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# HOW TO MANAGE DELAYS AND AVOID EXPOSURE

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# First Step?

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**READ YOUR CONTRACT!!!**

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- **Will dictate whether you recover**
- **Will dictate whether you are liable**

# “Red Flag” clauses?

- Key delay-related risk shifting clauses
  - Time and Schedule
  - Changes clause
  - Waiver Clauses
    - No damage for delay
    - Consequential damages
  - Notice of Claim clauses

# Time

- A101-2017, Art. 3
  - Contract Time – date of commencement (via NTP) to substantial completion date.
  - Better than if based on final completion date.

# Time

- Time is of the Essence (A201 § 8.2.1)
  - Failing to complete performance on-time is not material breach unless “time is of the essence”
  - Must be express stipulation
  - Delay is generally excused if the delay not attributable to the contractor



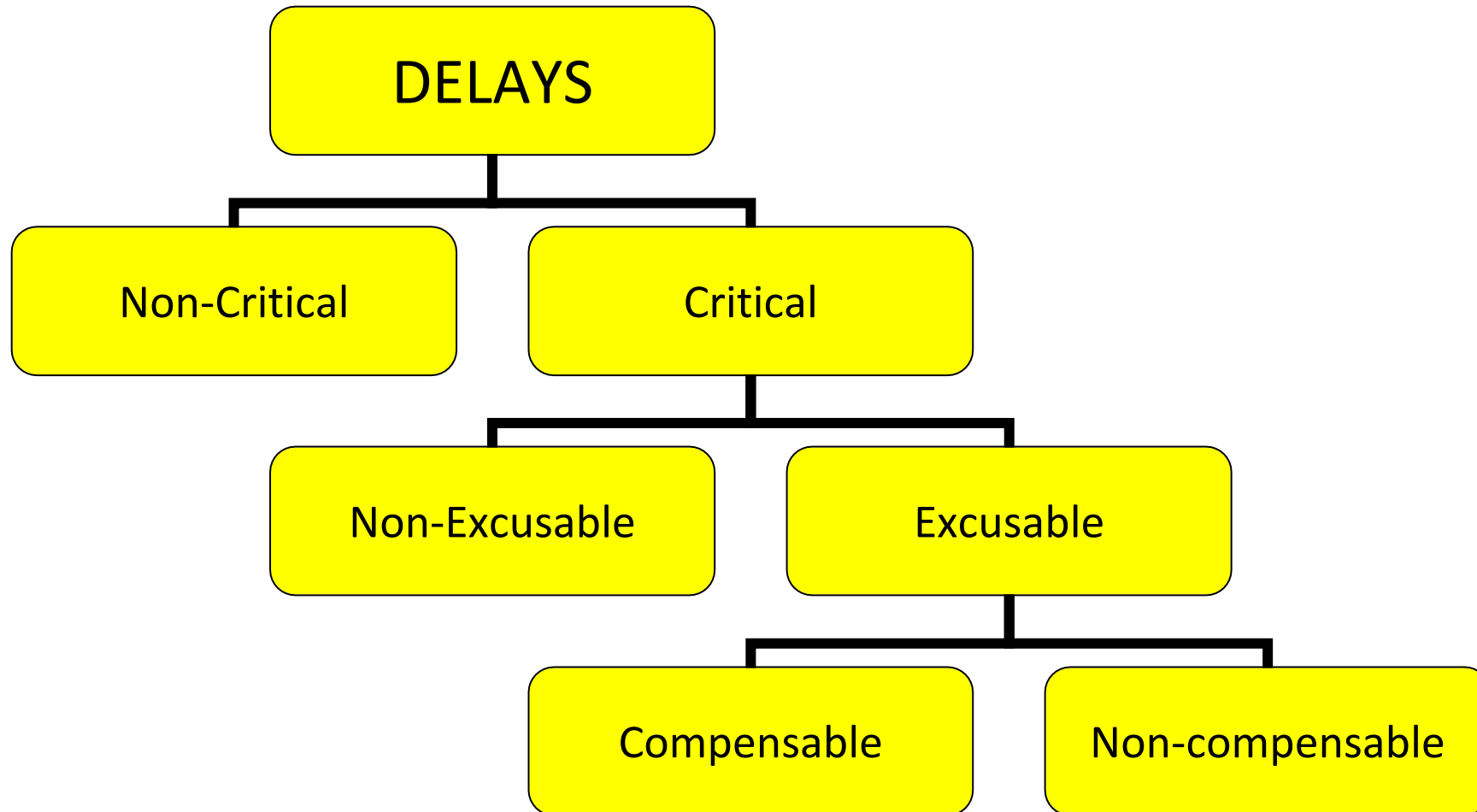
# Time

- A201 – 2017, § 3.10 (Schedule)
  - Contractor shall prepare and submit for the Owner's and Architect's **information** a construction schedule.
  - Shall be revised at appropriate intervals
  - Shall perform the work in general accordance with most recent schedule submitted.

# Time

- **Consequences of not enforcing schedule**
  - Waiver
    - Allowed completion date to pass w/o objection
    - Allowed continued performance
    - Did not set new completion deadline
    - Continued to issue COs and change directives
  - Waive right to recover for late completion
    - Liquidated damages
  - Waive right to terminate for default

# DELAY OVERVIEW



# Delays & Extensions of Time

- Typically must impact **critical path**
  - Float belongs to the project
  - Usually available on first-come, first-served basis
  - Legal precedent has established that a claimant is not entitled to a time extension or compensation for delay until all available float has been used and path has become critical.

# Concurrent Delay – What is it?

- A concurrent delay occurs on a construction project when two or more separate delay events occur during the same time period on separate critical paths with each independently affecting the project completion date.
  - If either event had not occurred, the project would have been delayed by the other event.
  - Of course, there exist no consequence if the concurrent delay is not on a critical path.
  - No recovery allowed unless the owner delay is more extensive than the contractor delay.

# Concurrent Delay – What is it?

- Example – Owner changes the design which causes a delay, but the contractor was delaying the project by repairing defective work at the same time.
- Commonly used as an excuse/defense to a delay claim.
- Not frequently addressed by contract.

# Practical and Legal Issues

- Courts recognize the value of CPM scheduling for proving and rebutting delay claims
- Must be valid baseline schedule
- Must be valid as-built schedule
- Battle of the scheduling experts!!!

# CRITICAL PROJECT DOCUMENTATION TO COMBAT OR SUPPORT DELAY CLAIMS



# Critical Project Documentation

- FIRST OF FOREMOST - CPM schedule
  - Realistic baseline
  - Regular periodic updates

# Critical Project Documentation

- Daily reports/logs
  - Routine, contemporaneous description of work progress **and problems**
  - Create standard form for easier use by field personnel
  - Instrumental in creating the as-built schedule

# Critical Project Documentation

- Daily reports/logs (cont.)
  - Information recorded briefly and concisely
    - Manpower utilization
    - Equipment used or idle
    - Major work activities
    - Any delays or problems
    - Areas of work not available
    - Oral instructions and directions
    - Weather summary

# Critical Project Documentation

- Time sheets
  - Document manpower
    - Number of manhours worked
    - Work performed
- Accounting records
  - Must prove damages with reasonable certainty
  - Invoices
  - Tracking idle personnel or equipment

# Critical Project Documentation

- Photographs
  - Monitor, depict and preserve conditions
  - Pictorial diary of project (weekly or monthly)
    - Electronic time stamp is important
  - Document problem conditions or events
    - Group steel example

# Critical Contract Clauses Affecting Damage Recovery

# Change Order

- If you are delayed, must request a change order for time and/or money.
- If denied, then make a claim per Art. 15.

# Claim Provisions

- A201-2017, Art. 15
- A “claim” is a request for change in contract time or compensation
- Note time limits – 21 days after occurrence OR first recognition of condition
  - NOTICE MUST BE IN WRITING AND MUST BE “SERVED.”
- Note procedural steps to follow
  - Note conditions precedent
    - Initial Decision Maker (Architect unless otherwise indicated)
    - Mediation, Arbitration



# Waiver

- Section 15.1.7 (2017) “Waiver of Claims for Consequential Damages”
  - Damages incurred by the **Contractor** for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

# Waiver

- Section 15.1.7 (2017) “Waiver of Claims for Consequential Damages”
  - Damages incurred by the **Owner** for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons.

# No Damage for Delay

- Example
  - Contractor expressly agrees not to make, and hereby waives, any claim for damages on account of any delay, obstruction or hindrance of work progress for any cause whatsoever and agrees that its **sole right and remedy for any delay shall only be an extension of time for completion of the Work.**

# No Damage for Delay

- Judicial attitudes have been mixed
  - Basis for enforcing the clause: The parties are free to structure the contract as they see fit ... as long as operating at arm's length (e.g. sophisticated business entities).
  - Basis for not enforcing the clause: The clause is seen as one of “adhesion” where the contract is offered on a “take it or leave it” basis.
  - Usually strictly construed due to implied obligation of good faith and fair dealing **but usually enforced**.

# No Damage for Delay

- Recognized exceptions to enforceability:
  - Delay was of a kind not contemplated by parties
  - Delay was unreasonable and tantamount to an abandonment of the contract
  - Delay was caused by fraud, misrepresentation, or bad faith
  - Delay was caused by active interference
  - Delay resulted from the breach of a fundamental obligation of the contract

# No Damage for Delay

- Several states have enacted legislation prohibiting enforcement
  - Wash. Rev. Code § 4.24.360

# Strategies to Enhance Damage Recovery

# Threshold Matters

- Prompt written notice of event
- Prompt written request for contract change
  - Price and/or time adjustment
- Submittal of formal claim
  - Detailed claim information
    - Claim summary
    - Key project documents
    - Schedule analysis
    - Damage calculation



# Threshold Matters

- If owner denies claim:
  - Reservation of rights
  - Proceeding under protest
  - Invoke dispute resolution

# Determination of Adjustment

- Impact costs accounted for
  - Direct costs
    - Direct labor, material and equipment costs actually incurred to perform.
  - Indirect costs
    - Time related costs
    - Increased indirect cost due to schedule extension

# Determination of Adjustment

- Impact costs accounted for (cont.)
  - Indirect costs (cont.)
    - Extended overhead (General Conditions)
      - Jobsite personnel
      - Home office
        - Eichleay Formula
    - Escalation costs
      - Increased labor rates
      - Increased material prices

# Determination of Adjustment

- Impact costs accounted for (cont.)
  - Indirect costs (cont.)
    - Original contract work made more difficult
      - Changes to means and methods
      - Changes to work conditions
        - Work pushed into winter months

# Determination of Adjustment

- Impact costs accounted for (cont.)
  - Indirect costs (cont.)
    - Loss of efficiency/disruption
      - Stacking of trades/crowding
      - Change in work sequence
        - Frequent crew movements
        - Excessive start and stop
      - Prolonged overtime
      - Decline in morale due to constant interruption
    - National Association of Electrical Contractors report

# Determination of Adjustment

- Proving indirect costs
  - Measured Mile Method
    - Most reliable
    - Makes causal connection
    - Must have non-impacted timeframe to compare with impacted time frame
    - Elements:
      - Production was impacted for known documented reason
      - Establish valid, similar periods of performance
        - May have to look at past similar jobs
      - Measure productivity over non-impacted period
      - Measure productivity over impacted period
      - Compare periods to determine productivity loss

# Determination of Adjustment

- Proving indirect costs (cont.)
  - Total cost method
    - Contractor claims entire contract overage (e.g. actual cost 140% of anticipated; claim for 40%)
    - Causation hurdles
      - Contractor's bid was perfect
      - Contractor's resulting cost are correct
      - Assumed contractor's performance flawless
    - Some courts will not accept

# Determination of Adjustment

- Proving indirect costs (cont.)
  - Modified total cost
    - Total cost method accounting for contractor-caused impact
  - Direct cost claim
    - Damage contemporaneously determined at time of impact



# Top Takeaways

- Read your contract!
- Document the delay.
- Request a time extension.
- Prove the damages.
- Make the claim.
- Proceed under protest.
- Invoke dispute resolution.

# Questions?

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