

# PUBLICATION

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## No Damage for Delay Clauses Have Limits on Louisiana Public Works Projects

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**The Louisiana Public Works Act prohibits "no damage for delay" clauses in contracts for publicly bid projects. Recently, the State of Louisiana tested the boundaries of that prohibition by including a provision in a public contract that limited the contractor's recovery of delay damages to situations where there was a complete stoppage of work solely attributable to the fault of the public entity/owner. The Louisiana First Circuit Court of Appeal examined this provision and concluded that it was an impermissible attempt by the State to limit the contractor's ability to recover delay damages to specific circumstances narrower than allowed in the Public Works Act.**

In *F.H. Myers Const. Corp. v. State, Div. of Admin. Office of Facility Planning & Control*, 2013-2153 (La. App. 1 Cir. 6/18/14), 2014 WL 3702302, the Louisiana First Circuit Court of Appeal recently examined the validity under La. R.S. 38:2216 (which prohibits "no damage for delay" clauses in public works contracts) of a provision in a public works contract that limited the contractor's recovery of delay damages to situations where there was a complete stoppage of work solely the fault of the public entity/owner. F.H. Myers Construction Corporation (Myers), as low bidder, was awarded a public works contract for the renovation of the Old U.S. Mint in New Orleans to provide for a new jazz performance theater and recording venue. The contract entered into between Myers and the State of Louisiana, Division of Administration, Office of Facility Planning and Control (the "State") included the agreement between the parties, the AIA General Conditions of the Contract for Construction, the Supplementary Conditions drafted by the State, and the project's plans and specifications.

After work began on the project, Myers encountered a pre-existing concrete and wood timber substrate underneath the floor that was not shown on the plans. This substrate was incompatible with the project's intended design features, so a redesign was developed. The State required Myers to provide a draft change order with its cost proposals to remove the existing substrate. After receiving the draft change order, the State notified Myers that several of the items claimed by Myers in the change order were ineligible under the contract, and rather than approve a change order, the State instead issued a Construction Change Directive directing Myers to proceed with the work required to move the existing substrate. The State subsequently issued a modified design to construct a new flooring substrate, for which Myers submitted a second draft change order. The State again did not agree on the sums in the draft change order and issued a Construction Change Directive directing Myers to proceed with the work required to construct a new flooring substrate.

Myers completed the work required by the Construction Change Directives and submitted a claim to the State for its costs associated with the changed work. The State agreed to pay a portion of the costs submitted by Myers, but disputed certain items as ineligible pursuant to the contract. Specifically, the State disputed two items: first, a portion of Myers' labor burden and second, Myers' extended-fixed jobsite overhead. As a result of the State's refusal to pay these items, Myers filed suit against the State for breach of contract, seeking payment for the disputed amounts contained in its claim. The State filed a motion for partial summary judgment requesting that Myers' claims be dismissed, which motion was granted by the trial court.

On appeal, the court addressed, among other things, the State's assertion that Myers was not entitled to extended-fixed jobsite overhead as part of its change order claims. Specifically, the State contended that Article 7.2.7 of the Supplementary Conditions allowed Myers to recover extended-fixed jobsite overhead for

time delays "only when complete stoppage of work occurs causing a contract completion extension, and [Myers] is unable to mitigate financial damages through replacement work. The stoppage must be due to acts or omissions solely attributable to the [State]." According to the State, there was not a "complete stoppage of work" as required by the contract for extended-fixed jobsite overhead to be due to Myers.

Although Myers did not dispute that there was never a "complete stoppage of work," Myers argued that the restrictions on Myers' recovery of delay damages provided in Article 7.2.7 was in violation of La. R.S. 38:2216(H), which states:

Any provision contained in a public contract which purports to waive, release, or extinguish the rights of a contractor to recover cost of damages, or obtain equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void or unenforceable. When a contract contains a provision which is void and unenforceable under this Subsection, that provision shall be severed from the other provisions of the contract and the fact that the provision is void and unenforceable shall not affect the other provisions of the contract.

The court found that because Article 7.2.7 imposed stricter requirements than allowed in La. R.S. 38:2216, the contract provision was in violation of the statute. Particularly, the court explained that Article 7.2.7 required that the delay must be due to "complete stoppage of work" solely the fault of the State for Myers to recover extended-fixed jobsite overhead. According to the court, La. R.S. 38:2216(H) contemplates that a public works contractor shall be able to recover for any delay that it may suffer out of fault of the state entity, and not just for a "complete stoppage of work" as provided in Article 7.2.7. Thus, the court found that Article 7.2.7 attempted to waive Myers' rights as the contractor to seek damages for extended-fixed jobsite overhead for any delay short of a complete stoppage of work, and therefore imposed a stricter requirement than La. R.S. 38:2216(H) allows.

The court further explained that Article 7.2.7 allowed for damages only if the State was 100% at fault for the delay. In contrast, La. R.S. 38:2216(H) prohibits waiver for delay damages when the "delay is caused in whole, or in part" by the State. Therefore, the court again found that Article 7.2.7 imposed stricter requirements for delay damages than La. R.S. 38:2216(H) allows.

The court went on to conclude that the inclusion of the phrases "solely" and "complete stoppage of work" in Article 7.2.7 attempted to limit Myers' ability to recover damages for delay to specific circumstances narrower than La. R.S. 38:2216(H) allows, and therefore Article 7.2.7 was void and unenforceable under the statute. Thus, the court held that Article 7.2.7 be severed from the contract.