



Proving and Pricing Subcontractor Delay Claims¹

James G. Zack, Jr., CCM, CFCC, FAACEI, FRICS, PMP²

&

Thomas F. Peters, P.E., CFCC³

Abstract – Much has been written over the years about proving and pricing contractor claims on construction projects. But little has been published about subcontractor delay claims. Do subcontractors have the same rights and remedies as the prime contractor? Are they held to the same standards? What are their legal rights? Do owners owe time extensions for subcontractor delays? Are prime contractors at risk when they “pass through” a subcontractor’s delay claim to an owner? Are subcontractors at risk when a prime contractor opts not to sponsor their delay claim to the owner? This paper examines some issues concerning subcontractor delay claims.

Introduction

As recent as the 1960’s and 1970’s general contractors typically self-performed as much as 85 – 90% of the work. In the 1980’s general contractors started self-performing less and less work, turning instead to the use of specialty subcontractors. At the outset of that decade, it was not uncommon to see public works contracts requiring that the general contractor self-perform at least 50% of the work. By the end of that decade, many public owners had dropped the requirement to 33% of the work. The 1990’s witnessed the growth of the Construction Manager at Risk (“CM@Risk”) concept. This resulted, in some cases, in general contractors performing virtually no work in the field at all but expending around 5% or so of the project cost in their role

¹ The opinions and information provided herein are provided with the understanding that the opinions and information are general in nature, do not relate to any specific project or matter and do not necessarily reflect the official policy or position of Navigant Consulting, Inc. Because each project and matter is unique and professionals can differ in their opinions, the information presented herein should not be construed as being relevant or true for any individual project or matter. Navigant Consulting, Inc. makes no representations or warranties, expressed or implied, and is not responsible for the reader’s use of, or reliance upon, this paper, nor any decisions made based on this paper.

² Executive Director, Navigant Construction Disputes Forum, the industry’s resource for thought leadership and best practices on avoidance and resolution of construction project disputes globally, based in Irvine, CA.

³ Associate Director, Navigant Consulting, Inc. located in Los Angeles, CA. Provided input on technical content.



as the CM@Risk. One unexpected consequence of this change in project delivery is the substantial growth of subcontractor claims. As a result, general contractors frequently pass through subcontractor claims to the owner, with the full expectation that owners will compensate subcontractors for the damages that have been claimed. Most owners are unwilling and unprepared to deal with these claims, frequently citing the lack of contractual privity as their basis for rejection.

Typical Subcontractor Delays and Impacts

Subcontractors, like general contractors, are frequently impacted by events and actions beyond their control. In addition to the typical risks involved in construction (i.e., changes, differing site conditions, work stoppages, delays, material and craft labor shortages, adverse weather, etc.) subcontractors face other problems also. Subcontractors routinely deal with four sets of problems on every construction project. These problems are caused by the general contractor, the owner, other subcontractors, as well as third parties or force majeure events.

General contractor caused impacts include, at a minimum, the following.

- Maladministration by general contractor – Examples include inadequate coordination between subcontractors as well as between the prime contractor and each subcontractor; inadequate scheduling; slow delivery and return of subcontractor submittals to and from the owner; failure to live up to contract commitments; failure to pass subcontractor delay or cost impact notices to the owner; refusal to pass through (sponsor) subcontractor claims to the owner; etc.
- Inefficiencies imposed on the subcontractor by the general contractor – Examples include mid-project restrictions in elevator and crane use imposed by the general contractor resulting in delays or inefficiencies; reductions in dedicated layout space; out of sequence trench excavations by the general contractor denying the subcontractor easy access to their work; etc.
- Lack of direction from the general contractor – When two or more subcontractors plan to perform the work in the same area or on the same elevation at the same time subcontractors must look to the prime contractor to give direction as to who gets the work space first. At times, general contractors do not provide such direction causing subcontractor inefficiency due to stacking of trades.



- General contractor imposed changes in the scope of work – While the general contractor’s primary source of project change is the owner subcontractors must reconcile change imposed by both the general contractor and the owner. It is not uncommon for a general contractor to direct a subcontractor to perform work which was initially included in either the general’s work scope or that of another subcontractor. And, just as a general contractor cannot refuse to comply with a change directive from the owner (for fear of being declared in default under the contract) neither can a subcontractor refuse.
- General contractor imposed changes in means and methods – Most subcontract Changes clauses allow the prime contractor to direct changes to the subcontractor’s means and methods. When the general contractor directs the subcontractor concerning which floors or which room order to rough in; what areas of the project to work on first, second, third, etc. without regard to the subcontractor’s planned methods; etc. time and cost impacts are likely to arise.
- Late payment/no payment by the general contractor – While many States have Prompt Payment Acts intended to mandate prompt payments from owners to contractors and from general contractors to subcontractors, most subcontracts have Pay When Paid clauses or Pay If Paid clauses. Should the subcontract have “condition precedent” language embodied in it, a Pay If Paid clause may be enforceable. For example, six States have specifically upheld Pay If Paid clauses including Arizona⁴, Colorado⁵, Florida⁶, Georgia⁷, Maryland⁸ and Michigan⁹. At the same time, three other States have specifically rejected Pay If Paid clauses either by statute or in case law, including California¹⁰, New York¹¹ and Wisconsin¹².

Owners too, may cause impact to subcontractors in the following manner.

- Poor or inadequate contract administration by the owner – Slow response to submittals; slow or delayed decision making concerning substitutions; poor, untimely, overly

⁴ L. Harvey Concrete, Inc. v. Agro Construction and Supply Co., 939 P.2d 811 (Ariz. App. 1997).

⁵ Printz Services Corp. v. Main Electric, Ltd., 949 P.2d 77 (Colo. App. 1977).

⁶ Blasland, Bouck & Lee, Inc. v. City of North Miami, 96 F.Supp.2d 1375 (S.D. Fla. 2000).

⁷ St. Paul Fire & Marine Insur. Co. v. Georgia Interstate Elec. Co., 370 S.E.2d 829 (Ga. App. 1988).

⁸ Gilbane Building Co. v. Brisk Waterproofing Co., Inc., 565 A.2d 248 (Md. App. 1991).

⁹ Christman Co. v. Anthony S. Brown Development Co., 533 N.W. 2d 838 (Mich. App. 1995).

¹⁰ William R. Clarke Corp. v. Safeco Insurance Co. of America, 938 P.2d 372 (Cal. 1997).

¹¹ Westfair Electric Contractors v. Aetna Casualty & surety Co., 661 N.E.2d 967 (N.Y. 1995).

¹² Wis. Statute § 779.135.



burdensome or changed inspection methods; lengthy time to respond to Requests for Information; etc. can all impact the subcontractor.

- Owner imposed changes in scope – Since today’s general contractors typically self-perform much less work than they used to and many general contractors are operating in a CM@Risk mode virtually every owner issued change order impacts one or more of the subcontractors on site.
- Owner’s failure to recognize and process legitimate change orders – An owner’s consistent failure or refusal to acknowledge and issue change orders and time extensions can impact subcontractors every bit as much as this lack of action impacts prime contractors. In the first instance, the impact to cash flow on the site is almost immediate. Impact to labor productivity may arise if the general contractor is forced to accelerate to “recover lost time” or face potential termination for default. In the second instance, the subcontractor may face inordinately large liquidated damages if the prime contractor attempts to pass along all late completion damages they incurred to the subcontractors.
- Owner imposed changes in means and methods – Under the most frequently used Changes Clauses, owners maintain the right to direct changes to a contractor’s means and methods. Should an owner elect to exercise this right, any change to the general contractor’s means and methods will likely cause changes to the subcontractors as well.
- Late payment by Owner – Late payment from the owner to the general contractor will, in turn, assuredly cause late payment from the general contractor to the subcontractor. This is especially true if the subcontract contains a Pay When Paid or a Pay If Paid clause.

Impacts may be caused by other subcontractors especially if the project site is crowded or vertical. Such impacts are almost inevitable.

- Rework – A good deal of rework on a construction site is caused by one subcontractor (Sub A) damaging the work of another subcontractor (Sub B). Even though Sub A damages the work of Sub B, typically the general contractor will require Sub B to repair the work. As there is no contractual relationship between the two subcontractors, there is no contractual mechanism whereby the damaged subcontractor can seek compensation from the other subcontractor, short of litigation, which is normally impractical in the middle of an ongoing



project. And, general contractors are typically loathe to withhold money from one subcontractor and transfer it to another.

- Changes in means and methods – If a concrete subcontractor performs work out of sequence and constructs a slab prior to the electrical subcontractor's installation of under slab conduit the electrical subcontractor may be required to snake the under slab conduit under slabs already placed and drill through the installed slabs to place the stub outs. This certainly is a change to means and methods which will cost the electrical subcontractor time and money which may or may not be recoverable.
- Extended performance by other subcontractors – If a lead subcontractor (say a framing subcontractor) is running late then follow on subcontractors (such as a plumbing or electrical subcontractor) may be unable to rough in their work as planned in a timely manner.
- Termination and replacement of other subcontractors – Should the general contractor be compelled to terminate another subcontractor for default and have to replace the terminated subcontractor all follow on subcontractors whose work is dependent upon the terminated subcontractor will undoubtedly be impacted.

Impacts to subcontractors may also be brought about by third parties such as government agencies, utility companies, railroads, owner supplied vendors, etc.

- Rework – If a the fire marshal demands hundreds of additional sprinkler heads be installed, which in turn delays issuance of the Certificate of Occupancy, there is no doubt that the general contractor will require the subcontractor to comply with this demand, even though the subcontractor installed the fire suppression system exactly as designed and permitted. This will impact the subcontractor's time and cost.
- Changes in means and methods – Should the local municipality require the subcontractor to install the traffic signals and appurtenances only between the hours of 11:00 PM and 5:00 AM the subcontractor will be forced to comply. This change in means and methods will impact time and cost.
- Extended performance by Third Parties – If a pipeline subcontractor is required to submit drawings to a railroad company, who does not respond for 120 days after submittal, the subcontractor will likely be impacted.



Additional impacts may also be caused by force majeure events. The term “force majeure” is French and comes into the construction arena from insurance law. The term is defined as a “superior or irresistible force”.¹³ Initially, force majeure events were confined to unpredictable acts of nature such as earthquakes, tsunamis, floods, wildfires and such. In more current construction contracts, the term force majeure has typically been expanded to include a number of acts or events brought about by man, including labor actions, freight embargos, acts of war, acts of terrorism, acts of the government in its sovereign capacity, etc. In the United States most public works construction contracts acknowledge the existence of force majeure events either in a Force Majeure clause, a Delay/Time Extension clause or, in the case of the Federal Acquisition Regulations, in the Termination for Default clause.¹⁴ Most public works contracts provide for an excusable, non-compensable time extension in the event a contractor encounters a force majeure event, thus relieving the contractor from sanctions for late completion.¹⁵ However, private contracts and some foreign contracts provide recovery for both time and money lost due to a force majeure event.

Contractual Issues Concerning Subcontractor Delay Claims

Privity of Contract – There are a number of contractual issues that potentially impact subcontractor claims. The first, of course, is the prime contract between the project owner and the general contractor. Most prime contracts are not very explicit concerning subcontractor claims. Most prime contracts acknowledge in the Changes clause that if a subcontractor is involved in an owner issued change order, the contractor is expected to include the subcontractor’s costs in the change order cost proposal. But, there is very little other discussion of recovery of damages for subcontractors in the prime contract. Why is this? Because there is no privity of contract between the owner and any subcontractor. In law, “privity” is defined as

“Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest.”¹⁶

It follows then that the term “privity of contract” means the following.

¹³ Black’s Law Dictionary (Revised 4th Edition), West Publishing Company, St. Paul Minnesota, 1968.

¹⁴ FAR § 52.249-10.

¹⁵ Cibinic, John, Ralph C. Nash, James F. Nagle, Administration of Government Contracts, 4th Edition, The George Washington University National Law Center, Wolters Kluwer Law and Business, New York, 2006.

¹⁶ Black’s Law Dictionary (Revised 4th Edition), Ibid.



“Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on.”¹⁷

Thus, most owners, when preparing prime contracts, do not think of impacts, disruption or delay impact to subcontractors since there is no contractual relationship (privity of contract) between the owner and any subcontractor. In the United States, even when the owner pre-purchases equipment or materials or pre-selects some specialty subcontractor, and then assigns the purchase orders or subcontracts to the general contractor, such assignment is normally *ab initio* (from the beginning), typically making the general contractor responsible for the actions of the assigned supplier, vendor or subcontractor just as if the general had selected them themselves. Thus, owners typically take the position that subcontractor issues and disputes are the general contractor’s problem.

No Damages for Delay Clauses – Owners almost never review subcontracts issued by the prime contractor, although many public works contracts specifically require that a copy of each executed subcontract be submitted to the owner. And subcontracts frequently do not address delay and time extension issues in the same manner as the prime contract. Subcontracts very often contain No Damages for Delay clauses limiting a subcontractor’s exclusive remedy for delay to a time extension only even when the prime contract does not include such a clause. There are a number of States where No Damages for Delay clauses are unenforceable by statute. As of the 2006 – 2007 timeframe, some 15 States had prohibited these clauses, in whole or in part, including Arizona,¹⁸ California,¹⁹ Colorado,²⁰ Kentucky,²¹ Massachusetts,²² Minnesota,²³ Missouri,²⁴ Nevada,²⁵ North Carolina,²⁶ Ohio,²⁷ Oregon,²⁸ Rhode Island,²⁹ Texas,³⁰ Virginia,³¹

¹⁷ Black’s Law Dictionary (Revised 4th Edition), Ibid.

¹⁸ Ariz. Rev. Stat. §41-2617.

¹⁹ Cal. Pub. Cont. Code §7102.

²⁰ Colo. Rev. Stat. Ann. 24-91-103.5(1)(a).

²¹ 371 Ky. Rev. St., 45 A-245, §371-160. (It is interesting to note that this statute is applicable to some private contracts in addition to public works contracts entered into after June 26, 2007.)

²² Mass. Gen. Laws Ann., Chapter 30, §390.

²³ Minn. Stat. Ann. §15.411(2).

²⁴ Mo. Ann. Stat. §34.058.

²⁵ Nev. Rev. Stat. Ann. §§108.2453(e), 624.622(2)(c).

²⁶ N.C. Gen. Stat. Ann. §143-134.3.

²⁷ Ohio Rev. Code Ann. §4113.62(C)(2).

²⁸ OR. Rev. Stat. §279CV.315(1).



and Washington.³² However, most of these statutes apply only to (1) public works projects and (2) to direct contracts between public works owners and prime contractors. Despite statutory bans on such clauses in prime contracts, courts typically enforce No Damages for Delay clauses in subcontracts even States where such clauses are expressly disallowed by statute.³³

Two relatively recent court decisions, one in a State Court and the other in Federal Court, illustrate the devastating effect a properly worded No Damages for Delay clause can have on a subcontractor's claim. A New York Court of Appeals has ruled that a No Damages for Delay clause not only insulates the prime contractor from a delay claim but also insulates the owner from such claim despite the fact that the owner was the actual cause of the delay.³⁴ More recently, the Court of Federal Claims held, pursuant to the Severin Doctrine, that a No Damages for Delay clause in a subcontract barred any recovery of delay damages from the government because the clause exculpated the general contractor. Thus, the Court held, the general contractor could not pass through a subcontractor's delay claim even though the government was, apparently, the cause of the delay because the contractor did not owe the subcontractor any delay damages under the subcontract.³⁵ Many subcontracts go to great length to limit the subcontractor's ability to recover damages from the general contractor. Notwithstanding this inequity, subcontractors continue to sign such subcontracts believing they have no choice but to do so.

Waivers and Releases – Another issue is that of waivers and releases. Subcontractors frequently sign documents without fully understanding what they are signing. Two types of actions must be avoided by subcontractors if they want to preserve their rights to file delay claims.

- Waivers – When a prime contractor issues a change order to a subcontractor it is not at all uncommon for the change order to contain language such as the following –

“This Change Order includes compensation to the Subcontractor for any and all effects, delays, inefficiencies or similar demands associated with

²⁹ R.I. Gen. Laws §37-2-42(a),(d).

³⁰ Tex. Gov't. Code Ann. §2260.003(a)(3), (c)(5).

³¹ Va. Code Ann. §2.2-4335(A).

³² Wash. Rev. Code Ann. §4-24.360.

³³ Michel & Pfeffer v. Oceanside Properties, Inc., 61 Cal.App.3d (1976).

³⁴ Goldberg, Henry L., “Claims for Delay: Tactics for Owner Caused Delay – Is the GC Liable”, Blueprint: The Construction Surety Law Update, Summer, 2004.

³⁵ Harper/Nielsen-Dillingham Builders, Inc. v. United States, 81 Fed.Cl. 667 (2008).



this Project and the Subcontractor recognizes that there is no basis for any such claim in the future.”

In a recent case where a subcontractor signed change orders presented by the general contractor, all of which included this waiver language, a Federal Appeals Court ruled that the subcontractor in fact gave up all rights to raise any further claims related to any of the executed change orders.³⁶ Subcontractors need to be very cautious about signing change orders with waiver language.

- Releases – Most subcontract forms require that the subcontractor execute a lien release form as a condition precedent to receiving payments. Some forms are specifically designed as partial lien releases intended to release the general contractor from liability for anything paid for to date. Other lien release forms are much more broadly designed and are full lien releases and may be interpreted as having the effect of releasing the subcontractor for any and all issues arising on the project up to the date of the lien release. A recent decision from a Federal District Court in Pennsylvania denied a subcontractor recovery of damages related to any of the work performed during the period covered by the first 18 payment applications on the basis that the release language was broad enough to release the prime contractor from any liability for damages arising during this period of time.³⁷ Another recent decision, this time from a California Court of Appeals case denied a subcontractor recovery of some of the change order costs claimed on the basis that the lien waiver language signed previously by the subcontractor released the general contractor from the obligation of paying these costs.³⁸ Subcontractors need to be cautious about the lien release language they are signing in order to protect themselves.

Practical Problems Concerning Subcontractor Delay Claims

Owners Do Not Distinguish Between Delay and Impact – In addition to contractual problems, subcontractor claims are made more difficult because many owners do not understand or distinguish between delays on the one hand and productivity loss and cumulative impact on the

³⁶ NAFCO Electrical Contractors, Inc. v. Turner Construction Company, United States Court of Appeals, 2nd Circuit, No. 09-1369-CV, December 21, 2009.

³⁷ Sauer, Inc. v. Honeywell Building Solutions SES Corp., --- F.Supp.2d ---, 2010 WL 3824228 (W.D.Pa. Sep. 21, 2010)(NO.CIV.A. 08-92J0.

³⁸ Martin Brothers Construction, Inc. v. Thompson Pacific Construction, Inc., 179 Cal.App.4th, 102 Cal.Rptr.3d 419 (2009).



other. All too many owners believe that lost productivity and cumulative impact arise only from project delay. When an owner makes this assumption the logical reaction to a lost productivity claim originated by a subcontractor and passed through to them by the prime contractor is to demand that the prime contractor demonstrate that the subcontractor's delay was on the project's critical path when the impact arose.

Subcontractor Claims Not Well Presented or Documented – The second practical issue is that all too often subcontractor claims are neither well documented nor well crafted. Subcontractor claims are frequently one page total cost claims focusing exclusively on cost and time and rarely on entitlement and causation. This often occurs when a general contractor notifies their subcontractors that they are going to file a delay and disruption claim with the owner and invites the subcontractors to join in the claim. Subcontractors tend to believe that if the general contractor is submitting a delay or impact claim then they (the subcontractors) have to get on the bus also. Subcontractors assume that the general contractor's entitlement and causation arguments are equally applicable to the subcontractors and that all they need do is provide damage estimates. Simply put, one page claims focusing exclusively on damages are not credible in the eyes of the owner.

Subcontractors Often Do Not Understand How to Calculate and Present Delay – The third practical issue concerning subcontractor claims is that even at the prime contractor level there is disagreement in the industry over how to “prove” delay. AACE International's Recommended Practice – Forensic Schedule Analysis Practice Guide (“RP-FSAPG”)³⁹ is the only U.S. based document addressing how to perform forensic scheduling from the scheduling viewpoint. It is highly controversial and has not gained full acceptance in the industry.⁴⁰ As a result, subcontractors face the same difficulty of preparing a schedule delay analysis as prime contractors – what methodology should I use? Additionally, it should be noted that this Recommended Practice does not address delay from the subcontractor's perspective. Further, subcontractors frequently do not have access to the complete electronic schedule and do not have contemporaneous understanding of the project's critical path. In sum, there is a dearth of resources available to the subcontractor that has been legitimately impacted and wishes to make a proper claim for delay and delay damages.

³⁹ Recommended Practice 29R-03, Revision 2, 2011, AACE International, Morgantown, WV.

⁴⁰ See Lifschitz, Judah, Evans M. Barba and Alexis M. Lockshin, “A Critical Review of the AACE Recommended Practice for Forensic Schedule Analysis”, *The Construction Lawyer*, American Bar Association, Fall 2009. See also, Hoshino, Kenji and John Livengood, “A Defense of the AACE Recommended Practice for Forensic Schedule Analysis”, *The Construction Lawyer*, American Bar Association, Winter 2010.



Prime Contract Dispute Resolution Clauses – Finally, dispute resolution processes embodied in general contracts are almost invariably silent on the role of the subcontractor. And, in subcontracts, the dispute resolution process is often entirely different than that contained in the prime contract. For example, the prime contract dispute resolution process may contain a Dispute Review Board with appeal rights to arbitration under the American Arbitration Association Rules for Construction Disputes in accordance with the laws of the State of New York. The prime contractor’s standard subcontract document may mandate resolution of all disputes in the Superior Court of Cook County, Illinois under the laws of Illinois. Such disparate dispute resolution clauses are not at all uncommon.

Getting Subcontractor Delay Claims Passed Through to the Owner

For a subcontractor claim to be presented to the owner for recovery of damages, the claim must be passed through and often “certified” by the prime contractor to the owner. If the prime contract is a cost reimbursable contract, allowing all subcontract costs to be reimbursed by the owner to the prime contractor, passing through a subcontractor claim may not be problematical for the prime. Under almost any other form of contract – Lump Sum, Guaranteed Max Price, Unit Price, Cost Plus, or Incentive Fee – general contractors are often more reluctant to pass through subcontractor claims today than they were 20 or so years ago. Why? Passing through a subcontractor claim puts the prime contractor at risk in at least three different ways.

Severin Doctrine Risk – The Severin Doctrine stands for the proposition that a general contractor cannot file a claim against an owner on behalf of a subcontractor unless the general contractor itself is liable to the subcontractor.⁴¹ Thus, for a prime contractor to pass through a subcontractor’s claim, in those jurisdictions where the Severin Doctrine holds sway, the prime contractor is admitting their own liability. (The results of this admission against their own interests are discussed further below.) This situation has resulted in the surge of Liquidating Agreements or Joint Defense Agreements where the general contractor buys out the subcontractor claim for pennies on the dollar; agrees to mutual cooperation in pursuing the claim against the owner; agrees on who pays how much of the legal costs to pursue the claim; and limits the amount of recovery the subcontractor is entitled to once the claim is resolved with the owner.

Risk of Inconsistent Outcomes – Should the general contractor and the subcontractor be unable to reach agreement on some sort of Liquidating Agreement but the general agrees to pass through

⁴¹ *Severin v. United States Court of Claims*, 99 Ct.Cl. 435, 1943.



the claim to the owner, the general contractor takes on the risk of differing outcomes. For example, the general contractor may pursue the claim against the owner in court and lose, and be sued in arbitration by the subcontractor and lose yet again. This substantial risk to the general contractor is one reason why general contractors are often reluctant to pass through a subcontractor claim.

False Claim Risk – In times past general contractors could simply pass through subcontractor claims on the basis that they had no legal obligation to critically review or certify the claim and therefore were simply acting as a conduit relying upon the subcontractor’s due diligence in preparing the claim. With the increased emphasis on the False Claims Act⁴² since 1986 contractors who certify a claim to the U.S. government are potentially liable to the government if any portion of a passed through subcontractor claim is determined to be a false claim. Subsequent to the Deficit Reduction Act of 2005⁴³ some 28 States have adopted State False Claim Acts and others apparently are contemplating doing the same.⁴⁴ Finally, the U.S. Supreme Court ruled in 2008 that subcontractors are also subject to the False Claims Act directly.⁴⁵ When the effect of all of these are combined, prime contractors are quite often reluctant to review a subcontractor claim in depth and detail and then certify the claim to a public works owner.

Sovereign Immunity May Bar Pass Through Claims – Some States, Connecticut for example, adhere to the principle that subcontractor pass through claims are barred by statute even though the subcontractor performed the extra work and the State has the full benefit of the extra work. The State may argue that they are immune from such claims under the Doctrine of Sovereign Immunity and some courts have supported this position.⁴⁶ Other States, such as Texas, have only recently recognized the legitimacy of pass through claims.⁴⁷

Notice of Claim – A Key Element to Successful Subcontractor Delay Claims

Subcontracts, like prime contracts, are replete with notice provisions. Subcontractors are typically required to provide timely, written notice for delays, changes, differing site conditions,

⁴² 31 U.S.C. § 3729(a).

⁴³ P.L. 109-171, February 2, 2006.

⁴⁴ www.whistleblowerslawyerblog.com, “Part 6: States’ Experience With Their Own False Claim Acts”, December 2010.

⁴⁵ *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

⁴⁶ *Walter Kidde Constructors, Inc. v. State of Connecticut*, 37 Conn. Supp. 50 (Conn. Super. 1981); *Federal Deposit Insurance Corp. v. Peabody N.E., Inc.*, 239 Conn. 93 (1996).

⁴⁷ *Interstate Contracting Corp. v. City of Dallas*, 135 S.W. 3d 605 (Tex. 2004).



suspensions and force majeure events. Like contractors, subcontractors need to examine their subcontracts carefully to determine what the notice requirements in the contract are and make certain all on site staff understands the importance and significance of providing proper notice. Subcontractors need to keep in mind that many jurisdictions throughout the nation strictly enforce the “no notice, no claim” rule frequently embodied in construction contracts and subcontracts.⁴⁸ Prior to sending any written notice, the subcontractor should review their subcontract to determine the following –

- Proper party – Who is the notice to be provided to?
- Method of delivery – What is the contractual method of delivery for the notice? For example, can notice be provided via e-mail?
- Contract reference – Include a citation to the contract clause(s) which form the basis for the subcontractor’s entitlement to recovery.
- Description of event, action or lack of action – A brief description of the event, action or lack of action which caused the need for notice.
- Damages – Include a reference in the notice as to whether this event is likely to cause additional time or cost, or both.
- Reservation of rights – The subcontractor’s written notice ought to contain simplified reservation of rights language allowing the subcontractor to modify the notice if necessary.

Finally, subcontractors should be aware of “continuing notice” requirements in the prime contract flowed down to them and/or in their subcontracts. This is a clause requiring additional written notice of the same event every 30 days if the event is still continuing 30 days after initial notice. Failure to comply with this requirement may have the same detrimental effects that lack of initial notice has.

⁴⁸ Associated Mechanical Contractors, Inc. v. Martin K. Eby Construction Co., Inc., 271 F.3d 1309 (11th Cir. 2001).



Entitlement – Subcontractor Delay Claims

All claimants, including subcontractors, bear the burden of proving liability/entitlement, causation and damages. “Entitlement” is the legal right to make a claim generally, in the construction claims arena, arising under some provision of the contract documents. For subcontractors, entitlement arises from three potential sources.

First, subcontractors must look to the provisions of their own subcontracts. Most subcontracts contain Changes, Delays, Differing Site Conditions, Force Majeure, Suspension and Termination clauses. These clauses may or may not read the same as similar clauses in the prime contract.

Second, most subcontracts flow down the terms and conditions of the prime contract to the subcontract. The flow down clause is a potential source of conflict with respect to subcontractor claims. Such conflict often arises when the prime and subcontract language are not conformed or coordinated.⁴⁹ For example, if the Changes clause of the prime contract (which has been flowed down in its entirety to the subcontract) allows recovery of impact costs arising from owner directed changes but the subcontract provides only for direct costs plus markup, which provision prevails? If the subcontract has an Order of Precedence clause, this may resolve the conflict. If the subcontract is silent on the issue, it may take legal action to resolve such a discrepancy.

Third, subcontractors may have rights under various State statutes or case law specifically intended to protect subcontractors even when such entitlement is not included in the subcontract. For example –

- California Public Contract Code Section 7104 mandates inclusion of a Differing Site Conditions clause in all public works contracts “...which involves digging trenches or other excavations that extend deeper than four feet below the surface...” which extends to subcontracts even if such a clause is not written into the subcontract.
- California Public Contract Code Section 7107 establishes a ten day period for progress payments to subcontractors after receipt of the funds by the general contractor.

⁴⁹ For a good discussion of the potential conflict between subcontracts and flowed down prime contracts see Brad C. Parrott, Esq., “Construction Subcontracts: An Exercise in Risk Management”, Precast Concrete Institute (PCI) Annual Convention, Atlanta, Ga., 2004.



- And, the California Supreme Court has ruled that Pay If Paid clauses in subcontracts are not enforceable on the basis that a subcontractor cannot be required to surrender their constitutional rights in order to get paid for work performed.⁵⁰

Delay Claim Entitlement – General

Beyond legal entitlement for a claim there are some general requirements that bear on the issue of entitlement. These are the following.

Impacts beyond the control of the subcontractor – When presenting claim entitlement the claimant must be able to demonstrate that the event or action complained of was something entirely beyond the control of the claimant. For example, an earthquake (a force majeure event) is entirely beyond the control of a subcontractor. On the other hand, a shortage of materials may be somewhat controllable if (1) the shortage of such materials is generally known within the industry and (2) the material shortage would not have impacted this project had the subcontractor ordered the material earlier.

Ability to Foresee – Another issue impacting entitlement is the issue of foreseeability. It is a general principle of common law that if a situation is reasonably foreseeable to a contractor at the time of bidding, then the contractor is held responsible for including the situation in their bid and is not entitled to seek additional time and cost later on. For example, if the earthwork subcontractor was aware of very narrow right of way limits on a project when preparing their bid (either from the drawings or a site visit) then they probably would be unable to recover lost productivity due to the fact that there was insufficient space within the right of way to allow their equipment to operate at peak efficiency.

Ability to Prevent – Another element of entitlement is the prevention argument. The subcontractor making the claim must be able to demonstrate that they could not have prevented the impact of the event. For example, if it can be demonstrated that had the subcontractor performed the work at a different time of year or in a different sequence the event would not have had any impact at all, then the subcontractor will probably lose their argument concerning entitlement.

⁵⁰ William R. Clarke Corp. v. Safeco Insurance Co. of America, 938 P.2d 372 (Cal. 1997).



Ability to Overcome – If it can be demonstrated that the subcontractor making the claim was in a position to overcome the impact of the event by replanning or resequencing work (work around) then the subcontractor is likely to lose their entitlement argument.

Without subcontractor fault or negligence – The subcontractor making the claim must be able to demonstrate that the event or action was not due to their own fault or negligence or to the fault or negligence of any of their sub-subcontractors, vendors or suppliers at any tier. An exception to this rule arises under force majeure situations. For example, if a supplier to a subcontractor encounters a 45 day labor action (strike) which prevents them from fabricating and delivering their product on time, as labor actions are typically included in Force Majeure clauses, the supplier and the subcontractor are probably entitled to a time extension, as would the general contractor be entitled provided that the late delivery impacted the project’s critical path.

Specific contract provisions – A subcontractor submitting a claim should be able to demonstrate that their claim is not barred by some specific provision of the contract. For example, if the subcontract’s Delay clause contained a No Damages for Delay provision then the subcontractor is not entitled to recover delay damages (absent other intervening circumstances). Another example would be if the contractor accepted a contract whose Force Majeure clause did not provide for time extensions for adverse weather. In both cases, a subcontractor may have given up the right to make such claims when they signed the subcontract.

Causation – Subcontractor Delay Claims

Assuming the subcontractor can establish entitlement to recover something under the subcontract for an event how does the subcontractor establish causation? “Causation” is the nexus between entitlement and damages in construction claims. In its simplest terms, the subcontractor must be able to demonstrate that the event they encountered “caused” them to do something they had not planned to do when they bid the work which resulted in damages they are entitled to recover under the terms of the subcontract.

Documentation of causation typically starts with the subcontractor’s as-bid plan. This is the best indicator of how they intended to perform the work. But, it is only an indicator and not proof because they are a subcontractor doing only a portion of the work. Subcontractors need to prepare their own CPM schedule in order to plan their work and document their plan. Subcontractors should submit their CPM to the prime contractor who is responsible for planning and scheduling the entire project. The subcontractor should get involved with the general



contractor's team, along with the other major subcontractors, in preparing the overall plan (schedule) for the project. Subcontractors should obtain a copy of the Baseline Schedule submitted to the owner and all schedule updates. (If subcontractors can obtain all project schedules electronically this will make their claim preparation work substantially easier.) Once the subcontractor has their plan and the approved project plan they should be in a position to document how they intended to perform the work. Once this is documented they can use these documents to demonstrate how the work actually proceeded and from this document the causation of the damages. Such documentation should be documented by notice letters, meeting minutes, correspondence, daily site activity reports, monthly schedule update narratives, job site photos, progress records, etc.

Damages – Subcontractor Delay Claims

When is a subcontractor entitled to recover time or money? – In the most general terms, the subcontractor has to look to their own subcontract first to determine entitlement (the legal right to recover damages for the sort of event or act the subcontractor has encountered) and to see whether the potential claim is barred under the terms of their subcontract with the prime contractor. If the subcontract does not deal clearly with the issue, then the subcontractor should turn to the general contract which was flowed down to them by reference in the subcontract. Assuming the subcontractor can locate a clause which provides entitlement, then the subcontractor has to be able to document causation and, finally, damages.

Delay Issues – Since there is typically only a single project schedule as far as the owner is concerned (that is, the schedule prepared and submitted by the prime contractor), any alleged subcontractor delay passed along to the owner will be measured against that schedule. If the subcontractor's activities are on the critical path at the time of the delay, then it is likely that the owner will have to issue a time extension to the general contractor (and assume that the general contractor will "share" this time extension with the subcontractor(s) impacted by the delay.) However, there are a series of issues that are not well defined in U.S. case law. Some of are discussed below.

- Delays caused by the General Contractor or Another Subcontractor – Subcontractors need to review their contract to determine what they have to document in order to obtain a time extensions and/or delay damages. In practical terms, the subcontractor should perform a root cause analysis to ascertain the initial cause of the delay they have encountered. Subcontractors seeking to file a delay claim with the general contractor need to determine



whether the delay was caused by the general contractor, another subcontractor, or the owner. If it was caused by the general contractor, and the subcontract provides for recovery, the claim will be between the subcontractor and the general contractor. That is, it will not need to be passed through to the owner thus alleviating some legal risk for the prime contractor. If the delay was actually caused by another subcontractor, the claim will also have to be filed with the general contractor and the general contractor will need to perform a root cause analysis of their own to determine if the owner actually caused the delay versus the other subcontractor. Depending upon how the subcontract is worded, the impacted subcontractor may be able to seek recovery under the theory that they are the “intended third party beneficiary” of this other subcontract which may allow the general contractor to settle the delay claim using monies from the other subcontract.⁵¹ As discussed earlier, subcontractors asserting a delay claim against the general contractor may face a No Damages for Delay clause which is enforceable under the law of the contract. However, courts in many States acknowledge some or all of the six widely recognized exceptions to the enforceability of such contract language.⁵² These exceptions are, generally, the following –

- a. A delay not covered by the language of the clause;
- b. A delay not contemplated by the parties when executing the contract;
- c. A delay of “unreasonable duration”;
- d. A delay resulting from active interference or other wrongful conduct of the owner;
- e. Waiver of the clause by actions of the parties; or,
- f. Fundamental breach of the contract by the owner justifying non-enforcement of the clause.⁵³

➤ Delays caused by the owner— Again the subcontractor should review their contract to determine what they have to document in order to obtain a time extension and/or delay

⁵¹ Horowitz, Matthew M., “Delay Claims Among Co-Prime Contractors: Opportunities and Risks for the Surety”, *Ninth Annual Surety and Fidelity Claims Conference*, October 22 – 23, 1998. [Note: Although the author of this article was asserting his legal theory about multiple prime contractors it is possible that the same legal theory would be applicable to subcontractors under the same general contractor. Advice of competent legal counsel in the appropriate jurisdiction should be sought prior to submitting this sort of claim.]

⁵² See Leavitt, Josh M. and Joseph C. Wylie, *Recent Trends in Exceptions to Enforceability of No Damages for Delay Clauses*, *Real Estate Law and Practice Course Handbook*, Practising Law Institute, New York, 2005. See also Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, *William and Mary Law Review*, March, 2005.

⁵³ Barry B. Bramble and Michael T. Callahan, *Construction Delay Claims, 3rd Edition*, Aspen Publishers, New York, N.Y., 2000.



damages. As mentioned previously the subcontractor must perform a root cause analysis to ascertain the initial cause of the delay they have encountered. Presumably, if the delay is excusable and compensable to both the subcontractor and the general contractor it is more likely that the general contractor would be willing to sponsor a well prepared and well documented subcontractor delay claim to the owner. However, the converse is not necessarily true in that delays that are excusable or compensable to the general contractor do not necessarily entitle each and every subcontractor to a day for day time extension. To convince the general contractor to pass through a subcontractor delay claim requires timely written notice, documentation of the delay, and documentation that the owner is the root cause of the delay.

- What governs – the subcontractors critical path or the project’s critical path?— It appears that there is no definitive answer to this question. The answer is found in the response to the question “Who caused the delay?” If the root cause of the delay for which the subcontractor is filing a claim was the owner then it is most likely that the prime contract will answer this question. Most prime contracts require that for a general contractor to be entitled to a time extension and/or delay damages, the prime contractor must demonstrate entitlement and causation (the owner is responsible for the event which caused the damages) and that the event impacted the project’s critical path resulting in late completion. In this case, it is most likely that the project’s critical path will govern, and the general contractor will have to show that the subcontractor’s activities were on the project critical path at the time the delaying event occurred. On the other hand, if the root cause of the delay was the general contractor or another subcontractor, then the subcontractor’s schedule may be used, with some limitations, to show causation. Subcontractors should take to heart the following suggestion.

“...subcontractors should not merely await action on the part of the prime contractor with regard to the project schedule and its updating, but should actively participate in the initial schedule’s preparation and the updating process. Subcontractors should periodically provide updated performance information, advise the prime contractor of other trades’ works that has an adverse impact on their work, and otherwise make known their continually changing appraisal of the progress schedule. Only by taking such action can subcontractors preserve their rights and require the prime contractor to fulfill schedule obligations.”⁵⁴

⁵⁴ Wickwire, Jon M., Thomas J. Driscoll, Stephen B. Hurlbut, and Mark J Groff, Construction Scheduling: Preparation, Liability and Claims, 3rd Edition, Aspen Publishers, Wolters Kluwer Law & Business, New York, 2010.



There are two other ways the subcontractor's critical path is likely to be relevant with respect to causation:

- ❖ Multiple Subcontractors on Site Sequentially – In some fairly unique projects such as fire rebuilds or outage turn around projects the general contractor often brings one subcontractor on site at a time in a specific order to avoid interference issues and maximize the potential for a shorter project performance time (generally to capture an early completion bonus). Should a subcontractor find themselves in this situation, they may be able to argue that their work was the critical path of the project as they were the only ones on site at the time the delay arose.
- ❖ Subcontract Language Specifically References the Subcontractor Schedule – Although not very common, if the subcontractor can get their schedule recognized in the subcontract as the “controlling schedule” in the event of delays, then the subcontractor's critical path may take precedence.

When the subcontractor's critical path is extended, but the subcontract work is not on the project's critical path, should the subcontractor be granted a time extension and delay costs? –

The short answer to this question is “Probably not.” In this case the subcontractor may have an impact claim, but it is not likely that it will have a valid delay claims. Generally, this determination is a function of the root cause of the delay. If the owner is liable for the delaying event, then it is very unlikely that the owner will ever agree to delay damages for a subcontractor if the subcontractor's work was not on the critical path of the project schedule. Almost every prime contract operates in this manner. If the delay is brought about by a force majeure event which shuts down all work for a period of time, the subcontractor may receive the same delay as the prime contractor under the flow down terms of the prime contract, but is unlikely to receive any delay damages as most Force Majeure clauses provide for excusable, non-compensable delay only. If, however, the general contractor or another subcontractor is the root cause of the delay and the subcontractor can demonstrate that they will, as the sole result of the delaying event, be forced to stay on site longer then they may be able to recover delay damages from the general contractor, but typically not from the owner; provided that, they have followed the advice set forth above about being an active participant in the project scheduling effort and providing notice to the general contractor of issues impacting them. If their subcontract has a Time of Completion clause they may also be able to obtain a time extension. However, it is noted that most subcontracts simply tie the subcontractor to the prime contractor's Time of



Completion clause and require the subcontractor to work to support that time. As such, it may not be necessary for a subcontractor to receive a time extension.

Conversely, can a subcontractor recover from an owner for delay damages when the subcontractor's performance has been extended, but that of the overall critical path of the prime contractor was not? – The short answer here is “Possibly.” In the case of E.R. Mitchell Construction Co. v. Danzig⁵⁵ a Federal Circuit Court agreed this was possible and awarded damages in this case to the subcontractor. They did so after recognizing that the government had waived its Severin/Sovereign Immunity defense and had paid damages (both cost and a time extension) to the general contractor who subsequently completed their work early. The Court stated that “...there is no reason to exclude Eichleay damages of a subcontractor simply because the prime contractor completed its contract on time.”

If the general contractor is awarded a time extension, is each subcontractor due a time extension even if their work was not affected by the change that resulted in the delay?— The short answer is probably “No”. A Federal Appeals Court ruled that a general contractor is not obligated to “share” or “pass down” any time extensions received from the owner to any or all their subcontractors.⁵⁶ Apparently, this issue is not often litigated.

In this circumstance, is any subcontractor due a time extension? – The short answer is “Maybe”. If the subcontract provides for a time extension for the subcontractor if they can demonstrate delay not of their own making and such a delay occurs, then a time extension received from an owner may be passed down to the impacted subcontractors by the prime contractor in accordance with the subcontract’s terms.

Are there any other theories under which a subcontractor can prosecute a delay claim against a general contractor? – Here, the answer is “Yes”. There are at least four other legal theories available to a subcontractor seeking a delay claim from a general contractor.

- A prime contractor has no right to simply abandon the project schedule or fail to update the project schedule routinely.⁵⁷
- A prime contractor may not unreasonably manipulate the schedule to delay subcontractors and interfere with their ability to effectively use the schedule.⁵⁸

⁵⁵ 175 F.3d 1369 (Fed. Cir. 1999)

⁵⁶ Mobil Chemical Company v. Blount Brothers Corp., 809 F.2d 1175 (5th Cir. 1987).

⁵⁷ Natkin & Co. v. George A. Fuller Co., 347 F. Supp. 17 (W.D. Mo. 1972).



- A prime contractor cannot provide subcontractors with inaccurate schedule information or simply withhold material information regarding the project schedule.⁵⁹
- Depending upon the wording of a No Damages for Delay clause, the subcontractor may be able to argue that the clause only precludes recovery of delay damages and not damages that are “separate and distinct” from delay. One Massachusetts Court recently ruled that such “separate and distinct” damages would include hindrances that caused the subcontractor to incur additional costs.⁶⁰

Relevance of the Recommended Practice – Forensic Schedule Analysis Practice Guide – Should a subcontractor want to pursue a delay claim either against the owner or the general contractor the subcontractor is typically required to provide some sort of forensic schedule analysis to prove and quantify the delay. The RP – FSAPG provides guidance on how to perform forensic schedule analysis. It outlines 9 basic methods of schedule delay analysis (including the strong and weak points of each); sets forth minimum protocols and required documentation for each; and discusses how to perform each methodology. The subcontractor, as the claimant, will have to choose one of these methods and prepare and submit their own delay analysis to the general contractor.

How does the doctrine of concurrent delay apply to subcontractors? — The answer is “It depends!” In an article written for Under Construction, a publication of the American Bar Association’s Forum on the Construction Industry the author offered the following discussion.⁶¹

“Concurrent delays arise when two or more independent delays take place within the same time or delay period and affect both the owner and the contractor (or the contractor and its subcontractors in a lower-tier relationship). These delay events could relate to one activity or multiple activities. Concurrent delays may affect a contractor’s or subcontractor’s claim if one delaying event is excusable and the other one is not, or if one such cause is compensable and the other is non-

⁵⁸ Kroeger v. Franchise Equities, Inc., 190 Neb. 731, 212 N.W.2d 348 (1973).

⁵⁹ E.C. Ernst, Inc. v. Manhattan Construction Co., 387 F. Supp. 1001 (S.D. Ala., 1974), *aff’d in part, rev’d in part*, 551 F.2d 1026 (5th Cir.1977).

⁶⁰ Schaub, Charles E., Jr., “Legal Corner – Superior Court Allows Damages for Delay”, Construction Outlook, March 2010.

⁶¹ Drewry, Michael F. and Daniel M. Drewry, “Downstream Allocation of Concurrent Delay Damages”, Under Construction, ABA Forum on the Construction Industry, December 2007.



compensable. Where such conflicting causes of delay exist, the entitlement to time or money may be threatened.

...

Concurrency issues are most often discussed in the context of the owner-general contractor relationship, when one delay is the responsibility of the owner and the other delay is borne by the contractor. However, the analysis utilized in the owner-general contractor cases works at all levels of vertical privity. (Case citations omitted.) As such, the same framework applied upstream should generally work downstream through the chain of privity.

...The burden of proof falls on the party seeking to recoup damages for delay to show that the claimed delay was not concurrent. (Citations omitted.) If the concurrent delay cannot be disproven, then the courts will not be able to separate the delay and will very likely not be able to award delay damages.” (Underscoring provided.)

Based on this information and the various cases cited in this particular article the concurrent delay argument can apply to any subcontractor delay claim whether it is against the owner or the general contractor. And, as noted above, if concurrency cannot be disproven by the subcontractor pursuing the delay claim (1) the Courts are unlikely to award delay damages, (2) cannot apportion the concurrent delay, and (3) will probably grant a time extension only.⁶²

Damages – Subcontractor Delay Claims

Once the subcontractor proves entitlement and causation, and demonstrates the delay was not concurrent, the subcontractor can then move on to the issue of damages (assuming that the subcontract does not contain an enforceable No Damages for Delay clause). Subcontractors may generally pursue delay claims against the prime contractor for the following impacts –

- Impacts caused by other subcontractor
- Directed and constructive suspensions of work
- Delayed site availability
- Mobilization and remobilization costs
- Delayed issuance of the Notice to Proceed

⁶² U.S. ex rel. Belt Con Construction, Inc. v. Metric Construction Co., Inc., 314 Fed. Appx. 151, 2009, WL 458795 (10th Cir. 2009).



- Inspection delays
- Delayed return of submittals
- Delays growing out of differing site conditions

However, these impacts are not necessarily compensable with respect to the owner.

Pricing Considerations

In pricing a delay claim against the prime contractor, the first place the subcontractor must look is the subcontract. Direct costs (i.e., labor, materials, sub-subcontractors, etc.) are typically straight forward and most often allowed. The subcontractor, of course, still faces the challenge of proving that these costs are the sole result of the delay events, but this is typical on almost all claims. Some subcontracts proscribe the recovery of extended or unabsorbed home office overhead by including home office overhead in the Consequential Damages clause.⁶³ Consequential Damages clauses frequently include lost profit, lost revenue, loss of bonding capacity, etc. Other contracts disallow profit on costs resulting from a directed or constructive suspension of work.⁶⁴ Others disallow “avoidable costs” in this situation. There may be many other cost disallowances embedded in the subcontract which was executed and, if so, the subcontractor will have to live with that.

Other delay costs might also include –

- Additional, extended or idled labor costs
- Extended or idled equipment costs
- Extended storage costs
- Extended field office overhead costs
- Extended or unabsorbed home office overhead

The delay cost calculation methods do not differ between general contractors and subcontractors. The three classic methods of calculating damages are –

- Cause and effect (i.e., costs tracked contemporaneously and separately from base scope costs;
- Modified Total Cost, and

⁶³ AIA Document A201-1997, ¶4.3.10.

⁶⁴ FAR § 52.242-14, Suspension of Work.



- Total Cost.

Dispute Resolution Forums

Most subcontracts are very specific about the dispute resolution mechanism between the general contractor and a subcontractor. They are written to favor the general contractor in that subcontracts are frequently governed by the law of the State where the general contractor is domiciled regardless of where the project is being constructed; the arbitration proceeding may be seated in the home town of the general contractor, even when this is half way or more across the country; and may be governed by a specific set of rules. If the subcontractor cannot negotiate a different clause at the outset, by the time the claim arises all the subcontractor can do is live with the requirements.

With respect to subcontractor claims being passed through to the owner, the subcontractor and the general contractor will be bound by the terms and conditions of the prime contract. The general contractor may approach the subcontractor and agree to sponsor or pass through the subcontractor's claim to the owner, if the subcontractor executes a Joint Defense Agreement or Liquidating Agreement. This is typically done to protect the prime contractor from some of the legal risks of passing through a subcontractor claim, discussed earlier. It is beyond the scope of this paper to discuss the details of a Joint Defense Agreement. In essence, it is an agreement for the general contractor and the subcontractor to work together to prosecute the claim to the owner with an agreement on the split of the proceeds of the claim at the end of the dispute.⁶⁵ A subcontractor seeking to have their claim passed through to the owner will have to make their own business decision on whether to sign such an agreement or not. Should they choose to do so, this becomes the subcontractor's risk.

Conclusion

Subcontractors face myriad challenges when attempting to assert and win a delay claim. The subcontractor must consider whether the delay was caused by the owner or the general contractor. Subcontractors have various legal and practical problems not common to prime contractors since they maintain a lower tier relationship with the owner. Notwithstanding these

⁶⁵ Pasternak, Thomas G. and R. David Donoghue, "Making Joint Defense Agreements Work", *Litigation*, Volume 34, Number 5, Summer, 2008. See also, Cappelluti, Lisa, Gene Witkin and Keith Bremer, "Cost Sharing Agreements" Bremer and Whyte Law Blog, May 19, 2010.



challenges, subcontractors are still held to the common law standards of liability/entitlement, causation and damages.

Subcontractors who want to maintain their right to file delay claims should –

- Perform adequate pre-bid site investigation
- Carefully review the subcontract and the prime contract flowed down
- Negotiate away or modify No Damages for Delay, Pay When Paid or Pay If Paid clauses
- Learn their rights and obligations
- Not unbalance bids
- Not bid at or below costs (just to get the work)
- Plan their work thoroughly (identifying key dependencies between the subcontractor, the general, other subcontractors and the owner) and provide your plan to the general contractor
- Get actively involved in preparation of the overall project schedule
- Stay involved in the schedule updating process including participating in update meetings
- Review all schedules for errors and notify the general contractor in writing when such deficiencies are found
- Not proceed with change order work before time and cost are addressed and the change order is issued in writing
- Not allow changes to be resolved “at the end of the job”
- Track all costs and time for extra work separately and contemporaneously and manage extra work as a separate project
- Strictly follow the contract requirements
- Give notice when and as required in the contract
- Not sign waivers or releases without fully understanding what is being signed (or modify them as needed).

Subcontractors that run their projects with this level of diligence will contribute to the general contractor’s success. If the general contractor is profitable at the end of the project it is likely that the subcontractor will be too.