

Fix Now, Point Finger Later

Handling Unexpected Issues on a Construction Project

By Matthew DeVries



When my kids break something in the house, they immediately begin pointing the finger at the “alleged” responsible actor. At the time, they are not concerned about what was broken. In the construction world, many times you will need to fix the problem first and then point the finger later.

I am reminded of a waste water treatment project in Washington State a couple of years ago. As reported in the *Seattle Times*, the incident involved two massive tunneling machines that were damaged and awaiting costly repairs ... 300 feet below ground. The 17.5-foot-diameter machines were supposed to be boring a 13-mile tunnel to take waste

water to Puget Sound. Rather than the 5-feet-per-hour pace that these machines should have been boring through compacted wet dirt, they were dead stopped awaiting repairs. More than 120 workers were laid off until the machines were fixed and each day of delay added to the owner’s more than \$1.8 billion in escalating costs.

This story represents what should be happening on a construction project gone wild—finding a solution. The owner’s project manager stated that the county, the contractor, and the machines’ manufacturer worked together on “getting the fix in place and *getting these tunnel-boring machines moving again*. . . . *it [was] in everybody’s interest*”

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to complete this job as quickly as possible.”

Although the parties worked to find a common solution to repair the two machines so the contractor could complete the work, legal responsibility for the delays still needed to be determined. Ultimately, when disputes like this arise, a court or arbitrator will have to resolve many legal questions, including:

- Were there any subsurface reports performed prior to the start of the work?
- Did the owner have any contractual responsibility for subsurface conditions?
- Did the contractor have any contractual responsibility for its own inspection of subsurface conditions?
- Did the owner/architect have any ongoing supervisory or inspection duties during performance of the work?
- Were the machines properly mobilized and operated during construction?
- Were the machines defective in any way?
- Were there any other concurrent delays affecting the work?

For all the players in the construction industry, this incident is an example of how unexpected events on a construction project require a multi-phased approach to the problem. Your situation may dictate that you quickly assess the extent of the damage, determine a workable and cost-effective solution, and fix the problem first ... and leave the finger-pointing to later. So long as the parties reserve their rights in accordance with the notice provisions of the contract, the project completion will be better served in this approach.

Contractors should pay particular attention to the contract provisions relating to time, changes, force majeure, and differing site conditions. When your work is delayed for reasons beyond your reasonable control, there may be contractual and legal defenses to an owner's assessment of liquidated damages. Of course, the immediate goal will be to get the project back on schedule—but remember that the finger may be pointed at you sometime down the road. ■

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