

Delay and Disruption Claims: Big Impacts on Your Bottom Line

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“Time is money” in construction. Owners, design professionals, and contractors use time to calculate the impact of lost performance. Yet delay and disruption is commonplace in construction projects. The reasons for the delay or disruption may vary, but delay or disruption is a major concern in the construction industry, and has a major impact on any project. Indeed, delay and disruption claims are some of the most expensive, difficult, and, time-consuming disputes to litigate.

Delay arises when the project is not completed within the agreed deadline. Disruption emerges when an owner causes a change in the method of construction upon which the contractor based its bid. Although delay and disruption often go hand-in-hand, they are distinct claims with distinct damages. Disruption of the contractor’s planned sequence and method of construction typically causes a loss of productivity. This loss of productivity, however, does not necessarily mean that the overall contractual completion date will be delayed as a result of the disruption.

Over the years, the construction industry has developed various methods of contractually allocating the risk of project delay and disruption. Some of these methods include liquidated damages provisions, “no damages for delay” clauses, mutual waivers of consequential damages, limitation of liability provisions, claims notice provisions, and provisions addressing responsibility for the adequacy of the construction plans and specifications. Parties frequently litigate the sufficiency and enforceability of these risk-shifting efforts in conjunction with the underlying merits of delay and disruption disputes. Understanding these claims and the contractual provisions that relate to these claims is critical. All parties should attempt to enter into contracts that clearly and adequately address the risks imposed by project delays and disruptions.

The contractor’s responsibility for delay and disruption tends to arise from improper planning. A contractor’s obligations center on proper planning, which ensures that the work is adequately scheduled, sequenced, and coordinated. Schedules are typically based on “critical path” methodology. Critical path scheduling is used to plan, sequence, forecast, and resource level the start and finish of work or scheduled activities. On the other hand, the owner’s responsibility from delay and disruption tends to arise from differing site conditions, changes made by the owner during construction, and design deficiencies.

Delay Claims

Many events may increase the time of performance of the overall project or affect any given activity. Common examples include contractor/subcontractor management and performance problems, differing site conditions, changes in requirements or design,

unanticipated weather, unavailability of labor, material or equipment, defective plans or specifications, and owner interference. Delay can either be excusable, thus justifying an extension of the contract performance time, or non-excusable, where the delayed party assumes the risk of the costs and consequences of delay. Determining whether a delay is excusable or non-excusable is usually addressed in the contract. The contract will usually enumerate various types of delay that will entitle the contractor to an extension of time (*i.e.*, an excusable delay). Typical extension provisions cover labor disputes, unanticipated weather, unusual delay in deliveries, and a catchall for any unforeseen causes beyond the control and without the fault or negligence of the contractor. The fight for the contractor will usually be whether the delay was foreseeable (non-excusable) or unforeseeable (possibly excusable).

Excusable delays may be further classified as compensable or non-compensable. Again, the contract is usually controlling. Compensable claims are those where the claiming party is entitled to additional compensation for the costs of the delay in addition to the additional time for contract performance. These are usually delays that could have been avoided by due care of the non-claiming party. The claiming party must not usually contribute to the delay. Non-compensable delays are those that are not the fault of the owner or contractor, but are due to events outside the control of the parties such as acts of God or labor strikes.

In order to be excusable, the delay must be critical – *i.e.*, extend the overall project completion date. A time impact analysis – a thorough examination of the various activities on the project, pinpointing deviations from planned performance, and then quantifying the delay – aids in this determination. Contractors making delay claims should provide a time impact analysis, particularly if it is required by contract. To do so, you should have your construction attorney engage an excellent scheduling consultant. Your scheduling consultant will evaluate the delay activities, the contract schedules, and the critical path, and the effect the delay activities have on the project milestones. They will determine, along with the contract requirements, if any time extension is merited.

Often times there is not a single cause of, or single party responsible for the delay. These “concurrent delays” – two or more unrelated delay periods occurring simultaneously, each independently affects the project end date – are hotly contested in litigation and difficult to analyze. The concurrent delays can differ as to responsibility (*e.g.*, owner vs. contractor), duration, impact on critical path, compensability, and the ability to substitute other work activities for the precluded activities. Thus, the analysis and apportionment of concurrent delays involves analysis of the contract provisions defining concurrent delay, if any, and legal principles in the controlling jurisdiction. It is usually fact intensive and involves multiple parties (owner, contractor, subcontractors, material suppliers).

If compensable, delay damages come in several forms and can be calculated in various ways. Again, depending on the contract, successful claimant may recover direct

job costs (general conditions costs such as jobsite payroll, costs of supervision, cost of job trailer and telephone, and rental value of idle equipment), overhead (home office, rent, and utilities), and labor and material increases (wage increases and impact of inflation on the cost of materials).

Establishing damages is a fact intensive and expert intensive exercise where the burden to prove the damages rests squarely with the claimants. It goes without saying that the better and more complete the proof, the better the chances for claimant recovery.

A party defending against a delay claim is not without recourse. And that recourse is usually found in the form of a contract provision. For example:

- **No Damages for Delay Clause:** These are exculpatory clauses that preclude damages for delay. Generally, a contract may provide that the contractor's sole remedy is only a time extension. These provisions are generally enforceable except in cases of fraud or owner interference or if a statute prevents it from being enforced.
- **Liquidated Damages:** An owner might be awarded damages based on contractor's delay.
- **Concurrent Delay:** One party may argue that any delay was also caused in part by the other party.
- **Written Notice:** Construction contracts typically require claims for delay and additional compensation to be preceded and confirmed by specific written notice. Failure to follow the contract may result in waiver of the claim, or at the very least, cause you to incur additional attorneys' fees attempting to circumvent the written notice requirement.

In sum, it is important to know your contract. Pay close attention to provisions relative to the schedule of work, provisions regarding your ability to manage and modify your work plan, schedule and sequence, provisions regarding your ability to seek relief from changes to and impacts upon your work plan and schedule, notice and claims provisions, and "no damages for delay clauses."

Disruption Claims

A contractor's disruption claim arises when an owner changes the method and/or sequence of construction from that upon which the contractor based its bid. When the planned method of completing the project is disrupted, contractors incur increased labor costs because it takes them more time to complete the task than originally contemplated. When this occurs, contractors either allege a breach of an express contract provision that requires cooperation between the owner and the contractor, or a breach of the implied

duties of the owner to cooperate with the contractor or to refrain from hindering the contractor.

To counter a contractor's disruption claim, owners often argue that they had the right in the contract to change the schedule and, therefore, the sequence of construction because of the terms of the contract. Owners often urge that these express terms trump the implied duty to cooperate, thereby undermine the legal basis for a contractor's disruption claim.

Disruption damages are the result of the timing or sequence of the flow of work (*e.g.*, lost productivity) and not necessarily an extension beyond the originally anticipated project completion. Loss of productivity claims are difficult, but vitally important, and almost always require expert testimony. Productivity is a measurement of rate of output per unit of time or effort, usually measured in labor hours or equipment hours. A loss of productivity, also sometimes known as "disruption" or "loss of efficiency," can have significant negative effects on a contractor's bottom line. There can be many causes of disruption on a project such as differing site conditions, design deficiencies, or lack of access to the work. Quantifying that loss of productivity is the difficult part. Knowledgeable construction counsel and knowledgeable experts can guide you through this difficult process.