Prolongation and fair recourse for consultants

Guest Editor **Will Buckby** of **Beale & Company Solicitors LLP** argues that many bespoke consultancy appointments are unacceptably harsh in the way they treat claims resulting from prolongation or delay outside of the consultant's control. Consultants should take a robust stance to negotiate appropriate clauses within their appointments entitling them to additional fees and extensions of time in the event of prolongation or delay.

Construction projects do not always complete on time. In December 2020, a report from Mace noted that "up to 80% of large infrastructure schemes globally are delivered late". This is an astonishing fact and relevant in the current Covid-19 and Brexit climate.

When there is prolongation or delay, consultants, whilst carrying out 'the same' services, are likely to be carrying out additional work to that which they anticipated at the outset of the project and when they calculated their price. It is not always the position that consultants will be able to claim additional fees where there is prolongation or delay. Is this fair?

The answer is 'no' if the prolongation or delay is outside the consultant's control.

The challenge

A consultant will find itself in this difficult position where it has not included within its appointment an express provision entitling the consultant to additional fees (and, where appropriate, an extension of time) if there is prolongation or delay.

It can also be in a difficult position where there would appear to be a valid variation provision in the appointment. Such as a clause may say the consultant will be entitled to additional fees if instructed to carry out additional services. It may say additional fees must be agreed before any additional services are delivered and such agreement is a condition precedent to additional payment. In these instances, it is likely that the consultant will be unable to claim additional fees. In the first, prolongation or delay is not always instructed, i.e. because the contractor is in delay. In the second, most of the time it is not possible to agree fees beforehand because the client does not 'agree' or it is impossible to say how long the delay will last.

What should consultants do?

Clearly the starting point is to get the contract out of the drawer and ascertain one's entitlement.

If the consultant has contracted using an unamended industry standard form, the position is favourable:

- Under the NEC4 PSC, if the Client or "Others" do not work within the times stated in the Accepted Programme or the conditions as stated in the scope, the consultant will be entitled to a compensation event (clause 60.1(5)). This is on the assumption that the consultant has notified the compensation event within eight weeks of becoming aware that the event has happened (clause 61.3), and complied with the early warning (clause 15) and programme regimes (clause 31).
- In the ACE Professional Services Agreement 2017 Edition, in the event the consultant has to carry out additional work and/or suffers disruption in the performance of the services because the consultant is delayed by others or by events that were unforeseeable or beyond its control, the consultant is entitled to additional fees (clause 8.2).
- Clause 4.4 of the FIDIC White Book, fifth edition, 2017 provides that the consultant is entitled to additional fees because of 'delay, impediment or prevention caused or attributable to the Client, the Client's other consultants, contractors, or other third parties'.

- The RIBA Standard Professional Services Contract 2018 states that if the consultant is 'involved in extra work … for reasons beyond the Architect/Consultant's reasonable control, additional fees shall be calculated on a time basis… unless otherwise agreed'. The clause also provides a non-exhaustive list of circumstances when additional fees are paid including when 'the performance of the Services is delayed, disrupted or prolonged'.

These provisions are of course welcomed but are to be expected of standard industry forms.

The position in bespoke appointments (and in some cases industry standard forms which have been heavily amended) is not as positive.

Many public sector and in particular local authority appointments do not contain a variation mechanism. On the face of it, this provides the consultant with no entitlement to additional fees or an extension of time in the event there are any changes to the services and/or there is prolongation or delay. This cannot be reasonable. From a legal perspective, this also creates significant ambiguity which is in neither party's interest.

Particularly frustrating is when a project is procured pursuant to the restricted procedure under the Public Contracts Regulations 2015, or the ITT does not permit amendments. The consultant is left with the choice of managing this risk (or declining to bid, which is unlikely).

It is the bespoke appointments with variation provisions which perhaps cause more problems. It is likely that the proposed contract which is provided in the tender documents or RfP will provide additional fees for some variations but will not include an entitlement to additional fees in the event of prolongation or delay. Moreover, such clauses are often fraught with 'slips and trips' to make life very difficult for the consultant. Examples have been mentioned already, such as a requirement for the variation to be instructed or the fees agreed before any additional work is carried out; other hurdles include condition precedent clauses.

Clearly these positions in bespoke appointments are unacceptable.

OK, but what if the terms provide no help?

Importantly, and this is often forgotten, the fact the contractual clauses in the consultant's appointment does not entitle the consultant to additional fees does not necessarily mean its claim for additional fees ends there.

The variation clauses (or lack thereof) should not be looked at in isolation. One can look to the normal rules of contractual interpretation such as Lord Wilberforce's 'factual matrix' which includes consideration of the entire contract documents including, say, a fee schedule and programme for a defined period, or the intention of the parties prior to entering into the contract, to provide arguments for an entitlement to additional fees.

It may be that there has there been agreement in correspondence to provide additional fees as a result of prolongation or delay which varies the terms of the appointment. There may have been payment of additional fees for previous prolongation or delay which constitutes a variation to the appointment through a course of dealing.

The consultant could potentially rely on equitable remedies such as unjust enrichment, estoppel or quantum meruit.

Claiming additional fees as a result of prolongation or delay

Once the consultant has considered its contract and formulated its arguments (with legal advice where this is of course appropriate), the consultant should notify the client for its claim for additional fees (and an extension of time where applicable), with appropriate substantiation. It is all too common that the consultant leaves its claim for additional fees to the end of the project when the services are complete and they no longer have any leverage against their client.

Where such entitlement to additional fees exists, the consultant should not be afraid to invoice the client in accordance with the contract. The client's failure to pay by the final date for payment in the absence of a pay less notice will put the consultant in an excellent position.

The easy answer – 'a prolongation clause'

The easy answer is to ensure that there is an appropriate clause within the consultant's appointment entitling the consultant to additional fees and an extension of time in the event of prolongation or delay. These clauses are being agreed and consultants should adopt a robust stance in negotiating them. **CL**