



Dealing with Delay and Impact:

From Contract Negotiations to Claims

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CONVENTION EDUCATION

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Keys to Success:

1. NEGOTIATE YOUR CONTRACTS!

2. COMMUNICATE AND DOCUMENT WITH A PURPOSE!

3. ASK FOR TIME!



Potential Delays:

- Delay to project start.
- Delay in delivery of materials/equipment.
- Delay arising from changes.
- Delay from unforeseen conditions.
- Weather delays.
- Suspension of the work.
- Traditional "Force Majeure" (and lessons learned from the COVID-19)
- Delay to the progress of your work (due to your own fault or the fault of others).
- Delay to the critical path of the Project.





Potential “Impacts” and Consequences of “Impact”:

- Disruption
- Hinderance
- Interruption
- Out-of-sequence work
- Trade stacking
- Acceleration
- Loss of Productivity/inefficiency



Proposals and Contracts



Use Your Proposal To:

- Outline your schedule assumptions.
- Limit the time for which you will hold your pricing.
- Propose amended contract terms and conditions when the bid documents include a form contract.
- Tie your price to your terms!



Negotiate Favorable Contract Terms and Conditions!



“No Damage for Delay”



Basic Classification of Delay

Causes of delay can be:

“**Excusable**” (beyond the control of either party - or concurrently caused by both parties) - time extension is allowed but no adjustment;

or

“**Compensable**” (due to fault of one party but not other) for which time extension AND recovery of resulting costs due to delay may be allowable.

But, even if other party **caused** the delay (e.g. changes, design problems, interference, etc.), if contract includes “NDFD” clause, time extension may be the only relief available.



ENFORCEABILITY OF “NDFD” CLAUSES

Some state legislatures and courts have precluded usage of “NDFD” clauses as AGAINST “PUBLIC POLICY.”

Otherwise, “**common law**” **judicial exceptions** have evolved allowing avoidance of such “NDFD” language where delay:

- a. Was well beyond original contemplation of the parties;
- b. Was so excessive as to effectively abandon project;
- c. Was result of active interference of other party; or
- d. Resulted from bad faith conduct of other party.



“No Damage for Delay” Clause Example:

If the progress of the Subcontractor’s Work is substantially delayed without the fault or responsibility of the Subcontractor, then the time for the Subcontractor’s Work shall be extended by Change Order to the extent obtained by the Contractor under the Contract Documents and the Schedule of Work shall be revised accordingly. *The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor’s sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor’s Work.*



Response

- **Strike:** *The Contractor shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays unless the Contractor has first recovered the same on behalf of the Subcontractor from said person, it being understood and agreed by the Subcontractor that, apart from recovery from said person, the Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontractor's Work.*
- **Insert:** If the Subcontractor is delayed due to the fault of the Contractor or persons or entities for whose acts the Contractor may be liable and Subcontractor incurs additional costs as a result thereof, then Subcontractor shall also be entitled to an equitable adjustment of the contract price.



Other approaches:

Expressly qualify or limit application of NDFD clause so it does **not** apply where:

- (1) A single delay is more than specified time
- (2) Cumulative effect of multiple delays more than specified time
- (3) Delay is due to specified types of causes [e.g. design changes, design errors, owner action or omission]
- (4) Total “damages” or direct costs due to delay exceed specified threshold amount.
- (5) Amount of direct and indirect project costs are quantified in contract – i.e. “reverse LDs” [e.g. \$2000 per day for “compensable delay”]



“Unilateral Right to Direct Resequencing or Acceleration”

Whenever, *in the opinion of Contractor, the Work falls behind schedule, the Subcontractor shall, to the extent necessary to meet said schedule, increase its labor force and/or provide overtime, Saturday, and Sunday and/or holiday work, and shall have each Sub-subcontractor do likewise, all at no additional cost to or compensation from Contractor.* Further, Contractor shall have the right to offset against any amounts then or thereafter due to the Subcontractor, or to be reimbursed by the Subcontractor for, any additional costs Contractor may incur as a direct result of said increase in labor force or overtime, Saturday, Sunday, and/or holiday work.



Whenever, *in the opinion of Contractor, activities on the critical path of the ~~the~~ Work falls behind schedule are delayed due to the fault of Subcontractor, the Subcontractor shall, to the extent necessary to meet said schedule, increase its labor force and/or provide overtime, Saturday, and Sunday and/or holiday work, and shall have each Sub-subcontractor do likewise, all at no additional cost to or compensation from Contractor.* Further, Contractor shall have the right to offset against any amounts then or thereafter due to the Subcontractor, or to be reimbursed by the Subcontractor for, any additional costs Contractor may incur as a direct result of said increase in labor force or overtime, Saturday, Sunday, and/or holiday work. *If Subcontractor is requested to work overtime or premium time due to a delay or impact not the fault of Subcontractor, Subcontractor shall be entitled to additional compensation.*



“Delegated Duty to Coordinate Among Separate Subcontractors”



Implied Duty to Coordinate

Where multiple contractors are engaged by owner to perform project work – i.e. “multiple prime contractors” (with or without “construction manager”), at common law, owner must undertake **coordination of such multiple prime contractors and be liable to the others for its failure to do so.**

Similarly, a **general contractor** is considered under common law to have **implied duty to coordinate its multiple subcontractors.**



Response

- Insert: While Subcontractor will seek to coordinate its work with other subcontractors, the parties recognize that Subcontractor has no contract with or ability to control or direct or sequence the work of other subcontractors. Contractor has the primary responsibility to coordinate the work of subcontractors and trades and to sequence the work to facilitate construction.



Liquidated Damages

Insert: Liquidated damages shall only be assessed against the Subcontractor to the extent delay to the critical path of the Project is due to the fault of the Subcontractor.



Effectively Documenting Delay and Impact Claims

- Understand your contractual requirements and satisfy them.
- Document progress and conditions accurately and in detail.
- Document delays and impacts and notify the customer.
- Respond to your client's communications and documentation.
- Segregate actual costs.



Avoid Contractual Pitfalls!



Contractual Notice Requirements

- Identify and comply with all “early” notice requirements!
 - When is Notice Required?
 - Schedule impacts
 - Cost impacts
 - To Whom Must Notice Be Sent?
 - Must Notice Contain Specific Contents?
- Beware of notice triggering events!



Create a Contract Requirements Chart

Topic	Contract Provision	Notice	Other Items of Note
Changes	Section 5	Written notice within five (5) days of event giving rise to change	If Client disagrees that it's a change, we proceed in time and material basis.
Delay	Section 7	Written notice within seventy-two (72) hours of when we knew or should of known fo the event causing delay	Required to show that there is an delay to activities on the critical path through a TIA
Concealed Conditions	Section 9	Written notice within five (5) days of uncovering the concealed condition.	If we proceed without giving the Client the opportunity to investigate, we waive our rights to time and money.



Avoid Inadvertent Waiver

- Waiver provisions often included in:
 - Waiver and releases provided in exchange for payment
 - Waiver and releases may be built into payment application
 - Waiver language may be included in Change Orders
 - Waiver may result from failing to provide timely notice by operation of the contract.
 - Waiver may result from accepting final payment.



Document with a Purpose!

- Accurately document the status of your work without overtly criticizing yourself.
- Everything you write should be written as if its going to be read back to you on a witness stand in the courtroom.



Schedule & Schedule Updates

- Track your work against the schedule and compare as-built to as-planned progress.
- Examine schedule updates for changes from prior schedules. Identify and provide notice of the impact of schedule change to the client.
- Identify and respond to attempts to accelerate/resequence through look-ahead schedules, pull-planning, or other short-term planning



Daily Reports

- Weather conditions
- Workers and hours worked
- Description of the work being performed (by each worker/crew if possible)
- Location of work being performed (by worker/crew if possible)
- Materials and Equipment used (with quantities)
- Work completed/progress achieved (by quantities)
- Hinderances/Delays/Impacts to the work
- Include photographs/videos



Schedule of Values

- Detailed line-item schedule of values

Change Order Logs

- Document the whole timeline – submission, response, rejection, acceptance dates

Submittal Logs and Long Lead Items

- Provide early notice of long lead items
- Track the process with detail



RFI Logs

- An accurate RFI log provides a starting place for documenting impact of insufficient design and delay from untimely resolution.

Meeting Minutes

- Make sure minutes are accurate and reflect the actual discussions.

Project Management Software

- Procore and other like software can be used to document constraints with photos, tied to plans, with start and finish



Keep your client informed:

- If your work is impacted/delayed, notify the client. No one likes surprises.
- Simple and straight-forward emails outlining challenges sent on a routine basis (weekly/bi-weekly) can be invaluable to resolving issues or, when they are not resolved, in support of a later claim.



General Example - Late Start/Delays:

Dear GC:

We were notified this week that we should mobilize to the Project and begin our work on August 1, 2020. We originally anticipated starting our work on March 1, 2020. Due to circumstances outside of our control, the start of our work has been delayed by five months. Our work was originally priced based on performing the work in a sequential manner, with normal manpower loading, and over a planned duration of six months in accordance with the schedule provided to us with our subcontract. If the sequencing, labor requirements, or duration of the work has changed as a result of the delays to the Project, we request that you immediately inform us of the changes so that we can evaluate the impact to our costs and present pricing to implement the required changes to complete the project in accordance with the current schedule requirements.

Sincerely,

Sub



Respond to assertions made against you and information provided to you.

- Cannot remain silent when others blame you for delay/issues. Need to push back.
- Refute what you can refute and clarify what needs to be clarified.
- Commit to addressing your work (in a reasonable and efficient manner) and insist others do the same.
- Respond to information provided by others that impacts you.



General Example – Response to Updated Schedule:

Dear GC:

We've reviewed the updates to the schedule dated July 23, 2020. Our review indicates the sequence and durations of our work activities has changed from what was originally anticipated at the time we entered into the subcontract. We understand that the Project has been delayed and you are working to recover the time and complete the job on time. We remain committed to working with you to achieve that goal.

However, our subcontract requires us to provide you notice of delay and other impacts that could give rise to claims for additional costs. The delays we have encountered, and the changes reflected in the updated schedule will cause Sub to incur unanticipated additional costs, which we are currently evaluating. We would like to meet with you to discuss the costs and ways that we can work together to timely complete the project and minimize cost impacts.

Sincerely,

Sub



Ask for Time!!



Track and Document the Costs

- Track and segregate the labor and equipment hours for impacted work.
- Track and segregate material costs for impacted work.
- Tie descriptions of work in reports to costs.
- Create costs codes specific to additional costs.
- Identify and track one-time costs
- Track general conditions and field overhead costs.



Present the claim ASAP!

- Don't wait until the end to present claims!
- You have more leverage while the Project is on-going!
- You don't know what is going to happen on the Project in the future.



Thank you!

ANY QUESTIONS?

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Complete the Online Evaluation

