

## **Concurrent Delays – A Potential Defence**

Concurrent delay is the construction equivalent of a hard fought five-day cricket test ending in a draw. If both parties to a dispute involving a claim for loss and expense due to delay 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 and those changes continue today. This article 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 defence against liquidated damages, and similarly, defences that clients can raise in response to a contractor's claim for delay loss and expense.

### **What is a Concurrent Delay?**

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 client'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; however, 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, for example, inclement weather.

The following is a typical scenario. A project is completed after the contract completion date, and the client seeks to recover liquidated damages (LDs) for each day the project was delayed. To recover LDs, the client must show that contract performance was not substantially completed on time. To defend against the client's claims of liquidated damages, the contractor can show that its delay was excusable, or the contractor can show the client was responsible for a concurrent delay. If the client is responsible for a concurrent delay, the client cannot recover liquidated damages for the period of concurrency—unless the contractor has waived its right to assert concurrent delay.

Recent decisions may signal a change in how courts treat a contractor's claim of concurrent delay. The client's defences 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.

### **Using Concurrent Delays as a Defence**

Most construction contracts include provisions that require written notice of delay events, as well as specific requirements for how and when a contractor must submit requests for time and money. Increasingly, courts are requiring strict compliance from contractors with these provisions. If a contractor fails to preserve its right to an extension of time for a client 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 extensions of time. Regardless of the specific contract terms, it is important to give immediate, or at least prompt, notice of any event that impacts or has the potential to impact the scheduled completion date of the project. A contractor will face an uphill battle to convince a court to find concurrent delay or grant an extension of time if the contractor did not raise the delay issue until after the project was completed. This is true even if the client caused a significant portion of the delay, which would otherwise give the contractor a solid defence 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 client, a contractor may assume the client is aware of the event and conclude notice is unnecessary. If, for example, a client failed to provide site access due to a permit issue, a contractor could easily assume that it would not need to follow the formal notice procedures since the client, 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 the ability to assert concurrent delay and claim delay damages.

On the flip side, clients should likewise be cognisant of the contract terms and vigilant in enforcing them. Clients 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 clients to both defend contractor claims for delay damages and to avoid concurrent delay as a defence to the assessment of LDs.

Clients 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 or reduce the delay damages claim.

## **Conclusions**

Concurrent delay is a double edged sword for clients and contractors. Both clients 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 defence, but only if the proper foundation is put in place during contract performance.

For assistance with variations, extension of time and loss and expense claims, please email us at [info@geoecs.com.au](mailto:info@geoecs.com.au).