

THE MAIN CHANGES TO THE PROTOCOL  
FROM THE CONSULTATION EDITION NOVEMBER 2001  
AND THE WORKSHOP EDITION MAY 2002  
TO THE FINAL VERSION PUBLISHED OCTOBER 2002

- We have lowered our sights as to the status of the Protocol - in the November 2001 consultation version, we had wording that suggested that parties could agree to use the Protocol as an aid to interpretation of their contract, and that decision-takers (adjudicators etc.) could use it like a textbook. In the May 2002 workshop version, we said that contract drafters might want to incorporate parts of the Protocol into their contracts. This type of wording has been removed. Now it is just a guide. We always stated that the Protocol could not take precedence over express terms of a contract; we have strongly emphasised this in the latest version. We say that the Protocol can be used as a guide (or checklist) to make sure that issues are covered when drafting a contract. We acknowledge that it may not be fair to judge the administration of contracts by reference to the Protocol when they were entered into prior to the finalisation of the Protocol.
- In the May 2002 version, maintained in the latest draft, we make a clear distinction between the core principles covered by the Protocol and the Guidance elaborating on those core principles. The reader can therefore easily see these core principles.
- Contractors were concerned about our approach to the “ownership” of float, so we have thoroughly reviewed our position on this important topic. We emphasise that the question of how float is treated should be specifically and clearly addressed in contracts (since it is not clearly dealt with in most of the standard forms). The standard forms can be placed into three broad categories: (1) those where the delay has to affect the contract completion date before an EOT is due (e.g. JCT) - there the project probably owns the float, (2) those where delay in completing the Work entitles the contractor to an EOT (e.g. FIDIC Silver book) - there the contractor may own the float, and (3) those which talk about a "fair entitlement" (e.g. ICE) from which it is difficult to ascertain who owns the float. To the extent that it is not dealt with, we recommend that the fallback should be that the float is there to be used by whoever needs it first. This is also consistent with recent case law, where the issues of float and criticality have been touched on, but not analysed in great detail - *Henry Boot v Malmaison*, *Ascon v McAlpine*, *Royal Brompton Hospital v Hammond* and most recently *Motherwell Bridge v Macafil*.
- Concurrency is also a controversial issue. We have made quite significant changes to the section where this is dealt with. We take the position that in both cases of true concurrent delay (two events occurring and taking effect at the same time) and concurrency where the delays started at different times, but have concurrent effects, the contractor should be entitled to an extension of time for the employer delay. We avoid questions of dominant cause, and we do not subscribe to the argument that because the contractor was going to be on site because of his own delay anyway, he should not be entitled to an extension of time. We do not think it could be right for the employer to deduct liquidated damages from a contractor who has failed to complete by the contract completion date for any period where the contractor is doing work instructed or caused by the employer. When it comes to compensation for this

prolongation, we say that the contractor should not get paid unless he can distinguish the time related costs that are caused by the employer's delays from those time related costs that result from his own delay. If he was going to incur those costs anyway because of his own delays, he should not recover them from the employer. Again, we avoid the question of which is the dominant cause of the delay.

- In the November 2001 version, our recommendations as to the preparation of the programme were intertwined with our other recommendations, and much of those recommendations depended on the parties having followed our advice on programming. Recognising that they will not always do so, we have separated out all our recommendations about the preparation of programmes, and put them in Guidance Section 2.
- On the contractor's entitlement to compensation in a situation where he is prevented from finishing by his planned completion date, which is a date earlier than the contract completion date, we have tidied up the wording on this and flagged up the potential conflict with the *Glenlion v Guinness* case.
- Our recommendations on how to deal with "after the event" delay analysis are now all contained in a Guidance Section 4. We have reduced our emphasis on the use of the technique called time impact analysis, recognising that it will not always be suitable or even possible in some circumstances. A table in Guidance Section 4 shows what types of analysis one can do, depending on the information that is available.
- Some commentators hold the view that the collapsed as-built technique is the only valid one to use in after the event delay analysis. They tend to say that any other technique based on entitlement to time is hypothetical. We do not agree with this. There are many flaws in the collapsed as-built technique, not the least of which is that it does not take any account of the efforts the contractor may have made in order to try to avoid paying liquidated damages. We strongly discourage the "wait and see" approach to the granting of extensions of time, and believe that, so far as practicable, judges, arbitrators etc. should put themselves in the shoes of the architect/engineer and grant the extension of time that the contractor should have had at the time he asked for it. We have emphasised this further in the latest draft.

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For the SCL Delay and Disruption Protocol drafting sub-committee  
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