



**John C. Livengood**

## The New AACEI Recommended Practice for Forensic Schedule Analysis (Part 2 of 2)

By John C. Livengood

In July 2007, the Association for the Advancement of Cost Engineering International (AACEI) published the first American effort at a “how-to” manual on Forensic Schedule Analysis. The Recommended Practice for Forensic Schedule Analysis (RP/FSA) is divided into five major sections: 1) Organization and Scope; 2) Source Validation; 3) Method Implementation; 4) Analysis Evaluation; and 5) Choosing a Method. In the first of this two-part article, published in the previous issue of this newsletter, I discussed the first three sections of the RP/FSA. In this second part, I discuss the RP/FSA’s treatment of some of the issues

common to all forensic schedule delay methods, issues of concurrency, pacing, the critical path, float and acceleration, as well as the issues to consider when selecting a methodology.

### Section 4—Analysis Evaluation

This fourth section of the RP/FSA covers some of the most contentious issues in schedule delay analysis. The four important topics discussed in the RP/FSA are (1) excusability and compensability; (2) the critical path; (3) concurrency and pacing; and (4) acceleration and mitigation.

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## Scheduling, Sequencing, Coordination: The AIA A201 v. ConsensusDOCS 200

By Sean T. Devenney



**Sean T. Devenney**

It is generally understood that the issue of scheduling and the related concept of sequencing of work is a contractor prerogative unless the contract documents dictate differently. On its face, the general rule that the contractor is in charge of the schedule and sequence makes perfect sense. The contractor is arguably in the best position to determine the most efficient schedule and sequencing to perform the work required on a particular project in the allotted time. When the contractor fails to schedule the work properly or fails to sequence the work efficiently, the contractor bears the responsibility through delay

costs or liquidated damages. Given the inherent “power” to control schedule and sequence, the contractor accepts the proportional “responsibility” for failing to schedule and sequence the work efficiently to meet project delivery deadlines.

However, the case law on scheduling, sequencing, and coordination shows a marked tendency toward letting the contractor seek costs and fees related to a poorly coordinated project even in the face of owner-favorable

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## Message from the Cochairs



**Patrick J. Greene**



**Charlotte Wiessner**

The current issue of *Construct!* kicks off another active year for the Committee. It is also a year of transition. We welcome Charlotte Wiessner, formerly cochair of our Program Subcommittee, as cochair of the Committee. We also welcome Edward Salanga as new cochair of our Publications Subcommittee and Anna Torres as cochair of the Program Subcommittee.

Under the direction of our former Committee cochair, Jim Landgraf, the Committee is hosting, with the ABA Forum on the Construction Industry, a two-day program entitled "Critical Insurance and Litigation Insight: Coverages, Disputes, and Tactics for Survival." The program presents a series of detailed plenary and workshop sessions focusing on the role of insurance issues, claims, and disputes in construction litigation. We thank Jim for his excellent work in bringing this program together.

The Committee will be cosponsoring the Forum on the Construction Industry's Annual meeting, April 16–18, 2009, in New Orleans, LA, focusing on sustainable design and construction issues. Our Program Subcommittee is preparing a plenary program to be presented at that meeting, "When 'Green' Turns to 'Red' and LEEDs to a Summons and Complaint: Potential Liability on Green Projects."

Our programs committee is also preparing two programs for the Section of Litigation Annual Conference, April 29–May 1, 2009, in Atlanta, GA. One program, cosponsored by the Immigration Litigation Committee, will focus on immigration and verification of employability status of employees. The other program will focus on workplace safety and sources of liability and insurance coverage for catastrophic accidents, such as crane collapses. We will also be cosponsoring a networking lunch, along with the Real Estate Litigation Committee. The theme of the lunch will be "Worldwide Financial Crisis: A discussion about the worldwide financial crisis caused by the subprime mortgage meltdown and its impact on the financial, credit, securities, construction, and real estate markets and resulting credit-crisis litigation."

In addition to the programs, we will publish four editions of *Construct!* We are currently soliciting proposals for the theme of the Spring edition. If any of you have theme or article ideas, please contact Dave Kurtz at dkurtz@bakerdonelson.com.

We expect to continue improving our website with the addition of useful new content and the expansion of existing features. If you would like your web-based article or news piece linked to our website, please submit the link to Tina Paries at tparies@BTlaw.com or Ray Garcia at r\_garcia@garciamilas.com. Please favor Tina and Ray

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# Concurrently Critical Delays

By Brian J. Furniss

**Brian J. Furniss**

Contracts typically address concurrent delays, if they address them at all, in the section defining changes to the work or time extensions on the project. Even when addressing them, some contracts do not describe concurrent delays using terminology that translates into an easily understood, usable guide that will allow the parties to determine accurately if they are experiencing concurrent delays. This is because most concurrent delay specifications commonly contain ambiguities, adding more confusion, instead of clarity, to the time extension process. Compounding this issue is the need to consider whether concurrent delays are concurrently critical delays. To straighten out this confusion, we first have to understand what a concurrent delay is and the various ways that concurrent delays affect construction projects.

The word “concurrent” is defined as “occurring or existing simultaneously or side by side.”<sup>1</sup> The word “delay” functions as a verb or a noun, and in the construction industry can be defined as “to impede the process or progress of” or “the period or amount of time during which something is delayed.”<sup>2</sup> Combining these two words, “concurrent delay” can be defined as “two or more delays occurring simultaneously.”

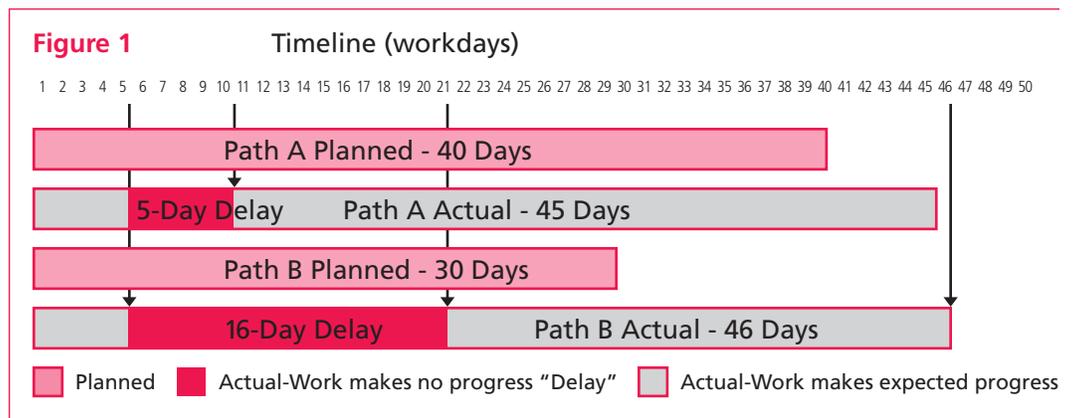
To comprehend concurrent delays fully, one must understand what they mean to a construction project, especially in relation to a project’s critical path. The critical path of the project is defined as the longest path of work activities, in terms of duration, through the schedule. Therefore, a project can only be delayed if the critical path of the project is delayed.

All projects, whether they have a critical path method (CPM) schedule, bar chart schedule, or no schedule at all, have a critical path. A project can have more than one critical path at any time during the project, and, as a result, the contract should identify how concurrent delays are determined on the project. Moreover, because two or more delays can occur on a project at the same time without all of them affecting the critical path, the contract must define if time extensions will be given only for concurrent delays to the critical path, or for all delays that are occurring concurrently, regardless of whether they are on the critical path of the project. This must be clarified because damage calculations can vary greatly depending on whether the delays were on the critical path of the project.

The term “concurrently critical delays” will be used to identify when two or more concurrent delays affect the critical path of the project. If only one item is delaying the critical path of the project, even though you may have multiple delays occurring at the same time, there are concurrent delays, but not concurrently critical delays. There are two main types of concurrently critical delays:

1. Two or more separate, unrelated activities are delaying the critical path of the project. An example of this would be if the critical path of a two-story office building were being controlled by the window installation and the electrical inspection at the same time.
2. Two or more parties are delaying a single activity that is controlling the critical path. An example of this would be if both the contractor and the owner were delaying progress of the second floor concrete placement.

Let’s use the following example to identify if there are concurrent delays, and if those concurrent delays are concurrently critical delays. Figure 1 shows a simplified project in which Path A had a planned duration of 40 workdays and Path B had a planned duration of 30 workdays. Path A is the critical path of the project because it has a total duration that is 10 days longer than Path B. If Path A made 10 more days of progress than Path B, then Paths A and B would become concurrently critical. If Path A made 11 more days of progress than Path B, then Path B would be solely critical.



From Day 1 through Day 5, Path A and Path B both made expected progress, and their durations decreased to 35 days and 25 days, respectively. On Day 6, both paths did not make progress and were delayed. Path A continued to be delayed through Day 10, while Path B continued to be delayed through Day 21. So, were there concurrent delays? Yes, there were concurrent delays from Days 6 through 10 because the two paths were delayed at the same time. However, the key questions are, were both activities on the critical path, and were these concurrently critical delays? To answer these questions properly, an analyst must perform a critical path analysis of what occurred on the project on a day-by-day basis.

As previously stated, at the end of Day 5, Path A had 35 days remaining, while Path B had 25 days remaining. Path A was still the critical path at the end of Day 5. From Days 6 through 10, both paths did not progress and were delayed. Therefore, at the end of Day 10, Path A still had 35 days remaining, and Path B still had 25 days remaining. The remaining duration of each path neither increased nor decreased and, as a result, Path A was the only critical path from Days 6 through 10. Therefore, although we had concurrent delays (two items being simultaneously delayed) for Paths A and B from Days 6 through 10, we did not have concurrently critical delays (two items simultaneously delaying the project completion date) because Path A was the only path that controlled the critical path from Days 6 through 10.

The analyst still must evaluate the progress that occurred from Days 11 through 21 to complete the analysis of concurrency for this project. At the end of Day 10, Path A had 35 days remaining, and Path B had 25 days remaining. From Days 11 through 19, Path A progressed 9 days, and at the end of Day 24, had 26 (35–9 = 26) days remaining. During the same time, Path B did not progress and, as a result, still had a remaining duration of 25 days at the end of Day 19. Therefore, although Path B was delayed an

additional 9 days from Days 11 to 19, it did not delay the critical path of the project because its remaining duration was consistently shorter than Path A.

Continuing on, at the beginning of Day 20, Path A had 26 days remaining, and Path B had 25 days remaining. Path A was still solely critical. On Day 20, Path A made one day of progress, and Path B did not. As a result, both Path A and Path B had 25 days remaining, and a critical path shift occurred, causing Path A and Path B to become concurrently critical paths.

On Day 21, Path A made another day of progress, and Path B was delayed, again. Did the project have a critical path delay? Yes, the duration of the critical path was 25 days going into Day 21, and it was still 25 days coming out of Day 21. Was this delay the result of lack of progress to both Paths A and B? No, Path B was the only path that was delayed on Day 21. Could this delay be considered a concurrently critical delay? Absolutely not. Again, only one path, Path B, caused a delay on Day 21. So, although there were concurrently critical paths on Day 21, there were no concurrently critical delays.

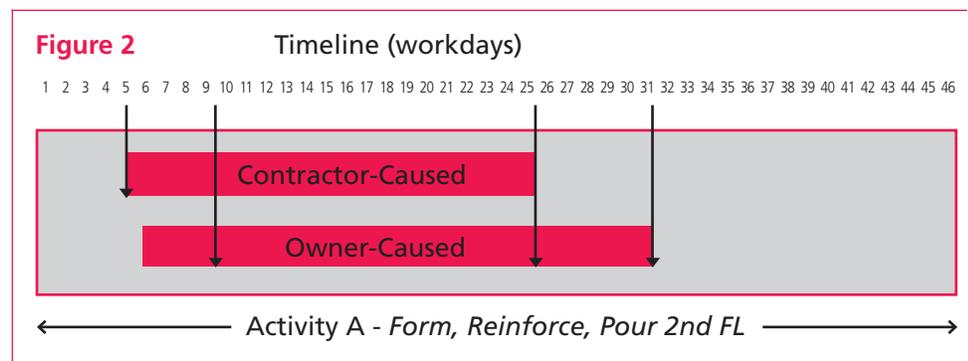
To summarize our results, there were concurrent delays on Days 6 through 10, but they were not concurrently critical delays. Path A, and only Path A, delayed the critical path of the project for 5 days from Days 6 to 10. The project critical path progressed as expected from Days 11 through 20 as a result of the as-expected progress to the critical path, Path A. The delays to Path B did not result in any critical path delay from Days 11 to 20. On Day 21, because of the progress to Path A and the lack of

progress to Path B, there was a critical path shift, and both paths were concurrently critical. Path A progressed on Day 21, and Path B did not make progress. Therefore, Path B caused 1 day of delay to the project on Day 21. For the rest of the time period, both paths progressed as expected without any delays, so there could not have been any concurrent delays or concurrently critical delays.

This example illustrates the first type of concurrently critical delay, which is when two or more separate, unrelated activities are delaying the critical path of the project. An analysis of the contemporaneous project schedules and documents should always be performed before determining whether the delays are concurrent delays or concurrently critical delays.

The second type of concurrently critical delay occurs when two or more parties delay a single activity that is controlling the critical path. This second type has less to do with concurrent delays and is better described as concurrent causes of a single delay. These examples tend to be more complex because they often require a thorough understanding of the contract, especially when various parties control the overlapping causes of delay. However, identifying and quantifying the delays uses the same process that was used in the first type of concurrently critical delays.

For this example, Activity A, *Form, Reinforce, Pour 2nd FL*, was expected to take 20 days to complete and controlled the critical path of the project throughout its duration. Activity A was delayed for multiple reasons, as shown in Figure 2. From Day 1 to 4, the contractor's work



progressed as expected, but on the morning of Day 5, the rebar subcontractor walked off the site due to a previous nonpayment issue with the contractor. The contractor and rebar subcontractor did not resolve the issue until Day 25, and the rebar subcontractor returned to the jobsite on Day 26. Let's presume the contractor would have been contractually responsible for this delay and, thus, potentially responsible for delays that occurred from Days 5 to 25.

On Day 9, while reviewing contract drawings during its subcontractor dispute, the contractor noted a discrepancy in the drawings and presented the architect with a request for information questioning whether the reinforcement shown in the drawings was adequate based on the weight of a heavier chiller that was added by the owner during the preceding month. The architect responded on Day 10 that it had contacted the structural engineer and the engineer would be reviewing its calculations and plans and should respond within the next couple of days. The architect did not respond with the structural engineer's redesign until Day 31. The redesign included some additional reinforcement to compensate for the added weight of the new chiller, but let's presume that the added reinforcement did not extend the expected 16-day duration (4 days of progress having been made on Days 1 through 4) to complete the remaining work on Activity A, and the only delay caused by the owner was for the redesign by the structural engineer from Days 10 to 31.

Were there concurrently critical causes of delay to Activity A? Referencing Figure 2, and its depiction of the contractor and owner delays, it appears that the contractor was a single cause (the rebar subcontractor left the site) for the delays that occurred from Days 5 to 9. However, the time period from Days 10 through 25 has overlapping causes of delay that resulted from separate parties involved with the project. The contractor argued that it could have mobilized a different subcontractor to perform the remaining rebar work,

but it knew that the design was being revised by the architect and, therefore, bringing on a new subcontractor would not progress the work. The architect also had an argument: The architect was aware of the contractor's issues with its subcontractor and, as a result, did not believe that a prompt response on its design would improve the progress of the work.

## A common mistake is to jump directly to the determination of damages before performing a contemporaneous analysis of the critical path of the project.

Therefore, the architect did not push its structural engineer to respond promptly. Both sides appear to have realistic arguments for the concurrent causes of critical delay from Days 10 to 25, but what is lacking in their arguments is reasoning centered around several points. Neither party took into consideration:

1. Which delay occurred first? How could the first delay have affected, or driven, the second delay?

2. Based on project documentation, what do the facts say? Did either of the parties write letters to the other party to discuss their assumptions in an attempt to resolve the delay expeditiously?
3. Is there language in the contract that discusses how concurrently caused delays will be handled on the project and, if so, what does it say? How does the contract language relate to this specific situation of concurrently critical causes of delay?

Of these points, the third is by far the most important factor in determining each party's entitlement to a time extension or delay damages. However, a common mistake is to jump directly to the determination of damages before performing a contemporaneous analysis of the critical path of the project. First, it must be determined if there were concurrent delays or concurrently critical delays. After that is determined, then an analyst should continue with the determination of the causes of the delay and the associated damages, which should be based on an analysis of the contemporaneous schedules, unless specifically defined otherwise by the contract.

With this understanding of concurrently critical delays, we can examine sample contract clauses to identify whether or not they clearly define concurrent delays. A sample contract stated:

... If one of several causes of delay operating concurrently results from any act, fault or omission of the Contractor or of its Subcontractors, and would itself (irrespective of the concurrent causes) have delayed the Work, no extension of time will be allowed for the period of delay resulting from such act, fault or omission.

This clause appears to state that any time the contractor is delaying an item on the project at the same time that the owner is delaying an item on the project, the contractor cannot

receive a time extension. However, it does not discern whether concurrent delays apply only to critical path delays, noncritical path delays, or both.

The Florida Department of Transportation (FDOT) Standard Specifications for Road and Bridge Construction 2007 states:

... in the event there are concurrent delays to one or more controlling work items, one or more being caused by the Department and one or more being caused by the Contractor, the Contractor shall be entitled to a time extension for each day that a controlling work item is delayed by the Department but shall have no right to nor receive any monetary compensation for any indirect impacts for any days of concurrent delay.<sup>3</sup>

Again, the FDOT clause appears to state that time but not monetary compensation will be given in the case of a concurrent delay to a "controlling work item." The FDOT's specifications define a "controlling work item" as an item or activity on the critical path, removing the ambiguity of how the FDOT determines concurrent delays with respect to the critical path.

However, the language that would commonly simplify concurrency specifications, and probably alleviate a great deal of confusion, would be if the contract clearly identified that a

concurrent delay occurs when more than one activity, or cause, is delaying the critical path of the project and, as a result, the project completion date. The New Jersey Department of Transportation (NJDOT) Specifications for 2007 states:

Concurrent delays are separate delays on the critical path that occur at the same time. When an excusable, non-compensable delay is concurrent with an excusable, compensable delay, the Department will grant an extension of Contract Time but will not make payment for delay damages as specified in 104.03.09. When a non-excusable delay is concurrent with an excusable delay, the Department will not grant an extension of Contract Time or make payment for delay damages.<sup>4</sup>

This NJDOT section not only addresses what it identifies as a concurrent delay and how a concurrent delay relates to the critical path of the project, but also defines which types of concurrent delays are eligible for either a time extension (excusable delays) or monetary compensation (compensable delays). This clause has removed the ambiguities from the previous example clauses, with respect to whether concurrent delays apply to only critical path delays or not, and also how time and monetary compensation will be determined

when more than one party is involved in the concurrent delay.

In conclusion, the critical path of the project should be analyzed to accurately determine which, if any, of the concurrent delays were critical path delays. If there are concurrently critical delays, determine whether they are concurrently critical activities or concurrently critical causes of delay. A causation analysis of the project documents should be performed to make an accurate determination of concurrent causes of delay to a critical activity. Also, since a determination of concurrency is tied to the relative measurement of progress or delay for each activity, an understanding of total float and its role, or lack thereof, in this measurement process is essential.

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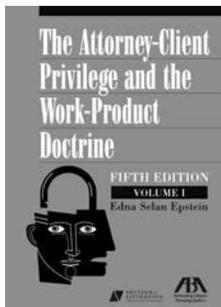
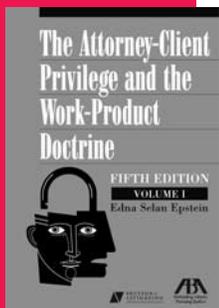
#### Endnotes

1. Dictionary.com, s.v. "concurrent," <http://dictionary.reference.com/browse/concurrent> (accessed Dec. 8, 2008).
2. Dictionary.com, s.v. "delay," <http://dictionary.reference.com/browse/delay> (accessed Dec. 8, 2008).
3. *Standard Specifications for Road and Bridge Construction 2007*, Florida Dept. of Transp. § 5-12.6.2.2 (2007).
4. *Standard Specifications for Road and Bridge Construction 2007*, New Jersey Dept. of Transp. § 108.11.01 B.4 (2007).

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# Recent Ethics Regulations Amending the FAR

By William (Tom) Thompson and Patrick J. Greene



**William (Tom) Thompson**

Final ethics regulations issued by the government

on November 12, 2008, have created a challenging and potentially troubling reality for all prime contractors and subcontractors who have a contract exceeding \$5 million and a performance period of at least 120 days.<sup>1</sup>

The government's latest ethics regulations amend the Federal Acquisition Regulation (FAR) to expand federal ethics and compliance requirements. The final regulations clarify the requirements for a contractor code of business ethics and conduct and an internal control system that were established in the previously adopted FAR regulations. More importantly, contractors will now be required to disclose, to the agency's Office of Inspector General (OIG) and contracting officer, violations of the criminal provisions of federal ethics laws, as well as violations of the civil False Claims Act and any "significant overpayments" on contracts with the federal government. Disclosures must be made whenever a contractor has "credible evidence" of a violation. Failure to disclose could result in suspension and/or debarment from doing business with the government.

The final regulations took effect on December 12, 2008.

## Mandatory Self-Disclosure

In a major departure from the current voluntary disclosure regime, the final regulations contain mandatory self-disclosure requirements. The new regulations were authorized by the "Close the Contractor Fraud Loophole Act," which was enacted on June 30, 2008, as part of the Supplemental Appropriations Act of 2008 (Pub. L. 110-252). The act required the FAR to be amended to require contractors to timely notify

the government of violations of federal criminal laws or overpayments in connection with the award or performance of covered government contracts or subcontracts, including contracts performed outside the United States and contracts for commercial items.

Under the new regulations, the self-disclosure requirement applies to contracts in an amount greater than \$5 million and a duration of more than 120 days. Government contractors must "timely" disclose in writing to the agency OIG, with a copy to the contracting officer, whenever the contractor has credible evidence that a principal, an employee, an agent, or a subcontractor of the contractor has committed:

a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.

If the violation relates to more than one government contract involving different agencies, the contractor may make the disclosure to the agency OIG and contracting officer responsible for the largest dollar value contract.

## Credible Evidence

The self-disclosure requirement applies when the contractor has "credible evidence" that a violation has occurred. This is a change from the originally proposed regulations, which would have required a contractor to self-disclose when it had "reasonable grounds to believe" that a violation occurred. The change was made in response to industry concerns that the "reasonable grounds to believe" standard was subject to varying interpretations and could be viewed as a lower standard than probable cause. While the new

"credible evidence" term is not defined in the final FAR regulations, the preface to the regulations states that the term indicates a higher standard than "reasonable grounds to believe." Nevertheless, what constitutes "credible evidence" is obviously subject to widely divergent interpretations depending on the circumstances.

**Patrick J. Greene**

## Civil False Claims Act

By the same token, contractors will be hard-pressed to determine when there is credible evidence of a violation of the civil False Claims Act. The boundaries of the False Claims Act are undefined and constantly changing. Different federal courts have different interpretations of such basic concepts as whether the submission of a payment request when a contractor is not in full compliance with all of the terms and conditions of the contract can be, in and of itself, a violation of the act.

For this reason, the new regulations recognize that genuine disputes over the application of the act may be considered by the government in evaluating whether a contractor knowingly failed to disclose a violation. The mere filing of a whistleblower (*qui tam*) action or a government decision to intervene in a whistleblower case would not, standing alone, constitute credible evidence of a violation that must be reported.

Nevertheless, these qualifications provide little comfort to a contractor who must make a difficult disclosure decision and risk being second-guessed later by the government for having made the wrong decision. In this regard, industry had expressed the concern that mandatory disclosure of violations of the civil False Claims Act would create a risk that whistleblowers would then bring *qui tam* law suits

against the disclosing contractor based on the disclosure. In response to this concern, the FAR drafters simply stated that this is a risk that contractors will have to take and that timely disclosure will have the benefit of possibly avoiding suspension or debarment and possibly obtaining a reduction in the False Claims Act penalties that would otherwise be imposed.

### *Timely Disclosure*

Although the regulations require contractors to “timely” disclose violations, the FAR drafters indicated that a contractor will have a reasonable period of time to conduct a preliminary examination of the evidence to determine its credibility before deciding to disclose to the government. Unless and until a contractor reasonably determines that the evidence is credible, it is not required to make such a disclosure.

### *Full Cooperation*

The requirement for full cooperation with government agencies responsible for audits, investigations, or corrective actions obligates contractors to disclose to the government information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes timely and complete responses to government auditors’ and investigators’ requests for documents and access to employees with information. Cooperation is measured by the cooperation of the contractor itself and not the cooperation of individuals within the contractor’s organization. This means that a contractor should not be penalized if its employees invoke their Fifth Amendment rights. A contractor may still be given full credit for cooperation if, because of the lack of cooperation of particular individuals, neither the contractor nor law enforcement personnel are able to identify the culpable individuals responsible for the violation.

### *OIG Involvement in Contracts*

One of the obvious questions raised by the new FAR regulations is whether they will mean that agency inspectors

general will be constantly looking over contractors’ shoulders hoping to find violations that have not been disclosed. The drafters of the regulations attempt to allay this concern by stating that OIG agents will not be “routinely involved” in company internal ethics functions and contract administration “unless violations are disclosed.”

## The FAR’s new requirements have made government contractors “partners” with the inspectors general of the agencies with which they have contracts.

### *Impact on Labor Agreements*

In response to concerns that the new regulations might violate existing labor agreements with unions if the self-disclosure requirements are imposed without bargaining, the FAR drafters cavalierly stated that “contractors can find ways to disclose without violating labor union provisions that protect individual privacy of workers.”

### *Attorney-Client Privilege*

The FAR final regulations provide that the self-disclosure requirement does

not require a contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine. This limitation, however, cannot be used to excuse the failure to self-disclose facts (as opposed to impressions and opinions), which would not be subject to protection. In addition, the regulations provide that the self-disclosure requirement does not require any officer, director, owner, or employee of the contractor, including a sole proprietor, to waive his or her attorney-client privilege or constitutional right against self-incrimination under the Fifth Amendment. Although the regulations do not require a Fifth Amendment waiver (no regulation could) and do not require a contractor’s counsel to Mirandize employees before interviewing them in an investigation, counsel may nevertheless conclude that they are ethically obligated to warn employees. This, in turn, could have a chilling effect on a contractor’s ability to conduct an effective internal investigation, not to mention employer/employee relationships.

### *Protection of Confidential Information*

If a contractor’s disclosure is marked “confidential” or “proprietary,” it will be safeguarded by the government and treated as confidential. The information will be withheld under the Freedom of Information Act (FOIA) to the extent permitted by the FOIA and will not be released without prior notification. Thus, it is crucial that any disclosures be appropriately marked.

### *Suspension/Debarment*

Under the final regulations, a contractor may be suspended and/or debarred if a principal of the contractor knowingly fails to timely disclose credible evidence of a violation of federal criminal law involving fraud; conflict of interest; bribery or gratuity violations; or a violation of the civil False Claims Act in connection with the award, performance, or closeout of a government contract performed by the contractor, or a subcontract awarded under a government contract. In addition, a contractor may be suspended and/or debarred if a principal of the

contractor knowingly fails to disclose credible evidence of a significant government overpayment, other than an overpayment resulting from contract financing payments.

### *Significant Overpayment*

The final regulations provide no clear guidance as to what constitutes a “significant” overpayment. However, the drafters do state that this determination depends on both the dollar value and “the circumstances of the overpayment.” The drafters noted that standard payment clauses already require contractors to disclose and return overpayments of any amount.

### **Involvement of Principal**

Under the final regulations, the term “principal” is defined to include an officer, a director, an owner, a partner, or a person having primary management or supervisory responsibilities such as a general manager, plant manager, head of a subsidiary, division, or business segment, or similar position. This definition will be interpreted broadly and could include compliance officers or directors of internal audits, as well as other positions of authority.

### *Relevant Time Period*

The knowing failure to timely disclose remains a cause for suspension and/or debarment for three years after

final payment on a contract. As a result, even though the self-disclosure requirement applies only to covered contracts awarded after December 12, 2008 (the effective date of the final regulations), a contractor’s failure to disclose a violation that occurred prior to December 12, 2008 may subject the contractor to suspension and/or debarment if the violation falls within the three-year reporting period. That period is measured from the date of the contractor’s determination that the evidence is credible, or the effective date of the regulations, whichever occurred later. If violations under an ongoing contract took place before December 12, 2008, then those violations must be disclosed or the contractor will risk suspension and/or debarment if the violations are subsequently discovered by the government.

### **Code of Business Ethics and Conduct and Internal Control System**

The requirement to have a written code of business ethics and conduct and an internal control system is clarified under the final regulations. The contractor must provide a copy of the code to each employee engaged in performance of the contract. The manner of communicating the code is left up to each contractor. A contractor may have different codes of conduct that apply

to different segments of a contractor’s business lines. The FAR drafters also pointed out that the internal controls required by the earlier compliance regulations reflect the government’s “minimum expectations” and that contractors are free to establish more rigorous ethical standards.

### *Bottom Line*

With the FAR’s imposition of new mandatory self-disclosure requirements, government contractors have effectively become “partners” with the inspectors general of the agencies with which they have contracts. Although the government’s commitment to eradicate procurement fraud is laudable, the legal, financial, and practical consequences of the policies intended to accomplish this public policy will have a profound impact on all government contractors. Today, more than ever, it is critically important that government contractors institute and implement an effective compliance program.

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### **Endnote**

1. 73 Fed. Reg. 67, 064 (Nov. 12, 2008).



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## The New AACEI Recommended Practice for Forensic Schedule Analysis (Part 2 of 2)

Continued from page 1

### *Excusability and Compensability*

While excusability and compensability is generally the last topic addressed in the course of an analysis, this discussion provides a framework for understanding the other three topics. By necessity, the RP/FSA provides little guidance in the actual allocation of responsibility for each delay because those individual determinations about the responsibility for delay to an activity are based on the specific facts of the case and are not subject to methodologies of the RP/FSA.

### *The Critical Path*

Generally, the path through the Critical Path Method (CPM) schedule with the lowest float is the critical path. This is true in the baseline schedule where the projected critical path at the outset of the project has zero float. However, the advent of more sophisticated computer-driven schedules, particularly those with multiple calendars, can alter this picture and create critical paths that have positive float values.

As a project experiences delay, and activities both on and off the projected critical path accumulate negative float, most analysts conclude that the path with the most negative float is the critical path. The RP/FSA agrees with this position, although it recognizes that there is a school of thought that any negative activity could be considered critical.

**Near-critical paths.** The RP/FSA clearly indicates that in identifying the critical path, near-critical paths must be reviewed and analyzed. The RP/FSA identifies several different criteria for consideration in identifying near-critical paths, yet the most commonly observed in expert reports is not discussed. Experts often state, assumably based on experience, that “all near-critical paths with XX days of negative float or more were considered in this analysis.” While this arbitrary cutoff may be sufficient, the RP/FSA offers several more scientific approaches.

First, the RP/FSA presents two alternatives based on the duration of delay events. The analyst could consider the impact of longest delay on the completion date as the outside limit of near-criticality. This conservative approach would capture virtually all significant impacts. Alternatively, the analyst could take an average of the impacts of the various delay events. This is considerably less inclusive than using the longest delay.

Ultimately, it is expert opinion that will generate the most believable and most likely accurate critical path.

Second, the analysis could simply assume that any activity with a float value of less than the measurement period would be sufficient. This means that any activity that, if it experienced no progress in a given month and therefore became critical, would be evaluated. This would seem to be reasonable unless through outside events or logic changes, an activity lost more days than were in the time period.

Third, the RP/FSA suggests that the analysis consider rate of float consumption. This would capture activities missed by other methods that might have major impacts.

Finally, the RP/FSA observes that due to the very nature of schedules and project completion activities, the closer the project gets to completion, the more activities become near-critical. In many analyses, the statement is made that

there are multiple critical paths during the final month or months of the project because both the logic and reporting of these activities become problematic.

**As-built critical path.** The as-built critical path cannot be directly computed using CPM logic because the network computations that generate float values can be generated only to the future (right) of the data date. The RP/FSA suggests that if monthly updates are available, the closest approximation to an as-built critical path is the sequential monthly updates’ projection of the projected critical path. This method needs a careful check to correct for logic changes, weather issues, and other events.

For projects that do not have monthly updates, the RP/FSA suggests that the analyst develop the as-built critical path based on all data available, including interviews with staff and what their perceptions of the critical path were. This author believes that even if the monthly updates indicate a likely as-built critical path, ultimately, it is expert opinion, supportable by the facts and the expert’s knowledge of the industry, that will generate the most believable and most likely accurate critical path. This is the part of the RP/FSA that is aptly called “art.”<sup>1</sup>

**Critical path manipulation techniques.** The RP/FSA devotes almost five pages to a detailed discussion of CPM manipulation techniques. This discussion is included because the manipulation, if any, manifests itself in the possible incorrect identification of the as-built critical path. Issues addressed include resource allocation, use of multiple calendars, logic tricks with lags and leads, milestones and constraints, calculation methods, and changes in the data date.

### *Concurrency and Pacing*

The RP/FSA deals with this subject in great detail, but it does so in a technical manner as opposed to a legal manner. First, the RP/FSA addresses the definitional aspects of concurrency and includes a useful “Net Effect Matrix” identifying what types of delays, when paired with other delays, generate a concurrent delay.<sup>2</sup> The RP/FSA correctly identifies that concurrency can only

be calculated using CPM techniques because one of the requirements is that both the delays be on the critical path. The RP/FSA then goes on to discuss six highly technical issues.

**Literal v. functional concurrency.**

Literal concurrency requires that the two delays occur at exactly the same time (meaning the same days). Functional concurrency recognizes that measurements are often made on a monthly basis and therefore, if the two events occur within the same measurement period, they are candidates for concurrency. Literal concurrency has the problem of assumed data accuracy that may not have been achieved (accurate to the specific day). Functional concurrency has the problem of allowing the arbitrary nature of the update period to have an impact on concurrency. The RP/FSA identifies that generally there will be less concurrency under a literal approach. The RP/FSA takes no position on which approach is better.

**Cause or effect.** The RP/FSA has an extensive discussion concerning the timing of delays. For example, on a five-day critical path activity, if there is a two-day delay immediately after the start of the activity, does the delay occur then or when the activity fails to finish on its late date? The RP/FSA makes the point that it would be desirable if opposing experts discussed some of these ground rules before they performed their analysis, because these decisions can positively or negatively affect the calculations. Further, the RP/FSA suggests that analysts look at both

the cause and the effect in performing their work.

**Analysis intervals.** The RP/FSA identifies that longer analysis intervals using the functional concurrency theory can result in significant concurrency. The RP/FSA also identifies that the placement of intervals can be manipulated to increase or decrease concurrency. This occurs when the analyst places a measurement break between two activities that others might consider functionally concurrent. Longer analysis periods also reduce the accuracy, because periodic adjustments to planned performance may not be recognized.

**Order of insertion/extraction.**

This sequence has relevance when a modeled method is used. Generally, if the delays are all inserted into the model at one time, there will be more concurrency.

**Hindsight or blindsight.** The RP/FSA takes no position on whether the use of knowledge of future events (with respect to the data date), known as “hindsight,” is better than pretending the analyst is standing in the shoes of the project manager ignorant of the future, known as “blindsight.” The RP/FSA simply suggests that the analyst be aware that these two approaches might lead to different conclusions.

**Pacing.** Pacing occurs when one party consciously delays performing an activity or a task because there is a delay caused by the other party that makes on-time performance unnecessary. In other words, there is no need to “hurry up and wait.” The RP/FSA

has a detailed explanation of pacing that goes far towards explaining the technicalities. Pacing is usually a matter of proof—can the party claiming it was pacing its work prove through contemporaneous documentation that such pacing was intentional?

*Acceleration and Mitigation*

The RP/FSA starts its discussion of acceleration and mitigation by providing a comprehensive and detailed definition of these terms and related terms such as “disruption.” The RP/FSA asserts that mitigation generally has no cost associated with it, while acceleration always does. In this section, the RP/FSA devotes several pages to constructive acceleration and its six requirements:

1. entitlement to excusable delay
2. request for time extension
3. refusal of time extension
4. request owner requirement to perform more quickly
5. notice of acceleration
6. proof of damages

While acceleration and mitigation are discussed generally here, the most useful discussions of acceleration and mitigation of delay occur in the discussions of the methodologies themselves.

**Section 5—Choosing a Methodology**

This fifth and final section of the FSA/RP concerns selecting the right methodology. (See chart below.) Eleven considerations are discussed, but those

SUMMARY OF COMMON METHODOLOGIES													
TAXONOMY	1	RETROSPECTIVE											
	2	OBSERVATIONAL						MODELED					
	3	Static Logic			Dynamic Logic			Additive			Subtractive		
	4	3.2 Periodic		Contemporaneous Updates (3.3 As-Is or 3.4 Split)		3.5 Modified/Reconstructed Updates		3.6 Single Base		3.7 Multi Base		3.8 Single Simulation	
	5	Fixed Periods	Variable Windows	All Periods	Grouped Periods	Fixed Periods	Variable Windows	Global Insertion	Stepped Insertion	Fixed Periods	Variable Windows or Grouped	Global Extraction	Stepped Extraction
Common Names	As-Planned v. As-Built	Window Analysis		Contemporaneous Period Analysis, Time Impact Analysis, Window Analysis	Contemporaneous Period Analysis, Time Impact Analysis, Window Analysis	Contemporaneous Period Analysis, Time Impact Analysis	Window Analysis, Time Impact Analysis	Impacted As Planned, What-If	Time Impact Analysis, Impacted As Planned	Time Impact Analysis	Window Analysis, Impacted As Planned	Collapsed As-Built	Time Impact Analysis, Collapsed As-Built

considerations must be evaluated in light of one overarching requirement: How convincing does the presentation need to be? Many experienced construction litigators are indifferent to the methodology chosen by the expert because they believe that the expert's convincing authority comes from having confidence, knowing the facts, and having a story to tell. While the subtext of the RP/FSA is to avoid the theatrical aspects of expertise, it is hard to dispute that experts who are convincing generally do better than those who are not.

### Contractual Requirements

While many construction contracts are silent concerning how entitlement to delay must be established, most governmental contracts, and many of the larger and more complex private projects specify a particular method, commonly known as time impact analysis (TIA), for requesting and proving entitlement to time extensions. Because the contractual language commonly applies to prospective requests for time, it may be an issue for legal counsel about whether such a provision requiring a TIA for prospective time extensions is applicable in cases where the analysis will be done retrospectively.<sup>3</sup>

### Purpose of Analysis

It is possible that the delay analysis requested by client or counsel is only required for a limited purpose, for

example to establish that a particular subcontractor was entitled to a time extension for a specific change order. Such a restrictive scope for the delay analysis might imply a more limited methodology. However, an expert incurs a significant risk in limiting his analysis to a small time period or specific aspect of the work. Due to the complexity and interrelationships of construction projects, such a restriction may make the results significantly less reliable.

The RP/FSA contains a chart that summarizes the advantages and disadvantages identified with each methodology.<sup>4</sup> (See chart below.) The chart is extremely useful, but should be used with caution as slight adjustments in methodology can make significant differences in the applicability of the particular methodology for a particular specific task.

### Data Availability and Reliability

Because disputes are usually a mixture of the facts and the influence of those facts on various legal theories, it is appropriate that the facts support an early consideration in any decision concerning methodology. The RP/FSA places considerable emphasis on gathering, organizing, and evaluating the quantity and quality of data, because availability of data is often more of a determinative factor in the choice of a method than quality.<sup>5</sup> But the quality of the data is also an important issue.

Assuming the existence of update schedules, if they are of poor quality, it may be better to use them as supplemental support for some other methodology, rather than run the risk of using data that is incorrect. A handy chart from the RP/FSA that summarizes these considerations can be found on the next page.<sup>6</sup>

### Size of the Dispute

It seems self-evident that there is almost never a sensible reason to perform a detailed, complex, and expensive schedule delay analysis when the dollar amount in dispute is small. A greater danger is choosing a methodology that is too simplistic (and inexpensive) for the facts.

### Complexity of the Dispute

Accurate results for complex delay situations generally require complex analysis. The danger of using a simple analysis technique for a complex situation is that the simplified method may incorrectly summarize the interrelationships of the activities and events, leading to wrong conclusions.

### Budget

Budget is always an issue for forensic analyses because they generally cost significant amounts of money in relation to the value of a dispute. For this reason, clients and attorneys correctly endeavor to have the time-consuming and not-easily-understood work performed as efficiently as possible. This, of course, causes a rub. It may be impossible to provide a reasonable explanation and proof of some delays, using less expensive (simpler) methodologies. Unfortunately, it is not possible to rank the eight methodologies in order of increasing cost or cost-benefit ratio because there are too many factors governing the outcome, many of which are discussed in this section.

### Time Allowed for Evaluation

Due to court or arbitration calendars, there may be only a limited time to perform an analysis. If there is not enough time to perform a detailed analysis, the expert may be forced to use one of the simpler and perhaps less accurate methods.

ADVANTAGES V. DISADVANTAGES IN METHODOLOGY TYPES								
Forensic Use of Analysis	METHOD							
	3.1	3.2	3.3	3.4	3.5	3.6	3.7	3.8
Non-Compensable Time Extension	OK	OK	OK	OK	OK	OK	OK	OK
Compensable Delay	OK	OK	OK	OK	OK			OK
Right to Finish Early Compensable Delay								OK
Entitlement to Early Completion Bonus	OK	OK	OK	OK	OK	OK	OK	OK
Disruption Without Project Delay	OK	OK	OK	OK	OK	OK	OK	
Constructive Acceleration				OK		OK	OK	

SUMMARY OF DATA AVAILABILITY								
Source Schedules or Data	METHOD							
	3.1	3.2	3.3	3.4	3.5	3.6	3.7	3.8
Baseline Schedule	Need	Need				Need	Need	
Schedule Updates			Need	Need				
As-Built Record	Need	Need			Need			Need

### Expert's Expertise

Not all experts are proficient in every methodology. While most forensic schedule experts are familiar with several types of methods, it is also true that usually they have a preferred methodology. For this reason, it is best to use a method with which the expert is familiar.

### Audience

Some courts, particularly federal courts, have over the years expressed dissatisfaction with some of the methodologies identified in the RP/FSA. Therefore, if the ultimate decision forum is a court, it is generally inadvisable to use a method accepted by the court. If the decision forum is a sophisticated court, board, or arbitration tribunal with real expertise in construction delay claims, it is vital that the methodology chosen be as accurate and complete as possible. Trials with juries create a more difficult consideration. Juries in construction cases are both bored and confused, often focusing on the wrong aspect or some minor issue of the case in rendering their decision. This means that whatever methodology is used, the expert has to present it and its conclusions clearly to the jury.

### Procedural Requirements

Certain triers of fact have very specific procedures or requirements that may affect the choice of methodology. Further, some arbitration panels have started to specify a particular methodology or standard for experts to follow. An additional consideration might be that certain methodologies have specific requirements of proof as established by case law.<sup>7</sup> If the facts

are insufficient to support those specific requirements, then it may be best to choose a different methodology.

**Juries often focus on the wrong aspect or a minor issue in rendering their decision.**

### Past History

In many cases, there is a negotiation or analysis history that must be considered. Further, sometimes there is a change in experts midway through an analysis. Often the owner and counsel wish the new expert to simply pick up where the old expert left off. This may be possible and should be considered by the new expert, but the unsatisfactory analysis done to date may be one of the reasons for the change of experts. What methodology the opposing side is using may also be a consideration.

### Conclusion

In the few pages above, I have summarized the RP/FSA's discussion of the factors to be considered when choosing a forensic schedule delay methodology. These considerations should be discussed with client and counsel, as many

of the factors are outside the expert's knowledge, at least at the outset of the analysis. Similarly, because the availability of accurate data is so critical to a successful analysis, it may be unwise to choose a method until it is known what facts are available. Finally, it has become clear in the past few years that the notion that all methodologies will produce identical results if performed impartially is untrue. Different methodologies create different outcomes due to differences in the timing of the delays and the level of detail.<sup>8</sup>

The RP/FSA is a milestone in the development of the forensic schedule delay industry. It is the first and most comprehensive guide to schedule delay analysis available. The RP/FSA is not perfect and is undergoing a minor revision to be published in the summer of 2009. Time will tell whether the RP/FSA fulfills its potential as a measuring stick for evaluation of methodologies and as an aid in performing schedule delay analysis. Because one of the reasons for the creation of the RP/FSA was to codify the methodologies, its use in the next few years as a tool in *Daubert*<sup>9</sup> challenges should be informative.

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### Endnotes

1. *Forensic Schedule Analysis 8* (Assoc. for Advancement of Cost Eng'g Int'l., Recommended Practice No. 29R-03, revised June 2007), available at [www.aacei.org/technical/rps/29R-03.pdf](http://www.aacei.org/technical/rps/29R-03.pdf) (RP/FSA).
2. *Id.* at 78.
3. *Fortec Constructors v. U.S.*, 8 Cl.Ct. 490 (1985).
4. RP/FSA at 101.
5. *Id.* at 17.
6. *Id.* at 101.
7. *Santa Fe Engineers, Inc.* ASBCA No. 24578, 94-2 BCA Para 26872 (1994).
8. Mark C. Sanders, *Forensic Schedule Delay Analysis—Example Implementation*, 2008 AACE International Transactions, CDR.11.
9. *Daubert vs. Merrell Dow Pharm. Inc.*, 113 S. Ct. 2786 (1993).



**Jodi A. Janecek Esq.**

## Early Lessons Learned

By Jodi A. Janecek Esq.

My first year as a construction litigator has taught me numerous lessons and I expect to learn countless more down the road. Not all of them came from the office or the courthouse, but from dining at the same table as a construction company's project manager—my husband. Here are some of those invaluable lessons, at least the ones that I have permission to print.

### 1. Strive for a Good Working Relationship with Your Fact Witnesses

One of the first things I learned is the importance of building a good rapport not only with your client, but also with the fact witnesses employed by your client. In a construction case, these fact witnesses often include the project manager. From my husband's gripes, it seems that the project manager can be skeptical of the "lawyers" or find the lawyers to be more of a nuisance than a help in a dispute. It is important to go out of one's way to build the working relationship with one's fact witnesses, especially if they are already skeptical of your ability to help. They will be the ones who help you build your case, whether it is by finding the invoices to support a claim or explaining the project plans and why a certain decision was made.

### 2. Don't Assume That Everyone Has Read the Contract

It is still surprising to find how often opposing counsel will make demands or assertions before reading the contract. I had always assumed that before an attorney wrote a demand letter for payment based on change orders, for example, that the attorney would actually read the relevant section of the contract entitled "Change Orders" to ensure that the client had complied with the contract. In my case, the attorney was arguing for a

particular change in a subcontract when that item was specifically excluded from the prime contract.

### 3. Reading Your Audience: The Judge

I have learned that in court, it can be difficult to read what a judge is thinking, and that some judges are easier to read than others. In a number of my cases, I was pleasantly surprised that the judge ruled in my favor, even though the only indications that the judge gave me during argument was that he was not going to rule in my favor. Instead of reacting to a difficult inquisition as a sign of the judge's doubt in my position, I now think of tough questions as a sign that the judge wants my help making a good record to avoid reversal.

### 4. Discovery's Many Discoveries

Through discovery, you can learn more than you ever thought you would about a client. In many cases, you will review all sorts of information that is not directly relevant to your particular case, but may be relevant to other aspects of your client's business. The key is keeping an open mind and eye for this information. For example, you may find information in a project manager's daily diary that could suggest a pattern of harassment by the employee that was unknown to your client.

### 5. Getting Your Client to Tell the Whole Story

One of the more frustrating lessons that I have learned is how to get your client to tell you the whole story. Asking the right questions is key. However, asking the right questions is difficult when your client is forgetful or deliberately filters out facts because he or she decided those facts were not relevant. After watching experienced litigators get surprised by clients in depositions and hearings, I realize that this will probably always occur. What I learned is to expect the unexpected when it comes to clients.

### 6. Containing Expressions

One of the hardest lessons that I have had to learn this first year is to contain my surprise, excitement, and disappointment. During my first deposition, for example, the defendant made many key admissions in support of my client's position. I was so excited that I could barely sit in my seat—but I was determined to make the defendant and opposing counsel think that I did not hear what the defendant said or that I expected it. I'm not sure how well I contained my excitement, but based on opposing counsel's expressions, he had a hard time containing his shock.

### 7. Your Client's Needs

Finally, one of the things that I've heard many times from my husband and have also learned during this past year is to synthesize your client's business goals with your litigation goals. Many times the two will be the same. However, there are instances when they may seem to be in conflict. For instance, from my husband's perspective, he has encountered a number of attorneys he has worked with who fail to recognize the client's objective. In one such case, he was so frustrated with a subcontractor's attorney that he refused to hold a meeting to discuss the contract if the attorneys were present. Of course, I reminded my husband that the attorney was really just trying to protect her client, but he was quick to reply that the attorney failed to realize her client's objective. That business objective was to be a subcontractor on a particular job—regardless of certain contract provisions—and the lawyer was turning a valued subcontractor into someone the general contractor didn't want to do business with. As lawyers, we need to make sure we don't win the battle at the expense of the war.

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“risk shifting” clauses that appear to insulate the owner from contractor claims for delays and impacts to its schedule. For instance, while no-damage-for-delay clauses are certainly enforceable, commentators have noted that there are so many exceptions that have been recognized by the courts that such clauses may have limited impact.<sup>1</sup>

The ConsensusDOCS 200 appears to have adapted itself to the reality that the owner will frequently bear the burden of poor coordination by unambiguously articulating the owner’s right to participate in scheduling, sequencing, and coordination activities. This allows the owner a chance to protect itself from protracted delays by providing the owner with the contractual right to change the sequence and schedule of the contractor. The AIA A201, by contrast, has left the owner in the netherworld of potential responsibility for poorly scheduled, sequenced, and coordinated projects without the clear power to insert itself in the decisions of the contractor.

### **Relevant Scheduling, Sequencing, and Coordination Provisions**

In comparing the ConsensusDOCS 200 to the AIA A201, the two contracts have significantly different language on scheduling, sequencing, and coordination. The ConsensusDOCS 200 approach—permitting and requiring the owner’s active participation in scheduling, sequencing, and coordination decisions—appears resigned to the need to balance the case law that protects the contractor’s right to control schedule, sequencing, and coordination—to the detriment (at times) of the owner—with provisions allowing the owner to have input in the process. By contrast, the AIA A201 approach appears to leave the owner in the unfortunate position where it could be found liable for delays and costs associated with scheduling, sequencing, and coordination problems as evidenced by the case law above, without the necessary

power to react to those problems and mitigate its damages.

### **The ConsensusDOCS 200**

All of the provisions relating to sequencing and scheduling in the ConsensusDOCS 200 can be found in articles 3, 6, and 8. Article 3 provides most substantive provisions relating to coordinating activities. Article 6 generally requires the contractor to develop a schedule, update it as necessary, and submit it to the owner/architect for approval. Finally, Article 8 provides a basis for a contractor to seek additional time and costs associated with an owner-requested change to re-sequence the work. Each one will be discussed in turn.

First, subparagraph 3.2.1 provides:

The Owner may perform work at the Worksite directly or by Others. Any agreements with Others [Multi-Prime Contractors] to perform construction or operations related to the Project shall include provisions pertaining to insurance, indemnification, waiver of subrogation, coordination, interference, cleanup and safety which are substantively the same as the corresponding provisions of this Agreement.

The import of this provision is to permit the owner to self-perform work or use a multi-prime project delivery system. Importantly, if the owner chooses to exercise this right, the owner must make sure that other prime contractors are required to “coordinate” their work the same as the contractor.

Second, subparagraph 3.2.2 provides:

In the event the Owner elects to perform work at the Worksite directly or by Others, the Contractor and the Owner shall coordinate the activities of all forces at the Worksite and agree upon fair and reasonable schedules and operations procedures for Worksite activities. The Owner shall require each separate Contractor to cooperate with the

Contractor and assist with the coordination of activities and the review of construction schedules and operations. The Contract Price and Contract Time shall be equitably adjusted, as mutually agreed by the Parties, for changes made necessary by the coordination of construction activities, and the Schedule of the Work shall be revised accordingly. The Contractor, Owner and Others shall adhere to the revised construction schedule until it may subsequently be revised.

The import of this provision is that if the owner elects to self-perform work or use the multi-prime project delivery system, the owner chooses to enforce coordination of the work between the various prime-contractors, and the owner must pay (or grant a time extension) if coordination activities result in changes to the contractor’s schedule.

Third, subparagraph 3.2.3 provides:

With regard to the work of the Owner and Others, the Contractor shall (a) proceed with the Work in a manner which does not hinder, delay or interfere with the work of the Owner or Others or cause the work of the Owner or Others to become defective, (b) afford the Owner or Others reasonable access for introduction and storage of their materials and equipment and performance of their activities, and (c) coordinate the Contractor’s construction and operations with theirs as required by this Paragraph 3.2.

The import of this provision is to foist some responsibility on the contractor to coordinate with the owner and other contractors on the project to meet the project delivery requirements.

Fourth, subparagraph 3.7.1 provides:

The Contractor shall schedule all required tests, approvals and inspections of the Work or portions thereof at appropriate times

so as not to delay the progress of the Work or other work related to the Project.

This provision stands out from all the other provisions in the contract because it is the only one with respect to scheduling and sequencing of work that appears to place complete control and responsibility upon the contractor. Basically, if interpreted literally, the contractor's failure to timely obtain tests, approvals, and inspections of the work that delay the progress of the work could be cause for an owner claim.

Fifth, subparagraph 6.2.1 provides:

Before submitting the first application for payment, the Contractor shall submit to the Owner and if directed, its Architect/Engineer, a Schedule of the Work that shall show the dates on which the Contractor plans to commence and complete various parts of the Work, including dates on which information and approvals are required from the Owner. On the Owner's written approval of the Schedule of the Work, the Contractor shall comply with it unless directed by the Owner to do otherwise or the Contractor is otherwise entitled to an adjustment in the Contract Time. The Contractor shall update the Schedule of the Work on a monthly basis or at appropriate intervals as required by the conditions of the Work and the Project.

This provision requires the contractor to submit and maintain a schedule. The owner is required to approve the schedule. When read in conjunction with the provisions relating to self-performed work or multi-prime project delivery, it is clear that the owner's decision to approve the schedule could have serious consequences in the event the owner has failed to coordinate the schedules of the various other contractors to avoid interference. By contrast, by taking the time to properly coordinate the work at the earliest point in the

process, presumably the owner would be able to pass responsibility to the contractor for failing to follow the agreed-upon schedule.

Sixth, subparagraph 6.2.2 provides:

The Owner may determine the sequence in which the Work shall be performed, provided it does not unreasonably interfere with the Schedule of the Work. The Owner may require the

## The lines of responsibility for the coordination and sequencing of work in the ConsensusDOCS 200 are less clear than in the AIA A201.

Contractor to make reasonable changes in the sequence at any time during the performance of the Work in order to facilitate the performance of work by the Owner or Others. To the extent such changes increase Contractor's time and costs the Contract Price and Contract Time shall be equitably adjusted.

According to this provision, the owner has the ability to require a contractor to perform out-of-sequence work as long as the demand to do so is not "unreasonable." Of course, the owner may be required to "pay" for

the privilege of requiring the contractor to perform out-of-sequence work in either a time extension or price change. Once again, however, this provision "ties back" to the agreed-upon schedule—which places further importance on the original scheduling of the work as described above.

Seventh, subparagraph 8.1.1 provides:

The Contractor may request or the Owner may order changes in the Work or the timing of sequencing of the Work that impacts the Contract Price or the Contract Time. All such changes in the Work that affect Contract Time or Contract Price shall be formalized in a Change Order. Any such requests for a change in the Contract Price or the Contract Time shall be processed in accordance with this Article 8.

This provision simply provides that a change to sequence of the work that impacts the contractor's ability to perform could result in a claim for additional money and/or time pursuant to the claim's provisions.

### The AIA A201

The primary provisions in the AIA A201 detailing responsibilities for scheduling and sequencing are found in article 3 and article 6. Article 3 generally provides that the sequencing and coordination of the work be "solely" the responsibility of the contractor. Article 6 generally provides that a contractor should coordinate its work with other contractors and/or the owner as necessary on a multi-prime project. Each of the relevant provisions will be discussed below.

First, subparagraph 3.3.1 provides:

The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the

Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences and procedures may not be safe, the Contractor shall give timely written notice to the Owner and Architect and shall not proceed with that portion of the Work without further written instructions from the Architect. If the Contractor is then instructed to proceed w/ the required means, methods, techniques, sequences or procedures without acceptance of changes proposed by the Contractor, the Owner shall be solely responsible for any loss or damage arising solely from those Owner-required means, methods, techniques, sequences, or procedures.

This provision makes it clear that unless the owner specifically instructs the contractor in the contract documents regarding sequencing and coordinating the work, the contractor is “solely” responsible for and shall have control over sequencing and coordination. Presumably, if the owner requests a change in the schedule and sequence of the work proposed by the contractor, the contractor has a right to make a claim for costs and time associated with the request pursuant to article 15 relating to claims resolution.

Second, subparagraph 3.10.1 provides:

The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner’s and Architect’s information a Contractor’s construction schedule for the Work. The schedule shall

not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

This provision makes it clear that the contractor—who is solely responsible for and has complete control over sequencing and coordinating the work to meet the schedule—also has control over the schedule. The owner or architect merely receives a copy of the schedule for their “information.”

Third, subparagraph 6.1.3 provides:

The Owner shall provide for coordination of the activities of the Owner’s own forces and of each separate Contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate Contractors and the Owner in reviewing their construction schedules. The Contractor shall make any revisions to the Construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate Contractors and the Owner until subsequently revised.

This provision requires the owner, if the owner chooses to use its own forces and/or to use a multi-prime project delivery system, to coordinate its activities with the contractor. The contractor is required to “cooperate” with the owner to accomplish the necessary scheduling. The contractor is expected to make revisions to its construction schedule as necessary to coordinate the work. However, it is not clear who decides what schedule alterations are “necessary.” The agreed-upon construction schedule then becomes the schedule to be used by the contractor until or unless it is revised. Left

unanswered is whether the owner must compensate the contractor for the handling of the contractor’s schedule.

Fourth, subparagraph 6.2.1 provides:

The Contractor shall afford the Owner and separate Contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor’s construction and operations with theirs as required by the Contract Documents.

This provision requires the contractor to coordinate its work as necessary to permit the owner and other contractors with a reasonable opportunity to connect to the contractor’s work and allow for site access and storage.

#### **ConsensusDOCS 200 v. AIA A201**

Overall, the “lines of responsibility” for coordination and sequencing of work in the ConsensusDOCS 200 are less clear than in the AIA A201. The AIA A201 provides clear language that the contractor is “solely responsible for and shall have control over” sequencing, scheduling, and coordinating its work, whereas, there is no similar definitive language in the ConsensusDOCS 200. The scheduling and coordinating language in the ConsensusDOCS 200 appears to favor less certainty on the subject, thus requiring more of a “give and take” process to sequence, schedule, and coordinate the work. For instance, the owner must provide written approval to the schedule submitted by a contractor. Presumably, the owner, by signing off on the schedule, can be “held to” the schedule, and thus if any other contractors impact the schedule “agreed to” by the owner, it could give rise to a contractor claim for delay or interference. The “approval process” for the schedule presumably includes the right to disapprove the contractor’s proposed schedule. Thus, the owner has the ability to assert some control over that process. There is no such similar right or requirement in the AIA A201 requiring the owner to approve the contractor’s schedule. In fact, it

appears clear that the contractor has the right to create its own schedule without significant owner input. Also, the owner in the ConsensusDOCS 200 has the explicit right to reasonably require the contractor to re-sequence its work (subject to the contractor's explicit right to make a claim for time and/or money). In addition, there is significant verbiage in the ConsensusDOCS 200 explaining how the contractor and owner must work together to coordinate schedules if the owner chooses to use a multi-prime contract delivery system. In contrast, the AIA A201 requires that the owner take responsibility for coordinating activities, presumably to avoid interfering with the contractor's work. However, it does not appear that the contractor must necessarily adjust its schedule to accommodate the owner.

Under the ConsensusDOCS 200, the owner is granted significantly more explicit rights to control schedule, sequence, and coordination of activities of the contractor. Importantly, to the extent that the owner's decisions on the subject impact time and costs, the contractor may be entitled to make a claim. The fact that the owner can force changes to schedule and sequence upon the contractor makes some sense in light of the fact that the owner can be held accountable for failing to coordinate various activities on the site as discussed in the cases above. Basically, it is fundamentally unfair for an owner to

be held responsible for poor jobsite coordination, and yet fail to provide the owner with the power to achieve proper site coordination and sequencing of work. The ConsensusDOCS 200, by permitting active participation of the owner in the scheduling/sequencing process, appears to meet the gap between responsibility and power created by the contractor-friendly case law on the subject.

The AIA A201 contract raises the issue of how an owner can protect its interests during the construction process if decisions related to scheduling, sequencing, and coordination are "solely" under the control and responsibility of the contractor. If courts are going to protect the contractor's right to claims associated with changes in schedule against the owner even in the face of owner favorable clauses, the AIA A201 probably fails as a contractual matter to properly balance the owner's level of responsibility with the owner's level of control.

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*Sean T. Devenney is with Drewry Simmons Vornehm, LLP in Indianapolis. Sean extends his thanks to Shelley Halleberg, a law clerk with Drewry Simmons Vornehm, LLP, whose efforts made this article possible.*

#### **Endnote**

1. See Bramble & Callahan, *Construction Delay Claims*, § 2.16[A] (3rd ed. 2000).

## **Message from the Cochairs**

Continued from page 2

with any useful news and information links as well.

This level of activity is only possible through the tremendous efforts of our membership and, especially, our subcommittee chairs. We should be especially grateful for the untiring work of the chairs of our Program Subcommittee, Anna Torres and Drew Williams, and the editors of *Construct!*, David Kurtz and Edward Salanga, who have worked tirelessly to assure that our Committee has provided the highest level of programs and content to our committee members. We also invite those interested in serving on the Program and Publications Subcommittees to step up and volunteer their services.

Our subcommittee chairs can not do all of this on their own. They require the active involvement of our membership in participating in programs, developing case notes, providing articles for *Construct!*, and other activities. The opportunity for all committee members to participate is available, and their assistance is welcome and necessary for the continued success and growth of the Committee. We are an equal opportunity committee and welcome participation by all of our members. We especially welcome participation from the newest members of the profession, our young lawyers, who have grown up with the technologies that some of us older lawyers view as alien, and whose fresh ideas will help all of us confront the emerging issues these new technologies represent.

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