

**DAMAGES IN CONSTRUCTION LITIGATION: CURRENT ISSUES AND
CASE LAW**

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This paper is intended to provide an overview of damages recoverable by both contractors and owners related to construction projects. With respect to contractors, typical damage claims will be covered such as: delay claims, lost profits, increased overhead, and quantum meruit. Regarding owners, this paper covers damages for delays, cost to complete, loss of use, lost profits, cost of repair, and difference in value measure of damages.

I. Damages Recoverable by Contractors

a. Delay Claims

If a contractor chooses to complete a project despite changes in conditions caused by the owner that increases the cost to the contractor, the contractor may claim the increased costs as damages. A contractor is entitled to recover damages from an owner for losses due to delay and hindrance of its work if it proves: (1) that its work was delayed or hindered, (2) that it suffered damages because of the delay or hindrance, and (3) that the owner was responsible for the act or omission which caused the delay or hindrance. *Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App. -- Houston [14th Dist.] 1978, writ ref'd n.r.e.).

The case of *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144 (Tex. App.-- Houston [14th Dist.] 1985, no writ), is illustrative of the type of disputes that can arise between contractors and owners over delays. In *Shintech*, the owner contracted with H.B. Zachry Company for expansion of its polyvinyl chloride (PVC) plant. Zachry was responsible for performing all work on the expansion project, including the mechanical construction and the electrical and instrumental work. The contract was on a cost-plus basis. *Id.* at 147. Well into the project, the owner determined that the expense of Zachry's work was exceeding the initial

projection and decided to obtain bids for the remainder of the work. Group Constructors, Inc. (“GCI”) submitted a bid proposal to furnish all labor, construction services, and supplies necessary to construct mechanical or piping work on the plant expansion project for a lump sum price. The owner and GCI thereafter entered into a contract for the completion of the work.

Later, GCI brought suit against the owner for damages allegedly caused by owner’s interference with the efficiency of its work. The owner allegedly interfered in the following ways: (1) failing to timely and continuously furnish material for use by GCI as called for in the contract; (2) furnishing materials for installation which were erroneously prefabricated by the previous contractor; (3) making excessive design errors, changes, and extra work orders; (4) constructively accelerating GCI’s work by delaying it through the acts mentioned above while refusing to extend the work schedule; and (5) accelerating GCI’s work through imposition of an additional swing shift. *Id.* at 147-48.

Citing to a provision in the contract that established liability on the owner for schedule delays it caused or controlled, the court of appeals held that the owner was indeed liable to GCI for GCI’s cost overruns. *Id.* at 150. The court noted that GCI had presented evidence that the owner had upset GCI’s work schedule by excessive design errors, extra work orders, prefabrication errors, and through the imposition of an additional swing work shift. *Id.* at 150. Contrast this result with the case of *Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App. -- Houston [14th Dist.] 1978, writ ref’d n.r.e.) (the court recognized the “no damages for delays” clause in the contract applied to ALL delays, both anticipated and unforeseen, thereby barring the contractor from recovering delay damages).

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