CONSTRUCTION DELAYS: How to Protect Yourself

A prominent construction attorney discusses contractor techniques for handling delay problems

By Marvin P. Sadur

Construction delays usually increase the cost of the work. Whether "Wall(ter) Ceiling," subcontractor, is entitled to reimbursement for his additional cost of the labor and material resulting from the delay depends on several factors.

1. If Wallter Ceiling caused the delay, he must absorb his own extra costs.

2. If the delay resulted from unforeseen causes which were beyond the control of either the owner, prime contractor, or Wallter Ceiling and occurred without their fault or negligence, such as legal strikes, unusually severe weather conditions, or acts of God, then Wallter Ceiling would be entitled to time extension but not to recovery of additional costs.

3. However, if the owner or prime contractor caused the delay, Wallter Ceiling may be able to recover his additional costs.

These principles apply to both private and public work. How Wallter Ceiling is affected depends in part on the terms and conditions under which he must perform and how he performs his work as agreed upon in his subcontract.

Factor one should be avoided. Factor two is a contingency which is part of the risk of the project. Factor three warrants discussion.

Preserve Rights

Ideally, Wallter should be sure that his rights to recover costs resulting from delays is preserved in the subcontract. Otherwise, Wallter may find himself the victim of having his work delayed without his fault and being entitled only to "time extension." Time extension only relieves Wallter Ceiling from liability for the delay, but contractually he may bar his right to recover his attendant costs. Wallter Ceiling should, attempt to have included in his subcontract a provision that protects his right to recover additional costs resulting from delays for which he is not responsible.

A typical provision would be in order: "In the event the subcontractor is unreasonably delayed in the performance of his work for reasons that are beyond his control and which occur without his fault or negligence, he shall be reimbursed by the contractor for any resulting additional costs of completing the work under this subcontract; provided that notice of said delay and effect upon the subcontractor's work is given to the contractor, in writing, within 20 days after the start of such delay."

OR, use the standard AIA Form 401 Subcontract which contains protection for payment of additional costs of labor and material incurred as a result of delay for which the subcontractor is not responsible.

Of course, the general contractor is going to resist liability for any delay which he may impose on you and consider any concurrent excusable delay as an avoidance of his responsibility. However, most competent and reputable firms will acknowledge and agree to be responsible for unreasonable delays which occur beyond and without the subcontractor's control, fault or negligence.

Delays which compensably increase costs should be particularly noted and watched by Wallter Ceiling. They include: delays that result from owner changes in the plans and specifications; delays that result from changed or differing site conditions; and unreasonable delays imposed upon the performance of the work by the owner or prime contractor in the administration of the contract or fulfillment of their respective duties. (This last cause of delay may be imposed by a stop order.)

Late Starter

Wallter Ceiling, by nature of his trade, may not start his work until long after he has signed a subcontract. (The prime contractor has to build the building first!) The subcontract may state that Wallter Ceiling is to start his work on the eleventh month after the agreement is made. Wallter Ceiling's price is based upon that fact and includes labor and material costs anticipated at and during the time he agreed his work would be performed.

However, in the course of building the building, the owner may make changes in the foundation, structure, roof, building systems, or whatever that may not change the work Wallter Ceiling has to do under his subcontract but do change the time frame of when he has to do the work.

A later start may involve increased labor and material costs to Wallter Ceiling which should be included as part of the adjustment for the change. Unfortunately, few contractors concern themselves with the possibility that change in the structure early in the job would have any effect on the "finishing" trades and only seek adjustment for the cost of the change itself relating to only those subs directly involved.

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Wallter Ceiling may not realize that a change early in the job affects his cost until it is too late. To avoid this problem, Wallter Ceiling should watch the job and its progress and be aware of changes which may affect his performance. If there are, Wallter Ceiling should inform the contractor (in writing) so that he can include Wallter’s costs when he settles the change with the owner.

This isn’t to suggest that Wallter Ceiling become a “claims artist,” but valid additional costs incurred as a result of the “change” are compensable under the majority of prime contracts. In fact, the owner would prefer that all costs of the change are adjusted rather than later face problems of performance and unanticipated increased costs.

**Potential Warning**

Wallter Ceiling may not be able to state precisely what additional costs will be involved at the time the change is made, but he can inform the contractor of potential increased labor and material costs, and the effect of the change on the orderly installation of ceilings and walls. The change may create access and storage problems. It may require the work to be performed in an exposed area without winter protection.

Provisions for these conditions in advance can save much aggravation and insure to Wallter Ceiling an opportunity to complete his work without extra cost or payment if the change does affect his work.

Other elements over which he has no control and which may delay Wallter Ceiling in his work and increase his cost include design errors and changed conditions. Both problems may be corrected by changes with appear remote to wall and ceiling work but which may critically affect Wallter Ceiling. Unless he is alerted, Wallter Ceiling may be overlooked in any adjustment in the design, time or money needed to correct the design error or changed condition.

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