

CONSTRUCTION LAW AND LITIGATION

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IN THIS ISSUE

Chris Drewry analyzes delay claims the contractor may assert against the owner and/or subcontractors when the project is completed on time but could have been completed early if not for the others interference.

Recovering Delay Damages Despite Timely Completion



ABOUT THE AUTHOR

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Construction projects frequently encounter delays to the work. A delay which is compensable to a contractor is one that was not anticipated when the contract was made and is due to some inaction or action for which the owner or those working under him is responsible. In such a situation, the contractor can recover money damages from the owner in an amount equal to the increased costs incurred as a result of the delay. However, a contractor should not forget about the time impact to its schedule resulting from the delay. For instance, the contractor is entitled to a time extension for completion of its contract work as an excusable delay.

Recovery by a contractor of damages for delays is complex enough as is, but what happens when the contractor finishes on time under the contract but claims that it could have, in fact, finished early but for delays to its work? In this instance, can the contractor recover for the increased costs of performance between the planned early finish and the actual completion (on time contractually)? Actually, the answer is yes...under the right circumstances.

If the contractor planned to finish its work before the contract date, but events for which the owner was responsible prevented early completion, the contractor may recover delay damages from the owner even if it finishes the project before the date specified in the contract. In other words, completing the project by the date specified in the contract does not necessarily prevent the contractor from recovering delay damages so long as the

contractor could have reasonably finished by an earlier date.

The case of *Owen L. Schwam Constr. Co.*, ASBCA No. 22407, 79-2 B.C.A. (CCH) ¶13,919 (1979), illustrates this point. The contractor planned to finish its work 70 days before the date specified in the contract. The other party delayed and prevented the early finish, but the contractor was still able to finish by the date specified in the contract. Nonetheless, the court allowed the contractor to recover delay damages from the other party because the early completion date – 70 days before the contract date – was reasonable.

Another case is *Grow Constr. Co. v. State*, 56 A.D.2d 95, 391 N.Y.S.2d 726 (1977), which involved a contractor who had planned to finish a bridge and highway construction project early. Instead, the project was delayed by state interference. The contractor sued the state for delay damages even though it was able to complete work by the contract date. The state argued that the contractor was not entitled to claim delay damages because the job was completed before the completion date stated in the contract. The court rejected this argument, reasoning that the contractor had a right to perform its work free from interference from the state, and to finish early if possible.

Delay damages for interference with early completion can also be made against a subcontractor. In *Williams Enterprises Inc. v. Strait Manufacturing & Welding Inc.*, 728 F. Supp. 12 (D.D.C. 1990), the contractor submitted a completion schedule to the

owner establishing an early completion date. Prior to submitting the schedule, the contractor had coordinated with its subcontractors to verify that the subcontractors could comply with the early completion date. During construction a steel tower collapsed, as a result of the structural steel subcontractor's fault. The court found that the subcontractor delayed early completion by 83 days and, therefore, found the subcontractor liable for the contractor's delay in completing the project by the early completion date. The court stated that the contractor could "properly commit its resources and those of its subcontractors to its projected [scheduled] completion date – even if that date [was] earlier than the final date required by the contract with the owner – and may recover damages from a subcontractor which causes delay."

When the contractor is asserting a delay claim for early completion, the record must contain concrete evidence of the contractor's intent. This would include documentation such as a bid, estimate, or any other contemporaneous documentation of its planned early completion. Also, notice to the owner, while not required, may be sufficient evidence of intent. *See Jackson Construction v. United States*, 62 Fed. Cl. (Fed. Cl. 2004). As this case discussed, even if a contractor can demonstrate its intent to finish early, it must still prove that it could have and would have finished early. The contractor also must prove that it had the technical capacity to complete the job ahead of schedule, had a viable work schedule to do so, and would have achieved early completion if not for the owner-caused

delays. In *Jackson*, the contractor failed to meet its burden of proof. The contractor failed to prove the exact number of days of delay to the project's critical path and failed to prove the necessary elements of an early completion claim.

It is important to note that those courts which allow contractors to recover delay damages despite timely or early completion will do so only if the contractor can prove that early completion would have been reasonable but for delay by the owner. Where a construction schedule is initially utilized to establish an early completion date and it is logically consistent, the schedule is strong evidence of a reasonable intent to complete early. Moreover, if the owner has acquiesced, expressly or impliedly, in the schedule, such acquiescence will be prima facie evidence of "reasonableness." Owner acquiescence is *not*, however, necessary to prove reasonableness – i.e., even if the owner is not contractually tied to the schedule, the schedule can nonetheless be persuasive proof of the reasonableness of an early completion date. Finally, it is worth noting that owners may attempt to expressly disclaim early completion claims. The contractor should be wary when reviewing the General Conditions so that it can be on the alert for such disclaimer clauses and can be proactive in striking them if it can.

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