

# Programming: the Society of Construction Law Delay and Disruption Protocol (SCL) Protocol and the Joint Contracts Committee (JCC)

By Arthur McLinnis

I had a very long letter this past week from Keith Pickavance, a well-known programming expert. Keith had taken the time to write to the Joint Contracts Committee (JCC) suggesting significant additions and amendments to the Draft Hong Kong Private form that the JCC has been working on so assiduously. First of all, let me say that comments are always welcomed and have always been given careful attention. This letter perhaps deserves special notice though because it seeks to take the Draft form into full compliance with the Society of Construction Law Delay and Disruption Protocol. It is an important suggestion and one that the Committee is studying very closely. In the meantime, I will use it as my excuse to look more closely at the Protocol.

## The status of the Protocol

Contrary to what many in the industry had expected, the Protocol does not suggest drafting with regard to the issues of float, entitlement to extensions of time, entitlement to compensation for prolongation or concurrency – the key issues which the Protocol seeks to address. Rather, the Protocol simply purports to be a balanced view on issues, some of which do not have absolute answers.

The SCL hope that the Protocol will be adopted in the future as the market norm but they believe that, until such time, it is still of use as a quasi textbook: as a guide and reference source for third party decision makers (such as adjudicators, arbitrators and judges) in the event of ambiguity in the terms of a construction contract. This belief is founded on the fact that many of the industry standard forms currently do not expressly address all the issues touched upon by the Protocol. Certainly the JCC in its current form does not.

## The effect on contract draftsmen

The only suggested drafting relates to the provision and updating of works programs and method statements and to the maintaining of records – the tools promoted by the Protocol to avoid and/or resolve disputes.

The Protocol also contains a checklist of certain matters to be addressed by contract draftsmen when drafting construction contracts.

The SCL consulted the JCT and the ICE and believe that the Protocol reflects the wishes of such industry bodies. The JCT is to review its own standard form construction contracts in the light of the Protocol and it remains to be seen how far the JCT will go in incorporating the Protocol into its standard forms. Hence the reason why our own JCC needs to look very closely at it.

## The statements promoted by the Protocol

Of interest to most is the Protocol's position on a contractor's entitlements in the event of an employer's risk event occurring. The Protocol addresses this both generally and in the event of concurrent delays. Of note too are the statements on programming and record keeping.

## Entitlement to Time ('EoT')

The Protocol supports the view that the project (and neither the contractor nor the employer exclusively) owns the float. In this respect the Protocol is not good news for contractors. The project owning the float means that there should be no entitlement to an EoT if the employer risk event occurs at a time when the float is still available and causes delay only to the contractor's anticipated completion date, without delaying completion beyond the contract completion date.

Careful drafting will be needed to reflect this position if problems in the *Chestermount Properties* case are to be avoided.

The effect of sequential or concurrent delay events should not, according to the Protocol, reduce any entitlement to an EoT due to the contractor as

a result of employer delay, save where the relevant employer's risk event is one that is non-compensable and occurs after the contract completion date where the failure to complete by that date has been caused by the contractor. The Protocol's position on concurrency entitlements to extensions of time is influenced by the legal prevention principle and avoids argument as to whether an employer delay that acts concurrently actually hinders the progress of the contractor in any way.

## Entitlement to money

The Protocol takes a very different approach to the relationship between float and entitlement to compensation for prolongation costs.

The position under the Protocol is that if, as a result of an employer delay, the contractor is prevented from completing the works by the contractor's anticipated completion date (being a date earlier than the contract completion date), the contractor should in principle be entitled to be paid the costs directly caused by the employer delay, notwithstanding that there is no delay beyond the contract completion date (and therefore no entitlement to an EoT). This is provided also that at the time they enter into the contract, the employer is aware of the contractor's intention to complete the works prior to the contract completion date and that that intention is realistic and achievable.

If the contractor incurs additional costs caused both by employer delay and contractor delay, then, according to the Protocol, the contractor would only recover compensation if it is able to separate the additional costs caused by the employer delay from those caused by the contractor delay. If it would have incurred the additional costs in any event as a result of contractor delays, the contractor will not be entitled to recover those costs.

## Programme and records

To reduce the number of disputes relating to delay, contractors should prepare and contract administrators should accept a programme showing the manner and sequence in which the contractor plans to carry out the works. The programme should be updated to record actual progress and any extensions of time granted. If this is done, then the programme can be used as a tool for managing change, determining EoTs and periods of time for which compensation may be due. The accurate identification of float and concurrency is only possible with the benefits of a proper programme, regularly updated.

The SCL believes that one way in which the construction industry will adapt to the Protocol is by increasing the numbers of suitably skilled programmers working in the industry who will be required to implement the statements and aims promoted by the Protocol. Further, the contracting parties should reach a clear agreement on the type of records to be kept.

## A marker

Overall, the Protocol lays down a marker and is the first of its kind in the area of construction to which it is concerned. At this moment, following a preliminary meeting of some key members of the JCC, it appears that the JCC is willing to include a supplement to the form that will incorporate the Protocol. This would give those using it the option of adopting and following the Protocol in relation to its subject. I support this and see it as both a welcome and progressive step. Going forward it would then be for those who might use the form to make a judgment as to how using it might accord with their objectives.

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