

## Contractual Notices – Time for a Review

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### Introduction

Despite numerous reminders on the subject, in my experience, many contractors still fail to give the appropriate notices for extensions of time and/or additional payment, as required by the various forms of contract. Hence, I review in this article, the requirements for contractors to give notices. This article updates an earlier article on notifications and records, drafted by the writer some years ago, and incorporates appropriate comments concerning notices from other subsequent articles published by BERA.

### Generally

Most standard forms of contract require the contractor to give notice when he:-

- (i) becomes aware of an event or events which have caused or are likely to cause delay to completion; and
- (ii) intends to claim additional payment.

In addition to item (i) above, the contractor is usually required to provide detailed particulars of the cause, effect and extent of the delay to the completion of the works and to keep records of the effects of the delaying events which were the subject of the notice.

Sometimes the notice provisions refer to the issue of a notice within a number of days of an event and sometimes introduce time bars and/or conditions precedent.

Although this article only reviews notices of delay and records associated with extensions of time, the comments equally apply to notices and records for additional payment.

### Common Misunderstandings

It is a common misunderstanding in the construction industry that extensions of time are primarily for the benefit of contractors, by providing more time for them to complete the contract works and reducing their exposure to liquidated damages if there is a delay to completion caused by an excusable delaying event. However, an appropriately drafted extension of time clause preserves the employer's entitlement to deduct liquidated damages should the contractor cause delay to the completion of the contract works after the occurrence of an excusable delaying event.

Such type of clauses include general provisions for extensions of time for what are called excusable delays, i.e. delays caused by acts of prevention or breach of contract by the employer or his appointed contract administrator (architect or engineer), and for delays caused by neutral events for which the employer has agreed to accept the risk in respect of time. Hence, one effect of the contract administrator extending the time for completion is that it preserves the contractor's obligations to complete the works within a defined period which, if the contractor fails to do so, may cause him to become liable to liquidated damages.

A further common misunderstanding is that a notice given

under the requisite provisions represents the contractor's application or claim for an extension of time. This is clearly not the case as, under most forms of contract, the contractor has an obligation (and not an option) to give written notice, as identified by the frequently drafted wording:

*"The Contractor shall give notice ....."* (underlining added for emphasis).

It is the consequential duty, or obligation, of the employer or the contract administrator, to then consider if the contractor is fairly entitled to an extension of time for the completion of the works.

### Notices of Delay

The common misunderstanding of extension of time provisions is most likely promoted by the construction of such clauses which put the onus on the contractor to 'get things started' by the issue of a notice, or notices, and the association of extensions of time with claims for additional payment.

One of the reasons for requiring the contractor to issue a notice is to forewarn the employer or the contract administrator, at an early stage, that a particular event has occurred which is likely to cause delay to the completion of the works. If the event was the issue by the contract administrator of an instruction or variation then, after receipt of a notice from the contractor in respect of such an event, the employer or the contract administrator may consider the consequences of the instruction or variation in order that they may review it and decide if it should either be withdrawn or amended.

It could be argued, however, that the contract administrator should know whether or not an instruction or variation would be likely to cause delay before the introduction of such an event. However, it is often the contractor that possesses more experience and awareness to perceive likely problems that result from such events and the actions that are required to be taken once such an event is introduced by the employer or the contract administrator.

### Timing of a Notice

Most common standard forms of contract require the contractor to give written notice in a timely manner and/or within a specific number of days after the commencement of an event.

For example, the time frame stipulated under Clause 23 of the July 1999 Edition of the Agreement & Schedule of Conditions of Building Contract, jointly published by the HKIA, HKIS and the Society of Builders states:-

*"Upon it becoming reasonably apparent that the progress of the Works is delayed, the Main Contractor shall forthwith give written notice ....."*

However, the time frame stipulated under Clause 25.1 of the April 2005 Edition of the same Conditions, published by the Joint Contracts Committee (referred to herein as the "2005 Building Contract") and which commences with

the words “*Contractor’s first notice of delay*”, are more onerous and state:-

“*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, the Contractor shall give notice .....*”

The requirements of, Clause 50(1)(a) of the HK Government’s General Conditions of Contract for Civil Engineering Works, 1999 Edition (referred to herein as the “1999 Civils Contract”) are, equally, as onerous and state:-

“*As soon as practicable but in any event within 28 days of the cause of any delay to the progress of the Works or any Section thereof becoming apparent, the Contractor shall give notice in writing .....*” (Note: the 1993 Edition stipulated 42 days).

Such timing may be amended (usually reduced) by specific clauses included within Special Conditions that are frequently used to amend standard forms of contract.

### Submission of Detailed Particulars

Clause 25.2 of the 2005 Building Contract requires the contractor, under the sub-heading of “*Contractor’s second notice*”, to submit “...*as soon as practicable but in any case within 28 days of giving the first notice ...*” a second notice giving, inter alia, detailed particulars of the cause, effect and length of the delay to the completion of the works or a section thereof.

The above Clause 25.2 continues by stating that, where the delaying event has a continuing effect, the contractor shall, inter alia, make further submissions of further interim particulars of the stated required details “*at intervals not exceeding 28 days*” until the delay ceases.

In addition, Clause 25.2 requires the contractor to submit final particulars “... *within 14 days after the delay ceasing ...*”

Clause 50(3) of the 1999 Civils Contract provides that the architect / engineer may require the contractor to submit full and detailed particulars of the cause and extent of the delay for which the contractor has given notice.

It is in the contractor’s interest to submit such particulars in writing as soon as practicable, not only because Clause 50(3) of the 1999 Civils Contract requires such submission, but also as the contract administrator has an obligation to consider the contractor’s entitlements to extensions of time only when the information and circumstances are made known to him.

Even if not specifically required by the contract, it is advisable for a contractor to submit interim particulars of the delaying events as soon as reasonably possible, even if the effects of such delaying events continue to be ongoing. Further and better particulars, in the form of further interim, or full and final, details may be submitted, or may be required to be submitted, at a later date.

### Conditions Precedent

Most contracts are now drafted with time bar provisions included within the associated contract clauses and a number of contracts make strict compliance with such notice provisions a conditions precedent to the contractor’s entitlement to extensions of time and/or additional payment. The practice of including such provisions has increased in Hong Kong since the airport core project (ACP) contracts were drafted. Many Hong Kong employers have either copied the time bar provisions from the ACP contracts into their own

conditions of contract or add and/or amend the same time bar provisions within special conditions of contract attached thereto.

The purpose of introducing the notice provisions as a conditions precedent is so that the employer can be kept informed by the contractor of the likely or actual effects of excusable or neutral delaying events for which the employer has agreed to accept the risk in respect of time.

If, on a contract where the issue of a notice of delay by the contractor is made a conditions precedent, the contractor is prevented from completing the contract works on time by an act of the employer or the contract administrator (known as ‘an act of prevention by the employer’), and the contractor has not complied with the conditions precedent, then the contract administrator cannot, contractually, grant an extension of time. Under such circumstances, there is case law which indicates that time may become ‘at large’. On the other hand, reference to the article by Glenn Haley and Parissa Notaras in this bulletin indicates that such case may have been superseded by more recent case law and the attitude which now appears to be adopted by the courts (in Australia and England).

It is recommended that contractors should comply with all conditions precedent, and any other notice provisions whenever they are able to do so.

### Absence of Conditions Precedent

It is notable that the 2005 Building Contract does not make compliance with the extension of time notice provisions stipulated therein a conditions precedent. However, recent case law indicates that failure to give a timely notice will, nonetheless, prevent a contractor from being able to obtain an extension of time and it may also mean that a contractor has to pay liquidated damages.

### Time at Large

If the extension of time provisions do not adequately provide for “acts of prevention by the employer” and the contract administrator cannot grant an extension of time in respect of such acts, then it is possible that time may become “at large”.

If time becomes ‘at large’, it means that a contractor has to complete the works within a reasonable time taking into consideration all of the circumstances, including the effects of the act(s) of prevention by an employer.

Under such circumstances, an employer’s entitlement to deduct liquidated damages would become unenforceable, however, it may be entitled to recover general damages if a contractor failed to complete within a reasonable time. Therefore, even when time is “at large”, a contractor should continue to issue notices of excusable and referred delaying events and maintain adequate records so that it can substantiate that it completed within a reasonable time.

### Conclusions

Contractors must now become aware that failure to give timely notices of delay caused by excusable or neutral delaying events for which the contract provides redress in the form of extensions of time, may and, according to Glenn’s and Parissa’s article, almost certainly will (if a dispute occurs and legal action is taken), mean that a contractor forfeits its entitlements to such extensions of time. This will leave a contractor at risk for liquidated damages.