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Construction Delay, Acceleration, and Inefficiency Claims

June 9-10, 2009 • Las Vegas, NV

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Construction Delay, Acceleration, and Inefficiency Claims

Just as a chain is only as strong as its weakest link, a construction business will only be as successful as its ability to handle its problems. And few industries are as vulnerable as the construction business to the problems posed by *time*.

The complexity of projects, complicated schedules and hair-splitting coordination all contribute to the necessity for this attention to time. And when deviations in construction schedules occur — as they invariably do for a variety of reasons — ominous shadows can emerge from behind the clock: *delay, acceleration and cumulative impact claims*.

How claims are handled will dictate their ultimate impact on the fortunes of owners, lenders, contractors, subcontractors and sureties. Effectively dealing with them, however, is a difficult task, requiring a concise understanding of the law, of each party's contractual rights, of the construction process and of claims presentation and defense techniques. Providing just such information is the purpose of this special course: *Construction Delay, Acceleration and Inefficiency Claims*.

As in any claim, it is not simply a matter of developing a list of changes and work disruptions. The contractor must show how the changes caused the greater impact and disruption. Problems of proof and quantification are formidable ones.

This course is designed to educate and guide those involved in schedule, performance, and efficiency-related claims. It is a concise analysis of the entire process. The course has been distilled into two highly concentrated days of work. The balance of the brochure spells it out; an exceptional faculty, special case situations, the detailed course curriculum and the course reference manual.

Course Faculty

Steven L. Reed is a partner in the Washington, DC office of Smith, Currie & Hancock LLP. Steve's experience includes an assignment as a Hearing Examiner with the Corps of Engineers Board of Contract Appeals (ENG BCA) in Washington, DC. He was appointed as an ENG BCA Administrative Judge where his docket included appeals addressing matters related to locks, dams, navigation, flood prevention, construction of the Washington Metro light rail system, Panama Canal construction and procurement and Saudi military facilities and foreign military sales transactions.

At the Armed Services Board of Contract Appeals, he mediated, assisted in the resolution of, or adjudicated appeals involving all types of Department of Defense contracts, projects and facilities, as well as contractual matters arising out of the U.S. Department of Health and Human Services, NASA, the U.S. Postal Service, the U.S. Justice Department, the Washington Metro bus and rail system, and the Panama Canal Commission.

Tom Driscoll is a Senior Vice President for the Construction Services Division of URS Corporation in Denver, Colorado. More than 35 years of experience as an international consultant in project and construction management practice. Author and lecturer on construction management and claims. Fellow and past President of the Construction Management Association of America. Member of the Institute of Management Consultants, the American Society of Civil Engineers, and the Project Management Institute.

Don Fredlund is a Senior Principal with PMA Consultants LLC, a national project, program and construction management firm providing consulting services since 1971. He has a Bachelor of Science Degree in Civil Engineering and is currently responsible for PMA's Southwest Region. Mr. Fredlund has over thirty (30) years of experience in project and construction management on many different types of construction projects including: heavy industrial, manufacturing, process, petrochemical, power, infrastructure, water and wastewater, architectural and environmental. He has significant expertise and knowledge in all aspects of project and construction management and in all phases of projects including pre-planning and programming, specifications drafting and contract document development, claims and changes avoidance reviews, cost and schedule administration and control, claims and disputes evaluation, and expert analysis and testimony. Prior to joining PMA, Mr. Fredlund worked for a combined 13 years with two large EPC contractors.

Reginald M. Jones is a Partner with the law firm of Smith, Currie & Hancock, LLP in Atlanta, which concentrates its practice in construction law, government contract law and employment law. Reggie counsels and represents clients in contract matters that involve both the public and private sectors at the federal, state and local levels. He has experience before federal and state courts as well as before various Boards of Contract Appeals including the General Services and Armed Services Board of Contract Appeals. Further, he has arbitrated or mediated numerous cases under the Construction Industry Rules of the American Arbitration Association. He is also the author of the comprehensive article entitled: *Lost Productivity: Claims for the Cumulative Impact of Multiple Changes Orders*, published by the American Bar Association's Public Contract Law Journal.

Construction Delay, Acceleration, and Inefficiency Claims Course Curriculum

I. INTRODUCTION TO SCOPE/ OBJECTIVES OF COURSE

II. DELAY

- A. Introduction
- B. Current Scheduling Methods
 - 1. Bar Charts.
 - 2. Critical Path Methods:
 - I-J Method
 - Precedence Diagramming Method
 - 3. Progress Curves
 - 4. Production Curves
- C. The Construction Contract, Risk Management, Risk Allocation & the Legal Aspect of Scheduling
 - 1. Owner Considerations
 - 2. General Contractor Considerations
 - 3. Subcontractor Considerations
 - 4. Designer/Design Builder Considerations
 - 5. Contractual Risk Shifting Provisions
 - a. No-Damages-for-Delay
 - b. Liquidated Damages
 - c. Allocation of Float
 - d. Suspension of Work Clause
 - e. Differing Site Conditions
 - f. Coordination of Work Provisions
 - 6. Implied Risk Shifting Provisions.
 - a. Duty Not to Hinder, Delay or Interfere with Contractor's Performance
 - b. Duty to Cooperate
 - c. Duty of Good Faith & Fair Dealing
 - d. Duty to Provide Site Access
 - e. Duty to Review Submittals
- D. Types of Construction Delays
 - 1. Excusable v. Nonexcusable Delays
 - a. Acts of God
 - b. Terrorism
 - c. Government Acts
 - d. Weather
 - e. Labor Strikes
 - f. Labor Supply
 - g. Financial Difficulties
 - h. Subcontractor/Supplier Delays
 - 2. Compensable v. Noncompensable Delays
 - 3. Critical v. Non-critical Path Delays
 - 4. Concurrent Delays and Non-concurrent Delays
 - 5. Pacing Delays
- E. Types of Delay Damages
 - 1. Extended Field Office Overhead
 - a. Labor Costs
 - b. Equipment Costs
 - c. Material Costs
 - d. Bonding Costs
 - e. Subcontractor Costs
 - f. Summary Example
 - 2. Extended Home Office Overhead.
 - a. Theory of "Unabsorbed Overhead" (i.e. extended Home Office Overhead) Damages
 - b. Effects of Delays on Home Office Overhead Costs
- F. Standards of Proof for Delay Claims
 - 1. Proper Baseline as a Starting Point for Analysis of Project Delays
 - 2. Properly Maintained Schedule Updates
 - 3. Accurate As-Built Schedule Information
 - 4. Pure Delay v. Delay Resulting from Disruption/Loss of Productivity

- 5. Cause & Effect Relationship to Events/Actions/Decisions
- 6. Impact to the Critical Path/Changes in the Critical Path
- 7. Concurrent and Non-concurrent Delays
- G. Methodology of Analyzing Delays
 - 1. Application of CPM Scheduling Techniques to Delay Claims
 - a. Total Time
 - b. Impacted As-Planned
 - c. But-for/Collapsed As-Built
 - d. Cumulative/Time Impact
 - e. Window Analysis
 - f. As-Planned v. As-Built
 - 2. Application of non-CPM Scheduling Techniques to Delay Claims
 - a. Rate of Progress
 - b. Production Rate Analysis
- H. Calculating Contractor's Damages for Delay
 - 1. Extended General Conditions
 - a. Forward Pricing
 - b. Calculation Based on Actual Records
 - c. Total Cost Method
 - d. Jury Verdict
 - 2. Extended Home Office Overhead
 - a. Is the Eichleay Formula still a Viable Option? Other Options
 - b. Calculations Based on Actual Records
- I. Calculating Owner's Damages for Delay
 - 1. Scope of Recoverable Damages
 - 2. Liquidated v. Actual Damages
 - 3. Actual Damages for Delay
 - a. Lost Profits
 - b. Loss of Use
 - c. Increased Financing
 - d. Extended Maintenance & Operations Expenses
 - e. Special Damages
 - f. Attorneys' Fees
 - g. Interest

III. ACCELERATION

- A. Basics of Acceleration
 - 1. The Theory behind Acceleration Claims
 - a. Acceleration vs. Expedited Performance
 - b. Relationship between Acceleration and Delay
 - 2. Contract Considerations
 - a. Changes Clause
 - b. Time & Performance of the Work Clauses
- B. Voluntary and Directed Acceleration
- C. Constructive Acceleration
 - 1. Contractor's Excusable Delay
 - 2. Notice to Owner of Delay
 - 3. Owner Denial of Time Extension
 - 4. Owner Acceleration Order Requests
 - 5. Reservation of Rights
- D. Proving Acceleration Claims
 - 1. Explicit or Implicit Orders to Accelerate
 - 2. Excusable Delays vs. Non-excusable Delays
 - 3. Notice Requirements
 - 4. Demonstration of Acceleration using Schedules
 - 5. Acceleration Costs Records

- E. Proving Damages
 - 1. Types of Damages
 - 2. Coordination with Other Damage Calculations (e.g. Delay, Inefficiency)
 - 3. Methods of Calculating

IV. INEFFICIENCY

- A. Introduction
- B. Defining and Measuring Inefficiency; Lost Productivity; Disruption
 - 1. Defining Productivity; Lost Productivity; Other Relevant Terms
 - 2. Measuring Planned vs. Actual Productivity
 - 3. Direct Impact Claims
 - 4. Indirect or Cumulative Impact Claims
- C. Distinguishing between Claims for Delay, Acceleration & Disruption
- D. Identifying Causes of Inefficiency
 - 1. Adverse Weather
 - 2. Out-of-Sequence Work
 - 3. Crowding and Stacking of Trades
 - 4. Overtime
 - 5. Restricted Site Access
 - 6. Inefficiency Caused by Manpower Shortages or Additional Shifts
 - 7. Change Orders
- E. The Legal Bases for Recovery
 - 1. Recovery under the Contract
 - a. Changes Clause
 - b. Suspension of Work Clause
 - c. Differing Site Conditions Clause
 - d. Coordination Clauses
 - e. Compliance with Notice Provisions
 - 2. Recovery under Common Law Contract and Equitable Principles
 - a. Breach of Implied Duty to Cooperate
 - b. Cardinal Change – Federal Government Contracts Law
 - c. Abandonment – State Law
 - d. Constructive Change
 - 3. Proving and Pricing Inefficiency and Impact Claims
 - a. Liability
 - b. Proving Damages with Expert Testimony
 - (1) Discrete Pricing
 - (2) Total Cost Method
 - (3) Modified Total Cost
 - (4) Measured Mile Approach
 - (5) Jury Verdict Method
 - (6) Industry Studies
 - (a) Use of MCAA Factors
 - (b) The Modification Evaluation Impact Guide
 - (c) The Leonard Study
 - (d) Construction Industry Institute Study
 - c. Demonstrating Causation (i.e. Cause and Effect)
 - d. Waiver & Reservation of Rights to Claim Cumulative Impact Costs

Detach and mail to the exact address stated below.

Construction Delay, Acceleration, and Inefficiency Claims

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DAILY SCHEDULE

Registration: 8:45 am on the First Day

Meetings: 9:00 am – 12:00 pm and 1:00 pm – 4:00 pm

To Register:

- **Registration Fee \$995.** The Registration fee of \$995 includes the price of a course manual which is valued at \$235 plus applicable taxes. Applicable taxes include sales, use, gross receipts, excise, value added tax (VAT) or equivalent, *ad valorem* and other taxes.
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TEAM DISCOUNT — A discount is available for three or more registrations from the same organization for this seminar. The discount – a \$200 per person reduction in the seminar fee – can be taken when three (or more) registrations are sent together. The discount cannot be transferred to other sessions of this program or to other seminars. To receive the team discount, please phone, fax or mail your registration.

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