

CHAPTER 5

CHANGES, DELAYS AND OTHER CLAIMS

INTRODUCTION

Complexities of Construction

The modern construction project is so marvelously complex that it is amazing that anything *ever* gets built. Projects have a multitude of players, including owners, architects, engineers, the government, the general contractor and a multitude of subcontractors and material suppliers. “Differing conditions” can impact the start, middle or end of a project. An excavator never knows how much solid rock will be beneath the surface until they start digging. In renovation projects, we never know what is behind the walls until they are torn down. Unrelated third parties, not involved in the construction process, can delay a project, including labor union strikes, war, terrorism or trade embargos. Acts of God, including severe weather or earthquakes, can occur that are no one’s “fault.”

The beauty of this process—and the problem—is that all of these players are human beings that can misjudge and make mistakes. A material supplier that simply forgets to place an order, orders the wrong material or is unable to produce on schedule can delay a multimillion-dollar project. A masonry subcontractor cannot build walls until the concrete footings are in the right place and finished. An electrical subcontractor cannot pull wire until the wall studs are properly in place.

The general contractor is responsible for coordination of all these subcontractors. Variance in experience or competence in this coordination can dramatically impact a project.

The owner must similarly coordinate with the general contractor and architect. An owner can simply decide to change the scope of work in a project. Owners can dramatically impact project schedules by failing to respond to requests for information, failing to respond to change orders or making decisions on material selections. Funding problems from the owner or its bank can obviously impact progress, as subcontractors and suppliers may slow down or stop performance if they are not being paid. Defects in plans and specifications can easily stop a project and then change the scope of work, leaving contractors idle while design professionals decide on a solution and all players on the project fight over who will bear the costs.

Federal environmental protection laws can delay the start of a project, while discovery of toxic wastes on site can implicate federal regulations that can stop a project at any time and create much more work in remediation. A project cannot even start until local government entities approve plans and issue permits, while one overzealous or incompetent building inspector can change the description or work or create delays and inefficiencies throughout a project.

With so many individuals involved, it is amazing any project ever is completed. Construction projects are almost always eventually completed, however, because of the experience, hard work, tenacity and perseverance of all the people involved.

Risk Allocation

Things are going to happen. The only thing we know with certainty is that the unexpected will occur. We just do not know what, when and who is going to pay the cost.

Changes in scope and project delays can create great costs to all players in the project. The process of risk allocation for these costs begins in contract negotiation. Owners, contractors and other players in the construction process *decide* who will pay the costs of problems when they negotiate a contract or when they simply decide to sign whatever contract form has been handed to them.

Clients call their lawyers constantly, telling detailed stories of problems on a construction project and asking for “the answer.” What happens? Who will bear the costs? What should I do? Most of the time, these questions are answered with another question: What does your contract say?

Most of the questions regarding claims on a construction project are answered in the contract documents. This is sometimes referred to as the “Big Boy Rule.” The parties to a construction contract are sophisticated business

professionals. They are familiar with the construction process and the risks involved. They are capable of reading risk allocation provisions in their contracts, and a court will generally require them to live up to their contract. This is particularly true in a “strict construction” state such as Virginia.

The parties generally agree to what the “law” will be on this construction project when they negotiate contract terms. There are very few laws or “statutes” passed by the legislature that will relieve a contractor or owner from their agreed contract terms. One exception is “consumer” or home improvement contracts, where there is unequal experience and sophistication in construction matters. Most states have Board of Contractors regulations that restrict a contractor’s ability to enforce “unfair” contract terms on a consumer owner. Another exception is public procurement. Public owners are sometimes restricted in their freedom of contract, particularly in the bidding process. General contractors who wish to perform public work are also often restricted, in order to protect the taxpayers paying for the project and to protect the subcontractors and suppliers on the public project.

Private owners and contractors, however, have few statutory restrictions. Some states have a “Prompt Pay Act” that restricts a contractor’s ability to withhold payment from subs and suppliers.¹ In Maryland, a waiver of mechanic’s lien rights in a construction contract is “void as a matter of public policy.”² Other than these limited statutory provisions, a contractor can only hope to rely on “Implied Duties,” discussed in greater detail below. These Implied Duties generally involve some sort of bad faith, fraud, gross negligence or active interference in a contractor’s ability to perform work. The court case law on these Implied Duties are somewhat unpredictable, conflicting and inconsistent, but they are a possibility to avoid the general rule that you will be bound to or protected by the agreed contract terms.

“Changes” or “Claims” provisions in a contract will often control whether a contractor is entitled to additional time or money on a project and will dictate the procedure to follow in order to obtain that time or money. “Conduit” clauses in a subcontract will often “incorporate” the general contract terms into the subcontract, requiring the subcontractor to follow the changes, claims and dispute resolution procedures in the general contract to get additional time or money resulting from owner action. A “pay when paid clause” in a subcontract can control when or even whether a subcontractor can collect extra money for changes. “Differing” or “Concealed condition” clauses allocate the risk of unknown conditions on a construction site. These are all “risk allocation” contract provisions discussed below.

Preventing Problems

Communication and coordination are critical to prevent problems on any construction project. The need for communication and coordination drive many of the contract terms requiring notice of claims and complete information on the cost and time impact at an early stage. These notice provisions will be strictly enforced as a general rule. Sometimes this seems very unfair to a contractor that has incurred extra expenses or been delayed. An owner or general contractor, however, is entitled to know and has good reason to require clear communication that an event has occurred and exactly what the time or cost impact will be. Communication may enable an owner to alter course by rescheduling or redesigning. There are often good faith disputes about what is in the scope of the contract. One person’s change is another person’s clarification.

Most changes on a project are a “zero sum game.” One party benefits and the other has an equal amount of additional costs. A defect in the plans and specifications should mean that the contractor receives additional time and money, including profit. The owner has additional costs that the owner will try to allocate to or force on the design professional. Of course, the pushing and shoving that occurs once a problem arises may mean that both sides lose. The parties may also agree to share in the costs.

Some changes are actually a “win-win” situation. An owner may decide to enhance the project by adding new features. The contractor is entitled to additional costs and profit. The owner gets a better building.

It is important to recognize that delays are a “net loss game.” Everyone loses and there are usually no winners. No player in the construction process benefits from project delays. The project is disrupted. There are a variety of costs to all the various players. Even the player that caused the delay will suffer from disruption, costs and delay claims against them. The innocent party is theoretically entitled to receive all costs of the delay and profit, but this rarely happens in reality. Since this is a net loss game with costs and no benefit, the parties will almost always try to push and shove the costs somewhere else. If a contractor is lucky, it will get some, but not all, of the costs. If a dispute is not resolved, the litigation costs will mean that there are no winners, except the lawyers involved.

¹ Va. Code Anno. §2.2-4354 (Michie 1950); Maryland Real Property Code Section 9-302, DC Code Section 27-134.

² Maryland Real Property Code Section 9-113.

All parties will benefit from preventing delays with careful schedule planning, communication and coordination. Good schedule planning starts with the owner and architect, and is amplified and expanded by the general contractor, subcontractors and material suppliers. Communication is critical during the bidding process, in preparations to proceed with the project and during construction. Communication regarding problems must flow in all directions: between the owner and architect, from them to the general contractor, on to subcontractors and suppliers and to or from third party participants. All contractors and suppliers must be vigilant to report problems as soon as they are apparent; that information must flow back through the general contractor to the owner and architect to minimize delays. Suppliers and subcontractors must also communicate with each other through the general contractor. Coordination among all of the contractors and suppliers on the project is possible only with prompt and clear communication.

Time is Money

We are all familiar with the adage that “Time is Money.” We experience this truth in many aspects of life, particularly business affairs. Never is this truer than in the modern construction project.

Subcontractors experiencing project delays incur costs from idle forces and idle equipment. Hourly construction workers may not get paid at all. Salaried supervisors and workers will be idle or inefficient, resulting in unrecoverable cost. Rental charges continue on equipment even if it is not being used, and use value is lost for equipment owned. Scheduling and resources available to other projects are impacted. Home office overhead costs also increase.

Often, projects are not completely shut down by delays. Partial delays result in labor and equipment inefficiencies. Forces cannot be moved to another project and increased costs result in a loss of profit. A delay on one project can mean a subcontractor is delayed in beginning another project, placing a subcontractor in an unavoidable breach of contract on the second project.

General contractors can be similarly impacted. Delays on one project can cause delays on another. General contractors also have staff, equipment and home office overhead expenses that rise on a delayed project, resulting in a loss of profit. General contractors are also responsible, however, for the coordination of and scheduling of all subcontractors on a project. If one subcontractor delays completion of a project for any reason, the other subcontractors and the owner may have claims against the general contractor for that delay.

The owner has the carrying costs for the project, including construction period interest. On a large project, an owner will also have its own staff costs for supervision and management. There are architect and engineering costs for inspection. A planned tenant for the completed building will have damage claims against the owner for delayed occupancy. If an owner plans to occupy the completed building itself, there will be lost profits and delays in opening a new business location and additional rent in their old location.

Documenting Claims

When delays or other problems occur, notice should normally be in writing, through letters, electronic mail and progress meeting minutes. Written notices promote clarity and allow all parties to pass on more complete information to all the players in the project. Written notices are also normally required pursuant to most construction contracts in order to preserve rights to time extensions or additional funds.

When projects are delayed or other claim costs are incurred, the players with the most complete documentation will have a tremendous advantage. This starts with written notices describing the time and place that problems occurred. Regularly kept daily reports will corroborate the circumstances surrounding the problem, show the personnel and equipment impacted, help establish the impact on the schedule as planned and evidence the costs incurred. Constant and consistent photographing is invaluable as an easy, inexpensive and thorough method of describing conditions.

In addition to sending your own notices, it is often important to respond to notices received. Likewise, it is often important to visit the site to view and photograph the condition before another player “cures” the alleged defect. You should review progress meeting minutes and object to entries that are inaccurate. In the event of litigation, having “the facts on your side” is certainly important. It is equally important, however, to have good evidence to support your facts.

In the event of serious problems and large costs, it is important to get independent third party witnesses and experts involved as problems occur. Experts can help show conflicts or defects in plans, help get a project back on schedule or limit damages. Any independent third party witness, including experts, can be very helpful as witnesses in litigation to establish the causes and costs of changes.

Litigating Claims

A good understanding of claims and defenses will help any contractor know when it is important to send notices of problems and how to preserve evidence of costs. We hope that these materials will be helpful toward that end.

Because of the potentially significant costs of project delays and other problems, owners and contractors try to shift risks and costs to others. The process of risk allocation takes place in contract negotiation. A good understanding of contract clauses impacting claims issues will help contractors negotiate a contract avoiding undue risk of delay and other claim costs.

Once a delay or other change occurs, owners and contractors also quickly engage in cost shifting. This often starts with the “blame game” and sometimes ends in litigation. By this time, the players are normally stuck with the contract provisions they agreed to, but there is often a great deal of legal maneuvers in attempts to avoid notice requirements, liquidated damages, no damage for delay and other contract clauses. A good understanding of contract clauses will help players protect their insulation from claims and to support claims that they may have against others.

Good lawyers and experts are also critical in delay and claims litigation. Claims litigation is very complex, and experience is essential. Good experienced lawyers and experts, however, are also very expensive.

Any player considering pursuing a delay or other claim should carefully evaluate the costs relative to any possible recovery. Better knowledge of contract clauses and claim litigation will better enable you to preserve your rights and defenses to claims, but you will also be in a better position to evaluate whether a claim is worth pursuing.

Delay claims are particularly “fact intensive.” Large construction projects can take months or years to complete. Delay claims can involve an analysis of events occurring daily for all of those months or years, involving an evaluation of schedules, correspondence and daily reports from the owner, general contractor and all of the subcontractors. It may be necessary to pay a lawyer *and* an expert hundreds of dollars an hour to acquire, review and evaluate boxes of documents—and then organize that material for a clear and cogent presentation to a court or arbitrator. In arbitration, you also pay an arbitrator hundreds of dollars an hour to go through the same process.

The reality of most construction projects is that much of this documentary evidence is missing or conflicting. All parties in the litigation will develop evidence that leads to different results. Sometimes contract clauses also conflict. Legal theories sometimes allow litigants to circumvent what are otherwise clear contract provisions. All of this results in uncertainty, risk and cost in claims litigation.

People often forget that there are three “essential elements” or “parts” to a contract claim: you must prove the contract, prove breach and prove your damages. Many clients tell compelling stories of increased and unexpected costs, but they are not recoverable unless the client can prove that someone else had the risk of these problems.

In some disputes, the claimant will fail on the first element. If a landscaper plants beautiful trees on the wrong lot, without the owner’s knowledge or agreement, the landscaper will fail to recover. There is no contract, even though there are damages. Subcontractors will usually fail to recover from an owner for problems caused by the owner. There is no “privity of contract.” The sub has a contract with the general contractor, but the problem caused by the owner may not be a risk that the general contractor agreed to assume in the subcontract. A general contractor can agree to pursue a subcontractor’s claims against the owner, but now we have to look at the contract between the owner and general. Can the general recover this claim under its contract with the owner? On construction projects, there is usually no question that there is a contract. The issues will be what is within the scope of that contract and what are the limitations of liability or risk allocation.

Once you establish the terms of the contract, you must prove that the defendant breached the contract and that the problems are the defendant’s “fault.” No contractor in history has ever built a project exactly according to plans and specifications or exactly according to schedule. No set of plans is ever perfect, and there are often conflicts or ambiguities in the contract or in the plans. The parties can spend much time arguing over exactly what any of the contract documents say and who caused or contributed to the problems.

Even if you can clearly establish problems caused by another player that are a breach of this particular contract, it is still necessary to prove your damage “with reasonable certainty.” Even if it is clear that the owner caused a problem that is a breach of this contract, the plaintiff still must prove exactly what damage was caused by that

problem. It is particularly difficult to prove damages caused by delay. There are various methodologies to establish damages from delay. These methodologies will often result in radically different calculations of damage. Some methodologies are more favored by various courts or arbitrators. It is often difficult to predict which methodology your court or arbitrator will use. Experts can often earnestly support or discredit any methodology in a particular factual situation. All of this again results in uncertainty, risk and cost in litigation.

Even if it is clear that a claimant has been delayed and has suffered damage, the exact cause of that delay or the proper calculation of damages often is not at all clear. The proper calculation of delay damage may lead to a damage recovery lower than the contractor earnestly feels was incurred. Recovery is often less than the damage actually incurred.

When a contractor is in litigation, it is often tempting to add a delay claim to other damages. If you are “going to court anyway,” why not “go for everything we can get.” This strategy can often backfire, however. The delay and other claims often unnecessarily overcomplicate a case and increase costs dramatically, with a limited chance of recovery because of limited documentary evidence, limiting contract clauses or difficulties in proving actual damage.

CONTRACT CLAUSES AND THEORIES

The guidepost in determining the legal responsibilities of the parties is the contract itself. The contract constitutes the law that governs the parties’ relationship.³ Where sophisticated business professionals enter into an arms-length transaction, a court will enforce the terms of the agreement absent some compelling reason that enforcement would be unreasonable or unjust.⁴ When an agreement is plain and unambiguous in its terms, it will be given full effect.⁵ Legal clients often want to tell their lawyer a story and then ask, “What is the answer?” The “answer” usually is that “we need to read your contract to know.” Construction industry buyers and sellers are sophisticated business professionals. They will be held to the terms in their contract documents. The construction industry generally works with sophisticated and detailed contract form documents that determine the result of most events on a construction project.

Conduit or Pass Through Relationship

Many construction subcontracts state that the provisions of the general contract will bind the subcontractor or supplier. Such contracts sometimes state that the subcontractor or supplier shall be bound to the general contractor to the same extent that the general contractor is bound to the owner. Such provisions have become very common in the marketplace and are generally enforceable. Conduit or pass provisions can impact or even control a subcontractor’s right or ability to collect for changes, delays and other claims. A conduit provision can pass a general contractor’s indemnification obligations down to a subcontractor.⁶

There are some limits, however, to the ability of a conduit provision to pass on a general contractor’s obligations.⁷ A conduit clause or incorporation of the general contract can also create duties in the general contractor and give a subcontractor rights.⁸

A subcontractor should obtain a copy of the general contract during the bidding process or before executing a subcontract. It is often more difficult to obtain any information once a dispute exists. Most general contractors are willing to provide copies of their general contract, although they may wish to “black out” the financial terms and may make the general contract available for review only at the general contractor’s office.

³ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 914 (E.D. Va. 1989), *aff’d in part and rev’d in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991, *citing Chantilly Construction Corp. v. John Driggs Co.*, 45 B.R. 297, 306 (Bankr.E.D.Va. 1985); *Bob Grissett Golf Shoppes, Inc. v. Confidence Golf Co.*, 44 B.R. 156, 159 (Bankr.E.D.Va. 1984); *Russell County v. Carroll*, 194 Va. 699, 703, 74 S.E.2d 685, 687-88 (1953).

⁴ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

⁵ *McLean House v. Maichak*, 231 Va. 347, 349, 344 S.E.2d 889, 890 (1986); *Gordonsville Energy v. Virginia Elec. & Power Co.*, 257 Va. 344, 354, 512 S.E.2d 811, 817 (1999) [reiterating that “when contract terms are clear and unambiguous, the words used by the parties must be given their plain and ordinary meaning”].

⁶ *Uniwest Constr., Inc. v. Amtech Elevator Servs.*, 280 Va. 428, 442-443, 699 S.E.2d 223 (Va. 2010).

⁷ *VNB Mortg. Corp. v. Lone Star Industries, Inc.*, 215 Va. 366, 371-372, 209 S.E.2d 909 (1974) [contractors and materialmen are not deprived of their independent liens unless they expressly waived their lien rights or expressly accepted, or by clear implication, agreed to be bound by the general contractor’s stipulation in the general contract against liens].

⁸ *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc.*, 219 Va. 111, 118-19, 244 S.E.2d 774 (1978); *Universal Concrete Prods. Corp. v. Turner Constr. Co.*, 595 F.3d 527 (4th Cir. Va. 2010).

It is, of course, the best practice for a subcontractor to review the general contract to determine the risk in agreeing to be bound. Even if a subcontractor will not have time to review the entire general contract, it will still be important to have it on hand in the event of future changes in work, claims or disputes. A subcontractor will have a harder time getting a copy once there is a dispute.

A subcontractor will want to pay special attention to time deadlines in the general contract for making claims for extra time or change orders to the owner. As discussed below in Claims Procedures, the general contract may have specific restrictions on when contractors can make such a claim or how they must make such a claim. A subcontractor should also look at the dispute resolution procedures. A subcontractor may be bound to arbitration or bound to let the architect decide on a claim before filing suit.

Payment Terms and Pay When Paid

“Pay When Paid” clauses are an important feature of most conduit or pass through relationships and have become very common in the marketplace. If the subcontract clearly states that payment by the owner is a “condition precedent,” then the general contractor is not obligated to pay unless and until the general contractor has been paid.⁹ Condition precedent pay when paid provisions can obviously impact a subcontractor’s right or ability to collect for changes, delays and other claims.

This essentially shifts the credit risk of project failure or owner insolvency to the subcontractor. Subcontractors obviously would prefer to eliminate this term from the contract if possible. In any event, however, it is important to recognize this situation when analyzing risks. A subcontractor now must analyze the creditworthiness of the owner and the quality of that project. If the owner of the project becomes insolvent or if this project fails, the general contractor will have no obligation to pay subcontractors.

If a condition precedent pay when paid clause is in your contract, you will want the same term in lower tier subcontracts. If the credit risk has been shifted to you, you want to keep passing it down the line. In modern construction contracts, the cost of a payment problem usually ends up with the contractor down the line who was handed the hot potato and failed to throw it to the next contractor.

One party to the contract cannot prevent occurrence of the condition precedent and then take advantage of the nonoccurrence to excuse performance. If a general contractor prevents or hinders payment from the owner, the condition may be waived or excused.¹⁰ This is known as the “prevention doctrine,” which is discussed in more detail below under Implied Duties.

If a pay when paid clause says only that the customer will pay “within five days after receiving payment,” this may not be a condition precedent. Courts have held that such a “pay when paid” term simply defines the time for payment and does not eliminate the need to pay eventually.¹¹ This type of pay when paid clause is found in AIA contract documents, for example, and is not as big a concern to subcontractors as the condition precedent pay if paid clause.

Some states, such as Maryland, do have laws that limit the effectiveness of “pay if paid” condition precedent clauses.¹² In Virginia, a contract provision that waives or diminishes the right to assert lien rights, the right to assert payment bond claims or the right to assert claims for demonstrated additional costs in a contract signed in advance of furnishing any labor, services, or materials is null and void.¹³ It is not yet clear whether a pay if paid clause “diminishes” these rights within the meaning of the statute and would be void. A pay if paid clause probably does not diminish lien rights in Virginia and would not be void on that ground. Some courts have held that a payment

⁹ *Galloway Corp v. S.B. Ballard Constr. Co.*, 250 Va. 493, 464 S.E.2d 349, 354 (1995); *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 723-24 (4th Cir. 2000); *Lane Constr. Corp. v. Brown & Root, Inc.*, 29 F. Supp. 2d 707, 723-724 (E.D. Va. 1998); *Universal Concrete Prods. Corp. v. Turner Constr. Co.*, 595 F.3d 527, 529-30 (4th Cir. Va. 2010); *James River Iron, Inc. v. Turner Constr. Co.*, No. LR-1763-3, 2004 Va. Cir. LEXIS 230 at *12 (Cir. Ct. City of Richmond Sept. 30, 2004) [“unambiguous pay-if-paid” clauses are enforceable in Virginia]; *Fairfax Co. Redevelopment v. Ulico Casualty Co.*, Chancery No. 146724, 1997 Va. Cir. LEXIS 689, at *2 (Fairfax County 1997); *Gilbane Bldg. Co. v. Brisk Waterproofing Co. Inc.*, 86 Md. App. 21, 585 A.2d 248, 252 (Ct. Spec. App.1991) [a provision that makes receipt of payment by the contractor a condition precedent to its obligation to pay the subcontractor transfers to the subcontractor the credit risk of non-payment by the owner “for any reason,” including insolvency of the owner].

¹⁰ *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000).

¹¹ *Thos. J. Dyer Co. v. Bishop Int’l Engineering Co.*, 303 F.2d 655 (6th Cir. 1962); *Hunt v. Kadlick*, 972 F. Supp. 2d 772, 776 (D. Md. 2013).

¹² In Maryland, for example, “pay if paid” clauses are generally enforceable, but do not constitute a defense to a mechanic’s lien, Little Miller Act or private payment bond claim. *Gilbane Bldg. Co. v. Brisk Waterproofing Co. Inc.*, 86 Md. App. 21, 585 A.2d 248, 252 (Ct. Spec. App.1991); Maryland Real Property Code Section 9-113(b); Maryland State Finance and Procurement Code Section 17-108(d)(2).

¹³ Va. Code Anno. §43-3(C) (Michie 1950); Va. Code Anno. §2.2-4341(C) (Michie 1950); Va. Code Anno. §11-4.1:1 (Michie 1950).

bond is an independent obligation and that a “pay if paid” clause in a separate contract has no impact on the payment bond obligation. Other courts have recognized the “pay if paid” defense to a payment bond claim, especially if the bond “incorporates by reference” the pay if paid clause. In any event, however, this argument now seems to be lost to general contractors and sureties in Virginia. If the pay if paid clause would have diminished the subcontractor’s bond rights, then that pay if paid clause is now null and void.

Change Orders

Most construction contracts state that there will be no payment for changes in the work unless ordered in a signed writing. These clauses are generally enforceable and can obviously impact a contractor’s right or ability to collect for changes, delays and other claims.¹⁴ If the contract has a written change order clause, the contractor may not get paid unless there is a written change order.¹⁵ It does not matter how much work was done, how much it cost or who ordered the work. Written change order clauses are actually required by many state licensing statutes or regulations.¹⁶

Owners, general contractors and other upstream contractors are entitled to know if extra charges are involved *before* the work is performed. One person’s change order is another’s clarification.¹⁷ An owner or general contractor may order work, thinking they are only providing instructions on details already included in the contract price. The most important function of a written change order is that it requires both owner and contractor to slow down and agree on whether this item is covered by the contract and what the compensation will be. Whether or not the contract has a written change order clause, field representatives should stop work, request a clear understanding and a change order (or at least a written directive) before change work is performed.

The most important thing to establish in writing is that the work is a change and will result in additional time and money. Establishing the precise price or time adjustment is not as difficult. A sample Change Order is shown in the Appendices. The sample form allows a fixed sum or a cost plus agreement. If you can’t agree on anything else, a contractor should carefully describe the work being performed and get the form signed. This means that there will be payment for the work at a price to be established, considering the reasonable value of the labor and materials. Establishing the exact price later will not be as difficult as establishing that the work was a change.

Contractors should be sure to establish an extension of time for the change, as well. Changes to a contract scope will generally entitle a contractor to additional time,¹⁸ but many contracts require notice or additional procedures to preserve that right. Many contractors remember to get a written change order but forget about the contract time. It doesn’t do you any good to get an extra \$500 for a change if the additional work means that the contract is completed four days later and you are assessed \$1,000 in liquidated damages. The Change Order form appearing in the Appendices has a default mechanism stating the contract time will be adjusted “by an equitable amount of time, if no time estimate is available.” The form also allows the contractor to verify funding for the change.

If it is impossible to get a signed change order or work must begin immediately, the contractor has a “claim.” The claims provisions in the contract become important, particularly written notice requirements. This is discussed in greater detail below in the subsection on Claims Procedures. Needless to say, the most important thing is to document claims. Normally, a contractor must perform the work “under protest” or at least make it clear in writing that the contractor considers this work to be a change under the contract. Written notice is normally required before, or soon after, beginning change work, followed by pricing data soon after the work is complete. Promptly sending a proposed change order complete with pricing data and time extension will normally satisfy these claim requirements.

¹⁴ *Artistic Stone Crafters, Inc. v. Safeco Ins. Co. of Am.*, 726 F. Supp. 2d 595, 602 (E.D. Va. 2010) [Under Virginia law, contractual provisions containing written change order requirements are binding upon the parties to the contract. *Citing Atlantic & Danville R.R. Co. v. Delaware Const. Co.*, 98 Va. 503, 37 S.E. 13, 16 (Va. 1900)]; *Main v. Department of Highways*, 206 Va. 143, 142 S.E.2d 524 (Va. 1965) [the written contract which the plaintiffs executed clearly provided the method by which they could insure the recovery of the cost of such extra work, and not having followed the prescribed method, they are not entitled to such recovery]; *Pa. Elec. Coil v. City of Danville*, 329 Fed. Appx. 399, 404 (4th Cir. Va. 2009).

¹⁵ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 919 (E.D. Va 1989), *aff’d in part and rev’d in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

¹⁶ *Virginia Board of Contractors Regulations*, 18 VAC 50-22-260 (B)(9)(i).

¹⁷ *Worley Bros. v. Marus Marble*, 209 Va. 136, 161 S.E.2d 796 (1968).

¹⁸ *Virginia & Kentucky Railway Co. v. Heninger*, 110 Va. 301,304, 67 S.E. 185, 187 (1909).

The fact that a contract contains no provision for extra work does not prevent recovery for the fair value of work performed beyond the scope of the contract. This fair value would include reasonable overhead and profit.¹⁹ Sovereign immunity and funding can still be an issue in state procurement disputes regarding change orders.²⁰

In Virginia, a subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish the right to assert claims for demonstrated additional costs in a contract in advance of furnishing any labor, services, or materials.²¹ So it seems impossible to waive the right to change orders before supplying labor or material. A general contractor is not mentioned and can still waive its rights to additional costs in the general contract.

Claims Procedures and Notice Requirements

To properly preserve claims, it is very important to read your contract, review any general contract incorporated into your contract, review any state or municipal procurement statute that may be applicable and make sure that you are following the claims procedures, particularly requirements for notice of claims for additional time or money. A court will enforce these procedures. If you fail to follow all required steps, you will not be able to collect the extra money or the extra time that was lost. Particularly in public procurement, the right to sue the government is a waiver of sovereign immunity and the statutory conditions precedent to filing suit will be strictly construed.²²

Most general contracts and subcontracts provide detailed procedures to make any claim for extra time or money. You may not have an opportunity to change the claims procedures in either the general contract or your subcontract. It is very important to understand the procedures, however, and make sure that you comply. Claims procedures may require “written notice of any claim within 48 hours of the event giving rise to the claim.” Courts will enforce this type of clause. If a subcontractor does not give sufficient notice to the general contractor (within the time and in the manner required by the general contract), then the general contractor will not be able to compel payment by the owner. This is the nature of the conduit relationship. If you fail to provide such written notice, you may not have a claim, no matter who caused the problem or how much it cost.²³

The American Institute of Architects (AIA) Document A201-2017 (General Conditions of the Contract for Construction) states:

15 CLAIMS AND DISPUTES

15.1 CLAIMS

15.1.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim.

15.1.2 Notice of Claims. Claims by either the Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party must be initiated within 21 days after

¹⁹ *Glassman Constr. Co., Inc. v. Md. City Plaza, Inc.*, 371 F.Supp 1154, 1160 (D.Md. 1974).

²⁰ *Beka Indus. v. Worcester County Bd. of Educ.*, 419 Md. 194, 213, 18 A.3d 890 (2011).

²¹ Va. Code Anno. §11-4.1:1 (Michie 1950). This was a 2016 amendment and it is not yet clear whether a conduit clause, notice and claim requirements or a pay if paid clause “diminishes” these rights within the meaning of the statute and would be void.

²² *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 252 (Va. Ct. App. 2009) [the principles of waiver and estoppel do not apply to the Commonwealth and that when acting in its governmental capacity it cannot be bound by the unauthorized acts or representations of its employees and agents]; *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 215, 695 S.E.2d 543 (2010) [Was a government contract, although this decision seems based on the contract terms, rather than Virginia Code, even though contract term seems to follow the procurement code on notice of intent to file claim]; *Jean Moreau & Assocs. v. Health Ctr. Comm’n*, 283 Va. 128, 720 S.E.2d 105 (2012); *Costello Constr. Co. of Md. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015).

²³ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 922 (E.D. Va. 1989), *aff’d in part and rev’d in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991); *see also U.S. v. Centex Constr. Co.*, 638 F. Supp 411, 413 (W.D. Va. 1985) [Virginia courts have upheld such contractual clauses between contractors and subcontractors for nearly a hundred years, and that such clauses are also recognized by other jurisdictions]; *John W. Johnson, Inc. v. J.A. Jones Constr. Co.*, 369 F. Supp 484, 494 (E.D. Va. 1973) [a subcontractor could not recover in the absence of a written order directing the work to be done]; *U.S. v. Cunningham*, 125 F.2d 28, 31 (D.C. Cir 1941) [a provision requiring written notice in a contract is a condition precedent to which parties must comply, and the court is not at liberty to disregard the words used by the parties or insert words for which they did not use]; *Omni Specialties—Washington, Inc. v. Esprit de Corp.*, No. 88-1103-LFO, 1989 U.S. Dist. LEXIS 3103, at *3 (D.D.C. Mar. 28, 1989) [the plain language of the contract must govern and is not limited to contractor-initiated changes but rather is written so as to apply to all requests for increases in the contract sum].

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.

15.1.4 Claims for Additional Cost. If the Contractor wishes to make a Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

Project managers should have a procedure to send written notice about any events that *may* later give rise to a claim. It is often best to have a regular policy of sending weekly or biweekly “status” or “progress” letters. Owners and general contractors generally appreciate a contractor that is organized and keeps them informed about the status of the contractor’s work, their anticipated schedule going forward and problems caused by others. This is also an opportunity to describe all problems or events encountered that may give rise to a claim.

If a contractor later finds that it failed to provide written notice of a claim in the precise manner required by the contract documents, they may be able to “piece together” adequate notice from a variety of sources. Courts may enforce an oral agreement or find a waiver of written notice requirements.²⁴ Written notice, however, will always be better than verbal. Witnesses are often unavailable later or their memories will fade, and witnesses will disagree on exactly what was said and when. Courts will hold that actual notice is insufficient and that written notice is required, depending upon the wording of the statute or contract.²⁵ Progress meeting minutes, emails and other correspondence, however, can provide adequate written notice that a claim was made or at least that an owner or general contractor was made aware of a condition.

There is no question your chances of recovering a claim will improve if you send clear written notice in compliance with the contract documents.²⁶ Your ability to use alternate methods will depend on the court or arbitrator deciding your case and the “fairness” or other circumstances on the project. Important factors include how clear it is that there has been a change in the scope of work or schedule, how clear it is that the owner had actual notice of the condition, and whether the owner could have modified the work or schedule on receipt of notice to avoid the costs of the condition.

Many claimed “changes” result in a dispute over the actual scope of work, because of ambiguities or conflicts in the contract documents. If it is arguable whether there is a “change” at all, the notice requirements will be more important. If there is clear evidence that an owner is aware of a condition or aware that a contractor is performing a change, contractual notice *may* be less important. Notice to the architect, however, may not qualify as notice to the owner.²⁷ The owner bears the costs of changes and is entitled to make decisions that impact costs.

Owners are entitled to notice of a potential claim, particularly if they could have done something to avoid the costs if they had received notice. If you are delayed because the owner left equipment in the way, you may not have a claim unless you provide notice that the equipment is in the way and you are delayed as a result. If the owner received the notice, they may be able to simply move the equipment. In this context, an estimate of the anticipated costs or time impact in a notice can be as important to an owner as notice of the condition.

Claims procedures often require detailed cost or time impact information within a certain period of time. If costs are continuing or if you will need more time to document your costs, it is still important to send a letter reiterating that you are incurring ongoing costs, explaining what you do know about the total costs and stating that a complete claim will be submitted when work is complete and information is available.

²⁴ *S. Leo Harmony, Inc. v. Binks Mfg. Co.*, 597 F.Supp 1014, 1032 (S.D.N.Y. 1984).

²⁵ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 254 (Va. Ct. App. 2009).

²⁶ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 255-56 (Va. Ct. App. 2009) [actual notice is insufficient and that the statute required written notice of the contractor’s *intention to file a claim* at the time of the occurrence or the beginning of the work]; *Constr. Enterprises & Contractors, Inc. v. Orting Sch. Dist.*, No. 29621—7-IL, 2004 Wash. App. LEXIS 681, at *13 (Ct. App. Apr. 20, 2004) [“[t]o show waiver, the contractor must produce evidence that the owner waived strict compliance in writing or through ‘unequivocal acts of conduct evidencing an intent to waive’”].

²⁷ *Fontano v. Robbins*, 22 App. D.C. 253, 266-67 (D.C. Cir. 1903) [apart from an agreement to the contrary, an architect has no power to change plans of the work, or insert provisions that the parties did not agree to, especially not the detriment of the owner. Contractual terms providing that contractors are to perform all work under the direction and to the satisfaction of the architect only means the architect’s supervision and direction to see that the contract is complied with].

It does seem the initial “notice” requirement of the contract will be more strictly enforced by the courts than the “claim” or final cost requirements.²⁸ Often, it is impossible to know the full cost or time impact of a condition until work has progressed or been completed. The owner or general contractor is also better able to avoid problems if they receive timely initial notice of the adverse condition. The final claim and final cost are less likely to impact behavior, because it is often too late. A claimant should provide accurate cost and time impact data as early as possible, however, especially if it is required by the contract, it is possible to make a prompt cost or schedule computation, or there would still be time to decide on another course of action if costs are higher than expected.

Initial notices or final claims may have to be submitted to the architect or the general contractor first. It may then be necessary to send a second notice of the claim if the architect fails to respond or gives a negative response. Contractors must follow all of these procedures if they are required by the contract.

If a contractor is delayed in performance, some contracts limit the remedy to a time extension. The contractor will be unable to claim the extra costs incurred as a result of the delay. Delay costs can be considerable, especially if you must keep your personnel on the job throughout the delay or if delays on one project keep you from performing on another. You could incur large liquidated damages on a project, for example, if delay on another project leaves you short of manpower. Contractors would obviously prefer to preserve rights to these costs by striking out language in a contract that limits remedies to time extensions.

Conduit claims procedures in subcontracts often state that subcontractors will receive extra time or money only if the general contractor receives the same from the owner. This is understandable in the sense that a general contractor would not want to cover out-of-pocket expenses for labor or material if an owner can successfully show that the event was not a change under the general contract. Subcontractors should be careful, however, to preserve rights if the event is caused by the mistake or omission of the general contractor.²⁹

Dispute Resolution Procedures

Many general contracts and subcontracts also provide procedures to resolve any disputes. A conduit clause in a subcontract can require a subcontractor to follow the dispute resolution procedure in the general contract, particularly for disputes involving the owner. You may need to submit disputes to the architect or some third party before you are allowed to demand arbitration or litigate. You must be aware of these dispute resolution clauses, so that you do not waste time and money using the wrong procedure. Even worse, you can forfeit your right to many claims if you follow the incorrect procedure, particularly in government projects with administrative claims procedures.³⁰

Arbitration clauses are a particular problem in many cases.³¹ In Maryland mechanic’s lien cases, a claimant has no lien until a court hearing establishes the lien.³² If the court stays your lien action because of an arbitration provision, your lien rights may be cut off by a bankruptcy or a sale of the property while you are off in arbitration.³³

²⁸ *But see Jean Moreau & Assocs. v. Health Ctr. Com’n*, 283 Va. 128, 720 S.E.2d 105 (2012) [The claimant’s letter giving “a ‘heads up’ that [she] intend[ed] to seek legal remedy was not a claim “in writing no later than 60 days after receipt of final payment.” Code §2.2-4363(C)(1). This statement gave notice of intention to file a claim pursuant to Code §2.2-4363(C)(1), requiring that written notice of the intent to file a claim be given “at the time of the occurrence.” But it was not itself a claim. While Code §2.2-4363 does not prescribe exactly what a writing must contain to be considered a “claim,” our prior cases suggest that it requires more than what was included in the letter].

²⁹ In Virginia, a contract provision that waives or diminishes lien rights, the right to assert payment bond claims or the right to assert claims for demonstrated additional costs in a contract in advance of furnishing any labor, services, or materials is null and void. It is debatable whether contract terms requiring written signed change orders or immediate written notice of any delay or other additional costs diminishes the right to make claims and are also void. The same question exists whether “pay when paid” or “pay if paid” clauses diminish the right to make claims and are also void. Va. Code Anno. §43-3(c) (Michie 1950); Va. Code Anno. §2.2-4341(C) (Michie 1950); Va. Code Anno. §11-4.1:1 (Michie 1950).

³⁰ *Sabre Construction Corp v. County of Fairfax*, 256 Va. 68; 501 S.E.2d 144(1998); *W. M. Schlosser Co. v. Fairfax County Redevelopment & Housing Authority*, 975 F.2d 1075 (4th Cir. Va. 1992); *District of Columbia v. Savoy Construction Co.*, 515 A.2d 698, 701 (D.C. Ct. App. 1986) [The particular construction contract between the government and a private contractor is always “the constitution governing the mode of resolving the parties’ disputes”].

³¹ See chapter, Dispute Resolution, Arbitration and Litigation for further discussion of administrative claims, mediation, arbitration and litigation.

³² See chapter, Mechanic’s Liens in Maryland; section, Petition to Establish Mechanic’s Lien; subsection, Arbitration Clauses: *Himmighoefer v. Medallion Indus., Inc.*, 302 Md. 270, 487 A.2d 282 (1985).

³³ *McCormick Constr. Co. v. 9690 Deerco Rd. Ltd. Partnership*, 79 Md. App. 177, 556 A.2d 292 (Ct. Spec. App. 1989); *Johnson Hydro Seeding Corp. v. Ian Homes, Inc.*, 126 Bankr. 933 (Bankr. D. Md. 1991).

Arbitration clauses can also be a particular problem for subcontractors in bond claims. They may be unable to arbitrate with the bonding company, because that bonding company did not agree to an arbitration provision in the bond.³⁴ This can leave a subcontractor in the position of litigating the same case twice.

Monitoring and Verifying Funds for the Project

Change orders, delays and cost overruns are often the cause of a project's failure. An inexperienced owner or architect and a bad set of plans can cause terrific overruns. Contractors often view this as their very objective, but this is often shortsighted. If the project fails or there is not enough money to finish, a contractor may not collect for change order work performed. This is particularly a problem for subcontractors with a "pay if paid" clause in their contract.³⁵

An owner may begin ordering changes because of a bad set of plans or because he wants to build the Taj Mahal, but has the lender agreed to fund these changes? The owner may even keep the lender in the dark because the owner does not want the lender to know there are problems. Toward the end of the project, there is another \$300,000 worth of work to do, \$200,000 in retention held and no money left on the construction loan. The owner then begins defaulting on payments to the contractors and to the lender.

Delays and accelerations present the same problem. These are, in effect, change orders. Is there enough money to pay for the acceleration or to compensate for delays? A contractor should continually monitor the financial health of the project as much as possible. This is especially important with a cost plus contract or when substantial change orders are requested.

The most important term would include the right to verify adequate funds to complete the project before the project begins and at various later stages of the project. At a minimum, the contractor should have the right to verify funding for change orders in excess of a certain dollar amount. In the case of a cost plus time and materials contract, the seller should be able to verify funding once the original budget is surpassed.

In any event, the seller should have the contractual right to refuse to perform any further work if adequate funding cannot be established. This term appears in AIA Document A201-2017 (General Conditions of the Contract for Construction), which reads:

2.2.1 Prior to commencement of the Work, the Contractor may request in writing that the Owner provide reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. Thereafter the Contractor may only request such evidence if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) a change in the Work materially changes the Contract Sum; or (3) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due. The Owner shall furnish such evidence as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. After the Owner has furnished the evidence, the Owner shall not materially vary such financial arrangements without prior notice to the Contractor.

It is also helpful to have the right to consult persons who may have knowledge concerning the health of the project, funding, scheduling, expected changes and other matters. You may also consider the right to run credit checks on the general contractor or owner.³⁶

³⁴ *Schneider Elec. Bldgs. Critical Sys. v. W. Sur. Co.*, 454 Md. 698, 165 A.3d 485 (2017) [A surety's agreement to be jointly and severally liable for the performance of a construction contract does not constitute assent to the subcontract's mandatory arbitration clause when the clause refers specifically to disputes between the contractor and the subcontractor]; *but see United States ex rel. Duncan Telcom, Inc. v. Pond Constructors, Inc.*, 2016 U.S. Dist. LEXIS 141419 (E.D. Va. 2016) [Under the Miller Act, the claimant's cause of action accrued 90 days after completion of its work. The Act permits Duncan to bring suit at that time, not when and if the claimant recovers from the contract debtor. Moreover, conditioning claimant's right to recover from the surety on the completion of the arbitration process with the contract debtor — a process that has not yet been initiated and, under the terms of the Subcontract Agreement itself, can only be initiated by the contract debtor — is at odds with the terms of the Miller Act itself]; *See also D.C. ex rel. Strittmatter Metro, LLC v. Fid. & Deposit Co. of Md.*, 208 F. Supp. 3d 178 (D.D.C. 2016).

³⁵ *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000).

³⁶ *See* chapter, Credit Management; section, Creditworthiness; subsection, Fair Credit Reporting Act (FCRA) and Equal Credit Opportunity Act (ECOA).

Defects in Plans and Specifications

An owner that had plans and specifications prepared is generally responsible for defects in those plans and specifications.³⁷ An owner is entitled to make changes, but where the change is necessitated by defective plans or specifications, the owner must pay the entire resulting damage. When the owner provides the plans and specifications, it implicitly warrants that compliance with the specifications will result in satisfactory performance.³⁸

A construction contractor who has followed plans and specifications furnished by the owner that are defective or insufficient will not be responsible to the owner for loss or damage, which results solely from the defective or insufficient plans and specifications in the absence of negligence on the contractor's part, or any express guaranty or warranty that the plans and specifications are sufficient or free from defects.³⁹ *A contractor who bids for work has the right to rely on the plans and specifications submitted to him for bidding purposes.*⁴⁰ The rights of the parties are to be measured by them. It is only through the plans and specifications that he can make an intelligent bid. Burdens other than those contemplated by the contract may not be placed on the contractor without additional compensation.⁴¹

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.⁴² However, the contractor can become liable for defects in the plans and specifications through negligence or by agreeing to a contractual warranty or guarantee that they are sufficient or free from defects.⁴³

The owner is also responsible for delays caused by faulty plans and specifications, including the failure to recognize the need for revisions in the plans and failure to make those revisions in a timely manner.⁴⁴

When a general contractor supplies a subcontractor with plans prepared by the owner's design professional, the general contractor impliedly warrants those plans to the subcontractor.⁴⁵ Absent open and obvious design defects, which should be apparent to a prudent contractor and called to a prime contractor's attention, the party who furnished plans and specifications impliedly warrants them to be fit for their intended use.⁴⁶

Differing or Concealed Site Conditions

In general terms, if a contractor agrees to construct an improvement for a stipulated sum, the contractor bears the risk and costs of concealed conditions. The contractor will not be excused or be entitled to additional compensation when unforeseen difficulties are encountered.⁴⁷ If a contractor agrees to erect a structure on a particular site, the contractor ordinarily assumes the risk of subsidence of the soil.⁴⁸

The risk of concealed conditions would normally cause a contractor to add large contingency amounts in a fixed price contract. As a result, owners would pay increased prices for projects, even if differing or concealed conditions

³⁷ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918); *Adams v. Tri-City Amusement Co.*, 124 Va. 473, 476, 98 S.E. 647 (Va. 1919) [The design of this wall was inadequate. For such a defect a building contractor cannot be held responsible, for it is his duty to follow the plans and specifications furnished as his guide by the architect as the agent of the owner].

³⁸ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 707-708 (Ct. Claims 1966); *E.C. Ernst, Inc. v. Manhattan Construction of Texas*, 387 F.Supp. 1001 (S.D. Ala. 1974).

³⁹ *Worley Brothers v. Marus Marble*, 209 Va. 136, 161 S.E.2d 796 (1968), citing *Richmond Inc. v. Ewing's Sons*, 200 Va. 593, 595-96, 106 S.E.2d 595, 597 (1959); see also 6 A.L.R.3d 1394.

⁴⁰ *Raymond International, Inc. v. Baltimore County*, 45 Md. App 247, 412 A.2d 1296 (Md. Ct. Spec. App 1980).

⁴¹ *Worley Brothers v. Marus Marble*, 209 Va. 136, 144, 161 S.E.2d 796 (1968), citing *Wunderlich Contracting Co. v. U.S.*, 240 F.2d 201, 205 (10th Cir. 1957).

⁴² *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 563, 137 S.E. 485 (1927), citing *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 61, 63 L. Ed. 166.

⁴³ *Costello Constr. Co. of Md. v. City of Charlottesville*, 97 F. Supp. 3d 819 (W.D. Va. 2015); *Chantilly Constr. Corp. v. Dep't of Hwys. & Transp.*, 6 Va. App. 282, 292 (Va. Ct. App. 1988); *Modern Cont'l S. v. Fairfax County Water Auth.*, 72 Va. Cir. 268, 272 (Va. Cir. Ct. 2006).

⁴⁴ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 707-708 (Ct. Claims 1966).

⁴⁵ *APAC Carolina v. Town of Allendale*, 41 F.3d 157 (4th Cir. S.C. 1994); cf. *Gillingham Construction, Inc. v. Newby-Wiggins Construction, Inc.*, 42 P.2d 680 (Idaho 2002).

⁴⁶ *Miller v. Guy H. James Constr. Co.*, 653 P.2d 221 (Okla. App. 1982), favorably cited in *Havens Steel C. v. Randolph Engineering Co.*, 613 F. Supp. 514 (W.D. Mo. 1985).

⁴⁷ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918).

⁴⁸ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918), citing *Simpson v. U.S.*, 172 U.S. 372; 19 S. Ct. 222; 43 L. Ed. 482 (1899).

are not encountered. To reduce the risk, the contingency and the price to the owner, many contracts include a differing or concealed site condition clause.

AIA Document A201-2017 (General Conditions of the Contract for Construction) removes the risk of differing or concealed site conditions from the contractor. It states:

3.7.4 Concealed or Unknown Conditions: If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents, or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially, and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment on the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

This contract provision splits concealed or unknown conditions into two "Types." A "Type I" condition concerns "subsurface or otherwise concealed physical conditions, which differ materially from those indicated in the contract documents." This type of claim depends on an inaccurate representation in the plans, specifications, test borings, soil reports or other contract documents.

A "Type II" condition is "unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the contract documents." This type of claim does not depend on an inaccuracy in contract documents, but does require a physical condition that was unknown and of an unusual nature. A Type II differing site condition is more rare than its Type I counterpart and is much more difficult to prove.⁴⁹

U.S. government contract documents and Federal Acquisition Regulations generally describe differing site conditions in the same manner.⁵⁰ Accordingly, differing or concealed conditions are generally split up into and described as Type I and Type II conditions in the construction industry.

Even in the absence of a differing site conditions clause in the contract, a Type I condition claim based on defects in the contract documents can be brought under a theory of "misrepresentation" by the owner⁵¹ or based on the owner's "implied warranty of the accuracy of the plan and specifications."⁵²

To avoid being bound to soils reports and other contract documents, owners sometimes include explicit disclaimers. The effectiveness of these disclaimers seems to vary.⁵³ The federal District Court in Virginia has upheld a disclaimer from an owner that provided a soils report "solely as a matter of convenience and general information," and expressly disclaimed "any responsibility for the data as being representative of the conditions and materials which may be encountered."⁵⁴

⁴⁹ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 266 (Va. Ct. App. 2009).

⁵⁰ *Federal Acquisition Regulations* 52.236-2.

⁵¹ *City of Richmond v. I.J. Smith & Co. Inc.* 119 Va. 198; 89 S.E. 123 (1916).

⁵² *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918); *Chantilly Constr. Corp. v. Dept of Transp.*, 369 S.E.2d (Va. App. 1988); *1616 Reminic Ltd. Partnership v. Atkinson & Keller Co.*, 14 B.R. 484 (E.D.Va. 1981); *Raymond International, Inc. v. Baltimore County*, 45 Md. App. 247, 412 A.2d 1296 (Md. Ct. Spec. App. 1980).

⁵³ *City of Richmond v. I.J. Smith & Co. Inc.* 119 Va. 198; 89 S.E. 123 (1916); *P.T. & L. Constr. Co. v. Dept of Transportation*, 531 A.2d 1330 (N.J. 1987) [withholding information negates waiver]; *Joseph F. Trionfo & Sons, Inc. v. Board of Education*, 41 Md. App. 103, 395 A.2d 1207 (Md. Ct. Spec. App. 1979); *Weichmana Engineering v. State*, 109 Cal. Rptr. 529 (Ct. App. 1973) [disclaimer effective for honest mistake without fraud, bad faith or fiduciary relationship].

⁵⁴ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 914 (E.D. Va. 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

By definition, a Type II condition is not described in the contract documents. It must be an *unknown* physical condition of an unusual nature. If the condition is shown on any contract documents or discussed in any pre-bid conference, it cannot be unknown and a Type II condition claim will be denied.⁵⁵

Type II condition claims must also be for *physical* conditions. Claims will not be allowed under these differing site condition clauses for non-physical conditions such as labor disputes, governmental, political, economic or weather conditions.

Differing or concealed conditions provisions in a contract normally have notice requirements similar to those for changes or delays. This allows the owner or architect to inspect and verify the condition, formulate the best method of proceeding and perhaps alter the work to avoid excessive cost increases.⁵⁶ If the contractor fails to strictly follow the notice requirements, however, courts may allow the claim anyway if the owner had actual notice of the condition and can prove no prejudice or damage due to the late notice.⁵⁷

The ability to obtain a time extension or make a delay claim for a differing or concealed site condition will depend on all of the same requirements for making a claim for additional compensation.

Site Investigation

A construction contract often includes an obligation by the contractor to fully investigate and inspect the site prior to signing the contract. A site investigation provision may read as follows:

The contractor represents that it is fully qualified to perform the work required by this contract and acknowledges that prior to the execution of this contract it has by its own independent investigation ascertained the conditions involved in performing its work, including but not restricted to: the location of the work; accessibility and character of the site; quality and quantity of surface and subsurface water; materials or obstacles to be encountered; the character and extent of existing work within or adjacent thereto; other work being performed thereto; transportation, disposal, handling and storage of materials; availability of labor and labor scales; location and availability of utilities and access roads; equipment and facilities needed for the prosecution of the work; uncertainties of weather or physical conditions at the site; and any other matters which can in any way affect the work or the cost thereof.

On its face, this provision places a significant responsibility on the contractor to investigate the proposed construction site and conditions. There are limitations to the responsibility and risk placed on a contractor by such a provision. As described in the prior subsection, most construction contracts contain a Differing Site Conditions or Concealed Site Conditions clause. As described above, the contractor is not responsible for the consequences of defects in the plan and specifications.⁵⁸ This responsibility of the owner is not overcome by a clause requiring contractors to visit the site, to check the plans and to inform themselves of the requirements of the work. The contractor should be relieved if misled by erroneous statements in the plan and specifications.⁵⁹

AIA Document A201-2017 (General Conditions of the Contract for Construction) does not attempt to shift the risk of differing or concealed site conditions or defects in the plans and specifications to the contractor. It states:

3.2 REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

3.2.2 Because the Contract Documents are complementary, the Contractor shall before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that

⁵⁵ *Highland Motor Transfer Co. v. Heyburn Building Co.*, 35 S.W.2d 521 (Ky. App. 1931); *Condon-Cunningham, Inc. v. Day*, 258 N.E.2d 264 (Ohio C.P.1969).

⁵⁶ *Schnip Building Co. v. U.S.*, 645 F.2d 950 (Ct. Cl. 1981).

⁵⁷ *Peter Kiewit Sons' Co.*, 60-1 BCA #2580; *B.J. Lucarelli & Co.*, 1962 BCA #3269; *Eisen-Magers Contr. Co.*, 59-1 BCA #23234; *Bignold v. King County*, 399 P.2d 611 (Wash. 1965); *Kenny Constr. Co. v. Metropolitan Sanitary District*, 288 N.E.2d 1 (Ill. 1972); *Frederick Snare Corp. v. Maine-New Hampshire Interstate Bridge Authority*, 41 F.Supp 638 (D.N.H. 1941).

⁵⁸ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918).

⁵⁹ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918); *City of Richmond v. I.J. Smith & Co. Inc.* 119 Va. 198; 89 S.E. 123 (1916); *Raymond International, Inc. v. Baltimore County*, 45 Md. App 247, 412 A.2d 1296 (Md. Ct. Spec. App 1980).

portion of the Work, as well as the information furnished by the Owner pursuant to Subparagraph 2.2.3, shall take field measurements of any existing conditions related to that portion of the Work and shall observe any conditions at the site affecting it. These obligations are for the purpose of facilitating coordination and construction by the Contractor and are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents; however, the Contractor shall promptly report to the Architect any errors, inconsistencies or omissions discovered by or made known to the Contractor as a request for information in such form as the Architect may require. It is recognized that the Contractor's review is made in the Contractor's capacity as a contractor and not as a licensed design professional, unless otherwise provided in the Contract Documents.

3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

Clauses requiring the contractor to perform its own pre-bid site investigation are enforced to varying degrees.⁶⁰ If the conditions would have been obvious to a "reasonably experienced and prudent" contractor examining the site, however, the risk is probably with the contractor.

Shop Drawings and Inspections

Modern construction contracts will typically contain requirements for shop drawings of some aspects of the work. Contracts will also typically state that approval of shop drawings does not relieve the contractor of the obligation to verify site conditions and complete work in accordance with plans and specifications. Design professionals usually place conditional language in any "approval" of shop drawings. Accordingly, contractors usually cannot rely on "approval" of shop drawings as a waiver of any other contract requirements.⁶¹ It is generally the best practice to alert the owner with a notice on the face of a shop drawing if a contractor is proposing a deviation from the plans and specifications.

Construction contracts typically also state that inspection of the work by the owner or government inspectors and even payment by the owner do not constitute acceptance of the work or not relieve the contractor of the obligation to complete work in accordance with plans and specifications.⁶²

Schedule Preparation and Updating

Contract documents often assign schedule preparation and updating duties to one or more of the players on the project. As a practical matter, this will also assign "fault" if the schedule is unrealistic or incorrect. AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

3.10.1 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.

Subcontract documents will typically state that the subcontractor must similarly provide its schedule before or soon after the award of the subcontract to enable the general contractor to complete a realistic schedule for the owner.

The requirements for development of a schedule will assist in preparation of a realistic schedule for the project. A contractor is in a better position than the owner or architect to know exactly how long various tasks will take for this particular contractor in this particular market.

⁶⁰ See e.g., *Dravo Corp. v. Dept. of Highways*, 564 S.W.2d 16 (Ky. App. 1977) [thorough investigation required]; *Robert E. McKee, Inc. v. Atlanta*, 414 F.Supp. 957 (N.D. Ga. 1976) [site investigation must be reasonable under the circumstances].

⁶¹ *D.C. McClain, Inc. v. Arlington County*, 249 Va. 131, 138-139, 452 S.E.2d 659 (1995); *R. C. Professional Services, Inc. v. Department of Homeland Security*, Civilian Board of Contract Appeals, No. 775 (November 12, 2009).

⁶² *R. C. Professional Services, Inc. v. Department of Homeland Security*, Civilian Board of Contract Appeals, No. 775 (November 12, 2009).

Schedule updates are often required at the time of any delay or potential delay and are often referred to as a “time impact analysis.” This provides full notice of the impact any change or delay will have on the project schedule as a whole and enable the owner to adjust as necessary to avoid unnecessary delay.

Contract Schedule Unilateral Amendments

Many contracts also provide that the owner or general contractor can unilaterally modify the schedule. Such a scheduling provision may read:

Should the contractor provide the Subcontractor with progress schedules or any kind of time analysis for the performance of the work, it is understood and agreed that said schedules are offered as an aid to the Construction process only. However, it is further understood and agreed that such schedules are not guaranties that the Subcontractor’s work will be performed within the time periods or durations or in the sequence set forth therein and such schedules may accordingly be changed or revised by the Contractor, in its sole discretion, from time to time as circumstances may require. Such schedules, if any, do not relieve the Subcontractor of the obligation, as set forth herein, to follow the progress of the work and the directions of the Contractor. Nothing herein will be construed as requiring the Contractor, either expressly or impliedly, to furnish the Subcontractor with progress schedules for the Subcontractor’s work.

The Subcontractor will proceed with the work in a prompt and diligent manner, in accordance with the Contractor’s schedules as amended from time to time. The Subcontractor will be liable to the Contractor for failure to adhere to the Contractor’s schedules, including amendments, even if such schedules differ materially from schedules set forth in the Contract Documents or the time of completion called for by the Contract Documents. TIME IS OF THE ESSENCE.

This may put a contractor in an unavoidable default. The contractor will be in default, for example, if the production time is cut in half or the length of a project doubled. A contractor may not have the manpower to complete production in less time and may not have a claim for overtime or other costs. Project extensions can also be troublesome if the contractor has already committed to other projects.

A contractor may know that it needs a certain amount of time to mobilize on a project, to order materials or to take measurements to begin work. If so, a contractor wants to make sure the contract says so. Contractors also generally prefer a definite starting date in their contract, rather than a need to mobilize immediately on a “notice to proceed.” Then, if the start of the project is delayed, the contractor may have a claim for overtime or disruption of their schedule on other projects.

It is a good policy for contractors to attach an actual projected contract schedule as an exhibit to the contract or to reference an actual schedule in existence at the time of the contract and eliminate any terms allowing changes to this schedule without consent or at least disallowing “unreasonable” changes. A defined schedule will cut both ways. If the actual projected contract schedule is attached as an exhibit, then the contractor will probably need to keep up with this schedule. If possible, contractors want to allow for some flexibility in their own scheduling.

Responsibility for Coordination

AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.3.1 The Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as state below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect

and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed with the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences or procedures.

This contract provision, very common in all types of construction contracts, gives the general contractor the right and the responsibility to coordinate all forces on the project in order to complete the project in a timely manner.

In the event there is work performed by the owner's own forces or the owner's separate contractors, the AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

Without such a contract provision, an owner may not have a duty to schedule and coordinate multiple prime contractors.⁶³

Contract Duration and Schedule

Most contracts provide a specific delivery schedule. This will leave the contractor in default and liable for delay damages if the completion date is not met.⁶⁴ The completion date also provides the contractor a specific time to complete its work and an owner may not shorten this time.⁶⁵ A delay in the completion date can result in a contractor claim for price increases.⁶⁶ Delay by a general contractor in accepting a bid may release the subcontractor from a bid.⁶⁷

When a contract does not specify a time for performance, the law implies a reasonable time.⁶⁸

Time of the Essence

Most construction contracts will state that "Time is of the Essence." As in most contracts, this means what it says in a construction contract. In the absence of an "excusable delay" or "*force majeure*" term in the contract, a time is of the essence clause can leave a contractor liable for damages in the event of delay, even if the contractor did not cause the delay.⁶⁹ If the contract does not make time of the essence and there is no required completion date, the work must be complete within a reasonable time.⁷⁰ A purchase order with a definite delivery date can make time of the essence for a material supplier.⁷¹

Force Majeure and Excusable Delays

Most contracts state that a contractor is not responsible for delays from causes beyond the contractor's control. In fact, some state contractor's regulations require such an explicit "*force majeure*" clause in contracts.⁷²

AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

8.3 DELAYS AND EXTENSIONS OF TIME

⁶³ *Broadway Maintenance Corp. v. Rutgers*, 447 A.2d 906 (N.J. 1982).

⁶⁴ *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp 906 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

⁶⁵ *M.F. & G. Trading Co. v. Clifford*, 200 Va. 744, 107 S.E.2d 441 (1959).

⁶⁶ *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc.*, 219 Va. 111, 118-19, 244 S.E.2d 774 (1978).

⁶⁷ *Piland Corp. v. REA Construction Co.*, 672 F.Supp. 244 (E.D.Va. 1987).

⁶⁸ *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 535, 201 S.E.2d 758, 767 (1974).

⁶⁹ *Sands v. Quigg*, 111 Va. 476, 69 S.E. 440 (1910).

⁷⁰ *May v. Martin*, 205 Va. 397, 137 S.E.2d 860 (1964).

⁷¹ *Kirn v. Champion Iron Fence Co.*, 86 Va 608, 10 S.E. 885 (1890).

⁷² *Virginia Board of Contractors Regulations*, 18 VAC 50-22-260 (B)(9)(d).

8.3.1 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.

This type of force majeure clause entitles a contractor to a time extension only. The contractor is protected from liquidated damage or other claims for delays beyond the contractor's control, but the contractor's affirmative claim for compensation for the delay will be controlled by other contract provisions. The ability to get even a time extension is dependent on the terms of the contract, especially timely notice requirements. A time extension clause in a contract does not necessarily provide an exemption from damages for delay.⁷³

In order to obtain even a time extension under a force majeure clause, the contractor usually must prove that the delay was truly beyond the contractor's control and that the delay was unexpected, unusual or out of the ordinary. The essence of an excusable delay is that the cause is unforeseeable, beyond the control of the contractor and without his fault or negligence.⁷⁴

If extensions of time are authorized only for "adverse weather conditions not reasonably anticipated," a contractor must be ready to prove that the adverse weather conditions were extraordinary.⁷⁵ Unforeseeability is often a difficult element to establish, particularly when delay is caused by a subcontractor or supplier.⁷⁶ A subcontractor must sometimes prove that it took all practicable efforts to overcome a delay to establish that the delay was beyond the contractor's control.⁷⁷

Material Supplier Deliveries

A material supplier must deliver goods within a "reasonable time" if the parties have not agreed on any other schedule.⁷⁸ This is vague, but it does mean something. In most markets, it is not reasonable for a lumberyard to deliver two months after an order.

What is reasonable will vary depending on such factors as the nature of goods to be delivered, the purpose for which they are used, the extent of seller's knowledge of buyer's intentions, transportation conditions, the nature of the market and so on.⁷⁹ A court would look at (1) the course of dealing between the parties; (2) trade usage in the industry; and (3) buyer's notification to seller of time concerns.⁸⁰ A purchase order with a definite delivery date can make time of the essence for a material supplier.⁸¹

⁷³ *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980).

⁷⁴ *R.G.Pope Construction Company v. Guardrail of Roanoke*, 219 Va. 111, 244 S.E.2d 774 (1978).

⁷⁵ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 915 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991) [The delays resulting from the adverse weather conditions were not excused where the precipitation levels were reasonably anticipatable by the contractor; the weather data provided by the contractor did not demonstrate that the higher levels of precipitation for the relevant time period could not have been reasonably anticipated; it should have come as no surprise to the contractor that it rains and snows a good deal during the winter in Northern Virginia; the rain and snowfall in that winter was far from the highest recorded and not so unusual as to have been beyond reasonable anticipation].

⁷⁶ See e.g., *Electrical Enters., Inc.*, IBCA 972-9-72, 74-1 BCA #10,400; but see *J.D. Hedin Constr. Co. v. U.S.*, 408 F.2d 424 (Ct. Cl. 1969) [unforeseeability of cement shortage was proven].

⁷⁷ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 915 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991). See e.g., *Int'l Elecs. Corp. v. U.S.*, 646 F.2d 496 (Ct. Cl. 1981).

⁷⁸ UCC Section 2-309(1).

⁷⁹ *White and Summers Uniform Commercial Code*, Vol 1. Ch. 3 at 126; *Am Jur Sales* § 268 and *Corpus Juris Secundum Sales* §170.

⁸⁰ *Jamestown Terminal Elevator v. Heib*, 246 N.W.2d 736 (ND, 1976); *Schiavi Mobile Homes v. Gagne*, 510 A.2d 236 (Maine, 1986) [buyer's failure to object to date of performance resulted in court concluding that performance had occurred within reasonable time]; *Robinson v. Commercial Contractors*, 274 A.2d 160 (CT, 1970) [adds intent of the parties to the "facts and circumstances" test, although this case does not address the time issue under the UCC but applies a common law contract standard]; *Thornton Construction Co. v. Mackinac Aggregates Corp.*, 157 N.W.2d 456 (MI 1968) [Court held that time of performance was reasonable based on both parties' understanding of timing of like projects in the industry].

⁸¹ *Kirn v. Champion Iron Fence Co.*, 86 Va 608, 10 S.E. 885 (1890).

Liquidated Damages

As discussed above in the Introduction, delay damages are often very difficult to prove. The rule that damages must be proven with reasonable certainty⁸² can mean that it is impossible for a claimant to recover damages, even if it is clear that a claimant has been delayed and has suffered damage. To avoid this difficulty, parties to a construction contract often agree in advance on the damage to be assessed in the event of delay. These “liquidated damages” clauses are normally expressed in a “*per diem*” or a certain dollar amount per day of delay.

Generally, liquidated damages provisions in a contract are enforceable.⁸³ Parties to a contract may agree in advance about the amount to be paid as compensation for damage, which may result from a delay when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is in proportion to the probable loss.⁸⁴ However, when the damages from a breach can be definitely measured or when the agreed amount would be grossly in excess of actual damages, courts usually construe such an agreement to be an unenforceable penalty.⁸⁵

The fact that a contractor agrees to a contract containing a liquidated damages clause does not prevent that contractor from later litigating the validity of the clause. The party opposing the imposition of liquidated damages is entitled to conduct discovery and present evidence that the damages resulting from breach of the contract are susceptible of definite measurement or that the stipulated damages are grossly in excess of the actual damages suffered. Upon proof of either of these elements, a liquidated damages clause becomes an unenforceable penalty.⁸⁶

If the party seeking to enforce a liquidated damages provision is responsible for or contributed to the failure to perform, the liquidated damages provision may not be enforceable.⁸⁷ A party that prevents performance of a contract waives liquidated damages.⁸⁸ This is true even if the contract requires written notice for extensions of time and the contractor failed to provide the notice.⁸⁹

The rule is often stated that the damages must be uncertain and in proportion to the probable loss *at the time the parties made the agreement*. At the same time, however, it seems that a liquidated damages provision will be an unenforceable penalty if damages are certain or out of proportion to actual loss incurred *at the time of the dispute*. A liquidated damages clause will be an unenforceable penalty when the damage resulting from a breach of contract can be definitely measured or where the liquidated amount is grossly in excess of actual damages.⁹⁰ Also, if it is apparent that no actual damages were incurred, a liquidated damages provision may be an unenforceable penalty.⁹¹

It is possible in a contract to waive the right to claim that a liquidated damages provision is an unenforceable penalty.⁹²

It is also important to remember that a liquidated damage provision can be a double-edged sword. In order to recover, an owner will not need to prove that actual damages were as high as the liquidated amount, but the owner will also be limited to that liquidated amount, even if actual damages were higher. A liquidated damages provision both establishes the amount of damages an owner may claim and limits the contractor’s exposure.⁹³ If a contractor abandons a project, however, this can be a repudiation of the contract, and the owner may not be limited to the liquidated damages in that contract.⁹⁴

⁸² *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 191, 288 S.E.2d 437 (1982); *Estate of Taylor v. Flair Property Associates*, 248 Va. 410, 448 S.E.2d 413 (1994); *Wayne Knorr, Inc. v. DOT*, 973 A.2d 106, 1081 (Pa. Commw. Ct. 2009).

⁸³ *Fidelity & Casualty Co. v. Copenhagen Co.*, 159 Va. 126, 135, 165 S.E. 528 (1932); *Wayne Knorr, Inc. v. DOT*, 973 A.2d 1061, 1091 (Pa. Commw. Ct. 2009).

⁸⁴ *301 Dahlgren Ltd. Ptnrshp v. Board of Supervisors of King George County*, 240 Va. 200, 396 S.E.2d 651 (1990); *Taylor v. Sanders*, 233 Va 73, 353 S.E.2d 745 (1987); accord *Crawford v. Heatwole*, 110 Va. 358,359-61, 66 S.E. 46, 47-48 (1909).

⁸⁵ *301 Dahlgren Ltd. Ptnrshp v. Board of Supervisors of King George County*, 240 Va. 200, 396 S.E.2d 651 (1990).

⁸⁶ *O’Brian v. Langley School*, 256 Va. 547, 551, 507 S.E.2d 363 (1998).

⁸⁷ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974).

⁸⁸ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974), citing *5 Williston on Contracts* § 789 (3d ed. 1961), quoting *U.S. v. United Engineering & Contracting Co.*, 234 U.S. 236, 242, 34 S.Ct. 843, 58 L.Ed. 1294 (1914).

⁸⁹ *Glassman Constr. Co., Inc. v. Md. City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974), citing *Peter Kiewit Son’s Co. v. Pasadena City Jr. College Dist.*, 28 Cal.Rptr. 714, 379 P.2d 18 (1963).

⁹⁰ *O’Brian v. Langley School*, 256 Va. 547, 551, 507 S.E.2d 363 (1998); *Brooks v. Bankson*, 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994); *Ameritech Constr. Corp. v. Cummings*, 66 Va. Cir. 328 (Cir Ct. City of Winchester 2005).

⁹¹ *301 Dahlgren Ltd. Ptnrshp v. Board of Supervisors of King George County*, 240 Va. 200, 396 S.E.2d 651 (1990).

⁹² *Gordonsville Energy L.P. v. Virginia Electric and Power Co.*, 257 Va. 344; 512 S.E.2d 811 (1999).

⁹³ *Fidelity & Casualty Co. v. Copenhagen Co.*, 159 Va. 126, 135, 165 S.E. 528 (1932).

⁹⁴ *Continental Realty Corp. v. Andrew J. Crevolin Co.*, 380 F.Supp. 246, 257 (S.D.W.Va. 1974).

Accordingly, a contractor should review a liquidated damages provision before signing a contract to determine if it is a reasonable amount relative to the actual damage that an owner will incur in the event of delay. If the liquidated amount is low, a contractor should readily agree. If the amount is disproportionately high, the provision may be an unenforceable penalty in a later dispute, requiring the owner to prove actual damage.

Subcontracts often allow a general contractor to pass on to subcontractors any liquidated damages assessed by an owner. Subcontractors would prefer to state that they are liable for liquidated damages only to the extent that their own breach of contract caused any delay. This term appears in the AIA Document A401-2017 (Standard Form of Agreement Between Contractor and Subcontractor). It states:

3.4 CLAIMS BY THE CONTRACTOR

3.4.1 Liquidated damages, if provided for in the prime contract, shall be assessed against the subcontractor only to the extent caused by the subcontractor or any person or entity whose acts the subcontractor may be liable, and in no case for delays or causes arising outside the scope of this subcontract.

It is otherwise common for general contractors to attempt to assess all subcontractors liquidated damages equally or pro rata according to their subcontract amounts.

As discussed above in Claims Procedures, it is important for any contractor to provide notice of any delay caused by others on the project, in order to obtain a time extension, even if no claim for money is allowed or necessary. This is equally true in the case of a liquidated damages clause or the possible assessment of actual delay damage.

No Damage for Delay

AIA Document A201-2017 (General Conditions of the Contract for Construction) expressly allows recovery of delay damages. It states:

8.3. DELAY AND EXTENSIONS OF TIME

8.3.1 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.

8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

In the absence of a contractual provision to the contrary, a contractor whose performance is delayed by the actions of an owner is entitled to monetary relief for damages caused by the delay as well as an extension of time for performance.⁹⁵

It is certainly possible to waive rights to damages in a contract, if the waiver is express and clear.⁹⁶ Owners and then general contractors will often require a waiver of delay damages against them. These "no damage for delay" clauses are generally enforceable.⁹⁷ Such clauses often limit the consequences of delay to a time extension and then only if the contractor provides timely written notice of the delay. Damages resulting from delay will not be allowed in any event. Such a clause may read as follows:

Should the Subcontractor's performance of this Agreement be directly delayed, hindered, accelerated or disrupted by the Contractor, other Subcontractors or the Contractor's suppliers, or by any acts

⁹⁵ *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 571, 587 S.E.2d 711 (2003), citing *Atlantic Coast Line R.R. Co. v. A. M. Walkup Co.*, 132 Va. 386, 390, 112 S.E. 663, 664 (1922).

⁹⁶ *VNB Mortgage Corp. v. Lone Star*, 215 Va. 366, 371, 209 S.E.2d 909, 914 (1974); *McMerit Constr. Co. v. Knightsbridge Dev. Co.*, 235 Va. 368, 374, 367 S.E.2d 512 (1988); *First American Bank of Virginia v. JSC Concrete Const.*, 259 Va. 60, 68, 523 S.E.2d 496 (2000).

⁹⁷ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 921 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

or causes of the Owner under the Prime Contract for which the Owner grants the Contractor an extension of time, and the Subcontractor notifies the Contractor in writing within five (5) calendar days after commencement of such delay, inefficiency, loss of productivity, hindrance or disruption as provided in this Article, the Subcontractor will receive an extension of time for the performance of the Subcontractor's obligations under this agreement. Such time extension will be the Subcontractor's sole and exclusive remedy, and the Subcontractor will not be entitled to any costs or damages for delay, suspension, inefficiency, loss of productivity, acceleration, disruption, etc., of its work.

Such "no damage for delay" clauses can insulate an owner or general contractor. At the same time, the contractor agreeing to the "no damage for delay" clause can be left exposed to massive damages from delay.

This can lead to very onerous and unfair results. Some states have passed legislation limiting the enforceability of "no damage for delay" clauses, particularly for public procurement.⁹⁸ Under the Virginia Code, for example, any provision contained in any public construction contract that waives the rights of a contractor to recover damages for *unreasonable* delay in performing is void and unenforceable as against public policy.⁹⁹

There are various theories that can allow a contractor claimant to circumvent a "no damage for delay" clause and recover damages. Some of these are described in greater detail in the subsection below on Implied Duties. Some legal theories, however, are peculiar to and used fairly exclusively to avoid no damage for delay clauses.

The theories most frequently used to circumvent a "no damage for delay" clause include the owner's fraud, bad faith,¹⁰⁰ active interference,¹⁰¹ gross negligence¹⁰² or abandonment of the contract.¹⁰³ A "no damage for delay" clause will not bar recovery of damages for delays that were not within the contemplation of the parties at the time of the contract.¹⁰⁴ A delay can also go on so long that it would be considered an abandonment of the contract, allowing a recovery of damages.¹⁰⁵ As discussed below, if the contract has a suspension of work clause, an unreasonable delay can also be considered a suspension of work under that contract clause.

Waiver of Consequential Damages

The types of damage incurred in a contract action include "direct" or "indirect" damages, also called "consequential" damages. Direct damages are those which arise "naturally" or "ordinarily" from a breach of contract. They are damages that can be expected to result from a breach in the ordinary course of human experience. Consequential damages arise from the intervention of "special circumstances" not ordinarily predictable.

If damages are direct, they are compensable. If damages are consequential, they are compensable only if it is determined that the special circumstances were within the "contemplation" of both contracting parties or were "predictable." Whether damages are direct or consequential is a question of law.¹⁰⁶ Whether special circumstances were within the contemplation of the parties is a question of fact.¹⁰⁷

⁹⁸ For a state-by-state survey of the enforceability of "no damage for delay" clauses, see Robert F. Cushman and James F. Myers, *Construction Law Handbook*, pp. 904-30 (1999).

⁹⁹ Va. Code §2.2-4335; *Blake Construction Company v. Upper Occoquan Sewage Authority*, 266 Va. 564, 576; 587 S.E.2d 711, 717-18 (2003).

¹⁰⁰ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 921 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

¹⁰¹ *Peter Kiewit Sons' Co. v. Iowa Southern Utilities Co.*, 355 F.Supp. 376, 399 (S.D. Iowa 1973); *Dennis Stubbs Plumbing, Inc. v. Travelers Casualty and Surety Co. of Amer.*, 67 Fed. Appx 789, 792 (4th Cir. 2003).

¹⁰² *Kalisch-Jarcho, Inc. v. City of New York*, 461 N.Y.S.2d 746 (1983).

¹⁰³ *Blake Construction Company v. Upper Occoquan Sewage Authority*, 266 Va. 564, 576; 587 S.E.2d 711, 717-18 (2003).

¹⁰⁴ *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569 (D.C. 1981); *Corinno Cievetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 502 N.Y.S.2d 681 (1986); *Mellon Stuart Constr., Inc. v. Metro. Water Reclamation Distr.*, 1995 WL 23971 *10 (N.D. Ill 1995). However, the "not within the contemplation of the parties exception, sometimes called the 'New York approach,'" may not be recognized in Maryland. See *State Highway Admin. v. Greiner Eng'g Sciences, Inc.*, 83 Md. App. 621; 577 A.2d 363 (1990).

¹⁰⁵ *Corinno Cievetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 502 N.Y.S.2d 681 (1986); *Kalisch-Jarcho, Inc. v. City of New York*, 461 N.Y.S.2d 746 (1983).

¹⁰⁶ *Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc.*, 254 Va. 240, 243, 491 S.E.2d. 731, 732 (1997); *Pulte Home Construction v. Parex, Inc.*, 265 Va. 518, 526, 579 S.E.2d 188, 192 (2003) [whether damages are direct or consequential is a matter of law for decision by the Court. Plaintiff's damages of "uncompensated costs to repair homes, lost of the remainder of its contract with the general contractor, and revenue loss due to damaged business reputation all constituted consequential damages"].

¹⁰⁷ *Roanoke Hosp. Ass'n v. Doyle & Russell, Inc.*, 215 Va. 796, 214 S.E.2d 155 (1975), *citing* 5 A. Corbin, *Contracts* § 1012(89) (1964); *C. McCormick, Damages* § 140(574) (1935) [Interest carrying costs are direct damages due to delay, but an increase in interest rates are indirect consequential damages not contemplated by the parties].

It is often difficult to determine whether damages are direct or consequential. Court case law is sometimes conflicting and confusing. Commonly identified examples of consequential damage, however, would be lost profits or lost opportunities to pursue other business, where no contract yet exists.

It is possible to waive the right to consequential damages in a contract, just as it is possible to waive damages for delay in a “no damage for delay” clause. To avoid confusion, contracts sometimes identify or define direct damages that are recoverable and consequential damages that are not recoverable. AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

15.1.6 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work

This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

Note that this contract provision includes a waiver of home office overhead for the contractor, as well as a waiver of lost profits and other projects that may have been impacted by a delay. Similarly, the owner waives rental expenses, financing costs and lost profits that may result from a delay caused by the contractor.

Suspension of Work

Many contracts allow an owner to suspend construction at any time, for the owner’s own convenience, business or other economic reasons. Depending upon the contract terms, a suspension of the work by the owner normally results in a claim for additional time and money from the contractor.

AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE

14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption as described in Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of the Contract.

Note that the AIA suspension of work clause does call for an adjustment of the contract sum, including profit. In a U.S. government contract, the federal acquisition regulations contain a suspension of work clause allowing the government to suspend work, but expressly excluding profit to the contractor in any claim.¹⁰⁸

Just as the changes clause in a contract is used to make a claim for a “constructive change,” a suspension clause in a contract is sometimes used to make a claim for a “constructive suspension” when delays occur.¹⁰⁹

¹⁰⁸ *Federal Acquisition Regulations* 52.242-14.

¹⁰⁹ See e.g., *C.H. Leavell & Co. v. U.S.*, 530 F.2d 878 (Ct. Cl. 1976) (Five months to obtain funding.); *Kraft Constr. Co.*, ASBCA 4976, 59-2 BCA #2347 (delay in issuance of the notice to proceed); *Head Constr. Co.*, ENGBCA 3537, 77-1 BCA #12,226; *Fruehauf Corp. v. U.S.*, 587 F.2d 486 (Ct. Cl. 1978) (delay in making the site available); *Sydney Constr. Co.*, ASBCA 21337, 77-2 BCA #12,719 (unreasonable delay in issuing shop drawings); *Maintenance Eng'g*, ASBCA 17474, 74-2 BCA # 10,760 (delay in inspections); *Brand S. Roofing*, ASBCA 24688, 82-1 BCA #15,513 (delay in issuing change orders).

Economic Loss Rule

Construction normally involves written contracts, but sometimes verbal contracts. Construction claims, therefore, are usually “breach of contract” claims. For a variety of reasons, construction owners or contractors attempt to bring claims under other theories, such as negligence or fraud. The economic loss rule limits the ability to do this. In its simplest form, this rule prohibits recovery of solely economic losses in the absence of privity of contract.

One common example is a design professional that “negligently” prepared plans. A contractor might wish to sue the design professional for damages resulting from faulty plans. However, the contractor is not in “privity of contract” with the design professional if it is the owner that had the contract with the design professional. The owner could sue the design professional for breach of contract, but the contractor could not.¹¹⁰

The most common example of a negligence case is a car accident. The two drivers involved in the accident do not have a contract between them. All of us have a common law duty to use reasonable care. If we breach that duty, we are liable for our negligence.¹¹¹ So the question becomes whether the subcontractor can sue that design professional for negligently preparing plans. If the damages are solely “economic losses,” the answer is no.

In a construction context, solely economic losses would be damage to the work itself.¹¹² If the subcontractor had to incur extra expenses completing work because of the faulty plans, then the subcontractor would be unable to sue the design professional for those losses, unless the subcontractor had a contract with the design professional (had privity of contract with the design professional). If the subcontractor suffered personal injury as a result of the design professional’s negligence, however, this would not be solely economic loss and the subcontractor could sue the design professional for negligence.¹¹³ Personal injury and damage to property other than the work itself are losses that are not solely economic losses.¹¹⁴ So if the subcontractor’s truck was damaged when a negligently designed structure collapsed, then the design professional could be liable for negligence.

In order to have a separate tort claim, the duty violated must be a “common law duty, not one existing between the parties solely by virtue of the contract.”¹¹⁵ In other words, it is not possible to negligently breach a contract.

Construction litigants sometime wish to bring fraud claims to avoid a statute of limitations problem or in order to get punitive damages. However, if each misrepresentation related to a duty or obligation required by the contract, the economic loss rule would prohibit the claim.¹¹⁶

A fraud in the inducement claim would be a fraud that induced the party to sign a contract. The economic loss rule would not prohibit the claim, since the fraud occurred before there was a contract (was separate from the contract).¹¹⁷ It is possible to enter into a contract never intending to perform it. This would be a fraud in the inducement not prohibited by the economic loss rule.¹¹⁸

Violation of state consumer protection laws can also be a breach of a statutory duty independent of any contract that would not be prohibited by the economic loss rule.¹¹⁹

Implied Duties and Other Legal Theories

Many breach of contract theories have been allowed by courts based on “implied duties” not explicitly in the contract. These breach of implied duty theories are often used to circumvent a “no damage for delay” clause, but

¹¹⁰ *Blake Constr. Co. v. Alley*, 233 Va. 31, 353 S.E.2d 724 (1987).

¹¹¹ *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 425, 374 S.E.2d 55 (1988) [Recovery in tort is available only when there is a breach of a duty “to take care for the safety of the person or property of another,” citing *Blake Constr. Co. v. Alley*, 233 Va. 31, 34, 353 S.E.2d 724, 726 (1987)].

¹¹² *139 Riverview, LLC v. Quaker Window Products*, 90 Va. Cir. 74 (Norfolk Cir. Ct. 2015).

¹¹³ *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 706 S.E.2d 864 (2011).

¹¹⁴ Va. Code Anno. § 8.01-223 (Michie 1950).

¹¹⁵ *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 558, 507 S.E.2d 344 (1998) [a party can, in certain circumstances, show both a breach of contract and a tortious breach of duty. However, the duty tortiously or negligently breached must be a common law duty, not one existing between the parties solely by virtue of the contract], citing *Foreign Mission Bd. v. Wade*, 242 Va. 234, 241, 409 S.E.2d 144, 148 (1991).

¹¹⁶ *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 507 S.E.2d 344 (1998).

¹¹⁷ *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 537 (4th Cir. 1988).

¹¹⁸ *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 559-560, 507 S.E.2d 344 (1998) [the promisor’s intention when he makes the promise, intending not to perform is a misrepresentation of present fact that is actionable as an actual fraud], citing *Colonial Ford Truck Sales v. Schneider*, 228 Va. 671, 677, 325 S.E.2d 91, 94 (1985).

¹¹⁹ *Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350, 354-55, 699 S.E.2d 483, 485 (2010).

are also used to claim compensation for costs incurred due to other types of constructive changes.¹²⁰ By definition, an implied duties theory is used when there is no express provision in the contract allowing the claim *or* there is an express provision disallowing this type of claim. Please *also see* the subsection below on Fact Supporting a Claim for related concepts.

Claimants and courts are often “stretching” contract terms or the law in order to avoid an obviously unfair result. Most of these cases involve some element of bad faith or act of interference with the claimant. The names placed on these implied duties by courts and commentators vary, with some similarities, redundancies and confusion. A non-exhaustive list would include the following:

Prevention of a Condition Precedent or Implied Duty Not to Prevent Occurrence of Condition Precedent

If a contract contains a “condition precedent,” one party to the contract cannot prevent occurrence of the condition precedent and then take advantage of the nonoccurrence to excuse performance. For example, in a “pay if paid” clause, payment from the owner is a condition precedent to the general contractor’s obligation to pay the subcontractors.¹²¹

The prevention doctrine is a generally recognized principle of contract law. If a promisor prevents or hinders fulfillment of a condition to his performance, the condition may be waived or excused.¹²² The prevention doctrine does not require proof that the condition would have occurred “but for” the wrongful conduct of the promisor. Instead, it only requires that the conduct have “contributed materially” to the non-occurrence of the condition. It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it.¹²³

Implied Duty Not to Actively Interfere with Performance¹²⁴

Implied Duty Not to Hinder or Delay Performance¹²⁵

These concepts include an Implied Duty to provide necessary working conditions for performance¹²⁶ and Implied Duty to have site ready for work.¹²⁷

Implied Duty Not to Prevent Performance¹²⁸

An implied provision of every contract is that neither party to the contract will do anything to prevent performance thereof by the other party or commit any act that will hinder or delay performance. Such hindrance of performance

¹²⁰ *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc.*, 219 Va. 111, 118-19, 244 S.E.2d 774 (1978) [claim of lost profits allowed based on breach of implied duty to do everything reasonably necessary to enable the subcontractor to perform]; *American Bridge Co. Inc. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935).

¹²¹ *Aarow Equip. & Servs. v. Travelers Cas. & Sur. Co. of Am.*, 2011, 417 Fed. Appx. 366 (4th Cir. Va. 2011); *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000).

¹²² *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000). See Restatement (Second) of Contracts §245 (1981); 13 *Williston on Contracts*, 4th ed., Lord, §39:4; 17A *Am.Jur.2d, Contracts*, §703; 17B *C.J.S., Contracts*, §530. The Supreme Court of Virginia recognized the prevention doctrine in *Parrish v. Wightman*, 184 Va. 86, 34 S.E.2d 229, 232 (1945); *Mardirossian Family Enterprises v. Clearail, Inc.*, 324 Md. 191, 203, 596 A.2d 1018 (1991).

¹²³ *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000); *Barnhill v. Veneman (In re Peanut Crop Ins. Litig.)*, 524 F.3d 458 (4th Cir. N.C. 2008); *Parrish v. Wightman*, 184 Va. 85, 34 S.E.2d 229, 232 (1945), (quoting *Amies v. Wesnofske*, 255 N.Y. 156, 174 N.E. 436 (1931) (quoting 2 *Williston on Contracts* §677)); see also *Whitt v. Godwin*, 205 Va. 797, 139 S.E.2d 841, 844 (1965) (citing 5 *Williston on Contracts*, 3d ed., Jaeger, §677A for the same proposition).

¹²⁴ *Blake Construction Company v. Upper Occoquan Sewage Authority*, 266 Va. 564, 576; 587 S.E.2d 711, 717-18 (2003); *Dennis Stubbs Plumbing, Inc. v. Travelers Casualty and Surety Co. of Amer.* 67 Fed. Appx 789, 792 (4th Cir. 2003); *Spotsylvania County v. Seaboard Surety Co.*, 243 Va. 202, 415 S.E.2d 120 (1992); *Peter Kiewit Sons’ Co. v. Iowa Southern Utilities Co.*, 355 F.Supp. 376, 399 (S.D. Iowa 1973); *American Bridge Co. Inc. v. State*, 245 A.D. 535, 283 N.Y.S. 577 (1935).

¹²⁵ *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc.*, 219 Va. 111, 118-19, 244 S.E.2d 774 (1978); *Wayne Knorr, Inc. v. DOT*, 973 A.2d 1061, 1081 (Pa. Commw. Ct. 2009); *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701,708 (Ct. Cl. 1966); *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980).

¹²⁶ *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982).

¹²⁷ *R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc.*, 219 Va. 111, 118-19, 244 S.E.2d 774 (1978).

¹²⁸ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161-62 (D.Md. 1974); *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980); *Blake Constr. Co. v. C.J. Coakley Co.*, 431 A.2d 569 (D.C. 1981).

can amount to a substantial breach of the contract.¹²⁹ A breach of this duty can result in delay damages *and* costs incurred because work was hindered, including extra manpower costs.¹³⁰

A party to a contract who wrongfully hinders or prevents the other party from performing his obligations under a contract has breached the contract. This implied condition is founded upon the principle that he who prevents a thing from happening cannot take advantage of the nonperformance he caused. The principle does not apply when the hindrance is due to action which he is permitted to take under the terms of the contract.¹³¹

Implied Duty to Adequately Coordinate Work of Subcontractors¹³²

Implied Duty to Provide Adequate Supervision¹³³

Implied Duty to Carry Out Bargain Reasonably and in Good Faith¹³⁴

It would be intolerable if the government could disregard the responsibility to carry out its bargain reasonably and in good faith, or were free to stretch its tardiness for however long it fancied, without sterner control than the mere prolongation of the completion date of the contract.¹³⁵

Implied Duty to Cooperate¹³⁶

It is an implied provision of every contract that the other party promises to cooperate and failure to do so is a breach. Where this implied provision is breached by delay, the other party is entitled to recover the additional expenses.¹³⁷

Implied Warranty of Plans and Specifications¹³⁸

As discussed in detail in the prior subsection, when the owner provides the plans and specifications, it implicitly warrants that compliance with the specifications will result in satisfactory performance.¹³⁹

When a general contractor supplies a subcontractor with plans prepared by the owner's design professional, the general contractor impliedly warrants those plans to the subcontractor.¹⁴⁰ Absent open and obvious design defects, which should be apparent to a prudent contractor and called to a prime contractor's attention, the party who furnished plans and specifications impliedly warrants them to be fit for their intended use.¹⁴¹

Implied Duty to Disclose Material Facts

A general contractor can maintain an action for breach of contract based on nondisclosure of material information if it can establish that the owner knew material facts concerning the project that would affect the contractor's bid or performance and failed to disclose those facts. It is not necessary to prove intentional concealment.¹⁴²

¹²⁹ *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 257 (8th Cir. 1969), citing *Restatement of Contracts* §315(1) (1932).

¹³⁰ *John E. Green Plumbing and Heating Co., Inc. v. Turner Constr. Co.*, 741 F.2d 965, 966-67 (6th Cir. 1984).

¹³¹ *Spotsylvania County v. Seaboard Surety Co.*, 243 Va. 202, 415 S.E.2d 120 (1992).

¹³² *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188; 288 S.E.2d 437 (1982); *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982); *John E. Green Plumbing and Heating Co., Inc. v. Turner Constr. Co.*, 741 F.2d 965 (6th Cir. 1984).

¹³³ *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188; 288 S.E.2d 437 (1982); *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982).

¹³⁴ *Questar Builders, Inc. v. CB Flooring, LLC*, 410 Md. 241, 273, 978 A.2d 651 (2009) [party with discretion is limited to exercising that discretion in good faith and in accordance with fair dealing. Upon entering a binding contract for a specified duration, the parties thereto give up their opportunity to shop around for a better price]; *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980).

¹³⁵ *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980).

¹³⁶ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974).

¹³⁷ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974), citing *11 Williston on Contracts* §§1296, 1316 (3d ed. 1968).

¹³⁸ *U.S. v. Spearin*, 248 U.S. 132; 39 S. Ct. 59; 63 L. Ed. 166 (1918).

¹³⁹ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 707-708 (Ct. Claims 1966).

¹⁴⁰ *APAC Carolina v. Town of Allendale*, 41 F.3d 157 (4th Cir. S.C. 1994); cf *Gillingham Construction, Inc. v. Newby-Wiggins Construction, Inc.*, 42 P.2d 680 (Idaho 2002).

¹⁴¹ *Miller v. Guy H. James Constr. Co.*, 653 P.2d 221 (Okl.App. 1982), favorably cited in *Havens Steel C. v. Randolph Engineering Co.*, 613 F. Supp. 514 (W.D. Mo. 1985).

¹⁴² *Los Angeles Unified School District v. Great American Insurance Co.*, 163 Cal. App. 4th 944, 964 (Cal. App. 2d Dist. 2008).

CLAIM DISPUTES

Facts Supporting a Delay Claim

Please also see the subsection above on Implied Duties and Other Legal Theories for related concepts.

Failure to Cooperate¹⁴³

Every contract has an implied promise to cooperate and failure to do so is a breach. Where this implied provision is breached by delay, the other party is entitled to recover the additional expenses.¹⁴⁴

Failure to Provide Necessary Working Conditions for Performance¹⁴⁵

Failure to Adequately Coordinate Work of Subcontractors¹⁴⁶

Failure to Provide Adequate Supervision, Incompetent Supervisors and Frequent Change of Supervisors¹⁴⁷

Excessive Changes So Beyond Scope as to Breach Contract¹⁴⁸

Changes ordered can go so beyond the scope of the contract, including the changes provisions, as to breach the contract. The cumulative effect of numerous change orders can result in a claim for the resultant disruptions and inefficiencies in a contractor's construction operations.¹⁴⁹

Defects in Plans or Specifications

The owner is also responsible for delays caused by faulty plans and specifications, including the failure to recognize the need for revisions in the plans and failure to make those revisions in a timely manner.¹⁵⁰

Interference and Hindrance from Design Professionals

Contradictory instructions and failure to give instructions by a design professional can amount to hindrance or active interference that is a breach of contract by a project owner.¹⁵¹ The architect is the agent for the owner, and the owner is responsible for any damages caused by the architect's deficiencies, including delays and inefficiencies.¹⁵²

Failure to Return Shop Drawings within a Reasonable Time¹⁵³

Failure to Provide Samples for Manufacture of Materials¹⁵⁴

¹⁴³ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974).

¹⁴⁴ *Glassman Constr. Co., Inc. v. Maryland City Plaza, Inc.*, 371 F.Supp 1154, 1161 (D.Md. 1974), citing *11 Williston on Contracts* §§1296, 1316 (3d ed. 1968).

¹⁴⁵ *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982).

¹⁴⁶ *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 288 S.E.2d 437 (1982); *Heller Electric Co., Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982); *John E. Green Plumbing and Heating Co., Inc. v. Turner Constr. Co.*, 741 F.2d 965 (6th Cir. 1984).

¹⁴⁷ *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 288 S.E.2d 437 (1982); *Heller Electric Co., Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227 (D.C.Cir. 1982).

¹⁴⁸ *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 255 (8th Cir. 1969).

¹⁴⁹ *Wallace Process Piping Co., Inc. v. Martin Marietta Corp.*, 251 F. Supp. 411, 416-17 (E.D.Va. 1965).

¹⁵⁰ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701 (Ct. Claims 1966).

¹⁵¹ *Spotsylvania County v. Seaboard Surety Co.*, 243 Va. 202, 415 S.E.2d 120 (1992).

¹⁵² *E.C. Ernst, Inc. v. Manhattan Construction of Texas*, 387 F.Supp. 1001, 1033 (S.D. Ala. 1974).

¹⁵³ *Slattery Contracting Co. v. State of New York*, 288 N.Y.S.2d 127 (1968); *Public Constructors, Inc. v. State of New York*, 390 N.Y.S.2d 481 (1977); *Langevin v. U.S.*, 100 Ct. Cl. 15 (1943).

¹⁵⁴ *Langevin v. U.S.*, 100 Ct. Cl. 15 (1943).

Substantial Completion

AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

9.8 SUBSTANTIAL COMPLETION

9.8.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

It is generally true that once the Owner has actually occupied the project, the contractor has achieved substantial completion. This depends upon the terms of the contract, however. Certification of the architect can particularly be an issue.¹⁵⁵

Substantial completion is significant, because any claim for liquidated damages will normally end or be reduced once substantial completion is achieved.¹⁵⁶

Substantial Performance

A related concept is substantial performance, which can allow a contractor to recover for labor and material provided, even if the contractor has not completely complied with all terms of the contract. Substantial performance is an “equitable” concept, relieving a contractor of the strict legal terms of the contract to prevent “forfeiture” by the contractor or “unjust enrichment” by the owner.¹⁵⁷

A contractor is still liable for damages cause by its failure to completely comply with the contract, but can avoid a complete forfeiture and can recover some value of the labor and material supplied.

Impossibility

Impossibility can be a “defense to delay” or other damages for breach on contract. Impossibility or impracticability may not be subjective but must be objective. The difference between the two concepts has been summarized in the phrases “the thing cannot be done” (objective impossibility or impracticability) and “I cannot do it” (subjective impossibility or impracticability).¹⁵⁸

If performance is rendered merely difficult or burdensome or unprofitable, the breach of contract is not excused. Successful completion of a portion of the work proves that it was feasible to perform all work to the contract requirements.¹⁵⁹

Excusable Delays

There is a distinction between delays that are “excusable” or “inexcusable” and delays that are “compensable” or “non-compensable.”

Whether a delay is excusable determines whether the contractor is entitled to an extension of time. An extension of time normally protects a contractor from liquidated damages or actual damages from the owner for delay.¹⁶⁰

Whether a delay is excusable depends initially on the contract terms discussed above.¹⁶¹ Most contracts provide a specific delivery schedule. This will leave the contractor in default and liable for delay damages if the completion

¹⁵⁵ AIA Document A201-2017 (General Conditions of the Contract for Construction), Section 9.8.4; *cf. Holy Family Catholic Congregation v. Stubenrauch Assoc.*, 136 Wisc.2d 515, 402 N.W.2d 382 (Ct. App. 1987).

¹⁵⁶ *Hill Construction Corp.*, ASBCA #43615, 93-3 B.C.A. (CCH) #25,973; *Zolman Construction & Development, Inc.*, ASBCA #47161, 96-2 B.C.A. (CCH) #28,463.

¹⁵⁷ The doctrine of substantial performance does not constitute a complete defense to liability for breach of contract, but is designed rather to prevent total forfeiture by a contracting party who is guilty of only trivial breaches of contract. The doctrine is essentially a rule of damages, allowing the breaching party to recover for benefits conferred on the other party, but reducing his recovery by any damages which his breach may have caused. *Ballou v Basic Construction Co.*, 407 F.2d 1137 (4th Cir. 1969) *citing Kirk Reid Co. v. Fine*, 205 Va. 778, 139 S.E.2d 829 (1965); *Mann v. Clowser*, 190 Va. 887, 59 S.E. 2d 78 (1950).

¹⁵⁸ *The Opera Company of Boston, Inc. v. The Wolf Trap Foundation for the Performing Arts*, 817 F.2d 1094, 1099 (4th Cir. 1987).

¹⁵⁹ The completion of acceptable work might have been extremely difficult or so expensive as to consume any profit the contractor may have contemplated, but neither factor excuses failure to meet contractual obligations. *Ballou v Basic Construction Co.*, 407 F.2d 1137 (4th Cir. 1969) *citing Lehigh Portland Cement Co. v. Virginia S.S. Co.*, 132 Va. 257, 111 S.E. 104, 108 (1922).

¹⁶⁰ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 267 (Va. Ct. App. 2009).

¹⁶¹ See section above, Contract Clauses and Theories; subsection, Contract Duration and Schedule; *McDevitt & St. Co. v. Marriott Corp.*, 713 F. Supp 906 (E.D. Va 1989), *aff'd in part and rev'd in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991).

date is not met and the delays are not excusable. However, a time extension clause in a contract does not necessarily provide an exemption from damages for delay.¹⁶²

Most construction contracts will state that “Time is of the Essence.” This means what it says in a construction contract. If there is no “excusable delay” or “*force majeure*” term in the contract, a time is of the essence clause can mean a contractor is liable for damages in the event of delay, even if the contractor did not cause the delay.¹⁶³ An excusable delay or force majeure term states that a contractor is not responsible for delays from causes beyond the contractor’s control.¹⁶⁴ In order to obtain even a time extension under a force majeure clause, the contractor usually must prove that the delay was truly beyond the contractor’s control and that the delay was unexpected, unusual or out of the ordinary. Unforeseeability is often a difficult element to establish, particularly when delay is caused by a subcontractor or supplier.¹⁶⁵

A force majeure clause only entitles a contractor to a time extension. The contractor is protected from liquidated damage or actual damages for delay beyond the contractor’s control. The contractor’s affirmative claim for compensation for the delay will be controlled by other contract provisions.

Examples of excusable (but non-compensable delays) would be extraordinarily adverse weather, labor strikes, or lack of sole source materials. Owner-caused delays are also excusable (but may not be compensable, depending on contract terms¹⁶⁶), including design defects, change orders, suspension of work, lack of permits, rights of way or access to the site or over inspection. Differing site conditions or impossibility can also result in excusable delays.

Weather

Weather conditions are normally out of a contractor’s control. However, weather conditions are often “foreseeable” and inexcusable.

If extensions of time are authorized only for “adverse weather conditions not reasonably anticipated,” a contractor must be ready to prove that the adverse weather conditions were extraordinary¹⁶⁷ and prove the impact on critical activities.¹⁶⁸

A contractor also has a duty to mitigate the effects of adverse weather conditions. Examples could be covering or heating work areas. A contractor should drain work areas promptly after precipitation to reduce surface water or muddy conditions. The failure to mitigate the effect of adverse weather conditions can limit the length of excusable delay.¹⁶⁹

Compensable versus Non-Compensable Delays

There is a distinction between delays that are “excusable” or “inexcusable” and delays that are “compensable” or “non-compensable.”

If a delay is “compensable,” the contractor is entitled to an extension of time *and* additional money as compensation for the delay. In general terms, a delay is compensable to a contractor only if the delay is caused by the owner (or the owner’s agents) and the claimant has *not* waived its right to compensation in the contract. A contractor can waive their right to compensation for owner caused delay in a “no damage for delay” clause or waiver of consequential damages.¹⁷⁰

¹⁶² *Howard P. Foley Co. v. J.L. Williams & Co. Inc.*, 622 F.2d 402,407 (8th Cir. 1980).

¹⁶³ See section above, Contract Clauses and Theories; subsection, Time of the Essence; *Sands v. Quigg*, 111 Va. 476, 69 S.E. 440 (1910).

¹⁶⁴ See section above, Contract Clauses and Theories; subsection, Force Majeure and Excusable Delays.

¹⁶⁵ See e.g., *Electrical Enters, Inc.*, IBCA 972-9-72, 74-1 BCA #10,400; but see *J.D. Hedin Constr. Co. v. U.S.*, 408 F.2d 424 (Ct. Cl. 1969) [unforeseeability of cement shortage was proven].

¹⁶⁶ See section above, Contract Clauses and Theories; subsection, No Damage for Delay.

¹⁶⁷ *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp 906, 915 (E.D. Va. 1989), *aff’d in part and rev’d in part* 911 F.2d 723 (4th Cir. 1990), on remand 754 F. Supp 513 (E.D. Va. 1991) [The delays resulting from the adverse weather conditions were not excused where the precipitation levels were reasonably anticipatable by the contractor; the weather data provided by the contractor did not demonstrate that the higher levels of precipitation for the relevant time period could not have been reasonably anticipated; it should have come as no surprise to the contractor that it rains and snows a good deal during the winter in Northern Virginia; the rain and snowfall in that winter was far from the highest recorded and not so unusual as to have been beyond reasonable anticipation].

¹⁶⁸ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240 (Va. Ct. App. 2009).

¹⁶⁹ See *Titan Pacific Constr. Corp. v. U.S.*, 17 Cl. Ct. 630 (1989).

¹⁷⁰ See section above, Contract Clauses and Theories; subsections, No Damage for Delay and Waiver of Consequential Damage.

Concurrent Delay

When there are two causes for the *same* delay at the *same* time, the delay is “concurrent.” A concurrent delay can be any combination of excusable, inexcusable, compensable and non-compensable delays. The battle normally revolves around whether a contractor is entitled to an extension of time or compensation, when the contractor has contributed in some manner to the delay. In other words, concurrent delay is most often used as a defense to a delay claim.

The treatment of concurrent delays is inconsistent and is, therefore, unpredictable. It probably is also evolving over time.

The traditional approach was for courts to refuse to apportion delays. Where the causes of delay were mutual, the courts would not allow compensation against a contractor but would also refuse to grant liquidated or other damages to the owner.¹⁷¹ In the case of concurrent delays, the contractor is entitled to a time extension but not additional money. In other words, neither party could recover from the other.¹⁷² This rule still seems to be consistently applied if the causes of the delay are too interrelated to apportion fault.¹⁷³

Courts have been increasingly willing to apportion fault for delay and damages.¹⁷⁴ This is probably in part because the science of construction scheduling has developed to the point that the evidence of delay is more reliable. If there is adequate evidence to apportion the delay, courts may allow proportional recovery.¹⁷⁵ Some contract terms define what weather conditions are reasonable and foreseeable.

It is also becoming increasingly common for contract documents to allocate these risks and determine the result of concurrent excusable or inexcusable or compensable and non-compensable delays.

Acceleration

The owner will typically have the right to change the contract schedule and “accelerate” the work. A “directed acceleration” would be by formal change order.

Allowable acceleration costs would include all costs incurred to accelerate performance that the contractor can prove with reasonable certainty, including additional labor or overtime charges for labor; additional or increased supervision; additional subcontractors; and accelerated freight or delivery charges as well as inefficiency costs from overtime and extended labor hours, out-of-sequence work, crowding or stacking of trades.

Constructive Acceleration

A “constructive acceleration” is essentially an acceleration to the contract schedule that is not “directed” or recognized by the owner. To have a constructive acceleration, the contractor must face an *excusable* delay and properly request an extension of time for that excusable delay, which is refused by the owner. As a result, the contractor is essentially required by the owner to complete work in less time than allowed by the contract.

In order to be successful in a constructive acceleration claim based upon an owner’s failure to grant time extensions for excusable delays, three conditions must be established: (1) that any delays giving rise to the orders were excusable; (2) that the contractor was ordered to accelerate (achieve the unextended contract completion date);

¹⁷¹ *Jefferson Hotel Co. v. Burmbaugh*, 168 F.2d 867 (4th Cir. 1909).

¹⁷² *J.A. Jones Construction Co. v. Greenbrier Shopping Center*, 332 F.Supp. 1336 (N.D. 1971).

¹⁷³ *Hardoman-Monier-Hutcheson*, ASBCA 11809, 67-2 BCA 6522 (1967); *Lee Turzillo Contracting v. Frank Messer and Sons*, 261 N.E. 2d 675 (Ohio App. 1969).

¹⁷⁴ There is no doubt that if only one party had delayed, that party would have been liable to the other for damages. Where each party delays the other, however, each should be able to recover to the extent of the injury caused by the other’s delay. Such a rule protects each party from losses due to the delay of the other throughout the period of performance. It also induces each party to avoid imposing such losses on the other at any time during the period of performance. In contrast, a rule precluding a party from recovering damages for delay, once the party itself delays, would leave the parties to a contract unnecessarily vulnerable to delay by the other. We see no wisdom in, nor authority for, such a rule of preclusion. Therefore, when both parties to a contract breach their contractual obligations by delaying performance, a court must assess the losses attributable to each party’s delay and apportion damages accordingly.

A plaintiff claiming, or a defendant counterclaiming, delay damages must prove, first, the amount of delay caused by the other party, and second, the amount of damages attributable to such delay. A subcontractor can recover whatever damages that it proves a general contractor caused, minus the amount of damages the general contractor proves the subcontractor caused. *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227, 1230-31 (D.C.Cir. 1982).

¹⁷⁵ *Techdyn Systems Corp. v. Whittaker*, 245 Va. 291, 427 S.E.2d 334 (1993); *Wayne Knorr, Inc. v. DOT*, 973 A.2d 1061, 1081-1084 (Pa. Commw. Ct. 2009); *E.C. Ernst, Inc. v. Manhattan Construction of Texas*, 387 F.Supp. 1001 (S.D. Ala. 1974); *Raymond Construction of Africa, LTD v. U.S.*, 411 F.2d 1227 (Ct. Cl. 1969).

and (3) that the contractor in fact accelerated performance and incurred extra costs.¹⁷⁶ It is advisable for a claimant to send the owner a notice of intent to accelerate, with a reservation of rights to claim the costs of acceleration.

It is important to make a proper request for an extension of time in accordance with the contract. AIA Document A201-2017 (General Conditions of the Contract for Construction) states:

15 CLAIMS AND DISPUTES

15.1 CLAIMS

15.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

15.2 Notice of Claims. Claims by either Owner or Contractor must be initiated by written notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. 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.

15.1.5 Claims for Additional Time.

15.1.5.1 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.

Acceleration costs are the additional costs incurred by a contractor to overcome excusable delays, including costs caused by the addition of extensive modifications to the work, within the time limits originally established in the contract. Acceleration costs can include costs paid for multiple shift operations and other increased operating expenses related to performance of the work on an accelerated time schedule.¹⁷⁷

Impact Costs

Impact costs are increased costs attributed to the cumulative effect of numerous modifications on one another and on the original contract work and to the resultant disruptions and inefficiencies in a contractor’s construction operations.¹⁷⁸

Right to Finish Early

It is possible to get delay damages, even if a project is completed on time or early. Although the owner is not under a duty to help the contractor complete the contract early, the owner may not deliberately prevent the contractor from completing its contract ahead of time. Where an owner is guilty of “deliberate harassment and dilatory tactics” and a contractor suffers damages as a result of such action, defendant is liable for breach of contract.¹⁷⁹ The contractor has to show that it *could* have finished the contract work early and *would* have done so, but was prevented by the delay caused by the owner.¹⁸⁰ The contractor must also show some type of interference or hindrance from the owner.¹⁸¹

¹⁷⁶ *Titan Pacific Construction Corp. v. U.S.*, 17 Cl. Ct. 630, 640 (1989).

¹⁷⁷ *Wallace Process Piping Co., Inc. v. Martin Marietta Corp.*, 251 F. Supp. 411, 416-17 (E.D.Va. 1965).

¹⁷⁸ *Wallace Process Piping Co., Inc. v. Martin Marietta Corp.*, 251 F. Supp. 411, 416-17 (E.D.Va. 1965).

¹⁷⁹ *Metropolitan Paving Co. v. U.S.*, 163 Ct. Cl. 420, 422-23; 325 F.2d 241 (1963); *Sun Ship Building & Dry Dock Co. v. U.S. Lines, Inc.*, 439 F.Supp 671 (1977); *Grow Construction Co., Inc. v. State of New York*, 391 N.Y.Supp.2d 726 (1977).

¹⁸⁰ It would seem to make little difference whether or not the parties contemplated an early completion. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1582 (Fed. Cir. 1994).

¹⁸¹ *U.S. v. Blair*, 321 U.S. 730, 69 S.Ct 820 (1944); *Penner Installation Corp. v. U.S.*, 86 F.Supp. 129 (1950).

Claims under Mechanic's Liens and Bonds

Mechanic's liens and bonds are devices to secure and enforce payment.¹⁸² The ability to collect under mechanic's liens and bonds for lost profit, delay or other claims is often in question, however, depending upon the wording of any particular statute or court case law interpreting the statute.

Payment bonds are "for the protection of all persons supplying labor and material in carrying out the work."¹⁸³ Some courts have ruled that the actual costs of delay¹⁸⁴ and other constructive changes are recoverable as costs of providing labor and material to the project.¹⁸⁵ Under some state Little Miller Acts, however, damages for delay are not recoverable against a bond.¹⁸⁶ Lost profits caused by delay are not out-of-pocket expenditures for "labor and material" and consequently are not recoverable under the federal Miller Act and most state bonding laws.¹⁸⁷

Recovery of claims in a mechanic's lien will depend upon the wording of each state mechanic's lien statute and the court case law. Many mechanic's lien statutes provide a lien "for labor or material provided for the construction of an improvement" or similar language. Many courts have concluded that delay claims, lost profits or other "off-site" claims are not labor or material provided for the construction of an improvement.

Experts

Claims cases typically involve much use of expert testimony. In any claim case, an expert is helpful or necessary to prove the proper amount of damages. In delay cases, scheduling experts are also usually necessary to prove liability or the causes of delay.

Experts will add greatly to the cost of litigation. Experts will charge hundreds of dollars per hour. Your attorney must also spend many hours evaluating the expert testimony and other evidence in the case. It is possible for client witnesses to qualify as "experts," and this has the potential to save money in a simple or low dollar value case. Client witnesses are not usually true experts, however. The subject matter is often beyond their expertise. Opposing experts and attorney will be able to highlight these shortcomings.

A trial judge acts as the "gate-keeper" to determine the admissibility of an expert's testimony. The factors a judge will consider include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether a particular technique has a high known or potential rate of error and whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.¹⁸⁸

In claims cases, expert testimony is generally admissible if it will assist the judge or jury in understanding the evidence. However, the evidence must be based on an adequate foundation.¹⁸⁹ Expert testimony is not admissible if it is speculative or founded on assumptions that have an insufficient factual basis.¹⁹⁰ Testimony is also inadmissible when an expert has failed to consider all variables bearing on the facts observed.¹⁹¹

It is probably true that courts have become more careful with and critical of expert testimony, as the science of delays and other damages has improved and expert testimony becomes more common. The trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable. The trial judge must

¹⁸² See multiple chapters on Mechanic's Liens in Virginia, Maryland, Pennsylvania and D.C., and on Performance and Payment Bonds.

¹⁸³ 40 U.S.C.A. §3131(b)(2).

¹⁸⁴ *Pertun Construction Co. v. Harvesters Group, Inc.*, 918 F.2d 915 (11th Cir. 1990); *Heller Electric Co. Inc. v. William F. Klingensmith, Inc.*, 670 F.2d 1227, 1232 (D.C.Cir. 1982); *General Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md.App. 700, 451 A.2d 1250 (1982); *Mariana v. Piracci Construction Co., Inc.*, 405 F. Supp. 904 (D.D.C. 1975).

¹⁸⁵ *United States for the Use and Benefit of T.M.S. Mechanical Contractors, Inc. v. Millers Mutual Fire Ins. Co. of Texas*, 942 F.2d 946, 951 (5th Cir. 1991); *General Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md.App. 700, 451 A.2d 1250 (1982); *Hartford Accident & Indemnity Co. v. District of Columbia*, 441 A.2d 969 (D.C.App. 1982).

¹⁸⁶ *Salvino Steel & Iron Works, Inc. v. Fletcher & Sons, Inc.*, 580 A.2d 853, 398 Pa.Super 86 (1990), appeal dismissed as improvidently granted 601 A.2d 806, 529 Pa. 62; *Reliance Universal, Inc. of Ohio v. Ernest Renda Contracting Co., Inc.*, 454 A.2d 39, 38 Pa.Super. 98 (1982).

¹⁸⁷ *Consolidated Electrical & Mechanicals, Inc. v. Biggs General Contracting, Inc.*, 167 F.3d 432 (8th Cir. 1999); *Lite-Air Products, Inc. v. Fidelity & Deposit Co. of Maryland*, 437 F. Supp. 801 (D.C. Pa. 1977).

¹⁸⁸ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137; 119 S. Ct. 1167; 143 L. Ed. 2d 238 (1999).

¹⁸⁹ *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (2002) citing Virginia Code §§8.01-401.1 and -401.3; *Keese v. Donigan*, 259 Va. 157, 161, 524 S.E.2d 645, 647 (2000); *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995).

¹⁹⁰ *Forbes v. Rapp*, 269 Va 374, 381 (2005).

¹⁹¹ *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (2002) citing *ITT Hartford v. Virginia Financial Assoc.*, 258 Va. 193, 201, 520 S.E.2d 355, 359 (1999); *Tittsworth*, 252 Va. at 154, 475 S.E.2d at 263; *Tarmac*, 250 Va. at 166, 458 S.E.2d at 466.

determine at the outset whether the expert is proposing to testify to scientific knowledge that will assist the judge or jury to understand or determine a fact in issue. This includes a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Ordinarily, a key question in determining whether a theory or technique is scientific knowledge will be whether it can be (and has been) tested. Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified. This methodology is what distinguishes science from other fields of human inquiry. Another consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is one element of peer review) does not necessarily establish reliability. In some instances, well-grounded but innovative theories have not been published. Some propositions are too particular, too new or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of “good science,” in part because it increases the likelihood that substantive flaws in methodology will be detected. For purposes of determining whether a theory or technique is scientific knowledge, the court ordinarily should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique’s operation.¹⁹²

Critical Path Method

The critical path can be defined as the series of activities with the longest extended duration representing the shortest time within which the project can be completed if the construction proceeds as planned. Any one day of delay in a critical path activity will delay the completion of the project by one day.

A schedule normally shows “activities” and “durations” for each activity, joined together by “logical relationships.” An activity can be any portion of the planned work. Clearing, excavation, foundation, framing and roofing would be examples. The duration is the expected length of time required for each activity. The logical relationships between activities would identify “predecessor activities” that must be complete before another activity can begin and “successor activities” that must follow other activities. Schedules show different levels of detail. Too much detail in a schedule or too little detail can present scheduling problems.

The critical path method is a management technique by which a project can be broken down into a number of identifiable tasks or activities. These tasks are then sequentially interconnected, reflecting various inter-dependencies of the activities to provide an overall schedule to complete the project. The result of this scheduling process is a critical path through this schedule, which if postponed, will delay project completion. All other paths through the project schedule can experience some postponement because of acts of God, owner changes, or other factors without delaying the overall project completion. The amount of postponement that a path of activities can experience without delaying the completion of the project is called “float.” The more float a path of activities has, the longer it can be postponed without delaying project completion. Float is defined as the difference between the early start and late start dates or between the early and late finish dates of any activities.¹⁹³

The schedule will show the “early start date and finish date” and “late start date and finish date” for each activity. The schedule will also show the critical path through the schedule network and the float status of all activities. The “total float” is the amount of time an activity can slip without delaying the project. The “free float” is the amount of time an activity can slip without delaying successor activities. The critical path is the activity path with the least amount of float and longest path of activities through the schedule network.

There are often arguments regarding who “owns” the float. Historically, the contractor had the right to schedule and coordinate its work, as long as the contract work was completed by the completion date. This means, essentially, that the contractor owns the float. Many owners include contract provisions claiming ownership of the float or providing that neither party owns the float. Clear communication and negotiation of contract terms regarding float is probably the best policy for all parties.

“Bar Chart” schedules were generally used before the development of critical path science and are still used on simpler projects. Bar charts will show the planned time to start and finish various aspects of the work, but will not show the logical relationships between the different activities. In other words, it will not show how a delay in one portion of the work will or will not delay another portion of the work.

An “as planned” schedule is the forward looking critical path method schedule developed before the project begins. To later identify the activities in which delay occurred, an “as built” schedule is prepared showing the

¹⁹² *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

¹⁹³ *Titan Pacific Construction Corp. v. U.S.*, 17 Cl. Ct. 630, 636 (1989).

durations of each of the activities as actually performed or “as built.” The as planned schedule must also be analyzed to correct any errors.

An “as planned to as built” analysis will compare the as built schedule to the adjusted as planned schedule to identify activities that took longer than planned or how sequencing of activities changed. The question still remains *why* these activities took longer than as planned.

A “time impact” analysis will use a methodology similar to the as planned to as built analysis. Instead of analyzing the entire project at one time, however, the project will be broken into different periods of work before and after specific events and time impact analyses. Each time period is analyzed separately to identify the delays in each period. These time periods are then joined together into a complete job schedule analysis. However, the time impacts must delay the overall project critical path.

An “impacted as planned” analysis starts with the as planned schedule and then shows the effect of a delay on the schedule as planned. One weakness in this method is the assumption that no other changes impacted the as planned schedule.

A “collapsed as built” analysis uses a reverse methodology that starts with an as built schedule and then deletes or removes delays. The as built schedule is then analyzed without each delay and concludes that the project could have been completed at an earlier date if the delays had not occurred.

It is possible to do a “total impact” analysis that simply blames all problems and costs on whatever party caused a delay. This is oversimplified and not reliable on most projects, however. There are typically many types of delays occurring on a project simultaneously, and a total impact analysis will not show which events caused delays in other activities and does not separate costs by the different events.

Claims Evidence

When claims arise in projects, the players with the most complete documentation will have a tremendous advantage. It is difficult and sometimes impossible to establish a claim without good documentary evidence. It is certainly easier to defend a claim with good documentary evidence.

Correspondence

A claims attorney will often want to look first at correspondence files, as the best way to see how the project unfolded chronologically and find notices between the players of events, impacts and costs. When delays or other problems occur, notice should normally be in writing, through letters or electronic mail. Written notices are also normally required pursuant to most construction contracts in order to preserve rights to time extensions or additional funds.

Daily Reports

Daily reports, log books, journals, equipment logs or labor logs are very helpful to determine chronology of events, progress of work, manpower and equipment on site. Regularly kept daily reports will corroborate the circumstances surrounding the problem, show the men and equipment impacted, help establish the impact on the schedule as planned and evidence the costs incurred.

Payroll Records and Delivery Receipts

Payroll records are also reliable evidence of manpower on site at various times in the project. Obviously, to be helpful, payroll records must show *which* job personnel were working on each day. It is also important to know *which* personnel were available, as well as their specific capabilities or experience. Delivery receipts will similarly show the availability of materials and equipment throughout the project.

Requisitions

Requisitions or pay applications will typically show work completed at specific times on the project. These are reliable indications of progress asserted by the contractor and agreed upon by the owner and architect as of those specific dates.

Schedules

Baseline or “as planned” schedules are particularly important to show what the owner and contractor really planned as a schedule for the project. Updated schedules and time impact analyses can show the occurrence of events and the impact on the project.

Bid Documents, Estimates and Job Cost Accounting

Bid documents, including estimates, will show costs expected by the contractor. Job cost accounting records created during the project can show the actual costs incurred at various stages of the project for comparison to bid estimates or change order estimates.

Photographs

Photographs and videos should be taken regularly on any project as an easy and accurate way to record conditions and progress of the work. It is important, of course, to establish when photos were taken, who took them and where. Constant and consistent photographing is invaluable as an easy, inexpensive and thorough method of describing conditions.

CLAIM DAMAGES

Reasonable Certainty

The plaintiff has the burden to prove the items of loss with reasonable certainty. An *absolute* certainty as to the amount of the damages is not essential when the existence of a loss has been established. A court can fix the amount of damages when the facts and circumstances permit an intelligent and probable estimate of damages.¹⁹⁴

As discussed above in the Introduction, delay damages are often very difficult to establish. The general rule is that damages must be proven with reasonable certainty.¹⁹⁵ The law does not require impossibilities when it comes to proof of damages, but it does require some degree of certainty. A damage award cannot be based on “mere speculation, guess, or conjecture.” A contractor can normally provide an accounting of the number of extra hours caused by change orders and provide a breakdown by job activity of the number of hours that would have been required with competent construction management. If a contractor fails to do these things, there is no basis to allocate a lump sum claimed, and the entire claim may be rejected.¹⁹⁶

The rule, which precludes the recovery of uncertain damages, applies when the *cause* of the damages are not certain. If the damages are definitely attributable to the wrong and only uncertain in their amount, the damages may not be determined by mere speculation or guess, but it will be enough if the evidence shows approximate damages. The wrongdoer is not entitled to complain that damages cannot be measured with the exactness and precision.¹⁹⁷

Elements of Damage

Claimant will normally need both fact witnesses and experts to prove elements of damage.

The claimant should also be prepared to show that these damages would not have been incurred if the delay or other claim event had not occurred. In other words, some or all of the costs may have been the same even if there was no claim event. The job may have been underbid. Market forces such as labor and material shortages or price increases might have caused costs to go up even without the delay. The claimant should be ready to prove what costs would have been without the delay or other change resulting in the claim. Experts may be necessary to prove the baseline cost or the reasonableness of the baseline costs or initial bid.

Labor Costs

Additional or expert labor

Overtime or premium costs for labor

¹⁹⁴ *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 191, 288 S.E.2d 437 (1982); *Wayne Knorr, Inc. v. DOT*, 973 A.2d 106, 1081 (Pa. Commw. Ct. 2009).

¹⁹⁵ *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 191, 288 S.E.2d 437 (1982); *Estate of Taylor v. Flair Property Associates*, 248 Va. 410, 448 S.E.2d 413 (1994).

¹⁹⁶ *John E. Green Plumbing and Heating Co., Inc. v. Turner Constr. Co.*, 741 F.2d 965, 968 (6th Cir. 1984).

¹⁹⁷ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 713 (Ct. Claims 1966).

Idle labor, including salaries and burdens

The claimant will normally need to show that the labor could not have been used on other projects to avoid the unabsorbed idle labor costs. It may be possible to show that demobilization and remobilization would have been too expensive or not possible because the length of delay was unknown at the time. It may be possible to prove reasonable market prices for labor through publications.

Lost Productivity or Inefficiency

From extended hours or overtime

From improper sequencing, stacking of trades or congested work areas

Additional mobilizations or demobilization costs

The labor loss of productivity resulting from improper delays is an item of damage for which a contractor is entitled to recover.¹⁹⁸ The impossibility of proving the amount with exactitude does not bar recovery for the item.¹⁹⁹ It is generally accepted that productivity and efficiency per man-hour will decrease when labor is forced to work overtime for an extended period of time or if work areas become crowded because the size of the labor force is increased. However, it will be necessary to prove the extent or actual cost of lost productivity or inefficiency through expert witnesses.

Material Costs

Additional or enhanced material

Storage costs for delayed delivery

Price escalation due to delayed delivery

Premium costs for expedited manufacturer or availability

Premium costs for expedited delivery

It may be possible to prove reasonable market prices for material through publications.

Equipment

Additional or specialty equipment

Additional actual rental costs, depreciation or rental value for contractor-owned equipment during extended duration

Idle equipment rental costs or depreciation or rental value for contractor-owned equipment

In a delay claim, the claimant will normally need to show that the equipment could not have been used on other projects to avoid the unabsorbed idle equipment costs. It may be possible to show that demobilization and remobilization would have been too expensive or not possible because the length of delay was unknown at the time. A claimant may be able to recover rental value (actual rental costs or internal rental value) for owed idle equipment or may be limited to depreciation. It may be possible to prove market prices for equipment through publications.

Field Overhead or General Conditions Costs

Increased supervision

Extended hours or overtime costs

Trailer or office rental

Utilities

Insurance premiums

It may be possible to prove reasonable market prices for most of these elements through publications.

¹⁹⁸ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 712 (Ct. Claims 1966) citing *Abbett Electric Corp. v. U. S.*, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958).

¹⁹⁹ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 712 (Ct. Claims 1966) citing *Needles v. United States*, 101 Ct. Cl. 535, 618 (1944); cf. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). However, the mere expression of an estimate as to the amount of productivity loss by an expert witness with nothing to support it will not establish the fundamental fact of resultant injury nor provide a sufficient basis for making a reasonably correct approximation of damages. Proof of damage is essential. *Id.* at 713 citing *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 199, 351 F. 2d 956, 968 (1965).

Profits

Lost on delayed project²⁰⁰

Lost on other projects²⁰¹

Imputed Interest or Loss on Capital**Home Office Overhead and the Eichley Formula**

Most costs of construction are “on-site” or field costs. The largest costs will be direct costs for labor and material to build the planned structure. There are also “general conditions” or field office overhead costs, such as field supervision or management, the field trailer, insurance, utilities.

Home office costs to run the entire construction business are also partially attributable to the various projects the business is working in the field. Home office overhead comprises those costs that a contractor must expend for the benefit of its business as a whole. These expenses include, for example, the salaries of office staff, accounting expenses, dues and subscriptions, equipment costs and utility services. Unabsorbed home office expenses comprise overhead costs needlessly consumed by a partially or totally idle contractor. A contractor continues to incur overhead costs during periods of reduced activity or delay on a particular contract. When this occurs, the “reduced activity” contract no longer “absorbs” its share of overhead costs.²⁰² If a job is delayed, home office costs for that project increase.

An increase in overhead costs is “foreseeable” in the event of delay and is recoverable.²⁰³ Home office overhead is a well-recognized item of damage for delay and a contractor is entitled to recover it—if the contractor did not release its claim to it.²⁰⁴ A contractor can recover as damages the amount of overhead on a daily basis allocable to the period of overrun for which the owner is responsible.²⁰⁵

As with most claims litigation, the difficulty is proving these costs and the correct apportionment to each project with reasonable certainty. The best known and most widely accepted “formula” to allocate home office overhead is the Eichley Formula.²⁰⁶ The Eichley formula is a mathematical method of prorating a contractor’s total overhead expenses for a particular contract.²⁰⁷ The Eichley formula can be mathematically described as:

$$\text{Contract billings / total billings for contract period} \times \text{total overhead for contract period} = \text{overhead allocable to the contract}$$

$$\text{Allocable overhead / days of performance} = \text{daily contract overhead}$$

²⁰⁰ A plaintiff may recover damages sustained by him for loss resulting from unreasonable delay on the part of the defendant in permitting him to perform his contract, and when he has been prevented by the defendant from completely performing his contract, he also may recover the profit he would have realized if he had been permitted to perform fully. This is not a double recovery. The object of the law in awarding damages is to make amends, or reparations, by putting the party injured in the same position, as far as money can do it, as he would have been if the contract had been performed. *Lehigh Portland Cement Co. v. Virginia Steamship Co.*, 132 Va. 257, 270; 111 S.E. 104, 108-09 (1922).

²⁰¹ Damages are recoverable for loss of profits prevented by a breach of contract “only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.” Lost profits that are speculative, remote, uncertain or contingent are not recoverable. A claimant would need to show it would have been the successful bidder on other projects and that the delay affected the ability to obtain projects. *Techdyn Systems Corp. v. Whittaker*, 245 Va. 291, 298-99, 427 S.E.2d 334, 339 (1993).

²⁰² *Fairfax Redevelopment & Housing Authority v. Worcester Bros. Co.*, 257 Va. 382, 387-88 514 S.E.2d 147, 150-51 (1999), citing Michael W. Kauffman and Craig A. Holman, “The Eichley Formula: A Resilient Means for Recovering Unabsorbed Overhead,” 24 Pub. Contr. L.J. 319, 321 (1995) (footnotes omitted).

²⁰³ *Younger v. Appalachian Power Co.*, 214 Va. 662, 665, 202 S.E.2d 866, 868 (1974).

²⁰⁴ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 711 (Ct. Claims 1966) citing *J. D. Hedin Constr. Co. v. United States*, 171 Ct. Cl. 70, 347 F. 2d 235 (1965); *F.H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955); *Fred R. Comb Co. v. United States*, 103 Ct. Cl. 174 (1945).

²⁰⁵ *Luria Brothers & Co. Inc. v. U.S.*, 369 F.2d 701, 711 (Ct. Claims 1966) citing *J. D. Hedin Constr. Co., Inc. v. United States*, *supra*, at 108, 347 F.2d at 259.

²⁰⁶ *Eichley Corp.*, ASBCA 5183, 60-2 Section 2688 (1961); *Fairfax Redevelopment & Housing Authority v. Worcester Bros. Co.*, 257 Va. 382, 514 S.E.2d 147 (1999); *Dewey Jordan v. Maryland National Capital Park & Planning Commission*, 258 Md. 490, 265 A.2d 892 (1970); *Capital Electric Co. v. U.S.*, 729 F.2d 743 (Fed. Cir. 1984), *George Hyman Construction Co. v. Washington Metropolitan Area Transit Authority*, 816 F.2d 753 (1987).

²⁰⁷ *Fairfax Redevelopment & Housing Authority v. Worcester Bros. Co.*, 257 Va. 382, 389-90, 514 S.E.2d 147, 151-52 (1999).

Daily contract overhead × days delay = amount recoverable²⁰⁸

To make the proration, the total amount billed on the particular contract by the contractor (Bc) is divided by the contractor's total billings during the contract period (Bt). This quotient is then multiplied by the contractor's home office expenses attributable to the contract period (Ht) to determine the amount of home office expenses allocable to the contract. Next, the amount of home office expenses allocable to the contract is divided by the total number of days of the contractor's performance under the contract (Dt) to determine a daily contract home office expense rate. Finally, the daily contract home office expense rate is multiplied by the number of days of delay (Dd) to determine the amount of damages (A). This is the Eichleay formula in its most basic application and may be stated mathematically as follows:

$$Bc \times Ht, Bt \times Dd = A Dt$$

It is not necessary for the contractor to show that its overhead was increased as a result of the delay, but the contractor may need to prove that it could not otherwise recoup its pro rata home office expenses incurred while its workforce was idled by the delay.²⁰⁹ To establish Eichleay damages, the contractor must satisfy three prerequisites. First, the contractor must prove that there was a government-caused delay or suspension of uncertain duration. Second, the contractor must prove that the delay extended the original time for performance of the contract, or that the contractor finished on time but nonetheless incurred additional, unabsorbed overhead expenses because it had planned finish even sooner. Finally, the contractor must prove that the government required it to remain on standby during the period of suspension, waiting to begin work immediately or on short notice. Once the contractor has proven these three elements, the burden shifts to the government to show that the contractor could have taken on replacement work and thereby mitigate its damages.²¹⁰

If there is evidence that a contractor has suffered actual damages as a result of an unreasonable owner-caused delay, the Eichleay formula is an acceptable method, though not the only possible method, of calculating the portion of home office expenses attributable to delay.²¹¹ The Eichleay formula is not universally accepted. Some courts have required proof that the Eichleay formula is a reasonable estimate of actual damage. A contractor should be prepared to prove that the extended duration did result in actual increased home office overhead; that it is not possible to determine the exact amount of home office overhead allocable to the project; and that the Eichleay formula provides a reasonable estimate of actual increased home office overhead costs. In other words, it is preferable to show actual overhead costs for the delayed project if possible.

Total Cost

In a "total cost" approach, the claimant's losses are based on the difference between actual costs incurred and the original bid estimate of labor and material cost.²¹² This method is generally disfavored, however, because it assumes the original bid was reasonable and that the claimant did nothing to cause the increased costs.²¹³ Some courts will allow the method when the breach and loss is clear, but the nature of the particular loss renders it impossible or highly impracticable to determine damages with a reasonable degree of accuracy.²¹⁴ Many claimants continue to attempt the total cost method, probably because it is feasible without the use of expensive expert testimony.²¹⁵ At a minimum, a claimant should be prepared to show that it was not possible to prove actual damage, that the original

²⁰⁸ *Capital Electric Co. v. U.S.*, 729 F.2d 743, 747 (Fed. Cir. 1984).

²⁰⁹ *Commonwealth v. AMEC Civil, LLC*, 54 Va. App. 240, 273 (Va. Ct. App. 2009), citing *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 166, 524 S.E.2d 420, 433 (Va. 2000).

²¹⁰ *Redland Co. v. United States*, 97 Fed. Cl. 736, 746 (Fed. Cl. 2011), citing *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370-71 (Fed. Cir. 2003) and *Nicon, Inc. v. United States*, 331 F.3d 878, 887 (Fed. Cir. 2003).

²¹¹ *Fairfax Redevelopment & Housing Authority v. Worcester Bros. Co.*, 257 Va. 382, 388-91, 514 S.E.2d 147, 151-53 (1999).

²¹² *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 288 S.E.2d 437 (1982).

²¹³ *Phillips Construction v. U.S.*, 394 F.2d 834 (Ct. Cl. 1968).

²¹⁴ *Wayne Knorr, Inc. v. DOT*, 973 A.2d 1061, 1097 (Pa. Commw. Ct. 2009).

²¹⁵ Claimant's losses were based on the difference between actual costs incurred and the original estimate of direct labor cost. The labor cost estimate was prepared using manuals customarily employed throughout the electrical contracting industry. They contained approximations of labor units or man-hours required to install the electrical materials called for by the plans and specifications. These manuals provided relatively accurate and realistic predictions of the labor ultimately required on a properly supervised project. There was no evidence that any component of the estimate was incorrect, nor was there evidence that the estimate had been improperly prepared. *Pebble Building Co. v. G.J. Hopkins, Inc.*, 223 Va. 188, 190-91, 288 S.E.2d 437 (1982).

bid was reasonable, that the eventual actual costs were reasonable and that the claimant did nothing to cause the increased costs.

It may be possible to use a “modified total cost” method that identifies and adjusts for errors in the original bid or eventual costs caused by the claimant.

It is preferable for claimants to have the capability to track each component of the work as a separate “account” in computer programs so that it is possible to see that basis for estimating each component before the job began and the actual costs of each component as built.

Measured Mile

A measured mile analysis takes a “snap shot” look at an uninterrupted (or least interrupted) segment of the work to create a baseline and then another snap shot of progress after the claim event to show the impact on all of the work. For example, a measured mile analysis could show the labor productivity before and after an acceleration or other disruption. It is impossible to do an accurate measured mile analysis if you cannot find a good picture of the same type of work on the project that has not been disrupted. It is possible to use examples from other projects, but this is not as reliable. The reliability of examples from other projects will depend largely on the custom and practice of the claimant in gathering the performance data from other projects and the ability to prove that performance on other projects reasonably represents the unimpacted period on the claim project.