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LEGAL ISSUES IN CONSTRUCTION SCHEDULE DELAY ANALYSIS

By W. Stephen Dale and Robert M. D'Onofrio

Schedule delay analysis bridges many divides in construction disputes, affecting proof of liability and damages and requiring both legal and technical acumen to apply correctly and consistently. As a result, the field represents one of the more complicated subsets of construction law. A discussion of construction schedule delays and the analysis of them arises from a simple theme: bringing order out of the chaos. On a less grand but more practical scale, the process is about allocating responsibility for the chaos that can occur on a complex construction project and helping the parties to determine the source and price the impact of that chaos.¹ The first step in allocating those responsibilities comes in defining the framework for a delay analysis and the fundamental issues at work. In that context, delays generally fall into one of three categories: (1) excusable and compensable, (2) excusable but not compensable, and (3) not excusable.² To the extent a delay is not excusable, it does not qualify

for an equitable adjustment either for delay damages or as an element of acceleration damages.

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As part of the effort to bring order out of the chaos, this BRIEFING PAPER provides a comprehensive overview of the key legal issues presented in the application of schedule delay analysis when allocating responsibility for delays on construction projects.

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These issues include (a) the burden of proof, (b) the distinction between delays and suspensions of work under federal contracts, (c) the contractor's right to early completion, (d) acceleration, (e) concurrency, and (f) waiver of completion.

Burden Of Proof

When an equitable adjustment is being sought for government-caused delay, "the contractor has the burden of proving the extent of the delay, that the delay was proximately caused by government action, and that the delay harmed the contractor." In some cases, this burden may be met if the contractor proves four elements: the government's delay was of unreasonable length, the government was the proximate cause of the contractor's delayed performance, the contractor was injured, and there was no concurrent delay on the part of the contractor.

These basic rules³ for proving entitlement to an extension of time and for recovering additional costs associated with delay mirror the obligations of almost any plaintiff in almost any civil suit. A claimant must prove liability, causation, and damages and do so with a preponderance of the evidence.⁴ Schedule delay analysis covers all three of those basic elements of proof. An analysis can identify the cause of a delay and thereby prove liability for its results. Likewise, an analysis can quantify the delay period and play a key role in developing the calculation of damages that arise from the delay. In both instances, the delay analysis will touch on causation and highlight the origin of delay and the motivating factors that resulted in the impacts.

The decision of the U.S. Court of Federal Claims in *George Sollitt Construction Co. v. United States*—and particularly the section conveniently titled "Overview of Legal Issues"—provides prob-

ably the most comprehensive, judicially drafted roadmap for proving a delay case.⁵ That case, and others, articulates the well-worn obligations of a plaintiff in the federal contracting arena. Those obligations begin with the following fundamental premise: "A contractor seeking to prove the government's liability for a delay must establish the extent of the delay, the contractor's harm resulting from the delay, and the causal link between the government's wrongful acts and the delay."⁶ This recitation of obligations echoes the traditional obligations of any civil plaintiff, and more specifically a contractor seeking an equitable adjustment.⁷ In short, "[i]t is incumbent upon the plaintiffs to show the nature and extent of the various delays for which damages are claimed and to connect them to some act of commission or omission on defendant's part."⁸

Similar rules apply to the Government in its efforts to impose liquidated damages. In that regard, the Government has the initial burden of establishing that a contractor did not substantially complete contract performance by the contract completion date.⁹ If the Government can meet its burden, the burden then shifts to the contractor, to prove that "the delay was excusable under the terms of the default provision of the contract."¹⁰

■ Delay To Critical Path Required

In meeting the first prong for demonstrating delays, the extent of the delay, the claimant must prove that a delay of some type occurred. When proving the fact of delay, the claimant must generally prove that overall completion of the work was delayed rather than simply some discrete element of the work.¹¹ Further, any claimant must meet this burden and demonstrate "with

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reasonable certainty the extent of unreasonable delay which resulted from defendant's actions."¹² To meet that requirement and to prove a delay to overall project completion with reasonable certainty, courts and boards of contract appeals have expressed a clear preference for critical path schedule analyses.¹³ The U.S. Court of Appeals for the Federal Circuit has stated:¹⁴

"The required nexus between the government delay and a contractor's failure to complete performance at some unspecified earlier date cannot be shown merely by hypothetical, after-the-fact projection." Part of one's understanding that an activity belongs on the critical path of a project is also an understanding of how that activity affects the other activities. "A general statement that disruption or impact occurred, absent any showing through use of updated CPM schedules, logs or credible and specific data or testimony, will not suffice to meet the plaintiff's burden."

The reason behind this is that some delays merely absorb float, and not every delay causes a delay to the critical path. For example, Figure 3-1 shows a delay that absorbs float and does not delay completion. The top half of the graphic shows a baseline schedule, and the bottom half of the graphic shows a schedule update as of Month 2 for the same simplified project. In the baseline schedule, Path B has 30 days of float. During Month 2, a 30-day delay occurs to Path B. As shown in the Month 2 schedule, this 30-day delay absorbs available float in the schedule and does not result in any delay to project completion.

Non-Critical Delay Absorbing Float

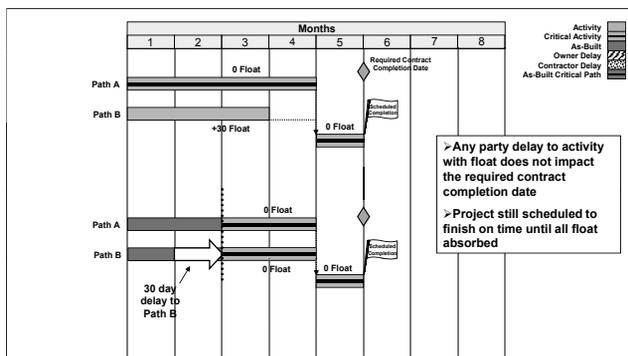


Figure 3-1

While a CPM analysis is clearly preferred as a means of proving delay to a reasonable certainty, even the Federal Circuit above contemplates other means of demonstrating delay to the critical path.¹⁵ The Tenth Circuit noted a similar senti-

ment in *Morrison Knudsen Corp. v. Fireman's Fund Insurance Co.*¹⁶

Courts often use CPM to resolve disputes over excusable-delay claims. CPM provides a useful, well-developed nomenclature and analytic framework for expert testimony. While CPM has generated a technical terminology, the legal requirement that it is used to analyze is general and commonsensical: a contractor must prove that a delay affected not just an isolated part of a project, but its overall completion. *Courts often do not use formal CPM terminology, but simply an informal, CPM-like analysis to determine whether a contractor has met its burden of proof on that general requirement.*

Indeed, some tribunals will accept proof other than CPM analysis to demonstrate delay.¹⁷

Despite the apparent willingness to accept proof of delay in forms other than a CPM analysis, the weight of authority shows more claims for delay failing as a result of not having a CPM analysis than succeeding by using an alternative method.¹⁸ The quote from *Morrison Knudsen* and decisions like it tend to relate more to the means by which a tribunal will analyze delays and reconcile competing expert opinions rather than a genuine opportunity for claimants to deviate from a CPM analysis. In other words, the apparent leniency offered by those decisions and others may be illusory where the absence of a CPM analysis, especially where required by contract, fails to provide the requisite degree of certainty.

The Court of Federal Claim's decision in *Mega Construction Co. v. United States*¹⁹ illustrates the dangers of proceeding without a critical path analysis. Before the board and later the Court of Federal Claims, the contractor sought to convert the default termination of its fixed-price contract for the construction of a post office into one for convenience and sought compensation for 272 days of delay. In beginning its analysis of the contractor's presentation, the court noted:²⁰

Not only must plaintiff disentangle its delays from those allegedly caused by the government, but the delays must have affected activities on the critical path. It is not enough that an activity is delayed: there must be delay of an activity on the critical path for there to be project, or compensable, delay. "An interruption in one phase of the work...does not always result in an increase in the time necessary for total performance. In such a case, the absence of any delay would obviously preclude recovery...."

In addition, the court noted the minimum evidence needed to meet the contractor's burden

as a claimant: “In order for the court to be able to award damages to plaintiff for government-caused project delay along the critical path, the court must have before it evidence that establishes the critical path of plaintiff’s project.”²¹ While the court expressed its preference for a CPM analysis, it remarked that the contract did not require the parties to maintain or to rely on CPM schedules.²²

Although the contract did not require maintenance and preparation of a CPM schedule for the project or for proof of delay, the court effectively imposed that obligation. In that regard, the court articulated a litany of complaints about the contractor’s presentation,²³ concluding that the contractor “failed to provide the court with any credible coherent analysis of critical path delay, leaving to the court the well-nigh impossible task of identifying, quantifying, and assigning responsibility for critical path delay.”²⁴ After beginning the “well-nigh impossible task,” the court concluded as follows:²⁵

Without a critical path analysis the court cannot exclude the possibility that the contractor caused concurrent delay on the project. Plaintiff’s charts are not sufficient to prove allocation between the parties or attribution to defendant. The court cannot rely on assertions of a contractor, not supported by a critical path analysis of the project, to award critical path delay costs.

Thus, although decisions of the courts and boards appear to entertain the notion that CPM schedules and accompanying analyses are not strictly required, *Mega Construction* teaches a different lesson—that even where not contractually required, anything less than a CPM analysis will fail to meet the required burden of proof.

■ CPM Is Dynamic/Updated CPM Schedules Required

In addition to recognizing that CPM schedules provide the optimum proof of delay, courts have imposed further requirements on the maintenance of performance schedules in order to find them reliable. Key among these requirements is the obligation that the project schedule be regularly updated and reflective of actual progress of the work.²⁶ In *Fortec Constructors v. United States*, the U.S. Claims Court (since renamed the Court of Federal Claims) articulated this requirement succinctly:²⁷

Usefulness [of the CPM schedule] as a barometer for measuring time extensions and delay damages is necessarily circumscribed by the extent to which it is employed in an accurate and consistent manner to comport with the events actually occurring on the job. ...This is the single most important factor in determining the acceptability of the [CPM] analysis.

Indeed, where the project schedule is properly maintained and updated, one board has noted that such an instance “present[ed] the circumstance where we have said in the past that we will let the parties ‘live or die’ by analysis of the CPM to determine the number of days of additional contract performance time.”²⁸ Nevertheless, “[a]dditional activity days inserted in a CPM [schedule] do not necessarily equate to day-for-day extensions to the contract completion date.”²⁹ The updates must accurately reflect the progress of the work and the known impacts of delays and other events on the schedule.³⁰

Some tribunals have articulated a “rebuttable presumption” in favor of agreed-upon project schedules. For example, the ASBCA noted the following in *Santa Fe, Inc.*: “There is a rebuttable presumption of correctness attached to CPM’s upon which the parties have previously mutually agreed....To put it another way, in the absence of compelling evidence of actual errors in the CPM’s, we will let the parties ‘live or die’ by the CPM applicable to the relevant time frames.”³¹

■ Contemporaneously Granted Time Extensions

A similar rebuttable presumption, known in federal contracting as a “*McMullan* presumption,” also may attach to the compensability of previously issued extensions of time.³² The presumption, which takes its name from the decision of the Armed Services Board of Contract Appeals (ASBCA) in *Robert McMullan & Son, Inc.*,³³ theoretically arises in a manner similar to estoppel, binding the Government to the implied admission that a previously granted extension of time means the Government was responsible for the delay. In *J.D. Hedin Construction Co. v. United States*, the former U.S. Court of Claims articulated this principle as follows:³⁴

The grant of an extension of time by the contracting officer carries with it the administrative determination (admission) that the delays

resulted through no fault of the contractor. However, this does not mean that where “the Government refrains from exercising its right to collect liquidated damages [by extending the time of performance], though that forbearance may tend to raise some question of government-caused delay, it is...tantamount to admitting liability for breach of contract...” It is up to this court to determine the extent of the delay for which defendant is responsible. However, “[t]he findings of the contracting officer have been said to constitute a strong presumption or an evidentiary admission of the extent of the Government’s liability, but always subject to rebuttal.”

The presumption articulated in *J.D. Hedin Constr. Co.* has since diminished, and a prior finding of compensable delay by the Contracting Officer (CO) likely persists only as a piece of evidence to be weighed by a court *de novo*. The Federal Circuit in *England v. Sherman R. Smoot Corp.*³⁵ addressed the question whether a CO’s grant of an extension of time could create a presumption in favor of the contractor that a delay was compensable. The court answered in the negative, finding that the Contract Disputes Act (CDA) removed any deference that might have once been accorded to the CO’s prior determination.³⁶ In addition to the statutory conflicts the court found, it also articulated a common sense rationale for its holding:³⁷

[W]e think that the McMullan presumption is logically inconsistent. There are three potential causes of delay in performance of a contract: the contractor’s actions, the government’s actions, and forces outside the control of both parties. A delay in a construction contract is excusable if it arises from either the government’s action or external forces. Thus, the mere grant by the government of a contract extension does not indicate that the government is at fault; rather, one of a number of other events external to the government could be responsible. In such a situation, a presumption that the government is responsible for the delay is unwarranted, and nothing in the Federal Acquisition Regulations supports such a presumption.

This analysis focuses on the procedural credit due to prior concessions by the Government as imposed by statute. The court’s treatment of the *McMullan* presumption does not, however, eliminate the impact of previous Government extensions of time on a properly adjusted schedule. Indeed, while the CDA, or similar rules, may remove the legal presumptions that might attach to Government actions, courts continue to hold

parties responsible for reflecting previous grants of time in their schedule analyses.³⁸

Delays vs. Suspensions Under Federal Contracts

A minor, but significant distinction exists under federal contracts between a claim for delay under the federal “Changes” clause³⁹ and a claim for delay under the “Suspension of Work” clause.⁴⁰ Many delay events may be considered a change or constructive change under the “Changes” clause and entitle the contractor to an extension of time or to compensation for the delay under the “Changes” clause.⁴¹ The “Suspension of Work” clause and the related doctrine of constructive suspension pose slightly different hurdles. For claimants, the key difference is often the inability to recover profit in connection with an ordered suspension.⁴² While that difference beyond the scope of this PAPER, the issue of suspension for “for an unreasonable period of time” is addressed here as it affects proof of delay.

The FAR “Suspension of Work” clause provides that “[t]he Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.”⁴³ When the Government orders a suspension of work under this provision, the FAR provides relief only where “performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted”⁴⁴ The Federal Circuit has articulated a four-part test to recover under the “Suspension of Work” clause:⁴⁵

First, there must be a delay of unreasonable length extending the Contract completion time. Second, the delay must have been proximately caused by the [Government’s] action or inaction. Third, the delay resulted in some injury and fourth, there is no delay concurrent with the suspension that is the fault of [the contractor].

In addition to express or directed suspensions under the clause, courts will recognize a claim for constructive suspension of work.⁴⁶ A constructive suspension “results when performance is effectively suspended or delayed, but the contracting officer has failed or declined to issue a stop-work order.

In such case, ‘the law considers that done which ought to have been done’ and deems such delay to constitute a constructive or de facto suspension.”⁴⁷ To prevail on a claim for a constructive suspension of work, the contractor must show that (1) the delays or extra expenses were directly caused by the actions of the Government, (2) the delay was for an unreasonable period of time, and (3) the delay occasioned injury to the contractor in the form of additional expense or loss.⁴⁸ Whether constructive or express, “[a]djustments are allowed under the [“Suspension of Work”] clause only to the extent that a delay is caused by the government’s action or inaction; to the extent a delay is caused by the fault or negligence of the contractor, no adjustment is warranted.”⁴⁹ As a corollary to that rule, the claim for suspension cannot arise out of a voluntary work stoppage by the contractor.⁵⁰

Both varieties of a suspension involve the requirement that the delay be “unreasonable.” Some delays such as those due to defective specifications have been deemed per se unreasonable.⁵¹ The majority of delay events, however, call for an analysis of the factors at work and present an issue of fact to the tribunal.⁵² To determine whether any delay was “‘for an unreasonable period of time’ pursuant to the Suspension of Work clause, the court must first ascertain the length of the delay.”⁵³ The contractor bears the burden of proving both the extent of the delay and the unreasonableness of the delay.⁵⁴

Right To Early Completion

Although most contracts contain some provision declaring that “time is of the essence,”⁵⁵ few, if any, prohibit the contractor from completing a project ahead of schedule. Indeed, a contractor may elect to accelerate its workforce to move those resources to another project or simply to reduce its presence at the current jobsite. An early completion schedule can also have the practical effect of reducing float that otherwise would be available to the project.⁵⁶ In any event, the decision to complete early remains one that inures to the contractor.

Given that right, courts have recognized that delays to a plan for early completion may give

rise to damages.⁵⁷ One of the earliest decisions recognizing the right to complete early and the concomitant obligation not to interfere with that right is *Metropolitan Paving Co. v. United States*.⁵⁸ In that case, the U.S. Court of Claims wrestled with the question “whether, as a matter of law, damages are suffered through delays which do not prevent a timely completion of the contract.”⁵⁹ The contract called for completion of the work within 300 days, and the contractor met that obligation. Nevertheless, at trial, the contractor argued that “but for ‘failure of defendant’s employees to give plaintiff a reasonable measure of cooperation in the performance of essential inspections and tests,’ plus the ‘deliberate harassment and dilatory tactics’ of defendant’s employees and ‘the absence of adequate supervision by the contracting officer,’” the contractor could have finished “some 94 days earlier.”⁶⁰

In analyzing the issue, the court reviewed the three requisites for proving a claim—liability, causation, and damages—remarking as to damages “[t]hat the last shall come first here seems advisable since, if plaintiff suffered no damages, it cannot recover even assuming a breach.”⁶¹ The court held:⁶²

While it is true that there is not an “obligation” or “duty” of defendant to aid a contractor to complete prior to completion date, from this it does not follow that defendant may hinder and prevent a contractor’s early completion without incurring liability. It would seem to make little difference whether or not the parties contemplated an early completion, or even whether or not the contractor contemplated an early completion. Where defendant is guilty of “deliberate harassment and dilatory tactics” and a contractor suffers damages as a result of such action, we think that defendant is liable.

Despite the court’s recognition that interference in early completion could give rise to a contractor claim, the court rejected the contractor’s claim for failure to link cause and effect.⁶³ Nevertheless, the decision enshrined the duty of good faith in the Government’s obligation not to interfere with a contractor’s right to complete a project early.⁶⁴

Following the decision in *Metropolitan Paving Co.* other courts took up the challenge of defining the requirements for proving interference with the right to early completion. In so doing, courts

addressed the question of what constituted an actual claim related to early completion versus a claim manufactured after the fact. Contractors might assert claims for extended overhead, calculating the delay period based on an early completion date never actually intended or not actually achievable.⁶⁵ In that regard, courts identified items necessary for establishing the bona fides of a claim. Two decisions from the Federal Circuit from the mid-1990s condensed the tests and remain the touchstone for proving a claim for damages related to early completion. The two decisions, *Interstate General Government Contractors, Inc. v. West*⁶⁶ and *Wickham Contracting Co. v. Fischer*,⁶⁷ focus mostly on defining the proof required to police a claim. In what typically is referred to as the *Interstate General* test, a contractor must show the following to recover on a claim for delay damages based on the right to early completion:

- (1) The contractor intended to complete the contract early;
- (2) As of the time of the delays the contractor had the ability to finish the project early; and
- (3) But for the Government's actions, the contractor would have actually completed its work early.⁶⁸

In addition to these three elements, the question of notice to the Government remains an open issue. In many early decisions, the idea of notice to the Government served as a means to legitimize the contractor's intent and to make the Government aware of it so as to avoid interference.⁶⁹ In *Blinderman Construction Co. v. United States*, the court attempted to synthesize the obligations for a claim for early completion, and in doing so expressly noted that the contractor must have notified the Government of its intention to finish the project early.⁷⁰ By contrast, the court in *Jackson Construction Co. v. United States*, stated that "[t]he contractor is not required to notify the Government of its intent to finish early as 'it would seem to make little difference whether or not the parties contemplated an early completion.'"⁷¹

The law imposes a reciprocal duty to notify on the Government if it intends to object to early

completion or to take advantage of the float created by a contractor's effort to complete early.⁷² In *Maron Construction Co.*,⁷³ the board examined the issue and reasoned that the Government must provide more by way of notice than a contract provision enlarging float. The contractor here alleged that it was delayed due to defective specifications and inadequate architect/engineer support, withheld superior knowledge, and cardinal changes to the work.⁷⁴ It asserted that it intended to complete the project early and that it was entitled to 320 days of compensable delay, of which 142 days arose from its intent to complete the project early.⁷⁵

The Government raised several arguments in opposition, most of which the board found compelling in rejecting the contractor's motion for early completion damages. An argument rejected by the board, however, arose from the contract and the Government's argument that it precluded the right to early completion. The board summarized the argument as follows:⁷⁶

According to [the Government], sections 01311-1.3C and 01311-1.8F [of the contract] precluded early completion delay damages because they required [the contractor] to prepare and to update a CPM schedule using April 20, 1995 as the contract completion date, and if [the contractor] had anticipated finishing the contract work before that date, the CPM scheduler would have simply built in more float, which would have been available to absorb any [Government]-caused delays. In other words, [the Government] says there was no such thing as early completion of this contract. Either [the contractor] would finish work on April 20, 1995, or [the contractor's] CPM scheduler would build in float time before that date which would absorb any [Government]-caused delays until that date.

The board rejected the Government's position and demanded that it provide express and clear notice to a contractor that early completion would inure to the benefit of the Government. Specifically, the board held:⁷⁷

Although we agree with [the Government] that the Government can draft a contract clause that limits or eliminates its liability for delay damages, . . . such a clause must specifically and expressly exempt the Government from liability. Section 01311 does not specifically and expressly state that [the Government] will be exempt from liability for early completion delay damages. Neither does this section specifically and expressly state that [the contractor] was precluded from completing

the contract work early, even though a contractor is usually entitled to improve its progress and to finish before a contract's completion date.

If [the Government] wanted to eliminate its liability for early completion delay damages by eliminating [the contractor's] ability to finish early, it should have made this clear in the contract. Sections 01311-1.3C and 01311-1.8F told [the contractor] that when it prepared its CPM schedule and updates to the schedule, it should make backward calculations for late finish dates by forcing the end date of the project to be April 20, 1995. These sections address the mechanics of constructing a CPM schedule and do not specifically and expressly tell [the contractor] either that [the Government] would not be responsible for any claim for early completion delay damages before April 20, 1995, or that it was not possible for [the contractor] to complete the project early.

In short, a party intending to address early completion, whether asserting a right to complete early or an intention to abrogate that right, must be explicit and timely.

An example of the differing effects of contractor and owner/Government delays on an early completion schedule is shown in Figures 3-2 through 3-4. Figure 3-2 shows a contractor's baseline schedule planned to complete at the end of Month 4, 30 days earlier than the required contract completion date at the end of Month 5. For simplicity, all activities are critical in this example.

Early Completion

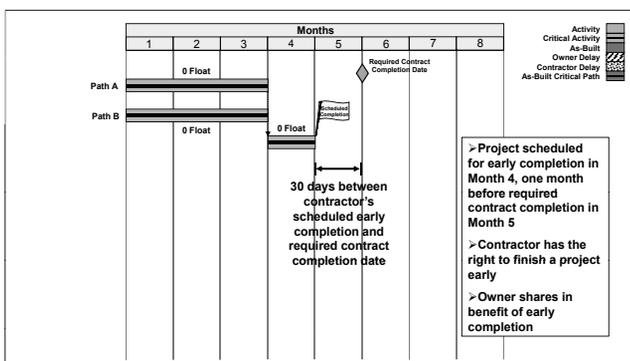


Figure 3-2

Figure 3-3 shows the impact due to a contractor-caused delay to an early completion schedule. A 30-day contractor-caused critical delay during Month 2 results in a projected 30-day delay to the project schedule. Because critical contractor-caused delay is non-excusable, there is no change to the required contract completion date, and no

float on the project's critical path. The contractor still retains the right to finish early should it make up for its own delay during the project.

Early Completion Contractor Delay

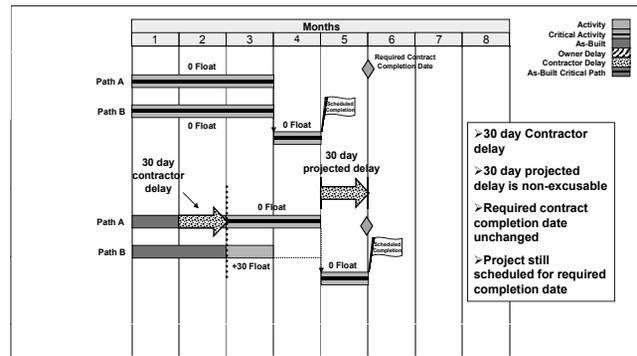


Figure 3-3

Figure 3-4 shows the impact due to an owner/Government-caused delay to the same early completion schedule from Figure 3-2. A 30-day owner-caused critical delay during Month 2 results in a projected 30-day delay to the project schedule. However, in this case, an owner-caused delay is preventing the contractor from achieving its early completion schedule at the end of Month 4. Therefore, the contractor is entitled to an excusable, compensable 30-day delay to project completion. The result is that the required completion date moves to the end of Month 6, and the contractor is put back in the position it would have been, but for the owner delay, finishing 30 days early.

Early Completion Owner Delay

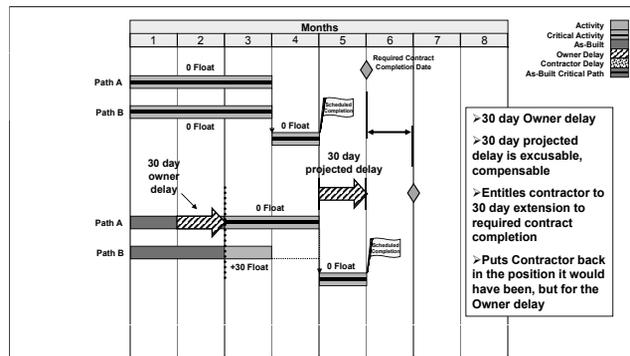


Figure 3-4

Acceleration

Acceleration typically refers to an effort to increase the pace of work to meet a project milestone, to overcome delay, to comply with

the request of the owner, or to satisfy some other justification for progressing the work faster. While acceleration is usually considered in the context of an owner/Government direction to accelerate, the concept of acceleration covers many other phenomena critical to schedule analysis. Acceleration is generally segregated into three categories: (1) voluntary acceleration, (2) directed acceleration, and (3) constructive acceleration.

A contractor may voluntarily accelerate to overcome its own acknowledged delays or to achieve an early completion milestone. In that regard, acceleration remains a project tool like any other and can be used by both parties to effectively manage the work. A viable schedule analysis method will be able to account for acceleration and incorporate it into the overall project.

The question of responsibility for acceleration costs frequently arises, and in that context, the law has segregated acceleration into two basic flavors: express (or directed) and constructive.⁷⁸ The difference in type derives from the nature of the order to accelerate. In the express variety, the order comes from the owner as a direction to accelerate the work. The parties may dispute the reason for the order or the effect of the order, but the intent and scope are clear. In a constructive acceleration, by contrast, the order to accelerate is less certain and may arise out of a failure to take some action, including the refusal to issue an extension of time. In that circumstance, the parties may argue over whether an order to accelerate even existed as well as the scope and costs of the order.

In either circumstance, for an acceleration effort to be compensable, the owner/Government must, either directly or implicitly, order the contractor to speed up its efforts on the site in an attempt to complete in the work in a period shorter than allowed by the contract as it may be extended.⁷⁹ The authority for this premise in federal contracts generally rests in the FAR “Changes” clause and its express acknowledgment that the CO may direct “acceleration in the performance of the work.”⁸⁰ Most disputes arise in the context of constructive acceleration, where the Government implicitly directs the contractor to overcome excusable delays and to complete the project within the original comple-

tion period, or some period shorter than allowed by the contract.⁸¹ The Federal Circuit described the doctrine of constructive acceleration in *Fraser Construction Co. v. United States* as follows:⁸²

A claim of acceleration is a claim for the increased costs that result when the government requires the contractor to complete its performance in less time than was permitted under the contract. The claim arises under the changes clause of a contract; the basis for the claim is that the government has modified the contract by shortening the time for performance, either expressly (in the case of actual acceleration) or implicitly through its conduct (in the case of constructive acceleration), and that under the changes clause the government is required to compensate the contractor for the additional costs incurred in effecting the change. A claim of constructive acceleration ordinarily arises when the government requires the contractor to adhere to the original performance deadline set forth in the contract even though the contract provides the contractor with periods of excusable delay that entitle the contractor to a longer performance period.

Thus, to demonstrate entitlement to increased costs under a theory of constructive acceleration, a contractor must prove that—

- (1) “the contractor encountered a delay that is excusable under the contract;”
- (2) “the contractor made a timely and sufficient request for an extension of the contract schedule;”
- (3) “the government denied the contractor’s request for an extension or failed to act on it within a reasonable time;”
- (4) “the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as a constructive change in the contract;” and
- (5) “the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.”⁸³

Accordingly, the initial element required to prevail on a claim for constructive acceleration is proof of an excusable delay. In that context, excusable delays need not be compensable to

recover for acceleration costs where the contractor has met the other elements of proof. Excusable, but not compensable delays that have resulted in recovery for acceleration costs include weather and strikes to name a few.⁸⁴ In each case, the concept outlined in *Fraser*, namely, that the Government has modified the contract by shortening the time for performance, result in the finding that the contractor may recover its acceleration costs. In other words, excusable delay entitled the contractor to an extension of time such that the Government’s direction to overcome the delays shortened the contractually allowed time of performance.

Figures 3-5 and 3-6 show an example of constructive acceleration. The top half of Figure 3-5 shows the planned schedule. For simplicity, all paths are critical. The required contract completion date is set for the end of Month 5. The bottom half of Figure 3-5 shows the impact of a 30-day excusable delay event. The projected completion date is set for the end of Month 6, 30 days later than the required completion date. The contractor’s request for a time extension is denied. Therefore, the required contract completion date is not adjusted to reflect the 30-day excusable delay, creating a negative 30 float position on the longest path. When the contractor is behind schedule it is still responsible for meeting the required contract completion date. In Figure 3-6, the contractor subsequently accelerates in order to get back on schedule. This is shown by comparing the plan to complete the work as of the Month 2 schedule (top half) with the plan to perform work as of Month 3 (bottom half). The 30-day acceleration savings in this case are reflected in the change to projected completion.

Constructive Acceleration

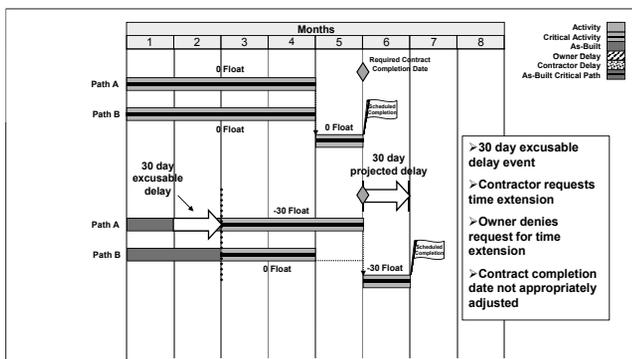


Figure 3-5

Constructive Acceleration (cont'd)

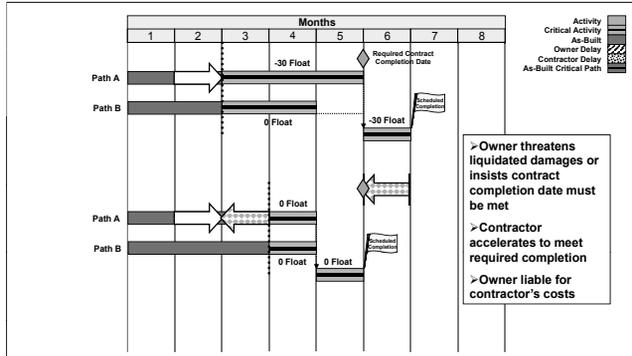


Figure 3-6

Concurrency

Concurrent delay takes many forms, but the term typically refers to a series of issues arising out of multiple delays caused by different parties on a project. The Court of Federal Claims rightly evaluated the issue of concurrent delay noting that “[t]hornier issues are posed by concurrent or sequential delays” than by single delays operating alone.⁸⁵ Concurrent delay comes in many flavors. In common usage, “concurrent” is generally defined as “operating or occurring at the same time.”⁸⁶ When used in the context of construction delays the term can refer both to delays occurring at the same time, as well as delays that occur at different times, but with a common effect. Still a third category of exists referred to as offsetting delays that may not occur simultaneously or even effect the same activities, but may interact over the project as a whole to impact the completion date.⁸⁷ As a result, the concurrency problem in delays can describe both the cause and the effect of a delay event. In that context, the Court of Federal Claims in *George Sollitt Construction Co. v. United States* developed the following definition of concurrent delays:⁸⁸

The exact definition of concurrent delay is not readily apparent from its use in contract law, although it is a term which has both temporal and causation aspects. Concurrent delays affect the same “delay period.” A concurrent delay is also independently sufficient to cause the delay days attributed to that source of delay.

The Court of Federal Claims articulated a slightly different formulation of concurrency in *Morganti National, Inc. v. United States*, holding that “[i]f a period of delay can be attributed simultaneously to the actions of both the Government and the contractor, there are said to be concurrent delays, and

the result is an excusable but not a compensable delay.”⁸⁹ Focusing on the outcome of events as well, the ASBCA offered its own slightly different focus on concurrency in *Utley-James, Inc.*:⁹⁰

[S]trictly speaking, there can be but a single delay over a given period of time, and when that delay has multiple, indivisible causes, it is attributable not to either party but to both. Hence it would probably be more accurate to speak not of concurrent delays but of a single delay with concurrent causes.

Although no single decision seems to encapsulate the definition of concurrency, a few facts persist. Concurrent delay involves two or more independent causes of delay, generally attributable to different contractual parities that occur at the same time or affect the same time period. Figure 3-7 illustrates a textbook example of concurrent delay and how multiple delays caused by different parties can affect the work. The top half of Figure 3-7 shows a planned schedule where both Path A and Path B are critical with no float available on either path. Normal progress occurs in Month 1. During Month 2, as shown in the Month 2 schedule in the bottom half of Figure 3-7, a 30-day owner-caused delay to Path A and a 30-day contractor-caused delay to Path B occur simultaneously. These delays would be considered concurrent. The effect of the concurrent delay in Figure 3-7 is an excusable, compensable time extension for the resulting projected 30-day delay. As a result, the required completion date is extended by 30 days. This extension to completion is shown in the bottom half of Figure 3-7.

Concurrent Delay

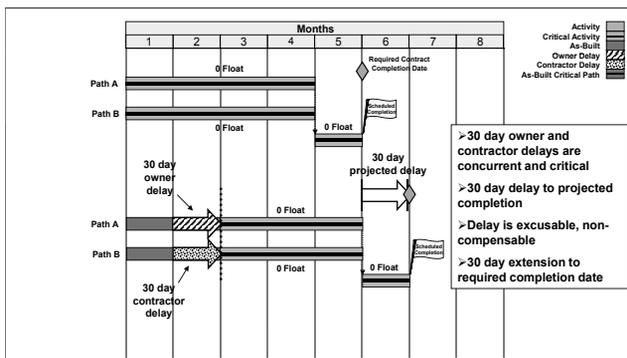


Figure 3-7

Courts and boards have determined that a concurrent delay is an excusable, but not a compensable, delay that entitles the contractor to an extension of

time.⁹¹ On that point, the Court of Federal Claims in *Morganti National* held that “the fact that the contractor may also have caused concurrent delay is not fatal to the contractor’s claim for additional time due to excusable delay.”⁹² The logic behind this general rule lies in proving causation.⁹³ Where two parties contribute to the delay, and the responsibility is inextricably intertwined, neither party can demonstrate causation for the delay that would satisfy the “sole, proximate cause” requirement. In *Essex Electro Engineers, Inc. v. Danzig*, the Federal Circuit held that a contractor “generally cannot recover [damages] for concurrent delays for the simple reason that no causal link can be shown: A government act that delays part of the contract performance does not delay ‘the general progress of the work’ when the ‘prosecution of the work’ as a whole would have been delayed regardless of the government’s act.”⁹⁴ Thus, where a concurrent delay exists, the contractor is entitled to an extension of time to accommodate the delay and may not be “charged with damages.”⁹⁵ From this rule, the phrase “time but no money” evolved as standard shorthand defining the practical resolution of concurrent delays on a construction project. This summary approach reflects the analysis of concurrent delays in the context of the common contract provisions, including the federal “Default” clause⁹⁶ and balances the risk of joint delays by dividing the financial burden between both parties. Thus, in the face of delays caused by both the contractor and the Government, the contractor will receive additional time to complete the work, but neither the Government nor the contractor may recover delay damages. As such, a concurrent delay serves as an excusable, but not compensable delay. Further, the contractor retains the right to control its means and methods and can evaluate whether to accelerate the work or to use the extended performance period. This approach recognizes the risk allocation of fixed-price contracting and compels each party to bear an equitable portion of the costs of an excusable delay.⁹⁷

■ Pacing

One flavor of concurrency worth specific mention is pacing. Under the concept of pacing, one party may adjust its pace of work to match an existing delay by another party.⁹⁸ As one board explained, “[w]here the government causes delays to the critical

path, it is permissible for the contractor to relax its performance of its work to the extent that it does not impact the project completion date.⁹⁹ Pacing most often arises as a defense to the allegation that owner and contractor delays were concurrent, therefore denying the contractor recovery for delay damages. Pacing, if successfully argued, carries the flavor of mitigation, as it shifts responsibility for the contractor's decision to extend the work to the owner's original delay event. Proving pacing has its own challenges. Without contemporaneous records documenting the decision to pace a critical or near-critical activity based on the owner's delay, a pacing delay appears very much like a simple contractor-caused delay. Absent records evidencing the contemporaneous decision to pace, testimony, even if accurate, may seem like after-the-fact justification. Pacing also reinforces the notion that the project schedules need to be revised to reflect excusable delay in order to determine which delays had float or which were critical.

Figures 3-8 and 3-9 show an example of a pacing delay. The baseline schedule in the top half of Figure 3-8 shows both Path A and Path B are critical with no float available. A 30-day owner-caused delay occurs to Path A during Month 2. The impact of that owner delay causes a 30-day excusable, compensable time extension and creates 30 days of float on the alternate path of work, Path B. The result of the owner delay in the bottom half of Figure 3-8 is shown in the top half of Figure 3-9. An owner delay occurring first chronologically sets the stage for a pacing delay. The bottom half of Figure 3-9 shows a subsequent 30-day contractor-caused delay to Path B. The subsequent contractor-caused delay absorbs the float created by the prior owner-caused delay. In situations where one delay clearly occurs prior to the other delay, it is relatively easy to segregate the impacts of each delay and to determine their chronological order. This determination is more difficult if the start date of the second delay occurs shortly after the start of the first delay. If the impact of the owner delay is known prior to the start of the contractor delay, the contractor can argue that it was pacing its work because of the float created by the earlier owner delay. Generally, critical delays that start within less than a week of each other can be considered concurrent, but this generalization is dependent on the accuracy of the schedule. For instance, in the oil and gas industry schedules may often be on an hourly instead of daily basis, and as a result critical delays may need to start closer together

to be considered concurrent. Likewise, if the schedule is updated more frequently than once a month, durations of less than a week may be required to consider sequential delays concurrent.

Pacing Delay

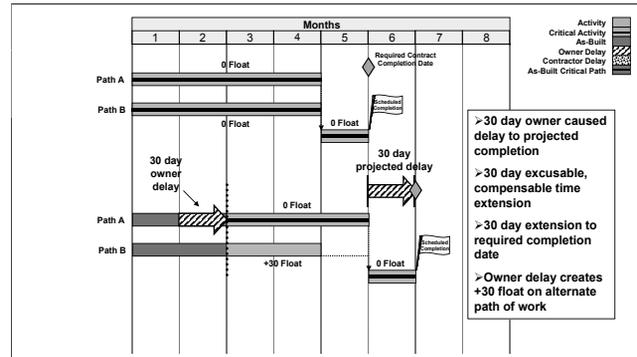


Figure 3-8

Pacing Delay (cont'd)

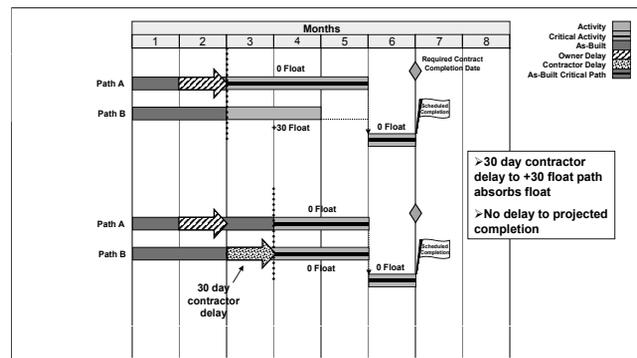


Figure 3-9

One of the leading cases on pacing delays, *John Driggs Co.*, involved a contract with Washington Metropolitan Area Transit Authority (WMATA) for the construction of a subway station.¹⁰⁰ The board found that the WMATA specifications were defective with respect to the interaction of the project and the active travel lanes on the adjacent highway. WMATA argued that the contractor's maintenance of the traffic plan was independently delayed along with the contractor's plan for support of excavation. The board disagreed, observing:¹⁰¹

A common thread running through all of these alleged "delays" is that [the contractor] did not complete these particular tasks on the originally-planned and scheduled date...When a significant owner-caused, construction delay such as the RW 11 design conflict occurs, the contractor is not necessarily required to conduct all of his other construction activities exactly according to his pre-delay schedule, and without regard to the changed circumstances resulting from

the delay. For example, in this case, WMATA's theory would require [the contractor] to have purchased the soldier piles in accordance with its As-Planned Schedule and have them delivered to the site, even though it was obvious that because of the RW 11 design conflict they could not be installed for weeks.

The occurrence of a significant delay generally will affect related work, as the contractor's attention turns to overcoming the delay rather than slavishly following its now meaningless schedule.

The board spelled out what the Government must prove to overcome a prima facie case of pacing delays. In that regard, the board held:¹⁰²

WMATA is required to demonstrate that, but for the delay caused by WMATA, the contractor could not have performed the project in less time, and would necessarily have been delayed to the same extent in any case. Respondent has failed to meet this burden. Merely speculative or theoretical contractor-caused delays are not adequate to establish a concurrent delay defense. Other than through speculation, there is no sound basis in the record for us to conclude that Appellant could not have accomplished its material purchases, expedited required submittals, and resolved its subcontract negotiations at an earlier date had they affected progress. To the contrary, subcontract negotiations..., submission of ordinary insurance certificates, and procurement and delivery of piles could, in our view, easily and expeditiously have been concluded. But for the RW 11 design conflict, only minor problems existed with Appellant's initial, early-August, support of excavation submittals.

Thus, while a contractor has a distinct burden to demonstrate that the pacing delay in fact related to an earlier owner-caused delay, the board's holding in *John Driggs Co.* imparts an equally significant obligation on an owner seeking to overcome that showing.

■ Non-Critical Delay/Delay Absorbing Float

The idea of non-critical delay or delay absorbing float is a commonsensical one. In short, non-critical delay is delay to an activity that is not critical and does not on its own delay overall completion of the project. The phenomenon becomes important as that delay erodes available float and begins to affect both the critical path and responsibility for timely completion. Depending on the use of float, the impact on completion of a non-critical delay may fall below that actual impact of the non-critical delay itself. In short, float can mask the impact of non-critical delays and distort responsibility for overall project completion.

With respect to the concerns noted above, the question of float ownership and the respective

rights of each party to use float to offset their own delays remains an ongoing issue.¹⁰³ In many circumstances, the contract will define the ownership of float and the use to which it may be put during performance.¹⁰⁴ Where the contract does not allocate beneficial use of float, the question remains and leaves open the opportunistic use of float by all parties.¹⁰⁵ Even where the contract may include aspirational language that float is to be used for the "benefit of the project," the parties will need to address the allocation of float to respective delays and what constitutes the project's best interest or benefit.

Also, because the impact of owner-caused and contractor-caused delay affects the contract completion date differently, they are treated differently in a schedule with multiple paths of work. For example, Figure 3-10 shows simultaneous owner and contractor delays, where the owner delay is critical and the contractor delay absorbs float. The top half of Figure 3-10 shows the as-planned schedule where Path A is critical, and Path B has 30 days of float. As the project progresses in the bottom half of Figure 3-10, simultaneous 30-day owner and contractor delays occur during Month 2 of the project. The result of the critical owner delay to Path A is a 30-day time excusable, compensable time extension. The contractor delay to Path B with +30 float is non-critical, and the 30-day delay absorbs float in the schedule as an additional 30 days of float is created by the critical owner delay.

Critical vs. Non-Critical Delays

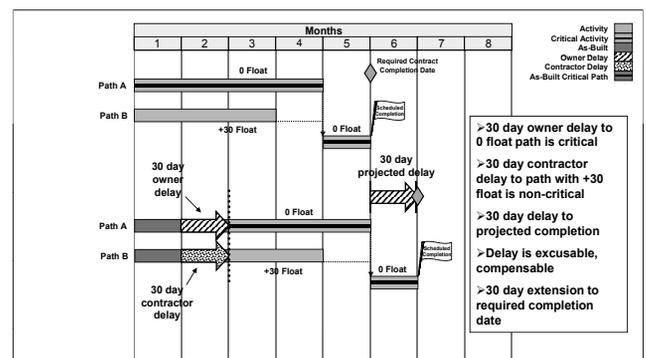


Figure 3-10

By contrast, Figure 3-11 shows an example of simultaneous contractor and owner delays, where the contractor delay is critical and the owner delay absorbs float. The top half of Figure 3-11 shows the

as-planned schedule, where Path A is critical and Path B has 30 days of float. As the project progresses in the bottom half of Figure 3-11, simultaneous 30-day contractor and owner delays occur during Month 2. In this case, the contractor delay is critical and non-excusable. Because there is no time extension, the critical contractor delay causes a negative 30-day (-30) float position on Path A. While Path A is behind schedule, the owner delay absorbs the +30 day float position on Path B. Because the 30-day non-critical owner delay to Path B absorbs all float on Path B, Path B is now critical with 0 float. If the contractor is unable to mitigate the delay and the project finishes as-scheduled in Month 2 (bottom half of Figure 3-11), the owner can assess the contractor 30 days of liquidated damages.

Critical vs. Non-Critical Delays

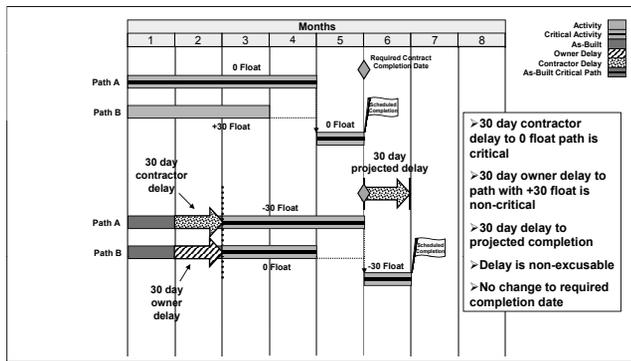


Figure 3-11

■ **Offsetting Delay**

Offsetting delay provides another flavor of concurrent delay. Offsetting delay is delay to work that could be considered critical, but not necessarily on the longest path to completion of the work.¹⁰⁶ Technically speaking, an owner-caused delay to a subcritical path of work that has no available float, and subsequently would have delayed project completion but for a more critical path of work, presents an “offsetting delay” and may entitle the contractor to an excusable time extension to offset liquidated damages.¹⁰⁷ More simply put, after the contract completion date has passed, all activities become critical to a greater or lesser extent.¹⁰⁸ Any given activity may not be on the longest path to completion, but nevertheless, with the passage of the contractual completion date, remaining float on the project has evaporated. Accordingly, an additional owner-caused delay to any path of work may be an excusable delay and serve to offset liquidated damages.¹⁰⁹

Figures 3-12 through 3-14 show an example of offsetting delay. The baseline schedule in the top half of Figure 3-12 shows both Path A and Path B are critical with no float available. By the original contract completion date at the end of Month 3 (bottom half of Figure 3-12), 90-day and 30-day contractor-caused delays occurred to the work. Because there is no time extension for non-excusable (contractor-caused delay), the float on Path A went to negative 90, and the float on Path B went to -30, meaning that both paths of work are still critical.

Offsetting Delay

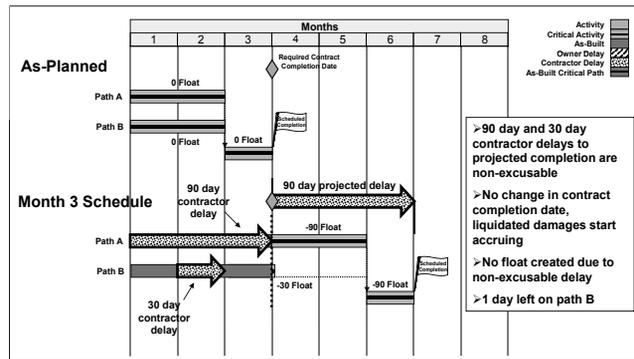


Figure 3-12

Figure 3-13 shows difference between the Month 3 schedule and the Month 4 schedule. The bottom of Figures 3-13 and 3-14 show the example of offsetting delay, where a 30-day owner delay caused by added work, occurs to Path B of work after the expiration of contract time during a period the owner is assessing liquidated damages. As shown in the bottom of Figure 3-14, this scenario results in a 30-day offsetting delay. The offsetting delay extends the required project completion date by the 30-day duration of the extra work, granting a time extension to offset liquidated damages for the duration of owner-caused extra work.

Offsetting Delay

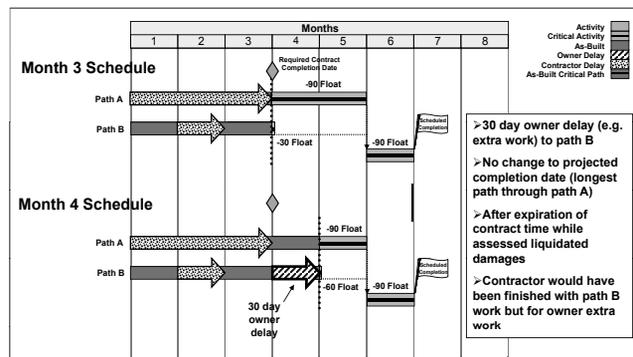


Figure 3-13

Offsetting Delay

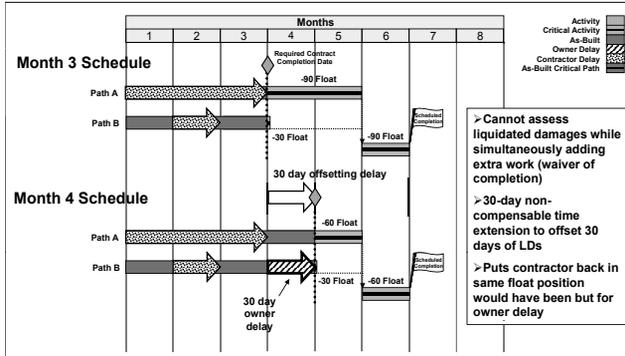


Figure 3-14

The legal genesis for the concept of offsetting delays arises in the “take them where you find them” theory, since application of the offsetting delay theory generally arises only where the contractor has already been delayed.¹¹⁰ The concept also seems to arise from the equities of the circumstances, namely that where the contractor is endeavoring to overcome its own delays, fairness would discourage further penalties for additional Government-caused delays. To do less would encourage opportunism on the part of the Government and owners by encouraging the perhaps untimely introduction of delays.

The phenomenon of offsetting delay stems from the definition of float and the common practice of project scheduling whereby the end date is constrained to the required contract completion date. The potentially controversial aspect of this phenomenon arises from the fact that offsetting delay is not on the longest path to completion of the work.¹¹¹ As a result, the traditional burdens placed on a claimant seeking an extension of time, namely the requirement that a claimant demonstrate delay in overall project completion, may pose a hurdle depending on the facts of the dispute.¹¹² Another critical feature inherent in the concept of offsetting delays is that at the time of the offsetting delay, the work must be behind in a properly adjusted schedule.¹¹³ An exception exists where the schedule specification requires that the project end date is not constrained to the contract completion date, meaning there is no negative float, and float would be created in the schedule as a result of contractor delay.¹¹⁴

The best articulation of the issue arose in *Framlau Corp.*¹¹⁵ There, the contract called for completion

by June 26, 1968, but the Government issued 14 change orders during performance of the work resulting in an extension of the contract period by 170 days, to December 13, 1968. Nevertheless, the contractor completed the work after the extended completion date and the Government took beneficial occupancy on May 28, 1969. As a result, the Government sought liquidated damages for 166 days of delay, the number of days between December 13, 1968 and May 28, 1969.¹¹⁶

The board confronted the issue that the Government had identified errors in the plans in January 1969, after contract completion but prior to substantial completion. Although the parties disagreed over the terms of an equitable adjustment, the work to address the design error took approximately nine days. The Government denied the request for an extension of time to address the nine days “on the ground that the work could be performed concurrently with items of uncompleted work under the basic contract.”¹¹⁷ The board rejected the Government’s argument and awarded the contractor an extension of time.¹¹⁸ In doing so, the board remarked:¹¹⁹

The Government’s position fails to recognize a distinction between requests for time extensions to support claims for relief from assessment of liquidated damages, and to support claims for upward price adjustments. In assessing liquidated damages, a contractor will not be charged for its delays which are concurrent with Government-caused delays. Since the Government directed a change and has assessed liquidated damages, appellant should not be charged for the number of days it took to perform the additional work, even though the work was performed concurrently with other work. On the other hand, appellant may not use these days for computing an equitable adjustment in price for the increased time of performing the contract if the work was performed concurrently with other work required by the contract or during an extended period of performance resulting from delays caused by appellant.

Accordingly, in recognizing offsetting delays, the board relied on the principle that where a concurrent delay exists, neither party will benefit from the delay.

The concept of offsetting delay aligns with the legal concept waiver of completion, discussed in more detail below. In essence, an owner’s failure to grant excusable time extensions for change orders after the expiration of contract time, even

if not on the longest path, may equate to a waiver of completion and thereby forfeit an owner's right to assess liquidated damages.¹²⁰ Granting a non-compensable time extension, as in offsetting delay, may preserve the contract completion date and the owner's right to terminate.

■ Apportionment

Given the legal approach to concurrent delay, namely that it serves as an excusable, but not a compensable delay, parties and tribunals place significant focus on apportioning concurrent delays. However, the rules with respect to apportionment, at least the implications of failing to apportion delays, remain unsettled.¹²¹

On the one hand, several decisions from various federal tribunals adhere to what has been referred to as the "rule against apportionment."¹²² This approach follows the holding in *Acme Process Equipment Co. v. United States*,¹²³ in which the Court of Claims addressed the assessment of liquidated damages where project delay also resulted from Government action. In that decision, and cases that subscribe to the rule against apportionment, the court determined that concurrent or sequential delay would relieve the contractor of liquidated damages. Specifically, the court held that "where delays are caused by both parties to the contract the court will not attempt to apportion them, but will simply hold that the provisions of the contract with reference to liquidated damages will be annulled."¹²⁴ In other words, as noted by the Court of Federal Claims, "under the rule against apportionment, the court must annul the liquidated damages clause of the contract and reject defendant's claim for liquidated damages because there was evidence of delay by the government on the contract."¹²⁵ The *Acme Process Equipment* holding adheres to the same "time but no money" approach discussed above, but also adds the additional warning that the court will not attempt to apportion the delays on its own. This nullification approach simply offsets one party's delays against another's, but does not engage in any analysis of the details. The resistance to apportionment by the court continues to remain good law in the federal arena.¹²⁶

In counterpoint to the rule against apportionment, tribunals also advocate the "clear apportion-

ment" rule. Decisions like *Blinderman Construction Co. v. United States* encourage apportionment and hold that, "Where both parties contribute to the delay 'neither can recover damage, unless there is in the proof a clear apportionment of the delay and the expense attributable to each party.'"¹²⁷ In this context, the tribunal will not simply nullify a remedy-granting contractual provision in the face of competing delays, but will engage in analysis of the competing delays and apportion responsibility accordingly.¹²⁸

While the rule against apportionment may remain viable, recent decisions tend to adopt the clear apportionment rule and approach it from a burden of proof perspective.¹²⁹ In *Sauer, Inc. v. Danzig*, the court reviewed an appeal from the ASBCA denying remission of liquidated damages imposed under a fixed-price contract for completion of a building at submarine base.¹³⁰ The contractor argued that delays caused by other Government contractors interfered with and delayed the Sauer's work. The board rejected the contractor's schedule analysis, finding it "too flawed to be convincing" and the evidence as "unreliable."¹³¹ Accordingly, the board denied the contractor's request for remission of liquidated damages. On appeal to the Federal Circuit, the court examined the matter as one of burden of proof. It began by noting that "[a]s a general rule, a party asserting that liquidated damages were improperly assessed bears the burden of showing the extent of the excusable delay to which it is entitled."¹³² The court sustained the board's determination that the contractor's expert was unreliable and found an absence of proof as to competing causes of delay. As a result, the court sustained the assessment of liquidated damages.¹³³

The debate over which rule to apply ultimately distills to the perceived role of the tribunal as compared to the burden of proof to be sustained by the parties. On the one hand, some panels view the apportionment exercise as one for which courts are intended.¹³⁴ This approach will not relieve the parties from providing a basis on which to render judgment,¹³⁵ but focuses more on the tribunal's willingness to sift through competing evidence rather than invoke nullification. By contrast, other panels continue to apply pressure to the parties and reject the notion

that the factfinder engage in the detailed and time-consuming analysis necessary to apportion delays. For example, the ASBCA noted: “We are not charged with sorting through a haystack of documents to locate relevant facts. If we were to engage in such efforts it would cripple our ability to perform our basic function of providing a just, inexpensive and expeditious remedy.”¹³⁶

The decision in *Utley-James, Inc.*¹³⁷ highlights the potential for a court to assume the role of apportionment on its own. In that case, after time extensions for differing site conditions and other design changes during the course of the work, the Government extended the contract completion date from July 20, 1975 to November 5, 1975. Nevertheless, the contractor did not achieve substantial completion until April 16, 1976, some 163 calendar days later than the contractually required date. The contractor’s arguments on appeal centered on four issues that included delays due to differing site conditions, strikes, and interference by the Government. Moreover, the contractor argued that the Government, “under the erroneous impression that the delays were appellant’s fault, ordered appellant to accelerate, which appellant did, then gave appellant time extensions after it was too late for them to do any good.”¹³⁸ The Government responded with allegations that it did not order the contractor to accelerate, but that any acceleration directive was addressed to the contractor’s own delays in concrete placement. The Government also argued that the contractor never actually accelerated its work, having finished later than the adjusted contract period with no interference from the Government.

The board, and later the Claims Court,¹³⁹ found that the Government delayed the work in part, as it related to the delivery of tenant design drawings. Nevertheless, the board found the contractor’s proof of acceleration unpersuasive and, after a lengthy analysis, determined that the contractor had not actually accelerated its work. Although this finding would have addressed the claim without further discussion, the board looked at the mechanics of the contractor’s purported acceleration effort. After doing so, the board found that “[a] case could be made that even if appellant did accelerate its performance after February 28, 1974, that acceleration had

only the effect of offsetting delays attributable to appellant’s performance, enabling appellant to complete the job in a timely fashion.”¹⁴⁰

The refreshing aspect of *Utley-James* lies in the board’s willingness to parse the periods of delay and analyze the interrelationships between work activities rather than simply rely on the fact of concurrent delay to solve the problem.¹⁴¹ In other words, rather than rely on the nullification doctrine of *Acme Process Equipment*, the board engaged in an active review of the record and a parsing of evidence.¹⁴² The board appeared troubled by the timing of the alleged acceleration and the timing of the major delay events. Indeed, it summed up the overall frustration in the following question: “This is as good a place as any to voice a lament about this appeal that perhaps typifies the problems of tribunals trying to decide cases of this sort: Why doesn’t anything ever connect to anything else?”¹⁴³ To address this problem, the board posited the following strategy:¹⁴⁴

In an effort to make sense of this, we will start with a look at each of the delay periods separately, since appellant presented them separately and never connected them. Next we will try to figure out what to make of them in combination and establish a single delay period attributable to the Government’s handling of the tenant layout drawings. Finally we will put this delay in the broader context of other events and try to determine whether it is not only excusable but compensable.

The board reviewed the evidence presented and reconstructed a timeline of events as it pertained to key delays in the work.¹⁴⁵ Based on this analysis, the board held that the contractor was in fact delayed by the Government with respect to the tenant layout drawings.¹⁴⁶ Nevertheless, the board’s detailed analysis afforded it the opportunity not only to evaluate the source of the delay, but to parse out whether any acceleration costs were incurred in response to the Government-caused delay. In that respect, the board answered in the negative. Indeed, its analysis indicated that the contractor generally did not accelerate at all, and if it did, that increased effort went to work types that were impacted by the delayed drawings. Accordingly, the board concluded that the acceleration addressed the contractor’s own problems rather than those caused by the Government. The board confirmed this observation through its overall suspicion about how the contractor

interacted with its delayed subcontractors, failing to provide them with any acceleration directive or even advise them of the Government's order. Fortunately, the parties provided the board with the factual and analytical information necessary to make the determination.¹⁴⁷

Utley-James witnessed the board analyzing delays in detail as well as analyzing the acceleration efforts separately. The board's work shows an interest not only in the superficial causes of the delays, but also in the downstream effect of the delays on the project. This kind of approach exemplifies an application of the "clear apportionment" rule. Using the *Utley-James* decision alongside other more recent decisions as a guide, courts and administrative boards will apportion concurrent delay. They look first to the parties to provide the relevant evidence, but will, if called upon, engage in the "uncomplicated fact finding process" of apportioning the concurrency. In that context, any party that expects to encounter concurrency as an issue should take steps to examine the concurrent delays and make every effort to apportion those delays if possible. The Court of Federal Claims discussed this obligation in the context of both non-segregable, concurrent delays and sequential, segregable delays as follows:¹⁴⁸

[W]here both parties contribute to a delay neither can recover damage[s], unless there is in the proof a clear apportionment of the delay and the expense attributable to each party." Concurrent delays "occur[] where both parties are responsible for the same period of delay, the second where one party and then the other cause different delays *seriatim* or intermittently." If delay is concurrent, apportionment of liability may be impossible, where in the latter, responsibility may be easily demarcated. For example, if both the government's late approval of plans and the contractor's delay in ordering material postponed the start of construction by two weeks, responsibility may be concurrent and responsibility simply not apportionable. But if later the government delayed the contractor's ability to build an access road to a project because it failed to timely approve its location or the specifications of the underlying aggregate base, and that period of delay necessarily postponed delivery of building materials to a job site which, in turn, led to a separate or sequential delay in the construction schedule of that building, that period would fall into a second, separate, sequential non-overlapping delay for which the government would be solely responsible.

Thus, the trend to apportion responsibility for delays helps to ensure a causal link between claimed damages and the delays giving rise to them.¹⁴⁹ Accordingly, if delays are sequential and not overlapping, and adequate evidence is available, the delays should be segregated and not considered concurrent. Sequential delays of equal duration and critical path impact also do not necessarily offset each other because the contractor's delay costs may not be equal to the liquidated damage rate.

For example, Figure 3-15 shows sequential owner then contractor 30-day delays. The planned schedule in the top half of Figure 3-15 shows both Path A and Path B are critical. As shown through actual progress in the bottom half of Figure 3-15, a 30-day owner-caused delay occurs in Month 2, followed by a 30-day contractor-caused delay in Month 4. As of Month 4 schedule update, the impact of these delays is a 30-day excusable compensable time extension, and the project is scheduled behind 30 days (-30 float to scheduled completion). Should the project finish as scheduled, the owner could assess 30 days of liquidated damages to the contractor.

Apportioned Delays (owner then contractor)

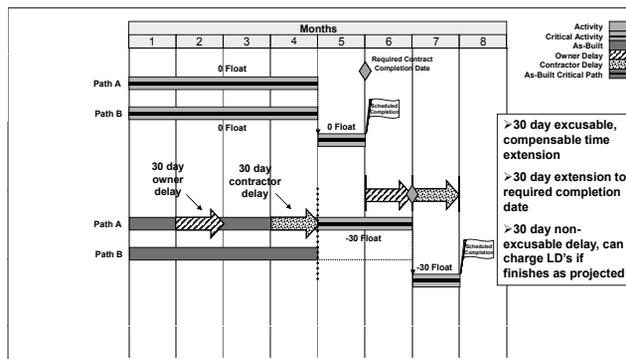


Figure 3-15

Likewise, Figure 3-16 shows sequential contractor then owner 30-day delays. The planned schedule in the top half of Figure 3-16 shows both Path A and Path B are critical (no float available). As shown through actual progress in the bottom half of Figure 3-16, a 30-day contractor-caused delay occurs in Month 2, followed by a 30-day owner-caused delay in Month 4. As of Month 4 schedule update, the impact of these delays is a 30-day excusable compensable time extension, and the project is behind schedule by 30 days

(-30 float to scheduled completion). Should the project finish as scheduled, the owner could assess 30 days of liquidated damages to the contractor. In this example, the order of responsibility for the equal length delays on the same path did not affect the result.

Apportioned Delays (contractor then owner)

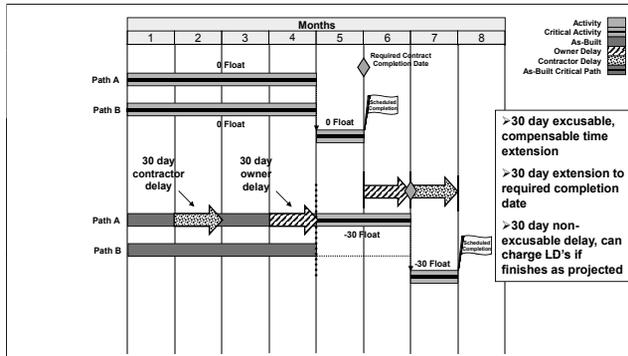


Figure 3-16

■ Acceleration

The interplay between concurrency and acceleration poses yet another wrinkle in the assessment of delay. Indeed, most decisions addressing concurrent delay do so in the context of a claim for delay damages and not in the context of acceleration to overcome the delays. Concurrent delay represents a commonly used defense by the Government to preclude a contractor from recovering the costs of extended performance and thus appear often in the context of delay damages.¹⁵⁰ Acceleration, however, embodies a different legal concept and results in different performance costs. While delay damages include extended time-related costs, acceleration involves the addition of labor, premium labor hours, additional equipment, and other means to speed the work rather than extend it. In that context, acceleration addresses fundamentally different issues from delay, even if both share common origins.

The most elusive complications raised in the context of constructive acceleration, however, relate to those concurrent delays that the Court of Federal Claims referred to as “simply not apportionable.”¹⁵¹ Generally, for those non-apportionable delays, the court should rely either on the rule against apportionment or the holding in *Morganti National, Inc. v. United States*¹⁵² to deem the concurrent delay an excusable, but not compensable delay. Accordingly, any analysis

of acceleration would proceed from that basis and would examine the *Norair Engineering Corp. v. United States* elements in that context.¹⁵³ Two decisions from the ASBCA, currently unchallenged, threaten the notion that concurrent delays qualify as excusable, but not compensable delays. These decisions—*Hemphill Contracting Co.*¹⁵⁴ and *R.J. Lanthier Co.*¹⁵⁵—rest on the premise that “in a ‘Changes’ clause analysis, a contractor cannot recover acceleration costs flowing from a concurrent delay, unless the record supports a clear apportionment of the delay and expense attributable to each party.”¹⁵⁶ While these holdings appear to comport with the allocation responsibilities inherent in a delay damages calculation, they undermine the theory of concurrent delays as excusable and contradict the long-held belief that in the face of concurrent delays to the work, “neither party will benefit from the delay.”

In the first of these two decisions, and the more substantive analysis, *Hemphill Contracting Co.*,¹⁵⁷ the contractor entered into a fixed-price contract for the clearing and removal of trees. That work included the disposal of materials cleared from the site by burning. During performance of the work, the Government shut down burning operations for 21 days to review whether to modify the contractor’s approach to the burning work. At the end of the suspension period, the Government directed that the contractor use a specific burning method different from that originally employed. During the same suspension period, the board found that the contractor “simply decided not to work” on other activities for 12 of the 21 days.¹⁵⁸ Despite the delays, the contractor completed the work on time and asserted a claim for constructive acceleration. In correspondence, the Government recognized the contractor’s acceleration efforts and noted that “The Contractor shut down all basic contract work for 6 weeks to get caught up with the burning and then spent 13 weeks performing the remaining clearing and burning.... The Contractor was able to finish on time by accelerating the basic contract clearing and by adding personnel and equipment to the burning operation.”¹⁵⁹

The board reviewed the contractor’s claim and found it lacking with respect to virtually every element of proof required to demonstrate

constructive acceleration.¹⁶⁰ With respect to the first element, namely excusable delay, the board began with a traditional analysis and stated that “The test for establishing an excusable delay that underpins an acceleration claim is whether the delay flows from causes ‘beyond the control and without the fault or negligence of the contractor.’”¹⁶¹ It proceeded to note that the contractor’s own suspension of non-burning operations in the key 21-day period did not result from Government action, observing:¹⁶²

From our review of the record, we are not convinced that any delay to [the contractor’s] work was occasioned solely by the Government’s restriction on burning during the “no burn” period, or other excusable causes. [The contractor’s] failure to work during the majority of that period either was attributed to rain or wet conditions that did not rise to the level of “unusually severe weather,” or was part of [the contractor’s] consistent pattern of no weekend work. Furthermore, there is nothing in this record by which we can apportion any segment of the delay exclusively to the Government. For these reasons, we conclude that [the contractor’s] partial idleness during the “no burn” period was not exclusively the result of an excusable delay.

From this analysis flowed the board’s conclusion that, “a contractor cannot recover acceleration costs flowing from a concurrent delay, unless the record supports a clear apportionment of the delay and expense attributable to each party.”¹⁶³

Despite the board’s reliance on the contractor’s lack of progress during the 21-day period, the board discussed no schedule analysis or any review of whether the burning or non-burning activities had any impact on the critical path. The opinion appears to conclude that the non-burning work the contractor did not perform in the 12 days impacted project completion to the same degree as the Government’s direction to suspend burning. In effect, the board adopted an approach akin to the nullification analysis used by *Acme Process Equipment*.¹⁶⁴ Based on this information and its presumption that the contractor and Government delays qualified as truly concurrent critical path delays, the board set forth the following rule:¹⁶⁵

When a contractor’s performance is delayed by multiple causes acting concurrently, and only one cause is excusable, *i.e.*, where other causes lie with the contractor, courts and boards have adopted the approach that neither party will

benefit from the delay. *Consequently, in a “Changes” clause analysis, a contractor cannot recover acceleration costs flowing from a concurrent delay, unless the record supports a clear apportionment of the delay and expense attributable to each party.*

This pronouncement appears to impose a heightened requirement on a contractor seeking compensation for constructive acceleration; not simply that it demonstrate an excusable delay as required by *Norair* and *Fraser*, but that it prove a compensable delay arising solely due to the actions of the Government. By forcing the contractor to treat concurrent delay as a compensable claim and therefore apportion the delays places a heavy burden on the contractor. Moreover, this holding effectively imposes a penalty on the contractor that could exceed the liquidated damages already disallowed by the “Default” clause. In that context, regardless of the “Default” clause and precedent instructing the Government to provide an extension of time to accommodate the concurrent delays, the Government’s acceleration directive may compel the contractor to overcome the concurrent delays without any financial contribution.

The *Hemphill* holding (and the later holding in *R.J. Lanthier Co.*)¹⁶⁶ on concurrency suffers from the facts of the case, as do many other cases that address concurrency and acceleration.¹⁶⁷ One of the early decisions addressing concurrent delay in the context of acceleration is *Kingston Bituminous Products Co.*¹⁶⁸ The decision itself, despite later citations to it as authority, does not actually address the issue of concurrency as excusable delay. Instead, the decision, like most, makes the determination of which delays controlled the project completion date, effectively avoiding the concurrency issue as it bears on entitlement.

At the board, the contractor asserted that the Government delayed the work 84 days for unreasonable suspensions of work, changed conditions, and late inspections. The contractor also claimed excusable delays related to severe weather. In addition to the delays, the contractor claimed that the Government issued a constructive acceleration order when, at a meeting on delays and project performance, the Government insisted that the “contract be ‘completed on time’”¹⁶⁹ and assessed 54 days of liquidated damages.

The board found that the Government delayed the contractor's work for 52 days in conjunction with severe weather, changed conditions, and late inspections. At the same time, however, the board denied the contractor's other claims for delay noting that the Government's suspensions arose out of the contractor's failure to provide aggregate and sand that met the contract specifications, the contractor's poorly managed quality control program, poor workmanship generally, and the contractor's failure to pave sections of the runway as required under the Contract. In its decision, the board included no analysis of this apparent concurrency or analysis of how the 52 days of Government-caused delay interacted with the contractor's own delays. Instead, the board relied on the "Suspension of Work" clause as a means of addressing the concurrency issue and simply noted the following:¹⁷⁰

Assuming *arguendo* that the respondent's actions or inactions as contended by appellant through the hearing did in part cause the delays and were hindrances to performance, they would be at most concurrent with the several and more serious causes for delays chargeable to the contract and under that situation no recovery can be permitted. We have taken that position on several occasions. Attention is also invited to the suspension of work clause, *supra*, which clearly says that "No adjustment shall be made to the extent that performance by the Contractor would have been prevented by other causes even if the work had not been so suspended, delayed, or interrupted."

This finding, combined with the lack of analysis, makes interpretation of the board's position difficult. By modern parlance, the board's broader holding suggests that the contractor-caused delays were controlling such that the Government-caused delays did not result in the extended performance period. The board's more specific findings, such as that quoted above, complicate the conclusion since the board issued conflicting findings. For example, despite having extended the contract completion date 52 days due to actions of the Government in what was termed the "First Cause of Action,"¹⁷¹ the board noted: "Appellant has not come forth with any convincing proof that the extension of time granted under the First Cause of Action actually delayed or had any material impact on the work in general and but for those delays the contractor would have completed performance on schedule."¹⁷² How the board found

enough merit to extend the contract completion date 52 days despite not considering the underlying delays sufficient to impact the work does not easily reconcile.

Despite the difficulty navigating the board's grant of time, the contractor lost its acceleration claim for reasons unrelated to the concurrency. In short, the board dismissed the acceleration claim based on the lack of an acceleration order from the Government. The board held that the Government's demand that the "contract be 'completed on time'" did not constitute an order to accelerate. Moreover, the contractor's "several efforts and assurances" about accelerating the work amounted to nothing more than "recognitions that the performance was behind schedule," not a response to an acceleration order.¹⁷³ Despite the board's rationale on this holding, other boards have relied on *Kingston Bituminous Products* as support for the theory that concurrent delay poses a complete bar to recovery for acceleration.¹⁷⁴

Kingston Bituminous Products provides little insight into the analysis of concurrent delay as it pertains to constructive acceleration. Between the lack of clarity in connection with delays and the ultimate denial of the claim on other grounds, the decision provides an uncertain starting point at best. The board's decision in *Koppers-Clough*,¹⁷⁵ four years later, however, offers an approach that examines concurrent delays and a means for addressing them. In this case, the appellant's contract was for the second and third stages of the construction of high frequency communications systems, support facilities, family housing, and related buildings, along with necessary utilities and roads for the U.S. Navy in Australia. During the first stage of the project, another Navy contractor encountered differing site conditions and unusually severe weather. As a result, the Navy directed the first-stage contractor to accelerate its work and authorized it to pay premium wages to complete the delayed work faster.¹⁷⁶

In its appeal, the contractor argued that the acceleration effort from the first-stage contractor resulted in 90 days of delay to its work. The acceleration effort, and the premium wages paid for the work, allegedly diverted labor from the

contractor's effort to the first-stage contractor. The contractor also argued that the Government's demands for additional design work related to temporary facilities delayed its ability to house, and thus to retain, its own workforce. The Government presented evidence of concurrent delays, noting that during the same 90-day period, the contractor provided design drawings for reinforcing steel to its fabrication and placement subcontractor late. Moreover, that subcontractor "was very slow in the preparation of shop drawings, so that the job was delayed for the lack of them."¹⁷⁷ Additionally, the concrete supplier running the batch plant that supplied both the contractor's base scope work and the first-stage contractor's acceleration effort did not timely provide material to the contractor.¹⁷⁸

The board accepted these concurrent delays and did not endeavor to parse the competing delays. Instead it found simply that the delays arose from "a number of causes all operating concurrently."¹⁷⁹ The board accepted the contractor's evidence as to the 90 days of delay despite doubt as to the quality of evidence presented. The board then, with no further explanation, split that delay in half, attributing half of the delay to the Government and half to the contractor noting:¹⁸⁰

Although the proof is not certain, we accept the appellant's testimony that the job was delayed 90 days from mid-July until the end of 1965. All of the factors mentioned in the foregoing paragraph contributed to the delay. On balance, we find that the Government's acceleration of the [first-stage contractor's] work and the aftermath of its delays to the temporary facilities created 45 days of this delay.

Having done so, it turned to the claimed acceleration costs. It held that "[w]here the Government requires action by the contractor to overcome an excusable delay, this is considered to be a constructive change for which the contractor may recover if additional costs are incurred."¹⁸¹ The board identified the acceleration costs sought by the contractor as premium wages paid to workers on Sundays, and awarded the contractor half of those costs based on its allocation of the delay period.¹⁸² As with the delay analysis, the board offered no additional insight into the allocation of these acceleration damages.

As a result, the decision in *Koppers-Clough* acknowledges the interest in apportioning both

the delays themselves and the acceleration costs attributable to overcoming the delays. In this case, the board's method of simply dividing the delays and the proven costs in half effectively amounted to a jury verdict. Such an approach presents a more reasoned means of apportioning the costs than simply a blanket denial of recovery, but also one that offers little detailed guidance.

While *Koppers-Clough* offered an early effort at apportioning concurrent delay and acceleration damages, it fell short of the ASBCA's subsequent decision in *Fischbach & Moore International Corp.*¹⁸³ That decision provided a more detailed framework for analysis of concurrency and for apportioning damages based on delay, that while available to the board in *Koppers-Clough*, did not make an appearance in the analysis. There, the contractor was awarded a fixed-price contract to erect a complex of steel radio towers, together with antennas, buildings, auxiliary structures, and site work, in the Philippines, for the U.S. Information Agency. During performance of the work, problems arose with respect to welding the steel supports for the radio towers. The Government issued a stop work order while it addressed the welding issues. The board, in an earlier decision,¹⁸⁴ found that the Government's interpretation of the specifications and subsequent stop work order constituted a constructive change. When the contractor and the Government could not reach a resolution on quantum for the contractor's delay, acceleration, and impact claims, the board issued this subsequent opinion.

The Government argued that any delay caused by the suspension of work and the additional welding resulted from a reasonable use of the "Suspension of Work" clause, or causes attributable to the contractor, thus resulting in no extension of time. The contractor, by contrast, argued that the Government's actions related to the welding issues resulted in 253 days of excusable and compensable delay to the project. To resolve these arguments, the board looked first to an analysis of the project delays, dividing the delays into two groups: those included in the "delay" claim and those included in the "impact claim." Since neither the contractor nor its subcontractors asserted excusable, but non-compensable delays, the board simply determined whether the claimed

delays were attributable to the Government or the contractor. In doing so, the board acknowledged that the parties had presented adequate information on which to analyze the issues:¹⁸⁵

With regard to the alleged intertwining of Government-caused and concurrent delays in this case, we have found, in the critical path analysis offered by appellant, a ready and reasonable basis for segregating the delays. If the delays can be segregated, responsibility therefor may be allocated to the parties. And if there is no basis in the record on which to make a precise allocation of responsibility, an estimated allocation may be made in the nature of a jury verdict....As will be seen in the discussion that follows, we have no such difficulty in the present case.

The board found that 102 days of the claimed 253 days resulted from “inefficiencies and poor performance” of the contractor’s fabrication subcontractor, “for which [the contractor] alone was responsible.”¹⁸⁶ The remaining 151 days, however, the board deemed compensable delays. That compensable period amounted to 60% of the total delay period. The board carried the 60% factor through to its analysis of the acceleration damages. In doing so, it stated, “we hold that this is a case of constructive acceleration for which appellant is entitled to be compensated to the extent of the delays chargeable to the Government during the delay and impact periods, that is, to 60% of whatever reasonable acceleration costs it can prove.”¹⁸⁷ Subsequently, the board reviewed the claimed acceleration costs and applied the 60% factor to those costs it deemed allowable and directly associated with the acceleration effort.¹⁸⁸

While this analytic process appears reasonable as a means of allocating responsibility for acceleration costs, its treatment of concurrent delays appears to ignore the theory that concurrent delays are also excusable in the context of acceleration. For example, when analyzing the delay claims, the board addressed the interrelation between the Government’s unreasonable suspension and the inability of the contractor’s subcontractor to perform. In that context, the board found that the subcontractor’s financial difficulties rendered it incapable of performing its duties under the contract during a period of Government-caused delay. It did not treat one delay or another as controlling, but simply identified a simultaneous delay of the work. More specifically, the board held:¹⁸⁹

Although the action taken by appellant was swift and effective in eliminating [the subcontractor’s] financial problems, we consider that before the takeover, [the subcontractor] would have been unable to perform any effective work, whether on the critical path or not, even if the Government’s stop work order had not been issued. Accordingly, the 28 days from 12 May to 9 June, as well as the 19 days between 9 June and 28 June 1967, represent a concurrent delay for which no compensation is allowable.

In the context of this particular analysis, i.e., delay damages, this conclusion comports with long standing precedent discussed in the sections above. Indeed, the board in this case noted, “When Government-caused delays are concurrent or intertwined with other delays for which the Government is not responsible, the argument continues, a contractor cannot recover *delay damages*.”¹⁹⁰ Although the claim sought acceleration damages, the board, however, did not revisit this concurrent, but presumably excusable period of delay when applying the 60% factor to the acceleration costs. Had it done so, the factor would have increased in the contractor’s favor to nearly 71%. Accordingly, the board relied on a compensability analysis rather than an excusability analysis to address the acceleration costs.

Nevertheless, the decision in *Fischbach & Moore* represented a leap forward for analysis of concurrent delays from *Kingston Bituminous Products* and a sophisticated turn on *Koppers-Clough*. No longer was the board satisfied with simply dismissing acceleration in the presence of concurrency. Moreover, the board developed a means of analyzing the project to allocate responsibility for delay and then apply that result to acceleration damages. This approach, however, ignored the role of truly concurrent delays and based its decision solely on the relative percentages of compensable delays. This effort seems to replace the first element of constructive acceleration with a compensability requirement not stated in *Fraser* or its predecessors. In addition, the damages allocation factor based on delays ignored the fact that acceleration costs may not correlate exactly with the delay. In other words, the cost of accelerating the Government-delayed activity may not equate on the same basis with accelerating the contractor-delayed activity. In short, while a giant step forward in analyzing these situations, the *Fischbach & Moore International Corp.* decision stopped short of fully addressing the problem.

The decision in *Essential Construction Co. and Himount Constructors, Ltd., A Joint Venture*¹⁹¹ represents a contrast from the detailed analysis undertaken by the board in *Utley-James, Inc.*, discussed above.¹⁹² The case arose from a 200-unit family housing contract at West Point that began in 1968, intended to finish in February 1970, but persisted until July 1971 before final acceptance. The appeals emerging from the project generated its first board decision in 1975 and, after nine others, finally concluded the acceleration issues in 1989. Despite the 14-year staying power of the litigation, the decision produced no lasting insight into the treatment of concurrent delay as it pertains to acceleration.

The contractor submitted 19 claims for delay and a single separate claim for impact and acceleration arising from the delay. The acceleration claim was predicated on those claims which included the following Government-caused delays to the work: “a sudden unexpected nationwide shortage of lumber material,” unusually severe weather conditions, lack of access to the site, utility changes, differing site conditions, and other changes.¹⁹³ The contractor complained that the Government directed it to meet a revised completion date that the Government unilaterally decided based on time extensions already provided for the 19 claims. The contractor believed that the Government failed to allow adequate time for the previously granted extensions, and that it should be provided additional time plus compensation for its attempts to meet the Government’s revised completion date.¹⁹⁴

In preceding hearings, the board denied these individual claims for delay but sustained the time extensions already granted by the CO. The Government argued in the acceleration appeal that there could “be no entitlement to claims for impact/acceleration costs because appellant ha[d] failed to establish the basic element for such a claim, namely a given period of excusable delay.”¹⁹⁵ The Government, in reliance on *Kingston Bituminous Products*, also argued that any concurrent delay of the contractor would constitute a complete defense to the acceleration claim. The board agreed with that strained reading of *Kingston Bituminous Products*, but declined to apply it at this phase of the hearing. More specifically the board stated:¹⁹⁶

The defense of concurrent delay is valid only when applied to an actually established delay, not merely an alleged delay. Appellant’s citation to *Kingston Bituminous Products*, is inapposite in this regard, since that case involved a claim of constructive acceleration where there were delays determined to be chargeable to the appellant, and recovery was denied because any delay by respondent would have been concurrent with those delays. In the instant appeal there is no period of delay already charged to appellant which could be concurrent with the delays claimed....

As noted above, the *Kingston Bituminous Products* board did not deny the contractor’s claim for acceleration due to concurrent delays, but due to the absence of an acceleration order. Nevertheless, the board in *Essential Construction* adopted the rule, dubbing it the “defense of concurrent delay” in a decision that related exclusively to a claim for impact and acceleration, not delay damages. Moreover, the board discussed its future treatment of concurrency, noting that “[i]n the event multiple causes were ultimately determined to have contributed to a delay, concurrent delays could be eliminated at that time.”¹⁹⁷ In other words, the concurrent period of any delay would presumably be removed from the board’s analysis.

The board decided that it required additional proof before ruling on the acceleration claim. In the follow-on decision,¹⁹⁸ the board denied the contractor’s claims. Unfortunately the dismissal was summary and based largely on a lack of evidence. In this respect, the board was denied an opportunity to conduct the same kind of investigation conducted in *Utley-James*. Indeed, on that note the board commented:¹⁹⁹

In tracing the development of the claim over time, it is often difficult to ascertain exactly what elements it incorporates at any given juncture.

* * *

Appellant’s presentation has generally been one of argument rather than one created from specific reference to the record. The summary of argument and argument contain periodic, limited references to the exhibits and transcript and then mostly for general points. Not a single case is cited by appellant in either its opening brief or its reply. Appellant’s submissions have been unhelpful in a case shrouded in confusion where more precision than normal is needed. We had been given some glimmer of hope in determining how, if at all, the alleged Government caused problems affected the completion of the project as a whole when appellant offered a C.P.M. chart as its exhibit A-2, but

nothing ever came of it. It contained only a CPM layout of appellant's as-planned schedule and no analysis was ever made to show what effect, if any, subsequent events had on the overall completion of the job. It is not even mentioned in appellant's briefs.

In sum, we have had virtually no aid and guidance in trying to determine appellant's entitlement in this appeal.

Unlike the board in *Utley James*, however, the quality of the evidence provided in the case caused the board to refuse openly to conduct a similar investigation. In that respect, as mentioned earlier in this PAPER, the board noted, "We are not charged with sorting through a haystack of documents to locate relevant facts. If we were to engage in such efforts it would cripple our ability to perform our basic function of providing a just, inexpensive and expeditious remedy."²⁰⁰

Thus the legacy of *Essential Construction* is twofold. First, the board introduced the "defense of concurrent delay" into the acceleration arena, applying rules developed for compensable delays to the first element of a claim for constructive acceleration. Second, the board refused to undertake an investigation as in *Utley James* since the claimant failed to provide adequate information on schedule. In doing so, the board declined to adopt the simple logic that concurrent delays are excusable. Rather, the board adopted the opposite approach, and simply denied the claim for lack of proof. As with *Utley James*, *Essential Construction* reinforces the contractor's obligation to provide sufficient evidence to allow the board to reach a decision.

In *Lovering-Johnson, Inc.*,²⁰¹ the board appeared willing to depart from the "defense of concurrent delay" set forth in *Essential Construction*. In this case, the Navy construction contract called for completion of all work within 915 calendar days of award and imposed a phased schedule on the contractor. During performance of the work, the contractor alleged that it encountered delays and increased costs as a result of Government changes to the storm water drainage system, the failure of the Navy to disclose an allegedly useful environmental report, differing site conditions, and changes to the site plan. The contractor claimed that these events lead to a 267-day delay in the project and forced it to incur acceleration costs in an effort to meet the unadjusted completion date.²⁰²

The board denied the contractor's claims except as they related to the site plan changes. For these changes, the board recognized a 20-day time extension. Despite this extension, the board denied the contractor recovery of costs, stating that "multiple concurrent, contractor-caused delays [were] intertwined with any possible minor delays for which the government could be held responsible." Since the contractor "fail[ed] to recognize, account for or segregate these other contractor-caused delays," it "[could] not recover monetary compensation for the periods."²⁰³ Armed with this finding, the board turned to the acceleration claims. For those claims, the result was expected, yet confusing.

The contractor argued, consistent with *Morganti*²⁰⁴ and *Fraser*²⁰⁵ that concurrent delays were excusable, even if not compensable delays, and thus satisfied the first element of the test for constructive acceleration.²⁰⁶ Relying on *Fraser*, the board noted that the first element of a claim for constructive acceleration was "that the contractor encountered a delay that is excusable under the contract." Nevertheless, the board seemed to set aside the excusable delay it found in the previous paragraphs and made the following confusing observation, "The *sine qua non* of acceleration is proof of excusable delay... Even with the grant of these and all other time extensions (in other modifications), appellant still would not have timely completed the work according to estimates it made contemporaneous with any acceleration."²⁰⁷ Presumably the board's observation addressed the fact that even with the time extensions granted by it and the CO, the contractor would not have been able to complete the project on time, thus leaving an overwhelming balance of delay attributable to the contractor. Accordingly, the board concluded that although the contractor may have accelerated the work, on balance any compensation due for addressing the excusable delay period was consumed by the liquidated damages due the Navy for overall late completion. For purposes of the case before it, the board did not need to address that point, as it found further that the contractor did not actually accelerate its work, and if it did, its efforts were misguided and did not address critical path work.²⁰⁸

As with many other cases, the facts of the *Loving-Johnson, Inc.* decision did not allow the board wholly to address the application of concurrent delay to constructive acceleration. Nevertheless, this decision does at least accept the argument offered by the contractor, namely that where it is “it was at least excusably delayed” by concurrent events, it should be allowed acceleration costs where it can demonstrate the other elements of proof. Again, this decision, like others before it, also teach the lesson that the contractor’s proof of both the delays encountered as well as the acceleration efforts undertaken, must be clear.²⁰⁹

Waiver Of Completion

An owner or the Government may waive the “time is of the essence” provision in its contract or simply waive the right to enforce mandatory completion dates. As with most contract actions, the waiver of completion may be express or implied. Absent an express waiver, the parties and ultimately a tribunal will have to determine whether some actions of the owner or Government amounted to an intent to release the contractor from the timing provisions of the contract.²¹⁰ Most often, the action identified as waiver is the failure to enforce a substantive right under the contract with respect to time.²¹¹ For example, the failure to assess liquidated damages for delay or failure to terminate the contractor for default in the face of contractor-caused delays can amount to a waiver of the right to enforce a contractual completion date. In *Florida v. United States*, the Federal Circuit described the phenomenon as follows:²¹²

A waiver of the government’s right to terminate a contract for default may be found when the government allows “a delinquent contractor to continue [substantial] performance past a due date,” under circumstances that justify a conclusion that the default has been excused. The purpose of the waiver doctrine is to protect contractors who are led to believe that time is no longer of the essence and undertake substantial efforts after the performance date specified in the contract has passed.

This principle in construction law arises from the basic contract principle that where a party to an agreement has actual knowledge of another party’s breach and continues to accept the benefits

of the contract without providing notice of intent to remedy the breach, the continuing performance constitutes a waiver of the breach.²¹³ This rule would not prohibit the owner/Government from seeking redress for a breach, but does impose an obligation to notify the contractor of its intent to continue enforcing the contract terms.²¹⁴

The decision in *DeVito v. United States*,²¹⁵ provides a good introduction to the issues and has lent its name to the test presently used by federal courts in addressing a waiver of completion. The case arose not from a construction project, but from a fixed-price supply contract for wire splicing kits. Shortly after performance began, the Government doubled the ordered quantity. The increase in quantity was also accompanied by notice from the Government that “there were some errors and defects in the contract drawings and specifications.”²¹⁶ The “some errors” turned out to require “over 200 changes to the drawings and specifications.”²¹⁷ In addition, the contractor encountered what it considered were additional excusable delays, including a nationwide steel strike, a fire that destroyed most of the contractor’s production space, and the closing of a key subcontractor’s facility. Nevertheless, the Government terminated the contract for default. During the 48 days that the Government officials contemplated the default, the Government continued to accept the contractor’s efforts to overcome the delays. In fact, “Until receiving the termination notice on January 17, 1961, neither the plaintiff nor the Government inspector assigned to the plant had any inkling of the contracting officer’s intention to terminate.”²¹⁸

The court reviewed the events in the context of the contractor’s request for an extension of time and the alternative argument that the Government had waived the right to terminate the contract. The court noted that the “Government is habitually lenient in granting reasonable extensions of time for contract performance, for it is more interested in production than in litigation.”²¹⁹ After remarking that default terminations were strictly construed, the court held as follows with respect to waiver:²²⁰

Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and

inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given. This is popularly if inaccurately referred to as a “waiver” of the right to terminate. The election is sometimes express, but more often is to be inferred from the conduct of the non-defaulting party. The determination of what conduct constitutes such an election is more conjectural than to prescribe the proper method of effecting a valid termination once the election has occurred.

The court continued to articulate the two-part test currently used to address questions of waiver of completion:²²¹

The necessary elements of an election by the non-defaulting party to waive default in delivery under a contract are (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government’s knowledge and implied or express consent.

In this circumstance, the court found that the 48-day delay in issuing a default was inconsistent with the contract language requiring a notice to be issued “at once.”²²² However, the court refused to commit to a specific test with respect to timing and instead made the following observations:²²³

What is a reasonable time for the Government to terminate a contract after default depends on the circumstances of each case. As stated earlier, [the contract] requires the contracting officer to issue a termination notice “at once.” The period for termination after default will naturally be greater where the contractor abandons performance or where his situation is such as to render performance impossible or unlikely, than where he continues performance in reliance on the lack of termination and proceeds to incur obligations in efforts to perform, particularly where, as here, he has no reason to know that a decision to terminate has already been privately made by the contracting officer and is subject only to higher approval.

In the event waiver of the completion date is found, contract performance reverts to completion “within a reasonable time period,” as if there were no required completion date or “time is of the essence”²²⁴ clause.²²⁵ As such, the owner is typically prevented from assessing liquidated damages,²²⁶ and the contractor is likewise typically unable to recover extended delay costs.²²⁷ During the project, after waiver, the completion date can be reinstated by affixing a new completion date, either bilaterally or unilaterally.²²⁸ Once the completion date is reinstated, it is treated like a normal revised project completion date.²²⁹

GUIDELINES

These *Guidelines* are intended to assist you in understanding the key legal issues in construction schedule delay analysis. They are not, however, a substitute for professional representation in any specific situation.

1. Remember that when seeking an equitable adjustment Government-caused delay, the contractor has the burden of proving the extent of the delay, the contractor’s harm resulting from the delay, and the causal link between the Government’s wrongful acts and the delay.

2. Bear in mind that in seeking to impose liquidated damages for delay, the Government has the initial burden of establishing that the contractor did not substantially complete contract performance by the contract completion date. If the Government can meet its burden, the burden then shifts to the contractor to prove that the delay was excusable under the terms of the contract’s “Default” clause.

3. Recognize that although decisions of the courts and boards appear to entertain the notion that CPM schedules and accompanying analyses are not strictly required to demonstrate that a delay occurred, anything less than a CPM analysis—even where not contractually required—will likely fail to meet the required burden of proof.

4. Be aware that although the Federal Circuit has discredited the so-called *McMullan* presumption, which held that when a CO granted a time extension on a contract, the Government was presumed to be responsible for the delay, courts and boards continue to hold parties responsible for reflecting previous grants of time in their schedule analyses.

5. Keep in mind that to prevail on a claim for a constructive suspension of work, the contractor must show that (a) the delays or extra expenses were directly caused by the actions of the Government, (b) the delay was for an unreasonable

period of time, and (c) the delay resulted in injury to the contractor in the form of additional expense or loss.

6. Remember that to recover on a claim for delay damages based on the right to early completion, the contractor must show that (a) it intended to complete the contract early, (b) as of the time of the delays the contractor had the ability to finish the project early, and (c) but for the Government's actions the contractor would have actually completed its work early. The Government has a duty to notify the contractor if it intends to object to early completion or to take advantage of the float created by a contractor's effort to complete early.

7. Bear in mind that a concurrent delay is an excusable, but not a compensable, delay that entitles the contractor to an extension of time.

8. Recognize that to demonstrate entitlement to increased costs under a theory of constructive acceleration, a contractor must prove that (a) it encountered a delay that is excusable under the contract, (b) it made a timely and sufficient request for an extension of the contract schedule, (c) the Government denied the contractor's request for an extension or failed to act on it within a reasonable time, (d) the Government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking

into account the period of excusable delay, after which the contractor notified the Government that it regarded the alleged order to accelerate as a constructive change in the contract, and (e) the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

9. Be cognizant that the trend to apportion responsibility for delays helps to ensure a causal link between claimed damages and the delays giving rise to them. If delays are sequential and not overlapping, and adequate evidence is available, the delays should be segregated and not considered concurrent. Keep in mind that sequential delays of equal duration and critical path impact also do not necessarily offset each other because the contractor's delay costs may not be equal to the liquidated damages rate.

10. Be aware that if the completion date is found to have been waived, contract performance reverts to completion "within a reasonable time period," as if there were no required completion date or "time is of the essence" clause. In that case, the Government is typically prevented from assessing liquidated damages, and the contractor is likewise typically unable to recover extended delay costs. After waiver, the completion date can be reinstated by affixing a new completion date, either bilaterally or unilaterally, which is then treated like a normal revised project completion date.

★ REFERENCES ★

1/ See generally Dale & D'Onofrio, *Construction Schedule Delays* (Thomson Reuters 2014).

2/ See, e.g., *Kirk Bros. Mech. Contractors, Inc.*, ASBCA No. 43738, 93-1 BCA ¶ 25,325 ("Where the delay is caused solely by the Government, it is compensable; where the delay is caused solely by the [contractor], [the contractor] is responsible.... Where the delay is prompted by inextricably intertwined concurrent Government and contractor causes, the delay is not compensable..."); Ness, "Delay, Suspension of Work, and Acceleration," in *Federal Government Construction Contracts* 413, 424-27 (Bastianelli et al. eds. 2003).

3/ *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 238 (2005) (quoting *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994)) (citation omitted).

4/ See, e.g., *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *CEMS, Inc. v. United States*, 59 Fed. Cl. 168, 189 (2003); *Ralph L. Jones Co. v. United States*, 33 Fed. Cl. 327, 331 (1995); *Wunderlich Contracting Co. v. United States*, 173 Ct. Cl. 180, 351 F.2d 956, 968 (1965).

5/ 64 Fed. Cl. at 236. For discussions of the essential elements of proving a delay

claim, see also *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000); *Sauer Inc. v. Danzig*, 224 F.3d 1340 (Fed. Cir. 2000); *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053 (Fed. Cir. 1993); *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402 (2004); *PCL Constr. Servs., Inc. v. United States*, 53 Fed. Cl. 479 (2002); *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396 (1993).

6/ 224 F.3d at 1295; see also *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1582 (Fed. Cir. 1995); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Mega Constr. Co.*, 29 Fed. Cl. at 424; *Servidone Constr. Corp.*, 931 F.2d at 861; *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed. Cir. 1984);

- Clearwater Constructors, Inc. v. United States, 71 Fed. Cl. 25, 36 (2006). But cf. Sauer Inc., 224 F.3d at 1347 (“[A] party asserting that liquidated damages were improperly assessed bears the burden of showing the extent of the excusable delay to which it is entitled.”). The same approach generally holds under state law as well. See *Manshul Constr. Corp. v. Dormitory Auth. of N.Y.*, 79 A.D.2d 383, 387, 436 N.Y.S.2d 724, 728 (1st Dep’t 1981); *City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston 14th Dist. 1978); *Jensen Constr. Co. v. Dallas Cty.*, 920 S.W.2d 761, 770 (Tex. App.—Dallas 1996).
- 7/ *Accord PCL Constr. Servs., Inc. v. United States*, 47 Fed. Cl. 745, 802 (2000) (“Although breach of contract claims and delay claims are distinct, the type of proof required to establish either claim based upon government “hindrance” and “perturbations” includes much similar evidence, otherwise contractors could avoid the admittedly demanding burden of proof for delay claims by simply arguing “hindrance” resulting in easy and numerous breach of contract claims.”).
- 8/ *Wunderlich Contracting Co.*, 351 F.2d at 969.
- 9/ See 64 Fed. Cl. at 243; *accord Wayne Knorr, Inc. v. Dep’t of Transp.*, 973 A.2d 1061 (Pa. Commw. Ct. 2009); *J.L. Davis & Assocs. v. Heidler*, 263 N.J. Super. 264, 622 A.2d 923 (App. Div. 1993).
- 10/ *Morganti Nat’l, Inc. v. United States*, 49 Fed. Cl. 110, 132 (2001), *aff’d*, 36 F. App’x 452 (2002).
- 11/ See, e.g., *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 409 (2004); *Kinetic Builder’s Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000). *Accord Wilner v. United States*, 24 F.3d 1397, 1398 n.5 (Fed. Cir. 1994); *Kelso v. Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1177 (Fed. Cir. 1994); *Mega Constr. Co.*, 29 Fed. Cl. at 424–25; *J.A. Jones Constr. Co.*, ENGBCA No. 6252, 97-1 BCA ¶ 28,918; *ADP Marshall, Inc. v. Noresco, LLC*, 710 F. Supp. 2d 197 (D.R.I. 2010). Note that a claim for disruption may lie where only a discrete element of the work is delayed or disrupted. The burden of proof in a disruption (as opposed to a delay) claim is different and does not generally require proof of overall project delay. See, e.g., *Atl. Coast Mech. v. R.W. Allen Beers Constr.*, 264 Ga. App. 680, 684, 592 S.E.2d 115, 119 (2003); *Sauer Inc.*, 224 F.3d at 1348.
- 12/ *Wunderlich Contracting Co.*, 351 F.2d at 968 (Indeed, “[b]road generalities and inferences to the effect that defendant must have caused some delay and damage because the contract took... longer to complete than anticipated are not sufficient.”); see also *Interstate Gen. Gov’t Contractors v. West*, 12 F.3d 1053, 1060 (Fed. Cir. 1993) (conclusory statements such as “if it had not been for this delay...we would have finished it six months earlier” is “legally insufficient to prove causation”); *R.P. Wallace, Inc.*, 63 Fed. Cl. at 409; *Commerce Int’l Co. v. United States*, 167 Ct. Cl. 529, 543, 338 F.2d 81, 89 (1964) (“Plaintiff has contented itself with broad generalities when specificity is essential.”).
- 13/ See *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984); *United States ex rel. CMC Steel Fabricators, Inc. v. Harrop Constr. Co.*, 131 F. Supp. 2d 882, 886 (S.D. Tex. 2000), *aff’d*, 61 F. App’x 120 (5th Cir. 2003); *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 314 (1999); see also *Interstate Gen. Gov’t Contractors, Inc.*, 12 F.3d at 1060; *Wilner*, 24 F.3d 1397; *Southern Comfort Builders, Inc. v. United States*, 67 Fed. Cl. 124, 144 (2005); *Haney v. United States*, 230 Ct. Cl. 148, (1982). See generally *Dale & D’Onofrio, Construction Schedule Delays* §§ 2.1 et al. (Thomson Reuters 2014).
- 14/ *PCL Constr. Servs., Inc. v. United States*, 53 Fed. Cl. 479, 489 (2002) (quoting *Interstate Gen. Gov’t Contractors, Inc. v. West*, 12 F.3d at 1060; *Preston-Brady Co.*, VABCA No. 1892 et al., 87-1 BCA ¶ 19,649) (citations omitted).
- 15/ See, e.g., *Lamb Eng’g & Constr. Co.*, EBCA No. C-9304172, 97-2 BCA ¶ 29,207 (“[A] CPM analysis is not required, particularly where a job is not managed using critical path methodology, and the delay aspects of the claims are relatively small in comparison to the costs and probative value of a CPM reconstruction. Nevertheless, some form of an accounting is required and it is not ordinarily something we do for an appellant.”).
- 16/ *Morrison Knudsen Corp. v. Fireman’s Fund Ins. Co.*, 175 F.3d 1221, 1233 (1999) (emphasis added) (citation omitted). For a more forceful position on the issue, see *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590 (2d Dist. 1998).
- 17/ See, e.g., *Thalle Constr. Co. v. Whiting-Turner Contracting Co.*, 39 F.3d 412, 413 (2d Cir. 1994) (affirming district court’s award of delay damages based on evidence such as a bar chart schedule, testimony from the project manager, and correspondence).
- 18/ See, e.g., *Hoffman Constr. Co. v. United States*, 40 Fed. Cl. 184, 198 (1998); *Wilner v. United States*, 26 Ct. Cl. 260 (1991); *Southwest Marine, Inc.*, ASBCA No. 36854, 95-1 BCA ¶ 27,601.
- 19/ *Mega Constr. Co. v. United States*, 29 Fed. Cl. 396 (1993).
- 20/ 29 Fed. Cl. at 424–25 (quoting *Paul Harde-man, Inc. v. United States*, 186 Ct. Cl. 743, 406 F.2d 1357, 1361 (Ct. Cl. 1969)) (citations omitted).
- 21/ 29 Fed. Cl. at 425–26.
- 22/ 29 Fed. Cl. at 426.
- 23/ 29 Fed. Cl. at 427–28.
- 24/ 29 Fed. Cl. at 426.
- 25/ 29 Fed. Cl. at 435 (citations omitted).
- 26/ See, e.g., *Fortec Constructors v. United States*, 8 Cl. Ct. 490 (1985); *Neal & Co. v. United States*, 36 Fed. Cl. 600 (1996), *aff’d*, 121 F.3d 683 (Fed. Cir. 1997); *Preston-Brady Co.*, VABCA No. 1892 et al., 87-1 BCA ¶ 19,649; *Ballenger Corp.*, DOTBCA No. 74-32 et al., 84-1 BCA ¶ 16,973; *J.A. Jones Constr. Co.*, ENGBCA No. 3035 et al., 72-1 BCA ¶ 9,261; *Continental Consol. Corp.*, ENGBCA No. 2743 et al., 67-2 BCA ¶ 6,624; *accord P.J. Dick Inc.*, VABCA No. 5597 et al., 01-2 BCA ¶ 31,647.
- 27/ 8 Cl. Ct. at 507 (quoting *Ballenger Corp.*, DOTBCA No. 74-32 et al., 84-1 BCA ¶ 16,973).

- 28/ P.J. Dick Inc., VABCA No. 5597 et al., 01-2 BCA ¶ 31,647.
- 29/ Conner Bros. Constr. Co., VABCA No. 2504 et al., 95-2 BCA ¶ 27,910.
- 30/ See, e.g., Blinderman Constr. Co. v. United States, 39 Fed. Cl. 529, 584–87 (1997), aff'd, 178 F.3d 1307 (Fed. Cir. 1998).
- 31/ Santa Fe, Inc., ASBCA No. 2168, 87-3 BCA ¶ 20,104.
- 32/ See, e.g., J.D. Hedin Constr. Co. v. United States, 171 Ct. Cl. 70, 84, 347 F.2d 235, 245 (1965); Cable & Computer Tech. Inc., ABSCA No. 47420 et al., 03-1 BCA ¶ 32,237; Robert McMullan & Son, Inc., ASBCA No. 19023, 76-1 BCA ¶ 11,728, abrogated by England v. Sherman R. Smoot Corp., 388 F.3d 844 (Fed. Cir. 2004) (issuing an extension of time “raised a presumption, subject to rebuttal, that [the government] was responsible for the delay”).
- 33/ 76-1 BCA ¶ 11,728.
- 34/ 171 Ct. Cl. at 84, 347 F.2d at 245 (citations omitted).
- 35/ England, 388 F.3d 844.
- 36/ See Nash, “The McMullan Presumption: It’s Gone!,” 19 Nash & Cibinic Rep. ¶ 5 (Feb. 2005).
- 37/ 388 F.3d at 857 (footnote omitted); see Pathman Constr. Co. v. United States, 227 Ct. Cl. 670, 652 F.2d 70 (1981) (contractor could not rely on the length of a time extension granted for completion of the contract to measure time-related delay costs but must independently demonstrate actual compensable delay; see also Perini Corp., ASBCA No. 51160 et al., 04-1 BCA ¶ 32,530 (expert’s schedule delay analysis that ignores contemporaneously granted time extensions carries no weight).
- 38/ But cf. Perini Corp., 04-1 BCA ¶ 32,530 (analysis found wanting for failure to account for “admitted government and excusable delays, clearly established by the record”).
- 39/ FAR 52.243-4. While the remedy for delay may be granted under the “Changes” clause, many of the delay events are enumerated or addressed in the “Default clause,” allowing the two provisions to work in tandem. See FAR 52.249-10 (“Default (Fixed-Price Construction)” clause).
- 40/ FAR 52.242-14.
- 41/ See, e.g., Nicon Inc. v. United States, 331 F.3d 878 (Fed. Cir. 2003) (delayed notice to proceed); Daly Constr. v. Garrett, 5 F.3d 520, 1993 (Fed. Cir. 1993) (defective specifications); Broome Constr. Inc. v. United States, 492 F.2d 829 (Ct. Cl. 1974) (weather); Gilbane Bldg. Co. v. United States, 333 F.2d 687 (Ct. Cl. 1964) (labor unrest); Blinderman Constr. Co. v. United States, 695 F.2d 552 (Fed. Cir. 1983) (site access).
- 42/ See FAR 52.242-14(b) (“an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly”).
- 43/ FAR 52.242-14(a).
- 44/ FAR 52.242-14(b); see also Triax-Pacific v. Stone, 958 F.2d 351, 354 (Fed. Cir. 1992) (“[T]he Suspension clause contemplates equitable adjustments for unreasonable delays in the performance of the contract.”).
- 45/ CEMS, Inc. v. United States, 59 Fed. Cl. 168, 230 (2003) (quoting P.J. Dick, Inc. v. Principi, 324 F.3d 1364, 1375 (Fed. Cir. 2003)).
- 46/ See, e.g., Louis Leustek & Sons, Inc. v. United States, 41 Fed. Cl. 657, 667 n.7 (1998), aff’d 215 F.3d 1347 (Fed. Cir. 1999); S.A. Healy Co. v. United States, 576 F.2d 299, 308 (Ct. Cl. 1978).
- 47/ Beauchamp Constr. Co. v. United States, 14 Ct. Cl. 430, 436–37 (1988) (quoting Merritt-Chapman & Scott Corp. v. United States, 192 Ct. Cl. 848, 870, 429 F.2d 431, 443 (1970)) (summarizing distinction between express and constructive suspensions of work); see also John A. Johnson & Sons v. United States, 180 Ct. Cl. 969 (1967).
- 48/ See Wunderlich Contracting Co. v. United States, 173 Ct. Cl. 180, 197–98 (1966).
- 49/ Sergent Mech. Sys., Inc. v. United States, 34 Fed. Cl. 505, 526 (1995).
- 50/ See, e.g., CRF—a Joint Venture of Cemco, Inc. v. United States, 224 Ct. Cl. 312, 624 F.2d 1054 (1980); First Line Mfg., Inc., ASBCA No. 24443 et al., 83-1 BCA ¶ 16,394.
- 51/ See, e.g., Chaney & James Constr. Co. v. United States, 190 Ct. Cl. 699 (1970).
- 52/ See, e.g., Tri-Cor, Inc. v. United States, 458 F.2d 112, 131 (Ct. Cl. 1972) (“What is a reasonable period of time for the government to do a particular act under the contract is entirely dependent upon the circumstances of the particular case.”). See generally Cibinic, Nash & Nagle, Administration of Government Contracts 591–94 (2006).
- 53/ GASA, Inc. v. United States, 79 Fed. Cl. 325, 349 (2007).
- 54/ See, e.g., Tidewater Contractors, Inc. v. Dep’t of Transp., CBCA 50, 07-1 BCA ¶ 33,525; Kaco Contracting Co., ASBCA No. 46346, 01-1 BCA ¶ 31,263.
- 55/ Generally, time is automatically of the essence with any contract that contains a completion date for performance. See Empire Energy Mgmt. Sys., Inc. v. Roche, 362 F.3d 1343, 1354 (Fed. Cir. 2004). But see Madden Phillips Constr., Inc. v. GGAT Dev. Corp., 315 S.W.3d 800 (Tenn. Ct. App. 2009) (distinguishing provision giving a time or date for completion with a provision or agreement providing that “time is of the essence”).

- 56/ See, e.g., *J.W. Bateson Co.*, ASBCA No. 27491, 84-3 BCA ¶ 17,566 (a constrained schedule such as an early completion schedule reduces float, thereby exaggerating the impact of delay, whereas schedules that are not as aggressive would tend to excuse or absorb more delays).
- 57/ See, e.g., *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1060 (Fed. Cir. 1993); *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994); *Weaver-Bailey Contractors, Inc. v. United States*, 24 Cl. Ct. 576 (1991); *Gardner Displays Co. v. United States*, 171 Ct. Cl. 497 (1965); *Elrich Contracting, Inc.*, GSBCA No. 10936, 93-1 BCA ¶ 25,316; *Castle Constr. Co./Tuskegee Lumber Co. v. Owens & Woods Partnership*, 590 So. 2d 186 (Ala. 1991); *State v. Cherry Hill Sand & Gravel*, 443 A2d 628 (Md. 1982); *Housing Auth. of Texarkana v. E.W. Johnson Constr. Co.*, 264 Ark. 523, 573 S.W.2d 316 (Ark. 1978). See generally Wonderlick, "Delay Damages: Claims for Delays to a Planned Early Completion Date, or, 'The Project Was Completed on Time: Why Am I Facing a Delay Claim?'," 33 *Constr. Law* 15 (2013).
- 58/ *Metro. Paving Co. v. United States*, 163 Ct. Cl. 420, 325 F.2d 241 (1963).
- 59/ 163 Ct. Cl. at 422.
- 60/ 163 Ct. Cl. at 421.
- 61/ 163 Ct. Cl. at 422.
- 62/ 163 Ct. Cl. at 423.
- 63/ 163 Ct. Cl. at 424 ("Plaintiff attempted to show deliberate harassment through its allegation of personal animosity. But not only has plaintiff failed to prove that animosity did exist; it has also failed to prove that the alleged delays flowed from that animosity.").
- 64/ See, e.g., *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) ("The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.").
- 65/ Even post- *Interstate Gen. Gov't Contractors, Inc.*, the question of proving whether an early completion schedule is achievable remains a major obstacle of proof. See, e.g., *Fru-Con Constr. Corp.*, ASBCA No. 53544 et al., 05-1 BCA ¶ 32,936; *Imperial Constr. & Elec., Inc.*, ASBCA No. 54175, 06-1 BCA ¶ 33,276.
- 66/ *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053 (Fed. Cir. 1993).
- 67/ *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574 (Fed. Cir. 1994).
- 68/ 12 F.3d at 1059. But see *Jackson Constr. Co. v. United States*, 62 Fed. Cl. 84 (2004) (notice to the Government was not a requirement); see also *CATH-dr/ Balti Joint Venture*, ASBCA No. 53581 et al., 05-2 BCA ¶ 33,046; *Elrich Contracting, Inc.*, GSBCA No. 10936, 93-1 BCA ¶ 25,316; *Frazier-Fleming Co.*, ASBCA No. 34537, 91-1 BCA ¶ 23,378.
- 69/ The issue of notice to the Government carries its own collateral problems with respect to the government forcing the contractor to work to a new or accelerated plan. See *Weaver-Bailey Contractors, Inc. v. United States*, 19 Cl. Ct. 474, 479 (1990).
- 70/ *Blinderman Constr. Co. v. United States*, 39 Fed. Cl. 529, 587 (1997) (synthesizing *Interstate Gen. Gov't Contractors, Inc.* and *Wickham Contracting Co.*).
- 71/ *Jackson Constr. Co. v. United States*, 62 Fed. Cl. 84, 98 (2004) (quoting *Wickham Contracting Co.*, 12 F.3d at 1582).
- 72/ See, e.g., *Maron Constr. Co.*, GSBCA No. 13625, 98-1 BCA ¶ 29,685.
- 73/ 98-1 BCA ¶ 29,685.
- 74/ 98-1 BCA ¶ 29,685.
- 75/ 98-1 BCA ¶ 29,685.
- 76/ 98-1 BCA ¶ 29,685.
- 77/ 98-1 BCA ¶ 29,685 (citations omitted).
- 78/ See, e.g., *Conti Corp. v. Ohio Dep't of Admin. Servs.*, No. 88-14568, 1992 WL 1200950, 2001-Ohio-147 (Ohio Ct. Cl. July 13, 1992).
- 79/ See generally *Cibinic, Nash & Nagle, Administration of Government Contracts 445-58* (2006); see also *Norair Eng'g Corp. v. United States*, 229 Ct. Cl. 160, 666 F.2d 546 (1981); *Fru-Con Corp. v. State*, 50 Ill. Ct. Cl. 50 (1996); *Contracting & Material Co. v. City of Chicago*, 20 Ill. App. 3d 684, 314 N.E.2d 598 (1974).
- 80/ FAR 52.243-4 (a).
- 81/ See, e.g., *Fraser Constr. Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004).
- 82/ 384 F.3d at 1360-61; see also *Azure v. United States*, 129 F.3d 136 (Table), 1997 WL 665763, at *3 (Fed. Cir. Oct. 24, 1997).
- 83/ 384 F.3d at 1360-61; cf. *Norair Eng'g Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981) (three elements); *McNutt Constr. Co.*, ENGBCA No. 4724, 85-3 BCA ¶ 18,397. See generally *Cibinic, Nash & Nagle, Administration of Government Contracts 445-456* (2006); see also *Sherman R. Smoot Co. v. State*, 136 Ohio App. 3d 166, 178, 736 N.E.2d 69, 78 (2000) ("Constructive acceleration occurs when a contractor has a justified claim for an extension of time, but is required to incur additional expenses because the project owner refuses to grant the extension and requires the contractor to complete the project by the original completion date.").

- 84/ See, e.g., *Norair Eng'g Corp.*, 666 F.2d 546 (acceleration costs allowed for strikes, unusually severe weather, and changes); *Atlantic Dry Dock Corp.*, ASBCA No. 42609 et al., 98-2 BCA ¶ 30,025 (allowing acceleration costs for unusually severe weather); *William Lagnion*, ENGBCA No. 3778, 78-2 BCA ¶ 13,260 (allowing acceleration costs for unusually severe weather); *Pathman Constr. Co.*, ASBCA No. 14285, 71-1 BCA ¶ 8,905 (acceleration costs allowed for strikes).
- 85/ *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 410–11 (2004).
- 86/ *Webster's Ninth New Collegiate Dictionary* 273 (1987); see also James, "Concurrency & Apportioning Liability & Damages in Public Contract Adjudications," 20 Pub. Cont. L.J. 490, 491 (1991) (defining concurrent delay).
- 87/ See *PCL Constr. Servs., Inc. v. United States*, 53 Fed. Cl. 479, 486 (2002) (discussion of sequential as opposed to simultaneous delays).
- 88/ *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 239 n.8 (2005) (citations omitted); see *Essex Electro Eng'rs v. Danzig*, 224 F.3d 1283, 1295–96 (Fed. Cir. 2000) (distinguishing concurrent from sequential delays); see also *Beauchamp Constr. Co. v. United States*, 14 Cl. Ct. 430, 437 (1988) (noting that a concurrent action "would have independently generated the delay during the same time period even if it does not predominate over the government's action as the cause of the delay").
- 89/ *Morganti Nat'l, Inc. v. United States*, 49 Fed. Cl. 110, 132–33 (2001).
- 90/ *Utley-James, Inc.*, GSBCA No. 5370, 85-1 BCA ¶ 17,816, *aff'd*, 14 Cl. Ct. 804 (1988).
- 91/ See, e.g., *United States v. United Eng'g & Constructing Co.*, 234 U.S. 236, 242 (1914) (refusing to allow liquidated damages for concurrent delay); *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402, 410–11 (2004); *Morganti Nat'l, Inc. v. United States*, 49 Fed. Cl. 110 (2001); *Newport News Shipbldg. & Dry Dock Co. v. United States*, 79 Ct. Cl. 25 (1934); *Acme Mis-*
- siles & Constr. Corp.*, ASBCA No. 11786, 69-2 BCA ¶ 8057. For detailed analysis of concurrency, see *Wiesel*, "Refining the Concept of Concurrent Delay," 21 Pub. Cont. L.J. 161 (1992); James, "Concurrency & Apportioning Liability & Damages in Public Contract Adjudications," 20 Pub. Cont. L.J. 490 (1991).
- 92/ *Morganti Nat'l, Inc.*, 49 Fed. Cl. at 132; see also *R.P. Wallace, Inc.*, 63 Fed. Cl. at 410–11; *Utley-James, Inc.*, 85-1 BCA ¶ 17,816; *Chas. I. Cunningham Co.*, IBCA 60, 57-2 BCA ¶ 1541.
- 93/ *Triax-Pac. v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992) (quoting *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976)).
- 94/ *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1295 (Fed. Cir. 2000).
- 95/ See, e.g., *Robust Constr., L.L.C.*, ASBCA No. 54056, 05-2 BCA ¶ 33,019; *Cogefar-Impresit U.S.A., Inc.*, DOTCAB No. 2721, 97-2 BCA ¶ 29,188.
- 96/ See e.g., FAR 52.249-10 ("Default (Fixed-Price Construction)" clause).
- 97/ *Accord Tyger Constr. Co. v. United States*, 31 Fed. Cl. 177, 259 (1994).
- 98/ See, e.g., *John Driggs Co.*, ENGBCA No. 4926 et al., 87-2 BCA ¶ 19,833. But see *Orlosky Inc. v. United States*, 64 Fed. Cl. 63, 70 (2005) ("pacing delay analysis has not been recognized by this circuit as a method of proving causation").
- 99/ *MCI Constructors, Inc.*, DCCAB No. D-924, 1996 WL 331212 (quoting *Wickwire et al.*, "Critical Path Method Techniques in Contract Claims: Issues and Developments, 1974 to 1988," 18 Pub. Cont. L.J. 338, 381 (1989)).
- 100/ ENGBCA No. 4926 et al., 87-2 BCA ¶ 19,833.
- 101/ 87-2 BCA ¶ 19,833.
- 102/ 87-2 BCA ¶ 19,833 (citations omitted).
- 103/ See, generally *Hess*, "Who Should Own the Float?," 4 J. Am. C. Constr. Law. 109 (2010); *Lifschitz & Scott*, "Who Owns the Float?," *Constr. Briefings* (Feb. 2005).
- 104/ See, e.g., *Gassman Corp.*, ASBCA No. 44975 et al., 00-1 BCA ¶ 30,720 (interpreting contract which required that "[f]loat is not time for the exclusive use or benefit of either the Government or the Contractor, but must be used in the best interest of completing the project on time. Extensions of time for performance required under the Contract Provisions pertaining to equitable time adjustment will be granted only to the extent that the equitable time adjustment exceeds total float in the activity or path of activities affected at the time notice to proceed was issued for the change.") *Santa Fe Eng'rs, Inc.*, ASBCA No. 24578 et al., 94-2 BCA ¶ 26,872 (interpreting a similar clause).
- 105/ See, e.g., *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989), *aff'd in part, rev'd in part*, 911 F.2d 723 (4th Cir. 1990).
- 106/ See *Dale & D'Onofrio*, *Construction Schedule Delays* §§ 2.11–2.14 (Thomson Reuters 2014).
- 107/ See *Dale & D'Onofrio*, *Construction Schedule Delays* § 2.34 (Thomson Reuters 2014).
- 108/ See, e.g., *Conner Bros. Constr. Co. v. Brown*, 113 F.3d 1256 (Table), 1997 WL 225068 (Fed. Cir. Apr. 30, 1997); *Fire Sec. Sys., Inc. VABCA No. 5559-63 et al.*, 02-2 BCA ¶ 31,977; *Advanced Eng'g & Planning Corp., Inc.*, ASBCA No. 53366, 05-1 BCA ¶ 32,806.
- 109/ See, e.g., *Framlau Corp.*, ASBCA No. 14479, 71-2 BCA ¶ 9082; *Jan R. Smith, Contractor*, FAACAP No. 66-21, 65-2 BCA ¶ 5306; *A. Brindis Co.*, GSBCA No. 3085, 70-2 BCA ¶ 8527; see also *Bramble & Callahan*, *Construction Delay Claims* § 11.09 (3d ed. 2009 Supp.) (using "offsetting delays" to describe "delays

- that have the same effect on project completion but do not occur within the same general time period”).
- 110/ Cf. *Bruce Constr. Corp. v. United States*, 163 Ct. Cl. 97, 101 (1963) (“[T]he standard of reasonable cost ‘must be viewed in the light of a particular contractor’s costs,’ and not the universal, objective determination of what the cost would have been to other contractors at large.”).
- 111/ Not all decisions follow *Framlau*, *Jan R. Smith*, and *Brindis*. See, e.g., *Ellis Envtl.*, ASBCA No. 55375, 08-2 BCA ¶ 33,918 (allowing assessment of liquidated damages despite the government’s failure to provide a repaired electrical panel before the expiration of contract time, finding that the panel repair was still provided well prior to when the contractor needed it). If an owner intends to follow the approach outlined in *Ellis Envtl.* and voluntarily chooses to delay owner-responsible work that has no float as a result of much more significant contractor delays, the owner may need to put the contractor on notice the intent to seek delay damages contemporaneously, effectively treating the situation as if it were “owner pacing.”
- 112/ See generally *Cibinic, Nash & Nagle*, Administration of Government Contracts 570–72 (2006) (describing requirements that overall completion be delayed in order to receive an extension of time); see also *Sauer, Inc. v. Danzig*, 224 F.3d 1340 (Fed. Cir. 2000); *KATO Corp.*, ASBCA No. 51462, 06-2 BCA ¶ 33,293; *Contel Advanced Systems, Inc.*, ASBCA No. 49075, 04-2 BCA ¶ 32,664; *Ealahan Elec. Co.*, DOTBCA No. 1959, 90-3 BCA ¶ 23,177; accord FAR 52.242-14 (“Suspension of Work” clause) (“However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.”).
- 113/ See *Dale & D’Onofrio*, Construction Schedule Delays § 2.34 (Thomson Reuters 2014).
- 114/ See *Santa Fe Eng’rs, Inc.*, VABCA No. 1943 et al., 84-2 BCA ¶ 17,341 (disallowing contractor recovery where a sophisticated CPM procedure was used that reflected
- available float time, and the contractor offered insufficient evidence that change orders extended its performance period).
- 115/ *Framlau Corp.*, ASBCA No. 14479, 71-2 BCA ¶ 9,082.
- 116/ 71-2 BCA ¶ 9,082.
- 117/ 71-2 BCA ¶ 9,082.
- 118/ Although not directly addressed in *Framlau* or other decisions dealing with the role of subcritical Government-caused delay, presumably the contractor could seek other increased costs of the subcritical delay under the doctrine of constructive changes. See, e.g., *Cibinic, Nash & Nagle*, Administration of Government Contracts 456–58 (2006) (stating that acceleration costs are recoverable).
- 119/ 71-2 BCA ¶ 9082 (citations omitted); see also *Cibinic, Nash & Nagle*, Administration of Government Contracts 571 (2006) (“When the Critical Path Method of schedule control is used, it is held that the delay must be on the critical path. This requirement does not mean that each event must delay the contractor past the scheduled completion date. As long as time is lost, the contractor is entitled to an excusable delay.”).
- 120/ See, e.g., *RDP Royal Palm Motel, L.P. ex rel. PADC Hospitality Corp. I v. Clark Constr. Group, Inc.*, 168 F. App’x 348, 354 (11th Cir. 2006); *Martin Constr., Inc. v. United States*, 102 Fed. Cl. 562 (Fed. Cl. 2011); *A. Brindis Co.*, GSBCA No. 3085, 70-2 BCA ¶ 8527; *Jan R. Smith, Contractor*, FAACAP No. 66–21, 65–2 BCA ¶ 5306; see also Acting Comptroller General Weitzel to the Secretary of the Army, Comp. Gen. Dec. B-120760, 34 Comp. Gen. 230, 234–235 (1954).
- 121/ *Sunshine Constr. & Eng’g, Inc. v. United States*, 64 Fed. Cl. 346, 371–73 (Fed. Cl. 2005); accord *PCL Constr. Servs., Inc. v. United States*, 53 Fed. Cl. 479, 486 (2002).
- 122/ See, e.g., *Acme Process Equip. v. United States*, 171 Ct. Cl. 324, 347 F.2d 509 (1965), rev’d on other grounds, 385 U.S.
- 138, 87 S. Ct. 350 (1966); see also *United States v. United Eng’g & Constructing Co.*, 47 Ct. Cl. 489 (1912), aff’d, 234 U.S. 236, 242, 34 S. Ct. 843 (1914).
- 123/ 171 Ct. Cl. 324, 347 F.2d 509 (1965).
- 124/ 171 Ct. Cl. at 367, 347 F.2d at 535 (quoting *Schmoll v. United States*, 91 Ct. Cl. 1, 28 (1940)).
- 125/ *PCL Constr. Servs. Inc. v. United States*, 53 Fed. Cl. 479, 487 (2002).
- 126/ See, e.g., 53 Fed. Cl. at 486 (2002) (discussing applicability); see also *S.O.G.-San Ore-Gardner v. Missouri P. R. Co.*, 658 F.2d 562 (8th Cir. 1981) (applying Arkansas law).
- 127/ *Blinderman Const. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982) (quoting *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714–15 (1944)).
- 128/ See, e.g., *Sauer Inc. v. Danzig*, 224 F.3d 1340 (Fed. Cir. 2000) (assessment of liquidated damages); *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1038–39 (5th Cir.) (assessment of liquidated damages); *William F. Klingensmith, Inc. v. United States*, 731 F.2d 805 (Fed. Cir. 1984) (contractor’s claim); *Blinderman Constr. Co. v. United States*, 695 F.2d 552 (Fed. Cir. 1982) (contractor’s claim); accord *Interstate Gen. Gov’t Contractors, Inc. v. West*, 12 F.3d 1053, 1060 (Fed. Cir. 1993) (“The required nexus between the government delay and a contractor’s failure to complete performance at some unspecified earlier date cannot be shown merely by hypothetical, after-the-fact projection.”).
- 129/ *R.P. Wallace, Inc. v. United States*, 63 Fed. Cl. 402 (2004).
- 130/ *Sauer*, like other apportionment decisions focuses on sequential delay rather than concurrent delay. In that case, the contractor argued that Government-caused delays occurring after the contractor’s delays should offset the assessment of liquidated damages. See 224 F.3d at 1346.

- 131/ 224 F.3d at 1347.
- 132/ 224 F.3d at 1347.
- 133/ 224 F.3d at 1347.
- 134/ See, e.g., *Nomellini Constr. Co. v. California*, 19 Cal. App. 3d 240, 246 (1971).
- 135/ See, e.g., *Bath Iron Works Corp., ASBCA No. 54544*, 06-1 BCA ¶ 33,158.
- 136/ *Hawaiian Dredging & Constr. Co., ASBCA No. 25594*, 84-2 BCA ¶ 17,290.
- 137/ *Utley-James, Inc., GSBCA No. 5370*, 85-1 BCA ¶ 17,816, *aff'd*, 14 Cl. Ct. 802 (1988).
- 138/ 85-1 BCA ¶ 17,816.
- 139/ See *Utley-James, Inc. v. United States*, 14 Cl. Ct. 804 (1988).
- 140/ 85-1 BCA ¶ 17,816.
- 141/ But see *Hawaiian Dredging & Constr. Co., ASBCA No. 25594*, 84-2 BCA ¶ 17,290.
- 142/ See, e.g., *Nomellini Constr. Co. v. California*, 19 Cal. App. 3d 240, 246 (1971).
- 143/ 85-1 BCA ¶ 17,816.
- 144/ 85-1 BCA ¶ 17,816.
- 145/ See also *Craft Machine Works, Inc., ASBCA No. 47227*, 97-1 BCA ¶ 28,651.
- 146/ Of note, the assumption of government responsibility for the delay arose in part due to the Government's failure to assess liquidated damages. See 85-1 BCA ¶ 17,816.
- 147/ 85-1 BCA ¶ 17,816.
- 148/ *Cumberland Cas. & Sur. Co. v. United States*, 82 Fed. Cl. 500, 506 (2008) (citations omitted).
- 149/ See, e.g., *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026 (5th Cir. 1977). But see *Cumberland Cas. & Sur. Co. v. United States*, 82 Fed. Cl. 500, 506 (2008).
- 150/ See, e.g., *Sauer, Inc. v. Danzig*, 224 F.3d 1340 (Fed. Cir. 2000); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982); *Commerce Int'l Co. v. United States*, 338 F.2d 81, 89-90 (Ct. Cl. 1964).
- 151/ *Cumberland Cas. & Sur. Co. v. United States*, 82 Fed. Cl. 500, 506 (2008).
- 152/ *Morganti Nat'l, Inc. v. United States*, 49 Fed. Cl. 110 (2001).
- 153/ *Norair Eng'g Corp. v. United States*, 666 F.2d 546, 548 (Ct. Cl. 1981) (three elements)
- 154/ *Hemphill Contracting Co., ENGBCA No., 5698 et al.*, 94-1 BCA ¶ 26,491.
- 155/ *R.J. Lanthier Co., ASBCA No. 51636*, 04-1 BCA ¶ 32,481.
- 156/ 94-1 BCA ¶ 26,491.
- 157/ 94-1 BCA ¶ 26,491; see also 04-1 BCA ¶ 32,481.
- 158/ 94-1 BCA ¶ 26,491.
- 159/ 94-1 BCA ¶ 26,491.
- 160/ The board found that (1) the contractor had not encountered an excusable delay, (2) the contractor had not requested an extension of time, (3) the Government had not denied a timely request for an extension of time, and (4) the contractor had not actually accelerated its work. 94-1 BCA ¶ 26,491.
- 161/ 94-1 BCA ¶ 26,491.
- 162/ 94-1 BCA ¶ 26,491.
- 163/ 94-1 BCA ¶ 26,491. Two paragraphs prior, however, the board made some effort to allocate delays noting: "During the 21-day period when Hemphill was unable to burn, it otherwise performed work on only nine days (including one weekend day). Seven days were lost to rain or wet conditions, but the record does not disclose whether the conditions on those days constituted 'unusually severe weather,' and there is no indication whether or not burning or any other work could have been accomplished on those days. On five weekend days, Hemphill simply decided not to work—a policy that continued throughout the contract term." 94-1 BCA ¶ 26,491.
- 164/ *Acme Process Equip. v. United States*, 171 Ct. Cl. 324, 347 F.2d 509 (1965), *rev'd on other grounds*, 385 U.S. 138, 87 S. Ct. 350 (1966), *reh'g denied*, 385 U.S. 1032, 87 S. Ct. 738 (1967).
- 165/ 94-1 BCA ¶ 26,491 (emphasis added).
- 166/ The board in *R.J. Lanthier Co., Inc* adopted the logic of the *Hemphill* holding without adding to the substantive analysis. See *R.J. Lanthier Co., ASBCA No. 51636*, 04-1 BCA ¶ 32,481.
- 167/ See also *United Constructors, LLC v. United States*, 95 Fed. Cl. 26 (2010) (citing the decision in *Hemphill Contracting* but holding on the facts of that case that no concurrent delay existed and therefore not resolving the issue).

- 168/** Kingston Bituminous Prods. Co., ASBCA No. 9964 et al., 67-2 BCA ¶ 6,638.
- 169/** 67-2 BCA ¶ 6,638.
- 170/** 67-2 BCA ¶ 6,638 (citations omitted); see also Metro-Tel, Div. of Grow Corp., ASBCA No. 8471, 1964 BCA ¶ 4164 (delay claim).
- 171/** 67-2 BCA ¶ 6,638.
- 172/** 67-2 BCA ¶ 6,638.
- 173/** 67-2 BCA ¶ 6,638.
- 174/** See, e.g., Essential Constr. Co. & Himount Constructors, Ltd., Joint Venture, ASBCA No. 18706, 83-2 BCA ¶ 16,906 (interpreting Kingston Bituminous Products to hold that concurrency disposed of the acceleration claim saying, "that case involved a claim of constructive acceleration where there were delays determined to be chargeable to the appellant, and recovery was denied because any delay by respondent would have been concurrent with those delays.")
- 175/** Koppers-Clough, ASBCA No. 12485 et al., 71-2 BCA ¶ 8,920.
- 176/** 71-2 BCA ¶ 8,920.
- 177/** 71-2 BCA ¶ 8,920.
- 178/** 71-2 BCA ¶ 8,920.
- 179/** 71-2 BCA ¶ 8,920.
- 180/** 71-2 BCA ¶ 8,920.
- 181/** 71-2 BCA ¶ 8,920.
- 182/** 71-2 BCA ¶ 8,920.
- 183/** Fischbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300.
- 184/** See Fischbach & Moore Int'l Corp., ASBCA No. 14216, 71-1 BCA ¶ 8775, aff'd on recons., 71-2 BCA ¶ 9081.
- 185/** 77-1 BCA ¶ 12,300 (citations omitted).
- 186/** 77-1 BCA ¶ 12,300.
- 187/** 77-1 BCA ¶ 12,300.
- 188/** 77-1 BCA ¶ 12,300.
- 189/** 77-1 BCA ¶ 12,300.
- 190/** 77-1 BCA ¶ 12,300 (emphasis added).
- 191/** Essential Constr. Co. & Himount Constructors, Ltd., Joint Venture. ASBCA No. 18706, 83-2 BCA ¶ 16,906.
- 192/** Utley-James, Inc., GSBCA No. 5370, 85-1 BCA ¶ 17,816.
- 193/** 83-2 BCA ¶ 16,906.
- 194/** 83-2 BCA ¶ 16,906.
- 195/** 83-2 BCA ¶ 16,906.
- 196/** 83-2 BCA ¶ 16,906 (citation omitted).
- 197/** 83-2 BCA ¶ 16,906.
- 198/** Essential Constr. Co. & Himount Constructors Ltd., Joint Venture, ASBCA No. 18706, 89-2 BCA ¶ 21,632.
- 199/** 89-2 BCA ¶ 21,632.
- 200/** 89-2 BCA ¶ 21,632.
- 201/** Lovering-Johnson, Inc., ASBCA No. 53902, 06-1 BCA ¶ 33,126.
- 202/** 06-1 BCA ¶ 33,126.
- 203/** 06-1 BCA ¶ 33,126.
- 204/** Morganti Nat'l, Inc. v. United States, 49 Fed. Cl. 110 (2001).
- 205/** Fraser Constr. Co. v. United States, 384 F.3d 1354, 1361 (Fed Cir. 2004).
- 206/** 06-1 ¶ 33,126; see also Contel Advanced Sys., Inc., ASBCA No. 49075, 04-2 BCA ¶ 32,664.
- 207/** 06-1 ¶ 33,126; see also Curry Contracting Co., ASBCA No. 53716, 06-1 BCA ¶ 33,24 (also confusing excusable and compensable delay).
- 208/** See 06-1 ¶ 33,126.
- 209/** See also Performance Constr., Inc., ASBCA No. 53575, 05-2 BCA ¶ 33,027.
- 210/** See, e.g., Olson Plumbing & Heating Co. v. United States, 221 Ct. Cl. 197, 204-05 (Ct. Cl. 1979); A.B.G. Instrument & Eng'g, Inc. v. United States, 219 Ct. Cl. 381, 593 F.2d 394 (1979); DeVito v. United States, 188 Ct. Cl. 979, 990 (1969); Panoramic Studios, Inc. v. United States, 188 Ct. Cl. 1092, 1095, 413 F.2d 1156, 1157 (1969); Acme Process Equip. Co. v. United States, 171 Ct. Cl. 324, 347 F.2d 509 (1965), rev'd on other grounds, 385 U.S. 138 (1966); Dallas-Fort Worth Reg'l Airport

- Bd. v. Combustion Equip. Assocs., Inc.*, 623 F.2d 1032 (5th Cir. 1980).
- 211/** See, e.g., *Martin Constr., Inc. v. United States*, 102 Fed. Cl. 562 (2011) (“The Corps cannot reserve default termination rights while also inducing the contractor to continue performance.”); *Acme Process Equip. Co. v. United States*, 171 Ct. Cl. 324 (1965), rev’d on other grounds, 385 U.S. 138 (1966) (waiver found where Government failed to reserve rights and did not act on any rights reserve and did not assert for over a year after learning of default basis); *All-State Constr., Inc.*, ASBCA No. 50513 et al., 04-2 BCA ¶ 32,711 (issuance of design changes one year after contract completion date amounted to waiver); *John S. Vayanos Contracting Co.*, PSBCA No. 2070, 88-2 BBCA ¶ 20,627 (no waiver found despite failure to terminate the work until approximately 10 months after the completion dates had passed); *Overhead Elec. Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026 (“We conclude that the Government, having permitted the completion date to expire without action, and never having established unilaterally or by mutual agreement, a new contract completion date waived the contract completion date and could not terminate appellant’s right to proceed with contract performance because of its failure to have met the amended but waived completion date.”).
- 212/** *Florida v. United States*, 81 F.3d 1093, 1096 (Fed. Cir. 1996) (quoting *Olson Plumbing & Heating Co. v. United States*, 221 Ct. Cl. 197, 602 F.2d 950, 955 (Ct. Cl. 1979)) (citations omitted) (rejecting the contractor’s waiver argument).
- 213/** See, e.g., *Restatement (Second) of Contracts* § 229, cmt. c (discussing waiver and forfeiture); 5 *Williston, Contracts* § 683; see also *Nat’l Westminster Bank v. Ross*, 130 B.R. 656, 675 (S.D.N.Y. 1991) (“where a party to an agreement has actual knowledge of another party’s breach and continues to perform under and accepts the benefits of the contract, such continuing performance constitutes a waiver of the breach”); accord *Martin Constr., Inc. v. United States*, 102 Fed. Cl. 562 (2011) (“The [Government] cannot reserve default termination rights while also inducing the contractor to continue performance.”); *Technocratica*, ASBCA No. 47995 et al., 06-2 BCA ¶ 33,316 (“Where a performance date has passed and the contract has not been terminated for default within a reasonable time, time does not again become “of the essence” until the government issues a notice that sets a new time for performance, which is both specific and reasonable from the standpoint of the performance capabilities of the contractor at the time notice is given.”); *B.V. Constr., Inc.*, ASBCA No. 47766 et al., 04-1 BCA ¶ 32,604 (“[A]fter waiving a contract completion date, the government cannot terminate a contract for default based upon a contractor’s failure to make progress with, or complete, the contract work unless it either reaches agreement with the contractor on a new completion date or establishes by specific notice a new completion date, which is reasonable based on the contractor’s performance capabilities at the time that date is established.”).
- 214/** See *McDonnell Douglas Corp. v. United States*, 76 Fed. Cl. 385 (2007) (discussing circumstance where Government bilateral efforts to set revised completion date failed, and court found no waiver).
- 215/** *DeVito v. United States*, 188 Ct. Cl. 979 (1969).
- 216/** 188 Ct. Cl. at 983.
- 217/** 188 Ct. Cl. at 983.
- 218/** 188 Ct. Cl. at 990.
- 219/** 188 Ct. Cl. at 990.
- 220/** 188 Ct. Cl. at 990 (citations omitted).
- 221/** 188 Ct. Cl. at 990–91.
- 222/** The court did provide guidance as to how the Government could continue to accept performance, but also reserve the right to seek damages later: “Time is of the essence in any contract containing fixed dates for performance. When a due date has passed and the contract has not been terminated for default within a reasonable time, the inference is created that time is no longer of the essence so long as the constructive election not to terminate continues and the contractor proceeds with performance. The proper way thereafter for time to again become of the essence is for the Government to issue a notice under the Default clause setting a reasonable but specific time for performance on pain of default termination. The election to waive performance remains in force until the time specified in the notice, and thereupon time is reinstated as being of the essence. The notice must set a new time for performance that is both reasonable and specific from the standpoint of the performance capabilities of the contractor at the time the notice is given.” 88 Ct. Cl. at 991–92.
- 223/** 88 Ct. Cl. at 991–92 (1969) (citations omitted); see also *Olson Plumbing & Heating Co. v. United States*, 221 Ct. Cl. 197, 206 (Ct. Cl. 1979) (“Moreover, the Government cannot be said to have waived the due date or to have elected continued performance if the contractor has abandoned performance.”).
- 224/** Generally, time is automatically of the essence with any contract that contains a completion date for performance. See *Empire Energy Mgmt. Sys., Inc. v. Roche*, 362 F.3d 1343, 1354 (Fed. Cir. 2004) (“the existence of a contract deadline itself establishes that time is of the essence”). But see *Madden Phillips Constr., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800 (Tenn. Ct. App. 2009) ((distinguishing provision giving a time or date for completion with a provision or agreement providing that “time is of the essence”).
- 225/** See, e.g., *Madden Phillips Constr., Inc.*, 315 S.W.3d at 822 (“If there is no agreed date for completion, courts may imply a reasonable time for performance.”).
- 226/** *RDP Royal Palm Motel, L.P. ex rel. PADC Hospitality Corp. I v. Clark Constr. Grp., Inc.*, 168 F. App’x 348, 354 (11th Cir. 2006).
- 227/** 168 F. App’x at 353.
- 228/** *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1019 (Fed. Cir. 2003); see also *Technocratica*, ASBCA No. 47992 et al., 06-2 BCA ¶ 33,316; *Dods, Inc.*, ASBCA No. 57667, 13-1 BCA ¶ 35,203.
- 229/** *Technocratica*, 06-2 BCA ¶ 33,316.