

## California Public Utility Gets Hit with \$45 Million Verdict for Delays to Power Plant Contractor



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On June 4, after two years of litigation, a California jury ordered the Los Angeles Department of Water and Power (the “Department”) to pay a power plant contractor \$45 million for delays and related damages the contractor suffered in connection with a project to construct a combined cycle plant for the Department.

The project, known as the Scattergood Unit 3 Repowering Project, began in April 2013, with an initial cost of approximately \$440 million and a Substantial Completion date of December 31, 2015. Kiewit Power Constructors (“Kiewit”) encountered problems in April 2014, after ten major pre-fabricated project components – specifically, heat recovery steam generator modules – were damaged by a storm during transport from Korea to Long Beach, forcing Kiewit to repair all ten modules upon delivery. Despite the resulting delay, the Department held firm on the original December 2015 project completion date, which required Kiewit to accelerate its work and incur substantial expense, in addition to the \$26 million it had spent on repairing the damaged steam generator modules.

Kiewit substantially completed the overall project by December 2015, although it missed some preceding milestones for the installation of certain project components. Kiewit sought recovery of its repair and acceleration costs from the Department, which totaled approximately \$49 million. The Department, which had approved and paid Kiewit the base contract price plus approximately \$17 million in change orders, rejected Kiewit’s claims. Kiewit sued the Department for breach of contract and related claims – including the oft-accompanying claim for breach of the implied covenant of good faith and fair dealing – and the Department filed identical counterclaims, along with a claim for just under \$30 million in liquidated damages related to Kiewit’s missed equipment installation milestones.

At trial, the parties’ respective cases centered on the usual issues raised by claims of delay and/or LDs: whether the delays to Kiewit’s work were excusable or compensable and whether Kiewit properly followed the notice and claim procedures required by the contract. However, the jury’s findings, at least according to the special verdict form, were somewhat unusual. The jury found that neither party breached their contract, but that both had breached the covenant of good faith and fair dealing. The remedy for those unfair acts? An award of \$45 million to Kiewit, and \$1 million to the Department.

To be sure, the mechanics of the jury’s award – to both sides – are somewhat puzzling. It is difficult to discern, for example, how Kiewit breached the implied covenant despite delivering a completed project to the Department on time, or how either side could be liable to the other for seven-figure damages on the claims in question without having breached the terms of the contract.

Of course, those legal niceties do little to diminish the magnitude of the verdict, or the message it sends to project owners, which is consistent with the long line of cases in Massachusetts that have addressed contractor claims for delay. That message is simple: Owners cannot take shelter under contract provisions that would protect them from delay damages when they have interfered with the contractor’s ability to complete the work on time, or refused to grant extensions for excusable delays. Or, as the California jury in the *Kiewit* case might put it: When relying on the terms of the contract, you can’t lose sight of your obligation to act in good faith.

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## About the Co-Author



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