



Delay Mitigation

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It is now prevalent for most contracts that get into delay, for whatever reason, for the contractor to take delay mitigation measures to reduce or extinguish such delay and to complete by the original date for completion or as soon as possible thereafter.

If the delay was caused by the effects of an excusable and compensable event (i.e. an event for which the employer is responsible for the effects on time and cost respectively) then the contractor will look to obtain compensation from the employer.

The Contractor's Completion Obligation

Where the progress of the works is delayed by the effects of an excusable event (which may also be compensable), the contractor's obligation, under most standard forms of contract, is to complete the works by the extended date for completion to which the contractor is entitled pursuant to the extension of time clause in the contract.

If the contract administrator does not recognise the contractor's proper entitlement, or maintains that there is no entitlement and, thereby, does not timeously award an appropriate extension of time, then the contractor is not obligated to complete by the date for completion then fixed under the contract but is obligated to complete by the date which the contract administrator ought to have fixed having properly taken into account the contractor's entitlements under the extension of time clause.

However, if, in the absence of an appropriate extension of time, the contractor then implements delay mitigation measures and extinguishes or reduces the projected delay to completion which would otherwise have been likely to occur had delay mitigation measures not been implemented, then the contractor is only entitled to an extension of time to the extent that there is residual delay to completion.

Mitigate or Prolong

Where delay has been caused by the effects of an excusable and compensable event and the contract administrator has not timeously awarded an appropriate extension of time, the contractor may decide to take delay mitigation measures where it has established, by carrying out forward cost projections and estimates, that it is in its best financial interests so to do.

Even if the threat of the employer imposing liquidated damages is ignored, it is often less costly for the contractor to implement delay mitigation measures than to allow the alternative prolongation to occur. If the threat of liquidated damages is factored into the cost projections and estimates then, financially, delay mitigation is always the less costly alternative to prolongation.

However, contractors must be realistic in their appraisal

of what can be done to speed up the progress of the works. Often the original programme is very tight and, unless specific measures are taken and subcontractors brought on board, then it may not be possible to complete outstanding works in a shorter time than originally planned. In such cases, prolongation is inevitable. In this respect, if a contractor merely programmes shorter periods for its subcontractors to carry out their subcontract works without identifying the specific measures needed to complete the subcontract works in less time than originally planned then it is unlikely that any true time savings will be achieved. Further, if the subcontractors fail to speed up their subcontract works, the subcontractors can, at any time, revert to the periods for completion stated in the subcontracts and rely on their extension of time entitlements.

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The risks and benefits of delay mitigation must, therefore, be carefully considered before irrevocable decisions are made.

Mitigation

In the UK and other jurisdictions based upon UK law, contractors have for many years looked to recover from employers the additional costs of implementing delay mitigation measures (additional costs to normal working excluding prolongation) even where there was no employer's instruction to implement such measures. Such claims were based upon the legal doctrine of mitigation although this philosophy does have its critics who advocate that the doctrine of mitigation does not apply when there are extension of time and additional payment clauses in a contract. Many contractors have been successful with mitigation claims but proper procedures have to be put into place, notices issued and particulars of the delay mitigation measures carefully recorded to establish causal nexus and the merits of such measures.

There are few authorities covering mitigation and contractors are recommended to take legal advice before committing to additional expenditure.

An employer should do likewise if it does not want the contractor to implement delay mitigation measures when its contract administrator does not award an appropriate extension of time at the appropriate time.

Constructive Acceleration

The Society of Construction Law's Delay and Disruption Protocol defines constructive acceleration as "Acceleration following failure by the Employer to recognise that the Contractor has encountered Employer Delay for which it is entitled to an EOT and which failure required the Contractor to accelerate its progress in order to complete the works by the prevailing contract completion date. This situation may be brought about by the Employer's denial of a valid request for an EOT or by the Employer's late granting of an EOT".

In the USA, contractors have, for many years, looked to recover from employers the additional costs of implementing delay mitigation measures based upon the legal doctrine of constructive acceleration. It is only relatively recently that this doctrine has been recognised in the UK and there is no reason why it should not also be recognised in HK.

However, before constructive acceleration was recognised in the USA as a ground for claim, contractors were able to recover additional expenditure incurred by implementing delay mitigation measures in the absence of a timely appropriate extension of time based upon the basic principles of law; i.e. the recovery of damages due to breach of contract, the breach being the absence of an appropriate extension of time issued at an appropriate time.

Such remedy would also be available in the UK and HK.

In the USA it is recognised by the courts that a refusal by a contract administrator to grant an extension of time, either promptly, or at all, is classed as an implied instruction by the employer to pay the contractor to accelerate, overcome delays and finish the project by the contractual completion date.

Various contract appeal decisions in the USA in the 1980's concerning acceleration claims analysed the principles and found five elements that they considered must be present to establish an acceleration claim:

- (i) there must be an excusable delay;
- (ii) there must have been timely notice of the delay and a proper request for an extension of time;
- (iii) the extension of time request must either be postponed or refused;
- (iv) the employer or other party must act by coercion, direction, or in some other manner that reasonably can be construed as an order to complete by the original date for completion;
- (v) the contractor must actually accelerate its performance and thereby incur additional cost.

In some later cases this list has been compressed. In the appeal of *R.C. Hedreen Co.*, there were four requirements, while in both *McDevitt & Street Co. v. Marriott Corp.*, and *Norair Engineering Corp. v. United States*, there were three requirements ((i) delays were excusable, (ii) the contractor was ordered to accelerate and (iii) actual additional cost was incurred due to acceleration). The Court of Claims in *Norair* observed that the requirements for a contractor to request an extension of time and a denial of a meritorious request constituted an order by the employer to accelerate.

Subsequent US cases held that a timely notice of delay

and a request for an extension of time must be given (*Envirotech Corporation v. Tennessee Valley Authority* (1988)), and an express or implied demand to accelerate is also needed following *Nello L. Teer Co. v. Washington Metropolitan Area Transit Authority* (1998).

The Position in the UK

In *Ascon Contracting Limited v. Alfred McAlpine Construction Isle of Man Limited* (1999) it was held that there was no obligation on the sub-contractor to mitigate the consequences of the contractor's breaches of contract, since that would deprive the sub-contractor of the opportunity of knowing how much of the delay was excusable, of assessing whether it was necessary to consider incurring additional expense in taking measures to reduce its potential liability for damages for any culpable delay and, if so, to decide for itself how far it was in its own interests to incur delay mitigation expense in the absence of an instruction to do so as a variation.

In the more recent case of *Motherwell Bridge Construction Limited v. Micafil Vakuumtechnik* (2002), Micafil refused to grant an extension of time to Motherwell who, after receiving progress complaints from Micafil, decided to accelerate (working night shifts and providing extra men and plant). Motherwell claimed the extra costs of complying with Micafil's requirement to finish the contract on time. It was held that:-

- (i) there had been excusable delays;
- (ii) Micafil had refused to grant extensions of time to which Motherwell would have been entitled under its sub-contract;
- (iii) Motherwell had accelerated to complete by the required date and had proved that, but for the delay mitigation measures, the works would have been completed on a later date than they were actually completed;
- (iv) Motherwell had written and told Micafil of the actual and projected costs of implementing delay mitigation measures, either prior to, or at the time of implementing the necessary measures; and
- (v) Motherwell was entitled to reimbursement of its additional costs incurred in mitigating the delays notified to Micafil.

The decision in *Motherwell* recognizes constructive acceleration as a ground for claim. On the face of it, the *Motherwell* case means that if a contractor is wrongfully refused an extension of time and accelerates to avoid liquidated damages, it is entitled to recover its acceleration costs, even without an acceleration agreement with the employer. In this context acceleration and delay mitigation are the same thing.

Other Case Law

There are also the following cases in support of claims to recover the additional costs associated with implementing delay mitigation measures:-

- (i) *Perini Corporation v. Commonwealth of Australia* (1969). In this Australian case the contract administrator repeatedly refused to give his decision on the contractor's submissions for extensions of time and the contractor accelerated to finish on time to avoid paying liquidated damages. It was held that:-

- (a) terms were implied into the contract that the employer must ensure that the contract administrator undertakes its duty as certifier of extensions of time and, furthermore, that the employer would not interfere with the contract administrator's duty, and
 - (b) any proven breach of the implied terms might give rise to a claim in damages against the employer. Again the court found in the contractor's favour in ordering the employer to reimburse the cost of acceleration.
- (ii) *Morrison-Knudsen v. British Columbia Hydro and Power Authority* (1978). All applications for extensions of time in this Canadian case were refused as the employer had a pressing need to have the project completed on time. The contractor accelerated the works at considerable cost. It was held by the court that the contractor was entitled to recover from the employer the additional cost incurred.
- (iii) *W.A. Stevenson Construction (Western) Ltd. v. Metro Canada Ltd.* (1987). The Canadian court awarded the contractor damages for lost productivity caused by constructive acceleration. The Canadian court determined that the employer had deliberately breached the contract when it maintained the position that the time for completion of the contract would not be extended for any reason.

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Causal Nexus

As with any claim to recover additional cost incurred due to the effects of a compensable event, the contractor must establish a causal nexus if the claim is contested by the employer.

In the hurly burly of a large project, where there are many compensable events the effects of which are complex, establishing the causal nexus and the additional costs incurred requires expertise and good records.

It is often necessary to establish that the contractor actually did speed up the rate of progress of the works (rather than just take measures to achieve its programmed rate of progress where the contractor underestimated the time required for an activity or a series of activities). To establish a causal nexus, contractors often adopt a delay analysis technique using a baseline programme which is then impacted with the effects of the compensable events, excluding the effects of delay mitigation measures. Such a delay demonstration technique projects what may have occurred absent the delay mitigation measures and is intended to show that completion would have been much later had delay mitigation measures not been implemented. If the additional cost of such measures is less than the prolongation costs (to the employer) which are saved then the contractor is entitled to additional payment for delay mitigation.

The critics of this technique say that the delay demonstration projection is fictitious, which is correct, as the projection is to demonstrate what was likely to have occurred absent the delay mitigation measures.

Another way of establishing causal nexus is to adopt a time impacted delay analysis technique using monthly windows. As the delay analysis is developed, the effects of compensable events are input month by month and so too are the effects of delay mitigation measures. The additional costs of the delay mitigation measures can, therefore, be calculated on a month by month basis and linked to the delays which were actually mitigated. On a large project, with many compensable delaying events and many delay mitigation measures, this exercise is very time-consuming, which is one of the reasons why most contractors prefer the impacted programme technique which is quicker but can be criticised for being fictitious.

However, if an employer unreasonably rejects an otherwise valid claim based solely upon a dislike of the impacted programme technique and, thereby, forces the contractor to prepare a time impacted windows analysis then the employer will eventually have to square up to its liabilities.

Prioritization

When the contractor considers what measures it can implement to mitigate delay it may decide to prioritize progress on parts of the works at the expense of progress on other parts of the works.

For instance, if the project is a hotel and an extension of time is unmeritoriously rejected, then the contractor may decide to speed up completion of the lower restaurants, public facilities and half of the guest rooms to achieve an early partial opening at the expense of completing the other half of the guest rooms and the roof top restaurant.

Such circumstances have to be taken into account when establishing the causal nexus and deciding any extension of time if the non-prioritized works subsequently delay overall completion.

Example of a Delay Mitigation Situation

1. As required under the contract, the contractor notified the engineer of its intention to claim extensions of time for the effects of the excusable delaying events (including the knock-on effects thereof) referred to in the notices of delay. The Contractor submitted further and better particulars for many of these events in sufficient detail for the contract administrator to be able to timeously award appropriate extensions of time.
2. Notwithstanding the particulars provided by the contractor, including delay demonstration programmes to substantiate the effects of the excusable delaying events, the consistent response from the contract administrator was that, with the exception of a few days' extension of time awarded for delays caused by inclement weather, the original date for completion must be maintained. This was a position which the employer appears to have fully endorsed notwithstanding the contractor's entitlements to extensions of time for such things as extra work and the late provision of information.

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3. Due to the uncertainty created by the contract administrator's failure to award appropriate extensions of time and, further, his insistence that the original date for completion must be maintained, the contractor was confronted with the possibility of liquidated damages being levied by the employer.
4. Consequently, a regime was forced upon the contractor whereby it had little option other than to implement delay mitigation measures in attempts to achieve completion by the original date for completion, or as soon as possible thereafter, for fear of the employer imposing liquidated damages upon the contractor.
5. The contractor avers that due to the contract administrator's continued failure or unnecessary or unreasonable delay in granting appropriate extensions of time, he has failed to comply with his contractual and/or legal obligations and, thus, the contractor is entitled to recover the additional costs of implementing delay mitigation measures on the grounds that, had appropriate extensions of time been granted, the contractor would not have been put to the expense of implementing such measures and was entitled to have its prolongation costs reimbursed by the employer.
6. Further, the contractor avers that its claim to be reimbursed the additional costs associated with implementing delay mitigation measures is further supported as the employer would have the benefit of the completed works on a date earlier than it would otherwise have had despite being responsible for the breach caused by its contract administrator not awarding an appropriate extension of time at an appropriate time which would have allowed the contractor to obtain reimbursement of associated prolongation costs. In this scenario, the employer would benefit from its own breach which is contrary to the principle of law and, as such, some remedy should be made available to the contractor.

Conclusions

An employer should be aware that if its contract administrator does not award an appropriate extension of time at an appropriate time and the contractor implements delay mitigation measures then, in all probability, the contractor can successfully recover the additional costs incurred in taking delay mitigation measures provided that proper notices and particulars are issued by the contractor.

Contractors should be aware that to succeed with a claim to recover the additional cost of implementing

delay mitigation measures it should give appropriate notices, establish its entitlement to extensions of time (or longer extensions of time) and prove that its delay mitigation measures reduced the extent of the delay to completion that would likely have otherwise occurred.

If the contractor's claim is contested, the contractor will need to establish causal nexus and to do this it will need to have kept adequate records to establish as-built progress and productivity and the effects of the delay mitigation measures in creating time savings compared to what was likely to have occurred had the delay mitigation measures not been implemented.

This article has concentrated on main contractor / employer relationships, however, similar principles would apply to sub-contractor / main contractor relationships, particularly where the contract administrator has to give approval for a main contractor to award an extension of time to a sub-contractor before such extension of time can be awarded.