Gibson Consulting Newsletter

No 14 : Autumn 2013

Autumn 2013 Newsletter.

In this, our Autumn 2013 newsletter, we have two articles, plus an update on Roger Gibson's latest published Article and books

The first article is '*Progress Mitigation and Acceleration'*. This article describes a Contractors obligation to mitigate delays.

Our second article is titled, '*Get Real About Project Planning'*. And is somewhat tongue-in-cheek' article on my experience of some aspects of the construction industry's views on 'project planning'.

- **Roger Gibson's Article to be published shortly.**

The next issue of Construction Law Review, number 8, which is to be published imminently, will contain an article by Roger Gibson; namely '*Progress Records and Other Record Keeping*'.

Tha Article is based on my 50 years experience in the Construction and Engineering industries; initially site based followed by managerial roles and for the latter years being closely involved in time-related disputes acting as an Expert or Adjudicator.

- **Book 1: 'Construction Delays:Extensions of Time and Prolongation Claims'.**

This book was published in 2008 by Taylor & Francis, and was later translated into Mandarin Chinese for sales in the Far East.

Overall sales have remained strong, increasing year-on-year.

- **Book 2: 'A Practical Guide to Disruption and Productivity Loss on Construction & Engineering Projects'.**

The manuscript for this, my second book, is almost complete and the final manuscript will be delivered to the publishers in mid-December.

On this basis the publishers,Wiley-Blackwell expect publication to be March/April 2014.

- **Book 3: 'Managing Extensions of Time and Prolongation Claims'.**

I have started work on the manuscript for this book. Essentially, this book is an update of my first book '*Construction Delays:Extensions of Time and Prolongation Claims*'.

The Current timetable is to complete the manuscript by mid-2014, with publication, by Taylor & Francis in late-2014.

Gibson Consulting Newsletter
No 14 : Autumn 2013

Article one:
Mitigation & Acceleration

Most forms of contract contain reference to a contractor's obligation to mitigate delays; including the effects of employer responsible delays.

> JCT2005 contains the following at clause 2.28.6.1,
> *"the Contractor shall constantly use his best endeavours to prevent delay in the progress of the Works or any Section, however caused, and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date"*

However, in many instances this leads to conflicting interpretations, for example, as to what extent of 'best endeavours', or mitigation, is required. Beyond a certain level, e.g. if substantially more resources are mobilised, it could be interpreted as 'acceleration' to catch up for delays by others, rather than mere 'mitigation', which could lead to further claims for compensation.

"Acceleration" tends to be bandied about as if it were a term of art with a precise meaning, but this is not the case.

The reasons for acceleration usually fall into one of the following categories:

1) *By agreement or instruction*. By agreement between the parties or, if the contract so provides, on the instruction of the architect.
2) *Unilateral acceleration*. Unilaterally on the initiative of the contractor, often categorised as 'mitigation' by the contractor or as 'using best endeavours' by the employer.
3) *Constructive acceleration*. Constructive acceleration is where the contractor argues that he has no real alternative in the circumstances.

By agreement or instruction

There should be no difficulty in obtaining payment where the architect, in exercise of his powers under a contract, orders acceleration of the work or the employer and the contractor agree acceleration and a claim under the direct loss and expense clause is unnecessary.

However, few standard forms of contract give the architect the power to order the contractor to accelerate.

Unilateral Acceleration

This is the situation where a contractor accelerates without any agreement with the employer or instruction from the architect. No pressure has been placed on him by the refusal of an extension of time; indeed in this situation it may be that the contractor is reasonably confident of getting an extension of time. The reason for doing so may be order to find work for operatives from another site which is drawing to a close. The result may be that some time is recovered and an extension of time is not required.

In most such cases, the contractor will find it difficult to contend that he was going other than 'using his best endeavours' to reduce delay. It is by no means clear, however, under what contract provision the contractor could be paid even if the architect.

Constructive Acceleration

This is an argument advanced by a contractor and is based on the architect's failure to give an extension of time to which the contractor believes he is entitled. A contractor will put more resources into a project than originally envisaged and then attempt to recover the value on the basis that he was obliged to do so in order to complete on time,

Article one:
Mitigation & Acceleration (Cont'd)

because the architect failed to make an extension of time of the contract period. The problem faced by the contractor is that in the absence of an extension of time he may be faced with liquidated damages being levied against him. He has a stark choice; he can continue to work as planned and efficiently in the hope that he can later successfully demonstrate that he is entitled to an extension of time and that this will be granted. Alternatively, he can accept, temporarily at least, that he is in default and take steps to mitigate the consequences of this temporary default by putting more resources on the project, and / or reorganising the works, so as to finish by the date for completion.

An important question to be asked before this kind of argument can be entertained is the extent to which pressure is put on the contractor; the contractor's problem is one of causation. Where the architect fails to make an extension of time, either at all or of sufficient length, the contractor's route under the contract is adjudication or arbitration. If, as a matter of fact and law, the contractor is entitled to an extension of time, it may be said that he can confidently continue the work, without increasing resources, secure in the knowledge that he will be able to recover his prolongation loss and/or expense and any liquidated damages wrongfully deducted, at adjudication or arbitration. If he increases his resources, that is not a direct result of the architect's breach, but of the contractor's decision.

In practice, it must be acknowledged that a contractor in this position may not be entirely confident; the facts may be complex and the liquidated damages high. Faith in the wisdom of an adjudicator or arbitrator may not be total. It may be cheaper, even without recovering acceleration costs, for the contractor to accelerate rather than face liquidated damages with no guarantee that an extension of time will ultimately be made. As a matter of plain commercial realism, the contractor may have no other sensible choice than to accelerate and take a chance as to recovery. Unless the contractor can show that the architect has given him no real expectation that the contract period will ever be extended and in those circumstances the amount of liquidated damages would effectively bring about insolvency, this kind of claim has little chance of success.

However, under the Housing Grants, Construction and Regeneration Act, a contractor now has the option to address the uncertainty at an early stage and not wait until after completion of the project. He can refer the architect's / contract administrator's refusal of his extension of time claim to an adjudicator during the course of the contract, rather than to arbitration or litigation after completion of the project.

In the United States, a 'constructive acceleration' doctrine has been established to permit a contractor to claim his acceleration costs. The U.S. doctrine, modified for the British construction scene, comprises a six-stage test of the following questions,

1. Is there a delay, resulting from a relevant event, that would entitle the contractor to an extension of time?
2. Has the architect / contract administrator been given notice of the delay in accordance with the contract?
3. Has the architect / contract administrator refused or failed to grant an extension of time?
4. Has the architect / contract administrator, or employer, acted in some manner that can be construed as an instruction to complete by the original or revised date for completion?
5. Has the contractor accelerated its performance?
6. Has the contractor incurred additional costs as a result?

Recovery of acceleration costs

Usually, if it can be shown that the acceleration has been caused by an event for which there should have been compensation, then there is no reason why the costs should not be recoverable as loss and expense and valued in the usual way under the contract. However, if they cannot be so valued, then it is possible that the claim can proceed on a quantum merit basis of the reasonable costs of the accelerated works.

Gibson Consulting Newsletter
No 14 : Autumn 2013

Article Two:
Get Real About Project Planning

Project planning and the conveying of this information into realistic project programmes is not only useful during the pre-construction stage, but vital for the successful coordination of the day-to-day activities of a project.

A project that is not planned thoroughly will probably result in unnecessary delays and cost overruns. This may lead to arguments or claims between the contractor and the employer. This article is primarily aimed at employers and developers, but the principles of good planning and realistic programming applies to all concerned with a construction project.

In today's fast-paced construction industry, it's crucial to use 'time' efficiently. Realistic and regularly updated programmes help a project to finish on time and within budget. Most construction companies realize that good planning and programming helps them stay competitive; and today's easily affordable computer technology and project planning software makes this achievable.

Delays and conflicts can occur over many issues during the course of a construction project. Design changes, additional work, late information are three common causes of project delay. With these potential problems, the court now considers network-based schedules as acceptable evidence when time-related disputes occur.

Phases of the project

A project is a one-time event with a budget, a task list, resources, deliverables and an end date.
A typical construction project can be divided into three phases.
The first is the *pre-construction phase*. Pre-construction includes the initial concept and scooping the work, evaluation of the feasibility of the project, budgeting and design work. Dependent upon the procurement process adopted this 'design work' may range from conceptual design through to full construction design.

The next phase of the project is the *procurement phase*. During this stage, again dependant upon the procurement process adopted for the project, contracts for the actual construction are bid and awarded based on designs developed during the pre-construction phase.

The final phase, the *construction phase*, is when the actual construction work of the project is accomplished.

Some ground rules for project planning development

Getting started. First, draft a preliminary plan, based on your requirements; e.g. financial milestones, planning approvals, construction start and, very importantly, construction completion and delivery. The second stage is to meet and discuss the preliminary plan with your project team, i.e. your design consultants, construction manager, and/or project manager. The objective of these discussions is to expand the preliminary plan into a fully integrated project plan incorporating the work and tasks of the design team.
A major development of the project plan should take place after appointment of the contractor. His detailed construction schedule and design requirements should be incorporated into the project plan. You will then have a comprehensive plan for the project to achieve your delivery date and all parties should confirm the project plan as being accurate and realistic. In essence, the project plan will identify and co-ordinate the contractor's and design team's requirements and deliverables in order to achieve your delivery date.

In my view and experience, the project plan should be developed and maintained by the employer or his representative with input from the architect and others in the project team during the *pre-construction* and *procurement* phases; and from the contractor during the *construction* phase. During the *construction* phase, whilst it is imperative that the contractor takes an active role in the development and updating of the project plan, the management and ownership of the project plan should reside with the employer.
Having the contractor "buy into" the project plan at the start of the construction phase will ensure that the project benefits from the experience of the contractors staff, and reduce the chance of conflict. In order to avoid an adversarial relationship, the contractor must be of the opinion that he is working with the project team's agreed project plan that has been integrated with his construction schedule.

Gibson Consulting Newsletter
No 14 : Autumn 2013

Article Two:
Get Real About Project Planning(Cont'd)

What if there are delays and claims?

As stated earlier delays and conflicts can and do occur over many issues during the course of a construction project, such as design changes, additional work, late information, severe inclement weather, shortage of labour, late delivery of materials, etc. By having a realistic project plan in place and being regularly monitored and updated then most delays can be avoided, their affect minimized or at least identified and quantified. However, when time-related claims from the contractor occur, an employer may be able to challenge and refute them based on an agreed project plan, updates and progress records. If this situation occurs, it is often better to seek the assistance of a specialist consultant to analyse, quantify and present the technical aspects of a defense and any counterclaim.

Suppose there are concurrent delays; what happens then? If they cancel each other out, then, according to the Society of Construction Law's 'Delay and Disruption Protocol', the contractor is entitled to an extension of time but no financial compensation for loss and expense; and the employer is not entitled to compensation by way of liquidated damages. However, there may be circumstances making it possible to apportion the effects of concurrent delays, or give one type of delay precedence over the other. Here, an employer's defense and counterclaim will benefit from the expertise of a specialist consultant who can show the causes and the effects through clear graphics and a concise factual based narrative, based on the project plan, its updates and project documentation.

Finally, a footnote; whilst these views and proposals are based on my own experiences of the results of poor project planning, I firmly believe it is important for any party, when faced with a claim situation, to seek professional contractual and legal advice.

By Roger Gibson

Contact Us
Details of our services can be found on our website, ***http://www.gibsonconsulting.co.uk/***, but if you would like to discuss how we can help you, Please don't hesitate to contact Roger Gibson on 024 7624 3607 or 07970 119 465, or send an email to ***roger.gibson@gibsonconsulting.co.uk***