

Managing Delay and Extension of Time Claims

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Disputes are an inherent feature of the construction industry and commonly arise from time and cost over-runs.

Generally, the main contributing factors to time and cost over-runs are:

- Erroneous cost estimate
- The budget is not monitored
- Excessive scope changes or variations
- Design errors
- Late client/authority reviews or approvals
- Deficient project schedules
- Late access to site
- Poor management of resources
- Poor workmanship resulting in rework/defects rectification

The availability of good site/factual records to support delay claims increases the likelihood of those claims being successful and avoids costly arbitration/litigation proceedings. This information includes:

1. Programme and Record Keeping

- (a) The contractor should prepare a programme showing the manner and sequence of the work. The programme should clearly show the critical path(s) and total float for each activity.
- (b) The programme must be updated at agreed regular periods, not longer than one month.

Guidance:

- i. The contract should include an appropriate mechanism for submission of the contract programme and stipulate the period for revisions.
- ii. The programme should be submitted by the contractor in its electronic native file format to assist in an analysis of delaying events and determination of the contractor's entitlements.
- iii. Any delay due to a qualifying cause must be inserted in the programme as an activity and linked to the activity(s) directly affected by the delay with appropriate relationships. It is industry accepted practice that a delay is inserted in the most recently updated programme before the start date of the delay.
- iv. The updated programme submissions should include an accurate status of the work activities. We have found that this does not normally occur.

2. Extension of Time (EOT)

- (a) One of the purposes of an EOT is to relieve the contractor from liability for delay damages (such as LDs).
- (b) The contractor will potentially only be entitled to an EOT for those events for which the employer has assumed/shared risk and responsibility (i.e. Employer Risk Events or Qualifying Cause of Delay).

- (c) An EOT should only be granted if the effect of a qualifying cause of delay prevents the contractor from completing the works by the contractual date for practical completion.
- (d) An EOT must be granted on the basis of the “time” provision in the contract.
- (e) Where the full effect of a delaying event is not able to be predicted, an EOT may be granted in the regular programme update period for which the causal effect can be demonstrated.

Guidance:

- i. Contractual terms must be adhered to in regards to the notification of a delay event and submission of the EOT claim. Contracts normally have a timeframe for the issue of notices of delay and submission of the particulars supporting the EOT claim.
- ii. Generally, the contractor must demonstrate by way of inserting the delaying event into the most recently updated programme that the delay event is on the critical path and its effect will be to critically delay the anticipated date for practical completion.
- iii. The actual duration of a delay event may be longer than its impact on the date for practical completion. For example, a delay event may last for 30 days but it may delay the date for practical completion by only 5 days due to the pre-existing “float” of the delayed activity.
- iv. An EOT application must be promptly dealt with by the project manager.
- v. Generally, an EOT once approved cannot be withdrawn.

3. Mitigation of Delay and Loss

- (a) Contracts may provide for “conditions precedent” to entitlement to an EOT. This may include the contractor’s responsibility to mitigate the effects of the delay in question.
- (b) The contractor must promptly take all reasonable steps to preclude or minimise the effects of delay and consequential losses.
- (c) Subject to the contract, the contractor’s responsibility to mitigate the effects of the delay does not require it to add extra resources or to work outside planned working hours (commonly known as acceleration).

Guidance:

- i. Mitigation steps may include re-sequencing the work, alternative work methods, standing down or off hiring plant/equipment and re-deploying resources to other areas of work (if possible).
- ii. The contractor is normally not obliged to increase resources or work overtime to overcome the effect of the delay, unless expressly requested by the Principal and the terms of which are agreed between the parties beforehand.

The Authors have referred to the following sources in preparing this article:

1. www.eotprotocol.com
2. http://www.construction-innovation.info/images/pdfs/Research_library/Extension/2007-006-EP/conf_papers/RCP_Causal_Modelling_of_Construction_Disputes.pdf