delay damages in a NUTSHELL

Delay Damages

In a Nutshell

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What are Delay Damages?

The term "**Delay Damages**" is often used in construction change order requests, requests for equitable adjustments, and claims. When used in those instances, what exactly does "delay damages" mean?

Well, the answer to this question is not as simple as you may think. It's reasonable to conclude that the term "delay damages" is simply defined as "damages that are caused by delay." But this definition depends on the how one defines the term "delay."

For example, when the term "delay" is defined as only critical project delay (a delay that is responsible for extending the project duration), then the term"delay damages" can be narrowly defined as only the damages that result from the project's extended duration.

The damages that would result from critical delay include the full battery of delay damages – extended field overhead, unabsorbed home office overhead, liquidated damages, idle labor and equipment costs, labor and material cost escalation, and many other costs.

If delay is defined more narrowly as only non-critical delay (a delay that is not the cause of an extended project duration), then the potential damages are still there, but would likely not include extended field overhead costs, unabsorbed home office overhead costs, and liquidated damages.

For the purposes of this discussion, the term “delay damages” is defined broadly to apply to both critical and non-critical delays.

Note that in each of the following discussions of the different types of delay damages, the damage will be defined as being the consequence of a critical delay or just a non-critical delay.

Types of Delay Damages

As described above, delay damages come in many flavors and can be caused by both critical and non-critical delays. The following list includes the most common types of delay damages, but is not intended to be exhaustive:

- Extended Field Overhead,
- Unabsorbed Home Office Overhead,
- Liquidated Damages,
- Escalation,
- Idle Labor and Equipment, and
- Additional Material Storage

Extended Field Overhead

Extended Field Overhead (sometimes called site overhead) is one of the most well-known and well-understood types of delay damages and only results from a critical project delay, or when the project's duration is extended.

Field overhead costs consist of indirect costs that are necessary to support the work in the field and that are directly chargeable to the project. Field overhead costs include, but are not limited to:

- Field office rental,
- Salaries of field office staff,
- Field office staff vehicles,
- Field office utilities and telephone, and
- Field office consumables.

Extended field overhead costs (also called field office or jobsite overhead costs) are, by definition, costs that increase due a critical and compensable delay. For example, if the project is delayed a month by a compensable delay, then the contractor would be entitled to recover the time-dependent field overhead costs such as the rental cost of the field office, the salaries of field office staff, and similar time-dependent costs incurred to support the contractor's operations in the field for the project's additional month of duration.

The contractor's entitlement to payment for extended field overhead costs is based upon the presumption that its original contract price only included field office overhead costs needed to support the project during the original project duration. So, when the project duration is extended, the contractor would incur

additional field overhead costs to support the project and, if the extended project duration was caused by a compensable delay, then the contractor may be entitled recovery of those costs.

Note that the executed change orders need to be evaluated, because if the change order work caused critical project delay, then they may address or affect the contractor's entitlement to recovery of extended field overhead costs.

Unabsorbed Home Office Overhead

Unabsorbed Home Office Overhead is also a well-known, but not well-understood delay damage and like extended field overhead is only caused by a critical project delay. Home office overhead costs are costs that are incurred to support the work, but are not directly chargeable to a specific project. Typically, the contractor's home office overhead costs are apportioned and assigned to the contractor's projects. Said another way, each project has to absorb its fair share of the contractor's home office overhead costs.

Home office overhead costs include, but are not limited to:

- Home office rental or home office ownership costs,
- Corporate Taxes,
- Insurance costs that can't be assigned to a specific project,
- Home office utilities and telephone,
- Home office equipment and maintenance, and
- Salaries of home office staff (company officers, estimators, payroll clerks, receptionists, and others not assigned to a specific project).

Although the terms **Unabsorbed Home Office Overhead** and **Extended Home Office Overhead** are often used interchangeably, they are not the same. For example, when a project experiences a critical and compensable delay, the project does not incur additional home office overhead costs, as it would additional field office overhead costs. Rather, the project's extended duration may limit the contractor's ability to earn revenue from new projects and,

as a result, the revenue of contractor's active projects are not able to fully absorb all of the contractor's home office overhead costs during the period when the delayed project is being delayed. In this circumstance, the contractor's home office overhead costs during the delay to the delayed project may be "unabsorbed" or "underabsorbed," but, conceptually, not extended.

The calculation of the contractor's unabsorbed home office overhead costs can be more complicated and is often quite controversial. It is usually determined through the use of appropriate apportionment formulas. The following is a comprehensive, but not exhaustive, list of such formulas and approaches:

- Eichleay Formula,
- Canadian Formula,
- Allegheny Formula,
- Carteret Formula, and
- Fixed Percentage Approach.

Similar to extended field overhead costs, the executed change orders need to be evaluated, because if the change order work caused critical project delay, then the change order may address the contractor's recovery of unabsorbed home office overhead costs.

(Given the complexities associated with determining the recovery of unabsorbed home office costs, it is recommended that the parties consult with those experienced in the determination of these costs.)

Liquidated Damages

Conceptually, an owner's delay damages are either **Liquidated Damages** or actual damages. The reason that owners use liquidated damages to quantify and collect delay damages when the project duration is extended by a contractor delay is due to the fact that it may be difficult or practically impossible for owners to accurately determine their actual damages before the contract is executed. Therefore, owners rely on liquidated damages to recover a reasonable estimate of the damages that they will incur if the project is delayed by the contractor. Typically, liquidated damages are calculated as a daily rate. Similar to both extended field overhead and unabsorbed home office overhead, liquidated damages result from only critical project delay.

Owners should rely on advice from counsel when calculating the amount of liquidated damages to ensure jurisdictional compliance. However, some of the costs that an owner should consider when preparing an estimate of liquidated damages are as follows:

- Cost for project inspection
- Costs for continued design services
- Costs for the owner's staff
- Costs for maintaining current facilities
- Costs for additional rentals
- Costs for additional storage
- Lost revenues
- Costs to the public for not having beneficial use of the facility
- Additional moving expense
- Escalation costs
- Financing costs

Escalation

Typically, the contractor is responsible for the risk related to fluctuations in labor, equipment, and material costs during the project. However, if a contractor's operation is delayed by compensable delay from one labor agreement period to another, causing the contractor to pay a higher hourly wage rate, the contractor may be entitled to additional compensation.

Note that escalation can be caused by both a critical and non-critical delay.

The same would apply if the purchase of materials was postponed due to a compensable delay and, as a result, the materials purchased for the project cost more.Damages resulting from escalation are usually determined by calculating the difference between the cost of the labor, equipment, or material components that the contractor would have incurred had there been no delay and the actual cost of the labor, equipment, or material components resulting from performing the work later than originally planned.Note that a contractor's recovery of escalation damages is not limited to just critical project delay.

Escalation damages can also result from owner-caused inefficiency, disruptions, and suspensions that do not result in critical project delays; but, instead to specific, non-critical work operations.

Asphalt and Fuel Price Escalation Provisions

Note that some construction contracts contain price escalation provisions for items like asphalt and diesel fuel. Contractors should be aware of these contract provisions and how they affect their entitlement to the recovery of delay damages for material cost escalation and how those costs should be calculated.

Idle Labor and Equipment

Idle Labor and Equipment costs can be caused by both critical and non-critical delays. Idle labor and equipments damages can also result from owner-caused inefficiency, disruptions, and suspensions.

For example, the contractor may be entitled to recover the additional costs of labor or equipment idled by an owner's stop work order. In this example, the suspension would not necessarily have to also be a critical delay for the contractor to be entitled to payment of idle labor and equipment costs.

Additional Material Storage Costs

Additional Material Storage costs are not limited to just critical project delays. Similar to idle labor and equipment costs, additional material storage costs can also result from owner-caused inefficiency, disruptions, and suspensions.

For example, if the contractor is storing structural steel for the project and the start of steel erection was delayed a month, which was the owner's responsibility, then the contractor may be entitled to recover the additional cost of storing that material for an additional month.

Get Help

Though conceptually simple – time is money – the actual measurement of and determination of entitlement to reimbursement for delay damages can be challenging. There is a mountain of literature and case law governing the payment of delay damages. And some issues are quite controversial. There are experienced construction professionals that work with these issues everyday who can quickly and efficiently steer you in the right direction. Reach out to them.

Your attorney can help you locate these construction consultants, but beware of the advice of attorneys or accountants or engineers or architects that don't work with these issues every day. There is a lot of misinformation out there.

Consultants

Trauner Consulting Services, Inc.: Experts in the areas of delay damages, delay and inefficiency analysis, and construction claims.

About The Author

Mark Nataga helps clients by providing construction claims preparation and evaluation, development and review of critical path method (CPM) schedules, delay analysis, training, dispute resolution, and specification writing.

Mark was a contributing author and continues to provide additional revisions to the Association for the Advancement of Cost Engineering International's *Recommended Practice No. 29R-03 for Forensic Schedule Analysis*, which is the first publication in the industry that comprehensively classifies schedule analysis techniques. Mark's contribution included describing and defining the Contemporaneous Period Analysis, also called the Contemporaneous Schedule Analysis.

Mark is a co-author of *Construction Delays: Understanding Them Clearly, Analyzing them Correctly*. He is a co-manager responsible for the development of the Project Management Institute's College of Scheduling's *Best Practice Guide for Schedule Impact Analysis*; continually writes technical papers and articles for industry publication; and speaks nationally on scheduling and claims analysis topics.

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