

## **Supplier's "Impact Damages" Precluded by No-Damage-for-Delay Clause**

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Subcontractors and suppliers often sign contracts with "no-damage-for-delay" clauses. These clauses typically provide that a subcontractor/supplier cannot recover any monetary damages for delays even if the delay was the fault of the general contractor or owner. When disputes arise over the issue of delay, subcontractors and suppliers will try to circumvent the harsh effect of no-damage-for-delay clauses by arguing that the delay at issue was not contemplated by the parties at the time the contract was entered into. Some courts are more willing than others to accept this argument and, as a result, parties have had to come up with even more creative arguments to circumvent the no-damage-for-delay clause.

These creative attempts are exemplified in the recent case of *U.S. ex rel. Tennessee Valley Marble Holding Co. v. Grunley Construction*, 2006 WL 1348523 (D.D.C. 2006), where the U.S. District Court for the District of Columbia held that a supplier's "impact damages" did not escape the effects of a no-damage-for-delay clause. In *Tennessee Valley*, a contract dispute arose between a subcontractor and a supplier on a renovation project for the National Archives building in Washington, D.C. The supplier, Tennessee Valley Marble Holding Co., owned and operated a marble quarry in Tennessee that was the source of the marble used in the original construction of the National Archives building. The contract to renovate the National Archives building was awarded to the general contractor in 2001. Thereafter, the general contractor awarded the stonework contract for the project to a subcontractor, which subsequently contracted with the supplier for the marble needed for the stonework. Disputes arose between the stone supplier and the subcontractor regarding the stone supplier's shipments of allegedly defective materials and the subcontractor's nonpayment for some of the material. The stone supplier filed suit against the subcontractor seeking payment for its work under the contract with the subcontractor.

In its complaint, the stone supplier alleged that the subcontractor breached the contract by failing to *timely* provide accurate field measurements needed to fabricate certain pieces. The subcontractor, in turn, argued that the stone supplier's claims were barred by the no-damage-for-delay clause in the contract. The no-damage-for-delay clause in the parties' contract stated:

*The [Subcontractor] shall not be independently liable to Supplier for any unforeseeable delay or interference occurring beyond the [Subcontractor's] control or for delay or interference caused by Owner or other contractors or suppliers. Supplier shall only be entitled to reimbursement for any damages for delays recovered on its behalf by the [Subcontractor] from the Owner or others.... A time extension shall be the sole and exclusive remedy of the Supplier for delays or suspensions caused by [Subcontractor], even if the delays or suspensions were: (1) of a kind not contemplated by the parties, (2) amounted to an abandonment of the contract, or (3) were caused by active interference.*

The stone supplier countered that the no-damage-for-delay clause was inapplicable because it was seeking “impact damages” rather than “delay damages,” and sought to distinguish damages for delay from damages for lost productivity resulting from the subcontractor’s breach of contract. The stone supplier alleged that the subcontractor breached its contractual obligations when it failed to provide field verifications for certain marble pieces until after the stone supplier had sold its assets to a new owner. As a result of the stone subcontractor’s failure to provide field verifications before the sale of assets, the supplier incurred additional production costs because the new owner, rather than the stone supplier, fabricated and delivered the marble pieces.

The U.S. District Court in *Tennessee Valley* was not persuaded by the stone supplier’s attempts to evade the no-damage-for-delay clause. The Court held that the supplier’s “impact damages” were precluded by the no-damage-for-delay clause. In reaching its holding, the Court relied upon the specific language of the no-damage-for-delay clause and rejected the stone supplier’s attempt to differentiate between “impact damages” and “delay damages.” The Court stated:

*Despite [supplier’s] attempts to cloak its claim for damages in language alleging a breach of contract, the Court is not persuaded that the damages claimed by [supplier] escape characterization as “delay damages” under the contract. There is no relevant difference between [supplier’s] claimed damages and the type of damages that the delay damages clause was intended to prohibit. . . . Although [supplier] has attempted to characterize [subcontractor’s] actions as a breach of contract, it has failed to demonstrate that [subcontractor’s] actions do not constitute a delay for which damages is prohibited under the contract.*

Accordingly, despite the supplier’s creative attempts, the Court in *Tennessee Valley* strictly enforced the no-damage-for-delay clause. The *Tennessee Valley* decision not only shows the creative legal arguments that subcontractors and suppliers are using in attempting to circumvent no-damage-for-delay clauses, but also shows that no-damage-for-delay clauses remain a difficult hurdle for subcontractors and suppliers to overcome because such clauses are often strictly enforced by the courts.