STANDARDS OF PROOF

A brief resource - Construction Claims
Robert G. Armando, President, Tectonics, Inc.

rga@tectonicsystems.com
631-220-1098

The standard of proof should be distinguished from the question of who bears the burden of proof. In civil actions, including construction claims arising from delay or acceleration, the standard of proof is relaxed to "a preponderance of the evidence". The preponderance standard simply means that the proponent of a claim must present the greater weight of the competent, persuasive evidence, even if that is only 51% of the evidence.

One further distinction that has been drawn by the courts and boards touches on the quantum of proof required for causation of delay, and the quantum of proof relating to the amount of damages. Generally, a greater certainty is necessary for proof of the causation of delay than for proof of the amount of damages.

The U.S. Court of Claims has held, in **Wunderlich Contracting Co. v. United States, 351 F.2d 956, 173 ct. cl. 180 (1965) :**

> ***A claimant need not prove his damages with absolute certainty or mathematical exactitude. It is sufficient if he furnishes the Court with a reasonable basis for computation, even though the result is only approximate. Yet this leniency as to the actual mechanics of computation does not relieve the contractor of the essential burden of establishing the fundamental facts of liability, causation, and resultant injury.***

See also **Dale Construction Co. v. United States, 161 ct. cl. 825 (1963)**.

Once entitlement is established, damages will not be refused solely because the contractor has not proved their amount to a mathematical certainty. Most courts and boards are willing to accept a reasonable estimate or a logical method of calculation.

See: **Peter Kiewit Sons Co. v. Summit Construction Co., 422 F.2d 242 (8th Cir. 1969*; and* Lauria Bros. & Co. v. United States, 369 F.2d 701 (1966)**.

DUTY TO COORDINATE THE WORK OF MULTIPLE PRIME CONTRACTORS

The Owner in a multi-phase project is under a duty to coordinate the work of all prime contractors. The law requires the Owner to schedule and execute the work of the various prime contractors in a normal and reasonable sequence of construction events. The courts have allowed recovery to the delayed prime contractor where the Owner has allowed another prime contractor's work to delay access to the site or even where the Owner's failure to accelerate preceding contractors has caused a delay in the receipt of access to another prime contractor.

- **Head Construction Company, ENG 3537, 77-1 BCA**
- **Pierce Associates, GSBCA 4163, 77-2 BCA 12,746 78-1 BCA 13,078**
- **Fruehauf Corp. v. United States, 587 F.2d 486 (ct. cl. 1978)**

DELAY, DISRUPTION, LEARNING CURVES

Analysis and comparison of project schedules is the best means of determining the impact of delays or disruptions upon a construction project. A compensable delay is one for which the Owner is responsible. The delay or disruption may be shown by comparison of the various project schedules. The impact of "pure" delay is usually readily assessable, but extended or numerous minor delays, and the effect of other disruptions also have impacts which may be demonstrated by schedule analysis. Loss of "learning curve" efficiencies is a common impact of Owner disruption. Here, actual labor costs and estimated labor costs applied under the "As-Planned" schedule are extremely helpful. Loss of labor efficiency is another impact of disruption readily demonstratable through use of project schedule analysis. Working under adverse weather conditions, overtime hours, etc. all contribute to inefficiency and result from delay or other disruptions.

- **Teledyne McCormick-Selph v. United States, No. 448-76 (ct. cl. Dec. 13, 1978)**
- **Fairchild Stratos Corp., ASBCA 9169, 67-1 BCA 6,225**

EFFECT OF OWNER APPROVALS & ACQUIESCENCE

If the Owner advertises a Pre-Bid Schedule or does not reject or raise timely objections to an "As-Planned" Schedule submitted by a contractor, it will be bound by the schedule and expected to meet its obligations thereunder.

- **Fullerton Construction Co., ASBCA 12275, 69-2 BCA 7,876**
- **Frank Briscoe Co., Inc., GSBCA 3545, 73-1 BCA 9,890**

DUTY NOT TO DELAY, HINDER, OR INTERFERE WITH PERFORMANCE

For years, courts have held that all parties to a contract have an implied duty to refrain from delaying, hindering, or interfering with others in the performance of their contracts. Numerous cases have found Owner liability for violation of this implied duty to the contractor. Where the Owner was unreasonably slow in providing the required access, failed to provide adequate advance planning, or committed numerous other negligent errors which contributed to unnecessary delay, the courts have found that the Owner breached its implied obligation not "to unreasonably interfere with or delay the contractor's performance". Likewise, in a number of cases, the failure to provide adequate plans and specifications, or the failure to make timely delivery thereof, constituted breach of duty.

- **Lewis-Nicholson, Inc. v. United States 550 F.2d 26 (ct. cl. 1977)**
- **United States ex rel Gillioz v. John Kearns Construction Co., 140 F.2d 792 (8th Cir. 1944)**
- **Sydney Construction Co., 21377, 77-2 BCA 12,719**

SUPERIOR KNOWLEDGE CREATES DUTY TO DISCLOSE MATERIAL FACTS PRIOR TO BID

The Courts and Boards of Contract Appeals have uniformly held that an Owner, with superior knowledge as to a material fact likely to impact a bidder's cost or schedule of performance, who fails to disclose completely and accurately such information to bidders of record, shall be deemed to have breached the contract; the contractor will be paid for damages resulting therefrom under the "constructive change" theory. This would include the witholding of material facts regarding (1) schedules of other prime contractors and (2) design defects known to the Owner at the time of bid. It includes the witholding not only of technical information, but non-technical information which is critical to the bidder's cost or schedule performance.

- **J. A. Jones Construction Co. v. United States, 182 ct. cl. 615 (1968)**
- **Hardeman-Monier Hutcherson v. United States, 198 ct. cl. 472, 458 F.2d 1364 (1972)**
- **Helene Curtis Industries, Inc. v. United States, 160 ct. cl. 437**
- **E. L. Peamer Co. v. City of Swartz Creek, 256 N.W. 2d 447**
- **G. W. Galloway Co., ASBCA 17436, 77-2 BCA 12,640**