Delay Damages

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Topics

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2. The importance of distinguishing between Delay and Disruption Damages in a claim, particularly in relation to an otherwise enforceable No-Damages-for-Delay provision
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1. The Distinction between Delay and Disruption Damages

Delay and Disruption (Contractor)

In Bell BCI Co. v. United States, 81 Fed. Cl. 617 (2008), the Court described the distinction between a delay and disruption claim:

"As the Court noted in its earlier opinion in this case, there is a distinction in the law between: (1) a 'delay' claim; and (2) a 'disruption' or 'cumulative impact' claim. The Court described the difference as follows:

Although the two claim types often arise together in the same project, a 'delay' claim captures the time and cost of not being able to work, while a 'disruption' claim captures the cost of working less efficiently than planned."

Delay and Disruption (Contractor)

- Delay = “time and cost of not being able to work”
  - Demonstration of entitlement to additional time, typically requiring critical path method analysis (CPM)
  - Time-related variable costs and damages such as extended general conditions, unallocated home office overhead, escalation, idle equipment, acceleration/mitigation costs, etc.
- Disruption = “cost of working less efficiently than planned”
  - May or may not be related to delay or acceleration/mitigation
  - Additional costs and damages are primarily related to reduced labor productivity and associated labor support resources

2. The importance of distinguishing between Delay and Disruption Damages in a claim, particularly in relation to an otherwise enforceable No-Damages-for-Delay provision

Disruption and No-Damages-for-Delay Provisions

- Disruption Damages may occur in the absence of a "delay" which extends the period of performance
- This can be related to a scope change, a differing condition or other cause that alters the method or sequence of performance and reduces efficiency resulting in additional performance costs. It may also be a result of conditions resulting from acceleration or compression of the work.

Disruption and No-Damages-for-Delay Provisions

- Disruption damages often “look” like “delay” damages, including lost labor productivity and the related support resources such as additional equipment costs, additional supervision and the allocation of general conditions to the “additional” labor required by the lower efficiency.
- The use of a No-Damages-for-Delay provision in defense against a legitimate non-delay disruption claim often blurs the distinction between delay and disruption claims, sometimes intentionally, sometimes as a result of confusion; therefore the claimant must make a clear distinction

3. Delay Damages and Concurrent Delay

Delay Damages and Concurrent Delay

- This issue is related to compensable delay entitlement
- The issue often arises simply due to a difference in definition between the common understanding of events occurring concurrently and the definitional use of concurrent delay in CPM schedule analysis
- However, even when the parties are correctly using the term in the context of CPM analysis there are issues and complexities

Delay Damages and Concurrent Delay

- AACE® International Recommended Practice No. 29R-03 (2011) FORENSIC SCHEDULE ANALYSIS
  - In the absence of any contractual language or other agreements, the conventional rule governing compensability is that the claimant must first account for concurrent delays in quantifying the delay duration to which compensation applies. That is, the contractor is barred from recovering delay damages to the extent that concurrent contractor-caused delays offset owner-caused delays, and the owner is barred from recovering liquidated/stipulated or actual delay damages to the extent that concurrent owner-caused delays offset contractor-caused delays.

Delay Damages and Concurrent Delay

- What is a Concurrent delay?
- AACE® 29R-03 (2011) - Pre-Requisite Findings Concerning the Delays Being Evaluated for Concurrency;
  - Before evaluation of concurrency, there must be:
  1. Two or More Delays that are Unrelated, Independent and would have delayed the project even if the other delay did not exist;
  2. Two or More Delays that are the Contractual Responsibility of Different Parties;
  3. The Delay Must be Involuntary (Pacing); and
  4. The Delay Must be Substantial and Not Easily Curable.

Delay Damages and Concurrent Delay - Pacing

- The concept of pacing delays and the natural reluctance to “hurry up and wait”, has long been recognized in the industry.
- In 1974, Wickwire & Smith specifically identified the issue in The Use of Critical Path Method Techniques in Contract Claims, 7 Pub. Contract L.J. 1 (1974), which specifically noted the natural reluctance of a contractor to “hurry up and wait”,
- Wickwire noted this concept as well in the article Use of Critical Path Method Techniques in Contract Claims: Issues and Developments, 1974 to 1988, 18 Pub. Contract L.J. 338,381 (1989) which stated:
  - “In Utley-James, Inc. the GSA Board demonstrated a willingness to apportion or discriminate between concurrent delays to determine the actual delays to the critical path. The Board specified the finder of fact should not assess the contractor with responsibility for delays which would not have affected the critical path. Such delays fall within the category of “why hurry up and wait.”

Delay Damages and Concurrent Delay - Pacing

- The Wickwire article was also cited in MCI Constructors, Inc. D.C.C.A.B. No. D-924, 1996 WL 331212, where the Board stated:
  - **“The board agrees with MCI that the delays attributed to MCI by the District were not critical path delays and generally come within the category of "why hurry up and wait."** For explanation, see J. Wickwire, et al., Critical Path Method Techniques in Contract Claims: Issues and Developments, 1974 to 1988, 18 PUB. CONTRACT L.J. 338, 381 (1989), which states **"[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 project completion."** See also Utley-James, Inc., GSBCA No. 5370, 85-1 BCA p 17,816 at 89,109, aff'd, Utley-James, Inc. v. United States, 14 Cl. Ct. 804 (1988). **Although it is clear that MCI completed roofing later than the date called for in the as-planned schedule, and it is true that MCI was having difficulty prodding Fischer & Porter in early 1988 to complete its delivery of instrumentation, the boards conclude that those delays simply did not affect project completion in view of the overriding District-caused critical path delays.”**

4. Delay Damages and the Period of Delay

Delay Damages and the Period of Delay

- General Conditions or Time-Related Jobsite Overhead
- Contractor's often average daily general conditions costs, either as estimated or actual, then apply that average to the extended contract period
- This method may under or overstate the damages incurred
- The general approach to damages is to create a model that most accurately assesses the actual damages incurred
- The damage model is generally dependent on the level of detail contained in the contractor's cost records

Delay Damages and the Period of Delay

- As jobsite overhead may greatly vary over the course of a project, the most accurate model will assess the costs incurred during the actual period of delay rather than the effect of that delay
- Example:
  - A delay during the structural construction period will result in the extension of resources associated with that work
  - The delay period is when the work was actually extended at a time when the daily rate of overhead reflects the equipment and management of the affected work
  - The effect of the delay will be an extension of the end of the project
  - Measurement of the damages based on an overall daily average or of costs incurred during the extended period at the end of the project will likely understate the actual damage incurred

5. Disruption Damages and the calculation of Lost Labor Productivity

Lost Productivity Calculations

- Measured Mile: The comparison of identical work activities in unimpacted and impacted periods
- Industry Standards/Factored Method: Such as MCAA® Labor Estimating Manual – Labor Factors affecting efficiency
- Comparison with Similar Projects and Productivity Analysis: Earned vs. Unearned hours based on a comparison of estimated and actual productivity rates (Bell BCI)
- Modified Total Labor Cost Method: Comparison of adjusted bid and adjusted actual costs