

Contractors Who Do Not Comply with Contract Claims Procedures May Be Held Liable for Liquidated Damages for Owner-Caused Delay

A California Appellate Court recently held in *Greg Opinski Construction, Inc. v City of Oakdale* (October 6, 2011) 199 Cal.App.4th 1107, that a public agency owner is entitled to liquidated damages for delay in project completion if a contractor fails to follow contract procedures to obtain a time extension, even if the owner caused the delay.

The implications of this case are widespread to owners and contractors alike. The opinion explains that a contractor must adhere to the contract's procedures for timely submitting claims for alleged owner-caused delays or risk being barred from contesting liability for late completion of the project.

Discussion of *Greg Opinski Construction, Inc. v City of Oakdale*

General contractor Greg Opinski Construction, Inc. (Opinski) entered into a contract with the City of Oakdale (City) to construct a building. The contract required project completion within 300 calendar days and provided liquidated damages of \$250 for each day of delay. Project completion was obtained seven months late. Opinski sued the City for the remaining contract balance and for an additional \$24,436 for proposed change orders, which had not been approved by the City. The City filed a cross-complaint for \$54,000 in liquidated damages and \$10,000 in construction defects.

The General Conditions provided that changes to the contract time or price could only be instituted via change order that resulted from either: (1) a mutual agreement by the parties or (2) a claim to the engineer. Additionally, the party making a claim to the engineer was required to give written notice of the claim to both the engineer and the other party "promptly (but in no event later than thirty [30] days) after the occurrence of the event given rise thereto." Supporting documentation was to be provided within "sixty [60] days of the occurrence," with a request for a formal decision in writing.

The contract provided that the City would extend the contract time in an amount equal to the time lost for delays that were beyond the control of Opinski (including owner-caused delays), if a claim was made to the engineer as detailed above.

The trial court awarded the City \$3,226 for repair of construction defects, \$54,000 in liquidated damages and prejudgment interest. It also denied Opinski's claims for unpaid change orders, stating that the contractor failed to follow contract procedures and submit written notice of the claim to the engineer within 30 days. The court declined to decide which party was liable for the delayed completion because the determination was irrelevant. The court explained that since Opinski did not use either of the available contract procedures to obtain a change order to extend the contract time, "the time was not extended, regardless of which party was to blame for the late completion." Accordingly, since there had been no extension of the contract time, liquidated damages were appropriate.

Relying on the California Supreme Court's prior ruling in *Peter Kiewit Sons' Co.* [\[1\]](#) and Civil Code section 1511, Opinski appealed, arguing that an owner is not entitled to liquidated damages when the project delay is caused by the owner's conduct, even if the contractor failed to follow contractually-required procedures for time extensions. The appellate court rejected Opinski's argument and distinguished *Kiewit* (which relied on section 1511) by explaining that the Legislature amended section 1511 after the *Kiewit* decision, effectively superseding the case. The Court explained that the amended statute applied here to allow parties to contractually agree to specific time extension procedures. Specifically, the statute recognizes parties' ability to allocate the risk of delay costs to the contractor and to agree that if a contractor would like to rely on the owner's conduct as an excuse for its delay or nonperformance, then it must provide written notice within a reasonable time. Consequently, the court held that the trial court did not err in allowing the City to recover liquidated damages due to Opinski's failure to strictly comply with the terms of the contract.

What Does This Mean?

This decision strengthens the right of a public owner to require a contractor to comply with the claims procedures set forth in the contract between the parties. However, there may be alternative theories still available to contractors who cannot show strict compliance with claims requirements.

Although the case may be appealed to the California Supreme Court, as it stands, contractors who do not strictly comply with contract procedures to obtain a time extension may be unsuccessful in contesting liability for late completion and, as a consequence, assessed liquidated damages for owner-caused delays.

[\[1\]](#) *Kiewit Sons' Co. v. Pasadena City Junior College* (1963) 59 Cal.2d 241.

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