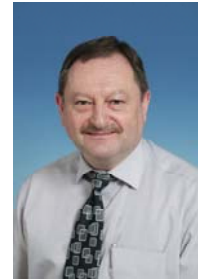




Clause 25 : Extension of Time : Standard Form of Building Contract Private Edition : With Quantities – 2005 Edition

By **Colin B. Lee** FRICS, FHKIS, FCIQB, FHKICM, MCI Arb, AHKI Arb RPS(QS), HKIAC Accredited Mediator, Dispute Resolution Adviser(ASD List) Chairman



One of the reasons for introducing into contracts a requirement for the contractor to give a written notice of delay is to alert the architect (and the employer) at an early stage that a particular event has occurred which is likely to cause delay to the completion of the Works, or a Section thereby giving the architect the opportunity to instruct any further steps the architect considers necessary to minimise the effects of the event. This may include withdrawal or modification of a previous instruction.

These days, construction is quite a dynamic process with critical activities often changing weekly, unfortunately, the procedure for the contractor's notice set out in clause 25 of this 2005 Edition clearly changes the emphasis from the initial objective of the early warning to a more complicated procedure which effectively assumes the delay is inevitable.

To understand these procedures better, I have endeavoured to interpret clause 25 using a flow diagram, refer to Figure A.

Pursuant to Clause 25.1(1) the giving of a notice is in two stages. The contractor issues the "first notice" which is to be given:

"as soon as practicable, but in any case within 28 days of the commencement of an event likely to cause delay to the completion of the Works or a Section beyond the Completion Date becoming apparent..." this is in fact, an improvement on the earlier draft of the document which allowed 42 days.

In addition to giving the notice, which must be in writing, Clause 25.1(2) requires the contractor to:

- "(a) state the likelihood and estimated length of the delay beyond the Completion Date;*
- (b) set out the material circumstances including the cause of the delay;*
- (c) state if the Contractor considers that he is or may become entitled to an extension of time due to the effects of an event listed in clause 25.1(3); such events are known as "listed events", and, if so, identify which of the listed events he believes to be the cause of the delay."*

The intention of these further requirements is to minimise "frivolous" submissions by the contractor and to make the contractor pay due consideration to the giving of such notice in the first instance. The contractor should be well aware that failure to provide the information in time and in the detail required will inevitably lead the architect to dismiss the notice as non-compliant.

The Listed Events

Clause 25.1(3) details the listed events. There are now 22 causes of delay, whereas the old Standard Form has 11. In particular, I note the introduction of:-

- "(t) delay to the Works due to time not reasonably foreseen by the Contractor in obtaining approved or consent from a Government department;*
- (u) a special circumstance considered by the Architect as sufficient grounds to fairly entitle the Contractor to an extension of time;*
- (v) an act of prevention, a breach of contract "or other default by the Employer or any person for whom the employer is responsible."*

Whilst it is a positive step to include these additional causes, it is regrettably inevitable that employers will likely strike out many of the additional causes to avoid giving the contractor more reasons to claim entitlement to extension of time. Even the old Standard Form is amended by supplementary conditions limiting the causes for delay.

Employers seem to forget that the reason for having such provisions for granting extensions of time is to maintain the employer's entitlement to the recovery of Liquidated and Ascertained Damages. Employers, however, treat such provisions as "excuses" for the contractor to claim extensions of time.

The risk to the employer in striking out many of these causes for delay is that it limits the architect's ability to give extensions of time for breaches of contract by the employer or by someone for whom the employer is liable, e.g. the architect. If there are no provision to remedy such breaches, then the completion date becomes "at large". In such circumstances, the employer cannot recover Liquidated and Ascertained Damages and the obligation on the contractor is to complete within a reasonable time.

Employers are clearly not interested in giving a contractor more reasons to claim extensions of time and, as market conditions prevail, employers will continue to make such conditions even more onerous on the contractor.

Best Endeavours

Clause 25.1(4) requires that the contractor shall continuously use his best endeavours to prevent or mitigate delay to the progress of the Works, however caused and to prevent the Completion of the Works being delayed or further delayed beyond the Completion date. (sub-clause (a) refers) and to do all that may reasonably be required to the architect's satisfaction to proceed with the Works (sub-clause (b) refers).

One of my criticism of the earlier draft was that there was no definition of best endeavors this has been corrected to some extent wherein subclause (a) states.

“best endeavors shall not be construed to mean that the Contractor is obliged to spend additional money, without reimbursement under clause 26, to accelerate the carrying out of the Works to recover delay that the Contractor did not cause”

The Second Notice

A further notice is to be issued by the Contractor *“as soon as practicable, but in any case within 28 days of giving the first notice”* (the *“second notice”*) (clause 25.2(1) refers). In addition, the second notice is to include

- “(a) substantiation that the listed event is the cause of the delay;*
- (b) particulars of the cause, effect and length of the delay to the completion of the Works or a Section beyond the Completion Date in sufficient detail to enable the Architect to make a decision under Clause 25.3(1);*

It is not unreasonable to require the Contractor to submit the details requested. I appreciate that the employer will be concerned to establish whether the contractor has an entitlement to an extension of time as soon as he can and, therefore, be in a position to negotiate commercially with the contractor at the earliest date.

However, under clause 25.3(2), see later comments, the architect has a further 60 days to consider and award an extension of time following receipt of the second notice. This makes the overall time from the occurrence of the delaying event to establishing an entitlement to an extension of time some 116 days, i.e. over 3 months later. Further, clause 25.2(1) is presumptive that within 28 days of the first notice it is possible to submit particulars of the cause, effect and length of the delay (emphasis added).

As will be inevitable by reference to current practice on contracts with similar provisions, there will be hundreds of such notices to deal with administratively by both the contractor and the architect.

Interim Particulars

Where an event has a continuing effect, the contractor is required to give a written statement to that effect together with interim particulars. Such particulars are to contain similar information to the second notice, (clause 25.2(3)(a) refers.) Such interim particulars are to be submitted at 28 day intervals until the delay ceases (clause 25.2(3)(b) refers) and then final particulars are to be submitted 14 days after the delay ceasing thereafter in sufficient detail to enable to Architect to make a decision under clause 25.3(1) (clause 25.2(3)(c) refers).

It will be interesting to see in practice, once this Standard Form is adopted, how many architects react to the first notice. Many architects will be too impatient to wait for the second notice some 28 days later (or interim particulars 28 days later) which contain detailed particulars and will inevitably respond to the first notice, as most do in practice

today. Usually, an architect’s initial response is to deny that there is any entitlement to an extension. Once such a position is taken, I find it difficult to see that an architect can then consider the detailed particulars fairly and reasonably.

One further point on the notice procedures – where an event is continuing, the contractor is to provide interim particulars at 28-day intervals until the delay ceases. It is not clear who determines when such a delay ceases, I suggest it can only be the Contractor. Further, according to clause 25.3(2) and (3), the Architect is to respond within 60 days of receipt of the second notice, however, it is not clear what happens when such continuing effects extend beyond 60 days.

The Architect’s Decision

Clause 25.3(1) sets out the architect’s obligations to give extensions of time provided that the architect is satisfied that:-

“completion of the Works or a Section is being or is likely to be delayed beyond the Completion Date by the listed event stated by the Contractor in his first and second notice to be the cause of the delay.”

Under clause 25.3(2), the architect shall give an extension of time and the reasons for his decision as soon as practicable, but in any case within 60 days after receipt of the particulars submitted with the second notice.

Clause 25.3(3) provides for the architect to notify the contractor after receiving the first and second notices that he has decided not to fix a later date as a new completion Date. Again to be given within 60 days of receipt of the second notice and to give reasons for his decision. Interestingly, there is no reference to *“or such further time as may be reasonable”* in this clause, which was in the earlier draft, this has been amended to *“as soon as practicable”*.

It is not clear what will happen if an architect does not respond within 60 days of receipt of the second notice or does not give reasons for his decision. Presumably, the contractor will have to issue a notice of dispute pursuant to clause 38.

Under clause 25.3(4), the architect need only consider extensions of time to the extent that he is able to on the information available in the circumstance that the contractor has not submitted the second notice within the time required by clause 25.1 or 25.2, but a first notice is nevertheless submitted.

This clause seems to be contrary to clause 25.3(1), in particular sub-clause (c), which requires the contractor to submit the first and second notices as required by clauses 25.1 and 25.2. There is also no reference to the interim and final particulars.

I suggest that not only is the architect to consider the information available from the Contractor, but also the information within his knowledge. This will include the knowledge of further revisions to critical activities, or variations which have yet to be issued and may not be known to the contractor.

Time Savings

Clause 25.3(5) provides for the architect to consider possible savings in time as a result of an omission or reduction in the works, thereby allowing the architect to reduce an extension of time previously granted under clause 25.3. However, such reduction cannot result in an earlier completion than the contract completion date.

Whilst it is intended that a reduction in a previously awarded extension of time shall only be effected if it is "*fair and reasonable to do so*", I envisage this clause will be easily abused.

Even if work is omitted, or the Works are reduced in scope, it does not necessarily mean that there will be a saving in time. The work omitted, or reduced, may not be critical, however, there is no obligation on the architect to substantiate that such an omission or reduction is critical to the Completion Date.

Conversely, however, if there is an increase in the scope of the Works, there is not an automatic entitlement to an extension of time. The contractor is effectively put to strict proof to demonstrate any such entitlement to an extension of time. In my opinion, the same obligations should apply to the architect under this clause 25.3(5).

Extensions After Culpable Delay

If an extension of time is given to the contractor under Clause 25(3) because of a listed event that occurs in a period of delay after the completion date, but before the Date of Substantial Completion, clause 25.3(6) makes it clear that the architect shall award an extension of time and fix a new completion date, even though the listed event may have occurred later than the date that the architect fixed as the new completion date. This is the principle adopted by the court in "*Balfour Beatty Building Ltd v. Chestermount Properties Ltd*", whereby the court determined that the architect was correct to add the net extension to the completion date, notwithstanding that the architect's instruction was after the extended date. Effectively, the contractor remained culpable for that portion of delay for which he was held responsible.

The introduction of this clause 25.3(6) is to prevent the contractor submitting "*global*" claims for extensions of time because of the issue of architect's instructions after a period of culpable delay.

Revised Extensions of Time

Under clause 25.3(7), the architect may fix a new completion date earlier or later than that previously fixed during the period of delay between the Completion Date and the Date of Substantial Completion, if it is fair and reasonable to do so, whether by reviewing a previous decision or by taking into account any further and better particulars that may be submitted by the Contractor or by taking into account any extension of time granted under clause 25.3(6).

This clause 25.3(7) gives the architect the power to revise the completion date, but only to a later date.

Final Extension of Time

Clause 25.3(8) states that the architect shall finally decide the overall extension of time, if any, to which he considers the contractor is entitled to under Clause 25, whether by reviewing any extension of time previously granted or otherwise and shall fix a Completion Date which may be the same as but not earlier than the Completion Date previously fixed, within 90 days after Substantial Completion or such later date as may be agreed by the parties.

I do not see the point of specifying 90 days, and then including the phrase "*or such later date as may be agreed by the parties*". This clearly diminishes the obligation on the architect to "*finally decide*" the overall extension of time within the specified period.

Further, it is unlikely that the contractor will in practice claim breach of contract if the 90 day period is exceeded, particularly where it is inevitable that the contractor will still be preparing final submissions in respect of extensions of time.

I also suggest that the specified period of 90 days is inadequate based on the durations allowed under clause 25.3. If an event has continuing effects, the Contractor has 28 days from the delay ceasing to submit detailed final particulars (clause 25.2(3) refers). The architect has at the minimum, 60 days from receipt of such final particulars to give a decision (clause 25.3(2) refers). This totals at least 88 days. Assuming the end of the effect is the Date of Substantial Completion, then the architect will be in breach of his obligations under clause 25.3(8) if he complies with clause 25.3(2).

Concurrent Delays

Clause 25.4 makes it clear that where the contractor has, in the opinion of the architect, contributed to or aggravated by a breach of contract or other default, the listed event resulting in delay to the Completion of the Works or a Section, then the architect shall take into account the effects of that contribution or aggravation in fixing the new Completion Date.

This clause is intended to deal with the situation of concurrent delays, however, it only requires an "*opinion*" of the architect; I suggest that there should be an obligation on the architect to demonstrate that such contribution or aggravation was critical and clearly affected the Completion Date, irrespective of the listed event. It is not sufficient to rely on an opinion, particularly where there are onerous requirements on the contractor to demonstrate entitlements to extensions of time. Where there are concurrent excusable and culpable causes of delay the contractor should be awarded an extension of time for the excusable delay and, thereby, relieved of the liability for Liquidated and Ascertained Damages.

Clause 25.5 refers to rate of progress and, in sub-clause (1), the Architect may notify the Contractor that, in his opinion, the rate of progress of the Works is at any time too slow to be completed by the Completion Date for any reason which does not entitle the contractor to an extension of time. Following such notification, sub-clause (2) provides for the contractor, at his own discretion and with no entitlement to receive additional payment, to take the measures that he considers necessary to expedite the progress to complete the Works by the Completion Date.

Similar provisions exist in other types of contracts and, in practice, are open to abuse. Often the architect notifies that the rate of progress is slow despite the contractor having submitted numerous notices of delay and having entitlement to extensions of time. Again, the clause is based on “*the opinion*” of the architect. This opinion may well be prejudiced by the circumstances I have referred to above. I suggest that the clause should require more than “*the opinion*” of the architect.

Nominated SubContractors and Suppliers

Clause 25.6(1) refers to the first notice which includes a reference to work carried out by a Nominated Sub-contractor or materials or goods supplied by a Nominated Supplier. The contractor is required to give a copy of the first and second notice to the Nominated Sub-contractor or Nominated Supplier and, in sub-clause (2), the architect is to notify each Nominated Sub-contractor and Nominated Supplier of any new Completion Date fixed under clause 25.3.

The idea of this clause is to ensure that each Nominated Sub-contractor or Nominated Supplier is fully aware of notices being given on its behalf and whether there are any revisions to the Completion Date. The clause is, therefore, not for the benefit of the contractor as the contractor would, in any event, be entitled to an extension of time under one of the 22 No. listed events.

Although not stated, it is presumed that the action under sub-clause (2) is not related to or consequent upon the first and second notices given under sub-clause (1). Each should be independent of the other.

It is also surprising that there is no requirement for notification of the Architect’s determination made pursuant to either 25.3(2) or 25.3(3), particularly in respect of the notices referred to in 25.6(1).

The Architect

In the Fourth Draft, I suggested that as the architect is responsible for deciding extension of time issues, including listed events which are clearly the architect’s fault and for giving opinions. I considered that it would be appropriate to introduce a “*contract administrator*” into the contract who does not have a vested interest to protect. Unfortunately the 2005 Edition did not adopt this suggestion.

This concludes my observations on clause 25, however, one final point. It is interesting that the authors of this 2005 Edition have resisted introducing a “*condition precedent*” within clause 25. This is clearly an acknowledgement of the unnecessary volume of paperwork that is generated by such a provision and which, frankly, serves no effective purpose in the end. This, of course, does not mean that employers will not introduce such a condition precedent in special conditions.

Figure A

Clause 25: Extension of Time

