

CONCURRENT DELAY

Mallesons Stephen Jaques

INTRODUCTION

The claiming and granting of extensions of time in large infrastructure projects is often a complicated and fractious process. One common reason for this is the issue of concurrent delay.

A concurrent delay occurs when two or more causes of delay overlap. It is important to note that it is the overlapping of the causes of the delays not the overlapping of the delays themselves. In our experience, this distinction is often not made which leads to confusion and sometimes disputes. More problematic is when the contract is silent on the issue of concurrent delay and the parties assume the silence operates to their benefit. As a result of conflicting case law it is difficult to determine who, in a particular fact scenario, is correct. This can also lead to protracted disputes and outcomes contrary to the intention of the parties.

This update considers the significance of addressing the issue of concurrent delay in construction contracts and the various approaches that may be taken.

SIGNIFICANCE OF CONCURRENT DELAY

There are a number of different causes of delay which may overlap with delay caused by the contractor. The most obvious causes are the acts or omissions of an owner.

An owner often has obligations to provide certain materials or infrastructure to enable the contractor to complete the works. The timing for the provision of that material or infrastructure (and the consequences for failing to provide it) can be effected by a concurrent delay.

For example, on gas plant projects, an owner often has a contractual obligation to ensure there is a pipeline available to connect to the plant by the time the contractor is ready to commission the plant. As the construction of a pipeline can be

expensive, the owner is likely to want to incur that expense as close as possible to the date commissioning is due to commence. For this reason, if the contractor is in delay the owner is likely to further delay incurring the expense of building the pipeline. In the absence of a concurrent delay clause, this action by the owner in response to the contractor's delay could entitle the contractor to an extension of time.

APPROACHES FOR DEALING WITH CONCURRENT DELAYS

The issue of concurrent delay is dealt with differently in the various international standard forms of contract. Accordingly, it is not possible to argue that one approach is definitely right and one is definitely wrong. Further, the 'right' approach will depend on which side of the table you are sitting.

In general, there are three main approaches for dealing with the issue of concurrent delay. These are:

- option one—contractor has no entitlement to an extension of time if a concurrent delay occurs;
- option two—contractor has an entitlement to an extension of time if a concurrent delay occurs; and
- option three—causes of delay are apportioned between the parties and the contractor receives an extension of time equal to the apportionment, for example, if the causes of a 10 day delay are apportioned 60-40 owner-contractor, the contractor would receive a six day extension of time.

Each of these approaches is discussed in more detail below.

Option one—contractor not entitled to an extension of time for concurrent delays

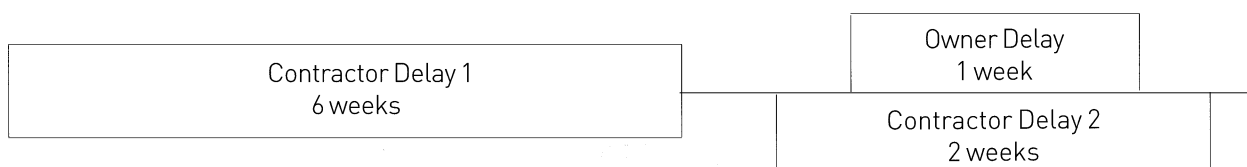
A common, owner friendly, concurrent delay clause for this option one is:

If more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is a cause of delay which would not entitle the contractor to an extension of time under [EOT Clause], then to the extent of the concurrency, the contractor will not be entitled to an extension of time.

Nothing in the clause prevents the contractor from claiming an extension of time pursuant to the general extension of time clause. What the clause does do is to remove the contractor's entitlement to an extension of time when there are two or more causes of delay and at least one of those causes would not entitle the contractor to an extension of time under the general extension of time clause.

For example, if the contractor's personnel were on strike and during that strike the owner failed to approve drawings, in accordance with the contractual procedures, the contractor would not be entitled to an extension of time for the delay caused by the owner's failure to approve the drawings. The operation of this clause is best illustrated diagrammatically using the following examples.

Example 1—Contractor not entitled to an extension of time for owner caused delay



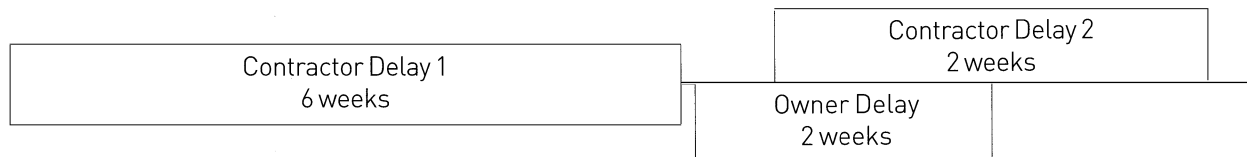
In this example, the contractor would not be entitled to an extension of time because the Owner Delay and the Contractor Delay 2 overlap. Under the example clause above, the contractor is not entitled to an extension of time to the extent of the concurrency. As a result, at the end of the Contractor Delay 2 the contractor would be in eight weeks delay (assuming the contractor has not, at its own cost and expense accelerated the works).

Example 2—Contractor entitled to an extension of time for owner caused delay



In this example, the contractor would be entitled to a two week extension of time for the Owner Delay. Therefore, at the end of the Owner Delay the contractor will remain in six weeks delay, assuming no acceleration.

Example 3—Contractor entitled to an extension of time for a portion of the owner caused delay



In this example, the contractor would be entitled to a one week extension of time because the delays overlap for one week. Therefore, the contractor is entitled to an extension of time for the period when they do not overlap, i.e. when the extent of the concurrency is zero. As a result, after receiving the one week extension of time, the contractor would be in seven weeks delay, assuming no acceleration.

From an owner's perspective, we believe, this option one is both logical and fair. For example, if, in Example 2 the Owner Delay was a delay in the approval of drawings and the Contractor Delay was the entire workforce being on strike, what logic is there in the contractor receiving an extension of time? The delay in approving drawings does not actually delay the works because the contractor could not have used the drawings given its workforce was on strike. In this example, the contractor would suffer no detriment from not receiving an extension of time. However, if the contractor did receive an extension of time it would effectively receive a windfall gain.

The greater number of obligations the owner has the more reluctant the contractor will likely be to accept option one. Therefore, it may not be appropriate for all projects.

Option two—contractor entitled to an extension of time for concurrent delays

Option two is the opposite of option one and is the position in many of the contractor friendly standard forms of contract. These contracts also commonly include extension of time provisions to the effect that the contractor is entitled to an extension of time for any cause beyond its reasonable control which, in effect, means there is no need for a concurrent delay clause.

The suitability of this option will obviously depend on which side of the table you are sitting. This option is less common than option one but is nonetheless sometimes adopted. It is especially common when the contractor has a superior bargaining position.

Option three—responsibility for concurrent delays is apportioned between the parties

Option three is a middle ground position that has been adopted in some of the standard form contracts. For example, the Australian Standards construction contract AS4000 adopts the apportionment approach. The AS4000 clause states:

34.4 Assessment

When both non-qualifying and qualifying causes of delay overlap, the superintendent shall apportion the resulting delay to WUC according to the respective causes' contribution. In assessing each EOT the superintendent shall disregard questions of whether:

a) WUC can nevertheless reach practical completion without an EOT; or

b) the contractor can accelerate, but shall have regard to what prevention and mitigation of the delay has not been effected by the contractor.

We appreciate the intention behind the clause and the desire for both parties to share responsibility for the delays they cause. However, we have some concerns about this clause and the practicality of the apportionment approach in general. It is easiest to demonstrate our concerns with an extreme example. For example, what if the qualifying cause of delay was the owner's inability to provide access to the site and the non-qualifying cause of delay was the contractor's inability to commence the works because it had been black banned by the unions. How should the causes be apportioned? In this example, the two causes are both 100% responsible for the delay.

In our view, an example like the above where both parties are at fault has two possible outcomes. Either:

(a) the delay is split down the middle and the contractor receives 50% of the delay as an extension of time; or

(b) the delay is apportioned 100% to the owner and therefore the contractor receives 100% of the time claimed.

The delay is unlikely to be apportioned 100% to the contractor because a judge or arbitrator will likely feel that that is 'unfair' especially if there is a potential for significant liquidated damages liability. We appreciate that the above is not particularly rigorous legal reasoning, however, the clause does not lend itself to rigorous analysis.

In addition, option three is only likely to be suitable if the party undertaking the apportionment is independent from both the owner and the contractor. Increasingly, this is not the case on large scale infrastructure projects.

CONCLUSION

A concurrent delay clause should be included in all construction contracts. Remaining silent on the issue may lead to disputes. Which option is adopted will depend on the project and the respective bargaining strengths of the parties.

This article was previously published in Mallesons Stephen Jaques' *Asian Projects and Construction Update* (20 September 2003). Reprinted with permission.
