

VI. TACKLING CONTRACT PERFORMANCE DELAYS

All parties involved in the construction process (i.e. owners, contractors, subcontractors and suppliers) have a vested interest in on-time performance and on-time payment. This section discusses delays in performance, which are, not surprisingly, among the most commonly litigated issues arising from construction projects. Construction projects involve expensive equipment, tremendous overhead, significant manpower and large payrolls for owners and contractors alike. The longer a job takes, the higher the costs and the greater the potential for litigation. Due to the high costs of untimely performance, contractors and owners usually require well-planned and often complex schedules.

Whether viewed from the perspective of the owner or the contractor, construction schedules serve several important purposes. First, the schedule is the vehicle for planning and sequencing of the work. Second, the schedule may protect a party from liability for delay costs. Third, the schedule may allow a party to establish that it was delayed by another party or that another party was, in fact, the cause of a claimed delay. To serve these purposes, schedules should be constantly monitored and updated. Failure to perform work in accordance with the project schedule can result in significant liability. For instance, in *Jerry Bennett Masonry, Inc. v. Crossland Constr. Co.*, 171 S.W.3d 81, 92 (Mo. Ct. App. 2005), the court upheld significant delay damages against a subcontractor that “failed to live up to its obligation under the subcontract to adequately staff the job and add additional manpower at the request of the contractor, thereby creating delays in the months following commencement of the work on the project.”

Contractors often use completion date, bar chart, and percentage of completion schedules to track progress, coordinate subcontractors and monitor delays. Owners may require more sophisticated scheduling methods, such as CPM (Critical Path Method), PERT (Program Evaluation and Review Technique), PDM (Precedent Diagramming Method), as a part of the contractor's obligations.

In light of the significant risks and liabilities associated with delays, the materials included in this section discuss the different types of delays often encountered on construction projects, liquidated damage provisions in construction contracts, defenses to delay claims and acceleration, an issue related to delays.

1. The Two Major Categories: Inexcusable and Excusable Delays

Delays in completion of a construction project (or a portion thereof) can have significant financial impact on the owner and the contractor. Sometimes the parties are able to resolve disputes arising out of delays, but, as is often the case, it may fall to the courts or arbitrators to determine which party or parties, if any, are responsible for the delay and which party or parties, if any, must bear the increased costs caused by the delay. Courts or arbitrators handling such disputes consider several factors, including, but not limited to, causes of the delay, the express or implied obligations of the parties under the contract documents, and how, if at all, the parties have allocated the risk of delay among themselves by contract.

There are two general categories into which construction delays typically fall. First, there are “inexcusable delays,” where the delay is the fault of the contractor or third parties such as subcontractors or material suppliers for whom the contractor may be responsible under the

contract. Second, there are “excusable delays,” where the delay is attributable to circumstances beyond the contractor’s control and, importantly, where the delay is not caused by the fault or neglect of the contractor or third parties for whom the contractor is responsible. Depending on the type of delay, the owner will be entitled to different relief.

a. **Inexcusable Delays**

In the instance of an inexcusable delay, the owner may demand that the contractor accelerate its performance to meet the schedule, recover actual or liquidated damages from the contractor and, in extreme cases, terminate the contract based on the contractor’s default. *See, e.g., MLK, Inc. v. Univ. of Kansas*, 940 P.2d 1158, 1162 (Kan Ct. App. 1997).

Excusable delays may be divided into compensable delays, where the contractor may recover damages for the extra costs it incurs as a result of the delay, and noncompensable delays, where the contractor is entitled to time but no money. Generally, delays that are attributable to an owner’s fault or neglect (or a party for whom the owner is responsible, such as an architect) are compensable, and delays which are unforeseeable, but attributable to neither party’s fault or neglect, are excusable but not compensable. In the latter case, additional time, but not additional compensation, is awarded.

As a general rule, a contractor is liable for the foreseeable costs incurred by an owner as a result of the contractor’s delay in completing a project. Many contractors make the erroneous assumption that they are not liable for an owner’s delay damages unless the contract contains a liquidated damages provision. To the contrary, an owner who does not include a liquidated damages clause in the contract will generally be entitled to his *actual* damages if they are foreseeable and can be proven with reasonable certainty.

In *DeSombre v. Bickle*, 18 Wis. 2d 390, 118 N.W.2d 868 (1963), the court held that a contractor who agreed to complete a project within 400 days was not entitled to expect 400 dry, sunny days to perform the work. The court concluded that some bad weather was contemplated at the time the contract was made, and the contractor’s 400 days included some days in which expected bad weather was experienced. The contractor was required to compensate the owner for the late project completion.

As in *DeSombre*, a contractor will be liable for costs incurred by an owner that were reasonably foreseeable at the time the agreement was made unless the contractor can show that responsibility for this type of loss was disclaimed in the contract. Modern contracts typically specify or “liquidate” the damages that an owner may recover for inexcusable delays.

b. **Excusable Delays**

With respect to excusable delays, an extension of the time for performance is justified, and, in some cases, the contractor may be entitled to recover delay damages from the owner. Excusable delays usually include delays for which the owner is responsible as well as delays specifically excused by the contract. Only those delays caused by circumstances beyond the contractor’s responsibility and those delays which were unforeseeable by the parties at the time of contracting will be deemed excusable delays by the courts. In a standard form excusable delay clause such as one used by the AIA, the contractor is excused from liability only for delays which are caused by the actions or inactions of the owner, architect, other parties working directly with the owner, and

other events beyond the contractor's control. The contractor, however, assumes liability for delays arising from labor shortages unrelated to labor disputes, failure of the contractor's subcontractors or material suppliers to perform on time, correcting defective work or replacing defective materials, or severe weather which is not unusual in the area.

If a court or arbitrator determines that a delay is excusable under the contract terms, the contractor need not pay the owner damages for the late completion and is entitled to a time extension to complete the contract. *See Kaltoft v. Nielsen*, 106 N.W.2d 597 (1960). But if the court or arbitrator finds that the delay does not amount to an excusable delay, the contractor will be liable to the owner for the owner's damages. The court or arbitrator may award as damages the value of the lost use of the project between the contract completion date and the actual completion date, or, in some cases, the profits whose loss due to delay was reasonably foreseeable.

These general rules are not, however, invariably applicable, and within certain limits, the parties to a contract are free to "make their law" by contractually agreeing as to those events which will constitute excusable, compensable, and inexcusable delays and the contractual procedures that must be followed for delays to be deemed excusable or compensable. With ever increasing frequency, courts are inclined to enforce construction agreements as written, even where the agreement is one-sided and the terms are dictated by the owner.

Timely notice by the contractor of its intent to claim additional compensation for increased work is essential to document the parties' agreement in the event the scope of work is increased. In *Department of Transportation v. Dalton Paving and Construction, Inc.*, 489 S.E.2d 329 (Ga. App. 1997), the court held that an oral directive to the contractor to change its work sequence entitled the contractor to compensation for the additional work, despite a contractual provision requiring that such directives be in writing. The court held that although the contract required a written change order as a condition precedent to the contractor's performance of additional compensable work, the parties waived these terms by their conduct.

2. Compensable Delays

A delay which is "compensable" to a contractor is one that was not anticipated when the contract was made and is due to some inaction or action for which the owner or those working under him are responsible. In such a situation, the contractor can recover money damages from the owner to cover the extra costs incurred as a result of the delay, as well as a time extension.

Most construction contracts do not set out all of the owner's obligations in helping the contractor complete the project on time, but there are general implied duties imposed on the parties to a construction contract. Absent contractual provisions negating such duties, an owner generally has (1) a duty to coordinate and schedule the work of all contractors with whom it has a direct contract, and (2) a duty not to delay, hinder, or interfere with the work of the contractor.

Contractors have often recovered delay damages against owners whose actions or inactions obstructed the progress in the project based on this general rule of law. For example, an owner has been held in breach of its general duty not to interfere with the contractor's progress when: (1) it failed to provide suitable access to the construction site; (2) its plans were defective, resulting in delays; (3) it failed to ready the construction site in time for the contractor to begin work; (4) it failed to make timely payments; (5) it failed to provide a written order for additional work requested; (6) it did not approve drawings necessary for the job within a reasonable time; and, (7) it

ordered a hold or suspension of the work. See *T.C. Bateson Construction Co. v. United States*, 319 F.2d 135 (Ct. Cl. 1963); *Langevin v. United States*, 100 Ct. Cl. 15 (Ct Cl. 1943); *Dewey Jordan, Inc. v. Maryland- National Capital Park & Planning Commission*, 265 A.2d 892 (Md. 1970); *In Re Roberts Construction Co.*, 111 N.W.2d 767 (Neb. 1961); *Mason Tire & Rubber Co. v. Cummins-Blair Co.*, 157 N.E. 367 (Ohio 1927); *Stehlin-Miller-Henes Co. v. City of Bridgeport*, 117 A. 811 (Conn. 1922); *Mayor and City Counsel of Baltimore v. Clarke*, 97 A. 911 (Md. 1916); *Seretto v. Rockland, S.T. & O.H.Ry.*, 63 A. 651 (Me. 1906).

3. Concurrent Delays

A concurrent delay occurs when two or more unrelated delays affect the work at the same time. These delays may originate with a number of sources (the same party, two or more parties, or by no party—inclement weather). Typically, the delays are of different types. For example, an owner should not be liable for compensable delay arising from the failure to timely provide the contractor with plans or specifications during a period of severe flooding that independently delays the project. When concurrent delays are experienced, the owner and the contractor each bear their own costs resulting from the delay and may not seek recovery against each other.

For example, in *J.A. Jones Construction Co. v. Greenbriar Shopping Center*, 332 F. Supp. 1336 (N.D. Ga. 1971) the contractor failed to ensure that its subcontractors timely performed their work. The owner, similarly delayed the project by repeatedly changing design and failing have the architect timely deliver the required drawings. The court held that neither party could recover delay damages. In so holding, the court did not permit the parties to attempt apportion the amount of delay costs among themselves.

Some courts, however, allow the parties to apportion damages between them if the proof is strong. The development of modern scheduling techniques have helped courts measure the effect of each party's delays and the actual amount of the final delay caused by each party. In *Pathman Construction Co. v. Hi-Way Electric Co.*, 382 N.E.2d 453 (Ill. Ct. App. 1978), the court apportioned the damages between two parties who had delayed the project. The court noted in its decision that the parties' scheduling methods (in this case, CPM) allowed day-by-day analysis of delays. *Id.* at 489.

The contractor need not be completely prohibited from working on the project in order to recover delay damages from the owner. The contractor may recover delay damages in cases where the owner's actions or inactions require the contractor to perform its work in an inefficient or out-of-sequence manner. For example, if a contractor is forced to work around the owner's excavating crew, and this process causes the contractor to spend more time on the project than the parties had originally contemplated, the owner should be liable to the contractor for the extra time required.

4. Liquidated Damages

Due to the difficulty of calculating damages at the time of contracting, contracts frequently include a provision for pre-set or "liquidated" damages, which are established on a per day basis for each day the project is not completed on schedule. If an owner recovers liquidated damages, however, it cannot then claim actual damages for inexcusable delays. For example, a contractor who is one week late in finishing a project under a contract that has a \$500 per day liquidated damages provision will be liable to the owner only for \$3,500 without regard to the amount of the

owner's actual damages. In some cases, liquidated damages can limit a contractor's liability to less than actual damages. See, e.g., *Georgia Ports Authority v. Norair Engineering Corp.*, 195 S.E.2d 199 (Ga. App. 1973).

Liquidated damages clauses, are enforceable only if, at the time of contracting, it would be difficult (or impossible) to ascertain the actual amount of damages in the event of breach, and that the amount set in the liquidated damages clause was a reasonable estimate by the parties of the actual damages they expected to suffer in the event of a breach. See *Priebe & Sons v. United States*, 332 U.S. 407 (1947). If, on the other hand, the court finds the amount of liquidated damages to be punitive, rather than a reasonable representation of probable damages, the court will decline to enforce the liquidated damages clause, forcing the owner to prove its actual damages. *Rohlin Constr. Co. v. City of Hinton*, 476 N.W. 78 (Iowa 1991).

Without an enforceable liquidated damages provision, the owner is still entitled to recover its actual damages for inexcusable delays. This may include interest, rental charges and other expenses incurred as a result of the delay. As a general rule, lost profits are difficult to recover. However, in *South Carolina Federal Savings Bank v. Thornton-Crosby*, 423 S.E.2d 114 (S.C. 1992), the South Carolina Supreme Court held that an award of lost profits was justified where the owner, a developer, had pre-sold 50% of the condominiums to be constructed. The owner was therefore able to prove the amount of lost profits to a reasonable degree of certainty.

5. Contractor's Damages for Delay Despite Early or On Time Completion

If the contractor had planned to finish its work before the contract date, but events for which the owner was responsible prevented early completion, the contractor may recover delay damages from the owner even if it finishes the project by the date specified in the contract. In other words, completing the project by the date specified in the contract does not necessarily prevent the contractor from recovering delay damages so long as the contractor could have reasonably finished by an earlier date.

In *Grow Construction Co. v. State*, 391 N.Y.S.2d 726 (N.Y. A.D. 1977), the contractor was delayed by state interference. The contractor sued the state of New York for delay damages despite the fact that it was able to finish the work by the date specified in the contract. The state of New York argued that the contractor could not recover delay damages because the job was completed on time. The court rejected the state's argument, reasoning that the contractor had a right to perform its work free from interference from the state, and to finish early if possible.

Other courts have adopted similar reasoning. See *Sun Shipbuilding & Dry Dock Co. v. U. S. Lines, Inc.*, 439 F. Supp. 671 (E.D. Pa. 1977). Courts that allow contractors to recover delay damages despite timely or early completion, however, require the contractor to prove that early completion would have occurred but for the owner's delay. Additionally, notice to the owner of the contractor's intent to complete the work ahead of scheduled is often required. Where a CPM schedule is initially utilized to establish an early completion date and it is logically consistent, the schedule is strong evidence of a reasonable intent to complete early.

In *Interstate General Government Contractors v. West*, 12 F.3d 1053 (Fed. Cir. 1993), the Court of Appeals for the Federal Circuit adopted a three-part test to determine a contractor's entitlement to delay damages for a missed early completion. The court held that "a contractor [must] show that from the outset of the contract it: (1) intended to complete the contract early;

(2) had the capability to do so; and (3) actually would have completed early, but for the government's actions.” 12 F.3d at 1059. General contractors who anticipate early completion should also discuss their schedules with any potentially subcontractors prior to entering into any subcontracts if they intend to hold the subcontractors liable for early completion delay damages. See *E&B Specialties Co. v. Phillips*, 523 P.2d 1357 (N.M. 1974).

6. Defenses to Delay Damages

a. No Damages for Delay or Exculpatory Clauses

A “no damages for delay” clause in a construction contract can cause a contractor to lose its claim to delay damages even before performance begins. As the name indicates, “no damages for delay” clauses contractually obligate the contractor to forgo claims against a party liable for damages incurred by the contractor due to delays. In *Marriott Corp. v. Dasta Construction Co.*, 26 F.3d 1057 (11th Cir. 1994), for example, the United States Court of Appeals for the Eleventh Circuit held that a “no damages for delay” clause prohibited the contractor from recovering additional costs for project delays. Although the contractor normally would have been entitled to recover for delays and interference of the owner, the contractor’s failure to provide the owner with written notice requesting time extensions in conjunction with the “no damages for delay” clause precluded recovery by the contractor.

If a contract has a “no damages for delay” clause, there are circumstances under which a contractor may avoid it. For example, if the delay was not of a type contemplated by the parties at the time of contracting, the contractor may pursue its claims. *Clark Fitzpatrick, Inc. v. Long Island Railroad Co.*, 603 N.Y.S.2d 526 (N.Y. A.D. 1993). As one might expect, damages attributable to bad faith, malicious conduct or gross negligence may not be disclaimed through a “no damages for delay” clause. *Id.*; see also *John T. Brady & Co. v. Board of Education*, 226 N.Y.S. 707, 709 (N.Y.A.D. 1928) (allowing recovery where owner actively interfered with contractor’s performance).

In determining whether a certain type of delay was within the contemplation of the parties when they agreed to the “no damages for delay” clause, courts strictly construe these clauses against the drafter, permitting recovery of delay damages when the clause even arguably fails to encompass the type of delays claimed. See, e.g., *Wells Bros. Co. of New York v. United States*, 254 U.S. 83 (1920); *Department of Transportation v. Arapaho Construction, Inc.*, 357 S.E.2d 593 (Ga. 1987). In *Williams & Sons Erectors v. South Carolina Steel*, 983 F.2d 1176 (2d Cir. 1993), for example, the United States Court of Appeals for the Second Circuit held that a contract was ambiguous and allowed the contractor to proceed with its delay claim due to the ambiguity arising from the interrelationship of the no-damage clause with a changes clause which provided that payment for the change “includes full payment for both the [e]xtra [w]ork ... and for any damage or expense caused the Contractor by any delays to other [w]ork ... resulting from said [e]xtra [w]ork. . .” *Id.* at 1179, 1184.

Courts appear to be more inclined to ignore a “no damages for delay” clause if the contract expressly makes time of the essence and if the actions of the party invoking the clause are particularly inequitable or egregious. See, e.g., *Arapaho Construction, Inc.*, 357 S.E.2d at 593; *John T. Brady & Co.*, 226 N.Y.S. at 707. As the cases demonstrate, an owner who requires the contractor to complete a project as quickly as possible may not also deny liability for additional expenses incurred by the contractor due to the owner’s delays.

Finally, "no damages for delay" clauses may be avoided if the owner, expressly or impliedly through its actions, assumes responsibility for causing the delay. In *Comm. State Highway & Bridge Authority v. General Asphalt Paving Co.*, 405 A.2d 1138 (Pa. 1979), for example, the contractor was delayed due to pressure problems in a water main owned by the City of Philadelphia. The owner assumed the responsibility of negotiating with the City to have the water main removed. On appeal from the claims board, the court held that the contractor could recover delay damages despite the "no damages for delay" clause because the owner had assumed the responsibility of the main's presence when it entered into negotiations with the City to have it removed.

b. Notice Requirements

Most contracts impose a duty upon the contractor to provide written notice to the owner in the event an excusable delay occurs. If such notice is not given, and the owner has not waived the notice provision, the contractor may forfeit its claim for a time extension and assume liability to the owner for damages attributable to the delay. See *Fla. N.R. Co. v. Southern Supply Co.*, 112 Ga. 1, 37 S.E. 130 (1900). Courts generally do not permit contractors to recover delay damages without proper notice because, absent such notice, the owner may not know about and have the opportunity to eliminate the cause of the delay and, consequently, may be prevented from providing appropriate notice to other parties. See *Allgood Electric Co., Inc. v. Martin K. Eby Construction Co., Inc., et al.*, 959 F. Supp. 1573 (M.D.Ga. 1997).

c. Waiver

A contractor may have waived its right to recover delay damages from an owner in various ways. For example, if a contractor signs a change order that either expressly or implicitly waives its right to the delay damages, its claim may be lost. In *Brandt Corp. v. City of New York*, 199 N.E.2d 493 (N.Y. 1964), the contract included a provision that the acceptance of final payment constituted a waiver and release of all claims. Although the contractor had previously submitted notice to the owner that it intended to seek recovery on a claim for over \$20,000, the court held that the contractor's acceptance of the final payment barred the claim. Similarly, owners may waive the right to seek damages after it makes a final payment to the contractor. See *Centerre Trust Co. v. Continental Insurance Co.*, 167 Ill. App. 3d 376, 521 N.E.2d 219 (1988).

7. Acceleration

Related to delay damages are damages resulting from acceleration. Acceleration damages are the extra expenses incurred by the contractor when it the owner requires it to complete the project, or a portion thereof, in less time than provided in the contract documents. The contractor may be instructed to finish the project before the specified completion date, or when the owner requires the contractor to finish the work by the completion date even though the contractor may otherwise have a right to an extension. The latter is referred to as a "constructive acceleration." Damages recoverable based on acceleration typically include additional labor costs, overtime, costs of rental equipment, and any other expenses incurred by the contractor in its attempt to finish the project in a compressed period of time.