

Delay Claim Analysis 101

Many construction projects incur increased costs related to project delays or other impacts. Some contracts prohibit the recovery of delay-related costs, whether caused by owner delay or interference or by force majeure. But under some contracts, delay damages are recoverable, and some states' laws declare waivers of claims for delay damages to be unenforceable or specify exceptions to when the waivers can be enforced.

When faced with increased construction costs from delays, many contractors and subcontractors fail to adequately document entitlement to these costs. Ultimately, if the parties are not able to informally resolve the claim for delay costs, the right to these costs will be decided by a fact-finder such as a

judge, jury or arbitrator. The type of proof that is necessary to show entitlement depends on the fact-finder.

The type of proof required also hinges upon the type of damages that the contractor is seeking. Although many claims for increased costs in construction are labeled by courts as "delay" claims, not all delay claims seek the same type of damages. In a true delay claim, a contractor claims extended field or home-office costs because of the project's failure to finish by the completion date specified in the parties' agreement. In other claims, a contractor claims increased costs caused by changed conditions or interferences that delayed the contractor's work and increased the contractor's costs by causing a need to increase manpower or add shift work, even if they did not necessarily delay project completion. These latter claims are commonly referred to as "impact" or "inefficiency" claims.

Courts and arbitrators generally require a contractor who wants to recover delay costs to present a proper "critical path method" scheduling analysis. This analysis shows the duration of delay caused by events beyond the contractor's control, and shows whether the



delays affected the “critical path” of the work. Delay to work that is not on the critical path will not be compensable.

Approaches to calculating critical path delay can vary greatly, in part because there is no universally accepted definition of “critical path.” Some approaches take a “contemporaneous” look at criticality, which involves examining schedules that had been submitted during the project. When contemporaneous schedules are not available, a party (or its scheduling expert) must recreate an understanding of the critical path retroactively (based on the as-built schedule). Generally, if schedules were submitted and agreed upon during construction, courts and arbitrators will find these to be more persuasive evidence of critical path than they would the as-built schedule.

Claiming Costs

To quantify recovery of impact or inefficiency costs that are not captured as part of the delay cost analysis, courts and arbitrators generally favor a “measured mile” analysis, which calculates loss of efficiency by comparing efficiency in an “unimpacted” area (the “benchmark” area) to the efficiency in areas that were impacted by owner interference or unforeseen site conditions (the “impacted” area). Typically, efficiency is determined by calculating the number of man-hours required to complete a certain unit of work (e.g., hours required for a cubic yard of concrete). Under a measured mile analysis, the contractor recovers the value of the hours expended in the impacted area that were in excess of the hours that reasonably could have been expected if the productivity factor of the benchmark area had applied to the impacted area.

A contractor that lacks understanding of what is generally acceptable as proof of a delay claim will often submit a “total cost” or “total delay” claim to its customer. In a total cost claim, the contractor asks the customer to pay the contractor the total costs that the contractor incurred beyond those it had reasonably anticipated when it bid the project. A total cost claim assumes that the customer (or causes beyond the contractor’s fault) caused all increased costs, through delays or interferences with the contractor’s work. A total cost claim also assumes that the costs that the contractor assumed in its bid were reasonable. In a total delay claim, the contractor asks the customer to pay the costs that the contractor incurred for extended overhead and field supervision or other field costs for the total time that the schedule extended beyond the originally anticipated completion date. Like a total cost claim, a total delay claim assumes that fault can be attributed 100 percent to the customer (or causes beyond the contractor’s control).

In general, total cost claims and total delay claims are heavily disfavored by courts and arbitrators. They recognize that it is rare that zero fault for increased cost or delay lies with the contractor, and they therefore generally require that a contractor provide an alternative

IN THIS SECTION

Dan’s Excavating Inc. – I-75 Reconstruction → p.96

DEI helped commuters feel safer with its Interstate-75 project.



EllisDon Kinetic– Fleet Maintenance Facility Cape Breton Shop Consolidation Project → p.102

EllisDon is overseeing the final phase of a shop consolidation project.



Company Profiles

- 96** Dan’s Excavating Inc. – I-75 Reconstruction
- 100** Anderson Columbia Company
- 102** EllisDon Kinetic– Fleet Maintenance Facility Cape Breton Shop Consolidation Project

analysis to recoup increased costs, such as the above-discussed critical path analysis or measured mile calculation.

A contractor seeking delay or impact costs would be well advised to seek legal counsel immediately upon encountering delay or significant adverse site conditions or interferences. Legal counsel can guide the contractor to a proper, qualified expert who can work with the contractor to quantify any damages. ♦

Jeremy P. Brummond practices in the litigation department at Lewis Rice in St. Louis with a focus on engineering and construction. He can be reached at jbrummond@lewisrice.com