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CIVL 402

Construction Bonds & Delay Claims

November 2026 | Michael D. Williams

Agenda

- Construction bonds nature and purpose
- Bid bond
- Performance bond
- Labour and material payment bond
- Lien bond
- Delay
- Delay claims – contract time
- Compensable & excusable delays
- Requirements to provide notice of delay
- Concurrent delays
- Damages/additional compensation

Construction Bonds Nature and Purpose

3-Way Contract

- Special form of contract in which one party, the **surety**, guarantees performance by another party, the **principal**, of certain obligations.

- The **obligee** is the party to whom obligations are owed (i.e. the party that benefits from the bond).

- In exchange for guaranteeing the principal's performance, the surety charges the principal a premium

- Bonds are a form of security for construction risks.

- Indemnity Agreement – typically the surety requires the principal (and its major shareholders) to indemnify the surety against any loss.

Construction Bonds Nature and Purpose

Not insurance!

- Three-party agreement between the surety, principal and obligee (insurance is two party)
- Bond is triggered when principal defaults on its obligations to the obligee (insurance triggered by fortuitous events)
- Bond pays for pure economic loss, meaning the cost of completing the principal's obligation (insurance usually excludes coverage making good deficient work)
- A surety that pays out on a construction bond has the right to seek recovery from the defaulting principal (an insurer that pays out on an insurance policy has no right to recover against insured)

Bid bond

Principal:	Tenderer.
Obligee:	Tendering authority.
Usual Amount:	10% of bid/tender price.
Risk:	Failure of contractor to enter into construction contract after bid acceptance by owner.
Requirements:	Surety required to pay difference between amount of tenderer's bid and next lowest bid, up to maximum amount specified in the bond.
Enforcement:	For CCDC bid bonds, legal action must be commenced within six months of the date of the bond.

Performance bond



Principal:	Contractor.
Obligee:	Owner.
Amount:	50% of Contract Price.
Risk:	Default in performance of the contract.

Performance bond

Requirements

- Obligations are triggered when principal is in default.
- Obligee must give surety timely notice of claim.

Enforcement

- Surety will conduct thorough investigation as to the alleged default
- Surety options to pay the bond amount, remedy the default, complete the contract, obtain a bid to complete the contract.
- Significant change in risk (e.g., material change in contract time) may release surety from its obligations.
- Legal action within two years from the date on which final payment under the contract falls due.

Labour and material payment bond



Principal:	Contractor or subcontractor
Obligee:	Owner or contractor
Claimants:	Subcontractors/material suppliers.
Amount:	50% of Contract Price.
Risk:	Non-payment.

Labour and material payment bond

Requirements

- Non-payment for 90 days after the Claimant's last work or material supply.
- Surety obliged to pay claimant face value amount owed by principal, up to available amount of bond.
- Surety entitled to any defences to payment available to principal/contract (e.g., deductions for deficiencies or other set-offs).

Enforcement

- Obligee must file claim under bond within 120 days after the Claimant's last work or material supply, for non-holdback, or within 120 days of when payment in full should have been made, for holdback.
- Legal action within one year of the date on which the Contractor ceased work.

Lien bond

Principal:	Contractor.
Obligee:	Registrar of the Court or Contractor's lawyer in trust.
Claimants:	Lien Claimants.
Amount:	Lien amount.
Risk:	Non-payment of lien judgment.
Requirements:	Surety required to pay lien claimant if lien found to be valid and principal does not pay amount ordered by the Court.
Enforcement:	Lien claimant to file claim of lien and commence action pursuant to limitation periods set out in the Limitation Act and the Builders Lien Act.

Typical Performance Bond Procedure

For your enjoyment…

1. Principal defaults
   - Failure to pay subcontractors
   - Insolvency
   - Refusal to remedy construction defects
   - Failure to meet project schedule

2. Obligee provides proper notice to the Surety and appropriate documentation
   - Notice provision and limitation period timelines apply
   - Documentation should also be included: contract, change orders, billing/accounting, etc.

3. Investigation by Surety
   - Surety has a reasonable period to investigate the default and a reasonable period to remedy it.
   - Potential defences: principal not actually in default; contract has been materially altered since the surety issued the bond; owner acted to the prejudice of or misled the surety.

Typical Performance Bond Procedure

For your enjoyment…

4. Performance by Surety
   - Assist principal in remedying default
   - Engage another contractor to finish the work
   - Issue tenders on behalf of the owner an dpay the owner any additional costs of th enew contract
   - Pay the owner the amount for which the surety has degtermine dit is liable

Relevant Caselaw

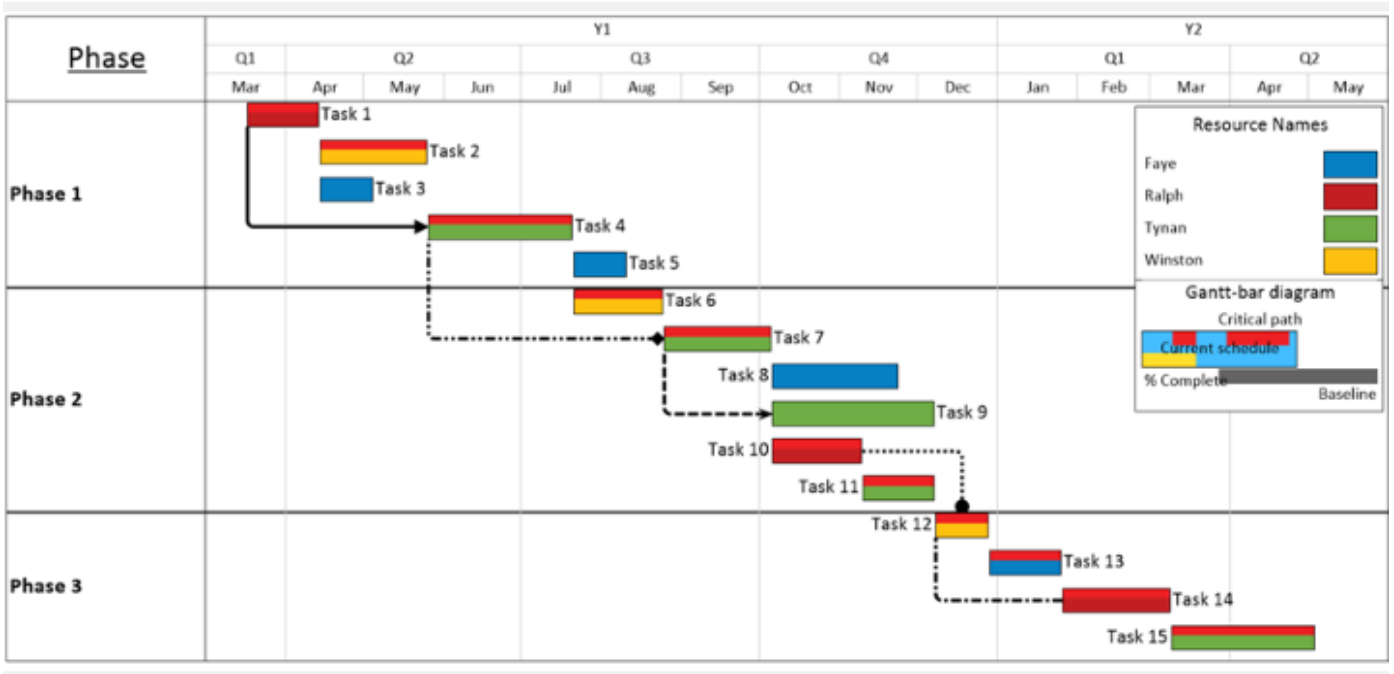
For your enjoyment…

- Bond must be signed by all parties and then delivered to the obligee: *Paul D'Aoust Construction Ltd. v. Markel Insurance Co. of Canada*, [2001] 3 S.C.R. 744 (SCC).

- Sureties cannot escape liability based on technical defects or late notice from an obligee unless the surety can prove it suffered actual prejudice or significant harm as a result: *Citadel Assurance v. Johns-Manville Canada Inc.*, [1983] 1. S.C.R. 513.

- Obligees (such as general contractors or owners) can owe a duty to unpaid subcontractors or suppliers to disclose the existence of a labour and material payment bond: *Valard Construction Ltd. v. Bird*, 2018 SCC 8.

Delay Claims



Causes of Delay

An event that causes extended time to complete all or part of a project

1) Design process
2) Material delivery
3) Performance of work
4) Authority Having Jurisdiction
5) Financial and cash flow problems

Contractual Terms

Typically, construction contracts outline how the parties deal with delay claims.

1) Notice provisions
2) Types of delays
3) Excusable versus compensable delays

Types of Losses

- Owner losses: damages due to late completion of a project by a contractor
  - Lost rent, increased financing costs, increased construction costs, etc.
- Contractor losses:: damages and/or extension of time due to factors beyond the contractor's control
  - Increased construction costs, lost opportunity, etc.

- Compensable vs. Excusable Delays



Compensable Delays

Where one party is contractually entitled to recover damages from the delaying party

- Delaying party is the sole cause of the delay
- No concurrent delays

Excusable Delays

- Not attributable to the fault of any party. Entitles a party to an extension of time.
- Typically, these are events that are unforeseeable and are not a result of the control, fault or negligence of the contractor.
- Ex: unusually severe weather, strikes, fires, floods.

Excusable Delays – Cont'd

- May or may not be compensable - depends on the wording of the contract.
- CCDC2 6.5.3: The contractor shall not be entitled to payment for costs incurred by excusable delays, unless they result from the actions of the Owner, Consultant or those for whom they are responsible.



Concurrent Delays

- Two or more events occur at the same time, each of which would have been sufficient to have caused the delay.
- Result in an excusable time extension but no damages.

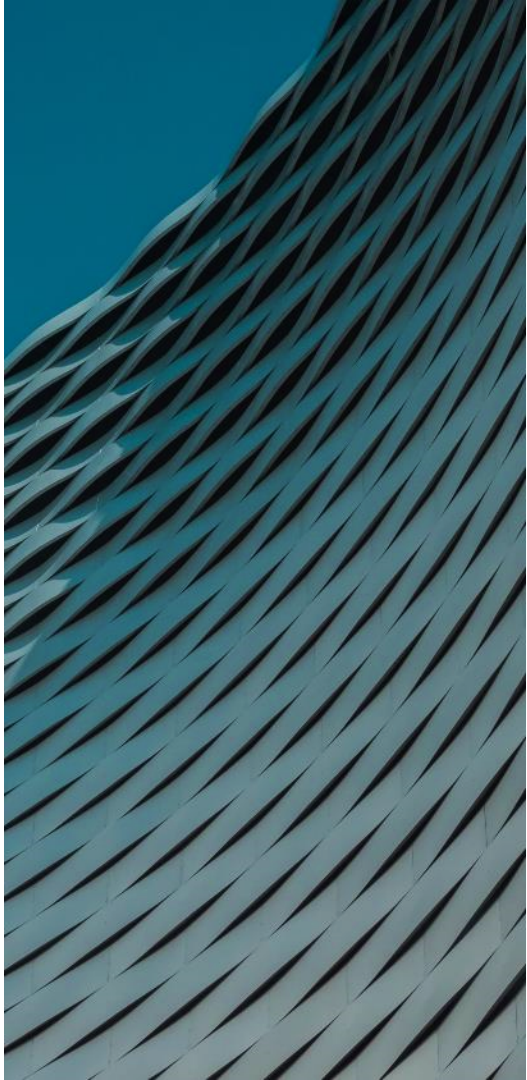


The Critical Path

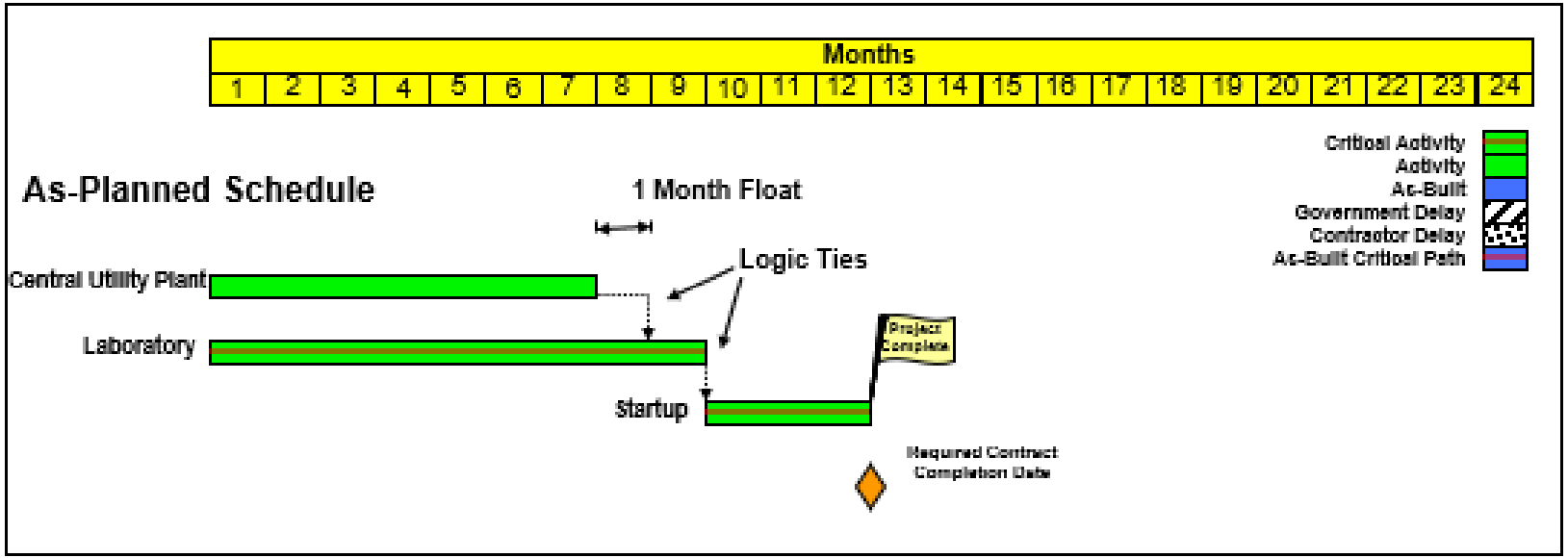
- Delays must impact the critical path of the project.
- The longest path through the contract completion date.
- If an activity on the critical path is delayed, the project's completion date will be delayed.

Float

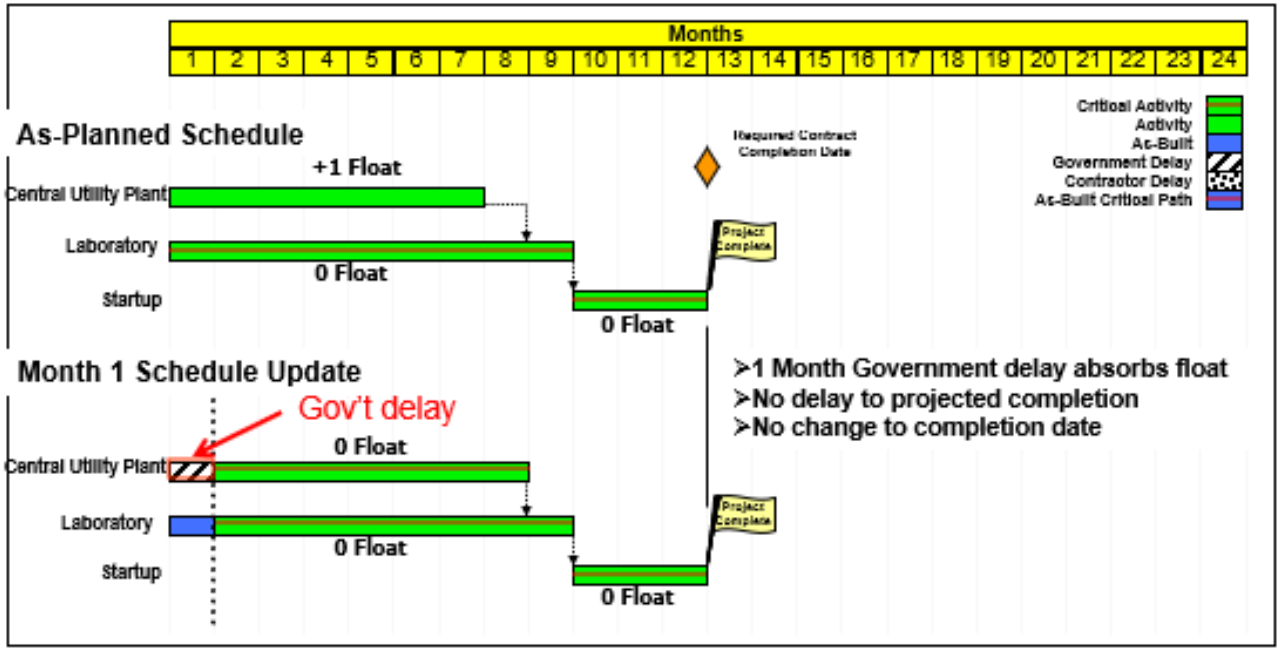
- Critical path activities typically have zero float.
- The available slack time in an activity or project schedule.



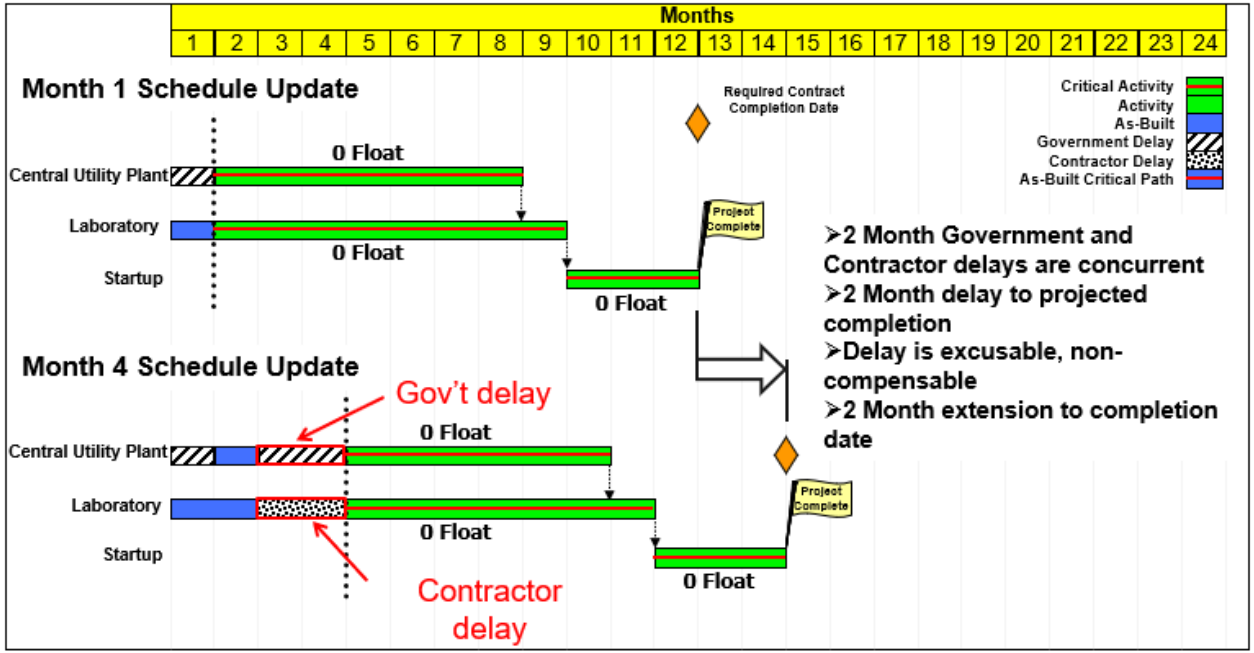
As-Planned Schedule



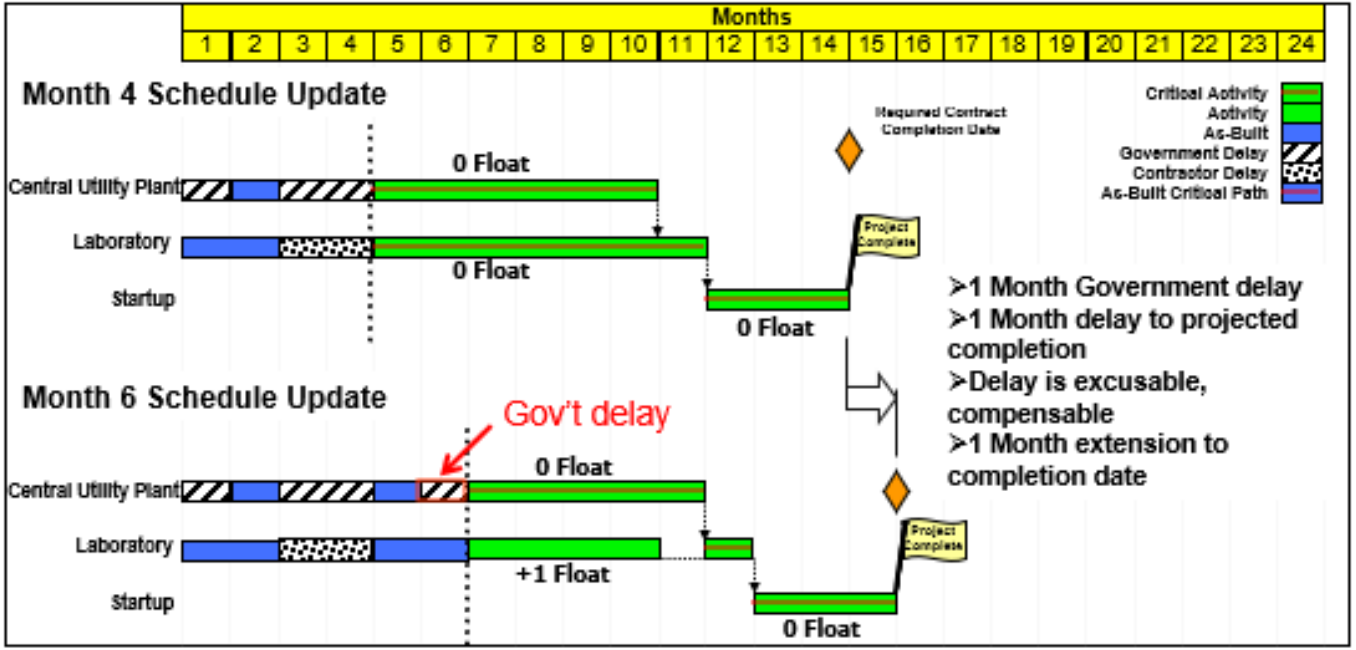
Noncritical Delay Absorbing Float



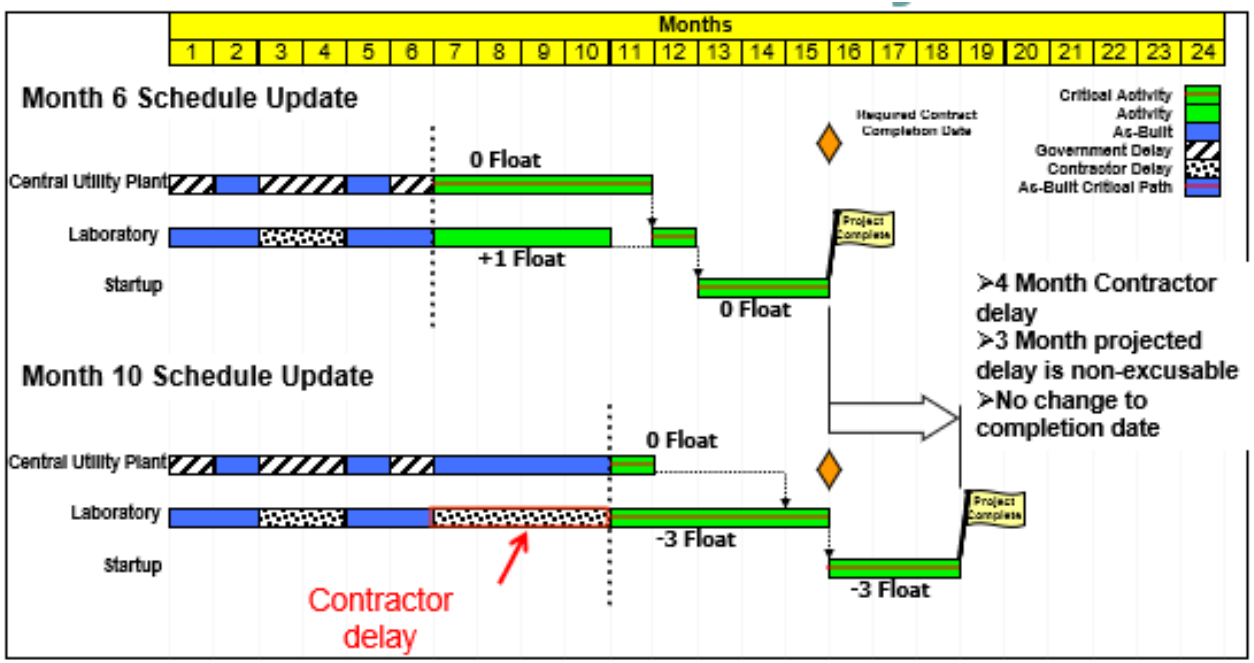
Concurrent Delay



Government Delay



Contractor Delay



Notice Provisions

- CCDC2 6.5.4: contractor must give notice of a delay claim within 10 working days to be entitled to claim time extension.

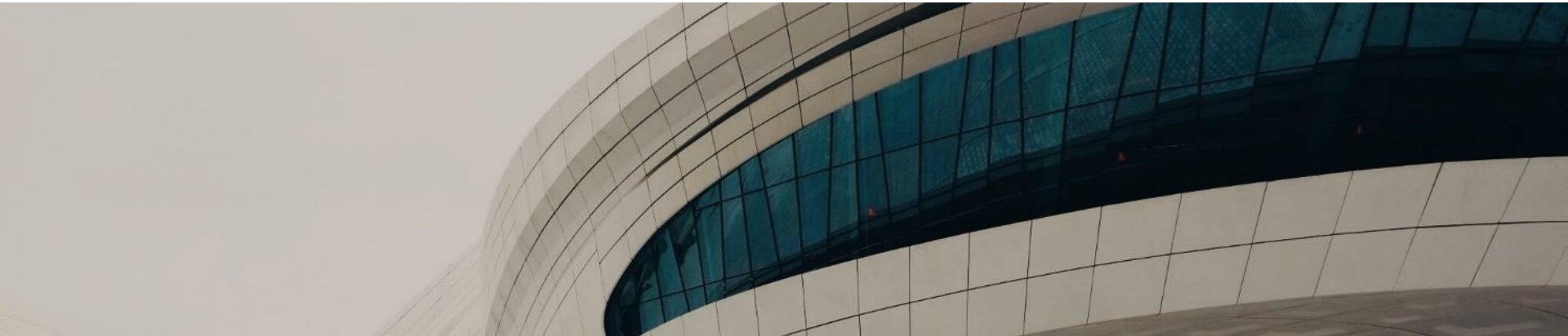


Notice Provisions – Cont'd

- CCDC2 6.6.1: contractor must give "timely notice" of monetary claims.
- CCDC2 6.6.3: party making the claim shall submit a detailed account and grounds for claim to the consultant "within a reasonable time".

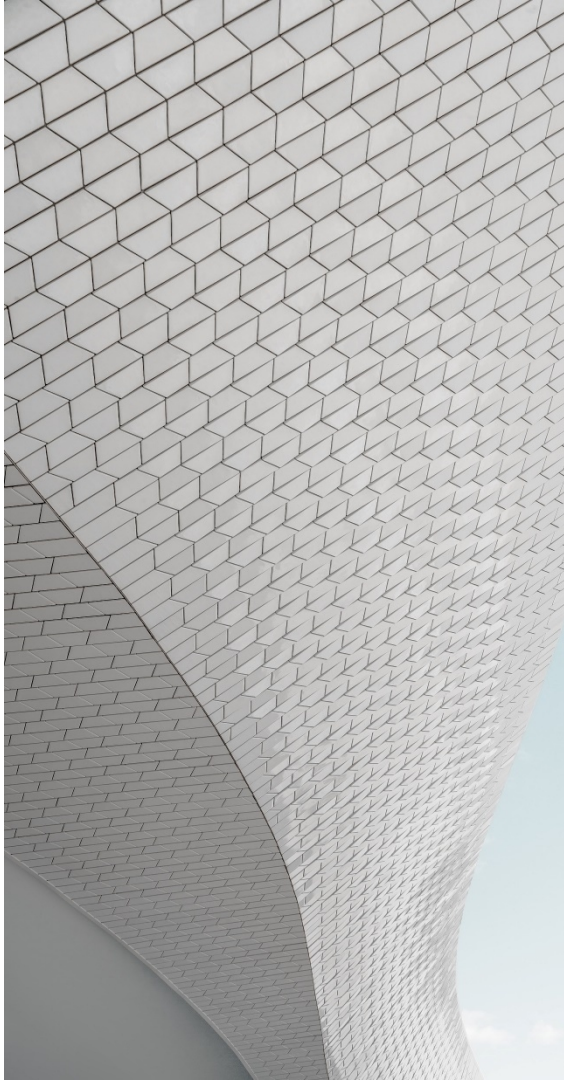
Delay Damages

- A claim for costs that arise from inefficiencies created by delays



Contractor Costs

- Time-driven costs
- Escalation costs



Owner Costs

- Extended project oversight costs
- Increased construction financing costs
- Lost profits



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Thank you. Any questions?

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V2.25

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