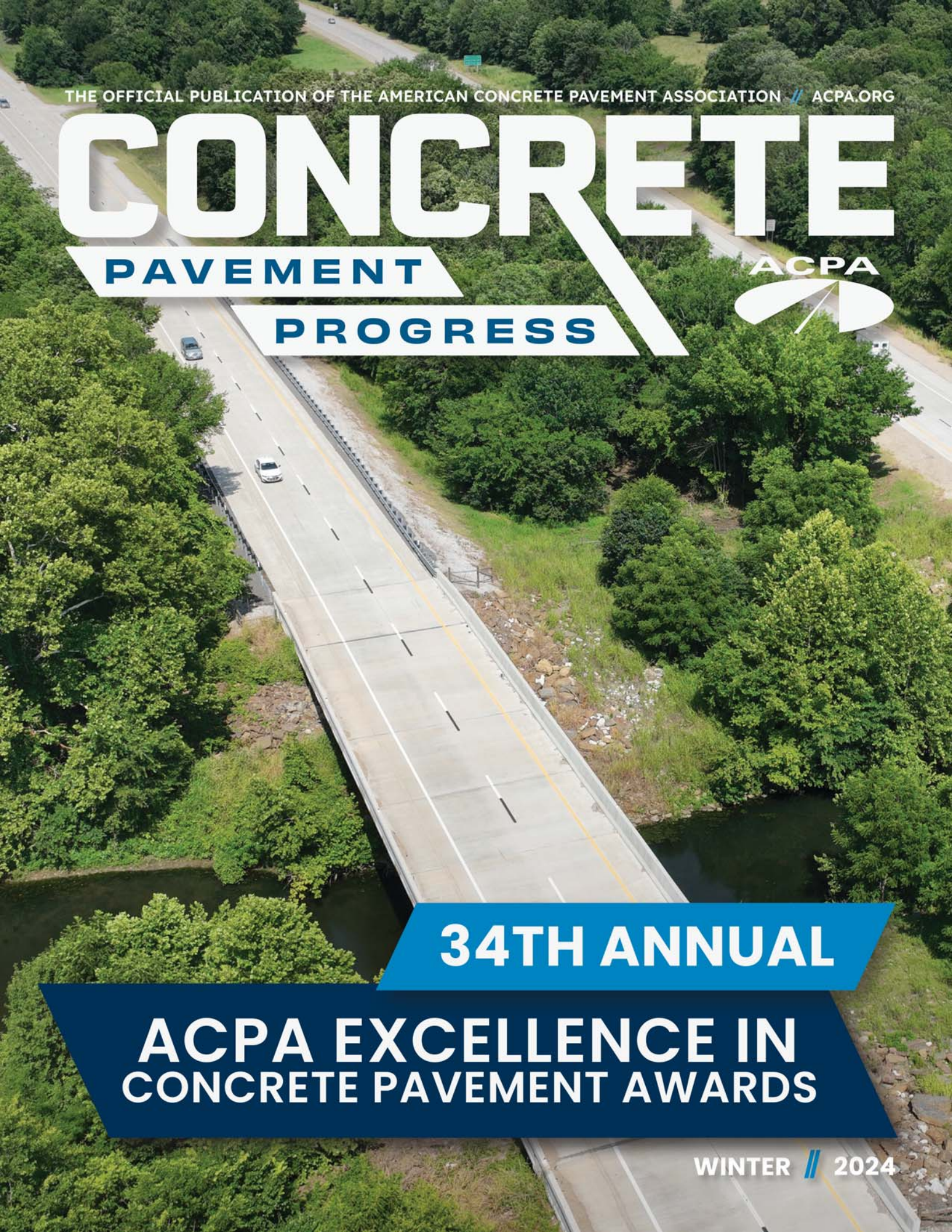

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2023: Lessons Learned

By Thomas R. Olson and Rielly J. Lund

LAST YEAR FOR THE QUARTER 4 EDITION OF THIS ARTICLE, WE WROTE A "2022: LESSONS LEARNED" ARTICLE, ADDRESSING SPECIFIC TRENDS THAT WE HAD DEALT WITH OVER THE YEAR. The feedback we received was very good, so we decided to make this a tradition and present, very creatively named: "2023: Lessons Learned." As with last year, these stories have details changed to protect any client identities, so if anything seems familiar, it is likely a coincidence.

Documenting Project Delays

Over the years, we have gone back and forth on who causes more delays: railroads or utilities. Both basically do what they want, and seem to have no consequences. While we are God-fearing people, as we sarcastically say: In the hierarchy of life, there is God. And above God are utilities. And, above utilities, there are railroads. This is especially apparent when it comes to working with contractors. Neither utilities nor railroads seem to care at all that their actions (or lack thereof) often cause significant delays and related extra costs for contractors. For utility companies, it seems more likely that you will have mismarked/unmarked utilities, or a late utility relocation, than utilities will be out of your way when they are supposed to be. For railroads, good luck with being provided with the work windows supposedly available according to the contract documents.

We addressed both of these issues numerous times in the past year, and it doesn't appear to be getting any better. Two specific instances come to mind, and the contrasts should guide you on how to handle delay issues when they arise.

First, the utility delay. We were called at the end of a project in which the work took nearly three months longer than planned due to the delays in utility relocation, which prevented all work in some areas, and disruption of work (i.e. working albeit at reduced production rates) in other areas. Now, you will notice we highlight that we weren't called until the end of the project. This is a huge issue. We went back through the project records and contractor documentation in order to piece together what we could and found some concerning information.

- The contractor did not accurately update the project schedule to show the delay as it was happening, and as required by the contract documents;
- The contractor's "written notice" consisted of one email essentially saying: "hey, there is some stuff out there that might delay us";
- The contractor did not track daily quantities of work performed; and
- The contractor did not document the utility delay/disruption.

This caused some serious issues, as documenting disruption and delay is highly difficult without proper documentation as the work is taking place. And, while the contractor has notes detailing the verbal discussions with the engineer, of course the engineer does not agree that the contractor ever raised the increase in time and dollars the delay was causing. Due to all of this, what was a clear delay turned into more work for us, and as a result more attorney's fees for the client. We had to essentially recreate the actual schedules, daily quantities of materials, and delay costs from scratch utilizing various project records, including working day reports and inspector's daily notes. We had to hire a consulting firm to go through all the minute details of the job to best present the evidence to the owner that the delays were not the contractor's fault, and that the contractor deserved not only relief from liquidated damages, but also payment for its extra costs. (*NOTE: For contracts that do not provide payment for late utility relocation, we have developed an approach that can still provide the contractor payment, albeit from the responsible utility company.*)

In contrast, on a highway/bridge reconstruction project in which there are multiple overpasses above a railroad line, we were contacted immediately when delays began. On that project, there were supposed to be a minimum of four, six-hour work windows for these work areas every week. Instead, the railroad is not even providing half of that, that and, the worst part is, they won't give the contractor advanced notice of when the contractor will be allowed to work. As a result, the flaggers, equipment and crews for those areas need to be mobilized every day, where they will sometimes wait for hours until the railroad allows them to begin. Because we were contacted immediately while the delay was just beginning, we were able to set the contractor up for success early, and minimize our fees for the project.

- Walked the contractor through showing delay on schedule updates;
- Set the contractor up to document the delay as it was happening; and
- Got formal notices sent in a timely fashion, preventing any procedural defense later.

As a result of this latter early and proactive involvement, the contractor on this project is currently working with the project owner to negotiate getting paid monthly as the delay is happening (along with receiving corresponding time extensions), rather than needing to wait until the end of the overall delay period to argue over a potential change order. In contrast, we are still going back and forth with the public owner on the above utility project, and recently completed mediation with more work upcoming.

Lesson learned: It is always easier to convince the owner/engineer to say "yes" initially rather than attempting to change a "no," a wrong opinion later. This is abundantly clear with the above two projects.

Contracts Still Matter

In lean times, it seems as though claims actually increase. Where contractors may be willing to take less in good times, when belts need to be tightened every penny counts. This means that it is more important than ever to make sure your subcontracts and supply agreements are well drafted to properly manage risks. Unfortunately, we have seen too many times where contractors do not do this, and unnecessarily bear the financial consequences.

- For general contractors, there are certainly legitimate circumstances where you may have to accept heightened risk. For example, you have a trenchless subcontractor who disclaims all responsibility for

continues on page 26 »

» continued from page 25

"boulders" regardless of whether you successfully prove a differing site condition claim to the owner. You may accept that risk or otherwise pay more, or not even have a subcontractor to perform the work. On the other hand, general contractors can and should ensure, for example, that their supply agreements include not only delivery dates, but also financial consequences for failure to timely perform. And, we continue to see more often than not that supplier agreements do NOT include such language.

- For subcontractors, it is important to understand that they have the legal right to *negotiate/change* subcontract terms in proposed standard form subcontracts. It is critical that subcontractors exercise this right as standard form subcontracts typically are unfairly one-sided. A typical example of this is where the subcontract provides that if the subcontractor delays the general contractor, the subcontractor owes the general contractor money. But if the general contractor delays the subcontractor, the subcontractor is only entitled to a time extension. Surprisingly, more often than not, subcontractors are NOT exercising their right to *change* contract terms so the rights and obligation are fairly balanced. And, as a consequence, subcontractors unnecessarily bear an inordinate amount of risk.

Conclusion

Contractors are facing many difficulties in this industry. Our goal with these articles is to help you *control what you can control* and increase your bottom line. So, the next time a delay issue happens, be proactive. Send written notice when required, and document the heck out of it. Work with the engineer and owner up front rather than trying to change their minds down the road. This should apply to any change scenario. Likewise, make sure that you are understanding the business implications and the risk allocation in your contracts. While you certainly can, and should, accept risk in some occasions, the key is understanding that risk and strategically managing it to the extent to which you can and should.

Thomas Olson is the founding partner of Olson Construction Law. Tom's commitment is to provide guidance on how to resolve issues on the jobsite, not in the courtroom. Tom has worked on highway heavy projects throughout much of the United States for more than 30 years. A prolific speaker and writer as well as attorney, his expertise is in concrete and asphalt paving, utility, earthwork and bridge construction, schedule analysis, material testing, and the technical and legal obligations of both engineers and contractors.

Finally, Olson Construction Law is proud to be presenting at this year's Annual Meeting in Florida. Tom Olson will be presenting "Late Utility Relocation: How to Prevent, and Get Paid if it Occurs." Likewise, Olson Construction Law will have a booth at the meeting, with past articles on hand and both Tom and Rielly available to discuss. After writing these articles for the past few years, we are greatly looking forward to meeting you in person.