Don’t Let the Poppies Slow You Down – Flow-down, Delay and Liquidated Damages Provisions

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I. Introduction

Call them what you like: flow-down clauses, flow-through clauses, conduit clauses, incorporation by reference clauses – they are important, especially when it comes to provisions related to claims and delays on a construction project. Although the specific terminology is not critical, the contractual obligations these clauses shift or flow-down to subcontractors can be. The purpose of the flow-down clause is simple – to ensure that subcontractors are equally bound by the terms of the prime contract and assume the same obligations and duties to the owner as the general contractor, without creating privity between the owner and the subcontractors. Plum Creek Wastewater Auth. v. Aqua-Aerobic Sys., Inc., 597 F. Supp. 2d 1228, 1233 (D. Colo. 2009) (“Flow down clauses are designed to incorporate into the subcontract those provisions of the general contract relevant to the subcontractor’s performance.”). Owners typically require general contractors to include provisions in subcontracts that incorporate all the prime contract terms and conditions, but even when owners do not mandate flow-down clauses, the modern trend is to incorporate the prime contract into most subcontracts.

These clauses arise out of the project owner’s desire that all project participants agree to perform their contracted work in conformance with the same standards and under the same obligations. General contractors want to be able to pass down duties and responsibilities, as well as liability for damages, to the lower tier subcontractors and suppliers who are actually performing the work and/or supplying the materials. Similarly, general contractors want subcontractors to be responsible for the specified warranty obligations for their respective trades and to ensure the subcontractors are contractually bound to perform the work in accordance with the owner’s design and specifications. In short, these clauses ensure the subcontractor is bound to the contractor to the same extent the contractor is bound to the owner. General contractors are also motivated to
limit subcontractors’ claims to those that it can pass through to the owner. These are known as “pass-through claims” and are those that the owner would be responsible for or has agreed to compensate. For example, if the owner does not compensate the general contractor for remobilization and delay costs due to design changes, the general contractor does not want to have to pay its subcontractor for such costs.

The following is an overview of typical contract flow-down language and a sampling of specific issues on which contractors should direct their focus as it relates to these provisions as well as a closer look at delays and risk shifting provisions that can be critical to an unwitting subcontractor that did not know it assumed such liabilities.

II. Flow-Down Clauses

Flow-down clauses are included in all major industry form agreements. In large part, the flow-down provisions of standard contracts such as the American Institute of Architects (“AIA”) and Consensus Docs are similar. The AIA A201-2007, General Conditions of the Contract for Construction, which is typically incorporated into the AIA standard forms of agreements between owners and contractors, addresses flow-down requirements by stating the following:

§ 5.3 SUBCONTRACTUAL RELATIONS

. . . , the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities, including the responsibility for safety of the Subcontractor’s Work, which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement that may be at variance with
the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

In general terms, this AIA contract language requires the contractor to flow down the terms of the prime contract to each subcontractor.

Similarly, Article 2 of the AIA A401-2007, “Standard Form of Agreement Between Contractor and Subcontractor,” complements the A201 through the following language:

The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201-2007 apply to this Agreement pursuant to Section 1.2 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor that the Subcontractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.

This AIA subcontract language incorporates terms from the prime contract that are relevant to the subcontractor’s work but also specifically states that the subcontract provisions take precedence over any inconsistent language in the prime contract. When using this contract form, contractors should engage in the exercise of comparing the subcontract and any exhibits or supplementary language with the prime contract to address any inconsistencies and ensure the risks, responsibilities and obligations of the prime contract are properly flowed down.

Similar to the AIA A201 requirements, Consensus Doc 200, “Agreement and General Conditions Between Owner and Constructor (Lump Sum),” requires the general contractor to flow down relevant prime contract provisions to subcontractors and suppliers as follows:

5.2 BINDING OF SUBCONTRACTORS AND SUPPLIERS Constructor agrees to bind every Subcontractor and Supplier (and require each Subcontractor to so bind its subcontractors and significant suppliers) to the Contract Document’s applicable provisions to that portion of the Work.
The Consensus Doc 750, “Standard Form of Agreement Between Contractor and Subcontractor” is coordinated with Consensus Doc 200’s requirements by providing as follows:

3.1 Obligations. The parties are mutually bound by the terms of this Agreement. To the extent the terms of the prime agreement apply to the Subcontractor’s Work, then Constructor assumes toward Subcontractor all the obligations, rights, duties and redress that Owner under the prime agreement assumes toward Constructor. In an identical way, Subcontractor hereby assumes toward Constructor all the same obligations, rights, duties and redress that Constructor assumes toward Owner and Design Professional under the prime contract. In the event of an inconsistency among the documents, the specific terms of this Agreement shall govern.

This Consensus Doc subcontract language generally incorporates prime contract terms but also states that the subcontract terms take precedence over the prime contract terms in the event of inconsistency between the documents. As recommended above, the contractor should take care to ensure there are no inconsistent terms between the prime contract and subcontract that could lead to the subcontractor not assuming the same rights, duties and redress as the contractor under the prime contract.

Most proprietary general contracts and subcontracts contain flow-down clauses as well. The following is an example of a large general contractor’s standard subcontract flow-down clause:

The Subcontractor has been given the opportunity to review the Principal Contract and has received all of the information it needs concerning the Principal Contract. The Subcontractor shall fully and faithfully comply with the Principal Contract insofar as it relates to the Work and hereby assumes all the obligations and responsibilities, which the Construction Manager, by the Principal Contract, has undertaken toward the Owner. The Construction Manager shall have the same rights and remedies against the Subcontractor as the Owner under the terms and provisions of the Principal Contract has against the Construction Manager, with the same force and effect as though every such duty, obligation, responsibility, right or remedy in the Principal Contract were set forth herein in full. Provided however that Construction Manager may also avail itself to any additional remedies set forth in this Subcontract, or that exist at law and/or in equity. Without limiting the generality of the foregoing, all Work shall be installed and completed by the Subcontractor in accordance with the Contract Documents as defined in Paragraph . . . herein.

Notably, this provision does not address the order of precedence in the event the subcontract terms are inconsistent with the prime contract terms.
Regardless of which form is used, subcontractors should request copies of the prime contract and all incorporated documents before entering into the subcontract. Many subcontract bid processes put the burden on the subcontractor to request or even go and inspect the prime contract. Subcontractors should be advised to pursue obtaining copies of the prime contract to properly assess the project risks. Once obtained, the subcontractor should pay specific attention to the flow-down of prime contract terms such as liquidated damages, no-damages-for-delays, payment, safety, changes in the work, insurance requirements, termination, claim and notice requirements, dispute resolution, design delegation, delays, and the owner’s right to take over or supplement the work.

Sometimes general contractors refuse to provide the prime contract to the lower-tier contractors, claiming it is confidential or contains proprietary information. In such an instance, the subcontractor should request that confidential information such as pricing be redacted from the prime contract and insist a copy is provided. It can prove to be much more difficult to obtain a copy of the prime contract after a claim or dispute arises. Arguably, if the general contractor refuses to provide the prime contract or other incorporated documents after a request is made, the subcontractor should not bound by the provisions in the prime contract. A subcontractor should send a letter or email requesting the prime contract so they have a paper trail in the event they are accused of not complying with the prime contract.

In addition, subcontractors should determine whether the flow-down clause is reciprocal so that the subcontractor not only assumes the contractor’s obligations to the owner but also receives the benefit of the owner’s obligations to the contractor. Put another way, if the subcontractor is going to assume duties and obligations of the general contractor, the subcontractor
should also obtain the general contractor’s rights and remedies against the owner. The above-referenced form contracts (AIA and Consensus Docs) contain reciprocal flow-down clauses – the subcontractors assume the duties and obligations, but also obtain the rights. On the other hand, the proprietary contract cited above flows down obligations only, not rights, to the subcontractor. The subcontractor should be aware of whether the subcontract includes obligations, rights, or both and assess the relevant risks. Subcontractors should also take care to flow-down the same provisions to their second-tier subcontractors and suppliers.

Likewise, as noted above, subcontractor should closely review order of precedence provisions contained in the flow-down clauses or elsewhere. Where the prime contract and other contract documents flow down to the subcontractor, sometimes the incorporation creates a direct conflict between the terms of the subcontract and the prime contract. This often happens when the subcontractor is permitted to attach an addendum or additional terms and conditions such as the subcontractor’s proposal. Do not just assume one document trumps the other, or that the subcontractor’s proposal or addendum will prevail. Review the order of precedence clause to determine which document controls in the event of a conflict. If there is a patent conflict between contract provisions, it should be resolved prior to execution of the agreements to avoid later disputes over which document or provision prevails, especially in the absence of an order of precedence clause. It is possible that the prime contract or other contract documents will become part of the subcontract, even in the absence of an obvious flow-down clause. This often occurs by virtue of a simple incorporation by reference statement. Quite simply, the subcontract may include “the agreement between owner and contractor is hereby incorporated by reference.” For language such as this, what terms are specifically “incorporated by reference”? That can be a source of disagreement later. Also, look closely at the subcontract’s definition of “Contract Documents.”
Although the AIA documents contain a true flow-down clause, they also contain an incorporation by reference provision. Article 1 of the AIA A401 “Standard Form of Contract Between Contractor and Subcontractor” provides:

The Subcontract Documents consist of (1) this Agreement; (2) the Prime Contract, consisting of the Agreement between the Owner and Contractor and the other Contract Documents enumerated therein, including Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of the Agreement between the Owner and Contractor and Modifications issued subsequent to the execution of the Agreement between the Owner and Contractor, whether before or after the execution of this Agreement, and other Contract Documents, if any, listed in the Owner-Contractor Agreement; (3) other documents listed in Article 16 of this Agreement; and (4) Modifications to this Subcontract issued after execution of this Agreement. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein.

This AIA subcontract language defines what specific parts of the prime contract are incorporated by reference.

The difference between flow-down and incorporation provision has been aptly described as follows:

An incorporation by reference provision is generally broader than a flow-down clause. Where a flow-down clause will typically seek to create the means for a particular obligation between contractors of one tier to specifically flow-down to lower tiers, an incorporation by reference provision will typically seek to make all rights and obligations between the higher tier parties apply, as a whole, to the lower-tier relationship.


As this author describes, the incorporation by reference is much broader than flow-down provisions.

III. Key Liability and Risk Shifting Clauses that can be Flowed Down: Delays and Liquidated Damages
As explained above, lower tier subcontractors and suppliers can unwittingly take on extreme risks through flow-down provisions. Some that arguably carry the most risk are the delay and liquidated damages clauses.

A. Delays and No-Damage-For-Delay Clauses

Flow down provisions can help intermediate parties pass liability for delays to the responsible parties, especially if these provisions contain reciprocal agreements. When an owner claims a project has been delayed, the general contractor may pass the responsibility for the delay, including any associated liability and damages, to any lower-tier contractors and subcontractors that allegedly caused the delays. As a result, the general contractor ultimately may avoid liability to the owner for liquidated damages or other delay damages.

Conversely, the flow-down clauses can limit the general contractor’s exposure to delay claims from its own subcontractors attributable to the owner’s actions on the project by limiting the subcontractor’s claims to only those damages that can be recovered from the owner. See THE CONSTRUCTION CONTRACTS BOOK 9 (Daniel S. Brennan ed.), American Bar Association (2004).

The AIA A201 General Conditions expressly states that a contractor has the ability to recover delay damages.

§ 8.3 DELAYS AND EXTENSIONS OF TIME

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner; or by changes ordered in the Work; or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor’s control; or by delay authorized by the Owner pending mediation and arbitration; or by other causes that the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.
This AIA contract language provides that the contractor could be compensated for delay.

In contrast to the AIA contract language, especially after the economic downturn when contractors lost substantial bargaining power with owners, the contractor’s right to recover delay damages from the owner was sometimes extinguished by express contract language, often referred to as “no-damages-for-delay” clauses. Timothy J. Woolford, *Beating Exculpatory Contract Clauses to Recover on Your Claim*, Construx Magazine, available at http://www.woolfordlaw.com/PDF/Construx112011.pdf. No-damages-for-delay clauses are a commonly-used contractual mechanism to waive a party’s right to recover direct and consequential damages resulting from delays. No-damages-for-delay clauses can allow a party to avoid what would otherwise be paid, such as additional labor hours, remobilization costs or overtime. These clauses typically state that the only remedy available to the delayed party is a time extension and that no monetary remuneration will be provided. In many cases, these clauses are not limited to barring claims for delay, but also bar claims for inefficiency, lost productivity, acceleration and other impacts. When a subcontract agreement contains a flow-down provision incorporating a prime contract containing a no-damages-for-delay clause, the subcontractor similarly can be barred from recovering for delays, inefficiency, lost productivity, acceleration and other impacts.

An example of a no-damages-for-delay clause from a large national construction manager’s standard subcontract is as follows:

. . . an extension [of time] shall be the Subcontractor’s sole and exclusive remedy for such a delay and in no event shall the Construction Manager be responsible for any increased costs, charges, expenses or damage of any kind resulting from such delays . . . .
If a subcontractor with an agreement containing this language flows this provision down to lower-tier subcontractors, those lower-tier subcontractors will also be barred from recovering for such claims.

No-damages-for-delays clauses are generally enforceable in most states. Some no-damages-for-delay clauses are considered reasonable because they only prohibit recovery for delays resulting from the contractor or subcontractor’s own fault, but allow recovery if the delay is beyond their control, unforeseeable or caused by the owner. Look out for harsh, over-reaching no-damages-for-delay clauses that prohibit recovery of costs resulting from delay, regardless of cause. If the delay was unavoidable, unforeseen, or not within the party’s control, the party’s right to recovery should be preserved.

Numerous factors can impact the enforceability of no-damages-for-delay clauses. For example, some states such as Washington have a statutory prohibition against no-damages-for-delays clauses on public contracts. See Rev. Code of Wash. §4.24.360. In states wherein no-damage-for-delay clauses are enforceable, courts may evaluate whether the type of delay was within the contemplation of the parties at the time they entered into the agreement containing the no-damages-for-delay provision. If not, the provision is unlikely to be enforced. Additionally, no-damages-for delay clauses will not be enforced where the party seeking to enforce the clause actively interfered with the work or acted in bad faith, maliciously, or with gross negligence.


In Michigan, for example, no damages for delay provisions generally are valid and enforceable, but Michigan courts recognize exceptions where the delay: (1) is of a kind not

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contemplated by the parties; (2) amounts to an abandonment of the contract; (3) is caused by bad faith on the part of the contracting authority; or (4) is caused by the active interference of the other contracting party. See Phoenix Contractors, Inc. v. Gen. Motors Corp., 135 Mich. App. 787, 792 (App. Ct. 1984); see also Macomb Mech. v. Lasalle Group, 2015 Mich. App. LEXIS 877, at *7 (Mich. Ct. App. Apr. 23, 2015) (“No-damage-for-delay’ clauses are commonly used in the construction industry and [are] generally recognized as valid and enforceable. However, because of their harsh effects, these clauses are to be strictly construed’ against the project owner.”); Interior v. Devon Indus. Group, No. 276620, 2009 Mich. App. LEXIS 299, at **16-17 (Mich. Ct. App. Jan. 8, 2009) (“While the parties contemplated the possibility of delays when contracting, agreeing to a "no damages for delay" clause, the evidence supports plaintiff's claim that the delay in this case exceeded what either party anticipated at contracting. Therefore, the jury was not unreasonable in finding that the excessive delay, combined with plaintiff's acquiescence in performing non-contractual work, constituted an abandonment of the contract.”).

Accordingly, in order to properly assess risk, lower-tier subcontractors should determine what the prime contract states as it relates to delay claims, and specifically, if the prime contract contains a potentially enforceable no-damage-for-delay clause.

B. Liquidated and Consequential Damages

Liquidated damages and consequential damages are two common issues addressed in prime contracts that will flow down to the subcontracts. Subcontractors should understand from the outset, prior to signing an agreement or performing work, whether they are liable for one or both of these measures of damages in the event of a delay and account for these risks in their price. Consequential damages, as opposed to direct damages, arise from special circumstances. See, Roanoke Hosp. Asso. v. Doyle & Russell, Inc., 215 Va. 796, 801, 214 S.E.2d 155 (1975).
Consequential damages may include higher or extra interest, lost rent, lost profit, loss of bonding capacity and loss of use. Sometimes the contract specifically identifies the types of damages that are considered consequential.

The standard form AIA A201 General Conditions contains a mutual waiver of consequential damages:

§ 15.1.6 CLAIMS FOR CONSEQUENTIAL DAMAGES
The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

This AIA language both waives consequential damages and conveniently defines what types of damages are considered to be consequential.

Similarly, the AIA A401 Standard Form Subcontract provides as follows:

§ 15.4 The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party’s termination in accordance with Article 7.

The AIA Standard Form Subcontract contains a waiver of consequential damages, but does not define what types of damages are considered consequential. The language in the AIA contracts is sometimes modified by owners and general contractors to a unilateral waiver, however, whereby only the contractor waives its right to recover consequential damages from the owner, but the owner may still recover consequential damages from the contractor. Depending on the language of the flow-down provision included in the subcontract agreement, the subcontractor may be

Liquidated damages are pre-determined daily costs that represent the estimated amount of the owner’s damages for each day of delay. Courts typically hold that to be enforceable, liquidated damages must be an estimate of actual damages and not simply a penalty, and it must have been difficult or impossible at the time of contracting to determine actual damages in the event of a breach. Nathan Chapman, Lee C. Davis and W. Henry Parkman, Resolving Problems and Disputes on Construction Projects: Tackling Contract Performance Delays, December 28, 2016, http://www.lorman.com/resources/resolving-problems-and-disputes-on-construction-projects-tackling-contract-performance-delays-15142. Liquidated damages must be a reasonable estimate of actual damages. See Id. Liquidated damages that are punitive will not be enforced. See id.

Liquidated damages are often preferable to owners because they provide some assurance as to the owner’s expected recovery in the event of delays. They relieve the owner of computing and establishing actual damages. However, liquidated damages that are the exclusive remedy (if a reasonable sum) can also be favorable to the contractor or subcontractor as it gives more certainty of the risk. Without liquidated damages, the actual damages may be difficult to approximate, and consequential damages (if not waived) may even be more difficult to accurately measure.

Liquidated damages provisions are not always enforceable. Liquidated damages are improper where the delay was excusable, or not caused by the fault or neglect of the contractor. A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ., 898 A.2d 1145 (Pa. Commw. 2006).

Furthermore, the prevailing rule is that liquidated damages cease to accrue once the contractor achieves substantial completion. Stone Heavy Equip. Co., v. City of Arcola, 536 N.E.2d
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1329 (Ill. App. 1989). The majority of courts hold that where an owner obtains occupancy and beneficial use of the building, the contractor is substantially complete and liquidated damages beyond that point are improper. *Appeal of Randolph and Co., Inc.*, ASBCA No. 52957 (November 6, 2002)(holding that the government could not continue to assess liquidated damages from substantial completion until final completion because when “the government has obtained, for all intents and purposes, all the benefits it reasonably anticipated receiving under the contract, then a finding of substantial completion is proper.”); *Appeal of Batson-Cook of Atlanta, Inc.*, ASBCA No. 44902 (July 22, 1997)(holding that government could not assess liquidated damages for time period where the building was occupied but missing wooden office doors because it did not prevent beneficial occupancy and use, but was merely an inconvenience and punchlist item); *All Seasons Constr., Inc. v. Mansfield Housing Auth.*, 920 So. 2d 413 (La. App. 2006)(holding that owner could not assess liquidated damages after the contractor achieved substantial completion and was performing only punchlist work); *Appeal of Rivera Constr. Co.*, ASBCA No. 30207 (April 12, 1980)(holding that even where incomplete punchlist items cause inconvenience to the owner, liquidated damages must cease once it is possible to take beneficial occupancy); *Phillips v. Ben M. Hogan Co.*, 594 S.W.2d 39 (Ark. App. 1980)(holding that “where a construction contract is substantially performed within the time limit, delay and the completion of minor details which does not cause material damage to the project will not subject the builder to liquidated damages”).

General contractors and subcontractors should closely examine the contract documents to determine whether they are liable for consequential damages if they cause delay. If the waiver is unilateral, propose reverting to a standard AIA-based mutual waiver. Also, if there are liquidated damages for delays, specify that the liquidated damages are the sole and exclusive remedy for delays to attempt to avoid consequential damages. Sometimes, contracts allow the parties to
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recover direct, consequential and liquidated damages. Contractors and subcontractors should try to avoid such provisions.

IV. Practical Pointers for Preserving Claims and Defenses

Contractors and subcontractors alike should look for the early warning signs of potential claims, such as upfront delays, access issues, design problems or changes, lack of coordination, interference or differing site conditions. Similarly, in order to preserve claim rights, the parties should know and follow the claims procedures stated in the relevant contract with the offending party. For a subcontractor, this could include the subcontract itself, as well as the prime contract and other incorporated documents. For example, when does notice have to be given? To whom must notice be provided? Must the notice be in written form that contains certain language and information? How must it be served?

Proper notice is typically a condition precedent to recovery of delay claims. Depending on the laws of the relevant state, a court may determine that the owner’s or general contractor’s constructive knowledge or actual knowledge of the issues does not meet the requirements of the contract. See, e.g., Mike M. Johnson, Inc. v. Cnty. of Spokane, 150 Wash. 2d 375, 377, 78 P.3d 161 (2003) (holding that actual notice is not an exception to compliance with mandatory contractual protest and claim provisions.). Depending on the language of the applicable provision, failure to provide proper notice may result in a waiver of a claim. Claimants should identify the nature, extent, cause and cost of the delay and the resulting damage calculations. If the information is unavailable at the time the notice is due, it is advisable to provide timely notice with a statement that a supplementation is forthcoming as information is gathered. Such supplementation should be made within a reasonable time, however. Unfortunately, the effect or impact of an event may
not be felt or realized until after the written notice period has expired, so more creativity may be required in order to preserve such claims.

Sometimes, certain trades do not have access to the overall project critical path schedule and may not be informed of impacts from preceding subcontractors, or the impact on follow-on trades. Also, the level of sophistication for schedule input may vary and impact other trades – level of detail, software, full schedule or look ahead schedules. Some trades may be forced to hopscotch around the project looking for available work, and often, are viewed as being slow, inefficient, not having enough men on the job, etc. Subcontractors may be subject to back charges based on other subcontractors’ costs if they delay other trades’ work.

Subcontractors should comply with the notice provision to the extent possible in light of the facts and circumstances. The law in most states requires subcontractors to give the general contractor and/or owner notice so they have an opportunity to mitigate.

General contractors, can sometimes indirectly give notice of a potential owner delay by giving notice to a subcontractor that it may be causing a delay. For example, a design issue and roofer delay may prevent meeting the schedule for getting the building under roof. A prudent general contractor could give the roofing subcontractor notice that the schedule is slipping, without expressly admitting that critical path is affected. This gives the owner notice that a design issue may be causing a delay, but also gives the subcontractor notice that it is contributing to the delay.

As the saying goes, sometimes the best shield is a sword. This couldn’t be truer with regard to a subcontractor’s defense of delay accusations. No subcontractor, especially early in the project, wants to be pointing the finger at other subcontractors or the general contractor about what may seem like trivial delays. However, oftentimes, near the end of the project, the writing is on the
wall that the completion date cannot be met. If a specific subcontractor is accused of delay, what story will the project file tell? Will that subcontractor have given notice of delays, changes from the general contractor or owner that had the potential to cause delays? Will that subcontractor be able to document that it was not the culprit? Much like the theory that it is better to be the plaintiff than the defendant, giving affirmative notice a party is being delayed by others may be the best way to stave off or defend against claims that it has delayed the work. Maintain accurate and detailed daily reports and logs. Ensure that meeting minutes adequately reflect the project progression, issues and delays and any concerns – but don’t rely on minutes to serve as your claim notice. Send emails or formal correspondence documenting the delays and issues as they occur. Keep photos or videos to record real time what is happening on the project. Maintain accurate and detailed logs of change orders, submittals, requests for information, design revisions or architect’s supplemental instructions. Also, ensure that your accounting information – from estimate to close out – is clear and accurate.