



Technical

## Extension of Time Claims – Best Practice

Date: 12 Sep 2013

### Ensure You Notify Delay Strictly in Accordance With the Contract Mechanism

1. To successfully claim an Extension of Time there are a number of things we would suggest you should do. Some because they make sense practically and some because you are required to do so in order to ensure your claim can succeed.
2. Most standard and bespoke forms of Main Contract and Sub-Contract which contain Extension of Time provisions comprise the following elements:
  - Notification.
  - Assessment.
  - Award.
3. The obligation to notify is commonly a condition precedent (or “*time bar*”) to receiving any Extension of Time.
4. To be deemed a condition precedent it is often stated that a clause should set out a timescale for action (for example, a notice) and explain what will happen (a Claimant losing a right) should the action be carried out outside the prescribed time frame. However, if the impact of failure can possibly be simply implied from the words, such a condition precedent may still be deemed to have force.

*© Ramskill Martin | Multi-Disciplinary Construction Consultants*

5. There have been a number of cases which have confirmed the view that if properly drafted, such clauses are enforceable and the failure to comply with the notice provisions in a Contract will result in a Claimant losing its rights under the Contract.
6. These cases include Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited, Steria Limited v Sigma Wireless Communications Limited, Education 4 Ayrshire Limited v South Ayrshire Council and City Inn Limited v Shepherd Construction Limited.
7. So, the first piece of advice in our suggested best practice is –

**Ensure you notify delay strictly in accordance with the Contract mechanism.**

## Prepare a Fully Linked Programme and Monitor Progress Against It

8. Practically speaking, however, you need to be in a position to know when a delay is going to have a critical effect on your ability to complete before any such notice can be issued.
9. To do this properly you need to have a fully linked construction programme to start with and monitor intended progress against achieved progress.
10. Modern programming software facilitates the production of such a programme and enables you to impact actual progress onto the programme to see what the impact of achieved progress is on the Completion Date. The updating (re-scheduling) of the programme is fairly straight forward and gives you a good, and importantly, sustainable indication of projected completion.
11. Our second piece of advice in our suggested best practice is –

**Prepare a fully linked programme and monitor progress against it.**

12. Whilst this is often viewed as a time consuming task the benefits of having such a programme far outweigh the time and cost expended preparing such a programme at a later stage.
13. Ramskill Martin has Planning and Programming resources which are able to assist you in preparing these programmes efficiently and effectively in terms of both time and cost.

14. Whether you follow this advice (regarding the programme) or not, the next piece of advice should most definitely be heeded as it is the most common cause for failing to achieve an acceptable Extension of Time.

## Record All Events and Matters Which Cause, Appear to Cause or Have the Potential to Cause Delay

15. Quite simply, if you do not record the cause and details of the delay at the time retrospective collation is difficult, time consuming, expensive and often almost impossible to do properly.
16. Ramskill Martin have prepared a template referred to as a “D” Schedule which we use to assist our clients in recording delay information and any of our Consultants would be happy to discuss this with you.
17. It may be on final analysis that some recorded events did not cause critical delay but the time taken to record these events, at the time, makes such “unnecessary” effort miniscule compared to the time taken to look for such issues/evidence retrospectively. It really is better to have the information and not need it than to need it and not have it.
18. Failure to collate information, record progress and have a workable programme will often result in a final claim for time being global in nature with a high chance of failure.
19. We suggest you should record all events regardless of cause (Employer, Main Contractor, Sub-Contractor, You or whoever).

## Record All Costs Associated With Events Wherever Possible

20. Whilst not necessarily linked to claiming simply time, we would also recommend that when you record the event you record any specific costs associated with the event/matter.
21. Providing evidence of the direct causal link between a cost and event improves the chance of achieving an acceptable outcome.
22. So, our next item of advice is –

**Record all costs associated with events wherever possible.**

## Record When Changes/Variations Were Carried Out On Site

23. Once your programme is prepared (in whatever detail you have adopted) and the project is progressing we would recommend that when a variation/change occurs you allocate the time effect to the various tasks on your programme and you record the events (on and off site) associated with each change. Record when the change was instructed, why did it arise, what tasks did it effect and why, what resources did it require, when was it carried out and record any other events associated with the change both on and off site.
24. The impact of change on the progress of the work needs recording at the time as often retrospectively this lack of detail can have a detrimental effect on claim preparation. Whilst it is straightforward to identify when the change was instructed, when it was carried out on site (which is far more important in an Extension of Time claim), it is often far more difficult and with this lack of detail has often caused our clients difficulties in the past.
25. Our next piece of advice therefore is –

**Record when changes/variations were carried out on site.**

## Presenting Your Case

26. Once you have the fundamental information necessary you need to present your case.
27. In summary, here are our tips for ensuring the best possible outcome:
  - Keep the submission clear, concise, factually based and rely as much as possible on contemporaneous records and the recollections of those on site.
  - Provide a narrative explaining each of the delay events and sequence of events all of which should be cross referred to contemporaneous records, the recollection of those directly involved on the project and any programmes you have available. Ideally you would have all your progress programmes presented in such a way as to evidence both the cause of the delay and the effect.

28. If you rely on retrospective delay analysis do not present a claim which is over reliant on such a claim; the courts do not like them so why should the recipient of your claim?
29. If applying retrospective delay analysis techniques use the right method which will be dictated, to a large extent, by your records.
30. Focus on the critical delays; there are usually numerous delays on a project but only some cause critical delay. Including non-critical delay into a claim can cause a loss in focus and make the claim appear “flabby” and cause confusion or create the suspicion that there are issues with the claim.

## Protecting Yourself

31. In Summary, with regards to protecting yourself we suggest:
  - Understand and comply with the Contract with regard to notices.
  - Prepare a programme and keep it updated.
  - Record all events and matters which cause, appear to cause or have the potential to cause delay.
  - Record when changes/variations were carried out on site.

## Presenting Your Claim

32. When presenting your claim:
  - Keep to the facts.
  - Explain your case clearly.
  - Use all information collated.
  - Use retrospective delay analysis with caution and do not be over reliant on it.

---

Article by: Nick Cheetham

*© Ramskill Martin | Multi-Disciplinary Construction Consultants*

<p><b>Sheffield</b></p> <p>The Annexe 260 Ecclesall Road South Ecclesall Sheffield S11 9PS</p> <p>Tel – 0114 230 1329 E-mail – <a href="mailto:frances.sawicki@ramskillmartin.co.uk">frances.sawicki@ramskillmartin.co.uk</a></p>	<p><b>London</b></p> <p>Adam House 7-10 Adam Street London WC2N 6AA</p> <p>Tel – 020 7520 9295 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>
<p><b>Birmingham</b></p> <p>Birmingham Business Park 4200 Waterside Centre Solihull Parkway Birmingham B37 7YN</p> <p>Tel – 0121 481 2381 E-mail – <a href="mailto:clive.ramskill@ramskillmartin.co.uk">clive.ramskill@ramskillmartin.co.uk</a></p>	<p><b>Manchester</b></p> <p>3 Hardman Street Manchester Lancashire M3 3HF</p> <p>Tel – 0161 932 1535 E-mail – <a href="mailto:nick.cheetham@ramskillmartin.co.uk">nick.cheetham@ramskillmartin.co.uk</a></p>
<p>Head Office The Annexe 260 Ecclesall Road South Sheffield, S11 9PS UK</p> <p>Tel – 0114 230 1329</p>	