

Concurrent Delays: AN Owner's Sword, Shield ... or Land Mine?

Appendix of US cases

1. Apportionment As Contractual Issue

United States v. United Engineering Co., 234 U.S. 236 (1914)

This case involved Construction of dry dock for the U.S. Navy. A controversy arose between the claimant and the civil engineer in charge as to the proper method of designing and constructing the floor of the pump well, and this resulted in considerable delay and eventually the cessation of work. The claimant maintained that this delay was through no fault on its part.

“On February 15, 1903, after the date fixed for the completion of the work under the original and supplemental contracts, a second supplemental contract was entered into, whereby the claimant agreed to construct three hatches in the roof of the pump well for additional compensation. Nothing was said in this contract as to the time of completion, or as to delays under prior contracts.” The Court held that this latter contract’s failure to address delay waived the delay damages clause form the original contract.

“It may be that damages were sustained by the failure to carry out the subsequent agreement. But the government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances, we think it must be content to recover such damages as it is able to prove were actually suffered.”

Since the latest contract did not address apportionment of concurrent delay, the court fell back on the general principle that the party seeking relief for delay bore the burden of proving that it was the other party’s responsibility.

Brashear v. Richardson Construction, Inc., 10 P.3d 1115 (Wyo. 2000)

In this case, there was no provision in the contract provided for such an allocation of damages, so the lower court developed a formula to allocate the delays. The appellate court held that, absent such a contract provision, the district court inappropriately developed its own formula to calculate liquidated damages to be assessed against the subcontractor.

L. A. Reynolds Company v. State Highway Commission, 271 N.C. 40 (1967)

\$15M roadway construction project where delays found to be largely the responsibility of contractor, but the contract did not address apportionment of delay.

The court noted that that the majority rule was that, absent a contractual provision as to apportionment, where a contract contains a provision for liquidated damages, and delays in its completion are occasioned by mutual defaults, the courts will not attempt to apportion the damages:

“It seems to us, and we so hold, that in the instant case when Judge Bone found as a fact that acts of commission and omission on the part of defendant wholly caused a large and substantial delay on the part of plaintiff to finish the job within the time limit, and none of the delay was caused by plaintiff, and that it is not possible from the evidence to determine precisely the length of time plaintiff was delayed, and plaintiff went ahead and fully completed the job on 24 May 1963, which eighty-four days after the contract completion date, but defendant extended the contract completion date for a total of forty-three days, and defendant assessed liquidated damages for forty-one days, the obligation under the contract for liquidated damages was annulled.”

The Court found that it was not necessary to rule on the question of which party held the burden of proof, given the terms of the contract at issue.

2. Burden of Proof Issues

Blinderman Construction Co. v. United States, 695 F.2d 552 (Fed. Circuit, 1982)

In a contract where relief for delay was sought by the contractor on the allegation that the Navy had delayed its performance by denying access, the court set forth the basic burden of proof issue in concurrent delay cases:

“Generally, courts will deny recovery where the delays are "concurrent or intertwined" and the contractor has not met its burden of separating its delays from those chargeable to the Government.”

(The issue was not fully briefed in the lower court, so the case was remanded for further findings)

Calumet Const. Corp. v. metro. Sanitary District, 222 Ill. App.3d 374 (Ill. Ap. Ct. 1991)

\$22M contract for construction of tanks, boilers, and compressor building for the local sewage authority. The contract was to be performed in 900 days. The court performed the analysis to apportion the delay between the parties, noting that:

“This trend in favor of apportionment is similar in nature to the trend of courts to apply a comparative negligence standard in tort cases, i.e. recovery based on apportionment of the responsibility of the parties.”

Bolton Corp. v. T.A. Loving Co., 94 N.C.App. 392 (N.C.Ct. App. 1989)

This case arose from a multiple-prime contract to build a multi-million dollar central library on the UNC-Chapel Hill campus. Bolton, the heating and ventilating contractor, sued the general contractor and "project expeditor," Loving, in negligence, and as a third-party beneficiary for breach of Loving's contract with the State.

The contracts here granted the architect with authority by contract to determine responsibility for delay among the prime contractors. Given this contractual provision, the court upheld the architect's determination, noting that:

“When an architect is vested with the authority to render judgment on a contractor's performance, the determination is prima facie correct, and the other parties have the burden of proving fraud or mistake.”

Essex Electro Engineers, Inc. v. Richard J. Danzig, Secretary of the Navy, 224 F.3d 1283 (Fed. Cir. 2000)

The contractor here was engaged by the Marine Corps to manufacture, test and deliver prototype floodlights, and the evidence showed that, pursuant to the contracts, the parties had engaged in a series of submissions, rejections, and resubmissions of drawings, specs, and engineering change orders. This timely process resulted in delay in delivery.

Dispute over submissions, rejections, resubmissions, and rejections of Engineering Change Proposals re changes to drawings.

The Board held that Essex was entitled to compensation for certain government-caused delays to its contract performance. For other government-caused delays, however, the Board held that Essex was not entitled to compensation, because it found that Essex concurrently delayed the performance of the contract.

The appellate court found that the parties' delays were in fact apportionable and vacated the Board's decision, remanding for further consideration of that issue. In this case, given the contractually required submission and resubmission process, the court found that: “The

sequential nature of Essex's submissions and [the owner's"] responses renders each party's delay inherently apportionable."

3. Conclusion

Generally, then, apportionment of delay causes will be governed by the terms of the contract. That will result in the most predictability where the architect is given authority to judge the issue or in unusual contracts where a sequential submission process is set forth in the contract. Failing that, the courts fall back on the general proposition that the party seeking relief bears the burden of proof on the issue. As is discussed in the Primer, this can present a significant proof problem.