

Project Delays, Disruptions, and Changes¹

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In a perfect world, all construction projects would finish on time, without changes or disruptions. Despite the common public perception that contractors cannot wait for the changes to start on a project because that is where they allegedly “make their money”, most contractors would prefer their projects to complete without changes. Changed work complicates a project, invites delays and increases the project cost – all things that make owners unhappy.

In reality, nearly all projects of any substantial size experience changes and/or delays, therefore the parties are well served by thinking about how they will handle changes and delays prior to the start of construction. Setting out a framework in the contract for dealing with this inevitability is in the interest of both the contractor and the owner.

TYPES OF PROJECT DELAYS

Delays fall into three general categories:

1. **Excusable/Non-Compensable Delays.** In these situations neither party is responsible to the other for any costs associated with the delay. These delays are those that are typically included in force majeure clauses – abnormal weather, labor strikes, acts of God, acts of war, etc.

2. **Compensable (Owner Caused) Delay.** Here, the owner is responsible for both the time and cost effect of the delay. The contractor may claim the owner interfered with the work, did not deliver owner-purchased equipment or supplies on site as promised, or that the owner’s actions or inaction caused other delays. An owner cannot contract out of its obligation to pay for compensable delay, although it may be able to limit its liability for such delays. *See, RCW 4.24.360* below:

Any clause in a construction contract, as defined in RCW 4.24.370, which purports to waive, release, or extinguish the rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment arising out of unreasonable delay in performance which delay is caused by the acts or omissions of the contractee or persons acting for the contractee is against public policy and is void and unenforceable.

¹ This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

This section shall not be construed to void any provision in a construction contract, as defined in RCW 4.24.370, which (1) requires notice of delays, (2) provides for arbitration or other procedure for settlement, or (3) provides for reasonable liquidated damages.

3. **Non Excusable (Contractor Caused) Delay.** Here the contractor bears the risk and responsibility for the delay and the owner may bring a claim against the contractor for the costs of the delay.

Owners' claims for delay typically allege that the contractor failed to promptly start the project, failed to coordinate the work as required to maintain progress, failed to have supplies and equipment on site and/or failed to have enough workers on site.

Both owners and contractors often use concurrent delay as a defense to delay claims. On nearly all projects that are delayed, there is more than one cause of the delay. Where there are two or more independently causes of delays during the same time period, the delay is termed "concurrent." In these situations, the owner and contractor may have dueling claims for delay, each of which will be difficult to prove. As a general rule, the party seeking damages must isolate the causes and periods of delay in order to recover damages for the delay. *See, Wiley v. Hart*, 74 Wash. 142, 132 P. 1015 (1913) (Court could not apportion the cause of delay between the contractor and owner and therefore did not grant either party damages for delay).

DOCUMENTATION OF DELAYS, DISRUPTIONS AND CHANGES

1. **The Current State of Washington Law Regarding Notice.** In 2003 the Washington Supreme Court addressed the issue of notice requirements and waivers in the context of construction contract. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.2d 161 (2003). Prior to *Johnson*, the Court had not directly addressed the notice and waiver issue for many years. Since the *Johnson* decision was issued there has been a plethora of seminars devoted to the case and its repercussions.

In *Johnson*, the contractor, Mike M. Johnson encountered a differing site condition. The owner (the County of Spokane) directed certain changes to accommodate the differing site condition. Johnson responded by "summarizing various project delays and their impact" in a letter. At that point, Johnson did not request reimbursement for the extra costs. The parties' contract contained strict notice requirements and a specific claim prosecution process. After Johnson completed the extra work associated with the differing site condition, he then requested compensation from the owner.

Although the owner engaged in continued negotiations with Johnson regarding the claim, throughout the process the owner specifically noted it was not waiving any claims or defenses which the County had against Johnson. The Court ruled that although the owner was aware of the changed condition, since the contractor did not provide notice of the claim, did not protest the unilateral change order terms and did not follow the claim procedures as required by the Contract, the contractor forfeited its claim².

Although contractors were hopeful the Court would take a more practical approach, the Court's ruling regarding strict adherence to the contract notice provisions is not new. The contractors argued

² *Johnson* was a 5-to-4 ruling.

that where owners have actual notice of the problems which are the basis of a claim, and are able to investigate the issue, owners are not prejudiced by a contractor's failure to submit a claim within the time and precisely in the manner set forth in the Contract. The contractors also argued that an owner with actual knowledge of events giving rise to a claim has suffered no prejudice, and should not be entitled to rely upon a technical breach of a notice or claim provision to defeat an otherwise meritorious claim. The contractors sought to establish a standard of actual prejudice, whereby, owners who denied claims based on a contractor's failure to strictly follow the notice and claim procedures of a contract would have to show they had been actually prejudiced by the contractor's failure.

The Washington Supreme Court disagreed and favored the strict enforcement of contract notice and other claims provision. Although the *Johnson* ruling is not a change in existing law, it has clarified the extent of the strict adherence doctrine and has brought the issue to the forefront of Washington's construction industry.

Another case, *Weber Construction Inc. v. Spokane County*, also dealt with construction notice provisions. Shortly after the *Johnson* decision, the Washington State Supreme Court accepted the *Weber Construction* petition for review and immediately remanded the case to the Court of Appeals, Division III for reconsideration "in light of *Mike M. Johnson, Inc. v. Spokane County*". *Weber Construction, Inc. v. Spokane County*, 150 Wn.2d 1009, 78 P.3d 1001 (2003).

Weber contracted with the County to build a 4.2 mile section of Curtis Road. Upon beginning its excavation, Weber encountered several large boulders unsuitable for fill and embankments. It therefore had to obtain fill from another site. This increased the cost of the project and delayed its completion as well. The County entered a change order permitting Weber to haul extra material, but Weber protested the change order because the County did not provide instructions on how Weber was to dispose of the boulders. Weber followed the contract's required protest procedures, but it did not include one piece of required information, the cost estimate. Weber could not provide the estimate without the County designating a dumpsite for the boulders, and the County did not provide the needed information. Weber sued the County for additional compensation. The County argued Weber did not follow the contract procedure for a formal protest, a jurisdictional prerequisite to filing a claim. On remand from the Washington State Supreme Court, the Court of Appeals, Division III, determined that Weber presented substantial evidence it either complied with the contractual notice provisions or the County waived strict contractual compliance and remanded the case to the trial court for a new trial. *Weber Const., Inc. v. County of Spokane*, 124 Wn.App. 29, 98 P.3d 60 (2004).

2. **What To Do?** At the beginning of a project, general contractors, subcontractors and suppliers should carefully read the notice and claim provisions of their contracts. Pay particular attention to (1) the time by which a claim or protest must be made; and (2) the required contents of the claim.

a. During bid time, contractors should examine the notice, protest and claims procedures of the proposed contract, make an assessment of the administrative costs necessary to comply and **adjust the bid price accordingly**. A contractor may have more leeway in private projects to negotiate reasonable notice and claim provisions. In contrast, the contract terms on public projects are unlikely to be negotiable.

b. During construction, contractors should devise a **detailed flow chart of the notice and claim requirements** and provide a copy of the chart to all project personnel. Contractors should make sure all personnel understand the importance of strictly following the requirements. Also provide project personnel with notice and claim forms based on the contract requirements to ensure all necessary information is included in notices and claims.

c. **Stick To It.** The contractor should notify the owner that it will not perform any changed or extra work based on oral directives due to the strict requirements of the contract for written changes - then the contractor must stick to it!

d. **If a dollar figure is required provide one** – even if it is only a rough estimate. If the notice provisions require you to provide notice of a changed conditions and an estimate of the cost of the change within a certain time – do so. If the number is difficult to estimate in the time frame required, adjust your estimate upward to account for the risk. You can always revise the estimate downward at a later time, but it would be difficult to adjust the number upwards.

e. **Promptly supplement notices and claims.** If you've given the owner preliminary notice of an event giving rise to additional costs and/or time, as the costs and time become more defined, supplement and update the claim.

f. **Don't be afraid to comply with the contract notice requirements.** The current legal landscape requires contractors to get over the idea that sending notice letters will somehow ruin their relationship with the Owner. The Owner must understand that its own contract requires the contractor to provide written notice and to obtain written change orders prior to performing changed work. The Owner shouldn't complain when the Contractor complies with the procedures mandated by the Owner.

g. Additionally, if you have subcontractors be sure **to include notice and claim provisions in your subcontracts** that will allow you to timely and fully meet the notice and claim requirements of the contract with the owner. If you don't, you could be faced with subcontractor claims which you cannot pass through to the owner.

3. **Proposed Legislation.** At the time these materials were written a bill was being proposed in the Washington State legislature (House Bill 1765) to soften the impact of the Johnson case. The bill would provide that:

any clause in a construction contract that purports to waive, release, or extinguish the claim rights of a contractor, subcontractor, or supplier to damages or an equitable adjustment based on failure to submit claim notice or claim-related documentation in a specified time frame or form is waived to the extent that the contractor, subcontractor, or supplier shows by a preponderance of the evidence that: the party to whom the claim is being made had knowledge of and consented to the actions of the contractor, subcontractor, or supplier that are the basis of the claim; and the actions of the contractor, subcontractor, or supplier that are the basis of the claim benefited the party to whom the claim is being made."

DAMAGES FOR DELAY – New Developments

RCW 4.24.360 invalidates as against public policy "no-damages-for-delay" clauses in construction contracts where the delay is caused by the contractee or "persons acting for" the contractee. A Washington State Supreme court decision last year found utility companies under a franchise agreement with a City were "acting for" the City and thus the no damages for delay clause in the contract did not act as a bar to such damages. Scoccolo Construction, Inc v. City of Renton, 158 Wn.2d 506, 145 P.3d 371 (2006).

In the Scoccolo case, Scoccolo Construction, Inc. (Scoccolo) sued the city of Renton (City) for damages stemming from delays in the completion of a street-widening project, including delays caused by utility companies operating under franchise agreements with the City. The primary issue before the court concerned a contract between the parties which includes a "no-damages-for-delay" clause pertaining to delays caused by utility companies. The contract between the City and Scoccolo provided:

The Contractor shall be entirely responsible for coordination with the utility companies and arranging for the movement or adjustment, either temporary or permanent, of their facilities within the project limits.

Existing utilities for telephone, power, gas, and television cable facilities shall be adjusted by the appropriate utility company unless otherwise noted in the Plans....No additional compensation will be made to the Contractor for reason of delay caused by the actions of any utility company and the Contractor shall consider such costs to be incidental to the other items of the contract.

The City's franchise agreement with Puget stated in part:

Grantee agrees and covenants, at its cost and expense, to protect, support, temporarily disconnect, relocate or remove from any street any of its installations when so required by the City of Renton by reason of traffic conditions, public safety, street vacations, dedications of new rights of way and the establishment and improvement thereof, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any Governmental agency acting in a Governmental capacity.

In addition to other remedies provided herein, the City reserves and has the right to pursue any remedy to compel and force Grantee ... to comply with the terms hereof and to furnish the services herein called for....

The TCI franchise agreement contained similar terms.

The court found that by virtue of their contracts with the City, Puget and TCI were "acting for" the City for the purposes of RCW 4.24.360. Under the terms of the franchise agreements, the City had the power to compel Puget and TCI to relocate their facilities at their own expense. The City did not assign any such authority to Scoccolo. Scoccolo's sole responsibility was to coordinate with the utilities. Accordingly Scoccolo was entitled to recover damages for the delays attributable to the utilities.

RESOLVING DISPUTES THROUGH MEDIATION AND ARBITRATION

The construction industry was on the forefront of utilizing mediation and arbitration to resolve disputes, in great part due to the AIA form contracts which required the parties to engage in alternative dispute resolution. Many construction contracts, including the AIA forms, require a phased dispute process. The clauses may require the parties to first have a meeting of management level personnel to discuss a dispute at the written request of either party. If this is unsuccessful, the next required step may be mediation within a certain period of time. Finally, if the mediation process is unsuccessful, then the aggrieved party may file a demand for arbitration. The theory behind this phased dispute resolution procedure is, at least in part, that if “given the opportunity” (or some would say “forced to”) to resolve conflicts early in a less adversarial setting the parties themselves should be able to reach a business resolution without the need to resort to traditional litigation.

1. **Tips For Mediating Disputes.** Mediation is a facilitated negotiation, not litigation. While some may look at the process as “free discovery” or investigation, that is not the most effective use of the mediation process.

The goal of mediation is not to convince the mediator your view of the case is the right one. Instead, it is to use the process and the mediator to persuade the other side to enter into an agreement your client can accept.

The key to success is careful preparation. Know your case and have a coherent strategy for settlement. Identify your true interests and appreciate what the other side needs to get from the process when developing your strategy.

Think about the kind of mediator you need for your case. Learn the mediator’s style, approach and background. The mediator’s experience in construction disputes may be important, but the mediator’s style and how he or she will relate to the parties may be as or more important.

Be prepared to listen and bargain. The object is to reach an agreement, not to have the other party concede that you were right all along. Being successful in mediation requires a thorough and fact-based showing of strength, rather than just persuasive or clever argument. You have been unable to convince the other side before the mediation that you are 100% right and you aren’t likely to achieve that result at the mediation either. Be realistic.

Develop a mediation statement that, although addressed to the mediator, also speaks to the decision maker on the other side. Consider a private letter to the mediator to highlight confidential but critical issues.

Draft a settlement agreement to take to the mediation or at least have a checklist of specific terms you need in a final agreement. Discuss any critical terms with the mediator early on in the process.

2. Arbitration.

Arbitration has long been used by the construction industry to resolve disputes. . . using arbitration it advantageous in construction disputes because it gives the parties an opportunity to select a neutral with experience in the industry, rather than relying on a judge and/or a jury who may know little about the industry.

It is widely thought (though not as much any more) that arbitration is a less costly and more expedient way to resolve construction disputes than traditional litigation. Arbitration was meant to be and can still be a cost effective alternative to litigation. Unfortunately, in some cases, it is evolving from a swift, cost-effective ADR mechanism, to a slow process akin to litigation in terms of procedure and costs without the safeguards of litigation.

Arbitration is a creature of contract. The process is defined and controlled by the parties' contract. Case law throughout the country makes it clear that if an arbitrator exceeds his or her authority under the parties' contract, the arbitrator loses her authority and jurisdiction, and the arbitration award may be overturned. Therefore, arbitrators are trained to follow the contractually prescribed limits and procedures of the process very carefully. The parties can help contain the costs of arbitration by inserting detailed procedural and time limitations in their contractual arbitration clauses.

For example, the parties can mandate that the arbitration hearing be held within a specified time after a demand for arbitration is filed and that the hearing date cannot be continued beyond that time unless the parties mutually agree. The parties can also limit the discovery that will be available in arbitration by specifically addressing the number of depositions that will be allowed (if any) and their length, the number of interrogatories (if any), etc. Motion practice in arbitration can be limited or eliminated. Parties may want to structure the deadlines and limits on discovery to allow for more time and more discovery in larger value disputes.

Parties that like the arbitration process, but want to limit the costs and time expended, can control of the process and limit the costs, if these issues are addressed at the time of contracting. It is unlikely the parties will agree to limit discovery or hearing time after a dispute has arisen.