TIME ISSUES IN CONSTRUCTION REVISITED

A Client Practice Note
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INTRODUCTION

“It does not matter how slowly you go as long as you do not stop” – Confucius

Speak about time in construction and what becomes a common conversational theme is usually extension of time (and more often, too little of it). A recently published research analysis\(^1\) on the nature of disputes that are adjudicated in the United Kingdom points to an upward trend on disputes concerning extensions of time and claims for loss and expense.

Dealing with time issues is a perennial problem and it starts when the decision to build is made. Problems with time are often linked to extensions of time and loss and expense claims but does it have to be so? What can be done about it?

This practice note examines the contractual environment created by standard forms and the typical difficulties with time affecting construction in the context of contract administration, and also discusses the pertinent key drivers for and offers some practical guidance on controlling time.

UNPREDICTABILITY IN DELIVERY – THE CONTRACTUAL ENVIRONMENT

“Projects are widely seen as unpredictable in terms of delivery on time, within budget and to the standards of quality” – Sir John Egan, Rethinking Construction. Unsurprisingly, the characteristic unpredictability can be gleaned from various clauses in standard forms which distribute time-related risks between the parties through familiar expressions such as ‘programme’, ‘extension of time’, ‘expediting progress’, ‘suspension’, ‘postponement’, ‘liquidated damages’ and time-bar notices. These provisions widely encountered in all standard forms make the presumption that a project tends not to finish on time.

Claims for extensions of time are often deemed as inevitable in construction contracts which in themselves are already unhelpfully complex. A typical extension of time clause entitles the Contractor to a new completion deadline if Employer-responsible events and specified neutral events occur.

Taking the commonly used standard forms published by the Singapore Institute of Architects (SIA Form), Real Estate Developers’ Association of Singapore (REAS Design and Build Conditions or REDAS D&B) and the Building and Construction Authority (Public Sector Standard Conditions of Contract for Construction Works or PSSCOC), the relevant clause starts with a list of delaying events and even includes a ‘catch-all’ provision to avoid the risk of time becoming ‘at large’. Mandatory notices characterised by the words ‘condition precedent’ are given by the Contractor within a specified time limit, failing which the Contractor’s entitlement to a time extension would be lost.

On receipt of the notice, the contract administrator must respond on whether the delaying event qualifies the Contractor to an extension of time. Provided the Contractor has given sufficient information, the amount of extension of time is assessed. In the SIA Form, the Architect has up to and including the issue of the Final Certificate to decide on the length of time. The Employer’s Representative and the Superintending Officer on the REDAS D&B and PSSCOC respectively have to make the decision responsibly within a reasonable time.

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\(^1\) Research Analysis on the Progress of Adjudication, Glasgow Caledonian University, Report No 10, June 2010.
Often linked with the amount of extension of time is the period qualifying for loss and expense. The interdependence of time and money claims must be distinguished and the giving of an extension of time for an Employer-caused event does not automatically make the Contractor eligible for loss and expense entitlements. Under the SIA Form, for any loss and expense incurred arising from any act of prevention or breach of contract by the Employer, pursuant to Clause 31.(14), the Architect has no power to decide or certify through the contractual process. In respect of such claims for loss and expense, the Contractor has to pursue an action for general damages under common law. Claims for additional payment under REDAS D&B are assessed and certified by the Employer’s Representative. In the PSSCOC, the Contractor is entitled to include in his payment claim for certification by the Superintending Officer such amount that has been substantiated in respect of any loss and expense suffered as a result of disruption and prolongation caused by events for which the Employer is responsible.

A snapshot of the contractual environment is illustrated in Figure 1.

### Relevant events

<table>
<thead>
<tr>
<th></th>
<th>SIA Form</th>
<th>REDAS D&amp;B</th>
<th>PSSCOC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Condition precedent notice</td>
<td>Clauses 23.(1)(a) to (q)</td>
<td>Clauses 16.1.1 to 16.1.5</td>
<td>Clauses 14.2(a) to (q)</td>
</tr>
<tr>
<td>Notice on whether event qualifies for extension of time</td>
<td>Yes - within 28 days</td>
<td>Yes - within 28 days</td>
<td>Yes - within 60 days</td>
</tr>
<tr>
<td>Decision-making on time extension</td>
<td>Yes - by Architect</td>
<td>Yes - by E Rep</td>
<td>Yes - by SO</td>
</tr>
<tr>
<td>Loss and expense entitlement</td>
<td>Architect has no power to decide or certify claims for breach of contract by Employer</td>
<td>E Rep assesses and certifies entitlement subject to compliance with notice and procedural requirements</td>
<td>SO assesses and certifies entitlement subject to compliance with notice and procedural requirements</td>
</tr>
</tbody>
</table>

**Figure 1**

| E Rep: Employer’s Representative; SO: Superintending Officer |

### TYPICAL DIFFICULTIES WITH TIME

Concurrent delays

When assessing extensions of time under the REDAS D&B and PSSCOC, the Employer’s Representative and the Superintending Officer are respectively expected to take into account concurrent delaying events which are caused by the Contractor. There is no comparable express provision in the SIA Form that the Architect should have concurrent Contractor-responsible events in mind when deciding on the amount of extension of time but it does not prevent him from doing so if he considers it fair and reasonable.

First, what is concurrency of delay? This issue has been the subject of much judicial scrutiny and most recently, by the appeal judges in the Inner House of the Court of Session in Scotland in *City Inn Ltd v Shepherd Construction Ltd* [2010] ScotCS CSIH 68 (“City Inn”). Briefly, concurrency refers to a situation where two or more occurrences caused by different parties, operating at the same time, have the potency to delay completion of the works. If the event is not on the critical path (although concurrent with the critical path), it cannot affect completion and there is no extension of time. True concurrency occurs where delays (one of which is an Employer-responsible event) start and end simultaneously and both are on the critical paths.

In practice, delays are usually consecutive where one event occurred after the other or some part of it overlapped in time with the other and both events have an impact on and caused delay to completion of the works. Hence, where there are two consecutive and/or overlapping causes – one due to the Contractor’s fault and the other an Employer-responsible event – and the latter event is likely to delay the works beyond the completion date, then provided the contract administrator considers it fair and reasonable, an extension of time would be given for the period of delay caused by the Employer-responsible event.

Dealing with concurrent delays can be exceedingly complex and perplexing. As can be gleaned from the City Inn case, it requires the contract administrator to exercise “professional judgment … to determine, as a matter of fact and no doubt using his and not a lawyer’s common sense” to determine whether the Employer-responsible event caused a delay to the completion date and if so, to fix a fair and reasonable new date for completion. This may in certain circumstances involve the contract administrator to apportion the periods of delay between the Employer-caused event and the Contractor-default event in a fair and reasonable manner. The court also opined a preference for “principles of common-sense” over “philosophical principles of causation” to be applied by the contract administrator based on the factual evidence acceptable to him (which may or may not include a critical path analysis) when deciding whether the Employer-responsible event is the cause of the delay.

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Avoid time becoming at large

The expression ‘time at large’ suggests that the Contractor has as much time as he wants to complete the works. Unsurprisingly, the meaning and effect are often argued (incorrectly) and misunderstood. What does it actually mean? Time becomes at large when the Employer prevents a Contractor from achieving completion by the specified contractual date and the contract does not contain a mechanism that allows a new completion date to be set or the clause was mistakenly deleted in the contract on the assumption that such provision serves to benefit the Contractor. In addition, time can also become at large when there is maladministration of the extension of time clause putting the Employer at risk of time being set at large and losing his right to recover liquidated damages.

When time is left at large, the Contractor is only obliged to complete within a reasonable time and not by the contract completion date. There is no longer a fixed date from which the liquidated damages can be calculated and hence, the Employer loses his right to liquidated damages although he may claim his losses as general damages for any time overrun.

Issuing variations during delay period

It is not uncommon for variations to be issued to the Contractor during the period of culpable delay after the original completion date has passed. Under such circumstances, if the contract administrator considers it fair and reasonable, is the extension of time (representing what it takes for the Contractor to execute the variation work) calculated from the original completion date until the date the variation work was finished or should the extra time be simply added to the previously-fixed completion date?

Following the decision in Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993) 62 BLR 1 (“Balfour”), it is settled law that variations issued during the delay period do not cause time to be at large. The new completion date is calculated by taking the previously-fixed completion date and adding on to it the time required which is considered fair and reasonable for carrying out the variation work. If the Contractor fails to complete by the extended completion date, he pays liquidated damages for the amount of time exceeded.

The ‘add-on’ or ‘net method’ in Balfour has been followed in the PSSCOC (see Clause 16.4) where the extension of time is “added to the Time for Completion of the Works”. A similar concept has also been provided in the SIA Form but in a manner allowing further extensions of time for specified events or certain matters occurring during the period of delay as regulated by the issuance of a Termination of Delay Certificate and Further Delay Certificate. There is no equivalent provision in the REDAS D&B.

KEY DRIVERS FOR CONTROLLING TIME

In an effort to achieve a cost, time and performance balance and complementary to the effectiveness of controlling time, certain key drivers have to be considered and resolved by the various stakeholders and some of these are set out below.

Consider early forward or enabling works

Early forward or enabling works comprise soil investigations, services diversions, earthworks, demolitions and piled foundations. Contracts for such works should be called in advance of the main building works to avoid unnecessary delays on the overall master programme.

Advance orders or purchases for materials and equipment and sub-contracts with long lead-in delivery times such as lifts and escalators should also be placed early to meet programme milestones.

Procurement – making the right choice

Exploring procurement options against a backdrop of time, cost, performance and contract interfacing issues and choosing an appropriate route to achieve a completed project that fulfils the Client’s objectives is the hallmark of a successful procurement strategy.

Where quality, cost and time certainty are of paramount importance, a traditional approach enables the Client to control time, quality and design development through detailed drawings and specifications. It also facilitates ease of making design changes during construction without time penalty and this is particularly important if preliminary requirements of the various interest groups of end-users whose input may only be available towards project completion are to be considered. A traditional route requires the design to be complete at the outset prior to tendering which means less scope for overlapping of design and construction. This inevitably leads to a comparatively longer design process.

A design-build procurement route transfers the responsibility of cost and time delivery to the Contractor whilst securing end-product performance and quality compliance. One of the principal benefits of a design-build approach is the single-point responsibility of the Contractor in coordinating and integrating the design and construction processes. It also offers increased scope for overlapping design and construction resulting in a corresponding reduction in the overall development timescale. The tender period is however much
longer than the traditional approach for the Contractor’s proposals to be produced and submitted as part of the bid documents, as is for a final contract to be drawn up and physical construction work to start on site. Changes at post contract phase are also expensive and attract time implications given the difficulty in evaluating the effects and little transparency of the Contractor’s cost base and performance design assumptions.

Whether the selected procurement strategy is the traditional approach or design-build, the longer time required in pre-construction processes can be negatived through two-stage tendering where it is possible to involve the Contractor earlier (Figure 2). This facilitates value engineering alternatives, cost effective alternative design solutions and particular construction techniques to be explored, encouraging innovation and less labour-intensive work methods. The Contractor’s input at the early stage can often be of benefit in avoiding construction and time difficulties often emanating at design and design-construction interfaces.

**Build collaborative ethos**

Collaborative working can achieve significant benefits for all parties if it is approached correctly and in the right spirit and attitude. Successful collaboration requires everyone to work at it and is not a miracle cure for the industry’s all-too-familiar woes — adversarial relationships, poor quality and performance, cost overruns and delays.

Amidst a changing landscape of fast-track projects, the array of collaborative working arrangements and relationships can be used positively to drive, motivate and maintain relationships throughout the course of the project life through regular reviews and continuous measured improvements against key performance indicators in getting the project delivered on time.

**Fast-tracking with letters of intent – but be wary!**

The need to use a letter of intent tends to be more commercially driven as when funding or pre-commitments with third parties dictate tight timescales for completion of the project. A letter of intent is issued to secure the commencement of work urgently before all details of the contract are agreed. Work on site can be started while negotiations are in progress so that time is not lost.

While there appears to be a perceived benefit to reduce the overall time for completion, a letter of intent should be treated with caution and is best issued under professional legal advice given the consequences when negotiations fail or the project is aborted and no contract is concluded. As the UK Supreme Court admirably said in the case of RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Company KG (UK Production) [2010] UKSC 14, “the moral of the story … is to agree first and to start work later”.

**CONCLUSION**

With growing complexity of construction contracts and construction projects, delays are unavoidable in a disputatious arena. The interests of parties can be better served if time issues both from the contractual and practical perspectives are efficiently managed and controlled without having to be embroiled in time-consuming and costly legal entanglements.

Risk allocation on timing starts at the outset when putting in place properly drafted time obligations in contracts and how these are to be managed and complied with. The risk of delay can also be mitigated through careful selection of a procurement route and involving the Contractor early, contract packaging and programming certain works to start first and creating an environment that embraces collaborative working where the project stakeholders are committed and subscribe to a common objective.