



Resolving construction disputes

New moves to shake up the industry

The Society of Construction Law (SCL) has recently published a document entitled: Protocol for Determining Extensions of Time and Compensations for Delay and Disruption. Commonly referred to as the SCL EOT Protocol, it aims to shake up the prevention and resolution of claims in the industry.

Jim McCredie, an engineer and programming professional, looks at how the construction industry is likely to receive the new Protocol.

Need for clarification

By far the most common cause of construction disputes is the contractor's claim for an Extension of Time (EOT) on account of delay events which are at the employer's risk. Not only does the award of an extension of time put back the moment when the contractor is liable for penalties for lateness (liquidated damages), it also creates the opportunity for the contractor to be able to claim damages for additional costs incurred.

The Protocol can be seen to have three main uses:

- Adoption by the parties to a construction contract, in order to provide the means to avoid EOT disputes;
- As an aid to deciding issues that are not clearly covered by an existing contract;
- As an aid to decision makers (such as contract administrators, adjudicators, review boards, arbitrators, judges etc), in dealing with delay issues.

The issues

Anyone having some experience of EOT claims will have come across the same thorny issues time after time:

- Preparation, approval and updating of the contract programme;
- Entitlement to an extension of time;
- Ownership of float (spare time) built into the programme;
- Concurrent delays attributable to separate employer and contractor risk events;
- Delay analysis techniques;
- Compensation payments.

The Protocol addresses all of these issues (and more). However, its recommendations will not be welcomed by all and there is a need to ensure that the principles of the Protocol do not conflict with general conditions of contract adopted by the parties. For instance, the issue of float mentioned above will always be seen as contentious. The Protocol suggests that, unless clearly specified otherwise, float should belong to the project. In other words, there are occasions when the employer can use the float to mitigate his own risks. The contractor is likely to take a dim view of this, because it was the contractor that

built the float into the programme in the first instance for its own use as and when required. In order to avoid the problem of handing its own float to the employer, the contractor will, of course, submit a programme with little or no float shown. The Protocol acknowledges this and encourages contractors not to do it. I think they will need somewhat more than words of encouragement.

On a more positive note, the Protocol clarifies a lot of apparently simple points which, nevertheless, often cause discussion, even among construction professionals of long standing.

Programmes

While there is nothing new in prescribing that industry standard critical-path method project planning software is to be used in a project, the Protocol is appropriately specific. It gives advice on the level of detail that should be included and the procedure for approval.

Records

The Protocol states: “*The starting point for any delay analysis is to understand what work was carried out and when it was carried out.*”

While there may be protests from contractors about the workload involved in maintaining the long list of information suggested, they have little reason, as they should be doing the tasks anyway as a matter of good management.

Nevertheless, I anticipate that sufficiency of records is going to be one of the difficulties of operating

the Protocol. What is very obvious at the time of preparing a record may not be quite so easy to recall a year or two down the line, when trying to correlate records with schedules and locations.

Delay analysis and concurrency

I believe that the Protocol is pragmatic in its approach: it lists the five commonly used delay analysis methods and the various factors that will need consideration before the preferred method is chosen (most notably these include the records available, time available and the nature of causative events).

The difficulties around concurrency were mentioned above. The Protocol recommends that an EOT should be awarded for employer delays, even when the contractor is suffering a delay of his own making in parallel. It states that separate analyses should be carried out for each delay event – the employer risk event should be analysed first. Clear advice such as this has been missing for a long time.

Compensation for prolongation

After pointing out that entitlement to an EOT relieves the contractor of liability for liquidated damages during the period of the extension, but does not automatically involve entitlement to recover additional costs, the Protocol provides guidance on a number of issues. These include:

- How to handle EOTs generated by variations (changes to the contract): the additional cost should be included within the variation;
- The basis of the compensation: only incremental costs incurred by the contractor are admissible;
- Concurrency: compensation should be recoverable only if the contractor is able to separate the additional costs caused by the employer delay from those caused by the contractor delay;
- Float: the Protocol is bold in giving guidance on this controversial topic. The published version is far less prescriptive than earlier drafts. It accepts that it cannot clear up all the old arguments of “ownership”.

Conclusion

The Protocol addresses most of the tricky issues which have plagued those trying to sort out EOT claims for a long time. I find that it provides pragmatic guidelines which, if adopted as “best practice”, should take a lot of the discussion out of disputes and bring the parties closer together. However, time will tell.



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