It is all too common that an Employer causes a delay but the Engineer is reluctant to assess a claim for an extension to the time for completion (EOT) while at the same time insisting on completion by the stated time for completion. What are your rights and how can you manage this situation?

**Position at Law**

Under UAE law, there is no recognised concept of constructive acceleration and a Contractor who incurs additional expense to mitigate an Employer caused delay will not automatically be entitled to recover those costs.

There is also no recognised concept of mitigation under UAE law however, it is expected that a party will take reasonable steps to mitigate or reduce its losses arising from another’s breach and a court may in fact reduce damages if there are no reasonable attempts to mitigate.

When considering what reasonable steps should be taken to mitigate a delay where the Contractor is not culpable, it is generally understood that the Contractor is not required to expend time and incur additional cost in order that it can mitigate an Employer caused delay.

Indeed the SCL protocol provides that any duty to mitigate Employer delay "does not extend to increasing resources or working extra hours]…".

Therefore, where this tension between entitlement to additional cost and obligation to mitigate arises, Contractors are likely to contend that their obligation to mitigate is not unlimited. While Employers are likely to maintain that the Contractor can recover the delay throughout the course of construction.

**Position under the Contract**

It might seem like the obvious place to start, however to determine your rights first look at whether the Contract provides a mechanism for acceleration. Most contracts unfortunately do not (including the standard FIDIC general conditions).

Without express contractual power, an Employer cannot instruct a Contractor to complete early, although the failure to grant an extension to the Time for Completion ("EOT") in a timely manner may implicitly cause this result.

On the other hand, if the Employer is right to not grant an EOT then a Contractor that does not mitigate the delay will be exposed to delay damages.

A claim, and the subsequent approval (or not), of an EOT will form the basis of any entitlement to claim costs which may be incurred by the Contractor as a result of mitigation measures it has adopted.
The obligations of the Contractor may also be changed by the Contract. It is not uncommon for the Contractor’s obligations to be amended to use “best endeavours” or to “use all available resources” to mitigate.

Such a clause may involve the Contractor having to actually incur additional cost, as the obligation is clearly a departure from the understood position at law.

So where this tension between entitlement to additional cost and obligation to mitigate arises, what other ways are the mitigation efforts by a Contractor best dealt with by the Parties?

**What to do**

For a Contractor ensure:

- compliance with all claim and notice requirements to establish its EOT and claims for Variations;
- keep contemporaneous records of the cost associated with any acceleration / mitigation measures.

For an Employer consider:

- whether the entitlement to an EOT exists and whether the Contractor has provided sufficient particulars to accurately assess it;
- whether such delays may be recoverable throughout the construction programme. If the delay event is early in the programme, or if the delay is only forecast in the as-planned schedule, there is a greater chance it may be recoverable.

**Best Outcome**

If it makes commercial sense that any acceleration be agreed, the details of such agreement should be set out in a signed agreement. The agreement should include:

1. the specific acceleration measures which the Contractor is to undertake;
2. the method of valuation for the additional works;
3. new milestone dates, programme and payment terms;
4. consequences should the agreed acceleration measures fail;
5. changes to the existing contract specifications;
6. how the payment for acceleration works will be made and any increase in retention or performance security.

As each project and its circumstances are unique, we can assist you in developing the best strategy.

If you have ongoing projects and would like advice on them, then please call Claire Miller on +971 (0) 4 356 3905 or Scott Lambert on +971 (0) 4 356 3904 for further information.

*This article is only intended to provide general information and should not be relied upon as legal advice.*