

3. *Types of Claims*

In the old days, there were few construction claims and owners did not assess liquidated damages against contractors. The level of competition was less, projects were less complicated and relationships between contractors and owners were more congenial. Problems that most likely would turn into claims today were worked out in the field and contractors received little if any additional compensation. Many states had applied sovereign immunity to transportation construction claims, which effectively stopped contractors from filing suit against the state.

Today, claims for additional compensation are permitted in all fifty states. In addition, Congress enacted a law directing the Secretary of Transportation to establish and require standardized contract clauses on all federal aid highway contracts unless otherwise provided for by state law. In 1989, the FHWA issued regulations establishing and requiring clauses on Differing Site Conditions, Suspension of Work and Significant Changes in the Character of the Work. Cases involving changes in the work, differing site conditions and delays have defined the rights and liabilities of the parties in those contexts. As a result, highway construction cases are now focused on the substantive merits of the claims.

Because of the mandated clauses, adverse court decisions and the increasing number of claims, some owners have tried to draft *exculpatory clauses*-contract terms and specifications that shift risk back to the contractor. Recent claims cases have dealt with courts interpreting contract language and deciding whether certain exculpatory clauses prohibited the claims. Additionally, courts have focused on the issue of *what* damages a contractor is entitled to receive and how such damages should be computed.

The author believes exculpatory clauses are not the best solution to the problem. Such clauses signal that the owner does not take fairness into consideration. A better approach is to understand the types of claims, take action to eliminate the causes and establish an early identification procedure. Claims typically fall into three categories:

- Changes in the scope of work.
- Differing site conditions.
- Delays, disruptions, acceleration, and other time-related problems.

These categories, however, are subject to some amount of overlap. For example, a change in the scope or a differing site condition claim frequently also has a time-related impact.

A. Changes, Alterations, and Extra Work

State DOTs and other owners need the flexibility to change the design and quantities of each item needed for construction. Otherwise, there would be no need for a **Significant Changes in the Character of the Work Clause or Extra Work Clause**. For years, public owners have included such clauses in their contracts giving them the flexibility to adapt to the actual conditions without breaching the contract or being forced to rewrite it. These clauses also protect the contractor. This is particularly true in states where contractors have no right to recover damages from a public owner for a “breach of contract.”

Change orders are a controversial aspect of the construction process. From a contractor’s point of view, they delay and disrupt the intended schedule and sequence of construction on the project. Whether initiated by the owner or the contractor, **change order requests** typically question the adequacy of the original design, causing the design engineers to become defensive, which results in delays and disputes. The authors of FHWA Report FHWA-TS-852151 believe both the nature of the work itself and the contracting process contribute to changes or extra work claims. The more the work is clearly defined, the less likely there will be claims. Such claims arise frequently on rehabilitation work and utility work.

In addition to changes as such, **Changes, Alterations, and Extra Work Clauses** are used to compensate for other conditions. These include the effect of inspection, acceptance, and warranties on the project; defective and erroneous plans and specifications; impossibility of performance; and variations in quantity.

The federally mandated **Significant Changes Clause** allows the DOT to make such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project. For **Significant Changes in the Character of the Work**, the clause provides for an adjustment in contract price whether or not changed by such different quantities or alterations. The federally mandated clause specifically provides:

23 C.F.R. § 635.131(a)(3) - Significant Changes in the Character of Work

- (i) The engineer reserves the right to make, in writing, at any time during the work, such changes in quantities and such alterations in the work as are necessary to satisfactorily complete

the project. Such changes in quantities and alterations shall not invalidate the contract nor release the surety, and the contractor agrees to perform the work as altered.

(ii) If the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract. The basis for the adjustment shall be agreed upon prior to the performance of the work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the contractor in such amount as the engineer may determine to be fair and equitable.

(iii) If the alterations or changes in quantities do not significantly change the character of the work to be performed under the contract, the altered work will be paid for as provided elsewhere in the contract.

(iv) The term *significant change* shall be construed to apply only to the following circumstances:

(A) When the character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction or

(B) When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

The **Extra Work Clause** or **Unforeseeable Work Clause** gives the state the right to order work for which there is no specific item accompanied by a unit price. The work may consist of additions to or changes in design. Extra Work may be ordered under a Supplemental Agreement Clause and may be subject to an Alterations Clause, which generally addresses whether a Supplemental Agreement may be used. In situations where in the state engineer's opinion, the character of the work is such that the cost of performance cannot be accurately estimated, or where the contractor and the state DOT cannot agree on a price for

the extra work, the contractor must perform and be paid on a “force account” basis. The state engineer’s written authorization is generally required before work may begin under either a Supplemental Agreement or force account basis.

Typical Disputes Between Owners and Contractors Regarding Changes/Alterations/Extra Work Clauses:

- No signed change order.
- Constructive changes in the work caused by:
 1. Defective plans
 2. Incomplete plans
 3. Interpretation of plans and specifications
 4. Variations in quantity
 5. Impossibility of performance
 6. Inspection and acceptance
 7. Construction method changes
- Whether the contract modification covers all the contractor’s costs, including impact costs.

Changes/Alterations/Extra Work
Legal Entitlement Check List

- ☐ 1. Is there a Changes/Alterations/Extra Work Clause?
- ☐ 2. Does the clause permit the owner to order the change requested?
- ☐ 3. Is the work requested a change in the contract?
- ☐ 4. Does the clause require a written change order prior to starting the work?
- ☐ 5. Is there a notice provision in the clause. If so, was notice timely given?
- ☐ 6. Did the contractor give the owner/architect/engineer the opportunity to keep track of the extra costs it will be claiming?
- ☐ 7. Did the contractor segregate its claimed extra costs to the extent possible?

B. Differing Site Conditions

In most states, in the absence of a **Differing Site Conditions** Clause, the risk of any cost or difficulty associated with unexpected subsurface site conditions is usually on the contractor. (While there are exceptions to this rule and arguments can be made to overcome the lack of a Differing Site Conditions Clause, keep in mind that historically **the absence of such a clause places the risk on the contractor.**)

Many years ago, the Federal Government decided that contractors would put contingencies for unforeseen subsurface conditions in their bids if no Differing Site Conditions Clause existed. This realization prompted the Federal Government to include the Differing Site Conditions Clause in its contracts. The clause was designed to minimize the contractor's risk and to give the contractor or the government an equitable adjustment in the contract price if the subsurface or latent physical conditions at the site differed materially from those indicated in the contract or if they were of an unusual nature differing materially from those ordinarily encountered. In 1987, Congress enacted a statute requiring a differing site condition clause on federal aid and highway construction projects unless otherwise provided for by state law. That clause specifically provides:

23 C.F.R. § 635.131 (a)(1) - Differing Site Conditions

(i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions before they are disturbed and before the affected work is performed.

(ii) Upon written notification, the engineer will investigate the conditions, and if he/she determines that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding loss of anticipated profits, will be made and the contract modified in writing according. The engineer will notify the contractor of his/her determination whether or not an adjustment of the contract is warranted.

(iii) No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.

(iv) No contract adjustment will be allowed under this clause for any effects caused on unchanged work. (This provision may be omitted by state highway agencies at their option.)

There are two types of changed or differing site conditions. **Type I Conditions** are conditions other than the ones indicated in the contract. **Type II Conditions** are unknown physical conditions at the site, of an unusual nature, and differing materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract.

To recover for a Type I Differing Site Condition, the contractor must prove it encountered subsurface or latent physical conditions differing materially from the conditions represented in the contract documents. **To recover for a Type II Differing Site Condition**, the contractor must prove the condition encountered was of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work. Under most clauses, the owner may obtain a decrease in the contract price if the Type I or Type III differing site condition decreases the cost of performing the work.

Examples of Type I Differing Site Conditions:

Rock:

1. Discovering rock where none was indicated.
2. More and/or different rock than was indicated.
3. Harder rock than was indicated.

Water:

1. Water and/or mud where none was indicated.
2. Different water pressure than was indicated.
3. Different water level than indicated.

Soil:

1. Different shrink/swell than was indicated.
2. Soil more difficult to compact.

Examples of Type II Differing Site Conditions:

- Rock that did not fracture as expected.
- Corrosive ground water.
- Debris in ducts.
- Various quagmire conditions.
- Soil cannot be compacted.
- Muck normally found only at low elevations found at high elevations.
- Unusual moisture conditions in soil.

The following cases illustrate how courts may view **Differing Site Conditions** claims:

State Road Department v. Houdaille Indus., 237 So.2d 270 (Fla. App. 1970). The state spent five months making subsoil investigations used in the preparation of Everglades Parkway plans. Bidders' prebid inspections consisted of aerial viewings and travel to certain areas accessible by swamp buggy. The successful contractor's inspections showed no inaccuracy between its observations and the state's data. After commencing work, the contractor found the state's plans were inaccurate. The court did not hesitate to conclude that the state's soil borings constituted a "material false representation" and that the contractor should recover for its extra work.

Ideker Inc. v. Missouri State Highway Commission, 654 S.W.2d 617 (Mo. App. 1983). Contractor won case based on breach of warranty against Highway Commission where the evidence indicated that the Commission positively represented the project to be a "balanced job" on the basis of a shrinkage factor of 1.28. Shortly after commencing work, it became apparent the fills would not hold the excavated material from the cuts and 355,937 cubic yards of waste was necessary. The actual shrinkage factor was 1.13.

Bernard McMenamy Contractors, Inc. v. Missouri State Highway Commission, (Mo. 1979). The contractor claimed underground conditions differed from those represented in plans regarding the character of the work to be excavated. Design cross-sections for rock areas indicated back slopes of 1/4:1 in rock cuts, or almost vertical back slopes in such cuts. The contractor found there was no cut on the project built in that nature. Instead, it found pinnacles of rock with plastic clay crevices and formation of boulders embedded in plastic clay. The court ruled for the contractor on the basis of the positive representations by the Commission.

Holloway Construction Co. v. State of Michigan, 205 N.W.2d 575 (1973). Contractor prevailed on claim for extra work and delay where the bid proposal indicated immediate availability of a state supplied borrow pit adjacent to the right-of-way and the contractor relied on that representation in making its bid. The borrow pit was not available and the substitution of other borrow pits and the delay in securing them caused the contractor to incur additional costs.

In addition to physical elements of a differing site condition, the ***notice requirement*** is a common feature of all Differing Site Conditions clauses. It is

found in the federally mandated clause, state Differing Site Conditions clauses and often appears in other contract provisions authorizing equitable adjustments or providing claims procedures. Its obvious purpose is to give the owner an opportunity to verify the condition, perhaps make initial measurements, or “suspend work” pending redesign. Owners obviously cannot allow contractors to simply proceed with work, incurring expenses that can not be readily verified and possibly could have been avoided.

Contract notice provisions are usually upheld as a condition precedent to any recovery. Occasionally, however, a contractor fails to give timely written notice and is still able to make its claim because it can show that the owner or engineer received **constructive notice**. This frequently occurs when the project engineer or inspector is at the job site when the condition or event giving rise to the claim is encountered.

One of the criteria courts use in adopting the constructive notice doctrine is whether the owner is prejudiced by the lack of actual notice. If a contractor can show that the alleged condition or event could have been verified and there was no feasible alternative, then the court is more likely to waive the strict notice requirement.

For instance, in Thorn Constr. Co. v. Utah Dept. of Transportation, 598 P.2d 365 (Utah 1979), the state failed to follow its own change order procedures. However, its engineers ordered the work to be done. The court found that the state was on notice that additional compensation would be required and refused to enforce the contractual notice provisions.

In New Pueblo Constructors v. State, 696 P.2d 185 (Ariz. 1985), the contractor failed to follow the contractual notice provisions after the work was damaged by an unforeseeable cause (100-year storm) beyond the control of the contractor. Because the contractor failed to comply, the state was unable to monitor and verify the extra work caused by the storm. The intermediate court denied the contractor’s claim for all work performed prior to the state receiving notice. However, the Supreme Court reversed the intermediate court on the notice issue, holding that the state had actual notice of the damages and was not prejudiced by the contractor’s failure to comply with the written notice requirements of the contract and granted recovery to the contractor under the “total cost” approach to calculating damages.

Some state and local government owners, have tried to negate the effect of the **Differing Site Conditions Clause** by including stringent site investigation clauses. They have met with varying degrees of success in doing so.

Exculpatory Clauses release owners from liability and are designed to shift the risk of a site problem to the contractor. In Florida, under Section 2-4 of the standard state specifications, a bidder's submission of a proposal is *prima facie* evidence that it has examined the site of the proposed work and is satisfied with the site as well as the plans and specifications. The exculpatory clause provides that any details in the plans related to the borings "are not guaranteed to be more than a general indication of the materials likely to be found" and that the contractor "shall" examine the borings, "make his own interpretation," and base its bid upon the conditions it thinks it will likely encounter. Cases dealing with exculpatory language include:

P.T.&L. Constr. Co. v. Dept. of Trans., 108 N.J. 539, 531 A-2d 1338 (1987). The contractor suffered losses on a project due to extremely wet, unanticipated soil conditions. Its expectation of dry conditions was based on inferences from the overall design of the project and the specifications (no provision for a coffer dam; specification for non-porous fill; "stripping" instead of "wet excavation"). The contractor was denied recovery under a changed conditions theory because the specifications contained no positive misrepresentation of fact ("the ground is dry") sufficient to overcome the contract's exculpatory language. Yet because the state withheld a letter stating in essence "the ground is wet," the court permitted recovery based on implied warranty and tort theories.

Grow Constr. Co. v. State, 391 N.Y.S. 2d 726, 56 A.D. 2d 95 (1977). The court found the state liable for negligent design, delay and supplying misleading bidding information. The bidding information falsely indicated no gravel or boulders in the project soils. The court refused to enforce the exculpatory clauses and relieve the state of liability for supplying the misleading information. It found that under New York law, liability may attach for misrepresentation of soil conditions -- despite the existence of exculpatory clauses -- if (1) reasonable inspections would not have revealed the actual conditions, or (2) the representations were made in bad faith.

Haggart Constr. Co. v. State, 427 P.2d 686 (Mont. 1967). The contractor based its bid on information and subsurface data indicating gravel of sufficient quantity and quality for completion of the project could be obtained from three state optioned borrow pits. The contract, however, expressly provided that the contractor was to make an independent investigation and the state made no guarantee of the quantity or quality of material available. Only 14 days were available for investigation between invitation to bid and letting. After work began, it was discovered that the borrow pits were not as represented. The court found that the state, by furnishing the contractor with the subsurface information, sought to obtain lower bid prices and intended for the

contractor to rely on them. As such, the contractor's reliance was reasonable and it was entitled to recover, notwithstanding the exculpatory language.

Conduit Foundation Corp. v. State, 425 N.Y.S. 2d 874,74 A.D. 684 (1980). The contractor encountered "nested" boulders while driving soldier beams. The boulders were not indicated in the contract documents and caused extensive performance delays which in turn caused design changes and more delays. The contract contained exculpatory clauses. However, the contractor proved there was insufficient time between the invitation to bid and bid letting for it to conduct its own subsurface investigation. The contractor was awarded damages for delays caused by misrepresentation, failure to coordinate the work and failure to timely issue change orders.

State Hwy. Dept. v. MacDougald. Constr. Co., 115 S.E. 2d 863 (Ga. Ct. App. 1960). The court enforced exculpatory clauses relieving the owner of liability for the incorrect soil information. The owner furnished a soil report to the contractor but "made no guarantee" as to its accuracy. The report was later found to be incorrect.

L-J. Inc. v. State Hwy., 2242 S.E. 2d 656 (S.C. 1978). The contractor experienced a 400% rock overrun from the estimate of rock to be removed during the performance of the "unclassified excavation" bid item. However, the contractor was denied recovery for the extra rock removal because the contract provided that subsurface information was furnished to the contractor for "informational purposes" only.

Typical Disputes Between Owners and Contractors Regarding Differing Site Conditions Clauses:

- Are the conditions encountered materially different from those represented in the contract?
- Is the condition a latent physical condition?
- Would the actual conditions encountered have been discovered by a reasonable site investigation?
- Has the owner protected itself with exculpatory clauses?
- Did the contractor give proper notice to the owner, giving it the opportunity to inspect the conditions?

Differing Site Conditions
Legal Entitlement Check List:

- ☐ 1. Does the contract contain a Differing Site Conditions Clause?
- ☐ 2. Does the clause include the type of condition encountered? (Type I: Subsurface or latent physical conditions differing materially from those indicated in the contract.) (Type II: Unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered.)
- ☐ 3. Do the conditions differ materially from those indicated in the contract documents or those ordinarily encountered?
- ☐ 4. Did the contractor make a reasonable site investigation as required by the contract?
- ☐ 5. Has the owner attempted to shift the risk of differing site conditions to the contractor?
- ☐ 6. Did the contractor notify the owner/architect/engineer prior to disturbing the conditions?
- ☐ 7. Have the conditions encountered increased the contractor's costs in performing the work or time required to complete the work?

C. Delays, Disruptions, Acceleration, and Other Time Related Problems

Before beginning a discussion of claims based on time related problems, it is important to understand some of the terminology involved in these types of claims:

Delay refers to the lack of performance or the extension of time required to complete a project that results from unexpected events. Delay may be caused by the contractor, the owner, third parties, or by unanticipated natural or artificial site conditions.

Disruption is the lost productivity that results from interruptions in the planned sequence of operations. When workers are shifted from work on one part of a project to another and back again, when work is suspended, or when change orders force rework of the project, the “learning curve” that would ordinarily increase productivity over time is halted, forcing workers to start over on developing as a cohesive, efficient work force.

Interference refers to actions by the owner that interfere with the contractor’s performance. Examples include: failure to allow the contractor access to the work site; opening the project to use before the contractor has completed it; and ordering the contractor to proceed where it is clear that work by other contractors will prevent the contractor from performing.

Excusable and non-excusable delays: **Excusable delays** are those for which the contractor is not penalized by an assessment of liquidated damages or termination for default. Excusable delays arise from unforeseeable circumstances beyond the control and without the fault or negligence of the contractor, such as: design problems; severe, unanticipated weather; and unforeseeable strikes not caused by the contractor’s unfair labor practices. **Non-excusable delays** are those which could have been avoided by planning (i.e., the events were foreseeable), regardless of whether the contractor had control over the occurrence.

Compensable and non-compensable delays are both types of excusable delays; however, various contract clauses may limit the delay damages the contractor is permitted to recover. For example, changes clauses may limit contractor recovery to costs associated with direct performance of the change order work. In such a situation, the owner may argue that delays incurred while the scope of the change is being determined or the impact of changes on unchanged work is non-compensable.

Concurrent delay refers to independent sources of delay that occur at the same time. Where one of the delays is compensable and another is not, the contractor will be unable to recover compensation because the non-compensable delay is as much the cause of the delay costs as the compensable one. Likewise, where one concurrent delay is excusable and another is not, no compensation or time extension will be granted. Concurrent delays where both the owner and the contractor have caused delays ordinarily prevent either party from recovering against the other, unless an apportionment of the delay attributable to each can be determined.

Controlling and non-controlling items of work: An item is controlling where other items of work cannot be performed until the controlling item is completed. For example, grading of the roadbed is a controlling item in highway construction because paving cannot proceed until the area to be paved is graded. Stripping and signage ordinarily are not controlling items. Delay that affects controlling items of work is the most serious because such delay carries through the entire project.

Critical and non-critical delays are similar to the distinction between controlling and non-controlling items of work. For example, a delay that affects non-controlling items of work is not a critical delay because the overall progress of the work is not affected. Although non-critical delays do not entitle a contractor to a time extension, the costs of such delays may still be recoverable. For example, delays that affect cost of performance are compensable.

Acceleration occurs when the owner requires the contractor to complete construction of the project earlier than the time the contractor was entitled to based on a properly adjusted schedule.

Typical Disputes Between Owners and Contractors Regarding Delays:

- Was the delay foreseeable?
- Is recovery of additional compensation prohibited by a “No Damages for Delay” clause?
- Was the proper notice given?
- Can the contractor prove the effect of the delaying event on its performance?

Contractors tend to believe that whenever they add supervision, labor, and/or equipment on work overtime, they are entitled to recover the additional costs they incur doing so. Disputes between owners and contractors on **acceleration** typically involve:

- Did the contractor experience an excusable delay?
- Did the contractor give timely notice of the excusable delay?
- Did the contractor request a time extension before accelerating its work?
- Did the owner direct the contractor to meet the unextended schedule?
- Did the contractor accelerate the work for its own benefit?
- Does the applicable law permit the contractor's recovery of acceleration costs?

Anticipating time-related problems can be a real challenge to transportation construction contractors. Frequently, when a problem occurs, crews and equipment can be shifted to another area of the project. CPM schedules are difficult to prepare and difficult for field personnel to understand. In many instances, they are not updated. Daily reports and other documentation at the project site are often inadequate. In addition, contract clauses requiring notice and force account recordkeeping usually don't contemplate delay claims and some states have inserted "no damage for delay" clauses in their specifications. Even when a time-related claim is anticipated, contractors find it is difficult to persuade owners, at the time of the delaying event, what the impact will be on future work.

Despite the problems, contractors can control certain aspects in a delay, disruption, or out-of-sequence work situation, but that control hinges upon being able to **recognize possible delay situations when they occur**. A prime contractor may have a delay and increased costs later in the project because of an event that changed the sequence of the work earlier in the project. Examples of potential disruptive events include:

- The entire site is not available because of the owner's failure to obtain permits, rights-of-way, or failure to coordinate work of other contractors.

- Excessive plan revisions.
- Extra work or alterations of work or quantities that alter the planned sequence.
- Defective plans and specifications.
- Failure to relocate utilities or other obstructions.
- Failure to provide agreed-upon materials.
- Site conditions that differ from those represented by the owner.
- Where any of the above conditions push the contractor into a period where bad weather conditions prevent the work from proceeding.
- To effectively recognize possible delay situations, contractors should be familiar with the **types of delays** they may encounter on a construction project. The most common delays include:

1. **Separate Prime Contractors**

Increasingly, two or more contractors may each have a separate contract with the owner for different portions of the work on a single project. Interference may arise, for example, from one contractor's storage of materials on a site where the other has work to perform, or from one contractor's failure to progress with work that is preliminary to the other's work. There is ordinarily no direct contact between the separate prime contractors and the owner may disclaim responsibility for any lack of cooperation between them.

Moore Construction Co. v. Clarksville Dept. of Elect., 707 S.E.2d 1 (Tenn. 1985), illustrates such a situation. In *Moore*, a prime contractor brought suit against a co-prime claiming the following: defective work by the co-prime and its subs; co-prime's storage of materials on the work site instead of in agreed storage areas; trash strewn by co-prime; and co-prime's false assurances regarding the date when the site would be available to the delayed prime. In this case, the court stated:

Unless the construction contracts involved clearly provide otherwise, prime contractors on construction projects involving multiple prime contractors will be considered to be as intended or third party beneficiaries of the contracts between the project's owner and other prime contractors . . . The courts have generally relied upon the following factors to support a prime contractor's third party claim:

- a. The construction contracts contain substantially the same language;
- b. All contracts provide that time is of the essence;
- c. All contracts provide for prompt performance and completion;
- d. Each contract recognizes the other contractors' rights to performance;
- e. Each contract contains a non-interference provision; and
- f. Each contract obligates the prime contractor to pay for the damage it may cause to the work, materials, or equipment of other contractors working on the project.

Claims may also be made against the owner based on the owner's failure to coordinate the work:

In re: Roberts Constr. Co., 172 Neb. 819, 111 N.W. 2d 767 (1961). The paving contractor was delayed in part by a third party's failure to prepare subgrade on schedule and a utility's delay in relocating poles. As a result, the paving contractor was unable to work in an efficient manner and was delayed into the winter months with a corresponding 50% increase in costs. The contractor was allowed its extra costs from the owner.

Carlo Biachi and Co. v. State, 230 N.Y.S. 2d 471, 17 A.D. 2d 38 (1962). A bridge contractor on a state highway project was delayed by the embankment contractor's failure to construct the embankments according to specification in a timely manner. The court held that the owner's failure to direct the embankment contractor to place "stub" embankment temporarily so that the bridge contractor could proceed was not a breach of contract.

2. Delay in Obtaining Right-of-Way, Site Access, or Third-Party Permits

It is well established that the owner has an implied duty to provide the contractor with access to the work site, and a contractor who can prove that the owner failed to provide access to the site will ordinarily be able to recover damages caused by lack of access, as illustrated by the following cases:

Farona Bros. Co. v. Commonwealth, 257 N.E.2d 450 (Mass. 1970). The contract called for demolition of several buildings in the path of highway construction. The state moved slowly in condemning the land and in releasing the buildings for demolition. The contractor was ordered from place to place, working piecemeal because of lack of access to the buildings and was under the threat of default if it stopped work. The court ruled the contractor was entitled to damages caused by the lack of an available site.

Gasparini Excavating Co. v. Pa. Turnpike Commission, 187 A.2d 157 (Pa. 1963). The contract included a “no damage for delay” clause stating that interference from other contractors would not justify damages. The site was not available to the excavating contractor because of the operations of a slushing contractor. Although ordinarily courts enforce “no damages” clauses, courts will not do so when there is active interference by the state. Here, the state’s order to the excavating contractor to proceed despite the lack of a site amounted to active interference and the excavating contractor was able to recover the damages it suffered from the delay.

Broadway Maintenance Corp. v. Rutgers, 447 A.2d 906 (N.J. 1982). Where a contract clause authorized the owner to deduct from the delaying contractor costs and expenses caused to the delayed contractor from the delaying contractor’s failure to cooperate, and a second clause required the delaying contractor to defend any suit by the delayed contractor against the owner, and where the contractors combined to produce the performance schedule, the co-prime contractors had contract fights against each other.

L.L. Hall Construction Co. v. United States, 379 F.2d 559 (Ct. Cl. 1966). Hall’s contract to repair and restabilize runways at a U.S. Naval Air Station was delayed four months because the Navy did not make the runways available so that Hall’s work could be completed in a timely manner. The runways were being utilized for military operations while other contractors worked on other runways. The other contractors were substantially behind schedule but were allowed by the Navy to proceed rather than allowing Hall to do so. The contract included a clause that provided:

“The Government will make every effort to schedule aircraft operations to permit accomplishment of the contractor’s daily schedule. However, in the event of emergencies, intense operational demands . . . the contractor will be required to move his operations. . . .”

The court ruled that the four month delay was not an emergency and the Navy was liable for unreasonably hindering and delaying Hall’s work.

Lewis Nicholson, Inc. v. United States, 550 F.2d 26 (Ct. Cl. 1977). The highway contractor building a road in the high Sierra Nevada was entitled to impact damages (delay and acceleration costs). The owner failed to grant access to all parts of the project after the notice to proceed was issued. Designated waste sites could not be used because access to them was blocked by uncleared areas to which the owner had not obtained a right of way. Additionally, the owner had failed to timely issue change orders. Recovery was granted based on the owner’s breach of its implied obligation not to hinder or delay.

Laas v. Montana State Hwy. Com’n., 483 P.2d 699 (Mont. 1971). The contractor sought delay damages caused by the owner’s failure to obtain a right of way. The contractor recovered because the specifications provided no award of the contract would be made until the applicable right of way had been obtained. The contractor had a right to expect the right of way had either been secured or would be secured without detriment to the contractor.

3. Utility Relocation or Interference

Contracts frequently try to limit a contractor’s recovery for such delays as illustrated in **Grant Construction Co. v. Burns**, 443 P.2d 105 (Idaho 1968). Here, the contract contained extensive provisions dealing with limitations on the contractor’s damages remedy for delays caused by utility pole removal. The actual delays, however, were due to the state’s failure to coordinate the work. The court ruled the contractor was not limited to the damages specified but rather was entitled to seek additional damages.

Recovery directly against the utility company may also be possible. In **Higgins Construction Co., Inc. v. Southern Telephone and Telegraph**, 281 S.E.2d 469 (S.C. 1981), the utility was held liable under the doctrine of **promissory estoppel** because although it had stated at the reconstruction conference it would remove its lines by the contractor’s anticipated start date, it did not. This inaction delayed the contractor for two months. There are cases, however, where the courts have refused to hold the utility companies liable. [See **Contempt Construction Co. v. Mountain States Telephone and Telegraph Co.**, 736 A.2d 13 (Ariz. App. 1987).]

4. Defective Specifications

An owner impliedly warrants that by following the specifications for a project, a contractor will be able to complete the project within the contract time and in the manner specified. The following cases illustrate this principle:

McCree & Co. v. State, 91 N.W.2d 713 (Minn. 1958). The contract required soil compaction to a specified density. This amounted to a warranty that the subsoil conditions would permit compaction to that density if the contractor followed the procedure called for in the contract. When the contractor discovered the specifications could not be complied with, it suggested corrective action. The state delayed in issuing work orders and the contractor was forced into a period of winter work requiring extra gravel for winter protection, extra labor, and extra equipment. Because the specification for compaction could not be achieved, the court held the state was liable for these costs.

Denton Constr. Co. v. Missouri State Hwy. Com'n., 454 S.W. 2d 44 (Mo. 1970). An excavation contractor failed to construct its portion of a project according to the plans and specifications furnished to the paving contractor. The state, however, required the paving contractor to bring the “roadbed” up to specifications. The paving contractor was entitled to the extra costs incurred in performing this work based on the court’s finding that the work of the excavation contractor would be as represented to the paving contractor.

Sandkay Constr. Co. v. State, 399 P.2d 1002 (Mont. 1965). The contract required the contractor to make a “cut” removing approximately 45,795 cubic yards of rock as part of performing “unclassified” excavation on a highway project. As designed, the cut was to be constructed with slopes at .75: 1. Ultimately, because of instability in the slopes, the final as-built slopes were 2: 1. This change resulted in a 300% overrun in rock excavation. However, the total volume of “unclassified” excavation on the project was not changed because the rock from the cut was used as fill. Despite the contract’s lack of a Changed Conditions clause, the court found the contractor was entitled to recover because, by including a changes clause in the contract, the parties did not intend for such “major” changes. The owner had breached its warranty against defects in the plans and specifications.

Midwest Dredging Co. v. McAninch Corp., 424 N.W. 2d 216 (Iowa 1988). The contract specifications required embankment material be hydraulically dredged from a borrow area and pumped to the work site. Later, it was discovered that hydraulic dredging was impossible or near to impossible because of rock not indicated in the subsurface data. The contract contained exculpatory language disclaiming inaccuracies in the subsurface data. However, the court found that the dredging subcontractor was entitled to recover because, by requiring the borrow to be hydraulically dredged, the owner warranted that the work could be performed by hydraulic dredging.

Other jurisdictions have found owners liable to the contractor for defects in the plans and specifications based on **misrepresentation**. In these cases, the courts conclude that the owner, by furnishing the contractor with plans and specifications or other information, represents the truth of the information furnished. When that information is later found to be untrue, the courts have sometimes held the owner liable for the difference between the cost of the work had it been as represented and the cost of the work as performed. Consider the following examples:

State v. Hartford Accident and Indemnity Co., 84 A.2d 57 (Conn. 1984). A highway contractor bidding a project based its bid on not having to perform any rock excavation. The specifications designated all excavation on the project as “unclassified.” At bid opening the contractor discovered that rock excavation would be required and attempted to withdraw its bid. However, the DOT represented the only 38,000 cubic yards of rock would need to be excavated, thereby causing the contractor to enter the contract. The volume of actual rock encountered was in excess of 70,000 cubic yards. The contractor was allowed the costs of excavating the excess rock based on a misrepresentation theory.

E.C. Nolan v. State, 227 N.W. 2d 323 (Mich. App. 1975). The owner represented in a schedule found in the bid documents that work on a bridge extension could begin on or before a certain date. At the time of the representation, other contractors on the project were experiencing significant delays. Work did not commence until 9 1/2 months after the represented start date. The contractor was entitled to delay damages based on the court’s determination that the owner was guilty of misrepresentation.

No Damage for Delay Clauses

To avoid claims for delays, disruptions, or other time-related problems, some owners have inserted “no damage for delay” clauses in their contracts. Other owners have, in specific situations such as utility delays or delays caused by separate prime contractors, provided for time extensions only. In most states, the

courts have found that such clauses are not void for being contrary to public policy.

Over the years, some courts have strictly interpreted such clauses and have developed exceptions to the enforceability of “no damage for delay” clauses. The exceptions most recognized by the courts include:

- Active owner interference.
- Not within the contemplation of the parties.
- Unreasonably long delays.
- Delays not covered by the specific clause.

Many state legislatures have enacted statutes prohibiting “no damage for delay” clauses in public contracts. One example is a California statute that provides:

“Contract provisions in construction contracts Of public agencies and subcontracts thereunder which limit the contractor’s liability to an extension of time for delay for which the contractor is responsible and for which delays are unreasonable under the circumstances involved and not within the contemplation of the parties shall not be construed to preclude the recovery of damages by the contractor or subcontractor.”

Numerous cases in jurisdictions without statutory limitations on the application of “no damage for delay” clauses exist. Examples include:

Dickinson Co. v. Iowa State Dept. of Trans., 300 N.W. 2d 112 (Iowa 1981). The court determined that “no damage for delay” clauses are generally enforceable except as to: (1) delays not contemplated by the parties at the time of the contract; (2) delays amounting to an abandonment of the contract; (3) delays caused by the bad faith of the owner; and (4) delays caused by the active interference of the owner. Applying this rule, the court found that a two year delay suffered by a lighting and sign contractor was not within any exception where the delays were not caused by the owner.

United States Steel Corp. v. Missouri Pac. R. Co., 668 F.2d 435 (8th Cir. 1982). The superstructure contractor on a bridge project was delayed by approximately 170 days because of inability to gain site access. The site was not available because of a second contractor’s failure to complete the bridge substructure. The owner issued the notice to proceed to the superstructure contractor without knowledge of the substructure delays. Despite the “no damage

for delay” clause in the contract, the court awarded delay damages on grounds that the owner’s issuance of the notice to proceed with actual or constructive knowledge that the site was unavailable constituted active interference. In the court’s opinion, active interference was not a delay contemplated by the parties when they entered the contract.

White Oak Constr. Co. v. Dept. of Trans., 585 A.2d 1199 (Conn. 1991). The contractor’s completion of a project was delayed by six months due to a utility company’s failure to relocate utility lines. The contract contained a “no damage for delay” provision. The court held that a six month delay was not so long as to be outside the contemplation of the parties at the time they entered the contract.

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Delay, Disruptions, and other Time-Related Problems
Legal Entitlement Check List:

- ☐ 1. Is there a Suspension of Work Clause in the contract?
- ☐ 2. Does the Suspension of Work Clause cover both owner-directed suspensions and constructive suspensions of work?
- ☐ 3. Is there a “No Damage for Delay” Clause in the contract?
- ☐ 4. Was the delay the contractor encountered foreseeable?
- ☐ 5. Was the delay the contractor encountered unreasonable?
- ☐ 6. Did the delay/disruption increase the time necessary to perform the work?
- ☐ 7. Did the contractor comply with the notice requirements of the contract?
- ☐ 8. Did the contractor comply with the schedule update requirements of the contract?

Acceleration
Legal Entitlement Check List

- ☐ 1. Is the contractor entitled to a time extension for excusable delays?
- ☐ 2. Did the contractor notify the owner and request the time extension?
- ☐ 3. Did the owner direct the contractor to accelerate its work or did it refuse to extend the contract time?
- ☐ 4. Did the contractor notify the owner that it intends to make a claim for acceleration?
- ☐ 5. Did the contractor's costs increase as a result of accelerating the work?