

# Understanding, Analyzing, and Resolving Construction Delay Claims

By: Jeff Chapman  
The Chapman Firm  
3410 Far West Blvd  
Suite 210  
Austin, Texas 78731  
512.872.3840  
[jeff@chapmanfirmtx.com](mailto:jeff@chapmanfirmtx.com)



A Balanced Approach to Construction Law.

# Source of Delay Claims

- ◎ Currently very common
- ◎ Labor/Subcontractor & Material unavailability
  - > Overextended commitments and procurement delays
- ◎ Contractor management struggles
- ◎ Optimistic and tight bidding practices

# Types of Delay

- ◎ 1) Non-excusable, non-compensable
  - > Delays within control of contractor
- ◎ 2) Excusable, non-compensable
  - > Delays outside control of all parties
- ◎ 3) Excusable, compensable
  - > Delay caused by owner
- ◎ 4) Concurrent
  - > Excusable, compensable delay event occurs at same time as non-excusable, non-compensable delay

# Basic Principals of Delay Analysis

- ◎ Critical Path must be established
- ◎ All Project schedules with accurate data must be considered
- ◎ Float should be considered
- ◎ Delays must affect the critical path

# Contract Controls

- ⦿ Allowable Weather Delay
- ⦿ Time & Money, one, or both
- ⦿ No Damages for Delay
- ⦿ Presentment of Claims
- ⦿ Initial Recommendation

# No Damages for Delay

- ◎ Generally Enforceable
- ◎ Express Provision
  - > May address both Contract Sum and Contract Time
- ◎ Zachry Const. Corp. v. Port of Houston Auth. of Harris Cty., 449 S.W.3d 98, 115 (Tex. 2014)
  - > Most recent definitive statement

# Exceptions to Enforceability of No Damages for Delay

- ⦿ Delay not intended/contemplated within purview of provision;
- ⦿ Delay result of fraud, misrepresentation, or bad faith by Owner;
- ⦿ Delay extended for unreasonable length of time that Contractor would have been justified in abandoning the contract;
- ⦿ Delay is not within the specifically enumerated delays to which the clause applies;
- ⦿ Active Owner interference or other wrongful conduct, including arbitrary and capricious acts or willful and unreasoning actions, without due consideration and in disregard of the rights of other parties.

# Resolving Delay Claims

- ◎ Understand Contractual Requirements
- ◎ Evaluate Forward Looking vs. Forensic (rear-looking)
- ◎ Tie to Critical Path
- ◎ Verify accuracy of as-built v. as-planned



# Contractor Analysis

- ◎ Typically forward looking
  - › Involves projection for change work
  - › Evaluate time for the event
    - Attempt to recover lost time or forgiveness from LDs
    - Unreasonable extension for non-critical work
  - › **Must be Critical Path Work**
    - Longest Path from date of request to completion when considering all subsequent trades
    - Evaluate affect on Critical Path

# Time Impact Analysis

- ◎ Properly used as basis for forward-looking claim
- ◎ Analyze current schedule
  - > Assume no other impact other than delay event
  - > Evaluate impact to Critical Path from event
  - > Assumes work plan cannot and will not change
- ◎ Assumes compensable delay without concurrency

# Expert Analysis

- ◎ Experts generally held to higher standard
  - › Follow AACE Recommended Practices
  - › American Association of Cost Estimators
  - › Independent Verification of data
  - › Forensic
  - › Use of as-planned v. as-built

# Forensic Analysis

- ◎ Verify Causation and connection to critical path
- ◎ Evaluate accuracy of information
  - › Garbage-in / Garbage-out
- ◎ Review claim notice and compliance
- ◎ Ability to rebuild as-built from Project Record

# Resolution of Delay Claims

- ◎ Understand & Negotiate
- ◎ Stay within Parameters of Contract
  - > What other Owners do on other Projects is immaterial
- ◎ Separate and Verify Monetary components
- ◎ Evaluate time extensions based on performance
  - > Consider likely performance concerns

# Resolution of Delay Claims

- ◎ Delay claims are extremely complex
- ◎ Costly and require expert analysis
  - > Quality & cost of experts vary greatly
- ◎ Consider scope of resolution/release/reservation
- ◎ Memorialize in written change order

# Conclusion

- ◎ Understand project schedule and its accuracy
- ◎ Evaluate information provided independently
  - > Including limitations within contract
- ◎ Consider impact to critical path & concurrency
- ◎ Negotiate both time and money
- ◎ Written Change Order memorializing agreement

Questions?



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