Isn't it time the Contract Drafters led the way with Delay Analysis?

A recent publication by the Society of Construction Law (no 189) by Julian Bailey considered the SCL Protocol for Delay and Disruption and reminded me of my attendance at the "Great Delay Analysis Debate" held at Kings College London in 2005. The upshot of that debate, as pointed out by Julian Bailey in his conclusion, was that none of the four delay analysis methods presented (and particularly the time impact method) had a majority vote from the 300 or so participants (many of whom were practicing expert delay analysts) as being the most acceptable method. In the subsequent report by Professor Anthony Lavers he noted that due to this lack of agreement "parties are likely to adopt the methods which best suit their respective positions, which is a recipe for conflicts between at least two approaches". And that is basically the unfortunate position we still have over nine years later!

It seems to me that if we, as experts in this field, cannot agree a most appropriate method for delay analysis then perhaps the contract drafters should be more prescriptive in the 'time' clauses so that the parties agree when entering the contract how they will approach the complex task of delay analysis and extensions of time. After all, most contracts contain detailed provisions when it comes to the valuation of change (variations), but few contracts really tackle the task of delay analysis, which arguably has more commercial impact than scope change, with the same amount of detail or clarity. In the majority of cases the best direction the parties are given is that the Engineer, Architect or Contract Administrator is expected to review the contractor's 'estimates' of delay and make a fair determination or fair and reasonable assessment. There are rarely any clauses setting out precisely how the contractor should calculate its entitlement to additional time, what it should specifically include in its notice or how the Employer should form an opinion.

Wouldn't it be much easier for all concerned if the contract specifically set out;

(a) how/when the delay event should be recorded (the notice provisions),
(b) how the delay event should be analysed using the programme/ progress (the method),
(c) how the effect of the delay event should be measured (float considerations),
(d) how the effect of other culpable delays should be accounted, if at all,
(e) how the award should be calculated (Malmaison or Apportionment?)

That would appear to be a logical solution to the problem – wouldn't it? Read the NEC I hear you say! Yes the NEC does include a more detailed mechanism. The compensation event is assessed according to its impact on the latest accepted programme and its effect upon the planned completion date. Activity float is therefore available to the Project but terminal float belongs to the Contractor. But the NEC is not without its problems, arguably more so than the more relaxed conditions in JCT. The problem with the NEC conditions is that they are so rigid that if one part of them fails the whole process becomes problematic. A common example is where there is no Accepted Programme or the latest Accepted Programme is badly out of date by the time the CE is assessed, so the process of assessing a Compensation Event cannot be carried out properly and is immediately subject to challenge. At least with the JCT there is flexibility for both parties, but at the expense of disagreement on both method and outcome!

So where does that leave us? Do we prefer a relaxed JCT style approach that relies upon contractors submitting delay 'estimates' and Employers making 'reasonable' awards or do we press for stricter rules in our contracts requiring regular agreement and updating of programmes and specific delay analysis methodologies? If I had to choose one over the other I would say that in the current situation, where we have a number of different analysis methodologies all of which produce significantly varied results, it suggests that we should press for a more prescriptive set of rules within the contracts themselves. These rules could be set according to the type of contract in use, with lower value (or lower LAD) projects using the more simple methods of analysis and higher value (or higher LAD) projects using more detailed methods. This would automatically bring into a play a degree of proportionality and certainty to the exercise.

However, the more prescriptive the requirements in the contract the more pressure there will be upon contractors to maintain programmes and records from which to implement the rules. The most common failure in the NEC is always the non-acceptance of the programme, often because the contractor has not included all of the prescribed requirements, but at least in the NEC the contractor is incentivised to maintain a proper programme – a good start point at least!

Food for thought?

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