

CONCURRENT DELAY AS A DEFENSE TO LIQUIDATED DAMAGES

Concurrent delay is a defense that contractors can use against an owner when the owner is threatening to assess Liquidated Damages. Likewise, a subcontractor can use concurrent delay as a defense against a prime contractor under a similar scenario.

Concurrent delay is the construction equivalent of offsetting penalties in football. If both parties to a dispute involving delay damages are partially responsible for the delay, **then neither recovers damages**. This post offers a brief overview of the general principle of concurrent delay, then addresses actions that contractors can take to ensure that they preserve their right to assert concurrent delay as a defense. Finally, this post will discuss defenses that owners can raise in response to a contractor's claim for delay damages.

According to the Association for the Advancement of Cost Engineering International ("ACE"), a leading authority on forensic schedule analysis, **CONCURRENT DELAYS** must have the following characteristics:

- They must affect the critical path, i.e., causing the length of the overall project to increase;
- They must be caused by different parties to the contract, or caused by at least one of the contract parties, plus a third party or outside cause such as government agencies or by a *force majeure* event;
- They must be unrelated to each other in terms of their initial costs;
- They must be independent of other concurrent delays in terms of when they start and end;
- They must be caused unintentionally, and thus, distinguish from pacing delays (activities that are purposefully delayed due to the fact that a preceding delay has occurred).

The most typical situation occurs when both the owner's and the contractor's actions are sufficient to independently cause a delay, **AND** both delays impact the same time period. The two delays do not necessarily have to occur at the exact same time, but **each delay must impact the critical path** related to the project's completion date.

Typical Owner – Contractor Scenario

The following scenario illustrates the relationship between concurrent delays and Liquidated Damages:

A project is completed after the contract completion date, and the owner seeks to recover liquidated damages for each day the project was delayed. To recover Liquidated Damages (LDs), the owner must show that contract performance **was not substantially completed on time**. To defend against the owner's claims of liquidated damages, the contractor must show that its delay **was excusable**, or the contractor should proffer that the owner was responsible for the delay or for a concurrent delay. If the owner is responsible for a concurrent delay, the owner cannot recover liquidated damages—***unless the contractor has contractually waived its right to assert concurrent delay defenses***, as explained below.

Court decisions indicate that **courts are becoming more receptive to owners' defenses to concurrent delays**, so contractors should be aware of and take measures to preempt those defenses.

Most prime (and sub) contracts include provisions that require written “Notice” of delay events, as well as specifically cited contractual requirements for how and when the contractor must submit requests for time and money. Increasingly, courts are requiring strict compliance from the contractor with these provisions.

Examples of express requirements that can undermine a claim of concurrent delay include:

- Late requests for extensions of time;
- Failure to timely submit a certified delay claim to the contracting officer;
- Failure to request and obtain a contracting officer’s final decision under the Contract Disputes Act (when applicable. See the case of *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (2010).

In effect, if a contractor fails to preserve its right to a time extension for an owner-caused delay or an excusable delay such as adverse weather, **it may be precluded** from asserting concurrent delay to offset a Liquidated Damages claim. Failure to give proper notice and request time may also preclude a contractor from making an affirmative claim for compensable delay damages.

Although contractors can rely on the principle of constructive notice [*see Excell’s post on this topic [here](#)*] to overcome a lack of timely written notice, a contractor will still face an uphill battle to convince a court to find concurrent delay or to grant a time extension **if the contractor did not raise the delay issue until after the project was completed**. Accordingly, contractors are well advised to ensure their field personnel are aware of contractual “notice” requirements.

On the other hand, owners should likewise be cognizant of the contract terms and be vigilant in enforcing them. If the owner does not demand strict compliance at the outset of a project, **it may have inadvertently changed the terms of the contract by implied mutual consent and/or ratification.**

Old Game, New Tricks

Excell Consulting has seen an increase in certain owners playing a “shell game” of sorts. This game involves the Owner assessing Liquidated Damages inappropriately to offset increased contract costs that result from unforeseen Changes due to Defective Plans and Specifications, Differing Site Conditions, or other causes. These improper attempts come in various forms, but typically result in denial the contractor’s requests for valid extensions of time (i.e., breaching the Owner’s contractual duty to extend the contract completion date), which **compresses** and **accelerates** the schedule and **artificially extends the actual performance of the work** – thus improperly increasing the cumulative amount being assessed as Liquidated Damage assessment days.

This shell game produces a “coffer” that will be used by the owner to pay for project cost overruns and to offset Owner-caused damages. This in turn fraudulently results in the contractor paying “out of pocket” for additional and otherwise compensable changes to the scope of work. Many contractors do not see the warning signs of this type of shell game until it is too late, and the cost of recovering withheld funds often can be prohibitively high and not worth pursuing.

Conclusion

If a contractor’s schedule begins to experience delays, it is highly advised that the contractor consult with an expert who can detect the early warning signs and guide correspondence to the owner to give proper and timely notice and contractual coverage to protect the contractor. In that regard, Excell was instrumental as the consulting firm to the claimant in the landmark case of *Bill Strong v. Shannon (Feb. 1995)* which established the contractors right to recover consultant’s fees when pursuing administrative remedies of this nature thereby, again proving that **Excell is here today for your tomorrow!**

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