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### CONSTRUCTION LAW

# Delay Claim Analysis

Construction delays, whether from lack of sub-contractor coordination, construction defects, design errors or omissions, late decision making, force majeure, etc., can have disastrous consequences for owners and contractors alike. Owners can suffer extended management, supervisory, administration, insurance and financing costs, overhead expenses, loss of income, and real estate taxes. Contractors can suffer similar expenses, as well as increased general conditions expenses, increased labor and material expenses, lost productivity and lost opportunities for new work.

Well-drafted contracts can limit the liability of the responsible party for the other parties' losses and expenses through waivers of consequential damages for the

benefit of the contractor (but often replaced with liquidated damages provisions) and "no damages for delay clauses" for the benefit of the owner (but often allowing for the recovery of actual general conditions costs incurred by the contractor). However, while minimizing exposure to the consequences of delay, contractual language cannot eliminate delay claims, and owners and contractors should be prepared to deal with them.

### Time Impact Analysis

The first step in dealing with a delay claim involves schedule analysis, i.e., the comparison of the original project schedule (the "as-planned schedule") with the project schedule showing how the project was actually built (the "as-built schedule"). The as-planned schedule is the schedule originally prepared by the contractor and accepted by the owner. Where an as-planned schedule does not exist it can be created from the original contract documents in order to

establish a base line plan. The as-built schedule is developed using factual project data to determine how the project was actually built, such as daily reports, logs, photographs, payment requisitions, and meeting minutes.

The comparison of the two schedules is used as part of a "time impact analysis" or TIA, which consists of breaking down the differences between the as-planned and as-built schedules into "time slices." The TIA follows the critical path of the project and examines the actual events which may have caused delay. This procedure also allows the analyst to separate critical issues (which affect the critical path) from non-critical issues (which do not). Once the critical issues are identified, the job records are analyzed in order to determine the cause of the delay and the assignment of responsibility.

### Delays and Assessments

Delays are commonly broken down into excusable delay,



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compensable delay and concurrent delay. An excusable delay entitles the contractor to be granted an extension of time to complete performance and avoid the assessment of damages (liquidated, actual or consequential) by the owner. Force majeure or owner delays are excusable delays; however, the contractor must demonstrate that such delays actually interfered with its performance of the work. If the excusable delay is also compensable (depending on the language of the contract), the contractor will be entitled to additional compensation, such as

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for extended general conditions costs. For the owner's part, contracts should contain "no damages for delay" clauses which limit the type of compensation to which the contractor is entitled, i.e., the contractor may be able to recover extended general conditions costs but not damages for loss of productivity or opportunity.

Concurrent delays are two or more delays occurring during the same period of time, where the owner is responsible for one and the contractor is responsible for

the other. In effect, the delays (if of the same duration) cancel each other out. However, in such case the contractor is entitled to an extension of time.

Once the responsibility for the delay is determined, an assessment of damages is made. Where there is a liquidated damages clause in the contract (for the owner's benefit), the assessment is simply mathematical. However, in the absence of such a clause, the owner must prove its damages (actual and/or consequential, as the case may be). For the contractor's part, depending on any limits in the contract, it must prove its actual damages. It is not uncommon for a contractor to be able to prove entitlement to damages only to discover that the actual costs of the project were in line with the bid estimate.

Two primary kinds of damages are direct and impact damages. Direct damages are linked directly to the delay, such as increases in labor and materials on the contractor's part or extended supervisory costs on the part of the owner. Impact damages are indirectly related to the project, such as disruption or acceleration, such as overtime (on the part of the contractor) or extended financing costs (on the part of the owner). As noted above, recoverable damages may be precluded or limited by contractual terms, such as waivers

of consequential damages of "no damages for delay" clauses.

## Conclusion

Delay claim analysis is, essentially, schedule analysis, i.e., the comparison of the as-planned schedule with the as-built schedule and the performance of a time impact analysis. Unless a careful TIA is performed and conditions and events on the project are recreated and evaluated, it is unlikely that delays can be properly identified and liability correctly assessed. Once liability is assessed, the determination of damages, as may be limited by the contract, is made. In making that assessment, in the absence of contractual language to the contrary, actual damages caused by the delay must be proven.