

# CHALLENGING CONTRACT PROVISIONS



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# Delay Clauses

“Time is of the essence”

Bonuses

Liquidated Damages

No Damages for Delay (NDFD)

*Zachry*

*v.*

*Port of Houston Authority*

# BACKGROUND

Zachry wins bid for project

- Proprietary process for working “in dry”  
Efficient and environmental benefits

Contract entered – June 1, 2004

- Zachry controls means and methods

Strict Timeline

- Interim and final  
February 1, 2006 and June 1, 2006

# PROJECT EXTENSION

- PHA decides it wants to expand/extend original project
  - March 2005
  - Adding a sixth wharf section – original design too short for modern ships
  - Zachry submitted proposals – beginning in April 2005 (April 13, May 18 and July 11)
  - Proposed design for extension – frozen cut-off wall – to be installed near existing/permanent piers
  - Design submitted on September 9, 2005
  - Change Order for extension (C04) executed on September 27, 2005

# DISPUTE OVER EXTENSION DESIGN

One of PHA's engineers expressed concern over extension design

- Because freeze wall too close to existing piers – freezing could compromise integrity of piers
- Some debate over validity of concerns
  - only testing done showed no basis for concern
  - many design professionals did not want to weigh in on

PHA rejects freeze cut-off wall design – October 11, 2005

- Changed September 9 design submission from “correspondence” to “submitted”
- Submitted for “review” not “approval”
- Issued a “revise and resubmit” order
- Doing so after signing CO4

# STRAINED RELATIONS

## Zachry claims breach

- Project budget and schedule (meeting deadlines) depended on freeze wall design
- They had right to control means and methods

## PHA sends Zachry letter 3 days later demanding timely completion

- Threatened liquidated damages (LDs) if they did not

## Zachry switches to working “in the wet”

# THE TRIAL

Zachry sued PHA for damages

- Additional costs for having to complete Project “in the wet”
- LDs withheld - \$2.36 million
- \$600,000 for amounts withheld for alleged defective dredging

PHA counterclaimed for AFs for bringing claim



# NO DAMAGES FOR DELAY

The Contractor shall receive no financial compensation for delay or hindrance of the Work. In no event shall the Port Authority be liable to the Contractor or any Subcontractor or Supplier, any other person or any surety for or any employee or agent of any of them, for any damages arising out of or associated with any delay or hindrance to the Work, regardless of the source of the delay or hindrance, including events of Force Majeure, AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY. The Contractor's sole remedy in any such case shall be an extension of time.

# *Zachry v. Port Authority of Houston*

## *(cont'd)*

Trial Court – Jury found delay resulted from Port’s “arbitrary and capricious conduct, active interference, bad faith and/or fraud.”

Court of Appeals – Freedom of contract

- Parties meant “other fault” to include the type of extreme conduct the jury found

# *Zachry v. Port Authority of Houston (cont'd)*

## Supreme Court – Against public policy

As a matter of textual interpretation, it is doubtful whether the rule of *eiusdem generis* would allow “other fault”, following “negligence” and “breach of contract”, to include the kind of deliberate, wrongful conduct the Port was found by the jury to have engaged in.

(cont'd)

We have indicated that pre-injury waivers of future liability for gross negligence are void as against public policy. Generally, a contractual provision “exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.” We think the same may be said of contract liability.

(cont'd)

The Port argues that withholding enforcement of a no-damages-for-delay provision is in derogation of freedom of contract. But that freedom has limits....Enforcing such a provision to allow one party to intentionally injure another with impunity violates the law for the reasons we have explained. The Port also argues that Zachry is a sophisticated party, a very large construction company that can protect itself. But the law's protection against intentional injury is not limited to the helpless.

# The Clauses Continue

Conditions precedent

- Required to bring claim

What does it mean?

- Legitimate or just a technicality

## 5.41 – “Changes and Modifications”

- Change order required to “stipulate the work to be performed” and “any difference in the Contract price.”

## 5.42 – “Change Conditions or Contract Interpretations”

- Five days written notice of any “interpretation of the Contract” by the Port that Zachry “believes...constitutes a change to the Contract.”

## Breach cures all

- Court found breach

“Breach” different than “changes”

- Breaching relinquishes contractual procedural rights regarding COs and claims for additional costs
- Precluded from invoking procedural clauses



## Conditions precedent disfavored

- TRCP section 16.071(a)

Must be reasonable

Less than 90 days is void

- Forfeiture to be avoided when another reasonable interpretation is possible
- Condition v. covenant

# Coverage Requirements

Attempts to expand

- Overreaching
- Impractical to impossible

In addition to the other insurance required by statute or this Agreement, the Architect shall, at no additional cost to the Owner, provide professional liability insurance, issued by an insurance carrier licensed to provide such coverage in the State of Texas, to compensate the Owner for damages arising out of negligent acts, errors, and omissions by the Architect, his firm, his employees, and his Consultants, and arising out of this Agreement. The Owner shall be provided a certificate of that insurance policy, which shall provide a coverage amount not less than One Million dollars (\$1,000,000.00) per claim and Two Million dollars (\$2,000,000.00) aggregate. Upon execution of this Agreement, and at every date for renewal of that policy, the Architect shall cause a Certificate of Insurance to be issued by an insurance agent licensed in the State of Texas. Provision of a valid Certificate of Insurance that meets the requirements of this Agreement is a condition precedent to the payment of any amounts due the Architect by the Owner. This policy shall remain in effect at least through any warranty period covering the Project but in no case for less than twelve (12) months after the date of issuance of the final Certificate for Payment by the Architect.

The Architect shall maintain all forms of insurance required by law in the State of Texas, including insurance coverage for comprehensive general liability, automobile liability, and workers' compensation, which carrier shall be licensed to provide such coverage in the State of Texas in forms and amounts not less than as required by law. The Architect shall use its best professional efforts to require that any and all Consultants engaged or employed by the Architect shall carry and maintain similar insurance. The Architect and his Consultants shall submit proof of such insurance to the Owner before submittal of the first insurance to the Owner, at the anniversary date(s) of the submittal, and at any time when a material change in coverage, carriers or underwriters occurs. The maintenance on full current force and effect of such coverage shall be a condition precedent to the Owner's obligation to pay under this Agreement. The insurance policies shall incorporate a provision requiring written notice to the Owner at least thirty (30) days prior to any cancellation or non-renewal of the policies.

- Representations regarding coverage
- Additional certificate at each renewal
- Condition precedent to payment
- Policy must remain in effect for 12 months after final payment
- Policy must remain in effect through any warranty period

- GL, Auto and Comp.
- Require Consultants to maintain similar insurance
- Proof of insurance required before submittal of first invoice and at anniversary date of submittal
- At any time when a material change in coverage, carriers or underwriters occurs
- Condition precedent to O's obligation to pay

# OTHER THINGS

Attempts to increase duties

- “Trust and confidence”

Treating geotechs like other “consultants”

- Geotechs unique – often hired by Owner
- Limitations of liability and insufficient coverage

Use of third party project managers

“Free contract review”