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Kansas Construction Law: Advanced Issues and Answers

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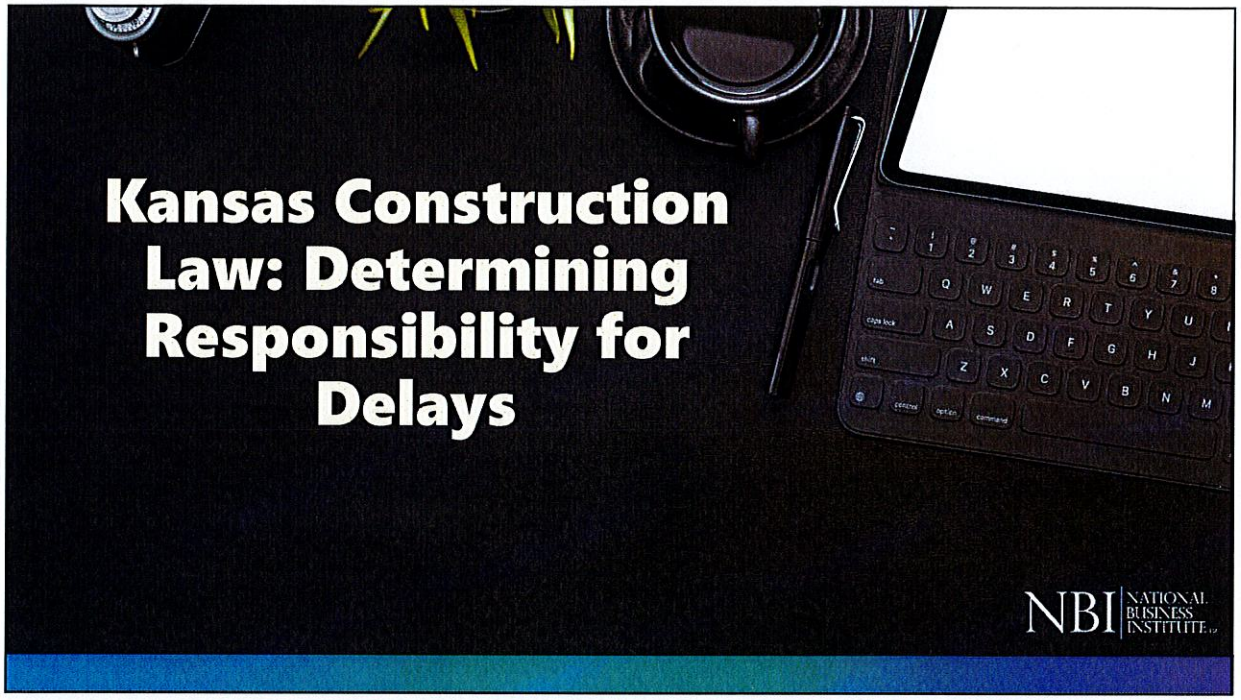
Determining Responsibility and Remedy for Delays

Submitted by Heather F. Shore and Brian Stigler



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Heather has over two decades of experience handling complex construction, commercial and surety matters ranging in value from $1,000 to $121 million, on some of the most recognizable projects in the country. Having an undergraduate degree in business with a minor in Economics, Heather brings a unique perspective to these practice areas.

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Delay Categories

Delay damages are an element of direct damages, and generally fall into one of three categories: (1) excusable and compensable; (2) excusable but not compensable; and (3) not excusable.

- To prove compensable delays, the delay must impact critical path activities on the project schedule.

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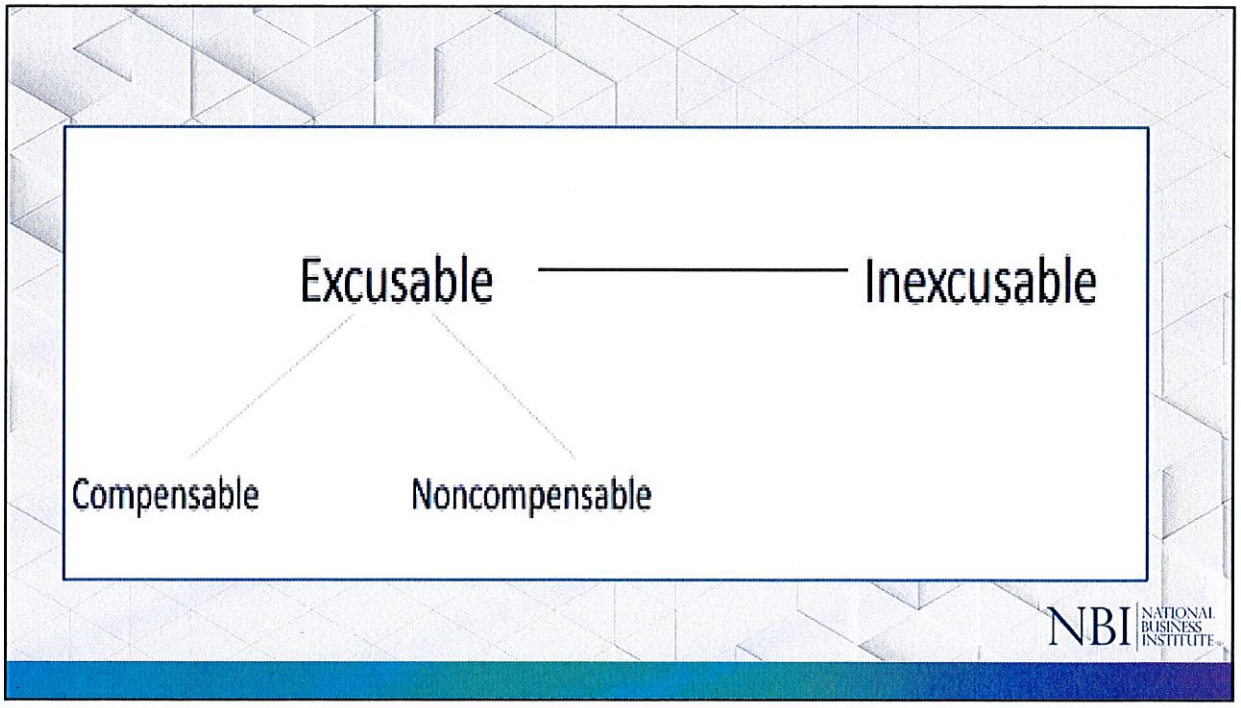

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Non-Excusable v Excusable Delays

Excusable Delays are unforeseeable and beyond the control of the contractor.

Examples: Material changes to or errors in the plans and specifications, failing to timely or completely respond to submittals, requests for information or shop drawings, delaying the process of utility hookup or access, or restricting physical access to the jobsite.

Non-Excusable Delays are foreseeable or within the contractor's control.

Examples: poor supervision of subcontractors, equipment problems or lack of proper equipment, untimely performance by suppliers, inadequately staffed work force, and repairs and rework due faulty workmanship by subcontractors which result in delay.

- The type of delay determines which party is liable and dictates whether a contractor is entitled to a time extension and possibly compensation or is exposed to paying the owner compensation for the delay.

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Critical Path

The longest path through the network of identified and logically sequenced construction activities that establishes the minimum overall project duration." 5 Bruner & O'Conner, On Construction Law, § 15:5 (West 2016).

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Compensable v Non-Compensable Delays

Excusable and non-compensable delays entitle the contractor to a time extension but not to additional monetary compensation.

-both parties assume their own additional costs arising out of the delay.

Example: *force majeure* events, including strikes, wars, Acts of God, Government shutdowns, and other delays that the contractor may not reasonably be able to foresee.

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Force Majeure

"To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determine the parties' intent, rather than resorting to any traditional definition of the term … In other words, when the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of force majeure." *R&B Falcon Drilling Co. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001).

- *To excuse performance based on force majeure the claimant must prove:*
  - -unanticipated triggering event; and
  - -directly caused the delay

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How do I get paid for delays?

Proof the delay was on the critical path is a necessary element to obtaining compensation for the delay.

Examples: A material change in the design or the contract terms; a suspension of work or the schedule; the owner's refusal or inability to provide site access; untimely review of submittals or shop drawings or responses to Requests for Information by the owner's design team; delayed issuance of the notice to proceed; suspensions of work; defective plans and specifications; differing site conditions.

➢Federal Contracts allow for broad recovery with proof of government delay

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Untangling Concurrent Delays

Two or more independent delay events overlap and cause the project network to be delayed for a similar or the same period of time, resulting in concurrent or sequential delays to the critical path of the project.

"…make them believe, that offensive operations, often times, is the surest, if not the only (in some cases) means of defense."
President George Washington, 1799

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Untangling Concurrent Delays

The delay must be involuntary; and

The delayed work must be substantial and not readily curable.

- *Two major functional requirements relating to the relationship between the delays must be proven:*
  - -the delays occurred during or impacted the same time analysis period, and
  - -the delays independently delayed the critical path.

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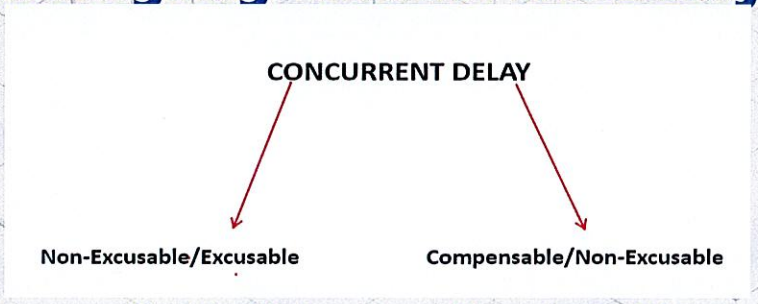
Untangling Concurrent Delays



Owner's compensable delay that concurs with contractor's inexcusable delay offsets each other; neither party would be entitled to monetary compensation, and the only remedy available would be an extension of the time. 5 Bruner & O'Connor on Construction Law § 15:67.

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CPM Schedules

A CPM schedule can be used as a planning and management tool, to graphically present "the planned sequence of activities [and to] show[] the interrelationships and interdependencies of the elements composing a project." James K. Bidgood, Jr., Steven L. Reed & James B. Taylor, Cutting the Knot on Concurrent Delay, Constr. Briefings No. 2008-2 (Feb. 5, 2008).

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CPM Schedules – A Good Defense and Offense

CPM schedules invite a more balanced approach to allocate damages even in cases where there is evidence of concurrent delays to project completion.

- Division of delay damages is possible "when clear apportionment of the delay [and the expense] attributable to each party has been established." *George Sollitt Constr. Co. v. United States,* 64 Fed. Cl. 229, 238 (2005).
- "*Time, but no money.*"

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Untangling Concurrency

- Define the use of CPM schedules in the Contract
- Define the term concurrency in the Contract
- Use generally acceptable CPM methodologies
- Regularly update the CPM schedules
- Document, document, document!

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Documentation

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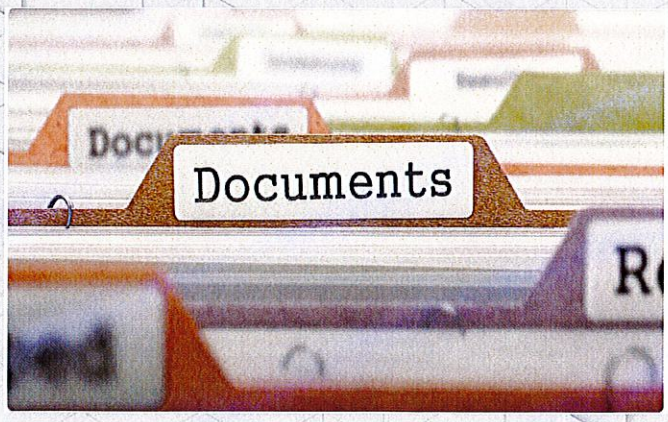

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Documentation

A contractor has the right to demand sufficient backup documentation prior to submitting the claim to an owner. *In re Central States Mechanical, Inc.*, Case No. 09-12542, 2011 WL 1637991 (Bankr. D. Kan. Apr. 29, 2011) (collecting cases); *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. App. 2014).

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Documentation

Notice Requirements:

- *KS* - A claim may invalid without proper notice and other documentation. *Razorback Contractors of Kansas, Inc. v. Board of County Com'rs of Johnson County*, 43 Kan.App.2d 527, 227 P.3d 29 (2010).
- *MO* – A subcontract requiring all change orders to be authorized in writing can be waived based on commercial practice/waiver." *Brockman v. Soltysiak*, 49 S.W.3d 740, 745 (Mo. App. 2001).

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Recovery Schedules

A recovery schedule is not the same as a revised schedule. A revised schedule is submitted by the contractor once it is clear that the original project schedule cannot be achieved. The revised schedule becomes the new baseline schedule.

- Acceleration.
  - *Directed Acceleration*
  - *Constructive Acceleration.*

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No Damage for Delay Clauses

Address whether the contractor has a right to adjust the contract price after encountering delays at the projects, under various conditions and as a result of one or more potential causes.

- In most states, no damages for delay clauses are enforceable on private projects, so long a they are knowingly made and clearly drafted.
- *MO:* void as against public policy on public projects, except for contracts with the Missouri Department of Transportation (public works projects).
- *KS & CO*: void on public projects – K.S.A. § 16-1907 (KS); C.R.S. § 24-91-103.5(1) (CO).

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No Damage for Delay Clauses

Example:

"In the event the Contractor is delayed in the prosecution of its work by any act or omission to act of the Owner or its representatives, the Contractor agrees to make no claim for damages for delay in the performance of the Contract, and agrees that any such claim shall be fully compensated by an extension of time to complete performance of the delayed work."

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No Damage for Delay Clauses

Potential Exclusions:

- Delays caused by active Interference by Owner.
- Delays not within the contemplation of the parties.
- Delays so unreasonable that they constitute abandonment of the Contract.
- Delays resulting from breach of a fundamental obligation of the Owner.

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III. Determining Responsibility and Remedy for Delays[1]

A. Non-Excusable Delays vs Excusable Delays.

Delay damages are an element of direct damages. A delayed project can have a severe economic impact on the contractor by way of extended general conditions and home office overhead, overtime, idle labor and equipment costs, escalated labor and material costs, and other impacts. The discussion of delays and of determining whether a party is entitled to damages for those delays, typically starts with analyzing whether the delay is excusable or non-excusable.

Excusable Delays are delays that are unforeseeable and beyond the control of the contractor. Non-Excusable Delays are delays that are foreseeable or within the contractor's control. Obviously, the distinction between these two is significant in that it determines which party is liable for the delay, and dictates whether a contractor is entitled to a time extension and possibly compensation or is exposed to paying the owner compensation for the delay. The contractor is typically required to maintain some form of reliable schedules if the parties desire to hold one another accountable for delays and ultimately determine the party responsible for the delays.

"Delays generally fall into one of three categories: (1) excusable and compensable; (2) excusable but not compensable; and (3) not excusable." W. Stephen Dale & Kathryn T. Muldoon, *A Government Windfall: ASBCA's Attack on Concurrent Delays as a Basis for construction*

[1] A huge thanks to Mike Barzee, Esq., Shareholder of Shaffer Lombardo Shurin, PC, who contributed many hours to the legal analysis and case law cited in this paper.

Acceleration, PROCUREMENT LAW, Summer 2009, at 4. As a general rule, in order for a delay to provide the basis for a claim for additional time or money, the delay must impact critical path activities on the project schedule. The term critical path means "the longest path through the network of identified and logically sequenced construction activities that establishes the minimum overall project duration." 5 BRUNER & O'CONNER, ON CONSTRUCTION LAW, § 15:5 (West 2016). Most well-drafted construction contracts address the critical path concept with detailed terms and specific language on how to deal with time and compensation for critical delays which are material to the timely completion of the project, as discussed in more detail below.

1. Non-Excusable Delays.

Non-excusable, or sometimes referred to as inexcusable delays, are caused by or are within the control of the contractor or its subcontractors. Contractor-caused delays typically entitle the owner to recover damages or to terminate the contract for the contractor's material breach in having delayed the project. Likewise, because the contractor is responsible for the delay it will not be entitled to either additional time or additional compensation for its own costs or damages associated with the delay. Because the owner's actual damages are oftentimes difficult to calculate for delays, most construction contracts contain a liquidated damages clause which is designed to compensate the owner a sum certain for each day the project is not timely completed. Typically, liquidated damages are in place to account for loss of rent, loss of income, additional storage or rental costs or fees, financing costs, etc. Examples of non-excusable delays include late performance due to the poor supervision of subcontractors, delays caused by equipment problems or lack of proper equipment, untimely performance by suppliers, delays caused by inadequately staffed work force, and repairs and rework due faulty workmanship by subcontractors which result in delay.

2. Excusable.

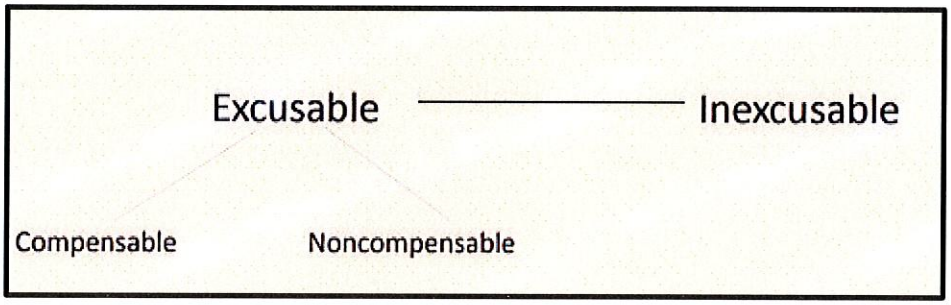
To prove that a delay is excusable, the contractor must establish the delay was caused by the intentional inaction or action of an owner or its agents. Typical examples of owner-driven causes of delays include material changes to or errors in the plans and specifications discovered during the course of the project's construction, failing to timely or completely respond to submittals, requests for information or shop drawings, delaying the process of utility hookup or access, or restricting physical access to the jobsite. *See, e.g., Roof-Techs Intern., Inc., v. State*, 30 Kan. App. 2d 1184, 57 P.3d 538 (Kan. Ct. App. 2002); *Statler Mfg., Inc. v. Brown*, 691 S.W.2d 445, 450-452 (Mo. App. 1985); *Artcraft Cabinet, Inc. v. Watajo, Inc.*, 540 S.W. 2d 918 (Mo. App. 1976); *Ark Constr. Co. v. City of Florissant, Mo.*, 558 S.W. 2d 418 (Mo. App. 1977); *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772 (10th Cir. 2007) (analyzing delay damages for contractor and owner under Kansas law).

Courts have taken different approaches to determining whether a delay is legally excusable or not. For example, the Federal Acquisition Regulations ("FAR") governing federal fixed-price contracts prohibit the government from assessing damages against a contractor for failing to timely complete the work if "the delay in completing the work arises from unforeseeable causes," such as acts of the government or delays of third-party subcontractors and suppliers that are "beyond the control and without the fault or negligence of the Contractor." FAR 52.249-10(b)(1) (Default). To prove an excusable delay, the contractor must show that the unforeseeable event "delay[ed] the overall contract completion; *i.e.,* it must affect the critical path of performance." *Sauer, Inc. v. Danzig,* 224 F.3d 1340, 1345 (Fed. Cir. 2000). And if the contractor seeks the remission of liquidated damages based on excusable delay, then the contractor bears the burden of proving "the extent of the excusable delay to which it is entitled." *Id.* at 1347. *See also* FAR 52.249 – 14

(Excusable Delays) (stating, "a Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor," and setting out eight examples of these causes including Acts of God, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, and others). However, these FAR clauses, like most remedy-granting contract provisions, do not provide automatic relief without proper notice and sufficient documentation, as discussed in more detail below.

An excusable delay will entitle the contractor to only a time extension. But to qualify as excusable and compensable, the contractor must prove the owner or its agent proximately caused the delay and that the contractor was not delayed for any other reason. (See Figure 1 below).

Figure 1



B. Compensable vs Non-Compensable Delays.

1. Non-Compensable Delays.

Non-Compensable Delays, commonly referred to as excusable and non-compensable, are delays for which the contractor is entitled to a time extension but not entitled to additional monetary compensation. In such cases, both parties assume their own additional costs arising out of the delay. For example, the contractor absorbs its delay costs for being on the project longer and the owner absorbs its costs associated with the delay. In this case, the owner would grant an

excusable/non-compensable time extension to complete the contracted work. These delays are typically addressed in the context of *force majeure* events and encompass such things as strikes, Acts of God, and other delays that the contractor may not reasonably be able to foresee. *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772, 778 (10th Circuit 2007) (applying Kansas law).

Courts typically interpret *force majeure* clauses in strict accordance with their terms, or at the very least in strict accordance with what the courts determine to be the intent of the parties in drafting such clauses. Courts have traditionally interpreted *force majeure* clauses by considering the language of the clause itself, to determine the purpose of that clause and whether a particular triggering event is included within the definition of a *force majeure* event. *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 296-97 (1987). "To determine whether a certain event excuses performance, a court should look to the language that the parties specifically bargained for in the contract to determine the parties' intent, rather than resorting to any traditional definition of the term." *R&B Falcon Drilling Co. v. Am. Expl. Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001). "In other words, when the parties have themselves defined the contours of *force majeure* in their agreement, those contours dictate the application, effect, and scope of force majeure." *Id.* (quoting *Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 283 (Tex. App. 1998)).

Courts also generally consider the reasonable expectations of the parties and whether those expectations and the overall performance of the contract have been frustrated by a circumstance beyond either parties' control. In the construction context, courts specifically consider whether the contractor contributed to or caused the delay or non-performance. If the *force majeure* clause may be invoked, courts then look to that clause to determine the appropriate relief to be awarded to the parties.

Since 2020 and 2021, courts have been called upon to determine how COVID-19 and similar natural disasters fit into the framework of the contract's definition of a *force majeure* event, in deciding whether the circumstances excused contractual performance. Many courts interpreting a *force majeure* clause, which included the words "pandemic" or "epidemic" or even "natural disaster," tended to recognize COVID-19 as an unanticipated "Act of God", as the virus was clearly not caused by anyone working on the jobsite and could not have been reasonably anticipated. These courts reasoned that the contractors that were unable to perform their work as a direct result of the pandemic, were entitled to excusable and oftentimes compensable delays. *See, e.g., In re Hitz Rest. Grp.,* 616 B.R. 374 (Bankr. N.D. Ill. 2020). *See also JN Contemporary Art LLC v. Phillips Auctioneers LLC,* 29 F.4th 118 (2d Cir. 2022) (excusing auctioneer's performance to auction a work of art based on Executive Orders which shut down all such nonessential businesses). But some courts concluded that claims of delay resulting from the hardships brought on by the COVID-19 pandemic could not be relied upon to excuse performance under the parties' contract. *See, e.g., American Medical Equipment, Inc. v. United States*, 160 Fed. Cl. 344 (Fed. Cl. June 30, 2022) (finding contractor's non-performance was not caused by excusable delay due to COVID-19 pandemic); *Regal Cinemas, Inc. v. Town of Culpeper,* No. 3:21-cv-4, 2021 WL 2953679 (W.D. Va. July 14, 2021); *Lantino v. Clay LLC,* No. 1:18 CV-12247 (SDA), 2020 WL 2239957, *3 (S.D.N.Y. May 8, 2020) (refusing to excuse a party's performance under a settlement agreement based on arguments of economic hardship due to COVID-19 pandemic).

Merely because an event is unforeseeable or is a triggering event listed in or reasonably contemplated by a *force majeure* provision, does not automatically excuse a party from performing. Rather the party seeking to excuse its performance based on *force majeure* must prove that the unanticipated triggering event was the direct cause of the parties' inability to complete

their contractual obligations. Some courts require proof that the triggering event rendered performance impossible, not just financially difficult or a hardship. 30 WILLISTON ON CONTRACTS § 77:31 (4th ed); *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314 (S.D.N.Y. 1985). *See also Kyocera Corp. v. Hemlock Semiconductor, LLC*, 886 NW 2d 445, 453 (Mich. App. 2015) (declining to invoke the *force majeure* clause because performance was not found to be impossible, but merely unprofitable due to governmental market manipulation); *Napier v. Trace Fork Mining Co.,* 235 S.W. 766, 766-67 (Ken. 1921) (finding that the influenza epidemic made it extremely difficult for the contractor to complete grading work, but did not render the entirety of the work impossible). Similarly, some courts have held that when a contract can be performed in either of two alternative ways, the impracticability of one alternative does not excuse the promisor of performance if the other alternative is still practicable. *Int'l Minerals & Chemical Corp. v. Llano, Inc.*, 770 F.2D 879 (10th Cir. 1985).

In the future, delays caused by COVID-19 and other pandemics may be deemed excusable but will most likely be deemed non-compensable given that all contractors should now anticipate that some sort of pandemic or similar *force majeure* event could impact the work of the project. Contractors might have better results in focusing their arguments on changes in the law, such as temporary orders to stop all work for extended periods of time, triggered by COVID-19 and other pandemics which make the entirety of their work impossible, in seeking to excuse their performance.

Delays due to weather are also typically determined to be excusable but not compensable. To obtain compensation for delays relating to weather requires the contractor to prove the weather was unusually severe and caused the delay to the critical path of the work. Unusually severe weather is typically determined based upon a review of the historical weather data for that area

and the contractor's ability to demonstrate the weather event could not have been anticipated at that time of year in that part of the country.

But the occurrence of unusually severe weather does not necessarily constitute a delay nor warrant a time extension. Indeed, even if the weather is proven to be severe and unusual, but the contractor cannot prove its critical path work was delayed as a result, it will likely not be entitled to compensation for the weather delays. For example, if the building is enclosed and the unusually severe weather had no effect on the contractor's ability to perform its interior work then there is no delay and a time extension is not warranted.

Some federal agencies, particularly the United States Army Corps of Engineers, have specified in their construction contracts what normal weather is anticipated for that area particularly with regard to precipitation. Like most commercial construction contracts, the Corps of Engineers' contracts will identify the number of days a specified amount of rain is expected each month for each year in that part of the country. The contractor is expected to account for the "expected" number of rain days in its schedule, for the duration of the project. Oftentimes, the excusable/compensable days of delay are limited to only the number of rain days that occur over and beyond the contractually agreed upon number of rain days. For example, the Corps of Engineers will consider unusually severe weather only if the claiming party can prove that the amount of rain over a certain number of days exceeded the amount of rain and the number of days specified in the contract. However, a careful reading of the contract is required to ensure what is exactly specified concerning weather, and if the contractor could be entitled to compensation under certain circumstances.

In short, even if the contractor can successfully prove that it was delayed by an unanticipated, unforeseeable or uncontrollable event such as a flood, weather or a strike, the delay

may warrant a time extension but typically the contractor is not entitled to compensation for the delay; but neither is the owner. Concurrent delays, discussed in detail below, are another example of excusable/non-compensable delays.

2. Compensable Delays.

Compensable delays are delays to the critical path that are unforeseeable and beyond the contractor's control or fault, for which the contractor is entitled to not only a time extension but also to additional compensation. Normally a compensable delay is caused by the owner or its agent, but could also be caused by "no fault" events, such as Acts of God and the like. Compensable delays may be caused by a material change in the design or the contract terms; a suspension of work or the schedule; the owner's refusal or inability to provide site access; untimely review of submittals or shop drawings or responses to Requests for Information by the owner's design team; delayed issuance of the notice to proceed; suspensions of project work; defective plans and specifications; and, differing site conditions.

A contractor may also seek compensation for delays from downstream subcontractors, resulting from late delivery of materials, lack of manpower, and other issues arising from the subcontractors' failures to timely commence or complete their own work. In such cases, courts have required the contractor to prove that its subcontractor was the sole or primary cause for the delay period for which the contractor seeks damages. *See, e.g.*, *Newell Machinery Co., Inc. v. Pro Circuit, Inc.*, 596 S.W.3d 635 (Mo. Ct. App. W.D. 2020) (affirming the district court's denial of the contractor's delay claim on the basis that the contractor failed to prove, by a preponderance of the evidence, that its subcontractor's delay in delivering parts was not the sole cause of the project shutdown).

In addition to extended general conditions and the other delay costs mentioned above, as a general rule, a federal contractor can recover extended home office overhead as damages for government-caused delays.[2] *See, e.g., Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993) (allowing recovery of extended home office overhead during the time period of government-caused delay); *George Sollitt Constr. Co. v. United States,* 64 Fed. Cl. 229, 242 (2005) (allowing recovery of extended field office overhead as a delay damage).

C. Untangling Concurrent Delays.

In certain situations, two or more independent delay events overlap and cause the project network to be delayed for a similar or the same period of time, resulting in concurrent or sequential delays to the critical path of the project. Concurrent delays are typically excusable/non-compensable because where both parties contribute neither can recover damages without clear proof of apportionment. Most contractors and practitioners refer to these delays as "allowing for time, but not money."

To establish concurrency, the delay must be involuntary and the delayed work must be substantial and not readily curable. The party claiming concurrency must also establish two major functional requirements relating to the relationship between the delays: (1) that the delays occurred during or impacted the same time analysis period, and (2) that the delays, each of which and absent the other, independently delayed the critical path.

Project schedules, which are typically presented in some form of network, are intended to identify both project activities and their interdependencies. A project network functions as a basis and an essential input to the process of assessing concurrent delays. For example, concurrent delay can arise from the concurrence of non-excusable and excusable delay, or compensable and non-

[2] This paper and course do not focus on the calculation of delay damages, which is oftentimes determined by the terms of the parties' written agreement.

excusable delay. Generally, concurrent delay is treated as an "excusable delay" entitling a contractor to an extension of contract time, but not entitling the contractor to additional costs or exposing the contractor to liability for liquidated damages or the owner's delay damages. Thus, an owner's compensable delay that concurs with a contractor's inexcusable delay would offset each other; neither party would be entitled to monetary compensation, and the only remedy available would be an extension of the contract time. 5 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 15:67.

The identification of concurrent delay is arguably the most contentious technical subject in forensic schedule analyses, and particularly with respect to disputes involving larger construction claims. This is most likely because there is no uniform definition of concurrent or sequential delays, and typically contracts do not clearly define its meaning. Although concurrency has both a temporal and a causal aspect, there is little agreement on specifically which of the many factors should be considered in establishing concurrency. Accordingly, it is important that all sides, if possible, agree on the Literal or Functional theory of concurrency that is to be applied, to better understand how concurrent delay should be identified and quantified. (AACEI 29R-03: Forensic Schedule Analysis, p. 101). Despite these disagreements, it is universally accepted that identification and quantification of concurrency must be based on Critical Path Method ("CPM") concepts.

Construction scheduling consultants and personnel use the CPM primarily to organize and schedule a complex project, and to analyze interdependent schedule activities to determine whether delay to a particular activity may jeopardize schedule milestone dates or overall final completion of the project. A CPM schedule can also be used as a planning and management tool, to graphically present "the planned sequence of activities [and to] show[] the interrelationships and

interdependencies of the elements composing a project." JAMES K. BIDGOOD, JR., STEVEN L. REED & JAMES B. TAYLOR, CUTTING THE KNOT ON CONCURRENT DELAY, Constr. Briefings No. 2008-2 (Feb. 5, 2008).

Retroactively identifying the accurate critical path on a large commercial project can be particularly complicated and difficult where the facts and sequence of events are complex. On these large projects, there are a number of factors which can impact the critical path or cause the critical path to change over time. As such, parties to a construction contract can have varying points of view of the critical path and critical path delays during the course of the project, or when looking back retrospectively. Thus, concurrent delay can be used from both the perspective of the party claiming the delay, and as a defense for a party facing a claim for delay damages. *See, e.g., Singleton Contracting Corp. v. Harvey*, 395 F.3d 1353, 1355 (Fed. Cir. 2005) (finding the government's failure to provide new drawings was merely a concurrent cause of the delay and that the contractor therefore was not entitled to unabsorbed overhead). Nevertheless, where seemingly concurrent delays can be isolated and segregated, liability can and should be apportioned among responsible parties. To be apportioned, the delays must be capable of isolation as to both causation and duration.[3]

[3] A primary source of confusion over the term "apportionment" has caused some courts to apportion each parties' fault (and, in turn, to apportion the damages claimed) and others to apportion time by attributing the causes of different periods of delay to one party or the other, and then assigning responsibility for those delay periods and associated damages accordingly. Without a clear contractual provision allocating responsibility for specific issues or setting out how the parties are to apportion delays, most courts overwhelmingly apportion the time by determining the days of delay for which each party is responsible, which is more akin to a comparative fault analysis utilized in negligence cases. Critics have opined that apportioning delay in this manner runs counter to fundamental notions of causation as applied to delay claims in typical commercial construction disputes.

1. The Pre-CPM Approach to Concurrent Delays.

Prior to the advent of CPM scheduling, and more specifically the widespread application of CPM principles to delay disputes, there was no reliable means to distinguish between the effects of two different delays acting in the same time frame. Courts generally refrained from getting involved in attempting to distinguish between the effects of different causes of delay during the same period, and subscribed to the adage that "where both parties contribute to a delay neither can recover damages." *See, e.g., Cumberland Cas. & Sur. Co. v. United States,* 82 Fed. Cl. 500, 507 (2008) (quotations omitted); *Newport News Shipbuilding & Dry Dock Co. v. U.S.*, 79 Fed. Cl. 25 (1934). Many courts still apply this general rule, despite the widespread use of CPM schedules.

This strict traditional approach has the benefit of simplicity: If both parties contribute to overall project delay, then neither party can be compensated for associated damages. Courts viewed it as effectively impossible to allocate responsibility and thus did not attempt it, even though the result was oftentimes unfair for an owner or contractor seeking damages for legitimate delays.

2. Post-CPM Methodology on Concurrent Delay.

The concept of the critical path enabled parties to distinguish critical work activities from non-critical ones, and opened the possibility for deciphering which delay was on the critical path and actually effected project duration. Thus, courts adopted a more balanced approach to allocate damages even in cases where there is evidence of concurrent delays (*i.e.,* multiple causes of delay which literally are happening during the same time period) to project completion, but only "when clear apportionment of the delay [and the expense] attributable to each party has been established." *George Sollitt Constr. Co. v. United States*, 64 Fed. Cl. 229, 238 (2005). *See also Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772, 782-786 (10th Cir. 2007) (finding,

under Kansas law, that delay damages may be divisible even where there is evidence that both parties caused construction delays); *Catel, Inc. v. United States*, No. 05-1113 C, 2012 WL 3104366, at *33 (Fed. Cl. July 30, 2012) (allowing a party to recover despite proof of concurrent delays, if clear apportionment of the delay attributable to each party has been established); *Flatiron Lane v. Case Atlantic Co.*, 121 F. Supp. 3d 515, 541 (M.D.N.C. 2015) (same). *But see Haney v. U.S.*, 676 F.2d 584, 586-88 (1982) (refusing to find the government acted in bad faith in failing to address the merits of contractor's delay claims during the progress of the work and by asserting a claim for liquidated damages, even though the government admitted it caused the delays in its own internal memoranda and despite expert testimony that contractor's CPM schedules clearly showed the government contributed to the delays).

The party seeking recovery bears the burden of separating the delays it caused from the delays caused by others working on the project. If this proves impossible, then the delays are considered "concurrent or intertwined," and neither party may recover. *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 559 (Fed. Cir. 1982) ("Courts will deny recovery where the delays are 'concurrent or intertwined' and the contractor has not met its burden of separating its delays from those chargeable to the Government.").

"Both federal and other state courts [] have been shifting away from the strict application of [non-apportionment]. 'During the past 30 years', 'a strong majority' of courts have adopted the 'modern view and allow[ed] damages to be apportioned when faced with damages that are in fact divisible.'" *Great American Ins. Co. v. E.L. Bailey & Co., Inc.*, 641 F.3d 439, 448 (6th Cir. 2016) (citing *Hutton Contracting Co., Inc. v. City of Coffeyville*, 487 F.3d 772, 785 (10th Cir. 2007)). Even so, if the delays are so intertwined or concurrent that they cannot be separated, then the court

will likely fall back on the traditional rule and deny recovery to either party. *Essex Electro Engrs., Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000).

Whether delay periods are allocable oftentimes turns on whether the causes of the delay are demonstrably concurrent or whether a delay period can be segregated into a series of sequential delays whereby "one party and then the other cause different delays seriatim or intermittently." *R.P. Wallace v. United States,* 63 Fed. Cl 402, 410 (2004). Where the two contractors both caused the same delay to the same activities, or both extended the critical path during the same segments of time, and either would have been sufficient to cause the delay, courts find the delays to be truly concurrent and intertwined, and ultimately non-compensable.

A contractor generally cannot recover damages if there is evidence of concurrent delays, unless the contractor can show a causal link between the delay and the damage: "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." *Essex Electro Eng'rs, Inc. v. Danzig,* 224 F.3d 1283, 1295 (Fed. Cir. 2000).

The CPM scheduling analysis can be useful in determining these causal links, and whether the causes of the critical path delay were concurrent and intertwined. This outcome can assist the contractor with proving that the overall project would have been delayed to an equal extent due to the owner-caused delays regardless of any contractor-caused delays. The CPM schedule could also be utilized to determine whether a series of different delay causes and periods comprised the overall period of delay, which would enable the parties to apportion the different delay periods between them. Regardless of how the CPM schedule is utilized, the scheduling experts agree that CPM schedules must be utilized to distinguish critical delays from non-critical delays.

All of this is to say that extensive and detailed documentation, and use of generally accepted CPM scheduling methodologies, is particularly important on complex construction projects. Indeed, the ability to apportion delays relies in large part on the credibility of the delay analysis, which in turn depends on good documentation and record-keeping. The CPM analysis is most reliable when a contractor commits to utilizing regularly updated CPM schedules. Understandably, the investment of additional time, money and resources needed for successful scheduling is not always justified by the size of a project.

Although CPM gives project scheduling and forensic schedulers the ability to be more precise than other simpler scheduling methods, and allows for the separate analysis of the impact of each delay causing event upon the critical path, the methodology and assumptions used in the approach of determining delays should be consistent with the contract documents and supported by the facts as reflected in the project records. The more detailed the schedule and the less documentation the contractor maintains, the easier it is for a claimant to disprove, and untangle concurrency. JAMES K. BIDGOOD, JR., STEVEN L. REED & JAMES B. TAYLOR, CUTTING THE KNOT ON CONCURRENT DELAY, Constr. Briefings No. 2008-2 (Feb. 5, 2008).

Parties should consider addressing concurrent delays in the construction contract, by agreeing in advance on how the parties will treat concurrent delays. For example, contracting parties may identify an agreed amount of recoverable costs or specify a percentage split, or mechanism for dividing responsibility between them as it pertains to specific concurrent delay.[4]

[4] The Association for the Advancement of Const Engineering ("AAECI") Recommended Practice No. 10S-90: Cost Engineering Terminology, lists five different, but similar definitions of concurrent delay. The five definitions reflect some of the differing opinions and applications associated with concurrent delay, and should be considered by experts and consultants prior to rendering an opinion on issues and causes of concurrent delays. It is helpful if the contract defines the term "concurrent delay" to avoid disputes and conflicts over its definition.

In *Belt Con Constr., Inc. v. Metric Constr. Co.*, 314 Fed. Appx. 151, 159 (10th Cir. 2009), the Court considered just such a provision that specified:

> If delays are caused by more than one subcontractor, Contractor shall equitably allocate the damages for delay among the Contractor and those subcontractors responsible for the delay, and the Contractor's decision as to the allocation shall be final and binding on all subcontractors as long as the decision is made in good faith.

Ultimately, the Court concluded that the contractor's allocation was not made in good faith, but the court was otherwise willing to abide by the parties' agreement on the treatment of concurrent delays.

D. Necessary Documentation.

Documentation is perhaps the single most important component to prevailing on delay and payment claims, particularly on complex commercial projects. Courts have routinely upheld a contractor's decision to demand sufficient backup documentation and other evidence to support a claim for payment, prior to submitting the claim to an owner. *See generally In re Central States Mechanical, Inc.*, Case No. 09-12542, 2011 WL 1637991 (Bankr. D. Kan. Apr. 29, 2011) (collecting cases); *Systemaire, Inc. v. St. Charles County*, 432 S.W.3d 783 (Mo. App. 2014) (finding a genuine issue of material fact as to what documents were required under the construction documents prior to payment). The party asserting the delay claim has the burden of establishing entitlement on the claim, and the finder-of-fact is entitled to consider whether the claiming party was partially responsible for causing the delays based on the weight of the evidence presented through documentation and testimony. *Newell Machinery Co., Inc. v. Pro Circuit, Inc.*, 596 S.W.3d 635, 653-654 (Mo. Ct. App. 2020). A best practice of any contractor is to place the owner on notice of delays and to submit all change orders for review and approval before proceeding with

extra work that might cause delays. Alternatively, a contractor can continue with the contract work in the face of delays caused by third parties, regardless of whether the contract requires written notice of delays or a delay claim.

Kansas typically does not interfere with the terms of contracts made by competent parties, and generally holds parties to contract terms which require written notice and specific documentation of delay claims and claims for extras. *Razorback Contractors of Kansas, Inc. v. Board of County Com'rs of Johnson County*, 43 Kan.App.2d 527, 227 P.3d 29 (2010) (rejecting contractor's claim that substantial performance sufficed to preserve its claims, when the contract required written notice of claims for extra to be given to specific entities and within a specified time-period). *See also In re Central States Mechanical, Inc.*, Case No. 09-12542, 2011 WL 1637991 (applying Iowa law and denying a subcontractor's delay claims based on the contractor's failure to strictly comply with the contract's provision to provide written notice of delays and delay claims and rejecting the argument that contractor had waived the subcontract's preconditions based on its prior actions). *Compare with Central Iowa Grading, Inc. v. UDE Corp.,* 392 N.W. 2d 857, 860 (Iowa App. 1986) (citing *Berg v. Kucharo Construction Co.,* 237 Iowa 478, 489, 21 N.W. 2d 561, 567 (1946)) (holding that a course of dealing that repeatedly disregards the written change order requirements and promises to pay for work that was orally requested, can be sufficient to waive the subcontract's written change order requirements).

The lack of documentation may not necessarily bar all claims of delay, however. Depending on the jurisdiction, written modification provisions may be waived orally or by course of dealing. For example, in Missouri, courts have held that even if a subcontract requires that all change orders be authorized in writing, the requirement can be waived: "Habitual acceptance of work done on oral change orders in connection with a contract, and payment therefore, results in waiver of a

contract clause providing that all orders must be signed." *Brockman v. Soltysiak,* 49 S.W.3d 740, 745 (Mo. App. 2001). *See also Missouri Dept. of Transp v. SAFECO Ins. Co.*, 97 S.W.3d 21, 36-37 (Mo. App. 2002) (holding that the subcontractor had presented sufficient evidence that the general contractor had requested and agreed to extra work and that the subcontractor had performed it, thereby waiving the requirement in the subcontract that all change orders had to be approved in writing by the contractor).

Most sophisticated contracts specifically address the methodology required to calculate and prove delays, as typically established through specific schedules, pre-determined methods of analyses, and specific documentation. For example, under FAR 52.235.15 Schedules for Construction Contracts, the federal government specifically lays out the deadline for the contractor to submit its schedules, the format and content that must be included in the schedules, and the dates on which the contractor contemplates starting and completing the several salient features of the work. In the case of federal contracts, if the contractor fails to comply with these requirements then the Contracting Officer may withhold approval of progress payments until the contractor submits a schedule in compliance with FAR 52.235.15.

Well-drafted construction contracts will also address notice requirements as a prerequisite for any claim for additional compensation under the contract, and how quantum for the delay claim is to be calculated. For example, under FAR 52.211-13, time extensions may only be submitted based on the following:

(a) If the Contractor requests an extension of the time for substantial completion, the Contractor shall base its request on an analysis of time impact using the project schedule as its baseline, and shall propose as a new substantial completion date to account for the impact. The Contractor shall submit a written request to the Contracting Officer setting forth facts and analysis in sufficient detail to enable the Contracting Officer to evaluate the Contractor's entitlement to an extension of time.

(b) The Contractor shall only be entitled to an extension of time to the extent that-

(1) Substantial completion of the work is delayed by causes for which the Contractor is not responsible under this contract; and
(2) The actual or projected substantial completion date is later than the date required by this contract for substantial completion.

(c) The Contractor shall not be entitled to an extension of time if the Contractor has not updated the project schedule in accordance with the contract.

(d) The Government shall not be liable for any costs to mitigate time impacts incurred by the Contractor that occur less than 30 calendar days after the date the Contractor submits a request for extension of time in compliance with this clause.

Courts routinely enforce contract clauses that set forth specific elements for establishing a delay claim and the calculation of the damages arising from such claims. *See, e.g., R.P. Wallace, Inc. v. Wallace*, 63 Fed. Cl. 402 (2004); *Manuel Bros., Inc. v. U.S.*, 55 Fed. Cl. 8 (2002); *Morganti Nat'l, Inc. v. U.S.*, 49 Fed. Cl. 110 (2001).

E. Drafting a Recovery Schedule.

If a contractor is delaying the critical path of a project, the owner may require a recovery schedule which is designed to reflect the anticipated completion of construction activities with the intention of making up time and getting the contractor back on track with the overall goal of completing the project as close to the original completion date as possible. The recovery schedule should outline the strategies and proposed measures that the contractor intends to take to catch up with the project's overall schedule, including adding manpower, working overtime, or working multiple crews. Typically, the contractor's efforts to recover the schedule are born by the party that caused the delay and is being required to "catch up".

A recovery schedule is not the same as a revised schedule. A revised schedule is submitted by the contractor once it is clear that the original project schedule cannot be achieved. The revised schedule becomes the new baseline schedule. If the contractor is directed by the owner to issue a recovery schedule, but disputes that it is at fault for the delays to the project, then the contractor should draft the schedule to document that the owner or its architect or other third parties have

caused or contributed to the delays, thereby requiring acceleration of the project schedule through the recovery schedule process. Contemporaneous daily logs, change order requests and the like should also be submitted with the recovery schedule, in accordance with the terms of the contract governing claims.

1. Calculating Acceleration Damages.

Acceleration of the schedule means completion of the contract work at a more rapid rate than contemplated or required by the parties' contract. Most construction contracts contain standard provisions that require a contractor to accelerate, at its own cost, work if the contractor falls behind or cannot keep pace with the overall project schedule. If the owner elects to enforce this provision and to direct the contractor to pick up the pace of the work, then this is commonly referred to as a "directed acceleration" or an "actual acceleration". Such acceleration clauses typically only apply if some event other than an "excusable event of delay" slows or delays the contractor's rate of progress on the project.

On the other hand, a constructive acceleration occurs when the contractor is directed to accelerate its work because of excusable delay and, thus, is entitled to a time extension; but the owner or government refuses to grant the extension. *See, e.g., Donald R. Stewart & Associates,* AGBCA No. 89-222-1 (Jan. 16, 1992) (finding contractor unable to recover its acceleration costs because no excusable delay was found); *Fischbach & Moore Int'l Corp.*, ASBCA No. 18146, *aff'd*, 617 F.2d 223 (Fed. Ct. Cl. 1980) (finding that contractor able to recover its acceleration costs). A contractor should submit a request for adjustment in the contract price if it is called upon to accelerate its work at its own cost because of revisions in the design drawings, changes and additions to the scope of its work, lack of utilities or project access, late deliveries in equipment and materials supplied by others and through no fault of the contractor, and the like.

See, e.g., Trepte Constr. Co., Inc., ASBCA No. 38555, 90-1 (Jan. 4, 1990) (setting forth the elements of an acceleration claim).

There are a variety of factors that a court will consider when determining whether the contractor has successfully proven a constructive acceleration claim, including for example:

> (a) that the delay causing the acceleration was not the fault of the contractor and/or was otherwise an excusable delay;
>
> (b) that the contractor made a timely and sufficient request for an extension of the contract schedule;
>
> (c) that the government or owner denied the contractor's request for an extension or failed to act on it within a reasonable time;
>
> (d) that the government or owner insisted on a completion date that did not take into account the period of excusable delay, which was documented by the contractor; and
>
> (e) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

See, e.g., Nova Group/Tutor-Saliba v. U.S., 2022 WL 815826, *42 (Fed. Cl. 2022) (quoting *Fraser Constr. Co. v. U.S.*, 384 F.3d 1354, 1361 (Fed. Cir. 2004) (internal citations omitted)).

A contractor may opt to voluntarily accelerate its work at its own cost, to avoid liquidated damages or to avoid being declared in default, or both. A contractor might also choose to voluntarily accelerate its work to reduce costs by finishing the project early, or because it is scheduled to be on another project and desires to avoid a delayed start on that project.

Regardless of whether the acceleration is actual or constructive, the right of an owner to direct acceleration at the contractor's cost is not an implied right; it must be explicitly set out in the contract documents. The contractor should properly document the delays which triggered the acceleration of work, and provide timely notice to the owner of any intention to seek recovery of the acceleration costs. It is also important for the contractor to advise the owner in writing if its

acceleration is under protest and subject to a reservation of rights, and to properly document all costs incurred to accelerate the work and to submit change orders for the additional costs, just like any other delay claim.