Can a Contractor Have a Critical Path Delay When the General Contractor Does Not?

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Abstract: To prove entitlement to delay damages, it has been reasonably established (by best practices, as well as case law) that a contractor must show a critical path delay to project completion. But, what happens when an owner-impact extends the time a subcontractor must remain on the job, but doesn't extend the project completion date? Shouldn't the owner be liable for any damages to the subcontractor? If not the owner, wouldn't the GC have some risk? What type of analysis would be required to prove entitlement to these subcontractor delays? Does current case law have any answers? This article will discuss the issues, examine existing case law, establish how experts analyze and prove subcontractor delays, and provide an example of an analysis for this condition. This article was first presented at the 2011 Annual Meeting as CDR-635.

Key Words: Claims, contracts, contractors, critical path delay, damages, and subcontractors

It is a generally accepted principle in construction that only delays critical to project completion can be considered compensable, or liable, from the owner. Non-critical delays simply absorb project float, and do not allow recovery of delay (time-related) damages. As such, a subcontractor that is extended on a project because of a non-critical delay, may not be able to recover for the costs of its superintendent, office staff, trailers, and sometimes equipment.

Another concern for subcontractors is that GCs often insist on contract language that delay costs are only reimbursable if liability exists and delay costs are actually recovered from the owner. The inclusion of such language can shift the risks of delay on construction projects to subcontractors —the party that may have the least amount of control over the progress of construction. But that doesn't mean the subcontractor does not actually incur delay-related costs, including when the subcontractor incurs delays to its work that is not on the project's critical path.

A common example of this type of delay is when a drywall subcontractor who is delayed on a particular floor because of an owner change in the rough-in electric, but the project schedule shows the drywall activities have sufficient float remaining to absorb the delay. The overall project completion date is not extended, but the drywall contractor is forced to be on the project longer than anticipated. In this situation, the question becomes: Is the subcontractor entitled to recover for the extra costs it has incurred because of these delays?

To address such questions and facilitate the discussion, this article is organized into the following sections:

- Pass-through claims: The contractual relationship between a subcontractor and an owner.
- Recovering delay damages through the Miller Act.
- Combating the no damage for delay clause. And,
- Overall strategies for proving a subcontractor's delay claim.

The recommendations in this article are technical scheduling suggestions based on the authors' experience with construction delay and disruption cases. We recommend that parties that may be involved with these issues seek guidance related to any potential legal implications from a knowledgeable construction attorney.

Pass-Through Claims: The Contractual Relationship Between a Subcontractor and an Owner

In general, a subcontractor does not have standing to bring a suit against the owner for damages caused by the owner because of a lack of privity of contract. See Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed.Cir.1984).

However, under certain circumstances, subcontractors are able to recover damages caused by the owner through the use of pass-through claims. A pass-through claim is a claim:

- by a subcontractor who has incurred damages resulting from the actions of the owner/government with whom it has no contract; and
- submitted by the GC who has a contractual relationship with both the subcontractor and the owner/government.

See: Interstate Contracting Corp. v. City of Dallas, 135 S. W.3d 605, 610 (Tex. 2004).

As such, the claim from the subcontractor "passes-through" the prime contractor to the owner/government.

In order to submit a pass-through claim to the owner, the general contractor must, "sponsor and certify the subcontractor's claim and bring the action in its own name [6]." This certification, "…must be submitted with the prime contractor's belief that there is 'good ground' for the claim, which is different from the prime contractor's belief that the claim is certain [6]." In addition, a contractor is limited to passing through only those suits for which it is liable to the subcontractor. See Severin v. United States, 99 Ct. Cl. 435 (1943).

The Severin Doctrine

With respect to contracts with the US federal government, the Severin doctrine, developed from the case of Severin v. United States, 99 Ct. Cl. 435 (1943), places limits on the government's exposure to pass-through claims.

In the Severin case, the court held a subcontractor could not recover against the government in a representative

lawsuit if the prime contractor was not also liable to the subcontractor on the same claim. See Severin, 99 Ct.Cl. at 443. Thus, under the Severin doctrine, "a prime contractor may sue the government on behalf of its subcontractor, in the nature of a pass-through suit, for costs incurred by the subcontractor [because of the government's conduct] . . . [i]f the prime contractor proves its liability to the subcontractor for the damages sustained by the latter . . . a showing [which] overcomes the objection to the lack of privity between the government and the subcontractor." See Harper/Neilsen-Dillingham, Builders, Inc. v. United States, 81 Fed. Cl. 667, 674-6-75 (2008); see also E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999).

The burden of proof under this doctrine has shifted to the owner to prove that the prime contractor is not liable to the subcontractor for the respective claims. See Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810 (Fed.Cir.1984); Blount Bros. Constr. Co. v. United States, 171 Ct.Cl. 478, 346 F.2d 962, 964-65 (1965).

Liquidating Agreements

Through the years, the Severin doctrine has been refined to narrow the severe consequences of its strict application.

One example of this narrowing is that the Severin doctrine requires a complete release or contract provision immunizing the prime contractor from any liability to the subcontractor. See E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d at 1370 (Fed. Cir. 1999).

Thus, the Severin doctrine does not bar a suit against the government if the GC and the subcontractor enter into a well crafted liquidating agreement.

The concept surrounding a liquidating agreement is that the subcontractor releases the GC from liability, and in exchange, the GC agrees to pursue the claims against the owner on behalf of the subcontractor.

A liquidating agreement has two seemingly opposite purposes—first, to satisfy the Severin doctrine requirement that the GC is technically and legally liable to the subcontractor for the claim being passed through; second, to limit the risk to the GC in the event that the pass-through claim is not successful.

One New York Supreme Court stipulated what was required in a liquidating agreement:

"• the prime contractor acknowledges liability to the subcontractor for increased costs;
- the prime and sub agree to 'liquidate' that liability to the amount the prime is able to recover from the project owner; and,
- the prime agrees to pursue the sub's claim and pass through the recovery, if any, to the sub."

See, e.g., Bovis Lend Lease LMB Inc. v. GCT Venture, Inc., 285 A.D.2d 68, 728 N.Y.S.2d 25, 27 (N.Y.App.Div.2001).

In entering these agreements it is important for a subcontractor to make certain that it has some authority or influence over the owner/GC's ability to settle claims. Without this authority, the owner/GC may settle claims without regard to the interest of the subcontractor.

The following are examples of how pass-through claims are handled in the US federal courts:

E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369, 1370 (Fed. Cir. 1999)

In this case, the US Federal Circuit found the government liable for unabsorbed home office overhead costs of a subcontractor whose work was delayed by the owner, even though the prime contractor was not delayed in the completion of the overall project.

The subcontractor, Clontz-Garrison Mechanical Contractors, Inc., (CG), was delayed 60 days by owner-caused poor plans and specifications. CG submitted a pass-through claim to E.R. Mitchell Construction Co., (Mitchell), who brought a suit against the government on behalf of CG.

The court found that:

- There was no dispute regarding the government's liability for the faulty plans and specifications or the number of days that the subcontractor was delayed.
- The government had approved the schedule which stipulated the timeframe in which CG was supposed to work.
- The government was put on notice that the delay was increasing the costs of both Mitchell and CG.
- The subcontractor satisfied all of the requirements for entitlement to Eichleay damages. And,
- "…it should be clear that our decision on the legal issue in this case is dependent on the operative facts of this case, which include the awareness and approval by the government of CG's duty to have completed its work by a date certain."

While this case clearly shows an example of case law where the owner is responsible for delay damages resulting from owner issues that were not on the critical path, the case has limited application because the government failed to raise the Severin doctrine as a defense in the case. Thus, the appeals court did not allow it to then raise this defense on appeal. Had the government raised this defense at trial, the government may have been able to prove that the contractor was not liable to the subcontractor for these delay costs. Assuming that the government succeeded in this assertion, the outcome of this case may very well have been different.

J.L. Simmons v. United States, 304 F.2d 886 (Ct. Cl. 1962)

In J.L. Simmons v. United States, the court defined the basic requirements of a liquidating agreement. The court held that where a prime contractor agreed to reimburse its subcontractor for damages suffered at the hands of the government, but only as and when the prime received payment for the subcontractor from the government, the prime may maintain its action against the US on behalf of the subcontractor.

The court further held, under the specific facts of that case, that a "waiver of lien and release" did not negate an action by the prime contractor on behalf of its subcontractors where the subcontracts did not expressly negate the prime's liability, even though the

waivers provided that if the prime was unsuccessful in prosecuting the subcontractor claims the prime's liability would be extinguished.

In US state courts, the extent to which a contractor must admit liability to a subcontractor before sponsoring a claim varies. As stated elsewhere in this article, a subcontractor's success is wholly dependent on the circumstances of the subcontractor's case and the jurisdiction in which the case will be heard.

There are two basic arguments which favor the sponsorship of subcontractor pass-through claims. First, it facilitates the settlement of claims among the owner, prime and subcontractors, by bringing all the parties together in the same forum to resolve disputes. Second, it allows the contractor to avoid the two-step process of litigating with the subcontractor and then turning to the owner to reclaim these damages [11].

Recovering Delay Damages Through the Miller Act

Most people in the construction business are familiar with the intent of the Miller Act, 40 U.S.C. § 3133. On non-federal projects, first and second tier subcontractors can typically add a lien to a project to secure payment for labor and materials which were provided for that project.

Because mechanic's liens are not allowed on US federal projects, the Miller Act was passed requiring a GC to secure payment bonds as a means for a subcontractor to receive payment for labor and materials furnished [5]. A discussion on payment bonds is relevant to this article based on the success subcontractors have had in recovering delay damages through the use of the payment bond.

The general trend with regard to recovering delay damages on a Miller Act payment bond is that they are recoverable especially if they are characterized as increased labor and material costs [3]. The fact that the delay may be the owner's fault and not the prime contractor's is not relevant [3]. There are some general policy considerations that have supported a broader interpretation of the Miller Act with regard to delay damages.

The following rationale would allow for typical delay costs to be recovered by the Miller Act:

> "The cost of labor and material on a construction project includes supervision, job site office, and other overhead costs, which are recoverable against a Miller Act bond as part of contract costs. Increased or extended overhead costs are typically recoverable on a Miller Act bond and should still be recoverable when increased by delays [3]."

In one case, a court awarded delay damages because of active interference of the prime contractor despite the existence of a "No Damage for Delay" clause [4] (discussed more fully below). Another court determined that without the ability to recover delay damages through the payment bond, "the subcontractor's options for recovery of said damages would otherwise be inadequate [4]."

On non-federal cases, state courts have had differing opinions with regard to what extent, if any, a subcontractor can recover delay damages on a payment bond [3]. Some states have enacted "little Miller Act" statutes, which allow their state courts to interpret the state statutes based on the US federal act. As previously mentioned, it is wholly dependent on the circumstances of the subcontractor's claim.

There are certain issues which a subcontractor must be aware of with respect to payment bonds if it plans on claiming against a GC's payment bond to recover delay damages:

- It is the subcontractor's responsibility to be aware of whether or not a payment bond is required for a project which it is considering working on. For instance, a payment bond is not required under the Miller Act for projects awarded under $100,000 [4].
- If required by the contract, it is equally important that a subcontractor follow up and ensure that the payment bond is attained by the prime contractor despite the fact that attainment of a bond may be required by the contract.

  In Greenville Independent School District v. B&J Excavating, Inc., the subcontractors and suppliers were unable to recover damages on a public job because of a failure by the prime contractor to obtain a payment bond.

  Certain contract language may be included to require a contractor to furnish a copy of the bond to the subcontractor (or other beneficiary) such as the language included in A201-207 Section 11.4.2 [13].
- Filing suit for a Miller Act payment bond must be initiated within 12 months of the subcontractor providing the last work on the project [3]. A subcontractor should be aware of any contract language attempting to require dispute resolution which would preclude it from initiating the Miller Act payment bond in time.
- The amount of liability that a surety has under the payment bond is limited to the penal sum set forth on the bond's face. Consequently, in a situation where there are multiple claims such that the amount of claim is higher than the penal amount, "then the total pool of successful bond claimants will take a pro rata share of the penal sum [4]."

Combating the No Damage for Delay Clause

The existence of the "No Damage for Delay" (NDFD) clause is to protect the owner or GC from paying monetary damages when a project is delayed. However, the existence of widely accepted exceptions and lack of enforceability in some states has "muddied the waters" with respect to the success, or lack of success, that an owner/GC may have with using this clause as a defense.

In any case, it is good business sense for a subcontractor to plan that the NDFD clause will be enforced. Possible locations in a contract for the NDFD

clause are the following sections: "Time for Completion;" "Scheduling and Delays;" and "Claims."

The typical clause may read as follows:

> "No payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable [12]."

Since subcontractors are typically at a negotiating disadvantage and since these clauses merely shift all delay risk to the contractor/subcontractor, some states have determined that these types of clauses are void and unenforceable (law varies from state to state regarding validity of this clause on both public and private contracts) [12].

Even in states where the clause is enforceable, there are common exceptions to its enforceability. The following are the four most recognized exceptions—they involve situations where the delay was:

- not contemplated by the parties;
- so unreasonable in length as to amount to an abandonment of the project by the owner;
- caused by acts of bad faith or fraud by the owner; or
- caused by active interference by the owner. And,
- A fifth exception is also sometimes cited-delays caused by gross negligence [12].

Sometimes the NDFD clause is incorporated by reference or as a "flow-down" provision. As with most legal disputes, there is differing case law as to whether or not these "flow-down" provisions or incorporations by reference are enforceable [12].

Language providing disclaimer clauses may occur in various places: Instructions to Bidders, Terms and Conditions, or elsewhere in the contract.

In addition, a subcontractor must be aware of how a NDFD clause will affect a contractor's ability to submit a pass-through claim to the owner. If the owner can prove that the contractor is not liable to pay damages to a subcontractor because of a NDFD clause, a pass-through claim may not be allowed [12].

A prime contractor in New York was able to circumvent this situation by entering into a liquidating agreement with its subcontractor wherein it accepted liability to the subcontractor for delays caused by the owner. In this case, the court ruled that the prime contractor could sponsor a pass-through claim by accepting liability in the liquidating agreement despite the existence of a NDFD clause in the contract between the prime and the subcontractor [10].

In conclusion, awareness of the terms of the contract and rules by which a subcontractor's state is governed is essential to ensuring that a subcontractor has the ability to pursue damages for delays in the future.

Overall Strategies for Proving a Subcontractor's Delay Claim

Implementation of strategies for ensuring success in proving a delay claim starts at the very beginning of the project and continues through to the end. There are important factors to consider at every phase of the project.

Review and Negotiation of the Contract

At the beginning of the project, a subcontractor should ensure that a careful review of the contract is conducted (assisted by a knowledgeable construction attorney). Assume that a "No Damage for Delay" clause will be enforced. A subcontractor should attempt to remove, or at least lessen, the scope of the clause such that the subcontractor only assumes risk for specific causes of delay.

One representative clause prohibits the recovery of delay damages unless there is active owner interference as defined by the following:

> Another clause allows a "grace period" before delay damages are triggered. This would allow the contractor/subcontractor the ability to calculate a contingency for the delay costs during this aforementioned grace period. The following is a portion of the clause referencing the existence of a grace period:
>
> "The Contractor shall be permitted an adjustment in the Contract Sum if any Delays, either individually or taken in the aggregate, cause the Contract Time to be increased by more than ( ) days (the "Grace Period") [2]."

While not specific to the situation in question where a subcontractor is delayed but the overall project is not delayed, certain alternate contract provisions may be worth considering in order to overall increase the likelihood of success in settling disputes after the fact.

These types of provisions include the following, but are certainly not limited to them:

- include more specific definitions of events that justify a time extension;
- describe the proof required to justify a time extension for excusable and compensable delay; or,
- insert a provision on pricing of delay claims [2].

An example of the provision for pricing delay claims is as follows:

> "For each day of delay to the critical path caused by [insert a description of the relevant delay events], Contractor shall be entitled to (a) $ per day for its general conditions or jobsite overhead without any additional markup for profit or overhead; and (b) its increased costs for Subcontractor Work caused solely by the applicable delay with a markup of % for profit and overhead [2]."

While the clauses are generally meant for the owner/contractor agreement, they could certainly be changed to be applicable to the subcontractor agreement.

A subcontractor should also review the contract for conflicts. For example, the contract may state one thing, but an incorporation of a clause from the owner's contract to the GC may state something different. In addition, if it is a US federal project, be aware of whether or not a payment bond will be required. If it is, follow up to ensure that it is obtained.

Another consideration is to be aware of the jurisdiction where the contract states that a dispute will be settled. In one case, a project was in Georgia, but the contract stated that any disputes would be settled by Ohio law. The subcontractor was awarded two million dollars because an Ohio statute did not enforce a "No Damage for Delay" clause when it is "the owner or contractor's act or failure to act which caused the delay [9]."

The authors have seen cases where the GC put the owner on notice and requested that the subcontractor participate in preparing documentation to secure its delay and disruption costs, but the subcontractor didn't respond until well after the project was complete. Because the GC negotiated with the owner, the subcontractor lost the ability to pursue its pass-through claim, and was forced to negotiate or litigate only with the GC.

Timely Notice

During the project, there are also many issues to consider. As with the "No Damage for Delay" clause, a subcontractor should assume that "Timely Notice" clauses will be enforced. In fact, there are multiple cases where such clauses have been enforced.

It is especially important to keep a prime informed: "A lack of information regarding a subcontractor's delay claim may compromise the prime contractor's ability to obtain a remedy from the project owner [8]." If an owner is not put on notice regarding the delays that have occurred, the owner "has no opportunity to remedy the problem, take action to mitigate the damages that delay causes, or know that the contractor intends to seek additional compensation or a time extension [7]."

Many of these suggestions are important for any type of claim to be pursued whether it is against the prime contractor or intended to be passed through to the owner. In particular, a second look at Mitchell vs. Danzig serves as a reminder that an owner must be made aware of certain issues at the time they are occurring. Part of the success for the subcontractor in that case is because of the fact that the government was made aware of the delay contemporaneously.

Waiver of Rights

During and after a project, a subcontractor should be aware of a possible waiver of its rights to pursue a claim. This could be in the form of a waiver as part of a payment application or when executing a change order request. A subcontractor should ensure that there is some form of a reservation included if it is contemplating submitting a delay claim.

Good Documentation

Good documentation is another key to ensuring that the subcontractor is able to prove the damages it has incurred as a result of an owner change or decision. Accurate record keeping in the form of bid documentation, daily reports, pay requisitions, time and materials invoice slips, correspondence, input to schedule updates (preferably in the form of written correspondence), and weekly and/or monthly meeting minutes are examples of the types of documents that are needed to increase the success in documenting damages. A subcontractor should also track expenses by base contract, change order and/or disputed work.

Involvement in the Baseline Schedule and Subsequent Updates

Finally, it is important for the subcontractor to be involved in the development of the baseline and subsequent updates of the schedule to be approved by the owner. In one case, a subcontractor relied on one schedule while the prime contractor relied on a different schedule. In this case, the board's decision was favorable to the government. Fru-Con Constr. Corp., ASBCA 53544, 02-1 BCA ¶ 31729.

> "From the subcontractor's point of view, this case emphasizes one reason why a sub should participate in the creation of the contractor's CPM schedule. The sub needs to be sure that adequate time is available for its work and, if early completion is contemplated by the sub, whether it will be prevented from doing so by other activities on the schedule [1]."

The subcontractor should provide detailed needs to the GC for any scheduling efforts, carefully identifying the subcontractor's period of performance, and the basis of that period. This includes sizes of crews, number and makeup of workers on the crews, and sequencing needs such as the number of crews planned to work concurrently. The phasing and sequencing of the subcontractor's work is essential; if the subcontractor's work requires stockpiling of materials, then changes in the sequencing required by the project will likely cost the subcontractor additional labor and time to re-stockpile materials. Shifting from an orderly flow of work to an irregular schedule will decrease the subcontractor's labor efficiency and increase costs to the subcontractor.

Most subcontractors plan for regular wage rates for their workers, but many subcontracts include language that permits the GC to force the subcontractor to work as directed by the GC. This includes requirements to work weekends and holidays, absorbing any overtime required, even if the delays are not the fault of the subcontractor.

In addition, with the preparation and publication of the periodic schedule updates, it is not unusual for the GC's scheduler, as directed by the project manager, to reduce subcontractor activity durations, or to overlap the activities, changing the planned sequential work to concurrent work. This will rapidly increase labor requirements, generally reduce labor efficiency and increase costs. It is imperative that the subcontractor reviews each and every schedule update or revision to ensure that no changes are

made that will decrease productivity or increase risk to the subcontractor.

Another risk that may occur with the schedule updates is movement of the subcontractor's start date or completion date because of interference from other trades, the GC, or the owner. If this occurs, at the earliest recognition of the problem, notify the GC if the changed date will cause additional costs.

Other ways to minimize risks to the subcontractor include insisting on baseline and update printouts that show total float values to determine if the subcontract work is on the project's critical path, and if not, how close the work is to critical.

An important question that a subcontractor may ask is how to portray the delay it is experiencing in the schedule updates. The first question is whether or not the owner interference has added scope to the subcontractor's work. In this situation, the answer may be easier. A change order could be negotiated for the extra work which would include an appropriate markup for overhead and profit.

However, this markup may not cover the cost of mobilization/demobilization which may be required dependant on when the extra work occurs. In this case, an insertion of a fragnet into the schedule may be appropriate. This fragnet might show previous completion of base contract or non-disputed work and a subsequent remobilization of a work force to complete the new work.

A more difficult situation would occur if there is no change to the scope of work of the subcontractor. Perhaps the subcontractor's time of performance is extended on the contract because of issues beyond its scope of work.

In this case, the subcontractor would need to show on the schedule how the duration for its scope of work has increased. The subcontractor would also need to be able to explain and document that the increased duration was not merely because of its own inability to complete the work on time.

A fragnet might be necessary to show a stoppage of work and subsequent restart because of the owner change. In the example used in the introduction regarding the delay of the drywall subcontractor, the fragnet could show the following: a start of work by the drywall subcontractor; a stoppage of work to fix the change in the rough-in electrical; and a subsequent restart of work on the drywall. The effect is the drywall subcontractor is on the jobsite longer than anticipated.

For that example, the ability to show this sequence of events on the contemporaneous schedule updates would be very helpful in proving the subcontractor's delay. However, this type of detail may not have been added contemporaneously. It is then up to the subcontractor to show the delay using contemporaneous documentation (in particular, meeting minutes, correspondence, daily reports, etc.), and might require some type of forensic schedule analysis to determine the actual effects of delay or disruption.

Loss of efficiency problems can most easily be demonstrated through the use of a "measured mile" type of disruption analysis, which requires good documentation of both the original plan of resources, as well as the actual consumption of resources, on the project.

In sum, certain factors are key to a subcontractor's successful pursuit of a delay claim:

- Contractual negotiations prior to the start of work.
- Involvement in, and documented feedback for, the baseline schedule and subsequent updates.
- Awareness of the rights and obligations of the subject contract. And,
- Timely notice and good contemporaneous documentation which shows how the subcontractor was affected by a specific change.

These are general recommendations to ensure that a subcontractor has the best chance at recouping its delay costs because of owner changes on a project.

As has been demonstrated, there is no clear-cut answer as to what delay damages a subcontractor may be able to recover because of owner-caused issues. The specific set of circumstances and the jurisdiction of the individual case are the determining factors of the outcome for each situation.

However, a subcontractor should do everything it can to increase its chances of attaining a favorable outcome (for any damages it is seeking). The following recommendations should be followed:

- **Negotiate the Contract** – Try to include language that is more favorable to the subcontractor especially in terms of a possible "No Damage for Delay" clause.
- **Know the Contract** – Follow the requirements of the contract including giving timely notice of present and future claims.
- Be involved in the generation of the baseline schedule and give input for the schedule updates. Know how your scope of work is included in the schedule and understand how it is incorporated with the work of other subcontractors. And,
- Maintain accurate documentation.

Finally, as noted earlier, it is recommended that parties that may be involved with this issue seek guidance related to any potential legal implications from a knowledgeable construction attorney. ◆

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