

Protect Yourself Against Sub Delays

by Quenda Behler Story

As a basic rule, the subcontractor is supposed to put enough time and money into a bid so that he can deal with foreseeable job-site delays and finish on time. If he has to schedule overtime or put on more crew to do that, that's money out of his pocket. If he *can't* finish on time, he may even owe you, the GC, or the clients for costs you or they incur as a result. End of story?

No — because life, let alone the law, is never that simple. There are important exceptions to that basic rule.

Exceptions to the Rule

If a delay is both unforeseeable and nobody's fault, such as the discovery of an unknown hazardous materials problem, as a general rule the courts will give everybody more time. The courts say that because this is an "excusable" delay, the sub gets more time, and if he needs it, the contractor also gets more time.

But if the delay was somebody's fault, it may be classified as both excusable — for somebody else — and "compensable."

A compensable delay. Suppose a GC has Frank the Foundation sub scheduled to start on April 1, right after Acme Excavation finishes digging the foundation. But Frank can't start on the 1st because Acme isn't done. The delay might look like Acme's fault, but the reason Acme isn't finished on time is because the GC failed to apply for his earth-moving permits so that Acme could start on time. That delay would probably fall into the compensable category.

Compensable means that Frank would be entitled to damages for the money the delay cost him, because the contractor had a duty to coordinate and

schedule the work so that Frank could do his portion of the job as scheduled.

It isn't just that the delay is not Frank's fault. Bad weather, equipment breakdowns, and no-show employees are not his fault either, but he's responsible for any delays caused by those things. He's responsible because those are all foreseeable delays (see *Legal Adviser*, 7/01). They might not happen, but it's not going to surprise anyone familiar with construction if they do.

What's different about this delay is that it wasn't foreseeable at the time Frank agreed to the subcontract and the completion date. Frank is not required to foresee that the contractor might not get the proper permits to keep the job moving.

So what is Frank entitled to in this situation?

More time, and possibly more money. To begin with, Frank is entitled to an extension of the contract date. The usual legal rule of thumb is that he is entitled to a "reasonable amount of time."

But just getting more time doesn't necessarily solve all of Frank's problems. Suppose he's scheduled to begin work on another job on April 17. He'll probably have to pay his crew overtime to finish your job in time to start his next job as agreed. Is he entitled to reimbursement of any of that overtime money? Yes.


The Other Subs

If a sub doesn't meet his completion date because of his own poor planning, that sub may owe you delay damages, but you may owe delay damages to your other subs who couldn't start on time because of him. The sub who caused the

delay may or may not be ordered by the court to reimburse you for those costs — but even if he is so ordered, he may not be collectible.

Sub A should not have agreed to a completion date he couldn't meet, but, as far as the other subs are concerned, you shouldn't have agreed to that date either. As the contractor, you're supposed to know how long the different parts of a construction project will take and be responsible for your subs sticking to the schedule.

To complicate matters further, one of your other subs may decide that he can't do your job because your job site isn't ready for him as a result of sub A's delay. If he waits around until it is ready, he won't be able to get to his next job on time. Is he in breach of contract? Probably not, because you breached it first by not having your job site ready for him.

The bottom line. As the contractor, you have a duty to your subs to schedule them so that they can finish on time. So when you set up a schedule for your subs, talk to them realistically about the job calendar. Don't accept a schedule just because you'd really like it to happen that way. Remember that if your sub can't finish by when he said he could, the buck can stop at your desk. Even if it doesn't, a job schedule that works will always be worth more to you than any number of winnable lawsuits against a sub who was late. 

Quenda Behler Story is the author of A Contractor's Guide to Construction Law (Craftsman Book Co.). She and her husband are partners in a remodeling company in Okemos, Mich.