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Protecting the Owner from Construction Delays: Perspectives from the Construction Manager and Construction Litigator

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Webb has represented all types of businesses in a variety of legal disputes, including restrictive covenant and non-compete litigation and general breach of contract actions. He has served as an attorney for majority and minority shareholders in valuation/dissenters' rights cases and has represented owners, contractors, subcontractors, architects, engineers and sureties in construction disputes. He has also represented lawyers, bankers, architects and engineers in defense of professional liability actions.

Webb's litigation experience includes dozens of civil jury and bench trials. He has participated in numerous arbitration proceedings and has appeared before the Supreme Court of Appeals of West Virginia and the Court of Appeals for the Fourth Circuit.

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Before going into the consulting business, Beers worked for nearly 20 years in the commercial construction industry. He managed the design and construction of numerous, multi-million-dollar projects, including government buildings, highway and bridge work, and commercial buildings. He served as Project/Construction Manager for residential buildings, retail establishments, municipal water and wastewater plants, and more.

Beers holds an associate's degree in civil engineering, a State of Virginia Class A Contractor License and is a certified instructor for Virginia Insurance Continuing Education Program.

Delays on a construction project cost money. Invariably, the longer the delay, the more the delay costs. Those allegedly injured by the delay typically seek compensation for the cost of the delay from the owner of the project. The allegedly aggrieved party – typically the general contractor or one of the multiple prime contractors – might ask for an “equitable adjustment” to the contract sum at the end of the project seeking to increase the cost of the work to recover for the added cost of the delay. In the authors' experience, these requests for extra compensation are seldom equitable – more often than not, the party seeking to increase its compensation played a significant role in the events that led to the alleged delay. This article discusses how the owner of the construction project can manage and mitigate the impact of construction delay claims from both a construction manager's perspective and a construction litigator's perspective.

How the Construction Manager Protects the Owner from Construction Delays

For most owners, timely completion of their project can determine its success as to the quality and cost of the work, yet owners may believe that they are powerless to avoid or overcome contractor delays. How can the owner manage the impact of delays if the contractor alone controls resources and the means and methods of performance? More troubling, owners may not learn that completion of the project will be delayed until late in the game, further limiting the owner's power to control the outcome. In desperation, the owner retains attorneys and their experts to sort through piles of documents to determine responsibility for the late completion. Too often, such action results in litigation, an outcome that few have survived contentedly. This article will initially explore how owners can take measures to increase their ability to manage the contract time and anticipate potential delays early enough to deal with them effectively.

How Projects Typically Fail to Meet the Contract Completion Date

Unsuccessful projects that fail to meet the completion date predictably share the following shortcomings:

- Poorly developed schedules that underestimate activity durations given available resources, lack correct logical

relationships and/or omit detail required to effectively manage the work.

- Untimely or irregular schedule updates that fail to accurately project the impact to the completion date as activities are completed.
- Schedule manipulation to overcome delays that unrealistically projects timely completion.

The development of a comprehensive schedule specification, coordinated with related contract provisions, will allow the owner the tools to hold the contractor accountable to a higher standard of performance in the construction and implementation of the project schedule.

Evaluating the Owner's In-house Expertise

Well before the project is offered for pricing, it is prudent to evaluate the scheduling expertise of in-house managers, consultants under contract (including the architect) and construction managers if the contract is multiple prime. In-house managers may have some scheduling background, but do they have the expertise to provide specifications related to

scheduling? Do they understand complex delay issues? Schedule analysis, like any trade, requires many years of experience in the trenches to be considered competent. Owners rarely have that expertise in-house.

And how about the architect? Most can provide a schedule specification that appears competent. However, it is very rare that architects have the experience to develop schedule specifications that are tailored to the owner's particular management approach or consistent with relevant contract provisions of the current project.

The owner must also ask if in-house managers are qualified to evaluate the schedule-related provisions proposed by its attorney. If not, the cost of retaining a consulting scheduling expert during the design development phase may well eliminate the need, at a much higher cost, to retain a scheduling expert during litigation.

Developing the Scheduling Specification

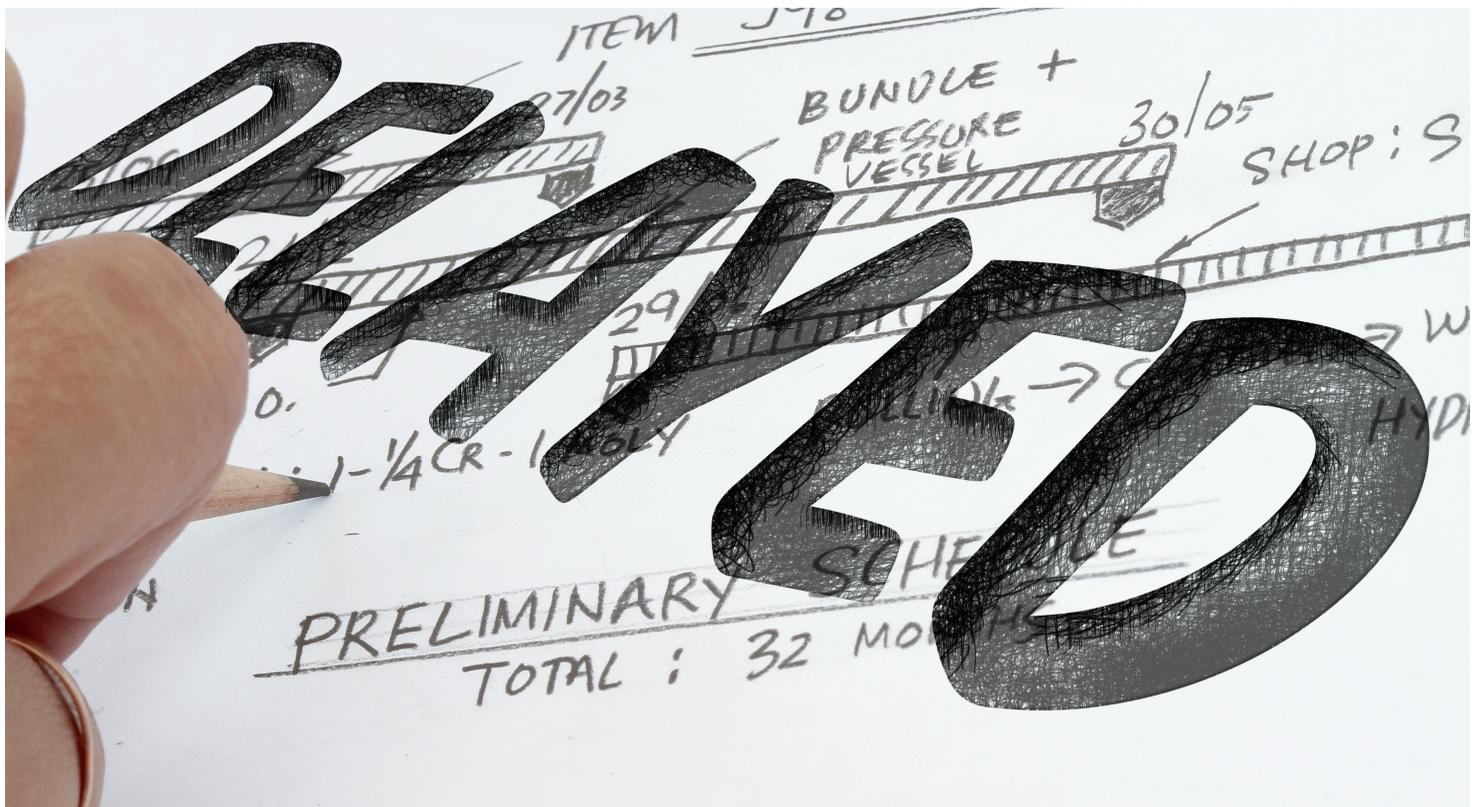
The project schedule is primarily the contractor's tool to manage the complex interrelationships between trades, the

sequence of construction dictated by the project design, the approval of submittals required to confirm the contractor's compliance with the design intent and the timing of the procurement of equipment and materials.

From the owner's perspective, the schedule and periodic progress updates also provide an important tool to measure progress and predict if progress is on track for timely completion. The following provisions establish the minimum elements required to allow the schedule to serve as an effective tool for the owner:

- The Critical Path Method (CPM) of scheduling is required. All activities are logically related with constructive¹ and resource² links. Constraints allowed only as milestones or external conditions.³
- Updated schedules required monthly with progress and without changes. Changes submitted in a separate schedule.
- All schedules to be provided in native format using Primavera P6.

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- Provide activities in such detail that individual crews are identifiable.
- Obtain written confirmation from major subcontractors and suppliers that they approve the schedule.

There is clearly much more required of a schedule specification, such as establishing acceptable industry standard methods of proving delays. However, these core provisions, if wholly implemented, provide a framework that can measure progress, enhance accountability and allow a reasonable prediction of the projected completion date.

Managing the Contractor's Performance – An Ounce of Prevention...

A well-developed schedule specification has little value if managed poorly. Unless the owner has specialized scheduling expertise in-house, a scheduling consultant should be retained to determine if the contractor's baseline CPM is reasonable, logically sound, sufficiently detailed and in compliance with the specification. Long term, it is even more effective to have the consultant train and oversee in-house managers.

Evaluating the schedule updates is equally important. The key to understanding the contractor's progress is an update that only records actual starts, actual finishes and remaining durations of activities in progress. Too often, schedulers see the update as an opportunity, for a variety of reasons, to make changes. The contractor has the right to change its means and methods. However, in order for the owner to be able to evaluate the reasonableness of these changes, the true impact of progress during the previous period must be determined without making changes.

The evaluation of schedule modifications is even more important when updates are used as a basis for determining the cause and effect of delays. A method of delay "analysis" currently in vogue – the "Window Analysis" – relies, often inappropriately, on modified (or even manipulated) updates taken at face value with consideration of the pure update.

How the Construction Litigator Protects the Owner from Construction Delays

Sometimes, despite the owner's best efforts to manage timely completion of the project through the utilization of a well-developed

schedule, projects fail to reach substantial completion by the date set out in the contract documents. Oftentimes, the delay in completing the project is lengthy and results in a claim against the owner for a significant amount of additional money. Such claims typically allege that some act or omission of the owner or the owner's architect caused the duration of the contractor's performance to exceed the time for performance set out in the contract documents. In the claims, the allegedly delayed contractors seek their additional stay costs – the contractor's additional costs of extended performance plus overhead and profit.

The Importance of a Well-Maintained Project File in Defending Delay Claims

By design, construction projects are document intensive. The files for the typical project contain written contracts with general and supplemental provisions, plans and specifications. The contract documents typically contain an initial "baseline" or "as-planned" construction schedule that shows, in detail, the sequence of how the contractor intends to build the project in the time allowed for performance – from notice to proceed through substantial completion. The general contractor or each multiple prime contractor typically participates in the preparation of the initial "baseline" or "as-planned" construction schedule.

These contract documents usually require other written documents that evidence questions about and changes to the work, like formal requests for information and change orders. The construction documents also require periodic project meetings – every two weeks or so – and written minutes of the meetings. The agenda for each of these meetings includes discussions of the construction schedule, any events delaying scheduled construction activities, and schedule updates and a discussion of anticipated construction activities for the next two-week period. The purpose of these agenda items is to discuss, identify, anticipate, avoid and resolve issues that might adversely impact the scheduled performance of the work.

If a contractor is being delayed in the performance of its work, the contract documents typically require that the delayed contractor notify the owner in writing of the delay and its impact within a relatively short time after the occurrence of the delay – e.g., within 21 days of the occurrence of the event giving rise to the delay. The short notice time is designed to bring events of delay to the owner's attention quickly to allow the owner to take action to resolve the delay and thereby mitigate the amount of adverse economic impact to the project.

Determining the Root Cause of the Alleged Delay

In defending the owner against a contractor's delay claim, it is important to first determine the root cause of the delay. Projects can become delayed for any number of reasons. Delays to the activities