Ohio’s Fairness in Construction Contracting Act

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Our first order of business is knowing yours
What Is Ohio’s Fairness in Construction Contracting Act?

• Ohio statute that provides relief against unfair contract clauses
  » Ohio Revised Code Section 4113.62.
What Was (and still is) The Problem?

The Fox Is Guarding The Hen House
Ohio’s Legislature Did Something

Ohio’s Fairness In Construction Contracting Act

  • Didn’t apply to the Dugan & Meyers case.

» Applies To BOTH Public and Private Projects.
Provides Relief Against Contract Clauses That:

- Waive Bond Rights
- Waive Pending Claims With Final Payment
- Prohibits Owner-Caused Delay Damages
- Could Prevent The Filing Of A Lien Or Bond Claim
- Make Out-of-State Law Apply
- Location of Dispute Resolution?
Bond Rights

• Simple, you cannot contractually waive them.
But You Can Lose Them

- Common Ways Lose To Your Payment Bond Rights
  - On Public Projects
    - Failure to serve a Notice of Furnishing on the Prime Contractor when you do not have a contract with them.
      - $30k exception
      - ODOT exception
    - Failure to make a timely bond claim.
      - Claim to be made within 90 days after Public Authority’s acceptance.
    - Failure to file suit within 1 year after Public Authority’s acceptance.
But You Can Lose Them

• On Private Projects
  » Make your claim within 90 days after last performing.
  » One year window to file suit.
Waive Pending Claims With Final Payment

• No longer enforceable
  » The acceptance of final payment shall constitute a waiver of all claims the Contractor has either asserted or may assert against the Owner/Contractor.

• Now claims will survive
  » No ransom in the form of final payment.
  » Important to assert the claim prior to receiving final payment.
• No Longer Enforceable
  
  » Owner/General Contractor shall have the right at any time to delay or suspend the work without incurring any liability. An extension of time shall be the sole and exclusive remedy.
How Do You Interpret Delay?

• **Broadly**
  » Delay means the same thing as disruption, acceleration, or interference.
    • Indirect costs such as out of sequence, trade stacking, loss of productivity are recoverable.
    • Contractor friendly.

• **Narrowly**
  » Delay only means extension costs.
    • Only extended general conditions and home office overhead costs are recoverable.
    • Owner friendly.
Is The Whole Donut Recoverable?
Lien/Claims and Contingent Payment Terms

• Can you file a lien or bond claim when the money is not technically due?
  • Common scenario under a “pay-if-paid” clause.

• Yes
  » Contingent payment terms do not prohibit the filing of a lien or bond claim.
True or False About Liens

In Ohio, you can contractually waive your lien rights.

• True
Mandate The Applicable State Law

• For Example:
  » This Contract shall be governed by the laws of the State of Alaska.

• No longer enforceable when the Project is located in Ohio.
Location of Dispute Resolution

• In the past clauses like these were not enforceable.
  » *Any action or suit arising under this Contract shall be brought in the jurisdiction of the Contractor’s principal office.*

• Now, it might not apply to arbitration.
  » Going forward, specify the location of the dispute resolution will be the Project’s location.
What Is On the Horizon?

- Possible retainage reform
- Possible legislation in response to Dugan & Meyers