



BEALE&CO

CONSTRUCTION ENGINEERING & INFRASTRUCTURE

Prolongation in Consultants Appointments

James Vernon and Andrew Croft – 16 December

Introductions



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Outline

1. Why is prolongation relevant?
2. Example of prolongation.
3. Common issues.
4. Typical position in appointments.
5. Prolongation and design and build.
6. Potential arguments following prolongation.
7. Recommended contractual approach.
8. Practical Tips



What is prolongation?

- + Cambridge Dictionary:

Prolongation is “the act of making something last a longer time”

- + SCL Delay and Disruption Protocol:

Prolongation 'the extended duration ... during which time-related costs are incurred as a result of a delay'

- + For a consultant the services taking longer than anticipated



Why is prolongation relevant?

- + Consultants are increasingly seeking to recover prolongation costs (COVID-19 is one cause of prolongation).
- + Prolongation can also cause a consultant to be in breach of contract.
- + Often no express contractual entitlement to:
 - Additional payment; or
 - Extension of time.
- + Common response:

“If the Services have not changed you should not be incur additional costs”.
- + Prolongation will result in more time being spent providing the services.
- + Consultant's should seek to be reimbursed for that time and also to avoid the time impact of not meeting programme.



Case Study

- + Fee proposal states that the services are anticipated to complete in 13 weeks.
- + Following significant client comments and third party delays, the services take 30 weeks to complete.
- + Consultant applies the weekly rate based on which the original fee was calculated to apply for additional payment.
- + Client refuses to increase fee.



Difficulties associated with prolongation

- + What impact has the extended time period caused on the consultant's services:
 - Same services provided over a longer period but no change in quantity
 - Same services provided over a longer period and increased quantity
 - Additional services
- + Demonstrating what is same services/increased quantity and/or additional services key
- + Establishing the consultant's programme including any completion date(s)
- + Contractual terms key to unlocking any entitlement to additional fees and/or programme extension

Contractual requirements

- + Procedure for claiming additional fees and time/extension of programme must be followed
- + Many entitlements have condition precedent on timing of notifications – don't fall foul of these
- + Keep on top of issues that impact on the time for providing services:
 - Instructions for additional work
 - Late supply of drawings/information/approvals
 - Inefficient working caused by others
 - Requirement to provide site resource over extended period



Typical Position in Appointment – RIBA PSC 2020

- + RIBA Standard PSC 2020
- + Architect “*does not warrant...compliance with the Project Programme*” (clause 2.3)
- + Entitlement to additional payment if:
 - Material changes are made to the Project Programme (clause 5.4.1); and
 - “*Architect/Consultant is involved in extra work or incurs extra expense for reasons beyond the Architect/Consultant’s reasonable control*” including where “*performance of the Services is delayed, disrupted or prolonged*” (clause 5.5).



Typical Position in Appointments – ACE PSC 2017

- + *“The Consultant shall use reasonable endeavours to perform the Services in accordance with any Programme or any variation to that Programme agreed with the Client from time to time. If there is no such Programme then in accordance with any programme submitted to and accepted by the Client.”*
(clause 2.2).
- + *“The Consultant shall inform the Client if it considers that any change or instruction from the Client is outside the scope of the Services and will cause a change to the Programme and/or a change to the level of fees and expenses.”*
(clause 2.2)
- + Consultant is entitled to additional payment and an adjustment to programme if *“the Consultant has to carry out additional work and/or suffers disruption in the performance of the Services because (i) of a delay by the Clientor;(ii) the Consultant is delayed by others or by events that were not reasonably foreseeable or.....(iv) of other reasons beyond the control of the Consultant”*.
(clause 8.2)

Typical Position in Appointment – NEC4 PSC

- + Detailed programme requirements.
- + Strict obligations re time and if X7 applies delay damages.
- + Compensation Events – only entitlement to additional payment and extension of time.
- + No CE for general prolongation. CES Include:

(3) The *Client* does not provide something which it is to provide by the date shown in the Accepted Programme.

(5) The *Client* or Others

- do not work within the times shown on the Accepted Programme,
- do not work within the conditions stated in the Scope or
- carry out work on the Site that is not stated in the Scope.



Typical Position in Appointment – NEC4 PSC(2)

(19) An event which

- stops the *Contractor* completing the whole of the *works* or
- stops the *Contractor* completing the whole of the *works* by the date for planned Completion shown on the Accepted Programme,

and which

- neither Party could prevent,
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it and
- is not one of the other compensation events stated in the contract.

- + Give early warnings asap and notify compensation events within 8 weeks in respect of each delay
- + Otherwise may be time barred (clause 61.3) or entitlement to additional cost and extension of time may be reduced (clause 63.7).
- + Global prolongation CE unlikely to be successful.

Typical Position in Appointment – FIDIC White Book 2017

- + Consultant to “perform the services in accordance with the Programme” (clause 3.1.2) and complete the Services within the Time of Completion (clause 4.2).
- + Consultant entitled to an extension of the Time for Completion and Exceptional Cost if and to the extent that completion of the Services is or will be delayed by:
 - a) A Variation to the Services
 - b) Any delay, impediment or prevention caused by or attributable to the Client, or the Client's other consultants, contractors, or other third parties;
 - c) An Exceptional Event; or
 - d) Any other event/circumstance giving an entitlement to extension of the Time for Completion.(clause 4.4)
- + Change in timing of performance of Services is a Variation (clause 5.1.2).



Typical Position in Appointment – Bespoke

- + Only entitled to additional payment if:
 - Additional services instructed; and
 - Additional fee agreed in advance.
- + Right for the Client to adjust instalments if services are delayed.
- + Strict obligation to comply with programme.
- + No entitlement to extension of time.
- + May even be an express statement that no additional payment due to prolongation.

Prolongation and Design and Build

- + Typically entitlement to loss and expense following prolongation in building contract if delayed due to “Relevant Matters”.
- + Rarely is a similar entitlement included in consultant’s appointment.
- + Fee for the construction phase should be:
 - If possible a rolling monthly sum; and
 - Subject to change following prolongation.
- + Consider impact of VE.
- + If contractor client submitting a claim offer to assist provided clear you will be entitled to additional fee and/or extension of time.



Contractor's entitlement

- + Construction programme the benchmark
- + Entitlement to extension of time for specific events
- + Entitlement to loss and expense in specific circumstances – contractual rate for preliminaries assists in quantifying prolonged matter such as increased number of meetings
- + Provision of weekly reports assists in keeping on top of programme

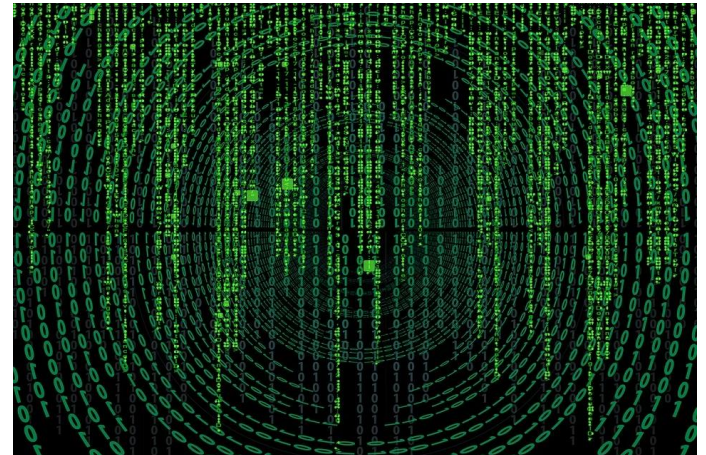
Arguments available following prolongation (1)

+ MUST consider contractual position

- What steps must be taken to claim an entitlement arising from prolongation?
- Are there conditions precedent?
- Can the services being provided in the prolonged period be identified and separated to show (i) same services provided over a longer period and increased quantity and/or (ii) additional services?
- Were your services defined by a set period or are they open ended?

+ Factual matrix

- What event(s) have led to the prolongation?
- Clear cause/effect?
- Any contributory issues?



Arguments available following prolongation (2)

+ ££££££££££

- What is the financial impact?
- Basis of claim – contractual rates (hourly; per meeting; day rates)
- Method of recording
 - Time sheets/records verified by supervisor
 - Work done linked to prolongation event (e.g. 'attending additional site meeting beyond the number of meetings allowed for in the appointment')
 - Avoid block recording that could include basic fee services
- Quantum meruit

Arguments available following prolongation (3)

+ Programme

- Can a programme for your services be provided for the prolongation or are you dependent on external factors?
- If dependent on construction programme / services of others, make clear
- Monitor for any new prolongation events

+ Waiver / estoppel

Recommended Contractual Approach

- + Include express entitlement to additional payment if Services prolonged.
- + Include entitlement to extension of time.
- + Avoid strict obligations to comply with programme.
- + Watch out for unilateral right for client to update programme.
- + Include anticipated duration of services/stages.
- + Consider other ways of limiting fee, e.g.:
 - Capping the number of meetings with an additional fee payable if exceeded; and
 - Charging for construction phase on a different basis.



Practical Tips

- + Don't leave the contract in the drawer!
- + Monitor/manage delay during a project.
- + Notify delays and impact as they occur.
- + Update programme to reflect delays.
- + Notify client if additional services instructed.
- + Don't let prolongation build!



Questions



Future webinars – “Construction Winter Webinar Services”

- + 13 January 2021 – **Where will the Golden Thread lead – the Draft Building Safety Bill**
- + 20 January 2021 - **Contractual Considerations in 2021 – a New Landscape**

If you wish to register, please email below:

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