1. DAMAGES GENERALLY

   a. The measure of damages for breach of a construction contract is similar to that in any other contract – the cost to put the injured party in the same position it would have been in if the breach had not occurred.

   b. Where the injury results from failure to furnish labor or materials as agreed, the measure is generally the cost to repair, replace or perform the defective work. If the defective work can be repaired to a state that conforms to the contract, replacement is not likely to be available as a remedy.

   c. Where the injury results from failure to pay money when due, the measure is recovery of the amount due, with interest.

   d. It gets more complicated when the injured party seeks an additional recovery for what are referred to as indirect or consequential damages, such as lost profits or business interruption. It is in the contractor’s interests to limit its exposure for indirect or consequential damages through use of a limitation of liability clause.
2. **DELAY, DAMAGES FOR DELAY AND EXTENSIONS OF TIME**

a. Contract must address these issues explicitly. Otherwise, the contractor probably is not entitled to compensation for damages due to delay, unless the delay is due to a breach by the other party.

b. The contract price does not reflect an amount for increased costs of performance due to unanticipated delay.

c. Thus delay for reasons beyond the control of the contractor should reasonably entitle the contractor to an extension of time without penalty (excusable delay), and may entitle the contractor to damages in the amount of increased cost of performance due to the delay (compensable delay). Such reasons may include weather, strikes, material shortages (when the contractor attempted to place the materials order in a timely manner), design errors, delays in the performance of work by others not within the control of the contractor.

d. Identification of compensable delay items is a matter of negotiation and allocation of risk. Where the delay results from a factor that is the responsibility of the owner (such as errors in the design, failure to make decisions or delay caused by other contractors that are the responsibility of the owner), compensation is highly appropriate. Where the delay results from a factor that is beyond the control of either party (such as severe weather or unavailability of materials), the negotiation determines who bears the risk.

e. Most delay clauses require the contractor to notify the owner when the contractor becomes aware of conditions that will result in a delay and many require the contractor to state the amount of the delay anticipated whenever it can be determined. If so, NOTICE IS ESSENTIAL OR THE CONTRACTOR MAY LOSE ITS RIGHT TO CLAIM EXCUSABLE OR COMPENSABLE DELAY, AND BE SUBJECT TO LIQUIDATED DAMAGES.

f. The contractor should maintain a daily log of project conditions and events, with particular emphasis on those which may impact the time of performance, including weather, delays in performance by others, delays caused by the owner, and delays caused by unanticipated conditions. Ongoing written communication with the owner regarding the status of the schedule is advisable even in the absence of a contract provision requiring notice of delay or providing for liquidated damages for delay.
g. No damages for delay clauses are generally enforceable unless prohibited by statute, but are not favored and are strictly construed against the party seeking to enforce the clause.

i. California limits enforceability by statute.

ii. Ohio enacted a statute in 1998 declaring such clauses unenforceable where the delay is the owner’s responsibility. Ironically, in April 2007 the Supreme Court of Ohio ruled that in the case of a contract entered into prior to enactment of the statute, a no-damages-for-delay clause barred the contractor from damages for delay, and from mitigation of liquidated damages for substantial delay, even though the delay was acknowledged to be solely attributable to defective plans and specifications furnished by the owner.

iii. Virginia limits enforceability of such clauses in public contracts where the clause limits recovery for unreasonable delay when the delay is due to acts or omissions of a public body or its agents or employees.

iv. The common law of some states declines to enforce no damages for delay clauses where the delay is due to the affirmative act, or failure to perform, of the owner, or where the delay is “unreasonable” in duration or for reasons “not within the contemplation of the parties.” Such relief cannot be assumed, and the contractor should negotiate the clause effectively.

v. Where the delay is the fault of another contractor or party other than the owner or the subject contractor, the enforceability of the no damages for delay clause is uncertain. Delay due to the failure of a third party to perform is foreseeable, and courts will generally hold parties to their contracts where the intention of the parties is clear. In some cases under these circumstances, it has been relevant to determine which party is responsible for coordination and scheduling – usually the general contractor.

vi. The contractor should negotiate to modify such clauses, especially clauses which purport to bar damages for delay which are the fault of the owner or a third party.

3. LIQUIDATED DAMAGES FOR DELAY

a. Generally – liquidated damages are appropriate only when the actual damages for a breach would be difficult to measure. Liquidated damages clauses are most often encountered in the context of time of performance, because determining the damages from a delay in performance might be very difficult. Where money damages can reasonably be determined, liquidated damages are not likely to be enforced.
b. Enforceability – liquidated damages must be in an amount reasonably estimated by the parties to compensate the damaged party for future delay, and must not be unreasonable or a penalty. The reasonableness of the estimate is determined based on what was known to the parties as of the time the parties entered into the contract, not at the time of the delay.

c. Amount – can be intended to cover pre-estimates of damages such as lost profit, lost production, temporary rental and relocation costs, lease holdover costs, multiple relocation costs, difference in construction loan interest vs. permanent loan interest. One general method of computing the amount of liquidated damages is to assess the equivalent of a daily rate of interest on the project value. Thus a $100,000 project with an assumed value of 8% would yield damages for delay in delivery at a daily rate of 

\[
\frac{\$100,000 \times 0.08}{365} = \frac{8,000}{365} = \$21.90
\]

d. May be escalated over time to reflect increased daily cost of extensive delay.

e. Generally, the arguments for the contractor seeking to avoid liquidated damages for delay are:

i. that the delay is excused under the terms of the contract, or

ii. that the liquidated damages clause is an unenforceable penalty.

4. WHEN IS FAILURE TO PERFORM NOT A BREACH?

a. When the other party has committed a material breach. What is a material breach? A breach that goes to the core of the contract.

b. When failure to perform is the result of conduct or omission by the other party that hindered or prevented performance, or is otherwise excused under the terms of the contract. Possible examples:

i. Improper sequencing

ii. Overcrowding

iii. Delay caused by other trades over which the contractor does not have control

iv. Change orders

v. Failure of the general contractor to manage the schedule

c. Watch out for the “Continuing Performance Clause” which requires the contractor to continue to perform under the contract even while a dispute is being resolved. Such a clause is intended to obligate the contractor to
perform, even if the owner is in breach, provided the breach is being contested. Some courts have held that the Continuing Performance Clause is unenforceable if the owner is in breach, which renders the clause a nullity, but that result cannot be counted on.

5. LIMITATION OF DAMAGES

a. Prohibition on recovery of consequential damages will generally be in the contractor’s favor. For example: “Notwithstanding anything to the contrary, the contractor shall not be liable for any special, indirect, consequential or incidental damages, including, without limitation, loss of profits or business interruption, even if the damage is to property beyond the subject matter of this agreement and even if caused by the contractor’s negligence.”

b. Recovery of interest is appropriate. Some clauses will allow recovery of interest only on claims as to which liability, but not the amount was not in dispute (“liquidated claims”). More favorable to the contractor are clauses that provide for interest on all damages recovered, from the date the payment was due or the damage was incurred.

6. LITIGATION OR ARBITRATION COSTS AND ATTORNEYS’ FEES

a. Absent a contract or statutory provision, each party bears its own attorneys’ fees. Settlement is often encouraged by a provision that entitles the substantially prevailing party to recover its reasonable attorneys’ fees. Some contracts provide for recovery of fees only to the extent that recovery is enhanced beyond the last offer of the losing party.

b. Arbitration clauses should provide for allocation of arbitrators’ fees and expenses. These may be allocated equally, or the arbitrator may be authorized to allocate those expenses in favor of the prevailing party. More sophisticated clauses may provide for allocation based on a comparison of the final outcome to the last recorded settlement positions of the parties.