

## Delay claims: best endeavours and acceleration – guidance for contractors

This note provides guidance to contractors in the event of delays being incurred to a project and on whether they may recover monies for investing additional resources to counteract the delay event. We explain the concepts of 'best endeavours' in the context of delay claims, acceleration and the key considerations for contractors in the context of the JCT Design and Build 2016 edition. All references to clauses are to clauses of the JCT Design and Build 2016 edition.

### What is a 'best endeavours' clause in the context of delay claims?

The starting point for looking at delay under the JCT contracts is the provision for an extension to the completion date in the event of employer's risk matters – Relevant Events, as set out in Clause 2.26. Matters which are not Relevant Events are at the contractor's risk.

The contractor's ability to claim an extension of time is subject to the proviso in Clause 2.25.6.1 – the 'best endeavours' clause. The crux of a best endeavours clause is that the contractor will use its 'best endeavours' to prevent a delay from occurring. Clause 2.25.6.1 provides that:

***'The contractor shall constantly use his best endeavours to prevent delay in the progress of the works or any section, however caused, and to prevent the completion of the works or section being delayed or further delayed beyond the relevant completion date.'***

Case law on what best endeavours means (*IBM (UK) Ltd -v- Rockware Glass Ltd* [1980] FSR 335) says the obligor should take all steps in one's

power to achieve the desired result – the approach should be in-line with a prudent and determined owner acting in his own interests and desiring to achieve that result. A best endeavours obligation may also require expenditure (*Jet2.com -v- Blackpool Airport* [2012] EWCA Civ 417).

However, there is no case law which deals specifically with the meaning of 'constantly use best endeavours' and what level of obligation that puts on the contractor under a construction project.

Given that the contract price is fixed and that these matters are at the employer's risk arising after the contract is let, there are arguments that the endeavours should be in relation to management of the works, not paying for additional resources. In some cases, it may be appropriate to reprogramme the works or utilise resources earlier- what is appropriate will ultimately depend on the circumstances, but it is unlikely that the provision requires substantial expenditure of money. Record keeping of such steps is advisable and a contractor should expect to have to evidence steps taken.

To put this into context, clause 2.25.6 is a proviso clause and the award of an extension of time takes into account whether the contractor used constant best endeavours to prevent the delay. If the contractor caused the delay there is no need for the proviso, as it is the contractor's obligation to complete the works on time and the contractor will do whatever it needs to do to catch up on the delay – and evidence those steps it has taken - or risk being exposed to liquidated damages. If the employer has

caused the delay, then arguably the contractor's best endeavours obligation is only not to make it worse by taking reasonable steps not to further delay the works.

### **What is acceleration?**

Acceleration occurs where the employer asks or instructs the contractor to achieve an earlier completion date than that envisaged (and priced for) by the contract between the parties.

For instance, where a project has been delayed by an employer risk event, acceleration would involve incurring additional costs to seek to overcome that delay by for example, increasing resources, work faces or working hours.

This would usually be the subject of a standalone acceleration agreement. Alternatively, there is a specific clause in the JCT that deals with acceleration at Supplemental Provision 4 which allows the contractor to provide a proposal as to whether this could be achieved or not and the additional payment required to do so.

In some circumstances, a contractor may argue that it has accelerated its work due to a failure by the employer to award an extension of time to which it is entitled – sometimes referred to as implied or constructive acceleration. However, the court has ruled that contractors cannot recover monies under this argument due to the potential for making a double recovery (for loss and expense as well as damages) (*Ascon Contracting Ltd -v- Alfred McAlpine Construction Isle of Man Ltd* [1999] 10 WLUK 605).

### **What should a contractor consider where there is delay and it is subject to a best endeavours clause?**

- Steps to prevent delay under a *best endeavours* clause ought not stray into acceleration. Steps taken by a contractor to recover from a delay for which it is responsible are not usually categorised as acceleration, because the contractor is trying to complete its works by the completion date. A contractor taking steps to recover from

an employer risk event however, might amount to acceleration which may entitle the contractor to additional money as loss and expense.

- Where there is a *best endeavours* clause and an employer risk event causes delay, while there is a duty for the contractor to actively mitigate the impact of such event, the duty does not extend to requiring the contractor to add extra resources, work outside its planned hours and incur additional costs (*Core Principle 15 - SCL Delay and Disruption Protocol* (2nd edition, 2017)).
- Where a contract does not specifically provide for acceleration, but the parties agree to take accelerative measures, payment should be agreed before any steps are taken. Where the contractor is considering implementing acceleration measures to avoid liquidated damages because of not receiving an extension of time that it considers is due, the contractor should first take steps to have the dispute about the extension of time claim resolved (*Core Principle 16 - SCL Delay and Disruption Protocol* (2nd edition, 2017)). In these circumstances, it is imperative to record the state of the works; the contractor must be in a position to show that he achieves something by his accelerative measures.
- Where the contractor believes there is an employer risk event delay, but the employer refuses to grant an extension of time, the contractor has two options available:
  - Enforce its right to an extension of time so that no liquidated damages can be levied and make a claim for loss and expense; or
  - Accept the commercial risk that to accept some liquidated damages or some additional cost to avoid some or all of those damages.

## Summary takeaway points

- The only scenarios where the contractor should incur significant expenditure in respect of preventing delay are i) to mitigate delay for which the contractor is responsible; and ii) acceleration which has been instructed or agreed by the parties.
- Any acceleration and associated payment terms should be agreed with the employer before any steps are taken by the contractor.
- A contractor should first seek to resolve any dispute about an extension of time claim before taking steps to accelerate. Otherwise, there is a risk that it will not be entitled to any compensation.
- A contractor's right to recover monies for taking accelerative measures when it considers it should be entitled to an extension of time should be under the time and money provisions.
- It is vital to capture evidence such as photographic and video records of the state of the works prior to and following any steps that are taken to mitigate delay or accelerate to evidence the delay/acceleration and the costs incurred.

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