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Owner Liability for COVID-19 Delay Costs on Public Works Projects at Issue in Pending Bill in Washington Legislature

Summary

A proposed bill currently working its way through the Washington State Senate seeks to require owners of public works construction projects to compensate construction contractors for delay costs incurred due to the COVID-19 pandemic, a reversal of normal contracting practice in public works contracts.

Specifically, proposed Substitute Senate Bill 5333 contains the following language:

> Any clause in a public works contract which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of a delay in performance which delay is caused by the COVID-19 pandemic emergency proclamations is against public policy and is void and unenforceable.

The current draft of the bill exempts situations where the parties have already executed a change order or modification addressing the effect of the COVID-19 pandemic on the performance of an existing contract.

Background

There is already a statute on the books that makes it unlawful for a public works construction contract to waive or extinguish the right of a contractor to seek damages for delay "caused by the acts or omissions of the contractee [owner] or persons acting for the contractee [owner]…." RCW 4.24.360. In effect since 1979, this statute does not apply to delay caused by COVID-19 because the pandemic was not "caused by the acts or omissions" of the owner.

Public works construction contracts have typically treated events such as the COVID-19 pandemic as excusable for schedule purposes, but not compensable. This approach is carried out in the contract through a written provision known as a Force Majeure clause. A Force Majeure event is essentially one that's beyond the control of the contracting parties (i.e., earthquake, flood, pandemic). In such a case, the normal approach has been to grant a time extension to the contractor for the delay caused by the Force Majeure event. Compensation for such delay, on the other hand, has typically been disallowed. The theory behind this approach is that that since the Force Majeure event wasn't within the control of the Owner, and since both the Owner and Contractor sustain losses due to the Force Majeure event, the Owner should not come out of pocket financially to address the delays costs of the Contractor and (likewise) the Contractor should not be liable to the Owner for the Owner's own incurred impact and delay costs.

Proposed SSB 5333

SSB 5333 seeks to amend the existing delay statute to add a new clause whose sole purpose is to address the effects of the COVID-19 pandemic. Under proposed new subsection (b) to the statute, *[quoted above in the Summary]*, it would be "void and unenforceable" to have a clause that waives or extinguishes the contractor's right to payment for delay due to COVID-19. In practice, this appears to mean that a Force Majeure clause would be void and unenforceable as it pertains to delay costs incurred due to COVID-19: in other words, that the Owner, unlike prior practice under the Force Majeure clause, would not be immune from payment claims due to COVID-19 delay.

The proposed bill currently has safe harbor for change orders executed prior to the bill's effective date; that language reads as follows:

> (b)(i) of this subsection does not void any provision of any contract where the parties have already agreed to modifications of a contract or contract provision due to the COVID-19 emergency proclamations, or have otherwise agreed to the terms in which the 3 COVID-19 pandemic emergency proclamations impact existing contract language prior to the effective date of this section. Any change order, memorandum of understanding, or other form of agreement by the parties over the impacts of the COVID-19 emergency proclamations agreed to prior to the effective date of this section may not be invalidated, nullified, or voided by this subsection (1)(b).

Under Section 2 of the proposed bill, its terms would take effect immediately upon passage and the Governor's signature. The bill by its terms does not apply retroactively to contracts signed before the effective date. Under case law, however, statutes that are "remedial" in nature may apply retroactively. There is therefore a risk that the new bill may apply to all existing contracts (subject to the safe harbor for specific change orders).

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