

# CONCURRENT DELAYS:

## What Are They and How Are They Addressed?

By Christopher S. Drewry

**D**elays in the completion of a construction project result in added expense and potential delay damages for both the owner and contractor. There also may be related impacts on the costs of performance during the initial period of contractual performance even where a party's contractual performance period has not been extended beyond the original completion date. Delay damages are recoverable if they are caused by the other party and are readily identifiable. Thus, if a project delay can be attributable to a single party it clarifies the issue of whether the damages are compensable or not and/or whether they are excusable or not. However, there is another type of delay of which contractors need to be aware ... a concurrent delay.



### WHAT IS A CONCURRENT DELAY?

Concurrent delays arise when two or more independent delay events take place within the same time period or delay period and affect both the owner and contractor (or the contractor and its subcontractors in a lower-tier relationship). These delay events could all relate to a single activity or they can relate to multiple activities. Concurrent delays may affect a contractor's or subcontractor's claim if one delaying event is excusable and the other one is not, or if one such cause is compensable and the other is non-compensable. Where such conflicting causes of delay exist, the entitlement to time (via an extension in the schedule) or money may be threatened.

A concurrent delay also can occur when both parties are responsible for delaying the same critical path activity over the same time period, or when

each party delays a separate critical activity at the same time (i.e., where there were multiple, interrelated critical path activities). Thus, concurrent delays have both a causal and a temporal component. *George Sollitt Constr. Co. v. U.S.*, 64 Fed. Cl. 229 (Fed. Cl. 2005). Both concurrent delays must be independent of one another. *Id.*; see *Beauchamp Constr. Co. v. U.S.*, 14 Ct.Cl. 430 (1988). In other words, the contractor's delay cannot be a result of, or contingent upon, the other party's delay, or vice versa. Otherwise, the delays are sequential and therefore not concurrent.

The real issue becomes whether concurrent delays are compensable. Generally, whenever concurrency is demonstrated (i.e., when both parties cause a delay to the critical path at the same time) the delays are said to be

concurrent and the courts will deny the claimant's relief, or attempt to apportion concurrent delays between the parties. See e.g., *PCL Constr. Services, Inc. v. United States*, 53 Fed.Cl. 479 (2002); *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed Cir. 1982). The burden of proof falls on the party seeking to recoup damages for delay to show that its claimed delay was not concurrent. *Coath & Goss, Inc. v. United States*, 101 Ct.Cl. 702 (1944); *Commerce International Co. v. United States*, 338 F.2d 81, (1964). However, if concurrent delay cannot be disproved (or apportioned), then the courts will not be able to separate the delay and will very likely not be able to award delay damages. Consequently, the definition and the appropriate analysis of concurrent delays are critical when performing a delay analysis.

### ABOUT THE AUTHOR

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## DEFINING CONCURRENCY AND APPORTIONING THE DELAY

While some courts have not dealt with concurrent delays in great detail, different opinions from various jurisdictions reflect the debate over how to treat such delays. Generally speaking, there are three approaches to analyzing claims when contract performance is affected by a concurrent delay.

First, there is the **traditional view** in addressing concurrent delays. In this instance, if the delays are inextricably intertwined, the owner is prevented from assessing liquidated damages against the contractor, while the contractor—by virtue of his partial responsibility—is similarly not entitled to seek damages. See *Sollitt, supra*; *Acme Process Equipment v. U.S.*, 347 F.2d 509 (1965), *rev'd on other grounds*, 385 U.S. 138 (1966). The same analysis would hold true for contractors vis-a-vis subcontractors. See e.g., *Alcan, supra*; *J. A. Jones Constr. Co. v. Greenbrier Shopping Center*, 332 F. Supp. 1336 (N.D. Ga. 1971).

Beyond the traditional view is the **modern approach** where a court will determine whether the delay can be

apportioned between the parties. If the delay can be allocated amongst the parties, the courts will allow proportional fault to govern recovery, akin to a comparative fault analysis. See e.g., *Essex Electro Engineers, Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000); *Tyger Constr. Co., Inc. v. U.S.*, 31 Fed.Cl. 177 (Fed. Cl. 1994); *E. C. Ernest, Inc. v. Manhattan Constr. Co. of Texas*, 387 F. Supp. 1001 (S.D. Ala. 1974); *Alcan, supra*.

A third, related way of looking at concurrent delays utilizes a **network or critical path method** (CPM) to identify and determine critical path delays and the party responsible for such delays. Under this analysis, the courts segregate the delays along the critical path and allocate each delay to the responsible party accordingly. See e.g., *Fishbach and Moore International Corp.* ASBCA 18146, 77-1 BCA ¶12,300, *aff'd* 617 F.2d 223 (1980); *Tyger Constr., supra*. Cases that reach conflicting results are usually distinguishable by their inability to separate delays between the parties.

While straight-forward in theory, any concurrent delay analysis is extraordinarily fact-sensitive and oftentimes inherently complex. Proving

or refuting concurrent delay often requires an accurate and updated network or CPM schedule. Solid contemporaneous project documentation also is a crucial element. Additionally, apportionment of concurrent delay may require the construction of a detailed as-built schedule, a task most often performed by a construction claims expert.

## CONCLUSION

As is evident, it is not always so cut and dried on a construction project that delays are attributable solely to the owner or solely to the contractor so as to be excusable or not excusable, or compensable or not compensable. In reality, situations will arise in which there are concurrent delays caused by both the owner and contractor. These delays can occur in relation to achieving the completion date or in maintaining the construction schedule. As such, it is important for owners and contractors alike to be aware of delays and the resultant impacts. In order to have a complete understanding, however, the parties must also be conscious of these concurrent delay scenarios. ■



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