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Recovery Schedules And Constructive Acceleration – Protect Yourself From Pitfalls

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On troubled or delayed projects, it is common for an owner to request that a contractor adjust performance in order to achieve an earlier-than projected completion date. In such circumstances, owners frequently demand that contractors submit a “recovery schedule” depicting the contractor’s plan to meet an accelerated completion date. This article addresses: (i) the foundations for submission of a recovery schedule; (ii) practical advice for the submission of such schedules; and (iii) legal questions of constructive acceleration and subcontractor performance that may impact claims and recovery.

The Building Blocks: Baseline And Schedule Updates



A baseline schedule is an important project management tool that is commonly used to determine the extent of delays along with impacts that may be experienced during the course of construction. These baseline schedules are typically the subject of agreement between a contractor and owner and often involve some degree of compromise and negotiation between the parties. Although not the focus of this article, contractors should memorialize when agreements on a baseline schedule has been

achieved. The reason is simple—failure to do so often complicates the contemporaneous issuance of schedule updates, and will present foundational challenges in potential disputes concerning the timeliness of project completion.

A sound baseline schedule will allow a contractor to prepare schedule updates that either track the baseline schedule, or, when delays or other unexpected events occur, divert from the original as-planned activities in favor of modified durations or logic. While construction contracts often include specific requirements for schedule updates and any changes thereto, contractors are advised to articulate the differences between schedule durations and logic in their schedule updates at the times of submission, especially as compared with the baseline schedule. Contemporaneous identification of events and impacts that may ultimately result in critical path delays is a leading indicator of what ultimately caused late project completion.

The Recovery Plan



Despite the best efforts of a contractor, owner, or other parties to a construction contract, delays may be experienced and a project owner may make a contractual (or extra-contractual) demand that a contractor produce a “recovery schedule.” A recovery schedule differs from a schedule update in that a recovery schedule projects substantial completion by either the original contract completion date, or some other date that is still earlier than the currently

projected completion date reflected in the most recent schedule update.

Certain construction contracts contain specific requirements for the preparation of a recovery schedule. Even in the absence of such requirements, however, an owner's request for a recovery schedule showing completion by a date certain may be part of an owner's notice to cure. By its nature, a request for a "recovery schedule" implies that the current-projected substantial completion date is beyond that originally identified in the contract. From a contractor's perspective, at the time a recovery schedule is requested, it is ideal to have already properly noticed any project impacts that resulted in the projected schedule delays. In the event that such impacts have not been the subject of contemporaneous notice, contractors are advised to notify the owner of the following at the time of recovery schedule submission: (i) impacts that led to the request for a recovery schedule (and which the contractor views are excusable and/or compensable under the terms of its contract) and (ii) the extent of any acceleration effort that the contractor believes necessary in order to meet the recovery schedule's substantial completion date.

The request for and submission of a recovery schedule often comes at a time of acute project stress. Most construction contracts require that a contractor continue performance in the face of disputes over entitlement to time extensions or extra compensation. Accordingly, while even lengthy or acrimonious disputes may not permit the contractor to cease operations, the provision of notice at the time of recovery schedule submission enhances a contractor's later legal position, and, equally important, allows the owner to effectively measure the temporal and financial ramifications of adherence to the recovery schedule.

The Question Of Acceleration



It is axiomatic that a recovery schedule seeks to "recover" time lost due to project delays or other impacts, and thus contemplates performance of work in a compressed time frame.

Accordingly, contractors may need to "accelerate" their work operations in order to meet newly revised interim or substantial completion dates.

In the event that an owner's request for a recovery schedule results from an excusable contractor delay, the owner's request for (and the contractor's ultimate adherence to) a recovery schedule may give rise to a

claim for "constructive acceleration." Under federal case law, "constructive acceleration" claims may be meritorious where the following elements exist: (i) excusable contractor delay has occurred on a project; (ii) the contractor made a timely and sufficient request for a time extension; (iii) the owner either denied the request or failed to take appropriate action on the request; (iv) the owner insisted on contract completion within a period shorter than that projected by the contractor, (v) the contractor notifies the owner that its order is being interpreted as an order to accelerate; and (vi) the contractor actually accelerated work and incurred additional costs as a result of its compressed efforts. See *Frasier Constr. Co. v. United States*, 384 F.3d 1354 (Fed. Cir. 2004).

The preceding factors beg the question: can an owner's demand that a contractor perform pursuant to a recovery schedule be considered a demand for "constructive acceleration?" The answer is likely "yes." In *Norair Engineering Corp. v. United States*, the U.S. Court of Claims reversed a previous Board of Contract Appeals ruling that denied a prime contractor's claim for acceleration costs. 666 F.2d 546 (1981). The contractor in *Norair* was granted a compensable time extension for project delays, but sought additional relief in the form of acceleration costs for overcoming what could have been even greater excusable delays. The Court of Claims held that there was nothing "incongruous" about a contractor's right to recover for acceleration damages that may have prevented even greater delay than the amount of the time extension. *Id.* at 548. Additionally, the Court found that an owner's order to accelerate "need not be couched in explicitly mandatory terms" and that the owner's stated intention to hold the original completion date and threat of liquidated damages served as an acceleration order.

Accordingly, the contractor's accelerated performance to achieve an earlier-than projected completion date (i.e., work to a recovery schedule) was the proper subject of an acceleration claim. *Id.* at 549. In a more recent decision concerning a constructive acceleration claim, the U.S. District Court for the Western District of Virginia ruled that where a contract did not expressly require a contractor to provide notice of acceleration, that contractor could still maintain its acceleration claim based on an owner's demand for completion by a date certain. *SNC-Lavalin America, Inc. v. Alliant Techsystems, Inc.*, 858 F. Supp. 2d 620 (W.D. Va. 2012). The Court held that, unlike contracts with the federal government that include the standard FAR changes clause, the contract in question did not require that the prime contractor notify the owner that it believed an owner's completion

demand required acceleration. Accordingly, despite the contractor's lack of notice, the court permitted the contractor to recover on its claim for damages resulting from "constructive acceleration."

In short, a contractor's performance to a recovery schedule may be the basis for an acceleration claim, but the specific terms of one's contract will govern the circumstances upon which such a claim may be asserted. In the spirit of caution, contractors are advised to notify their contract partners at the time of submission of a recovery schedule that: (i) delays previously encountered are understood to be excusable; and (ii) performance to a submitted recovery schedule is understood to be accelerated work at the owner's request. For owners, to the extent that accelerated performance is sought, express direction relative to the "recovery schedule" should be provided to the contractor. Owners should explain the rationale for determination of unexcused delay or why performance to the compressed schedule may not actually result in acceleration damages.

Recovery Schedules Up And Down The Contract Chain



Submission of and performance to a recovery schedule may also give rise to legal issues between a prime contractor and its subcontractors. Disputes are particularly likely where the subcontractor's performance arguably contributed to the necessity of a recovery schedule. Where subcontractor performance (or lack thereof) is a point of contention, prime contractors are advised to review and protect their rights vis-à-vis both subcontractors and project owners at the time of recovery schedule submission. In fact, failure to do so may result in the legal waiver of rights.

Notably, in the case of *McLain Plumbing & Electrical Service, Inc. v. United States*, a prime contractor placed in default agreed with its owner to perform to a recovery schedule. 30 Fed. Cl. 70, 75 (1993). As part of the recovery schedule performance, the prime contractor terminated an alleged underperforming subcontractor. Subsequent to its termination, the subcontractor pursued arbitration with the prime contractor and prevailed on a theory of wrongful termination. The prime contractor later attempted to recover the cost of the subcontractor judgment and associated costs from the government, asserting that the government "forced" the prime contractor to terminate the subcontractor. The Court of Federal Claims ruled against the prime

contractor, holding that the prime contractor's written agreement with the government pledging performance to the recovery schedule and wherein the prime also agreed to terminate the subcontractor, amounted to accord and satisfaction. Accordingly, by failing to reserve its rights in the recovery schedule agreement, the prime contractor was deemed to have relinquished its right to recover the subcontractor damages. *Id.* at 77-84.

While the above fact pattern is layered, it again underscores the importance of notice and reservation of rights at the time of performance to a recovery schedule. Prime contractors especially must be wary of the sometimes competing legal interests of project owners and subcontractors.

Conclusion

The submission of a recovery schedule can be a trying experience for contractors and project owners. Typically, recovery schedule submission is surrounded by stressful delays and accusations of under-performance. As this article details, all parties are advised to fully review and understand their contractual and other legal rights at the time of recovery schedule submission. Indeed, failure to do so may result in a relinquishment of rights associated with claims of acceleration or other damages.

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Chris Burke has significant experience in construction litigation, government contracts, surety, and other commercial contract cases. Chris has litigated disputes in the public and private sectors, both domestically and internationally. Since joining Watt, Tieder, Hoffar & Fitzgerald in 2002, Chris has represented clients in state and federal courts and in alternative dispute resolution proceedings. Over the course of his career, Chris has represented general contractors, construction managers, sureties, and subcontractors through the various stages of dispute resolution, from claim preservation through trial. Throughout each of these phases, Chris has advised his clients how to reach the most efficient and economical resolutions to their disputes. Chris graduated cum laude from Yale University and from the University of Virginia School of Law, where he served as a Dillard Fellow Legal Research and Writing Instructor.

Managing the Time Factor

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- The pros and cons of various schedule and delay methodologies being used by project participants and experts.
- The foundational principles for any successful schedule and delay analysis methodology.



On Time Project Delivery

The construction process is a complex undertaking. It involves many different activities and participants from initial planning through execution. The requisite tasks, and the roles and responsibilities of the owner, architect engineers, construction managers, contractors, and subcontractors can be organized in a number of different ways to deliver a construction project.

Despite these many options, building a major construction project today without experiencing schedule delays and cost overruns is often the exception. While there are many factors that can contribute to these poor results, there are two key success factors: effectively managing time and change.

The Importance of Time

Time, with its associated costs, are vitally important for each participant in the construction process including the lender, owner, architect engineers, contractor, and subcontractors, as well as those who provide bonding and insurance coverage. Effective management and the administration of the contract time and change provisions are central to the avoidance and mitigation extended time and cost overruns.

To enhance the odds of a successful project outcome, it is essential for participants in the construction process to have a basic understanding of:

- Critical path scheduling techniques, the associated scheduling specifications, and the software involved.
- Delay and how it occurs.

Proving and Defending a Delay



When a specific delay occurs, or is claimed by the contractor, it requires the early attention and timely action of the owner or its representative (PM, CM, or A/E). The owner needs to quickly identify the party responsible for the delay (Owner, A/E or Contractor) and develop and promptly implement a corrective action plan.

This requires the establishment of an effective method of inquiry for preparing a timely and independent assessment of changes and delay issues, and establishing a clear, concise, and persuasive position to be taken on each one. The pertinent contract requirements need to be followed. Additionally, the owner needs to require that its representative institute the basic principles of delay analysis using a sound methodology, like Time Impact Analysis (TIA) procedures. The owner or its representative also requires a basic working knowledge and understanding of related legal precedence for schedule and delay, as well as addressing any issues with the project completion date. Further, field procedures should be initiated, requiring the identification, isolation and recording of factual data related to the delay and impact costs.

Establishing the Necessary Controls and Procedures

Planning to avoid, mitigate, and timely resolve changes, delays, and claims during the delivery process is a key to the successful completion of any project. Guidelines for making it happen include:

1) Establish contract provisions and project procedures setting forth a clear understanding of the requirements for planning, implementing and controlling the project.

2) A claims avoidance and mitigation system should be established and geared to risk management and aid in prevention, mitigation and timely resolving potential disputes, and particularly those that deal with schedule and cost overruns. A sound claims avoidance and mitigation program entails:

a) A review of the contract documents to identify potential areas of risk and how they can be best managed and resolved; to ensure that critical claims prevention provisions and procedures are a part of the contract documents.

b) Training staff to be familiar with the procedures established and the areas in which claims are likely to arise, to establish early warning systems, to develop consistency in responding to potential claim impacts, and to recommend techniques to prevent, recognize, analyze, mitigate and successfully resolve claims.

c) A claims surveillance program to periodically assess the efficiency of the avoidance and dispute resolution process.

d) A periodic reporting system to keep the project team and management informed, and to ensure that all parties are in agreement with the approach, actions, timetable, and results being achieved.

e) A periodic management briefing focused on addressing the most important issues on a by-exception basis.

3) Be familiar with the strengths and weaknesses of the project delivery system being used, and the obligations, roles and responsibilities assumed or avoided by the parties involved.

4) Develop an awareness of the key contract provisions that will potentially generate disputes, scheduling delays and cost overruns.

5) Develop and maintain a contemporaneous summary entitlement analysis.

Managing and Administering the Time Factor

Scheduling techniques have made it possible to demonstrate, with reasonable certainty, the delay impact which can occur as a result of issues and

unplanned project events. Delays can be identified, isolated, quantified, and concurrent delays accurately segregated. This capability has contributed significantly to the legal importance of the project schedule. While scheduling techniques do not necessarily constitute proof in and of themselves, their application can be of evidential value to demonstrate liability and causation. In addition, they can provide a legitimate and supportable basis for allocating or apportioning damages, a means preferable to using guess work or the like.

It is important to also understand the basic rights of both the owner and the contractor, which arise from a contractual relationship. For example, the owner has the right to establish the envelope of time for performance. He also has the right to expect timely performance and to contract for liquidated damages for late performance. He may even make agreements to limit contractor remedies.

The contractor also has certain rights. For example, he has the right to expect reasonable access to work areas, timely approvals, and the timely delivery of owner furnished materials and equipment, and to be promptly paid. He also has the right to finish early and to expect extra time and money, depending on the circumstances, for owner caused delays.

As participants in the construction arena, it is imperative that we understand not only the techniques of scheduling and how to make them work, but also that a project schedule can serve as a basis to delineate the respective rights, obligations, and warranties flowing from the schedule.

Be Proactive – Use Time Impact Procedures



Plans, estimates, and schedules are bound to change as a result of errors and omissions, owner changes, unforeseen subsurface conditions, strikes, and actual performance variations. These are just a few of the many factors that create the need to change the schedule. Such conditions require that the schedule be kept up to date and revised on a regular basis to reflect actual performance and the contractor's best, current plans and intentions.

Calculating the extent of delay can best be accomplished through a process called Time Impact Analysis (TIA), which is a time estimating procedure that utilizes networking techniques (fragnets) to demonstrate the

effect of specific delays on the project schedule as they occur. A fragnet can be defined as a sequence of new activities and/or network revisions that are proposed to be added to the existing schedule to demonstrate (graphically and mathematically) the effects and the method for incorporating delays as they are encountered. Its objective is to pinpoint, isolate, and quantify the time impact of a specific issue and determine its time relationship to past or current delays. Time Impact Analysis procedures can be used in a prospective or retrospective manner, even on the same project.

The use of Time Impact Analysis (TIA) had its origin in 1960's as a contract requirement on the Apollo Space Program (Launch Complex 39). It is a contemporaneous procedure to be used by both the owner and the contractor for quickly identifying which activities and paths of criticality are impacted. A TIA is best performed by considering the following principles: chronology of delay; responsibility for delay; duration of delay including any allocation; the method to be used to incorporate delay/causation into the schedule; available float; any concurrent delay and how it occurs, and the affect (if any) a delay has on the project completion date.

When both parties use TIA procedures, it provides a disciplined basis for two contractual parties to independently evaluate the impact of a delay event or issue. Employing a common basis to analyze and compare results facilitates the negotiation and agreement of the parties as to the amount of delay and time impact involved. TIA techniques allow each party to demonstrate its understanding of a specific delay and the scheduling proofs offered versus those required. If no agreement can be reach, the efforts can provide a clear record of any differences which can be documented by records of meetings or negotiations. A TIA can be used contemporaneously during the project as a contract requirement, as well as a key tool in performing an after the fact delay analysis should issues remain unresolved.

Hank Kaiser, founder of Federal Publications summed up the situation stating "construction is big business, big in its physical product, big in money, big in the problems it generates, and big in the potential for claims. Because so much is at stake, those who engage in construction must guard against costly error, must arm themselves with protective knowledge, and must, in short, be educated in their specialties." Nothing could be truer than in managing the time and change factors under any of the delivery methods.

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Mr. Driscoll is a Senior Vice President with Hill International's Construction Claims and Consulting Group and has over 40 years of program, project, construction management and claims experience, specializing in large-scale construction projects. He has also served as an expert witness in the areas of construction management, construction claims and scheduling and delay analysis. He is a Fellow and a former President of the Construction Management Association of America. This Fall, the American Society of Civil Engineers will be honoring Mr. Driscoll with their Construction Management Award "For setting the standard in critical path method scheduling and delay analysis."