

Construction Contractor's Right To Early Completion

Concept Definition

Proof of the Claim

Definition

- ◆ Reasonably, feasibly, accurately and constructively plan to finish before the contractually-required completion date
- ◆ Obtain awarded delay damages from planned early completion date to actual delayed completion date, even if after the contractual completion date

The Question

Could the contractor have finished early, but for the owner-caused delays?

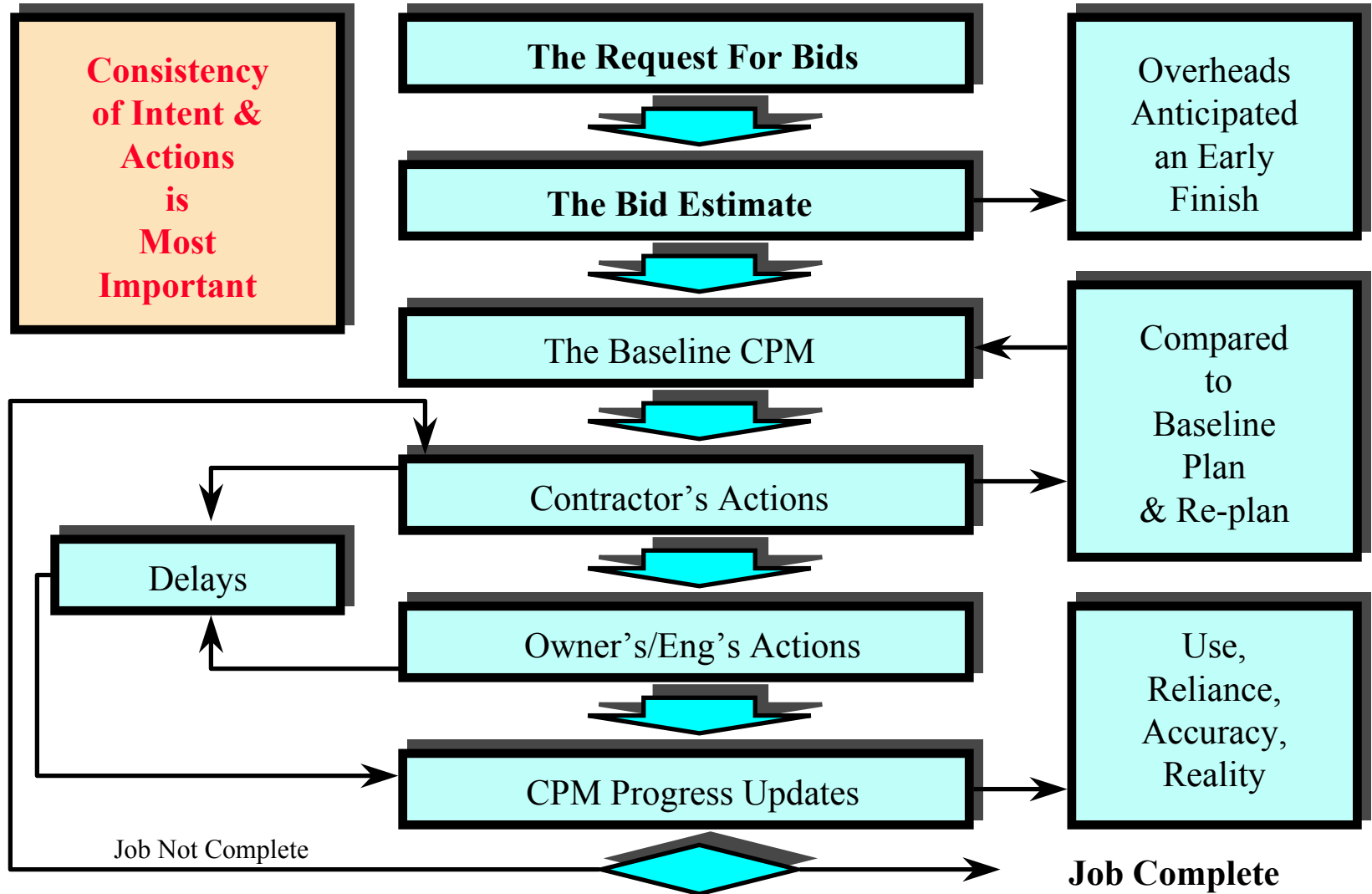
Owner = Owner, Engineer,
Architect and/or
Construction Manager

Not Cut & Dry!

There Is No Absolute
Formula For Success
Or Cause For Failure

An Apparent Mixture
of Facts and Opinions;
Objective/Subjective
Reasoning!

The Continuum



Important Attributes

**Consistency
of Intent &
Actions
is
Most
Important**

Secondary Attributes

**Timely
Notification**

Documentation

CPM Schedule

Early Completion / Finish

- ◆ **Beginning at Estimating and Bidding, Planned to Complete the Project Earlier than the Contractual Finish Date**
- ◆ **Courts Have Consistently Ruled that a Contractor Has the Right to Complete Prior to the Contractual Finish, and If Hampered in that Effort, Be Reasonably-Compensated for the Delay**

Request For Bids

- ◆ **What does the contract say:**
 - **Defined/Regulated Early Finish**
 - **Internal Contractual Milestones**
 - **Forecasted Early Completion Converted to Revised Contract Finish**
 - **Early Finish Specifically Not Allowed**
 - **Requirements to Achieve/Document Early Finish**

The Bid Estimate

- ◆ **Based on Overhead Calculations, Did the Contractor Plan on Fewer Days than Contract Allowed?**
- ◆ **If it Did, Was the Estimate Rippled into the Baseline CPM Schedule (Do they Tell the Same Story?)**

The Baseline CPM

- ◆ **Is an Early Finish Clearly and Accurately Shown and Quantified?**
- ◆ **Is it Reasonable, Achievable, Accurate, Constructible?**
- ◆ **Does it Meet the Contract?**
- ◆ **Is Full Scope Represented/Included?**
- ◆ **Are Outside Constraints Considered?**

The Contractor's Actions

- ◆ **Did the Contractor Man & Equip the Job In-Line with Early Completion Plans/Assertions?**
- ◆ **Is the Contractor Proceeding in General Synchronization with the Baseline Plan?**
- ◆ **Are All Impacts and Delays, By All Parties Accurately Integrated into the Current CPM?**

The Owner's Actions

- ◆ **Has the Owner or its Representatives caused Identifiable Impacts/Delays?**
- ◆ **Has the Owner Consistently Met All Contractual Requirements?**
- ◆ **Has the Owner or its Representatives Disallowed Changes to the CPM, relative to Delays, that Prevents Proper or Accurate Progress Updates?**

CPM Progress Update

- ◆ **Was the Progress Update Accurate and Correct, and Reflect Real Progress and Real History?**
- ◆ **Are Impacts and Delays By All Parties correctly and Accurately Integrated?**
- ◆ **Does the CPM, After Update, Still Reflect an Early Completion, Minus the Owner-Caused Delays?**

Owner's View Point

- ◆ **Extra and/or Accelerated Costs Incurred**
- ◆ **Typically Not Adverse to Allowing, Even Wanting Early Finish, But Not Wanting to Reimburse the Contractor For Not Finishing Earlier than the Specified Contractual Finish Date**

Contractor's View Point

- ◆ **If We Can Work Harder and Smarter and, thereby, Finish Early, and Improve Our Profit Picture, Why Shouldn't We Be Allowed to Do So?**
- ◆ **If the Owner Inhibits Our Early Completion, Despite Our Efforts, Why Shouldn't We Be Reimbursed For Our Lost Profits?**

BUT!

- ◆ **But, What If All of this is Just Posturing for a Large Delay Claim!**
- ◆ **But, What If Impacts and Subsequent Delays Are Caused By Both Parties, and Become Intermingled and Impossible to Isolate and Quantify, Do We Lose?**
- ◆ **How Do We Proceed?**

Concurrent Delays

- ◆ **Critical Delays By the Contractor Will/ May Offset the Delays By the Owner and, therefore, Reduce or Negate a Planned, or Even Attempted, Early Finish**
- ◆ **Even Non-Critical Delays May Cloud the Evaluation Enough that the Early Finish Claim May Fail or Be Dulled**

Validity Test Elements

- ◆ **The Contractor Must Consistently Show and Work Towards its Forecasted Early Finish and Reflect this in its Schedule**
- ◆ **The Contractor's As-Planned (Baseline) Schedule Should Reflect this Forecasted Early Completion**
- ◆ **The Contractor's Baseline Schedule Must Be Reasonable, Accurate, Constructible, Achievable and Reflect its Bid Estimate**

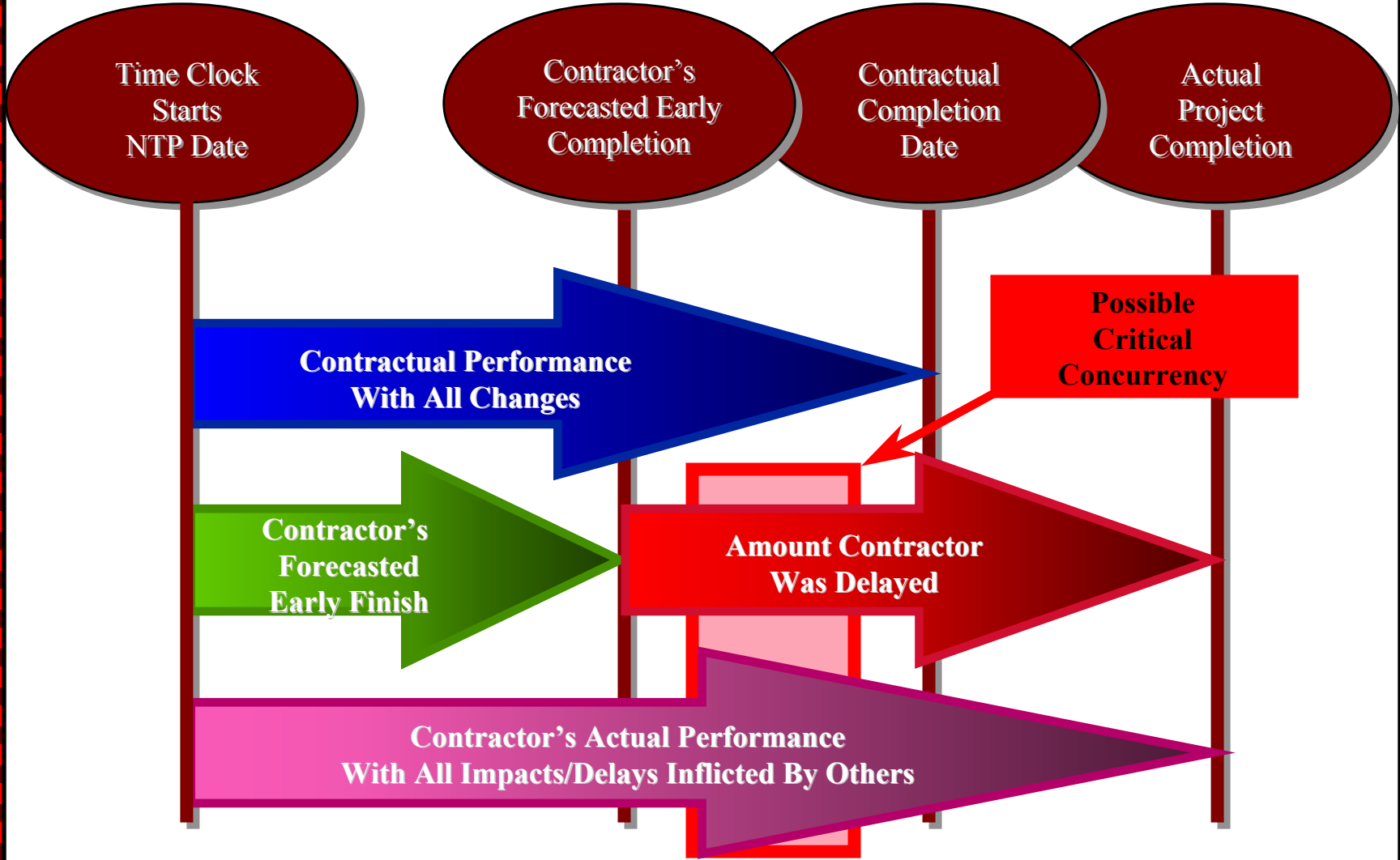
Validity Test Elements

- ◆ **The Contractor's Schedule Must Provide the Means for it to Be Assessed and Evaluated Relative to Resources**
- ◆ **The Contractor Must Use this Schedule to Plan and Control its Work and Progress it Timely and Accurately**
- ◆ **The Contractor Must Not Have Critically-Delayed Itself to Create the Late Finish**

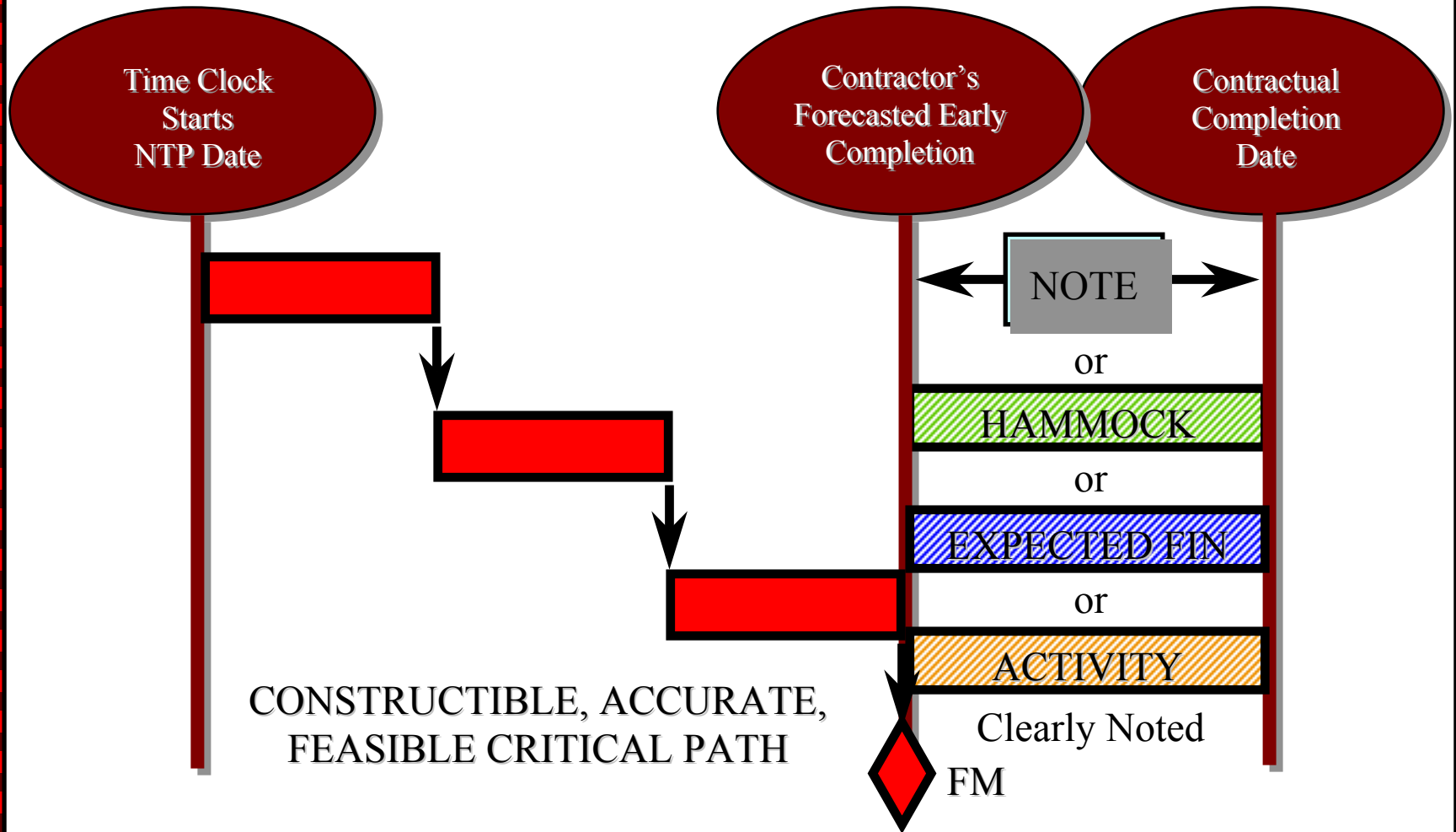
Validity Test Elements

- ◆ **Any One Point, Buy Itself May Not Be Adequate For Proof or Denial of Contractor's Claim**
- ◆ **The More Points that Consistently Apply in the Same Direction, the Stronger the Proof, in that Direction**

The Timeline



The BaseLine CPM



Applicable Case Reference

- ◆ United States v. Blair, 321 U.S. 730. 64 S. Ct. 820 (1944)
- ◆ Metropolitan Paving Co. v. United States, 325 F.2d 241 (Ct. Cl. 1963)
- ◆ Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (fed. Cir. 1994)
- ◆ Weaver-Bailey Contractors, Inc. v. United States, 19 Cl. Ct. 474 (1990)

Applicable Case Reference

- ◆ Bell Coatings, Inc.,
93-2 BCA (CCH)
&25,805 (1993)
- ◆ CS&T Gen.
Contractors, Inc., 93-
1 BCA (CCH)
&25,438 (1992)
- ◆ Housing Auth. v.
E.W. Johnson
Constr. Co., 573
S.W. 2d 316 (Ark.
1978)
- ◆ Green Builders, Inc.,
88-2 BCA (CCH)
&20,734 (1988)

Applicable Case Reference

- ◆ Elrich Contracting, Inc., GSBCA No. 10936 93-1 B.C.A. &25,316 (1992)
- ◆ Frazier-Flemming Co., ASBCA No. 34537, 91-1 B.C.A. &23,378 (1990)
- ◆ Montgomery-Ross-Fisher, Inc., PSBCA Nos. 1033, 1096, 84-2 B.C.A. &15,275 (1981)
- ◆ Coley Properties Corp. v. United States, 593 F.2d 380 (Ct. Cl. 1979)

Prerequisites

For Planned Early Finish

- v Contractor evaluated the bid request/invitation, believed that they could finish earlier than the contract deadline, and so constructed its bid estimate, considering overhead through only the forecasted early finish date**
- v Contractor had constructed its baseline plan (CPM), and that plan verified their reasonable ability to complete at its forecasted early completion date, in accordance with its estimate**
- v Contractor's baseline CPM was accurate, constructible, and complied with all contract mandates and represented a reasonable and achievable plan within industry standards**

Prerequisites

For Planned Early Finish

- v The contractor submits to the owner it's baseline plan submittal that reflects the planned and verified planned early finish, thereby, putting this plan into project records and providing timely notification
- v None of the above by itself would prove/disprove the contractor's right to early finish, but all together would provide solid proof

Operations Under Early Finish Plan/Intent

- v The established planned early completion becomes a contractual obligation to both parties, the owner and the contractor**
- v The contractor is obligated to consistently strive to complete early and not delay itself, and the owner is obligated not to delay the contractor**
- v If the contractor finishes when it estimated it would, on the early finish date, it wins with a successful contract completion and the owner wins with a finished project ahead of the original contract finish date**

Operations Under Early Finish Plan/Intent

- v If the contractor finishes after the forecasted early finish because of delays it caused to itself, it absorbs the penalty (extra costs) from the forecasted early finish date to when it finally finishes**
- v If the contractor finishes after the forecasted early finish because of delays caused to it by the owner, the owner pays the damages**
- v If the contractor finishes after the forecasted early finish due to a combination of delays caused by both parties, the critical concurrent delays are excused, but typically not compensable, and non-concurrent delays are the responsibility of the delaying party**

Final Conclusions

- e BE HONEST IN YOUR INTENT
- e BEGIN YOUR PLAN TO FINISH EARLY AT BID
- e ACCURATELY DEPICT EARLY FINISH IN BASELINE CPM
- e BE CONSISTENT IN YOUR INTENT
- e USE YOUR CPM TO MONITOR, CONTROL & REPLAN
- e KEEP CPM CURRENT WITH ALL ASPECTS OF THE PROJECT
- e CONTEMPORANEOUSLY DOCUMENT EFFORTS/IMPACTS