



ادعاهای مربوط به قراردادهای پیمانکاران جزء (SC) در ارتباط با تاخیرات (مختص اعضای کانون VIP)

ارائه دهنده:

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What we will learn?

- ☐ Reasons For Subcontractor's Claims
- ☐ Contractual Issues Concerning Subcontractor Delay Claims
- ☐ Subcontractor Delay Claim
- ☐ Delay Caused by Other Parties
- ☐ What SC governs?
- ☐ Relevance of Recommended Practice

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Introduction

- ❑ 1970's & earlier General Contractors (G/C's) performed **85%-90% of the work**
 - ❖ Subcontracted only very specialized work
- ❑ 1980's subcontracting increased **substantially**
 - ❖ Owner's specified G/C's had to perform 50% but often dropped to 33% by end of decade
- ❑ 1990's saw advent of **CM@ Risk**
 - ❖ G/C's perform little work on site
 - ❖ Manage all the subs
- ❑ Unintended consequence of **change** in project delivery
 - ❖ **Substantial increase** in sub claims passed to owners
 - ❖ **Very little** published on subcontractor delay claims

Reasons For Subcontractor's Claims



Typical subcontractor delays & impacts

❑ G/C caused impacts

- ❖ Maladministration of contract
- ❖ Inefficiencies imposed on subs
- ❖ Lack of direction
- ❖ G/C imposed changes to work scope
- ❖ G/C imposed changes to means & methods
- ❖ Late payments / no payments
 - ✓ Pay when paid clause
 - ✓ Pay if paid clause



Typical subcontractor delays & impacts

❑ Owner caused impacts

- ❖ Poor, inadequate contract administration
- ❖ Owner imposed changes to work scope
- ❖ Failure to recognize & process legitimate change orders
- ❖ Owner imposed changes to means & methods
- ❖ Late payment by owner



Typical subcontractor delays & impacts

❑ Impacts imposed by other subs

- ❖ Rework
- ❖ Changes in means & methods
- ❖ Extended performance by other subs
- ❖ Termination & replacement of other subs



Typical subcontractor delays & impacts

❑ Third party imposed impacts

- ❖ Rework
- ❖ Changes in means & methods
- ❖ Extended performance by other subs



Typical subcontractor delays & impacts

❑ Force majeure events

❖ Natural events

- ✓ Severe weather
- ✓ Earthquakes & tsunamis
- ✓ Fires & floods



Typical subcontractor delays & impacts

❑ Manmade events

- ❖ Strikes
- ❖ Acts of government in sovereign capacity
- ❖ Acts of war or terrorism

Contractual Issues Concerning Subcontractor Delay Claims



No privity of contract with owner

- ☐ Owners feel **no obligation** to deal with subs' problems



No damages for delay clauses

- ☐ Restricts sub recovery for delay to **time only**
- ☐ 15 states have prohibited clauses in whole or in part
- ☐ Most statutes not ban such clauses in subcontracts
- ☐ Court decisions at Federal & State level
 - ❖ New York – Clause **“insulates owner”** from claims
 - ❖ Court of Federal claims – Clause **prohibits prime** from sponsoring sub claims to government



Waivers & releases

☐ Waiver of **claim language** on change orders



Owners not distinguish between delay & impact

- ☐ When impact damage claim submitted owners deny claim for **lack of critical path impact**
- ☐ Not understand can have **impact without delay**



Sub claims often not well presented or documented

- ☐ Provide **damages calculations only**
- ☐ Believe they **can ride** on G/C entitlement & causation
- ☐ Sub **not understand** how to calculate & present delay
- ☐ Prime contract dispute resolution clauses generally deal with **prime contract claims only**,
not sub claims



Subcontractor Delay Claim



Notice of claim – A key element to delay claim

- ☐ Subs often **not pay attention** to notice requirements in subcontract or prime contract flowed down to them
- ☐ Subs must give **timely written notice** pursuant to both contracts
- ☐ Notice issues
 - ❖ Proper party
 - ❖ Method of delivery
 - ❖ Contract reference
 - ❖ Description of event, action or lack of action
 - ❖ Damages
 - ❖ Reservation of rights a





Entitlement – General

❑ **Must “prove liability / entitlement , causation & damages**

1. First look at subcontract
2. Next examine prime contract flowed down
 - ❖ **Conflict** between prime contract & subcontract
 - ❖ **Check order** of precedence clause
3. Finally, look at statutes or case law
 - ❖ California public contract 7104-DSC Clause
 - ❖ California public contract 7107-Sub payment clause





Entitlement – General

- ❑ To **win entitlement argument** subcontractor must prove
 - ❖ Impact beyond control of subcontractor
 - ❖ Delay unforeseeable
 - ❖ No ability to prevent
 - ❖ No ability to overcome event
 - ❖ Without subcontractor fault or negligence (at any tier!)





Entitlement – General

- ❑ **Claim not barred** by subcontract provision
 - ❖ **No damages** for delay clause
 - ❖ **Force Majeure** not prohibit delay claim
 - ❖ **Consequential damages clause** prohibits recovery of delay damages



Causation – General

- ☐ Subcontractor **must** prove “causation”
- ☐ **Relation** between entitlement & damages
- ☐ **Prove** that event / action “caused” them to do something they **would not have done**





Causation – Where to start?

- ❑ Start with **as-bid plan** for subcontract work
 - ❖ Show **how plan changed** by **delaying event(s)**
 - ❖ Document through
 - ✓ Schedule updates
 - ✓ Meeting minutes
 - ✓ Notices of delay
 - ✓ Correspondence
 - ✓ Site photos
 - ✓ Etc.



Damages

- ☐ **When** is sub entitled to recover time or money from **owner**?
- ☐ When is sub entitled to recover time or money from **G/C**?
- ☐ When sub can
 - ❖ Prove entitlement under sub or prime contract
 - ❖ Prove causation
 - ❖ Document damages claimed





Damages

☐ Delay issues

- ❖ Only 1 project schedule
 - ❖ Delay claims passed to owner will be measure against this
 - ❖ If sub's activities on critical path when event occurs, good!
 - ❖ If not, subs have a problem
-
- ❖ Let's look at a **series of issues** & try to find answers



Delay Caused by Other Parties



Delays caused by G/C or another Sub

- ❑ Subs **look to subcontract** to determine **what have to prove** to recover delay damages
 - ❖ Perform root cause analysis to determine **real cause of delay**
 - ✓ Owner., G/C, another sub, third party, force majeure event?
 - ❖ If caused by **G/C or another sub**, no need to sponsor to owner
 - ❖ Can **recover under subcontract clauses**
 - ❖ May **argue “intended third party beneficiary”** of other subcontracts
 - ❖ **If faced with No Damages for Delay clause** may argue exceptions
 - ✓ Not covered by language of clause
 - ✓ Not contemplated when subcontract executed
 - ✓ Active interference
 - ✓ Waived by actions of parties
 - ✓ Fundamental breach of contract



Delays caused by owner

- ☐ **Review** subcontract & prime contract to determine what must be proven to recover
- ☐ **Perform** root cause analysis to prove cause of delay
- ☐ If delay **excusable & compensable**
 - ❖ Prime more **likely to pass claim** to owner as they benefit also
- ☐ But, **not all excusable / compensable delays** to prime contractor entitle subs to time extensions
- ☐ **To convince prime to sponsor claim to owner**
 - ❖ Provide timely written notice of delay
 - ❖ Document owner is root cause of delay
 - ❖ Document delay & delay impact to sub





What governs?

❑ Sub may be able to **rely on own schedule** when making delay claim

1. If multiple subs on site sequentially

- ❖ If this is the case, Subs often on site one at a time
- ❖ If this is the case, sub's work is mostly on critical path – they are the only one on site!

2. If subcontract language specifically references subs' schedule as controlling schedule

- ❖ If sub can get this sort of language negotiated into subcontract then sub's schedule will be used

If this is not the case, what usually happens?



What governs?

☐ No single answer – depends on who caused delay

❖ Owner caused delay?

- ✓ Most likely have to live with project schedule

❖ Third party or Force Majeure caused delay?

- ✓ Most likely have to live with project schedule

❖ G/C or other Subcontractor caused delay?

- ✓ Subs must

- o Be actively involved with baseline & all schedule updates
- o Provide updated performance information to prime
- o Notify prime when prime or other sub interfering
- o Keep prime informed of continuing appraisal of progress

If do so, may be able to preserve rights to file delay claim using Sub's schedule

What SC governs?



What governs?

Can sub recover from owner when
Sub's performance has been extended
but overall project critical path was not?

Can sub recover from owner when Sub's performance has been extended but overall project critical path was not?

☐ Possibly!

☐ Federal circuit court **awarded delay damages** to sub even though G/C **completed work earlier**

- ❖ Found government **waived** severin & sovereign immunity defenses
- ❖ Government had paid damages (time & cost) to G/C who completed work early
- ❖ "...there is no reason to exclude Eichleay damages of a subcontractor simply because the prime contractor completed its contract on time."



What governs?

If G/C awarded EOT, each sub entitled to EOT
even if their work was not affected by delay?

If G/C awarded EOT, each sub entitled to EOT even if their work was not affected by delay?

❑ **Possibly not!**

- ❖ Federal appeals court ruled that **G/C is not obligated** to share or pass down any time extensions received from owner
 - ✓ **Unless** subcontract requires it
- ❖ Subs need to be **cautions of No Damages** for Delay Clauses in subcontracts



What governs?

Where G/C receives EOT
Any subs due a time extension?



Where G/C receives EOT Any subs due a time extension?

☐ Maybe!

- ☐ If subcontract provides for **time extension**, provided **sub can demonstrate** they were delayed & delayed **not caused by them**
 - ❖ G/C may be **obligated to pass down** delay received from owner





What governs?

Any other theories under which sub can pursue delay claims against G/C?

Any other theories under which sub can pursue delay claims against G/C?

☐ Yes – At least 4!

1. G/C has no right to abandon or fail to update project schedule routinely
2. G/C may not unreasonably manipulate schedule to delay subs or interfere with sub's ability to effectively use project schedule
3. G/C cannot provide subs with inaccurate schedule information or withhold material information regarding project schedule
4. Depending on wording of No Damages for Delay Clause, sub may be able to argue clause does not preclude damages “separate and distinct” from delay

Relevance of Recommended Practice



Forensic schedule analysis

- ❑ If sub wants to pursue delay claim
 - ❖ Must document & quantify delay
 - ❖ Use AACE RP and/or SCL Protocol

Does concurrent delay apply to sub delay claim?



Concurrent delay

- ☐ **It depends!**
- ☐ If sub not provide notice of delay & requested time extension
 - ❖ May not be able to rely upon concurrent delay defense
- ☐ Concurrent delays applied to owner vs. G/C delay
 - ❖ Also applies to G/C vs. sub delay
- ☐ Concurrent delay may adversely impact sub's delay claim
- ☐ "...the analysis utilized in **owner-general contractor cases** works at all levels of vertical privity..."
- ☐ **Burden of proof falls** on party seeking damages
 - ❖ If concurrent delay cannot be disproven courts unlikely to award delay damages or apportion concurrent delay





Damages

- ☐ Sub must prove entitlement & causation
- ☐ Must document delay **not concurrent, not barred by no damages** for delay or other subcontract clauses
- ☐ Subs may **pursue damages vs. G/C** including
 - ❖ Impacts caused by other subs
 - ❖ Directed & constructive suspensions of work
 - ❖ Delayed, impaired site availability
 - ❖ Delays growing from DSC's



Pricing considerations

- ☐ Demobilization & remobilization
- ☐ Delayed issuance of NTP
- ☐ Inspection delays
- ☐ Delayed return of submittals
- ☐ Delays growing from DSC's
- ☐ Etc.





Pricing considerations

☐ Direct costs typically recoverable

- ❖ Provided sub can show additional direct costs resulted **solely from delay**

☐ Other costs may be written out of subcontract

- ❖ **Extended** home office overhead, lost profits, lost revenue, impaired bonding may be classified as **Consequential Damages**
- ❖ **Suspension** of work clause may preclude profit, avoidable costs
- ❖ **Other cost disallowances** may be in subcontract or prime contract



Pricing considerations

☐ Direct costs may include

- ❖ Additional, extended or idle labor costs
- ❖ Extended or idled equipment costs
- ❖ Extended storage costs
- ❖ Extended field office overhead costs
- ❖ Extended or unabsorbed home office costs

☐ Typical delay cost calculation methods

- ❖ Cause & effect
- ❖ Modified total cost
- ❖ Total cost





Dispute resolution forum

- ☐ Subcontracts typically **very specific**
- ☐ But, often **not harmonized with prime contract** disputes clause
- ☐ If sub's delay claim **passed through** to owner
 - ❖ Sub will have to **conform to disputes clause** of prime contract
- ☐ If sub claim **solely against G/C**
 - ❖ Will have to **comply with disputes clause of subcontract**





Dispute resolution forum

❑ G/C may require sub to execute joint defense or liquidating agreement **if want claim passed to owner**

- ❖ Agreement to work together to prosecute claim
- ❖ Share costs & proceeds
- ❖ G/C **exonerated** from damages beyond what obtain from owner
- ❖ Sub will have to make own business decision about signing such agreements



Conclusion

❑ Subs face a lot of challenges in today's market

- ❖ Have number of practical & legal problems not common to G/C's
- ❖ But still held to common law standard of entitlement, causation & damages

❑ Subs who want to maintain their rights to file delay claims should

- ❖ Perform **adequate pre-bid site investigation**
- ❖ **Carefully review** subcontract & prime contract flowed down to them by prime contract
- ❖ **Negotiate away** or modify No Damages for Delay & Pay When Paid or Pay If Paid clauses
- ❖ **Learn** rights & obligations
- ❖ **Not** unbalance bids



Conclusion

- ❑ Subs who want to maintain their rights to file delay claims should
 - ❖ **Not bid** at or below cost just to get work
 - ❖ **Plan work thoroughly**, identify key dependencies with G/C & other subs & provide plan to G/C
 - ❖ Get **actively involved** in preparation of baseline schedule
 - ❖ Stay **involved in all schedule** updates, including attending update meetings
 - ❖ **Review all schedules** for errors, notify G/C if find any in writing
 - ❖ **Not proceed with** change work until time & cost agreed & change order issued in writing
 - ❖ **Not allow changes** to linger to end of job
 - ❖ **Track** all extra cost & time separately & contemporaneously
 - ❖ **Manage** change work as separate projects



Conclusion

- ☐ Subs who want to maintain their rights to file delay claims should
 - ❖ **Strictly follow** contract requirements
 - ❖ **Give timely written notice** when & as required
 - ❖ **Not sign waivers** or releases without full understanding of what signing or modify them as needed
- ☐ Subs who run their projects this way will contribute to G/C's success
- ☐ If G/C profitable at end of project, it is likely sub will be also



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