

HOW WELL DO YOU UNDERSTAND CONCURRENT DELAY?

THE LATEST IN PROTECTION FOR THE OWNER

INTRODUCTION

Concurrent delay is a method that the owner of a project can use in its **defense against a contractor** when “allegations” that delays experienced, which affect the critical path of a project, are caused by both the contractor and owner, or some other external cause beyond the control of the contractor.

A concurrent delay claim is usually asserted so that a contractor can avoid imposition of liquidated damages. A concurrent delay can be claimed when an owner begins withholding liquidated damages as the project is nearing completion (65-75%), or after the project is complete. Contractors need to be aware of the pitfalls associated with a claim of concurrent delay.

DEFINITION

The Association for the Advancement of Cost Engineering (AACE) provides a definition for Concurrent Delay as follows:

- *(1) Two or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date....*
- *(2) Concurrent delays occur when there are two or more independent causes of delay during the same time period. The “same” time period from which concurrency is measured, however, is not always literally within the exact period of time. For delays to be considered concurrent, most courts do not require that the period of concurrent delay precisely match. The period of “concurrency” of the delays can be related by circumstances, even though the circumstances may not have occurred during exactly the same time period.*
- *(3) True concurrent delay is the occurrence of two or more delay events at the same time, one an employer(owner) risk event, the other a contractor risk event and the effects of which are felt at the same time. The term concurrent delay is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time....*
- *(4) Concurrent delay occurs when both the owner and contractor delay the project or when either party delays the project during an excusable but non-compensable delay (e.g. abnormal weather). The delays need not occur simultaneously but can be on two parallel critical path chains....” Id*

When a concurrent delay situation exists, the delay is considered excusable and, at a minimum, warrants that the contractor receive a time extension whenever the completion date is affected. Other considerations for a contractor include insisting upon remission of liquidated damages and requesting compensation for any costs incurred during the delay. *Id*

ASSERTION OF CONCURRENT DELAY

Claims against a contractor for late completion of a project are typically brought by the owner, who also bears the burden of proof for the late claim. Additionally the owner may claim that liquidated damages and/or actual damages should be imposed upon a contractor for failure to complete the project on time.

Contractors must be aware that an owner can overcome an assertion of concurrent delay based upon language contained in the contract or any statutory requirements. See *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed.Cir. 2010). Examples of such contract language or requirements can include:

- Contractor failure to provide written notice of delay within a certain period of time;
- Untimely extension requests as required by the contract;
- Failure to submit a certified delay claim to the Contracting Officer;
- Failure on the part of a contractor to obtain a final decision from the Contracting Officer (when applicable) under the CDA.

In order to support a delay claim, the owner must rely on specific provisions related to time extension requests and change order requests requiring the contractor to provide proof that the delay was caused by "...circumstances beyond the contractor's control." An example of such contract terms can be found in *Greg Opinski Construction, Inc. v. City of Oakdale*, 199 Cal.App.4th 1107 (Oct 06, 2011). In that case, the City of Oakdale had included the following language in its contract to Opinski:

"The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of the Contractor if a claim is made therefor as provided in paragraph 12.1"

In that case, the Court found that Opinski did not file notices of delay, did not file delay claims as required by the terms of the contract, and did not obtain a formal decision in writing from the engineer, which was also required by the contract.

The preceding cases provide clear proof that a contractor has an obligation to ensure that the terms of the contract are followed when assessing concurrent delay as a defense.

CONCLUSION

The CDA and other statutory requirements can prevent a contractor from using concurrent delay as a defense if the requirements outlined in the CDA, or the contract between a contractor and owner, are not strictly followed.

Therefore, contractors need to be aware, informed, and educated about how to correctly handle any potential delay that may occur and how to contractually address it.

A professional consultant can evaluate your contractual position and provide suggestions to help your company better understand contract terms and requirements as related to the Contract Disputes Act. In the event of a claim against your company, the experts at Excell Consulting International, Inc. can evaluate your company's position and provide valuable and cost-effective protection for your business. Your partnership with Excell Consulting can assist you and your company with understanding the complexities of any possible "game changers" associated with claims related to concurrent delays.

In the end, you will be glad you made the call.

EXCELL CONSULTING: "HERE TODAY FOR YOUR TOMORROW."

Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – *John G. Balch, CEO CPCM*