

When Is a Project Delay Material and Actionable?

Prepared by:
Rick Erickson
Snell & Wilmer L.L.P.



LORMAN[®]

Published on www.lorman.com - June 2022

When Is A Project Delay Material and Actionable?, ©2022 Lorman Education Services. All Rights Reserved.



Lorman Education Services is a leading provider of online professional learning, serving individuals and teams seeking training and CE credits. Whether you're looking for professional continuing education or an enterprise-wide learning and development solution, you will find what you need in Lorman's growing library of resources.

Lorman helps professionals meet their needs with more than 100 live training sessions each month and a growing collection of over 13,000 ondemand courses and resources developed by noted industry experts and professionals.

Learn more about Lorman's individual programs, economical All-Access Pass, and Enterprise Packages:

www.lorman.com

When Is A Project Delay Material and Actionable?

By Rick Erickson

Welcome to 2022! This year, the construction industry will undoubtedly reflect on the last two years as unprecedented times plagued by construction project delays. The COVID-19 pandemic contributed to the suspension of work and closure of construction projects worldwide in 2020. The end of 2021 brought additional delays caused by an inexplicable clog in the supply chain of construction materials. The combined impact of these events on project milestones and completion deadlines led our clients to ask, with unusual and particular urgency, who is liable for such delays and how do contracting parties lessen the consequences from such unexpected and uncontrollable delays.

Granted that project delays are nothing new or unusual. They were common enough before inflation caused shipping complications and the pandemic decimated the construction labor force. All delays, whatever the source, variably cause loss to all players on a construction project. But not all delays matter when it comes to claims and remedies available to the contracting parties in dispute resolution, where the determinative focus is on material delays impacting the entire project and on delays the claimant can credibly prove.

Most, if not all, jurisdictions interpret actionable delays from the contract documents for the project. The contract is definitely where you should start before pursuing any delay remedies. Delay remedies may be a time extension only, or a

time extension plus your additional general conditions. Some delay remedies may be barred by the contract's express terms and may be enforced adversely by the courts when such contract terms are indisputable. See *Quinn Constr. v. Skanska USA Bldg., Inc.*, 730 F. Supp. 2d 401, 411 (D.C. Pa. 2010) (enforcing the subcontractor's contractual waiver of claims for delay and disruption damages). On the other hand, delay damages that are expressly allowed by the contract—like overtime necessitated by the delays—are usually actionable and recoverable. *Id.* However, not only the contract terms, but applicable law, may affect the outcome.

As an example, other delay remedies may not be expressly allowed by the contract but may be recoverable if they were sustained on the critical path of the project schedule and were not caused by the claimant themselves. The term "critical path" is familiar enough as an industry term but is often mistaken as a determinative legal principle. Consider this clarification of critical path in *Quinn*:

"Critical path" is a term of art, not a legal concept; a project's critical path is simply a collection of those construction tasks that cannot be delayed without delaying the entire project. 730 F. Supp. 2d at 407 (citing 5 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 15:120 (West) (case citations omitted). ... While [Critical Path Methodology] has generated a technical terminology, the legal requirement that it is used to analyze is general and commonsensical: a contractor must prove that a delay affected not just an isolated part of a

project, but its overall completion. 730 F. Supp. 2d at 408; see also *Cortinas Painting & Rest., Inc. v. Corp Inc., Constr.*, 2017 WL 4640326 *7 (Wash. App. 2017) (“[c]ritical path methodology analyzes the legal requirement that a delay affects overall completion of a project.”) (citing *Morrison Knudsen Corp. v. Fireman’s Fund Ins. Co.*, 175 F.3d 1221, 1233 (10th Cir. 1999)).

Thus, it is important to distinguish your burden of proving a material and compensable delay from the critical path methodology. Critical path methodology is one means of proving that the delay is actionable, ideally with reliable expert testimony and contemporaneous evidence showing impact on the overall project schedule completion date.

Causation, on the other hand, is a key legal element that must be proven along with facts establishing delays on the critical path. A compensable delay is usually a delay caused by someone else on the project, so a contractor cannot cause its own critical path delays and credibly prove it is entitled to delay damages. If the contractor, for example, was carelessly late in ordering its materials, the contractor will have a much harder time proving that supply chain complications were to blame for blown completion dates on the critical path. In addition, a project owner that fails to implement or require a safety protocol for protection of all project personnel from the coronavirus cannot usually credibly prove it was really the contractors who caused an outbreak and indefinitely shut down the project.

These commonsense principles governing delay claims equally depend upon comprehensive and timely documentation of the delay. Written correspondence confirming delay causes and consequences should be contemporaneous and immediate. Delay documentation should also be sufficiently detailed and timely to put key players on notice that the delay will impact the critical path, further citing specific contractual provisions that trigger available remedies for the delays. Conversely, after-the-fact and imprecise documentation of the delay carries little weight with judges, juries, and arbitrators and tends to suggest that the delay is neither material nor actionable. Proving a material and actionable delay, therefore, usually requires favorable contractual terms, critical path impact, favorable law, and believable documentation demonstrating timely notice and no fault for the delay.



LORMAN[®]

📍 2510 Alpine Road Eau Claire, WI 54703

💻 www.lorman.com ☎ 866-352-9539 ✉ customerservice@lorman.com



The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.