Preserving, Making, and Winning (and Rebutting) Delay Claims
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Wally Zimolong, Esquire[1]

INTRODUCTION.

In construction, the adage "time is money" is more than a simple cliché. The financial impacts of delay in construction cannot be understated. Delays force a contractor to spend more money on manpower and material. Moreover, because a delayed contractor is forced to spend time completing the delayed project, it is unable to devote resources to other projects or potential projects. Indeed, a significant delay claim can threaten the very viability of a construction firm. In the case of a private owner, delay can mean the difference between a profitable and unprofitable project. However, in the case of a public owner, like a School District, delay is simply inexcusable. Therefore, understanding how to preserve a claim – and to rebut it – is critical.

A. <u>Understanding the Contract and Its Time and Claim Related Provisions</u>.

Preparing a successful claim begins before the contract is signed. The contract sets the schedule, allocates the risk between the parties, determines what claims are compensable, and states how claims are made. Therefore, it is crucial the parties involved on a construction project understand the meaning and impacts of the contractual terms effecting time related claims.

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[1] Wally is one of Super Lawyer Magazine's "rising stars" of construction litigation. Wally has dedicated his entire legal career to representing individuals and companies in the construction industry and is a frequent author and presenter on issues facing the industry. He has counseled clients nationwide on developing and constructing multifamily apartment buildings, professional and collegiate sports stadiums, power plants, schools, and uniform planned communities. He has appeared in the Wall Street Journal, Construction Executive Magazine, ABA Construction Litigation Newsletter, Philadelphia Inquirer, Philadelphia Business Journal, and others.

Wally enjoys supply side economics and is a passionate conservative who actively supports the Republican Party. His litigation experience includes conservative public interest litigation. He is currently the elected Republican Committeeman for the City of Philadelphia's 2nd Ward, 10th Division. He also is a member of United States Senator Pat Toomey's Service Academy Selection Committee.

1. **No Damages for Delay Clauses.**

Parties to a construction contract are free to allocate duties and risks between them[2]. Indeed, the contract will state whether one even has the legal right to bring a claim. One area where this is apparent is with a "no damages for delay clause." Essentially, a no damages for delay clause states that an owner will not be liable for monetary damages resulting from any delays. Instead, the contractor will only receive an extension of time to complete the work.

An example of typical no damage for delay clause language appears at Section 8.3.1 of the AIA 201-1997 general conditions and states:

> "If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine."

The enforceability of "no damages for delay" clauses depends on depends on state specific common and statutory law.

Under Federal law, "no damages for delay" clauses are valid and a contractor may only recover if it can establish that the government alone delayed the work by actively interfering with the contract or by failing to prefer an act essential for the work to proceed, such as issuing a timely and necessary change order. P.R. Burke Corp. v. United States, 277 F.3d 1346, 1359-60 (Fed. Cir. 2002).

Even when a valid "no damages for delay" clause exists, a contractor can recover monetary damages depending on the owner's conduct. Generally, a contract can recover monetary damages in the face of a "no damages for delay" clause when the owner "actively

[2] See e.g. Telecom International America, Ltd. v. AT&T, 280 F.3d 175 (2d.Cir. 2001)

interferes" with a contractors ability to prosecute the work. Determining what constitutes "active interference" can vary because courts do not apply a uniform definition or standard.[3]

The "active interference" exception requires proof of "intentional" and "willful" conduct.[4] In *Peter Kiewit Sons' Co. v. Iowa Southern Util. Co.*,[5] the court reasoned that active interference involves "some affirmative, willful act, in bad faith, to unreasonably interfere with plaintiff's compliance with the terms of the construction contract."[6] The court explained that active interference requires "more than a simple mistake, error in judgment, or lack of total effort, or lack of complete diligence."[7] Moreover, the court held that active interference must involve both "willfulness" and "bad faith."[8]

The standard applied in the *Kiewit* case has been adopted by many federal and state courts.[9] However, states that recognize a separate exception for bad faith have declined to adopt the bad faith requirement applied in the *Kiewit* case and only require a willful act to interfere.[10]

In sum, active interference is a fact sensitive issue, which will require evidence that the interference occurred. The best way to document active interference is to document those offending owner actions contemporaneous with their occurrence. As is discussed below, while the contract often sets forth a method of notifying the owner of events causing delay, at a minimum contractors should be creating a record of the events causing the delay as they occur.

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[3] *See* Pellerin Constr., Inc. v. Witco Corp., 169 F. Supp.2d 568, 583 (E.D. La. 2001) (stating that active interference "has not attained any precise judicial description.")

[4] *See, e.g.*, Peter Kiewit Sons' Co. v. Iowa S. Util. Co., 355 F. Supp. 376 (S.D. Iowa 1973); *P.T. & L Constr. Co., Inc. v. State of NJ Dep't. of Transp.*¸531 A.2d 1330, 1343 (N.J. 1987); United States Steel Corp. v. Missouri Pacific R. C., 668 H2d 435, 438 (8th Cir.), cert. denied, 459 U.S. 836 (1982).

[5] 355 F.Supp. 376 (S.D. Iowa 1973).

[6] *Id.* at 399.

[7] *Id.* at 399.

[8] *Id.*

[9] *See, e.g.* P.T. & L. Constr. Co., Inc. v. State of N.J. Dep't. of Transp., 531 A.2d 1330, 1343 (N.J. 1987); United States Steel Corp. v. Mo. Pac. R.R. Co., 668 F.2d 435, 438 (8th Cir., 1982), cert denied, 459 U.S. 836 (1982); Phoenix Contractors, Inc. v. General Motors Corp., 355 N.W.2d 673, 677 (Mich. App. 1984).

[10] *See* Williams Elec. Co., Inc. v. Metric Constructors, Inc., 325 S.C. 129, 480 E.2d 447, 449 n.2 (1997).

In addition to notifying the owner directly in writing through correspondence, a contractor can document delay by noting it in meeting minutes, daily reports, and job logs and diaries.

c. examples of active interference.

While there is no hard and fast rule on what qualifies as active interference, some examples of it include:

(a) <u>Wrongfully issuing a notice to proceed</u>. In *United States Steel Corp. v. Missouri Pacific RR Co.,*[11] the U.S. Court of Appeals held that a company actively interfered with the contractor when the company issued a notice to proceed knowing that another contractor's work would not be completed on time.[12] The court held that this was a willful act and that the company's turning a blind eye from conditions capable of delay was indicia of bad faith.[13]

(b) <u>Knowingly scheduling work out of sequence.</u> In *Blake Construction Co. v. C.J. Coakley Co., Inc.*, the active interference exception was used in a broad sense.[14] In *Blake*, the Court refused to enforce the no damage for delay clause because the general contractor scheduled the subcontractors' work in an improper sequence.[15] The court in *Blake* laid out a list of various factors to establishing improper sequencing which may amount to active interference. Some of those factors include: (a) out of sequence work by trades which should have been subsequent to the subcontractors; (b) performance or failure to perform work that interfered with the subcontractor's

[11] 668 F.2d 435 (8th Cir. 1982), cert denied, 459 U.S. 836 (1982).
[12] *Id.* at 440.
[13] *Id.* at 439.
[14] *See* Blake Constr. Co., Inc. v. C.J. Coakley Co., Inc., 431 A.2d 569 (D.C. 1981).
[15] *Id.* at 576.

planned performed under its contract; (c) issuing of change orders disruptive to the subcontractor's planned performance.[16]

(c) <u>Repeated bad faith acts.</u> In *US for Use and Benefit of Evergreen Pipeline Constr. Co., Inc. v. Merritt in Meridian Constr. Corp.*,[17] the Second Circuit refused to uphold a no damage for delay clause where there was active interference which included (a) failing to honor repeated promises to provide surveyors to the subcontractor to be able to begin its work; (b) backcharging the subcontractor for delays even though the owner had granted an extension of time; (c) stealing $20,000 worth of excavating material that the subcontractor intended to use as backfill; and (d) terminating the subcontract one day prior to the completion of work for unjustified reasons.[18]

2. Notice Requirements.

Most contracts require a contractor to give written notice of a claim to the owner or its designated representative. These clauses typical require a contractor to provide notice within a certain period of time of learning of the event causing an impact to the schedule. Notice of claims is a matter of fundamental fairness as it permits the recipient of the notice to assess and investigate the costs and liabilities associated with the claim.[19] Because of this, a majority of jurisdictions recognize that claims will be waived for failure to comply with claim notice requirements established under the contract.[20] Accordingly, contractors should always give

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[16] *Id.* at 573-74.
[17] 95 F.3d 153 (2d Cir. 1996).
[18] *Id.* at 153-69.
[19] *See Clark Constr. Group, Inc. v. Allglass Systems, Inc*., 2004 WL 1778862 (D. Md. Aug. 6, 2004) (citing treatise and opining that "timely notice of claims is a matter of fundamental faireness," and holding that a subcontractor waived its claims against the contractor by failing to give timely notice of changes as required under the subcontract").
[20] *See Envirotech Corp. v. Tennessee Valley Authority*, 715 F. Supp. 190, 191 (W.D. Ky. 1988)(holding that the prejudice to [the owner] from [the contractor's] delay demonstrates why the contract contains a time limit on claims.); *Hall Contracting Corp. v. Entergy Services, Inc*., 309 F.3d 468 (8th Cir. 2002)(affirming denial of

written notice to an owner of an event causing an impact to the contract schedule and of its intention to seek a claim for additional time, compensation, or both. Pity the contractor that loses an otherwise compensable claim because it failed to follow the contract's notice requirements.

3. Differing Site Conditions.

Conditioned encountered on a project that differ from what was expected will obviously impact a contractors ability to prosecute its work according to the agreed upon schedule and will often result in a delay claim. Accordingly, knowing under what circumstances a contractor can recover both monetary compensation and an enlargement in time for it to complete its work.

"Differing site conditions" or "changed conditions" clauses seek to do just that. These clauses dictate under what circumstances a contractor will be entitled to an equitable adjustment when it encounters conditions at the site that were neither known, expected, nor disclosed to the contractor. The differing site conditions clause found in the Federal Acquisition Regulations (FAR) states:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of— (1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or (2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract[21].

Government contracts not government by FAR and private contracts that contain a differing site conditions clause track the FAR language. Generally these clauses share three elements:

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contractor's extra work claim for failure to have complied with claim notice requirements); *Veolia Water North America Operating Services LLC v. City of Atlanta*, 2008 WL 5169525 (N.D. Ga. 2008)(rejecting a contractor's claim due to lack of timely notice given a year and a half after the claim arose).

[21] FAR 52.236-2

(1) A written notice requirement;

(2) An indication of what site conditions differ and why; and

(3) The promise of an equitable adjustment.

Changed or differing conditions are classified as either Type I or Type II. Type I are conditions that materially differ from the conditions that were disclosed to the contractor in the contract documents at the time of bidding. Type II are conditions that are "unusual, unknown, and unanticipated" compared to what a contractor would expect to encounter.

a. Examples of Type I conditions.

In *Ace Constructors, Inc. v. U.S.*, the contractor entered into a contract for the construction of an ammunition facility for the Air Force. The contract documents provided to the contractor at the time of bidding stated that the project was a "balanced" project, which means that the amount of dirt excavated from the site was roughly equal to the amount of fill necessary for the project. Based upon this information, the contractor submitted a bid expecting to have sufficient fill material from on-site excavation and potentially excess fill. In reality the conditions the contractor encountered required it to excavate approximately 129,000 cubic feet of soil. The Court determined that the encountered condition differed materially than what the government represented in the contract document and, therefore, the contractor had proven a Type I site conditions claim.

In *A.G. Cullen Construction, Inc. v. State System of Higher Education*[22], a contractor was required to remove painted wood frames. The contractor did not know that the frames were painted with lead based paint. However, the owner, the State System of Higher Education, did know that the window frames were painted with lead paint but did not disclose it to bidders. Furthermore, the owner issued a "notice to contractors" that "all asbestos and lead containing

[22] 898 A.2d 1145 (Pa.Cmwlth.2006)

materials affecting the project will be addressed." The court concluded that the contractor incurred a Type I differing site condition because the field conditions differed materially from what was representing in the contract documents -"that all lead containing material affecting the project will be addressed." Accordingly, the court awarded an equitable adjustment to the contract.

b. Examples of Type II site conditions.

In *Appeal of Hercules Const. Co.*[23], the VA Board of Contract Appeals awarded a contractor an equitable adjustment after it encountered a four-course thick brick wall during a hospital renovation. The contractor argued that the type of wall encountered was materially different than other walls in the hospital and that the wall was not typical of an interior wall in a building constructed in the 1940's.

In *Appeal of Dawson Const. Co., Inc.*[24], the Board of Contract Appeals found that that the second layer of sidewalk that a contractor encountered when excavating a sidewalk at a federal building constituted a type II 'changed' condition; an unknown physical condition at the site of unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the type covered in the contract. The Board noted that neither the contractor nor the government was aware of the second sidewalk.

c. Disclaimers.

i. Site Investigation.

Recovery for damages related to differing site conditions can be thwarted by contract clauses that attempt to shift the risk for differing site conditions to the contractor. Contracts sometimes require the contractor to warrant that it has visited and inspected the work site;

[23] VABCA No. 2508, 88-2 B.C.A. (CCH) ¶ 20527 (Feb. 11, 1988)
[24] GSBCA No. 5170, 80-2 B.C.A. (CCH) ¶ 14696 (Sept. 26, 1980)

reviewed all of the documents and data about the site made available to the contractor; and become familiar with both. If the condition is one that would have been discovered during a reasonable investigation of the site or based upon a review of the available data, a contractor will not be able to recover for unknown or unanticipated site conditions. Therefore, if the contract contains a clause that requires a site visit and investigation and a review of relevant data, then a contractor is best advised to do both.

ii. Exculpatory clauses.

Rather than simply requiring a contractor to investigate a site, contracts sometime require a contractor to broadly disclaim any claim for extras related to differing site conditions and disclaiming the accuracy of the plans, specifications, soil borings, or geotechnical reports. These clauses will explicitly shift the risk of bearing the cost of differing conditions to the contractor.

In *Metcalf Construction Co. v. U.S.*[25], the Court of Federal Claims held that such an exculpatory clause will prohibit a contractor from recovering under a Type I differing site conditions theory even when there is no dispute that the information the government supplied to the contractor is inaccurate. In that case, the contract contained the standard FAR differing site conditions clause. However, the contract also contained a disclaimer that stated the soil report provided by the government for was informational and bidding purposes only. Furthermore, the contract required that the contractor obtained its own independent soils report after bidding. The Court held that the contractor could not be said to have relied on the government's soil report because it had its own independent obligation to perform a soils investigation post award.

3. Scheduling and Coordination Duties.

Contractors must not assume basic contractual terms are included in the contract. First, the contract should state when the contractor's work commences or in other words when the

[25] 102 Fed.Cl 334 (Fed.Cl. 2011)

clock starts running. Second, the contract should state when the contractor's work is deemed to be complete or substantially complete. Generally, a contractor will not be liable for delay damages after it achieves substantial completion. Third, a contractor must be aware of its scheduling and coordination duties.

4. Extra-contractual Traps.

a. interim lien waivers and releases.

As part of the payment process, most construction contracts require contractors to submit some form of lien waiver and affidavit when requesting a progress payment. Many contractors do not give much thought to what a standard lien waiver form actually says. Instead they presume that, as the document's title indicates, in exchange for the payment being requested, they are waiving claims for non-payment and attesting to payment of lower tier subcontractors. However, a closer look at the release language of a standard lien waiver shows that a contractor is releasing much more than simple payment claims when it executes a lien waiver and is likely releasing its claims for delay damages as well.

Courts have consistently treated the release language in lien waiver waivers as broad releases of claims, including claims for delay damages. In *Sauer Incorporated v. Honeywell Building Solutions SES Corporation*[26], plaintiff, a mechanical and plumbing subcontractor, sued defendant, the general contractor for, among other things, delays associated with the construction project. Honeywell, the general contractor, moved for summary judgment against plaintiff on the basis that its claims for delay were barred by the releases it signed in connection with its progress payment applications. The Court agreed and dismissed most of plaintiff's delay claims.

Like most subcontracts, the subcontract between Sauer and Honeywell required Sauer to submit with its payment application a "Subcontractor Lien Waiver and Affidavit Form." The

[26] 742 F.Supp.2d 709 (W.D.Pa. 2011)

form stated, in relevant part, that "based upon payment of such sums due as of [the date of the application], Subcontractor hereby waives, relinquishes, and releases its liens, claims, rights and charges of every nature whatsoever which have arisen at law, equity, or contract by virtue of such labor, and/or materials furnished by said Subcontractor." Sauer submitted 18 payment applications to Honeywell which attached lien waivers containing the quoted language. Critically, beginning with the payment application 19, Sauer began submitting payment application with the applicable release language stricken.

The court reviewed the release language contained in the lien waiver and found that it clearly released all claims Sauer could have asserted at the time of payment, including delay claims. The Court noted that if Sauer did not believe that the release was clear and effective, then it would not have felt the need to cross out the offending release language starting with payment application 19. The Court held that by crossing out such language Sauer had implicitly acknowledged that the unaltered release meant that Sauer was releasing the delay claims Sauer was now perusing. The Court then dismissed all of Sauer's delay claims which arose prior to the date of payment application 18 – the last unaltered application– because of the release language contained in the lien waivers submitted with those first 18 payment applications.

b. additional time in change orders.

When negotiating for additional compensation in a scope related change order, it is imperative that the contractor include a request for additional contract time. An increase in scope of any significance will obviously require the contractor to spend more time on the project than what was anticipated at the time of bidding. Even modest increases in scope have an impact in the schedule that can easily metastasize if multiple modest changes in scope are required. A contractor that does not open a written change order that includes an adjustment to the contract

schedule and the contract price risks agreeing to do additional work within the same amount of time.

B. Documenting delay related costs.

Once a contractor understands its contractual right to compensation it can then prepare the documentation necessary to prove its claim. The validity and credibility of CPM analysis depends on the quality of factual data supporting its conclusions. Contractors are counseled to memorialize events causing delay through various mediums. Owners are counseled to look to these mediums for inconsistencies in the contractors CPM analysis. Moreover, beyond the quality of the data supporting the factual causes of the delay, contractors must track the costs it is incurring because of the delay.

Documentation that should be used to support a claim for delay damages:

- Cost codes.
- Job reports.
- Meeting minutes.
- Foreman's logs.
- Job diaries.
- RFI logs.
- Submittal and shop drawing logs.
- Schedules.
- Union fringe benefit reports.
- Photographs and videos.
- Memorandum.
- Payment Applications.