A GUIDE TO RESOLVING DISPUTES OVER CONTRACTOR DELAY ENTITLEMENTS

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A GUIDE TO RESOLVING DISPUTES OVER CONTRACTOR DELAY ENTITLEMENTS

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ABSTRACT

This thesis presents criteria to resolve disputes over contractor entitlement for delay damages with a detailed examination of the enforceability of the no-damage-for-delay clause. Appellate case law identifies the rules applied by the courts in these disputes. These rules of application were organized into a flowchart format to give contract administrators and other construction professionals an understanding of how the no-damage-for-delay clause has been interpreted. The intent is for contract administrators to resolve their disputes without going to court.

The thesis also states the rules of application for resolving disputes over site access delays prior to commencing construction.

Finally, the thesis explains the significance of the time-is-of-the-essence clause, as it relates to delay disputes.

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INTRODUCTION TO DELAY DISPUTES

All parties to a construction contract have the goal of timely completion of the construction project. Project delays generally result in increased costs to the contractors, and significant loss of potential revenue to owners.

A party that fails to perform in a timely manner because of an act or fault of the other party will not be held responsible for the delay.[1] Courts have frequently read an implied obligation into contracts that the owner will not obstruct, hinder, or delay the contractor, but will cooperate in the execution of the work.

The implied duties of cooperation and coordinating the work has lead many owners to contractually shift the risk of delays to contractors by using a no-damage-for-delay clause which denies the contractor the right to recover monetary damages for delay. These clauses are normally quite broad with regard to the nature or cause of the delay.

Courts have frequently been challenged to determine the enforceability of the no-damage-for-delay clause. Courts have applied legal criteria, or rules of application, to adjudicate disputes of contractor delay damages. The consistency of the rules of application is addressed in People v. Hobson. The New York Court of Appeals found:

> Always critical to justifying adherence to precedent is the requirement that those who engage in transactions

based on the prevailing law be able to rely on its stability.

This thesis presents the rules of application which will give contractors and owners an understanding of how the exculpatory clause has been applied, and help them resolve delay disputes without resorting to litigation.

PROBLEM STATEMENT

The rules applied by courts to resolve delay disputes, especially with a no-damage-for-delay clause, are not clearly defined. An understanding of these rules of application organized into a logical framework is necessary to analyze and resolve potential disputes.

OBJECTIVES

The objective of this thesis is to develop and test a guide incorporating the rules of application used by courts in resolving contractor delay entitlement disputes, with and without a no-damage-for-delay clause.

The specific objectives of this thesis are as follows:

1) Define the rules for contractor entitlement for delays when the contract is silent on delays, and when the contract contains provisions that allow the contractor to recover monetary damages for delays caused by the fault of others.

2) Explain the rules that determine the enforceability of no-damage-for-delay clauses in construction contracts.

3) Define the rules that determine if a contractor is entitled to monetary delay damages for site access delays prior to commencement of the work.

4) Define the significance of the time-is-of-the-essence clause in delay disputes.

SIGNIFICANCE AND EXPECTATIONS OF RESEARCH

A well defined set of common law criteria for resolving disputes concerning contractor entitlement for delay damages, with and without a no-damage-for-delay clause, may prevent costly litigation. The objective of this thesis is to explain the consistent rules of law, based on judicial precedent, which will result in a correct dispute resolution when applied to the facts of the case. A contract resolution guide for delay disputes will improve contract administration by construction planners, designers, contractors, and owners.

METHODOLOGY

General

The research for this thesis included a thorough literature search of construction law publications, and legal references that identified what has been written on contractor delay claims for contracts, with and without a no-damage-for-delay clause. The literature search revealed key appellate cases where the courts formed the legal rules of application for resolving disputes over contractor delay claims.

Application of Inductive Reasoning

The rules of application for resolving delay disputes were identified and organized using inductive reasoning as follows:

1) The research identified the legal rules of application identified by the courts in over 75 significant appellate court decisions involving contractor entitlement for delays caused by other parties in construction.

2) The rules of application were organized into a flowchart where judicial rules are applied to the facts of a case.

3) The flowchart was tested on 20 different cases to verify that the rules of application were consistent with the

court decisions. The validation process was considered successful if ninety percent or more of the judicial outcomes were consistent with the outcomes predicted from the flowchart.

BACKGROUND

Delay claims are probably the most litigated of all construction claims because delays are common, have significant economic impact on the parties, and frequently have complex causes.[2] Damages for construction delays include increased costs for labor overruns, site expenses, materials, home office overhead, finance costs, and the costs for inefficiency and idle equipment. Delay damages also include the potential loss of profits to owners and contractors.

Routes to Entitlement

There are three contractual approaches to delay entitlements. The contract will allow recovery of cost and time as a remedy, preclude entitlement through a no-damage-for-delay clause, or the contract will be silent on the issue of delays. The contractor faces a relatively straight forward analysis when the contract has provisions allowing monetary delay damages, or when the contract is silent on delays. The no-damage-for-delay clause will require careful consideration

to determine if a contractor is entitled to monetary damages. Key appellate cases have established the legal criteria, or operational rules, that govern the enforcement of these clauses.

Recovery as per the Contract

Standard Contracts, such as AIA Document A201, the Engineer Joint Contract Document 1910-8, and the Standard Form 23A (Federal Contract), do not preclude entitlement for monetary delay damages.

These contracts require written notice by the contractor, and may define certain delays as noncompensable. For example, Standard Form 23A for Federal construction projects has the following suspension of work clause:

> 17. Suspension of Work
> ....
> (b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.
> ....[3]

The No-Damage-For-Delay Clause

The no-damage-for-delay clause seeks to assign the risk of delays to the contractor, and limit the contractor to time extensions. Appendix A contains three sample no-damage-for-delay clauses. Generally, to recover monetary damages, the contractor must prove that the clause should not be enforced. Few generalizations about no-damage-for-delay cases are entirely reliable because courts have applied different criteria to individual cases.

Although courts will not re-make the agreement of the parties, the no-damage-for-delay clause is often strictly construed because of the possible harsh consequences that may result from enforcing the clause. Exculpatory clauses will be enforced if the delays or disruptions encountered are ones that could have been expected in the particular contract in question, and ones that the owner could not have reasonably avoided.[4]

Delays in Site Access

Interference with other contractors is a common problem with site access delays. Delays in site availability are treated the same as interference (in bad faith) during performance. The contractor may recover monetary damages when the owner is at fault.[5]

Recovery When the Contract is Silent on Delays

In the absence of contractual provisions to the contrary, a contractor has a right to recover damages resulting from a delay caused by the owner. The Contractor must prove a breach of contract to recover delay damages when the contract is silent on delays.

In order for the contractor to recover, the following items must be proved:

1) There was a default by the owner.

2) The default caused a delay in the contractor's performance.

3) The contractor was damaged by the delay.[6]

ORGANIZATION

This thesis is divided into six chapters. **Chapter 2** defines the rules for a contractor's entitlement for delay damages with contracts that allow recovery of cost and time extension as remedies. It also addresses contracts that are silent on delays. **Chapter 3** addresses the validity of the no-damage-for-delay exculpatory clause. The chapter defines six rules of application that courts consider in determining the enforceability of these clauses. **Chapter 4** defines the rules of application for delay disputes over site access. **Chapter 5** defines the significance of the time-is-of-the-essence

clause with respect to delay disputes. **Chapter 6** contains the thesis summary and conclusions.

Chapter 2

RECOVERING MONETARY DELAY DAMAGES

There are three contractual approaches to delay entitlements. The contract will allow recovery of cost and time as a remedy, preclude entitlement through a no-damage-for-delay clause, or the contract will be silent on the issue of delays. This chapter will address the first and third routes to a contractor's entitlement to monetary delay damages.

CONTRACTS THAT ALLOW RECOVERY OF COST AND TIME

Contracts generally contain provisions granting time extensions when the contractor has been delayed through no fault of its own.[7] However, it has been generally held that a contractual provision allowing a contractor an extension of time in which to complete the work in case of delay caused by the owner, does not preclude the contractor from recovering delay damages.[8]

Certain standard contract forms, such as AIA Document A201, the Engineer Joint Contract Document 1910-8, and the Standard Form 23A (Federal Contract), do not preclude recovery of cost and time for delay damages.[9] These contracts require written notice by the contractor, and may define certain delays as noncompensable.

AIA Document A201

Article 8.3 of the American Institute of Architects General Conditions of the Contract for Construction, 1987 Edition, addresses delay damages. Paragraph 8.3 expressly reserves the right of either party to recover damages for delay, assuming other provisions of the contract, such as notice requirements, are met.[10] The clause states:

> 8.3.3. This paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the contract documents.

Therefore, the remedies to the contractor are cost and time.[11] This contract form requires that the contractor give written notice within 21 days to the architect.

Engineer Joint Contract Document Committee Document 1910-8

The EJCDC Standard General Conditions of the Construction Contract, 1983 Edition, addresses delay damages in Article 12: Change of the Contract Time. Article 12.3 states:

> All time limits stated in the Contract Documents are of the essence of the Agreement. The provisions of this Article 12 shall not exclude recovery for damages (including compensation for additional professional services) for delay by either party.[12]

This is similar to the AIA Document A201 in that it does not preclude a contractor's entitlement for monetary delay damages. This contract requires written notice within 15 days of the delay.[13]

Federal Government Standard Form 23A

The Federal Contract also will not preclude a contractor's entitlement to delay damages. The suspension of work clause states:

> 17. Suspension of Work
> ....
> (b) If the performance of all or any part of the of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract, an adjustment shall be made for any increase in the cost of performance of this contract caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly.[14]

This clause obligates the Government to pay for the unreasonable delays it may cause. This contract requires written notice within 20 days of the delay.[15]

CONTRACTS THAT ARE SILENT ON DELAYS

The Contractor must prove breach of contract to recover delay damages when the contract is silent on delays. The proof for breach of contract involves the following items:

1) There was a default by the owner.

2) The default caused a delay in the contractor's performance.

3) The contractor was damaged by the delay.[16]

Owners have four implied obligations in construction projects. They must schedule and coordinate the work,

cooperate in good faith, grant reasonable time extensions, and refrain from any acts that would delay, hinder, or interfere with the work.[17] The implied obligations are not likely to be addressed in contract delay provisions, but courts have found that failure to satisfy these obligations are compensable breaches of contract. Unless the contract specifically states otherwise, the contractor is generally entitled to recover losses sustained by delays caused by the owner.[18]

In the 1961 appeal, In Re Roberts Construction Company v. State of Nebraska, the Contractor was delayed by the State in making the construction site available due to late subgrade work and untimely removal of utility poles. The contract stated that an extension of time was the exclusive remedy for any delay resulting from causes outside the Contractor's control. The Supreme Court of Nebraska held that delay was a breach of contract, and the Owner was liable to damages in the absence of a no-damage or similar contract provision. As a general rule, if a contractor agrees to do certain work within a specified time, and is prevented from performing the contract by the act or default of the other party, the delay will be excused, and the contractor is relieved of its contractual duty to perform.

Chapter 3

VALIDITY AND ENFORCEMENT OF NO-DAMAGE CLAUSE

This chapter defines the rules that determine the enforceability of a no-damage-for-delay clause in a construction contract.

Validity of No-Damage-For-Delay Clauses

Courts have frequently been asked to enforce a no-damage-for-delay clause. Generally, the no-damage-for-delay provision is valid and enforceable if it meets the ordinary rules governing the validity of contracts. The contractor is bound to the express conditions of the freely accepted contract, and the owner cannot be denied the benefit of the no-damage-for-delay clause, unless the owner's conduct constitutes fraud or other tortious intent.

Courts have used restraint in approving no-damage-for-delay clauses because of their harshness, and such clauses are strictly construed against the owner, who is usually the drafter of the exculpatory provision.[19]

Exculpatory clauses will be enforced if the delays or disruptions encountered are ones that could have been expected by the contracting parties, and ones that the owner could not have reasonably avoided.[20] The law for contracts with exculpatory clauses applies equally to subcontracts containing

the same clauses of the principal contract, providing that the two contracts are consistent.[21]

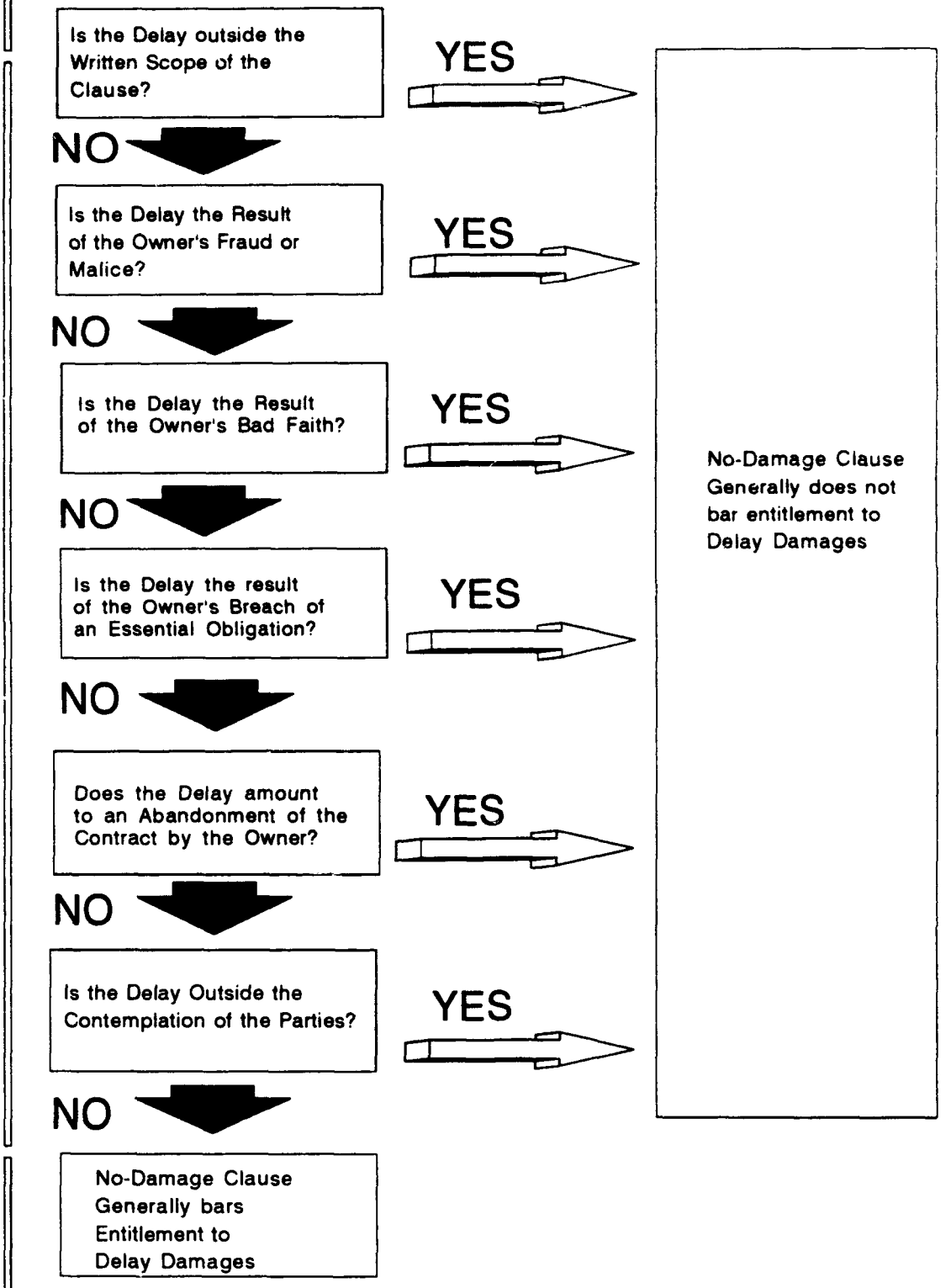
Exceptions to Enforcing the Clause

The no-damage-for-delay clause seeks to place the entire risk of delays on the contractor, and limit contractor remedies to time extensions. To recover monetary damages, the contractor must prove that the clause should not be enforced. Few generalizations about no-damage-for-delay cases are entirely reliable because courts have applied different criteria to individual cases. For example, Washington State legislation prevents the use of no-damage-for-delay clauses. Massachusetts' Courts have not recognized the exceptions to enforcing a no-damage-for-delay clause enumerated in this thesis.

There are special circumstances when the clause will not be enforced. The rules that courts use to allow recovery despite a no-damage-for-delay clause are defined in the remaining sections of Chapter 3. The rules are organized in Figure 3.1. Three of the rules involve an owner's breach of the contract, and the remaining three rules do not involve breach of contract. In general, they have been consistently applied by the courts. However, Figure 3.1 must be modified for the user's specific jurisdiction.

FIGURE 3.1

Flowchart of Rules to Void a No-Damage Clause:



Is the Delay outside the Written Scope of the Clause?

The first question on Figure 3.1 is whether the delay is outside the written scope of the contract's no-damage-for-delay clause. If yes, the contractor may recover monetary delay damages. Whether the no-damage-for-delay clause will preclude recovery of delay damages depends on the terms of the contract provisions. Sample no-damage provisions are illustrated in Appendix A. To preclude a contractor's entitlement of delay damages, there must be an express no-damage-for-delay clause. In some instances, no-damage-for-delay clauses are narrowly constructed and only address specific aspects of the contractors undertaking.[22] One example was a clause that specified that the contractor bear the risk of specific delays such as site access (Ace Stone, Inc. v. Wayne). The plain language of the no-damage-for-delay clause cannot be treated as meaningless or futile, and generally will be enforced according to its terms.

When no-damage-for delay clauses are broadly constructed, they purport to indemnify the owner from a wide variety of delays. Courts have been asked to determine if these clauses are ambiguous, and therefore unenforceable. Unambiguous language will be confined to its usual and ordinary meaning.[23] Courts have construed broad no-damage-for-delay clauses as not covering a work stoppage caused by the owner's interference (Algernon Blair v. Norfolk Redevelopment and Housing

Authority). However it has also been held that a broad no-damage-for-delay clause was not ambiguous and intended to cover unforseen delays (Western Engineers, Inc. v. State of Utah).

A no-damage-for-delay clause may not protect an owner from liability for delays not within the terms and conditions of the provision. A contract specifying the elements of damages which could be recovered in case of delay is enforced according to its terms, so that the contractor is entitled to any delay damages not enumerated in the clause.[24]

Is the Delay the Result of the Owner's Fraud or Malice?

If the delay is not outside the written scope of the clause, the next question in Figure 3.1 is whether the delay is the result of the Owner's fraud or malice. If the answer is yes, the contractor is likely to recover monetary delay damages.

Delays resulting from Owner's Malice

The court in Kalish-Jarcho v. City of New York appears to have established the most strict approach to the enforcement of a no-damage-for-delay clause. As a result, this case is often used to compare exculpatory clause enforcement in other jurisdictions. The court defined malice as "the state of mind intent on perpetrating a wrongful act to the injury of another

without justification." The Contractor was delayed in construction of the City Police Headquarters by the City's revisions of plans, and failure to coordinate the activities of the prime contractors. The trial court ruled for the Contractor on the grounds of interference, but the Court of Appeals reversed the decision. The Court ruled that a stricter standard was required to void a no-damage-for-delay clause, because the clause "would have little meaning if it were not read to extend acceptability to a range of unreasonable delay as well."

Delays resulting from Owner Fraud

Fraud is the intentional deception of one person by another. The deception may consist of false or partially concealed information. For example the owner may defraud a contractor concerned about the owner's financial status by falsely telling the contractor it has received a loan commitment. Another example would be a contractor's false statement that it has access to special equipment required for a project.[25] In E.C. Nolan Company, Inc. v. State of Michigan, the court held that in order to prevail on a claim of fraud or misrepresentation, a plaintiff must establish:

1) the defendant made a material representation;
2) that it was false;
3) the defendant knew the representation to be false, or made it recklessly, without any knowledge of the truth and as a positive assertion;
4) the representation was made with the intention that it

should be acted upon by the plaintiff;
5) that the plaintiff acted in reliance upon it; and
6) the plaintiff thereby suffered an injury.

Is the Delay the Result of the Owner's Bad Faith?

If the delay is not outside the written scope of the no-damage-for-delay clause and not the result of the owner's fraud or malice, the next question is whether the delay resulted from the Owner's bad faith? If yes, the contractor will likely recover monetary delay damages.

Every contract implies good faith and fair dealing between the parties. Bad faith includes dishonest acts, arbitrary and capricious acts, gross negligence, and wrongful interference with the contractor's work. Courts have held that a no-damage clause will not be enforceable in the case of wrongful, willful, or deliberate conduct. In such cases the contractor is entitled to monetary delay damages despite a no-damage-for-delay clause.[26]

Dishonest Acts

Bad faith connotes a dishonest purpose. In United States Steel Corp. v. Missouri Pacific Railroad Co., the court found that the owner acted in bad faith when it issued a notice to proceed to the contractor, when the site was occupied by another contractor, who was behind schedule. The steel

contractor was delayed in building a bridge by the work of the substructure contractor. The notice to proceed was dishonest (unworthy of trust or belief) because the Owner knew that the substructure contractor was behind schedule. In C.J. Langenfelder & Son v. Commonwealth of Pennsylvania, the Pennsylvania Department of Transportation acted in bad faith when it assured a road builder it could deposit sediment and to borrow fill outside the right of way in wetlands, while simultaneously assuring environmental groups that construction in the marsh would be limited to the highway right-of-way. This was a dishonest act because the State compromised it's integrity and truthfulness. Bad faith requires more than simple procrastination, and many cases involving allegations of bad faith have been not been supported by proof (F.D. Rich Co. v. Wilmington Housing Authority).

Delays resulting from the Owner's Arbitrary and Capricious Acts

Courts have found arbitrary and capricious acts of the owner to reflect bad faith because they are considered to be wrongful, willful, or deliberate conduct. The contractor has been entitled to delay damages in these cases. In Hoel-Steffen Construction Co. v. United States, the Court found that a contract officer's failure to verify and determine whether the Contractor could justify substitution of subcontractors was capricious and arbitrary. The Contractor

was awarded monetary delay damages. In Housing Authority of Dallas v. J.T. Hubbell, the Court found eleven separate acts or failures to act by the Owner, which delayed the Contractor's construction of a Texas housing project. The findings included arbitrary and capricious requirements of architects. The Court defined arbitrary and capricious acts as "willful, unreasoning action, without due consideration, disregard of facts circumstances, and rights of other parties involved". The Court held that the Owner was liable for delay damages notwithstanding the no-damage-for-delay provision.

Delays resulting From Owner's Gross Negligence

A contractor will be entitled to monetary delay damages despite a no-damage-for-delay clause for an owner's gross negligence. Williston on Contracts states:

> An attempted exemption from liability for a future intentional tort or a future willful act or one of gross negligence is void, ... Generally, an indemnity agreement will not be construed to cover losses to the indemnitee caused by his own negligence unless such effect is clearly and unequivocally expressed in the agreement.[27]

In Ozark Dam Constructors v. United States, the Contractor was delayed in procuring cement because of a railroad strike. The possibility of the strike was known by the Government but not reported to the Contractor. The Court held that a contractor could recover if the delay was caused by an owner's negligence where the neglect was almost willful. In Southern Gulf

Utilities, Inc. v. Boca Ciega Sanitary District, the Contractor was delayed by the Sanitary District's failure to speedily obtain rights of way. The Court held that a no-damage-for-delay clause was unenforceable when the delay was negligent, willful, and long lasting.

This rule of application does not apply to delays resulting from simple negligence. In Kalisch-Jarcho v. City of New York, the court ruled that gross negligence is more than interference, and requires a finding of bad faith with deliberate intent. In Anthony P. Miller, Inc. v. Wilmington Housing Authority, the court held that the no-damage-for-delay clause will be enforceable for delays caused by simple negligence involving inaction, lack of diligence, or lack of effort.

Wrongful Interference

Courts have applied the bad faith rule to resolve delay disputes involving the Owner's interference in the Contractor's work. Courts distinguish interference from interference in bad faith with the labels of "direct", "active", or "willful" interference with the contractor. The courts are generally agreed that a broad no-damage-for-delay clause will not exculpate an owner from liability for delay damages when the delay is caused by the owner's interference in bad faith.[28] In Peter Kiewit Son's Co. v. Iowa Southern Utilities Co., the Court held that active interference

requires some affirmative, willful act, in bad faith, to unreasonably interfere with the contractor's compliance with the contract. It requires more than simple mistake, error in judgement, lack of effort, or lack of diligence. In Cunningham Brothers, Inc. v. Waterloo, the Court held that interference requires reprehensible conduct of the owner which is "in collision with or runs at cross purposes to the work." This illustrates that active interference must constitute more than the ordinary or usual delays encountered by construction contractors.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

If the answer to the first three rules is negative, the next question in Figure 3.1 is whether the owner delayed the work by a breach of an essential obligation. An affirmative response will entitle the contractor to monetary damages. Chapter 2 identified the criteria for proving breach of contract.

In Hawley v. Orange County Flood Control District, the Court held that the Contractor was entitled to delay damages when the act of the Owner constituted a breach of its contract, or a breach of a fundamental or essential obligation of the contract. In Northeast Clackamas County Electric Co-op., Inc. v. Continental Casualty Co., the Court held that a no-damage-for-delay clause was unenforceable when the Owner

breached its contract, without justification, by failing to clear a utility line right-of-way of heavy timber. Other cases allowing contractor entitlement to delay damages for breach of contract or breach of fundamental obligation refer to other recognized exceptions to the general rule, such as delay not within the contemplation of the parties, active interference, or unreasonable delay.[29]

Does the Delay amount to an Abandonment of the Contract by the Owner?

In Figure 3.1, a negative response to the first four questions leads to the question of whether the Owner's conduct constitutes abandonment of the contract. An affirmative answer will generally entitle the contractor to monetary delay damages.

Abandonment is defined in Kalisch-Jarcho v. City of New York as "relinquishment with the intention of never resuming the interest relinquished." In Hawley v. Orange County Flood Control District, the Contractor was delayed when an open excavation collapsed because the District insisted the trench remain open while manholes were under redesign, despite the Contractor's repeated warnings and protests. The Court defined an unreasonable delay as one which is not in the contemplation of the parties to the contract. Courts have also recognized that a no-damage clause will not be

enforceable if the delay is specifically unreasonable in duration.

In Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co., the Court held that the no-damage-for-delay clause would not preclude entitlement for delay damages if the delay might be considered to be equivalent to an abandonment of the contract.

In Cunningham Brothers, Inc. v. Waterloo, the Contractor was barred from recovering delay damages by a no-damage-for-delay clause. The Contractor was delayed in building two parking garage ramps by a collapsed wall which killed one of the Contractor's workmen. The work was delayed while the Contractor had the site safety certified by an independent engineer. The Court held that the clause would not be enforced for delays that would justify the contractor in abandoning the contract. However, the owner did not indicate in it's actions any intent to abandon the work.

In Peckham Road Co. v. State of New York, the Court held that delays are not unreasonable if they are specifically contemplated by the no-damage-for-delay clause. In F.D. Rich Co. v. Wilmington Housing Authority, the Contractor was delayed by the Owner's requirement that the Contractor use borrow fill. The Contractor contemplated using on-site fill material instead borrow fill. The contracting officer extended the contract completion time which caused the Contractor to provide heat during the heating season, and store electric refrigerators which could not be installed.

The Court held that extensive delays alone will not justify a finding that the parties had abandoned the contract, or the no-damage-for-delay provision, when the parties conduct give no indication of abandonment.

Is the Delay Outside the Contemplation of the Parties?

If the Contractor answers no to the first five questions on Figure 3.1, the final question is whether the delay is outside the contemplation of the parties. If yes, the contractor will probably receive monetary delay damages. In Ace Stone, Inc. v. Wayne, the Court permitted oral evidence to determine if the parties contemplated that the clause would preclude entitlement to delay damages. In the Courts' analysis of a no-damage-for-delay clause the goal is to determine the contemplation or common intention of the parties. This intention is gathered from the language of the contract, read "in the light of the existing facts with reference to which it was framed."[30]

In Ozark Dam Constructors v. United States, the Court held that despite a no-damage-for-delay clause, the contractor may recover monetary damages for delays and obstructions if their causes were not within the contemplation of the parties at the time the contract was made. Figure 3.2 defines four types of contemplated delays.

FIGURE 3.2

DELAYS CONTEMPLATED BY THE PARTIES:

1) DELAYS SPECIFICALLY MENTIONED IN THE CONTRACT.

2) DELAYS RESULTING FROM THE CONTRACTOR'S PERFORMANCE.

3) DELAYS WHICH ARE REASONABLY FORESEEABLE.

4) ORDINARY AND USUAL DELAYS:

A) Delays from usual and long-established means and methods.

B) Lack of elevators, stairs, temporary heat & light & power.

C) Supplier actions, shop drawing approval process, labor inefficiencies, increased costs.

D) Material shortages, accidents, bad weather.

E) Subcontractor performance and rework.

In Peckham Road Co. v. State of New York, the Court held that the contemplation of the parties involves only such delays that are reasonable foreseeable, which result from the contractor's performance, or those specifically mentioned in the contract. The parties who enter a construction contract with a customary no-damage-for-delay clause contemplate that the contractor will bear the risk of ordinary and usual delays

The Court in Western Engineers, Inc. v. State of Utah held that a broad no-damage-for-delay clause is not ambiguous and the contractor could not introduce evidence to show that the delay was not contemplated.

In Hawley v. Orange County Flood Control District, the Court held that the intent of the parties (contemplation) was a factual question requiring the weighing of all the facts presented.

In Peter Kiewit Son's Co. v. Iowa Southern Utilities, the Court recognized that a no-damage-for-delay provision that included a time extension as the remedy for delay supported the ruling that all delays were contemplated by the parties.

Ordinary and Usual Delays

The following examples illustrate ordinary and usual construction delays (see Figure 3.2):

1) Delays resulting from the usual and long-established

methods (contractor means and methods) employed by the commercial world (J.D. Hedin Construction Company v. United States).

2) Delays resulting from lack of elevators and stairs, lack of temporary light and power, increased wages, increased material costs, and lack of temporary heat (Broadway Maintenance Corporation v. Rutgers).

3) Delays caused by the actions of suppliers, the shop drawing approval process, labor inefficiencies (Georgia Department of Transportation Special Provision, Modification of the Standard Specifications).[31]

4) Delays caused by bad weather, accidents, material shortages.[32]

5) Delays caused by material deliveries, inclement weather, subcontractor performance, and rework.[33]

Extraordinary Delays

The following examples illustrate extraordinary and unusual construction delays:

1) Site delays prior to commencement of the work (Ace Stone, Inc. v. Township of Wayne).

2) Deliberate delay by City to deliver five joints of sixty inch reinforced concrete pipe, an express contract obligation (Sandel and Lastripes v. Shreveport).

3) Owner defrauded contractor by ordering work to proceed

when it knew that contractor would not have access to site for fourteen weeks (Commonwealth, Department of Highways v. S.J. Groves and Sons Company)

4) Delays caused by unreasonable schedule of work (Blake Construction Co. v. C.J. Coakley Co.,Inc.).

5) Owner caused delays resulting in sporadic, unorthodox, and more expensive excavation of medical out-patient facility (Chicago College of Osteopathic Medicine v. George A. Fuller Company).

PREDICTING ENFORCEMENT OF A NO-DAMAGE-FOR-DELAY CLAUSE

The use of Figure 3.1 is illustrated with four recent appellate decisions addressing entitlement to delay damages that involved no-damage clauses.

Case #1 **Blake Construction v. Coakley**

Statement of Facts

In 1974, C.J. Coakley Co. entered into a subcontract with Blake Construction Company to complete the fire-proofing work in the construction of the Walter Reed Army Hospital, in the District of Columbia. Article 2(b) of the subcontract said:

> No such delay [caused by reasons beyond the Subcontractor's control] shall give rise to any right to the Subcontractor to claim damages therefore from the contractor.

Coakley's work was disrupted by the contractor's delays in ordering and receiving structural steel, the mingling of several trades that caused overcrowding, and the accidents of other subcontractors that damaged the areas sprayed with the fire protection compound. Blake Construction Co. failed to follow the project schedule because of the delays in ordering and receiving delivery of structural steel. As a result, Coakley was forced into unplanned use of scaffolding platforms.

Analysis

To apply Figure 3.1, the Contractor is considered to be the Owner. The Contractor, contractually, had the same obligations to subcontractors as the owner had to contractors. The trial court determined that Blake did not provide a reasonably clear and convenient work area to Coakley. Blake failed to reasonably sequence the work to allow Coakley to perform, and Blake failed to supervise other subcontractors that disrupted Coakley's work. Coakley argues that Blake's actions constituted a breach of implied and implicit conditions for performance under the subcontract.

Is the Delay Outside the Written Scope of the Clause?

No. The no-damage clause covers all damages outside the subcontractor's control. This language is not ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. Blake's conduct did not amount to fraud or Malice.

Is the Delay the Result of the Owner's Bad Faith (Dishonest Acts, Arbitrary or Capricious Acts, Gross Negligence, Wrongful Interference)?

Yes. The facts of this case indicate that Blake caused delays willfully, without reason, and without due consideration for the subcontractor's performance. The no-damage clause did not give Blake immunity for damages caused under these circumstances. The lack of an adequate work area, and the improper work scheduling constitute wrongful interference.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

Yes. Blake failed to provide Coakley with a suitable work area, or to properly coordinate the work to prevent the haphazard application of fire protection.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The delays in the contract period did not justify the conclusion that the Owner had abandoned the project.

Is the Delay Outside the Contemplation of the Parties?

Yes. Blake's failure to follow the project schedule, and

coordinate the work caused delays beyond what may be considered usual or ordinary. Blake's breach of implied and explicit provisions of the subcontract were not contemplated by Coakley.

Conclusion

In this case, the delay is the result of the Owner's (Contractor's) bad faith (wrongful interference), the Owner's breach of an essential obligation, and the delay is outside the contemplation of the parties. From Figure 3.1, we can conclude that the no-damage clause in the subcontract should not bar the Subcontractor's recovery of monetary delay damages.

Case #2 **Peter Kiewit Son's Co. v. Iowa Southern Utilities Co.**

Statement of Facts

Peter Kiewit Son's Company contracted to function as general contractor for a fossil fuel electrical power plant in 1966. The work included pile driving for foundations, pouring concrete slabs, erecting walls and ceilings for various structures, and painting. The contract contained the following no-damage for delay provisions:

If the work of the contractor is delayed...the

> contractor shall have no claim against the owner on that account other than an extension of time.
>
> The contractor expressly agrees that the construction period named in the contract agreement includes allowances for all hindrances and delays incident to the work.

Peter Kiewit Son's Company was delayed by the steel contractor, material delays, labor problems, equipment storage problems, heavy rain, and the efforts of the project manager to keep the project on schedule. The engineer, Black & Veatch, prepared an overall construction schedule in the form of a bar chart. The schedule, titled "G-1", was made part of the general, mechanical, and electrical contracts, but was not incorporated in the boiler, turbine, or steel contracts because they were awarded prior to the issue of G-1. Because new problems continually arose on the site, the work schedules became obsolete almost as they were issued. This required Black & Veatch to make frequent schedule modifications on site. The contract contained a contract clause titled Project Management that stated:

> In the event conflicts arise between contractors concerning scheduling or coordination, the Engineer will make the final decision resolving the conflict. The Engineer's decision shall not be the cause for extra compensation or for extension of time.

Analysis

Peter Kiewit Son's Company brought action against the owner and engineering contractor for breach of contract, and

negligence.

Is the Delay Outside the Written Scope of the Clause?

No. The no-damage clause covers hindrances or delays from any cause during the progress of the work. This language is not ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. The Owner's conduct did not amount to fraud or malice.

Is the Delay the Result of the Owner's Bad Faith (Dishonest Acts, Arbitrary or Capricious Acts, Gross Negligence, Wrongful Interference)?

No. There is no evidence of mistake, neglect, or interference rises to the level of Bad Faith. Both parties to this litigation shared the goal of prompt completion of the construction. The schedule modifications were made within the contractual authority of the engineer.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

No. The Owner did not breach any essential obligation.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The delays in the contract period did not justify the conclusion that the Owner had abandoned the

project.

Is the Delay Outside the Contemplation of the Parties?

No. The delays encountered were ordinary and usual for the construction of a fossil-fuel power plant. The contract language of the no-damage clause states that any delay would entitle the plaintiff to a time extension. Many courts, including those in Iowa, have accepted that no-damage provisions that allow time extensions as a remedy for delay support the ruling that all delays were contemplated by the parties.

Conclusion

In this case, the delays do not meet the criteria for voiding the no-damage-for-delay clause. From Figure 3.1, we can conclude that the no-damage clause in the contract should preclude the Contractor's entitlement to monetary delay damages.

Case #3 **Ozark Dam Constructors v. United States**

Statement of Facts

Ozark Dam Constructors, a joint venture, contracted with the Government, through the Army Corps of Engineers, to build

a concrete gravity dam at the Bull Shoals Dam Site in Arkansas. Ozark Constructors was to furnish all materials except for the cement, which the Government was to furnish. Article 9 of the contract was summarized in the Court's opinion:

> Article 9 of the contract was the standard Delays-Damages article which, so far as here pertinent, provided that if the work was delayed for causes beyond the control of the contractor, including strikes, the contract should not be terminated by the Government, and the contracting officer should extend the contractor's time for completion of the contract. The Government exculpated itself from liability for any expense or delay caused the contractor by delayed deliveries except for a time extension.

The cement was not delivered on schedule because of a strike of the employees of the Missouri Pacific Railroad from 9 September to 24 October 1949. The events leading up to the strike were known to the Government, but it took no steps to investigate possible alternative ways to deliver cement to the job site. The resulting 43 day delay prevented concrete work during the favorable construction months of September and October.

Analysis

Ozark Constructors claim increased costs resulting from the Government's neglect in preventing delay in cement deliveries due to the railroad strike.

Is the Delay Outside the Written Scope of the Clause?

No. The no-damage clause specifically addressed delays caused by strikes. This language, summarized by the court, does not appear ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. There is no evidence of Owner Fraud or Malice.

Is the Delay the Result of the Owner's Bad Faith (Dishonest Acts, Arbitrary or Capricious Acts, Gross Negligence, Wrongful Interference)?

Yes. The Government's failure to plan contingency plans for cement in the face of a likely railroad strike was grossly negligent. The possible consequences of the strike were so serious and possible preventive measures so slight, that the negligence was almost willful. It showed a complete lack of consideration for the plaintiff's interests.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

No. The Government's failure to deliver cement in September and October was contemplated in Article 9 of the contract. There was no breach of the contract provisions.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The 43 day delay did not constitute an unreasonable delay that would cause the Contractor to believe the contract had been abandoned.

Is the Delay Outside the Contemplation of the Parties?

Yes. The Contractor did not contemplate the strike that disrupted cement delivery by rail. In fact the contract required the Government to order and furnish cement for the contractor.

Conclusion

In this case, the delay is the result of the Owner's bad faith, and is outside the contemplation of the Parties. From Figure 3.1, we can conclude that the no-damage clause in the contract did not preclude the Contractor's entitlement to monetary delay damages.

Case #4 **L.S. Hawley v. Orange County Flood Control District**

Statement of Facts

In 1959, L.S. Hawley contracted to construct a public improvement of a sewer system called the Huntington Beach Channel, and a portion of Talbert Channel in California. Prior to the excavation, the District notified Hawley that the plans contained the wrong type of manhole, and Hawley was instructed not to install any of the manholes until the plans were revised. Hawley completed the excavation, laid all of the pipe for the sewer, and left the six to eight foot

excavation open until the manholes were available.

On July 30, 1959, Hawley notified the District that the open trench was a dangerous condition, and requested permission on several occasions to backfill the trench. The District refused. On September 10, 1959, Hawley completed the construction. However, before the sewer line could be tested, the banks of the trench caved in, knocking the sewer line out of place and causing it to separate at the joints. The cause of the trench cave-in was the gradual weakening of the banks of the trench that occurred as a natural result of allowing it to stand open from July 15th to September 10th, which is an unreasonable amount of time for leaving an excavation open.

The contract specifications contained the following no-damage-for-delay provision:

> Furthermore, if the contractor suffers any delay caused by the failure of the District to furnish the necessary right-of-way or materials agreed to be furnished by it, or by failure to supply necessary plans or instructions concerning the work to be done after written request therefore has been made, the contractor shall be entitled to an extension of time equivalent to the time lost for any of the above-mentioned reasons, but shall not be entitled to any damages for such delay.

Analysis

Hawley claims breach of contract based upon unreasonable delay by defendant in furnishing revised plans and written authority to proceed with the work of installing modified manholes.

Is the Delay Outside the Written Scope of the Clause?

No. The no-damage-for-delay clause covers hindrances or delays caused by the District's failure to furnish materials that it agreed to provide. This language is not ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. The Owner's conduct did not amount to fraud or malice.

Is the Delay the Result of the Owner's Bad Faith (Dishonest Acts, Arbitrary or Capricious Acts, Gross Negligence, Wrongful Interference)?

Yes. The only effective way to protect the trench was to cover it, but the District refused to allow the work to progress. The District wrongfully interfered in the work by refusing the contractor's repeated request to backfill any portion of the trench, until the sewer line had been tested.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

Yes. The District's failure to furnish Hawley with revised manhole specifications, and to give written authority to proceed with the work was a breach of an essential part of the contract.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The delay in testing the sewer line did not

justify the conclusion that the Owner had abandoned the project.

Is the Delay Outside the Contemplation of the Parties?

Yes. The delay is unreasonable because the District's change of manhole specifications and long delay were not contemplated by the parties.

Conclusion

In this case, the delay is the result of the Owner's bad faith, breach of essential obligation, and it is outside the contemplation of the parties. From Figure 3.1, we can conclude that the no-damage clause in the contract should not preclude the Contractor's entitlement to delay damages.

VALIDATION OF RULES

The validity of the rules developed in this chapter were tested by ten appellate cases decided since 1950. In all ten cases, the judicial decisions are consistent with the results predicted using Figure 3.1. In some cases, the conclusion was reached using one rule. In other cases, a combination of the rules were applied. The ten cases used in the test were:

City of Seattle v. DYAD Construction, Inc., 565 P.2d 423 (1977).

Grant Construction Co. v. Wallace C. Burns, 443 P.2d

1005, (1968).

Housing Authority of City of Dallas v. J.T. Hubbell, 325 S.W.2d 880 (1959).

Western Engineers, Inc. v. State of Utah Road Commission, 437 P.2d 216 (1968).

Coatsville Contractors & Engineers, Inc. v. Borough of Ridley Park, 506 A.2d 862 (1986).

Sandel and Lastripes v. City of Shreveport, 129 So.2d 620 (1961).

E.C. Nolan Company, Inc. v. State of Michigan, 227 N.W.2d 323 (1975).

American Sanitary Sales Co. v. State of New Jersey, Department of Treasury, Division of Purchase and Property, 429 A.2d 403 (1981).

Lichter v. Mellon-Stuart Company, 193 F.Supp. 216 (1961).

Anthony P. Miller, Inc. v. Wilmington Housing Authority, 165 F.Supp. 275 (1958).

Chapter 4

SITE ACCESS DELAYS BEFORE COMMENCEMENT

Delays in site availability are treated the same way as Owner interference in bad faith. Relief is granted where the Owner is at fault.[34] When a Notice To Proceed is used, the Contractor assumes the risk of ordinary delays in gaining site access, but not those delays outside the contemplation of the parties.[35] In Gasparini Excavation Co. v. Pennsylvania Turnpike Co., the Court held that the contractor assumes the risk for delays in providing site access if they can be foreseen.

THE CHALLENGE OF PROVIDING SITE ACCESS

Owners have a fundamental obligation to provide the Contractor with the project site, a reasonable work area, proper surveys, and access to the site.[36] The Owner must have legal ownership or property rights to the work site.[37] Site access includes easements, public approvals, permits, and financing before the contractor is allowed access to the site.[38] Some examples of common owner-caused delays in obtaining site access are failure to demolish existing structures, failure to evacuate occupants, and interference with site access roads.[39]

SITE ACCESS DELAYS WITH FEDERAL CONSTRUCTION CONTRACTS

Boards of Contract Appeals have ruled that an obligation to issue a notice to proceed at a specific time is a warranty of site availability. The issue of a Notice To Proceed when the site is not available will require the Government to compensate the contractor under the Suspension of Work Clause (cited in chapter 2).[40] In Broome Construction, Inc. v. United States, the Court of Claims held that the Government was not liable for delay in making a work site available when it used diligent (in good faith) but unsuccessful efforts to make the site accessible.

JUDICIAL RULES USED IN SITE ACCESS DELAY DISPUTES

The legal rules that courts apply to site access delays are the same as those used to determine enforceability of the no-damage-for-delay clause. To recover monetary delay damages, the contractor's performance must be significantly affected by the delay in gaining site access.[41] The contractor may recover monetary delay damages if the owner commits fraud or malice, acts in bad faith, materially breaches the contract, or abandons the contract. The owner is further liable to the contractor for delays outside the plain terms of the contract or the contemplation of the parties. Courts will consider whether the owner acted in

good faith, and whether the contractor made a reasonable effort to mitigate the damages.

GOOD FAITH AND EFFORTS TO MITIGATE DELAY DAMAGES

Good faith by the owner is an important issue in delay disputes over site access. In Broome Construction, Inc. v. United States, the Contractor was delayed in improving 8.5 miles of the Toposhaw Creek Channel by the work of another contractor. The other contractor's work progressed more slowly than expected and Broome Construction could not begin excavation until five months after the contemplated commencement. The Government was relieved of liability because it acted diligently to schedule the work of the two contractors.

Similarly, contractors are obligated to do what is reasonable to mitigate delay damages. A contractor may not recover damages if they could have been reasonably avoided.[42] In Gasparini Excavating Co. v. Pennsylvania Turnpike Co., the Court recognized:

> The rule that a party cannot recover damages from a defaulting defendant which could have been avoided by the exercise of reasonable care and effort is applicable to all types of contracts.

In Broome Construction, Inc. v. United States, the Contractor rented a drag line before receiving a Notice To Proceed. The early rental of this equipment needlessly added to the Contractor's loss. The Court did not allow

recovery for the drag line rental.

SITE ACCESS DELAYS CAUSED BY INTERFERENCE (BAD FAITH)

The Owner has an implied obligation not to interfere unreasonably or intentionally with the Contractor's performance.[43] Issuing a Notice To Proceed when the work site is unavailable may be considered an interference or hindrance to performance. In Walter Kidde Constructors, Inc. v. State of Connecticut, the Contractor was denied site access in construction of the State hospital and outpatient clinic. The work area in Kidde's contract was occupied by the equipment, material, and personnel of another contractor, who was constructing dental buildings. This interference caused the Contractor to use oversized cranes and work from the opposite side of the building. The process was described as similar to building a bridge from one side. The Contractor recovered monetary delay damages because of the Owner's Active Interference. In U.S. Steel Corporation v. Missouri Pacific Railroad, the Construction of two railroad bridges over the Arkansas River was delayed, with defendant's knowledge, by the progress of the substructure contractor. The railroad issued an order to proceed to U.S Steel, when the substructure work was incomplete. The result was early arrival of steel shipments, which had to be stored on site, and repainted.

The Contractor recovered delay damages for the Owner's interference.

CONTEMPLATION OF SITE ACCESS DELAYS

Significant site access delays have been ruled to be outside the contemplation of the parties. In Ace Stone, Inc. v. Township of Wayne, a sewer line project was delayed because the township had not acquired all of the necessary rights of way or easements. The contract contained a no-damage-for-delay clause. The Superior Court granted summary judgement for the defendant. The Supreme Court ruled that Summary Judgement was improper and the parties should have been permitted to introduce evidence to aid in determining if the clause was intended to exclude claim in question (contemplation). This ruling opened the door for the contractor's entitlement for monetary delay damages.

In McQuire & Hester v. City and County of San Francisco, the construction of a water supply line was delayed by failure of the City to obtain some of the necessary rights of way. The contract contained a no-damage provision which did not address delays arising from the City's failure to secure the rights of way. Since the delay was not contemplated by the parties, the Court awarded monetary delay damages to the Contractor, stating:

> It would outrage every semblance of justice, fairness and equity to assume that the paragraph of the contract

> that provided for extensions of time for causes beyond the contractor's control foreclosed the contractor from recovering damage sustained by him because of the City's failure to furnish the materials as agreed.

PREDICTING CONTRACTOR'S ENTITLEMENT FOR SITE ACCESS DELAY

The use of Figure 3.1 is illustrated with two recent appellate decisions addressing entitlement to delay damages that involved site access delays.

Case #1 **Franklin Contracting Co. v. State of New Jersey**

Statement of Facts

A New Jersey highway contract called for the relocation of certain sewer lines. The contractor was orally assured that all easements had been obtained, at a pre-construction conference. The State was forced to institute condemnation proceedings after a landowner later refused to grant right-of-access. The contract stated:

> The contractor shall make no claims for additional compensation on account of delays or necessary alterations in the procedure of his work that may be caused by delays in the vacating or removal of buildings by others and/or the acquisition of right-of-way.

Analysis

The Contractor filed a claim for delay damages due to lack of site access.

Is the Delay Outside the Written Scope of the Clause?

No. The no-damage-for-delay clause includes delays in acquiring rights-of-way. This language is not ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. The State's conduct did not amount to fraud or malice.

Is the Delay the Result of the Owner's Bad Faith (Dishonest Acts, Arbitrary or Capricious Acts, Gross Negligence, Wrongful Interference)?

No. The State did not act in bad faith.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

Yes. The State failed to provide the Contractor with site access.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The delay in the contract period did not justify the conclusion that the Owner had abandoned the project.

Is the Delay Outside the Contemplation of the Parties?

Yes. The Court concluded that the parties did not contemplate delay because the State did not have a valid right-of-way.

Conclusion

In this case, the delay is the result of the Owner's breach of an essential obligation, and the delay is outside the contemplation of the parties. From Figure 3.1, we can conclude that contractor is entitled to monetary delay damages for the delay in site access.

Case #2 **Gasparini Excavation Co. v. Pennsylvania Turnpike Co.**

Statement of Facts

The Northeastern extension of the Pennsylvania Turnpike was delayed when the Gasparini Excavation Company was denied access to the work site. Specifically, Gasparini Co. was unable to begin a large cut because other contractors occupied areas for the fill material. The State ordered the Contractor to start work when two other contractors were occupying the work site for drilling and slushing operations (grouting voids left by strip mining to stabilize the soil).

Analysis

The Contractor brought action against the Owner for interference in bad faith.

Is the Delay Outside the Written Scope of the Clause?

No. The contract contained clauses requiring the contractor to cooperate with others, with rights of the various interests established by the engineer. This language is not ambiguous.

Is the Delay the Result of the Owner's Fraud or Malice?

No. The Owner's conduct did not amount fraud or malice.

Is the Delay the Result of the Owner's Bad Faith?

Yes. The State acted in bad faith (wrongful interference) by excluding the Contractor from the work site.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

Yes. The Owner failed in the essential matter of not having a predetermined program to allow several contractors to complete their work without interference.

Does the Delay amount to an Abandonment of the Contract by the Owner?

No. The delays in the contract period did not justify the conclusion that the Owner had abandoned the project.

Is the Delay Outside the Contemplation of the Parties?

Yes. The six month delay in gaining site access was outside the contemplation of the parties.

Conclusion

In this case, the delay is the result of the Owner's bad faith (wrongful interference), breach of an essential obligation, and the delay is outside the contemplation of the parties. From Figure 3.1, we can conclude that Contractor is entitled to monetary delay damages for the delay in site access.

VALIDATION OF RULES

The rules developed in Chapter 3 apply to the delays caused by site access prior to commencement of work. The validity of using these rules for delay disputes over site access were tested by ten appellate cases decided since 1950. In all ten cases, the judicial decisions are consistent with predictions predicted using Figure 3.1. In

some cases, the conclusion was reached using one rule. In other cases, a combination of the rules were applied. The ten cases used in the test were:

Ace Stone, Inc. v. Township of Wayne, 221 A.2d 515 (1966).

Buckley & Company, Inc. v. State of New Jersey, 356 A.2d 56 (1975).

Hallet Construction Co. v. Iowa State Highway Commission, 154 N.W.2d 71 (1967).

U.S. Steel Corporation v. Missouri Pacific Railroad, Co., 668 F.2d 435 (1982).

Gasparini Excavating Company, Inc. v. Pennsylvania Turnpike Commission, 187 A.2d 157 (1963).

Peckman Road Co. v. State of New York, 300 N.Y.S.2d 174 (1969).

Southern Gulf Utilities, Inc. v. Boca Ciega Sanitary District 238 So.2d 458 (1970).

Northeast Clackamas County Electric Co-operative, Inc. v. Continental Casualty Company, 221 F.2d 329 (1955).

McQuire & Hester v. City and County of San Francisco, 247 P.2d 934 (1952).

Walter Kidde Constructors, Inc. v. State of Connecticut, 434 A.2d 962 (1981).

Chapter 5

TIME IS OF THE ESSENCE CLAUSES

This Chapter explores the significance of the time-is-of-the-essence clause in delay disputes.

CONTRACTS WHERE TIME IS OF THE ESSENCE

Because time for performance is a major cost element, most construction contracts contain a time-is-of-the-essence clause. This clause clearly establishes that time is a critical contract requirement. It reflects part of the contract bargain since the Owner's predetermined contract schedule may be related to financing the project, or anticipated profits from the completed project.[44] When time is of the essence, the party not performing on time is liable for damages resulting from the delay.[45] Most contracts provide for extensions of time if contractors are delayed for factors outside of their control, and may provide for liquidated damages for each day completion is beyond an adjusted completion date.[46] If the failure to perform timely is considered to be a material breach of the contract, the contract may be terminated. In the case of termination, damages for breach of contract are awarded to the non-breaching party.[47]

In Pinewood Realty Limited Partnership v. United States,

the Partnership was the high bidder to purchase Pinewood Apartments from the U.S. Department of Housing and Urban Development (HUD). The contract of purchase contained the following clause:

> 9. Time is of the essence of this contract. The sale shall be closed within 60 days following execution hereof by the Seller at the offices of the Seller, or at such time and place as may be agreed on by the parties in writing. Should the purchaser fail or refuse to perform his part of the contract promptly at the time or in the manner herein specified, the earnest money deposited herewith shall, at the option of the Seller, be retained as liquidated damages.

A law suit by a certain Bradley, who wished to enjoin the sale, delayed the closing date of the purchase. The Partnership agreed to three postponements requested by HUD. On the third postponement, the Partnership stated that it did not waive its rights to damages and lost profits incurred from the delay in closing. HUD accepted the third postponement, but did not admit liability of the Government for damages or lost profits. The Court held that time is of the essence in any contract containing fixed dates for performance. The Court also held that "where a due date for performance has passed and the contract has not been terminated for the fault within a reasonable time, inference arises that time is no longer of the essence of the contract as long as both parties continue with their performance." As a result, the Partnership was not entitled to delay damages, but was able to recover rents collected by the Government less maintenance costs for the period of delay.

Courts have also interpreted time to be of the essence of a contract if it appears that this was the intention of the parties, or if time becomes material to the rights or interests of the parties.[48] In Wilderman v. Watters, a dispute arose over the payment period for a sale of land. The Plaintiff attempted to use a loan to accelerate the property purchase instead of making scheduled monthly payments, as specified in the contract. The Owner refused to issue the deed of sale. The Court held that time will be regarded as of the essence of the contract if it appears that it was the intention of the parties. The Court also held that if time becomes material to the rights and interests of the parties to any substantial degree it will be regarded as of the essence. Hence the Court concluded that the "cardinal rule" for determining if time is of the essence is the intention of the parties. As a result, the Owner could not be compelled to accept the purchase price in full at any time prior to the last scheduled monthly payment would be made.

CONTRACTS WHERE TIME IS NOT OF THE ESSENCE

Time is not of the essence unless the contract clearly states that it is.[49] Time is generally not considered part of the basic exchange of value in construction contracts. The basic exchange is the owner's money for the contractor's performance.[50] If time is not of the essence, courts have

generally indicated that time is not a material obligation of the contract, and therefore the breach of a time factor does not create the material breach of the contract. Courts have ruled that time is not of the essence for contracts that include performance dates or simply state a completion date.[51]

In Kingery Construction Co. v. Scherbarth Welding, Inc., the plaintiff contracted with Scherbarth Welding Company to install three 10,000-bushel steel storage tanks for the Ralston Purina Company. Under the contract, the defendant was to complete installation of the tanks within five weeks after the foundation was ready, allowing the plaintiff to complete the project on June 15, 1968. The defendant was to begin work within three days of receiving notice to proceed, or the plaintiff would take over the contract at the defendant's expense. The plaintiff was delayed and did not notify Scherbarth Welding Company to proceed until June 15, 1968. The defendant was unable to start work within three days, due to other commitments, and the plaintiff took over. The defendant argued that time was of the essence of the contract, and that it was excused from its duty to perform because the date of the notice to proceed prevented completion by June 15, 1968. The Court held that, generally, times fixed in building contracts when work is to begin and when work is to be completed are not considered to be of the essence of the contract unless there is an special stipulation to that effect. The court cited 3A Corbin on Contracts:

> Time is not generally considered as the essence of a contract, unless it is expressly provided or it appears that it was the intention of the parties that it should be of the essence thereof.

The court found that the Scherbarth Welding Company breached its subcontract, and was liable for delay damages.

Chapter 6

SUMMARY AND CONCLUSIONS

This Chapter contains a summary of this thesis, conclusions, and recommendations for additional research.

Summary of Entitlement for Delay Damages

This thesis defines the judicial rules for a contractor's entitlement for delay damages. It addresses contractor's entitlement for standard forms of contracts, contracts silent on delays, and explores the enforceability of no-damage-for-delay clauses. The thesis also defines the rules of application for site access delays, and defines the significance of the time-is-of-the-essence clause. Construction professionals can apply these judicial rules of application to understand how the courts have resolved delay disputes. This may prevent expensive and time-consuming litigation that is detrimental to all parties to a construction contract, and is very disruptive to project completion.

The contractor has three routes to entitlement for delay damages, based on the form of the construction contract. Standard forms of contracts, such as the AIA Document A201 and Federal Standard Form 23, do not preclude monetary delay

damages. Contracts that are silent on delay damages will allow entitlement for delay damages if the contractor can prove that the owner has breached the contract.

When delay disputes involve contracts with no-damage-for-delay clauses, the courts have been challenged to rule on their enforceability. Figure 3.1 contains a flowchart of the judicial rules applied by the courts. The judicial rules question the good faith and fair dealing between the parties, and examine the intentions of the parties.

Is the Delay Outside the Written Scope of the Clause?

Courts have strictly construed exculpatory language against the drafter. No-damage-for-delay clauses will not protect an owner from liability from delays not addressed in unambiguous language in the clause.

Is the Delay the Result of the Owner's Fraud or Malice?

Courts will not enforce a no-damage-for-delay clause when the owner's commits fraud or malice. Malice is defined as the intent to wrongfully injure another without justification. Fraud is the intentional deception of one person by another.

Is the Delay the Result of the Owner's Bad Faith?

Courts have held that exculpatory clauses are not enforceable when the benefitting party acts without good faith

or fair dealing. Examples of bad faith include dishonest acts, arbitrary or capricious acts, gross negligence, and wrongful interference. However, not every wrongful act or default by the owner will obviate the exculpatory clause.

Is the Delay the Result of the Owner's Breach of an Essential Obligation?

Courts have held that exculpatory clauses are not enforceable if the owner breaches a fundamental or essential obligation of the contract. Minor breaches will not entitle a contractor to delay damages.

Did the Delay amount to an Abandonment of the contract by the Owner?

The courts will not enforce a no-damage clause if the owner causes a delay that is not contemplated by the parties which would justify the contractor to abandon the contract. The courts have held that extensive delays alone will not justify a finding that the parties had abandoned the project.

Is the Delay Outside the Contemplation of the Parties?

Courts have held that the intent of the parties is the principal focus of contract interpretation. No-damage-for-delay provisions have been held to place the risk of usual and ordinary delays on the contractor. However, some jurisdictions have ruled that time extension provisions in no-damage clauses support that all delays are contemplated by the

parties.

The rules that courts apply to site access delays are the same as those used to determine enforceability of the no-damage-for-delay clause. The contractor may recover monetary delay damages if the owner commits fraud or malice, acts in bad faith, materially breaches the contract, or abandons the contract. The owner is further liable if the delays are outside the plain terms of the contract, or the contemplation of the parties. The courts will carefully consider the owner's good faith in making the site available, and the contractor's efforts to mitigate the damages.

The time-is-of-the-essence clause will affect construction disputes involving delays, if the contract expressly makes time of the essence. Courts have also interpreted time to be of the essence of a contract if it appears that this was the intention of the parties, or if time becomes material to the rights or interests of the parties.

Conclusion

Contract clauses that allocate risk for delay damages are critically important because of their serious consequences with projects that experience significant delays. The enforcement of contracts with exculpatory clauses, such as a

no-damage-for-delay clause, may be predicted with reasonable accuracy using the rules in Chapter 3. Based on this research, the courts apply a uniform set of judicial rules to resolve disputes involving construction delays. The rules appear to be consistent, except in the States of Washington and Massachusetts, and generally independent of jurisdiction. Washington State legislation prevents use of no-damage-for-delay clauses. Massachusetts' courts have not recognized the exceptions to the no-damage clause enumerated in this thesis. Because courts have applied different criteria to cases involving no-damage-for-delay clauses, Figure 3.1 must be modified for each jurisdiction.

Recommendations for Further Research

The following issues are related to this thesis, and warrant additional research:

1) Do the judicial rules developed in this thesis apply to delays caused by third parties?

2) In Blake Construction Company v. C.J. Coakley, the court noted:

> ...except in the middle of a battlefield, nowhere must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences as in a huge construction project such as the building of this 100 million dollar hospital.

What is the best method to allocate risk for delays on multi-

million dollar contracts involving many trades?

3) How have recent court decisions reinforced or reduced the significance of exceptions to enforcing no-damage-for-delay clauses?

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[2]John D. Carter, et al., Construction Litigation: Representing the Contractor (New York: Wiley Law Publications, 1986), p. 18.

[3]Kenneth M. Cushman, et al., Construction Litigation (New York: Practicing Law Institute, 1981), p. 121.

[4]Justin Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, 4th ed. (New York: West Publishing Company, 1989), p. 594.

[5]The George Washington University, National Law Center, Government Contracts Program, Construction Contracting (Washington, D.C.: The George Washington University, 1991), p. 640.

[6]Julian F. Hoffar and John B. Tieder, Jr., Proving Construction Delay Damages (Washington, D.C.: Federal Publications, INC., 1985), p. 306.

[7]Justin Sweet, Sweet on Construction Industry Contracts (New York: Wiley Law Publications, 1987), p. 334.

[8]Lawyers Cooperative Publishing Company, 13 American Jurisprudence,2d., Section 51, "Delay attributable to both parties" (Rochester, New York, Lawyers Cooperative Publishing Company, 1991), p.54.

[9]Sammie D. Guy, et al., Construction Claims Analysis, Presentation, Defense (New York: Van Nostrand Reinhold Company, 1983), p. 49.

[10]Thomas J. Driscoll, et al., Construction Scheduling: Preparation, Liability, and Claims (New York: Wiley Law Publications, 1991), p. 170.

[11]H. Murray Hohns, Preventing and Solving Construction Contract Disputes (New York: Van Nostrand Reinhold Company, 1979), p. 83.

[12]Engineer's Joint Contract Documents Committee, Standard Contract Conditions, Article 12.3, 1983 Edition.

[13]Guy, p. 48.

[14]Cushman, p. 121.

[15]Cushman, p. 121.

[16]Hoffar and Tieder, p. 306.

[17]Driscoll, pp. 97-103.

[18]Joseph T. Bockrath, Contracts, Specifications, And Law For Engineers, 4th ed. (New York: McGraw-Hill Book Company, 1986), pp. 71, 190.

[19]Lawyers Cooperative Publishing Company, 74 American Law Reports,3d., Section 187, "Validity and Construction of No-Damage Clause with respect to delay in Building or Construction Contracts" (Rochester, New York: Lawyers Cooperative Publishing Company, 1967), p. 201.

[20]Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, p. 594.

[21]74 American Law Reports,3d., Section 187, p. 202, (1967).

[22]74 American Law Reports,3d., Section 187, p. 199, (1967).

[23]74 American Law Reports,3d., Section 187, pp. 207-209, (1967).

[24]74 American Law Reports,3d., Section 187, pp. 230-231, (1967).

[25]Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, p. 504.

[26]74 American Law Reports,3d., Section 187, pp. 215-216, (1967).

[27]Samuel Williston, A Treatise on the Law of Contracts,3d., Section 1750A, "Bargains to Discharge Future Torts and Statutory Liabilities" (Rochester, New York: Lawyers Cooperative Publishing Company, 1972), pp. 141-143.

[28]74 American Law Reports,3d., Section 187, p. 219, (1967).

[29]74 American Law Reports,3d., Section 187, p. 222, (1967).

[30]74 American Law Reports,3d., Section 187, p. 209, (1967).

[31]Georgia Department of Transportation, Special Provision, Modification of the Standard Specifications, Revised November 17, 1988, p.1.

[32]Guy, p. 3.

[33]Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, p. 581.

[34]George Washington University Government Contracts Program, p. 640.

[35]Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, p. 573.

[36]Michael S. Simon, Construction Contracts and Claims. (New York: McGraw-Hill Book Company, 1979), p. 156.

[37]Barry B. Bramble and Michael T. Callahan, Construction Delay Claims (New York: Wiley Law Publications, 1987), p. 60.

[38]Sweet, Sweet on Construction Industry Contracts, p. 324.

[39]Bramble and Callahan, p. 61.

[40]George Washington University Government Contracts Program, p. 639.

[41]Bramble and Callahan, p. 61.

[42]Sweet, Legal Aspects of Architecture, Engineering,and the Construction Process, p. 68.

[43]Simon, Construction Contracts and Claims, p. 157.

[44]Steven M. Siegfried, Introduction to Construction Law (Philadelphia, Pennsylvania: The American Law Institute-American Bar Association Committee on Continuing Professional Education, 1987), p. 149.

[45]Carter, p. 353.

[46]Bramble and Callahan, p. 238.

[47]Siegfried, p. 149.

[48]American Law Book Company, 17A Corpus Juris Secundum, Section 504(1), "Time as of Essence of Contract" (Brooklyn, New York: American Law Book Company, 1963), p. 792.

[49]Lawyers Cooperative Publishing Company, 13 American Jurisprudence,2d., Section 47, "Delay in Performance" (Rochester, New York, Lawyers Cooperative Publishing Company, 1991), p.50.

[50]Siegfried, pp. 241-242.

[51]Michael S. Simon, Construction Law Claims and Liability (Butler, New Jersey: Arlyse Enterprises, INC., 1982), pp. 12.2-1 - 12.2-7.

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Appendix A

EXAMPLES OF NO-DAMAGE-FOR-DELAY CLAUSES

Peter Kiewit Sons' Co. v. Iowa Southern Utility Co., 355 F.Supp. 376 (1973).

GC-36. EXTENSIONS OF TIME. Should the Contractor be delayed in the final completion of the work by any act or neglect of the Owner or Engineer or of any employee of either, or by any other contractor employed by the owner, or by strike, fire, or other cause outside of the control of the Contractor and which, in the opinion of the Engineer, could have been neither anticipated or avoided, than an extension of time sufficient to compensate for the delay, as determined by the Engineer, will be granted by the owner provided that the Contractor gives the Owner and the Engineer prompt notice in writing of the cause of the delay in each case and demonstrates that he has used all reasonable means to minimize the delay. Extensions of time will not be granted for delays caused by unfavorable weather, unsuitable ground conditions, inadequate construction force, or the failure of the contractor to place orders for equipment and materials sufficiently in advance to insure delivery when needed.

Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413 (1983).

Article 13. The Contractor agrees to make no claim for damages for delay in the performance of this contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.

Chicago College of Osteopathic Medicine v. George A. Fuller Company, 776 F.2d 198 (1985).

Article XI, the Delay Waiver Clause, provides: The Subcontractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance for any cause whatsoever...and agrees that its sole right and remedy in the case of any delay, obstruction or hindrance shall be an extension of the time fixed for completion of the work.

Appendix B

PRACTICAL GUIDE FOR AVOIDING DELAY DISPUTES

The construction industry is notoriously risky. Contractors should consider the following measures to avoid delay disputes:

1) Read the contract documents. Examine and copy all the information offered by the owner, especially soil samples and core borings (Hohns, 1979, p. 96).

2) Closely scrutinize the changes clause, the dispute clauses, the time extension clauses, payment clauses, suspension of work clauses, the liquidated damages clause, and hold harmless or exculpatory clauses such as the no-damage-for-delay clause (Siegfried, 1987, p. 147).

3) Avoid contracts that specify that the Owner has a right to delay the Contractor and that interference is not a breach of contract (Sweet, 1989, p. 592). The best way to avoid a dispute over a no-damage-for-delay clause is to avoid signing a contract that contains one (Baldwin and McDonald, 1989, p. 200).

4) Before signing any contract, Contractors should

consult with an attorney to determine how the courts in the project jurisdiction customarily deal with enforcing exculpatory clauses (Guy, 1983, p. 49).

5) If the contract has exculpatory delay clauses, Contractors should increase their bids to take this risk into account (Sweet, 1989, p. 592).

6) Request a survey from the Owner showing the boundaries and legal description of the site with copies of all land use agreements (Hohns, 1979, p.96).

7) Ensure the Owner is capable of providing the project site, all approvals, finances, design and timely revisions, and contract administration: utilities, surveys, approvals, payments (Bramble and Callahan, 1987, p. 60).

8) A Contractor should carefully evaluate the site and the design, maintain adequate resources (cash, materials, labor), prevent poor workmanship, and prevent subcontractor failures (Bramble and Callahan, 1987, p. 74).

9) Prior to scheduling its work, the contractor should request the Owner's detailed schedule to search for impossibilities or errors (Hohns, 1979, p.96).

10) Establish, maintain, and document the construction schedule using the Critical Path Method (CPM). CPM schedules should require the Contractor to work more efficiently (planning), give the Owner notice of the actual progress of the work, and the documentation helps prove or disprove the impact of Owner-caused delays (Sweet, 1989, pp. 578-579).

11) Maintain the detailed documentation essential to establish the start and end dates for an activity, and accurately determine the cause of the delay and its affect on the project (Bramble and Callahan, 1987, p. 4). In a delay dispute, the party with the best records has a great advantage (Sweet, 1989, p. 595).

12) Price risk into the job by putting down larger fees when the contract terms and conditions are too onerous to bear at normal markups (Hohns, 1979, p. 95).

13) Negotiate with the Owner for a contract that entitles the Contractor to a time extension and just compensation for any act or omission of the Owner that causes delay (Bockrath, 1986, p. 191).

14) Use Figure 3.1 (p. 16) to determine a contractor's entitlement to monetary delay damages if a significant delay occurs.

Appendix C

GLOSSARY

Abandonment. The surrender, desertion, relinquishment, disclaimer, or cession of property or of rights. Voluntary relinquishment of all right, title, claim and possession, with the intention of not reclaiming it. The giving up of a thing absolutely, without reference to any particular person or purpose, as vacating property with the intention of not returning, so that it may be appropriated by the next comer or finder. It includes both the intention to abandon and the external act by which the intention is carried into effect (Black's Law Dictionary, 1983, p. 1).

Arbitrary or Capricious. Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle (Black's Law Dictionary, 1983, p. 55).

Bad Faith. The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will (Black's Law Dictionary, 1983, pp. 72-73).

Breach of Contract. Failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement (Black's Law Dictionary, 1983, p. 98).

Contemplation. The act of the mind in considering with attention. Continued attention of the mind to a particular subject. Consideration of an act or series of acts with the intention of doing them or adopting them. The consideration of an event or state of facts with the expectation that it will transpire (Black's Law Dictionary, 1983, p. 167).

Delay. To retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; interpose obstacles; as, when it is said that a conveyance was made to "hinder and delay creditors." The term does not necessarily, though it may, imply dishonesty or involve moral wrong (Black's Law Dictionary, 1983, p. 221).

Fraud. An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another (Black's Law Dictionary, 1983, p. 337).

Gross Negligence. The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care (Black's Law Dictionary, 1983, p. 539).

Interfere. To check; hamper; hinder; infringe; encroach; trespass; disturb; intervene; intermeddle; interpose. To enter into, or to take part in, the concerns of others (Black's Law Dictionary, 1983, p. 417).

Malice. The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act

toward another without justification or excuse. A conscious violation of the law which operates to the prejudice of another person. A condition of the mind showing a heart regardless of social duty and fatally bent on mischief (Black's Law Dictionary, 1983, p. 493).

Material Representation. In law of deceit, a statement or undertaking of sufficient substance and importance as to be the foundation of an action if such representation is false (Black's Law Dictionary, 1983, p. 505).

Slight Negligence. A failure to exercise great care. Slight negligence is defined to be only an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use (Black's Law Dictionary, 1983, p. 539).

Unreasonable Conduct. That which violates ethical code of profession (e.g. Code of Professional Responsibility) or such conduct which is unbecoming member of profession in good standing. It involves breach of duty which professional ethics enjoin (Black's Law Dictionary, 1983, p. 800).

Unreasonable Delay. Delays not in the contemplation of the parties to the contract (Hawley v. Orange County Flood Control District).

Wrongful Interference. Some affirmative, willful act, in bad faith, to unreasonably interfere with the contractor's compliance with the contract (Peter Kiewit Son's Co. v. Iowa Southern Utilities Co.).