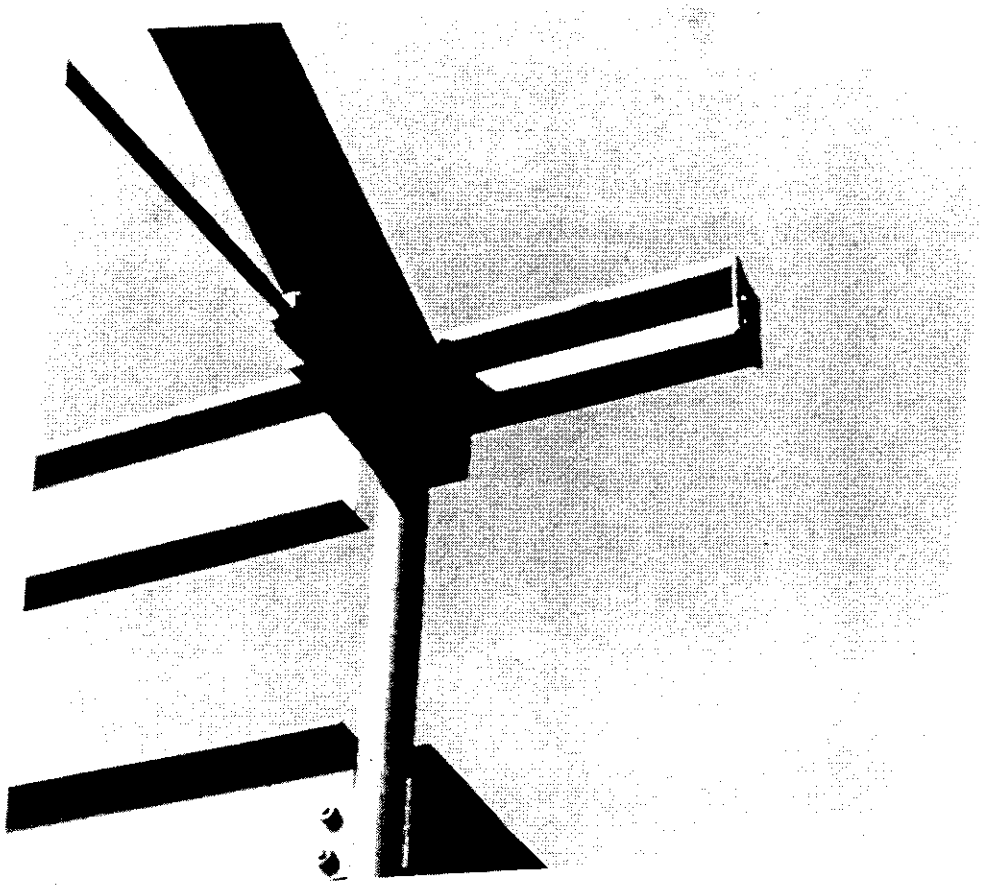
Technical Publication No. 108

A STUDY OF THE "NO DAMAGE FOR DELAY" CLAUSE



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November 2000

This research project was sponsored by the Building Construction Industry Advisory Committee under a grant from the State of Florida Department of Education.

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CHAPTER I
EXECUTIVE SUMMARY

With respect to delay, contracts today, more often than not, contain a "no damage for delay" clause that waives the contractor's right to compensation regardless of the cause of the delay. The main objective of this study is to determine if the risks associated with the "no damages for delay" clause are unreasonable, if there is an impact on the cost of construction, if the court recognized exceptions are adequate in reasonably limiting the harsh impact of the "no damages for delay" clause and if the parties affected by the presence of the NDD clause should seek legislative intervention.

To accomplish this objective, an industry survey questionnaire was sent to general contractors, subcontractors, ,material suppliers, design professionals, public entities such as school districts, municipalities and members of the legal profession. Approximately 1300 questionnaires were mailed and 417 responses were received. Based on the over 400 responses received, the attitude towards the "no damages for delay" clause is astonishingly negative! Yes, the shift of the risks of delay are unreasonable; yes, there is a real and adverse impact on the cost of construction because of the presence of the "no damages for delay" clause; no, the court recognized exceptions do not adequately reduce the harsh impact of the "no damages for delay" clause, and yes, the parties would not oppose government imposed guidelines.

Today's contractor must be as much an expert at managing its contractual risk as he is at managing a safety program. Similarly, the owner and the designer seek to limit their exposure to contractual risk. They are able to accomplish this objective through the use of legal counsel. Presently, the contractor is unable to manage a risk over which he has no actual control and the "no damages for delay" clause represents such a risk. Notwithstanding the very harsh results, which a "no damages for delay" clause is capable of producing, the construction industry seeks not the elimination of the clause but merely a clear, concise and unambiguous definition of the scope of the clause and what activities in general prevent enforcement of the clause. This is the same sentiment expressed by the design profession and public owners.

In addition to the industry survey, there is a case law review of seventeen states which include the so-called "leading states" whose position many other states have adopted. The

court decisions to date not based on statutory regulation have apparently caused more harm than good. Those states that have adopted legislation have expeditiously resolved claims based on the "no damages for delay" clause by properly allocating the risks associated with delays. Legislation that either eliminates the NDD clause as against public policy or clearly identifies exceptions and exclusions appears to be appropriate.

A copy of the report can be obtained by contacting:

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CHAPTER II
Introduction

Frequently, owners will seek to protect themselves from liability for delay costs for which they are partially or solely responsible by including in their contracts a "no damages for delay" provision. Similarly, a prime contractor may include the same type of clause in his contract with a subcontractor in order to achieve the same goal. This is accomplished through the use of a "no damages" clause or by way of a "flow down" clause that incorporates the owner's agreement with the prime contractor into the prime contractor's agreement with the subcontractor. A typical "no damages" clause reads as follows and shall be used as the model NDD clause for purposes of this study:

> "No payment or compensation of any kind shall be made to the contractor for damages because of any hindrance or delay from any cause in the progress of work, whether such hindrance or delay be avoidable or unavoidable, Any finding by any administrative officer, arbitrator, and/or judge that a delay was caused either wholly or in part by actions of someone other than the contractor shall only entitle the contractor to equivalent extensions of time".

A similar provision reads as follows:

> "Neither the Owner or Contractor shall be entitled to damages for any delay caused by the Owner in the performance of the work under the contract. In such event, however, the owner shall grant the Contractor an extension of time".

The effect of such a clause is exculpatory in nature; that is, is excuses the party who is responsible for the delay from any monetary liability. The forfeiture effect is tempered only by allowing for a time extension that allows for the avoidance of liquidated damages. Besides the potential for incurring liquidated damages the effect on the contractor can still be very harsh. The more difficult problem for contractors is the "ripple" effect of such delays, that is, the "consequential damages" or "impact costs" associated with unchanged work that can result from project delay. Examples of impact

costs are standby costs of non-productive workers, supervisors, and equipment; expenses caused by disrupted construction and material delivery schedules; start-up and stopping costs such as those incurred in moving workers and equipment on and off the job; and additional overhead costs. Other examples include project delays that can defer work until higher wage rates and material prices have gone into effect or until bargains or discounts have been lost. (Clough) Generally, exculpatory clauses are disfavored and narrowly construed by the courts. It would be contrary to public policy to enforce an exculpatory clause that attempts to immunize one from breach of a positive statutory duty. (Leiby). Individual response to "no damages for delay" clauses has been mixed. Courts in some states are loathe to enforce the clause because bidding documents are drafted by the owner and advertised on a "take it or leave it" basis, compelling the contractor to accept the clause or refrain from bidding. Another court, the Court of Appeals of New York, in upholding the trial court's instruction, described the "no damages for delay" clause as "a perfectly common and acceptable business practice" that "clearly, directly and absolutely, barred recovery of delay damages." (Bartholomew). In other situations, absent tortious intent, courts are generally reluctant to find active interference and instead attribute the owner's acts or omissions to a level of negligence or neglect that does not relieve the clause of its effect. (Lambert).

The objective of this study is look at issues directly related to the inclusion of a "no damages" clause and determine their impact on the performance of a construction contract. Specifically, does the inclusion of the clause in a contract for construction services:

1a) unreasonably shift the risk of delay to the prime contractor or subcontractor.

b) have an adverse impact on the cost of construction.

c) have an adverse impact on the relationship between the owner and the prime or the prime and the subcontractor and material suppliers.

d) eliminate the incentive for timely resolution of performance and dispute issues.

2a) are the current court recognized exceptions adequate or does the clause

promote litigation.

To properly address these issues the following activities were undertaken during the research period:

1) A survey of current literature by industry commentators considered experts in the field of construction management.
2) A review of a fifty state monograph on the enforceability of "no damages for delay clauses".
3) A survey of a representative sample of contractor and supplier members of the construction profession in the state of Florida.

This report will consist of first, a review and discussion of the fundamentals and principles of contract law combined with the thoughts, opinions and observations of industry commentators in reference to the "no damages for delay" clause. The purpose here is to inform and educate the reader what guidelines the courts follow when addressing "no damages for delay" issues. It will become apparent that resolving contract disputes can be a very complicated and frustrating process.

After the review of contract law fundamentals and industry observer comments the report will follow the sequence outlined above. The report will end with a section discussing conclusions and recommendations.

SECTION III
Principles of Contract Law

Fundamentals

Construction contracting is nothing more than contract law applied to agreements for construction services. The principles of contract law apply. The basic and necessary elements of any contract are offer, acceptance and consideration. Under the generally accepted bargained for exchange theory, there is the allocation of risk where risk is defined as the possibility of loss and that risk is quantified with consideration. A bargain is an exchange of promises, acts, or both, in which each party view what is given as the price (consideration) of what is received. Our legal system places great emphasis on the freedom to contract. Two business entities bargaining on an arm's length basis are free to strike just about any deal they choose. One of the primary purposes of a contract is to allocate risk between the parties, and this is just as subject to bargaining as the price. (Jervis). Words, actions, reliance or a writing, each of which may be expressed or implied, can manifest these essential elements which necessarily allocate this risk.

Every party to a contract attempts to minimize its perceived risk through the use of clauses. These clauses condition the duty to perform due to the other party's failure to meet the conditions required by the contract or may limit the liability for damages due to the breaching party's failure to fulfill contract conditions. As mentioned above these conditions may be expressed or implied. Further, every condition must be excused or satisfied. Express conditions are stated in the contract whereas implied conditions are generally presumed or understood. An example of an implied condition that is well recognized is the duty to deal in good faith. The law will usually presume, absent any provision to the contrary, that there is an implied term in the agreement that each party will not impede or hinder performance by the other. This is also known as the duty to cooperate. An owner cannot unreasonably deny access to a job site on one hand, and turn around and hold the contractor liable for non-performance. A second example of an implied condition is the performance of a shorter activity is conditioned by the performance of a longer activity. The time it takes to paint a house is longer than the time

it takes to pay for the painting services. The law will again presume, absent any provision to the contrary, that there is an implied term in the agreement that the party whose duty to perform takes the longest will have a duty to perform first before the other party has the absolute duty to perform. The subject matter of this study, the "No Damages for Delay" clause, is subordinate to these underlying principles of contract law.

Purpose of the clause

Owners do not like to see their projects affected by delays. They also do not like to pay money damages when they have contributed to or have been solely responsible for delays. As a result, it is becoming increasingly common for clauses in the contracts – particularly public contracts and private ones drafted largely with the interests of the owner in mind – to attempt to make the contractor assume the risk of owner caused delay. (Hinze) For public works contracts, negotiation is usually not available to the contractor – "If you want the work sigh the contract!" (Tittes) To accomplish the latter wish, owners will sometimes include in their contract a provision that is intended to bar a contractor from claiming money damages for delays. (Hinze) This clause is commonly known as the "no damages for delay" clause. It is designed to protect the owner from claims for money damages by the contractor associated with delay and acceleration caused by the owner or his agents. The only limitation on complete relief for the owner is the clause does not preclude the contractor from insisting on an extension of time. Essentially, the contractor's relief is limited to a time extension only and relief in the form of money is not available.

Public entities are often limited by appropriations and bond issues. As a result, they must know in advance the ultimate cost of a construction project. To do this, many public entities use the disclaimer system for unforeseen subsurface conditions. Similarly, they wish to avoid claims being made at the end of the project based on allegations that they have delayed completion or required the contractor to perform its work out of sequence. These entities recognize that barring claims may cause higher bids, but they would prefer to see bidders increase their bids to take this risk into account rather than face claims at

the end of the job. (Sweet) So essentially, owners will argue adamantly that the no damages for delay clause is like any other clause in the contract; it is designed to do nothing more than shift the risk of doing business with the owner to the contractor and account for that perceived risk through the price to perform the work.

Problem Areas

In any event the ultimate issue of the enforceability of the no damages for delay lies in three areas:

1) Procedural. Here, a party will argue that a specific procedure, as defined in the contract, was not followed. This failure to follow procedure precludes the enforcement of the no damages for delay clause. From the owners perspective he may have waived the contractual right to enforce the clause by conduct either expressed or implied. As for the contractor, his failure to follow procedures outlined in the contract precludes avoidance of the impact of the clause. Here, notice, whether actual or constructive is usually the issue. Most construction contracts require that any claim for additional costs or time extensions be preceded and confirmed by a written notice to the owner or architect within a definite period of time. Notice requirements exist to allow the owner the opportunity to mitigate its damages resulting from an apparent problem. (Tittes). Notice must usually be given within 10 or 20 days after the delay-causing event. If the contractor fails to comply with these notice requirements, he may be unable to recover damages for delays and disruptions unless he can show that the owner waived the written notice requirements or that other circumstances are present that would excuse the notice condition. Often this notice requirement is stated to be a condition precedent to any right to delay damages. (Sweet) The contractor who gives prompt notice that a particular act or failure to act on the part of the owner is causing or will cause delays stands a good chance, not only of recovering delay costs but also of motivating the owner to correct some of its costly contract administration habits. (Currie).

2) Implied duties. Many contract disputes arise not from an express provision in the contract but from an unwritten duty that is deemed inherent and presumed to exist by the mere fact that the party entered into the contract. A duty of reasonableness and fairness and the duty to deal in good faith are examples of implied duties. There also exists an implied warranty by the owner that the plans and specifications are adequate for construction purposes and the implied promise that it will not disrupt or impede the performance of the construction process. Unfortunately, the contracting parties do not always perceive these implied duties in the same way.

An excellent example if found in United States Steel v. Missouri Pacific Railroad, 668 F.2d 435, (8th Cir. 1982). Here, a claim of active interference was based on the owner's directing the contractor to proceed before the requisite work of an earlier contractor had been completed. Access was denied during completion of the earlier contractor's work, causing a delay of 175 days. The owner granted a time extension for the delay but based on a "no damages for delay" clause refused to pay and delay damages. The court noted that the owner had an implied obligation to refrain from anything that would reasonably interfere with the contractor's opportunity to proceed with its work. The court concluded that issuance of the notice to proceed was an affirmative, willful act and that the owner's bad faith was demonstrated by its knowledge of circumstances that would prevent the contractor from proceeding with its work. (Sweet).

3) Express duties. Stated in the form of a provision or a clause, express duties are often found to have not been fulfilled. Failure to fulfill a express duty under the contract precludes the other party from his duty to perform. This duty must be fulfilled or excused. There is also the occasion where the duty required under the contract is subject to interpretation in order for a court to determine whether it has been fulfilled.

Tools of Interpretation

Common to each of the above areas is the issue of interpretation. A contract can be based on either words or conduct. The general rule of interpretation in contract law is that where the interpretation of an expression is in issue, the expression should be given an objective interpretation. This means that the expression should be given the interpretation a reasonable person standing in the addressee's shoes would put upon it, rather than the interpretation that the addressor subjectively intends.

In applying the objective test, the question should be not simply how a generalized reasonable person in the addressee's shoes would interpret the relevant expression, but what interpretation would be given by a reasonable person knowing all that the addressee knew. Accordingly, if the parties are in a special trade, the interpretation must take into consideration the custom and usage of the trade. Another tool of interpretation includes course of performance that involves repeated occasions for performance with knowledge of the performance and the opportunity for objection to it by the other party. A third tool of interpretation is a course of dealing. A course of dealing is a sequence of conduct between the parties prior to the contract. Similarly, if the addressee knows special circumstances that would give the expression a different meaning than it would normally be given, those circumstances would be relevant in an objective interpretation.

Rules of Interpretation

These tools of interpretation are not given equal weight. Absent a contract provision to the contrary, express terms are given greater weight than course of performance, course of dealing, and usage of trade. Course of performance is next in priority followed by course of dealing. In addition, some courts will take the position that a contract will be interpreted according to the following rules of interpretation:

1. Words intended to exempt a party from liability because of its own fault are to be construed against it. (Samuels)

2. It is the duty of one party, for whom another is doing work under a contract, to do his or her part to facilitate the work. (Ibid)
3. A contract will not be so construed so as to put one party at the mercy of another. (Ibid.)
4. If a written contract contains a word or phrase which is capable of two reasonable meanings, on of which favors one party and the other of which favors the other, that interpretation will be preferred which is less favorable to the one by whom the contract was drafted. This rule favors the party of lesser bargaining power, who has little or no opportunity to choose the terms of the contract. (Patterson)
5. The principal apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof. (Ibid.)
6. If a public interest is affected by a contract, that interpretation or construction is preferred which favors the public interest. As applied to government contracts it would be used to save the taxpayers' money as against those contracting with the government. But this is not, it is believed, a standard of interpretation or construction uniformly applied to government contracts. (Ibid.)
7. A court should prefer an interpretation that makes an agreement reasonable, lawful, and effective to one that produces an unreasonable or unlawful result or that renders the agreement ineffective. (Knapp).

Extrinsic Evidence

To aid in the interpretation effort the court may have to look to extrinsic evidence, that is, evidence outside the contract itself, such as conversations between the parties and surrounding circumstances. Traditionally, if there is no ambiguity in a written contract on its face, and no special meaning attached to the words of a written contract by custom or usage, the terms of the contract will be interpreted according to their "plain meaning," and extrinsic evidence is inadmissible. However, modernly, there is an increasing tendency to be liberal, and allow extrinsic evidence to show what the party's intended by their words, without regard to their plain meaning or a prior showing of ambiguity.

Parol Evidence

A traditional hurdle to interpretation was the parol evidence rule. Simply stated, the parol evidence rule provides that where there is a fully integrated contract, evidence of an alleged earlier oral or written agreement that is within the scope of the writing, or evidence of an alleged contemporaneous oral agreement that is within the scope of the writing will not be allowed into evidence to vary, add to, or contradict the terms of the writing. Today many or most courts follow the Corbin test, to determine whether or not the agreement is fully integrated. Under this test, a writing is deemed to be an integration if the parties actually intended it to be an integration. Any relevant evidence will be admitted to determine whether the parties actually intended the writing as the final and complete expression of their agreement. This test leads to a narrower application of the parol evidence rule and consequently leads to the admission of parol evidence. (Eisenberg).

It is important to understand the concept of parol evidence. Unless the evidence meets an exception to the parol evidence rule it will not be allowed into evidence to support or defeat a damage claim that is based on the no damages for delay clause. Some of the relevant exceptions are as follows:

1) Naturally omitted term – parol evidence is admissible if it concerns a naturally omitted term. A term will be treated as a naturally omitted term if: (a) the terms of the alleged parol agreement do not conflict with the written integration; and (b) the alleged parol agreement concerns a subject that might naturally be made as a separate agreement and omitted form the integration; i.e., a subject that similarly situated parties would not ordinarily be expected to include in the written agreement. This exception is appropriate where the contract is silent on the issue of no damages for delay. (Ibid.)

2) Fraud, duress, or mistake – parol evidence is admissible to show fraud, duress, or

mistake. Furthermore, a person who makes a promise that he has no intention of performing commits promissory fraud. Applying this concept to the parol evidence rule, many courts hold that under the fraud exception, it is permissible to introduce evidence of a parol promise if the promise was made with no intention to perform it. This application has been a valuable tool to show bad faith when attempting to use the no damages for delay clause as a defense. (Ibid.)

3) Evidence to explain or interpret terms of a written agreement – The parol evidence rule does not bar admission of extrinsic evidence to show what the parties meant by the words used in their written agreement. Such evidence explains the written agreement, rather than adding to, varying, or contradicting the written agreement. To qualify under the exception, the evidence may not be in the form of a promise or agreement, but rather must be in the form of background discussion, surrounding circumstances or the like. For example, a New York court ruled that a release clause was ambiguous in nature regarding its intended scope thereby allowing the material supplier to pursue his claim for delay damages. As evidence of the ambiguity, the Court noted the document's reference to a release of lien. Liens are not possible on public projects in New York, so the release was obviously not drafted for this particular project, raising questions regarding its intended effect. (Construction). This exception allows for entering into evidence course of performance, course of dealing, usage of trade and evidence of a waiver of the "no damages for delay" clause. Although such evidence may be barred under the plain meaning rule, today, there is an increasing tendency to be more liberal and allow extrinsic evidence to show what the part is intended by their words and actions.(Eisenberg.)

4) Modifications – a later oral agreement that modifies a previously existing written contract does not fall within the parol evidence rule, because the modification is subsequent to, rather than prior to or contemporaneous with, the written agreement. (Eisenberg.)

In some cases, a written contract contains a provision requiring that any modification of the contract be in writing. Such provisions are not normally given effect to prevent the enforcement of an oral modification of a contract containing such a provision, if the modification is otherwise legally enforceable. The rationale for not giving effect to such a provision is that if the modification has consideration, it is a new contract, and the new contract implicitly includes a mutual agreement to abandon the requirements of a writing set out in the old contract.

Overcoming these hurdles sets the stage for an in-depth analysis of how and when the no damages for delay clause can be given effect and how and when the impact of the clause can be avoided.

CHAPTER IV
CASE LAW REVIEW

Introduction

In general, the court system represents the final avenue of relief for a contractor injured by a NDD clause. However, it must be recognized that the state and/or federal government can change case law through enacted legislation. In regards to the "no damages" clause each state and the federal government is free to address this issue as it sees fit. Some states automatically enforce "no damages for delay" clauses, while other states have created exceptions and allow contractors and subcontractors to recover delay damages. Still other states simply prohibit the enforceability of these clauses and allow recovery for damages for delay despite the inclusion of the clause in the construction contract.

Most states have adopted the position of the so-called "leading" states such as California, New York, Illinois and Pennsylvania with slight deviations to reflect their particular circumstances. The leading states recognize the NDD clause as not being void as against public policy but limit its enforceability by recognizing several exceptions. The most widely recognized exceptions include those delays being unreasonable under the circumstances and not within the contemplation of the parties. Other recognized exceptions are active interference by the owner, fraud or misrepresentation and failure to deal in good faith. The following discussion reviews many but not all states on the issue of the "no damages" clause. Significant treatment is given to the State of Florida.

Caveat: The cases cited in each state have not been Shepardized for purposes of this study. Shepardizing is a research technique wherein the researcher reviews all the citing cases for a cited case using *Shepard's Citations* to make sure the cited case is not bad law or to help find other cases like the cited case. (Nolfi) Not withstanding this potential shortcoming it is highly unlikely that the legal principles or issues raised in the following state by state discussion have been abandoned or substantially changed in any manner.

Discussion

As a general rule, in the absence of a contractual provision, a contractor or subcontractor delayed in its performance of its contract may recover from the owner or contractor damages resulting from the delay if the owner or contractor caused the delay respectively. Typical delay damages may include costs of idle workers and equipment, field overhead, loss of productivity, costs of performance in later periods, increased supervisory costs, labor and material escalation. "No damages for delay" clauses, therefore, commonly appear in construction contacts to preclude contractors or subcontractors from seeking these damages due to delays encountered on the project.

The following selected issues were considered with respect to the enforceability of the "no damages for delay" clauses:

- Because of the potential for the clause's harsh consequences courts often use the tool of interpretation to minimize such extreme called upon to interpret the language used in the clause to determine the intent of the parties. Have the courts given a literal interpretation or do they find the clause ambiguous and allow the introduction of evidence of the parties' intent?
- Have the courts treated the enforceability of "no damages for delay" clauses differently depending on whether they are contained in a private contract or public contract?
- Has the state enacted legislation affecting the enforceability of "no damages for delay" clauses?
- What exceptions, if any, have the courts created?
- Does the contractor or subcontractor's failure to comply with a notice requirement in the contract preclude their respective right to recover delay damages?
- What arguments have contractors or subcontractors used to avoid application of the clause and how have the courts treated these arguments?

ALABAMA

Although the state courts have not addressed the issue of enforcing the NDD clause, the Fifth Circuit in E.C. Ernst, Inc. v Manhattan, 551 F2d. 1026 applied state law and addressed the enforceability of the NDD clause. The court cited Peter Kiewit Sons' Co. v Iowa Southern Utilities, 355 F.Supp. 376, 396-401 in making their ruling. In Ernst, an electrical subcontractor sought delay damages against Manhattan. Although the trial court found the GC responsible for overall schedule delays, the Fifth Circuit held that Ernst was precluded from recovering any damages for delays based on the NDD clause. The court held that the general contractor's delays were not the result of any recognized exceptions. Citing Kiewit, the exceptions are delays (1) not contemplated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference.

In attempting to avoid the NDD clause, Ernst argued that the GC's failure to formally grant Ernst a time extension constituted a breach of a condition precedent to the GC's invoking the NDD clause. Ernst also argued that the GC had an obligation to assert Ernst's claims for delay damages against any other responsible party and that the GC's failure to assert Ernst's claim negated the NDD clause. The Fifth Circuit rejected both arguments.

ARIZONA

It does not appear that there is a reported case interpreting a NDD clause by the courts. The policy of the State of Arizona on such clauses can, however, be gleaned from its statutes. Ariz. Rev. Stat. 41-2617 (1997) of the state's Procurement Code provides: A contract for the procurement of construction shall include a provision which provides for negotiations between the state governmental unit and the contractor for the recovery of damages related to expenses incurred by the contractor for a delay for which the state governmental unit is responsible, which is unreasonable under the circumstances and which was not within the contemplation of the parties to the contract. This section shall not be construed to void any provisions in the contract which requires notice of delays, provides for arbitration or other procedure for settlement or provides for liquidated

damages. The language of the Arizona statute appears patterned after 7102 of the California Public Contract code (1987); for similar statutory provisions see Oregon Revised Statutes 279.063 (1997); Colorado Revised Statutes 24-91-103.5 (1997); Missouri Revised Statutes 34.058 (1997); Virginia Code Ann. 11-56.2 (1997).

ARKANSAS

Arkansas has few reported cases and no statutes concerning the NDD clause. However, when considered together, these cases demonstrate that Arkansas courts recognize the generally accepted rule that so long as a NDD clause satisfies the requirements for a valid contract, they are enforceable and not against public policy. These cases also reflect that Arkansas courts will construe their terms strictly and will carefully consider exceptions to the enforcement of these clauses, because of the harsh results they often produce. Although a NDD clause was not at issue in Housing Authority of Little Rock v. Forcum-Lannom, Inc., 248 Ark 750, 454 S.W.2d 101 (1970), the Arkansas Supreme Court affirmed the award by a trial court jury that awarded delay damages caused by the owner. While the owner's conduct was not termed active interference, the court noted that the owner was in control of the area and continually neglected to remedy problems even after the contractor had made several requests. This decision potentially broadens the definition of active interference or creates an entirely new exception.

CALIFORNIA

In California, "no damages for delay" clauses in public contracts have been limited by statute. The limitations are based on the delay being unreasonable under the circumstances and not within the contemplation of the parties. Further, the statute may not be waived or its application altered or limited by contract. In a post statute case, Stacey & Witbeck v. City and County of San Francisco, 44 Cal.Rptr.2d 472 (Cal.App.1 Dist., 1995) the damages for delay were extremely limited rather than completely barred and strongly favorable to the public entity. In another post statute case, Vrgora v. Los

Angeles Unified School District, 200 Cal.Rptr. 130 (Cal.App.2 Dist., 1984), the public entity reduced its potential exposure for delay damages by specifically enumerating how much it would owe in the form of liquidated damages. A third post statute case, Pacific Employers Ins. Co. v. City of Berkley, 204 Cal.Rptr. 387 (Cal.App. 1 Dist., 1984), demonstrated a similar technique in limiting delay damages exposure by allowing a recovery amount that was specifically stated in the agreement in the form of liquidated damages. The technique of the owner limiting his risk for delay damages through the use of the liquidated damages clause has essentially eliminated the NDD clause.

The California courts have tended to show a greater toleration for "no damages for delay" clauses in contracts between private parties. In Hansen v. Covell, 218 Cal. 622, 24 P.2d 722 (1933) the court held that although the contract certainly was ambiguous as to whether the contractors had waived their right to delay damages, "the parties had a right to agree upon the exclusive remedy (a time extension) available to the contractors by reason of such delay." The Court, without discussing or even acknowledging the ambiguity, held for the owner.

COLORADO

In Colorado, there is very little law regarding the "no damages for delay" clause. In the only reported case, W.C. James, Inc. v. Phillips Petroleum Company, 347 F. Supp. 381 (D. Colo. 1972), aff'd 485 F.2d 22 (10th Cir. 1973).the Tenth Circuit held that a "no damages for delay" clause was valid but did not indicate that it was applying Colorado law.

However, Colorado has enacted legislation that makes the "no damages for delay" clause void and unenforceable when it purports to waive the rights of a contractor to recover damages for delays caused by a public entity. Colo. Rev. Stat. 24-91-105.3. Even here, it is unclear if the statute will apply to all public works projects or only to projects in which the owner is other that a home-rule municipality with a local ordinance that conflicts with the state statute.

A reading of the statute states is fairly self-explanatory. However, it raises several notable issues. An interpretation of the language in the statute may suggest that the doctrine of concurrent delay should no longer apply in Colorado. Also, the only

provisions the legislature intended to void were those "no damages for delay" clauses in public works contracts to the extent the delay is caused by the owner. Thus, other contractual provisions such as liquidated damages and mandatory arbitration are valid. As of this date there has been only one appellate level decision concerning a contract with a public entity but the contract in dispute in that case was actually entered into prior to the effective date of the statute. Thus, Colorado Appellate Courts have not specifically decided a delay damages case, regarding a public entity contract under the present law.

CONNECTICUT

There is little Connecticut law on the subject of "no damages for delay" clauses. Such a clause is to be upheld and interpreted literally. Such clauses are found to be enforceable and not contrary to public policy. (Corbin, 74 A.L.R. 3d 187) The exceptions found valid in Connecticut have been adopted from a decision reached in a New York case, Corinno Civetta Construction Corp. v. New York, 67 N.Y.2d 297, 502 N.Y.S. 2d 681 (1986). These exceptions include (1) delays caused by the contractee's (owner) bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract."

DELAWARE

Delaware has long recognized the principle "that contractual provisions which purport to relive a party from liability for matters resulting from its own fault are not favored." J.A. Jones Constr. Co. v. city of Dover, 372 A.2d 540 (1977). However, where the contract language is clear and without ambiguity and leads to a meaning that is both reasonable and sensible, there is no need to look beyond it in search of some other intention.

Delaware courts allow the introduction of evidence of the parties' intent under certain circumstances. But if the language is unambiguous, extrinsic evidence is not admissible to vary the terms of the agreement. Under this reasoning Delaware courts treat public and private contracts the same. In Delaware there is no legislation affecting the

enforceability of the "no damages for delay" clause. The courts rely on the common law for rules governing the enforceability of the "no damages for delay" clause. Exceptions created by the courts are delays caused by the owner's negligence, recklessness, or willful misconduct. Also delays due to the owner's concealment, misrepresentation, or fraud will all a contractor to recover delay damages, Anthony Miller v. Wilmington Housing Authority, 165 F.Supp. 281.

Additionally, a contractor may avoid a "no damages for delay" clause by showing the delay was the result of the owner's bad faith, was of such a nature that it was not foreseeable by the parties, or was so extensive that it constitutes an abandonment of the contract (F.D. Rich Co., 392 F.2d 843). However, delay claims against an owner that amount to simple negligence or carelessness are not recoverable where the "no damages" provision expressly covers "avoidable" delays.

DISTRICT OF COLUMBIA

The District of Columbia Circuit Court of Appeals held that a NDD clause, as an exculpatory clause, is generally not favored, and should be strictly construed. Using this strict construction rule or narrow interpretation, the court was able to make a distinction between a subcontractor and a supplier and thus determine that the NDD clause did not apply to a supplier. (U.S. Industries, Inc. V. Blake Constr. Co. 671 F.2d 539 (1982). In the same case the court did not disturb an award of disruption costs to the subcontractor, finding that the disruption claim had been appropriately separated from the delay damages claim.

In Blake Constr. Co. v. Coakley Co., 431 A.2d 569 (1981), the court gave short shrift to the potential application of the NDD clause in the context of determining the damages recoverable by a subcontractor who justifiably stopped work due to the prime contractor's numerous actions that hindered or prevented the subcontractor's performance. Here, the prime contractor argued that the NDD clause nevertheless precluded recovery of related delay damages. The court adopted the trial court's view that the NDD clause did not give the prime contractor a license to cause delays "willfully" by unreasoning action, without due consideration, and in disregard of the

rights of the other parties, nor did the provision grant the prime immunity from damages if delays were caused by it under such circumstances.

The courts in the District of Columbia rely on the common law, as there is no relevant legislation on the issue of the enforceability of the NDD clause.

FLORIDA

The state of Florida does not have any legislation dealing with the NDD clause. While the Florida courts recognize the NDD clause is not void as being against public policy, they agree that NDD clauses cannot be read literally. As such, their effectiveness can be limited. Thus, in Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District, 238 So.2d 458, 459 (Fla. 2d DCA), evidence concerning delays, and monetary recovery for them, even in the face of a "no damages" clause may proceed, particularly when the evidence is pertinent to the parties' motive, knowledge and intent where the cause of the delay "transcends mere lethargy or bureaucratic bungling."

The other well-recognized exceptions of fraud, concealment, and active interference are rooted in long-standing Florida law recognizing the implied duty of good faith and fair dealing, that is, the implied contractual duty of a party not to hinder, obstruct or impede the performance of the other party to the contract:

> "It is one of the most basic premises of contract law that where a party contracts with another to do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder the agreed thing. Indeed, if the situation is such that co-operation of one party is a prerequisite to performance by the other, there is not only a condition implied in fact qualifying the promise of the latter, but also an implied promise by the former to give the necessary co-operation." (Casale v. Carrigan & Boland, Inc., 288 So.2d 299, 301 (Fla. 4th DCA).

To further limit the effectiveness of the NDD clause contractors may present creative arguments to the court; however, absent competent evidence demonstrating that the defendant's conduct falls within one of the recognized exceptions, Florida courts tend to reject these novel approaches to avoiding the impact of the NDD clause.

One argument that has been advanced by several contractor plaintiffs, and rejected by the courts, is that the NDD clause is inapplicable due to improper or inaccurate contract specifications. C.A. Davis, 400 So.2d 536. In Davis the prime contractor experienced work delays primarily resulting from inaccurate utility installation and building foundation information. After abandoning the job, the prime contractor brought a breach of contract action against the City alleging that the City failed to "provide adequate plans and specifications" and failed to cooperate. In its decision the Court held that the City was insulated by the NDD clause since it did not "willfully or knowingly delay job progress." There was no competent evidence demonstrating that the City caused any specific delay, and there was no evidence that the City failed to cooperate with the contractor.

Even where there is no direct relief as against the owner the contractor may be able to obtain relief against the owner's agent; the A/E (Moransais v. Heathman, 744 So.2d 973, 1999. In Moransais, the Court held, "Accordingly, we hold that the economic loss rule does not bar a cause of action against a professional for his or her negligence even though the damages are purely economic in nature and the aggrieved party has entered into a contract with the professional's employer. We also hold that Florida recognizes a common law cause of action against professionals based on their acts of negligence despite the lack of a direct contract between the professional and the aggrieved party." This holding has the potential for the contractor to be able to sue the A/E for increased costs of performance that arise out of the A/E's own negligence.

Where there exists a valid exception to the NDD clause, the party seeking recovery may need to establish that it has complied with any notice requirements established by the contract, provided the exception did not also impede notice. In Marriott Corp. v. Dasta Development Corp., 26 F.3d 1057 (11th Cir. 1994), the Eleventh Circuit affirmed the lower court and held that the contractor was not able to defeat the NDD clause because the contractor had not complied with a notice requirement. The Court found that in addition to the fact that the notice requirement provided the owner with the opportunity to evaluate the necessity of an extension of time, the requirement was of particular

importance to the contractor because the contractor would only be permitted to recover monetary damages if the owner's "refusal to grant a time extension was wrongful." Since the notice requirement was an essential element to the remedy sought the failure to satisfy the requirement precluded recovery.

One final argument asserted by a contractor plaintiff is waiver and estoppel, at least in a matter involving a state entity. In County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049, 1997, the Florida Supreme Court rejected a waiver and estoppel argument against a municipality as exceptions to a "no oral change order" clause. The court held that sovereign immunity has only been waived in tort by the Florida Legislature for personal injury, wrongful death, and loss or injury of property but not for contract claims. Thus in Florida as it presently stands, it would appear that state entities have an argument based upon Miorelli that as to a NDD clause, a cause of action against them will not lie if the only argument being advanced is that the clause has somehow been waived or that they are estopped from asserting it, in the absence of a breach of an implied covenant or condition.

Contractors doing business in Florida are best advised to give timely notice of any delays; make claims for the same or requests for change orders in strict adherence to the provisions of the contract; and. Perhaps, to stop work until a time extension is granted, at least when dealing with a state entity.

GEORGIA

Like most other states, Georgia courts find the NDD clauses generally valid and enforceable as exculpatory clauses and therefore apply strict rules of construction to limit their effectiveness. In DOTG v. Arapaho Const., Inc., 357 S.E.2d 593 (Ga. 1987), the DOT attempted to terminate its contract with Arapaho due to its failure to obtain the necessary right-of-ways and avoid damages by applying the NDD clause. The Georgia Supreme Court held that "it is well settled that termination or no-damages clause will not be applied to delays or their causes not contemplated by the parties." Such clauses must

be clear and unambiguous. They must be specific in what they purport to cover, and any ambiguity will be construed against the drafter of the instrument. Because the clause did not specifically refer to the DOT's breach of contract in not obtaining necessary rights-of-ways, it was held not apply.

Arapaho, then, is precedent in Georgia case law for courts to find insufficiency or ambiguity in NDD clauses. This suggests that for a NDD clause to succeed in Georgia a "laundry list" of circumstances must be provided in the contract. A drafter seeking an enforceable NDD clause should seek to craft that clause as inclusively as possible, enumerating every possible situation in which it might be applicable.

IOWA

An Iowa federal court had occasion to address the "no damages for delay" issue in Kiewit Sons' Co. Iowa Southern Utilities Co., 355 F. Supp. 376 (S.D. Iowa1973) (applying Iowa law). The Kiewit decision has been cited in many state court opinions over the years for the following statement of law regarding the NDD clause: "no damages for delay" clauses are legitimate and that when they are "without ambiguity, such clauses will be regarded as valid, and enforceable according to their terms."

Of particular significance is the court's discussion concerning active interference. In Kiewit, the project engineer issued orders, which although made in the interest of expediting the project, forced the plaintiff to alter its original plans for pouring the necessary concrete. Keiwit sued the owner of the contract, alleging losses from delays caused by the supervisory engineer. After a lengthy analysis, the court concluded that "more than a simple mistake, error in judgment, lack of total effort, or lack of complete diligence is needed" in order to prove active interference. Active interference would require an "affirmative, willful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms" of the contract. The court found that the engineer's decision did not meet this standard.

LOUISIANA

Louisiana Revised Statute 38:2216H, enacted in 1990, makes "no damages for delay" clauses void and unenforceable as to delays caused in whole, or in part, by the contracting public entity or persons acting on behalf of the public entity. One unique exception to an otherwise enforceable NDD clause is pre-contract negligence. A NDD clause did not preclude the plaintiff from bringing suit against the engineer for additional work and costs attributable to defective plans and specifications prepared pre-contract. As of this writing there are three reported cases dealing with delay claims. In each case a liquidated damages clause was applied in the place of the NDD clause.

MARYLAND

In State Highway Admin. (SHA) v. Greiner Engineering Inc., 83 Md. App. 621, (1990) the Maryland Court of Special Appeals held that Maryland does not recognize a "not contemplated by the parties" exception. The Court relied to some degree on the need to protect public agencies working under fixed appropriations as justifying the enforceability of the NDD clause even in the face of an uncontemplated and very lengthy delay. In Griener, the SHA extended the contract's duration from fifteen months to more than six years due to funding problems. Little if any consideration was given by the court as to the cost impact to the contractor. Another source of reliance was the court's opinion that the "lack of ambiguity in the contract precluded an inquiry into the parties' initial contemplation." Finally, the court held that enforcement of a NDD clause is not unconscionable.

MASSACHUSETTS

Delay damages are recoverable in Massachusetts unless expressly precluded by the terms of the contract. If the contract contains NDD provision, it will be enforced absent arbitrary or capricious conduct by the owner, so that delay damages will not be recoverable unless certain statutory provisions are met.

Under general principles of contract law, a written contract may be altered, either in writing or by oral agreement or by the conduct of the parties. Where the awarding authority pays the contractor for extra costs due to delays and approves a subcontractor's claim for delay damages, it is deemed to have waived the NDD clause, Findlen, 28 Mass. App. Ct. 978-79.

In addition, a NDD clause will not be read into a contract. Such a clause would be of "extreme importance," and "the contract could have specifically stated such a prohibition" if the parties had intended it. This is an example of a partially integrated contract. Thus, where the contract contains a provision expressly authorizing an extension of time as a result of delays, but does not expressly prohibit the recovery of delay damages, such damages can be recovered.

MISSOURI

The courts in Missouri will not enforce a "no damages for delay" clause in a public works contract, but will in a private contract. Missouri will not strain the language of such a clause to relieve a party from a potentially harsh damages bar. Missouri will not recognize a "beyond the contemplation of the parties" exception to the NDD clause, but will not enforce such a clause if the delay is the product of fraud, bad faith, or the like.

There are two post statute cases involving delay damages. In Global Construction v. Missouri Highway and Transportation Commission, 963 S.W.2d 340, rather than use the NDD clause, this public contract simply contemplated the possibility of delay resulting in additional or slowed work. The court held recovery for the delay damages under the contract could be barred because the contract specifically contemplated the possibility of such a problem arising. Essentially, the public entity allowed the contractors to take their chances and build the cost of a potential delay into the contract. The second reported case extended the statutory ban on the NDD clause to contracts that concern public tariff contracts.

NEW JERSEY

New Jersey currently has no legislation in place or pending which affects the enforceability of NDD clauses. Therefore construction contracts are interpreted and applied in accordance with the principles of contract law in New Jersey. Accordingly, the four widely recognized exceptions to the enforcement of the NDD clause are recognized.

PENNSYLVANIA

There is no legislation on the issue of NDD. Noteworthy in the state of Pennsylvania is the State Supreme Court's interpretation of active interference. In Gasparini Excavating Co., v. Pa. Turnpike Commission (PTC), 409 Pa. 465, (1963), defendant TPC awarded an excavation contract to Gasparini. The contract made reference to a "Predetermined Program of the Commission" relating to contracts for other work in progress running concurrently with Gasparini. The TPC ordered Gasparini to mobilize on the site but due to the nature of the other contracts Gasparini was denied access and was therefore delayed several months. Gasparini lost their appeal to a board of arbitrators who cited contract language to support their position. Gasparini appealed and lost in the Court of Common Pleas.

Under Pa. Law Gasparini was entitled to appeal to the Pa. Supreme Court. Here, the Court reversed. Although the court acknowledged NDD clauses generally, the court ruled that such provisions (NDD clauses) have no reference to an affirmative or positive interference on the part of the owner or ordinarily to a failure to act in some essential manner necessary to the prosecution of the work unless delay in performance is contemplated by the contract. The court concluded that there was a failure to act in an essential manner of the Commission "not having a predetermined program and interference with Gasparini's performance. This case illustrates that the phrase "active interference" is somewhat of a term of art, and includes such concepts as passive negligence.

SUMMARY

Most states, including Florida acknowledge the validity of the NDD clause and hold that the clause is not void as against public policy; at least in principle. In addition most states, including Florida, do not distinguish between public and private contracts. Recognizing the very real potential for the extreme and harsh consequences as a result of the enforcement of the NDD clause most states recognize exceptions to the clause. The most widely accepted exceptions to the NDD clause are: (1) bad faith or willful, malicious, or grossly negligent conduct; (2) uncontemplated delays; (3) delays so unreasonable that they constitute an abandonment of the contract by the contractee; and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract. Other exceptions that are not generally recognized are (1) a delay not within the specifically enumerated delays to which the NDD clause applies. This exception lends itself to the development of a "laundry list" to be found in the agreement; (2) the "passive negligence" exception and, (3) precontract negligence. The last two exceptions could arguably be included under the breach of a fundamental obligation of the contract and an uncontemplated delay.

These exceptions are the results of the courts seeking to minimize the clause's impact on the aggrieved party. The tools of interpretation are used extensively to determine the intent of the parties mixing in longstanding rules and principles of basic contract law. The results of the efforts of the courts in the states addressing the NDD issue lead to generally inconsistent results. These results are primarily based on whether the court gives literal interpretation to the language in the agreement. One state's high court may give an entirely different meaning to an identical NDD clause under same or similar circumstances as another state's high court.

There presently exists a growing trend to eliminate the use of the NDD clause in public contracts. As of this year four states have enacted various forms of legislation that

essentially ban the use of the NDD clause in contracts involving public entities. These states include California, Colorado, Louisiana, and Missouri. Prior to the passage of the legislation banning the use of the NDD clause the State Court decisions were not uniform. It appears that where a state has legislation on the issue of delay damages the matter is resolved with expediency. Those states that have enacted legislation have properly responded to the expanded use of the NDD clause by owners, especially in the public arena. In response owners have either incorporated the possibility of delay into the language of the agreement or resorted to a more expanded use of the liquidated damages clause (Woodward).

CHAPTER V
Survey Questionnaire

INTRODUCTION

The survey questionnaire is considered a very useful tool to obtain the input of those who are directly impacted by the research effort. Approximately 1300 questionnaires were mailed to various members of the construction industry and those groups that serve and are served by the construction industry. As such each of these groups may be affected by the impact of the NDD clause and were therefore included in the survey group. The survey group consisted of general contractors, subcontractors, material suppliers, and design professionals, public entities such as municipalities and school districts, and members of the legal profession. (Appendices F thru I are the sample questionnaires submitted to the various survey groups). There were approximately 417 responses received during the survey period that represents a 32% response rate. Those responses received after the stated reporting deadline were given a cursory review but were not included in the assembled data. It should be noted that for whatever reason the response from the legal community was very disappointing. Essentially all legal survey questionnaires were returned unopened.

Construction Group

Upon receipt, the contractor questionnaires were separated into three groups. The first group (A) consisted of those contractors whose volume was in the $1 – $10 million dollars range. This group provided 115 responses. The next group (B) consisted of contractors whose volume ranged between $10 and $30 million per year. Group B provided 30 responses. The last category (C) was made up of contractors whose volume exceeded $30 million per year. Here, 35 questionnaires were returned. This grouping was essentially the only breakdown of the study. All contractors were asked the same questions with room for their personal comments on selected questions. Rather than disperse comments through the analysis all comments were collected in Appendices A - D. All comments were sorted by construction group and by question. The discussion will address each question by group.

GROUP A ($1 – $10 million)

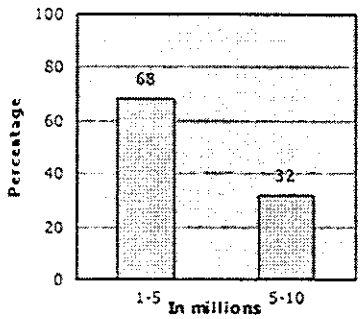


Table 1

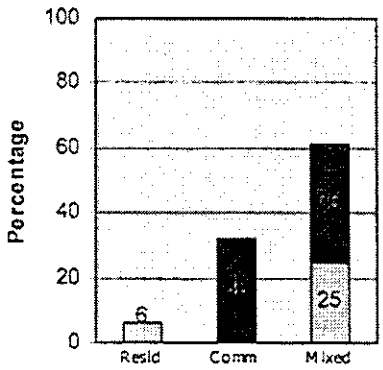


Table 2

The average number of years in business for this group of contractors is 18 years. For construction companies ranging from $1-$10 million in annual revenues, most combined residential and commercial work. Only 32% performed commercial work exclusively. It should be noted that 68% fell within the lower range of the category, that is, into the $1 - $5 million range (SEE TABLE 1). The mix of the volume of work within the various companies is also important (SEE TABLE 2). This data suggests that a significant majority of the contractors in this group supplement their commercial work in the residential market. Most of these smaller companies do not include the NDD clause in contracts between themselves and the owner as well as with the subcontractors. Only one-third included the NDD clause in their contracts in either case.

A substantial majority of the members of this group feel that the NDD clause unreasonably shifts the risk of delay from the owner to the contractor because the language in the clause is too extreme and absolute. This suggests that the presence of the clause in and of itself is not the issue; it is the language used or which is not used that is a cause of concern.

At this point in time current contract language typically does not identify exceptions to the enforcement of the NDD clause; only through litigation and court decisions have exceptions to the NDD clause been recognized. The survey

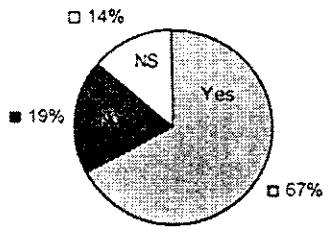
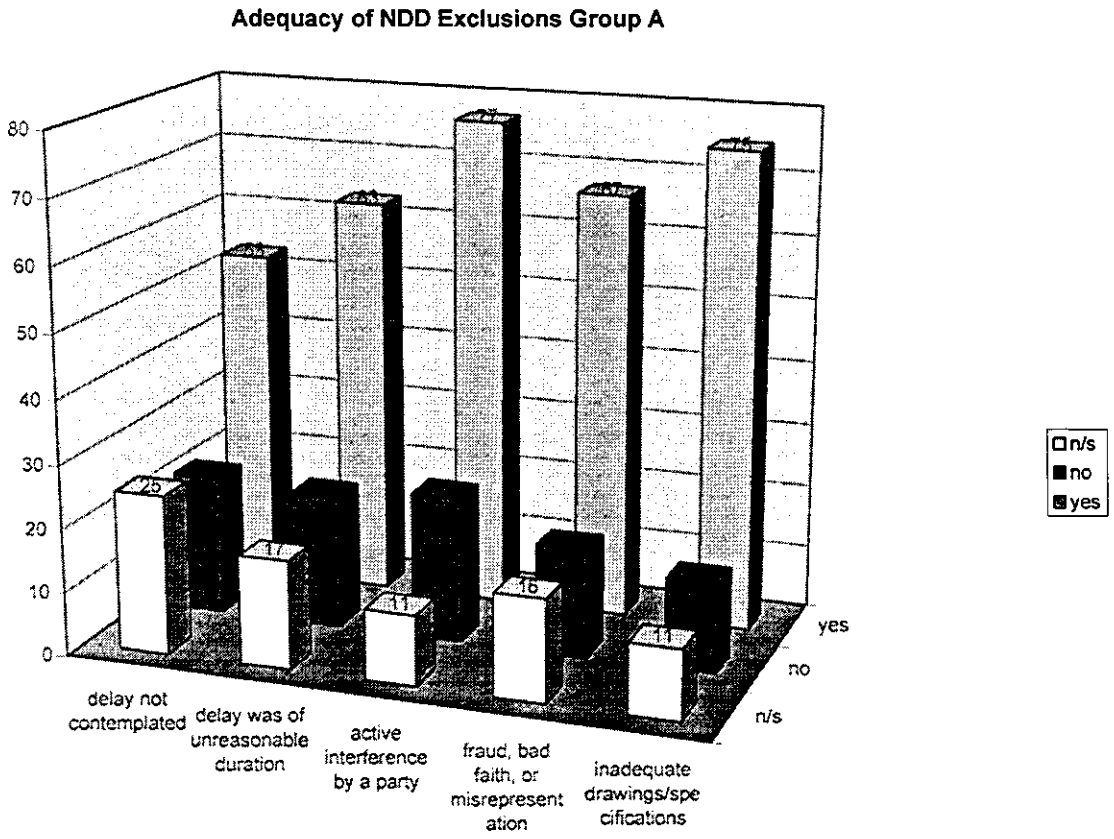


Figure 1

questionnaire identifies these five exceptions. Of the five exceptions that have emerged, an average of 67% of the respondents believes that the five exceptions adequately cover those situations that should prevent the application of the NDD clause. An average of



19% feel that the five exceptions do not adequately cover NDD clause situations and 14% stated they were not sure one way or the other. (SEE FIGURE 1). Table shows the relative level of satisfaction each exception serves the contractor in avoiding the enforcement of the NDD clause. (SEE COLUMN CHART ABOVE)

It is interesting to note that active interference and inadequate drawings/specifications are the two exceptions the contractors in this group were most concerned with preventing the enforcement of the NDD clause.

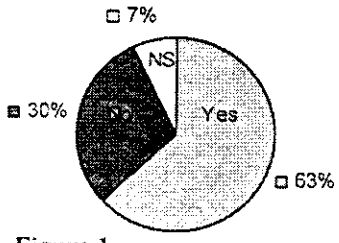


Figure 1

Figure 2

Because of these uncertainties, 63% believe that the NDD clause has an adverse impact on their perceived cost of construction (SEE FIGURE 2). In addressing this perceived cost, 25% quantified that cost as a separate line item in their estimate while 75% included the cost in their percentage markup for the job. A majority of those responding felt that the NDD clause added 5% to the cost of the job. In addition to adding a percentage cost to the job 53% felt that the NDD clause had an adverse impact on their relationship with the owner.

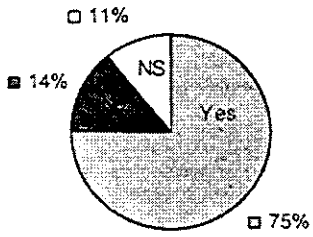


Figure 3

In addition, 75% felt that the presence of the NDD clause is yet another obstacle to team building, partnering and good faith dealing (SEE FIGURE 3).

To resolve both the issues of added cost and an adversarial relationship with the owner 40% suggest that the NDD clause be deleted from the contract while 60% felt that modifying the language to more fairly allocate the risk is appropriate.

Of those responding 72% have been successful at avoiding a construction dispute based on the NDD clause. Of the 28% that have been involved in a dispute based on the NDD clause all the well known methods of resolving the dispute have been used with negotiation been employed 55% of the time. Of the steps taken by those who have been impacted by the clause to avoid future disputes 35% exclude the clause from their contract, 41% negotiate the clause out of the contract and 20 keep the clause and adjust their bid accordingly. Clearly, 75% take affirmative action in dealing with the NDD clause rather than take a passive approach.

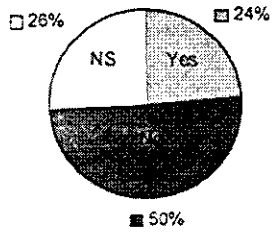


Figure 4

The presence of the NDD clause in a contract comes with a price. 71% of the members of this group felt that the NDD clause added 1% - 10% to the cost of the job. This range is consistent with the relative cost of a project in this category in real dollars. In spite of the presence of the NDD clause 50% felt it was not detrimental to the timely resolution of performance and disputes. This question may be a bit ambiguous since 26% were not sure as to its impact on the incentive to resolve disputes (SEE FIGURE 4).

Figure 2

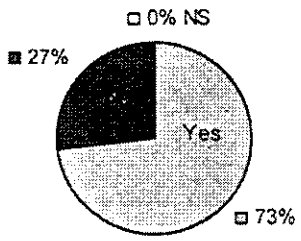


Figure 5
Figure 3

The discussion so far has not made a distinction between the public contract and private contract. This issue was asked in the following question: As a matter of public policy do you feel that the clause should be eliminated from construction contracts that are public in nature, character, and funding? The overwhelming majority (73%) felt that it should be eliminated. As one respondent stated, "A public entity should be working towards what is fair for the public, this includes a general contractor" (SEE FIGURE 5).

In line with the opinions expressed in the previous question 75% of the respondents felt that the inclusion of the NDD clause in a contract was another obstacle to team building, partnering and good faith dealings. This large percentage strongly suggests that the two parties are presumptively entering into the contract from adversarial perspectives.

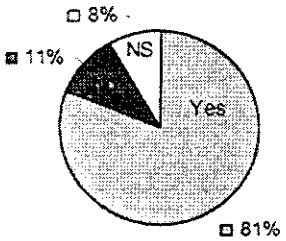
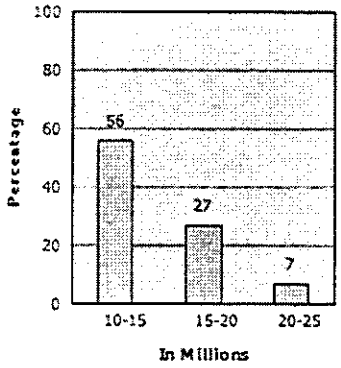


Figure 6
Figure 4

In pursuit of this goal the question of support for legislation to address the NDD clause issue was asked. A solid 81% would support legislation that would clearly define the scope of the NDD clause and identify the exceptions to its enforcement (SEE FIGURE 6).

GROUP B ($10 – $30 Million)

The respondents in this group indicated being in business for an average of 27 years. Within this group 56% generated $10 - $15 million in volume per year; 27% of the respondents averaged $15 - $20 million in volume; 7% earned $20 - $25 million in volume and 10% brought in $25 - $30 million in volume (SEE TABLE 3). Of all companies in this group 57% performed commercial work exclusively while 16% performed residential work only. The balance of this group, 27% performed a mix of residential and commercial. Within this mix 24% was residential and 71% was commercial (SEE TABLE 4). Similar to Group A, this group supplemented their commercial operations with residential work.



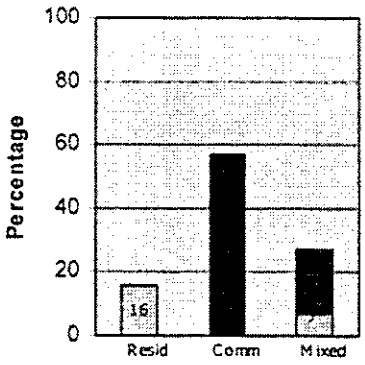


Table 4

Insofar as the use of the NDD clause is concerned, 57% of the companies had a NDD clause included in their contracts with the owner. As between the general contractor and the subcontractor there was an even split of 50% who did and 50% who did not include a NDD clause in their contract with the subcontractor.

Similar to the members of Group A, the overwhelming majority (90%) believed that the NDD clause unreasonably shifted the risk of delay from the owner to the contractor. This shift of risk is qualified in the sense that the language of the clause is too extreme and absolute in meaning and in favor of the owner. Again, similar to the members of Group A, the members

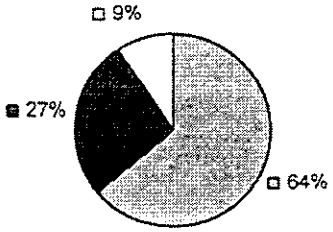
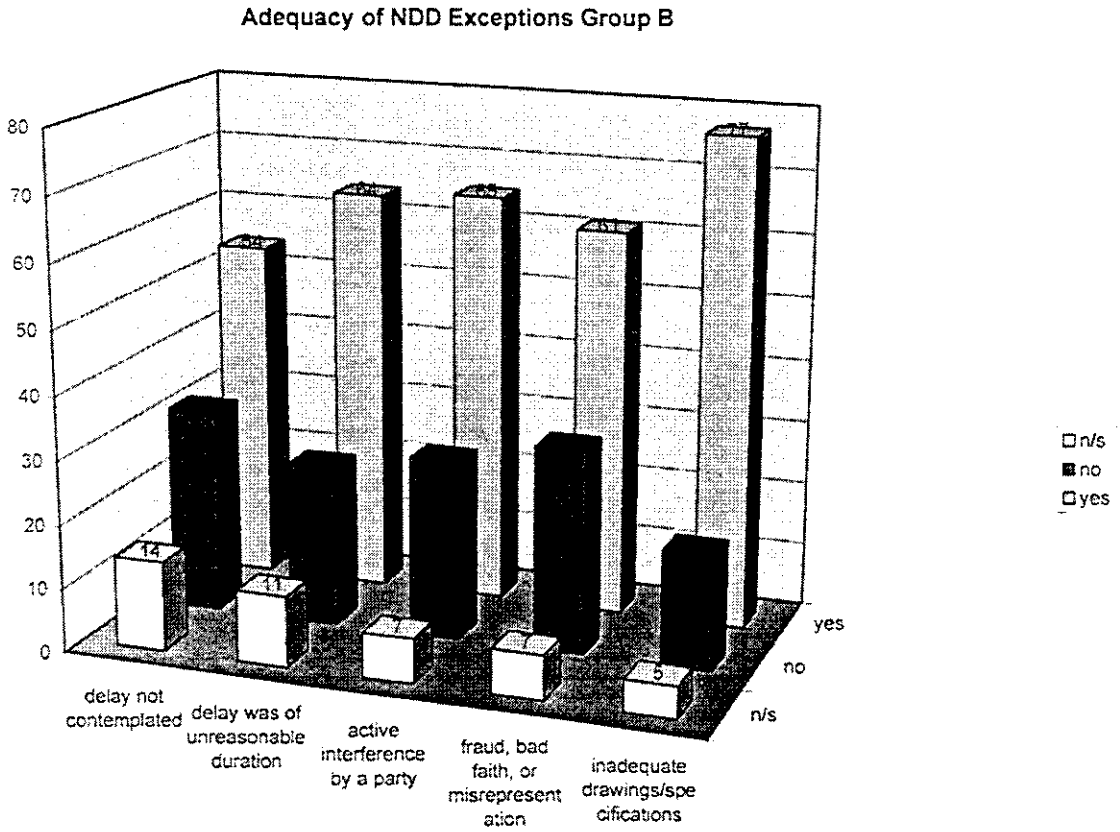


Figure 7

of Group B (90%) feel that if the clause had to remain in the contract that the clause would be supplemented with language which expressly lists exceptions rather than keep the current form of language that is broad and ambiguous.

In regards to the five generally accepted exceptions to the NDD clause, the members of Group B (64%) felt about the same as the members of Group A, that the five exceptions adequately cover those situations which should prevent the enforcement of the NDD clause. Similarly, 27% of the members of Group B said the five exceptions did not work while 9% were not sure (SEE FIGURE 7). Within the five exceptions the two exceptions that these contractors are most sensitive to are active interference and more importantly, inadequate drawings/specifications. (SEE COLUMN CHART BELOW)



In contrast to the members of Group A (63%), only 46% of the members of Group B felt that the presence of the NDD clause had an adverse impact on their perceived cost of construction. Within the 46% group 25% quantified this cost as a separate line item in

their estimate while 75% addressed this issue in their percentage markup for the job. Further, it is also interesting to note that in contrast to Group A (53%), a bare majority, a full 68% of the members of Group B felt that the NDD clause had an adverse impact on their relationship with the owner (SEE FIGURE 8). Due to this perception 52% want the clause deleted and 48% would like to see the language modified to more fairly allocate the risk of delay. Clearly, all members of this group would like to see some form of action taken against the NDD clause.

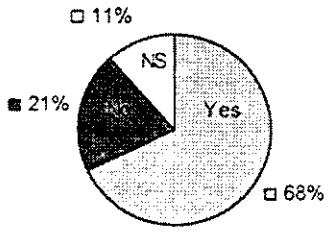


Figure 8

Modifying or eliminating the clause is understandable where 50% of the contractors in this group have been involved in a dispute that was based on the NDD clause. Their position is even more compelling when they all want a modification in the NDD clause and 50% have not been involved in a dispute based on the NDD clause.

In terms of dealing with the impact of the NDD clause 39% used negotiation to resolve their dispute, 17% used mediation, 9% went to arbitration and 35% decided to resort to litigation in order to obtain relief. These percentages seem to indicate an "all or nothing" strategy. If the decision is to seek relief then a true commitment was made to take the dispute all the way to litigation. Another point of view suggests that only 40% were able to resolve their dispute through negotiation while 60% had to take the resolution process to the next levels. Of the 60% remaining only 25% were able to resolve their dispute short of litigation. The remaining balance of 35% continued on to the most expensive form of resolution; litigation.

The strategy chosen by those affected by the NDD clause to avoid the future enforcement of the NDD clause resulted in the following: 34% would require the NDD clause be excluded as a condition of their proposal to the owner. Of the remaining members of Group B, 45% would negotiate the NDD clause out of the contract, 14% would allow the clause to remain in the contract and would adjust their bid accordingly

and 17% would take some other form of action. Reviewed another way, 83% would take some positive action toward addressing the NDD clause. Only a small minority would respond in a passive form by only adjusting their bid accordingly. On this issue 63% believed that the perceived addition cost to the job totaled between 1% and 5%. This seemingly small incremental cost is equivalent to approximately 50% of the contractor's overhead and profit.

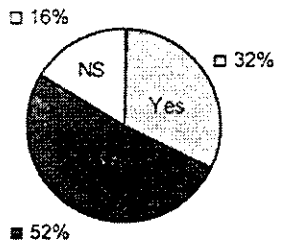


Figure 9

Because so much, if not all, of the contractor's profit is at risk, 52% of the contractors do not allow the NDD clause to diminish the incentive to resolve disputes in a timely manner. This question may be somewhat ambiguous since it suggests that the NDD clause does eliminate the incentive to resolve disputes. This is most likely their opinion based on the owner losing the incentive to resolve disputes promptly (SEE FIGURE 9).

Under most circumstances the owner wants his building completed by the agreed upon date. This is especially true when the structure has a direct impact on the revenue generating power of the company. This can be in the form of employee productivity or direct sales such as a retail outlet. This is not necessarily the case where the owner is a public entity. There is an impact but most often not as direct; the profit motive is missing. It is in this area that the NDD clause seems to play a significant role because it is in the public contract arena where most NDD cases are found. So it is understandable that 85% of the contractors in Group B would like to see the NDD clause eliminated from projects that are public in nature, character and funding (SEE FIGURE 10).

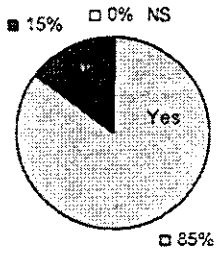


Figure 10

Finally, as to Group B, the substantial majority (74%) feel that the clause is an obstacle to team building (SEE FIGURE 11) and 86% would support legislation that

would not necessarily eliminate the clause from the contract but clearly define the scope of the NDD clause and its exceptions (SEE FIGURE 12).

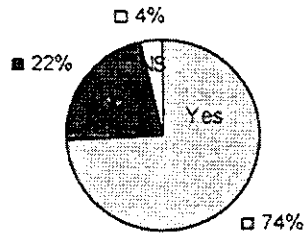


Figure 11

GROUP C ($30 Million and Greater)

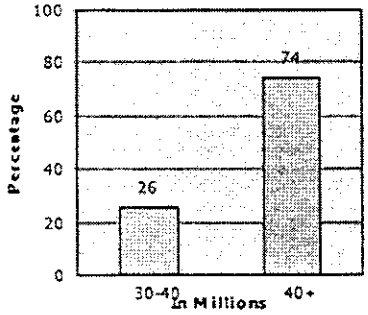


Table 5

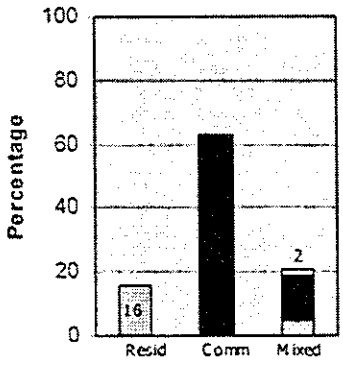


Table 6

There were twenty-five companies in this group that responded to the survey. Of this group 26% were in the $30 -$40 million range. The balance (74%) reported volumes of greater than $40 million per year (SEE TABLE 5). The average age of the members of this group is 42 years. The respondents in this group are clearly well established and have most likely seen their fair share of litigation. As would be expected, 63% of the contracting companies focused on commercial construction exclusively while only 16% devoted their resources to residential construction only. Twenty-one percent of the companies had a mix of residential and commercial and this mix was 24% residential, 71% commercial and 5% civil construction (SEE TABLE 6).

In this group there appears to be slightly less significance placed on the NDD clause. Only 44% of those surveyed indicated that they include a NDD clause with the owner whereas 57% of those in Group B stated that they include a NDD clause with the owner. There is less presence of the NDD clause as between the general contractor and the subcontractor. In Group B there was

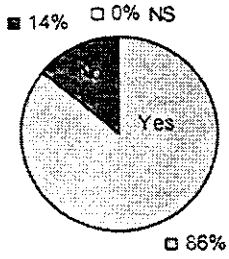
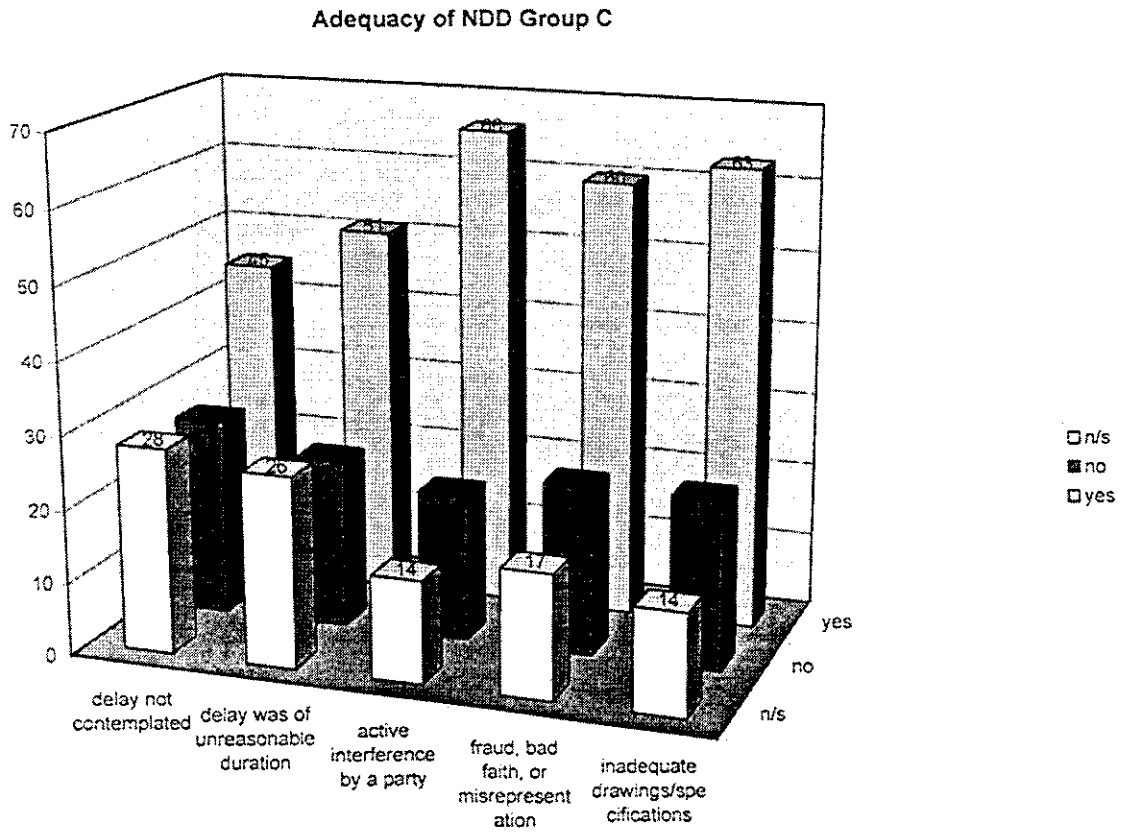


Figure 12

a 50/50 ratio but in Group C there was a 60/40 ratio. This difference is slight but there appears to be a definite trend. It could be argued that the general contractor is successfully eliminating the NDD clause from his contract with the owner while managing to keep the clause in place in his agreement with the subcontractor.

All companies in Group C feel that the clause unreasonably shifts the risk of delay from the owner to the contractor due to the extreme and absolute nature to the language that is used in the clause. Ninety-one percent feel the way to deal with this problem is to supplement the NDD clause with language that expressly lists exception to the clause.



In regards to the list of generally recognized exceptions, only an average of 57% felt that those generally accepted exceptions adequately covered those situation that should prevent the application of the NDD clause. It appears that a substantial minority of contractors in the group feels that the current lists is inadequate and is looking to increase

the list of exceptions. Within the list of generally accepted exceptions this group also feel that active interference and inadequate drawings/specifications are the two critical issues in determining the enforceability of the NDD clause. (SEE COLUMN CHART ABOVE)

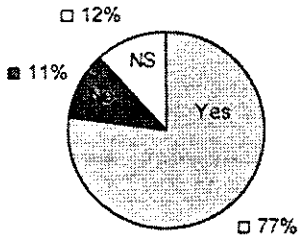


Figure 13

Because of a list that is perceived to be inadequate a substantial majority (77%) believe the NDD clause has an adverse impact on their cost of construction (SEE FIGURE 13). The majority of contractors in the group (80%) addressed this perceived cost by including the perceived risk into the percentage markup for the job. Only 20% actually quantified the perceived cost of the NDD clause by creating a separate line item in their estimate.

In addition to the increased cost in the project 77% believe the presence of the NDD clause has an adverse impact on their relationship with the owner. To resolve this issue 63% believes that the clause should be deleted entirely from the contract while 37% would be satisfied if the language were modified to more fairly allocate the risk of delays beyond the control of the contractor.

This greater animosity toward the presence of the NDD clause is understandable when approximately 60% of the contractors in the group have been involved in a dispute that was based on the NDD clause. In this group of 60% the use of negotiation was the most popular choice; 46% used this method to resolve the NDD based dispute. In avoiding the presence of the NDD clause in the contract on future projects, 30% made their bid contingent on the NDD clause not being in the contract. Another 43% would negotiate the NDD clause out of the contract prior to any agreement and 25% would not seek to remove the NDD clause but resort to adjusting their markup. When asked their opinion as to what percentage of cost was added to the job because of the NDD clause, 68% of those responding to this question stated the job 's cost was artificially increased

somewhere between 1% and 5%. Certainly for the size of projects that fall within the $30 million dollar category this amount is substantial.

Even though, theoretically, the NDD clause reduces the incentive for the owner to meet his obligations under the contract in a timely manner, just over half of the contractors indicated they didn't think that it reduced the incentive. As mentioned under Group B this question may be a bit ambiguous since the response could be read as an incentive for the owner or the contractor. In either case only a slight majority believed it either did or it did not. There is no clear consensus on this issue.

Finally, on the matter of publicly funded contracts, a tremendous majority believes that the NDD clause should be eliminated from a public works contract. Further, a 94% majority believes that the clause is a substantial obstacle to good faith dealing during the

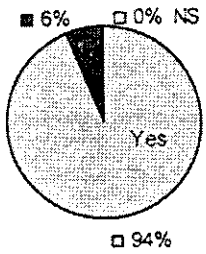


Figure 14

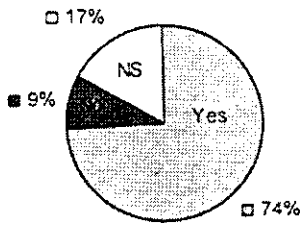


Figure 15

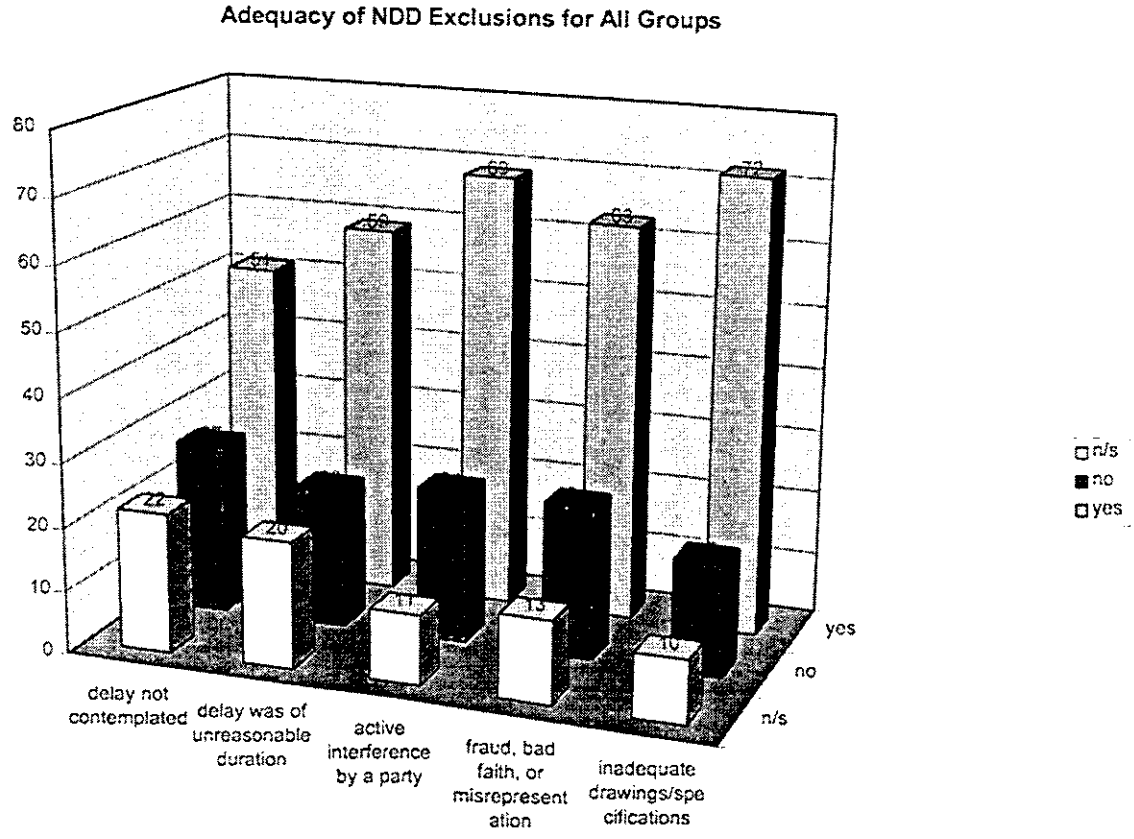
term of the contract (SEE FIGURE 14). To the extent that the clause can be removed from a publicly funded contract 74% would be willing to support legislation to address the ambiguous nature of the NDD clause and develop clear language that would more fairly allocate the risk associated with delays (SEE FIGURE 15).

ALL GROUPS

The discussion so far has address the NDD clause issue by contracting group based on volumes of work. This final analysis reflects the construction companies as a whole with significant differences highlighted.

It can be a safe presumption that the companies surveyed fairly represent the construction industry across the state. This is so because the average age of the companies surveyed is 29 years. However it must be noted that the majority of the contractors responding were in Group A and a majority of those contractors were in the $1 - $5 million category having been in business approximately an average of 7 years. Certainly age in and of itself is no measure of industry representation but it does indicate that the respondents have seen many events that have affected their company and the construction industry as a whole. Throughout it all they have managed to not only survive, but prosper, as indicated by the number of years in business.

The two situations that are the most frequently cited causes to avoid the enforcement of the NDD clause it 1) active interference and 2) inadequate drawings and specifications. Seventy-three percent of all contractors view these two circumstances as justification to excuse the application of the NDD clause. (SEE COLUMN CHART BELOW)



Often cited examples of active interference are the denial of access to the job site due to the owner not obtaining the necessary permits or right of way or the ongoing work of another contractor. The cost of the delay under these conditions is relatively easy to determine. However, the determination that the drawings and specifications are inadequate is much more difficult to establish. Even when established, the correction and redesign process is very time consuming. The issue here is not just the delay but the cause of the delay. The owner will assert that the so-called "inadequate drawings and specifications" are reasonable and ordinary and are indeed adequate as AFC drawings and not at all a result of gross negligence. This argument will save the NDD clause as against the contractor.

After having encountered these types of problems in the past the contractor will typically incorporate these types of costs into their estimate. The cost here is either the cost to address the active interference and inadequate drawings or the cost of the NDD clause. Since there is little the contractor can do to prevent an owner's active interference or require adequate drawings and specifications the contractor can only address the NDD clause. This is demonstrated by 60% of the contractors in the survey who perceive the NDD clause as adding to the cost of the project. SEE FIG 16 This cost for most contractors is in the 1% - 5% range. From a non-quantifiable perspective, 79% of the all contractors believe the NDD clause is an obstacle to team building, and partnering. Certainly this obstacle does not serve the public's best interest.

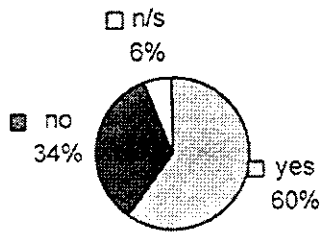


Figure 16

The NDD clause reveals itself most often in the public contract's arena. There is simply no opportunity for the contractor to negotiate the NDD clause out of the contract as there is in the private contract area. This "take-it-or-leave-it" approach does not represent the public's best interest in the eyes of the contractors. As a result an overwhelming 78% of the contractors surveyed feel that as a matter of public policy the

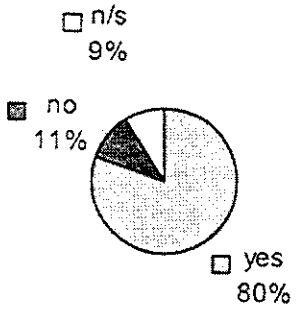


Figure 17

NDD clause should be eliminated from public works contracts. SEE FIG 17. To address this issue 80% of those surveyed are willing to support legislation not to necessarily eliminate the NDD clause but to properly define the scope of the clause and identify the exceptions to the clause.

Design Group

The questions asked of the members of the design group were the same or similar as the questions asked of the members of the contracting group. The first question of importance addressed who encouraged the inclusion of the NDD clause when the design professional was responsible for drafting the contract documents. Here, 75% did not recommend the NDD clause be included in the contract documents. Further, the same 75% stated that the owner DID NOT request that the NDD clause be included in the agreement. This would suggest that, as question #4 verifies, 62% the design professionals stated that the owner's legal counsel is responsible for the inclusion of the NDD clause in the agreement. This can most likely be attributed to the attorney's duty to affirmatively protect his client's interest.

Notwithstanding the design groups apparent dislike of the NDD clause they were essentially evenly split as to whether the NDD clause does or does not reasonably shift the risk of delay from the owner to the contractor. Half of those responding felt that the shift was reasonable since the contractor is given adequate notice and is therefore able to incorporate this risk into his profit markup. The other half felt that, even so, the language used in the typical NDD clause is too vague and overbroad to fairly shift the risk of delay to the contractor.

Question 7 reflects the state of confusion and uncertainty expressed by the design group. This question identified the five commonly found exclusions recognized by the

courts and asks if the exclusion adequately covers the situation that would avoid the application of the NDD clause. The responses were evenly split among the choices given. There was no clear consensus as to whether the situations/conditions mentioned provide adequate exclusions to the NDD clause. In each situation 36% said they did, 41% said they did not and 23% were not sure. This apparent frustration is again demonstrated in question #8. This question asks if the NDD clause is equitable to all parties to the agreement. Of those responding 63% stated that is not, 19% stated that it is and 18% were not sure.

Given the uncertainties surrounding the inclusion of the NDD clause in the contract and it's potential impact question 10 asks if there is a cost, whether perceived or real, associated with the presence of the NDD clause. Of those responding, 67% said there was a cost and that cost was approximately 5 – 10% of the contract amount.

Question 6 asks if the NDD clause should be supplemented with language that identifies exceptions and/or exclusions to the clause. An overwhelming 89% stated that it should. This clearly suggests that there is a clear need to address the impact of the NDD clause to the agreement. Question 16 is a follow-up questions that asks for a possible solution. Of those responding, 71% of the design professionals would support legislation that would keep the clause but define appropriate exclusions and/or exceptions to the NDD clause.

Public Entity Group

This group consisted of members of the Florida League of Cities and the organization that represents the state's county school boards. As such, response was limited in numbers but offers exceptional representation of the public buyers of construction services. This is important because it is in the public contracting arena that the NDD clause has had its most dramatic impact. The first five questions profiled the members of this group. In terms of dollar amount this group represents over $903 million in taxpayer money spent on public projects; primarily school construction. Of this group 70% had $25 million or less in construction volume, 13% had between 25 million and 65 million

in construction awards, and 17% had construction programs greater than 65 million. Of these dollars, 74% of the respondents spent 85% or greater of their construction program dollars on building construction.

Question 6 is the first question that directly asks this group their opinion on the NDD clause. Because the clause is stated in the agreement 74% felt that adequate notice was given to the contractor and the burden was on the contractor to evaluate this type of risk and incorporate the cost of that risk into his profit markup. Question 7 addressed those who responded negative to question 6. The 26% who felt that the risk was not reasonably shifted to the contractor 70% felt that the risk could be reasonably shifted if the clause was supplemented by language that identifies exceptions and/or exclusions to the clause. As far as their opinion about the adequacy of the court-recognized exceptions there was no clear consensus in this area. In each exception approximately 41% felt the recognized exceptions were adequate while 36% felt the recognized exceptions did not and a significant 23% were not sure.

Of obvious concern to the public entity group is the cost of construction. Question 7 addresses this issue. Sixty-three percent felt that the NDD clause had a negative impact on the cost of construction. In their opinion the NDD clause added approximately 5% to the cost of construction. This could result into a savings in the millions of dollars In question #12 a slightly greater percentage (68%) of the respondents felt that the NDD clause had an adverse impact on their relationship with the prime contractor. To resolve this issue 41% believed that modifying the language of the NDD clause would minimize the negative impact on the relationship with the prime contactor. Forty-three percent either took no position by not responding or were not sure while a very small percentage 6% felt it appropriate to delete the clause in its entirety.

Questions 14, 15, and 16 addressed the issue of direct involvement in a dispute based on the NDD clause. A surprising 20% of those responding have been directly involved in a NDD based dispute. The resolution process followed the typical steps: first negotiation, followed by mediation, then arbitration, and finally litigation. Unfortunately, 40%

reached the litigation stage before reaching final resolution. This appears to demonstrate that a NDD clause consisting of language that is vague and overbroad will likely lead to costly litigation. Perhaps with the legal consequences lingering in the back of the minds of the owners, an astonishing 53% felt that the presence of the NDD clause did not eliminate the incentive for timely resolution of performance and other dispute issues. Indeed, the fact that the owners are aware of the nature of the NDD clause and the fact that it can be a two edged sword may motivate the owners to protect their position by expediting issues under dispute.

The last three questions address possible solutions. Question 18 inquires as to the appropriateness of the NDD clause in public contracts. Where the clause meets the criteria for sound public policy 70% of those responding felt that the clause should remain in the agreement. This suggests that the present status of the NDD clause fails to meet public policy standards and that a rewriting or standard criteria be established for the NDD clause. To this end question 19 asks if the respondent would oppose legislation that would a) more clearly define the language of the NDD clause and b) more clearly define the exceptions and exclusions to the NDD clause. In both cases over 70% stated that they would not oppose such legislation. The last question asks for other information that would be beneficial to the study. Relevant comments are noted in the appendices.

SECTION VI
CONCLUSIONS AND RECOMMENDATIONS

The study has thus far covered general principles of contract law, case law, a survey of industry commentators, a selective state-by-state analysis, and a survey of industry professionals. This final section identifies those areas of significant concern to the parties affected by the NDD clause and recommendations to address those concerns.

Construction Group Conclusions

- *There appears to be an overwhelming sense of frustration and helplessness in the construction industry in regards to the enforceability or avoidability of the NDD clause.* Based on the overwhelming opposition to the presence of the NDD clause the problem appears to be quite serious. At the higher end of the sample group (Groups B and C) an average of 73% of the contractors felt that the presence of the NDD clause has an adverse impact on their relationship. Further, 84% of the contractors in these two groups believed that the NDD clause was a substantial obstacle to team building and fair dealing.

- *It can be a safe presumption that the companies surveyed fairly represent the construction industry across the state.* The sample size for the survey was calculated using the following formula:

$$\text{Sample size} = (Z^2 \times P \times Q) / (\text{limit})^2$$

Where: Z is standard normal variable at the desired level of confidence.

P is incidence of NDD clause

Q is (1 – P)

Limit is the range within which the true value of P will fall.

Sample size = $[(1.64)^2 \times .9 \times .d1)] / (.05^2) = 96.8$ say 97

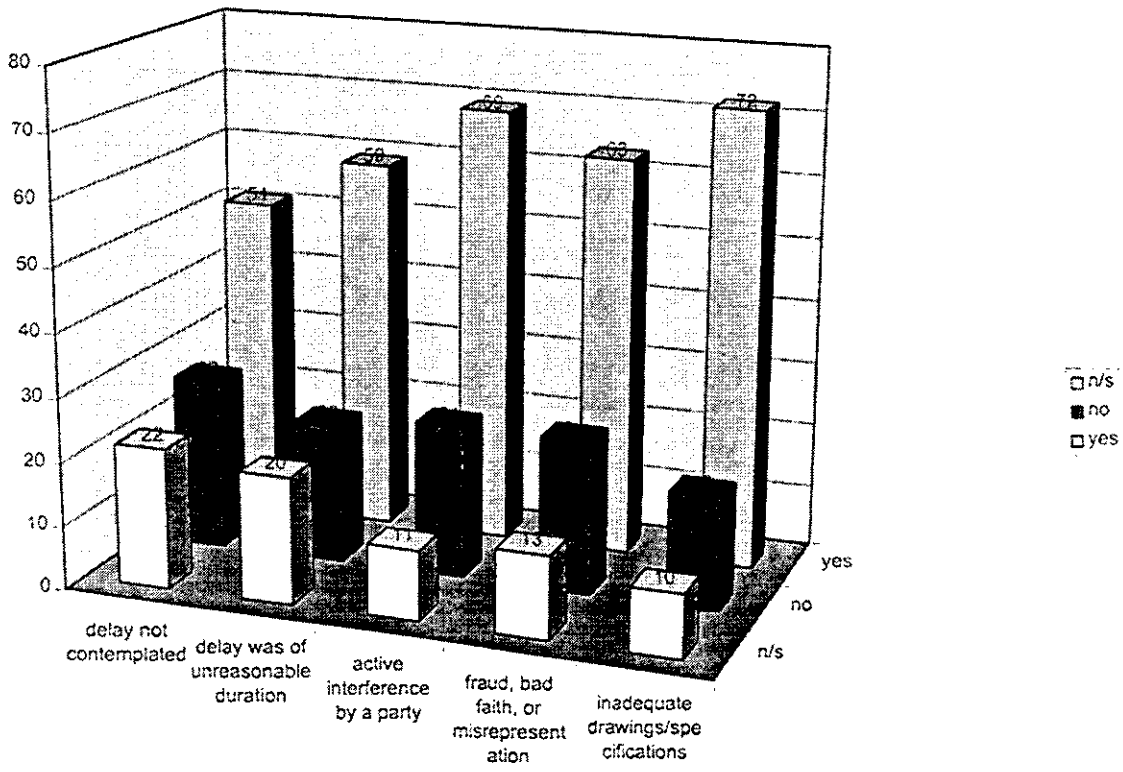
Therefore a sample of 97 responses will provide an estimate of P within + or – 5% points with a 90% level of confidence.

The number of responses for the survey was over four hundred.

- *The two situations that are the most frequently cited causes to avoid the enforcement of the NDD clause it 1) active interference and 2) inadequate drawings and specifications.* Seventy-three percent of all contractors view these two circumstances as justification to excuse the application of the NDD clause. (SEE TABLE CHART BELOW)

Often cited examples of active interference are the denial of access to the job site due to the owner not obtaining the necessary permits or right of way or the ongoing work of another contractor. The cost of the delay under these conditions is relatively easy to determine. However, the determination that the drawings and specifications are inadequate is much more difficult to establish. Even when established, the correction and redesign process is very time consuming. The issue here is not just the delay but the cause of the delay. The owner will assert that the so-called "inadequate drawings and specifications" are reasonable and ordinary and are indeed adequate as AFC drawings

Adequacy of NDD Exclusions for All Groups



and not at all a result of gross negligence. This argument will save the NDD clause as against the contractor.

- *The presence of the NDD clause in the contract carries with it a cost of 1% - 5% of the amount of the contract.* After having encountered these types of problems in the past the contractor will typically incorporate these types of costs into their estimate. The cost here is either the cost to address the active interference and inadequate drawings or the cost of the NDD clause. Since there is little the contractor can do to prevent an owner's active interference or require adequate drawings and specifications the contractor can only address the NDD clause. This is demonstrated by 60% of the contractors in the survey who perceive the NDD clause as adding to the cost of the project. SEE FIG 16 This cost for most contractors is in the 1% - 5% range. From a non-quantifiable perspective, 79% of the all contractors believe the NDD clause is an obstacle to team building, and partnering. Certainly this obstacle does not serve the public's best interest.

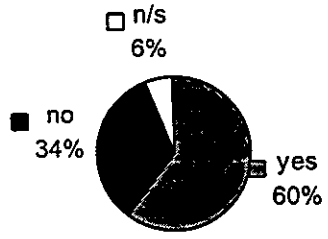


Figure 16

- *The NDD clause reveals itself most often in the public contracts arena.* There is simply no opportunity for the contractor to negotiate the NDD clause out of the contract as there is in the private contract area. This "take-it-or-leave-it" approach does not represent the public's best interest in the eyes of the contractors. As a result an overwhelming 78% of the contractors surveyed feel that as a matter of public policy the NDD clause should be eliminated from public works contracts. SEE FIG 17.

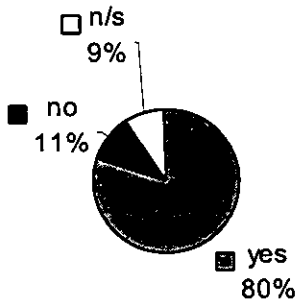


Figure 17

- *80% of all respondents are willing to support legislation to properly define the scope of the clause and identify the exceptions to the clause.* The construction industry

appears willing to accept the presence of the NDD clause in the contract but it should be properly based and a fair allocation of the risks associated with delays. The reasoning is based in equity and fairness. Public owners carry with them the upper hand in bargaining power. This power should be tempered based on public interest that the NDD clause does not reflect. The repercussions do not end with the general contractor. The impact is quite pervasive as demonstrated by the overwhelming opposition to the NDD clause.

- *Legislation appears to be appropriate in the area of public works contracts.* A review of case law in those states without statutes in the area of NDD clauses lack uniformity in the application of the principles of contract law. Decisions made by the various courts are based on whose interest is most greatly affected. Maryland ruled for the state agency merely because of the agency's limited budget at the expense of one of its citizens. Other courts dismiss the entire matter viewing the NDD clause as just another term in a given contract that carries no special weight or significance. The need for uniform guidelines is greatly needed.

Design Group Conclusions

- *68% of the respondents do not recommend inclusion of the NDD clause in the contract documents and state that the owner does not request the NDD clause be included.* This strong showing against the inclusion of the NDD clause implies that the presence of the NDD clause in the agreement is not necessarily in the owner's best interest. The fact that the NDD clause is not part of the "boiler plate" language of the agreement indicates that the clause is inserted at the urging of the owner's legal representative. This is verified by 61% of the respondents stating that the owner's legal representative is responsible for drafting the language which makes up the clause.

- *The members of this group strongly believe that the NDD clause should be supplemented with language that identifies exceptions and/or exclusions to the*

clause. In their opinion the NDD clause, in its present state, is a significant problem that may be more of a liability than an asset in protecting the owner's interest. This is further evidenced by the fact that, in their opinion, the present list of recognized exceptions are inadequate in defining when the NDD clause can be applied. This group would strongly support legislation that would keep the clause in the agreement but define the exceptions and exclusions to the NDD clause.

Public Entity Group Conclusions

- *This group strongly believes that because the contractor knows the NDD clause is in the contract the risk associated with the NDD clause is reasonably shifted to the contractor.* There is validity in this belief especially where the owner establishes a clear pattern of including the NDD clause in the contract. On the other hand where the contract is not subject to modification, which is typical in public works contracts, notice of the inclusion of the NDD clause in the contract has little merit in attempting to justify the reasonableness of risk allocation.

- *Similar to the other reporting groups there is no clear consensus that the presently court recognized exceptions adequately identify when the NDD clause may or may not be applied to delay claims.* Wording and phrases such as active interference, fraud, delay not contemplated, and delay of unreasonable duration are vague, overbroad and subject to wide interpretation. This group, along with the other groups, recognizes the inadequacy of such language when delay disputes are in issue. They appear to want more specific language, if for no other reason, to avoid the long and costly litigation process.

- *A clear majority in this group would not oppose legislation that would clearly identify exceptions and exclusions to the NDD clause.* A clear and substantial majority of this group would appear to welcome legislation that would remove the ambiguities associated with the current recognized exceptions to the NDD clause. Where the criteria for protecting the public interest are fairly and equitably met,

the NDD clause should remain in the agreement; otherwise it should be deleted according to this group.

Recommendations

- **Educate the public entity owner as to the real consequences of maintaining the NDD clause in a contract for construction services.** Generally speaking, those real consequences are an additional 1% - 5% in construction costs. The not so tangible costs but which are also real are those costs that are inherent in an adversarial relationship. The presence of the NDD clause to a substantial majority of the respondents is the source of this cost. One other cost is that cost the owner suffers when the better contractor chooses not to pursue the work due to the presence of the NDD clause. This is more widely known as a "lost opportunity" cost.(Shimp).

- **Within the context of owner education, inform the owner of the need to provide the contractor with the necessary plans and specifications to assure uninterrupted construction progress.** This essentially involves the providing of adequate funding for design services. Where the design team is providing professional services the bidding aspect of this activity should be reevaluated. The manifestation of the design effort is reflected the quality of the plans and specifications assembled for the project. These two items are essentially the tools the contractor needs in order for him to expedite the work.

- **Inquire into the common causes of public entity owner delays and take the necessary steps to streamline the approvals process.** This issue requires investigation into the operating procedures of the owner and his representatives. Current procedures appear to restrict the timely exchange of information between the contracting parties. To this extent the traditional competitive bid approach to public works contracts should be reviewed. Perhaps a CM approach is more appropriate

since this method of contracting directly address NDD clause issues in favor of owner interests.

- **Where any alternative to the competitive bid approach is not available adopt the AIA documents (AIA-201 for example) for use in the competitive bidding process.** The AIA documents are generally accepted as the standard for building construction contracts. They do not include a NDD clause as generally understood. The allocation of risk due to delays is equitably distributed among the parties to the contract. The AIA documents are court tested and are endorsed by the major industry groups associated with the construction industry.

- **Research the appropriateness of the determination that the NDD clause is not void as against public policy.** Arguments for and against the presence of the NDD clause have debatable degrees of merit. What are the real merits for and against the NDD clause and should there be a balancing of the interests. The courts have carved out exceptions but still retain the essence of the clause. Should the clause itself be declared void and exceptions be made which allow the application of the clause?

- **Enact legislation to address the NDD clause issues.** The reliance on current case law will continue to lead to uneven results. Where there exists a uniform rule in the form of statutory language the resolution of NDD clause issues will be expedited. The presence of statutory language will also give the courts guidance as to what the legislature intended rather than relying on court decisions that may or may not be appropriate.

The above listed recommendations are not all inclusive. They are intended to respond to the issued raised within the scope of the research study. Certainly any contract clause, which appears unreasonable, onerous or unconscionable, is worthy of further research.

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Appendix A
Construction Industry Survey Question 17
COMMENTS

Does the use of the clause eliminate the incentive for timely resolutions of performance and disputes?

A. One to Ten Million in Volume.

- *This clause is typically used as a hammer to force the contractor into that which is not in the contractor's best interest.*
- *The owner has no motivation to be equitable.*
- *I'm duty bound and my reputation is at stake.*
- *The clause places an atmosphere of "the owner could care less if he delays the contractor", therefore even if the owner's agent does not perform there is no motivation to do so.*
- *Owner and owner's representative have little incentives to resolve disputes which may cause delays.*
- *There is no room for modification to allow for delay damages for differing site conditions. The rationale is that otherwise the public may be overpaying in the long run because they are paying when no delays occur.*

B. Ten to Thirty Million in Volume.

1. *O/A/E has no monetary responsibility to the contractor to furnish a timely response to RFI's or CO proposals. The risk is entirely on the contractor.*
- *Due to the almost unlimited and uncontrollable opportunities for delay in our industry, my company will never enter into a contract where there are damages for delay.*
- *It gives the owner/GC no reason to be prompt with anything. If you accept this clause the owner/GC cannot be monetarily at risk even though they could be at fault.*
- *If the clause is in the specifications, you must accept it. To modify the bid to exclude it would be grounds for your bid being rejected.*
- *There have to be incentives (Basically "damages" to owner/engineer/architect) in order to resolve problems quickly. None of these entities fully appreciate the full impact to GC's and Subs that delay impose and the potential impact to "other" projects the GC and Subs may be involved in.*

- *The party(owner) who is protected by this clause has no incentive to expedite resolution.*

- *Why should they (owner) cure a problem rapidly when it cannot effect the cost-time?*

C. Thirty Million and Greater in Volume

- *Creates an adversarial relationship to all issues.*

- *Owner does not have incentives to make prompt decision.*

- *Allows A/E and owner to interfere with construction without recourse.*

- *No damage for delay provides no incentive for timely resolution of issues which may delay progress. Mere inclusion of clause shifts all risk to contractor for any and all times related issues. Most issues involve some component of time.*

- *Owner has no reason to act timely.*

- *On public projects the owner's representative has no vested interest to resolve and accordingly does not respond quickly nor on the interest of reasonable financial resolution.*

Appendix B
Construction Industry Survey Question 19
COMMENTS

As a matter of public policy do you feel that the clause should be eliminated from construction contracts that are public in nature, character and funding?

A. One to Ten Million in Volume.

- *Governments are generally not experts and don't understand the process of construction.*
- *If you delay me you damage me, I have to plan my future and bid other work.*
- *The courts despise these clauses because they are so "one-sided" and unreasonable that they are almost impossible to defend or support. These clauses imply a lack or loss of integrity and responsibility on the owner's behalf.*
- *Should reduce cost to owner and allow contractor to recover costs that are beyond the contractor's control. It also would encourage timely response to problems by the owner.*
- *Should be eliminated period!*
- *Normally contract language is too vague and broad. Risks are not equitably shared.*
- *It does not represent a fair agreement and causes the contractor to assume risk and the costs of those risks in an unfair manner.*
- *Just properly define when a delay can be compensated.*
- *Time is money – any unnecessary delays cause a potential for loss – without a delay damage option things tend to happen only in due course.*
- *This required contractors to resolve issues as quickly as possible to keep project moving forward. Owner wants this!*
- *This is not a risk that can be or should be the responsibility of the sub, since we cannot manage the risk per the CII. Let risk be assumed by that party best able to manage the risk.*
- *There is no incentive for public employees to mitigate or timely address issues that ultimately delay projects.*
- *The competitive nature of public contacts is enough to ensure expediting of construction contacts.*

- *This clause is a "take it or leave it" clause. This is not what team building or partnering is about.*

- *Public contacts are inherently demanding on contractors to begin with. This clause would only adversely impact the performance and working relationship between the municipalities and the contractor throughout the project.*

- *The clauses are opportunistic and punitive. They eliminate the theory of an even and fair document. They should not be enforceable for any taxpayer-funded work.*

B. Ten to Thirty Million in Volume.

- *Each entity should bear the responsibility and cost for timely response/performance.*

- *The owners must assume liability for their actions.*

- *Delays happen; the contractor should not take 100% of the responsibility.*

- *NO! We know how to deal with the current clause and a replacement would open more unanswered questions. We could never see it go away.*

- *In today's construction market, subs perform 95% of the work and are forced to assume 110% of the risk. The circumstance of delay and correction/compensation for same should be shouldered by the responsible party. If a project is delayed for 1 year through the negligence of an owner or GC and the sub's contract contains a "no damages for delay" clause all costs for de-mobilization, re-mobilization, material cost increase and labor increases are born by the sub through no fault of his own.*

- *It is only fair to compensate a contractor for his cost incurred due to delays imposed on a project by sources beyond his control.*

- *The clause can remain with direct reasonable controls.*

- *Owner's reps are not financially involved in the outcome of the project. If there were some way to have a representative of the owner tied financially to the successful timely completion of a project, they would act more quickly.*

- *This keeps the bid price reasonable and all parties are paid for value received.*

- *No! To keep the job momentum and scheduling in tact this is a good program. If designed with reasonable standards.*

- *Subs are responsible for their delays, however the owner is not responsible for his.*

- *The contractor is always entitled to be reimbursed for his fair value costs of any delay or time extension.*

C. Thirty Million and Greater in Volume

- *It places an unfair burden on the contractor.*
- *Delays are an owner risk that shouldn't be shifted to the contractor.*
- *The clause is unfair and places the additional financial risk on the contractor for delays that are cause by others. If the contractor delays the owner, he has the right to collect either "real" or "liquidated" damages. We as contractors would like a "level playing field".*
- *There is no need for this type of clause in any contract. It is totally unilateral.*
- *Most delays are cause by the owner and architect taking too long to make a decision or a delay is from unforeseen conditions.*
- *A public entity should be working towards what is fair for the public, this includes a general contractor.*
- *This clause should be removed so as to force the owners representative to fairly and quickly resolve the dispute.*
- *Public entities are highly susceptible to delay impact by their nature. This would prevent taxpayer burden.*
- *No. With the additional exception/exclusions included in the contract to limit its application, it should remain.*

Appendix C
Construction Industry Survey Question 20
COMMENTS

Do you feel that the creation and addition of the clause to the construction contract is yet another obstacle to team building, partnering and good faith dealing for the life of the contract?

A. One to Ten Million in Volume

- *There is no trust between contractor and owner and basis for all parties to be fair and equitable.*
- *Why would I trust an owner who insists on the ability to jerk me around?*
- *It is another "classic" vehicle for an entity or individual to dismiss themselves or itself from taking responsibility for its actions.*
- *All parties on a building team have a vested interest to perform timely. Delays need to be resolved timely and a "no damage for delay" clause tends to take out the necessity to act timely and responsibly.*
- *An owner should not insist on a clause that is so onerous to one party.*
- *Good contacts/projects depend on cooperation between the owner, contractor, engineer, and architect.*
- *It tends to pit the owner/engineer/contractor interests against each other in trying to pin the blame on each other for delay problems.*
- *I won't work under those conditions.*
- *Team should work together. Partnering – assumes all parties are reasonable.*
- *It forces the contractor to build a CYA file at day one of construction, as possible defense of a claim which on public work is inevitable.*
- *No. Adequately covered, it would probably be an asset to the industry as a whole.*
- *It immediately creates an adversarial relationship which requires parties to spend even more time justifying issues.*
- *It provides too much unfair protection for the owner's incompetence.*
- *Get a good bid and work together; don't always take the lowest bid.*

- *It is difficult to maintain that player/partner attitude when the contractor is watching profit margins fall from the impact of downtime. The liability is not shared. Where is the partnering in that?*

- *Just another reason not to do any public work*

- *It gives the party generating the contact the upper hand which promotes abuses or the perception of abuse..*

B. Ten to Thirty Million in Volume

- *Partnering means 'each entity' is responsible for the success of the project. Most partnering I've seen to date is in name only.*

- *It pits owner and architect against the GC.*

- *No. It is an owner's tool if the contractor is flagrant or very uncooperative. If you start out partnering it most likely will be left unused.*

- *A contract containing NDD clause is one-sided from the beginning and indicates that the owner is not interested in being fair or assuming responsibility.*

- *No. If the intent is clear to all parties – the team will succeed.*

- *Placing all this risk on one party to the contract makes that party start out from ground zero with his defenses up and fingers ready to point.*

- *The mere presence of the clause indicates a lack of trust and an atmosphere of the owner wanting something for nothing.*

- *Professionals must be responsible for their actions and the adverse results of the same.*

- *Absolutely! For partnering to succeed all parties must have a stable goal in project success. This clause gives owner's protection against their failure to perform.*

- *Just like liquidated damages, it sets a bad tine, initially, at the start of work.*

- *One sided clause for the owner and architect.*

C. Thirty Million and Greater in Volume

- *Shifting of outside risk to a single party does not fit with positive relationships. Its not a win-win or lose-lose clause. It is a fictional win-lose.*

- *Creates the possibility of unfair penalties*
- *Places contractor in an adversarial/claim mode.*
- *Team building would emphasize shared risk vs. shifted risk.*
- *Contracts should contain fair wording stating that the sub should do a quality job, started and finished per the schedule.*
- *Creates more paperwork and friction between CM/GC and A/O.*
- *Failure by other team member results in additional cost to the contractor.*
- *Does not require those responsible for their actions to pay delay costs.*
- *It creates immediately an adversarial relationship.*
- *In our work owners hire us because of our ability to meet schedules.*
- *The owner has no vested interest in the delay and should not have the opportunity to prolong resolutions.*
- *If A/E or owner delay GC, the GC spends most of time documenting active interference claim.*

Appendix D
Construction Industry Survey Question 22
COMMENTS

If there is any other information that you feel would be beneficial to the study please discuss.

A. One to Ten Million in Volume

- *Present case law that identifies the onerous nature of this clause. Prove to public entities that this clause causes reason for the entity to be perceived as dishonest.*
- *Our experience with delays is mainly a result of unrealistic completion times.*
- *Owner and contractor must place a great deal of trust in each other. If he insists on having the contractual right to delay the work without fair compensation, I don't feel he is operating in good faith and I don't trust him. Anyone who doesn't think delays cost money is an idiot.*
- *Architects are the weak link in the system. Most could not build from their own plans even with a cost plus contract.*

B. Ten to Thirty Million in Volume

- *Most of our work is in the public arena and we have not found it to be fair to subs. In private jobs when the GC is responsible for hiring the design professionals and subs the partnership concept has worked much better and delays are much less common.*
- *Eliminate completely.*
- *Will the fix be worse than our current system? I do not feel the lawmakers can put together wording to satisfy all and be fair to all. Seems all law is based on the homeowner point of view; not our commercial market.*
- *We would support outlawing this clause and pay clauses completely. They are unfair and morally worn and should be made illegal to impose on others*
- *Construction delays are a part of the industry. In the fictional world they don't exist. In the real world they are dealt with.*
- *In bidding on public projects, "draft" copy of the contract is always included in the bidding document. You cannot add money to bid as delays might not occur. Only recourse is to sign contract and sue later if the owner causes delays to project, and will not pay for it.*

C. Thirty Million and Greater in Volume

- *Some of our answers may seem contradictory; however, we've learned to live with the clause. Our work is private, not public. Usually private owners need building and work with us to avoid delays. Hasn't been a big problem. It is still unfair.*
- *Existence of a no damage for delay clause is a non-questionable expense in terms of companies who will not price work due to its existence. They are bad business and good firms avoid bad business. It is a clause like many others that gives a general contractor or construction manager broad rights to spend a subs money to bail himself out of delays mostly cause by his own inaction. It is a machine gun he points at every finish sub trade; someone gets shot down.*

Appendix E
Design Group Survey Questions 8&17
COMMENTS

Are there any other situations or circumstances you would consider appropriate for avoiding the impact of the "No Damages for Delay" clause?

- *The NDD clause if written properly and defining acceptable reasons for delays is a good clause.*
- *The clause diminishes the design professional's authority to enforce decisions that are in the best interest of the public.*
- *Impossible to list! All clients would be required to pay for delays, generally bid as a % of the contract, as contingencies are presently included in lump sum bid contracts.*
- *Unseen/Hidden conditions; owner delays; acts of God (needs definition).*
- *Multiple contractors, adjacent sites, natural causes.*
- *The act of God and beyond the control of the contractor protects the contractor. Negligence on the part of the contractor should be prevented.*

If there is any other information that you feel would be beneficial to the study please discuss:

- *I believe in rewards equal to the penalty for early completion if savings are realized by the owner.*
- *I believe in exceptions to cover unforeseen obstacles.*
- *I believe the word penalty should represent true costs to the owner.*
- *Wrote portions of the text for project management courses for military construction. We had no clause in our contracts that were titled "No Damages for Delay".*
- *The method for determining costs for delay should equally be tied to any defined exclusions.*
- *Contractors figure time = expense (and it does) if the owner delays the project the owner should pay. Contractors shouldn't be forced to accept what are the owner's risks relative to weather, acts of God.*

- *Need to get this information out to all architects.*
- *I feel the design industry needs to be more educated.*
- *Why not have an industry symposium @ FL AIA Convention?*
- *Get the legislature out of private industry decisions covered under most professional practice acts.*
- *Round table dialogue with say 3-4 representatives of contractors, private sector clients, public sector clients, professional insurance providers, legal profession (only those familiar with construction law).*

State of Florida
Department of Education
Office of Educational Research and Improvement

Building Construction Industry Advisory Committee

A Study of the "No Damage for Delay" Clause in Construction Contracts

INDUSTRY QUESTIONNAIRE

All information that would permit
Identification of individuals will be kept confidential.

Sponsored by: Building Construction Industry Advisory Committee

Supported by: University of Florida
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Dear Construction Professional:

I am writing to ask you to participate in the 1999 study of the "No Damages for Delay" (NDD:99) clause in construction contracts by completing the enclosed short questionnaire. Please understand that your organization was randomly selected. As part of a randomly selected sample, your participation, while voluntary, is vital to the study's success. In addition, all information will be used strictly for research purposes and will otherwise remain confidential. Further, in appreciation for your participation, the results of this survey will be sent to you if requested. (See last page of questionnaire).

NDD:99 is a comprehensive study of the impact of the no damages for delay clause. The construction industry, in addition to facing the risks associated with actual construction, faces contract clauses that increasingly places the risk of loss on the contractor due solely or in part by others. To properly assess the impact of the "No Damages for Delay" clause construction industry professionals, buyers of construction services and design professionals need reliable and current data on the opportunities, limitations and demands the clause has on the parties to a contract. The NDD:99 will provide profiles of the construction professionals, design professionals and owners who are affected by the "No Damages for Delay" clause and information as to the future status of the clause.

The Building Construction Industry Advisory Committee is sponsoring the study. The study is being conducted through the M.E. Rinker, Sr. School of Building Construction, University of Florida.

Participation in completing the questionnaire is estimated to average 30 minutes, including time to review the enclosed material and to complete the survey. Send comments regarding this burden to participate or any other aspect of this study along with the survey.

If you have questions or comments concerning the study please contact the NDD:99 principal investigator, Dr. Michael J. Cook, at the M.E. Rinker School of Building Construction, at 1-352-846-1862 or via e-mail to: zekecook@ufl.edu.

Your participation in this important and useful study is critical to its success. We appreciate your taking part in making this research successful and thank you for your assistance. Please fax or mail your completed response in the attached prepaid envelope by August 20, 1999.

Sincerely,

Michael J. Cook, JD
Assistant Professor
M.E. Rinker School of Building Construction

Legal

1. How many construction-related cases has your firm been involved in the past 5 years? _____

2. What percentage of your firm's total caseload consists of construction-related disputes? _____%

3. What percentage of the construction-related cases were based on a delay claim? _____%

4. Of the delay cases, what percentage involved the no-damage-for-delay clause? _____%

5. In those cases involving the no-damage-for-delay clause, what percent of these cases were you trying to enforce the application of the clause? _____%

6. In those cases involving the no-damage-for-delay clause, what percent of the these cases were you attempting to avoid the impact of the clause? _____%

7. From the exceptions listed below, please identify in descending order of frequency from the most to the least, the exception that is most frequently employed: 1- most frequently used, 5- least frequently used:

   ____ Delays were not contemplated

   ____ Delays were of unreasonable duration (constructive abandonment

   ____ Active interference by the owner

   ____ Fraud, bad faith, or misrepresentation

   ____ Other: _____

8. Do you feel that the "No Damages for Delay" clause unreasonably shifts the risks of delay to the prime contractor or subcontractor? YES NO

9. On what legal principle do you base your decision? _____

10. Do you believe that ultimately the "No Damages for Delay" clause has an adverse impact on the cost of construction? YES NO

11. If yes to what extent? _____

12. Does the inclusion of a "No Damages for Delay" clause eliminate the incentive for timely resolution of performance and disputes? _____

13. Do you encourage the use of other avenues of dispute resolution prior to litigating the NDD clause? YES NO

14. If yes, what techniques are most frequently used?

    _____ Negotiation _____ Mediation _____ Arbitration

15. Should the state adopt some form of legislation addressing the NDD clause? YES NO

Note: All of the above information will be complied and used anonymously for reporting purposes.
All information on this questionnaire will be kept confidential.
If there are any questions please call Professor Michael Cook, at (352) 846-1862

Please Fax to : (352) 392 –9606 Or return to: BCN/FAC 101, PO. Box 115703
Gainesville, FL 32611-5703

CONSTRUCTION

1. What is your company's approximate annual volume of work?

   _____ 1 to 5 million _____ 5 to 10 million _____ 10 to 15 million _____ 15 to 20 million
   _____ 20 to 25 million _____ 25 to 30 million _____ 30 to 40 million _____ Over 40 million

2. What percentage of your volume of work is: _____ residential _____ commercial

3. As between yourself and an owner do the contracts that your firm signs typically include a no damage for delay clause? YES NO

4. As between yourself and a subcontractor do the contract that your firm signs typically include a no damage for delay clause? YES NO

5. In your opinion does the clause unreasonably shift the risk of delay from the owner to the contractor?
   Yes To the extent that the language of the clause is too extreme and absolute.
   No To the extent that the contractor is given adequate notice and can incorporate The NDD risk into his profit markup.

6. Should a NDD clause be supplemented with language which expressly lists exceptions? NO YES

7. Do the following exceptions adequately cover those situations which should prevent the application of the NDD clause?

a)	delay not contemplated	YES	NO
b)	delay was of unreasonable duration	YES	NO
c)	active interference by a party	YES	NO
d)	fraud, bad faith, or misrepresentation	YES	NO
e)	inadequate drawings/specifications	YES	NO

8. If no, what other situations or circumstances would you consider appropriate for avoiding the NDD? Please list:

   _____
   _____
   _____

9. In your opinion does the mere presence of the NDD in the contract have an adverse impact on your perceived cost of construction?

   YES NO

10. If yes, is this cost: A. Quantified in the bid proposal as a separate line item of cost or
    B. is it included in the percentage markup for the job?

11. In your opinion does the presence of the NDD have an adverse impact on your relationship with the owner?

    YES NO

12. If yes, the best way to eliminate the impact of the NDD is to:
    a) delete it from the contract
    b) modify the language to more fairly allocate the risk

13. Has your company ever been involved in a construction dispute that was based on the No Damages for Delay clause?

    YES NO

14. If yes, what method has your company employed to avoid the impact of the clause?

_____	Negotiation	_____	Arbitration
_____	Mediation	_____	Litigation

15. Assuming your company has been adversely impacted by the application of the no damages for delay clause what steps do you now take to avoid future application of the clause?

A) Exclude the clause from your proposal
B) Negotiate clause out of the contract
C) Keep the clause and adjust bid accordingly
D) Other _____

16. Where the clause must remain in the contract what perceived increase in cost does the NDD add to project in percentage terms?

_____ %

17. Does the use of the clause eliminate the incentive for timely resolutions of performance and disputes?

YES NO

18. If yes, please discuss briefly:

---

19. As a matter of public policy do you feel that the clause should be eliminated from construction contracts that are public in nature, character and funding?

YES NO

Reason:

_____
_____
_____
_____

20. Do you feel that the creation and addition of the clause to the construction contract is yet another obstacle to team building, partnering and good faith dealing for the life of the contract?

YES NO

Reason:

_____
_____
_____

21. If there is any other information that you feel would be beneficial to the study please attach your response.

Again, thank you very much for your time and effort in answering the above questions! Also, if you have an interest in the final report please send the mailing address that you would like to receive the information.

Note: All of the above information will be complied and used anonymously for reporting purposes.
All information on this questionnaire will be kept confidential.
If there are any questions please call Professor Michael Cook, at (352) 846-1862

Please Fax to : (352) 392 –9606 Or return to: BCN/FAC 101, PO. Box 115703
Gainesville, FL 32611-5703

DESIGN PROFESSIONALS

1). Approximately how many years has your firm been in business? _____ yrs.

2). What is your firm's approximate annual volume of work? _____ million.

3). When your firm is responsible for drafting the contract documents:
do you recommend the NDD clause be included? YES NO NOT SURE
does the owner ask that the NDD clause be included? YES NO NOT SURE
is the NDD clause a part of the "boiler plate" language? YES NO NOT SURE

4). Where the "No Damages for Delay" clause is included who is responsible for drafting the language which makes up the clause?
A. The design Professional B. The Owner C. The Owner's Legal Representative

5). In your opinion does a typical "NO Damages for Delay" clause reasonably shift the risk of delay from the owner to the contractor? Circle One

NO Because the language of the clause is overbroad and vague.
YES Because the contractor is given adequate notice and can incorporate the risk associated with the clause into his profit markup.
NOT SURE (please discuss briefly) _____
_____
_____

6). Should a "No Damages for Delay" clause be supplemented with language which identifies exceptions and/or exclusions to the clause? YES NO

7). Should the following circumstances/conditions cover those situations which would prevent the application of the "NO Damages for Delay" clause?

a) delay not contemplated	YES	NO	NOT SURE
b) delay of unreasonable duration	YES	NO	NOT SURE
c) active interference	YES	NO	NOT SURE
d) fraud, bad faith, or misrepresentation	YES	NO	NOT SURE
e) inadequate drawings/specifications	YES	NO	NOT SURE

8). Are there any other situations or circumstance you would consider appropriate for avoiding the impact of the "No Damages for Delay" clause?
_____
_____
_____

9). Do you feel that the "No Damages for Delay" clause is equitable to all parties to the agreement?
YES NO NOT SURE

10). In your opinion, does the presence of the "NO Damages for Delay" clause in the contract have an adverse impact on the cost of construction?

YES NO NOT SURE

11). If your response to question 8 is yes, by what percent do you feel construction costs could be reduced if the clause was eliminated? _____%

12). In your opinion does the presence of the "NO Damages for Delay" clause in the contract have an adverse impact on your relationship with the contractor in your capacity as the owner's representative?

YES NO NOT SURE

13). Has your firm ever been involved in a dispute that was based on the "No Damages for Delay" clause?

YES NO NOT SURE

14). If yes, what method was employed to resolve the dispute?

____ Negotiation ____ Mediation ____ Arbitration ____ Litigation

15). Do you feel that the presence of the "No Damages for Delay" clause in a contract is an obstacle to team building, partnering and good faith dealing for the life of the contact?

YES NO NOT SURE

Rationale: _____

_____

_____

16). Would your firm support legislation that would either:

_____ void the clause as against public policy,

_____ keep the clause but define exclusions,

_____ maintain the present status of the clause.

_____ other, _____

17). If there is any other information that you feel would be beneficial to the study please discuss :

_____

_____

Again, thank you very much for your time and effort in responding to the above questions! If you have an interest in the final report please send the mailing address that you would like to receive the report.

Note: All of the above information will be compiled and used anonymously for reporting purposes.
All information will be kept STRICTLY confidential.
If you have any questions please call professor Michael Cook @ (352) 846-1862.

Please Fax to: (352) 392-9606 or return to: BCN/FAC 101, P.O. Box 115703
University of Florida, Gainesville, FL 32611-5703

PUBLIC ENTITIES

1. Please indicate if your organization is a: (Circle One)
   State Agency Municipality School District Other

2. What is the approximate annual volume of construction work awarded by your organization? _____ million.

3. Of that volume what percentage of the work is building construction?
   _____ %.

4. What is the most common method of construction administration?

   By: Architect CM Clerk of the Works

5. Does your organization include in the contract documents a "No Damages for Delay" clause?

   Never Sometimes Frequently Always Not Sure

6. In your opinion does the "No Damages for Delay" clause reasonably shift the risk of delay damages to the contractor?

   YES Because the contractor is given adequate notice and can incorporate the risk associated with the "No Damages for Delay" clause into his markup.

   Yes, _____

   NO Because the language of the clause is vague and overbroad.

   No, _____

7. If you answered no to #6, could the issues surrounding the "No Damages for Delay" clause be resolved by supplementing the clause with language which identifies exceptions and/or exclusions to the clause?
   YES NO

8. In your opinion, should the following circumstances be recognized as being situations that would relieve the prime contractor from the consequences of the "No Damages for Delay" clause?

Active Interference	YES	NO	NOT SURE
Fraud/Misrepresentation	YES	NO	NOT SURE

Delays not Contemplated by the Parties	YES	NO	NOT SURE
Delays of Unreasonable Duration	YES	NO	NOT SURE
Inadequate Plans/Specifications	YES	NO	NOT SURE

9. If no, are there any circumstances or situations you would consider appropriate for allowing the contractor to avoid the impact of the "No Damages for Delay" clause? Please list: _____
_____
_____
_____

10. Does the presence of the "No Damages for Delay" clause in the contract have an adverse impact on your perceived cost of construction?

YES NO

11. If yes, the cost of construction is increased by what percentage?

_____%

12. In your opinion, does the presence of the "No Damages for Delay" clause create an adversarial relationship with the prime contractor?

YES NO NOT SURE

13. If yes, in your opinion, what is the most appropriate way to minimize the negative impact on the relationship with the contractor?

A). Delete the clause from the contract
B). Modify the language to more fairly allocate the risk
C). Other _____

14. Has your organization ever been involved in a contract dispute based on the "No Damages for Delay" clause?

YES NO NOT SURE

15. If yes, what method/s were used to resolve the dispute?

____ Negotiation, ____ Mediation, ____ Arbitration, ____ Litigation

16. Assuming you were adversely impacted by the outcome of the dispute what steps are now taken to avoid future disputes based on the :No Damages for Delay" clause?

    a. Remove the clause from the contract
    b. Negotiate the clause out of the contract
    c. Keep the clause in the contract
    d. Other _____

17. Does the presence of the "No Damages for Delay " clause in the contract eliminate the incentive for timely resolutions for performance and disputes?

    YES NO NOT SURE

18. Should the "No Damages for Delay" clause remain in the contract if it meets the criteria for sound public policy?

    YES NO

    Discuss _____
    _____
    _____

19. Would your organization oppose legislation that would

    a. more clearly define the language of the "No Damages for Delay" clause.
       YES NO
    b. more clearly define the exceptions and exclusions to the "No Damages for Delay" clause.
       YES NO

20. If there is any other information you feel would be beneficial to the study please discuss below.

    _____
    _____
    _____
    _____

Again, thank you very much for your time and effort in answering the above question! Also, if you have an interest in the final report please send the mailing address that you would like to receive the information.

Note: All of the above information will be compiled and used anonymously for reporting purposes only. All information contained in the questionnaire will be kept confidential. If there any question please call Dr. Michael Cook at (352) 846-1862

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