



Time Extension Requests – A Checklist¹

James G. Zack, Jr., CCM, CFCC, FAACEI, FRICS, PMP²

Navigant Consulting, Inc.

Mark A. Sgarlata³

Watt Tieder Hoffar & Fitzgerald®

Joseph S. Guarino⁴

Watt Tieder Hoffar & Fitzgerald®

ABSTRACT – Whether an Agency CM or a CM@Risk, construction managers must learn to analyze and justify their decisions concerning time extension requests. As an Agency CM it is not uncommon for the construction manager to be tasked with the responsibility of receiving, analyzing and recommending a course of action on time extension requests submitted by contractors. As a

¹ The opinions and information provided herein are provided with the understanding that the opinions and information are general in nature, do not relate to any specific project or matter and do not necessarily reflect the official policy or position of Navigant Consulting, Inc. Because each project and matter is unique and professionals may differ in their opinions, the information presented herein should not be construed as being relevant or true for any individual project or matter. Navigant Consulting, Inc. makes no representations or warranties, expressed or implied, and is not responsible for the reader's use of, or reliance upon, this paper, nor any decisions made based on this paper.

² Executive Director, Navigant Construction Forum™, *"The industry's resource for thought leadership and best practices on avoidance and resolution of project disputes globally"*, based in Irvine, CA.

³ Senior Partner, Watt Tieder Hoffar & Fitzgerald®, located in McLean, VA.

⁴ Partner, Watt Tieder Hoffar & Fitzgerald®, located in McLean, VA.



CM@Risk the construction manager may be called upon to submit a time extension request on their own behalf and/or analyze time extension requests submitted by their subcontractors. This paper identifies the tests that have been set forth by the Federal Courts to justify an excusable or compensable time extension. The paper discusses how these rules are applied, whether submitting or analyzing, a time extension request. The paper discusses the rules concerning concurrent delay and how the courts hold the claimant responsible for allocating concurrent delay. Finally, the paper highlights two new court rulings which may be “game changers” concerning delays, time extension requests and defense against liquidated damages.

Introduction

Over the past century the Federal Courts have been crafting tests and rules concerning when and under what circumstances contractors are entitled to time extensions, delay damages and impact costs. Construction managers, whether @Risk or Agency, due to their routine involvement with time extension requests, must know the rules concerning entitlement and justification of such requests. This includes both the rules set forth in the project’s contract documents as well as the rules dictated by various courts

As a CM@Risk, for example, construction managers may be required to prepare and submit a time extension request for themselves when delays arise which impact the project schedule. Further, a CM@Risk has numerous subcontractors and suppliers who may file time extension requests which the CM@Risk must analyzed and address. Many current publicly funded contracts now require that contractors (i.e., CM@Risk), who sponsor a subcontractor or supplier claim to the owner, to “certify” that they have reviewed the claim and

“...have determined in good faith that each such claim is justified hereunder and that the contractor is justified in requesting an increase in



the contract price and/or contract time in the amounts specified in the subcontractor claim.”⁵

A CM@Risk who sponsors a subcontractor delay claim to an owner under this clause will be on record as stating that the subcontractor’s claim is valid. Some have suggested that this is an “admission against the construction manager’s best interest” in the situation where the owner denies the subcontractor time extension request but the subcontractor litigates against the CM@Risk arguing that the construction manager has already acknowledged entitlement to this claim when they certified the claim to the owner.

The other side of this coin is the role that Agency CM’s play in the construction industry. A typical portion of an Agency CM’s scope of work is to receive, analyze and make recommendations to the owner concerning change order requests and claims. Thus, an Agency CM has the contractual duty to analyze time extension requests, based on the terms and conditions of the contract documents and the rules established by the courts and submit a recommendation to the owner. Failure to perform this scope of work properly and professionally could expose both the owner and the construction manager to liability. Therefore, regardless of whether the construction manager is an Agency CM or a CM@Risk, all construction managers must know what tests courts have established concerning justification of time extension requests.

George Sollitt Construction Company v. U.S.⁶

The background of this case is fairly simple. In February 1995 the U.S. Navy issued a contract to the George Sollitt Construction Company (“Sollitt”) to renovate two existing buildings; construct an addition to a third existing building to house a “Ship’s Trainer”; construct a new Pump House; and construct two new “Range Buildings” at the Great

⁵ Exposition Metro Line Construction Authority Design-Build Contract No. XP8902-002, Exposition LRT Project – Phase 2, Los Angeles, California, April 4, 2011.

⁶ 64 Fed. Cl. 229, February 23, 2005.



Lakes Naval Training Center in Illinois. The value of the contract was \$15.5 million. The work of the contract was to start on March 14, 1995 and be completed by May 31, 1996, a period of approximately 14.5 months. Substantial completion of the work was not achieved until September 4, 1996, some 96 days late. Sollitt submitted a claim to the contracting officer in October 1997, which involved requests for both excusable and compensable delay, along with damages arising from alleged extra work. The contracting officer's final decision was issued in December 1998. Subsequently, in December 1999 Sollitt appealed the contracting officer's final decision to the Court of Federal Claims. The trial was held in August 2003 and the Court's decision was issued in February 2005.

The outcome of this case is not particularly relevant to the purpose of this paper. What is relevant, however, is that Judge Lynn J. Bush surveyed Federal Court cases going back to the early 1900's and created an "Index of Legal Issues Presented by the Courts". The case provides a sweeping review of the legal rulings concerning delay, delay damages and impact damages. This paper summarizes the Court's analysis of the rules concerning both excusable and compensable delay.

Rules for Recovery of Delay

Since Sollitt sought both compensable and excusable delay the Court surveyed past decisions concerning both types of delay, starting with compensable delay.

Compensable Delay

- *The government is liable for an equitable adjustment when the government caused delay to the contractor's performance.*



The Court noted that under the standard Suspension of Work clause⁷ the government is liable when they cause a delay to the contractor's work. Citing *Merritt-Chapman & Scott Corp. v. U.S.*⁸ the Court noted that should the contractor's cost increase as a result of government action or inaction which effectively suspends the contractor's work, the Suspension of Work clause provides a remedy. The Court also acknowledged that recovery for compensable delay is allowed for government caused changes, citing *Coley Props. Corp. v. U.S.*⁹, as well as for delays arising from differing site conditions, citing *Baldi Bros. Constructors v. U.S.*¹⁰. However, the Court noted that there still remains the standard three part test required for recovery of an equitable adjustment – "liability, causation, and resultant injury" – citing *Servidone Constr. Corp, v. U.S.*¹¹ and *Wunderlich Contracting Co. v. U.S.*¹².

➤ ***The government's liability is limited to unreasonable delays.***

The Court continued its analysis by noting that the government's liability for delay under the Suspension of Work clause only arises when the delay is unreasonable, citing *John A. Johnson & Sons, Inc. v. U.S.*¹³ The Court noted that only "unreasonable delays" are compensable because there are "...some situations in which the government has a reasonable time to make changes before it becomes liable for delay" citing *Essex Electro Eng'rs, Inc. v. Danzig.*¹⁴ The Court took note of *P.R. Burke Corp. v. U.S.*¹⁵ in which that court stated that whether a government delay is reasonable or unreasonable depends

⁷ 48 C.F.R. § 52.242-14 (2004).

⁸ 429 F.2d 431, 443-44 (Ct. Cl. 1970).

⁹ 593 F.2d 380, 385 (Ct. Cl. 1979).

¹⁰ 50 Fed. Cl. 74, 78-79, 83, 85 (2001).

¹¹ 931 F.2d 860, 861 (Fed. Cir. 1991).

¹² 351 F.2d 956, 968 (Ct. Cl. 1965).

¹³ 180 Ct. Cl. 969, 986 (1967).

¹⁴ 224 F.3d 1283, 1289 (Fed. Cir. 2000).

¹⁵ 277 F.3d 1346, 1360 (Fed. Cir. 2002).



upon the circumstances of the situation.¹⁶ However, the Court noted that delays arising from defective specifications are always unreasonable, citing *Essex Electro v. Eng'rs, Inc. v. Danzig*.¹⁷

- *The government's action or inaction must be the sole proximate cause of the delay.*

The Court noted the general rule that for the government to be liable for a delay, the government's actions must be "the sole proximate cause of the contractor's additional loss, and the contractor would not have been delayed for any other reason during that period" citing *Triax-Pacific v. Stone*¹⁸. The Court noted that the "sole proximate cause" rule is also embodied in the Suspension of Work clause. The Court concluded that even if the government caused an unreasonable delay, the delay will not be compensable if any other factor (not chargeable to the government) caused a delay concurrent with the government caused delay. If there is a concurrent delay, the Court noted that the contractor loses their right to compensable delay under the Suspension of Work clause, as follows.

"...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..."¹⁹

¹⁶ The Court also cited *Tri-Cor, Inc. v. U.S.*, 458 F.2d 112, 131 (Ct. Cl. 1972) and *Specialty Assembling & Packing Co. v. U.S.*, 355 F.2d 554, 565 (Ct. Cl. 1966).

¹⁷ 224 F.3d at 1289.

¹⁸ 958 F.2d 351, 354 (Fed. Cir. 1992) and also citing *Merritt-Chapman & Scott Corp. v. U.S.*, 528 F.2d 1392, 1397 (Ct. Cl. 1976).

¹⁹ 48 C.F.R. § 52.212-12(b) (1994) and 48 C.F.R. § 52.242-14(b) (2004).



➤ *The burden of proof for compensable delay is borne by the contractor.*

Citing *Wilner v. U.S.*²⁰ when a contractor is seeking a compensable delay from the government, the contractor has the burden of proving

1. The extent of the delay;
2. That the sole proximate cause of the delay was the government; and,
3. That the delay harmed the contractor.

The Court also cited *P.J. Dick Inc. v. Principi*²¹ and *CEMS, Inc. v. U.S.*²² stating that in some cases the contractor may have to prove four elements to recover compensable delay, as follows

1. The government delay was unreasonable;
2. The government was the sole proximate cause of the delay;
3. The contractor suffered harm due to the delay; and
4. There was no concurrent contractor delay.

The Court noted that proof of an equitable adjustment for compensable delay is more complicated when both parties have contributed to the delay (i.e., when concurrent delay exists).

➤ *The contractor bears the burden of separating and apportioning concurrent delays.*

In analyzing this issue the Court incorporated a brief discussion of the term “concurrent delay”. It was noted that a definition of concurrent delay is not obvious from contract

²⁰ 24 F.3d 1397, 1401 (Fed. Cir. 1994).

²¹ 324 F.3d 1364, 1374-75 (Fed. Cir. 2003).

²² 59 Fed. Cl. 168, 230 (2003).



law. Relying on *Tyger Constr. Co. v. U.S.*²³ and *Beauchamp Constr. Co. v. U.S.*²⁴ the Court commented that concurrent delay affects the same “delay period” and noted that when both parties contributed to the delay “...by separate and distinct actions” the cost of the delay must be allocated between the parties. The Court cited *T. Brown Constructors, Inc. v. Pena*²⁵, which also cited *Coath & Goss, Inc. v. U.S.*²⁶, and stated that the general rule barring recovery of government caused delay when there was a concurrent delay caused by the contractor does permit recovery when “clear apportionment” of the delay to each party has been performed. Citing *William F. Klingensmith, Inc. v. U.S.*²⁷ the contractor as the claimant, has the burden of apportioning the delay between the parties. (**Note:** While most contractors believe that concurrent delay is a defense raised by owners – and thus the burden falls on the owner to prove concurrent delay – some courts have ruled that the contractor has the burden of [1] proving there was no concurrent delay or [2] apportioning the concurrent delay between the parties, in order to justify a compensable delay.) Relying on *Blinderman Constr. Co. v. U.S.*²⁸ the Court concluded that generally recovery will be denied when delays are “concurrent or intertwined” and the contractor has not separated its delays from those caused by the government.

- *The contractor must prove the extent of the government caused delay, and its increased costs, to prove its injury.*

Citing *Servidone*²⁹ and *Wilner*³⁰, the Court stated that a contractor claiming compensable delay must first prove the extent of the unreasonable delay caused by the government

²³ 31 Fed. Cl. 177, 259 (1994).

²⁴ 14 Cl. Ct. 430, 437 (1988).

²⁵ 132 F.3d 724, 734 (Fed. Cir. 1997).

²⁶ 101 Ct. Cl. 702, 715 (1944).

²⁷ 731 F.2d 805, 809 (Fed. Cir. 1984).

²⁸ 695 F.2d 552, 559 (Fed. Cir. 1982).

²⁹ 931 F.2d at 861.

³⁰ 24 F.3d at 1401.



(i.e., how many days of delay resulted from the event). Relying upon *Johnson & Sons*³¹ and *Wilner*³² the Court stated that the contractor then must prove that the delay caused the contractor to incur additional cost as a direct result of the delay for which the government was responsible.

➤ *The increased costs of winter construction may be compensable.*

As Sollitt was claiming increased cost due to winter construction, the Court delved into the issue of recoverability of winter construction costs. The Court noted that as far back as 1909, in *Owen v. U.S.*³³, the Court of Claims recognized that winter construction brought with it increased costs. Relying on a string of cases, including *J.D. Hedin Constr. Co. v. U.S.*³⁴, *Owen*³⁵, *Youngdale & Sons, Constr. Co. v. U.S.*,³⁶ and *Am. Line Builders, Inc. v. U.S.*³⁷ the Court discussed the recoverability of winter construction costs brought about by government caused delay including additional costs and loss of labor productivity. The Court went on to note, however, that the recovery of winter construction costs rests entirely upon the contractor proving that, but for the government's delay, the work would have been completed prior to the onset of winter, citing *Kit-San-Azusa, J.V. v. U.S.*³⁸ If the contractor cannot prove this critical element of the claim, such costs will be not be recoverable.

➤ *The increased costs of winter work must be apportioned for concurrent delays.*

The Court noted that if a contractor is seeking to recover winter weather construction costs in a situation where concurrent delay exists, in addition to apportioning the

³¹ 180 Ct. Cl. at 986.

³² 24 F.3d at 1401.

³³ 44 Ct. Cl. 440, 445 (1909).

³⁴ 347 F.2d 235, 256 (Ct. Cl. 1965).

³⁵ 44 Ct. Cl. at 445-46.

³⁶ 27 Fed. Cl. 516, 547, 557 (1993).

³⁷ 26 Cl. Ct. 1155, 1211-12 (1992).

³⁸ 32 Fed. Cl. 647, 656 (1995).



concurrent delay, the contractor is required to apportion the increased costs resulting from winter weather work, citing *Luria Bros. & Co. v. U.S.*³⁹ and *Chaney & James Constr. Co. v. U.S.*⁴⁰ The Court opined that apportionment of the claims costs will be dependent upon the amount of the government's portion of the concurrent delay.

- ***When establishing the extent of government caused delay to project completion, the contractor bears the burden of proving critical path delays.***

The Court relied upon a number of cases – including *Kinetic Builders, Inc. v. Peters*⁴¹, *Essex Electro*⁴², and *Sauer Inc. v. Danzig*⁴³, *Wilner*⁴⁴, *G.M. Shupe, Inc. v. U.S.*⁴⁵ and *PCL Constr. Servs., Inc. v. U.S.*⁴⁶ to make the point that to recover compensable delay the contractor must demonstrate that the government's actions impacted the critical path of the project schedule. In this regard, the Court reached back to *Haney v. U.S.*⁴⁷ for the definition of the term "critical path" as set forth by the U.S. Court of Claims:

"Essentially, the critical path method is an efficient way of organizing and scheduling a complex project which consists of numerous interrelated separate small projects. Each subproject is identified and classified as to the duration and precedence of the work ... The data is then analyzed, usually by computer, to determine the most efficient schedule for the entire project. Many subprojects may be performed at any time within a given period. However, some items of work are given no leeway and must be performed on schedule; otherwise, the entire project will be

³⁹ 177 Ct. Cl. 676 (1966).

⁴⁰ 421 F.2d 728, 739 (Ct. Cl. 1970).

⁴¹ 226 F.3d 1307, 1317 (Fed. Cir. 2000).

⁴² 224 Fed.3d at 1295-96.

⁴³ 224 Fed.3d 1340, 1345-46 (Fed. Cir. 2000).

⁴⁴ 24 Fed.3d at 1399.

⁴⁵ 5 Cl. Ct. 662, 728 (1984).

⁴⁶ 47 Fed. Cl. 745, 801 (2000).

⁴⁷ 676 F.2d 584, 595 (Ct. Cl. 1982).



delayed. These latter items of work are on the ‘critical path.’ A delay, or acceleration, of work along the critical path will affect the entire project.”

(**Note:** While this discussion is accurate, insofar as it goes, it is too complicated to be considered a good definition. AACE International’s definition – “The longest continuous chain of activities (may be more than one path) which establishes the minimum overall project duration”⁴⁸ is much more concise.)

The Court stated that “...only construction work on the critical path...” impacts the project’s completion date, and thus only critical path analysis can demonstrate the impact of a government caused delay. The Court noted that delays impacting non-critical path activities do not delay the project and therefore, do not justify the recovery of compensable delay, citing *CEMS, Inc.*⁴⁹ and *PCL Constr. Servs., Inc.*⁵⁰ The Court went on to cite the rule set forth in *Hoffman Constr. Co. of Or. v. U.S.*⁵¹

“[W]hen the contract utilizes CPM scheduling, the contractor must prove that the critical path of the work was prolonged in order to prove a delay in project completion.” (Underscoring provided.)

- ***Because the critical path changes over time, critical path schedule updates are needed to analyze delays.***

Citing *Sterling Millwrights, Inc. v. U.S.*⁵² the Court acknowledged that the critical path is dynamic in that activities may drop off the critical path while other activities may be added to the critical path due to changes on a project. As a result accurate CPM

⁴⁸ AACE International’s Recommended Practice (“RP”) 10S-90, Cost Engineering Terminology, Morgantown, W.V., March 5, 2010.

⁴⁹ 59 Fed. Cl. at 233.

⁵⁰ 46 Fed. Cl. 802, 804.

⁵¹ 40 Fed. Cl. 184, 197-98 (1998), *aff’d in part, rev’d in part on other grounds*, 178 F.3d 1313 (Fed. Cir. 1999).

⁵² 26 Cl. Ct. 49, 75 (1992).



updates are required if the contractor wants to use the CPM to analyze and document delay, citing *Fortec Constructors v. U.S.*⁵³. Relying on *Blinderman Constr. Co. v. U.S.*⁵⁴ the Court noted that accurate schedule updates generated during the life of the project are better tools for delay analysis than the baseline schedule.

➤ *The contractor bears the burden of apportioning concurrent critical path delays.*

If concurrent delay has occurred on the project – one delay caused by the government and the other by the contractor – it is up to the contractor (as the claimant) to apportion the concurrent delay in order to recover delay damages. The Court cited *Blinderman*⁵⁵, *Avedon Corp. v. U.S.*⁵⁶, and *Klingensmith*⁵⁷ when noting that courts will deny recovery to a contractor when delays on the project are concurrent but the contractor did not segregate their delay from the government's delay. Citing *Kelso v. Kirk Bros. Mech. Contractors, Inc.*⁵⁸ the Court noted that since delays not on the critical path do not cause project delay an accurate critical path analysis is essential to determine concurrent delay. Relying on the rule set forth in *Mega Constr. Co. v. U.S.*⁵⁹ the Court stated that the contractor seeking recovery of compensable delay must "...disentangle its delay from those allegedly caused by the government..." and prove that the both delays impacted the project's critical path. (**Note:** This is the Court's way of restating the rule that for a delay to be concurrent, one element of required proof is for the contractor to demonstrate that either delay event, on its own, would have impacted the critical path and thus delayed the project.)

⁵³ 8 Cl. Ct. 490, 505 (1985), *aff'd*, 804 F.2d 141 (Fed. Cir. 1986).

⁵⁴ 39 Fed. Cl. 529 (1997).

⁵⁵ 695 F.2d at 559.

⁵⁶ 15 Cl. Ct. 648, 653 (1988).

⁵⁷ 731 F.2d at 809.

⁵⁸ 16 F.3d 1173, 1177 (Fed. Cir. 1994).

⁵⁹ 29 Fed. Cl. 396, 424 (1993).



- *One type of injury to the contractor from government caused delays to the completion of the project is that of wage increases which would not have occurred during the planned time of performance.*

Sollitt sought compensation for increased labor costs when some activities were delayed, forcing labor into a higher wage rate period. Citing *Luria Bros.*⁶⁰ and *J.D. Hedin*⁶¹ the Court acknowledged such damages may be recoverable in a compensable delay situation. However, relying on *Wilner*⁶² and *Servidone*⁶³ the contractor is obligated to prove the extent of the delay and the damages arising from the delay in order to recover such damages. The contractor must also demonstrate that the activities which incurred the higher labor cost increase would have been completed prior to the increase in wage rates but for the government's delay.

- *The contractor must prove the amount of home office and field office overhead that is related to the government caused delay to project completion.*

Sollitt also claimed extended home and field office overhead costs as a part of their damages submitted to the Court. Relying on the rulings set forth in *West v. All State Boiler, Inc.*⁶⁴ and *Fred R. Comb Co. v. U.S.*⁶⁵ the Court confirmed that extended home office overhead costs are a type of recoverable damage. And, looking to *Luria Bros.*⁶⁶ the Court noted that extended field office overhead costs are likewise recoverable.

⁶⁰ 177 Ct. Cl. at 743, 746.

⁶¹ 347 F.2d at 256.

⁶² 24 F.3d at 1401.

⁶³ 931 F.2d at 861.

⁶⁴ 146 F.3d 1368 (Fed. Cir. 1998).

⁶⁵ 103 Ct. Cl. 174, 184 (1945).

⁶⁶ 177 Ct. Cl. at 741, 746.



- *When the parties stipulate to the daily costs of home office and field office overhead, the contractor must prove the extent of the government caused delay but is relieved of some other elements of proof of its increased costs.*

In *Sollitt* the daily field office and home office overhead costs had been stipulated, apparently in the contract documents. Accordingly, the Court noted:

“Such a stipulation establishes the daily cost of unabsorbed home office overhead costs allocated to the project in question, a figure normally calculated by using what is known as the Eichleay Formula. ... This sort of stipulation also obviates, when it is accompanied by proof of entitlement to delay damages ... the requirement for ‘separate proof of entitlement to Eichleay damages’ ... if the stipulation predicates stipulated damages solely on liability under [the contract]...”

The Court also observed that “...the daily costs of field office overhead have been established by the stipulation of the parties.” Again, this was apparently done in the contract documents. The Court went on to discuss how damages are calculated in such situations. Referring to *All State Boiler*⁶⁷ the Court noted that the simple multiplication of the number of days of compensable delay times the value of a day of home office and/or field office overhead is used to arrive at the compensation owed. However, the Court also referred to *Luria Bros.*⁶⁸ and stated that in cases involving concurrent delay, just as the courts require apportionment of delay between the contractor and the government, the extended overhead costs owed must be apportioned in the same percentage as that of the delay caused by the government. In a footnote to the *Sollitt* decision, the Court offered an alternative formula for compensating the contractor for government caused delay when there is concurrent delay. The Court suggested that when the government causes more delay days to the critical path than the contractor, then one could subtract the contractor caused delay days from the government caused

⁶⁷ 146 F.3d 1371, 1382.

⁶⁸ 177 Ct. Cl. at 740, 746.



unreasonable delay days and multiply the remainder by the stipulated daily overhead cost.

- *When multiple delays by one party are concurrent with each other, that party's delays must be analyzed to ensure that the overall effect of these multiple delays is correctly attributed to that party.*

The Court then addressed the issue of how to handle multiple delays by the government when the contractor also caused multiple delays concurrently. Citing *Essex Electro*⁶⁹ the Court concluded that they first have to examine the delays caused only by one party to make certain that the concurrent delays alleged are not double counted. Then, the Court stated, they would have to apportion the overall critical path concurrent delays from each party to determine the contractor's entitlement to compensable delay. The Court stated that

"...this approach of comparing one party's overall delays with the other party's overall delays is more reliable than checking each delay from one party against a possible concurrent delay from the other party for a series of subtotal periods of entitlement."

The Court went on to state that "...accurate and updated CPM ... schedules are essential tools in the court's concurrent delay analysis." And, relying upon *Blinderman*,⁷⁰ the Court stated

"...the only way to accurately assess the effect of the delays alleged ... on the ... project's progress is to contrast updated CPM schedules prepared immediately before and immediately after each purported delay."

⁶⁹ 224 F.3d at 1296.

⁷⁰ 39 Fed. Cl. at 585.



Excusable Delay

In addition to compensable delay, Sollitt also claimed excusable delay, apparently in order to avoid the assessment of liquidated damages by the government. Therefore, the Court addressed two additional rules governing the analysis and proof required with respect to excusable delay in the following manner.

- *The government has the initial burden of showing late completion, and the contractor then has the burden to show that the delay was excusable.*

The Court noted, in keeping with *PCL Constr. Servs., Inc. v. U.S.*⁷¹ that when the government is assessing liquidated damages, the government must first bear the burden of proving that the work of the contract was not substantially completed by the contract completion date and that the period for which the liquidated damages is being assessed is appropriate. Once the government meets their burden of proof, the contractor has the burden of proving any excusable delays (not already granted under the contract) and that the assessment of liquidated damages should be reduced, in whole or in part. Citing *Schmoll v. U.S.*⁷² and *Levering & Garrigues Co. v. U.S.*⁷³ the Court noted that when the government prevents the contractor from completing work on time, the contractor is relieved of his obligation to complete work on time and is also relieved of the obligation to pay liquidated damages. Continuing with their discussion of excusable delay, the Court noted that when the delay is caused by government “...action or inaction...” there is some controversy as to whether liquidated damages are void entirely or reduced consistent with an apportionment of the delay. Citing *R.P. Wallace, Inc. v. U.S.*⁷⁴ the Court noted that some cases have been decided in favor of

⁷¹ 53 Fed. Cl. 479, 484 (2002), *aff’d*, 96 Fed. Appx. 672 (Fed. Cir. 2004).

⁷² 91 Ct. Cl. 1, 28 (1940).

⁷³ 73 Ct. Cl. 566, 578 (1932).

⁷⁴ 63 Fed.Cl. 402, 413 (2004).



apportionment of liquidated damages whereas other cases, pointing to *PCL Constr. Servs.*⁷⁵, have stated that the issue of apportionment of liquidated damages is unsettled.

- *When the government has caused part of the delay to project completion, liquidated damages are either waived or the liquidated damages may be apportioned.*

The Court noted that the rule against apportionment of liquidated damages, when the government has contributed, at least in part, to the project delay stems from *U.S. v. United Eng'g & Constructing Co.*⁷⁶. That court stated in 1914 that when the government contributes to a portion of the project delay "...the rule of the original contract cannot be insisted upon, and the liquidated damages measured thereby are waived." The Court noted that the waiver of liquidated damages rule has been upheld in both the United States Court of Claims and United States Claims Court cases, referring to *Acme Process Equip. Co. v. U.S.*⁷⁷ and referencing the list of cases upholding this rule cited in *PCL Constr. Servs.*⁷⁸ The Court also noted that the rule "...has been criticized and ignored in other cases..." referring to *R.P. Wallace*⁷⁹ and again noting the list of cases ignoring this rule cited in *PCL Constr. Servs.*⁸⁰

The Court went on to discuss cases which ignored the waiver rule from *United Eng'g* including *William F. Klingensmith, Inc.*⁸¹, *Karcher Envtl., Inc.*⁸², and *Sauer*⁸³. Further, the Court cited some relatively recent cases that acknowledged and applied the rule of

⁷⁵ 53 Fed. Cl. at 486.

⁷⁶ 234 U.S. 236 (1914).

⁷⁷ 347 F.2d 509 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966).

⁷⁸ 53 Fed. Cl. at 485.

⁷⁹ 63 Fed. Cl. at 410-413.

⁸⁰ 53 Fed. Cl. at 485-486 (listing cases).

⁸¹ ASBCA No. 52028, 03-1 B.C.A. (CCH) ¶ 32,072 (November 15, 2002).

⁸² PSBCA Nos. 4085, 4093, 4282, 02-1 B.C.A. (CCH) ¶ 31,787 (February 21, 2002).

⁸³ 224 F.3d at 1347.



apportionment of liquidated damages including *Neal & Co. v. U.S.*⁸⁴ where that court referred to “...over-withheld liquidated damages...” and returned a portion of the liquidated damages previously withheld by the government. The Court also took note, again, of *R.P. Wallace*⁸⁵ and *Robinson v. U.S.*⁸⁶ which allowed apportionment of liquidated damages as far back as 1923.

Recent Developments

Sollitt was decided by the United States Court of Federal Claims in February, 2005. Subsequently, two additional cases have been decided – one in 2010 and the other in 2011 which may represent “game changers” insofar as some of the rules concerning time extension requests are concerned. These new rulings are the following.

Bad News – *A contractor must file a certified delay claim in order to defend itself against government imposed liquidated damages.*

Five years after *Sollitt* the United States Court of Appeals for the Federal Circuit issued their decision in *M. Maropakis Carpentry, Inc. v. U.S.*⁸⁷ (“Maropakis”). A brief background of the case follows. In 1999 the U.S. Navy issued a contract to Maropakis to replace windows and the roof on a Navy warehouse. The completion date of the contract was set at January 16, 2000 although this date was modified to February 4, 2000 later. The contract also had a liquidated damages clause providing that Maropakis would be liable for \$650 per day for each day of delay beyond the completion date. Maropakis did not commence work until after the specified completion date and did not complete their work until May 17, 2001 – some 467 days after the modified completion date.

⁸⁴ 36 Fed. Cl. 600, 647, 649 (1996).

⁸⁵ 63 Fed. Cl. at 410-13.

⁸⁶ 261 U.S. 486 (1923).

⁸⁷ 609 F.3d 1323 (Fed. Cir. 2010).



Subsequent to completion of the work Maropakis sent a letter to the Navy requesting a 447 day time extension based on five alleged but distinct delay events. Maropakis did not certify their claim as required by the Contract Disputes Act⁸⁸ nor did Maropakis request a Contracting Officer's final decision. Some three months later the Navy responded, stating that Maropakis had not "...present[ed] sufficient justification to warrant the time extension." The Navy rejected the time extension, but invited Maropakis to submit additional information. Ten months later the Navy sent Maropakis another letter reminding them that they had not submitted any additional information. Further, this letter advised Maropakis that in the absence of additional information, the Navy was imposing liquidated damages in the amount of \$650 per day for 467 days of delay, for a total of \$303,550. Approximately one month later Maropakis submitted another letter requesting a time extension for "multiple delays" but only discussed one delay event specifically, for a total of 107 days.

Finally, in December 2002 the Navy issued the Contracting Officer's final decision concerning the assessment of liquidated damages. (Later, at trial, the Navy asserted the position that the final decision in December 2002 only applied to the issue of liquidated damages, and not to Maropakis's delay claim.) Nearly one year later, in December 2003 Maropakis appealed the final decision to the United States Court of Federal Claims. The Navy responded by counterclaiming for the value of the liquidated damages assessed on the project. The Navy also moved to have Maropakis's delay claim dismissed contending that the Court of Federal Claims did not have jurisdiction over Maropakis's claim as Maropakis "... had not submitted a 'claim' for contract modification as required under the CDA [Contract Disputes Act]." The Court agreed with the Navy's position dismissing Maropakis' claim for lack of jurisdiction and upholding the Navy's claim for liquidated damages.

⁸⁸ 41 U.S.C. § 605.



Maropakis appealed this decision to the United States Court of Appeals for the Federal Circuit contending, in essence, that their letters to the Contracting Office constituted a valid claim for time extension, sufficient to give the Court of Federal Claims jurisdiction over the matter. “Maropakis also argue[d] that even if it was not in technical compliance with the CDA, the United States had actual knowledge of the amount and basis of Maropakis’s claim and therefore the Court of Federal Claims had jurisdiction.” (Note: It appears that Maropakis was attempting to create a “constructive claim” under the Contract Disputes Act.)

The Court of Appeals considered carefully what is required to have a certified claims submitted under the Contract Disputes Act and the necessity for a Contracting Officer’s final decision in order to appeal a denied claim under the Act. The Court concluded that Maropakis did not submit a “certified claim” to the government nor did they receive a “final decision” on their claim. Accordingly, the Court ruled that the Court of Federal Claims acted appropriately in dismissing Maropakis’s claim for lack of jurisdiction.

The Court of Appeals then went on to examine Maropakis’s argument that they should have been allowed to raise their delay claim as a defense against the Navy’s imposition of liquidated damages as their claim presented “factual defenses” against the claimed liquidated damages. The Court analyzed this argument and rejected it. The Court acknowledged that the Navy’s claim for liquidated damages was a government claim that did not require certification under the CDA and further acknowledged that the contracting officer had issued a final decision on the issue of liquidated damages. The Court of Appeals concluded that the Court of Federal Claims was correct in stating they had jurisdiction over the liquidated damages claim.



The Court continued their examination of the issue of whether a contractor has to provide a certified delay claim in order to defend itself against government imposed liquidated damages. Citing *Sun Eagle v. U.S.*⁸⁹ the Court stated:

“This court holds that the plaintiff is challenging a government claim to liquidated damages and making its own contractor claim to recover amounts withheld for liquidated damages. The latter must be certified.” (Underscoring provided.)

The Court also cited *Elgin Builders, Inc. v. U.S.*⁹⁰ wherein that court stated

“...where ... the contractor seeks to contest the assessment of liquidated damages by claiming entitlement to time extensions or other relief, the court is presented with a claim by the contractor against the government and that must first be presented to the CO.” (Underscoring provided.)

The Court of Appeals concluded that

“The statutory language of the CDA is explicit in requiring a contractor to make a valid claim to the contracting officer prior to litigating that claim.

...

Thus, we hold that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action.” (Underscoring provided)

⁸⁹ 23 Cl. Ct. 465, 477 (1991).

⁹⁰ 10 Cl. Ct. 40, 44 (1986).



Therefore, contractors under a Federal contract can no longer count on asserting excusable delay as a defense against government imposed liquidated damages unless the contractor had submitted a certified claim to the contracting officer and the contracting officer had issued a final decision.

Good News – Critical path testimony by an expert is not required to sustain the burden of proof concerning delay and delay damages.

In January, 2011 the 8th Circuit Court of Appeals issued their decision in *The Weitz Company v. M.H. Washington, et al.*⁹¹ (“Weitz” and “Washington”). There were a number of issues in this case but the one issue appropriate for this paper is the issue of whether critical path testimony is required to sustain the burden of proof concerning delay damages?

At issue in this appellate court case was the District Court’s refusal to exclude the testimony of Weitz’s expert (“Brannon”) as unreliable. The Appellate Court reviewed the District’s Court’s ruling concerning this issue. Brannon was the construction engineer retained by Weitz to analyze delay events and establish causation and responsibility on the project. Brannon compared Weitz’s original schedule to contemporaneous updates (defined by the Court as “...events as they actually occurred.”)⁹² The Court termed Brannon’s forensic scheduling method a “... ‘windows analysis,’ which distinguishes activities on the ‘critical path,’ where a delay causes a delay in the overall project, and those activities with ‘float’ time, where a delay does not affect the overall job.”

⁹¹ 631 F.3d 510 (8th Cir. 2011).

⁹² Based on the very brief discussion, from the Court’s decision, concerning the forensic schedule methodology used by Brannon, it appears that Brannon employed Method Implementation Protocol (MIP) 3.2, Observational/Static/Periodic from AACE International’s Recommended Practice (RP) 29R-03 – Forensic Schedule Analysis, 1st Edition, June 25, 2007, Morgantown, W.V.



Washington argued that Brannon’s analysis was unreliable because it allocated most of the work on the project to the critical path based on a baseline schedule (identified as Schedule Z) prepared by Weitz that did not distinguish critical path and float activities. Further, Washington argued that the baseline schedule Brannon used in his forensic analysis was his own creation, contending that this in itself rendered it unreliable as a tool for allocating responsibility for delays. Finally, Washington argued that since Brannon could not identify whether each activity on the schedule was critical or non-critical, his testimony could not be tested or verified and was, therefore, unreliable. Weitz countered with the argument that in Brannon’s experience on similar projects, “near critical path” activities should be analyzed as critical, even though the original baseline schedule indicated some small amount of float associated with some of the activities.

The Court summarized the rules concerning admissibility of experts stating that courts may admit the testimony of a witness whose knowledge, skill, experience, training, and/or education merits expert status if (1) the testimony “...will assist the trier of fact to understand the evidence or to determine a fact in issue⁹³ and (2) the evidence is relevant and reliable⁹⁴. The Court noted that a District Court has wide latitude in determining reliability⁹⁵. The Court noted that if a court is satisfied with the expert’s knowledge, skill, experience, training, or education and the expert’s testimony is reasonably based on that expertise, a court does not abuse its discretion by admitting that testimony. The Court went on to state that a court must exclude expert testimony only if it is so fundamentally unreliable that it does not assist the trier of fact.

The Appellate Court reviewed the District Court’s decision to allow Brannon’s testimony and noted the following:

⁹³ Fed. R. Evid. 702.

⁹⁴ *U.S. v. Eagle*, 515 F.3d 794, 800 (8th Cir. 2008) and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 570, 588-91 (1993).

⁹⁵ *U.S. v. Kenyon*, 481 F.3d 1054, 1061 (8th Cir. 2007).



- There were “some apparent weaknesses” in Brannon’s analysis, but the weaknesses did not rise to the level of making his testimony unreliable;
- Brannon’s report was sufficiently specific to allow Washington to identify specific documents that arguably demonstrated flaws in the delay analysis.
- The District Court distinguished Washington’s quibbles over Brannon’s analysis from a situation where an expert was truly unable to explain the link between the facts and the result.
- Washington’s arguments about which activities should have been excluded from the critical path did not rise to the level of unreliability since, at some point, most construction activities become critical if they are all that is left to complete the work.
- Brannon’s use of Schedule Z (which did not identify critical path activities) to assist in deriving the critical path schedule bears more on the weight of Brannon’s testimony rather than the fundamental reliability of his analysis.
- Finally, the Court cited *Daubert*⁹⁶ noting that “vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”

Based on this reasoning, the Court of Appeals concluded that the District Court did not err in admitting Brannon’s analysis and testimony in the lower court case even though the analysis did not identify critical path activities.

Conclusion

These three court cases provide construction managers with a checklist when preparing a time extension request or reviewing one from a contractor, as follows.

Compensable Delay

⁹⁶ 509 U.S. at 595.



- The government is liable for an equitable adjustment when they cause a delay to the contractor's performance.
- The government's liability is limited to unreasonable delays under the Suspension of Work clause.
- The government's actions or lack of action must be the sole proximate cause of the delay.
- The burden of proving compensable delay falls to the contractor as the claimant.
- The contractor bears the burden of separating and apportioning concurrent delays.
- The contractor must prove the extent of the government's delay and its increased costs in order to recover.
- Increased costs of winter construction may be recoverable; provided that the contractor can demonstrate that but for the governments delay the work would have been completed prior to the winter.
- Increased cost of winter work must be apportioned if there are concurrent delays.
- When demonstrating the extent of the government's delay the contractor bears the burden of proving critical path delays.
- Because the critical path changes over time, critical path schedule updates are needed to analyze delays.



- The contractor bears the burden of apportioning concurrent critical path delays.
- The contractor may recover wage rate increase costs that would not have been incurred but for the government's delay.
- The contractor must prove the amount of home office and field office overhead directly related to the government's delay.
- When the parties stipulate to a daily delay cost the contractor must prove the extent of the government's delay but is relieved of the obligation of proving their increased costs.
- When multiple delays by one party are concurrent with each other, that other party's delays must be analyzed to ensure that the overall effect of these multiple delays is correctly attributed to that party.

Excusable Delay

- The government has the initial burden of showing late completion and the contractor has the burden of showing that the delay was excusable.
- When the government has caused part of the delay to project completion, liquidated damages are either waived or apportioned.

Recent Developments

- A contractor must file a certified delay claim with the contracting officer and obtain the contracting officer's final decision in order to defend itself against government imposed liquidated damages.
- Critical path testimony by an expert may not be required to sustain the burden of proof concerning delay and delay damages.



Knowing these rules should make a construction manager's preparation or review of time extension requests easier.