

Delay Claims – What you need to Recover Damages for Delay

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Every contractor, at some time, will be involved in a project on which its work is delayed. Often, the delay will be minimal, and the contractor will simply absorb the additional costs it incurs. At other times, however, the delay can be so severe that it can jeopardize the contractor's entire business. If the contract does not contain a "no damages for delay" provision, the contractor will want to recover as much of its damages as possible from the responsible party - sometimes, the owner, sometimes another contractor or subcontractor on the project. However, while Arizona courts allow recovery of these damages, they want a contractor to provide as much proof as is possible as to the amount of the damages. Just because the original contract price was \$1 million, and the final cost to complete was \$2 million does not mean that the contractor's damages are \$1 million.

Most contractors are aware of the types of damages they can recover for delay: extended general conditions; unabsorbed home office overhead (Eichleay damages); acceleration costs; increased costs of labor and materials; lost productivity costs; and lost opportunity costs. However, not all these damages may be recovered on every job. Moreover, even when a contract permits damages for delay, it may bar the recovery of some of those damages. For example, the 1997 AIA 201 General Conditions specifically excludes home office overhead and appears to exclude lost opportunity costs under its waiver of consequential damages provision. Therefore, a contractor will want to make sure it recovers every penny of the other forms of delay damages to which it is entitled. Its best bet for doing so is to make sure it has all its paperwork in order.

Naturally, the most important issue the contractor must prove is that someone for whom the owner is responsible is the cause of the delay. If, for example, the delay is caused because the owner's architect or engineer has failed to respond to a valid request for information, the owner will be responsible for the delay. Often, however, both the owner and the contractor are partially responsible for ongoing delays -for example, when the con-

tractor is unable to work around the delay caused by the architect because a subcontractor in a different trade is unable to obtain materials. Many courts will not award a contractor damages for this type of "concurrent" delay unless the contractor can separate out the delays for which it is responsible and the delays for which the owner is responsible. Probably the best tool in proving delays and the cause of those delays is the project CPM schedule. For the best understanding of the project, the schedule should be updated regularly while the work is still in progress. While a good scheduling analyst might be able to recreate an as-built schedule that points to the cause of delays after the project is complete, that recreation will not carry as much weight as schedules that are prepared during the project. A frequently updated schedule will also be able to demonstrate which delays were on the critical path and which were not. If a delay is not on the critical path, the contractor will not be entitled to recover for that delay.

While a frequently updated schedule is very important, it is not the only documentation that a contractor needs to keep to prove its claim. The contractor should not discard even one piece of paper prior to resolving all its claims against the Owner. The bid file is necessary to demonstrate how the contractor priced the work in the first place. It should contain the work ups of the labor hours and the cost of materials. Often the contractor will be required to prove that its original estimate was carefully calculated, and the delays increased the number of hours worked or the cost of the materials purchased. If the owner received more than one bid, the successful contractor's bid can often be compared to other bidders to show that it was reasonable.

While the Project is ongoing, well kept daily job logs are often irreplaceable -not merely daily logs that state who was on site and what happened -but often what did not happen. A daily log that states that the painter was on site is not nearly as helpful as one that says the painter was only able to work for two hours because other parts of the work were not ready. These daily logs, when analyzed with the schedule, can be invaluable

Often, a contractor incurs additional labor costs because a delay interferes with its ability to perform its work in the most efficient sequence. To prove these costs, detailed laborer time sheets are necessary. Not simply time sheets that state that the worker was on the job for eight hours, but time sheets that show what he or she was doing during those eight hours. If the number of employees is not too great, it may be simpler for the project superintendent to note this in the daily log. Similarly, when and why overtime was incurred should be noted on these timesheets.

With the omission of home office overhead as damages from the AIA contracts, a contractor will want to recover as much actual overhead as possible from its extended general conditions. Anything that can be legitimately costed to the job should be included. Contractors, especially smaller contractors, often include costs that could be included in the job costs in home office overhead. To avoid losing some of the general conditions, any good construction accountant should be able to assist. For example, while the cost of keeping the job site trailer on the project during the delay is an obvious extended general condition, contractors often forget that costs such as the insurance for that trailer can also be costed to the job.

Often in delay cases, the party with the best paper trail wins. By keeping good records during the project, a contractor can reduce the amount it will need to spend later on attorneys, accountants and claims consultants. A contractor with a good paper trail is also less likely to make an over-inflated claim. If you make a claim for which you have adequate back up, you maintain credibility, and you get paid more quickly. Make sure you are the party with the best paper trail.