

Fearnsides and Associates

Claims, Contract, Delay Analysis and Quantum Consultants
for the Construction and Engineering Industries

Tel: Dubai: +971 (0)50 4945873

Tel: Hong Kong: +852 5331 9853

Email: jeremyfearnsides@gmail.com

Websites: www.fearnsidesandassociates.net

"How not to make friends and
influence people, the thorny issue of
concurrent delay!!!!"

F&A

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Claims - Delay Analysis - Quantum - Expert Services
Contract Management - Commercial - Project Controls
Quantity Surveying

Fearnsides & Associates have provided expert reports for both delay and quantum and have been cross examined by Counsel for both in Arbitration

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Further to a previous post I made concerning concurrency and the literal and functional approaches to its determination and now with such clauses as “no time, no money” where concurrent delay is said to exist, surely its determination needs to be right and not an err. If its determination is an err, then the determiner will not be “making any friends nor will they be influencing anyone”. What to do?

<https://www.linkedin.com/pulse/thorny-issue-concurrent-delay-jeremy-fearnsides/>

I was reading a FIDIC 99 contract the other day and this clause was added to clause 8.4, normally FIDIC is silent on concurrency in its standard format:

“At the end of Sub-Clause 8.4, insert the following as a new paragraph:

"Notwithstanding any provision in the Contract, if a period of delay was caused by two or more events of delay which are of approximately equal causative potency, whether such events of delay are contemporaneous or not ("Concurrent Delay"), and one or more of the events of delay is such as to entitle the Contractor to an extension of time under Sub-Clauses 8. 4 [Extension of Time for Completion] and 20. 1 [Contractor's Claims] but the other event(s) of delay does not entitle the Contractor to an extension to the Time for Completion, the Contractor shall, subject to compliance with the requirements of Sub-Clauses 8. 4 and 20. 1, be entitled to an extension

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of the Time for Completion but the Contractor shall not be entitled to any Costs associated with, or arising out of, such Concurrent Delay".

So there we have it, where concurrent delay is determined, the Contractor, is not allowed to claim money, but is allowed time. Which of course is better than “no time, no money” clauses. In the Middle East the legal world considers “no time, no money clauses would not stand up, because if challenged, it would be said to be unfair enrichment. And likewise, “time, no money” maybe difficult to impose as under the UAE Civil Code, the code would seek to apportion (money and as such time if that is how, they would wish apportion costs, don’t ask me how, I do not know). But putting all that aside, someone has to determine what is and what is not concurrent?

Without a pre-prescribed method set out in “black and white” and still even with a pre-prescribed method, one way or another, no matter how close we can get, there is going to be some disagreement.

So, what is equal causative potency? How do we determine whether something is of equal causative potency or not? Do we go to dominant cause theory first and decide if one or the other competing events is the effective cause? If we can, then there is no concurrency? If we cannot separate the competing events via dominant cause theory, then they must be said to be of equal causative potency? Yes or No?

How close in time should the competing events be? Should they be literal (i.e. the competing events impact occurs upon a critical activity at exactly the same time) or should they be functional (i.e. the competing events impact close, or near to one another upon the critical activity they effect). Yes or No?

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Which critical path are we to use to determine whether an activity lies on a critical path or not?

Should it be a dynamic critical path determined from the contemporaneous updated programme (criticality determined to the right of the data date line based on the theoretical forecast plan of activities still to complete)? Or should it be based on the As-planned v As-built critical path (determined via disregarding logic and calculated from the relative delay an update as-built start and finish date is from the same planned activity start and finish date delta – the most critical on any given update being the “factual” most critical and therefore the activity and/or activities on the “factual” critical path? Yes or No?

If the EOT clause uses the words “Forecast Delay to Completion” how should the critical activities be determined? Or the EOT clause uses the words: “Actual Delay to Completion” should they be determined via the as-planned v as-built method to get to the factual as-built critical path? Yes or No?

Obviously, one size does not fit all. However, I am in favour of a methodological pre-agreed prescriptive approach written into the contract to deal with concurrency to define what it is and where it exists. I consider that if the parameters are set to respect what EOT clauses actually say, then the method of determining, for example, as-built critical path, would be clear (Although I do think that any analysis performed retrospectively has to be based on fact).

I would like to know your thoughts and what you think needs to be done so that a consensus can be reached to the determination of what is and what is not said to be concurrent?

Regards,

Jeremy Fearnsides