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The following is a five-part article addressing concurrent delay.

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DISSECTING THE DOCTRINE OF CONCURRENT DELAY

The concept of *Concurrent Delay* 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 damage 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.

Float Ownership

While it is common for project participants on a delayed project to toss the term "*Concurrent Delay*" about freely, it is rare that the construction contract actually defines what it means. Furthermore, there is a divergence of opinion on the net effect of concurrent Excusable, Non-Excusable and Compensable delay events when the contract is silent on the topic [1]. If this issue is not addressed clearly in the contract documents, it is virtually certain that the parties will disagree over who should bear the cost of time during the Concurrent Delay periods.

The answer to the Concurrent Delay riddle is complicated because it is rooted on both contractual and legal principles, as well as a technical assessment of the project schedule and the analyst's definition of criticality [2]. Furthermore, it is often difficult to distinguish discrete delay events from *pacing delays* resulting from either the owner or contractor taking advantage of float made available by more critical delays to the project's longest path [3]. For these reasons,



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consistent outcomes amongst litigants claiming Concurrent Delay have been elusive [4]. When there is Concurrent Delay, contract provisions addressing the ownership of float help minimize disputes and remove some of the uncertainty in the outcomes when these cases are litigated.

Who Owns the Float?

The *Float Ownership* concept is fundamental to the analysis of project delay and the allocation of responsibility when there is Concurrent Delay. Both Owner and Contractor want access to the float in the schedule because it affords them more flexibility in their decision making and use of resources. However, many contracts do not address this important topic. As a result, neither the Owner nor Contractor has a contractual right to use the float.

So who owns *Float*? The now generally accepted (but sometimes disputed) answer to "*the project owns the float*" question is that "*whoever gets to it first, gets to use it first!*" Under this interpretation, a party is permitted to delay an activity with positive *Total Float* provided that the delay duration does not exceed the *Total Float* calculation for that activity, and their use of positive *Total Float* occurred prior to anyone else's. The *Float Ownership* concept becomes more complex when the project is late and the *Total Float* calculation becomes negative [3].

Consider the court's findings in *John Driggs Company, Inc., ENGBCA No. 4926, 87-2-BCA ¶ 19,833*. In this case, the Contractor sought additional compensation and extensions in contract time for multiple events that occurred early in the contract. "The Board stated:

"A common thread running through all of these alleged "delays" is that Driggs did not complete these particular tasks on the originally-planned and scheduled date." From this, (the Government) concludes that they represent concurrent, contractor-caused delays... We disagree. More proof is required to establish (the Government's) defense of concurrent delay. When a significant owner-caused construction delay... occurs, the contractor is not necessarily required to conduct all of his other construction

activities exactly according to his pre-delay schedule and without regard to the changed circumstances resulting from the delay...

The occurrence of a significant delay generally will affect related work, as the contractor's attention turns to overcoming the delay rather than slavishly following its now meaningless schedule. "(The Government) is required to demonstrate that, but for the delay caused by (the Government), the contractor could not have performed the project in less time and would necessarily have been delayed to the same extent in any case. Respondent has failed to meet this burden."

The Driggs decision appears to affirm the notion of *Pacing* (reallocation of resources in observance of another, more critical delay) and the contractual right to utilize float (even if it is negative) made available by another party's Critical Path Delay.

Define Float Ownership in the Contract!

If the contract is silent regarding Float Ownership, the Contractor will likely attempt to maximize the delay calculation by quantifying project delay using the early start and finish dates. The Owner, on the other hand, will likely attempt to minimize the delay calculation by claiming the float and quantifying project delay using the late start and finish dates. To avoid this controversy, many Owners have recognized the importance of clarifying the ownership of float in their contracts.

A typical Float Ownership clause might state:

***Total Float** belongs to the project and shall not be for the exclusive benefit of any party. **Total Float** is the number of days an activity may be delayed from its early dates without extending the contract period. **Total Float** shall be available to any party and is intended to accommodate changes in the work or to mitigate the effect of events, which otherwise may delay completion.*

While this approach is widely accepted, consider also the following observations:

"...if the contract provides that either party may absorb all the available float in an activity with complete impunity, it should be construed to create a contractual privilege...thus, if protected by such a contractual privilege, a party whose delay exhausts the float should not forfeit any rights to recover for a compensable delay by the other party that is a concurrent cause of actual project delay. Conversely, contracting parties intending to observe the rule that concurrent causes of project delay cancel out the compensability of one another should not adopt contract language allowing either party to freely exhaust all available float [5]."

Some Owners have recognized these distinctions and now augment Float Ownership clauses with language designed to bank float for the benefit of the Owner. These clauses permit the Owner to retain ownership of float purchased as part of a recognized Owner caused delay to the project's critical path. For example:

"As float is an expiring resource, if the Work is delayed on the Critical Path due to a delay caused by the Engineer, the Contractor may not use any float created by such a delay on any other path without the express written approval of the Engineer. Use of such float on any parallel path without the approval of the Engineer shall be construed as concurrent delay to any delay caused by the Engineer [6]."

It is vitally important, therefore, that the resolution of disputes associated with Concurrent Delay be consistent with the contract's float ownership provisions.

Be Proactive!

No matter which side you are on, be sure to negotiate contract provisions that anticipate conflict associated with Concurrent Delay. If you remain uninformed and don't participate in a clarification effort, 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! Proactive management of Concurrent Delay conflict utilizing appropriate contract language is your best weapon against an *Inequitable Adjustment*.

References

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