

PUBLICATION

Bricks In The Wall: Your Contractor Delayed Completion of the Project: What Next?

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How many times has your project not ended on schedule? Has some other contractor on the project ever affected your ability to perform and delayed your work? It is not surprising that delays often occur on a construction project. These delays arise for a variety of reasons: weather, materials aren't shipped on time, a contractor botches his scope of work. For some delays, you'll get paid or you'll have to pay someone else; for others, no one gets paid. Some delays will give you an extension of the contract time; some will not. Let's take a look at some issues that will help you begin to analyze what to expect when a project is delayed, and in particular, whether anyone on the project may recover damages for the delay.

What should you do when your contract does not have a specific completion date?

There is no substitute for knowing your contract. It is the first thing that everyone looks to when problems start to build on a project. But let's look at a situation that may seem odd: your contract does not contain a specific completion date, the project is not required to finish by a date certain, or you aren't given an amount of time to do your work. Can you still "delay" the project?

Yes, you can delay the project if you do not complete your work within a reasonable time. But what is a "reasonable" time? While it will vary on a project-by-project basis, some things to consider include:

- Your scope of work - what are you responsible for?
- The relationship between the contracting parties - do you get along?
- What were the parties' intentions at the time the contract was entered - did anyone discuss goals about how fast the project should move or when it should end?
- Communications between the parties about how the project is progressing - did the subcontractor tell the general that he was having problems getting materials and the general tell him not to worry about it?
- Overall circumstances surrounding your efforts to perform - did you actually work at a good pace and attempt to keep to a schedule?
- Overall circumstances on the project - did someone else contribute to the delay?

Does your contract contain a "no damages for delay" clause?

One of the things you may be seeing in your contracts is what is called a "no damages for delay" clause. The idea behind it is that, during the negotiation phase of drafting the contract, the parties planned ahead for addressing delays that could occur and allocated the risk in the contract terms and price. This may seem harsh given the various kinds of delays that might occur, but if you sign the contract, it binds you. A "no damages for delay" clause is accepted in construction industry contracts.

Even if you have such a clause in your contract, is there still no chance of recovering damages caused to you by someone else's delay? No; you may still recover some damages. A "no damages for delay" clause is usually strictly interpreted. This means that any variation between what really happened on the project and what the contract actually says will be very closely scrutinized. For example, you may be able to recover damages caused by delay if the delay that occurred:

- was not contemplated by the parties at the time the contract was entered - does the contract identify specific kinds of delay for which recovery is not allowed?
- resulted from an abandonment of the contract - did the contractor leave the site?
- was caused by bad faith - did the contractor intentionally delay the project?
- was caused by active interference by the party from whom you seek delay damages - did the party simply get in your way and impede your progress?

What types of damages may you recover for a delay claim?

You generally will be able to recover damages that are the normal and foreseeable result of a breach of contract. These are additional or extra expenses that you reasonably expect to see, such as:

- increased payroll;
- increased material costs;
- costs arising because of lost efficiency;
- additional costs associated with extending bonds or insurance; and
- overhead.

Is it possible that you may incur substantial delay damages and not have a "no damages for delay" clause in your contract, but still not recover damages for the delay?

Absolutely. Be aware of the notice requirements in your contract. In at least one Tennessee case, a subcontractor's recovery of delay damages was barred when the subcontractor failed to follow the notice provisions of the general contract documents incorporated into the subcontract.

Portland Utilities Construction Co., LLC v. Chase Creek, LLC, 2004 WL 746602 (Tenn. Ct. App. April 7, 2004); *Thomas & Associates, Inc. v. The Metropolitan Government of Nashville*, 2003 WL 21302974 (Tenn. Ct. App. June 6, 2003); *White's Electric, Heating, Air and Plumbing v. Lewis Constr. Co.*, 1999 WL 605654 (Tenn. Ct. App. Aug. 11, 1999); *Moore Constr. Co., Inc. v. Clarksville Dept. of Electricity*, 707 S.W.2d 1 (Tenn. Ct. App. 1985).

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