

Concurrent and Pacing Delays in Construction Claims

In a previous article we looked at how concurrent delays can be used as a defence against claims.

This article looks further at concurrent delays and their assessment and then goes on to compare concurrent delays to pacing delays. We then consider how a contractor could still pursue an extension of time claim while also reducing costs through reducing the pace of construction works.

What is a Concurrent Delay?

The term “concurrent delay” is commonly used to describe circumstances where different causes of delay overlap during a period of time. A concurrent delay could occur if a delay that was caused by the owner is on the same activity path or a parallel activity path as a delay that was caused by the contractor. If the owner-caused delay and contractor-caused delay affect the same activity or affect different activities on parallel activity paths which are equally critical, and therefore the owner-caused delay and contractor-caused delay would each have delayed the completion date of the project, the delays are said to be concurrent.

Figure 1 below shows a concurrent delay, two parallel activity paths are each delayed by five workdays during the same window by separate causes, one delay caused by the owner and the other delay caused by the contractor, and both affected activities are on the critical path. The two 5-work day delays are concurrent.

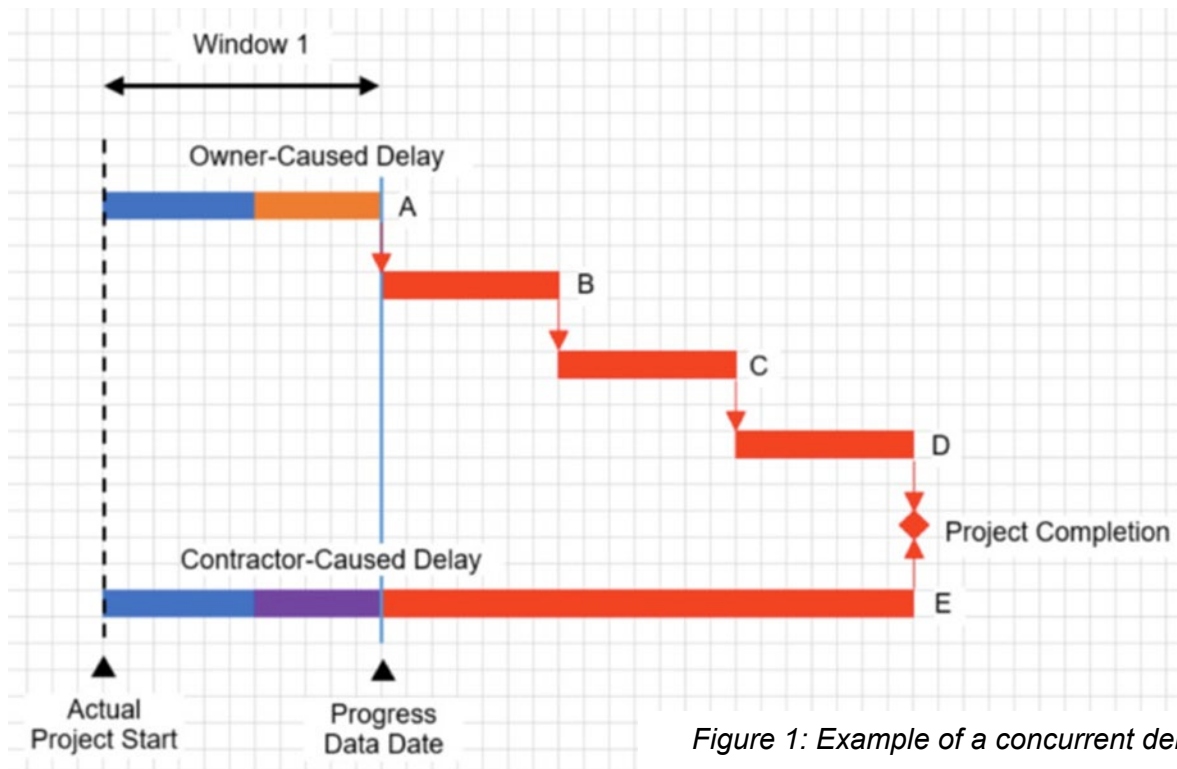


Figure 1: Example of a concurrent delay

Allocation of Responsibility for Concurrent Delays

Delays can typically be categorized as either:

Excusable delays

Excusable delays occur due to events which are outside the control of contractor like inclement weather, strikes, fire, client suggested changes, differing site conditions, change of government policy etc. When there are excusable delays, the contractor is entitled to an extension of time in case the date for completion is delayed.

Excusable delays can be further classified into compensable and non-compensable delays:

- Excusable Compensable Delays are those for which the contractor is entitled to additional payment (compensation). An example of such a delay could be that the owner does not provide access to the site even after a notice to proceed is issued. Such a delay would be compensable.
- Excusable Non-compensable Delays are those for which the contractor is entitled to an extension of time but no monetary compensation. In this case, generally both the contractor and owner are not responsible for the delay. An example of such a delay could be inclement weather.

Non-excusable delays

Non-Excusable Delays are such that no excuse is available for them. They typically arise due to carelessness, actions, or omissions of the contractor. For such delays, no extensions to time or monetary compensation are given to the contractor if it has affected the whole duration of the project. In such cases, the owner would be expected to deduct liquidated damages from the contractor. Examples of such a delay could be constructing something not in accordance with the drawings, improper resource allocation etc.

Basic Principles when Assessing a Concurrent Delay

Typically, construction contracts may state either that neither party receives time or cost compensation for a concurrent delay or that both parties receive compensation for time but not cost. The most applied principle in the international construction industry is that the contractor would not be entitled to compensable delay damages and the owner would not be entitled to damages either actual or liquidated.

The AACE¹ states the following with respect to compensability when a concurrent delay occurs:

“Thus, entitlement to compensability, whether it applies to the contractor or the owner, requires that the party seeking compensation shows a lack of concurrency if concurrency is alleged by the other party... Based on this symmetry, contractor entitlement to a time extension does not automatically entitle the contractor to delay compensation. The contractor would first have to show that an owner delay impacted the critical path, and then if the owner defends alleging concurrent delay, the contractor would have to show the absence of concurrent delays caused by a contractor delay or a force majeure delay in order to be entitled to compensation...”

The SCL Delay and Disruption Protocol² states:

“Where Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs.”

The various permutations of concurrent delay are summarised in table 1 below.

Delay Event	Concurrent With	Result
Owner Delay	Contractor Delay	Excusable but not compensable to either party
Owner Delay	Force Majeure Delay	Excusable but not compensable to either party
Contractor Delay	Force Majeure Delay	Excusable but not compensable to either party
Owner Delay	Another Owner Delay	Compensable to Contractor
Contractor Delay	Another Contractor Delay	Compensable to Owner

Table 1: Concurrent delay net effect matrix

Equal Delay Duration

There is usually no requirement that concurrent delays must be equal in duration. If the Contractor incurs additional costs that are caused both by an Owner Delay and a Contractor Delay, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Owner Delay from those caused by the Contractor Delay.

The SCL Delay and Disruption Protocol³ states:

“Where an Employer Delay to Completion and a Contractor Delay to Completion are concurrent, the Contractor may not recover compensation in respect of the Employer Risk Event unless it can separate the loss and/or expense that flows from the Employer Risk Event from that which flows from the Contractor Risk Event. If it would have incurred the additional costs in any event as a result of concurrent Contractor Delay, the Contractor will not be entitled to recover those additional costs. In most cases, this will mean that the Contractor will be entitled to compensation only for any period by which the Employer Delay exceeds the duration of the Contractor Delay.”

This concept is shown in figure 2 below. In this example:

- The owner caused five days delay to an activity.
- The contractor caused three days delay to a different activity.
- The contractor received a five-day extension of time due to the owner-caused delay, but no compensation for the three days of concurrent delay.

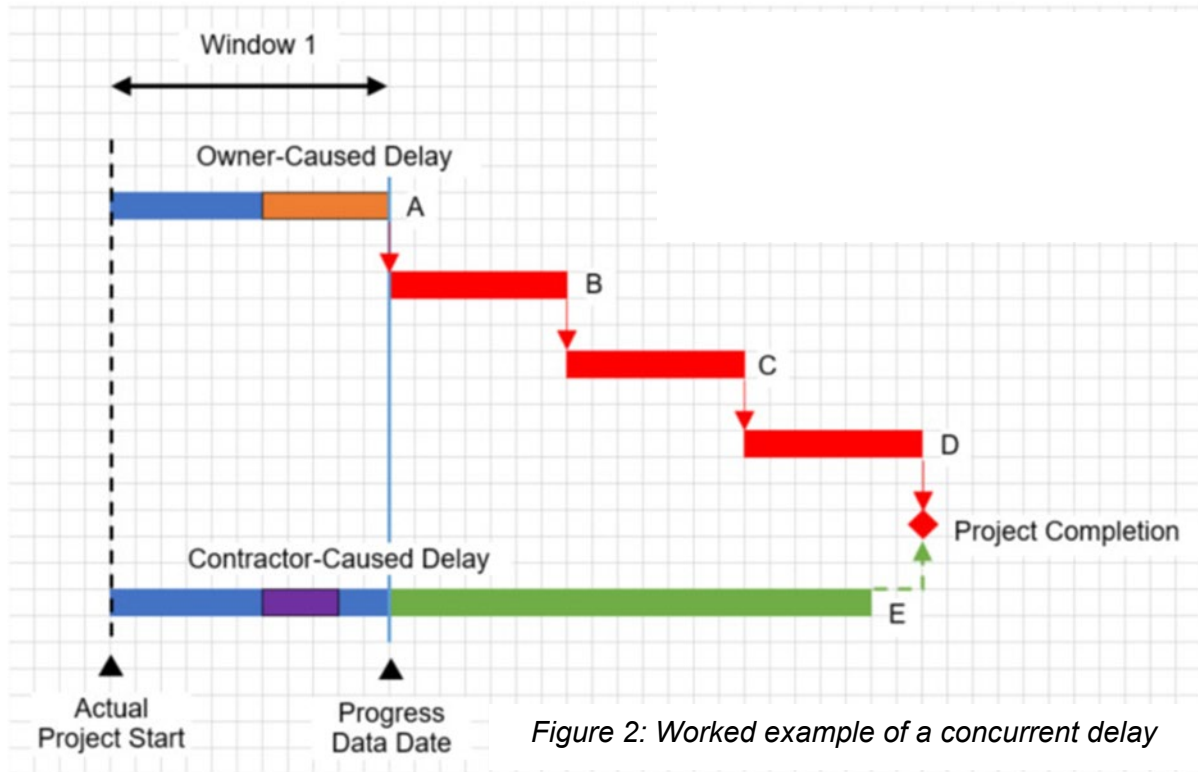


Figure 2: Worked example of a concurrent delay

What is a Pacing Delay?

A pacing delay occurs when a delay caused by the owner occurs in one activity and based on that event a conscious and contemporaneous decision is made by the contractor to pace progress in a second, independent activity. That is the contractor has deliberately slowed down its performance.

However, if the delay in the second activity is caused by factors independent from the first activity, it becomes a concurrent delay.

In figure 3 below, the owner has delayed the delivery of a pump resulting in the contractor deliberately slowing down its foundation works. The contractor's argument is simple. Why work hard to maintain the current schedule when late delivery of the owner supplied equipment will cause a delay to the overall project? This is particularly true on very labour-intensive projects where the daily cost of labour is extremely high.

The Purpose of a Pacing Delay

A contractor's decision to "pace" its work is a recurring action, and in many situations, "pacing" is the most appropriate and practical action a contractor can take to reduce the financial risks caused by an owner-caused delay to the critical path.

The reasons behind a contractor's decision to pace its work could be the following:

- Optimising labour and equipment by reducing work in non-critical areas (a contractor is not required to “hurry up and wait”).
- Reducing on-site material storage.
- Delaying the delivery of weather-sensitive equipment.

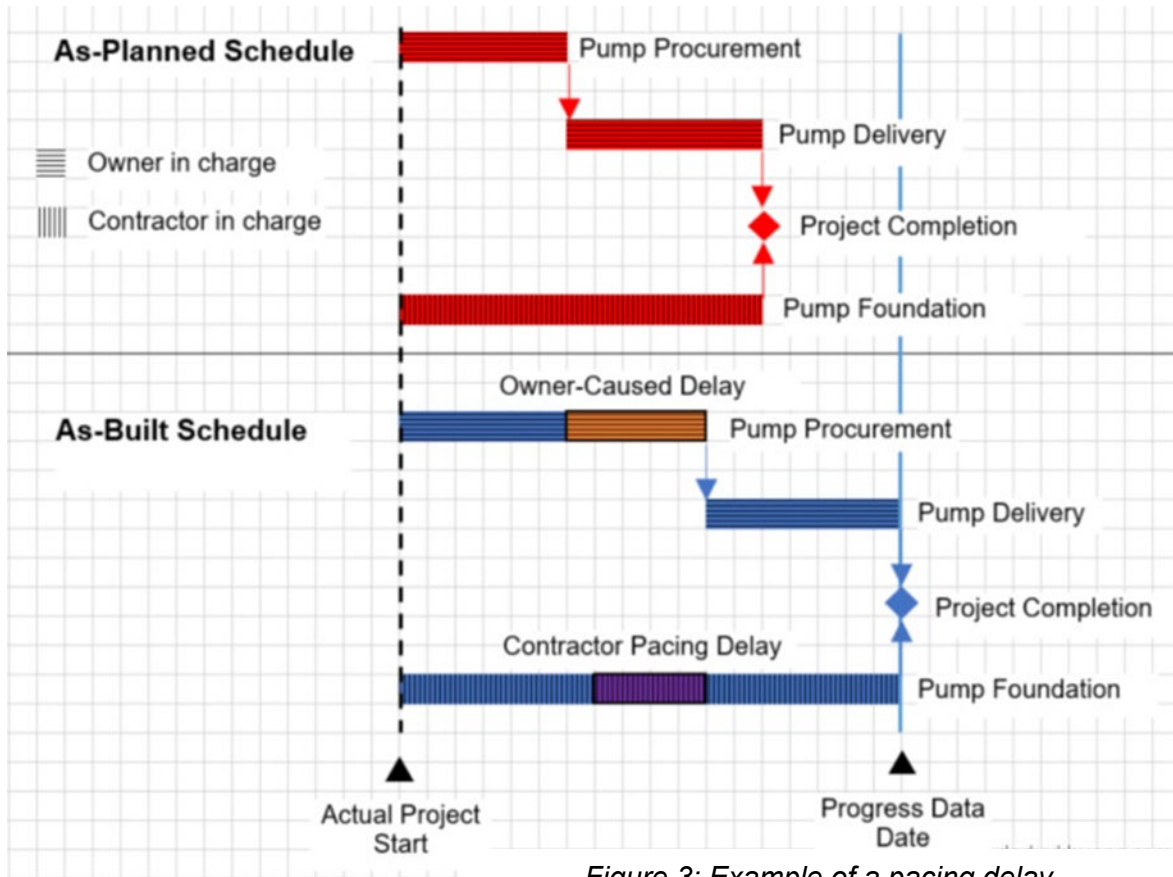


Figure 3: Example of a pacing delay

Pacing Delay Scenarios and Results

The various permutations of pacing delay are summarised in table 2 below.

Delay Event	Concurrent With	Result
Owner Delay	Contractor Pacing	Compensable to Contractor
Contractor Delay	Owner Pacing	Compensable to Owner

Table 2: Pacing delay scenarios

Concurrent Delay versus Pacing Delay

In its evaluation of potential concurrent delay versus a pacing delay, the following generally accepted international construction industry guidelines from the AACE⁴ apply, as follows:

- A “main” delay must precede a “pacing” delay.
- The contractor needs to demonstrate that it could resume progress at a normal pace.
- The contractor needs to provide evidence that a conscious and deliberate decision was made at the time to pace the work as a result of the other delay.

Unfortunately, many contractors fail to diligently inform the owner or adequately document in contemporaneous project records its decision to “pace” other work. Contractors usually inform the owners after the fact, and so owners are not given the opportunity to understand the implications of the contractor’s action. As a consequence, an atmosphere of distrust between the parties can adversely influence the ability of the parties to reach an amicable resolution regarding a delay claim.

Recommendations for Contractors

Contractors are recommended to:

- Maintain a well thought out, detailed and routinely updated schedule.
- Provide prompt notice of delay when an owner-caused delay occurs.
- Analyse the owner delay to determine whether pacing is logical and cost effective.
- Provide written notice of pacing to the owner if a pacing delay is appropriate.
- Prepare a written pacing plan showing the cost of pacing and the anticipated delay cost.
- Demonstrate that the work the contractor plans to pace was, until the advent of the owner delay, being performed as planned in the current schedule.
- Submit the pacing plan to the owner seeking its agreement with the plan.
- Carefully track which activities were slowed down by pacing, how they were slowed, and what cost impacts were incurred.

Recommendations for Owners

Owners are recommended to:

- Include definitions of specific terms in contract documents including “Concurrent Delay”, “Pacing Delay”, “Free Float”, “Total Float” and perhaps some other terms as necessary.
- Include a general or special condition clause that deals with pacing delay including:
 - A notice of pacing requirement including what should be included in the notice.
 - A requirement for preparation and submittal of a pacing plan to the owner.
 - Other provisions appropriate for such a clause.
- Meet with the contractor to discuss the pacing plan and its implementation if a notice of pacing has been received from the contractor.

Conclusions

Pacing delay is a legitimate management decision on the part of a contractor when an owner-caused delay is encountered. The issue has been addressed in arbitrations and courts and it is clear that contractors have a legal right to pace an owner delay. However, a pacing delay may have some unintended consequences for contractors. At a minimum, pacing delay decreases the amount of time between the actual end date of the project and the but for end date, potentially reducing a contractor's recovery of delay and delay damages. At present, there are several defences against contractor recovery of compensation for cost impacts resulting from a pacing delay.

Contractors seeking to maximise recovery due to a compensable delay should not attempt to pace an owner delay. Cost recovery for delay may actually increase if the contractor maintains its original schedule to the maximum extent practicable, thus increasing the time between the actual end date and the but for date. Maintaining the original project schedule, to the maximum extent practicable, increases the potential for maximising delay damages.

Contractors who determine to pace an owner delay to mitigate damages should provide written notice of pacing, fully advising the owner of how they intend to pace the owner delay. They should also prepare and submit a written pacing plan and attempt to get agreement with the owner concerning the issue of impact costs

For assistance with delay analysis, variations and claims please email us at info@geoecs.com.au.

Footnotes

¹ AACE International Recommended Practice No. 29R-03, pages 100-101

² The Society of Construction Law Delay and Disruption Protocol 2nd edition,

³ The Society of Construction Law Delay and Disruption Protocol 2nd edition, February 2017, Guidance on Core Principles No.14.3)

⁴ AACE International Recommended Practice No. 29R-03, page 113