Your Contractual Questions Answered

'Float' In The Programme Of Works, Who Owns It?

By The Entrusty Group

The Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisations is in projects, commercial and contractual management, has been running a regular contractual question-and-answer section fror MBAM members in Master Builders Journal.

In this instalment of the series, the Entrusty Group will provide the answer to the frequently asked question above.

In the previous issue of Master Builders Journal, we demonstrated the various scenarios on how to deal with concurrent delays and whether the Contractor is entitled for extension of time (EoT). In this issue, we will look at the situation when the programme of works contains 'float' and who actually owns it if both the Employer and the Contractor respectively delayed the project. Before answering this question, let us define what actually 'float' is in the programme of works. 'Float' is basically the time available for an activity or path in addition to its actual duration required to perform that activity which serves as contingency or spare time. It gives some flexibility to the Contractor in the event that he is not able to carry out the works on the intended start date or as quickly as it is planned. In other words, 'float' is used to 'absorb' the delay of any such occurrences, which fall outside the critical path, i.e. not jeopardising the contract completion date.

Standard Form of Contracts (Relevant Clauses)

Most of the standard form of contracts in Malaysia, i.e. PAM 98/JKR PWD 203/IEM /CIDB 2000, do not clearly express the provisions in dealing with 'float'. Thus, the consequences that are contained in the provisions of these contracts can be different depending on the wordings of the respective EoT provisions.

This can be explained by referring to the example given below. Scenario 1a (see *Figure A*) represents the original programme of works and Scenario 1b (see *Figure B*) represents the programme of works with a three-week delay caused by a Variation Order (Activity D1) directed by the Employer.

The original as-planned programme of works shown in Scenario 1a has a total of four weeks 'float'. The work is then delayed by Activity D1 as shown in Scenario 1b, and the delay used up three out of four weeks of 'float', therefore only one week of 'float' remained. In most contracts, Activity D1 (Variation Order from the Employer/SO) which is a relevant event, would be a firm ground for EoT.

Under PAM 98 cl.23 and JKR PWD 203 cl.43, both contracts state that a fair and reasonable EoT shall be given when the Contractor notifies the Architect/S.O. of such relevant event that cause the Works to be delayed or has actually delayed beyond the date

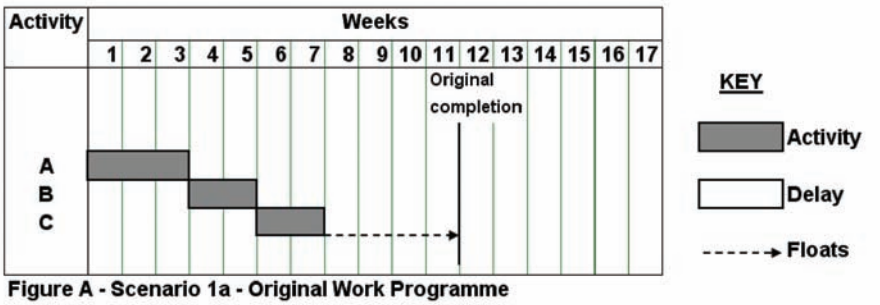

Figure A - Scenario 1a - Original Work Programme

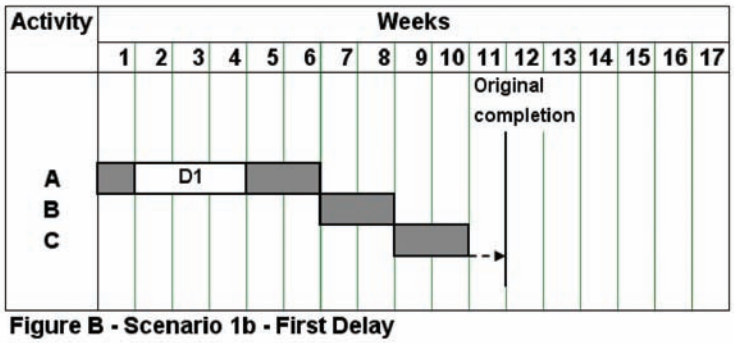

Figure B - Scenario 1b - First Delay

for completion. However, Activity D1 had just used up three out of four weeks of 'float' and did not actually delay the Works beyond the date for completion. As such, there was enough 'float' at this time to absorb the delay and the Contractor is unlikely to be granted any EoT for Activity D1.

On the other hand, CIDB 2000, under cl.24.1 stated that "*...the Time for Completion of the Works...may be extended by the Superintending Officer (S.O.) by such further periods or periods of times as may reasonably reflect* ***delay in completion of the Works***..." and under cl.24.3(b) that the EoT given by the S.O. shall be "*fair, reasonable and necessary for the completion of Works*". By referring to "*delay in completion of the Works*", CIDB 2000 would appear to be referring to the period of delay beyond the date when the Contractor could have completed the Works (i.e. as-planned completion date) and not the contractual date of completion. Therefore, in our opinion, it is arguable that the three weeks EoT under Scenario 1b ought to be granted to the Contractor due to Activity D1 as the planned date for completion and his original four weeks 'float' would therefore be preserved.

Now let us give some further illustrations and look at some further scenarios below in Scenario 2a, 2b and 2c (see *Figure C, D* and *E*). Scenario 2a represents the original programme of works for two paths of activities; one is on the critical path and the other is on the non-critical path with four weeks of 'float'. Scenario 2b represents a three-week delay caused by a Variation Order from the Employer (Activity D1) on the non-critical path. After which, as shown in Scenario 2c, a three-weeks delay was caused by the shortage of labour of the Contractor (Event D2) occurring after Activity D1. Before the occurrence of Event D2, Activity D1 has used up three weeks of 'float' available in the non-critical path and did not affect the contractual completion date. However, after Event D2, the only one week of 'float' left was now being used up and the non-critical path has now became the critical path, consequently the completion has been delayed by two weeks beyond the contractual completion date.

Under PAM 98/JKR PWD 203/IEM, the Contractor would not be entitled any EoT for Activity D1. This is because Activity D1 did not occur on the critical path and in addition, Activity D1 did not cause any delay beyond the contractual completion date. But when it comes to Event D2, which is not a relevant event, should the Contractor been granted any EoT?

Under CIDB 2000 standard form of contract, the Contractor is likely to be given EoT of three weeks as Activity C was delayed by three weeks (Activity D1) and had to be completed later than its as-planned completion date. With this EoT (per cl.24.1) for Activity D1, the

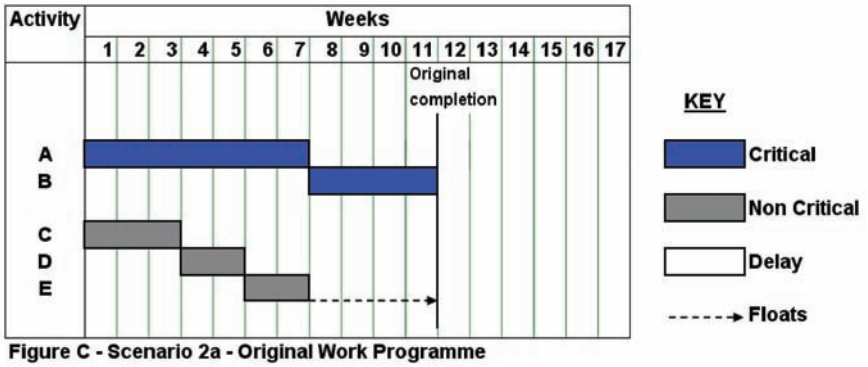

Figure C - Scenario 2a - Original Work Programme

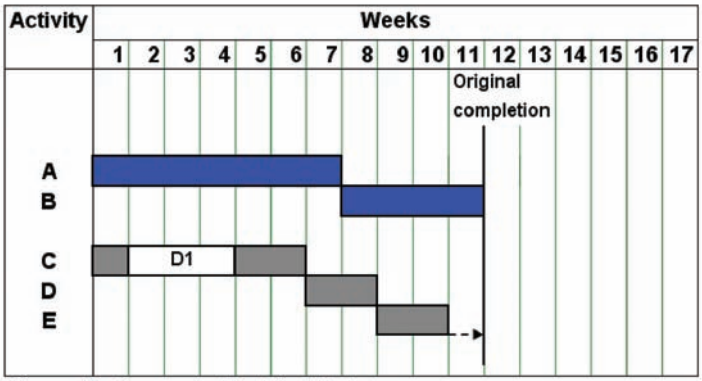

Figure D - Scenario 2b - First Delay

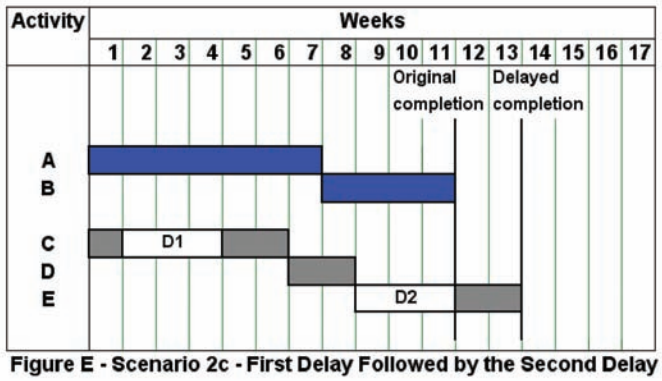

Figure E - Scenario 2c - First Delay Followed by the Second Delay

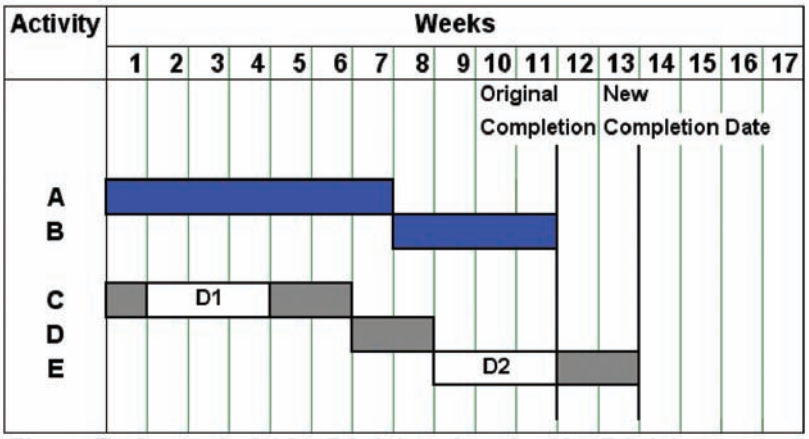

Figure F - Scenario 2d for D2 delay absorbed by D1 delay.

three weeks delay of Event D2 will be absorbed (see *Figure F* - Scenario 2d).

As for PAM 98/JKR PWD 203/IEM, the entitlement of the EoT will be in question when D1 for three weeks had been used up and subsequently no 'float' available for the Contractor to absorb the delay for D2. The main question would be, who owns the 'float'?

In most situations, the Contractor would like to argue that since they have built-in the 'float' into the programme of works, therefore they have the right to use it to accommodate its own risk. Whereas, for the Architect/S.O, the 'float' is to be shared or belongs to the first party that utilises it. Such differing arguments have been put before the courts of law and decisions of the courts shed some light on this question as to who owns the 'float'.

Case Law

In a case at the turn of the last century, *Wells v Army and Navy Cooperation Society (1902)*, Lord Justice Vaughan Williams held that "*in the contract one finds the time limited within which the builder has to do the work. This means not only he has to do it within that time, but it means also that he is to have that time within which to do it…*". From Lord Justice Vaughan Williams judgement, it clearly implies that the Employer must not deprive the Contractor of any of the time by its own delaying acts/activities. In other words, if the Employer were to use the 'float' and deprive the Contractor of its benefit, then the Contractor can be said to have been denied its entitlement for EoT under the contract to complete the works.

The UK's Society of Construction Law's *Protocol for Determining Extension of Time and Compensation for Delay and Disruption* sets out that for an EoT to be granted to the Contractor, the delay caused by the Employer must be on an activity path that affects the contract completion date. In other words, the Employer's delaying event is on the critical path. The effect of this rule is that the 'float' is available to the first party that uses it. The Protocol states that the project owns the 'float'. By using the example of Scenario 2c above, the approach would be like this: where Activity D1 (a delaying activity of the Employer) has used up most of the 'float' and there is now not enough 'float' available for the Contractor's subsequent delaying event, D2, resulting in a two-week delay beyond the date for completion. The Contractor would therefore be responsible for the delays and is liable on liquidated and ascertained damages (LAD). However, if the parties to the delaying events, D1 and D2 are reversed, where D1 is caused by the Contractor and D2 by the Employer, the Contractor would then be entitled for EoT!

In the US, it has also been decided that the party who uses the 'float' first, receive the benefits of the 'float' (*Dawson Construction Company, GSBCA No 3998 (1975); Titan Pacific Corporation, ASBCA No 27 (1987) and Weaver-Bailey Contractors Inc v United States, 19 Ct CL 474 (1990)*).

However, in a later case in England, *The Royal Brompton Hospital NHS Trust v Frederick Alexander Hammond and Others (No.11) (2002)*, the issue of determining ownership of 'float' had been considered head-on. His Honour Judge Humphrey Lloyd's decision clearly implied that the Contractor would appear to own the 'float', but the Employer can get the benefit of it if the Contractor does not need it.

During his discussion on a variation order, Judge Humphrey Lloyd's initial comments were along the lines of the "first to use the 'float' receives the benefits of it" approach as can be seen here below from his judgement:

"*Under the JCT conditions, as used here, there can be no doubt that if an architect is required to form an opinion then, if there is then unused 'float' for the benefit of the contractor (and not for another reason such as to deal with prime cost or provisional sums or items), then the architect is bound to take into account since an extension is only to be granted if completion would otherwise be delayed beyond the then current completion date. This may seem hard to a contractor but the objects of an extension of time clause are to avoid the contractor being liable for liquidated damages where there has been delay for which it is not responsible, and still to establish a new completion date*

to which the contractor should work so that both the employer and the contractor know where they stand."

However, Judge Humphrey Lloyd continued and stated that if after allowing the Employer to use the 'float' and there was a subsequent delaying event of the Contractor, "the Architect should in such circumstances inform the Contractor that, if thereafter events occur for which an extension of time cannot be granted, and if, as a result, the Contractor would be liable for liquidated damages then an appropriate extension, not exceeding the 'float', would be given."

From the case law above, we can infer that the use of 'float' by the Employer would not be permanent. If the Contractor incurs any other later delaying events and he is liable for the liquidated damages, the ownership of 'float' goes back to the Contractor to absorb its own delay. An EoT for the earlier Employer's delaying event would then be granted to the Contractor.

This case would seem to follow the principle in CIDB 2000 that the 'float' belongs to the Contractor and that would also appear applicable to PAM 98/JKR PWD 203/IEM.

Hence, back to the question for EoT entitlement under PAM 98/JKR PWD 203/IEM, where the Employer has initially used up three weeks of the 'float' for Activity D1 of the programme of works and later returned these three weeks with an EoT. Therefore, the Contractor will still have the benefit of the 'float' to absorb its own delay of three weeks for Event D2. Although PAM 98/JKR PWD 203/IEM are different in its wordings to CIDB 2000, the Contractor should also be entitled to an EoT of three weeks (see *Figure F* - Scenario 2d).

Conclusion

As the programme of works is prepared by the Contractor, any 'float' in the programme of works should belong to the Contractor and only in circumstance where the 'float' is unused then the Employer can benefit from it. The Architect/S.O. should also grant an EoT to the Contractor for any delaying events that are not attributed to the Contractor notwithstanding it is not on the critical path if the eventual completion is beyond the date of completion and the Contractor is liable for Liquidated Damages.

Reading from the decided cases, neither the Architect/S.O. nor the Employer has any right to object to the Contractor who later reprogrammes by using the available 'float' that belongs to him to absorb the delay that was caused by him. As such, the Contractor is advised to update his programme of works regularly in order to monitor and ensure that the 'float' is programmed to maximise its benefits. MBJ

In the next issue of the MBAM journal the article will answer the question on **"What Are The Obligations Of The Contractor During The Defects Liability Period?"**
