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Compensation for Delay on VA Projects

Introduction

Construction delays are among the most impactful causes of construction disputes. Some measurements of average time extension requests amount to 71 percent of the original project duration.[1] And construction delays can also be quite expensive as costs for financing, staff, equipment, and material and wage costs all have time dependent aspects. Contractors with increased costs will often seek additional compensation or an equitable adjustment.

On all projects, it is imperative to look to the project contract when seeking compensation for delays or an extension of time. The U.S. Department of Veteran's Affairs (VA) relies on a combination of the Federal Acquisition Regulation (FAR), the VA Acquisitions Manual (VAAM), and the VA Acquisition Regulation (VAAR) as well as the VA's Master Construction Specification (Master Spec) to identify the conditions a contractor must meet to be granted a time extension and to determine compensation for added time. The FAR and agency supplements are the primary regulations used by all Federal Executive (i.e., U.S. Government) agencies when procuring supplies and services.[2] The end result somewhat resembles a patchwork of voluminous regulations and can leave contractors uncertain as to exactly where to look.

Properly Measuring Delays

With respect to the VA, measuring a delay begins with the project schedule. The VA's Master Spec Division 01 General Requirements contains the subsections relevant to scheduling requirements and to the application for an extension of time. Several subsections of Division 01 deal with scheduling requirements based on the size of the project (major versus minor (over or under $10million)) and type of contract (design-build, design-bid-build, etc.).

The sub-sections of the Master Spec that are relevant to measuring schedule delays are shown in Table 1 below.

Table 1: Relevant Scheduling Subsections of VA Master Spec

Sub-Section Number	Title
01 32 16.01	Architectural and Engineering CPM Schedules
01 32 16.13	Network Analysis Schedules - Major Construction Project - Design-Bid-Build

[1] 2021 CRUX Insight - Operating in Uncertain Times
[2] *See* Foreword of the FAR. "The FAR was established for the codification and publication of uniform policies and procedures for acquisition by all Government agencies." See FAR Part 1.101 Federal Acquisition Regulations System; Purpose, Authority, Issuance; Purpose.

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01 32 16.15	Project Schedules (Small Projects - Design/Bid/Build)
01 32 16.16	Network Analysis Schedules (Design-Build Only)
01 32 16.17	Network Analysis Schedules - Major Design/Build Projects

All of the subsections shown above require the use of critical path methods to demonstrate that any delays for which time is being requested, be shown to have extend the project completion date. In other words, the contractor must demonstrate that the project's critical path was delayed. In this paper, the general term "delay" is used to referred to critical delays that extend the project's longest path.

The Master Spec distinguishes between critical delays resulting from work activities and critical delays resulting from non-work activities such as RFI's, weather, strikes, etc. In addition, time extension requests that relate to delays to work activities are treated differently than non-work activity related delays depending on the project's status as major/minor and the type of contract. As a result of these distinctions, the requirements to demonstrate and measure delay differ slightly, as does the available compensation. However, often the contractor must submit requests for time extensions in accordance with FAR 52.243-4 Changes, and the contractor has one month from the date a change order or bilateral agreement was issued in which to submit its request for a time extension.

... the contractor must demonstrate the project's critical path was delayed.

The VA's Consulting Support Service has also issued a brief paper on applying for time extensions, titled "General Time Extension Analysis Procedure." The paper describes itself as providing a "generic time extension analyses procedure," and lists several steps in the performance of a time impact analysis.[3] This paper is available for download on the Consulting Support Services page of the VA's Office of Construction & Facilities Management website.

1. Non-Work Delays

Regarding non work-related delay events, all relevant sections of the Master Spec require that delays be analysed on a month-by-month basis. The requirement that delays be analysed monthly limits the applicable delay analysis methods to those considering each of the monthly schedule updates available during the period of the delay. For example, methodologies described in AACEi 29R-03 as "Gross Mode" would not apply because, as stated in the 29R-03:[4]

[3] Consulting Support Service (003C5), Technical Topic, General Time Extension Analysis Procedure
[4] AACEi 29R-03 Forensic Schedule Analysis, Section 1.4.D.1

"…the gross mode considers the entire project duration as one whole analysis period without any segmentation."

Methodologies described in the 29R-03 that are recommended for the analysis of non-work delays on VA projects should be, in the terminology of AACEi 29R-03, periodic (with each period being equal to the schedule update period), dynamic (referring to schedule updates with logic that varies from each other and with logic changes accepted by the VA's contracting officer), and observational (without adding or subtracting delays to/from the schedule). One example of a recommended methodology for the analysis of non-work activity delays is the contemporaneous period analysis.

It should be noted that, at the time of this writing, the relevant sub-sections contain inconsistent language regarding RFIs, as well as retrospective analysis. Sub-sections 01 32 16.01 and 01 32 16.15 of the Master Spec do not explicitly bar the inclusion of RFIs in fragnets time extension analysis, while the other three sections not only bar the inclusion of RFIs in time extension requests, but *also* bar the inclusion of RFIs in the schedule. Sub-sections 01 32 16-13 and 01 32 16-17 explicitly bar the retrospective use of the TIA method within certain parameters, as described below.

2. Work Activity Delays

01 32 16.01 ARCHITECTURAL AND ENGINEERING CPM SCHEDULES

Sub-section 01 32 16.01 discusses time extensions in part 1.12 Adjustment of Contract Completion. This sub-section requires that time extension requests be submitted using logic and duration revisions agreed upon by the project manager, and requires that the number of days of delay determined by the contracting officer be based upon critical delay demonstrated using the project schedule.

01 32 16.13 NETWORK ANALYSIS SCHEDULES (MAJOR CONSTRUCTION PROJECT – DESIGN-BID-BUILD)

Part 3.2D of Sub-section 01 32 16.13 states that time extensions shall preferably be included with change order proposals submitted prior to the work being completed in the form of fragnet analysis (time impact analysis or "TIA") using agreed-upon planned durations.[5]

[5] VA Master Specification Section 01 32 16.13 Network Analysis Schedules – Major Construction Projects, Part 3.2D

"The analysis shall only include original workday durations and schedule logic previously agreed upon during the update meeting by the contractor and the SRE for the contract change(s), and preferably shall be submitted as a part of the C.O. proposal and before any physical C.O. work is performed."

Part 3.2 F of Sub-section 01 32 16.13 bars the use of retroactive TIAs, which it defines as "generally over 3 months" after "the initiation of the impact" and which includes as-built logic or durations. This section also requires the TIA to be performed within one month of the VA-issued change order or other added work directive.

01 32 16.15 PROJECT SCHEDULES (SMALL PROJECTS – DESIGN/ BID/ BUILD)

Sub-section 01 32 16.15 does not call for a specific method for time extension requests. This sub-section covers requests for time extensions in part 1.12 Adjustment of Contract Completion. Part 1.12 includes language shown below, some form of which is found in most of the other relevant sub-sections discussed here.

"Request for an extension of the contract completion date by the Contractor shall be supported with a justification, CPM data and supporting evidence as the COTR may deem necessary for determination as to whether or not the Contractor is entitled to an extension of time under the provisions of the contract. Submission of proof based on revised activity/event logic, durations (in work days) and costs is obligatory to any approvals."

01 32 16.16 NETWORK ANALYSIS SCHEDULES (DESIGN-BUILD ONLY)

Sub-section 01 32 16.16 states that time extensions shall preferably be included with change order proposals submitted prior to the work being completed in the form of fragnet analysis (time impact analysis or "TIA") using agreed-upon planned durations.[6]

"The analysis shall only include original workday durations and schedule logic agreed upon by the contractor and the SRE for the contract change(s), and preferably shall be submitted as a part of the

[6] VA Master Specification Section 01 32 16.16 Network Analysis Schedules – Major Design/Build Projects, Part 3.2E

C.O. proposal and before any physical C.O. work is performed."

Part 3.5B of sub-section 01 32 16.16 requires the submission of time extension requests "within a reasonable time" which it describes as being "within one month of the issuance of the change order or before signing of the bilateral supplemental agreement."

01 32 16.17 NETWORK ANALYSIS SCHEDULES – MAJOR DESIGN/ BUILD PROJECTS

Part 3.2 E of sub-section 01 32 16.17, states that time extensions shall preferably be included with change order proposals submitted prior to the work being completed in the form of fragnet analysis (time impact analysis or "TIA") using agreed-upon planned durations.[7]

"The analysis shall only include original workday durations and schedule logic agreed upon by the contractor and the SRE for the contract change(s), and preferably shall be submitted as a part of the C.O. proposal and before any physical C.O. work is performed."

Part 3.2 G of sub-section 01 32 16.17 bars the use of retroactive TIAs, which it defines as "generally over 3 months" after the "initiation of the impact" and which includes as-built logic. This section also requires the TIA to be performed within one month of the VA-issued change order or other added work directive.

The Cost of Delays, Suspensions, and Changes

When applying to the VA for an equitable adjustment, the contractor must consider the distinctions made in the VAAR and the FAR between the type of delay (stop work, suspension, or government delay) as well as the estimated cost of the change (greater or less than $500,000). These distinctions are discussed in more detail below.

1. FAR

The FAR is the primary set of regulations governing procurement by the US government. Within the FAR, part 52 contains requirements and instructions for the administration of government contracts. FAR part 52.242 distinguishes between delays resulting from suspensions of work, government-issued stop work orders, and general government-caused delays of work. Part 52.242 provides instruction for the contractor on the types of delay-related construction costs that are compensable based on these types of delay.

[7] VA Master Specification Section 01 32 16.17 Network Analysis Schedules – Major Design/Build Projects, Part 3.2E

Below is a brief summary of the three relevant sections of FAR part 52.242.

FAR 52.242-14 Suspension of Work: contractor eligible for increased costs (excluding profit) that stem from suspension, delay, or interruption of the execution of the work by the contractor, with exceptions for concurrent delays and certain other circumstances.

FAR 52.242-15 Stop-Work Order: Contractor, upon receipt of a stop-work order, is required to take all reasonable steps to minimize incurring additional costs. If the contractor properly incurs added costs or increased time as a result of the stop-work, it may be eligible for an equitable adjustment (with regard to both time and contract price) provided other concerns such as notice requirements are met.

FAR 52.242-17 Government Delay of Work: The contractor may be entitled to an adjustment (excluding profit) for VA-caused delay in the execution of contract work, with exceptions for concurrent delays and certain other circumstances.

2. VAAR and VAAM

The VA relies on the VAAM and the VAAR as supplemental to the FAR. The VAAM incorporates extracted parts of the VAAR "as well as other internal agency procedural guidance,"[8] and the VAAR was created by the VA in order to "codify and publish uniform policies and procedures for VA's acquisition of supplies and services, including constriction." [9] The standard contract for VA construction includes the VAAM and the VAAR. The VAAM and the VAAR, among many other things, instruct the contractor as to how damages for delays are to be determined. With respect to recovering the added cost of delays on construction projects, the most relevant sections of the VAAR and VAAM are discussed below.

VAAM M843.2 – Change Orders, deals with entitlement to the recovery of costs and additional time resulting from contract changes. The section states that "it is the VA's policy to negotiate in advance the cost and/or time associated with all contract changes except in unusual circumstances where it is not possible as a consequence of the character of the changed work."

VAAM M843.70 – VA Modification Procedures, discusses special procedures for negotiating overhead rates in cases where the value of the work was insufficient to justify the preparation of an itemized estimate of job overhead costs. This section recommends the use of flat rates for field overhead and home overhead.

[8] Federal Register Volume 86, Number 187, Pages 54111-54117
[9] VAAR 801.101 Purpose

VAAR Section 852.243-70 discusses changes to construction contracts. This section includes requirements for the contractor to submit a proposal for equitable adjustment. Among these requirements, the contractor must submit an itemized breakdown of materials, quantities, labor costs by trade, equipment, etc. The section also provides a period of time, after a contractor receives a written change order, within which the contractor must submit its proposal.

The VAAR distinguishes between change orders exceeding $500,000 and those costing less than $500,000. Regarding change orders valued at less than $500,00, VAAR 852.243-70 provides direction for calculating profit and overhead. Accordingly, profit and overhead should be calculated based on a percentage, not to exceed 10 percent of "the value of labor, material, and equipment required to accomplish that change." In part, this section states:

> *"Profit (fee) shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs. Allowable percentages on changes will not exceed the following:*
>
> *(i) 10 percent overhead and/or 10 percent profit (fee) on the first $20,000;*
>
> *(ii) 7.5 percent overhead and/or 7.5 percent profit (fee) on the next $30,000;*
>
> *(iii) 5 percent overhead and/or 5 percent profit (fee) on a balance over $50,000."*

VAAR section 852.243-70 also goes into detail as to which costs are to be included in the overhead and profit percentages, providing examples such as insurance, small tools, incidentals, etc.

Recovering Costs

1. Entitlement

Identifying delay and calculating costs are not the only considerations when a contractor is attempting to recover added costs resulting from delays on a construction project. In all construction claims, the contractor must demonstrate not only that it has incurred additional time or costs above those expected, but also that it is entitled to recover compensation for that time or those added costs. Establishing proof of entitlement to additional compensation is beyond the scope of this paper.

2. Unabsorbed Home Office Overhead

In addition to what is described in the VAAR, recovery of Home Office Overhead is limited in several respects, based on existing case law and precedent. Factors such as whether the

VA issued a written suspension of work order will affect what the contractor must demonstrate.

For example, if the VA issued a suspension of work order, the contractor must show that there was a government-caused delay to its performance that extended contract performance (i.e., that there was a critical delay) that was not concurrent with another, contractor-caused delay. Finally, the contractor must prove its damages.[10]

If the VA did not issue a suspension of work order, the contractor must demonstrate that it was effectively suspended by showing a government-caused delay of indefinite duration. The contractor must also demonstrate that it was required to be ready to resume full work, at full speed, immediately once the suspension of work was over. Finally, the contractor must show that much, if not all, of the work on the contract was effectively suspended.[10]

Prospective vs Retrospective Analysis

In several locations of the VAAM and its Master Spec the VA has inserted clauses which seek to promote the prospective resolution of changes. Clauses in Master Spec sub-sections 01 32 16-17 and 01 32 16-13 bar the use of retrospective TIAs (greater than three months from the initiation of the impact) and require that a TIA be performed within one month of the related change order or work directive. In addition, M843.201-70 (a) of the VAAM states that it is the VA's policy is to negotiate time extensions and changes in advance.

The VA does not explicitly describe or recommend any method other than what is traditionally termed a Time Impact Analysis ("TIA"). TIAs are typically understood in the delay analysis industry to be a prospective analysis. AACEi 52R-06 describes the TIA as "a forward-looking, prospective schedule analysis technique" that "is not recommended for a retrospective (hindsight or forensic) view taken after a significant passage of time since the delay event."[11] The VA has indicated that it will not accept retrospective TIAs issued retrospectively, which the VA identifies as greater than three months after the initiation of the impact.

Summary

Receiving additional compensation for delays and delay related costs on VA projects is governed by related sets of regulations, the VAAR and the FAR, as well as the VAAM. The VA requirements for demonstrating delay and calculating the cost of delay differ based on project size and contract type, as well as the value of the prospective claim. The contractor should endeavour to come to agreement with the VAs contracting officer on the value of a change as well as the duration of an

[10] P.J. Dick Incorporated v. Secretary of Veterans Affairs, 02-1290 (April 7, 2003)
[11] AACEi Recommended Practice No. 52R-06, Time Impact Analysis – As Applied in Construction, Page 1

expected delay from changed work prior to the performance of that work.

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