

Your Construction Project is Running Very Late. Who Pays?

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I am always surprised when a client tells me that a construction project in his or her building finished on time and on budget. In my role as a construction lawyer and litigator, I usually get called in once a job goes south. From where I sit, all construction projects would appear to run late.

But when they do, who has to absorb all the additional costs which accompany a delayed project? Who pays for the Contractor's extended labor and supervision costs? Who pays for the Owner's carrying costs and lost rent? The answer is usually determined by the contract between the parties—and the party who drafts the contract often has a major influence over how those questions are answered. Here's why.

Most people in real estate are familiar with "time of the essence" clauses. They eventually rear their head in every contract of sale for real property. Basically, it means that the closing date is etched in stone. Miss it even by one day, and you are in material breach and liable for damages.

What many people do not understand is that one can make any date in a contract "time of the essence." And in construction contracts, an Owner is foolish not to. That is, the substantial completion date (at the least, and sometimes other milestone dates) should be made "time of the essence" in the written contract. Then, as with contracts of sale, if the

Contractor doesn't finish by that date, it will be in material breach and subject to damages. Those damages could be "liquidated damages" (that's those pre-established amounts you like to think of as penalties, like \$1,000 per day), or they could be actual damages (like the cost of extended fire watch services, or temporary heat or scaffold rental, or lost rent). But whether they are actual or liquidated damages, if the Contractor runs past a "time of the essence" deadline, it can be liable to the Owner for those damages.

But what happens if the Contractor is delayed through no fault of its own as, say, by another contractor, or adverse weather, or a strike? Whether or not that is the Owner's problem, or the Contractor's problem, is largely up to you.

If your contract has what we call a "no damage for delay" clause, you can make it the Contractor's problem. A "no damage for delay" clause says that if the Contractor encounters any delays caused by third parties (or even by the Owner!) the Contractor is NOT entitled to recover any additional costs from the Owner. None. The Owner may have to give the Contractor an extension of contract time, so that the Contractor is not in material breach when it fails to finish by the substantial completion date (which is important, because the Contractor would otherwise be in breach for violating the "time of the essence" clause. But no money; no damages.

From an Owner's perspective, a "no damage for delay" clause is a pretty powerful weapon. And it's not in the standard AIA A101 or A107 form of contract or the A201 general conditions. So if you are using AIA documents, thinking them to be "standard" form contracts, you may be doing yourselves a major disservice.

Can a "no damage for delay" clause protect you even when you are the party which caused the Contractor to be delayed? Usually yes. Not if you have deliberately or willfully or maliciously taken action to delay the Contractor. But pretty much anything short of that – even an Owner's inept contract administration – is protected against the Contractor's claims for delay damages in the face of a strong "no damage for delay" clause. All the Contractor can get from the Owner is an extension of time. Not money.

So, to sum up: You can sometimes be the master of your own destiny.

- are you using a construction contract or a rider tailored to your individual needs, or just a form AIA you pulled out of your file cabinet; or worse yet, the contract which the Contractor pulled out of its file cabinet?
- if you are prescient enough to have consulted a lawyer to draft you a customized contract, does it include a time of the essence clause requiring the Contractor to complete by the substantial completion date (or achieve other milestones on time) under penalty of being in material breach of contract?
- and, most importantly, does your contract contain a "no damage for delay" clause which prevents the Contractor

from collecting any compensation from you for delays caused by third parties, or even by you (short of your own malicious conduct)?

The most important thing you can do is consult a lawyer before the project begins to obtain a contract which protects your interests; not afterwards once your project becomes one more "problem job" which ran late.

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