



CONSTRUCTION

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EARLY COMPLETION SCHEDULES & EARLY COMPLETION DELAY CLAIMS

“THE CONTACTOR’S RIGHT TO FINISH EARLY”

INTRODUCTION

Simply stated, an Early Completion Schedule is just that – a schedule showing an earlier project completion date than required by the contract. However, while such a schedule seems rather straight forward for a construction project, it is not that simple – the execution, administration and closeout of a project can all be affected. Given that contractors already know how difficult it is to complete a project on time, why would contractors want to add yet another risk to their responsibilities? Regardless of the risk, contractors do submit them, some contractors achieve them, and some actually are awarded delay damages against their early completion date. This paper discusses the various aspects and consequences of the use of an early completion schedule against the actual outcome of the project.

The contractor is responsible for preparation of the project schedule, which includes means and methods, sequencing and preferred logic, and the planned manpower and equipment to support the plan. As most contracts include a required execution period in the Time of Performance clause, the contractor's schedule must meet the owner's specified completion date and any other milestones defined in the contract. Except in uncommon contracts that require that the contractor finish no earlier than the contract completion date, the contractor may perform better than the specified time of performance and finish the work ahead of the contract completion date. On the other hand, a contractor, after evaluation of the bid documents and preparation of its plan, may conclude that it can complete the work earlier than required, submit a proposed schedule with the earlier completion date and reduce its bid price accordingly. Since owner bid evaluations are based on the review of cost and schedule, an owner may award the project to the contractor with the shorter schedule since, in the owner's mind, the contractor has assumed the risk of the early completion. Owners in situations such as

this often believe they have purchased a schedule contingency to meet its true need date for the project. However, the contractor's approach is that it is planning to meet the earlier date, turn over the project to the owner and save general conditions costs.

After the contract is let and the contractor submits its detailed schedule as required by the contract, the contractor may or may not provide notice to the owner that it intends to complete early. Depending on how the owner responds to the notice and how the contractor performs against its early completion schedule, the administration, execution and closeout of the project can be impacted in various manners.

There is another nuance that should be introduced into a discussion on early completion schedules – the use of a ghost or shadow, schedule to assist a contractor to complete a project earlier.¹ A contractor may use a ghost schedule that projects an early completion date as a side schedule hidden in the background while also maintaining and submitting a project schedule that supports the contract completion date. However, the contractor manages the project using the ghost schedule in its attempt to complete early. Both early completion and ghost schedules will be discussed further in this paper.

HISTORY OF EARLY COMPLETION & EARLY COMPLETION DELAY DAMAGES

Almost every contract includes a specified contractual substantial completion date for a project.² Time is of the essence in many contracts and, therefore, many contracts include liquidated damages, termination for default, and other punitive measures associated with late and/or unsatisfactory contractor performance. However, contracts rarely specify that a contractor may not complete early. To the contrary, it is often in the best interests of both the contractor and the owner for a contractor to pursue completion earlier than contractually specified. The contractor who best plans and allocates its resources and those of its subcontractors to reduce overall performance time is likely to reduce costs for both parties. An owner benefits from use of its project earlier than planned at lower bid prices while the contractor reduces its home office and field overhead costs.

The opposite circumstances can also be true. Delayed performance, regardless of the party at fault often results in increased costs of performance including extended field and home office overhead costs, increased labor and equipment costs, material escalation costs, liquidated damages, lost opportunity costs and other consequential damages. Similarly the owner incurs additional project management costs, financing costs and other project related costs plus potential lost revenue.

A contractor whose performance is delayed beyond the contract completion date for reasons beyond its control is perhaps one of the most common subjects of construction disputes and litigation. Whether a contractor is entitled to recover damages associated with completion of work later than the planned date in its bid but earlier than the contracted completion date is a subject that is also often the subject of dispute.

One of the earliest cases involving whether or not a contractor can recover damages for delay to a planned early completion was *United States v. Blair* in 1944.³ The government awarded a contract to Blair for construction of buildings at a Veterans' Administration facility in Roanoke, Virginia. Blair developed a schedule indicating its planned early completion of work ahead of the contract completion date. Following completion of its contract by the contract date, but later than its early completion date, Blair filed a claim against the Veterans Administration arguing that delays caused by a second contractor awarded a contract by the Veterans Administration caused delays to Blair's planned early completion, which required Blair to utilize its entire contract period. The Veterans' Administration denied the claim. On appeal the U.S. Court of Claims upheld Blair's claim but the award was reversed by the U.S. Supreme Court. The Supreme Court held that while a contractor has "...the undoubted right to finish his construction work in less time ..." than required, there were no contract requirements obligating the government to assist Blair in achieving early completion. The Supreme Court reversed the Court of Claims decision on appeal and denied Blair's request for an equitable adjustment due to a delayed early completion. However, this decision gave rise to contractors submitting claims for delays to their planned early completion dates.

1/ Scott A. Beisler & James G. Zack, Jr., *Ghost Schedules – What, Why & What's the Risk?* Navigant Construction Forum™, Boulder, CO, March 2015.

2/ Contracts also may include interim milestone dates that may bear liquidated damages. For purposes of this article the focus is placed on overall project completion and associated contractor claims for overall prolonged site overhead project, early completion delays and associated damages.

3/ *United States v. Blair*, 321 U.S. 730, 64 S.Ct. 820, 88 L.Ed. 1039 (1944).

In 1958, in *Maurice L. Bein, Inc. v. Housing Authority of the City of Los Angeles*, a California court ruled that the contractor's damages should be computed from the date the contractor reasonably planned to complete its work rather than the contractually specified completion date.⁴ The project owner, the Housing Authority of the City of Los Angeles, failed to provide access to a certain portion of land and caused delay to the contractor's early completion of apartment buildings to be located on the land. The owner argued that the contractor's damages should be computed from the contract completion date. However, the court found that the damages should be computed from the contractor's earlier planned completion date because the contractor successfully proved that it would have achieved its planned completion date but for the owner caused delay. Moreover, the court determined that the contractor had provided a reasonable schedule depicting its planned early completion, which had been approved by the owner.

Court recognition of a contractor's right to finish early continued into the 1960s with the Court of Claims' dismissal of the government's argument that a contractor's claim for delay damages involving an Air Force paving project should be barred on the basis that the contractor finished on time per the contract. The contractor, Metropolitan Paving Company, claimed that it would have finished the paving project early but for the government's failure to facilitate timely testing and inspections and indifference to the contractor's efforts to achieve its early completion date. The Court of Claims determined that the contractor did not meet its burden of proof. The Court of Claims stated,

“there is not an ‘obligation’ or ‘duty’ of defendant to aid a contractor to complete prior to completion date [sic], from this it does not follow that defendant may hinder and prevent a contractor's early completion date without incurring liability. It would seem to make little difference whether or not the parties contemplated

an early completion, or even whether or not the contractor contemplated early completion. Where defendant is guilty of ‘deliberate harassment and dilatory tactics’ and a contractor suffers damages as a result of such action, we think that defendant is liable.”⁵

An additional benchmark ruling was set forth in the 1993 in *Interstate General Government Contractors v. West*⁶ in which the Court established a “three part test” for the contractor to establish entitlement to damages resulting from delay to a planned early completion even if the contractor nonetheless completes its contract work on time. The three part test is discussed later herein.

Owners have repeatedly argued that contractors are not entitled to damages for delay until after the adjusted contract completion date. Courts, however, have established that contractors can recover damages due to delayed early completion when established burdens of proof are met. The Courts have also issued decisions addressing questions concerning the need for contractors to provide notice to owners that early completion was planned; whether or not contractors are obligated to make owners aware of their interference with the contractor's early completion efforts; and whether delays to early completion merely utilized float that would otherwise have been available to the owner to absorb its own delays.

CONTRACT CLAUSES

Contracts Excluding Early Completion Schedules

In some situations, owners may not benefit from early completion of a project. Project financing requirements, maintenance needs, dates of production for a new facility, lack of budget funding to take over and operate the completed project and other costs are among a number of considerations an owner may face in not wanting the project completed earlier than contractually required. A contractor's plan to complete earlier than the contracted date disregards the owner's stated date for project

4/ 321 P.2d 753, 157 Cal. App. 2d 670 ((1958).

5/ *Metropolitan Paving Company v. United States*, 163 Ct. Cl. 420, 325 F.2D 241 (1963).

6/ *Interstate General Government Contractors v. West*, 12 F. 3D 1053, 1058-59 (Federal Circuit 1993)

completion. Therefore, in situations such as this owners may want to insulate themselves from responsibility for delay to early completion by the contractor by including provisions in the contract prohibiting recovery of damages for completion in advance of the contracted completion date.⁷

Certain contracts include requirements that a contractor's baseline schedule extend through the contract completion date, thereby preventing submission of an early completion schedule. The following is an example of such a contract clause.

“The Initial Project Schedule shall be submitted for approval within 30 calendar days after Notice to Proceed. The Initial Project Schedule shall extend from the Notice to Proceed to the contract completion date. The Initial Project Schedule shall provide a reasonable sequence of activities which represent work through the contract completion date and shall be at a reasonable level of detail.”

The same contract from which the above clause is drawn recognizes a contractor's ability to finish work earlier than contracted as the work progresses. However, the contractor's subsequent plan to finish early is then considered to be an acceleration effort by the contractor, since the contractor was precluded from depicting an early completion at the outset of the project. The clause states as follows:

“In the event a project progress schedule shows completion of the project prior to the contract completion date, the Contractor shall identify those activities

that have been accelerated and/or those activities that are scheduled in parallel to support the Contractor's “early” completion. Contractor shall specifically address each of the activities noted in the narrative report at every project schedule update period to assist the Owner's representative in evaluating the Contractor's ability to actually complete prior to the contract period.”

Under this contract the contractor gets the benefit of reduced overhead costs due to early project completion but only as a result of its actual acceleration during the project that was unreimbursed by the owner. However, the contractor could only claim delay damages from the original contract date, not the earliest date it showed in its updates. In essence, the owner benefited from the float created by the contractor's better performance.

Notice of Early Completion Schedule

In order for the contractor to recover for owner delays, it is common for contracts to require contractors to provide written notice to the owner when excusable delays are experienced. If notice is not given, and the notice provision is not waived, failure to provide notice may constitute waiver of entitlement to additional performance time and/or cost. Absent such notice, owners may be prejudiced in their ability to mitigate the delay. However, with respect to planned early completion, Courts have determined that it is not essential for contractors to inform owners of their intent to complete projects early. It is beneficial to do so, which is the authors' recommendation, as the contractor will need the owner and its design professionals to cooperate for the contractor to meet a more aggressive schedule.

Most recently, in Jackson Construction v. United States indicated that a contractor is not specifically required to inform the government that it intends to complete its work earlier than

^{7/} A No Damages for Delay clause may preclude contractor recovery of delay damages regardless of whether the delay was to an early or a contractual completion date. Considerations governing enforceability or lack thereof of a No Damages for Delay clause are not within the purview of this article. See “Fifty State Survey: Pay if Paid/Pay When Paid and No Damage for Delay”, Woods & Aitken LLP, 2011.

the contracted completion date. In the Jackson case, the court stated that “[t]he contractor is not required to notify the Government of its intent to finish early as ‘it would seem to make little difference whether or not the parties contemplated an early completion.’”⁸

Although contractor notice is not required based on Jackson, providing notice of planned early completion can be helpful in meeting a contractor’s burden of proof for entitlement to damages for delay to early completion. In *Interstate General* one element of the Court’s three part test required of a contractor to demonstrate entitlement to damages due to delayed early completion involves establishing that the contractor intended to complete early at the time of bidding for the project. As one author noted regarding *Interstate*, “Notice to the government, while not an absolute necessity, likely will play a substantial role in establishing the ‘intent’ element, at least in situations where providing such notice would not actively prejudice the contractor.”⁹

PREPARATION OF AN EARLY COMPLETION SCHEDULE

The contractor’s decision to submit an early completion schedule is a significant choice in its bidding strategy and/or execution plan and certainly one that should be thoroughly analyzed, discussed and agreed upon by contractor’s team. Before a contractor prepares an early completion schedule, whether it is in the bidding stage or after award, the contractor should carefully review the bid documents; fully understand the scope of work and the project challenges; meet with key subcontractors to obtain their buy in; and research the owner’s and design professional’s history of project performance. If the contractor has done multiple projects of this type; worked with the owner and/or design professional on previous projects successfully; and has the right personnel available for the project, it may very well be logical and wise to attempt to complete the project earlier than required. Nevertheless, the contractor should ensure that all key personnel, subcontractors, suppliers and other key parties are all aware of and committed to the early completion date, the project execution plan and the key assumptions to meet that date.

The contractor should prepare its early completion schedule in the same manner as it would prepare a baseline schedule. Work sequencing, crew loading, activity durations, shift work (if needed), material delivery, equipment needs and supervision should all be considered together when assembling the schedule. As the schedule develops, the critical and subcritical paths should be reviewed by both the field and project supervision as all parties must understand and agree to the plan. The distribution of float available in the schedule should also be analyzed. For example, if a high percentage of the schedule activities have less than two weeks float, the project may not be suitable for an early completion schedule. A schedule with multiple independent critical and subcritical paths is also not one for an early completion. Ideally, the schedule should be man loaded to determine if manpower peaks can be achieved by local labor markets. The schedule should also be cost loaded to match the payment application line items to verify that cash flow can be met by the owner and the contractor. If the contractor has concerns with these manpower and cash flow requirements, the team should revise its plan or no longer pursue the early completion. As part of its due diligence during the preparation of its early completion schedule, the contractor should perform the same types of analysis as it does for any baseline schedule. The contractor should maintain its supporting analysis and assumptions created during the bidding period as part of the documentation of its intent and ability to complete the project early. The schedule and bid estimate should be consistent, as seen in the above noted cases. Such items for the contractor to analyze and document include:

- Assumptions and basis for the development of the schedule;
- Production and productivity analyses to support the durations in the schedule;
- Appropriate resource loading to support the planned production and productivity required to meet the schedule;
- Bid estimate that comports with schedule; and,
- Correspondence from subcontractors and suppliers indicating commitment to early completion.

8/ *Jackson Construction Company v. United States*, 62 Fed. Cl. 84, 2004 U.S. Claims, citing *Wickham Contracting Co. v. United States*, 12 F.3d 1574, 1582 (Fed. Cir. 1994).

9/ David R. Wonderlick, “Claims for Delays to a Planned Early Completion Date or ‘The Project was completed on time, why am I facing a delay claim?’” *The Construction Lawyer*, Spring 2013, American Bar Association.

An early completion schedule, given its risks and rewards, should be carefully prepared and analyzed before its submission and implementation. Any delay claims made using the early completion schedule will be challenged by the owner and the Courts. The contractor should be prepared to prove its early completion schedule as well planned and achievable.

IMPLEMENTATION OF AN EARLY COMPLETION SCHEDULE

Similarly, the contractor should maintain project management tools during execution that prove it implemented and achieved, to the extent it could, its planned production and productivity rates. If the contractor is unable to demonstrate that its early completion schedule was achievable prior to owner impacts, the intent of its early completion schedule will be compromised by its actual project execution and performance. In other words, the mere submission of an early completion schedule in hopes of obtaining delay damages is insufficient and will likely be the owner's initial defense against a contractor's early completion delay claim.

After the contractor submits its early completion schedule with notice to the owner, it must implement the schedule, particularly if the owner accepted the schedule and revised the project completion date via change order, thereby placing the schedule risk back on the contractor. If the owner did not accept the schedule or accepted the schedule without changing the contract completion date, the contractor must still pursue the schedule as submitted to meet the early completion date if the early completion schedule is to be used to prove any delay damages. In order to be able to claim delay damages against the early completion schedule, the contractor must follow (or better) its early completion schedule until the point where owner delays and impacts no longer permitted the contractor to use it to manage and execute the project.

During the project, the contractor must manage to the early completion schedule as it would manage a project schedule. That is, the contractor should:

- Issue subcontracts as required to meet the schedule;
- Issue material purchase orders as required to meet the schedule;
- Review the early completion schedule during weekly subcontractor meetings to ensure conformance;
- Review the early completion schedule during owner meetings;
- Advise the owner and the design professional of short and long term needs to meet the schedule;
- Advise the owner and the design professional of potential impacts;
- Propose solutions to impacts as discovered;
- Cooperate with the owner and the design professional;
- Mitigate impacts to extent possible; and,
- Provide proper and timely notice of delays.

EARLY COMPLETION SCHEDULE V. GHOST SCHEDULE

An early completion schedule and a ghost schedule, which each have the same purpose of early completion, are different. An early completion schedule, as discussed herein, is fully transparent to all parties and submitted as the contractor's plan to complete the project. It is similar to a contractor's baseline schedule, with the exception that it reflects an earlier completion date than the contract schedule. A ghost schedule, as its name implies, is not provided to the owner. A ghost schedule is a schedule other than the official project or contract schedule. Further, a ghost schedule is not a schedule maintained in lieu of submitting a baseline schedule and schedule updates per the contract. Instead, a ghost schedule, when used by a contractor, is its plan for completing the project early without informing the owner.¹⁰

¹⁰/ Ghost Schedules – What, Why & What's the Risk? *ibid.*

LEGAL ISSUES/KEY CASES

Three Element Test – Interstate General

Since the 1940s, Courts established the right of contractors to recover for delay to planned early completion. However, the elements of proof necessary to establish entitlement to damages recovery were not well defined. In *Interstate General* the U.S. Court of Appeals for the Federal Circuit court established a three part test necessary for a contractor to establish entitlement to damages caused by delay to its planned early completion. The court stated that “... from the outset of the contract it (1) intended to complete the contract early; (2) had the capability to do so; and (3) actually would have completed early, but for the government’s actions.”¹¹

1. Intent to complete early

In order for the contractor to establish that it intended to complete work earlier than the contracted completion date, development of a schedule that is logically sound and founded upon supportable productivity, manpower and work durations can provide a solid foundation from which to establish intention and ability to finish early. An estimate that indicates a time period for general conditions and supervision costs that is less than the contract completion date conveys an intention to finish early. Contractors might also use subcontracts including completion dates consistent with the early completion schedule to demonstrate intent. By extension, contractors should discuss early completion schedules with potential subcontractors prior to entering into any subcontracts if they intend to hold the subcontractors liable for early completion delay damages.¹²

Contracts may include project specific provisions that purport to override a contractor’s intent to complete early when evaluating the first of the three part test for entitlement to early completion damages. In a 2006 ruling, the ASBCA held that a contractor failed to provide pre-bid schedules indicating its plan to complete work early and its failure to recognize contractual restrictions concerning commencement of successive phases of the work rendered its claim for delay to early completion untenable.¹³ The contractor was awarded a three phase contract to modernize living quarters at a naval facility in Hawaii. The contract enabled commencement of each successive phase of work within a

specified time frame following completion of the prior phase. The contractor contended that government caused delay to the first phase which prevented the contractor from achieving overall early project completion of all three phases. The ASBCA ruled,

“... In view of the express contractual provision limiting Kato’s ability to start a subsequent phase early and ultimately demobilize early, Kato’s assertion that it intended to finish Phase A work early and incurred unabsorbed overhead by not doing so is difficult to comprehend. ... Kato knew, no matter when it completed its Phase A work, it would have to resume contract work on a later specified date to perform a subsequent phase of its contract. Kato’s assertion that it intended to complete the work under its Navy contract early by performing “Phase A” work before a specified date, accordingly, on its face, appears to be a non-sequitur. We conclude, based upon the record before us, Kato has not shown it intended to finish early.”¹⁴

2. Capability to complete early

The second element of the three part test to proving entitlement to damages for delayed early completion requires a contractor to demonstrate its ability to finish early. If a contractor intends to finish early, it should develop a schedule that reflects the early completion and the manner in which it will be accomplished. Sometimes contractors will plan to finish early but submit a schedule that indicates use of the entire contract period. This

11/ Ibid.

12/ *E&B Specialties Co. v. Phillips*, 523 P.2d 1357 (N.M. 1974).

13/ *Appeal of Kato Corporation*, ASBCA No. 51462, May 18, 2006.

14/ Ibid.

approach can undermine the ability to demonstrate a plan for early completion unless a ghost schedule is employed as the contractor's actual management tool for the project, which can result in additional issues for the contractor including subcontractor management issues.

A contractor's claim on behalf of its subcontractor for government interference with the subcontractor's planned early completion was denied by the Armed Services Board of Contract Appeals. The Army Corp of Engineers awarded a contract to Fru-Con Construction Corp to rehabilitate a dam in West Virginia. Fru-Con submitted a schedule that depicted the entire five year time period allotted for the replacement of multiple roller gates. Fru-Con subcontracted with Noell, Inc. to fabricate and install the new roller gates. A government design change altered Noell's planned installation method and Noell did not complete its work within its plan.

The government argued that Fru-Con was obligated to demonstrate intent and ability to complete its work early. This obligation extended to the work of its subcontractor Noell when Fru-Con passed through Noell's claim to the government. The Board concluded that Fru-Con could not prove intent since Fru-Con's five-year schedules did not base its work performance on Noell's three year performance schedule for Noell's own planned early completion. Moreover, Noell failed to demonstrate its ability to perform its work in its planned three year time period. Its schedules did not allow recognized non-work time periods due to holidays or make allowances for inclement weather. Coupled with self-caused roller gate fabrication and delivery delays, Noell could not have met its three year performance schedule absent government-caused delays.^{15,16}

3. Ability to finish the project early at the time of the delay

The third element of the Interstate three part test to prove entitlement to recover early completion delay damages requires a contractor to prove that it had the ability to achieve early completion at the time it experienced excusable delay. In another Armed Services Board of Contract Appeals case involving the appeal of Emerald Maintenance, Inc., the Board ruled that Emerald failed to demonstrate it was capable of achieving early completion at the time the delaying event(s)

arose. Emerald maintained that it planned for and could have completed its military housing renovation work at a Naval Air Facility in California early but for interference caused by the government. The Board determined that Emerald's schedule durations were inconsistent with its bid estimate labor hours and material fabrication time periods were not considered in Emerald's schedule. Therefore, the Board concluded Emerald was incapable of achieving early completion notwithstanding alleged government-caused delays.¹⁷

Reconciliation with Schedule Incentive clause

Many State transportation contracts include incentive and disincentive clauses in their contract. If a contractor completes early, it is entitled to an early completion bonus on a pre-determined dollar amount per day that a contractor completes ahead of the contracted completion date. Conversely, the contractor is assessed Liquidated Damages or actual damages for each day that they complete work later than the contracted completion date.

The use of incentive and disincentive clauses provides a common basis from which early completion delay claims can arise. The presence of these clauses sometimes coincides in contracts with scheduling clauses that mandate submission of a baseline schedule for a project that includes work performance through the specified contract completion date. Such clauses seek to limit State liability for delay to completion dates earlier than the contracted date. Such circumstances often give rise to creation of ghost schedules by contractors that are ultimately used to demonstrate their plan and manage their work to complete early while submitting a separate schedule for contract compliance purposes, as discussed above.

WHO OWNS THE "FLOAT"?

Contract provisions may allocate ownership of float to one party but more typically state that float may be absorbed by either party on a first come, first serve basis, which is generally the case without such a provision. Where a clause exists that allocates ownership of the float to one party or the other, it likely will affect early completion delay claims since the balance of schedule has shifted.

^{15/} *Appeal of Fru-Con Construction Corp.*, ASBCA No. 53544, April 14, 2005.

^{16/} Based Fru-Con the authors recommend that subcontractors ensure their plans for early completion are made known to the owner through the general contractor or construction manager when possible and, further, that a contractor's overall project schedule reflects performance time frames consistent with the subcontractor's own early completion schedule.

^{17/} *Appeal of Emerald Maintenance, Inc.*, ASBCA No. 43929, July 16, 1998.

A schedule that reflects an early completion date would, in effect, depict float to the contract completion date. Owners who do not wish to expose themselves to possible liability for delays to the early completion date may include language that states the owner owns the float. Furthermore, owners may issue a change order to the contractor that reflects the early completion date as the new contract completion, which places the risk of completion back on the contractor. Absent a clear allocation of float ownership in contract requirements Courts and Boards have reached decisions that contractor claims concerning early completion are barred by clauses that enable float to be used by either party in the best interests of a project completing on time. Conversely, a Board ruled that absent an express provision limiting or eliminating government liability for an early completion delay claim, the government's reliance on contract provisions requiring a contractor to develop a project schedule depicting the contract completion date and allowing liability for project delays only to the extent that the delay exceeded available schedule float was not sufficient to limit government liability. Moreover, the Board noted that contract provisions did not preclude early completion despite the opportunity for the government to have done so.¹⁸

PROS/CONS OF EARLY COMPLETION SCHEDULES

Since there is both risk and reward when a contractor submits an Early Completion Schedule, there are advantages and disadvantages in its use for both the contractor and owner

- Benefits to Contractors -
 - Early completion of the project;
 - Reduced costs passed on to owner;
 - Ability to transfer personnel to planned future projects;
 - Early release of bonds;
 - Opportunity to complete a successful project with its subcontractors and suppliers; and,
 - A satisfied owner (at least in most cases).

- Benefits to Owners -
 - Lower project cost;
 - A project completed earlier than originally required (unless specifically stated that early completion is not allowed);
 - Use of project earlier; and,
 - Potential earlier revenue stream from project.
- Risks to Contractor -
 - Shorter performance period;
 - Owner may issue change order revising contract date to proposed early completion date;
 - Places schedule risk back on contractor;
 - Burden of proof that early completion was achievable;
 - Subcontractors or suppliers added after bid that cannot support early completion; and,
 - Assumptions in early completion schedule may be wrong or compromised by unforeseeable project conditions (excusable, but non-compensable).
- Risks to Owner -
 - Potential delays to an accepted early completion date may disrupt corporate planning;
 - Potential delays to accepted early completion date may disrupt corporate planned revenue stream in business plans and negatively affect corporation;
 - Lack of staff (including design professional) to support submittal approvals, requests for information, and inspections to support early completion schedule; and,
 - Lack of budget to assume care, custody, control and operation of a facility completed earlier than planned and contracted.

The parties, particularly the owner, may need to adjust their project plans to support the contractor's early completion schedule. In addition, cooperation between the parties takes on a greater importance, as any discord among the parties, be it the owner and the design professional, the contractor and the owner, or the contractor and one of its suppliers or subcontractors, could decrease the probability of meeting the earlier date.

^{18/} *Maron Construction Company v. General Services Administration*, GSABCA No. 13625, 98-2 BCA 1998.

In contrast to ghost schedules, an Early Completion Schedule has different benefits and risks. The most positive difference is that there will be no dispute that the contractor intended to complete earlier than the contract date. The contractor formally submitted its early completion schedule, provided written notice and both the contractor and owner administered the project based on the early completion schedule.¹⁹

RECENT CASES

Strand Hunt Construction

Due to a party's lack of attention to the formation and content of basic project documentation, such as change order related information and Notice to Proceed documentation, misunderstandings between parties can occur and parties can act in ways that inadvertently alter the terms of a contract resulting in damages and subsequent disputes. A recent case provides an example of how a contractor's intent to finish early was undermined by its lack of attention to project documentation officially issued during the contract period that resulted in seven years of litigation before receiving a ruling for the contractor to avoid liquidated damages for delays computed against its planned early completion date.

Strand Hunt Construction Inc. ("Strand Hunt") proposed to design and construct a Joint Security Forces Complex in Alaska. In its proposal, Strand Hunt planned to complete the project in 570 calendar days, 60 days ahead of the solicitation duration of 630 days. Strand Hunt established an even more aggressive goal of completing the project by July 1, 2005. The actual project completion date should have been September 25, 2005. Strand Hunt did not notice that the project Notice to Proceed ("NTP") indicated that the entire works should be complete and ready for use by July 1, 2005; that is, the government listed Strand Hunt's early completion date as the contract date. Moreover, Strand Hunt failed to notice that two subsequent contract modifications were issued by the government and executed by Strand Hunt for time extensions, which indicated the July 1, 2005 completion date as the original contract completion. When Strand Hunt experienced delays to its performance, and the project actually

completed on February 14, 2006, Strand Hunt sought relief from what it understood to be the contract completion date of September 25, 2005.

Strand Hunt faced a possible outcome that by accepting the NTP and executing two contract modifications containing the erroneous completion date, it would be held to have agreed to accept the contract change to the early July 1, 2005 date. The majority opinion of the Board ruled that Strand Hunt had agreed to complete the work by July 1, 2005 and that any subsequent modifications were without basis for lack of consideration. However, Strand Hunt was granted a time extension due to government caused delay and avoided liquidated damages due to delayed completion measured against the July 1, 2005 completion date.²⁰

Gilchrist Construction Company

A contractor was entitled to use a CPM schedule to prove delay damages even though the schedule contained projected, not actual, performance quantities and the project was not delayed. In fact, the project completed early because the contractor changed some work sequences and accelerated its performance. The Court's key ruling was confirmation that, "...as a matter of custom and practice in the construction industry, a contractor has a right to finish early."

Gilchrist Construction Company ("Gilchrist") entered into a highway construction contract with the Louisiana Department of Transportation and Development ("DOTD"). Although Gilchrist completed the project 130 days early and received an early completion bonus, Gilchrist submitted a \$4 million delay claim due to DOTD's "...gross miscalculation of the quantity of embankment required to perform the project properly." A trial court ruled in favor of Gilchrist. On appeal, the primary question was whether Gilchrist properly proved that it incurred delay damages.²¹

Gilchrist claimed that the delay was caused by the extra embankment quantities and lime needed. Gilchrist installed an additional 60,000 cubic yards of embankment material, a 40%

19/ *Ghost Schedules – What, Why & What's the Risk?* ibid.

20/ *Appeal of Strand Hunt Construction, Inc.*, ASBCA No. 55905, April 2013.

21/ *Gilchrist Constr. Co., LLC v. State of Louisiana*, 2015 La. App. Lexis 483, (March 9, 2015).

increase over the contract quantities. Although DOTD paid the contract unit price for the additional materials, Gilchrist claimed that it sustained further damages due to delay (costs of idle equipment and stockpiled materials). Gilchrist submitted a series of impact schedules to demonstrate 180 days of delay due to the added quantities. Furthermore, there was indication during performance that Gilchrist planned to finish early and there was also trial testimony that Gilchrist accelerated its work because DOTD refused to grant any time for the added quantities.²² Gilchrist also proved it performed its embankment work at a faster pace than its approved baseline schedule. With the extra quantities and no time extension from the owner, Gilchrist elected to accelerate its work. Gilchrist argued, and the Court agreed, that had it accelerated its work as it did (plus its original intent to finish early), but without the additional 60,000 cubic yards, it would have reduced its actual duration by 180 days. Thus, even though Gilchrist completed the work early despite the extra quantities, they had incurred 180 days of delay. The Appeal Court upheld the idle and stockpiled material costs, but vacated the award of home office overhead as none was actually incurred. An interesting side note to this case is that an early completion schedule was never prepared yet delay damages against an actual early completion date were awarded.

CONCLUSION

While early completion schedules, whether an official project document or a ghost schedule, and their associated risks and resulting disputes have existed in the construction industry for decades, Jackson added a new wrinkle to the use of early completion schedules and the resolution of disputes concerning early completion delays. Although Jackson noted that a contractor does not have to advise the owner of its intent to finish early, it is the authors' recommendation that contractors provide notice as proof of its intent to finish early, which was also recommended in Jackson. It is also good practice for the contractor to have supporting documentation and analysis in its bid files, which was also noted in Jackson.

Nevertheless, the submission and implementation of an Early Completion Schedule requires the contractor to be vigilant in both the bid and post award period when formulating the production and productivity assumptions included in the

schedule, to obtain commitments from subcontractors to support the early completion and to perform a thorough and well vetted list of assumptions that formed the basis of the schedule. Thereafter, once the contractor implements its early completion schedule, it must adhere to the basis of the planned production and productivity rates and buy out its subcontractors and deliver material per its bid to meet the plan. During weekly project meetings with the owner, the design professional and subcontractors, the contractor must clearly identify its needs from the owner and the design professional and provide notice of actual or potential impacts to the schedule. In addition, just like in any contract, the contractor maintains its obligation to mitigate impacts. Finally, when submitting time extension requests during or after the project, the contractor must submit the proper time impact or forensic schedule analyses and documentation to support its requests.

Early completion schedules remain a viable option for a contractor who believes it can complete the work earlier than required by the contract. However, it is another risk in a construction industry environment that by its very nature already contains many unknowns. Thus, the contractor should proceed with caution and evaluate its risk and potential reward before submitting and committing to an Early Completion Schedule. For owners, regardless of whether the Early Completion Schedule is accepted, the owner and its agents should support the contractor's efforts to pursue its schedule while meeting their obligations under the contract.

In conclusion, the authors believe that early completion schedules will remain an option for a contractor and disputes will continue regarding their administration, execution and resolution. However, contractors, owners and the Courts now better understand the issues that can arise. Thus, the industry is better equipped to implement and manage early completion schedules. Used properly, early completion schedules can provide benefits for both contractors and owners. Nevertheless, the parties should recognize their responsibilities when an early completion schedule is used. Finally, even if the contractor decides not to use an official early completion schedule but still would like to complete early, the contractor has the option of using a ghost schedule, with or without the owner's participation.

^{22/} Gilchrist's claim was essentially a constructive acceleration claim based on owner delays and the owner's refusal to grant appropriate time extension(s).

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