IS IT OR IS IT NOT CONCURRENT DELAY?

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Introduction

A common defense used to lessen exposure to delay damages is to argue that while the delay, or delays, for which one is being held responsible may have been critical, other delays for which one is not responsible were concurrently critical thereby resulting in an excusable, but non-compensable period of delay. But when is a delay concurrent and how does one determine concurrency?

Defining Concurrent Delay in Construction Claims

There are several definitions of concurrent delay. The Association for the Advancement Cost Engineering International provides five forms of the definitions of concurrent delay, including:

Concurrent delays occur when there are two or more independent causes of delay during the same time period. The "same" time period from which the 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 period.

Additional definitions are also provided by other organizations such as the American Society of Civil Engineers, and the American Bar Association

[1]AACE International Recommended Practice No. 29R-03; Forensic Schedule Analysis; Rev. April 25, 2011

Characteristics of Concurrent Delays Events

As stated in the definition, the delay events themselves need not be fully overlapping, but may be partially overlapping, or not overlapping at all, but they still have their effect on the critical path occurring at the same time. While not explicit in the definition, when used in delay analysis these are delay events where one event is the responsibility of the Contractor and other the responsibility of the Owner, a third party, or resulting from a Force-Majeure event.

Practical Example of Concurrent Delay on the Critical Path

As an example, take the scenario in which the critical activity *FRP Concrete Slab - Floor 2* is the immediate finish-to-start successor to two activities, *Steel Erection*, and *Complete Concrete Slab-on-Grade*. Assume that *Steel Erection* has a planned duration of 7 days and total float of 3 days; and *Complete Concrete Slab-on-Grade* has a planned duration of 9 days and is the critical controlling predecessor to *FRP Concrete Slab Floor - 2*. Let's assume both predecessor activities started on their early start dates but the completion of *Steel Erection* is delayed by 5 days because of delay in steel supply and *Complete Concrete Slab-on-Grade* is delayed 3 days because of a delayed response to an RFI. In this scenario *Steel Erection* would not only exhaust its 3 days of float, but it will also incur 2 additional days of delay. These 2 additional days would, on their own, cause a delay to the critical path by delaying *FRP Concrete Slab - Floor 2* by 2 days. Let's also assume that Complete Concrete Slab-on-Grade was delayed by 3 days, which on its own would have delayed critical *FRP Concrete Slab Floor - 2* by 3 days. Stated another way, even if the *Concrete Slab-on-Grade* had not been delayed, the *Steel Erection* delay alone would have critically delayed the project by 2 days. Likewise, even if the *Steel Erection* had not been delayed, the *Concrete Slab-on-Grade* delay by itself would have caused a 3-day critical delay. Because these delays affected the start of same critical successor, 2 days out of the total 3 days of delay represent the concurrent delay.

It is of note that since both *Steel Erection* and *Complete Slab-on-Grade* are immediate finish to start predecessors to *FRP Concrete Slab - Floor 2*, it is not necessary that the delay in the RFI response affecting the slab on grade, and the delay in the steel supply happen exactly at the same time, that is to say on the exact same days, as long as they

both would independently result in a critical delay to the start of their shared successor.

Challenges in Identifying True Concurrent Delays

The problem the schedule analyst has is discerning whether in fact the schedule reflecting the extended performance, or late finish, of two concurrent activities represents a concurrent delay or whether one of the activities is merely purposefully paced, for any one of numerous possible reasons.

This is not readily apparent when performing contemporaneous update-based analyses such as the Half-Step Analysis or Time Impact Analysis which are based on comparison of sequential schedule updates through time. Going back to our scenario above, an update-based analysis would not readily yield which activity is driving the critical path or if both activities are. In this case a deeper investigation must take place regarding the cause of the delay (in our scenario the late finish) of the predecessors since either delay can be claimed to be a simple case of, "why hurry up and wait," while something else is already critically delaying the project.

Conclusion

Here it becomes important to determine not just the cause of the delay to both activities, but the "why" behind the cause. While analyses based on a daily as-built schedule may, through the daily reports used to create them, provide a greater focus on the causes of delays, even these types of analyses may not reveal the complete picture. In such cases it is fundamental to review all available records including correspondence, field diaries, meeting minutes, etc. Only through such a comprehensive analysis can a claimed concurrent delay be truly established or refuted.

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