



Tony Bingham

The Society of Construction Law has just launched its Delay and Disruption Protocol. It's a splendid guide to solving extension of time and compensation problems

A landmark protocol ...

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Download the *Delay & Disruption Protocol*; it's yours free. Two years of work and one year of consultation have gone into this splendid work. It is the first major policy document in the Society of Construction Law's development. And it's a landmark. The only mistake is to call it a protocol. In truth, it is just a guide. Oh, it's a very good guide for managing change on a construction project, change that threatens the programme and the completion date and claims for lateness. The aim is that, in time, most contract documents will adopt this "guide", as the best way to deal

with delay and disruption issues. The trouble with that remark is that it carries the implication that what lurks in the plethora of standard forms right now is not quite ticketyboo; that the protocol is a better bet. Ruffled feathers, eh? But, believe me, what the industry really cries out for is one set of clear rules for managing change on a project. Clear enough to be understood by builders, rather than lawyers.

So, what does the "guide" guide us to? First, it demands not just a building programme showing manner and sequence, it demands a record of actual progress. This is the tool for managing

change. The benefit for the employer is to establish a revised, later date from which damages will run.

Then the idea is to deal with extensions of time soon after the delay event. A shift of thinking is needed here. The employer is inclined to want to wait to see what the effect of a delay event really is. The contractor, in this guide, will be entitled to require the architect/engineer/contract administrator to predict the effect of the event and add time immediately. Then any later knock-on delays that are traceable back to the root event will be given more time.

John Sims

Admirable in some ways, the protocol has it got it badly wrong in the advice it gives on the subject of float as it relates to extensions of time

... but fundamentally flawed

THE DELAY AND DISRUPTION PROTOCOL IS AN admirable document in many ways. But in one important area it is in my view, fundamentally wrong in the advice it gives, and that is in the treatment of programme "float" in relation to extensions of time.

Paragraph 1.3.1 states that where there is remaining float in the programme, an extension of time should only be granted if the employer delay is predicted to reduce this float below zero, thereby actually extending the works beyond the formal contract completion date.

This is completely to misunderstand the primary purpose of an extension of time, which is to preserve the employer's right to liquidated damages by fixing a new, later date by which the contractor is obliged to complete the works if the progress of the work is delayed by the employer or its contract administrator. It has nothing to do with the contractor's intentions as to completion. Whatever float the contractor has built into its

programme to allow for unforeseen events for which no extension will be granted, should still be available to it.

The fallacy of the protocol's approach is vividly illustrated by paragraph 1.3.4, which contains two propositions which I read with disbelief. The first is that if an employer delay occurs first and uses up all the float, then "the contractor can find itself in delay and paying liquidated damages" as a result of any subsequent contractor delay that would not have been critical had the employer delay not occurred first. All I can say is that, if an employer were foolish enough to deduct damages in such circumstances, it would rapidly find itself in court being ordered to pay them back. Any contract administrator who advised it that it should do so would be guilty of professional negligence.

The second proposition is this: "Under contracts where the employer delay only has to affect the contractor's planned completion date, the contractor is potentially entitled to an extension

of time every time the employer ... delays any of its activities, irrespective of their criticality to meeting the contract completion date."

In more than 50 years' in the building industry, I have never come across any contract that expressly links delay and extensions of time to "the contractor's planned completion date". To do so would effectively be to make that the contract completion date, which is an obvious nonsense.

Obviously, any contract administrator considering the grant of an extension of time must consider whether the delaying event affects any activity critical to completion of the work. If it does not, no extension should be granted. If it does, even though the contractor's programme suggests that it will still complete before the contract completion date, an appropriate extension should be granted to preserve the employer's right to damages if, in the event, the remaining float is used up due to other delays.

One of the problems is that clause 25.3.1.2 of

Float at the back end of the programme is tackled head on. It is daft to have a programme that hasn't got an actual finish at least a few weeks before the formal contract completion date. If a delay occurs that eats into that float and that delay would ordinarily extend time, the protocol says no to an extension; but it says yes to

contractor has suffered no loss. So, there you are ready to put the roof on today but the architect has indicated a change to the wall plate design. The job stops. True, the builder can do bits and bobs here and there but what's the predicted effect? Whatever it is, he gets an extension of time now. And if later because of the roof delay a

Those events that do have financial consequences, however, are costed to a system. Come to think of it, the effect can be pre-priced. Interest, global claims, overheads, disruption, acceleration are all here, even a guide to software.

The Society of Construction Law is a neutral body heaving with ordinary members each of whom know the reality of building and civil engineering. It is dedicated to providing a transparent and unified approach to the everyday events in the real world. For my

money I don't actually care very much what the rules are, so long as they fairly allocate risk and above all can be understood by ordinary building folk. Have a look at all this, please. The idea is to simplify and make user-friendly. It might even make buildings better.

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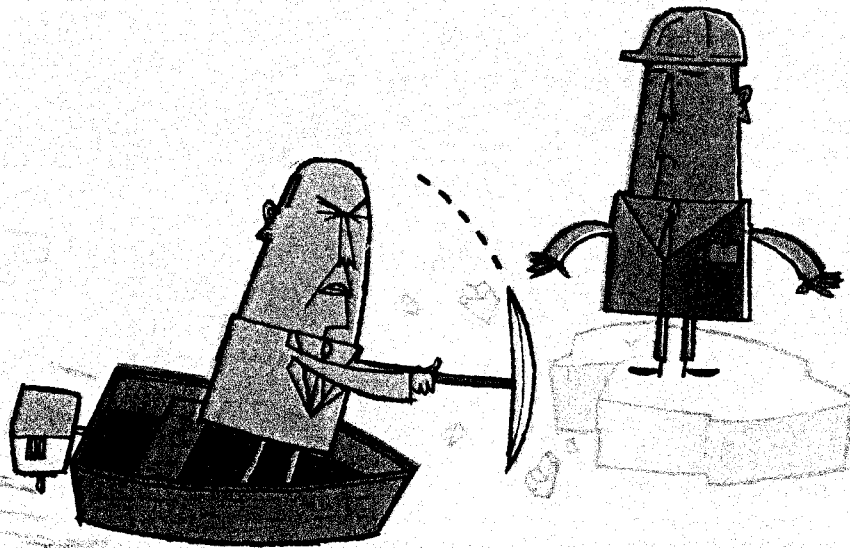
What the industry really cries out for is one set of clear rules for managing change – clear enough to be understood by builders, not lawyers

ADRIAN JOHNSON compensation because the contractor's work has been disrupted. A lot of current contract documents would suggest an extension of time is appropriate, but there is an air of reality about the protocol's stance.

There will be arguments about all this. Concurrent delays – that is, delay events warranting a time extension that occur simultaneously – entitle the contractor to an extension of time. But the extension may not therefore carry money compensation since the

subcontractor can't get back as and when wanted and that delays the job some more, another extension is given.

Then what of mitigation? The protocol makes plain that mitigation does not extend to requiring the contractor to add extra resources or work outside planned working hours. And what of financial consequence of delay? The reminder is that extensions of time are often neutral events for which neither builder nor employer pays. They are best thought of quite separately from money.



JCT80 requires the contract administrator, on receiving notice of a delay, to grant an extension if "the completion of the works is likely to be delayed thereby beyond the completion date". Those last four words appear to suggest that the administrator should only grant an extension if

the delaying event will, in fact, delay completion beyond the contract completion date. In my view, those words are redundant and misleading.

The only remedy is for the JCT to take immediate steps to delete the four offending words from future editions of all their contracts,

and for the drafters of the protocol to change paragraph 1.3 in the interests of preserving employers' rights to levy damages without exposing themselves to legitimate challenge.

John Sims is a consultant, arbitrator, adjudicator and mediator in construction disputes.