

Concurrent Delay – The Owner’s Newest Defense



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Introduction



- Presentation examines how concurrent delay is asserted by contractors to defend against owner assessment of liquidated damages
- Examines 2 court decisions which remind owners of legal defenses that may be employed to defend against allegations of concurrent delay
 - ✓ If concurrent delay raised at end of project for the first time

What is “Concurrent Delay”?



- **“Concurrent delay” has many definitions**
- **AACE definitions from RP 10S-90**
 - ✓ **Two or more delays that take place or overlap during the same period, either of which, occurring alone would have affected the completion date**
 - ✓ **Two or more independent causes of delay during the same time period. The “same time period” ... is not always literally within the exact period of time**
 - ✓ **Concurrent delay occurs when both the owner & contractor delay the project or when either party delays the project during an excusable delay (e.g., abnormal weather)**

“Doctrine of Concurrent Delay”



- Modern legal doctrine not based on equitable resolution of delay claims
- Based on –
 - ✓ Past litigant’s failure to prove their claims &
 - ✓ Older court’s hostility toward liquidated damages
- Two issues blended into modern concept of concurrent delay
 - ✓ Courts stopped delving into real delay analysis
 - ✓ Courts simply “declared” concurrent delay for all overlapping delays

“Doctrine of Concurrent Delay”



- “Concurrent delay” not new law
- First case – *Stewart v. Keteltas* – decided in 1867
 - ✓ New York case involving late project completion
 - ✓ But delays were, in part, caused by independent contractors hired by owner to work on same building
 - ✓ Court decided owner could not impose liquidated damages as owner caused or contributed to delay
- Other older cases with similar results include
 - ✓ *Shook v. Dozier* (1909)
 - ✓ *Caldwell & Drake v. Schmulbach* (1909)
 - ✓ *Greenfield Tap & Die Corp. v. U.S.* (1929)
 - ✓ *Newport News Shipbuilding v. U.S.* (1934)

“Doctrine of Concurrent Delay”



- US Courts have not provided an exact definition
- But, definition can be ascertained from case law between 1867 & 2011
 - ✓ Concurrent delay is independently sufficient to cause delay days attributed to that source of delay
 - ✓ Concurrent delays affect the same “delay period”
 - ✓ To be concurrent, delays must be “inextricably intertwined”
 - ✓ Two causes of delay independently cause delay to the same time period
- AACE definition meets definitions outlined by numerous court cases

Why is Concurrent Delay Important?



- **Concurrent delay typically entitles contractor to excusable delay**
 - ✓ Excusable delay is delay that justifies a time extension
 - ✓ Excuses contractor from meeting contractual deadline
 - ✓ Typically results in “**time, no money**”
- **AACE definition of excusable delay**
 - ✓ Delays not attributable to contractor action, inaction
 - ✓ Entitles contractor to time extension if completion date affected
- **If contractor entitled to time extension**
 - ✓ Owner not entitled to assess liquidated damages for that period of time

Liquidated Damages



➤ Liquidated damages

- ✓ Damages determined, fixed & agreed to in advance
- ✓ Stipulated in contract
- ✓ An estimate of damages owner likely to incur if project completed late, as known at time of bidding

➤ AACE definition

- ✓ Amount stated in contract as liability of contractor for failure to complete work on time

When Do Contractors Assert Concurrent Delay?



- Often, after owner assesses liquidated damages!
- Liquidated damages = owner claim
- Owner has initial burden of proof that ...
 - ✓ Contract performance requirements not substantially completed by contract completion date &
 - ✓ Delay period for which liquidated damages assessed is proper period
- Contractor then has burden of proof that ...
 - ✓ Delay excusable under the contract

When Do Contractors Assert Concurrent Delay?



➤ Most common scenario

- ✓ Project completed late
- ✓ Owner examines delay period & determines they are not at fault
- ✓ Owner announces intent to or actually assesses LD's
- ✓ Contractor reviews schedule & determines owner responsible for some or all of delay on project
- ✓ Contractor responds to owner

“You’re right, job was completed 43 days late. I caused some delay but you caused some also. Your delays are concurrent with mine. You owe me a time extension which eliminates the LD’s you plan to assess.”

Contractors Assertion of Concurrent Delay at End of Project



- Contractor may/may not have filed notice of delay
- Contractor may/may not have filed time extension requests or delay claims
- May be very first time owner hears about alleged “owner delays”
- Owner wonders ...
 - ✓ Why is contractor asserting concurrent delay at end of project with no warning earlier?
- Because concurrent delay eliminates liquidated damages!

Owner's Newest Defenses



➤ Contracts almost always have written notice of delay provisions

“...within 10 days of when contractor knows or should have known of event, contractor shall provide notice, in writing, to owner...”

➤ Followed by claim submittal requirements

“...within 30 days after event is over, contractor shall submit request for time extension to owner, in writing ...”

➤ Two recent court cases, one Federal in 2010 & other State in 2011 changed groundrules

✓ Reminded owners of legitimate legal defenses

M. Maropakis Carpentry v. U.S.



➤ **Decided by Court of Appeals for Federal Circuit in 2010**

✓ *609 F.3d 1322 (Fed. Cir. June 17, 2010)*

➤ **Project background**

✓ Navy issued contract to Maropakis in 1999

✓ Original contract completion date January 16, 2000 – later modified to February 4, 2000

✓ Contract had LD's clause for \$650/cd

✓ Maropakis not commence work until after contract completion date

✓ Maropakis not complete work until May 17, 2001 – 467 days after adjusted contract completion date

M. Maropakis Carpentry v. U.S.



➤ Background of dispute

- ✓ After completion Maropakis requested 447 day time extension based on 5 alleged delay events
- ✓ Maropakis not follow requirements of Contract Disputes Act (“CDA”)
 - Not certify claim
 - Not request Contracting Officer’s (“CO”) final decision
- ✓ 3 months later – CO notified Maropakis that request submitted “insufficient” to justify time extension
 - CO rejected request but invited Maropakis to submit further documentation
- ✓ 10 months later – No additional information submitted
 - Navy imposed \$303,550 in LD’s for 467 day late completion

M. Maropakis Carpentry v. U.S.



- 1 month later – Maropakis sent letter again requesting time extension
 - ✓ Mentioned all 5 delay events but discussed only 1 for 107 days
- December 2002 – CO's final decision issued concerning assessment of LD's
 - ✓ Navy later contended at trial “final decision” only addressed LD's & not Maropakis's delay claim
- December 2003 – Maropakis appealed CO's final decision to U.S. Court of Federal Claims
 - ✓ Not file in time to file appeal with ASBCA

M. Maropakis Carpentry v. U.S.



- Navy responded by counterclaiming LD's
- Navy also asked court to dismiss Maropakis delay claim for lack of jurisdiction arguing Maropakis never submitted claim under CDA
 - ✓ Not certify claim
 - ✓ Not request & receive CO's final decision
- Court of Federal Claims agreed with Navy position
 - ✓ Upheld LD's
 - ✓ Dismissed Maropakis claim for lack of jurisdiction

M. Maropakis Carpentry v. U.S.



➤ Maropakis appealed to Court of Appeals for Federal Circuit

- ✓ Contended that letters to CO constituted valid claim sufficient for Court of Federal Claims jurisdiction
- ✓ Argued that even if not in technical compliance with CDA, Navy had actual knowledge of amount & basis of claim
- ✓ Therefore, Court of Federal Claims had jurisdiction

➤ Maropakis attempted to create “Constructive Claim”

M. Maropakis Carpentry v. U.S.



- Court of Appeals determined that Maropakis...
 - ✓ Did not submit certified claim under CDA
 - ✓ Neither requested nor received CO's final decision on claim
- Ruled that Court of Federal Claims acted properly in dismissing claim for lack of jurisdiction
- Court of Appeals looked at issue of whether Maropakis should have been allowed to present their delay claim as a factual defense against assessment of LD's

M. Maropakis Carpentry v. U.S.



➤ Recall that...

- ✓ First owner has to prove work completed late & period of damages assessed is appropriate
- ✓ Then contractor has to prove late completion result of excusable delay (caused by owner, 3rd party, force majeure, etc.)

➤ Court reviewed assessment of LD's under CDA

- ✓ Noted LD's assessed by Navy a government claim
- ✓ Does not require certification under CDA
- ✓ Did have CO's final decision on LD's assessment
- ✓ Therefore, Court of Federal Claims did have jurisdiction concerning Navy's claim for LD's

M. Maropakis Carpentry v. U.S.



➤ Court also examined issue of whether contractor must submit certified claim for delay to be able to defend against LD's

➤ Court of Appeals ruled that...

“...contractor seeking an adjustment of contract terms must meet ... requirements of CDA, whether asserting claim against government or as a defense to government action...”

➤ Court cited *Sun Eagle v. U.S. (1991)*

“When plaintiff is challenging government claim to LD's & making their own claim to recover amount withheld for LD's...[contractor's claim] must be certified [under CDA]...”

M. Maropakis Carpentry v. U.S.



➤ Court also cited *Elgin Builders, Inc. v. U.S. (1986)*

“Where contractor seeks to contest LD’s by claiming entitlement to time extension, this is a claim against government which must first be presented to CO...”

➤ **Summary**

- ✓ 9 years after project completion & 7 years in Court
- ✓ Contractor never able to present their claim or argue Navy’s delays
- ✓ Based on Court of Appeals decision, contractors cannot raise excusable delay as defense against LD’s unless they have submitted certified claim to CO & requested & received CO’s final decision

Opinski Construction v. City of Oakdale



➤ Decided by California Court of Appeals in 2011

✓ *199 Cal. App. 4th 1107 (2011), 132 Cal. Rptr. 3d, 170 Court of Appeals, Fifth District, CA (Oct. 6, 2011)*

➤ Project Background

✓ May 3, 2004 – Opinski contracts with City & NTP issued same day

✓ Time of Performance – 300 days resulting in contract completion date of February 26, 2005

✓ Certificate of Substantial Completion – issued on September 30, 2005

- 216 days late

✓ City assessed \$54,000 in LD's based on \$250/cd

Opinski Construction v. City of Oakdale



➤ Contract Background

- ✓ Sec. 11.2 & 12.1 provided price & time only adjusted by written change order
- ✓ Sec. 9.11 set forth claims procedure & required written determination by “the engineer”
- ✓ Sec. 12.2 stated time extensions owed only for circumstances beyond contractor’s control & only “...if a claim is made therefor as provided in Sec. 12.1...”

➤ Claim Background

- ✓ Litigation started when unpaid sub sued Opinski
- ✓ Opinski, in turn, sued City for breach
- ✓ City responded with suit for breach vs. Opinski & surety

Opinski Construction v. City of Oakdale



- Focus of presentation – LD's issue only
- In initial litigation Opinski argued City delays caused late completion
 - ✓ Therefore, claimed City could not assess LD's
- City argued that Court did not need to consider causes of project delay as Opinski had...
 - ✓ Not filed notice of delay
 - ✓ Not filed delay claim(s) as required by contract
 - ✓ Not obtained written decision of "the engineer"

Opinski Construction v. City of Oakdale



- Superior Court ruled that since Opinski had not followed contract procedure, not necessary to deal with alleged delay issues
 - ✓ Regardless of which party was responsible for delay!
- Opinski appealed decision arguing LD's could not be assessed for any portion of delay caused by City
 - ✓ Even if Opinski failed to follow contract requirements
- Opinski argued timely performance rendered impossible due to City caused delays

Opinski Construction v. City of Oakdale



➤ Appellate Court ruled...

- ✓ If Opinski needed time extension must obtain signed change order or file claim with engineer & receive written ruling
 - Opinski did neither
- ✓ Superior Court correct to rely on & enforce terms of contract
- ✓ Makes no difference whether time of performance possible or impossible
- ✓ Purpose of contract procedure was to transfer risk of all delay to contractor, unless contractor follows procedures in contract

Opinski Construction v. City of Oakdale



➤ Appellate Court ruling stated...

“City entitled to LD’s for contractor’s late completion under contract, even if delays caused by City, where contract required time extensions to be obtained through certain procedures & contractor did not follow those procedures”

Opinski Construction v. City of Oakdale



- *Opinski* goes beyond *Maropakis*
- In *Opinski*, City admitted they caused some delay
 - ✓ But insisted upon collecting LD's for entire delay period
- City prevailed on argument of non-compliance with contract procedures
 - ✓ Even in absence of statute like CDA as backdrop
 - ✓ Solely because contractor did not follow procedures detailed in contract documents

Impact of *Maropakis & Opinski*?



- Contractors seeking to employ “concurrent delay defense” to protect themselves against LD’s have obligation to follow statutory or contract procedures exactly
- If contractor...
 - ✓ Does not provide timely written notice of delay as required
 - ✓ Does not file time extension requests as required
 - ✓ Does not obtain written decisions from owner or owner representative as required
 - ✓ May be precluded from raising concurrent delay as defense vs. LD’s later

Owner's Newest Defenses



➤ To defend vs. concurrent delay raised at end of project for first time, owners may be able to assert contractor

- ✓ Failure to comply with statutory requirements (e.g., CDA, California Civil Code §1511 or similar statutes in other jurisdictions)
- ✓ Failure to comply with well crafted, clearly worded change order, time extension & claim submittal clauses in contract

Practical Tips for Owners



➤ If owners want to incorporate such defenses in their contracts...

- ✓ Consult with legal counsel to determine applicable statutory requirements in jurisdiction
- ✓ Craft clearly worded change order & time extension procedures & insert into contract documents
- ✓ Educate staff thoroughly on procedures
- ✓ Ensure no owner action (e.g., grant time extensions when no notice of delay provided or no time extension request submitted) waives protection of such contract language

Practical Tips for Contractors



➤ **Contractors faced with clear contract language such as this should –**

- ✓ **Provide prompt written notice of potential delay whenever any delay event arises even if not certain event will cause impact to critical path**
 - **“When in doubt, give written notice!”**
- ✓ **Adhere strictly to change order, claim submittal & time extension procedures of contract**
- ✓ **Educate project team concerning contract procedures**
- ✓ **Insist all owner decisions on change orders, claims & time extension be provided in writing**
- ✓ **Reserve right to continue to assert time extension requests by submitting written objections to denials**

Conclusion



- Two court cases potential game changers
- “Concurrent delay defense” may no longer be reliable & easy to use against assessment of LD’s
- Failure to follow contract or statutory requirements may prevent contractors from being able to raise concurrent delay as defense against LD’s at end of project
- Owners can adopt & utilize these defenses
- Contractors must be more attentive to notice & time extension request requirements

Questions?



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