

# Extension of Time and Cost Reimbursement Claims



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## Identify The Event

A delay claim of a construction project corresponds to a period of time which the project has been extended or work has not been performed due to conditions which were unforeseeable at the time the parties entered into the contract. The most common cause of delay on a project include ;

- a) differing site conditions
- b) changes in design requirement
- c) Inclement weather
- d) unavailability of labour
- e) market interruptions
- f) defective plans & specifications
- g) interruption by the employer

Such delays often force a contractor to extend the time to complete the work required under the contract, as well as to invite additional costs to the project. Generally, these costs may include: the cost of sustaining an idle workforce and equipment, unabsorbed on site and off site expense and general conditions. However, in order to receive an addition of time for the project completion and/or to recover additional costs, the contractor must meet a number of fundamental requirements, specified in the conditions of contract.

## Liability For The Event

Once an event has been identified the next step is to determine the liabilities of the event. If responsibility rests with the employer or it's a neutral, such as force majeure or exceptionally adverse climatic conditions, the contractor may be entitled to an extension of time. However, this is dependent upon the terms and conditions of the particular contract. In circumstances where the contractor is responsible for the delayed event, then the consequences remain with the contractor. Therefore the

contractor should be required to identify the contract provisions under which claims are being made.

*Eg: Contract provides for time for completion to be adjusted under FIDIC 1987 Clause 41.1 (Commencement delays & site conditions), 52 (Variations), 44.1 (Extension of Time).*

## Consideration of Contractual Entitlement;

Typically construction contracts contain provisions entitling the contractor to an extension of time on the occurrence of a particular event provided the progress of the works of time for completion is delayed as a consequence. For example FIDIC 1987 provides for an entitlement for extension of time in the event of : **late drawings**( clause 6.4) ,**adverse physical conditions** (Clause 12.2), **discovery of fossils or antiques**( Clause 27.1), **suspension of work** ( Clause 40.2) ,**failure to give possession of site** ( Clause 42.2), **additional or extra work** ( Clause 44.1 (a) ) , **delay referred to in these conditions** ( Clause 44.1 ( b) ) , **exceptional adverse climatic conditions** ( Clause 44.1 ( c) ) , **any special circumstances, other than through the default of the contractor** ( Clause 44.1 (d)), and , **contractors suspension of the works**(Clause 69.4).

## Considerations of Contractual Compliances

Generally with an extension of a time claim, the contractor will be obliged to submit notice(s) and detailed particulars within a specified time frame. For example, Clause 44.2 of FIDIC 87 provides: "Provided that the engineer is not bound to make any determination unless the contractor has "a) Within 28 days after such an event has first arisen, notified the engineer with a copy to the employer b) Noticed within 28 days, or such other reasonable time as may be agreed by the engineer, after such notification submitted to the engineer detailed particulars of any extension of time to which may consider himself entitled in order that such submissions may be investigated at

the time. Occasionally, the submission of notice and/or detailed particulars will be expressed to be a condition precedent. The contractor's failure to comply waives his entitlement to claim an extension of time and owner's liability ceases. For this reason therefore, it is critical to comply with the contract from the start of the project at all levels. In addition, further submissions may be required for particular events. For instance: Clause 6.3 of FIDIC 1987 (Disruption of Progress) requires the contractor to "give notice to the engineer, with a copy to the employer, whenever planning or execution of the works is likely to be delayed or disrupted unless any further drawing or instructions is issued by the engineer within a reasonable time. The notice shall include details of the drawings or instructions required and of why and by when it is required and of any delay or disruption it may suffer."

**Cause & Effect** – A common mistake made by contractors when attempting to demonstrate the cause and effect on the event is that they merely order the pertinent exchanges of correspondence between the parties. From my experience this is usually insufficient to satisfy the burden of proof. To demonstrate cause and effect, an account should be prepared based on the facts describing the effects of the event upon the works. This should include detail of activities affected, referring to its planned sequence, durations and methodology; the status of the works in relation to the planned at the time of the event; and description of the changes to that plan as a consequence of the event.

**Delay Analysis** – There are a number of delay analysis. Ultimately, the choice of delay analysis methodology will be dependent upon such matters as level of records available; the robustness of the base line programme and any updates; time available; degree of accuracy; and level of proof that is required. The 1st step would be classifications of the delays, as follows.

**A) Excusable & compensable** – (Responsibility of the Employer) Extension of time shall be granted. The contractor is relieved from the liability of penalties and the contractor is entitled to claim prolongation cost.

**B) Excusable but Non compensable (Concurrent)** – Delays are regarded as neutral. For example, extension of time shall be granted. Contractors are relieved from the liability of penalties. The contractor is not entitled to claim reimbursement of prolongation cost (exceptional climatic conditions etc.).

**C) Inexcusable (Contractor culpable)** Eg; Extension of time shall not be granted, and the contractor shall not be relieved from the penalties. The contractor is not entitled to claim reimbursement of prolongation cost.

Methods of delay analysis can be identified concisely as follows:

**As Built Vs As Planned:** This method basically is a comparison between the planned base line and up dated programme.

**As Planned Vs Impacted:** The impacted as planned technique is based on introducing the events of the delay in the base line. After introducing these delays the programme will show a new completion date which has resulted from these events. However in theory, the contract should be entitled to a time extension of time equivalent to the variance between the original & the impacted dates.

**Time Impacted Analysis:** In this technique the impact of delayed events are reflected on the plan updated as a planned programme. After completion of impacted programme for each event, the analysis has to be done to establish which delays are from the contractors and which may have resulted from the delayed event.

### **Statement of Claim:**

Every extension of time claim must contain a concise statement of what the contractor is claiming. The claim particulars should include as a minimum a) the description of the event including the timing and nature of the event b) proof of entitlement c) the impact of the contractors work programme, resources, deployment of materials d) equipment & personnel e) analysis of measures undertaken to ease the problem f) approved programme g) detailed justification of the time delay suffered h) all other supporting documents and evidence j) prolongation cost.

### **Substantiation of Claim:**

Extract and provide documentary evidence (letters, method statements, progress reports and photos, minutes of meeting, programme, and schedules), statements of fact and expert witness statements (if required). In supporting the assertion made within the claim submission, examining this check list will give a good starting point for evaluation of any time extension claim.