

WHAT YOU NEED TO KNOW ABOUT DELAYS, BUT WERE AFRAID TO ASK

By Kelly Gagliuso

In fielding contract questions from construction clients, one of the more common areas of concern centers on the treatment of delay issues under the AIA documents. Primarily, contractors want to know what rights they have in the event of a delay caused by the owner or architect. My clients don't generally find it amusing when I unlock the legal mystery of the AIA documents by disclosing to them that, under the AIA documents, delays are never the owner's fault unless the architect says so. As a result, I'll try to expand on that principle. My comments are most certainly skewed toward the interests of contractors, and are worthy of consideration when you are confronted by the AIA forms in a standard Design/Bid/Build project, or any other type of project utilizing form A201.

I. "No Fault" Delays / Force Majeure A201 §8.3.1

AIA form A201 addresses delays which arise out of unforeseen, sometimes calamitous, circumstances which are outside of the control of both parties and could not be avoided with the exercise of reasonable care. Section 8.3.1 provides, in part, that should the contractor experience delays due to "labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control ... the Contract Time will be extended by change order for such reasonable time as the Architect determines." Given the nature of these types of delay, it generally accepted that neither party will be able to seek compensation from the other for the costs associated with the delay. Rather, the appropriate remedy is to extend the completion date to reflect the length of the delay.

Lawyers generally refer to these provisions as "force majeure" clauses. The literal translation is "irresistible force" and generally encompasses all so-called Acts of God. Consequently, under A201, no monetary compensation is due to the contractor for delay associated with events properly categorized as force majeure. The delays are, in legal terms, excusable and noncompensable. Generally I do not quarrel with this principle, so long as the contractor is not working in an area where the risk of such occurrences is unusually high.

II. Delays Caused by the Owner or Architect A201 §§8.3.1 and 8.3.2

Unfortunately, §8.3.1 of A201 combines the concept of force majeure delay with the concept of delays caused by the owner or architect. Delays caused by "an act or neglect of the Owner or Architect, or of an employee of either...., or by changes ordered in the Work" are also grouped into section 8.3.1 and the only remedy specifically provided to the contractor is that "the Contract Time will be extended by change order for such reasonable time as the Architect determines." Although this clearly gives the contractor some recourse in the form of a time extension, additional *compensation* is not specifically authorized. Many argue, however, that a related provision in section 8.3.3 leaves the door open for such claims.

At best, I find this "combined" provision dangerous and I always modify this section to separate

the language dealing with force majeure from that concerned with delays caused by the owner or architect. In a separate section dealing with delays caused by the owner or the architect, I make specific provision for a time extension *and* additional compensation to the contractor. Generally, I also eliminate the language contained in 8.3.1 which suggests that the architect has sole discretion to determine the extent of such compensation.

A. No Damage for Delay Clauses

Form A201 does not expressly prohibit contractors from claiming or collecting delay damages. More often than not, however, experienced Owners modify A201 to specifically preclude the contractor from collecting damages for delays caused by the owner or the architect. These "no damage for delay" clauses are generally enforceable. Implementation of these clauses can cause catastrophic losses on a project which experiences substantial delay, especially where the contractor's profit margin is already thin.

Typically, a no damage for delay clause will state, in no uncertain terms, that the contractor is not entitled to collect damages for any delays experienced during the project. These are often paired with a liquidated damages clause which, in essence, allows the owner to avoid any liability for its own delays, but requires the contractor to forfeit a portion of its contract balance when it is responsible for the delay. In most jurisdictions, however, no damage for delay clauses are not absolute.

In order to defeat a no damage for delay clause, the contractor must show relatively egregious conduct on the part of the owner or architect. The contractor must prove that *one* of the following circumstances occurred: 1) the owner *wilfully* interfered with the contractor's timely performance; 2) the delay was unreasonably long; or 3) the owner or architect purposefully misrepresented material facts to the contractor. If the contractor cannot show that one of the above events occurred, it is likely to be prohibited from collecting any compensation as a result of a delay which was clearly caused by the owner or its representatives.

Based on the potentially devastating consequences of these clauses, I generally tell contractor clients that the owner's insistence on such clauses should be a "deal-breaker" unless the contractor has a considerable amount of risk built into its price. These clauses can often be negotiated to allow both parties to collect appropriate damages if the other should be responsible for delay. This is clearly the more equitable result.

III. Delays Caused by Weather §4.3.7.2

This is one of the more misunderstood claims that I encounter. Many contractors feel that if they can show that their work was interrupted or halted by rain, snow or other weather conditions, they are entitled to a direct credit for each day that the weather interfered with their work. This is not an accurate interpretation. Contractors need to look to §4.3.7.2 of A201 which deals with weather-based claims and provides that:

"If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an adverse effect on the scheduled construction."

Based not only on the precise language of this section, but also on case law which has developed over time, it is not enough to contend that weather conditions interfered with or halted the contractor's work on the project. The weather must be "abnormal" for the time of year and the region in which the construction is being completed *and* the contractor must show that the weather conditions were not foreseeable and impacted the schedule adversely.

These are tough hurdles, especially in the Northeast where winter conditions are expected during a substantial portion of the year. As a result, my best advice to contractors faced with scheduling projects during particularly rainy seasons, or during the winter, is to be sure to allow adequate time in their schedules and contingency in their bids to cover adverse weather conditions. As we discussed in the force majeure section, even if the contractor is successful in proving abnormal, unforeseeable weather conditions, the remedy is generally limited to an extension of time. These issues should be seriously considered in bidding winter projects.

IV. Delays cause by the Contractor or Subcontractor

The contractor and its subcontractors are required to work efficiently and have adequate forces on site to complete the contract by the set completion date. Failure to adequately man the job can give the owner a claim for breach of this provision. *A201 §8.2.3*. There are a number of other contractor-caused delays, including failure to order materials or supplies on time, failure to coordinate the work and, occasionally, sheer incompetence of the project manager or superintendents. Delay which originates from any of these causes may also be charged to the contractor.

A. Liquidated Damages *A101 §3.3 and A401 §9.3*

Due to the difficulty of measuring and proving damages actually caused by construction delays, many owners insist upon including a liquidated damages provision in the contract. *See A101 §3.3*. In turn, contractors often pass on liquidated damages to subcontractors, to the extent that the subcontractor contributed to the delay. *A401 §9.3*. These provisions typically allow the owner to deduct a specific sum from the contract balance for each calendar or work day the contractor is on site beyond the scheduled completion date.

Most owners who impose such damages intentionally make them stiff to encourage contractors to perform in a timely fashion. These types of damages are allowed and enforceable in New Hampshire, so long as they bear some resemblance to the actual damages that would be suffered by the owner if the project is not completed on time. As a result, contractors should think long and hard before signing a contract with a liquidated damages clause. These clauses are often used as a hammer to extract performance and can create an unfair advantage in favor of an unscrupulous owner. More

often than not, these clauses are negotiable and, if they cannot be eliminated completely, the daily penalty can often be substantially reduced.

V. Delay Claims *A201 §8.3.2 and A401 §5.3*

Delay claims by contractors must be submitted in accordance with the claims provisions of *Article 4.3* of A201. Review and follow these provisions as soon as you become aware of any significant delay. Since §2.1 of A 401 incorporates the provisions of the general contract into the subcontract, the subcontractor must submit its delay claims in the same manner. Section 5.3 of A401 makes this clear by requiring claims for extensions of time be submitted to the contractor in time to allow it to comply with §4.3.

It is vitally important to consider the financial effect of delays in drafting and negotiating construction contracts. Delay claims can destroy your profit margin on a project, or worse, cause substantial losses. Contractors should make sure to include adequate provisions to ensure their right to collect appropriate damages in the event of delays caused by the owner and be on the look out for oppressive liquidated damages clauses which assess unreasonable penalties in the event of the contractor's own delay.