THE PROLONGATION PRINCIPLE

IN BUILDING CONTRACTS

Litigation Lawyers

PROLONGATION COSTS

A prolongation claim is a claim by a contractor for increase in the amount payable pursuant to a building contract due to a failure by the Principal to comply with the building contract. This can arise when the Principal's building program is delayed. The delay of the program can cause a contractor substantial loss. It will also cause substantial difficulty in a contractor complying with his contract if he needs to reorganise his other contract to enable him to have workers available at an unexpected time. Commonly, a contractor will want compensation for the costs the delay causes.

Take for example the case where the contractor's quote estimates five employees to complete the work within a designated one week period. To keep his employees busy, the contractor will presume to start and finish at the designated time and there enter contracts with other builders for the succeeding weeks. As a result of those unrelated contractual obligations, the contractor will need his employees to be on other jobs the next week. Delay in commencement date will cause difficulty in undertaking the work, and the need to hire casual labour to cover the requirements.

Commonly, building subcontracts will include clauses such as:

1. Allowing the principal to vary timing of the contract by providing notices;

2. Allowing formal variations of the building contract in writing;

3. Delay costs.

Under common building subcontract clauses, provided a contractor observes the conditions set out in the contracts, and provided he brings his or her claims within the appropriate concepts of quote "costs", "expenses", "loss", "damages", he or she can still recover each item .

Common examples of prolongation cost claims are:

1. On-site overheads, for example supervisory costs, sheds, hoists or cranes. Standing time of other plant, insurance, additional notices, cost of water, electricity, sanitary accommodation, telephone calls, store rooms, offices etc, general foreman and other site staff and protection of work and scaffolding guard rails;

2. Off-site overheads;

3. Loss of profit and profit earning capacity;

4. Loss of productivity;

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5. Increases in costs of labour, materials and subcontract rates not otherwise covered by rise and fall;

6. Any claims by subcontracts; and

7. Storage charges.

As the common building contract clauses require notification to the architect within a time period, they are limited to costs incurred. This clearly only includes issues incurred to the date of the claim. Many causes of delay may not have been incurred at that time. Therefore, this suggests that a series of claims is necessary, unless the claim is for damages at common law. As most subcontracts provide clauses in respect of prolongation claims, a contractor needs to ensure that they comply with any notice conditions required prior to making such claim.

Contract Variations

Generally, on the face of the contract, a contractor cannot obtain monetary compensation for delay under a variation claim, because a variations claim is properly restricted to variations of the works as distinct from the program for constructing the works.

Importantly, most building subcontracts treat delay costs separately from variations. It is commonly a concern whether it is concurrent or overlapping delays – i.e. the program is already delayed but the contractor also delays. Subject to the express wording of the contract, any delay by a contractor will taint his claim for prolongation costs ("one drop of poison by way of contractor's culpable delay taints the whole tree").

Summary

As can be seen, in reality, this is merely standard contractual principles being applied in building litigation. However, it is useful to understand the operation of these principles in this context as it substantially assists to identify the real issues more quickly. It must always be accepted that implied terms will not be implied into the contract by operation of law contrary to express provisions of the contract.

Therefore, whether or not, and how the above principles apply to a particular matter, requires careful consideration of the contract and the facts.

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