Scheduling Claims Are Vital

For a Contractor To Establish a Successful Delay Claim a Number of Elements Must Exist—and Be Proven

Few elements in construction are of greater importance than the factor of time. Proper control of the time factor is essential to the successful completion of almost all construction projects, while lack of control over the time element can often result in financial disaster. The ideal situation is to spot the problems that would cause the schedule to be delayed or disrupted. Contractors should take actions to correct potential delays before they ripple the contractor’s schedule and costs. Trend reports between the owner and the contractor may be very helpful in keeping the schedule on track. It is important for all parties involved in a construction project to be aware and conscious of the schedule. Unfortunately, no matter how conscientious a party is in maintaining a manageable project schedule, some projects are not performed or completed precisely according to schedule. Each party to a construction contract should, therefore, carefully consider any contractual exposure and rights with respect to the time factor. By so doing, a party may take control of the appropriate steps to preserve any rights to extensions of time or additional compensation necessitated by deviations from the schedule, and may limit any liability for damages caused by delays which, in many cases, that party may have little ability to control.

In order to receive compensation for delays and disruptions, a contractor must be prepared to state the relevant events in terms of a scheduling claim. The basic function of a scheduling claim is to identify those facts which caused the deviation from the schedule, to demonstrate that the contractor was delayed and to prove the extent to which the contractor is legally entitled to an extension of time or additional compensation.

In order to state a successful delay claim, a contractor must prove a number of elements:

1) The contractor must prove that the delay was an excusable occurrence and not something for which the contractor is liable under the terms of the contract. The contract will generally outline what constitutes an excusable delay.

(2) In order for a delay claim to be successful, the contractor must comply with the technical requirements of the contract pertaining to the assertion of claims. Although there are exceptions to the rule, generally if a contractor fails to comply with the contract requirements for asserting a claim, the claim may be denied.

(3) The contractor must also prove the facts which caused the delay and that the delay actually increased the contractor’s costs. Therefore, contractors and subcontractors should maintain the types of records which may be required to prove at a later time why the project failed to proceed on schedule and the time in which it would have been performed had it not been delayed. Only an excusable delay will allow the contractor to rightfully deviate from the project schedule. In order to succeed in any delay claim and in order to avoid a possible default for failure to complete the contract by the original completion date, a contractor or subcontractor must show that the events which caused the delay constituted an excusable cause for delay. Generally, a contractor may encounter two types of excusable delays.

1) Noncompensable delay. Non-compensable delays generally arise from events which are beyond the control of the contractor or the owner, but which nevertheless
delay the contractor’s timely completion of the project. A noncompensable delay may be excusable in that it justifies the contractor in deviating from the project schedule and avoids the imposition of a penalty on the contractor for not completing the project on time; however, it does not allow the contractor to collect additional compensation for any extra costs. Noncompensable delays include such things as labor disputes, unusually severe weather conditions, unusual delays in transportation, vandalism and delays caused by suppliers and second-tier subcontractors.

(2) **Compensable delay.** Compensable delays are those which are caused by the owner or the owner’s representatives. A compensable delay not only gives the contractor a right to an extension of contract time, but also provides a right to collect additional compensation. Some owners, particularly the United States Government, expressly provide in their contract that if their representatives suspend, delay or interrupt the contract, the contractor will be entitled to extra compensation. Some private contracts also have suspension of work clauses which allow the contractor to collect additional compensation for delays caused by the owner. In order for the contractor to recover damages for a delay, the contractor must show that the delay was caused by the owner or that the owner somehow disrupted or interfered with the contractor and that the contractor thereby incurred additional costs.

The basic categories of delays may be modified by special contractual terms, such as “liquidated damage” and “no damage for delay” clauses. A liquidated damage clause represents an agreement by the parties that certain amounts of damages will be recoverable for a breach of contract. The liquidated damage clause is usually written to provide compensation to the owner for delays which are caused by the contractor, however, seldom provide for payment of damages to the contractor for delays by the owner.

In addition, some owners attempt to contract away any monetary responsibility for delays caused by them or their representatives by inclusion of a “no-damage-for-delay” clause in their contract. Because this clause is an attempt to limit a party’s rights and remedies, it will be strictly construed. The no-damage-for-delay clause is often used in conjunction with a time extension clause and will, generally, be enforced where the contract expressly grants an extension of time for an excusable delay.