



Ask An Attorney



The Legal Rights Committee expresses its appreciation to **Tim Woolford of Cohen, Seglias, Pallas, Greenhall & Furman, Philadelphia.**

Q: Can a contractor recover for labor cost overruns even when the project finished on time?

A: Contractors often incur labor cost overruns on projects that are completed on time. This is frequently due to delays and disruptions that prevent the contractor from working as efficiently as he expected. The result is a claim for "inefficiency" and is typically caused by one or more of the following:

Trade Stacking. Trade stacking can occur when too many trades are working in the same area at the same time. It can limit mobility and access and can create congestion and confusion.

Overtime. Overtime can decrease efficiency by causing fatigue, decreased morale and absenteeism. It can result in greater demand for equipment, material, planning and information, increasing the likelihood of disruptions. Widely recognized studies conclude that overtime harms productivity.

Adverse Weather. Efficiency can be impacted by rain, excessive humidity, frozen ground, extreme temperatures and excessive wind. Most contracts provide that extreme weather justifies a time extension, but it may also give rise to inefficiency damages.

Out-of-Sequence Work. Out-of-sequence work can occur when one trade is forced to perform work at the same time as another trade that should precede or follow that trade. It can also occur when a trade is forced to split crews and work in separate areas, adding travel time and extra set up time.

Change Orders. When performing change order work, efficiency can be reduced by 30 percent. Changes often require the crew to move to another location and work out-of-sequence. Each time they do so, they incur "learning curve" or "start-up" inefficiencies.

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Other Disruptions. Many types of other disruptions can cause inefficiency. If you think your increased costs are caused by conditions like those described above, you may have a legitimate claim for inefficiency.

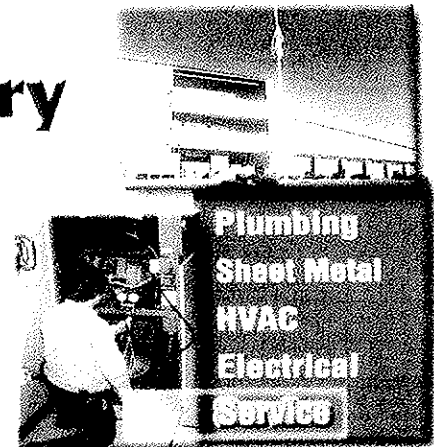
Q: If a prime contractor is delayed or disrupted by mismanagement of the project, who does it look to for recovery - the owner or the construction manager?

A: It depends. When prime contractors incur added costs due to project mismanagement, or failure to coordinate the work, they often ask me "who is liable?" Generally, the owner has the duty to coordinate the work, and an owner's failure to deal with disruptions or delays ordinarily constitutes a breach of that duty.

However, an owner can delegate its coordination responsibilities to a CM or coordinating prime contractor ("coordinating prime") so as to avoid liability for breach of the duty to coordinate. Prime contractors who have

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complained to the owner on troubled projects are often told to direct their concerns to the CM and that the owner is not responsible for the CM's alleged mismanagement. In reality, the claim for breach of the duty to coordinate should be made solely against the CM or coordinating prime instead of the owner *only if the owner has properly delegated the power to coordinate and control to the CM or coordinating prime.*

To do so, the owner must delegate real power to compel coordination by, for example, giving the CM the power to withhold payments or declare default. Often, however, owners do not effectively delegate the duty because they fail to delegate real power to control. Thus, the owner remains liable. If the owner has effectively delegated the duty to coordinate, contractors can typically bring actions against the CM on a third-party beneficiary theory without involving the owner.

Upcoming Membership Meetings:

April 21 (Safety Awards) - Reading

April 22 (Safety Forum) - Lancaster .

May 19 (Apprentice Graduation) - Harrisburg

June 16 - York

Q: If a project is delayed, can a contractor recover monetary delay damages, even if the contract says the only remedy is a time extension?

A: *Maybe.* Many contracts contain a "no-damages-for-delay" provision which attempts to insulate the owner from paying delay damages in the event of a delay. There are a number of exceptions to contract language of this sort, and if your project falls into one, you might be able to recover delay damages. One such exception is where the contractor can show that the owner or, in some cases, its CM has *actively interfered* with the contractor's work. There is no bright line rule for what constitutes active interference, but generally, it is when the owner has not acted fairly and caused delay as a result. Active interference might be found where a project was grossly mismanaged, where excessive changes were ordered or where there was a partial denial access. Another exception to the no-damages-for-delay clause is where the delay is of an "unreasonable duration."

The bottom line is that there are several exceptions to the no-damages-for-delay clause that may permit recovery of monetary delay damages. Application of the exceptions depends on the individual facts of each project.

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