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Contracts ■

Delay and disruption

Gillian Birkby explains why you must read the SCL's new protocol on extensions of time – but not necessarily follow it.

EVERY ARCHITECT SHOULD READ THE delay and disruption protocol recently published by the Society of Construction Law. This is not because everything in it is correct – much of it contradicts the standard forms – but because the arguments in it will be used by contractors when claiming extra time. If the architect knows where the arguments have come from, it will be much easier to deal with them.

The introduction to the protocol states: 'It is not intended that the protocol should be a contract document. Nor does it purport to take precedence over the express terms of a contract or be a statement of the law. The protocol is for guidance only.'

It contains 21 core principles, some of which are uncontroversial. For instance, it advises that there is no automatic link between an extension of time and entitlement to compensation. The protocol also advises that the effect of variations should be agreed before the work is carried out.

Other principles, however, are much more controversial. These include the idea that the float should belong to the project. The float is allocated to whoever first needs it. The guidance believes that it should not be hidden, nor should any of it belong solely to the contractor. This is, understandably,

extremely unpopular with contractors. The more important principles are:

Programme

The protocol recommends that: 'The contractor should prepare and the CA [contract administrator, here the architect] should accept a properly prepared programme showing the manner and sequence in which the contractor plans to carry out the works.'

The crucial point here is the contract administrator's acceptance. According to the protocol, acceptance 'merely constitutes an acknowledgment by the CA that the accepted programme represents a contractually compliant, realistic and achievable depiction of the contractor's intended sequence and timing of construction of the works'.

Is it feasible for a contract administrator even to 'acknowledge' that a programme prepared by the contractor is achievable? On many projects, the architect will have insufficient information on how the contractor intends to carry out the works or may doubt whether the contractor can achieve its programme. Acceptance of the programme imposes increased risk on the architect that should be checked with insurers if the architect has any doubt about whether it is properly covered.

This acceptance is one of the linchpins of the protocol. Its authors say the key to avoiding disputes is to have an agreed, detailed programme that is updated regularly. This will enable the effect of a relevant event to be assessed more easily. The architect could consider engaging a programmer to assist in making these assessments, but it is essential to agree beforehand with the client who will pay for the programmer.

Timing of assessment

Applications for an extension of time, and decisions on that application, should be made as the work proceeds, rather than

being left until the end of the project. This is good practice.

Reviews of extensions of time

The document recommends that an extension of time should be reviewed periodically as events unfold. This contradicts the JCT contracts, which envisage at most an initial assessment of extension of time followed by a further review after practical completion. The terms of the contract must prevail over the protocol.

Early completion

Sometimes the contractor plans to complete before the date specified in the contract. The guidance suggests that, if the contractor has made this known to the employer and there is then a delay that is at the employer's risk, the contractor should be entitled to the costs of the delay, even though there is no delay to the contract completion date. This must of course be on the basis that the early completion date is realistic and achievable.

Again, this is at odds with standard forms. If the guidance on this point is to be adopted, the employer needs to be warned of the potential cost implications.

Concurrent delay

This is one of the most difficult areas in assessing delay. The suggestion in the protocol is that, if there is concurrent delay, the contractor is entitled to an extension of time but, when it comes to extra payment, the contractor should only be entitled to any additional cost caused by the employer's delay, which is additional to that caused by the concurrent contractor's delay.

This is a compromise. The textbooks suggest that the dominant cause is the right approach, which will often produce a different result from what the protocol is suggesting. ▽

▷ **Analysis of delay after the event**
The protocol has the slightly unusual suggestion that when an adjudicator, judge or arbitrator is deciding entitlement to an extension of time, they should put themselves in the position of the architect at the time the relevant event occurred. Again, this is at odds with the standard forms, which require the architect, either during the course of the contract or in a subsequent review period, to grant the contractor extensions in relation to relevant delays that it has actually suffered. These delays could be significantly different from the architect's perception of likely delay at the time the event occurred. Part of the reason for a further review of extensions after practical completion is to allow the architect to take into account other factors and information that may not have been available at the time the event occurred.

Mitigation of delay

The protocol discusses mitigation on the basis of a much lower obligation than the 'best endeavours' duty that a contractor has under the JCT contracts. This can be confusing, and the architect should reject arguments that the contractor has mitigated its loss, even though it has not used its best endeavours.

Global claims

As expected, the protocol does not approve of global claims, although the courts are prepared to consider them where there is no other basis on which to assess delay.

Acceleration

Claims for constructive acceleration are discouraged. The employer and contractor should agree on acceleration measures before they are undertaken.

The protocol also provides guidance on the preparation of programmes, and how to deal with applications for extension of time. There is an eight-page model specification clause dealing with contractor's programmes. It also suggests that where there is a dispute between the contractor and the architect in relation to the contractor's programme, this should be resolved by formal dispute resolution procedures. The wording has been slightly softened – in the draft protocol it was a recommendation to go to adjudication – but the implication is the same. This is not helpful. Adjudication during the course of a contract is usually time-consuming and a dispute over the contractor's programme is likely to be about lack of time to complete the works, so this will only compound the problem.

There is a long and short form model

clause setting out the records that are to be kept, to enable claims for delay to be assessed more easily.

This whole latter section of the protocol reflects the membership of the drafting committee and the enthusiasm of the planners on it. It is undoubtedly frustrating for those involved in delay analysis after the end of a project, to find that the programmes have not been kept up-to-date and the records are sparse. The burden on time and resources in improving this situation by adopting the model clause, or a variant of it, needs to be carefully considered before the contract is entered into. Will it be cost-effective, ultimately, to burden the contract with further requirements in order to deal more easily with what would otherwise be contentious claims for delay or disruption?

Action points for architects

- ☒ Read the protocol at www.eotprotocol.com. At the very least, read the introduction and statement of the core principles.
- ☒ If you are faced with a claim for delay or disruption, read the contract. This is the crucial document. Interpretation of the contract by the courts – case law – is also relevant. Judges will rely on previous case law and the wording of the contract rather than the protocol, when giving their judgments.
- ☒ Reject any arguments based on the protocol unless they are consistent with the construction contract, when they can be considered along with other information provided by the contractor.

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Legal

Job done

In the first of two articles, Neil Black looks at the implications of the Employment Act 2002.

THE EMPLOYMENT ACT 2002, WHICH came into force on 1 October, will affect many employees and almost all employers.

Under the act, maternity rights are being simplified and enhanced; new rights are being introduced to benefit fathers, adoptive parents and employees interested in flexible