

Delay claims

By Bill Schmalz, FAIA

Construction delays will almost always result in change order requests, and as architects, we are obligated to review them not only for the requested additional time or money (or both) but also for whether the claim is justified. To determine justification, we need to understand the two categories of delay: inexcusable and excusable.

An inexcusable delay is caused by the contractor's team, which includes subcontractors and vendors. For an inexcusable delay, the contractor receives neither additional time nor additional money.

Excusable delays are caused by forces outside the reasonable control of the contractor, and fall into one of two subcategories: compensable and non-compensable. A compensable excusable delay is caused by, and is the responsibility of, the owner's team, and can include owner-generated changes and architect's errors and omissions. For a compensable delay, the contractor can legitimately claim additional time and money. Non-compensable excusable delays are caused by neither the contractor nor the owner; examples include unseasonable bad weather, unforeseeable site conditions, and unanticipated labor strikes.

For a non-compensable excusable delay, the contractor can receive a time extension, but no additional money. See the table below for a graphic summary of this.

	INEXCUSABLE	EXCUSABLE		NET IMPACT	
		COMPENSABLE	NONCOMPENSABLE	TIME	COST
SINGLE DELAY	X			NO	NO
		X		YES	YES
			X	YES	NO

With all that in mind, let's look at these three scenarios:

1. After most of the interior framing is complete, the client directs you to redesign the executive suite, resulting in a two-week project delay.
2. Three days of torrential summer rain have flooded the excavation of your project and delayed the pouring of foundations by two weeks.
3. A week before the Italian stone specified for the lobby is scheduled to be installed, the contractor tells you that the ship has not yet left Italy, so the project will be delayed by two weeks.

Because of these delays,¹ the contractor submits change order requests for additional time and money. How do we, as architects, respond to them?

1. The first case is a compensable excusable delay, since it was caused by the owner's changes while the work was underway.

¹ To keep things simple, let's assume that all three delays are on the critical path, meaning that a two-week delay for each particular activity will result in a two-week delay for the overall project.

2. The second case is a non-compensable excusable delay; the rainstorm occurred in a normally dry season, so neither the contractor nor the owner caused it or could have anticipated it. The construction contract schedule should be extended by two weeks, but without a change in the contract amount.
3. In the third case, the delay was caused by a member of the subcontractor's team—in this case, the stone supplier—so the delay is inexcusable, and there is no change to the construction contract.

While all of the above may sound straightforward, things are seldom so simple during construction. Now consider these more complicated scenarios:

1. After most of the interior framing is complete, the client directs you to redesign the executive suite, resulting in a two-week project delay. Then, on the day the revised drawings are given to the contractor, the drywall union unexpectedly strikes, halting construction activities for two weeks.
2. Three days of torrential summer rain have flooded the excavation of your project and delayed the pouring of foundations by two weeks. At the same time, the contractor informs you that the reinforcing steel, which was scheduled to be installed on the day the rain began, won't be on site for another two weeks.
3. A week before the Italian stone specified for the lobby is scheduled to be installed, the contractor tells you that the ship has not yet left Italy, so the project will be delayed by two weeks. This coincides with a two-week delay caused by an owner-directed change to the lobby design.

In each of these examples, two events are simultaneously causing two-week delays. In each case, our response is based on the delay for which the owner is least responsible. In other words:

1. In the first, we have a compensable excusable delay (the owner's changes) and a non-compensable excusable delay (a labor strike). The combined delays are treated as a non-compensable excusable delay (additional time, but no additional money).
2. The second example combines a non-compensable excusable delay (bad weather) with an inexcusable delay (late material delivery). The delays are treated as an inexcusable delay (no additional time or money).
3. In the third, we have an inexcusable delay (late material delivery) and a compensable excusable delay (owner changes). The delays are treated as an inexcusable delay (no additional time or money).

See the following table for a graphic depiction of these combinations.

	INEXCUSABLE	EXCUSABLE		NET IMPACT	
		COMPENSABLE	NONCOMPENSABLE	TIME	COST
CONCURRENT DELAYS	X		X	NO	NO
	X	X		NO	NO
		X	X	YES	NO

Even these examples are simplified, since each involves two delays that, through a remarkable coincidence, start on the same day and end on the same day. In the real world, we're far more likely to encounter two or

more overlapping delays of each type, so determining if the contractor is owed additional time, additional money, or both, or neither requires considerable analysis. But no matter how complex the actual situation, the basic (and simple) principles apply.

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