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## **DAMAGES**

### **I. INTRODUCTION**

The calculation of damages is based on several interrelated factors. First, what does the contract say? Second, what is the applicable law? Third, what are the applicable facts ( including the testimony of witnesses and the available documents)? Fourth, characterization of the problem or the type of wrong. Finally, what responsibility does the Contractor or Owner have in regard to the problem.

Two concepts are useful in analyzing a claim and determining the damages that can be argued.

#### **A. ALLOCATION OF RISK**

Who bears the risk for the problem that has developed because of the wrong that has occurred? The allocation of risk is usually determined by the contract and the applicable law. The legal theories and calculation of damages flow from this. A well drafted contract will attempt to allocate the risk of a particular event to one of the parties. Responsibility for communication, mobilization, providing plans, providing equipment to sub-contractors, etc., is generally set forth. The applicable law may also allocate the risk or provide a general principle that if a set of facts occurs and can be proven then the risk will be allocated to one party. If the contract or law allocates the risk of an event to you then you will need to rely upon extra contractual theories or attempt to develop facts necessary to alter the contractual allocation of risk.

For example, if a contract has a “no damages for delay” clause then you will have to establish the necessary facts to determine an exception to such a clause. Otherwise, the Contractor can not recover delay costs. This is because a “no damages for delay” clause allocates the risk of delay costs to the Contractor. However, if the same contract provided that the Owner will provide certain material or fulfill other conditions, that clause may provide a condition, which if breached by the Owner can be used to avoid the “no damages for delay” clause. In such circumstances, the Contract allocates the risk arising from a failure to deliver the material or circumstances to the Owner.

**B. ALLOCATION OF RESOURCES**

Any Contractor or Sub-Contractor who bids and estimates for a job will consider the resources available and necessary to perform the job and will attempt to allocate those resources to complete the project at the least cost within the required time. These considerations are labor, equipment, material, interest costs, cash flow and overhead. In the same way, an Owner allocates resources in planning, financing and timing a project. The resources the Owner must allocate are money, interest, professional fees (architect, engineering, environmental, legal) and the time necessary to plan and execute a project. For all parties, the devotion of resources to a project usually involves a determination not to spend some or all of those particular resources on another project. In order to properly compute and prove damages one must take into consideration the use of additional resources, the delayed use of resources and the inefficient use of resources.

For example, if an Owner requires a Contractor to perform a disputed extra, the Contractor may have to make a decision regarding extra labor and extra equipment to perform the extra work. If the resources are available the extra may not delay the job or

otherwise interfere with other work. However, if the additional labor and equipment is not available, then the Contractor will have to decide to spend extra resources (money spent in overtime for labor and additional equipment) or seek an extension of time since the extra work will likely delay the job and possibly interfere with other work. In this case, to compute the damages properly it will not be enough to determine how many workers or how much equipment was required to perform the extra work or the direct cost of the extra. It will also be necessary to determine if the labor and equipment came from resources already allocated to the project and therefore interfered with or delayed other work which are the indirect costs.

In the example above, the Owner may be able to challenge the Contractor's choice to use the existing resources rather than seeking to obtain additional resources which would eliminate overtime and the delay of the project. This is the duty to mitigate one's losses. The duty to mitigate by a party is the allocation by law that the risk to allocate and use the available resources in a fashion which will not cause damages greater than those reasonably justified by the circumstances.

## **II. RULES TO SEEK DAMAGES BY.**

A. Ask for everything you may be entitled to but do so reasonably. Inflated claims lose credibility and in some circumstances are illegal. Because of the very nature of claims and negotiation you should ask for all that you can justify because:

1. Reasonable people can differ. An Owner or jury may be willing to pay you for a delay claim but not for a constructive acceleration claim. If you only ask for the delay claim then you lose.

2. Many parties are very proficient at negotiation and will rarely pay you more or as much as they believe an arbitrator or jury will give you. If you can not settle for less than your demand, then negotiation and settlement will be difficult.

3. Satisfactory settlements generally require that all parties walk away with something. If one party is not given something during the negotiation there is little incentive to settle.

4. Frequently the individual you are negotiating with needs to justify the settlement amount to an owner, bank, partner, insurance company, etc. Unless they are given something to show for their efforts it will be very difficult to satisfactorily conclude the claim.

B. Evaluate claims and calculate damages on the merits and not on perceptions and expectations. The most difficult client for a lawyer is one who has unrealistic expectations in the claim process. Beware of the individual who starts out with a bottom line. Claims and damages must be based on the facts and law and not what the client expects or feels it needs to recover. A good point to begin claim evaluation and damage calculation is to review the project finances for the client. If a Contractor lost money on a particular work item then that item should be investigated to determine if there are facts that will support a claim for the loss. Often times the loss on that work item maybe a beginning point to help locate areas where facts will support a claim. The mere fact that there was a loss does not necessarily prove an existence of a claim

C. Assume the damage calculation you present to the Owner or Contractor may one day be presented to a court. Lawyers in particular like to depend upon Evidence Rule 404 which bars the admissibility of compromises and offers to compromise in a

legal proceeding. However, in practice the parties are often bound by the initial damage presentation simply by the fact that lawyers are often not involved in the initial negotiations between the parties.

Oftentimes it is helpful if the initial damage claim appears to have been drafted by a lay person. Often it is not necessary or helpful to be overly detailed in the calculations. Still, the damages should be clearly presented indicating the source documents and sufficiently detailed to be understood and evaluated. The claim should be in a form that is consistent with facts, the available record and the applicable contractual terms. One wants to avoid being forced to discard the original damage presentation, whether in negotiation or litigation. It is far better to be able to revise or update your claim. A Contractor makes it very difficult for an Owner to accept its claim when the Contractor has to discard the initial damage calculation and begin again.

D. Frame the damage calculation in the party's language and preferences if possible. If the Contractor knows that the Owner is aware that it will be filing a claim, the Contractor should discuss with the Owner the format to be used and, if possible, the principle for establishing labor rates, site overhead, home office overhead, etc. Naturally, the Contractor should present the damages in the most forceful and convincing way possible and not attempt to placate the Owner. However, if the Owner is comfortable with your damage calculation you will generally collect more money and in a shorter time. Since most major claims arise after a project is substantially underway or completed, a Contractor should have a good idea as to what approach will be best received by an Owner.

### **III. GENERAL RULES IN COMPUTING DAMAGES**

Over the years I have found several principles helpful in calculating damages.

None of these principles is original.

1. The claiming party (whether Owner or Contractor) has the burden of proof to prove its claim and damages.

2. The purpose of awarding damages in a construction case is to compensate the party who has wrongfully suffered damages. Liability can be based on various theories of recovery, breach of contract, tort, statutory remedies, but the damages calculated use the breach of contract standard. The purpose of damages is to place the injured party in the same position it would have been in but for the breach. Sometimes the measure of damages for tort and contract is different. For example, consequential damages in breach of contract cases are limited to those that were within the reasonable contemplation of the parties at the time of contracting. Tort damages are those that proximately result from the wrongful conduct whether they were contemplated or not.

3. The claimant's actual costs are presumed reasonable, subject to contrary proof. This presumption does not shift the burden of proof but will shift the burden of persuasion. See, Bruce Construction Corp. v. United States, 324 F.2d 516 (Ct. Cl. 1963).

4. Once liability has been established, the damages do not have to be proven to a scientific certainty. Kissell Co. v. Gressley, 591 F.2d 47 (9<sup>th</sup> Cir. 1979). A claimant must prove what the problem costs. It must be proven with records: Payroll records for labor costs; purchases orders and invoices for material costs, invoices for rental equipment; equipment logs for owned equipment; or expert opinion. Damages should be prepared with sufficient detail to withstand an audit and costs must be explained with the

above records. John E. Green Plumbing & Heating Co. v. Turner Construction Co., 742 F.2d 965 (6<sup>th</sup> Cir. 1984). However, most courts will not let a breaching party avoid damages merely because proof of damages is not precise.

5. The best way to calculate damages is to establish a cause and effect basis for the extra costs. Cause and effect proof normally depends on the available records. If an event occurs that is going to cost either the Owner or Contractor additional money that party should establish a separate cost category for the extra work and record the added costs according to its normal business practice. Arbitrators and courts are likely to accept the actual costs as the reasonable ones.

6. A claimant always has the obligation to mitigate damages. It is the defendant's burden to prove damages could have been mitigated.

#### **IV. CONTRACTOR'S DAMAGES**

##### **A. WRONGFUL TERMINATION PRIOR TO BEGINNING PERFORMANCE.**

Damages from wrongful termination prior to beginning performance of the contract are calculated by deducting the reasonable cost of performance of the contract from the contract price. The damages are the anticipated net profits, which should be calculated from the Contractor's estimate. The Contractor's estimate should be accepted as the reasonable costs, which is particularly true if it is the result of competitive bidding. The Contractor should also claim to recover reasonable pre-bidding costs even though no work on the project has yet to be performed. General Sprinkler Corp. v. Loris Ind. Dev., Inc., 271 F. Supp. 551(1967).

**B. WRONGFUL TERMINATION DURING PERFORMANCE.**

Damages for wrongful termination during the performance of the contract are the contract price minus the costs incurred in performance minus the reasonable costs to complete the project. The Contractor should be compensated for its loss or placed in the same position it would have been but for the breach. E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 559 F.2d 268 (5<sup>th</sup> Cir., 1977). The damages are the recovery of costs incurred plus the lost profit. However, if evidence shows that the Contractor would have suffered a loss if the contract had been fully performed, then that loss is deductible from the Contractor's recovery. Jaminson Co., Inc. v. Westvaco Corp., 526 F.2d 922 (5<sup>th</sup> Cir., 1976). Lost profits should be limited to the reasonable profit anticipated at the time of the breach as opposed to the reasonable profit anticipated when the job was bid. Farris v. Smith Erectors Inc., 516 S.W.2d 281 (Tex. App. 1974).

Federal contracts and many private contracts (such as AIA201) treat termination by contract as a convenience rather than a wrong. The Contractor is compensated for the cost of performance, cost to demobilize and adjusted for the profit or loss on the work performed.

**C. TOTAL COST METHOD.**

The total costs approach uses a somewhat suspect methodology. The Contractor does not tie particular costs to particular events by rather seeks the difference between actual costs and performance and its anticipated costs on the theory that the full cost overrun is due. Courts have accepted this method of calculating damages usually only when there is no other alternative because of the lack of certainty was caused by the

Owner. J.D. Hedin Const. Co. v. United States, 347 F.2d 235 (Ct. Cl. 1965). To prevail using this method the Contractor must prove:

1. That its bid was reasonable;
2. That the cost incurred were reasonable;
3. None of the extra incurred costs were caused by the Contractor;
4. The job was disrupted by the Owner in such a fashion that the Contractor

can not use the cause and effect method of proving its damages.

**D. MODIFIED TOTAL COST METHOD.**

Under the modified total cost approach damages are calculated by taking the actual cost to perform the work ( minus any cost that may be due to the Contractor) minus the Contractor's bid plus adjustment to cover bid.

This method requires the Contractor to prove:

1. That the bid, as adjusted, was reasonable;
2. The reasonable costs to perform the work;( this must take into account the actual costs incurred minus the extra cost incurred due to the Contractor, if any);
3. The Owner's acts or failures caused the Contractor to incur extra costs;
4. Establish that except as modified by 1 and 2 above the damages could not

be calculated on a cause and effect basis.

Like the total cost method before it, it is not favored by the courts but permitted under circumstances where the Owner has breached the contract and the Contractor can not provide the court with exact calculations. Dawco Construction Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

**E. QUANTUM MERUIT**

Quantum Meruit is the theory of implied contract based on the benefit conferred and is not technically a method for calculating damages. Damages awarded in a quantum meruit action is the reasonable value of the construction performed minus any payments made. Quantum meruit is a remedy where there is no express contract. In the context of a construction contract quantum meruit is used when a contract has been so breached that the contract may be considered void. The Contractor must establish that its costs to perform the work equals the reasonable value of the construction performed.

I feel that quantum meruit, like the total cost and modified total cost approaches can be avoided by the astute Contractor who is keeping good records of his labor and material costs. The Contractor who is on top of the job will not let it get so out of hand. Of course there are exceptions particularly with dealing with inexperienced, quirky or unreasonable Owners.

## **F. DELAY DAMAGES**

Delay claims normally involve actual delays which impact on the project schedule. Contractors that can show they plan to and could have finished early but for the Owner's fault maybe entitled to delay damages even though they finished within the project schedule time.

### **1. LABOR AND MATERIAL ESCALATION.**

If because of change orders, extra work, failure to provide plans, material, coordinate work or other event without contractual excuse the Owner causes the work to be performed in a fashion which results in higher labor costs than planned, the Contractor is entitled to be paid for the excess labor costs. This is easy to prove if the project is pushed into a higher wage period with a date later than the original completion date.

Sometimes, the contract may have been completed within the contract time because of acceleration, but the original delay may have rearranged the percentage of effort in different cost periods. Thus a delay may have moved a period of greater activity into a period of higher costs. This is particularly true on a major project that may span more than 12 months.

Material escalation within an original contract may be more difficult to prove. This is because a Contractor must establish that it could not fix the material prices at the beginning of the contract. If performance extended into a time period where material prices escalate, the additional cost may be included in the claim. The proof for the contractor are the actual purchase orders and invoices showing what the contractor planned to purchase material for and what he actually paid for it in the delayed or extended period.

Equipment escalation costs are calculated in the same manner as labor escalation costs. Rental equipment costs are determined pursuant to the terms of the invoices contract in the same way that material escalation costs are calculated. Gundersons, Inc. v. Tull, 678 P.2d 1061 (Colo. Ct. App. 1983), *remanded*, 709 P.2d 940 (Colo. 1985).

Delays regarding escalated costs can also ripple to the sub-contractors. J.D. Hedin Const. Co. v. United States, 347 F.2d 235 (Ct. Cl. 1965).

## **2. EXTENDED ON-SITE OVERHEAD.**

One of the more common types of delay damages are those time sensitive costs that are due to extended performance time. Maintaining additional personnel, equipment and services at the project site such as extra job site supervision, field office trailer and office equipment, utilities and similar costs which are incurred as a result of a delay are

recoverable. These overhead costs should be directly attributable to a particular job and the Contractor should be able to rely upon actual costs to recover. The determination of on-site overhead can be somewhat complex if the delays occur at different times during the project. Typically, on-site overhead is less at the beginning and the end of a job compared to a middle of a job where there is much activity. If the overhead is difficult to determine because of the various disruptions, courts will use averages for the entire job. H. John Homann Co. v. United States, 418 F.2d 522 (Ct. Cl. 1969). The formula for on-site overhead damages is usually calculated by taking the total of on-site overhead and dividing it by the number of days for the job and then multiplying by the number of days of compensable delay.

### **3. HOME OFFICE OVERHEAD.**

When a delay causes a shut down or idleness for a period of time, or a construction project is extended, fixed overhead and general administrative expenses continue to incur. The amount of direct cost to which these expenses can be charged is thus reduced. The result is an amount of overhead which is proportionately higher or unabsorbed as a result of a delay.

The Eichleay formula is frequently used to allocate unabsorbed overhead. The formula computes the daily amount of overhead that the contract would have absorbed had there been no delays or suspensions and gives the Contractor that amount of daily overhead for each day of the delay or suspension. The formula is :

Step 1. Contract billings divided by the total company billings for the contract period multiplied times the total overhead incurred during the contract period equals the overhead.

Step 2. Allocable overhead divided by actual days of contract performance equals overhead allocable to contract per day.

Step 3: Daily overhead times number of days of delay equals unabsorbed overhead.

The Eichleay formula has received considerable criticism over the years. Contractors are compensated for unabsorbed overhead whether or not the overhead rate has increased because of additional business or bad management or decreased because of problems independent of the delayed project. Eichleay may distort the period used to calculate the daily overhead rate because it includes the period of delay. The actual home office expense included in the calculation does not necessarily consider the intended home office expenses that were not realized as a result of the delay. Several recent cases from the Federal Circuit have re-enforced the Eichleay calculation as a method of compensation for unabsorbed home office overhead costs. West v. All State Boiler, Inc., 146 F.3<sup>rd</sup> 1368 (Fed. Cir. 1998) examines the rationale of Eichleay in detail and approves its use under the proper circumstances.

#### **4. EXTENDED OR IDLE EQUIPMENT.**

Delays cost a Contractor idle or unproductive equipment. Equipment costs are normally a substantial part of a claim. Extra equipment costs are incurred as a result of using equipment for a longer time than planned or causing equipment to sit idle. Damages are calculated by multiplying the time of use or idleness by the reasonable rate or cost.

Equipment costs or rates need to be established. If the equipment is rented the damages can be calculated using the rates on the invoices. This assumes that the rental

rates were reasonable. Reasonableness can be established by comparison with the published rate books or by expert testimony. As always, first look to the contract to see if the rate has been agreed upon either by contract term or by reference to publications by third parties such as the Associated General Contractors of America (AGC). The AGC rate takes into consideration depreciation, overhaul, repair, interest, taxes, storage and insurance spread over the life of the equipment broken into a monthly figure. This method is generally accepted by the courts. Nolan Bros., Inc. v. United States, 437 F.2<sup>nd</sup> 1371 (Ct. Cl. 1971).

If no rate is specified in the contract then the rate can be established from the Contractor's actual cost records or its internal rate if one is established. The Contractor can also use the rate it charges for renting its equipment to third parties. The various rate manuals usually do not include operating expenses, labor or mobilization. If appropriate, these costs must be added in determining damages.

#### **5. EXTENDED USE OF EQUIPMENT.**

The extended use of equipment arises because of unplanned multiple shift operations or extensions to the project time. With regard to multiple shift operations the AGC manual provides that several of the cost factors are covered by the first shift's use and the succeeding multiple shifts are allowed only depreciation, repair and maintenance in determining the rates.

For extended use of each piece of equipment the damage equals the rate or cost times the extended period of use. The cost of the equipment is determined as if it were idle equipment. Extended periods of use can normally be determined from the

Contractor's records. If equipment is only partially idle due to the delay, the Contractor is still entitled to recover damages for the lost time.

**6. IDLE EQUIPMENT.**

The damages are less for idle equipment than extended use because the equipment is not subject to wear and tear. The contract should be read to determine whether there is a rate established for idle equipment.

**G. INCREASED COSTS: INEFFICIENCY AND LOST PRODUCTIVITY**

Common sense and experience demonstrate that disruptions to the work schedule, acceleration ( which result in increased crew sizes, overtime and multiple shifts) loss of learning curve, fatigue and adverse weather conditions all contribute to the loss of productivity and inefficiency on a project. Various factors that effect productivity include:

Multiple trades in a work area at once or stacking of trades.

Morale

Redirecting labor to different tasks

Crew size

Concurrent operations

Reduced supervision or multiple supervision duties

Learning curve

Errors/omissions

Multiple occupancy of job site

Access to the work

Transit and supply issues

Fatigue resulting from overtime or weather conditions

Overtime

Weather conditions

Ripple effect from any of the above.

To generally calculate the damages for inefficiency, and lost productivity one must first determine whether there was a normal period of production on the project. If production decreases using the same equipment and labor, damages can usually be calculated by comparing the inefficiency factor between normal and subnormal production. The payroll during the subnormal production can be multiplied times the inefficiency factor to determine the costs.

If changes and disruptions occur early on a project and continue for a substantial portion thereof it will be impossible to determine a normal production rate for the work involved. Under those circumstances the Contractor should attempt to determine the normal production for work on similar projects. The production schedule and production contemplated in preparing the bid are useful in approximating what production was contemplated by the Contractor. This is an area where expert testimony is very helpful.

It is helpful to prepare an as built schedule and compare that with the as planned schedule using the Critical Path Method. This comparison will demonstrate which activities took longer than planned and show how the job was impacted. Once again, this type of analysis is most effective when presented by an expert. Experts can help in this area since there are industry and government studies that can be used to establish

inefficiency caused by excessive overtime and other adverse conditions under which crews maybe forced to work be cause of an Owner's disruptions, changes and delays.

Expert testimony is particular effective when the disruption and delay problems become obvious in a project and the Contractor is able to document the fact with regard to the events that are impacting upon the work while the job is in progress. Such facts can result in the creation of very effective demonstrative evidence. Comparing the progress of the job as a result of the delays and disruptions.

#### **H. PROFIT**

Reasonable profit is recoverable as damages. Contracts frequently stipulate a percentage of profit for change orders. With government contracts, regulations may set forth guidelines for the determination of profit. Lost profits can be claimed for delays as well as future projects and delays prevented the Contractor from obtaining. Moorehead Construction Co. v. City of Grand Forks, 508 F.2<sup>nd</sup> 1008 (8th Cir. 1975); Tempo Inc., v. Rapid Electric Sales & Service, 347 N.W. 2<sup>nd</sup> 728 (Mich. App. 1984); Steele Tech Building Products Inc. v. Edward Sutt Associates, Inc., 559 A.2<sup>nd</sup> 228 (Conn. App. 1989).

There is some authority for recovery of loss profits due to a loss of bonding capacity. Lass v. Montana State Highway Commission, 483 P.2<sup>nd</sup> 699 (Mont. 1971).

#### **J. INTEREST.**

Unless a claim for interest is expressly prohibited by the contract or by statute, interest should always be claimed. If nothing else, a claim for interest will show that the Contractor financed the work. In Delaware the rate of interest is determined by contract or, absent a contract provision, by state statute. In Delaware the legal rate of interest is

5% over the Federal Reserve discount rate at the time that the interest is due. 6 Del. C. §2301. Prejudgment interest is calculated from the date payment is due. Where the obligation to make the payment arises out of a contract the court looks at the contract to determine when the interest begins to accrue. United States ex rel. Endicott Enterprise Inc. v. Star Bright Constructions Co., 848 F. Supp. 1161 (D. Del. 1994). Prejudgment interest is allowable and damages awarded where the amount of recovery is calculable. Rollins Environmental Service Inc. v. WSMW Industries Inc., 426 A.2<sup>nd</sup> 1363 (Del. Super. 1980).

**K. ATTORNEYS FEES**

Unless authorized by contract or statute attorneys fees are not permitted in Delaware, as in most other jurisdictions. For example, AIA A201 only provides attorneys fees in its indemnification clauses regarding bodily injury claims and in the Contractor's duty to furnish a waiver of liens against a completed project.

**V. OWNERS DAMAGES**

**A. CONTRACTOR ABANDONMENT**

As with a Contractor, damages are to place an Owner in the same position it would have been in had the contract been fully performed. As with a Contractor, and Owner's completion costs are presumed to be reasonable. Damages are calculated from determining the reasonable costs to perform or complete the work minus the unpaid balance of the contract price. Pursuant to AIA A201 14.2.4 , if the Owner terminates the Contractor for cause and if the costs and damages to complete the work exceed the unpaid balance, the Contractor is responsible to pay the difference to the Owner.

**B. DEFECTIVE PERFORMANCE: COST RULE**

Where there has been a defective performance the Owner is to be placed in the same position it would have been in if the Contractor had fully performed the contract. The damage is usually the reasonable cost to repair the defect. If it costs too much to make the repair then the courts have held it to be an “economic waste” and apply the “value rule” to calculate the damages. Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921). Where there has been a bad faith or deliberate breach some courts have based damages upon the reasonable costs to repair in spite of the economic waste argument. Fidelity & Deposit Company of MD. V Stool, 607 S.W. 2<sup>nd</sup> 17 (Tx. App. 1980).

**C. DEFECTIVE PERFORMANCE: VALUE RULE.**

To calculate the damages using the “value rule” expert testimony is generally needed. The value rule is used when the cost to repair or complete is disproportionate with the injury and will result in economic waste. Damages are generally calculated by determining the value of the project as built according to the contract specifications minus the value of the project as actually built.

**D. DELAYED COMPLETION- LIQUIDATED DAMAGES**

Losses from Contractor caused delays are difficult to estimate. Therefore, liquidated damage clauses are used. The purpose of a liquidated damage clause is to fix the Owner’s damages for Contractor delays by setting a rate for each day the project completion is delayed. Often times the stated liquidated damage is so great the Contractor may argue that it is a penalty rather than a reasonable estimate of the actual damages.

In Delaware liquidated damages will be upheld when the damages are indeed uncertain and the amount is reasonable. Lee Builders v. Wells, 103 A.2<sup>nd</sup> 918 (Del. Ch. 1954). Liquidated damages clauses are upheld unless there has been a clear abuse or the Owner is determined to have been unconscionable in setting the amount of damages. W & G Seaford Associates v. Eastern Shore Markets, 714 F. Supp. 1336 (D. Del. 1989).

If a Contractor abandons the work prior to completion the Owner should seek to assess liquidated damages up to the date the project was either actually completed or when it reasonably should have been completed. The Contractor should argue the Owner's right to assess liquidated damages ended at the abandonment. The assessment of liquidated damages can be complicated if there are concurrent delays. The burden is on the Owner to apportion the delay in order to assess liquidated damages.

**E. DELAY DAMAGES.**

An Owner's damages for delay are normally the rental or use value of the completed project. However, claims should also be made for costs to rent alternative facilities (if applicable), increased financing costs, labor and consulting costs and consequential damages, such as lost profits.

**1. Rental Value/loss of use.**

Loss of rent can be determined best from actual rental agreements made for the property or rental for comparable properties. This often should be supported by expert testimony.

Occasionally, it can be argued that equipment has suffered some depreciation because of the delay, if it was purchased but unable to be put to use.

**2. Cost of Alternate Facilities**

If the Owner is denied use of a structure it may have to lease substituted facilities and should be entitled to the actual lease cost incurred, so long as the terms are reasonable.

**3. Increased Financing Cost**

These include interest during construction, increased commitment fees for permanent financing and interest increases during the extended period.

**4. Extended Employee and consulting cost.**

These damages are essentially the same as a Contractor's on-site overhead costs and are recoverable to the extent that they have resulted from the Contractor's delay.

**5. Consequential Damages**

Consequential damages such as lost profit or other damages which were within the reasonable contemplation of the parties at the time of contracting are recoverable.

McLain v. Faraone, 369 A.2<sup>nd</sup> 1090 (Del. Super. 1977).

Lost profits are recognized as an element of damages. They need to be proven to a reasonable degree like all damages.