Concurrent Delay – A Potent Defense For Owners and Contractors

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, neither recovers damages. The principle of concurrent delay is not a new one. It is a concept that has been changing and evolving from the time it was first addressed in the United States in 1867, and those changes continue today. This update will give a brief overview of the general principle of concurrent delay, then focus on actions that contractors can take to ensure that they preserve their right to assert concurrent delay as a defense, and similarly, defenses that owners can raise in response to a contractor’s claim for delay damages.

Concurrent delay happens when two or more delays resulting from independent causes overlap during the same time period. The most typical situation occurs when both the owner’s and the contractor’s actions are sufficient independently to cause a delay, and both delays impact the same time period. The two delays do not have to occur at the exact same time. But each delay must impact the completion date of the project. That is, each delay must impact the critical path if the other delay is removed from the analysis. Concurrent delay can also occur when a delay caused by either party overlaps with an excusable delay such as abnormal weather.

The following is a typical scenario. 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 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 can show that its delay was excusable, or the contractor can show the owner was responsible for a concurrent delay. If the owner is responsible for a concurrent delay, the owner cannot recover liquidated damages—unless the contractor has waived it right to assert concurrent delay.

Recent decisions may signal a change in how courts treat a contractor’s claim of concurrent delay. The owner’s defenses to concurrent delay are not themselves new, but courts may be becoming more receptive rendering it more difficult for contractors to successfully assert concurrent delay.

Most prime construction contracts include provisions that require written notice of delay events, as well as specific contractual requirements for how and when a contractor must submit requests for time and money. Increasingly, courts are requiring strict compliance from the contractor with these provisions. 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 delay damages.

For contractors, it is crucial that all field administrative personnel know the contract’s requirements for providing notice of delays and requesting time extensions. Regardless of the specific contract
terms, it is important to give immediate or at least prompt notice of any event that impacts scheduled completion of the project. A contractor will face an uphill battle to convince a court to find concurrent delay or grant a time extension if the contractor did not raise the delay issue until after the project was completed. This is true even if the owner caused a significant portion of the delay which would otherwise give the contractor a solid defense of concurrent delay and the potential for an affirmative claim.

To know and follow the contract terms is simply common sense. Still, it is easier than one would think to miss a notice requirement where concurrent delay is involved. When a delay is undeniably caused by the owner, a contractor may assume the owner is aware of the event and conclude notice is unnecessary. If, for example, an owner failed to provide site access due to a permitting issue, a contractor could easily assume that it would not need to follow the formal notice procedures since the owner, having communicated with the contractor regarding the delay, is plainly aware of the delay. This is a dangerous and potentially expensive assumption. Even in the most seemingly straightforward cases, contractors should always follow the strict letter of the contract in order to preserve their ability to assert concurrent delay and claim delay damages.

On the flip side, owners should likewise be cognizant of the contract terms and vigilant in enforcing them. Owners who do not demand strict compliance at the outset of a project may find they have inadvertently changed the terms of the contract by implied mutual consent. Strict enforcement of notice and claims submission requirements allows owners to both defend contractor claims for delay damages and to avoid concurrent delay as a defense to assessment of LDs.

Owners should also carefully monitor contractor performance. Even in instances where a contractor has perfectly preserved a claim for delay damages, a concurrent delay caused by the contractor or any subcontractor or supplier for whom the contractor is responsible may be used as an offset to avoid the delay damages claim.

Concurrent delay is a double-edged sword for owners and contractors. Both owners and contractors need to be vigilant in compliance with contract terms. Both parties should also make use of increasingly accurate scheduling tools and more sophisticated methods to estimate financial impacts of a delay. Concurrent delay can be a useful defense, but only if the proper foundation is put in place during contract performance.