



In this, our Winter 2012 newsletter, our first article looks at a TeCSA case Roger Gibson was heavily involved in some 13 years ago.

In the 'Royal Brompton' case, He was the only Planning/Delay Analyst Expert who testified and was cross-examined in Court by four barristers; and he likes to think that HHJ Seymour, when deliberating his judgment, took on board his view that 'a contractor is still entitled to an extension of time for an employer responsible delay even though he was in concurrent culpable delay'.

Our second article is titled, 'Planning Tips, Programme Submittal and Acceptance'. The article focuses on a Contractor's first programme submittal, often referred to as the 'contract programme' or 'baseline programme'. The article looks at this programme both from the Contractor's and Contract Administrator's perspective.

End piece

"Planning is an unnatural process; it is much more fun just to do something. The nicest thing about not planning is that abject failure comes as a complete surprise, rather than being preceded by a period of worry and depression." Sir John Harvey-Jones (1924 – 2008)

## Royal Brompton Hospital NHS Trust v. Frederick Alexander Hammond and Others (2000)

### The Facts

The project was the construction of a six-storey hospital, known as 'The National Heart and Chest Centre Phase 1', in Chelsea, London for the Royal Brompton Hospital NHS Trust. Taylor Woodrow was the main contractor, and practical completion was certified as being achieved on 23 May 1990, some 43 weeks and 2 days later than the original completion date for the project. In total, the architect awarded an extension of time of 43 weeks and 2 days, thereby revising the date for completion to 23 May 1990.

The contractor claimed loss & expense from the hospital for delays. Some money was paid by the hospital, and in 1992 the contractor commenced arbitration proceedings against the RBH Trust for the remainder of its claim.

In 1995, prior to a hearing, the arbitration was settled with the employer making a payment of £6 million to the contractor.

### The Dispute

In 1997 the RBH Trust served a statement of claim with allegations of negligence against members of their professional team involved with the project, i.e. architect, project manager, etc. seeking to recover the settlement amount paid to the contractor plus their own arbitration costs. The action resulted in a series of trials taking place in the Technology and Construction Court between 1999 and 2002.



## Royal Brompton Hospital NHS Trust v. Frederick Alexander Hammond and Others (2000) (Cont'd)

### The Judgment

The Hospital's main case against the architect was that the contractor was responsible for the delays but the breaches and negligence of the architect had so weakened the hand of the Hospital in the arbitration that instead of recovering from the contractor liquidated and ascertained damages and the loss and expense already paid to the contractor, it paid out further sums to the contractor plus costs of £15 million.

One of the key points in the Trusts case was that in determining a fair and reasonable extension of time the architect failed to determine the actual critical path of the contractor's works and that extension of time awards had been given for non-critical path works.

Further, the Trust alleged that the architect had failed to determine the contractor's actual progress against its programme and had not examined the reasons for delay against that programme and the actual progress of the works in assessing the applications for extensions of time.

A key issue in this case was 'concurrency'. On this issue, Judge Seymour distinguished between sequential causes of delay and true concurrency, stating,

*"However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, 'the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date'. The Relevant Event simply has no effect on the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which had it happened on its own would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is real concurrency of causes of delay."*

Judge Seymour also gave his view on the analysis that is required to demonstrate delay and the available float by saying,

*"All activities have potential or theoretical float (even if the period is negative). What is required is to track the actual execution of the works. On a factual basis this case requires no further discussion. In addition clause 25 refers to "expected delay in the completion of the Works" and for the need for the Architect to form an opinion as to whether because of a Relevant Event "the completion of the Works is likely to be delayed thereby beyond the Completion Date". Under the JCT conditions, as used here, there can be no doubt that if an architect is required to form an opinion then, if there is unused float for the benefit of the contractor (and not for another reason such as to deal with p.c. or provisional sums or items), then the architect is bound to take it into account since an extension is only to be granted if completion would otherwise be delayed beyond the then current completion date."*

### Commentary

The important matters that are gleaned from this case and judgment are,

- i) In determining a fair and reasonable extension of time as a consequence of a delay event, an examination of the actual critical path of the contractor's works should be carried out to establish that the delay event affected, or was likely to affect, the completion of the works. Furthermore the work activities that were critical to the forward progress of the works at the time the delay event occurred should be taken into account.
- ii) The matter of concurrency should be looked at closely to determine those events are sequential and those that are truly concurrent.



## Royal Brompton Hospital NHS Trust v. Frederick Alexander Hammond and Others (2000) (Cont'd)

Judge Seymour also noted that in order to make an assessment of whether a particular delay event affected the completion of the works and not just a work activity, he considered it correct to take into account what work activities were critical to the forward progress of the works, at the time the delay event occurred.

*Roger Gibson*

### Planning Tips, Programme Submittal and Acceptance

There is a clear need for a 'baseline' programme to be developed after the award of contract, reflecting the intentions of the contractor.

Contract administrators need front-line skills to review a contractor's baseline programme. Accordingly, contract administrators increasingly have to decide if, and to what extent, they are going to trust, approve or accept a contractor's programme submissions. In today's planning software paradise, CA's should be able to detect common techniques or mistakes when reviewing programmes that attempt to or increase the likelihood of extension of time awards. These techniques mean that a programme will not function as a proper predictive tool for measuring progress or quantifying the impact of delays and changes.

The JCT 2005 Contract has a very basic requirement for submittal of the contractor's programme, as described in clause 2.9 of Section 2. Essentially, the only requirement being a 'master programme for the execution of the Works' Unlike the NEC3 Contract, there are no requirements on the content of the programme and supporting information.

The NEC3 contract recognizes that the programme is an important tool for use by both the contractor and project manager. The programme is valuable not only as a scheduling tool but also as a project management and change control tool.

NEC3 has distinctive features on the content of the contractor's programme. Indeed, the programme is the contractor's programme and he owns the terminal float. The programme is not only used to portray how the contractor intends to carry out the works, but can also be used for forensic analysis to determine the effect of compensation events for both time and money.

One of the key features of the programme under NEC3 is that upon its acceptance the contractor's programme becomes the 'Accepted Programme'. Any subsequent programmes submitted by the contractor and accepted by the project manager in turn become the 'Accepted Programme', superseding the previous programme.

What the Contract Administrator / Project Manager should look for in a programme review

When the programme is submitted, the CA should ask the following questions,

- i) Does it comply with contractual obligations, milestones, or restraints on working hours or methods?



## Planning Tips, Programme Submittal and Acceptance (Cont'd)

- ii) Is the entire scope of the work represented?
- iii) Are any activity durations questionably too long, or too short for the scope of work they represent?
- iv) Are there any obvious errors in the programme related to the sequence or timing of the works?
- v) Are there any onerous requirements of the employer's professional team, e.g. early completion programmes, unrealistic time allowances for approvals or supply of information, which are employer's risks?

A very dangerous misunderstanding exists with a CPM programme submittal; many contract administrator's and other professionals are still of the mistaken opinion that a CPM submittal exists of several pages of activity listings and/or a barchart plot or two. A CPM submission for review should consist of a full copy of the computer files necessary to recreate the programme; everything else is just frills.

A CPM submission, both for the baseline for review and subsequent updates, should consist of three discrete items, which are,

- i) The activity details, including description, original and remaining durations, and percent complete. In conjunction with this, you should see for each activity other computed information such as early and late start and finish times, and total float.
- ii) The logical relationships that connect the various activities together to form a network which makes the CPM work. Full details of any lags and leads, i.e. imposed time durations between activities, is a must in the submittal.
- iii) Lastly and certainly not least is 'constraints'. The true logic of a network can be overridden by the programme containing various time constraints on an activity(s).

These will artificially reduce total float and could create an invisible delay, or even have the activity just expand to take all available time. This will never show up on a barchart plot and is only found in a 'constraint' listing and/or a copy of the computer files.

Having been satisfied that the information in the contractor's submittal is sufficient for a proper review, here are five basic checks or tests that should be carried out using the computer files provided by the contractor,

Test 1: Does the 'longest path' filter identify a reasonable critical path for the project?

Make sure the longest path is reasonable, and then check the reasonableness of near critical paths.

Test 2: Are there any open-ended activities in the programme?

In general, there should be only two open-ended activities in the entire network. One beginning activity with no predecessors and one completion activity with no successors. Every other activity should be logically tied into the network. Furthermore, every activity should have its finish constrained with at least one FS (finish to start) or FF (finish to finish) successor relationship to another activity. Likewise every activity should have at least one SS (start to start) or FS (finish to start) predecessor relationship to another activity.



## Planning Tips, Programme Submittal and Acceptance (Cont'd)

Test 3: Do any of the activities have too much float?

Activities with too much float may indicate missing logic links, or logic links that have been overridden in a subsequent progress update. Identify any such activities.

Test 4: Are there any unnecessarily long gaps in workflow when grouping activities by work area and sorting by early start dates?

In most cases once work begins in a particular area or phase of the project then the programme should allow work to continue uninterrupted in that area or phase. Long calendar gaps in a work area or phase may indicate less than ideal workflow and suggests an adjustment of preferential logic links to create a better plan.

Test 5: Are there activities with unnecessary contractor assigned constraints?

As constraints override the network logic in calculating activity start / finish dates and total float they should be used sparingly, if at all. A better approach is to use activity durations and network logic to model the project, and thereby eliminate constraints.

### Acceptance of the programme

If the contract administrator fails to comment it may be implied as acceptance that the contractor's programme is contract compliant / satisfactory. When 'accepting' a programme the contract administrator could be merely acknowledging receipt of contractor's intentions. In 'approving' the programme, the contract administrator is more often seen to have performed some level of due diligence on the programme, such as asking the questions above, and is therefore acknowledging that the submission complies with the terms of the contract. However, it is important that a realistic baseline is established for the management of the works and the assessment of potential and actual effects of changes, unforeseen events or other circumstances that could delay the works.

Programmes are key documents in extension of time and delay claims disputes; therefore their significance in potential dispute resolution forums cannot be under-estimated. At the same time, the perspective must be maintained that the programme is a management tool to assist in managing the work. A balance should be struck between keeping the contractor on an accurate progress path and the emphasis on the programme as a claims document. If approval is granted, this should not in any way relieve the contractor from complying with the contract, or in any way increase the employer's liability.



Everyone at Gibson Consulting, would like to take this opportunity to wish everyone a  
**Merry Christmas and Prosperous New Year**



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