



***MAKING CHANGES AND
RESOLVING DISPUTES***

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CHANGE ORDERS

- ***Change Orders are part of every project.***
- ***Designs are not perfect.***
- ***Owners insert changes during the work.***



CHANGE ORDERS

- ***Site conditions are sometimes different than expected.***
- ***Unexpected delays occur.***
- ***Change Orders must be managed effectively!***



The Change Clause Provides:

- ***Means by which the owner can adjust plans and specifications***
- ***An outline for organizing and presenting claims for additional compensation or time***
- ***Coordination with dispute clause for serious problems***



Issues to Consider When Changes Arise:

- ***Does the change fall within the scope of the project?***
- ***Must the change be in writing?***
- ***Who has the authority to make the change?***
- ***Is there a resolution available if a price cannot be agreed upon?***



Issues to Consider When Changes Arise:

- ***Is the time adjustment appropriate?***
- ***Are markups equitable/properly applied?***



Changes Do More Than Alter The Work, They:

- ***Disrupt orderly sequences***
- ***Interfere with planned deliveries***
- ***Void prior coordination***
- ***Change schedule logic***
- ***Change methods for work not otherwise addressed by the change***



Changes Do More Than Alter The Work, They:

- ***Cause a contractor to remain mobilized on site longer than originally planned***
- ***Continue to add administrative costs resulting from backtracking and rework***



Constructive Changes:

- ***Constructive changes are changes that the owner does not recognize as a change, so no written change order is signed or approved by the owner.***



Constructive Changes:

- ***Examples:***
 - ***Defective plans/specs***
 - ***Change in method of performance***
 - ***Misinterpretation of plans/specs***
 - ***Rejection of conforming work***
 - ***Rejection of “or equal” submissions***
 - ***Defective owner-furnished property***



Constructive Changes:

- ***Contractor must provide notice when it believes there is a constructive change and must follow claim procedures in the contract.***



Changes Clause in MAG Specs:

- **Section 104.2**
 - **Five Types**
 - 1) **Alterations by contracting agency**
 - 2) **Due to Physical Conditions**
 - 3) **Extra Work**
 - 4) **Contractor's Request**
 - 5) **Contractor's Failure to Maintain Project**



Changes Clause in MAG Specs:

▪ ***Payment for Changes***

- ***Sections 109.4 and 109.5***

- ***Is there a change order directive or some other mechanism to resolve disputes?***



Changes Clause is AIA A201

- ***Article 7***
 - ***Three Types***
 - 1) Change Order***
 - 2) Change Directive***
 - 3) Minor Change***



Cardinal Changes:

- ***A cardinal change is a change that is beyond the scope of the contract***
- ***Example: A contractor who agrees to build a house cannot be required to build an apartment complex***
- ***Example: Extraordinary delays***
- ***Contractor's remedy?***

Solving Problems



***LITIGATION =
TIME & MONEY***



Types of Disputes

1) CONTRACT DISPUTES

- ***Someone failing to perform contract obligations***

2) TORTS

- ***Someone failing to use reasonable care resulting in personal injury or damage to property***



Typical Construction Contract Disputes

1) PAYMENT

2) CHANGES

3) DELAY

4) POOR WORKMANSHIP

5) TERMINATION



How To Stay Out Of The Court Room

- ***KNOW YOUR CONTRACT***
- ***FOLLOW YOUR CONTRACT***



How To Stay Out Of The Court Room

- ***FIRST -- Avoid disputes***
 - ***A major cause of conflict is insufficient funds***
 - ***Steer clear of clients and contractors who lack integrity. Investigate reputation of general contractor and subcontractors***



How To Stay Out Of The Court Room

- ***There are few problems on jobs to which the Owner, Designer and Constructor dedicate their top people.***
- ***Set a frequency for reports on progress and keep team members aware of what is going on.***
- ***Supervision is key.***



How To Stay Out Of The Court Room

- ***SECOND -- Resolve disputes intelligently***
 - ***Identify and address disputes as early as possible***
 - ***Communication at lowest level of dispute is critical***
 - ***Document,***
 - ***Document,***
 - ***Document.***



How To Stay Out Of The Court Room

- ***THIRD – SECURE LIEN OR BOND RIGHTS***
- ***Gov't entities/subs should confirm contractor's bonds***



Differing Site Conditions (MAG Specs):

- **Section 104.2.2**
 - **Type 1 – Site conditions different than those indicated in contract**
 - **Type 2 – Unknown physical conditions of an unusual nature**



Differing Site Conditions (AIA A201):

- **Article 4.3.4**
 - 1) **Type 1**
 - 2) **Type 2**
 - **Notice**
 - **What if contract does not have a clause covering differing site conditions?**

- ***Types of Delays***
 - ***Excusable Delays***
 - ***Inexcusable Delays***
 - ***Compensable Delays***

Delays

- ***Excusable Delays***
 - ***Force Majeure – Beyond either parties' control***
 - ***These delays excuse the contractor from completing on time by increasing the Contract Time***



Delays

- ***Excusable Delays***
 - ***Contractor must make written request “immediately” for extension of time under § 108.7 of MAG Specs***
 - ***A delay is excusable only if it was beyond the contemplation of the parties at the time of contracting.***



Delays

- ***Examples of Excusable Delays***
 - ***Acts of God – bad weather is not excusable unless it is unusual for the locality***
 - ***Labor problems (not always)***
 - ***Acts of Government (not contracting agency)***
 - ***Acts of public enemy***



Delays

- ***Inexcusable Delays***

- ***Delay for which the contractor is not entitled to an extension of the Contract Time***
- ***Delays caused by the contractor or its subs***



Delays

- ***Compensable Delays***
 - ***Owner/agency caused delays***
 - ***Delay that is not only excusable, but contractor is also entitled to damages from the owner***
 - ***Contractor gets more time and money***



Delays

- ***Compensable Delays***
 - ***Contractor needs to keep good records of how delays are causing additional costs***



Delays

- ***Examples of Compensable Delays***
 - ***Delayed or restricted site access***
 - ***Changes in the work***
 - ***Failure to make timely progress payments***
 - ***Defective Plans and Specs***



Delays

- ***Examples of Compensable Delays***
 - ***Interference within owner's control***
 - ***Failure to coordinate separate contractors***
 - ***Delay in shop drawing approvals***

Delays

- ***Liquidated Damages***
 - ***Per day charge for each day project is late***
 - ***Sky Harbor Runway -- \$1,000.00 per minute***
 - ***Replace actual damages owner may suffer as a result of delays since actual damages are difficult to prove***



Delays

- ***Liquidated Damages***
 - ***Must be a reasonable approximation of the owner's actual damages or the provision will be determined to be a penalty and will not be enforced***
 - ***LDs valid after substantial completion?***



Delays

- ***Liquidated Damages***

- ***Limit damages that owner can recover for contractor's late completion***



Delays

- ***Acceleration***
 - ***When contractor speeds up the construction through overtime and additional workers***
 - ***Creates additional costs that contractor may recover from owner***
 - ***Contractor needs to keep good records of costs***

▪ ***Acceleration – Types***

- ***Actual (Directed) – when owner asks contractor to complete job early***
- ***Constructive – when owner refuses to provide time extension for an excusable/compensable delay***
- ***Self Imposed – when contractor wants to avoid LDs***



Delays

- ***Concurrent Delays***

- ***Two or more independent delays (whether excusable, inexcusable or compensable) occurring at the same time***

Delays

- ***Concurrent Delays***
 - ***General Rule: Neither owner nor contractor entitled to damages, but the contract time is extended during the concurrent delay***

- ***Concurrent Delays***

- ***Example 1:***

- ***Ten day owner delay
(compensable)***

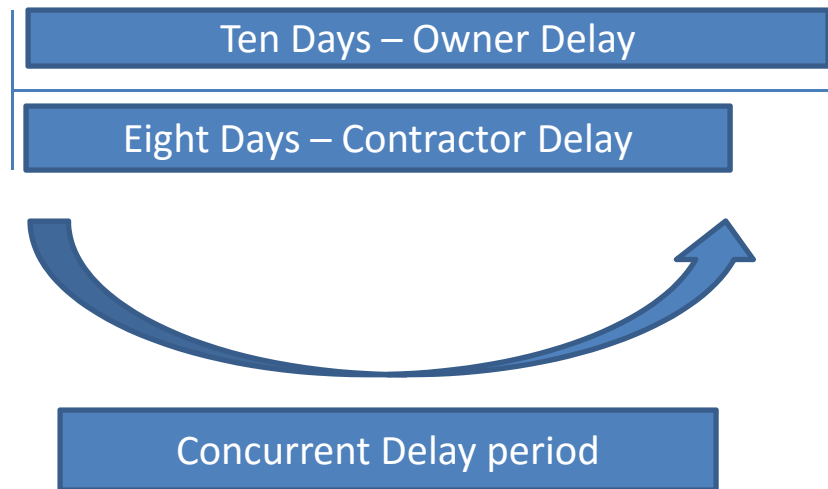
- ***Eight day contractor delay
(inexcusable)***

- ***What is the result?***

Delays

▪ **Concurrent Delays**

• **Example 1:**



• **Who gets what in terms of time and/or money?**

Delays

- ***Concurrent Delays***
 - ***Example 1 Answer:***
 - ***Contractor gets 10 day contract extension***
 - ***Contractor only gets 2 days of delay damages***

- ***Concurrent Delays***

- ***Example 2:***

- ***Five day owner delay
(compensable)***

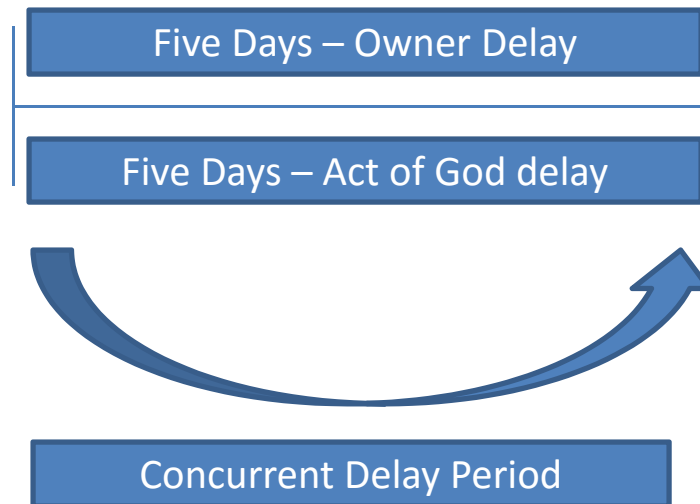
- ***Five day excusable delay
(Act of God)***

- ***What is the result?***

Delays

▪ **Concurrent Delays**

• **Example 2:**



• **Who gets what in terms of time and/or money?**

Delays

- ***Concurrent Delays***

- ***Example 2 Answer:***

- ***Contractor gets 5 day contract extension, but no days of delay damages***

▪ ***Concurrent Delays***

• ***Example 3:***

***-Ten day contractor delay
(inexcusable)***

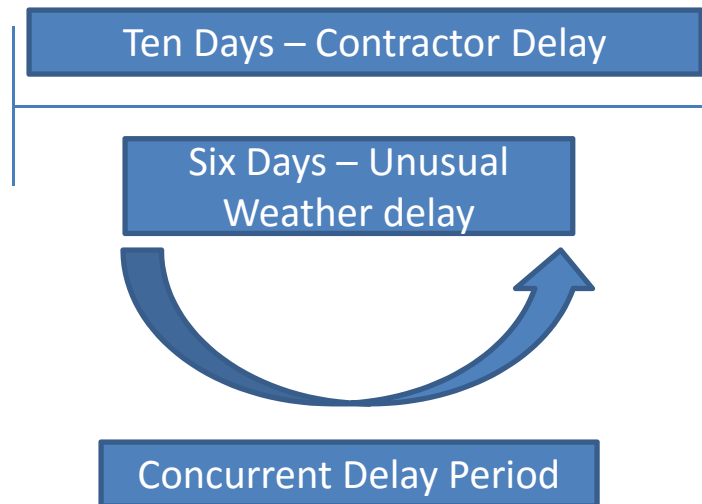
***- Six day excusable delay
(unusual weather)***

- What is the result?

Delays

▪ **Concurrent Delays**

• **Example 3:**



• **Who gets what in terms of time and/or money?**



Delays

- ***Concurrent Delays***
 - ***Example 3 Answer:***
 - ***Contractor gets six day contract extension***
 - ***Owner gets four days of liquidated damages if time not made up***



Delays

- ***Owner only has to show Contract Time was not met***
- ***Contractor then has burden to prove it is entitled to extension/damages***
- ***Delay is excusable/compensable only if it affects the “critical path” (i.e., extends the Project’s completion)***

- ***Tips for proving delay claims:***

- 1) ***Update schedule during the project***

- ***Expensive for expert to reconstruct schedule***
- ***Updates tend to show more accurately where delay is occurring***

• Tips for proving delay claims:

2) Review contract terms

- Contract probably defines rights and responsibilities for delays***
- Contract may require notice and claims submission requirements***

• *Tips for proving delay claims:*

3) *Provide written notice of delay claim*

• *Use magic words “critical path delay”*

- ***Tips for proving delay claims:***

- 4) ***Keep good records of damages***

- ***Updated schedules***
- ***Meeting minutes***
- ***Photos/video***
- ***Daily reports***
- ***RFI logs***
- ***Job cost reports***

·Tips for proving delay claims:

5) Raise delay issues at project meetings

6) Make corrections to project meeting notes if necessary



Delays

• Tips for proving delay claims:

7) Be sure of “bad sub” before writing letter

- Accusing sub of delay can come back to haunt you***
- Write letters without emotion or personal criticism***

- ***Tips for proving delay claims:***

- 8) ***Don't waive delay damages when signing change order/lien waiver***
- ***Be sure to include extended completion costs and time in change order***