



CONCURRENT DELAY — THE OWNER'S NEWEST DEFENSE¹

When owners impose liquidated damages at the end of a delayed project, contractors often respond with allegations of concurrent delay. That is, contractors argue that some or all of the project delay was actually caused either by the owner or an external force, concurrent with the contractor's delays, and therefore liquidated damages should be forgiven or excused. As owners generally do not impose liquidated damages until the end of the project, frequently a contractor's claim of concurrent delay is not submitted until the project is complete. This paper explores mechanisms, based on recent court rulings that owners employ to defeat a contractor's concurrent delay defense.

INTRODUCTION

This paper explores the issue of how concurrent delay is commonly used by contractors to defend against the imposition of liquidated damages when a project is completed late. Further, the paper examines two recent court decisions that serve to remind owners that legal defenses can be employed to overcome allegations of concurrent delay, if those allegations are raised, for the first time, at the end of a project after the owner imposes liquidated damages due to late completion.

WHAT IS CONCURRENT DELAY?

The term "concurrent delay" has numerous definitions in the construction industry, in general, and in the scheduling profession, more specifically. AACE's definition of this term, as contained in Recommended Practice 10S-90, is quite lengthy, and is as follows:

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“CONCURRENT DELAY”

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 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...”⁴

THE DOCTRINE OF CONCURRENT DELAY

One in-depth article on the issue of concurrent delay examined the origins of the doctrine of concurrent delay. The authors summarized the history of concurrent delay as follows:

“...it is evident that the modern doctrine of concurrent delay is premised not on the equitable resolution of construction delays, but is instead based on past litigants’ failure or inability to effectively prove their cases and the older courts’ hostility toward liquidated damages ... Over time, these factors merged and evolved into the legal doctrine of ‘concurrent delay.’ After several years, the later courts stopped delving into the ‘real’ analyses of these early courts, and instead rotely applied these early courts’ resolutions of concurrent delay as a ‘rule’ for resolving all overlapping construction delays.”⁵

The legal concept of concurrent delay is not new. Perhaps the first case in the United States addressing the issue of concurrent delay is *Stewart v. Keteltas*⁶ an 1867 case in which a New York court ruled on a claim for late completion damages by noting that while the contractor completed the project late, some of the delay was caused by other contractors, employed separately by the owner, working on the same building. The court concluded that the owner could not impose late completion damages on the contractor as the owner caused or contributed to the delay. Other early court cases concluded the same over many years.⁷

Courts in the United States have never set forth an exact definition of “concurrent delay,” but a definition can be pieced together from case law between 1944 and 2011, as follows:

“A concurrent delay is ... independently sufficient to cause the delay days attributed to that source of delay ... a concurrent action ‘would have independently generated the delay during the same time period’”⁸

“Concurrent delays affect the same ‘delay period.’”⁹

4. Recommended Practice No. 10S-90, Cost Engineering Terminology, AACE International, Morgantown, WV., Rev. Dec. 13, 2011. Pages 19-20. (Footnotes omitted.).

5. Bidgood, J. K., Reed, S.L., and Taylor, J.B., Cutting the Knot on Concurrent Delay, Construction Briefings No. 2007-02, Thomson/West, February, 2008.

6. 36 N.Y. 388, 1867 WL 6457 (1867), 2 Transc. App. 288 (1867).

7. See *Shook v. Dozier*, 168 F. 867 (C.C.A. 6th Cir. 1909); *Caldwell & Drake v. Schmulbach*, 175 F. 429 (C.C.N.D. W. Va. 1909); *Greenfield Tap & Die Corporation v. United States*, 68 Ct. C. 61, 1929 WL 2484 (1929); *Newport News Shipbuilding & Drydock Co. v. United States*, 79 Ct. Cl. 25, 1934 WL 2021 (1934); and *Commerce Intern. Co. v. United States*, 167 Ct. Cl. 529, 338 F.2d 81 (1964).

8. *Beauchamp Constr. Co. v. United States*, 14 Cl. Ct. 430, 437 (1988).

9. *Tyger Constr. Co. v. United States*, 31 Fed. Cl. 177, 259 (1994).

*"...courts will deny recovery where the delays are 'concurrent or intertwined' and the contractor has not met its burden of separating its delays from those chargeable to the [owner]."*¹⁰

Bidgood, Reed and Taylor summarized the concept of concurrent delay in the following manner:

*"Simply put, two causes of delay are generally considered concurrent when they both independently cause delay to the same schedule period at the same time."*¹¹

Thus, AACE's definition of the term "concurrent delay" meets the legal definition as established by the courts over the past century and a half.

WHY IS CONCURRENT DELAY IMPORTANT?

Concurrent delay is classified as excusable delay that entitles the contractor to a time extension, at the least, the remission of liquidated damages, and potentially to delay damages, depending upon the situation and the contractual terms and conditions. Excusable delay is defined as follows:

*"An excusable delay is one that will serve to justify an extension of the contract performance time. It excuses the party from meeting a contractual deadline."*¹²

AACE's Recommended Practice 10S-90 defines excusable delay in the following manner:

*"Delays not attributable to [the] contractor's actions or inactions. Excusable delays when founded, entitle [a] contractor to a time extension if the completion date is affected."*¹³

Provided that it is proven that an excusable event actually delayed the end date of the project, excusable delay is important to a contractor in that it entitles the contractor to seek and receive additional time in which to perform its work. Further, as the delay is excused and the contractor is held harmless for of the delay, the owner has no right to assess damages, liquidated or actual, for the period of the excusable delay.

AACE's Recommended Practice No. 10S-90 defines "liquidated damages" as:

*"An amount of money stated in the contract as being the liability of a contractor for failure to complete the work by the designated time(s). Liquidated damages ordinarily stop at the point of substantial completion of the project or beneficial occupancy of the owner..."*¹⁴

WHEN DO CONTRACTORS TYPICALLY ASSERT CONCURRENT DELAY?

When a project is completed late — **beyond** the original or adjusted contract completion date — contract language often allows owners to impose liquidated or actual damages due to a project's late completion. As such, late completion damages are an owner's claim. The owner, as claimant, has the burden of proof. As one court recently stated:

10. *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982).

11. Cutting the Knot on Concurrent Delay, p. 2.

12. Bramble, Barry B. and Michael T. Callahan, *Construction Delay Claims*, 4th Edition, Aspen Publishers, New York. 2011. §1.01[A].

13. Recommended Practice 10S-90, p. 45.

14. Recommended Practice 10S 90, p. 32.

*"In the context of litigating liquidated damages assessed by the [owner] in a construction contract, the [owner] first must meet its initial burden of showing that 'the contract performance requirements were not substantially completed by the contract completion date and that the period for which the assessment was made was proper.'"*¹⁵

A common late project completion situation follows. The project is completed beyond the original (or adjusted) contract completion date. The owner examines the delay period and concludes that the late completion is **not** the result of anything for which it is responsible. Accordingly, the owner either assesses liquidated damages or announces its intent to do so. At this point, the contractor examines the schedule to analyze the delays in an effort to avoid paying, or having the owner withhold, liquidated damages. One mechanism utilized by contractors to avoid such damages is to assert concurrent delay (the concurrent delay defense). In this scenario, the contractor responds to the liquidated damages notice or assessment by admitting that the job was late and that it did cause some of the delay, but that the owner's delays were concurrent with the contractor's delays. The contractor asserts that the owner owes a time extension for the project delay period, thereby eliminating the liquidated damages.

Contract language almost always includes requirements that contractors provide written notice of delay within a certain period of time following a potential delay event. In the situation outlined above, the contractor may or may not have filed notice of delay for the issues that it now raises, at the end of the project, to substantiate concurrent delay. Even if notice had been provided, the contractor may or may not have submitted time extension request(s) as required under the contract. As a result, owners are frequently caught by surprise when concurrent delay is asserted by the contractor in response to the imposition of liquidated damages.

THE OWNER'S NEWEST DEFENSE

A recent set of court cases, one from the Court of Appeals for the Federal Circuit in 2010 and the other from the Court of Appeal, Fifth District, California, in 2011 have changed the ground rules concerning concurrent delay so frequently asserted by contractors. These cases highlight owners' defenses against contractors' allegations of concurrent delay. In both cases, the owners prevailed due to the contractors' failure to comply with statutory requirements or contract terms, including notice, change order requests, time extension requests, and/or claim procedures.

M. MAROPAKIS CARPENTRY, INC. V. U.S.¹⁶

The Court of Appeals for the Federal Circuit issued their decision in *M. Maropakis Carpentry, Inc. v. U.S.* (Maropakis) in 2010. A brief background of the case follows.

In 1999 the U.S. Navy ("Navy") issued a contract to Maropakis to replace windows and the roof on a Navy warehouse. The original contract completion date was Jan. 16, 2000. This date was later modified to Feb. 4, 2000. The contract includes a liquidated damages clause providing that Maropakis would be liable for \$650 per day for each day of delay beyond the revised contract completion date. Maropakis did **not commence** work until **after** the specified completion date and did **not complete** their work until May 17, 2001 — 467 days **after** the modified completion date.

After completion of the work, Maropakis sent a letter to the Navy requesting a 447-day time extension based on five alleged but distinct delay events. Maropakis did **not** certify their claim as required by the Contract Disputes Act (CDA)¹⁷ **nor** did Maropakis request a contracting officer's final decision, which is also required by the CDA. Three months later, the Navy responded, stating that Maropakis had not "...present[ed] sufficient justification to warrant the time extension." The Navy rejected the time extension, but invited Maropakis to submit additional information.

Ten months later, the Navy sent Maropakis another letter reminding them that they still had not submitted any additional information. Further, this letter advised Maropakis that in the absence of additional information, the Navy was imposing liquidated damages in the amount of \$650 per day for 467 days of delay, totaling \$303,550. Approximately one month later Maropakis submitted another letter requesting a time extension for "multiple delays" but only discussed one delay event specifically, for a total of 107 days.

15. *PCL Constr. Services, Inc. v. United States*, 53 Fed. Cl. 479, 484 (2002), *aff'd*, 96 Fed. Appx. 672 (Fed. Cir. 2004).

16. 609 F.3d 1323 (Fed. Cir. June 17, 2010).

17. 41 U.S.C. § 605

Finally, in December 2002, the Navy issued the contracting officer's final decision concerning the assessment of liquidated damages. (Later, at trial, the Navy asserted the position that the final decision in December 2002 applied **only** to the issue of liquidated damages, and **not** to Maropakis's delay claim.) Nearly one year later, in December 2003, Maropakis appealed the contracting officer's final decision to the United States Court of Federal Claims. The Navy responded by counterclaiming for the value of the liquidated damages assessed on the project. The Navy also moved to have Maropakis's delay claim dismissed, contending that the Court of Federal Claims did **not** have jurisdiction over Maropakis's claim as Maropakis "... had **not** submitted a 'claim' for contract modification as required under the CDA..." The court agreed with the Navy's position. It **dismissed** Maropakis' claim for lack of jurisdiction and **upheld** the Navy's claim for liquidated damages without ever getting to the issue of whether the Navy caused any of the delays resulting in the late completion.

Maropakis appealed to the Court of Appeals for the Federal Circuit, contending, in essence, that their letters to the contracting office constituted a valid claim for time extension, sufficient to give the Court of Federal Claims jurisdiction over the matter. "Maropakis also argue[d] that even if it was not in technical compliance with the CDA, the United States had actual knowledge of the amount and basis of Maropakis's claim and therefore the Court of Federal Claims had jurisdiction."¹⁸

The Court of Appeals carefully considered the CDA's requirements governing the submission of certified claims and the need to obtain a contracting officer's final decision in order to appeal a denied claim. The court concluded that Maropakis had **not** submitted a "certified claim" to the government nor did they obtain a "final decision" on their claim from the contracting officer. Accordingly, the court ruled that the Court of Federal Claims acted appropriately in dismissing Maropakis's claim for lack of jurisdiction.

The Court of Appeals then went on to examine Maropakis's argument that they should have been allowed to raise their delay claim **as a defense** against the imposition of liquidated damages as their claim presented "factual defenses" against the Navy's claim for liquidated damages. The court analyzed this argument and rejected it. The court acknowledged that the Navy's claim for liquidated damages was a government claim, but noted that government claims do **not** require certification under the CDA. The court further acknowledged that the contracting officer had, in fact, issued a final decision on the issue of liquidated damages when he assessed the liquidated damages. The Court of Appeals concluded that the court of Federal Claims was correct in stating it had jurisdiction over the liquidated damages claim.

The court continued its examination of the issue of whether a contractor must provide a certified delay claim in order to defend itself against government imposed liquidated damages. Citing *Sun Eagle v. U.S.*,¹⁹ the court stated:

*"This court holds that the plaintiff is challenging a government claim to liquidated damages and making its own contractor claim to recover amounts withheld for liquidated damages. **The latter must be certified.**"*

The court also cited *Elgin Builders, Inc. v. U.S.*²⁰ wherein that court stated:

"...where ... the contractor seeks to contest the assessment of liquidated damages by claiming entitlement to time extensions or other relief, the court is presented with a claim by the contractor against the government and that must first be presented to the CO."

18. It appears that Maropakis attempted to create a "constructive claim" under the Contract Disputes Act.

19. 23 Cl. Ct. 465, 477 (1991).

20. 10 Cl. Ct. 40, 44 (1986).

The Court of Appeals concluded that:

*“The statutory language of the CDA is explicit in requiring a contractor to make a valid claim to the contracting officer prior to litigating that claim... Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, **whether asserting the claim against the government as an affirmative claim or as a defense to a government action.**”*

The Court of Appeals never heard or ruled on the Maropakis' contentions that the Navy was the cause of at least some of the delay. The Court focused exclusively on the requirements of the CDA and whether Maropakis had met those requirements. Based on this logic it appears that contractors on federal contracts can no longer rely upon asserting excusable concurrent delay as a defense against government-imposed liquidated damages **unless** they have previously submitted a certified delay claim to the contracting officer and the contracting officer has issued a final decision.

GREG OPINSKI CONSTRUCTION, INC. V. CITY OF OAKDALE²¹

Approximately 16 months later, an appellate court in California reviewed a case involving similar arguments but without the backdrop of the federal CDA. The facts of the case follow.

On May 3, 2004, Greg Opinski Construction, Inc. (Opinski) entered into a contract with the City of Oakdale, Calif. (City). The Notice to Proceed was issued by the City the same day the contract was executed. The time of performance under the contract was 300 days, resulting in a completion date of Feb. 26, 2005. The liquidated damages clause stipulated \$250 per day for every day of late completion. The city's architect did **not** issue the Certificate of Substantial Completion until Sept. 30, 2005, 216 days beyond the contract completion date. The city withheld \$54,000 in liquidated damages from Opinski.

The litigation in Superior Court began when a subcontractor sued Opinski for withholding payment. In turn, Opinski sued the city for breach of contract and the city countered with a suit against both Opinski and its surety for breach. The sole issue relevant to this paper is the city's claim against Opinski for \$54,000 in liquidated damages.

Paragraphs 11.2 and 12.1 of the contract provided that the contract price and completion time could only be adjusted by means of a written change order signed by the city. Paragraph 9.11 set forth a process by which the engineer²² was to review and rule on claims by the parties for changes in time or price. Claims pursuant to Articles 11 and 12 of the contract were to be referred to the engineer in writing with a request for a formal written decision. The procedure required submittal of written notice within 30 days of the event, giving rise to the additional cost and/or time. The formal claim submission was to be provided to the engineer within 60 days after the event, unless the engineer allowed additional time. The contract also provided that the engineer was to then issue a formal written decision within a “reasonable period of time.”

Paragraph 12.2 specified that a time extension had to be based on “circumstances beyond the contractor's control” and would only be granted after submission of a claim. More specifically, the contract stated that:

*“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.”*
(Underscoring provided.)

In the initial litigation, Opinski argued that delays caused by the city were the reason the project was completed late and therefore the city was prohibited from assessing liquidated damages. The city argued, and the Superior Court agreed, that there was no need for the city to respond to Opinski's request for findings about the causes of delay to the completion of the work because Opinski:

1. Had not filed notices of delay,
2. Had not filed delay claims as required by Paragraph 12.1 of the contract,
3. Had neither requested nor obtained the engineer's formal decision in writing as required by Paragraph 9.11 of the contract

21. 199 Cal. App. 4th 1107 (2011), 132 Cal. Rptr. 3d, 170 Court of Appeal, Fifth District, California (Oct. 6, 2011).

22. The term “the engineer” was defined in the contract as “the person, firm or corporation which prepared the Plans and Contract Documents.”

The Superior Court concluded that since Opinski had not followed the contractually mandated procedure, it was not necessary to review the alleged delay issues, **regardless of which party was responsible for the late completion.**

Opinski appealed the Superior Court decision, arguing that liquidated damages could not be assessed for any portion of the project delay brought about by the city, even if Opinski had failed to follow the procedures set forth in the contract for obtaining a time extension. Opinski also argued that timely performance of the work was rendered impossible due to delays caused by the city. Opinski's arguments rested, in large part, on a 1963 California Supreme Court decision in the case of *Peter Kiewit Sons' Co. v. Pasadena City Junior College District*.²³ This argument was set aside by the Appellate Court, noting that the legislature amended the provisions of California Civil Code Section 1511 in 1965 to overturn the effect of The *Peter Kiewit* ruling.

The appellate court stated that:

"If the contractor wished to claim that it needed an extension of time because of delays caused by the City, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal decision from the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether Opinski's timely performance was possible or impossible under the circumstances. The purpose of [these] contract provisions ... is to allocate to the contractor the risk of delay costs — even for delays beyond the contractor's control — unless the contractor follows the required procedures for notifying the owner of its intent to claim a right to an extension."

The Appellate Court finding concerning the liquidated damages withheld by the city was summarized as follows:

"[The] City was entitled to liquidated damages for [the] general contractor's late completion under construction contract, even if the delays were caused by the City's conduct, where the contract required any extension of time to be obtained through certain procedures, and [the] general contractor did not use such procedures."

Opinski goes beyond *Maropakis* in that in *Opinski*, the city admitted it was the cause of some of the project delay, but still insisted on collecting the full amount of liquidated damages since Opinski had **not** previously **provided notice** or **submitted time extension requests**. Unlike *Maropakis*, the city simply argued noncompliance with contract procedures without a statutory obligation like the CDA.

Based on the outcome of these two cases, contractors seeking to assert a concurrent delay defense against the imposition of liquidated damages face an obligation to ensure that the terms of the contract are followed. If a contractor does **not** file timely notice of delay; does **not** submit time extension requests, with adequate supporting documentation in strict accordance with contract procedures; and does **not** obtain a written decision from the owner or its representative; it may be **precluded** from raising the defense of concurrent delay at the end of the job, even if the delay was solely caused by the owner or was concurrent.

Based on these two cases, contractors and owners alike should take note that the owner's newest defenses against concurrent delay allegations raised for the first time at the end of the project for the first time are to assert one or both of the following positions:

- Failure to comply with statutory requirements such as the federal CDA or a similar state statute
- Failure to comply with carefully prepared and clearly worded notice, change order, time extension, and claim submittal requirements included in the contract.

²³. 9 Cal. 2d 241, 28 Cal. Rptr. 714, 379 P.2d 18 (1963).

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PRACTICAL TIPS FOR OWNERS

If owners want to prevent the practice of an end-of-project concurrent delay defense they might consider taking the following actions.

- Consult with legal counsel to determine applicable statutory requirements in the jurisdiction where the project is to be constructed
- Craft clearly worded change order and time extension procedures and include these procedures in the contract documents
- Educate staff thoroughly on these contract procedures.
- Ensure that all project management staff, whether its own or that of its consultants, adhere to the contract management procedures
- Ensure that no owner actions inadvertently waive the protections afforded by the contract (such as granting time extensions in the absence of notices of delay or time extension requests as required by the contract)

PRACTICAL TIPS FOR CONTRACTORS

In the face of such contract language, contractors should —

- Provide prompt written notice to the owner whenever any potential delay event occurs, even if it is not apparent that the event will cause an impact to the critical path
- Adhere strictly to the change order, claim submittal, and time extension process set forth in the contract documents
- Educate project team thoroughly on contract procedures.
- Insist that all owner decisions concerning time extension requests be provided in writing
- Reserve all rights to continue to assert time extension claims by submitting written objections to owner denials of time extension requests

CONCLUSION

These two cases, one federal and the other state, are potential game-changers when it comes to contractors asserting and owners defending against the concurrent delay defense at the end of a project. Failure to follow the strict requirements of statute or contract may preclude a contractor from successfully asserting concurrent delay as a defense against liquidated damages. Owners can and have been successful when asserting these defenses. In turn, contractors must become much more attentive to both the contractual notice and time extension request requirements and procedures.

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