

# Contracts law and time extension

**T**HE Society of Construction Law in the UK has recently published a consultation copy for general circulation and comment on protocol for determining extensions of time and compensation for delay and disruption.

Although issued in the UK, the principles of the protocol can be equally applicable to the Middle East.

The objective is to answer some of the common issues that arise on construction contracts where one party wishes to recover from the other an extension of time and or compensation for additional time spent and resources used to complete the project.

The intention is to provide material to assist in avoiding unnecessary disputes. If the parties agree, it can be used as an aid in deciding issues that are not clearly covered by the contract but should not be used as a contract document.

Matters covered by the protocol are: Programme; Entitlements to extensions of time; Float; Concurrent delays; Mitigation; Retrospective delay analyses; and Monetary claims.

It should be said at the outset that the protocol provides clear and easily understandable basic information on matters, which regularly cause disputes that can be understood without detailed knowledge of construction law. The guidance at the end of each section is a model of clarity of thought.

If there is one part of the protocol, which is likely to cause controversy, it is the section dealing with the programme. The expressed view is that the contractor's programme should be submitted and approved by the contract administrator or engineer.

When all is said and done, it is the contractor's duty to complete the works within the time constraints stated in the conditions of contract, the programme representing the manner in which it is to be achieved.

A further contentious item is the recommendation that a provisional sum should be allowed by the employer in the contract price for the provision by the contractor of a programme together with further payments for properly updating the programme.

This type of arrangement is unlikely to find much favour among employers.

**Extensions of time:** This section starts by explaining that an extension of time serves only to relieve the contractor of liability for liquidated damages and does not automatically carry with it an entitlement to financial

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**International contract consultant ROGER KNOWLES highlights some of the likely causes of contention in a new proposed British protocol on contracts. Knowles will be addressing seminars on the subject in Dubai and Abu Dhabi next month.**

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**Knowles.**

compensation. Basic guidance for contractors, contract administrators and engineers states that applications for extensions of time should be made and dealt with as close in time as possible to the delay.

A view is expressed that the contract administrator should be given power to grant extensions of time in respect of a risk event where the contractor has failed to submit a delay notice.

To expedite the process, it is recommended that, in respect of an extension of time for an employer's risk event, delay to the progress of the works need not have occurred before an extension of time is awarded.

**Float:** What is 'float' and who owns it are questions repeatedly asked. Appendix 1 to the protocol provides definitions with examples, which explains the first of these questions. The protocol, however, fails to conclude that either the contractor or employer owns the float but states that there are a number of possible answers to the debate and that the float is not for the exclusive use of employer or contractor.

An opinion is expressed that an extension of time should only be granted if it is predicted that an employer delay reduces the total float on the critical path to below zero.

**Concurrent delay:** The protocol deals only with delays due to contractor's default which begin and end at the same time as delays caused by the employer. True concurrency, it is advised, will be a rare occurrence. The authors found it a subject on which it was difficult to gain consensus.

The guidance given, therefore, represents a compromise, which will not prove to be convincing to parties to a construction contract who are in dispute. This said, the underlying principle of English law, that one party to a contract cannot insist on the other

party meeting its obligations to perform the contract unless the first party properly performs its own obligations, is offered as a source for answer.

**Mitigation:** This part is short and to the point. The contractor has an obligation to mitigate the effect on his work of employer risk events. However, it does not extend to requiring the contractor to add extra resources or to work outside planned working hours.

**Retrospective delay analyses:** There are a number of differing methods of retrospectively ascertaining an entitlement to an extension of time. The protocol briefly describes five and gives them in order of preference as – time impact analysis, windows analysis, collapsed as built, impact plan and global assessment.

The protocol recommends that in order to avoid or minimise disputes over methodology, the parties should try to agree upon the delay analyses method.

**Monetary claims:** Prolongation costs, the protocol advises, should be based on costs incurred. Whether or not the cause of prolongation compensation is governed by a provision in the contract or arises from a breach of contract, it is up to the contractor to demonstrate that he has actually suffered loss and/or expense before becoming entitled to compensation, unless the contract or indeed the applicable law provides otherwise.

The tender allowance, on the other hand, has limited relevance to the evaluation of prolongation and disruption caused by a breach of contract or any other cause that requires the evaluation of additional costs.

The protocol expresses views on such matters as claims for the recovery of head office costs using Hudson's formula and its rival Emden's formula, together with interest and finance charges, profit, acceleration and claims for the recovery of costs incurred in preparing claims.

**Conclusion:** The protocol has obviously been prepared following a great deal of thorough research and effort, which has resulted in a highly commendable publication. It will not eliminate disputes concerning extension of time and monetary claims but then the authors have not claimed that it will.

\* Knowles is the chairman of international construction contract consultants James R. Knowles. He will address the seminars in Dubai and Abu Dhabi between November 2 and 4.