A Contractor Can Recover For Damaging Delays—But He Must First Prove a Loss

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A contractor has the right to recover damages resulting from delays caused by the owner. Excusable delays attributed to the fault of the owner entitle the contractor not only to an extension of the contract time but also to damages for his increased cost of performance occasioned by the delays.

The basis of recovery of damages for delays is the implied obligation that the owner will cooperate with the contractor and not impede the performance of the work of the contractor.

A subcontractor has the right to receive damages for delays which are attributable to the general contractor or the owner if the effects of the delays are transmitted by the general contractor.

The duty to cooperate is implied between the owner and general contractor, between the general contractor and the subcontractor, and between multiple prime contractors and all subcontractors. The owner has a duty to coordinate the work of multiple prime contractors, and the general contractor must take reasonable steps to protect subcontractors from interference caused by the general contractor himself and other subcontractors.

In order for the contractor to recover damages for delays, it must be shown not only that the delays were caused by the fault of the owner but also that the contractor was damaged by the delays. Similarly, in addition to proving the amount of the damages caused by the delay, the subcontractor must prove that the delay was caused by the fault of the general contractor or the owner and transmitted by the general contractor.

Although the AIA General Conditions (AIA Document A201, 1976 ed.), Article 8.3.1, allow for an extension of time in the excusable delay clause, the General Conditions also state in Article 8.3.4 that the extension of the contract time for excusable delay caused by the owner does not preclude recovery for damages for delay. Article 8.3.4 of the AIA General Conditions provides as follows:

Article 8.3.4 This Paragraph 8.3 [relating to an extension of the contract time for delays] does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents.

The AIA General Conditions recognize the right of the contractor to claim additional costs which might include damages for delays in Article 12.3.1, which provides as follows:

Article 12.3.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work, except in an emergency endangering life or property in which case the Con-

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tractor shall proceed in accordance with Paragraph 10.3. No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order.

The AIA Standard Subcontract Form (AIA Document A401, 1972 ed.) in Article 11.4 recognizes the right of the subcontractor to claim damages for delays under the same procedure set out in the general contract documents and provides as follows:

Article 11.4 The Subcontractor shall make all claims promptly to the Contractor for additional work, extensions of time, and damage for delays or otherwise, in accordance with the Contract Documents.

The owner is liable for damages for delays whenever it interferes with the performance of the contractor. Some of the situations which have allowed contractor to collect damages for owner caused delays are as follows:

• Whenever a formal or constructive change order directs the performance of extra work which necessarily extends the time needed to get the job done.
• When the owner fails to provide adequate and accurate specifications or misinterprets the specifications, and the contractor incurs delay waiting for them to be corrected or tries to perform the work using them.
• When the contractor must wait an unreasonable time for the approval of drawings or of a subcontractor.
• When the contractor must wait an unreasonable time for an inspection or a test, or if delay results from the owner’s failure to give notice of an inspection.
• When the owner fails to make the site available on time or fails to obtain title to a right of way when promised, or denies access to the site by another contractor whose work must precede the work of the complaining contractor.
• When the contractor must wait for owner-furnished materials or for the owner to replace defective materials.
• When the owner allows another contractor to disrupt the work.
• When the owner directs the

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contractor to give priority to work under another contract.
• When the owner directs that the work be done in a less efficient sequence or suspends the work.
• When the owner directs that a less efficient method of performance be used.
• When the owner unreasonably delays in making a payment due to the contractor.

Damages for delays caused by the owner to the general contractor or by general contractors to subcontractors are based upon the implied promise that their own actions will not disrupt or impede the performance of the contractor. Generally damages for delays can be obtained by the contractor only for delays caused by the fault of the party with whom he contracted and which have increased the contractor’s cost of performance.

Excusable delays occasioned by providential conditions such as strikes or unusually severe weather will not give rise to recovery of damages for delays by the contractor because there is no interference with the contractor’s performance by parties with whom he contracted.

Many contracts have a notification provision which requires the contractor to notify the owner within a stipulated time after the commencement of an event giving rise to a claim for an increase in the contract time and contract price under the change clause.

The notice requirement in the contract should be complied with in order to preserve the contractor’s right to submit a claim for increased costs because of the delay. However, in case the contractor fails to give the notification required under the change clause and excusable delay clause, there may be certain exceptions to the rule under which a contractor may obtain damages for delays in spite of the fact that he has failed to give the required notice.

As in the case of noncompensable excusable delays, the notice requirement may be satisfied by substantial compliance short of formal written notice or when the owner or general contractor had actual knowledge of the problem and was not prejudiced by the lack of written notice.

Often in the fine print of the general contract with the owner (or the subcontract with the general contractor) there may be a clause that the contractor give up his right to damages for delays caused by the owner or general contractor and be content with an extension of the contract time of performance.

The waivers are called “no damages for delay” clauses. Contractors should refuse to include such waivers in the general contract or subcontract because express waivers of the right to damages for delay are generally enforced by the courts.

Any delay in the performance of a construction contract can have a ripple effect on the cost of the work re-
maining to be done. When owner-caused delays force the contractor into more costly operations, the owner is liable for damages for the resulting additional outlays.

The possible extent of the additional expense caused by an owner-caused delay is demonstrated by the following case.

The contractor should keep accurate records to be able to establish the time, duration, and cost of the delay. A jobsite log which outlines the various delays encountered on the job and accurate cost records are invaluable aids in pursuing a claim for damages for delays.

Overhead, an indirect cost which is increased by an owner-caused delay, is a recoverable damage for delay. The method of computing overhead

The rationale as developed and accepted by federal procurement decisions and apparently now starting to be recognized by state jurisdictions is the fact that overhead costs, including main office expenses, cannot ordinarily be charged to a particular contract. They represent the cost of general facilities and administration necessary to perform all contracts undertaken by a company.

It is therefore necessary to allocate these costs to specific contracts on some rational basis of proration. Overhead rate does not increase during the performance of a contract, but expenses do continue during the period of suspension or delay.

Generally, specific direct amounts expended in performance of a specific contract cannot be established, and it has been held that it is sufficient to demonstrate by the mere fact of prolongation of time of performance and continuation of main office expense that more of such expense was incurred during the performance than would have been except for the suspension or delay.

The formula developed is computed by determining a daily overhead dollar amount and multiplying it by the number of days of delay.

The allocation for delay damages is accomplished as follows:

1. \[ \text{Overhead allocable to contract} = \frac{\text{contract billings}}{\text{total billings for contract period}} \times \text{total overhead for contract period} \]

2. \[ \text{Daily contract overhead} = \frac{\text{allocable overhead to contract}}{\text{days of performance}} \]

3. \[ \text{Overhead allocable for delay period} = \frac{\text{daily contract overhead} \times \text{number of days of delay}}{\text{number of days of delay}} \]

Delays caused on jobs by the owner and delays caused by the general contractor to subcontractors can subject the contractor and subcontractors to costs for delays which can be and frequently are very substantial amounts. Contractors and subcontractors should be alert to recognize the causes of delays and consider claiming damages for delays when they are caused by the owner or general contractor.