

Timely Time Extensions: The Owner's Duty

John Orr, PSP

URS Corporation



Construction CPM Conference

New Orleans, LA

January 27th to 30th, 2013

URS

- Degrees / Certifications:
 - BS Chemical Engineering
 - BA Biology
 - PSP, Planning & Scheduling Professional, AACE International
 - University:
 - *Bucknell University*
-  “Ray, Bucknell ...”
- Years of Experience:
 - 29+ years, beginning in the golden days of yore, when scheduling was still performed using IBM punch cards.
 - Professional Field:
 - Construction Management, including scheduling, cost control, value engineering, project administration and claims analysis.
 - Something you do not know about me:
 - My first logged hours as a student pilot were in a de Havilland Tiger Moth.

INTRODUCTION

Construction Contract Obligations

- Express Provisions
- Implied Obligations

Four Implied Obligations relevant to construction scheduling:

1. The duty to schedule and coordinate the work;
2. The duty to not delay, hinder, or interfere with the work;
3. The duty to cooperate;
4. **The duty to grant reasonable time extensions**

Taken from Wickwire, Driscoll, et.al.

Construction Scheduling: Preparation, Liability and Claims

Chapter 5 - Rights and Obligations in Scheduling

The Situation: Delay

**When in the Course of project events, it becomes necessary ...
to read your contract in greater detail**

1. Express Provisions relating to time extensions

Excusable delays

Caused by factors outside the contractor's control

Force majeure

Coupled with "No Damage for Delay" clause = non-compensable

Compensable delays

Change orders

Requires reimbursement for direct costs plus costs of delay

2. Implied Obligation for time extensions

Requires the owner to grant time extensions in a timely manner

The Temptation: A Passive Approach

- **Why Must We Address Time Extensions Now?**

- Senior Management doesn't want to hear about delay
- We don't like confrontation/arguments about cause
- The Contractor doesn't want to sign off and relinquish rights
- The contract provisions protect the Owner's interest as long as the design is good and we don't issue too many change orders
- We are all too busy getting the job done. We'll do the paperwork later.
- The project might recover on its own (*"The triumph of hope over experience."*)
- The Contractor might be manipulating the schedule – didn't we used to have float?
- We don't really trust the schedule – is this really a critical path delay?

- **Why Can't We Just Wait Until the End of the Project to Settle All the Time Extensions?**

The Obligation: Timely Time Extensions

What Happens When the Owner Doesn't Grant a Time Extension?

1. The current schedule status update will likely show the project behind schedule;
2. The CPM schedule will not accurately reflect the remaining period of performance;
3. The contractor cannot coordinate the work remaining with the period remaining;
4. Control is lost when either increased scope (change order) or reduced time, or both, are not reflected in the schedule;
5. Documentation and analysis becomes more difficult and costly the more time passes from the delay event

... And just what is “Constructive Acceleration” anyway?

The Danger: Constructive Acceleration

- **The Contractor is entitled to the entire contract time**
- **Contract time is reduced if:**
 1. **The Owner directs the Contractor to finish early, or;**
 2. **An excusable delay has shortened the schedule**

In either instance, the remaining work must now be completed in less time than the contract allows.
- **A directive to finish early (in less time than the contract allows) is called Directed Acceleration**
- **If the Contractor has NOT been granted a time extension for an excusable delay, the schedule has effectively been shortened. The remaining work must now be completed in less time than the contract allows. All the elements of acceleration are present ...**

- **Constructive Acceleration occurs when all the elements of acceleration are present except for a direct order to accelerate**
- **Constructive Acceleration occurs when it can reasonably be construed as a mandate from the owner that the project must be completed within the original time frame:**
 - 1. “Time is of the essence” contract clauses, and/or**
 - 2. Threats of liquidated damages for late completion**

Have been used as the basis for constructive acceleration claims
- **The owner can be held responsible for increased costs incurred by the contractor in expediting performance**

Six Reasons Owners Delay Decisions

Six Reasons Why Decisions on Time Extensions are Delayed

1. The Owner's lack of expertise or experience in project scheduling;
2. A lack of confidence in the accuracy of the most recent schedule update;
3. A Contractor who "cries wolf" too often;
4. Other pending claims that might be affected by the decision;
5. An agreement or understanding that time extension requests will be deferred;
6. An unrealistic belief that the threat of liquidated damages will prompt the contractor to bring the project back on schedule.

Taken from Wickwire, Driscoll, et.al.

Construction Scheduling: Preparation, Liability and Claims

Chapter 5 - Rights and Obligations in Scheduling

Guidance for Owners

1. Lack of Expertise in Scheduling

When can outside scheduling expertise be of greatest benefit?

1. To Perform the Baseline Schedule Review

- Whether formally “approved” or not, the baseline is the standard
- Courts will impose implied schedule obligations regardless of silence
- Minimum standards for Baseline Review:
 - i. **The Critical Path is reasonable**
 - ii. **Resources are identified, at least for the critical path sequence**
 - iii. **The schedule reflects the complete scope of work**
 - iv. **Timing, phasing, sequencing and work flow meet contract milestones**
 - v. **Excessive constraints, negative float, early project completion**

2. To Review Requests for Time Extension

- Bring in outside expertise as extension of owner’s PM staff
- Address delay and potential claim situations on a contemporary basis

2. Lack of Confidence in the Schedule's Accuracy

- Owners are concerned if:
 1. The schedule is not being used in the field as the working schedule, it was only submitted as a contract requirement;
 2. Errors have been identified but not corrected.

Owners must not use these concerns as an excuse for lack of action in evaluating time extension requests

- Courts will give the schedule great *gravitas* after the fact
- A flawed baseline project schedule is still the best contemporary documentation of contractor intentions
- If the “flawed schedule” can be used on a forensic basis by claims consultants, it can and should be used on a contemporary basis to evaluate and quantify time extension requests

3. The Contractor who “Cries Wolf” by asserting unreasonable or unjustified requests too often

- **The requests must still be reviewed and the reasons for rejection documented**
- **Many provisions of the contract documents are written to protect owners; the contractor may feel obligated to “paper the project” in order to preserve their rights**
- **Contract “timely notice” provisions obligate a contractor to document all delays and potential claims within a fixed time period or otherwise lose the right to receive compensation**

4. Other Pending Claims or Time Extension Requests

- **Multiple and possibly concurrent delay situations require expertise in evaluating:**

1. Concurrent Delay
2. Establishing Responsibility for Delay
3. Ownership of Float
4. Pacing
5. Productivity Loss
6. Schedule Impossibility
7. Acceleration
8. Cumulative Impact(s)
9. Limitations to “No Damage for Delay” clauses

The best time to address is on a contemporary basis

- **Goal: To sort out the situation and regain project control for the remainder of the project**

5. Defer Resolution Until Project Close-out

- A great temptation for both owner and contractor alike
- The common attitude is “get the job done and sort out the paperwork later.”
- Project documentation is focused on protecting rights:
 - **Assertions**
 - **Unsubstantiated statements**
 - **Finger-pointing**
- No effort is made to sort out issues and entitlements
- With poor contemporary documentation, the costs for research and analysis after the fact is greatly increased
- Potential liability for a constructive acceleration claim

6. Unrealistic Belief in Recovery

- The immediate delay issue may not be the only significant factor. Interpret the following:
 - Schedule progress update #3 with negative float (-15) work days.
Would you conclude that this project is going to be completed three weeks late?
- Consider the same project and interpret this trend:
 - Progress update #1 with negative float (-5) work days
 - Progress update #2 with negative float (-10) work days
 - Progress update #3 with negative float (-15) work days
Would you still conclude that this project will be completed three weeks late?
- Trend: This project is losing 5 work days per month – an eighteen-month project would finish 18 weeks late!

Timely Time Extensions: Two Case Studies

- **Buy-Back Time and Sequence Changes**
 - Preferential logic reflecting resource (crew) limitations
 - Results in reduced float and can extend the critical path
 - Contractor can revise later to “recover” their own delays
- **Flawed Baseline Schedule**
 - Owner noted the logic errors in baseline review
 - Critical path was not corrected; no re-submittal of baseline
 - Baseline schedule was never approved
- **Asbestos remediation delayed demolition completion**
- **Contractor submitted time extension request based on impact to baseline critical path**
- **“Impact cost” settled as cost of a second masonry scaffold (to support a second crew)**

- **Concurrent Delay**
 - **Design Omission – addition of support steel to partitions**
 - **Contractor experiencing other delays; their own fault**
- **Flawed Baseline Schedule**
 - **Owner never approved the baseline schedule**
- **Flawed Time Impact Analysis by Contractor**
 - **Time extension request only identified owner-caused delays**
 - **Impact sequence did not reflect actual performance**
- **Site project team could the observe work in progress**
- **Equitable adjustment reached quickly because both parties had access to accurate, current information**

Confirmed the great value in negotiating time impacts on a contemporary basis

CONCLUSIONS

CONCLUSION: Top Ten Reasons to Issue Timely Time Extensions

- **A Time Extension does not benefit the contractor unless the additional time allows the remaining work to be controlled**
 - **Timely Time Extensions mean:**
 1. **Issues are dealt with immediately with minimal misunderstandings**
 2. **Research is easier with documents current and readily understood**
 3. **Personnel are available who are actively involved in the project**
 4. **Subcontractor participation for problem identification and resolution**
 5. **Recovery and mitigation of delay is possible; schedule adjustments can be made and achieved**
 6. **Remainder of the project can be accurately scheduled and controlled**
 7. **Win-win outcome is still possible**
 8. **Scheduler is not tempted to “force” on-time projected completion**
 9. **Costs for documentation and analysis are much higher after the fact**
- And the best reason to resolve on a contemporary basis:**
10. **Experienced schedulers are less expensive than attorneys!**

ANY QUESTIONS?

BONUS: A Discussion of “BLINDSIGHT” versus “HINDSIGHT”

- **Blindsight says you look at a delay using only the information available at that time**
- **Forensic methodology essentially favors blindsight**
 - **Windows Analysis utilizes the update immediately preceding the delay, coupled with the update immediately following the delay**
- **Hindsight says that you take everything into account**
- **Andy Ness’ position favors hindsight**
 1. **Blindsight can be unfair and seem arbitrary**
 2. **Blindsight ignores the reality of the actual project**
- **John Orr’s position favors dealing with the delay on a contemporary basis, a *de facto* “blindsight” approach**
 1. **Society of Construction Law Delay and Disruption Protocol says to deal with a delay as close as possible, not more than one month later**
 2. **AACE RP says the longer the period between the delay and the approval of the time extension, the less useful and valid the TIA becomes**

BONUS: A Discussion of “BLINDSIGHT” versus “HINDSIGHT”

- **Andy Ness identifies “When Blindsight Fails:”**
 1. Presumption that the contemporary schedule update is accurate
 2. Validation of the contemporary schedule update requires expensive resources
 3. Consequences of events take time to sink in
 4. New plans take even more time to develop
 5. The Project Manager knows more that is reflected in the schedule
- **John Orr identifies “When Hindsight Fails:”**
 1. Looking backwards at the project history has more potential for abuse
 - Positions have hardened
 - Contemporary information is lost
 - Knowledgeable parties have left the project
 2. The resources required to evaluate in hindsight are more expensive than using contemporary resources

Open for Discussion (no throwing of chairs, please!)