



Can a Contractor Be Entitled to a Time Extension If The Delay Is Not Critical?

Presented by Mark Nagata, PSP, *Director/Shareholder*, Trauner Consulting Services, Inc. – 8/14/17



Meet Your Presenter, *Mark Nagata, PSP*

- Director/Shareholder
 - Trauner Consulting Services, Inc.
- 17 years of experience
- Scheduler, Analyst, Author, Expert Witness, Award-winning Instructor



Discussion Overview

- The ASCE Proposed Schedule Delay Analysis Standard had two rounds of public comment.
- TRAUNER submitted comments in both public comment periods.
- The Committee addressed some of TRAUNER's comments.
- TRAUNER met with the committee head and a committee member on two occasions since August 2016 to discuss our concerns.
- Our biggest concern is the “Offsetting Delay” concept.



Discussion Overview

- The ASCE's "Offsetting Delay" concept is really a concurrent delay argument.
- The AACE International's Recommended Practice No. 29R-03 Forensic Schedule Analysis (RP-FSA) provides good guidance on concurrent delay, so let's review what it says.



- AACE International's RP-FSA describes the conditions for concurrency as:

Before evaluation of concurrency, there must be:

- Two or more delays that are unrelated, independent, and would have delayed the project even if the other delay did not exist;
- Two or more delays that are the contractual responsibility of different parties, but one may be a force majeure event;
- The delay must be involuntary; and,
- The delayed work must be substantial and not easily curable.



- AACE International's RP-FSA describes concurrent delay as:

The identification and quantification of concurrent delay is arguably the most contentious technical subject in forensic schedule analysis. Accordingly, it is important that all sides, if possible, agree on either the **Literal or Functional theory** (See Subsection 4.2.D.1.) employed in the identification and quantification of concurrent delay.



- AACE International's RP-FSA defines the Literal and Functional theories as follows:

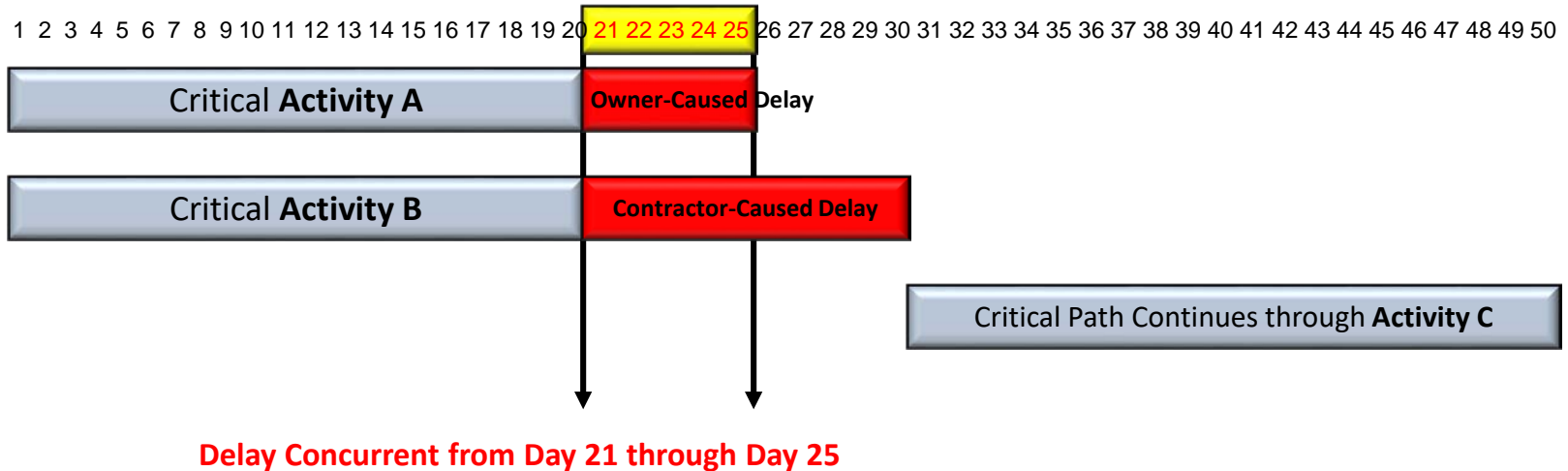
Under the Literal Theory, the delays have to be literally concurrent in time, as in “happening at the same time.” In contrast, under the Functional Theory, the delays need to be occurring within the same analysis period.

Of the two, the functional theory is more liberal in identifying and quantifying concurrency since the delays need only occur within the same measurement period, while in the literal theory, only delays require same-time occurrence. The assumption made by the functional theory practitioner is that most delays have the potential of becoming critical, once float on the path on which they resides has been consumed.



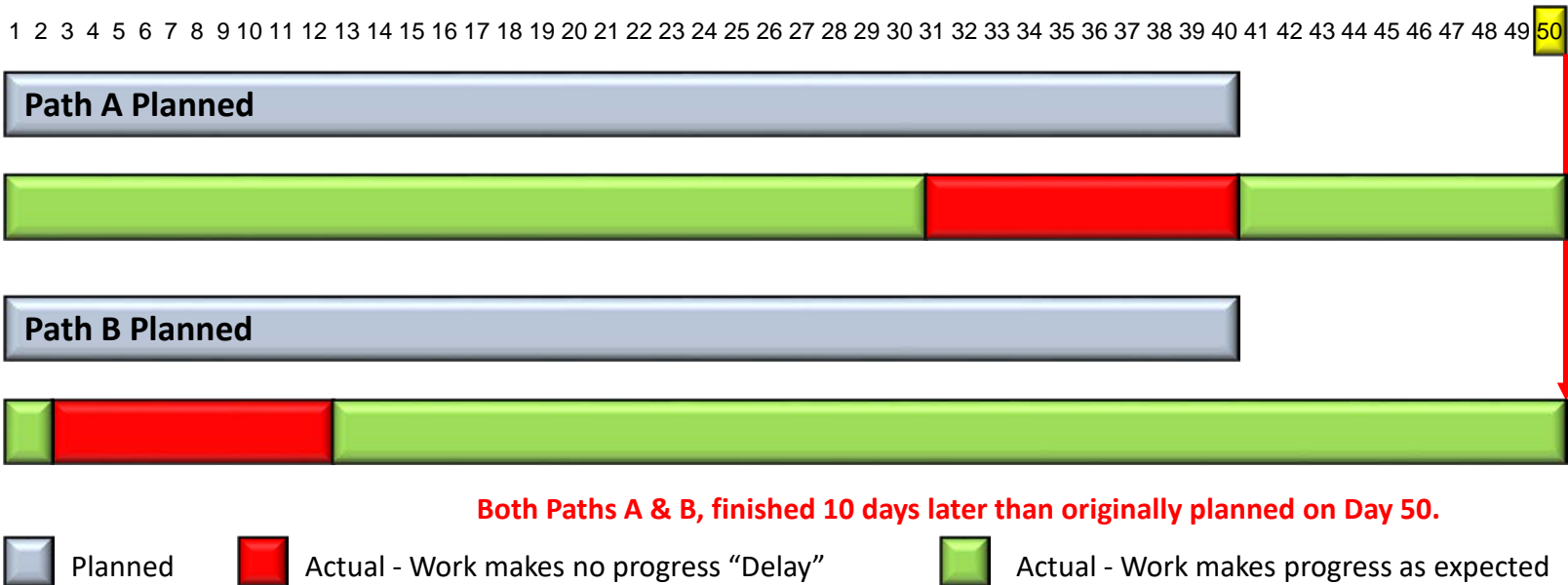
Graphically, the Literal and Functional theories look like this:

Literal Concurrency Theory:



Graphically, the Literal and Functional theories look like this:

Functional Concurrency Theory:



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Under the Literal Theory, the delays have to be literally concurrent in time, as in “happening at the same time.” In contrast, under the Functional Theory, the delays need to be occurring within the same analysis period.

- Concurrent delays as defined under the Literal Theory are rare.
- Concurrent delays as defined under the Functional Theory would occur more often as the delays just have to occur during the same time.



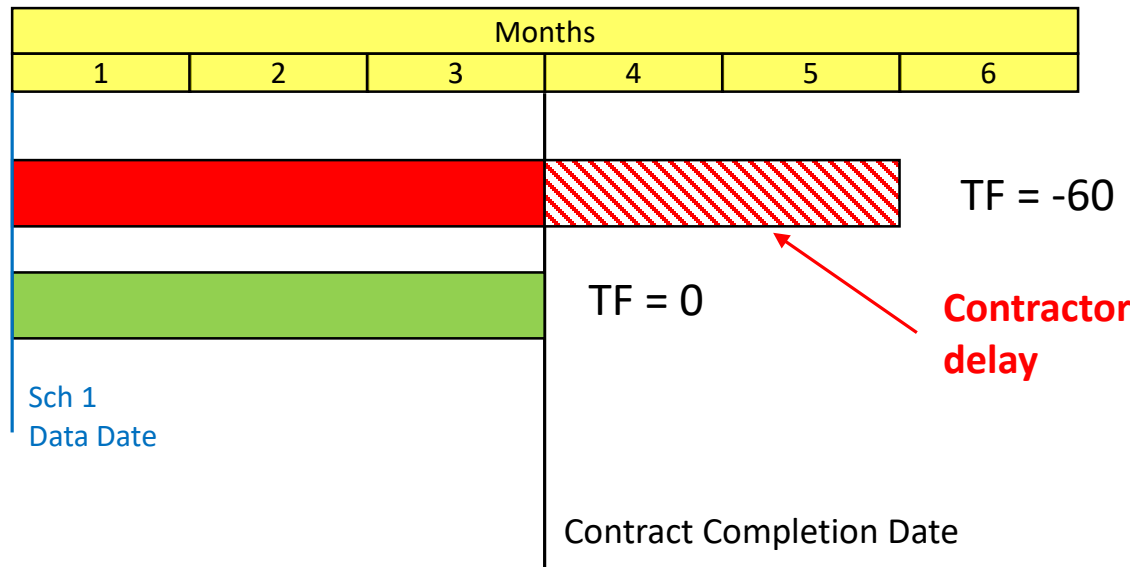
- ASCE's SDA defines an Offsetting Delay as:

4.6 In situations where the completion date is adjusted properly for change orders and the contractor is behind schedule, owner delays that occur thereafter on a separate path may have a mitigating effect on assessment of damages.

In certain situations when the current, as adjusted contract completion date has passed or the current, updated schedule is projecting a completion date that is later than the contract completion date, owner-responsible delays occurring thereafter may mitigate the assessment of liquidated damages. This type of delay is referred to as “offsetting delay,” recognizing that an owner-caused delay may result in recognizing a noncompensable time extension to offset all or a portion of any potential liquidated damages.



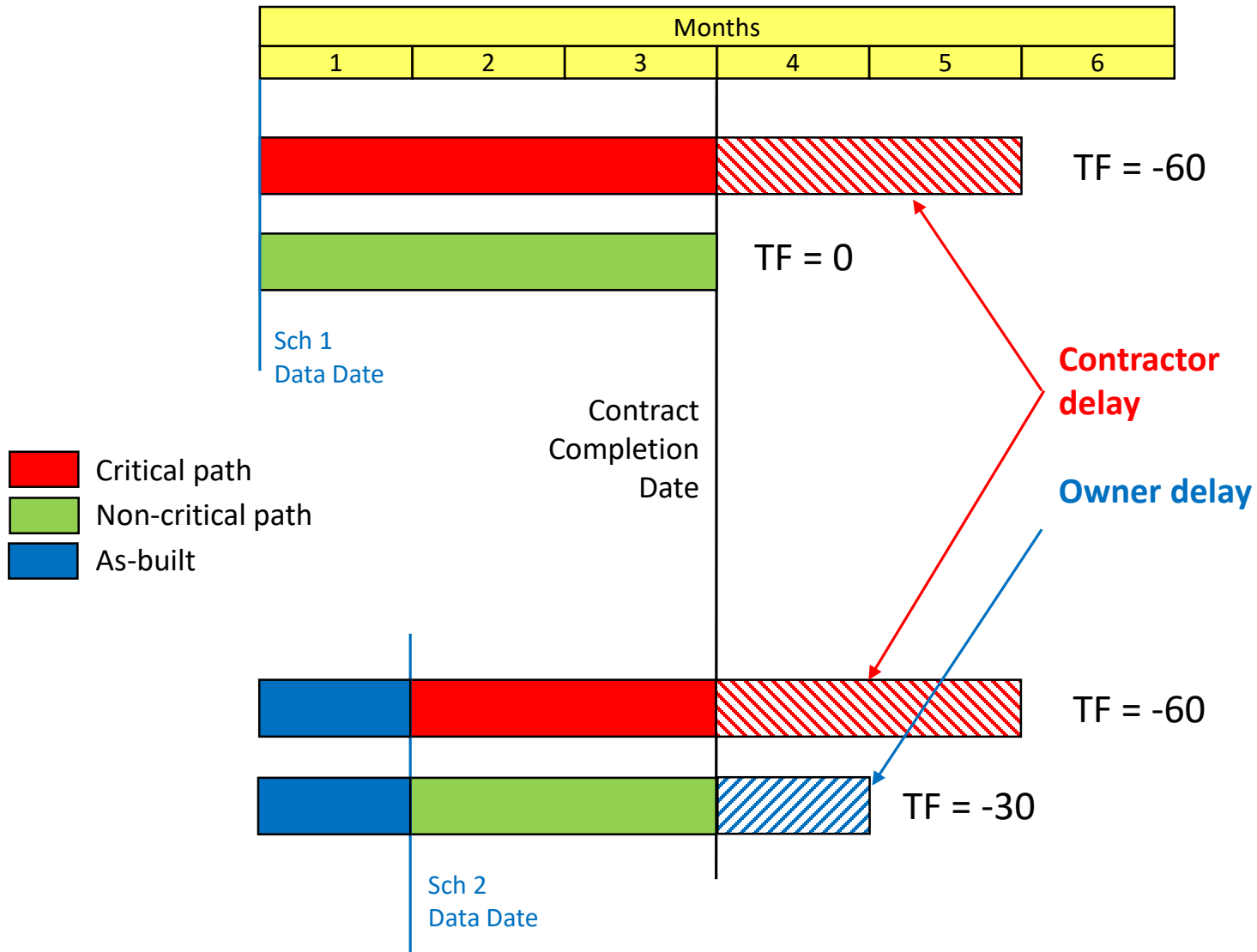
- An Offsetting Delay is graphically depicted as:

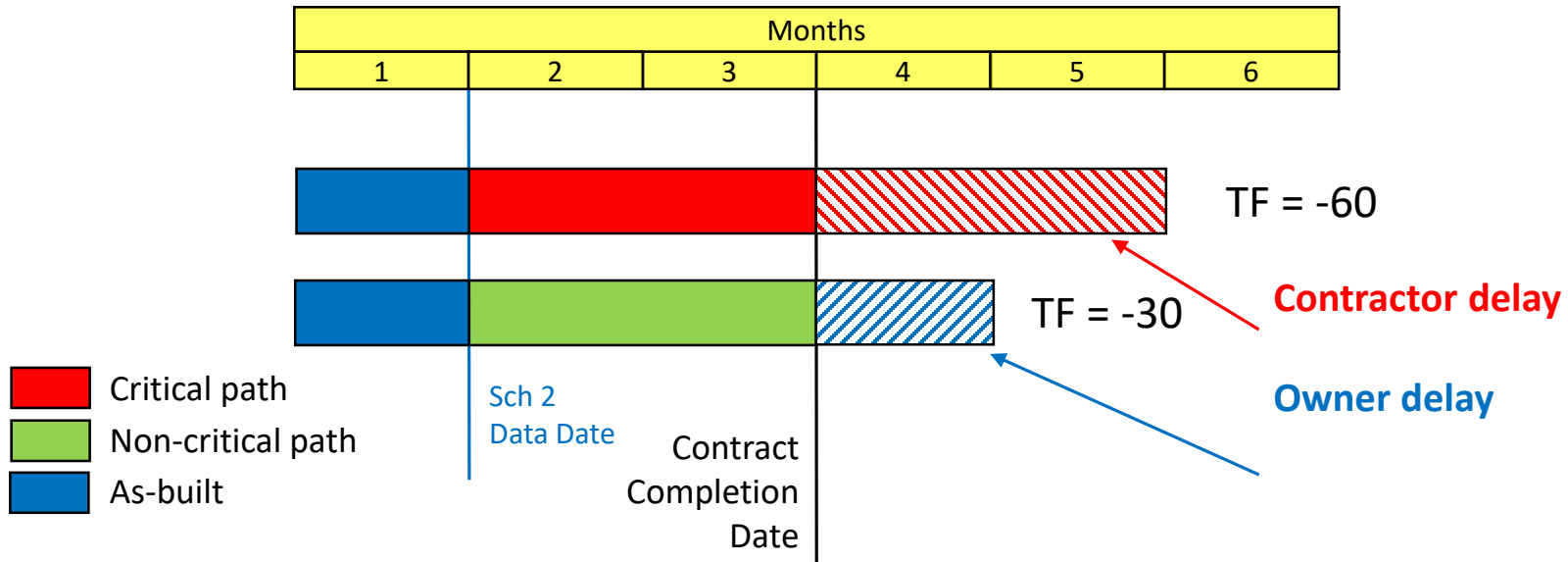


- Critical path
- Non-critical path

- The critical path is forecasting a late completion of 60 calendar days.
- It is undisputed that the 60-CD project delay is the contractor's responsibility.







- The owner delayed a non-critical work path 30 CDs.
- Offsetting Delay advocates believe the contractor is entitled to a 30-CD Time Extension for a *non-critical path delay* to offset the owner's assessment of LDs.



- Really think about what an Offsetting Delay is. Effectively, it takes the position that a contractor is *entitled to a time extension for a non-critical path delay.*
- The court rulings that the ASCE Committee is relying upon only address owner delays that occur *“after the contract completion date.”*
- However, proponents of Offsetting Delays state that an Offsetting Delay, which is an owner-caused delay to a non-critical work path that creates negative float, could occur as early as in the second month in a multi-year project, departing from the rulings they rely on.
- Plus, they say Offsetting Delays are not reciprocal. That is not fair or equitable.



- Literal Concurrency
 - Both delay events are critical path delays.
 - Delay events simultaneously delay project.
- Functional Concurrency
 - Both would individually delay project in same time period.
- Offsetting Delays
 - The offsetting delay can be a non-critical delay. The most liberal of all concurrent delay theories.



- One of the ways that ASCE's Proposed SDA Standard achieves this goal is by defining critical activities as:

Critical activities – Activities with zero or negative float in a schedule reflecting a current adjusted completion date, **some of which may not be on the critical path.**

- It's illogical that a critical activity does not have to be on the critical path.
- Critical activities should be defined as activities on the “**critical path.**”



- One of the ways that ASCE's Proposed SDA Standard achieves this goal is by defining critical activities as:
 - Critical activities – Activities with zero or negative float in a schedule reflecting a current adjusted completion date, some of which may not be on the critical path.
 - Critical path – The series of logically connected tasks that define the minimum overall duration for the completion of the project, also known as the longest path. There can be more than one critical path in the schedule.



- The basis for ASCE's Proposed SDA Standard's inclusion of the Offsetting Delay concept is its reliance on court rulings, specifically:
 - Appeal of Framlau Corp., A.S.B.C.A. No. 14479, 71-2 B.C.A. (CCH) ¶ 9082, 1971 WL 1269 (Armed Serv. B.C.A. 1971)
 - Conner Bros. Const. Co., Inc. v. Brown, 113 F.3d 1256, 41 Cont. Cas. Fed. (CCH) ¶ 77119 (Fed. Cir. 1997)



- We've discussed Framlau and the Offsetting Delay concept with experienced construction attorneys who state:

“The Framlau ruling does not support an argument for an Offsetting Delay.”

“Framlau is nearly 50 years old and over the last 50 years no court has cited it or accepted it as the basis for an Offsetting Delay proposition.”

“If ASCE wants to adopt a rule that any offsetting delay, or work, mitigates a contractor's critical path delay during an extended period of contract performance, that is a policy decision and not a legal matter. It would be incorrect, in my opinion, to state that the current state of the law supports such a notion.”



- The ASCE's Proposed SDA Standard's inclusion of the Offsetting Delay concept conflicts with the last 80 to 90 years of how construction professionals, specifically owners, have determined when contractors are entitled to time extensions during active construction projects and also during claim situations or in litigation.
- Granting time extensions for owner-caused delays to non-critical paths of work contradicts the long-standing CPM scheduling concept that the contractor is only entitled to a time extension for delays to the project's critical path.





Questions/Comments?



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