It is becoming commonplace now for projects to be controlled by a “critical path” method of scheduling, in which all activities are identified and broken down into sequence and duration and then plotted onto a matrix which establishes which activities are on the critical path to permit timely completion of the project. Such items must be started and finished on fixed dates or the completion of the project will be delayed. Items which are not on the critical path are assigned a certain time period longer than the duration actually required for the activity, during which the work activity may be completed without delaying the entire project. For such activities, the period between the earliest possible start and the latest possible finish, less the duration of the activity itself is called “float!”

If completion of an activity is delayed beyond its available “float” time, then it becomes a critical path item on which further delay shall delay the project completion. Thus, it becomes important who has a right to control this “float?”

If the owner retains control of the float, then he would have the right to delay any work item and consume the “float” without incurring any liability.

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“If completion . . . is delayed beyond its available ‘float’ time, then it becomes a critical path item on which further delay shall delay the project completion . . . (and) becomes important who has a right to control this ‘float’?

to the contractor for the resulting additional expense of performance or for additional contract time. Any use of the “float” by the contractor is at his own peril since it would belong to the owner. If neither party has exclusive use of the “float’ then either could consume all or part of the slack on a first come first served basis without responsibility for delay to the other.

However, should the contractor own the float, then he can control the time and sequencing of work items not on the critical path. Any delay or disruption of that activity by the owner could entitle the contractor to compensation for any additional costs of delaying performance of that event even though it does not delay completion of the project.

At least one Board of Contract Appeals has implicitly recognized that “float” is a resource best utilized by the contractor, stating:

[Float] allows the manager latitude in the scheduling of non-critical activities that originate or terminate at that event, and to effect trade-offs of resources to shorten or control his project.

Joseph E. Bennett Co., 72-1 BCA ¶9364 (GSBCA 1972) at 43,467 n. 7. However, the courts have not yet fashioned a satisfactory answer to the question of whether the contractor or the owner “owns” the float—i.e., has the discretion to use that time. Where the contract is silent, however, established legal principles suggest that the discretion to use the float lies with the contractor. One such principle comes from the “concurrent delay” cases.

The general rule there is that a contractor cannot recover delay damages where he and the owner are jointly responsible for the delay. In other words, any contractor-caused delay will bar his claim. However, the courts have refused to apply this rule where the contractor caused delays occurred on items which did not lie on the critical path. The necessary implication is that the contractor had the right to delay those items to the extent of their “float;’ and thus that the float was his.

The other principle is the rule that a contractor has the right to finish a project early, and may recover damages if the owner delays his planned early completion date — even if the project still meets the contractual completion date.

An analogy can be drawn between an individual work item in a CPM project schedule and its float time, and an entire project, with its total float time being the period between the contractor’s early completion date and the contract completion date.

If a contractor can recover damages for delay of an entire project which still meets the contract date, he should be able to recover damages for delay of a work item which still meets its late finish time. In both cases, the owner has taken from the contractor a valuable resource—time.

As with many construction issues, the ownership of the float is a matter which can be clearly settled by a specific contract provision. Obviously, the discretion to use float time is something a contractor should consider bargaining for in the contract. However, failing a clear allocation of this resource or even worse facing a contract document allocating float to the owner, the contractor should consider preparing his schedule to show minimal float so that he can exercise greater control over his work activities.

This article presents timely ideas and information on legal matters of interest to the construction industry. The text of these articles is necessarily generalized, and we recommend that you consult legal counsel as to the legal implications of any given actual circumstances.