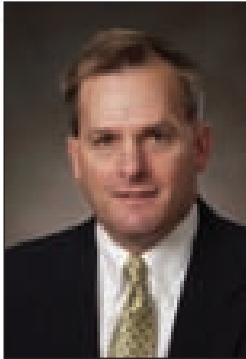


Extension chord

Tone involving time extensions can make a difference



BY LARRY CAUDLE

If the government wrongfully refuses to grant a time extension for an excusable delay, any claim for delay damages by the government will be unjustified.

More important, if the government either denies a legitimate time request during the project or fails to act in a timely manner upon such a request, it will be deemed to have “constructively” ordered the contractor to accelerate

the schedule and thus is responsible for any reasonable costs the contractor incurs attempting to complete the project within the original contract time period.

Five-speed

In a perfect world, a contractor that encounters a delay outside of its control promptly alerts the government to the delay-causing event, and once the extent of the delay can be quantified, the government responds to a formal request for time by either granting all or a portion of the request or denying it altogether. This is perfect because both the government and contractor are placed in a position where they can make intelligent decisions on going forward. The government, presented with a timely request, can consider both the entitlement and quantum of the time request and whether it desires the contractor to accelerate to make up for lost time. The contractor—having received a prompt response to its request—is either relieved from the cloud of delay damages hanging over its head (if the request is granted) or is empowered to decide whether it makes more sense to finish late and face the government’s delay damages or incur additional costs to accelerate the schedule. Regardless of whether the contractor or owner is ultimately responsible for the delay, the contractor’s decision on whether or not to accelerate must be reasonable.

“Constructive acceleration” occurs when the government requires the contractor to meet the original delivery schedule despite the existence of excusable delays. There are five requirements for constructive acceleration: (1) an excusable delay; (2) knowledge by the government of the delay; (3) a statement or act by the government that can be construed as an order to accelerate; (4) notice to the government by the contractor that such statement or act is construed as an acceleration order; and (5) the incurrence

by the contractor of acceleration costs.

In practice, constructive acceleration most commonly occurs when the government either wrongfully denies a legitimate time extension request or fails to act in a timely manner on such a request. In order to fully satisfy the five requirements identified

above, the contractor must first turn in a substantiated request for a time extension. Then it is not enough that the government either wrongfully denies the request or fails to respond within a reasonable time. The contractor must place the government on notice that its failure to act on the request or its denial of

such request is considered by the contractor as an order to accelerate the project. The contractor should also inform the government in writing that it will seek at a later date all costs incurred in connection with acceleration efforts.

Excuse yourself

Until a formal request for a time extension is made, the government has no duty to extend the contract time. More important, any acceleration efforts or re-sequencing of the work by the contractor to mitigate the impact of an excusable delay will not be compensable until the government either (1) expressly orders such mitigation; (2) wrongfully denies a legitimate time request; or (3) fails to act within a reasonable time on such a request. Contractors, therefore, must instill in their project management personnel the importance of quantifying the impact of excusable delays as soon as possible and promptly placing before the government a formal request for extension of time. Similarly, government contract administration personnel must be mindful of the ramifications of their decisions on time extension requests and their failure to provide a timely decision. ■

Contractors must instill in their project management personnel the importance of quantifying the impact of delays as soon as possible.

Caudle is a principal in Kraftson Caudle LLC, a law firm in McLean, Va., specializing in heavy-highway and transportation construction. Caudle can be contacted via e-mail at lcaudle@kraftsoncaudle.com.