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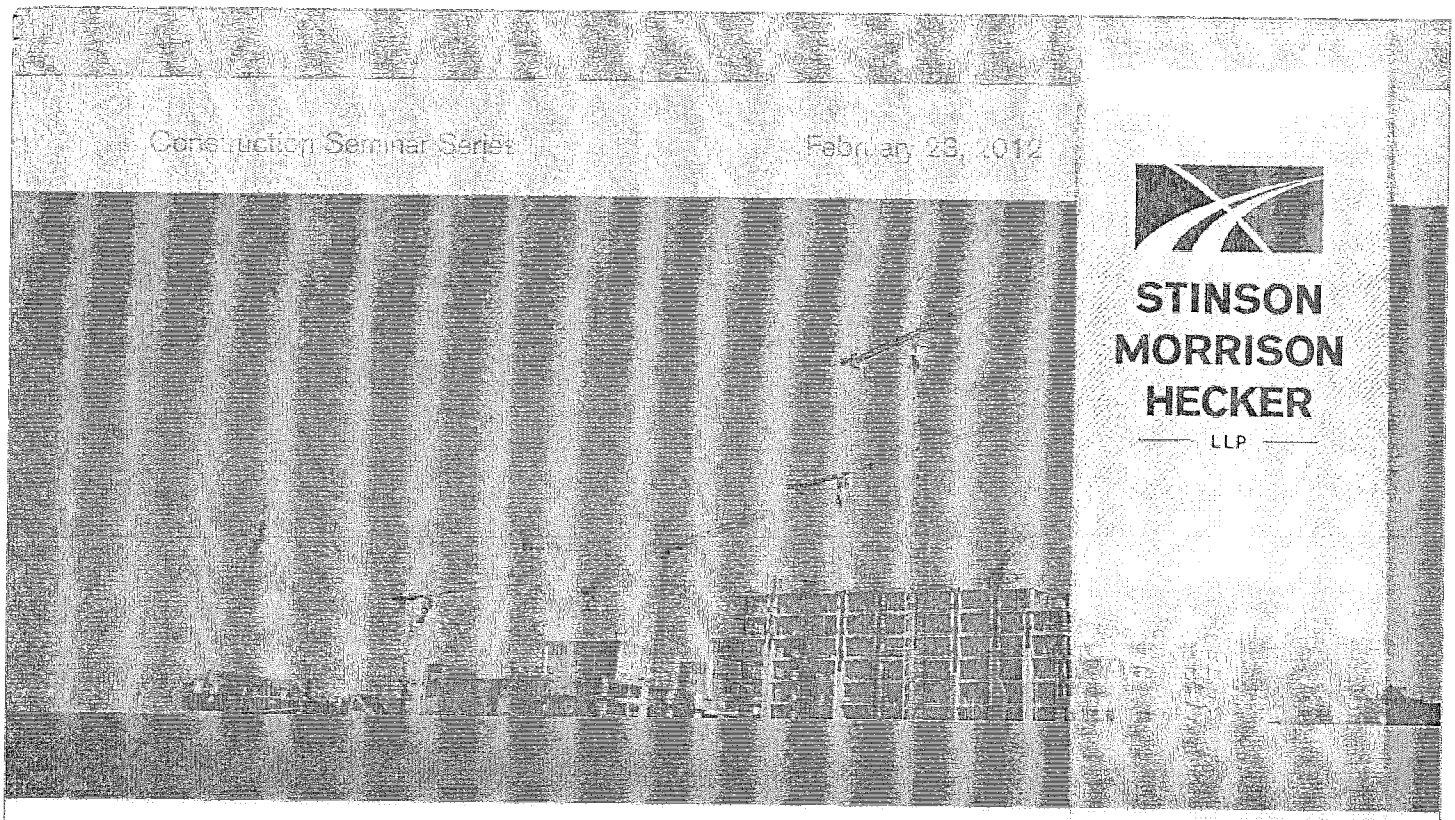

STINSON MORRISON HECKER LLP

It's About Time!

Presented by Susan McGreevy and Michael Crowley of Stinson Morrison Hecker LLP

February 23, 2012 | 1201 Walnut Street, Suite 2900 | Kansas City, Missouri

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It's About Time©

presented by Susan McGreevy and Michael Crowley,
Stinson Morrison Hecker LLP
Kansas City, Missouri | February 23, 2012

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It's About Time

Time is money in construction–

For Everyone

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It's About Time

Time is money in construction – for everyone

For the owner, who may:

- Have to be out of other space, or
- Have equipment/furnishings coming, or
- Have borrowed money at a high rate,
- Have architects/engineers/inspectors on the job
- Have school starting August 15

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It's About Time

Time is money in construction – for everyone

For the contractors, who:
- Have to pay employees
- Have to rent equipment
- Have to rents trailers
- Have tied-up bonding capacity

For every day that the work continues

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It's About Time

Time is money in construction – for everyone

For the construction lender who wants its construction loan paid off, and turned into a long-term commitment

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It's About Time

Time is money in construction – for everyone

For designers who have to pay their staff for all the extra time spent and may not be reimbursed, and who have to deal with all the contractor problems that go along with delays

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It's About Time

Time is money in construction – for everyone

For the contractor's surety, who doesn't want claims on its payment and performance bonds

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It's About Time

***All* parties have an interest in not letting construction projects drag on**

Yet, too often, this is just what happens. For lots of reasons – sometimes one of the parties' fault, and other times no one's fault

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It's About Time

Because this is such a common problem, most construction contracts contain specific clauses about time, and many different references to time throughout the contracts

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It's About Time

Today we will talk about:

- What is "typical" language in construction contracts on all of these points, and the differences among clauses; and
- Pointers for how to deal with typical problem issues when they arise.

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It's About Time

How is the agreement about time set out in the contract?

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How is a "day" defined?

Most form contracts mean a 24-hour period when they refer to "day"

- **AIA § 8.1.4**
- **DBIA § 1.2.2**
- **EJCDC § 1.02.B.1** (midnight to midnight)
- **ConsensusDOCS § 3.9.4, § 3.19.2**
- **KCMO § 1.01(10) and (20)** (day is a calendar day)

But ConsensusDOCS sometimes *also* uses "business day," ***so be sure to check*!!**

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What's this "Time is of the Essence" language?

This is common in form documents. **It is a Big Deal, legally.** (It could be in the general conditions or the base contract.)

- It means that the Owner can require *EXACT*, and not approximate, compliance with deadlines. **One Day Late= Material Breach of Contract**
- It is there for the benefit of the Owner, not the Contractor.
- Standard in construction contracts: AIA § 8.2.1; ConsensusDOCS § 6.1.2; DBIA Article 5; EJCDC Article 3; KCMO § 12.01

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When you get time, do you get money too?

Most contracts have different clauses to deal with just time and with time + money

- Getting **time only** is easier – generally all the contractor has to show is that the delay was not the contractor's fault – *but this may not always be the case!*

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When you get time, do you get money too?

Some contracts allow the contractor more time if the reason for the delay was something "beyond his control" – which would allow an extension even if it was a sub's fault

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When you get time, do you get money too?

Other contracts say that the delay has to be beyond the control of anyone for whom the contractor was responsible – so if a supplier can't get materials there on time, there will be no time extension

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General contract provisions allowing extensions of time

AIA § 8.3 Delays and Extensions of Time

- **§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the work... then the Contract Time shall be extended by Change Order for such reasonable time as the architect may determine
- **§ 8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Article 15

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General contract provisions allowing extensions of time

DBIA 8.2.1 If Design-Builder is delayed in the performance of the work due to acts, omissions, conditions, events or circumstances beyond its control and due to no fault of its own *or those for whom Design-Builder is responsible*, the Contract Time(s) for performance shall be reasonably extended by Change Order

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General contract provisions allowing extensions of time

ConsensusDOCS § 5.3.1 – …[I]f the commencement or progress of the Subcontract Work is delayed **without the fault or responsibility of the Subcontractor**, the time for the Subcontract Work shall be extended….

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General contract provisions allowing extensions of time

So, if you ever have an issue come up, check the wording of the contract!

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What *specific* things entitle the contractor to more time?

Lots of things. . .

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What *specific* things entitle the contractor to more time?

There will typically be one general clause that you can look to for the types of things that entitle a contractor to more time – that gives "examples" of things that trigger extensions and/or money

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What *specific* things entitle the contractor to more time?

AIA § 8.3 Delays and Extensions of Time

- **§ 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work . . .by [1] an act or neglect of the Owner or Architect, or of an employee of either, or [2] of a separate contractor employed by the Owner; or [3] by changes ordered in the Work; or [4] by labor disputes,[5] fire, [6] unusual delay in deliveries, [7] unavoidable casualties or [7]other causes beyond the Contractor's control; or [8] by delay authorized by the Owner pending mediation and arbitration; or [9] by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine

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What *specific* things entitle the contractor to more time?

ConsensusDOCS § 6.3.1

- (a) [1] Acts or omissions of the Owner, the Design Professional or [2] Others; (b) [3] changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; (c) [4] encountering Hazardous Materials, or [5] concealed or unknown conditions; (d) [5] delay authorized by the owner pending dispute resolution or suspension by the Owner. . .; (e) [6] transportation delays *not reasonably foreseeable;* (f) [7] labor disputes *not involving the Constructor;* (g) [8] general labor disputes impacting the Project *but not specifically related to the Worksite*; (h) [9] fire; (i) [10] Terrorism; (j) [11] epidemics; (k) [12] adverse governmental actions; (l) [13] unavoidable accidents or circumstances; (m) [14] adverse weather conditions not reasonably anticipated...

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What *specific* things entitle the contractor to more time?

DBIA § 8.2.1… *All lumped together*

- By way of example, events that will entitle Design-Builder to an extension of Contract time(s) include [1] acts or omission of Owner or anyone under Owner's control [2] (including separate contractors), [3] changes in the Work, [4] Differing Site Conditions, [5] Hazardous Conditions, [6] wars, [7] floods, [8] *labor disputes*, [9] unusual delay in transportation, [10] epidemics *abroad*, [11] earthquakes, [12] adverse weather conditions not reasonably anticipated, and [13] *other acts of God*

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What *specific* things entitle the contractor to more time?

EJCDC Section 12.03 *Delays Beyond CONTRACTOR's Control*

- Delays beyond the control of CONTRACTOR shall include, but not be limited to, [1] acts or neglect by OWNER, [2] acts or neglect of utility owners or other contractors performing other work as contemplated by Article 7, [3] fires, [4] floods, [5] epidemics, [6] abnormal weather conditions, [7] or acts of God

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What *specific* things entitle the contractor to more time?

KCMO – Some specific things followed by a general catch-all provision:

- **Article 12.03 Proof Required to Justify an Extension of Time for Excusable and Compensable Delays**
  - A compensable or excusable event includes, but is not limited to:
    1. unreasonable delay of issuance of Notice to Proceed by CITY;
    2. CITY's unreasonable delay of delivery furnished materials, equipment, or work;
    3. unreasonable delay responding to shop drawings and submittals;
    4. CITY's unreasonable delay in issuing a Change Order;
    5. an order by the CITY to stop the Work where the CONTRACTOR was not at fault; and
    6. other reasonable grounds as determined by the City in its sole discretion

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What *specific* things entitle the contractor to more time?

– **Article 12.05 Delays Beyond the CITY's and CONTRACTOR's Control**

A. Where CONTRACTOR is prevented from completing any part of the Work within the Contract Times (or Milestones) due to delay beyond the control of both CITY and CONTRACTOR, an extension of the Contract Times (or Milestones) in an amount equal to the time lost due to such delay shall be CONTRACTOR's sole and exclusive remedy for such delay

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Any other reasons for the contractor to get more time?

Most contracts have lots of other clauses that describe *additional* situations that could lead to time extensions, and some of them use different language, have different rules to follow…

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Any other reasons for the contractor to get more time?

If work is delayed due to ***defects in construction documents***…

- Generally, if the Owner supplies documents that can't be used without time taken up with clarifications or corrections, the contractor will be entitled to more time

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Any other reasons for the contractor to get more time?

If work is delayed due to ***defects in construction documents***...

- **AIA § 3.2.4** If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall make Claims as provided in Article 15....
- (similar: **ConsensusDOCS §3.3.4; EJCDC Section 9.04**)

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Any other reasons for the contractor to get more time?

If work is delayed due to ***defects in construction documents...***

- DBIA – Contract between Design-Builder and GC allows for GC to make a claim for extra time for defects in the documents given to Design-Builder. *Obviously, design-builder has no claim for extra time from the owner for defects in its own documents!*

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Any other reasons for the contractor to get more time?

If Work is delayed due to ***site/hidden conditions...***

- **AIA § 3.7.4 Concealed or Unknown Conditions.** If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions **that differ materially from those indicated in the Contract Documents** or (2) unknown physical conditions of an unusual nature, **that differ materially from those ordinarily found to exist** and generally recognized as inherent in construction activities of the character provided for in the Contract Documents,....
- Similar clauses in **ConsensusDOCS § 3.16.2 , DBIA § 4.2.1, EJCDC §4.03.C.1, KCMO § 4.03**

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Any other reasons for the contractor to get more time?

If Work is delayed due to ***site/hidden conditions***... EJCDC/KCMO break this out to distinguish between "site/physical" conditions and uncovered underground facilities:

- **EJCDC §4.04.B.2** "...An equitable adjustment shall be made in the Contract Price [or] Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated with reasonable accuracy in the Contract Documents [and that Contractor gave "prompt" notice of, and didn't/shouldn't have known about.]

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor...***

- If the Sub really wasn't qualified, and the owner's rejection was "reasonable," there generally will be no more time. But if the owner just wants someone else, there will be an adjustment

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor...***

- The problem, of course, is that the owner is not likely to volunteer that it is being unreasonable, so the contractor has to document its objection to the delay and be prepared to fight about it later

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Any other reasons for the contractor to get more time?

If the contractor is delayed due **to *owner's rejection of subcontractor...***

- **AIA § 5.2.3** If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor:***

- **ConsensusDOCS § 5.2.2** "If the Owner has reasonably and promptly objected, the Constructor shall not contract with the proposed Subcontractor or Material Supplier... An appropriate Change Order Shall reflect any increase or decrease in the Contract Price or Time because of the substitution"
- [but if owner's objection was reasonable and prompt, why should there be any adjustment?]

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor...***

- **EJCDC § 6.06.B/KCMO § 6.07.B** anticipate a price adjustment for rejection of subcontractors, but no mention of a time adjustment...? ? ?

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor...***

- This concept doesn't exist in the DBIA contract – owner has no right to approve Design-Builder's subs. (But the design-builder does have right to approve GC's subs)

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Any other reasons for the contractor to get more time?

If the contractor is delayed due to ***owner's rejection of subcontractor...***

- Suggestion: set a time-frame in the contract for how long the owner has to object

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Any other reasons for the contractor to get more time?

If the *submittals are late being reviewed...*

- **AIA § 4.2.7** The Architect will review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken in accordance with the submittal schedule approved by the Architect or, in the absence of an approved submittal schedule, with reasonable promptness while allowing sufficient time in the Architect's professional judgment to permit adequate review....

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Any other reasons for the contractor to get more time?

If the ***submittals are late being reviewed...***

- **ConsensusDOCS § 3.14.2** "The Owner shall be responsible for review and approval of submittals with reasonable promptness to avoid delay"

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Any other reasons for the contractor to get more time?

If the ***submittals are late being reviewed...***

- **EJCDC § 6.17.E** says that the Engineer will "timely" review them according to a "schedule" – but nowhere does it say that the "schedule" has to set out how long the Engineer has to review submittals

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Any other reasons for the contractor to get more time?

If the ***submittals are late being reviewed...***

- *Suggestion: It would be a good idea for contractors, when putting together such schedules, to state in them the length of time that the Engineer has to return the submittals, so that all parties know when a delay may be starting*

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Any other reasons for the contractor to get more time?

If the *submittals are late being reviewed*...

–Again, this concept doesn't exist in the DBIA documents

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Any other reasons for the contractor to get more time?

If the *owner's separate contractors get in the way...*

- **AIA § 6.1**
  Owner's Right To Perform Construction And To Award Separate Contracts
- **§ 6.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Article 15

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Any other reasons for the contractor to get more time?

If the *owner's separate contractors get in the way...*

- **ConsensusDOCS § 3.2.2** "...The Owner shall require each such separate contractor to cooperate with the Constructor and assist with the coordination of activities and the review of construction schedules and operations. The Contract Price and Contract Time shall be equitably adjusted, as mutually agreed by the parties, for changes made necessary by the coordination of construction activities, and the Schedule of the Work shall be revised accordingly"

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Any other reasons for the contractor to get more time?

If the *owner's separate contractors get in the way...*

- **DBIA § 8.2.1** ...By way of example, events that will entitle Design-Builder to an extension of Contract time(s) include [1] acts or omission of Owner or anyone under Owner's control (including separate contractors),...

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Any other reasons for the contractor to get more time?

If the *owner's separate contractors get in the way...*

- **EJCDC §7.01.A.2** "If OWNER and CONTRACTOR are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times that should be allowed as a result of such [work by other contractors], a Claim may be made...

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Any other reasons for the contractor to get more time?

If the *Engineer's clarifications or interpretations affect the work...*

- **EJCDC §9.04.A/KCMO 9.03** "...If OWNER and CONTRACTOR are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a written clarification or interpretation, a Claim may be made...

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Any other reasons for the contractor to get more time?

If the *Engineer directs "variations" in the work...*

- **EJCDC §9.05.A** "...If OWNER and CONTRACTOR are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Field Order, a Claim may be made...

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Any other reasons for the contractor to get more time?

If *hazardous materials are found on site...*

- **AIA § 10.3.2** ...When the material or substance has been rendered harmless, Work in the affected area shall resume upon written agreement of the Owner and Contractor. By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased in the amount of the Contractor's reasonable additional costs of shut-down, delay and start-up

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Any other reasons for the contractor to get more time?

If *hazardous materials are found on site ...*

- **ConsensusDOCS §3.13.5** "If the Constructor incurs additional costs or is delayed due to the presence or remediation of Hazardous Material, the Constructor shall be entitled to an equitable adjustment in the Contract price or the Contract Time

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Any other reasons for the contractor to get more time?

If *hazardous materials are found on site...*

- **DBIA § 4.1.4** Design-Builder will be entitled, in accordance with these General Conditions of Contract, to an adjustment in its Contract Price and/or Contract Time to the extent Design-Builder's cost and/or time of performance have been adversely impacted by the presence of Hazardous Conditions
- **DBIA § 8.2.1** ...By way of example, events that will entitle Design-Builder to an extension of Contract time(s) include [[4] Hazardous Conditions,...

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Any other reasons for the contractor to get more time?

If *hazardous materials are found on site...*

- **EJCDC § 4.06.D/KCMO § 4.06.D –** [Contractor to "immediately" stop work and notify Owner and Engineer, and then "promptly" follow up in writing.]

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Any other reasons for the contractor to get more time?

If *changes are made in laws...*

- **ConsensusDOCS § 3.21.1** "The Contract Price or Contract Time shall be equitably adjusted...for additional costs [??] resulting from any change in Laws...
- **DBIA § 2.5.2** "The Contract Price and/or Contract Time shall be adjusted to compensate Design-Builder for effects of any changes in the Legal Requirements enacted after the date of the Agreement affecting the performance of the Work...

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Any other reasons for the contractor to get more time?

If *changes are made in laws...*

- **EJCDC § 6.09.C** "Changes in Laws...Not known at the time of opening of Bids...having an effect on the cost or time of performance of the Work may be the subject of an adjustment in Contract Price or Contract Times."
- **NOT IN AIA OR KCMO**

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Any other reasons for the contractor to get more time?

If *work is damaged or destroyed...*

- **AIA § 8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work... by unavoidable casualties or other causes beyond the Contractor's control;
- **ConsensusDOCS §6.3.1....** (I) unavoidable accidents or circumstances

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Any other reasons for the contractor to get more time?

If *work is damaged or destroyed...*

- **DBIA § 8.2.1** – acts of God?
- **EJCDC/KCMO § 12.05** – "beyond the control of both OWNER [CITY] and CONTRACTOR"

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Any other reasons for the contractor to get more time?

If a *substitution* will take more time...

- **ConsensusDOCS § 3.14.5** "All such substitutions shall be promptly memorialized in a Change Order,..., and, if applicable, [the] Design Professional [shall] provide for an adjustment to the Contract Price or Contract Time
- **AIA § 3.4.2** – Contractor may only make substitutions "with the consent of Owner and in accordance with a Change Order or CCD" – so time will be accounted for as part of Change Order process
- NOT IN EJCDC
- CONCEPT DOESN'T EXIST IN DBIA

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Any other reasons for the contractor to get more time?

If the *Owner re-sequences the work...*

- **ConsensusDOCS §6.2.2** "...To the extent such changes [in the sequence of the work], the Contract Price or Contract Time shall be equitably adjusted"

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Any other reasons for the contractor to get more time?

If the *Owner re-sequences the work...*

- Only place in AIA concerns unsafe work procedures: 3.3.1: "If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be responsible for any loss or damage arising from those Owner-required means, methods, techniques, sequences or procedures." *Could this be used to hold owner liable for time impacts resulted from the owner disallowing a proposed re-sequencing of the work?*
- NOT IN DBIA

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Any other reasons for the contractor to get more time?

If ***unusually severe weather affects the work...***

- Weather can be the subject of another whole seminar, but there are some *general* things to keep in mind

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Any other reasons for the contractor to get more time?

If ***unusually severe weather affects the work...***

- It will (almost) never be enough for a contractor to just say that it was delayed because of weather. The contractor will (almost) always have to prove more – but how much more will depend on what the agreement says

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What about the weather?

If ***unusually severe weather affects the work...***

- **AIA § 15.1.5.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were [1] abnormal for the period of time, [2] could not have been reasonably anticipated and [3] had an adverse effect on the scheduled construction

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What about the weather?

If *unusually severe weather affects the work...*

- Similar requirements (delay, abnormal conditions and unanticipated) exist in the other contracts. **ConsensusDocs § 6.3.1; DBIA § 8.2.1; EJCDC § 12.03; KCMO § 12.03.D.**
- Question/Issue: Is there any functional difference between "abnormal" and "not reasonably anticipated"?

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What about the weather?

The Contractor will have the burden of proving that the weather was "**abnormally severe**"

- How do you do this? Do you use local NOAA station vs. get data for actual site? Keep gauges on site?
- How far back do you go in time to get the "norm"? None of these form contracts address this

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What about the weather?

The Contractor will have the burden of proving that the weather was "**abnormally severe**"

- It is in everyone's interest to be using the most accurate historical standard for "normal"

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What about the weather?

The Contractor will have the burden of proving that the weather was "**abnormally severe**"

- It is in everyone's interest to be using the most accurate data for what actually occurred at the job site

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What about the weather?

The Contractor will have the burden of proving that the weather was "**abnormally severe**"

- It is entirely possible that the weather that is recorded at the closest NOAA office does not represent what was happening on site

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What about the weather?

The Contractor will have the burden of proving that the weather was (1) "**abnormally severe**"

- It would help if the parties agreed on what/where thermometers, rain and wind gauges would be used, to document actual facts

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What about the weather?

The Contractor will have the burden of proving that the weather (2) "**could not have been reasonably anticipated**"

- How do you do this? This means that the contractor didn't take the type of precautions, and include in its bid and schedule, time and money for the weather that would have been "normal"
- The owner has the right to ask to see the bid documents that reflect how the contractor "normal" anticipated weather

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What about the weather?

The Contractor will have the burden of proving that the weather (2) "**could not have been reasonably anticipated**"

- Suggestion: before a contractor decides not to work due to weather, the contractor could ask – and not wait the full length of time for notice allowed under the contract – what if anything the owner would like to do to avoid a delay
- Often an owner might like to avoid the delay by implementing steps such as temporary heat, importing gravel to stabilize roads, etc. *But if the contractor isn't required to ask, the owner will never have that option*

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What about the weather?

The Contractor may have to prove that the unusual weather (3) **adversely affected the work**

- HOW DO YOU PROVE THIS?
  - Through photos, videos, daily reports, meeting minutes
  - Getting all the parties out to the site to see the conditions is generally a good idea too

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What about the weather?

The Contractor may have to prove that the unusual weather (3) **adversely affected the work**

- DOES IT HAVE TO AFFECT THE CRITICAL PATH?
  - Generally, yes, but it depends on the contract language…

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What about the weather?

The Contractor may have to prove that the unusual weather (3) **adversely affected the work**

- KCMO requires a CPM comparison – not all contractors will be using CPMs on their projects:
  - KCMO clearly refers to critical path and puts burden on Contractor. **KCMO § 12.03.B** ("Contractor shall compare the [approved] critical path… to the actual critical path of the Work, identifying the specific impact of the compensable or excusable event.")

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Any other reasons for the contractor to get more time?

As a result of Change Orders…

- **AIA§ 7.2 CHANGE ORDERS**
  - **§ 7.2.1** A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:
    - **.1** The change in the Work;
    - **.2** The amount of the adjustment, if any, in the Contract Sum; and
    - **.3** The extent of the adjustment, if any, in the Contract Time

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Any other reasons for the contractor to get more time?

As a result of Change Orders…

- **ConsensusDOCS § 8.1.1** "The Constructor may request or the Owner may order changes in the Work or the timing or sequencing of the Work that impacts the Contract Price or the Contract Time. All such changes in the Work that affect the Contract Time or Contract Price shall be formalized in a Change Order and processed in accordance with this Article."

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Any other reasons for the contractor to get more time?

As a result of Change Orders…

- **DBIA § 8.2.1**…By way of example, events that will entitle Design-Builder to an extension of the Contract Time(s) include… changes in the Work…

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Any other reasons for the contractor to get more time?

As a result of Change Orders…

- **EJCDC § 10.01.B** If OWNER and CONTRACTOR are unable to agree on entitlement to, or the amount or extent, if any, of an adjustment in the Contract PricTime(s) include… changes in the Work…

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Any other reasons for the contractor to get more time?

DO NOT SIGN CHANGE ORDERS THAT ADDRESS PRICE BUT DON'T COVER TIME – DIRECT AND INDIRECT.

Always consider whether your "no impact" change orders that don't cost money may still impact time.

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Any other reasons for the contractor to get more time?

Or Construction Change Directives…

- AIA § 7.3 CONSTRUCTION CHANGE DIRECTIVES
  - § 7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly

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Any other reasons for the contractor to get more time?

Or Construction Change Directives…

- ConsensusDOCS
  - §8.2.1 The Owner may issue a written Interim Directed Change directing a change in the Work prior to reaching agreement with the Constructor agreement on the adjustment, if any, in the Contract Price or the Contract Time

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Any other reasons for the contractor to get more time?

Or Construction Change Directives…

- **DBIA § 9.2.1** A Work Change Directive is a written order prepared and signed by the Owner, directing a change in the Work prior to agreement on an adjustment in the Contract Price or the Contract Time

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Any other reasons for the contractor to get more time?

Or Construction Change Directives…

- **Since these "directives" don't have to be signed by the contractor to be effective, a contractor operating under one isn't giving up any rights at all – but needs to be keeping track of time impact in order to settle up later**

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Any other reasons for the contractor to get more time?

If there is an "emergency"…

- **AIA § 10.4 EMERGENCIES**
  - In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7
- **DBIA § 9.5.1; KCMO § 6.17.A; EJCDC § 6.16 generally say the same thing**

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Any other reasons for the contractor to get more time?

If the owner "suspends" the work...

- AIA § 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent
  - .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
  - .2 that an equitable adjustment is made or denied under another provision of the Contract.

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Any other reasons for the contractor to get more time?

If the owner "suspends" the work...

- **ConsensusDOCS§ 11.1.1...**The Contract Price and Contract Time shall be equitably adjusted for by Change Order for the cost and delay resulting from any such suspension....

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What entitles the contractor to money (as opposed to just time) for delay?

This is not an issue for <u>public</u> work in Missouri and Kansas. By statute, the states have said that the state has to pay for its delays.

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What entitles the contractor to money (as opposed to just time) for delay?

- K.S.A. 16-1907:
  - Provisions waiving right to collect damages for delays, void, unenforceable. Any provision in a contract that purports to waive the rights of a party to the contract to collect damages for delays caused by another party to the contract shall be void, unenforceable and against public policy. This provision is not intended to create a contract between parties where a contract did not otherwise exist

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What entitles the contractor to money (as opposed to just time) for delay?

- The **Missouri** counterpart is **RSMo. 34.058:**
  - Public works contract, defined--certain contract clauses against public policy--exceptions.

* * * * * *

2. Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

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What entitles the contractor to money (as opposed to just time) for delay?

AIA leaves this vague. It is not as detailed on this as ConsensusDOCS:

- **AIA § 8.3.3** This Section 8.3 [on time extensions] does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents

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What entitles the contractor to money (as opposed to just time) for delay?

ConsensusDOCS *specifically allows* recovery of money for delay for these categories:

(a) Acts or omissions of the Owner, the Design Professional or Others; (b) changes in the Work or the sequencing of the Work ordered by the Owner, or arising from decisions of the Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by the owner pending dispute resolution or suspension by the Owner... (6.3.2)

- These are all things that are within the owner's control.

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What entitles the contractor to money (as opposed to just time) for delay?

DBIA says this in a different way:

- **§ 8.2.2** In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for those events. . . that are beyond the control of both Design-Builder and the Owner, including wars, floods, labor disputes, unusual delay in transportation, epidemics, earthquakes, adverse weather conditions not reasonably anticipated, and other acts of God

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How does the contractor get more time?

First, by giving notice of delay when it occurs. *Remember, for subsurface issues/physical conditions, you can't disturb the site.

- Watch it! There is a difference between giving notice that *a contractor is being delayed* -- which must be given soon after the delay starts – and notice of a *claim*. The contracts may require both, especially if there is a disagreement about the existence or extent of any impact

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How does a contractor give notice of a delay?

AIA smushes together the notice of the fact that the there has been a delay, and making a claim based on it into one process – all of which is to be done within 21 days:

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How does a contractor give notice of a delay?

AIA § 15.1.2 NOTICE OF CLAIMS

Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later

AIA § 15.1.5 CLAIMS FOR ADDITIONAL TIME

§ 15.1.5.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary

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How does a contractor give notice of a delay?

DBIA only appear to require notice of a claim of delay – not of delay itself. (10.1.1) but it wants the notice before any costs are incurred

- **Sometimes, you don't know if you will have costs at the beginning of the delay**

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How does a contractor give notice of a delay?

ConsensusDOCs wants the contractor to give a "prompt" notice of the *delay*, followed by submission of the *claim* within 14 days of the occurrence

How does a contractor give notice of a delay?

ConsensusDOCS requires notice of the *delay* "promptly" – but doesn't define what that means:

- **§ 6.3.3 NOTICE OF DELAYS** If delays to the Work are encountered for any reason, the Constructor shall provide prompt written notice to the Owner of the cause of such delays after the Constructor first recognizes the delay. The Owner and the Constructor agree to take reasonable steps to mitigate the effect of such delays. *[If Owner claims that Constructor is delaying work, it has no similar obligation to give prompt written notice.]*

How does a contractor give notice of a claim based on delay?

And ConsensusDOCS requires notice of the *claim* within 14 days of event

- **§ 6.4 NOTICE OF DELAY CLAIMS.** If the Constructor requests an equitable extension of the Contract Time or an equitable adjustment in the Contract Price as a result of a delay...The Contractor shall give the Owner written notice of the claim [within fourteen days after the occurrence] ...
- **§8.4 CLAIMS FOR ADDITIONAL COST OR TIME...** The Constructor shall give the Owner written notice of the claim within 14 days after the occurrence, or within 14 days after the Constructor first recognizes the condition, whichever is later. *The Owner then has 14 days to respond*

How does a contractor give notice of a delay?

EJCDC requires notice of the *delay* "promptly" – but doesn't define what that means:

- **§ 4.03.A Notice:** If CONTRACTOR believes that any subsurface or physical condition at or contiguous to the site that is uncovered or revealed [is materially different], then CONTRACTOR shall , promptly after becoming aware thereof and before disturbing the...condition..., notify OWNER and ENGINEER in writing about such condition....
- ***No hard-and-fast time limit. KCMO is virtually identical***

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How does a contractor give notice of a claim based on delay?

DBIA requires notice if a party believes it is entitled to relief "if possible, *prior to incurring any cost or expense* and in accordance with any specific notice requirements contained in applicable sections of these General Conditions... *or in 21 days, whichever is later.* Such notice shall include sufficient information to advise the other party of the circumstances giving rise to the claim for relief, then specific contractual adjustment or relieve requested and the bass of such request." (§10.1.1)

- *This seems to give the contractor 21 days*

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What happens if the contractor is late?

Since most contracts have a completion date in them, the Owner does not have to give the Contractor any notice of delay – or of its intention to pursue a claim of delay:

- **ConsensusDOCS § 6.4 NOTICE OF DELAY CLAIMS...** If the Constructor causes delay in the completion of the Work, the Owner shall be entitled to recover its additional costs [as a Change]...

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What happens if the contractor is late?

The first thing a contractor should expect is that the owner will withhold money

Can the owner withhold for a delay prior to completion that appears to be delaying the scheduled completion date? YES

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What if the contractor is late?

The Owner withholds money

- AIA § 9.5 DECISIONS TO WITHHOLD CERTIFICATION

  § 9.5.1 The Architect may also withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss for which the Contractor is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of

  .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or

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What if the contractor is late?

The Owner withholds money

- ConsensusDOCS § 9.3 ADJUSTMENT OF CONSTRUCTOR'S APPLICATION FOR PAYMENT

  The Owner may adjust or reject a payment application or nullify a previously approved payment application, in whole or in part, as reasonably may be necessary to protect the Owner from loss or damage based upon the following to the extent that the Constructor is responsible, under the Agreement:

  9.3.5 reasonable evidence of delay in performance of the Work such that the Work will not be completed within the Contract Time; or

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What if the contractor is late?

The Owner withholds money

- *DBIA is really vague*
  - DBIA § 6.3 Withholding of Payments

...If the Owner determines that Design-Builder is not entitled to all or part of an Application for Payment, it will notify Design-Builder in writing at least five (5) days prior to the date payment is due. The notice shall indicate the specific amounts Owner intends to withhold, the reason and contractual basis for the withholding, and the specific measures Design-Builder must take to rectify Owner's concerns...

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What if the contractor is late?

And it is not likely that the Contractor will see this money until the project is at least substantially complete, and the owner has assessed its damages

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What money can either side get for delay?

There are two kinds of damages:

- "actual" damages which are out of pocket costs due to late completion, such as extra rent at old facility; extra inspection/management cost; furniture storage; etc.

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What money can either side get for delay?

- And, "consequential" damages which are things that flow from the fact that the owner couldn't put the work to its intended use – usually, lost profits.

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What money can either side get for delay?

- Many contracts also state that the parties agree to **waive** the consequential damages entirely
  - AIA § 10.1.6
  - ConsensusDOCS § 6.6
  - DBIA § 10.5
  - EJCDC § 4.03.C.3 (Contractor waives, not Owner)
- This is generally inserted for the benefit of the *contractor*, since it is the owner who stands to lose a lot of profit if a project isn't done on time

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What if the contractor is late?

- Many contracts state that the parties agree to **liquidate** the actual damages (to a daily amount) instead of having to prove them item by item later. (Owners *might* have to prove some *actual* damage on private jobs to recover LDs)
- This is generally inserted for the benefit of the *owner*, but contractors often like the fact that they can know their risk ahead of time

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What if the contractor is late?

ConsensusDOCS allows parties to set different amounts of Liquidated Damages for late Substantial Completion and late Final Completion – § 6.5.

- *Query: how can you set LDs for late Final Completion when you have no idea which items will still be on the punch list after substantial completion?*

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What if a subcontractor is late?

Subcontracts should provide not only for a "pass-through" of the damages that the owner assesses against the GC for delay, but also for any other damages the GC might incur because of a sub's delay, such as:

- *extended field conditions*
- *Extended home office overhead*
- *Increases in prices, wage rates*
- *Claims from other subs*

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How does a contractor make a claim for more time?

A good place to start is *the language of the contract.* Many are very specific as to what you have to prove

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How does a contractor make a claim for more time?

A good time to start is RIGHT AWAY. Keep the kind of documentation discussed above to prove schedule impacts and costs

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How does a contractor make a claim for more time?

If the delay looks to be significant, the contractor may want to talk to the owner and try to agree on how the conditions and expenses will be documented so that a fight can be avoided later

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How does a contractor make a claim for more time?

If the delay looks to be significant, the contractor may want to talk to a scheduling consultant to set up the right systems for capturing the accurate data

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Puzzlers

Q: When do you give notice if you don't know what the impact might be?

A: Follow the contract , but, generally **As Soon As Possible**, even if you don't know yet that there will be an impact. This allows the owner maximum opportunity to take action to avoid a delay.

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Puzzlers

Q: What if the event is ongoing (e.g., 40 days/nights of rain; notice from supplier that goods are stuck in customs – notice after day 10? 15? 40?)

A: Follow the contract – but if it doesn't say otherwise:

- Copy everyone on daily reports, weather data
- Try to reconcile at week end, month-end
- Ask for direction (even if you don't expect to get it)

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Puzzlers

Q: What does a contractor do if the owner won't authorize an extension?

A: Act as if you were spending your own money. You might well not get any money, so do what is the less expensive thing to do:

- overtime vs. schedule extension
- Buying readily available goods at higher price
- Temp. heat, gravel, additives, blankets

And make sure the owner knows everything you are doing.

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Puzzlers

Q: What does a subcontractor do if the delay isn't the owner's fault, but not the sub's fault either?

A: This is a tough one. Often subcontracts are drafted to allow a sub more time only if the general gets more time, and money only if the general gets more money. This leaves the sub out in the cold if the fault is the general's.

Some courts won't enforce "pay if paid" clauses in this situation, but that doesn't solve the delay issue: the job still needs to be done on time which might force a sub into overtime/acceleration for something not his fault.

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Puzzlers

Q: What does a subcontractor do if the delay isn't the owner's fault, but not the sub's fault either?

A: **This is a tough one.** Often subcontracts are drafted to allow a sub more time only if the general gets more time, and money only if the general gets more money. This leaves the sub out in the cold if the fault is the general's.

Thinking ahead to modify subcontract language to make sure the sub is not penalized for someone else's delay is the best thing. Another step would be to document that schedule change was not sub's fault and treat it as a change directive.

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Puzzlers

Q: What about subcontractor vs. subcontractor delays - how do they get worked out? One sub has no duty to the other.

A: These become the problem of the GC – unless the GC put very specially drafted language in the subcontracts making each sub agree that they have duties to the others, that the others are "third-party beneficiaries" of the contract, and specifically taking the GC out of the mix. Even then there is no guarantee this will work.

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Puzzlers

Q: What about a delay caused by the architect, who now has a conflict of interest in ruling on claims?

A: The same problem exists with all claims. The parties should remind the Architect of its duty to act impartially. If the Architect will agree, or the parties agree, the Architect can be taken out of the middle and someone else decide. *It will be faster and cheaper to get an answer sooner rather than later, so it is in everyone's interest to get things ruled on quickly.*

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Puzzlers

Q: What if a change order partially addresses/compensates time or money for a particular change?

A: Do Not Sign Anything That Doesn't Address All Issues (unless you can reserve your rights in the document, or you are really, really desperate).

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Puzzlers

Q: What if the owner/GC says "Trust me. We'll be fair" or "We'll figure it out after the job is finished"?

A: (now, honestly, what did you think I was going to say?)

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Best Practices

1. **Document your assumptions** about site conditions, weather, intended subcontractors, etc., when preparing your estimate. This allows you to show what you had in your bid for "reasonably foreseeable" conditions

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Best Practices

2. **Avoid having a fixed date to *finish* the project if you don't have a fixed date to *begin*** (e.g., you'll be waiting on a Notice to Proceed but have to be finished on June 1). Your contract should have either a fixed start and fixed end date, or a number of days added on to the notice-to-proceed date

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Best Practices

3. **Manage expectations** by putting timeframes for claims, responses, actions in the agreement

   - And make sure that if you are telling a contractor that he designer will respond in a certain number of days, that agreement is in the designer's contract too.

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Best Practices

4. **Train personnel** to document not just the existence of an impact, but also the detail of the impacts: daily log shouldn't just say "too much rain to work today." It should say "we had five workers show up on site prepared to operate the following pieces of equipment for full shifts. The workers were unable to perform today4.

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Best Practices

5. **When you suspect a delay, notify the Owner and designer *immediately,* even before the contract says you have to.** If you don't know the impact, it's better to tell the Owner that you have an impact that you can't quantify than to wait until you *can* quantify it

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Best Practices

6. **Track, in as much detail as possible, any direct costs associated with a delay**. Direct subs and suppliers to do the same. *You can never recover what you can't prove*

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It's About Time

Questions?

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Susan's practice consists primarily of advising construction companies, sureties, design professionals, and owners in their day-to-day business ventures, including the drafting and negotiation of all types of agreements, resolution of disputes, trying lawsuits and arbitrations, strategic and succession planning, and representing sureties in bond claims and litigation. She also serves as an arbitrator and mediator.

Susan began her career in construction law by working for Professors Ralph Nash and John Cibinic, co-authors of Federal Procurement Law, in the Government Contracts Program at George Washington University Law Center. Upon graduation, she became a trial attorney at the U.S. Department of Justice, Civil Division, where she represented the United States in construction litigation. In 1977, she went into private practice, continuing her focus on civil litigation and construction-related issues.

Practice Areas

- Construction
- Government Contracts
- Real Estate

Representative Experience

- Represented general contractor in arbitration over design-build project for replacement of an arena's inflated dome, won seven-figure award.
- Represented general contractor in litigation over water infiltration of condominium project, obtained insurance coverage of all damage.
- Negotiated construction contracts on behalf of owner of performing arts center.
- Negotiated contracts for construction and operation of water treatment facilities.
- Negotiated contracts for construction of casinos, both water-based and on tribal land.
- Served as arbitrator in disputes arising out of delayed construction of golf course community, and construction of sewer piping systems.
- Routinely prepares construction contracts, design agreements, subcontracts, master subcontracts, purchase orders, lien waivers, insurance and bond requirements, bills of sale, and daily report forms for clients.
- Presents training sessions for project managers and superintendents on issues such as claim documentation and effective use of daily reports.

Education

George Washington University, J.D., *with honors*, 1974

University of Michigan, B.A., *with honors*, 1971

Of Note

Susan has written and spoken extensively on virtually all areas of construction law. In 2005, her article, "The Myth of the One-Year Warranty and Other Construction Warranty Issues" was selected by the editors of the American Bar Association's Property and Probate Magazine as the "Best Practical Use" real property article of the year.

Community Involvement

- Central Exchange Education Foundation, Board Chair
- Association of women lawyers Foundation, Board Member
- Heart of America United Way, women's Leadership Circle Board Member
- Swope Ridge Gardens Senior Housing, Board Member

Bar Admissions

- Iowa 2007
- Kansas, 1992
- Missouri, 1978

Professional Affiliations

- American Bar Association
  - Real Property, Probate and Trust Section
  - Public Contract Section
  - Tort and Insurance Practice {Surety} Section
- The Missouri Bar
  - Construction Law Committee, past Chair
- Kansas City Metropolitan Bar Association
  - Construction Law Committee, past Chair
- American Arbitration Association
  - Panel of Construction Arbitrators
- American Bar Foundation (Fellow)
- Builder's Association of Missouri
- Associated General Contractors
- Construction Finance Management Association
- Kansas City Surety Association
- Construction Specifiers Institute

Articles

- "If Stimulus Funds Can't Stimulate the Construction Economy, What Will?" *Ingram's*, May 2009
- Co-author, "Ethical Reform for Federal Contractors," *Building Profits Magazine*, published by the Construction Finance Management Association, March/April 2009
- Co-author, "What Have We Done to the Lien Waiver? Way Too Much," *Probate & Property*, published by the American Bar Association, January/February 2009
- Monthly columnist, *Contractor* magazine
- Articles in: *Building Profits; Construction Specifier; ENR* Magazine; *Practical Real Estate Lawyer* (ALI/ABA); *Modern Builder*; Kansas City, Springfield and St. Louis, Missouri *Business Journals*

Presentations

- "The ABCs of DBEs: Understanding Preference Programs in Procurement," AICPA, Dec. 2010
- "What's Going On in Construction?" BKD, Nov. 2010
- "Managing Subcontractor and Supplier Financial Risks," Associated General Contractors webinar, Aug. 2010
- "Federal Ethics Compliance Requirements" Annual Meeting of the Construction Industry Certified Public Accountants, Chicago, Ill., July 2010
- "New Ethics Compliance for Federal Contractors," Construction Industry CPAs/Consultants Association, June 2010
- "New Ethics Compliance for Federal Contractors," Construction Financial Management Association, June 2010
- "Federal Ethics Compliance Programs" Annual Convention of the Construction Finance Management Association, Kialua, Hawaii, June 2010
- "Turbulent Economic Times for General Contractors: Implementing Practices to Ensure Survival During this Difficult Period for Contractors," Associated General Contractors, March 2010

- "Risk Management of Subcontractors" Annual Convention of Associated General Contractors, Orlando, Fla., March 2010
- "How to Keep the Economic Slowdown From Taking You Down," Kansas Gas Service in-house seminar, June 2009
- "Killer Contract Clauses," Mechanical Contractors Association of Iowa, February 2009
- "New Federal Requirements for Business Ethics Compliance," Surety Association of Kansas City, January 2009
- Keynote speaker, annual meetings of National Association of Surety Bond Producers; Kansas Contractors Association; Kansas Consulting Engineers Association; Missouri Concrete Masonry Council and National Association of Women in Construction.

Recognitions

- Susan was recognized as a 2011 Dean of the Trial Bar by the Kansas City Metropolitan Bar Association.
- In 2011, she was named amongst the "Best of the Bar" by the *Kansas City Business Journal* for the seventh time.
- She is listed in the current edition of *Best Lawyers in America* in the area of Construction Law and has been since 2003.
- She has been selected for inclusion in *Missouri & Kansas Super Lawyers* for Construction/Surety since 2005.
- Susan was recognized as a Rainmaker by *Ingram's Magazine* in 2009.
- In 2007, Susan was elected as a Fellow of the American Foundation by The Missouri Bar Association, an honor reserved for no more than half of 1 percent of the state's attorneys.
- Susan was among the first group of 25 women to be chosen as *Women Who Mean Business* in 2000.