

Defending Against Construction Delay Claims

New Jersey Law Journal, October 2020
Jacqueline Greenberg Vogt, Esq.

Delays are inevitable in construction. They can also cause the project owner to lose a lot of money resulting from contractor claims, loss of use of the project, the cost of construction funding and other damages which are incurred when a project extends beyond the scheduled completion date.

Delays can be caused by the owner, the designer, the contractor, or a combination of any of these. Owner caused delays may be occasioned by site access issues, delays in obtaining government approvals, financing issues, changes to the scope of work and many other reasons. Designer caused delays may result from inadequate detail in the plans, lack of timeliness in responding to submittals and requests for information (RFI), design errors and omissions and untimely inspections, among other things. Contractor caused delays may occur from poor project management and coordination, inadequate financial and labor resources or defective workmanship. Lastly, unanticipated severe weather or a pandemic can also delay a construction project.

Ultimately, the project owner bears the burden of the majority of delay claims on a construction project. Here are some commonly used and oft successful defenses for the project owner in combatting delay claims.

Lack of Notice

The first defense an owner may raise in response to a delay claim is lack of proper notice. If the contractor failed to follow the contractual notice requirements regarding the timing, delivery method, format, delivery or completeness of a claim, the owner may have a complete defense. Moreover, if the contract requires the contractor to supplement the claim and the contractor fails to properly do so, that failure may be fatal to the contractor's claim.

No Damages for Delay

Looking again to the construction contract for defenses to a delay claim, an owner may benefit from including a “no damages for delay clause” in the contract. This essentially declares that delays are all part of the business, and any costs associated with them should be written off. This clause prohibits a contractor from recovering money damages for a delay. Many no damages for delay clauses limit relief to extensions of time for the contractor to complete its work.

However, owners may not benefit from a no damages for delay clause if the owner actively interfered with the performance of the work. In this scenario, the contractor must show that the owner engaged in a direct, active, and willful act in bad faith that unreasonably interfered with the contractor’s performance of the work.

Also, an owner may not be able to rely on a no damage for delay clause if the delay was not contemplated by the parties at the time they entered into the contract. An example is where a delay is caused by the discovery of asbestos on a project site, or the non-party city’s failure to timely provide a permit. In such a case, the contractor may be awarded delay damages from the owner despite the existence of a no damages for delay clause.

Time of the Essence

A “time is of the essence” clause may also provide a beneficial defense to a delay claim. A time of the essence clause will hold everyone responsible for completing the work by an agreed upon time. This means that the owner may claim that any delay is a material breach of the contract and hold the contractor liable.

Challenges to Causation

In bringing a delay claim, the contractor is required to prove causation for the delay, If the contractor is unable to show that the delays were caused by the owner or the designer and not it, the contractor may prevail. On the other hand, if in response to the claim, the owner can prove that the contractor caused the delay, the owner may escape liability for the damage resulting from the delay.

Even if the contractor can show that it was delayed through no fault of its own, the owner may still be able to remain unscathed if the owner can show that the delay was not on the critical path of the project’s schedule. The critical path is the sequence of longest project activities that add up to the longest overall duration of a project. Thus, a delay that is not on the critical path is deemed not to impact the overall project duration and therefore may not be compensable.

Concurrent Delay

Concurrent delays occur when there are two or more delays at the same time that are caused by different events but overlap. They must be unrelated to each other and caused by different parties, or by one party and a third party or outside cause. To identify a concurrent delay, the relevant question is to whom the delay is attributable. If the delay is attributable to both the owner and the contractor, neither can recover delay damages from the other. Conversely, if the delay by the owner occurring at the same time as the contractor's delay, but it does not impact the project completion, *i.e.*, the critical path, then the owner may shift the responsibility for the delay to the contractor. If the delay is caused by a third party or a *force majeure* event, the owner may also use the concurrent delay argument to mitigate or even eliminate liability to the contractor for the delay.

Thus, including contractual provisions that define concurrent delays and address the excusability and compensability of concurrent delays protect the owner from the outset. If a delay truly is concurrent with some other delay on the project, then that can be used as an argument against compensating for the accused delay.

Another way for an owner to defend against a concurrent delay claims is to show that its own delay did not impact the critical path and therefore there was no actual concurrent delay.

Proving that a delay was or was not concurrent often requires extensive expert analysis and documentary evidence. The most commonly used methodology is schedule delay analysis, a process through which an expert uses CPM techniques in concert with forensic review of project documentation and data to assess and apportion the effect of delays on the project's schedule. As discussed above, the purpose of a critical path schedule is to map out and determine the length of time required to complete a project. An owner would use the schedule impact analysis to allocate the fault and show that the contractor's delay on its own affected the critical path, regardless of the fact that owner caused delay also occurred.

Liquidated Damages

Liquidated damages clauses allocate risk to the contractor for delays and provide the owner with a claim for damages. Liquidated damages substitute a predetermined amount for actual damages and are primarily assessed for unexcused delays in achieving substantial completion and are typically set in dollars per day. Liquidated damages clauses are designed to avoid arguments about the reasonableness of the actual damages an owner may have due to unexcused delays by the contractor.

To prevent abuse of liquidated damages, courts have imposed a requirement that liquidated damages be based on a reasonable precontract estimate of actual damages that would otherwise be difficult to prove. Liquidated damages that substantially exceed a reasonable estimate can be deemed an unenforceable penalty.

Liquidated damages on a construction project normally stop at substantial completion. Once a project can be used for its intended purpose, any ongoing delay related damages an owner might incur before final completion should be reasonably easy to calculate and, therefore, not appropriate for liquidated damages.

Liquidated damages that are based on a reasonable estimate of likely actual damages serve a useful purpose for both owners and contractors. Specifying a predetermined amount per day relieves the project owner from the risk of being unable to prove actual damages. At the same time, competition permitting, it allows a contractor to factor into its bid the likely cost of an unachievable contract completion date. For both contractors and owners, liquidated damages may reduce somewhat the complexity of resolving delay related disputes.

Conclusion

Because delays are so prevalent in the construction industry, a prudent owner may wish to consider the above defenses and include protective provisions in its construction contracts at the outset, carefully document all delays and strictly adhere to the terms of the contract in its dealings with its contractors.

Jacqueline Greenberg Vogt is a partner with Mandelbaum Salsburg P.C. and the Chair of the Construction Law practice group.

**This article was published prior to Jacqueline joining Mandelbaum Salsburg P.C.*