

SOMEWHERE IN TIME – SECURING AND PROTECTING YOUR CONTRACTUAL RIGHTS

Introduction

It is in both employers and contractors interests that construction projects are completed by contracted completion dates otherwise at least one organisation, if not both, can incur additional costs for the project, if not losses to their respective companies.

Most contracts contain clauses which enable the employer to deduct monies from a contractor when late completion of a project occurs, which may be a pre-estimated sum of its likely cost (liquidated and ascertained damages) or the actual costs incurred (unliquidated damages).

However, there are usually clauses which protect the contractor from incurring these costs, subject to contracted criteria having to be complied with by allowing the contractor additional time to complete the project because of delays which the employer is culpable for.

An extension of time postpones the completion date, allowing the contractor additional time to complete the project without incurring any of the employer's costs for it. This not only protects the contractor from incurring the employer's costs for delays but, in certain circumstances, such as a variation of additional works, it also entitles the contractor to recover additional costs for remaining on the contract for the extended period to undertake these additional works.

The employer is required to give advance notice to the contractor of its intention to deduct damages for late completion and the contractor is required to give notice of the delays which it considers the employer is responsible for, the effect that those delays may have on the completion date and possibly an estimate of the additional cost of the delay, before the contractor can gain the extension of time and recover its costs for the additional time required.

When the contractor and employer have both caused delays, which are termed concurrent delays, these are always a cause of potential dispute. Who then recovers what monies from whom? Does the contractor have an entitlement to an extension of time?

The Employer's Position

When an employer engages a contractor to construct a project it normally requires completion by a given date to provide certainty as to when it can take possession and normally, protects itself by incorporating clauses in the contract that enable it to reduce the monies to be paid to the contractor for completing the project later than contracted. This is by liquidated and ascertained damages, or occasionally by ascertaining the actual cost.

Should an employer issue instructions hindering the contractor from completing the project by the completion date, it is probable that it would be stopped from recovering these costs, unless there is a mechanism incorporated in the contract for the completion date to be postponed to take into account the employer's instructions. It is for this reason that extension of time clauses are incorporated into contracts.

However, this is usually insufficient to meet the employer's requirements, because if an instruction of variation is issued by the employer, causing delay, it does not want to have to wait to near the time of completion to find out about it. Furthermore, if an instruction is issued that has more serious consequences than previously perceived, it wants to be notified by the contractor of those consequences promptly so that it can reconsider whether the instruction is fulfilled, or whether to rescind it because it is commercially more viable to do so.

Therefore, in many modern construction contracts an employer incorporates clauses that require prompt notification of delays to the contract by the contractor, with a possible assessment of any extension of time requirement to the completion date because of the delays for which it is culpable.

No employer wants surprises concerning the completion of a project. It is as important for the employer to be able to plan with certainty as to when it will be completed, as it is to the contractor to complete it.

Employers secure their contractual rights concerning the completion of the project by the contracted date, by incorporating provisions into contracts whereby any revised contracted completion date is determined at the earliest opportunity by the contractor being required to provide notices of delays within a stated period of events taking place. The employer can then calculate whether any sum of money can be deducted from the contractor for late completion, if the contractor fails to achieve completion by the revised date.

If the employer is not going to take possession of the completed project by a certain date it has to consider the effects of this upon its cash flow and make provision for it. It therefore needs certainty in assessing what sums it is due to pay the contractor, what it can deduct from the contractor's payment because of late completion and the cost of the delays in being unable to earn income from the completed project. As a result, it is common to have contracts that state that if no notice of delay or extension of time is requested within a stated period of events taking place, then the contractor does not receive an extension of time.

Consequently, if the contractor fails to comply with the requirements of the contract regarding providing notices of delay and/or in requesting extensions of time, it might not be able to belatedly seek the additional time and cost after the project is completed.

The Contractor's Position

Contractors know that if they are on a project for longer than intended, or allowed for within their pricing, then it will cost more and possibly cause a loss on the contract.

Notwithstanding this stark realism, contractors all too often assume that because the employer causes delay to the project, either by failing to release information at the appropriate time or by instructing variations, that they will automatically receive an extension of time.

Despite contractors ensuring that there are clauses in the contract entitling them to receive extensions of time for stated events, all too often they ignore the notice provisions and just consider that this can be dealt with at the end of the project. They are then surprised at the employer's reaction and "unreasonableness" when it points out that the contractor has failed to comply with the notice provisions and/or extension of time request requirements in the contract and therefore is not entitled to one.

Under English Law a party to a contract is not allowed to profit from its own breach of the contract. This is known as the Prevention Principle and is usually the contractor's first defence on being informed that the employer is not prepared to grant an extension of time due to the lack of notices of delay and/or a request for an extension of time. After all, it is the employer's instructions or failure to provide information that has caused the delay, so why should the employer not grant an extension of time when it is considered in hindsight at the end of the contract?

The Courts are looking closely at the notice provisions in construction contracts and the precise wording, to determine whether the words indicate with certainty that failure to issue a notice of delay and/or a request for an extension of time at the appropriate time means that the contractor is not entitled to one at all. Increasingly, the Courts are supporting employers where the words of the contract can be interpreted with certainty that if its provisions have not been complied with, then the contractor is not entitled to an extension of time, irrespective of the employer's culpability in causing delay. Some modern standard forms reinforce this by their wording (See NEC 3rd Edition).

Having determined that contractors are not due extensions of time because of their failure to notify delays and request extensions of time in accordance with the requirements of the contract, this not only prevents the contractor from being awarded the appropriate extension of time, which in itself causes injury to the contractor, but the employer is still entitled to recover its damages for late completion of the contract. As the contractor has chosen not to notify delays in accordance with the contract, this is not a breach of the Prevention Principle. (See *Steria Ltd v Sigma Wireless Communications Ltd.*)

Therefore, the contractor not only fails to secure an extension of time that might entitle it to additional financial reimbursement, but it also has to pay the employer damages because an extension of time has not been granted. The contractor's failure to issue notices and/or request extensions of time as required by the contract will mean that the contractor is penalised for his lack of attention to the administration of the contract.

What is a Notice of Delay

I have yet to read a construction contract which requires a notice of delay or a request for an extension of time being drawn up as a formal legal document.

A contract will state what has to be stated within a notice of delay, and this is the minimum content that should be included. However, the more information that can be included for the employer to consider, then so much the better. It usually has to be written, therefore telephone calls between the contractor and the employer confirming delays are irrelevant; but with the advent of e-mails this has been easily overcome as e-mails are written documents that result in notices being issued in day to day communication between contractors and employers.

Where a contractor has been delayed by the employer, the Courts have proved to be very helpful to the contractor in accepting contemporaneous documents as evidence of notice. This has extended to e-mails which have been purportedly issued regarding other subject matter, but contain a concluding paragraph stating that another item or element of work is in delay because of outstanding information from the employer, daywork sheets detailing labour and equipment being used on additional work, or unable to work, and a Court has even held an Information Required Schedule to be a notice of delay where the contractor stated against one item that it was on the "Critical Path" and then the employer failed to provide the information by the required date stated on the Schedule.

For clarity, the contractor is usually better off if he sends a letter stating clearly the areas of delay, an assessment of their affect upon the completion date and then concludes with a request for an extension of time to the contract completion period. However, whilst elements of work are in delay, it is sometimes difficult to predict the effect that these will have on the completion date of a project because sequencing of works can be altered to mitigate the elements that are in delay.

There is also a benefit to the contractor for including a Cause and Effect Schedule to the progress reports detailing all elements of work that are in delay with reasons, so that the employer is aware of the information requirements for the contractor, to complete the project within the contracted period. Whilst this is usually seen initially as an adversarial tactic by the contractor, after a few progress meetings it is often seen as a beneficial management tool in assisting all parties in completing the project on time. This is because the employer becomes fully aware of the most important items of outstanding information that are required by the contractor to enable construction to take place with a minimal of delay.

A Cause and Effect Schedule should contain a unique item number for each item of work that is in delay, the reason it is in delay and the immediate consequence of that delay on the subsequent operation. If there are further consequences to the delay, then the immediate consequence should, be considered a further cause of delay so that each can be dealt with individually on the Schedule.

Where there is an element of a project in delay for which the contractor is culpable, then the contractor is usually better off if he is up front and states this on the Cause and Effect Schedule as well as stating what it is doing to mitigate the delay. Whilst the contractor usually has no contractual requirement to accelerate the works to overcome delays for which the employer is culpable, it does have the duty and ability to accelerate works that are in delay for which it is culpable. By recording these on the Cause and Effect Schedule it can clearly demonstrate the affects that they did, or did not, have on the completion date of the project. My experience is that if the contractor has caused the delay and agreed a period of delay that it is responsible for, it is usually dealt with far more amicably with the employer and usually has a better result, than having an argument concerning it at the end of the contract.

Very often elements of work are in delay because of the contractor's alterations to its method of working and when analysed at the end of the day, these have no effect whatsoever upon the completion of the project. But because of the contractor's lack of disclosure concerning them, considerable argument and cost is devoted to proving and evidencing that they had no effect upon the completion date and that the items that did cause delay arose from events for which the employer is culpable.

What is required for an Extension of Time Request

The precise detail that is required for an extension of time request alters from contract to contract. It is therefore important that a contractor reads the contract and complies with it.

However, rarely does it mean that the contractor has to submit a full, detailed, critical path analysis of the progress of the construction of the project to support its request for an extension of time and recently the Courts have supported this view.

The majority of construction contracts require the contractor to detail the items in delay that will affect the completion of the project, the reasons they are in delay and an estimate of the extension of time requested. The wording of the majority of contracts would indicate that the assessment is subjective and that the project manager or architect responsible for granting the extension of time should also consider it in a subjective manner, although he is likely to bring to the contractor's attention delays for which the contractor is culpable.

If a contractor submits a request for an extension of time (I have yet to read a contract that refers to a contractor "claiming" an extension of time) and meets the requirements of the contract, then this is what the employer has to consider. Too often a contractor submits an extension of time request only to receive a letter from the employer, or his project manager or architect, stating that he cannot consider the request as no critical path analysis has been submitted to establish that it has been correctly assessed.

My view, recently concurred with by the Courts, is that if the employer refuses to deal with an extension of time request until an expensive analysis is compiled in support of the request, then this is a variation to the contract and the contractor should be reimbursed for providing the analysis requested.

Furthermore, there are different methods of analysing delay and which method is used can affect the result. Because of this, it is rare that a construction contract requires such analysis to be submitted with a request for an extension of time. In recent reported cases, Courts have been reticent at accepting such analysis, and looking at extension time disputes with a more pragmatic and common sense approach, due to the vagaries of results that can occur which are solely dependent upon the method of analysis adopted.

However, this does not deal with the situation whereby there is concurrent delay in which the contractor is culpable for delay in one portion of the works at the same time that the employer is culpable for another. Needless to say both the employer and the contractor's first desire is concerning money. The employer does not want to pay the contractor for delay where the contractor is culpable for it and the contractor requires payment for the additional costs it incurred where the employer is culpable for the delay.

Courts have resolved this by awarding the contractor the period of delay for which the employer is culpable, but not any cost applicable to the delay, as the contractor would have been on site in any event undertaking works because of the delay for which it was culpable.

Using Computer Programs to Analyse Delay

There is not a software planning program on the market that has been designed and written to consider delay retrospectively. Every software planning program is written for the construction team to plan and programme the construction of the project in advance, after consideration of the sequencing and method of working necessary to deliver the contract by the contracted completion date.

Software planning programs cannot satisfactorily be used retrospectively because timelines usually show one line from commencement of an operation through to its completion and they do not show the level of production. For example, the contractor may have had ten tradesmen undertake 70% of an item of work and then reduce it to two men to complete the remaining 30%. This does not show up on any software generated planning program, nor the contractor's reasoning for doing it.

Other examples are;

1. If 95% of an item of work had been undertaken and the remaining 5% left until the week before the contract was completed, when the contractor could have undertaken the work previously, for example the external door used for access into the building being left off so that it is not damaged. It does not show when 95% of the work was completed in accordance with the programme with only a small 5% of the work left until the week before the contract completion. It shows a time line running through to the week before the contract was completed, which is incorrect.
2. If the suspended ceilings had been completed only for suspended ceiling tiles to be removed by the mechanical installations sub-contractor so that it could commission its works, does the computer generated programme show the suspended ceilings as being completed prior to the removal of the tiles to commission the mechanical installation, or after they are re-installed?

Software planning programs do not take into account the actual undertaking of the works, they merely deal hypothetically with delays for which an extension of time could be granted. They ignore when instructions to vary works are given. For example, an instruction to vary works not due to be commenced for another six weeks is going to have less impact, if any at all, than if an instruction was issued when those works were about to, or had, commenced. No software planning program will pick this up and allow for it. Software planning programs are designed to assume that there is only one way of undertaking a project, in accordance with the construction teams preferred method and sequencing of works and furthermore require detailed, precise and regular updating to be correct. They are therefore of little use in assessing an extension of time retrospectively.

It is for this reason that Courts have become reticent at accepting computer generated planning programs as evidence of delay and more willing to accept extensions of time to be arrived at from contemporaneous records and facts as to what happened on site, when considered with dates of instructions being issued affecting the progress of the works, logic as to what happened and experience as to proficiency in dealing with and mitigating the delays.

Therefore, extensions of time should be considered with an as-built programme that shows when precise elements of work were undertaken, the production resources used to undertake them and dates when instructions are issued by the employer. Then by using pragmatism and common sense, determination of the extension of time due to the contractor can usually be agreed.

As long as the contractor takes into account delays that it is culpable for and any failings in decisions it made as to construction of the project, then a fair and reasonable extension of time can usually be ascertained with minimal cost and more often than not, amicable agreement.

Conclusion

1. If Courts can interpret that the words of the contract state that if the contractor fails to provide a notice of delay, or to request an extension of time, at the appropriate time as stated in the contract, then no extension of time is due to be granted, then they shall not award one. (City Inn Ltd v Shepherd Construction Ltd BLR (2003) 468 and Steria Ltd v Sigma Wireless Communications Ltd (2007))
2. Courts will be liberal in deciding what constitutes a notice of delay or request for an extension of time, as long as it complies with the requirements of the contract. (Steria Ltd v Sigma Wireless Communications Ltd (2007))
3. Courts are reticent at accepting software generated critical path analyses in determining entitlement of delay, due to the susceptibility of error occurring in their compilation. (Skanska Construction UK Ltd v Egger (Barony) Ltd (2004) EWHC 1748 and City Inn Ltd v Shepherd Construction Ltd CILL (2008)2537)