

# LAW: The Contractor's Side



by **Cordell Parvin**

A lawyer's view of legal issues affecting the roadbuilding industry

## Owner: "Keep me updated"

FHWA Report No. FHWA-T5-85-217 titled "Comparative Analysis of Time and Schedule Performance on Highway Construction Projects Involving Contract Claims" suggested:

"A sincere commitment to the development and maintenance of an accurate schedule is essential if it is to serve as a meaningful document. Proper maintenance includes the monitoring and periodic updating of the schedule."

Because a construction project rarely, if ever, advances exactly as planned, the report urged owners to require schedule updates.

In "Construction Project Management," Richard H. Clough and Glenn A. Sears noted that "the original schedule will become increasingly inaccurate and unrealistic as changes, slippages and other logic and schedule aberrations occur."

Using a schedule that has not been updated for building a project is analogous to using a 1999 airline timetable for a 2001 flight. The airline may no longer fly to or from the desired city, and even if it does flight times may be different than those indicated in the 1999 schedule. That, of course, assumes the airline is still in business. Clough and Sears suggested that the basic objective of updating the schedule is to reschedule the work yet to be done using current project status as a starting point for redetermination.

"Updating reveals the current time posture of the job, indicates whether expediting actions are in order and provides guidance as how best to get the job back on schedule. An update is also very valuable in testing the effectiveness of proposed time recovery measures."

### **Set and re-set timetable**

Updating schedules also has legal significance. There are many court and Board of Contract Appeals cases where the evidentiary value of the "as-built" schedule was discounted because of the failure of the contractor to update the schedule during construction.

In *Natkin v. Fuller*, 347 F.Supp. 17 (W.D. Mo. 1972), the court stated "the critical path plan may become obsolete unless it is kept current."

In *Continental Consolidated Corp., ENGBCA 2,74367-2 BCA Section 6642 (1967)*, the Board of Contract Appeals noted that the failure to incorporate changes in the work and time extensions will not reflect the current status of the work. As a result, it cannot represent the actual manner in which the project was constructed.

In *Lane-Verdugo*, ASBCA 16,328,73-2 BCA Section 10,271 (1973), the Board of Contract Appeals rejected the CPM analysis because updates made no change in the initial estimates of time actually required to accomplish the work. Also, logic changes made to reflect field conditions were made without changing the initial estimates of activity durations. In *E.C. Ernst, Inc. v. Koppers Co.*, 476 F.Supp. 729 (W.D. Pa. 1979), the court rejected Koppers' schedule analysis because neither restraints nor durations

were updated.

In *Fortec Construction v. U.S.*, 8 Ct. Cl. 490 (1985), the court recognized that control of the project as well as the time extension process is lost if the parties do not properly update the critical path diagram to reflect delays and time extensions.

Fortec, which built an aircraft fuel maintenance facility, brought suit against the U.S., seeking extensions of time for work performed beyond the contract requirements, additional compensation and remission of liquidated damages assessed by the government.

The contract required a Critical Path Method (CPM) network analysis system. During construction, both parties failed to use the CPM for scheduling purposes.

Despite that fact, the government claimed at the trial that the additional work Fortec was required to perform did not justify any contract time extensions, since the CPM did not show that any of the additional work was on the project's critical path. In support of its position, the government relied entirely upon the one and only revision that had been made to the CPM. That revision did not show the critical path actually followed during construction. In fact, it showed "removal of telephone poles" to be on the critical path, when actually the removal of telephone poles was deleted from the work.

The court ruled that because changes in contract performance were not integrated into the CPM, it was impossible to determine which activities were on the critical path. As a result, the court refused to permit the government to use the CPM to assert that a particular activity was critical or non-critical, on schedule or behind.

### **Don't delay**

As illustrated by the above-mentioned cases, the reason courts and Boards of Contract Appeals discount the evidentiary value of the "as-built" schedule when there have been no updates during construction is the feeling that the "as-built" prepared after the fact is inherently less reliable than updates during construction. Courts and Boards of Contract Appeals realize that "judgments" will have to be made in determining the sequence and start and finish dates of various activities in the after-the-fact "as-built" schedules. <sup>R<sub>B</sub></sup>

*Jenkins & Gilchrist is making materials from a recent workshop conducted by Cordell Parvin, John Stenger and Larry Caudle of the firm's Construction Law Practice Group available to the readers of ROADS & BRIDGES.*

*The volume, titled "Design-Build Legal Issues," is available for \$42 (includes shipping and handling). For more information on how to purchase the book, contact Joyce Flo at 214/855-4490; e-mail: jflo@jenkens.com.*