

Contracts Spell It Out

Your Entitlements to Delay Damages Depends on Contract Specifics—So Be Careful

By McNeill Stokes, AWC General Counsel

Whether a contractor is entitled to delay damages for delays caused by the other party to a contract or by persons within that other party's control and responsibility will depend upon the specific contract under which a contractor is performing.

On federal government contracts, delay damages are generally recoverable under the standard Suspension of Work clause. On non-federal jobs, entitlement to delay damages will vary depending upon the specific contract under which one is performing. Under a given contract, a contractor may be entitled to delay damages, or there may be a no-damage-for-delay clause which could preclude recovery of delay damages.

Since delay damage claims arise frequently on construction projects, we urge you to review all contracts prior to execution to make certain they contain a specific provision for recovery of delay damages for delays beyond your control. We also urge you to review all contracts for the purpose of complying with any stated notice provisions regarding alleged delays.

There are two generally accepted means of determining delay damages, although one is greatly preferred over the other.

The method which is not favored by the courts and the boards is known as the total cost method of computing delay damages. Under this approach, the contractor utilizes the total cost he has incurred in performing his contract as a base. He then subtracts his bid price from his total cost figure, the difference being the amount he attributes to delays caused by the other party. The problem with this approach is that there is not necessarily a direct correlation between the extra costs incurred and the delay allegedly caused by the other party. In order to prevail



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under this theory, a contractor must show that his bid price was reasonable, he must be able to verify all of his actual costs upon which he relies, and he must be able to show that *all* extra costs were attributable to the delays of the other party or persons for whom he was responsible, and not due to his own actions or inactions.

The more preferable way for documenting a delay claim is to itemize and segregate each and every delay cost which the contractor attributes to delays caused by the other party or by third parties for which he is responsible. In addition, these costs must be accompanied by a detailed explanation of the causal connection between the damages incurred and the delays suffered. If a contractor's accounting records and procedures allow for this type of itemized breakdown, the courts will generally require its use.

The following types of delay damages are generally recoverable, assuming, of course, that the contract under which one is performing allows recovery and assuming that the contractor can establish a causal connection between the damages claimed and the delays attributable to the other party.

1. Idle Men and Equipment.

A contractor who has been delayed by the other party to a contract is entitled to the costs he has incurred by idle personnel and equipment. These items of damages should be documented by daily field reports, payroll records, accounting records, union agreements, etc. (Idle equipment losses should be documented by equipment rental invoices, or use of AGC's Contractors' Equipment Manual if the idled equipment is owned by the contractor. In addition, the contractor should be prepared to show that he has mitigated his damages for idle men and equipment by trying to utilize those men and equipment elsewhere, if at all possible. If such use has not been possible, that should also be explained in the claim for delay damages.

2. Escalation of Labor and Materials.

A delayed contractor is also entitled to escalated prices of labor, materials and equipment during the delay period. These cost increases should also be documented by equipment and material invoices, union agreements, and payroll records. General trends regarding increased material and labor costs are not acceptable; the contractor must show his actual cost increases.

3. Lost Labor Efficiency.

In a delay situation, a contractor is often forced to perform his contract out of sequence or in unanticipated inclement weather. He may also incur unanticipated shutdown and start-up costs, congestion in work areas and re-handling of materials due to the delays. While a contractor is entitled to damages for loss of efficiency, these damages are often difficult to document. Some courts and boards have recognized these damages as a percentage loss of productivity which is then applied to the actual cost of perfor-

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mance of the portion of work affected by the delay. This inefficiency factor can be established by use of labor costs per unit from other similar jobs versus labor costs per unit for the delayed job. Loss-of-efficiency calculations should be made for various aspects of the contract, since certain portions of a contractor’s work may be more greatly affected by the delay than others.

4. Increased Overhead.

There are two types of increased overhead which a contractor may recover in a delay claim, job-site overhead and home office overhead. Job-site overhead is comprised of those overhead items which are directly job costed in a contractor’s accounting records. Home office overhead is the general company overhead pool. The most widely used increased home office overhead formula in a delay claim, at least on federal government projects, is what is known as the *Eichleay* unabsorbed home office overhead formula. This formula or variations thereof, can be utilized to calculate a daily home office overhead figure attributable to the delayed project, which is then multiplied by the number of days of delay in arriving at an unabsorbed overhead damage claim. One is not automatically entitled to unabsorbed home office overhead in a delay damage claim. In order to review unabsorbed home office overhead, one must be able to show or at least argue convincingly that there has been an adverse impact on the contractor’s home office overhead due to the delay. On government contracts, there are certain items which a contractor normally charges to overhead which by federal regulation, cannot be recovered against the government. Therefore any disallowed overhead items must be deleted from the contractors’ overhead pool prior to making any overhead calculations. For example, on a federal government job, interest, social club dues and

membership fees, and attorneys fees incurred in prosecuting any claim against the government must be deleted from the contractor’s overhead pool prior to making an unabsorbed overhead calculation.

5. Extended Insurance Coverage

If insurance on the project in question is job costed, rather than included in a general overhead pool, a contractor can also claim as an element of delay damage the increased insurance coverage during the delay period on equipment, personnel or other project risks.

6. Interest

All government contracts entered into after March 1, 1979, are now processed under the Contract Disputes Act of 1978. Under that Act, a contractor is entitled to interest on a delay claim only from the date it submits its claim to the contracting officer until

the date the contract modification is issued. Interest is calculated at the interest rates established by the Secretary of the Treasury every six months, which rates vary according to present economic conditions. For example, the interest rate in effect from July 1, 1981 to December 31, 1981 is 14.78%. A few recent decisions have held that the interest rate to be applied to an entire delay claim is that interest rate in effect on the date of claim submittal, not utilization of the variable interest rates established every six months by the Secretary of the Treasury throughout the period of time until the claim is ultimately resolved. On non-government contracts, recovery of interest will depend upon specific contract provision or state statute. Generally, if there is no specific provision in the contract, a contractor is limited to the legal rate of interest currently in effect in that particular state, which rate

tends to be significantly lower than commercial interest rates. Therefore, if a contractor has an opportunity to do so, he should make certain the contract under which he is performing allows for recovery of interest on claims at prime commercial interest rates, the Secretary of the Treasury's interest rates, or some other more favorable interest rates, and from the date the delay damages were incurred.

7. Profit

The standard form federal government contract specifically disallows the recovery of profit on a delay claim made pursuant to the Suspension of Work clause. On non-federal government delay claims, the contractor is entitled to a profit markup on his damages, either based upon his historical profit markup percentage or based upon profit previously allowed on change orders or other contract extras on the subject contract.

In conclusion, the key to any successful delay damage claim, whether it involves a federal government contract or a private contract, is the contractor's documentation of its claim and compliance with applicable notice provisions. While a contractor may legally be entitled to the types of damages addressed above, he is unlikely to prevail in any negotiated settlement or litigation, unless he is able to show a causal connection between the delays of the other party and his extra costs, and unless he has complied with stated notice provisions.