

CONSTRUCTION

RECOVERY SCHEDULES AND CONSTRUCTIVE ACCELERATION — PROTECT YOURSELF FROM PITFALLS

On troubled or delayed projects, it is common for an owner to request that a contractor adjust performance in order to achieve an earlier-than-projected completion date. In such circumstances, owners frequently demand that contractors submit a “recovery schedule” depicting the contractor’s plan to meet an accelerated completion date. This article addresses: (1) the foundations for submission of a recovery schedule; (2) practical advice for the submission of such schedules; and (3) legal questions of constructive acceleration and subcontractor performance that may impact claims and recovery.

THE BUILDING BLOCKS: BASELINE AND SCHEDULE UPDATES

A baseline schedule is an important project management tool that is commonly used to determine the extent of delays, along with impacts that may be experienced during the course of construction. These baseline schedules are typically the subject of agreement between a contractor and owner and often involve some degree of compromise and negotiation between the parties. Although not the focus of this article, contractors should memorialize when agreement on a baseline schedule has been achieved. The reason is simple — failure to do so often complicates the contemporaneous issuance of schedule updates, and will present foundational challenges in potential disputes concerning the timeliness of project completion.

A sound baseline schedule will allow a contractor to prepare schedule updates that either track the baseline schedule, or, when delays or other unexpected events occur, divert from the original as-planned activities in favor of modified durations or logic. While construction contracts often include specific requirements for schedule updates and any changes thereto, contractors are advised to articulate the differences between schedule durations and logic in their schedule updates at the times of submission, especially as compared with the baseline schedule. Contemporaneous identification of events and impacts that may ultimately result in critical path delays is a leading indicator of what ultimately caused late project completion.



THE RECOVERY PLAN

Despite the best efforts of a contractor, owner, or other parties to a construction contract, delays may be experienced and a project owner may make a contractual (or extra-contractual) demand that a contractor produce a “recovery schedule.” A recovery schedule differs from a schedule update in that a recovery schedule projects substantial completion by either the original contract completion date, or some other date that is still earlier than the currently projected completion date reflected in the most recent schedule update.

Certain construction contracts contain specific requirements for the preparation of a recovery schedule. Even in the absence of such requirements, however, an owner’s request for a recovery schedule showing completion by a date certain may be part of an owner’s notice to cure. By its nature, a request for a recovery schedule implies that the current-projected substantial completion date is beyond that originally identified in the contract. From a contractor’s perspective, at the time a recovery schedule is requested, it is ideal to have already properly noticed any project impacts that resulted in the projected schedule delays. In the event that such impacts have not been the subject of contemporaneous notice, contractors are advised to notify the owner of the following at the time of recovery schedule submission: (1) impacts that led to the request for a recovery schedule (and which the contractor views are excusable and/or compensable under the terms of its contract) and (2) the extent of any acceleration effort that the contractor believes necessary in order to meet the recovery schedule’s substantial completion date.

The request for and submission of a recovery schedule often comes at a time of acute project stress. Most construction contracts require that a contractor continue performance in the face of disputes over entitlement to time extensions or extra compensation. Accordingly, while even lengthy or acrimonious disputes may not permit the contractor to cease operations, the provision of notice at the time of recovery schedule submission enhances a contractor’s later legal position, and, equally important, allows the owner to effectively measure the temporal and financial ramifications of adherence to the recovery schedule.

THE QUESTION OF ACCELERATION

It is axiomatic that a recovery schedule seeks to “recover” time lost due to project delays or other impacts, and thus contemplates performance of work in a compressed time frame. Accordingly, contractors may need to “accelerate” their work operations in order to meet newly revised interim or substantial completion dates.

In the event that an owner’s request for a recovery schedule results from an excusable contractor delay, the owner’s request for (and the contractor’s ultimate adherence to) a recovery schedule may give rise to a claim for “constructive acceleration.” Under federal case law, “constructive acceleration” claims may be meritorious where the following elements exist: (1) excusable contractor delay has occurred on a project; (2) the contractor made a timely and sufficient request for a time extension; (3) the owner either denied the request or failed to take appropriate action on the request; (4) the owner insisted on contract completion within a period shorter than that projected by the contractor, (5) the contractor notifies the owner that its order is being interpreted as an order to accelerate; and (6) the contractor actually accelerated work and incurred additional costs as a result of its compressed efforts. See *Frasier Constr. Co. v. United States*, 384 F.3d 1354 (Fed. Cir. 2004).

The preceding factors raise the question: can an owner’s demand that a contractor perform pursuant to a recovery schedule be considered a demand for “constructive acceleration?” The answer is likely “yes.” In *Norair Engineering Corp. v. United States*, the U.S. Court of Claims reversed a previous Board of Contract Appeals ruling that denied a prime contractor’s claim for acceleration costs. 666 F.2d 546 (1981). The contractor in *Norair* was granted a compensable time extension for project delays, but sought additional relief in the form of acceleration costs for overcoming what could have been even greater excusable delays. The Court of Claims held that there was nothing “incongruous” about a contractor’s right to recover for acceleration damages that may have prevented even greater delay than the amount of the time extension. *Ibid.* at 548. Additionally, the court found that an owner’s order to accelerate “need not be couched in explicitly mandatory terms” and that the owner’s stated intention to hold the original completion date and threat of liquidated damages served as an acceleration order. Accordingly, the contractor’s accelerated performance to achieve an earlier-than-projected completion date (i.e., work to a recovery schedule) was the proper subject of an acceleration claim. *Ibid.* at 549.

In a more recent decision concerning a constructive acceleration claim, the U.S. District Court for the Western District of Virginia ruled that where a contract did not expressly require a contractor to provide notice of acceleration, that contractor could still maintain its acceleration claim based on an owner's demand for completion by a date certain. *SNC-Lavalin America, Inc. v. Alliant Techsystems, Inc.*, 858 F. Supp. 2d 620 (W.D. Va. 2012). The court held that, unlike contracts with the federal government that include the standard FAR changes clause, the contract in question did not require that the prime contractor notify the owner that it believed an owner's completion demand required acceleration. Accordingly, despite the contractor's lack of notice, the court permitted the contractor to recover on its claim for damages resulting from "constructive acceleration."

In short, a contractor's performance to a recovery schedule may be the basis for an acceleration claim, but the specific terms of one's contract will govern the circumstances upon which such a claim may be asserted. In the spirit of caution, contractors are advised to notify their contract partners at the time of submission of a recovery schedule that: (1) delays previously encountered are understood to be excusable; and (2) performance to a submitted recovery schedule is understood to be accelerated work at the owner's request.

For owners, to the extent that accelerated performance is sought, express direction relative to the "recovery schedule" should be provided to the contractor. Owners should explain the rationale for determination of unexcused delay or why performance to the compressed schedule may not actually result in acceleration damages.

RECOVERY SCHEDULES UP AND DOWN THE CONTRACT CHAIN

Submission of and performance to a recovery schedule may also give rise to legal issues between a prime contractor and its subcontractors. Disputes are particularly likely where the subcontractor's performance arguably contributed to the necessity of a recovery schedule. Where subcontractor performance (or lack thereof) is a point of contention, prime contractors are advised to review and protect their rights vis-à-vis both subcontractors and project owners at the time of recovery schedule submission. In fact, failure to do so may result in the legal waiver of rights.

Notably, in the case of *McLain Plumbing & Electrical Service, Inc. v. United States*, a prime contractor placed in default agreed with its owner to perform to a recovery schedule. 30 Fed. Cl. 70, 75 (1993). As part of the recovery schedule performance, the prime contractor terminated an alleged underperforming subcontractor. Subsequent to its termination, the subcontractor pursued arbitration with the prime contractor and prevailed on a theory of wrongful termination. The prime contractor later attempted to recover the cost of the subcontractor judgment and associated costs from the government, asserting that the government "forced" the prime contractor to terminate the subcontractor. The Court of Federal Claims ruled against the prime contractor, holding that the prime contractor's written agreement with the government pledging performance to the recovery schedule and wherein the prime also agreed to terminate the subcontractor, amounted to accord and satisfaction. Accordingly, by failing to reserve its rights in the recovery schedule agreement, the prime contractor was deemed to have relinquished its right to recover the subcontractor damages. *Ibid.* at 77-84.

While the above fact pattern is layered, it again underscores the importance of notice and reservation of rights at the time of performance to a recovery schedule. Prime contractors especially must be wary of the sometimes competing legal interests of project owners and subcontractors.

CONCLUSION

The submission of a recovery schedule can be a trying experience for contractors and project owners. Typically, recovery schedule submission is surrounded by stressful delays and accusations of under performance. As this article details, all parties are advised to fully review and understand their contractual and other legal rights at the time of recovery schedule submission. Indeed, failure to do so may result in a relinquishment of rights associated with claims of acceleration or other damages. However, it should not be forgotten that these resources need to be effectively and efficiently deployed within a transparent and accountable business case framework with appropriate leadership and governance to steer the project to success.

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