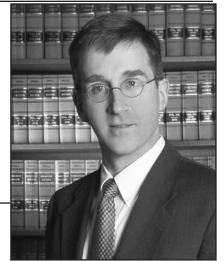




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# Planning for Delay: Critical, in More Ways than One

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Delay is expensive. It swiftly diminishes productivity rates, profits, and project morale, while at the same time increasing labor, equipment, material, and subcontractor costs. Costs mount as the beleaguered owner or contractor prepares, submits, and, if necessary, litigates a delay claim. And while every owner and contractor expect that their projects will proceed on schedule, delay is an unfortunate reality in the construction industry.

When should owners, contractors, and their attorneys first consider delay? The prudent owner or contractor does not postpone such considerations until the project is actually delayed but prepares for potential delay before it happens. The diligent construction attorney advises clients to anticipate and plan for the risk of delay. Preparing for delay is a wise investment that can reap significant dividends, and mean the difference between gain and loss.

This article discusses planning for delay. It discusses the need for contractual language that articulates methods to prevent and manage delay, the critical role that record keeping plays, what an owner's and a contractor's response to delay should include, and what the parties can expect to have to prove should they fail to amicably allocate responsibility for the delay and its costs.

## Contractual Provisions and Delay

An owner and a contractor can make a good start on their plan for delay well before the work begins. There is no better time to consider and allocate responsibility for ensuring the project's timely and uninterrupted completion than during contract negotiations. Certain contract provisions are more important to delay than others. Contract provisions to be considered include, but are not limited to, scheduling, delay and extensions of time, liquidated damages, notice, and suspension

and termination. Examples of such contract terms can be found in The American Institute of Architects's (AIA) form agreements regularly used throughout the industry, and referred to throughout this article.

Scheduling provisions are necessary because scheduling is an important part of any project, regardless of size. A construction schedule serves many uses, but two are especially noteworthy. First, and foremost, the construction schedule represents the manner in which the contractor plans to build the project and the time it intends to take. It is an extremely helpful management tool throughout the construction phase, assisting project managers, superintendents, and subcontractors alike in their daily decisions affecting manpower, equipment, and other resources. Second, the schedule is a project record that can prove immeasurably useful long after construction is through.

The scheduling provision, at a minimum, should clearly define which party to the contract is responsible for writing and maintaining the schedule. Normally, the contractor, that defines the means and methods by which it will build the project, is responsible for the schedule.<sup>1</sup> In addition, because there is no universally accepted view of what a schedule includes, the scheduling provision should express specific reporting requirements. Schedules should be reasonably and sufficiently detailed, descriptive, and complete. The activities should describe the project from start to finish and the relationships among such activities should be accurate and comprehensive. The schedule should be based on the critical path method using commercially acceptable software. Schedule submittals, including updates, are best comprised of color charts and graphs that demonstrate the project's progress and remaining work, and a CD-ROM of the electronic file. Specific reports also should be required under the schedu-

ling provision. The need for such information and reporting is apparent when one considers that the project schedules, sufficiently detailed and regularly maintained, are the principal method by which owners, contractors, and the courts measure delay and determine its cause. Quality schedules, required under a detailed scheduling provision, are a component part to any plan for delay.

Delay and extensions of time provisions are equally important to a plan for delay. The contract time, under typical contracts, can be extended for delay not caused by the contractor.<sup>2</sup> Delays to activities on the project's critical path should warrant an extension of the contract time, while those not on the critical path should not. An owner, in particular, will therefore want to add language to typical delay and extensions of time provisions to narrowly define delay to mean that which affects the critical path and, accordingly, project completion. Also, provisions such as these are best revised to reflect the reality of our world today. Consider adding acts of war, and actual or threatened acts of terrorism, to the causes of delay that warrant an extension of the contract time if they affect project completion.

Construction contracts often allow contractors remedies for delay claims other than extensions of time.<sup>3</sup> Common contractor claims for delay damages include lost productivity, lost profits, disruption, acceleration, and extended overhead. A so-called no-damages-for-delay clause provides an alternate scheme. Owners can, and regularly do, insist that the contract limits a contractor's remedy for delay solely to extensions of the contract time, to the exclusion of delay damages. Courts, however, have recognized exceptions to exculpatory clauses such as the "no damages for delay" and "waiver of consequential damages" provisions.

Similarly, construction contracts often are drafted to reflect the impartial nature of delay. An owner should not be precluded from delay damages simply because ascertaining an actual amount of potential damages is difficult at the time the contract is signed. Liquidated damages provisions entitle an owner to delay damages from a contractor. Liquidated damages serve to reduce, or offset, the contract sum by the contractually agreed-upon amount for each day the contractor delayed substantial completion for which an extension of the contract time was neither warranted nor granted. Liquidated damages provisions that impose penalties are unenforceable.

Whether a contractor seeks an extension of contract time due to delay, or an increase in the contract sum, or both, it must be mindful of obligations to notify the owner of claims under the contract. Construction contracts regularly require that contractors provide owners with notice of delay claims within a specific time frame.<sup>4</sup> In this way, owners may undertake a relatively contemporaneous investigation of the events giving rise to the claims, and base their decision to either grant or deny requests for extension of time and increases in the contract sum accordingly. The notice provision usually requires that the contractor provide documentary support to substantiate a delay claim.<sup>5</sup> Provisions such as these underscore the need for sufficiently detailed, complete, and regularly updated project schedules. In support of a timely notice of claim, a contractor can append the most current approved schedule update to show the extent to which the events that gave rise to the delay impact project completion.

Contracts generally require contractors to continue their performance while their delay claims are pending.<sup>6</sup> While a contractor may normally suspend performance if the architect of record fails to issue a certificate of payment or the owner fails to pay an approved certificate of payment in the prescribed time,<sup>7</sup> termination provisions typically preclude a contractor from stopping work simply because the owner denied its delay claim, absent other specific criteria.<sup>8</sup> Based on typical

contract language, therefore, a contractor's financial exposure to delay damages is substantial. Because it is rarely more advantageous for a contractor to terminate its contract with the owner, rather than complete the work and later pursue a claim, contractors often shoulder the costs of the delay for months, even years, before such claims are resolved.

Before groundbreaking, therefore, during the contract negotiation phase, owners and contractors alike should begin planning for delay by determining which will be responsible for the project schedule, the frequency and content of schedule submittals, delay claim notification requirements, whether the contractor is precluded from seeking delay damages, and the extent to which delay can support a contractor's termination rights. A plan for delay, however, does not stop at contract signing.

### **Record Keeping and Responding to Delay**

Once the project begins, record keeping is essential to furthering a plan for delay. Accurate and complete records are important on any construction project for a myriad of reasons, not least of which is understanding the causes and quantifying the costs of delay. Among such record keeping, there should be complete and regularly maintained schedule submittals, daily reports, monthly reports, meeting minutes, and project photographs. Each of these records will further support a delay claim should the need arise. The importance of keeping such records cannot be overstated.

Continuous and contemporaneous project records minimize the risk of loss, should delay occur. Owner-caused delay can typically be classified into four main categories: (1) delay resulting from the owner's failure to fulfill its contractual obligations, (2) delay caused by making changes in the work to be performed under the contract, (3) delays caused by interfering with the responsibilities of the contractor, and (4) the owner's failure to coordinate the activities of its subcontractors and suppliers.<sup>9</sup> Delays attributable to the contractor, on the other hand, are often

the result of five major causes: (1) failure to evaluate the site or design; (2) contractor management problems; (3) inadequate resources, such as cash, material, or labor; (4) poor workmanship; and (5) subcontractor failures.<sup>10</sup>

A contractor with good records is better prepared to immediately react to any of these events, however small, that are likely to cause delay. A contractor can respond by creating a separate account in its cost control program and coding any and all labor, equipment, material, subcontractor, and supplier costs that stem from the delay to this separate cost account. Similarly, the contractor can file copies of all the time sheets, invoices, correspondence, designs, schedules, and photographs that record the work caused by the delay together in a file separate from the remainder of the project files. In this way, the contractor will be better able to establish the cost of a delay, in time and money, should there be a need to do so at a later date. Accurate and complete record keeping on the part of the contractor with respect to delay claims is essential to avoid potential false claims allegations when contracting in states that have enacted False Claims Acts or with the federal government.

A contractor should promptly notify the owner when an event will likely lead to a delay claim. The notice should comply with the contract, often taking the form of a letter or change order request addressed to the owner or its representative. Where the contractor can be certain of the cost of the delay and its impact to the project schedule prior to notifying the owner, the contractor can quantify the increases to the contract sum or extensions of the contract time that it requests. Otherwise, the contractor should reserve its rights to request still more increases and extensions at a later date when the full impact of the delay is made known. Where the owner is a state agency, at least one state requires the contractor to provide notice and the factual bases of its claims to the commissioner of that agency within a limitations period dating from project completion.<sup>11</sup>

The owner often responds to a contractor's notice of delay not with an approval or denial, but with a request

for documentary support of the claim. A prepared contractor will be in a position to substantiate a delay claim. Owners, after reviewing such supporting documentation, can still, and often do, deny the contractor's delay claim. When this happens, a contractor should review the contract to determine what options exist. Where the magnitude of the delay is great, a contractor will have to decide whether to proceed with its work, or suspend or terminate its performance under the contract in hopes of minimizing losses. No decision to suspend or terminate should be made absent sound legal counsel. If, after a contractor terminates for delay, or any other reason, an arbitration panel or court determines that the contractor's reasons for terminating were not valid, the losses that the contractor would have otherwise experienced had it completed the contract may likely pale in comparison to amounts it is held liable to the owner for breaching the contract.

#### Proving Delay

Not every delay claim is resolved by change order during the course of the project. Some claims are destined to be resolved only by adjudication, where detailed contract provisions and records become useful evidence. Whether an owner files a demand for arbitration or commences a lawsuit, it must show that the project's actual completion date exceeded the planned completion date to entitle the owner to liquidated damages.<sup>12</sup> The contractor must show that the delay impacted the project's critical path, was excusable, and was beyond its control to entitle the contractor to an extension of time sufficient to refute the owner's liquidated damages claim.<sup>13</sup> The contractor must prove that the delay was compensable, as well, to be entitled to delay damages.<sup>14</sup> An owner may be able to show that the project completion date would have been delayed regardless of any excusable and compensable delay that the owner may have caused.<sup>15</sup> A contractor, therefore, should consider the extent to which claims of owner-caused delay are offset by concurrent impacts of its own making.<sup>16</sup>

Courts will not award a time extension or additional compensation for

delay on a project unless the delay at issue impacts the project's critical path.<sup>17</sup> Accordingly, a contractor must not only prove that the project was delayed, but that the delays occurred to activities on the project's actual critical path.<sup>18</sup> Contractors rely upon project critical path method (CPM) schedules to fulfill this requirement. CPM schedules show how each activity on the project, from start through completion, interrelates with the other activities on the project. Courts and contract review boards favor such schedules because each, when done correctly, prioritizes which of the project's many activities are most important to project completion at any given time throughout the course of the project. Such "critical

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activities" cannot withstand a delaying impact without, in turn, delaying the project completion date. The project schedule allows no flexibility, or "float," in prescribing when a critical activity must begin and finish. Activities that a contractor can, in its discretion, postpone starting or finishing without affecting project completion are not critical. CPM schedules should be continually updated during the construction of the project to reflect the conditions and activities as they occur. CPM schedules are important elements to proving delay claims and establishing not only the amount of delay, but identifying the causes of the

delay. The causes of the delay, together with the contract provisions, determine the legal remedies of the owner and contractor in cases where a contractor completes a project behind schedule. Accordingly, CPM schedules are indispensable tools in determining and proving which party is responsible for the delay and the extent of the delay.

A delay is excusable if it was unforeseeable. Examples of excusable causes of delay include, but are not limited to, architect or engineer errors or omissions, adverse weather, owner-initiated changes, owner interference, differing site conditions, and a late contract award.<sup>19</sup> A contractor that encounters a contractually enumerated cause of delay is not entitled to an extension of time, however, if the event was foreseeable.<sup>20</sup> Weather delay is excusable only if the occurring conditions are unforeseeable and unusually severe for the particular location of the project. Variations in the weather are always expected, and delays resulting from variations typical to a project's location are not excusable.<sup>21</sup> A contractor must document three elements to receive an extension of the time for adverse weather conditions: (1) the weather conditions were abnormal, (2) the weather conditions could not have been reasonably anticipated, and (3) the weather conditions had an adverse effect on the scheduled construction. All types of weather conditions may affect the contractor's performance: rain, abnormal humidity, winter weather, and extreme heat and fall weather.

Additionally, other events may impact the critical path of the project that are the fault of neither the contractor nor the owner. Delays resulting from such events are viewed as excusable, noncompensable delays, meaning that the contractor is entitled to a time extension but not additional compensation, and that the owner cannot assess liquidated damages for delays arising from such delays. Typically, the terms of the contract will identify the types of events and acts that fall within this purview.<sup>22</sup>

Excusable, noncompensable delays for which a contractor may seek an extension of time also include "acts of God." This term typically refers to a

natural occurrence caused directly and exclusively by natural forces without any human intervention that could not have been reasonably foreseen or prevented by the contractor or owner. Earthquakes, landslides, tornadoes, hurricanes, lightning, and floods are all deemed acts of God.<sup>23</sup>

Generally, delays caused by strikes, refusal of workers to cross picket lines, and other labor problems entitle the contractor to a time extension. Such delays, however, must have been unforeseen and beyond the control of the contractor. If the strike was caused by the contractor's unfair labor practice, the delay may not be excusable because the strike can be said to have been caused by the contractor. Further, the contractor is not entitled to recover delay damages or costs of maintaining the work during the strike, especially if the owner did not cause the strike.<sup>24</sup>

Delays caused by the inability to obtain materials for a project may be excusable, provided the contractor can show that such delays were unforeseeable and beyond the control and without the fault of the contractor and the supplier. Typically, the materials can be obtained, but at a cost substantially exceeding what the contractor originally anticipated at the time of the bid. In this instance, the contractor must prove that the increased cost is so great that performance would be commercially impracticable in order to be relieved from contractual obligations. Courts and boards of contract appeals are unwilling to grant such relief and will do so only when the increase in price is extreme.

Where an owner has delayed the project's critical path, and the delay was excusable and compensable, the contractor is entitled to both time extensions and additional compensation. Where the contractor caused the delay to project completion, the owner may be entitled to liquidated damages by showing the extent of the delay, and proving that it was neither excusable nor compensable.<sup>25</sup> If an owner, however, is also responsible for such delays, the owner cannot recover damages against the contractor. Furthermore, if the contractor can prove that owner-caused or excusable delays are either the sole reason for the delay or are "inextricably inter-

twined" with any contractor-caused delay, the contractor can avoid liability for liquidated damages.<sup>26</sup>

Situations where the owner and the contractor have caused delays impacting the critical path of the project are known as concurrent delays. Such delays occur when there are two or more independent causes of delay during the same time period. They may occur during any part of the project performance period, not necessarily at the same time. As a general rule, neither party can recover damages absent a clear apportionment of the delays and damages attributable to each party where both parties contribute to the delays.<sup>27</sup> If the delays caused by the owner can be separated or apportioned from the contractor-caused delay, the

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contractor may be able to recoup a portion of its claim or at least avoid liquidated damages.<sup>28</sup> If, however, the owner can prove that the contractor-caused delays are either the sole reason for the delay or are "inextricably intertwined" with any owner-caused delay, a contractor cannot recover for these delays.

Owners, or designers as the case may be, regularly assert that delay damages, if even proven, are not recoverable under a no-damages-for-delay clause often contained in a construction contract. Even where there is such a clause, however, delay damages may be recovered in certain jurisdictions for "1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct; 2) unanticipated delays; 3) delays so unreasonable that they constitute an intentional abandon-

ment of the contract by the contractee; and, 4) delays resulting from the contractee's breach of a fundamental obligation of the contract."<sup>29</sup> For a delay to be unanticipated, it must be unanticipated by both parties, or more objectively stated, must not be "reasonably foreseeable."<sup>30</sup> An owner or designer cannot presume that the contractor bargained away its right to bring a claim for damages resulting from delays that the parties did not contemplate at the time they entered into the contract.<sup>31</sup> As interpretation and enforcement of no-damages-for-delay clauses vary from jurisdiction to jurisdiction, owners, contractors, and their attorneys should be aware of the enforceability of such clauses in their location.

At a minimum, a contractor seeking delay damages must prove that the delay was compensable and excusable and impacted the project's critical path. Furthermore, if a contract contains a no-damages-for-delay clause, the contractor seeking delay damages must prove that the delay satisfies any judicially recognized exceptions, like those existing in states such as Connecticut and New York. In proving that a delay is compensable and excusable, there is no substitute for proper and thorough documentation of the delay. And, in proving that a delay impacted the project's critical path, it is necessary to rely upon a CPM schedule, updated regularly during the prosecution of the work. While other schedules can establish the amount of the delay, the CPM schedule best identifies the causes of the delay and whether they impact the critical activities of the project.

Proper records and schedules are necessary elements to delay claims and, accordingly, a plan for delay. So, too, is contractual language that allocates responsibility for preventing and managing delay. Parties are well served to devote the time and attention necessary to negotiating and drafting contractual provisions that are flexible enough to address different types and causes of delay, but that are also plain and unambiguous enough to define the parties' responsibilities, remedies, and means of recovery. In the long run, an owner and contractor will be rewarded many

times over for their respective investments in time and energy to minimize delay, and its effects, before it occurs or escalates. There is no substitute for properly planning for delay: a critical discipline, in more ways than one.

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## Endnotes

<sup>1</sup> All references to AIA Document A201 contained herein are to the 1997 edition, "General Conditions of the Contract for Construction." Subparagraph 3.10.1 of AIA Document A201 provides that:

The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

<sup>2</sup> Subparagraph 8.3.1 of AIA Document A201 provides that:

If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

<sup>3</sup> Subparagraph 8.3.3 of AIA Document A201 provides that "[t]his paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents."

<sup>4</sup> Subparagraph 4.3.2 of AIA Document A201 provides that:

Claims by either party must be initiated within 21 days after occurrence of the

event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

<sup>5</sup> Clause 4.3.7.1 of AIA Document A201 provides that:

If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

<sup>6</sup> Subparagraph 4.3.3 of AIA Document A201 provides that:

Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

<sup>7</sup> Subparagraph 9.7.1 of AIA Document A201 provides that:

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

<sup>8</sup> Subparagraph 14.1.2 of AIA Document A201 provides that:

The Contractor may terminate the Contract if, through no act or fault of the Contractor or a Subcontractor, Subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with the Contractor, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

Subparagraph 14.1.4 of AIA Document A201 provides that:

If the Work is stopped for a period of 60

consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

<sup>9</sup> BARRY B. BRAMBLE AND MICHAEL T. CALLAHAN, CONSTRUCTION DELAY CLAIMS § 3.02 at 3-5 (3d ed. 2000).

<sup>10</sup> *Id.* at § 3.04 at 3-36.

<sup>11</sup> See CONN. GEN. STAT. § 4-61 (2005).

<sup>12</sup> BRAMBLE AND CALLAHAN, *supra* note 9, § 13.13 at 13-66 to 13-67 (citing Bigelow, Inc., ASBCA No. 24376, 81-2 B.C.A. (CCH) ¶ 15,300, at 75,737 (1981)).

<sup>13</sup> *Id.* at 13-67 (citing Santa Fe, Inc., VABCA Nos. 1943 et al., 84-2 B.C.A. (CCH) ¶ 17,341, at 86,410 (1984)).

<sup>14</sup> *Id.* (citing H.W. Detwiler Co., ASBCA No. 35327, 89-2 B.C.A. (CCH) ¶ 21,612 (1989)).

<sup>15</sup> *Id.* (citing MCI Constructors, D.C.C.A.B. No. D-924, 1996 WL 331212 (June 4, 1996)).

<sup>16</sup> BRAMBLE AND CALLAHAN, *supra* note 9, § 13.13 at 13-67 (citing P. Kuntal and A. Ness, *Concurrent Delay: The Challenge to Unravel Competing Causes of Delay*, 17:4 CONSTR. LAW, 20 (Oct. 1997)).

<sup>17</sup> Wilner v. United States, 23 Cl. Ct. 241, 255-56 (1991).

<sup>18</sup> Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 426 (1993).

<sup>19</sup> BRAMBLE AND CALLAHAN, *supra* note 9, § 1.01[A] at 1-5.

<sup>20</sup> J.D. Hedin Constr. Co. v. United States, 408 F.2d 424 (Ct. Cl. 1969).

<sup>21</sup> Broome Constr. v. United States, 492 F.2d 829, 835 (Ct. Cl. 1974).

<sup>22</sup> See, e.g., subparagraph 8.3.1 of AIA Document A201, *supra* note 2.

<sup>23</sup> United States v. Brooks-Calloway Co., 318 U.S. 120, 122, 63 S. Ct. 474 (1943); see also Tombigbee Constr. v. United States, 420 F.2d 1037 (Ct. Cl. 1970).

<sup>24</sup> Fritz-Rummer Cooke Co. v. United States, 279 F.2d 200, 201 (6th Cir. 1960).

<sup>25</sup> Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 502 (1993) (if a contract contains a provision to assess liquidated damages for late completion and the owner proves the project completion was delayed, then the owner is entitled to impose liquidated damages for the delay unless the contractor can prove that the owner caused or contributed to the late completion).

<sup>26</sup> Coffey Constr. Co., VABCA Nos. 3361 et al., 93-2 B.C.A. (CCH) ¶ 25,788 (1993) (an owner was not entitled to assess liquidated damages, and a contractor was enti-

tled to a time extension, for delays to the project's critical path that were "inextricably intertwined" and attributable to either the owner or the contractor).

<sup>27</sup> *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982).

<sup>28</sup> *William F. Klingensmith, Inc. v.*

*United States*, 731 F.2d 805, 809 (Fed. Cir. 1984).

<sup>29</sup> *White Oak Corp. v. Dep't of Transp.*, 217 Conn. 281, 289, 585 A.2d 1199, 1203 (1991) (citing *Corrino Civetta Constr. Corp. v. New York*, 67 N.Y.2d 297, 493 N.E.2d 905, 502 N.Y.S.2d 681 (1986) ("exculpatory claus-

es may be avoided if the contractee causes delays which are so great or so unreasonable that they may fairly be deemed equivalent to its abandonment of the contract").