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Building Your Delay Claim: Recovering After a Project Falls Behind Schedule

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Part 4 of 4

GRSM's "Women in Construction" Tuesday Talk Series

March 9, 2021 – How to Survive and Succeed in Your Case Virtually

May 18, 2021 – Contract Tips, Strategies, and COVID Compliance

September 14, 2021 - Consequential Damages

Visit GRSM's Women in Construction Tuesday Talks Webinar Archive to access previous recordings: <https://gordonreeswebinars.com/women-in-construction/>.

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What Are Delay Damages?

- In the context of a construction project, delay damages are those arising out of delayed completion and/or suspension to work performed.
- These damages compensate the contracting party that is injured when a project takes longer than the construction contract specified.
- No automatic right for a party to receive delay damages.

Actual Delay Costs v. Liquidated Damages

- Liquidated Damages –
 - Used when a determination of actual damages would be difficult if not impossible to ascertain.
 - Amount expressly provided for in the contract, usually at a daily or weekly rate. For example, \$10,000 per day, with a not to exceed amount, as represented as a dollar amount or percentage of total contract value (i.e., no more than 10% of contract value).
- LD provisions are generally enforceable if not deemed a penalty.
 - *Preibe & Sons v. United States*, 332 U.S. 407 (1947) (holding liquidated damages clause constituted a penalty, and was not enforceable)
 - *Miami Valley Contractors, Inc. v. Town of Sunman*, 960 F. Supp. 1366 (S.D. Ind. 1997) (holding liquidated damages clause enforceable despite contract reference to a “penalty”)
- If no LD provision in the contract, actual costs are awarded for delay (to the extent proven).

What Actual Costs are Recoverable Delay Damages?

- Contract may specify what costs are recoverable or methodology for determining recovery.
- Direct and Indirect
 - Direct – tied directly to the subject project (equipment, for example)
 - Indirect – function of the injured party's operations (home office OH)
- Variable or Fixed
 - Variable – increase or decrease in relationship to the amount of work (site supervision)
 - Fixed – costs remain the same even though work may fluctuate (office trailer)
- Relationship to the project – owner versus contractor?
 - Owner: additional supervisory expenses, loss of rents, loss of use, interest expenses, lost profits
 - Contractor: extended supervision/ project management, labor/material escalation, extended home office overhead

Price Escalation & COVID-19

- Seeing huge increases in material prices at time of bid versus when materials can reasonably be secured.
- Example Escalation Clause:

Subcontractor's material prices, including construction materials, are based on current prices at the time of the Proposal. Any significant price increases (meaning a price increase exceeding (10%) in materials necessary to perform the work, that occur during the period of time between the date of this Proposal and Substantial Completion of the Project, shall cause the Subcontract price to be equitably adjusted by an amount reasonably necessary to cover any increase. Further, if material or equipment, which the Subcontractor is required to supply are not available due to shortage or unavailability or if the price to procure such material or equipment increases a set forth in this provision, then an acceptable substitute shall be found and an adjustment in the contract price shall be made accordingly. Subcontractor shall be entitled to an extension of time for any delay in obtaining delivery of the item necessary for completion of the Work.

Example of Delay Damages Clause

- Example Delay Damages Provision:
 - “For any delay resulting from any act or neglect by the Owner or its employees, agents or representatives or by another contractor employed by the Owner, and which delay is not otherwise specifically provided for in the Contract Documents, the Contractor shall recover from the Owner any damages incurred as a result of such delay in accordance with the claims procedures set forth in the Contract Documents.”
 - “For any delay resulting from any act or neglect of the Contractor, any Subcontractor, or those under the control of either, the Contractor shall pay to the Owner the sum specified as liquidated damages for each day of such delay, not as a penalty, but because the actual damages for such delay are uncertain and would be impracticable or extremely difficult to ascertain.”

Example of “No Damages for Delay” Clause

- “No Damages for Delay” provision: Owners and contractors frequently use “no damages for delay” provisions in contracts to push down the risk of delay costs.
 - “The Owner shall not be liable to the Contractor and/or Subcontractor for claims or damages as a result of delays. The sole remedy against the Owner shall be an extension of time to complete the Work in accordance with the claims procedures of the Contract Documents.”
 - Check governing law – “no damages for delay” provision may not be enforceable. Not uniformly enforced across 50 jurisdictions.

Force Majeure Clauses Amidst COVID-10

- Consider Adding FM Clause (or be prepared to defend one):
- FORCE MAJEURE. If the performance of the Contract by Contractor is interrupted by any cause beyond the reasonable control of Contractor, whether similar or dissimilar, foreseen or unforeseen, foreseeable or unforeseeable, existing or future, Contractor shall be excused from the performance of this Contract while and to the extent it is prevented from so performing by any one or more of such causes: (1) labor shortages, strikes, of labor disputes, whether or not the demands of Contractor shall be reasonable and within the power of either party to concede, or other inability to obtain necessary labor; (2) acts of God, including, but not limited to, epidemic, quarantine, flood, earthquake, wind, hurricane or other inclement weather; (3) changes in laws, proclamations, acts, regulations, ordinances, demands or requirements of any governmental authority; (4) explosions, accidents, sabotage, revolution or insurrection, acts of terrorism, civil commotion, blockade, embargo. Any such delay shall extend the time for completion of the Contract by not less than the duration of the delay, but will not entitle any party to any other compensation.
- Are COVID supply chain disruptions Force Majeure?

Critical Path Delay

- A critical path delay is a delay to an activity that, if not mitigated, will delay the completion of the project.
- There can be more than one critical path; thus, there can be concurrent critical delays that, absent one delay, the other could still cause a delay to the completion of the project.
- Delay to an activity or portion of a project is not enough; the injured party is entitled to delay damages only if it demonstrates that the delay(s) impacted the critical path.
- A schedule delay analysis is the analytical process through which an expert employs Critical Path Method (CPM) technique, in concert with a forensic review of project documentation, to assess and apportion who owns the delay and what effects the delays had on the schedule.

CPM Analysis: What's the Focus?

- Expert analysis of schedules and time-related claims compare the planned versus actual/as-built project performance, focusing on:
 - 1 – The manner in which the project was planned to be constructed in terms of work activities, sequence, duration, manpower, equipment;
 - 2- The actual duration and sequence of those activities;
 - 3- The variances between the planned and actual performance of the work;
 - 4 – The causes of the variances between the planned and actual performance of the work; and
 - 5 – The effect of the variances in work sequences, activity durations, manpower, and resources on the critical path of the project.

Records & Documentation for Building Your Claim

- To recover delay damages, you need to:
 1. Establish entitlement (experienced critical path delay due to issues beyond your control) and
 2. Demonstrate you incurred measurable damages as a result of that delay(s) (incurred additional costs as a result of the delay).
- Finders of fact want claims to be quantified in the most discrete manner possible.
- The more detailed and consistent project documentation, the better.
- Having company-wide policies and documents for use in the field and office makes this easier.

Proving Your Delay Claim: What Records are Necessary

- Schedules
 - As-Planned/Baseline schedule (preferably CPM schedule)
 - Schedule updates (weekly, monthly)
 - As-Built Schedule
- Documentation supporting discrete causes of delay
 - Daily logs/journals
 - RFIs and responses
 - Formal correspondence
 - Notices of impacts/delays
 - » Follow contract notice requirements and procedure
- Detailed job costs records of time-related costs
 - Site supervision
 - Site administration
 - Site general conditions (trailers, office supplies, phones)
 - Rented & owned equipment costs

Necessary Records (Continued)

- Owned equipment usage logs & rates
- Invoices related to rented equipment and project general conditions
- Payment Applications (extended home office OH quantification or development of as-built progress)
- Financial Statements (extended home office OH quantification)
- Materials –notices from suppliers relating to increased costs and delays; invoices and proof of payment for increased costs as a result of delays (including storage costs).
- Equipment – proof of down-time hours through daily time cards or equipment logs, certified payrolls, daily reports, or a separate phase code in your job cost accounting system.
- Supervision (non-working) Labor – compare original estimated hours with actual hours spent; use daily time cards, certified payroll, daily reports or separate phase code in your job cost accounting system.

Notice

- Be aware of jurisdictional notice requirements
- Applies to CORs that form basis of formal cost & time claims
Common Elements of Contractual Notice Requirements
 - Time Requirements – i.e. 14 days, 15 days, 30 days when “becomes aware” of basis for claim.
 - Description of claim and evidence supporting claim.
 - In writing – make sure this is clearly drafted and you understand contractual requirements (email, USPS, certified, electronic ok?, address)
 - Notice must go to designated party – if provided to wrong party, notice runs the risk of being ruled ineffective.
 - Strict enforcement varies by state
 - » New York, Washington Jersey, Maryland – most strict
 - » *Mike M. Johnson, Inc. v. County of Spokane*, 78 P.3d 161 (Wn. 2003)
- Defenses: actual knowledge, waiver (owner breached K), substantial compliance

Building a Cost Claim for Damages (Recap)

- Use what you have
 - Perform delay analysis using baseline, updated, and as-built schedule
 - As-built schedules can be developed through the review of contemporaneous project documents (daily logs, meeting minutes, payment applications, etc.)
 - Use supporting documentation – correspondence, daily reports, invoices – to quantify delays and their associated cost and time impacts.
- Alternatives if Documentation is Missing
 - Expectation to quantify delays and cost and time impacts to a “reasonable degree of certainty”



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Questions?



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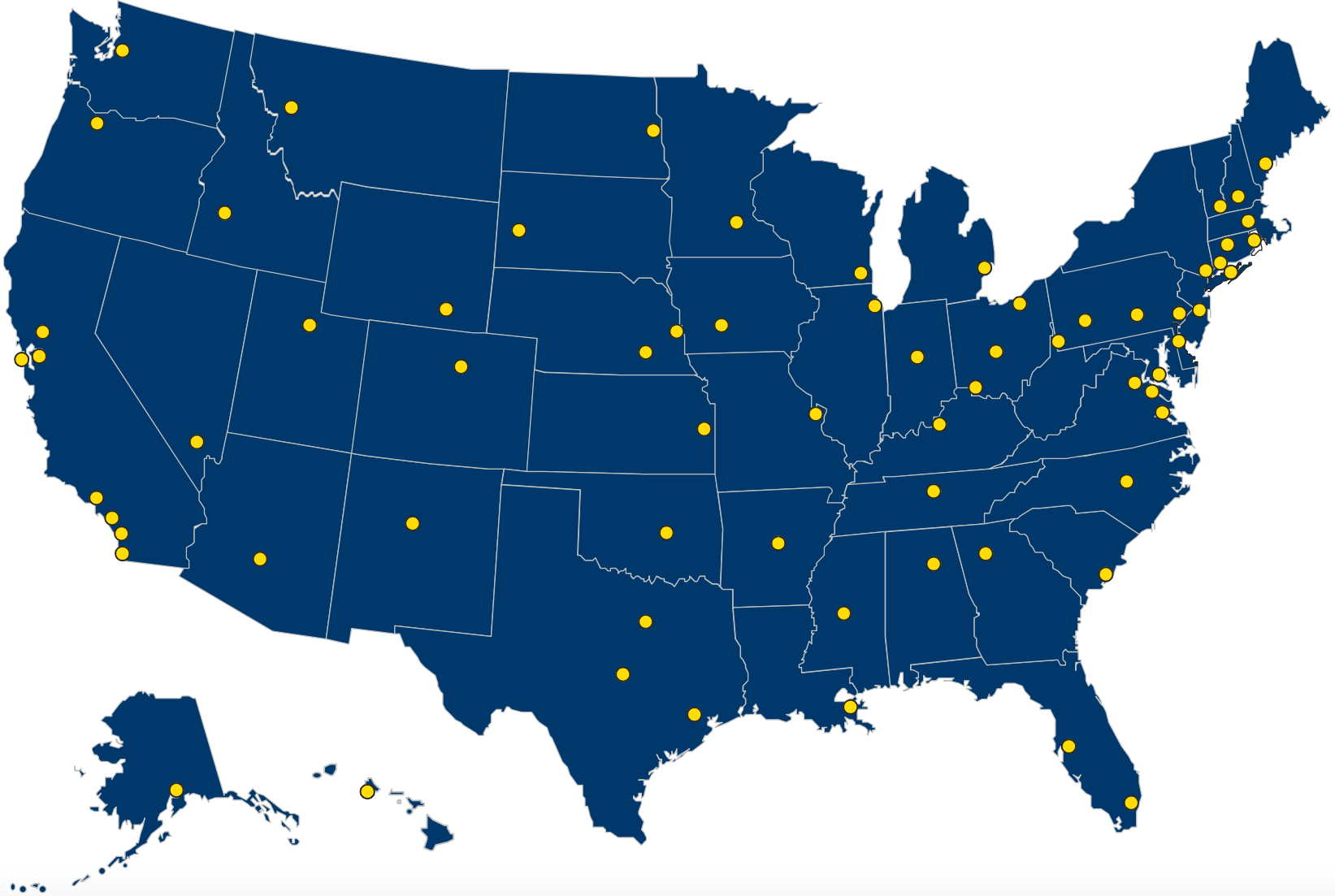
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