

Don't Be An ATM



DON'T BE AN ATM

Presented by:

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Trauner Consulting Services, Inc.



Don't Be An ATM

- Because you don't know your contract.
- Because you don't know the facts.
- Because you don't know how to measure delays.
- Because you don't know the law.
- Because you don't know when to settle.



Know Your Contract

- Understand why and how your contract apportions risks and responsibilities.
- Don't create a claims generation machine.
- Make sure it works. "Taxi Test It Tough"

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Understand Your Contract

New Hampshire DOT Standard Specifications

"D. Suspensions of Work Ordered by the Engineer..."

"If the Engineer agrees that the cost and/or time required for the performance of the Contract has increased as a result of such suspension...the Engineer will make an adjustment (**excluding profit**) and modify the Contract in writing accordingly."

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Understand Your Contract

New Hampshire DOT Standard Specifications

“D. Suspensions of Work Ordered by the Engineer...

“No Contract adjustment will be allowed under this clause to the extent that performance would have been suspended or delayed by any other cause, or for which an adjustment is provided or excluded under any other term or condition of this Contract.”

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“Taxi Test It Tough”



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Make Sure Your Contract Works

Mississippi Department of Transportation

“104.02.2—Differing Site Conditions”

“Upon written notification, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost and/or time required for the performance of any work under the Contract, an **adjustment**, excluding anticipated profits, will be made and the Contract modified in writing accordingly.”

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Don't create a claims generation machine.

- Don't make a contractor file a claim in order to get a time extension or get paid for delay.
- Don't pay for claims differently than a normal change.

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Knowing the Facts

*You're entitled to your own opinion, but
you're not entitled to your own facts.*



-Daniel Patrick Moynihan

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Knowing the Facts

- Observing or acquiring the facts.
- Documenting the facts.
- Accessing the facts.

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Knowing the Facts

- Don't make more work for yourself than you need to.
- You, your contractor, your CEI, and maybe even the contractor's subcontractors record information daily on the project.
- Why duplicate efforts?

Be Smart

- For example, every day, the contractor's superintendent or foremen typically code every labor hour to a particular item.
- For example, every activity in a contractor's schedule identifies every work activity with a unique number. Why not record the work performed each day by the schedule activity number?

Measuring Delays

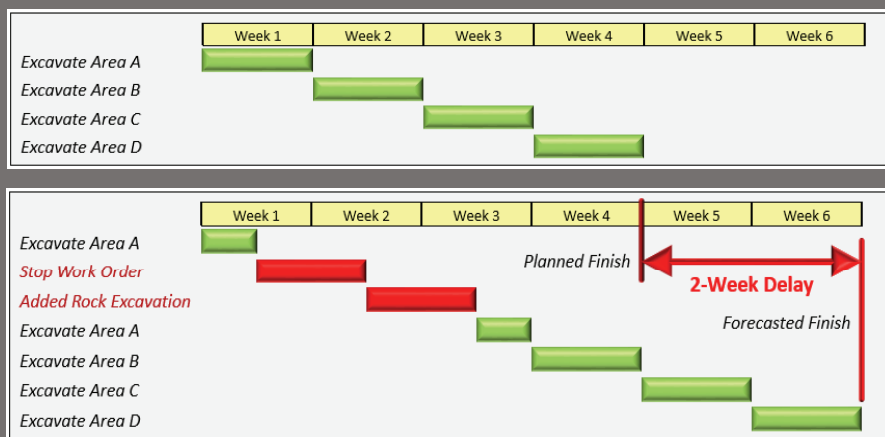
- Critical
- As determined based on the contemporaneous schedules
- Beware the TIA
- Excusable
- Compensable

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Beware of the Retrospective TIA

- What is a TIA?



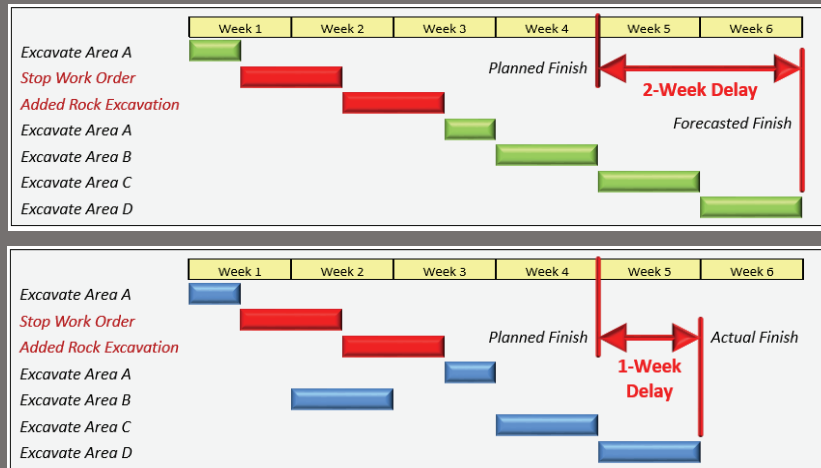
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Beware of the Retrospective TIA

This approach does not necessarily account for what actually happened.



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Excusable Delays – Be Specific

- Some specifications don't identify when delays are excusable and a contractor is entitled to a time extension.
- Some specifications identify generally when a contractor is entitled to a time extension.
- For example, generally, a contractor is entitled to a time extension when it experiences a delay that was not its fault or responsibility and could not be anticipated.
- Under this definition, who is responsible for material shortages?

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Compensable Delays – Be Specific

- Many DOT contracts are silent as to whether delays are compensable.
- Generally speaking, unless the contract specifically prohibits compensation for delay, delays are compensable if they are the owner's fault or responsibility.
- Under this definition, who is responsible for delays attributable to other branches of government?

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Know the Law

- Do you know if your contract is enforceable?
- Proving entitlement to unabsorbed home office overhead.
- Proving entitlement to constructive acceleration.
- Proving entitlement to a proprietary specification.

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Notice

Supreme Court of Virginia.

"Claim Involving Drilled Shaft Work

"AMEC's claim for drilled shaft work stemmed from problems it encountered during construction of Bridge 616. The Court of Appeals held that AMEC's notice was untimely because it was given in 2003, two years after the beginning of the work on the drilled shafts... We agree with the Court of Appeals that AMEC's notice for this claim was untimely.

"The record contains letters and minutes from meetings exchanged between AMEC and VDOT which show that the parties were aware of problems with the drilled shaft work on Bridge 616 as early as 2000. However, it was not until 2003 that AMEC sent VDOT a letter stating its intention to file a claim for additional compensation due to the problems associated with the drilled shafts. Clearly this notice was not given at the "beginning of the work" on this claim because it was given two years after work began... The notice was also given long after a legitimate dispute regarding the problems with the drilled shafts arose between the parties, as evinced by the correspondence in the record. Therefore, the notice was also given after the "time of the occurrence" of this claim, rendering it untimely...

Unabsorbed Home Office Overhead

To show entitlement to unabsorbed home office overhead damages, the contractor must prove:

- There was a government-caused delay to contract performance (as originally planned) that was not concurrent with a delay caused by the contractor or some other reason...
- The contractor must also show that the original time for performance of the contract was thereby extended
- It must then prove that it was required to remain on standby during that delay.

To Prove Standby

- First, the contractor must show that the government-caused delay was not only substantial but was of an indefinite duration.
- Second, the contractor must show that during that delay it was required to be ready to resume work on the contract, at full speed as well as immediately.
- Third, the contractor must show effective suspension of much, if not all, of the work on the contract.

Knowing When to Settle

- Good facts make bad law.
- Beware of the Spearin Doctrine.

Spearin Doctrine

United States v. Spearin (248 U.S. 132), also referred to as the **Spearin doctrine** is a 1918 United States Supreme Court decision. It remains one of the landmark construction law cases. The owner impliedly warrants the information, plans and specifications which an owner provides to a general contractor. The contractor will not be liable to the owner for loss or damage which results solely from insufficiencies or defects in such information, plans and specifications.

The Supreme Court wrote: "...if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work...the contractor should be relieved, if he was misled by erroneous statements in the specifications."

Wikipedia



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