



In this, our Autumn 2015 newsletter, we have two articles,

“Concurrency”, and “An Overview of Extension of Time Assessment”.

The first article discusses the ‘thorny issue’ of Concurrency, and the various approaches to be reviewed when this is encountered.

Whereas, the second article, discusses Delay Analysis relative to Extensions of Time in the Standard Forms of Contract.

If you wish to discuss any of the matters or points we raise in these articles, please do not hesitate to make contact.

Roger Gibson
November 2015

Concurrency

Introduction

A question that frequently arises is the method of dealing with extensions of time which may be due to either or both of two causes, i.e. concurrency. The more complex the project the more likely that this issue will arise.

Concurrent delays, refer to delay situations when two or more delays, regardless of the type, occur at the same time or overlap to some degree – either of which had the delays occurred alone, would have affected the project completion date.

It is important to differentiate between the delaying event or cause and the delay itself. It is generally recognised that there are times when there are delays which may be the result of different causes, but that sometimes the causes will run at the same time or overlap. This makes it difficult to decide how to treat the delay, particularly if the causes originate from different parties or the delays are of different kinds. For example, under most forms of contract, some causes may give the contractor entitlement to an extension of time; some causes may give the contractor entitlement to an extension of time and also loss and expense, whilst other causes may not entitle the contractor to any extension of time or loss and expense whatsoever.

In analysing concurrent delays, each delay should be assessed separately and its impact on other activities and the project date for completion calculated. Much will turn on the quality of planning and programming, and record keeping. Not only will there often be several delay events running in parallel, but there may be parallel critical paths to contend with and periods of acceleration and/or mitigation to take into account. The contract conditions will also have to be taken into account on the analysis technique used.

Methods of assessment

‘Keating on Building Contracts’ looks at a number of propositions as follows:

1) The Devlin Approach; which contends that if there are two causes operating together and one is a breach of contract, then the party responsible for the breach will be liable for the loss.

2) The Dominant Cause Approach; which contends that if there are two causes, the effective, dominant cause is to be the deciding factor.



Concurrency (Cont'd)

3) The Burden of Proof Approach; which contends that if there are two causes and the claimant is in breach of contract, it is for the claimant to show that the loss was caused otherwise than by his breach.

A further method to consider is the 'Malmaison' approach, which is often considered to be the leading modern decision on concurrent delay. Disputes occurred on a hotel project in Manchester which culminated into arbitration and subsequently ended in Court before Mr Justice Dyson. An agreement on concurrency was reached between the parties and this was ratified in Court by Judge Dyson, who said in his judgment,

"It is agreed that if there are two concurrent causes of delay, one of which is a relevant event and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event. Thus to take a

simple example, if no work is possible on site for a week, not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week."

Therefore, by using a simple example, Judge Dyson demonstrated that if a contractor suffered a delay of one week due to exceptionally inclement weather, a Relevant Event, and in the same period there was a delay due to the contractor's shortage of labour, which is not a Relevant Event. Then, if the architect considers it fair and reasonable to do so, he should grant an extension of time of one week; and he cannot refuse to grant one on the grounds that the delay would have occurred anyway because of the contractor's shortage of labour.

A simplistic approach sometimes used is the 'first past the post' method. This is based on the logic that where delays are running in parallel, the cause of delay that occurs first in terms of time will be used first to evaluate the impact on delay to the date for completion.

'Brompton Hospital'

In a subsequent case, Royal Brompton Hospital NHS Trust v. Frederick Alexander Hammond and Others (2000), a key issue was "concurrency". On this issue, His Honour Judge Seymour QC 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."

Therefore, an important matter to be gleaned from this case and the judgment was that the matter of concurrency should be looked at closely in order to determine those events which are sequential and those which are truly concurrent.



Concurrency (Cont'd)

A practical approach to concurrency

When faced with the problem of concurrent delays, it is always worthwhile pausing and asking whether the delays really are concurrent; as most delays are in fact consecutive. The test is to look at the project's critical path. Delays will generally be consecutive unless there are two or more critical paths. On some projects, several critical paths running in parallel is not uncommon, but even in such cases, true concurrency is rare. Usually, after investigation it can be established that one delay occurs after the other. Or, for example, only one delay is affecting the critical and the other delay is using up only available float, the non-critical delay is not delaying completion of the project.

Therefore, before the question of concurrency arises at all, it must be established that there are two competing causes of delay operating at the same time and affecting the critical path or paths of the project.

Complications are introduced when, for example, one delaying event is soon followed by another during the delay caused by the first event itself, and it may be unclear as to whether the second event was triggered by the first; or if the contractor's obligation to mitigate delays has to be reassessed.

Useful guidelines

Where there are overlapping, or concurrent delays, the most popular guidelines are,

- a. No extension of time granted when an employer responsible delay event is within a noncritical path while a contractor responsible delay (e.g. poor progress through lack of resources) is on a critical path.
- b. An extension of time is awarded when both an employer responsible delay event and a contractor responsible delay event occur concurrently on parallel critical paths, on the basis that either delay by itself could have prolonged the project by the same period.

However, where the delays are unequal, or where an employer responsible delay is followed by a contractor responsible delay (or vice versa) on the same or parallel critical paths, and it is unclear as to whether the second was triggered by the first, the 'dominant cause' approach could help to allocate liabilities.

Clearly, more explicit guidelines are needed based on sound principles to improve fairness, consistency and certainty in practice which would in turn lead to better planning and control of potential project risks and less resource wastage on acrimonious disputes if these risks eventually do materialise.

Roger Gibson
November 2015



An Overview of Extension of Time Assessment

Introduction

The standard forms of contract set out a number of possible contingencies, the risk of which is to be borne not by the contractor but by the employer. For example, the JCT form, under clause 25, details Relevant Events which are beyond the control of the contractor. If the occurrence of any of those contingencies occur so as to cause the Works to take longer to complete then, because those contingencies are not at the contractor's risk, that much more time must be added to the contract period.

The amount of time to be added to the contract period for employer responsible delaying events which have caused delay to the completion date should be calculated logically and methodically by the contract administrator, or architect, and he must form his judgement impartially and objectively. This means that if it comes to a dispute as to whether a fair and reasonable extension of time has been granted and the contract administrator has determined the period of that extension of time instinctively, intuitively, or under the instructions of one of the parties, his decision is likely to be overturned.

Unfortunately, none of the standard forms provide any indication of the sort of information or technique upon which such a logical and methodical appreciation of the factual matrix upon which an extension of time should be calculated.

For example, JCT98 requires the contractor to identify any cause of delay or likely delay to progress, and requires the contractor to estimate the effect on the date for completion for each delay event and to provide all the necessary particulars demonstrating how such an effect has been calculated. However, it does not say how, i.e. which EOT assessment technique should be used to demonstrate any such delay to the date for completion.

It is important to recognise that, generally, it is only a delay or likely delay to the progress of the Works that the contractor has to notify, but it is the extent, or knock-on effect of such event to the date for completion that the contract administrator has to certify. One of the major difficulties is that the delay in the planned timing of an activity alone gives no clue as to whether it is likely to have an effect on the date for completion. Neither is it of any importance that an activity took longer to achieve than that shown on the contractor's as-planned programme. In the end, the deciding factor to the contract administrator is whether the employer responsible delay event has adversely affected the date for completion.

Except in the most obvious of circumstances, proving a chain of causation in an environment in which many ongoing activities are being carried out concurrently is by no means a simple exercise. Therefore, even if the contractor provides what is required under the contract, the contract administrator will necessarily have to do an awful amount of work to sort out the wheat from the chaff.

Arising out of its role as an aid to the planning of a project and as a monitor of current performance, it was a short step to the programme being used to provide a quick and simple means for appraising delays and showing entitlement for extensions of time. By the early 1970's the use of computers and project planning software meant that the Critical Path Method (CPM) was developed as a tool for assessing responsibility in delay and disruption construction disputes.

Since then there has been a proliferation of techniques which have evolved with increasing sophistication and ingenuity but most of these suffer from weaknesses to adequately address a number of issues relating to the use of CPM for extension of time submissions and delay claims, such as programme float and concurrency.



An Overview of Extension of Time Assessment (Cont'd)

Delay analysis

'Delay Analysis' in respect of a construction dispute is the process in a claim or claim defence through which the contractor or employer has to go in order to be able to:

- Establish lines of research and investigation;
- Demonstrate the contractor's (or employer's) entitlement to claim (or to reject a claim against it or to counterclaim);
- Present the claim (or claim defence) effectively.

The initial research and review stage will help to ascertain whether the delay claim to be pursued involves 'critical' delays or 'non-critical' delays. Critical delays are those that delay the project completion date, whereas non-critical delays are those which affect progress at any given time but which do not have an effect upon the completion date of the project.

The next stage is the investigation stage where all the factors relating to the areas of claim made known during the initial research and review stage are analysed. The need is to establish what were the specific causes of the delay, and in what area or section of the work did the delay occur, and when did the rate of progress start to be affected. It is often useful at this stage to use specific databases for recording this information.

Once recorded in a database these records would then have to be analysed and put into a format that can be used to demonstrate how the particular events led to the delays. After compiling the databases regarding the delay claims, the results may be shown in the form of charts, graphs histograms, etc.; basically using the best format to make the most presentable and convincing argument when presenting the claim.

Due to the dynamic and often complex nature of a construction project, the use of a simple 'short cut' method of delay analysis has proved to be inappropriate for anything other than providing a relatively informed feel for what happened. However, this can be useful for the purpose of providing an element of support for positions adopted in the context of normal final account negotiation, but it falls considerably short of the burden of proof in the context of legal proceedings.

Previous experiences of various authors and observations by other investigators indicate,

- a. the wide spectrum of extension of time (EOT) assessment and analysis approaches/techniques adopted or adapted by various contractors and consultants at different times,
- b. the lack of consensus on any suitable approach.

A closer examination of the various techniques widely used for EOT submissions shows that none of the commonly recognised techniques allows for the assessment of three important issues at the same time, namely,

1. The progress of the project at the time the event occurred.
2. The changing nature of the critical path at the time the delay occurred.
3. The effects of action taken, or that should have been taken, to minimise likely delays.

It is thus not surprising that the consequential inconsistencies and clashes have fuelled many prolonged disputes on EOT analysis and assessments.

Problems often arise in unravelling 'cause' and 'effect' patterns, given that many EOT causes and entitlement are inter-related and may also be concurrent. Concurrent delays are said to arise when two or more delays occur at the same time or overlap to some degree. Examples of scenarios needing careful consideration and evaluation include those where,

- a) a contractor responsible event on a non-critical path makes a subsequent activity critical and this activity is then subjected to an employer responsible event,
- b) an employer responsible event is followed by a contractor responsible event,



An Overview of Extension of Time Assessment (Cont'd)

c) an employer responsible event and a contractor responsible event are concurrent and on parallel critical paths.

The following are the most recognised EOT assessment techniques, which I have categorised into the following groups,

A. 'Impressionistic';

B. 'Simplistic'; these are static models and do not provide the insights into impacts and relationships provided by critical path analysis methods.

C. 'Prospective Analysis'; these techniques use as planned programmes and essentially project the likely delay an event will cause.

D. 'Retrospective Analysis'; these techniques use as built programmes and establish the actual delay an event caused.

The importance of reliable documentation and records in establishing EOT entitlements cannot be over-emphasised, whatever the technique that is ultimately adopted.

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November 2015

Contact Us

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