How to Spot, Deal With, and Move Past a Delay

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GENTRY LOCKE
Attorneys

Hypothetical Problem

- Your company is working on a project and discovers a latent design issue that will likely require significant design input to correct, which in turn will result in significantly more materials and labor.
- Your relationship with the Owner (or GC, for subs) is already strained.
- On top of it all, your NET is maybe 3%.

Significance of a Construction Schedule

- **Why is a Schedule important at this juncture?**
- **How can a realistic, accurate schedule aid in your assessment of this problem?**

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Initial Review of the Problem

- Without a schedule (or, without a regularly and accurately maintained schedule) how are you going to determine the extent of the impact of this event?
- How do you convey that information to the Owner/GC?

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Initial Review of the Problem using an Accurate Schedule

- Reveals that the design issue will likely result in 45 days of additional work.
- This will push the completion date 23 days past the Contract Completion Date.
- Your general conditions and home/field office overhead are costing you $1250/day.
- Contract has Liquidated Damages at $500/day.

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Now what do you do?

- Under the AIA 201-2007?
- Under the Municipal Contract?
- Under the VDOT Contract?
- Project Specifications Div. 1
- **Know your Contractual Requirements.**
  - Make a checklist of dates/requirements

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What about Subcontractors?

- How do you handle a delay claim, especially when your subcontract has a flow-down provision?

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What is the law in Virginia?

- **The Contract is the law to live by.**
- Notice requirements are strictly construed and strictly applied.
  - AMEC Civil
  - American Bridge
  - Coleman Adams
- How this impacts you → comply with the contract.

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Giving an Effective Notice

- A notice needs to comply with the contract.
  - Content
    - Factual statement
    - Supporting data
  - Timing
    - Within the appropriate timeframe
  - Delivery
    - Send it the way the contract requires, and then every other way.

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Content of a Notice

- Write so that an outsider (judge, jury, uninvolved Owner) can understand the project, the issue, and the remedy.
- Provide supporting data as Contract requires
  - Schedule analysis
  - Photos
  - documentation

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Timing Conflicts

- How do you handle the conflicting deadlines?
  - For time delays, VDOT 2016 Spec. states:
    - Contractor to submit its request for an extension of the Contract time limit **within 3 days of experiencing such a delay**. (§ 108.04 (¶3))
    - Contractor shall **within 14 days after the end date of a delay event,** submit a written request for a change order, along with a Schedule Impact Analysis (SIA). (§ 109.05(e))
    - Contractor to submit a written Notice of Intent to File a Claim **at the time of each and every *occurrence*, or prior to the beginning of the work.** (§ 105.19(a))

"Each and Every Occurrence"

- What does that mean?
- Should I submit a Notice every time it rains on the jobsite?
- Do I wait until the weather culminates into "abnormal" weather conditions?
- Cumulative Inpact Claims?

Record Keeping

- Important to substantiate and prove your claim.
  - Daily logs
  - Photos/video/as-built
  - Third-party testing/inspection
  - Tracking progress in the schedule

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Use of Schedules to Prove Claim

- Effectiveness
  - Tracks the details of the project
  - Empirically illustrates delays to the project

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Key Points

- Read your Contract and Specs.
- Maintain an accurate and reliable schedule.
- Evaluate each and every possible delay.
- Don't wait until the end to deal with a delay, it will likely be too late.

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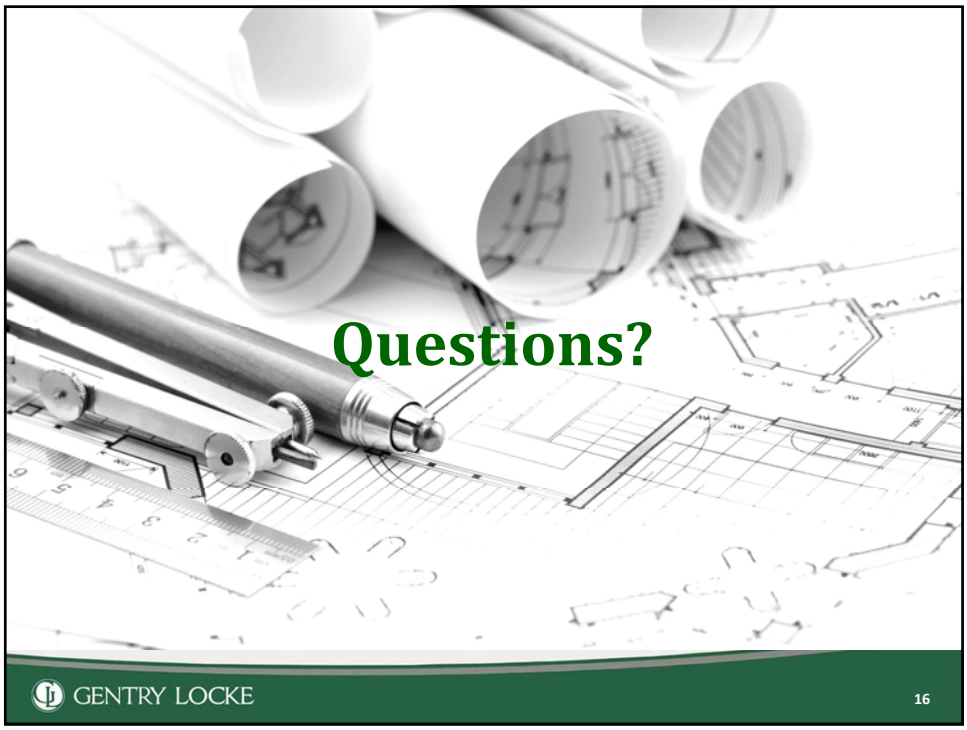

Questions?

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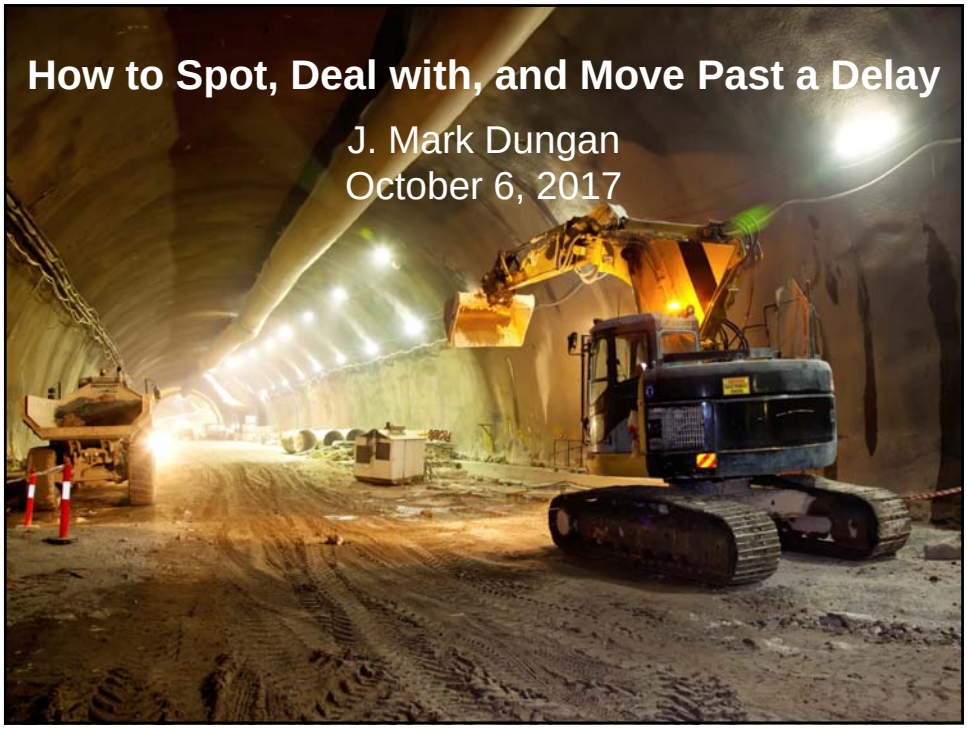

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Schedules: Back to Basics

I. CPM Scheduling Basics
II. The Baseline Schedule
III. The Schedule Update
IV. Delay Analysis
V. Proving and Tracking Damages

Delay Claims and Time Extension Requests

- How to recoup the costs and obtain a time extension for delays
- "Pitfalls, tricks and traps" that can foil time extension request and delay claims

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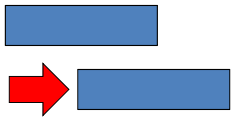
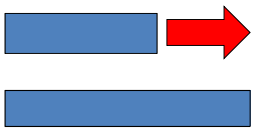
Delay Events

Essentially, a delay occurs when:



An activity starts later than planned, and/or



Takes longer to perform than planned

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Delay Events

A delay event may be attributed to any party in the project

- Owner/Stakeholder
- Designer/Consultants
- Contractor/Subcontractor
- Government and Regulatory Agencies
- “Force Majeure” or “Acts of God”

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Delaying Events

- Events causing delay:
  - Single Change Order
  - Multiple Change Order cumulative impact
  - Differing Site Conditions
  - Delays caused by others not under your control
  - Force Majeure
  - Unusual weather
- Types of Delay:
  - Critical
  - Non-Critical
  - Concurrent

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Types of Delay Events

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Critical Delays

- The Critical Path is the longest continuous path through the project schedule.
- A Critical Path Delay is an event that affects the timing of a critical activity in the schedule.
- Only delays to the critical path can delay the completion date of the project.

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Critical Delays

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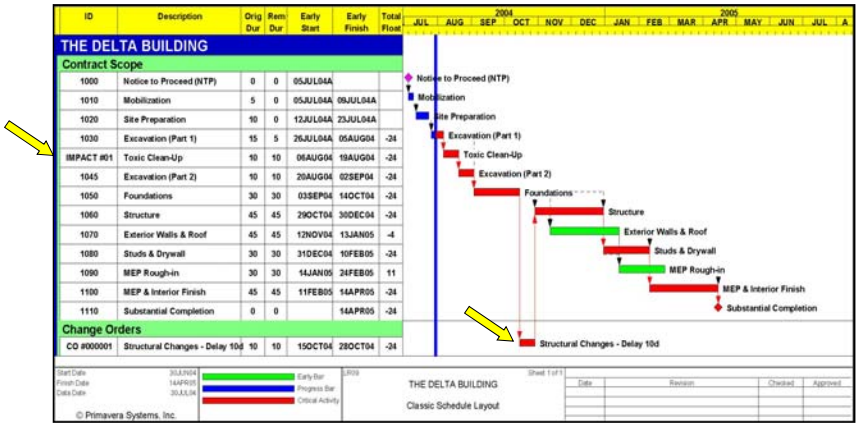

A toxic clean-up and a change order are critical delays to this schedule.

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Non-Critical Delays

- A Non-Critical Delay is an event that impacts non-critical schedule activities
- Non-critical activities have Total Float
- Delay to completion of a non-critical activity consumes project float and therefore does not impact the project completion date

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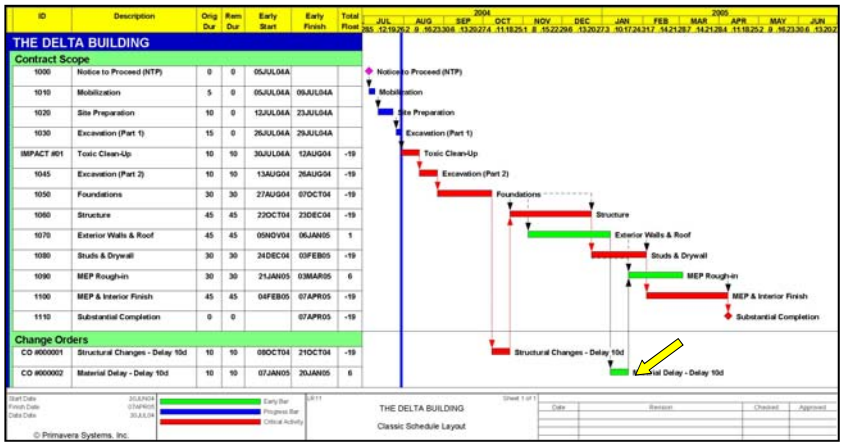
Non-Critical Delays



A delay in material deliveries for MEP is a non-critical delay to this schedule.

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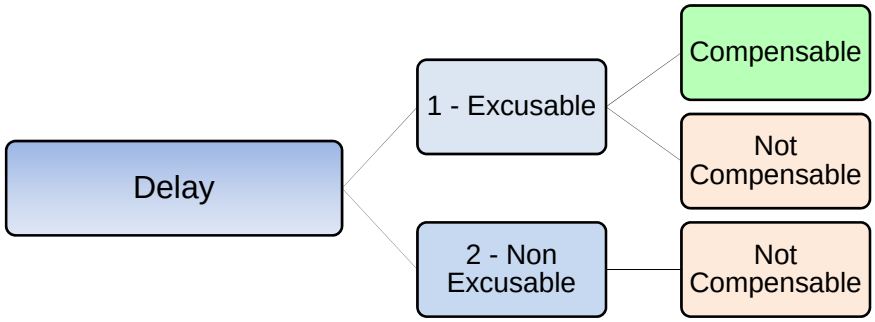
Excusability: There are Two Ways to Categorize Delay



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Types of Delays

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- Excusable delays – Critical Path delays for which the Contractor is not responsible. Contractor may be entitled to a time extension and damages (money).
  - Contract provisions may state delay risks for which the Contractor is not liable.
    - Certain number of weather days beyond which the Contractor is not liable
    - Force Majeure provision
      - weather
      - labor unrest
      - civil unrest
      - other “Acts of God”

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Types of Delays

- Excusable Compensable delays – Excusable delays that are the responsibility of a party outside of the contractor's control
  - Contractor may be entitled to a time extension and damages (money)
  - Examples:
    - Delays providing engineering and other design drawings
    - Access to site
    - Disruption due to numerous changes

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Types of Delays

- Excusable Non-Compensable Delays
  - Concurrent delays – Two or more critical path delays occurring in the same timeframe:
    - Owner's contribution to the delay results in a time extension, therefore Owner gets no LD's
    - Contractor's contribution to the delay nullifies any compensation to the Contractor

Time extension is the only Remedy.

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Types of Delays

- Non Excusable Delays
  - Any critical path delay for which the contractor is solely responsible, for example:
    - Late material deliveries
    - Slow performance
    - Correcting defective work

Contractor received neither a time extension nor compensation and must seek “recovery” at its own expense.

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Delay Correction: Acceleration/Recovery

Acceleration

- Directed Acceleration
  - Owner directs Contractor to accelerate the work
  - Contractor alters plan to accommodate and incurs additional cost
    - Additional manpower, overtime, inefficiencies
    - Increased overhead
- Constructive Acceleration
  - Contractor is entitled to Excusable Delays but no time extension granted despite request for time extension in accordance with the contract
  - Contractor must notify the Owner
  - GC/Sub, in fact, accelerate and incur increased costs

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Delay Correction: Acceleration/Recovery

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Recovery

- Non-Excusable Delay caused by GC/ Subs
- Voluntary Recovery is an effort for “making up lost schedule time”
- In recovery scenario, GC/Sub extra costs due to compressed schedule are NOT recoverable from Owner

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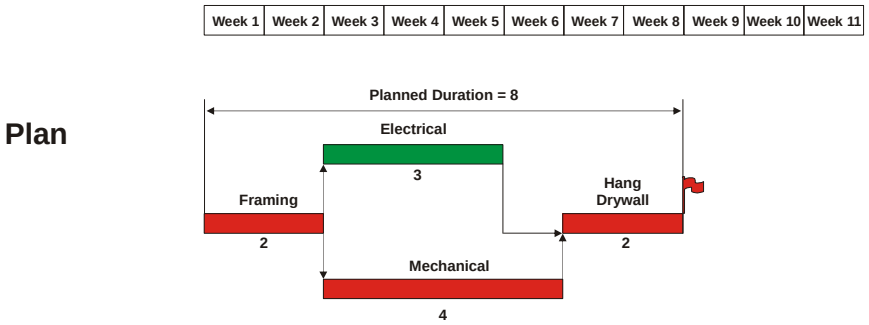
DELAY ANALYSIS



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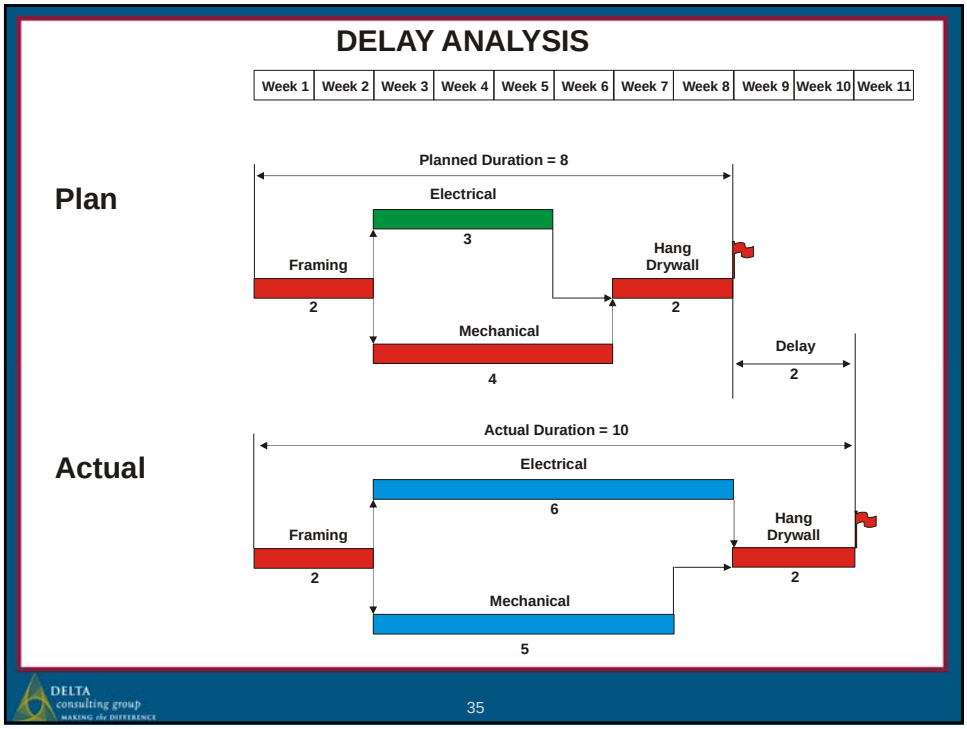
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Week 1
Week 2
Week 3
Week 4
Week 5
Week 6
Week 7
Week 8
Week 9
Week 10
Week 11
Plan
Planned Duration = 8
Electrical
3
Framing
2
Hang Drywall
2
Mechanical
4
Delay
2
Actual
Actual Duration = 10
Electrical
6
Framing
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Hang Drywall
2
Mechanical
5
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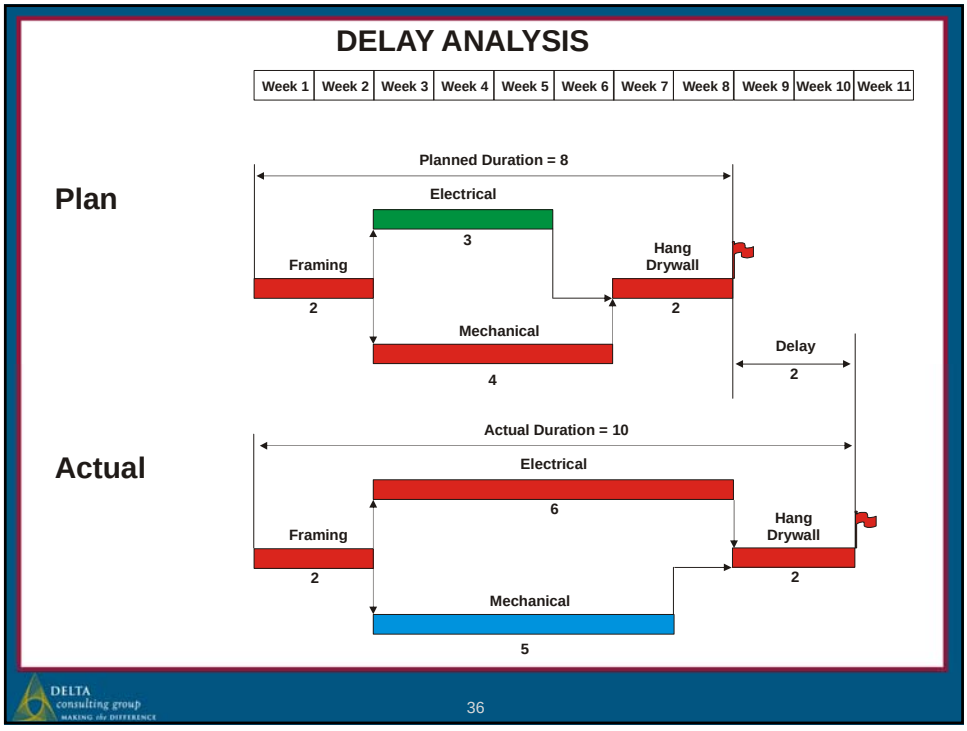
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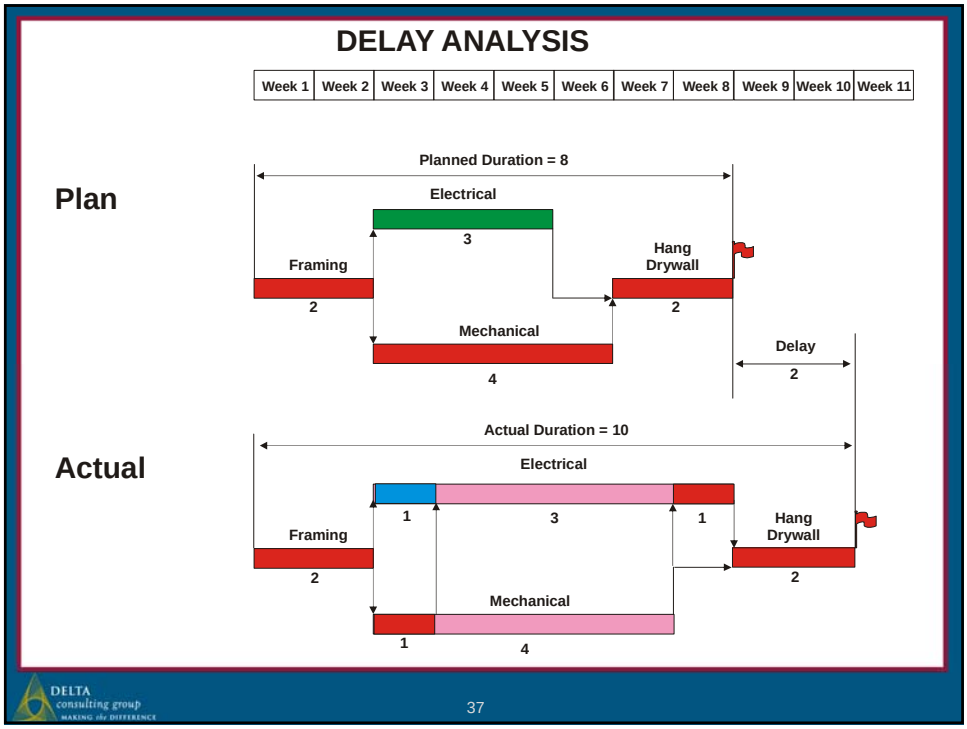
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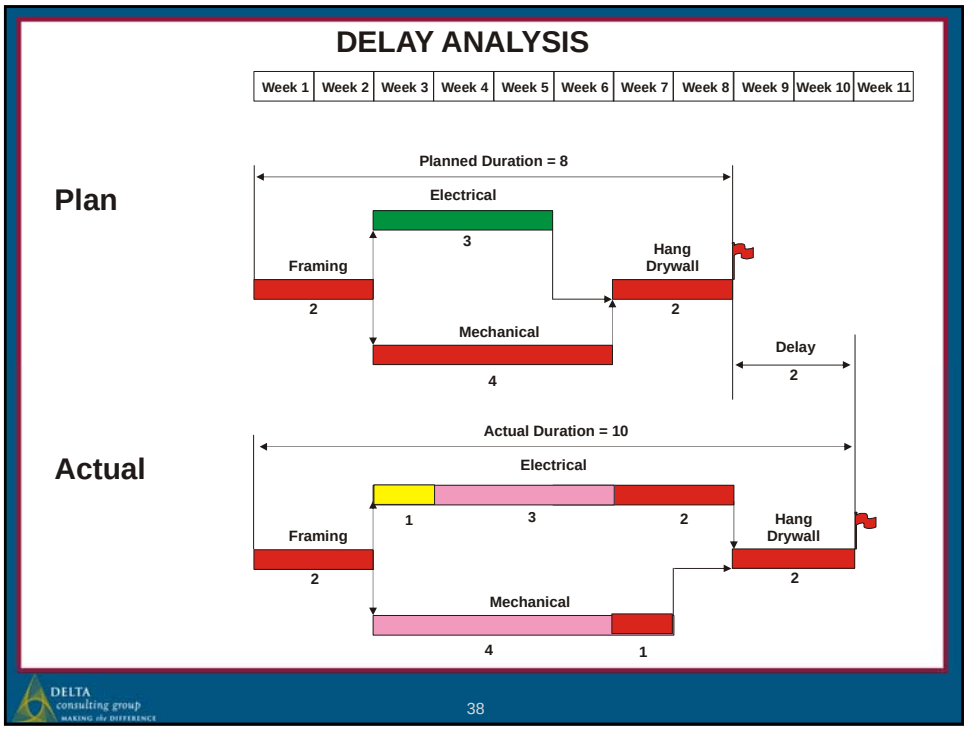
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THANK YOU