
 <p>PINNACLEONE The cornerstone of confidence™</p>	<p>November 2003</p>	
<p>The following is a five-part article addressing concurrent delay.</p>	<p>Article 1 of 5</p>	
<p>SEMINARS PinnacleOne Institute National Seminar Series Begins This Month!</p> <p>P1/Lorman Seminars</p> <hr/> <p>SERVICES Program & Project Management</p> <p>Dispute Avoidance & Resolution</p> <p>Real Property Advisory Services</p> <hr/> <p>Headquartered in Phoenix, PinnacleOne regional operations are located in Irvine, Los Angeles, Sacramento, and Hartford.</p> <p>To view a specific back-issue of this newsletter, please Click Here></p>	<div data-bbox="405 383 1444 467" style="border: 1px solid black; text-align: center; padding: 5px;"> <p>DISSECTING THE DOCTRINE OF CONCURRENT DELAY</p> </div> <p>The concept of <i>Concurrent Delay</i> is one of the most hotly contested topics in the industry. Both Owners and Contractors invariably use Concurrent Delay as an excuse to avoid responsibility for claims of extended overhead claims or liquidated damages assessments. Unfortunately, there is no uniform application of the Doctrine of Concurrent Delay. Contracts seldom address it. Courts can't seem to agree on what it is or how it is measured. This five part discussion of Concurrent Delay is intended to help provide you with an understanding of the confusion and controversies arising from Concurrent Delay and ways you can proactively address Concurrent Delay to avoid costly disputes of uncertain outcome.</p> <p style="text-align: center;">Concurrent Delay -- What is it and Why is it so Important?</p> <p>Projects change. It's just that simple. Owners change their mind. Design Engineers make mistakes. Contractors make substitutions. If change is inevitable, so is delay. Project delay is generally the result of multiple causes from multiple parties. The project participants routinely use <i>Concurrent Delay</i> as a global excuse for their failure to perform. After all, if multiple parties contributed to the problem, wouldn't it be fair that multiple parties contribute to the remedy? Enter the <i>Doctrine of Concurrent Delay</i>. Be forewarned....</p> <p style="text-align: center;"> <i>"Popular opinion is the greatest lie in the world [4]."</i> Thomas Carlyle </p> <p>While the <i>Concurrent Delay</i> defense is often raised, the defense does not have consistent meaning. Most practitioners don't understand the definition of the</p>	 <p>Mr. Tom Peters, P.E., is a Sr. Claims Analyst for PinnacleOne's Los Angeles operations.</p> <p>With 23 years of experience in construction claims assessment, dispute resolution, program and project controls, CPM scheduling, cost control, construction and program management, document management, general contracting and design engineering. He is a registered civil engineer in the State of California. Mr. Peters' experience is both domestic and international and includes the design and construction management of commercial, industrial, petrochemical, institutional, off-shore & sub-sea, water and wastewater facilities.</p>

term, its intent, or its application. The age-old adage, “*time, no money*,” is just too simplistic and largely out of step with contemporary application of the theory. Perhaps the *Doctrine of Concurrent Delay* is misunderstood because:

1. Contracts are prepared by attorneys and are relationship based.
2. CPM Schedules are prepared by schedulers and are mathematically based.
3. Attorneys aren’t schedulers and relationships aren’t mathematical.

While the problem is easily stated, it remains difficult to solve. Numerous articles have been written on Concurrent Delay; some by brilliant legal minds, some by expert schedulers. Few however, have been written in a manner that is plainly accessible to both.

Remember, most Concurrent Delay settlements are business decisions and not grounded in esoteric doctrine. Consider Ockham’s Razor:

“Don’t multiply entities except by necessity [5].:
William of Ockham (1285 – 1349)

In other words, when presented with multiple theories, the simpler solution is likely the better solution.

What is Delay?

Many contracts are ambiguous when it comes to defining delay and who bears the financial burden of the added costs associated with added contract performance time. In the absence of a contractual definition, generally the construction industry recognizes the following:

*“All delay events fall into one of three categories. **Excusable delay** is caused by factors beyond the control and without the fault of either the project owner or the contractor. The contractor is entitled to an extension of time, but not an increase in the contract price. **Non-excusable delay** is caused by the fault or performance deficiency of the contractor. The contractor is entitled to neither an extension of the schedule nor an increase in the contract price. **Compensable delay** is caused by the fault or shortcoming of the owner. The contractor is entitled to both an extension of time and an increase in the contract price to compensate for*

additional costs [1]."

Concurrent Delay typically becomes a much contested issue on those projects that experience more than one of these types of delays. The vast majority of projects that are finished late fall into this category.

What is Concurrent Delay?

While most project participants toss the term *Concurrent Delay* about freely, it is also rare that contracts actually define this term. Consider the following lack of consistency which is characteristic of the systemic confusion within our industry:

§ *"Concurrent delay is experienced on a construction project when two separate delay events occur during the same time period [1]."*

§ *"It is important to note that to be considered concurrent delays, the delays need not actually take place at the same time [8]."*

§ *"Concurrent Delay is experienced on a project when two or more separate delay events occur during the same time period and each, independently affects the completion date [11]."*

§ *"Concurrent Delay occurs when the results of two separate delay events overlap [2]."*

§ *"The events are considered to result in concurrent ...delays when it is clear that one of the events caused a delay in the schedule, but even if that event had not occurred, the schedule would have been delayed anyhow by the other event [10]."*

§ *"Causes are "concurrent" when they operate in conjunction simultaneously upon a single work element or phase of contract performance, causing an effect or effects (legal harm, injury) which would not occur in the absence of any one of the several causes [6]."*

What Happens when there is Concurrent Delay on Your Project?

This critical question also is not answered consistently in our industry. Be aware

of the following divergence of opinions on the net effect of concurrent delay:

Excusable Delay concurrent with Non-Excusable Delay yields either a net Excusable Delay (see Footnotes [10], [11], [14], and [15]) or a net Non-Excusable Delay (see Footnotes [1], [2], [16], [17], and [18]);

Excusable Delay concurrent with Compensable Delay yields either a net Compensable Delay (see Footnote [10]) or a net Excusable Delay (see Footnotes [1], [2], [11], [14], [15], [16], [17], and [18]);

Compensable Delay concurrent with Non-Excusable Delay yields either a net Excusable Delay (see Footnotes [10], [11]) or a net Non-Excusable Delay (see Footnotes [1], [2], and [18]).

If these basic delay categories are not addressed in the contract documents, it is certain that discussions regarding concurrent combinations of these categories will be both heated and protracted.

No matter which side you are on, it is in your best interests to define and negotiate Concurrent Delay to your commercial advantage. Otherwise, Dispute Resolution Boards, Mediators, Arbitrators, Judges and Juries will define the concept for you. Unfortunately, those definitions will likely be as erratic tomorrow as they have been in the past.

Anticipate! Mitigate! Define Delay. Define Concurrency. Provide clear and concise language that describes the net effect Concurrent Delay. Proactive management of Concurrent Delay conflict is your best weapon against an *Inequitable Adjustment*.

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