change order.

Life becomes very 'nail-biting' in these types of circumstances because, under some circumstances, a refusal to do change order work consistent with the scope and amount of your existing contract may constitute a grounds for your termination. Unless you fairly well understand your situation, getting legal advice as to any particular circumstance *prior to its becoming a done deal* may be money well-spent. There are no absolutes in these situations. A lot will depend on the wording of your contract and some may depend on the prior course of dealing between you and your contracting party on this and other contracts. Recognizing that there are no absolutes, there are, at least, a couple of ideas. The greater the percentage is of your contract as is reflected by the proposed change order, the greater the justification is to refuse to do the work without something in writing. Conversely, the smaller the percentage is of the proposed change as compared with the amount of your contract, the less justification there might be for such a refusal.

Example. You have a six hundred thousand dollar plumbing contract to put in one hundred fifty lavatories, which contract is a lump sum contract and not a unit price contract. You are ordered to put in another fifteen lavatories using the same plans and specifications. There might be less justification – probably, no justification - in refusing to do the work in these circumstances than you would have if another one hundred bathrooms were attempted to be added. Since contract law envisions minor variations and changes as part of the contract work, adding another fifteen lavatories to your contract work would come within that principle of law. But, not so if another one hundred lavatories were ordered. That could be a 'cardinal change'. Also, since that would almost amount to a new contract, the work is so dissimilar to what might be reasonably expected as a change to justify refusing to do it without having the change order in writing first, which could involve an overall revision of the contract pricing information for all of the units, not just the added units.

8. Parenthetically, there is some law pertaining to pure unit price contracts that an ordering of increased units may not require an actual change order where the contract contemplates some variation in quantities.

What should be kept in mind, however, with regard to this is that if there is going to be a *major* increase in units, which the other side may not be aware of, this should be treated like any other changed condition situation and notice should be provided. Such a situation might occur where there is a gross increase in the percentage of units requiring extensive cleaning prior to re-coating, which the other side

may not be aware of.

IN SUMMARY ON THIS SUBJECT, these eight strategies are not alternatives to following what the contract calls for. There are no alternatives to following anything other than what the contract requires. The above suggestions might work in certain circumstances but should never be considered as replacing whatever notice provisions and other change order provisions are contained in the contract.

II. MASSACHUSETTS LAW APPLICABLE TO DIFFERING SITE CONDITIONS

Initially, where we are concerned today with public work, there is a statutory provision which is applicable to public jobs involving either public buildings or public works. This is Chapter 30, section 39N of the General Laws, which provides in pertinent part as follows:

"Every contract subject to section forty-four A of chapter one hundred and forty-nine or subject to section thirty-nine M of chapter thirty shall contain the following paragraph in its entirety and an awarding authority may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims:

If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly."

An important thing to note in looking at section 39N is that a request for an equitable adjustment based on a differing site condition shall be delivered " as soon as possible after such conditions are discovered."

This is a fairly recent statute, added to the General Laws in 1972. (The law has funny ideas about time: the former Suffolk Superior Court Building was always referred to as the "New Court House" because it was built recently: in 1938!)

The case of Skopek Bros., Inc. v. Webster Housing Authority, 11 Mass. App. Ct. 947 (1981) considered the import of this statute within the context of that case.

The plaintiff encountered a differing site condition as early as January of 1974. However, the only writing seeking additional compensation was submitted in May of 1975, some sixteen months after the plaintiff encountered the condition.

It is important to note, much as in our discussion of changes, the court made an effort to see whether or not there was any finding by the master which would demonstrate that the defendant waived or excused compliance with a "written request' requirement as contained in Chapter 30, s. 39N. There was no such finding. Therefore, there could be no recovery by the plaintiff for having failed to comply with this statute. Indeed, the Appeals Court pointed out that the purpose of this statute is so there could be: "resolution of disputes such as the present by the architect (with the approval of the Department of Community Affairs) rather than by a court."

Still, under the case law, a differing site condition claim is not exactly the same thing as a claim for changed conditions. That is because, among other things, a claim for a differing site condition is not necessarily the same thing as a claim for extra work, as pointed out by the next case.

In Sutton Corporation v. Metropolitan District Commission, 667 N.E.2d 838, 423 Mass. 200, 207 (1996) the Supreme Judicial Court of Massachusetts considered what a contractor's obligations are for notice on public work for a differing site condition. As stated by the Court:

"The master's subsidiary findings support the conclusion that subsurface conditions at the construction site differed substantially from those "ordinarily encountered and generally recognized as inherent" in the installation of sand drains by the methods specified in the contract. G.L. c. 30, § 39N. The difference in the conditions caused "a change in the construction methods required for the performance of the work which result[ed] in an increase ... in the cost of the work," see id., a conclusion also supported by the master's findings.

The Appeals Court concluded that Sutton forfeited its claim for an equitable adjustment by failing to follow the procedures for an extra work claim under Article XVIII of the contract. We disagree. Section 39N mandates that its provisions be included in public works construction contracts. It provides a specific procedure and remedy for the contractor encountering differing subsurface or latent physical conditions. Article XVIII, on the other hand, applies to "extra work," rather than work required by the contract. The unexpected soil condition encountered by Sutton required it to modify its construction methods and incur significant additional expense in order to complete the contractually required work. Such modifications and additional expense do not constitute "extra work" within the meaning of Article XVIII. Cf. Lawrence-Lynch Corp. v. Department of Envtl. Management, 392 Mass. 681, 682-683, 467 N.E.2d 838 (1984). (FN14)

The cases cited by the MDC are not to the contrary. It is true that contractors seeking to recover payment in excess of the contract price must follow the procedures set out in the contract. See Lawrence-Lynch Corp. v. Department of Envtl. Management, supra at 684-685, 686, 467 N.E.2d 838; State Line Contractors, Inc. v. Commonwealth, 356 Mass. 306, 317-319, 249 N.E.2d 619 (1969); Marinucci Bros. & Co. v. Commonwealth, 354 Mass. 141, 144-145, 235 N.E.2d 783 (1968); Chiappisi

v. Granger Contracting Co., 352 Mass. 174, 177-178, 223 N.E.2d 924 (1967); Lewis v. Commonwealth, 332 Mass. 4, 5-7, 122 N.E.2d 888 (1954); Glynn II, supra at 394-395, 487 N.E.2d 230; Skopek Bros. v. Webster Hous. Auth., 11 Mass.App.Ct. 947, 416 N.E.2d 1006 (1981); D. Federico Co. v. Commonwealth, 11 Mass.App.Ct. 248, 252-253, 415 N.E.2d 855 (1981). In those cases, recovery was denied when the contractor failed to give timely notice of its claim to the public agency. Without such notice, the contracting authority was unable to monitor the additional expenses incurred by the contractor. Here, on the contrary, Sutton met the procedural requirements for a claim under § 39N: it provided timely written notice of its claim to the MDC. As the master found, the MDC was aware throughout the project of Sutton's additional expense. Furthermore, there was no evidence or finding that the MDC was prejudiced in any way by the lack of an itemized statement of damages. Therefore, we conclude that the MDC's refusal to pay Sutton's additional sand drain installation expenses was improper." (Emphasis added)

Apart from Chapter 30, s. 39N of the General Laws, essentially a differing site condition relative to private work should be handled much as any other change order/equitable adjustment matter should be handled: attention should be given - preferably, before any extra work commences - to the changes and disputes clauses as well as any particular differing site conditions clause of the general contract; these clauses should be complied with to the letter. With differing site conditions – particularly with regard to most site conditions – it is critical that the other side be given an opportunity to both measure and photograph before conditions are physically changed.

As is discussed earlier in this article relative to changes seeking equitable adjustments, in some instances, changes, including differing site conditions, can be preserved even with an absence of strict compliance with these conditions. Whether or not one will have a compensable differing site condition on a private job - assuming entitlement from a factual standpoint - will depend on a number of factors, including: whether or not the contracting party waived strict compliance with formal procedures, whether by course of conduct otherwise applicable to the job or in an effort to get the differing site condition corrected; and, whether or not any person orally authorizing and/or implicitly or explicitly waiving more formal contractual requirements has the appropriate authority to do so. Keep in mind that the higher up the food chain you go in terms of waiver - meaning, dealing with people higher up in the company or organization - the better off you are.

10. Whether or not the differing site condition is on a public project or not, here are the key ideas:

· (1) Give **notice** of the differing site condition prior to disturbing what is there.

· (2) Give your contracting party - and the Owner, if you are a subcontractor - an opportunity to **measure** (especially important with horizontal construction, dirt, peat, unsuitable materials and ledge). Indeed, not being given a party in interest the opportunity to measure prior to disturbing the conditions as found is one of the two key judicial justifications of denying these claims when insufficient or no notice has been given. (The other ground is a judicial assumption that if the party in interest had been notified of the differing site condition prior to the disturbing of conditions as found, perhaps the work could have been changed in some other way to make its correction less expensive: even to the point of abandoning or redesigning the work.)

· (3) Find some way to **make a record** both of what you found and how this was corrected. Invariably, this is going to involve pictures and possibly videos. If you are dealing with an expensive extra brought about by a differing site condition that will be hard to measure or identify when the job is over - because the physical area has changed or is covered up - consider getting a **third party** to measure and monitor quantities and conditions. This might be, in certain cases, an engineer, architect or other specialist. The fact that this person is a third party - not directly profiting from the change, other than being paid a fee to perform a service - will likely help you in further negotiations and litigation.

III MASSACHUSETTS LAW APPLICABLE TO DELAYS

The purpose of this section will be to talk, generally, about compensation issues involving various aspects of delays. Suggestions concerning the preparation of such claims will be found elsewhere.

Preliminarily, there is only minimal recent (modern) case authority to say that "time is of the essence" in construction contracts only when the contract so provides.

As stated in the case of Resnic v. Toleas, 56 Mass. App. Dec. 54, 60-61 (1975):

". . . Unless expressly stipulated, time is normally not of the essence in building or other contracts. 6 Williston S846, 849. Here, there was a time stipulated for the completion of the painting but there was nothing indicating that this was essential to the contract. We are of the opinion therefore, because of his general finding and logical inferences that may be drawn therefrom, that by implication the trial justice found that time was not of the essence."

The cited case does not reflect modern trends. (It's from an inferior appellate court from which often there are unusual decisions.) As a practical matter, as we all know, "time is money and money is time." It will be a rare construction contract that does not contain the words "time is of the essence."

The words "time is of the essence" are frequently tied into the provision for liquidated damages. If you find this phrase in your contract or general conditions, more likely than not, you will find a provision somewhere else in the contract that says there are liquidated damages.

11. When are liquidated damages (which are damages agreed up-front as to the consequences of a party's delay) enforceable?

This issue is discussed in the case of A-Z Servicenter, Inc. v. Harry Segall, Trustee, 334 Mass. 672, 675 (1956) by the Supreme Judicial Court:

"Whether a provision of a contract for the payment of a sum upon a breach is rendered unenforceable by reason of its being a penalty depends upon the circumstances of each case. (Cases cited) Where actual damages are difficult to ascertain and where the sum agreed upon by the parties at the time of the execution of the contract represents a reasonable estimate of the actual damages, such a contract will be enforced. (Cases cited) But where the actual damages are easily ascertainable and the stipulated sum is unreasonably and grossly disproportionate to the real damages from a breach, or is unconscionably excessive, the court will award the aggrieved party no more than his actual damages. (Cases cited) The

words "liquidated damages and not as a penalty" in the instant note are not decisive. If from the nature of the transaction and the attending circumstances it appears that the contract is a cloak to hide a sum of money out of proportion to and differing greatly from the actual damages ordinarily arising from a breach, then the sum named as in the case at bar is not a penalty. This is true even if it may be designated in the contract as liquidated damages."

A factor which the Supreme Judicial Court takes into consideration as to whether or not a certain sum represented enforceable liquidated damages is whether or not the disputed provision (on liquidated damages) is: " . . . negotiated on an arms-length basis between two substantial business firms." Graves Equipment, Inc. v. M. DeMatteo Construction Co. & another, 397 Mass. 110, 112 (1986). More likely than not, a subcontractor's or a general contractor's bidding on a project is probably tantamount to being an 'arms' length negotiation' because of the fact that if one strongly objects to any particular bid document or general contract provision, one can always *not* bid. Put another way, the law - whatever *that* is - is not big on trying to divine subjective intent of parties in entering into a contract after the smoke has cleared. In the vast majority of circumstances, the contract is going to be enforced as written. To do otherwise would only increase fraud and uncertainty in the interpretation of contracts.

One thing that should be kept in mind is that liquidated damages are an alternative to actual delay damages. If one gets liquidated damages, one will not ordinarily be able to recover actual delay damages.

As to actual damages for delay to be sought by a contractor, one of the important earlier cases discussing this is Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 499-503 (1939). In this particular case, the Supreme Judicial Court discussed some of the issues involved with making a delay claim.

As stated on pages 499-500:

"A party to a contract, who is not precluded by its terms from asserting a claim for damages due to delay in commencing or in completing performance, may recover if he can show that the delay was a breach of some express provision of the contract or of an implied obligation imposed upon the other party to the contract not to interrupt or hinder the progress of the first party."

In the *Hosmer* case, there was a provision in the contract that, essentially, there would be 'no damages for delay' but that the contractor would be entitled to additional time to complete the work. (**ED:** For more on 'no damage for delay' clauses, see elsewhere on this website the article entitled "Understanding and Negotiating Subcontracts".)

As stated by the Supreme Judicial Court on page 502: "Such a provision negatives any pecuniary compensation for delay."

Further, some ideas which might become prophetic in later years (and cases) were discussed by the Court on page 503:

"The petitioner did not introduce any evidence showing the reasons or causes of any of the delays alleged in its petition. The characterization of the action of the Department of Public Works as

negligent, unreasonable or due to indecision is not enough to avoid the pertinent provisions of the contract. The respondent or the officials in charge of the work are not charged with arbitrary, capricious or fraudulent action, nor with acting in bad faith or under such a gross mistake as to be tantamount to fraud."

A more recent case on this issue is the case of Wes-Julian Construction Corporation v. Commonwealth, 351 Mass. 588 (1967).

The contract in question had essentially a "no damage for delay" clause.

The Court stated on page 594:

"In the absence of a specific contract provision to the contrary, the respondent would be bound to refrain from causing delay in the petitioner's commencement or performance of the contract, and the petitioner could recover for breach of contract for such delays."

Later, there was some argument by the contractor that the contractor might be entitled to recover for delay damages even in the presence of a no damages for delay clause in the presence of "arbitrary, capricious or fraudulent actions . . . (or action) in bad faith or under such a gross mistake as to be tantamount to fraud."

The Court stated on pages 596-597:

"Even if we assume that the judge was warranted in finding that the conduct of the respondent was 'arbitrary and capricious,' the petitioner is not entitled under this contract to recover damages for delay caused by the respondent in view of the specific provisions of the contract regarding delay."

In 1990, the Appeals Court "chipped away" at this type of holding. The case in question was the case of Fred J. Findlen v. Winchendon Housing Authority, 28 Mass. App. Ct. 977 (1990).

The construction contract in question had a sweeping provision disclaiming any liability by the owner for job delays. There would be no payment for unavoidable delays, although there would be a time extension.

As stated by the Appeals Court on page 978, ". . . a clause which exculpates the awarding authority from liability for damages arising out of delay is enforceable. (Cases cited) The general rule is subject to an exception if arbitrary and capricious conduct on the part of the awarding authority produces the delay and the authority declines even to extend the time for contract completion."

In this particular case, although the awarding authority did give time extensions, the authority paid some monies on account of delay and the Court found that this constituted a waiver of the "no delay damages" clause. Moreover, by the authority paying delay damages to the contractor, the awarding authority would have an obligation to indemnify the general contractor for monies it had to pay a subcontractor for delay damages in a separate action.

The rationale for this decision was that, as stated on page 978:

"Parties to a written contract may, of course, alter it subsequently, by oral modification, by their joint conduct, or, ideally, by a writing subscribed to by the persons to be bound."

12. A FAILURE TO GIVE A TIME EXTENSION WHEN ONE IS APPROPRIATE CAN EXPOSE THAT PARTY TO DELAY-TIME DAMAGES.

One of the best cases to be familiar with in this area is the case of Farina Brothers Co., Inc. v. Commonwealth, 357 Mass. 131 (1970), a decision of the Supreme Judicial Court. The Supreme Judicial Court confirmed an auditor's (another term for a 'master', which is a lawyer who acts like a judge in hearing certain cases) finding for the contractor for delay damages against the Commonwealth of Massachusetts. Article 68 of the contract provided that there would be no damages for delay but that the contractor would be entitled to a time extension in the event of delay.

In discussing the testimony, the auditor had found that the contractor was repelled and insulted by the chief construction engineer who blatantly informed him that he did not care about what was happening and would do nothing to carry out the obligations of the department.

Also, there was no extension granted, even though the facts warranted a time extension.

As stated by the Supreme Judicial Court on pages 138-139:

"In circumstances such as here appear, however, the Commonwealth in effect has used the delay provisions to whipsaw the contractor. So employed, they cannot absolve the Commonwealth of liability. If, as may be the case, delay is to occur during performance of the contract the collateral provisions relating to appropriate extensions should come promptly into play. In the present instance their application was unconscionably delayed in a manner to deprive the contractor of such protections as the Blue Book afforded to it. Adherence to these standards by both parties is required. The evidence supports the conclusion that agents of the Commonwealth by intentionally obstructing the application of those standards caused damage to the contractor . . . "

On page 140 of the decision, the Court continued in this vein:

"In sum, we hold that the Commonwealth cannot hide behind the specifications of its contract dealing with delay and, in the circumstances of this case, deny recovery to a contractor who has been put upon to the extent here shown. We have dealt not with the question of damages caused by delay itself which was the main subject of the Wes-Julian case. We have dealt rather with damages caused the contractor by failure to grant seasonable extensions for performance made necessary by delay and failure of the Commonwealth to assist the contractor properly in rescheduling work. It remains only to say that the Commonwealth cannot expect unfailing and honest performance by contractors when it administers its contracts as this one appears to have been administered."

Thus, it appears that under particularly egregious circumstances, a court might allow a contractor delay damages even in the presence of a 'no damage for delay' clause when a time extension that should have been granted wasn't. Among other things, one of the key idea is that a 'time extension' is supposed to

be seen as the (very rough) equivalent of 'delay damages'. Thus, where a party is seeking to avoid paying delay damages where there is a no damage for delay clause, not granting an appropriate time extension could open that party up to paying delay-type damages.

13. AS TO PUBLIC WORK, IRRESPECTIVE OF WHETHER OR NOT A CONTRACTOR MIGHT BE ENTITLED TO DELAY DAMAGES BECAUSE OF A POSSIBLE 'NO DAMAGES FOR DELAY CLAUSE', THERE MIGHT BE ALSO A STATUTORY BASIS FOR SUCH A CLAIM.

Notice should be made of Chapter 30, s. 390 of the General Laws. This provision applies to both public buildings and to public work and provides as follows:

"Every contract subject to the provisions of section thirty-nine M of this chapter or subject to section forty-four A of chapter one hundred forty-nine shall contain the following provisions (a) and (b) in their entirety and, in the event a suspension, delay, interruption or failure to act of the awarding authority increases the cost of performance to any subcontractor, that subcontractor shall have the same rights against the general contractor for payment for an increase in the cost of his performance as provisions (a) and (b) give the general contractor against the awarding authority, but nothing in provisions (a) and (b) shall in any way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other.

(a) The awarding authority may order the general contractor **in writing** to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of the awarding authority; provided however, that if there is a suspension, delay or interruption for fifteen days or more or due to a failure of the awarding authority to act within the time specified in this contract, the awarding authority shall make an adjustment in the contract price for any increase in the cost of performance of this contract but shall not include any profit to the general contractor on such increase; and provided further, that the awarding authority shall not make any adjustment in the contract price under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which this contract provides for an equitable adjustment of the contract price under any other contract provisions.

(b) The general contractor must submit the amount of a claim under provision (a) to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of final payment under this contract and, except for costs due to a suspension order, the awarding authority shall not approve any costs in the claim incurred more than twenty days before the general contractor notified the awarding authority in writing of the act or failure to act involved in the claim." (Emphasis added)

Case law interpreting this statute seems fairly insistent that the owner issues something that constitutes a '**written order'** before the remedies of this statute are invoked. Furthermore, the statute provides that

subcontractors shall have the same rights against the general contractor for payment for an increase in the cost of performance as a general contractor has against the awarding authority for suspensions, delays or interruptions but this statutorily-granted right "shall in no way change, modify or alter any other rights which the general contractor or the subcontractor may have against each other." As always, read the subcontract!

A warning for subcontractors: always look to see what the general conditions of the general contract provide as to whether or not damages are recoverable for delay by the general contractor. Again, this type of provision - like most provisions in a subcontract - usually will be 'incorporated by reference' into your subcontract, unless you specifically exclude it in the subcontract. So, you could still be subject to such a clause in the general conditions even where your subcontract is silent on precluding damages for delay.

In the case of B.J. Harland Electrical Co., Inc. v. Granger Brothers, Inc. 24 Mass. App. Ct. 506 (1987), the plaintiff subcontractor brought an action against the defendant general contractor and its surety for what were essentially delay damages.

Under Article 23 of the general conditions of the prime contract, there was a provision that the general contractor would not be entitled to damages on account of any hindrances or delays but would be entitled only to a time extension.

The Appeals Court appears to say that inasmuch as the subcontract incorporates by reference the general conditions of the general contract, Harland's claim for delay is precluded. The Court states on page 514 of the decision that: "The right to recover damages for hindrances or delays is comprehensively provided for by Art. XXIII (and, perhaps Art. XXII, see note 6, supra), subject to the limitations therein contained and agreed to by Harland when it signed the contract. That article is enforceable and binding upon Harland."

As has been discussed at great length in another article on this website - "Understanding and Negotiating Subcontracts" - in very many instances - indeed, in the majority of instances and as to probably the majority of issues - matters which are dealt with in the general conditions of the general contract will be binding and enforceable against the subcontractor, such as has occurred relative to the subcontractor's delay damage claim in the *Harland* case.

14. THERE IS SOME MASSACHUSETTS LEGAL RECOGNITION OF 'EICHLEAY' CLAIMS.

It is interesting to note that the Appeals Court in 1982 has allowed a subcontractor to recover against a general contractor and the general contractor's surety so-called "Eichleay" damages which, as described by the Appeals Court in the case of PDM Plumbing & Heating, Inc. v. Fred J. Findlen, 13 Mass. App. Ct. 950 (1982), is a method which:

". . . utilizes a formula designed to determine office overhead expenses resulting from a breach of contract where such expenses are not capable of precise measurement. The formula attempts to establish a daily overhead expense rate chargeable to a particular contract by allocating total overhead among all contracts based upon the percentage the dollar volume of any one contract bears to the dollar volume of

all contracts over the same period . . . ”

In summary as to delay issues, there are a number of things to keep in mind. Generally speaking, the courts of this Commonwealth have enforced fairly uniformly no damage for delay clauses, providing there is a correlative provision for time extensions in the event of delay. Several cases have hinted that there might be a different result if the behavior of the awarding authority is arbitrary, capricious and/or in bad faith. Indeed, the *Farina* court so-held, but attempted to do so on the artifice that damages were not being awarded on the basis of delay damages but as consequential damages for the failure to provide time extensions. In other words, it appears as if Court “wimped out.” For, this would appear to be a distinction without a difference.

Subcontractors have to be very careful to make sure they understand whether or not there are no damage for delay provisions in the general conditions of the general contractor’s contract, which will most likely be enforceable against the subcontractor. Indeed, if there are such provisions, in certain types of cases where the subcontractor runs a risk of suffering great money damages in the event of a delay, the subcontractor may wish to attempt to negotiate a provision to its subcontract specifically providing that either there can be delay damages under appropriate circumstances and/or that the provision in the general conditions as applicable to the general contract will not be binding on the subcontractor. Candidly, such attempts will almost never be successful. But, if there is not a ‘no damage for delay’ clause in the general contract but there is one in the subcontract there might be a greater chance for success in arguing for an adjustment of the subcontract language to the effect the subcontractor would be entitled to recover delay damages under the same circumstances as the general contractor under the general contract would be entitled to recover against the owner.

Here’s a tantalizing idea, that I cannot quote you a case on presently. I have an experienced general contractor client who argues vigorously that a claim for ‘general conditions’ - trailer, project manager’s time as applicable to job, superintendent, phone, fax, etc. - is not the same thing as a strict ‘delay claim’. Thus, it is not necessarily precluded by a ‘no damage for delay’ clause because of the fact that it is not, strictly speaking, a *delay* claim. There would seem to be some intellectual support to this claim because a ‘delay claim’, strictly speaking, is an “Eichleay” type claim and deals with general and administrative home office expenses: officers’ salaries, rent, secretarial salaries, the copier, vehicles. In other words, a classic delay claim deals with non-job costable expenses whereas a ‘general conditions’ claims deals with expenses which are eminently and properly job-costable. I was able to convince a state agency of this approach for some fairly significant (six figure) dollars.

A final note. I have had two six figure recoveries for delay damages in the presence of ‘no damage for delay’ clauses, one which was negotiated during litigation and one which was negotiated within two or three months of submitting the claim. If you have been delayed to a significant extent, run it by someone who does this type of work to see if there might be some way of getting a recovery.

In one of those cases, a larger law firm spent a couple of years passing memos back and forth among its partners decrying an inability to submit this claim because of this clause. When the client brought the matter to my attention, I gave them this advice: “What harm is there in submitting the claim? By not doing so, you have already lost.” The advice was taken and a good recovery achieved.

Reader beware: only Perry Mason won all of his cases. (Remember, that it usually took him to the last

commercial to do so! Also, it's been rumored that these days, he is sort of dead, which can seriously interfere with a lawyer's ability to attend court! And, by and large, those shows were in black and white, a heresy as regards modern televisions!) And, it takes a magician to pull a rabbit out of a hat. Casual compliance or non-compliance with contractual provisions concerning these subjects in most cases will shape and limit and often preclude subsequent claims down the road. Therefore, you should assume in any given situation that contractual non-compliance will preclude many, if not most, of the claims discussed in this paper, although we have provided some strategies that may work in certain circumstances.

CONCLUSION

I hope that this article has given you some ideas and some strategies to follow relative to differing site conditions, changes and delays. Much as our mothers used to tell us – if they didn't, they *should* have - it is easier to avoid becoming covered by mud by knowing where the mud-hole is and trying to step around it. As we all know, however, this is not always possible and often in the construction contract dispute arena, much as in life, we have to try to clean up a mess - and not with the best tools - as to a problem which should not have been caused in the first place or which was made worse by mistake, ignorance, neglect or inattention.

Final last words. A favorite story of mine involves a World War II story in which a destroyer captain used to submit lengthy after action reports to his superiors. Criticized for doing the same, the next report read: "Saw sub, sank same." Truth can often be found in few words. And, much as many try to criticize lawyers for being excessively verbose, truly excellent legal writing is often simple and straight to the point. (That's why one of the latest issues of ***Scribbles*** was over one hundred pages. Uh, come to think about it, probably best to move on to our next topic . . . .)

The few words I would leave you with are: (a) give notice in some manner when these conditions are encountered; (b) offer an opportunity to all other parties in interest to measure (or take pictures of) anything that needs measuring (or pictures taken of); (c) keep good detailed daily reports with as much information as possible concerning labor and equipment and material employed to deal with the changed condition (as compared with contract work) and which identify resources you will later attribute to a claimed delay; (d) take a lot of pictures and videos.

If I had a nickel for every contractor who has told me that he can't get his supers to write daily reports – or *good* daily reports – I would have, uh, a lot of nickels! (When I was a kid, you could buy any candy bar for a nickel, except Mounds bars, which were a dime. Of course, when I was a kid, our ruler was Julius Caesar and we were under Roman law!)

I can only respond thusly. You do pay this guy, don't you? Why can't you say that he can't pick up his check until these records are turned in every week? Moreover, if pressed, I think most supers would say that, for them, long term employment with your company is their goal, hope and expectation. This may be an unachievable goal if proper preparation is not done to preserve claims as they develop. There have been a lot more than one contractor who has been put out of business due to a failure to control and preserve and present these claims *on just one job.* And, for those business owners reading these words, don't put yourself in the position of losing your business – or of having it seriously damaged – due to lazy employees.

A further word. Various supers like to keep their own 'job diaries' or 'job logbooks'. You should not consider these to be acceptable alternatives to daily reports. Here are the problems with these. First of all, from an evidentiary standpoint, they are not legally admissible as 'business records' as would be daily reports, which make cases a great deal easier to prove, particularly as to any issue involving delay. And, many supers consider these to be their personal records and property and treat them in that fashion. Which means, upon termination, they often don't find themselves into the job files and records for the project at issue and years down the road, you may be trying to figure out what was the daily impact of certain events some years previous.

If all else fails, as readers of ***Scribbles*** and *Scribbles Squibs* know, this writer is a contracts lawyer. Which could mean, among other things, that some small group of problems may be capable of being resolved under certain very unique circumstances with the employment of, uh, *contracts.* *Capisce?*

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(This paper is intended for educational purposes only and should not be considered as specific legal advice for specific situations facing you. This subject matter is complicated and cannot be presented with any ultimate degree of accuracy and finality in such an abbreviated fashion. Also, claims made under contracts are highly fact-dependent. For teaching purposes, some cases and trends have been generalized. The fact that some cases have been recited does not mean that there are not other cases which have held differently. Really, the purpose of this article is not to provide an actual 'snapshot' of Massachusetts law at present. Rather, its purpose has been to identify what the issues are with these types of claims and what the key concepts are in working one's way through them.)

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