

## Extension of Time Claims – 4 Key Elements to Include

A previous Top Tips Paper, *The Preliminaries to the Claim*, covered the preliminaries to the claim and explained how essential information should be presented at the front end of the claim so that a reader who has no previous knowledge of the project or circumstances leading to the claim may gain an understanding of the project, the parties, the contract and brief details of the claim, before studying the essential matters of the claim itself. Having previously set the scene for our 'story', we are going to move on to the part of the claim where the action takes place for an extension of time claim and which is where we need to discuss four key elements including cause, effect, delay analysis and entitlement; matters that are all essential to proving the case.

### **Cause and Effect**

Often the best way to deal with the event itself is to present the details through a chronology. The chronology should describe what happened, when it happened and provide substantiation of the events by way of reference to the project records. The project records should, of course, be included in an appendix for verification and reference. We should also split the chronology into sections that deal with **cause** and **effect** so that it is very clear that we have these essential elements covered.

The chronology will demonstrate the cause, i.e. what happened and is usually a matter of fact. The effect is a little more subjective and often takes a little more work to demonstrate. The effect section should conclude with the following:

- What activity(ies) were affected;
- When did the delay start;
- When did the delay finish.

This information can then be used to create a delay analysis to show the effect on the completion date.

## The Delay Analysis

An essential part of any claim for an extension of time is a demonstration that the delay event actually had an effect on the time for completion. It is not the purpose of this paper to delve into the often murky science of delay analysis, so I would like to recommend the Society of Construction Law's *Delay and Disruption Protocol*, which goes a long way towards explaining the principles and making recommendations as to the most suitable forms of project programming and delay analyses. Certain principles, however, do need to be understood and taken into account in order to demonstrate entitlement to additional time, so it is worthwhile reviewing the basics here.

Firstly, there must be a programme from which to measure the effect of a delay. Whatever programme is used for the delay analysis, it is necessary to make reference to it within the claim, possibly with an explanation as to how it came about. It is also necessary to include substantiation to demonstrate that it was approved or accepted by the Engineer and to include the programme within the appendices.

It must be remembered that delay does not automatically lead to an extension of time. For example, a 25-day delay to an activity will not automatically result in entitlement to an extension of time of 25 days because, in order to have an effect on the completion date, the delay event must impact the critical path of the programme. It could well be the case that a delay event will only use up float, or that the delayed activities are not on the critical path. Alternatively, it could be the case that the delay event uses up the entire available float, thus making the activity part of the critical path and therefore affecting the date for completion.

Another important principle to bear in mind at this stage is that where two delays occur at the same time or concurrently, and one of the concurrent delays is the responsibility of the Contractor and the other is the responsibility of the Employer, the entitlement of the Contractor to an extension of time is not negated. Concurrency affects the payment of prolongation costs, but not time.

One of the frequently-used methods of delay analysis is to impact the delay into the current programme to produce an 'impacted as-planned' programme and this may be done by adding the delay event itself as a new activity within the programme. If this method is

chosen, the appropriate logic links must be introduced. The resulting impacted as-planned programme will show the effect of the delay event on the critical path and, consequently, on the completion date. The revised completion date will, in turn, demonstrate the extension of time to which the claimant is entitled.

Whatever method of delay analysis is used, it is important to justify that it is a suitable method. On many occasions, a claimant will adopt one method only for the respondent to state that a different method should be used. Sometimes there are good reasons for doing so, but frequently, this is just a reason for prolonging the making of a decision by the respondent. As with most matters when compiling a claim, it is best to deal with anticipated responses from a reviewer within the claim and effectively 'close the door' on them, rather than waiting for the response.

The Society of Construction Law recommend that the time impact method of delay analysis is used to demonstrate the effect of delay, so if you are going to use this method, reference to the Society of Construction Law's *Delay and Disruption Protocol* would provide sufficient justification. If it is preferred to use an alternative method, the reasons for doing so must be explained within the claim.

The narrative which justifies the method of delay analysis used could be dealt with in the section that provides details of the extension of time claim, or in a separate section within the claim. Much here depends on the level of explanation necessary to justify the basis of the delay analysis. *Where* this explanation is included in the claim document is not particularly important, but it is essential that a detailed explanation is provided for the reviewer.

It is also essential to include an explanation of the adopted method and exactly how the programme used to demonstrate entitlement has been created. Such an explanation should be given in such a way that a non-expert planner can understand the methodology. It is often the case that the claim narrative is produced by one person and the delay-analysis programmes by another and it is also frequently the case that the two documents have little interrelationship or are sometimes even contradictory. Possibly the logic would be obvious to an experienced planner, but it is quite possible that the reviewer of your claim document won't be an expert in this field and needs the benefit of an explanation. A step-by-step explanation of what has been done must be included at this point in the claim document and

the resulting programme should be included in the appendices. The reviewer should certainly not have to guess the logic of, and the reasoning used in, the creation of the programme.

## **Entitlement**

A demonstration of the cause and effect of an event will not automatically contain entitlement to an extension of time and/or additional payment. The claim will either flow from a remedy contained in the contract conditions, or from a breach of the contract giving rise to damages under the law and could possibly fall under both categories. It is of vital importance to set out precisely on what contractual basis the claim is made.

A substantial part of any contract is the allocation of risk between the parties and it is therefore necessary to demonstrate that the event on which the claim is based is something that the contract, or the law to which the contract is subject, provides entitlement to the claimant. It is therefore, imperative to state precisely on what contractual basis the claim is founded. The first place to check for entitlement is the contract.

It is sometimes the case that entitlement is not so clear cut. In such cases, persuasive arguments including expert opinion and case law may have to be brought into play in order to sway the balance. On the other hand, there are some events that would fall under more than one clause that would provide entitlement. In such cases, it would be better to examine and include all such provisions within the claim submission. The latter may be a 'belt and braces' approach, but the small amount of additional time taken to strengthen the case can be worthwhile, especially if the reviewer subsequently finds flaws in one of the reasons put forward to establish entitlement.

Bearing in mind the two principles that it is incumbent on the claimant to prove the merits of the case and that we have to do everything we can to make the reviewer's job as easy as possible, the claim submission must contain a clear demonstration of the claimant's entitlement by reference to the contract.

It is not unusual, when examining the events surrounding a claim and particularly the conditions of contract, to discover that the claimant has not complied with the provisions of the contract in all respects. Failure to submit notices or particulars within the specified time

frames is a fairly typical failing in this respect. In such cases, the claimant has two choices: either ignore the failure and hope that the reviewer will not notice the non-compliance, or acknowledge the issue and submit a compelling argument as to why it should not affect his entitlement. In the first case, the claimant might be lucky and the reviewer might not realise that there is a weakness in the case, but it is not likely that a more experienced reviewer will do so and this is very unlikely if the matter escalates into a dispute. Alternatively, and particularly if the failure was a condition precedent to entitlement, the reviewer may reject the claim in its entirety or may at best reduce the amount of the claim. This would require the claimant to make a counter-response and to argue his case at a later date which only serves to prolong the process. In the second case, the claimant not only demonstrates his integrity by acknowledging the failing but also presents his arguments at the outset, which should serve to bring the matter to a quicker conclusion.

If you have a just case for an extension of time and you adopt the above principles and guidance when preparing your claim narrative, you should have a good chance of achieving a successful outcome.

*This subject is covered in our **Construction Claims Distance Learning Course**. If you have found this paper useful and informative, you can find further details about the course on our website at [www.constructionclaimsclass.com](http://www.constructionclaimsclass.com).*

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