

A review of the Society of Construction Law Delay and Disruption Protocol

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In October of this year the Society of Construction Law published the final version of its Delay and Disruption Protocol (hitherto referred to as its EOT protocol). Those who have followed its development will know that the final version is little different in its principal objectives to earlier versions.

The Protocol remains steadfast in setting out the methodology for proactive delay analysis (as the job proceeds) and the methodology for retrospective delay analysis (after disputes materialise). It has toned down its doctrinaire attitude to certain types of claims and has been more reserved in its attempt to dictate the law where no legal precedent exists.

There are parts of the Delay and Disruption Protocol that are wholly unnecessary and detract from its good points:

- Its attempts to decide what claims can, or should, be made. This is an unnecessary confusion in what is generally a good document.
- The attempts to dip into aspects of quantum appear amateurish.

- Its comments on how specific definitions are to be contractually interpreted should be cautiously adopted since we are all aware that each contract has to be construed on its own terms and definitions.

So what has the Delay and Disruption Protocol to offer to the construction industry and to those of us involved in dispute resolution in particular?

In this article I want to consider its recommendations and methodology in respect of proactive delay analysis:

- Section 2 of the protocol provides “guidelines on **preparing and monitoring programmes and records**”.
- Section 3 of the protocol provides “guidelines on **dealing with extensions of time during the course of the project**”.

For those of us who deal with real-time disputes in adjudications these sections should be of great interest.

However interesting they may be, if the guidelines are to be of any effect on us, they will in the first instance have to be embraced by the construction industry in its day-to-day activity. By construction industry I not only mean contractors but also subcontractors, contract administrators and contract drafters. It is the latter two of these that have to lead the way.

If one examines these guidelines they would sit well within GC/Works contracts and NEC(ECC) contracts, but they would require a revolution in thinking and practice in respect of the JCT suite of contracts.

The RIBA has already expressed its opinion that there is nothing wrong with the current JCT provisions – it says: why bother to

change something that works well where the vast majority of projects are completed without dispute?

Is that really the test that should be applied when deciding whether or not to adopt these guidelines? I think not. The test should be: do they add value? If employers, contractors and subcontractors are to be persuaded to adopt such procedures they need to see added value to their businesses as distinct from provisions “just in case there’s a dispute”. So what added value does the implementation of these guidelines create?

The sceptics in the industry would say: how can added value be created by the implementation of a detailed regime of preparing and monitoring records that inevitably has a significant cost impact in the overhead of a construction project?

I have for many years helped contractors and subcontractors to put in place systems of record keeping to track progress and to enable them to respond rapidly to delays. Having implemented those procedures on a difficult and complex M & E subcontract, I was once faced with the comment at the end of the job: “what a waste of time and cost – we finished the job on time and there was no dispute”.

In fact a difficult project was well managed. The construction team, because of the systems in place, were able to keep an accurate record of progress, identify delays and their impact timeously and react accordingly. Under those circumstances one would expect the various parties to be able to recognise the cause of delay and take appropriate steps to deal with them, and hence no dispute.

That is what guideline sections 2 and 3 are all about – putting good procedures in place to manage change. I embrace those guidelines wholeheartedly and I believe that every employer, contractor, subcontractor and contract administrator that adopts them in a focused way will perform more efficiently and

therefore more cost effectively to the benefit of the project and construction industry as a whole. The participators will manage change.

The RIBA is of course correct in that all the provisions in the world will not make bad administrators good administrators; but at least if the protocol is adopted they will know what they should be doing, and that gives a chance for improvement.

For those of us who deal with delay and extension of time disputes it would be a refreshing change to find progress well documented and delays well analysed without the necessity for retrospective delay analysis (guidelines section 4).

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