

Is The Contractor Still Entitled To Extension Of Time When There Is Concurrent Delay?

By the Entrusty Group

The Entrusty Group, a multi-disciplinary group of companies, of which, one of their specialisations is in project, commercial and contractual management, has been running a regular contractual question-and-answer section for 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.

Before we attempt to answer this question, let us understand what it is meant by the phrase 'concurrent delay'. As the phrase 'concurrent delay' suggests, it is basically where two or more delaying events occurring at the same time. In the context of the construction industry practice, it is where two or more delaying events occurring at the same time or overlapping activities that affected or delayed the progress of construction works.

Back to the question on whether the Contractor is entitled to Extension of Time (EoT) when such concurrent delays occurs depends on what these delaying events are and what provisions there are within the construction contract. Let us first look at the contract provisions.

Contract Provisions For EoT

All construction contracts usually contain provisions for time extension and monetary claim in the event of delay. The relevant events causing delay which shall be the ground for the Contractor to claim for EoT are detailed and stated under PAM 1998 clause 23, IEM 1988/JKR PWD 203 clause 43, CIDB 2000 clause 24, and JKR PWD DB/T clause 45.1. Any event falling outside the listed events will not entitle the Contractor to any EoT. The events can be

divided into two basic categories that will entitle the Contractor to EoT:

- (a) Category 1 - Natural events, e.g. *force majeure*, exceptionally inclement weather, civil commotion, strike, or lockout, availability of materials not due to the Contractor's fault, etc.; and
- (b) Category 2 - Defaults by the Employer and/or his agents, e.g. late decision/information of the Architect/Engineer/S.O./P.D., late site delivery, compliance with the Architect/Engineer/S.O./P.D., delay by the Employer's agents, delay by nominated sub-Contractors/suppliers, etc.

Generally, when the events fall under Category 1 - Natural events, the Contractor is entitled for time extension but no monetary claim. However, if the delaying event falls under Category 2 where it is due to defaults by the Employer and/or his agents, the Contractor will be entitled for both time and monetary claim (dependent on the wording of the relevant clauses for EoT under the contracts).

Apart from the categories of delaying events described above, there are delaying events that are entirely due to the Contractor itself. It is commonly

termed as culpable delay. Colloquially it is sometimes called inexcusable or non-qualifying (for EoT) delays. Strictly, culpable delay is the situation where the Contractor has failed to complete the works by the due date and has no entitlement to an EoT let alone monetary compensation. Culpable delay is also sometimes used to describe the situation prior to the date for completion where the Contractor has fallen behind programme of schedule without cause for extension.

The Approach For EoT During Concurrent Delays

The analysis to derive at the EoT entitlement can indeed be a complex subject especially when there is more than one delaying events. First, it is essential and prudent for the Contractor to present a programme of works or schedule of works showing how the delay period was computed and its effects on the completion of the works. To claim for an EoT there must be an effect upon the critical path of the project, not just a delay to a particular event or activity. In addition, consideration must be given to determine whether or not the completion date has been affected by lack of progress by the Contractor itself, i.e. concurrent culpable event.

Each delaying event or activity has to be analysed both individually and collectively, whilst individually each delay may affect the critical path but when analysed collectively, the cumulative effect may be different to the individual effects totalled up. This is also the case for non-critical activities, where such activities can become critical if these are delayed by a sufficient amount of time. As such, it is essential that the programme of works is updated progressively as the project advances, where the critical path is monitored with the various intervening events are entered into the programme to demonstrate the effects and subsequent entitlement for EoT.

In order to provide examples on how to approach EoT analysis, the following are simple situations to illustrate the approach to EoT analysis for concurrent delays.

Scenario 1 – Concurrent Delays – critical and non-critical

Scenario 1 is where there are two delaying events, D1 and D2 and these occurred at the same time (See Figure 2). If both of these delaying events were non-culpable delaying events, the Contractor will be entitled to an EoT of two weeks for the delaying event D1 that affected activity A that is on the critical path. Now, let's say that delaying event D2 is a culpable event, the Contractor is still entitled to an EoT of two weeks, notwithstanding that the D2 event occurred at the same time as event D1. This would also be the case if the D2 event is on another critical path activity provided it occurred at the same time and for the same duration of event D1.

However if the delaying event D1 is a culpable delaying event and delaying event D2 is non-culpable, then the Contractor is not entitled to any EoT, notwithstanding the two events occurred at the same time for the same duration.

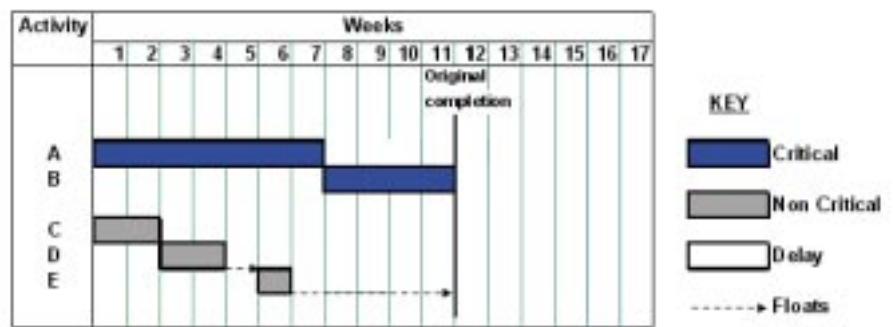


Figure 1 – Original Programme

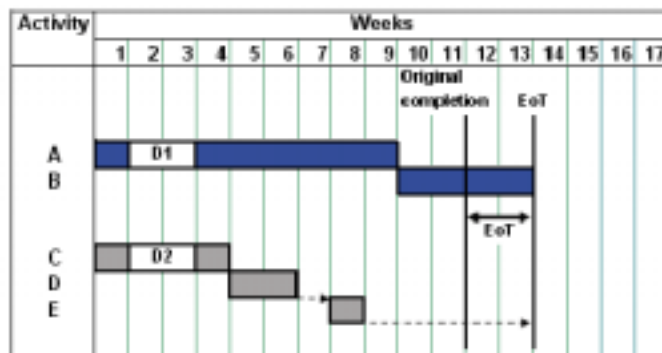


Figure 2 – Scenario 1 – Concurrent Delay – Critical and Non-Critical

Scenario 2a – Concurrent Delays followed by subsequent delays

Here the delaying events, D1 and D2 are similar to those described in Scenario 1 but there was a further delay of two weeks contributed by another delaying event, D3, to activity D (See Figure 3). If delaying events D1 and D2 were both non-culpable delays (even with D2 as a culpable delaying event), an EoT of two weeks should be granted to the Contractor since delaying events D2 and D3 are both not on the critical path and therefore there will be no impact on

the overall timeline / completion date of the project.

As delaying event D3 (whether or not it is a non-culpable or culpable event) is not on the critical path, no EoT will be granted to the Contractor. The effect of event D3 is only to reduce the float from five weeks to four weeks.

Scenario 2b – Concurrent Delays followed by subsequent delays

However, let us introduce another delaying event, D4, which occurred for a

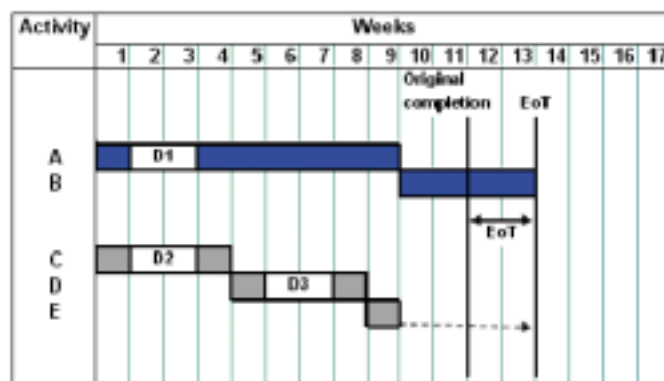


Figure 3 – Scenario 2a – Concurrent Delay Followed by Subsequent Non-Critical Delay

period of five weeks after event D3 and is a culpable delaying event (See Figure 4). As delaying events D2 and D3 had both already reduced the Contractor's float to 4 weeks, now with the culpable delaying event D4 occurring after events D2 and D3, this will mean that the remaining float of four weeks will all be used up and indeed has caused the completion to be delayed by one week. As the delaying event D4 is a culpable delaying event, the Contractor will not be entitled to any EoT for that one week delay.

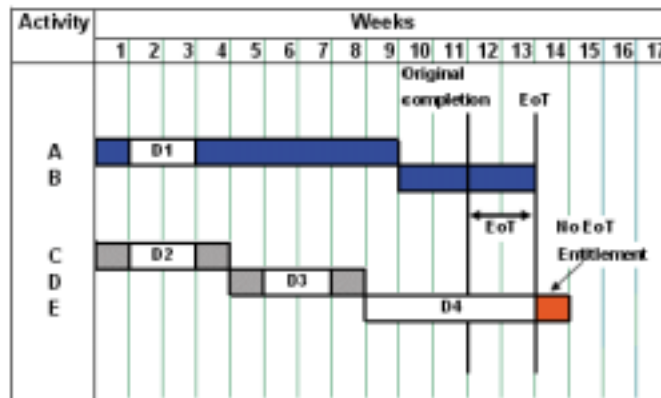


Figure 4 – Scenario 2b – Concurrent Delay Followed by Subsequent Non-Critical Delay

Case Law

In *Henry Boot v Malmaison Hotel Ltd (2000) BLR 509, CA*, where the parties had already agreed that if there were two concurrent causes of delay, one of which was a non-culpable event and the other was a culpable event, then the Contractor was entitled to an EoT for the period of delay caused by the non-culpable event, notwithstanding the concurrent effect of the culpable event.

In contrast, in the *Royal Brompton Hospital v Hammond (2000) BLR 75, TCC* case, it would seem to support an argument by the Employer that when a Contractor is in concurrent delay [once culpable and one non-culpable], he is not entitled to either an EoT or to compensation for prolongation to the contract period.

Conclusion

Whether the Contractor is entitled to EoT depends on the type of delaying events, what activities were impacted and the sequence of these delaying events. The delays can be one due to the Employer's default and the other caused by the Contractor. When the Contractor delaying event occurring concurrently with the Employer's delaying event to complete the project, the Contractor's concurrent delay should not reduce any Extension of Time (EoT) due subject to whether which event falls under the critical path. When delays due to the Employer and

the Contractor occur sequentially (one after the other), the impact should be considered, i.e. how has the events influenced the critical path.

In Malaysia, generally, the Contractor has a misconception that when there is an occurrence of concurrent delays whereby one of it due to the Employer's default, he will certainly be entitled for EoT. In addition and unfortunately, on most projects in Malaysia, the programme of works as prepared by the Contractor is usually not detailed, realistic or have the activities properly linked to show the critical path. It is usually used for 'show' only more than anything else which is the cause of many incidences where EoT was not

granted even when the Contractor rightly has its entitlement to EoT if a proper programme of works was presented.

The advice to all Contractors is to prepare a detailed and realistic programme of works with proper linkages of the activities identifying the critical path. Thereafter it is essential that the Contractor have an understanding of the critical path and the logic of its planned programme. In this way, the Contractor will have a clear understanding on how to plan for the project and will lead to the preparation of a proper EoT claim for the consideration of the Architect/SO/Engineer/P.D. **MBJ**

In the next issue of the MBAM journal the article will answer the question on "Float in the Programme of Works, Who Owns It?"



The **Entrust Group** includes Entrust Consultancy Sdn Bhd (formerly known as J.D. Kingsfield (M) Sdn Bhd), BK Burns & Ong Sdn Bhd (a member of the Asia wide group BK Asia Pacific), Pro-Value Management, Proforce Management Services Sdn Bhd/Agensi Pekerjaan Proforce Sdn Bhd and International Master Trainers Sdn Bhd. Apart from project, commercial and contractual management services, the group also provides risk, resources, quality and value management, recruitment consultancy services and corporate training programmes to various industries, particularly in construction and petrochemical, both locally and internationally.

Entrust Group will provide 30 minutes of free consultancy with prior appointment to MBAM members on their contractual questions. The Group also provides both in-house and public seminars/workshops in its various areas of expertise. For further details, please visit website: www.entrust.com. or contact HT Ong or Wing Ho at 22-1 & 2 Jalan 2/109E, Desa Business Park, Taman Desa, 58100 Kuala Lumpur, Malaysia. Tel: 6(03)-7982 2123 Fax: 6(03)-7982 3122 Email: enquiry@entrust.com.my