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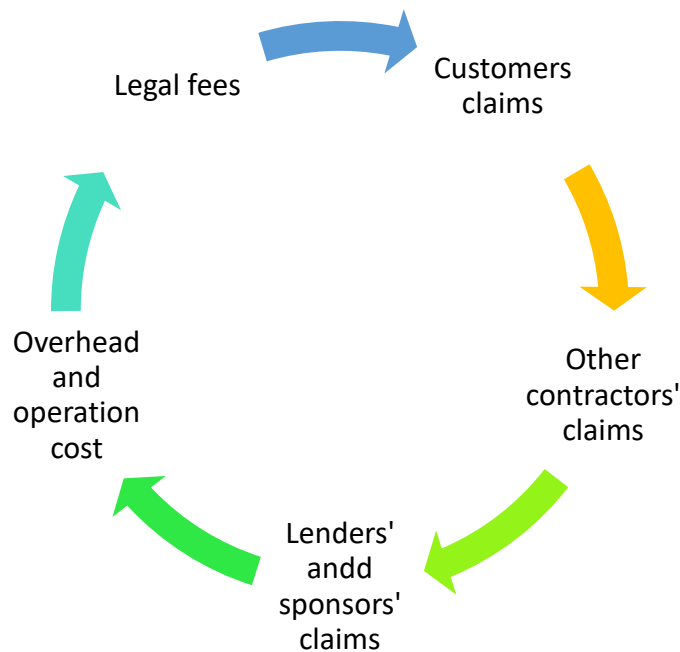


Extension of Time (EOT) under Construction Contracts

Time is of the Essence

Construction contracts typically include a Time for Completion of Works¹, and the preparation of the Extension of Time (EOT) which plays a vital role when the Works are not completed within the stipulated Time for Completion of Works outlined in the contract - regardless of the reason.

Resulting damages and losses – including loss of profits – affect both parties of the contract, and will likely be incurred by either party of the project’s cycle of development, and include various costs, such as:



Associated Costs due to Extension of Time

Mitigation of these damages is crucial and must be dealt with efficiently and effectively.

Challenges abound for members of management, including those responsible for the implementation of Works and/or practitioners (experienced lawyers and engineers) to prepare and submit the EOT Claim in a timely manner and pursuant to contract requirements. Most important is the justification between and of the events leading to the claim and its effects upon the completion of Works.

Similarly, the lack of background knowledge and experience regarding the legal basis for an EOT, along with the norms to review, assess, and clarify to file EOT Claims is cumbersome for those who involved in the determination of EOT Claims. Disputes and/or disagreements during performance of

¹ Works means “Section”, “Package”, “the Works” or “Project”, depending on situation to situation.

the construction contract become complicated due to this lack of background knowledge and experience and threatens the long-lasting relationship between the parties.

Collectively considering and implementing relevant guidelines and references of reputable global firms such as the Society of Construction Law², The International Federation of Consulting Engineers (FIDIC)³, and CNC's wealth of experience, CNC is unhesitatingly available to introduce a plethora of leading edge Vietnamese practitioners (including engineers, QS – Contract managers, lawyers, arbitrators, mediators, etc.) involved in managing, monitoring, and settling extension of time claims under construction contracts.

Determination to the Time for Completion

The justification(s) for the determination of each EOT Claim requires commencement (beginning) and completion (ending) dates - the relevant period of Time for Completion of the Works or Section ("Time for Completion"⁴) and the extension of time previously granted to the Contractor.

Determination of the Commencement Date

Initially, the determination of the Commencement and Completion dates appears easy - it may have been stipulated or defined under relevant contract documents. However, it is worth noting that the determination of the Commencement and Completion dates, becomes particularly cumbersome and/or unclear due to variances of such dates with respect to the reality of contract performance.

The variances of these dates is easily identified and may be provided in conspicuous or obscured language such as, "*Commencement Date is the date on which the Contractor receives the Letter of Acceptance*"⁵ and therefore, it is set that the "*Completion Date is [x] days from the Commencement Date*", or in another situation, it is set out that the "*Completion Date is on x/y/z.*"

With respect to the aforementioned examples, it was thought that the Commencement Date, the Completion Date, and obviously the Time for Completion had been clearly defined, but it was not as such provisions lead to potential disputes between the parties at later stages.

Considering the Commencement Date, it is highly recommended and encouraged that diligent and dynamic consideration be given to what is possible, feasible, and/or likely-to happen in nature of a Commencement Date. Once the contractor has neglected the deployment of the Commencement Date, then a wrongful determination of the Commencement Date in the Letter of

² See more at <https://scl.org.uk>, www.scl.org.au,

³ See more at <https://fidic.org>,

⁴ Or time for completion of the "Works", "Section", "Package", or "Project", as the case may be.

⁵ For the confidentiality matter, the name and the particular information of the Letter of Acceptance or the Parties is not disclosed.

Acceptance/contract means the parties to the contract are now agreeing to uncertain factors for the start of the Works, such as potential access to the Site, availability of the contractor's materials and equipment, establishment of temporary utilities - including water and electricity for the works, temporary transportation within the Site, e.g. hoists, tower cranes, forklifts, etc. and/or construction documentation - drawings, procedures and protocols, lines of communication, payment procedures etc., have all NOT been established.

Whenever defining the Commencement Date, attention should be drawn to the matter in which FIDIC anticipates the duration for all parties (contractors, employers, and engineers) involved to set the Commencement Date whereby it provides that *"The Engineer shall give the Contractor not less than 7 days' notice of the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance"*⁶.

The expectation to have 42 days after the Contractor receives the Letter of Acceptance provides each party a reasonable period of time for preparation prior to commencing work, as well as necessary prior notice given by the Engineer.

Nevertheless, the actual meaning of an anticipated period of time (e.g. 42 days) is that it allows the Contractor to submit important documents (under normal circumstance, 28 days after the Contractor receives the Letter of Acceptance) to ensure that the Commencement of the Works is properly implemented/started, in particular:

- (i) Submission of the Performance Security⁷
- (ii) Submission of the detailed program⁸

Furthermore, a provision requiring the Contractor to submit confirmation of insurance arrangements (and perhaps evidence for payment of the premium), is something employers and Engineers generally do to ensure risks during construction are mitigated at the time the work is started.

Succinctly, to determine a proper Commencement Date for any Works the consideration given to each specific situation becomes vital and must ensure that the Parties to the contract become aware of the required tasks and activities to be performed so that the meaning of the Commencement Date – the start of the Works - can be considered the "countdown" toward the Time for Completion, and the Contractor is liable to the Employer for the timely completion of the Works within the contractually specified Time for Completion, and no further.

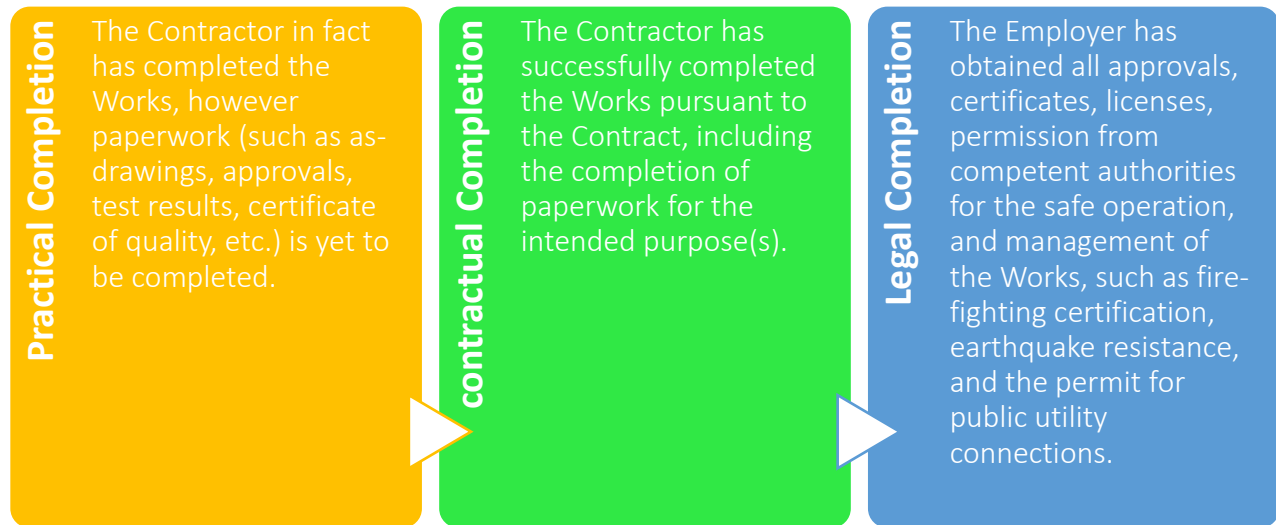
⁶ See more at Sub-Clause 8.1, FIDIC Red Book, First Edition 1999;

⁷ See more at Sub-Clause 4.2 [*Performance Security*], FIDIC Red Book, First Edition 1999; FIDIC Yellow Book, First Edition 1999; and FIDIC Silver Book, First Edition 1999.

⁸ See more at Sub-Clause 8.3 [*Program*], FIDIC Red Book, First Edition 1999; FIDIC Yellow Book, First Edition 1999; and FIDIC Silver Book, First Edition 1999.

Determination of the Completion Date

Likewise, to determine the Completion Date necessitates the question “*what does the completion mean*”. Completion can be construed in different ways, depending on each situation, from time to time, and applicable laws under the contracts. Therefore, the completion could mean:



Various Practical Completion Status

In reference to the FIDIC contract, “*completion*” means the point at which the Contractor has completed the Works and each Section (if applicable) in its entirety within the contractually specified Time for Completion, including¹⁰

- (i) Passing of Tests on Completion, and
- (ii) Completion of all work outlined in the Contract as being required for the Works or Sections to be considered completed for the purpose of assuming control under Sub-Clause 10.1 [*Taking-Over of the Works and Sections*].

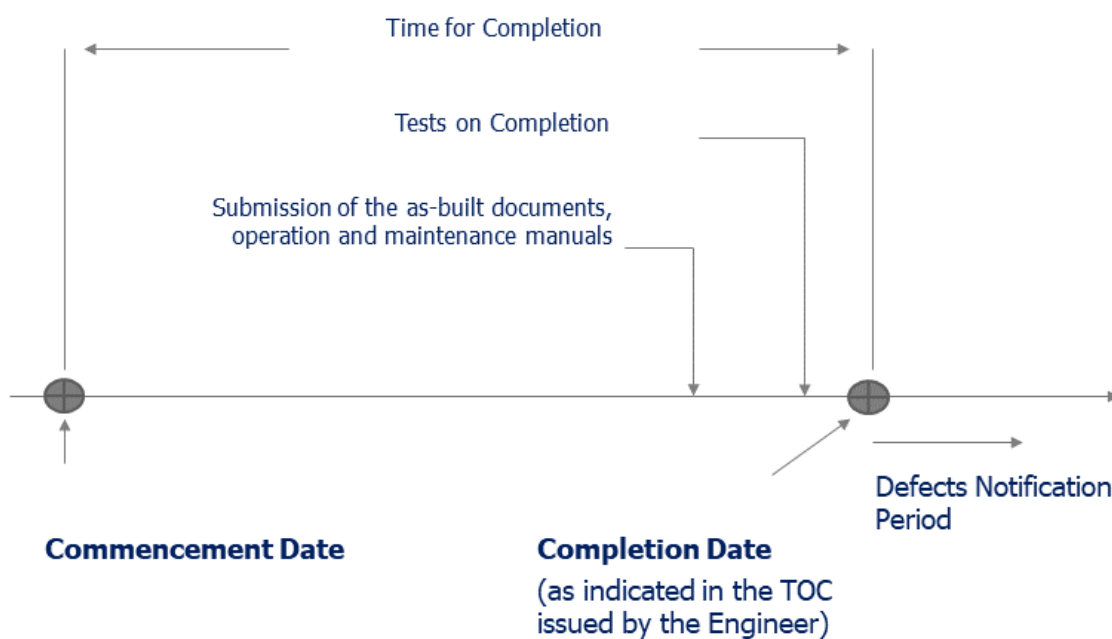
Of course, prior to performing any Tests of Completion, the Contractor is required to provide (submitted) necessary paperwork, such as submission of as-built documents, and detailed operation & maintenance manuals sufficient for the Employer to operate, maintain, dismantle, reassemble, adjust, and repair any part of the Works.

Simply put, the Works are only considered as completed when the Contractor has established three critical elements, including:

¹⁰ See more at 8.2 [*Time for Completion*], FIDIC Red Book, First Edition 1999; FIDIC Yellow Book, First Edition 1999; and FIDIC Silver Book, First Edition 1999.

- (i) Execution and completion of the substantial part of the Works in fact;
- (ii) Preparation and submission of the paperwork justifying the completion of the Works; and
- (iii) Tests of Completion for the Works or Section have achieved a passing result (if any).
- (iv) In rare situations, the Employer’s receipts for approval, acceptance, permits, and licenses from the competent authorities is defined as the basis for the determination of whether or not the Works have been completed.

Should this be the case, the legal status of the completion of Works is demonstrated as follows:



The Completion Status

Vietnamese Laws

Apart from this analysis, the definition of Completion Date or Time for Completion has not been provided for in Vietnamese Laws on Construction. Thus, until a circular promulgating Vietnamese Laws on Construction, with respect to construction contracts is introduced¹¹, please refer to the following definition: “*Time for Completion of the Works means the period for the completing of the Works or Sections (as the case may be) pursuant to Sub-Clause 10.2 [Time For Completion] including*

¹¹ See more at Sub-Clause 1.19 [Time for Completion] EPC Contract Standards, annexed to the Circular 30/2016/TT-BXD.

any extension of time thereof pursuant to Sub-Clause 10.4 [Extension of Time for Completion], calculated from the Commencement Date (or other date as agreed by parties to the contract).”.

The Contractor is required to complete the Works and any Sections (if any) within the Time for Completion, including:

- (i) Tests on Completion for the Works or Sections (if any) have achieved a passing result - as the case may be, and
- (ii) The Contractor has executed and completed the entirety of the Works pursuant to the contract to be considered completed, and
- (iii) Successful completion of any and all tests and inspections of the Works¹².

In short, the Time for Completion defined under the sample construction contract under Vietnamese law and the FIDIC Contracts have a similar approach in nature, and the effect of such provisions is undeniable, if not considered to be necessary.

However, determining the Time for Completion does not come without effort when such a provision is provided. Each party, depending on their status, will encounter varying obstacles in determining the Completion Date, the result of which will have significant impacts and legal consequences. Obvious consequences include, but are not limited to:

- (i) Employer responsibility for assuming the Works/Sections upon completion;
- (ii) The Contractor, on the completion point of time, must cease the obligation to care for the Works when the responsibility is passed on to the Employer thereof;
- (iii) The Contractor ceases liability for delay damages. In other words, if the Contractor is in a delay to the Works, the Contractor has no further liability upon the Completion Date;
- (iv) Similarly, in the event a delay caused by or attributable to the Employer, the Contractor is entitled to an extension of time and payment of associated costs thereof;
- (v) The Contractor may well submit its statement to the Employer by the completion date. Under some situations (law of Vietnam for example), the Contractor could be entitled to submit a statement of final payment and as a result thereof, the variation order cannot be initiated (unless there is an exception to the remedying defects context);
- (vi) Other obligations of the Contractor during performance of the contract shall cease hereinafter. Such obligations include submission of “cash flow”, “updated progress reports” etc.;
- (vii) Any obligation(s) to extend or renew the performance security (or any other surety) of the Contractor may be terminated promptly upon transfer of the Works;

¹² See more at Sub-Clause 9.1 [Tests on the Completion of the Works] EPC Construction Contract Sample, annexed to the Circular 30/2016/TT-BXD.

- (viii) Outstanding amounts of advance payment immediately becomes due and payable from the Contractor to the Employer; and
- (ix) Finally, the defects notification period thereupon immediately begins upon the transfer of the Works by the Employer.

In brief: the determination of the Completion Date and its legal effects support the parties by providing more information, justification, and other factors necessary to determine the events leading to the extension of time, their effects, and who will be responsible for extensions of time for completion of the Works.

Program Plays an Important Part

Common to most Vietnamese practitioners, up to the time being, is that the Program is a part of the contract. However, the Program should only be considered as a tool for managing the time under the construction contract and not to be considered as an actual contractual document. This is because:

Firstly, the question as to whether the Program forms a part of the construction contract is unacknowledged when there are clear provisions under the contract which represent the Commencement Date, the Time for Completion, and the Completion Date. Because, under this situation the Parties could still determine whether or not the Contractor is liable to the Employer for delays (if any), or entitled to an extension of time and compensation of associated costs thereof.

Secondly, the Program was previously submitted by the Contractor during the tender stage. Based upon which, the Contractor details the Program in consideration of varying integrated trades to form the project's master schedule. Therefore, the detailed Program is progressively updated to reflect the Site's actual status. Specifically, the submitted Program serves as a benchmark for the parties to plan, coordinate, and prepare necessary resources for the Works—it is a time management tool rather than a contractual document.

Thirdly, considering the Program as a part of the contract document – meaning a contractual document that has full effect, validity, and enforcement via the parties' authorized representative(s) at the date of signing might be subjected to the (i) possibility to adjusting, amending, minor editing, or substantiation in nature only by their site representative(s) and (ii) the possibility of not reaching an agreement on the detailed Program after the Commencement Date. Thus, the performance of the Works would likely be affected or (iii) such an agreement might not be congruent with those agreed upon at the time of signing the Contract.

Therefore, it should not come as a surprise to know that Sub-Clause 1.5 [*Priority of Documents*], FIDIC Red Book, First Edition 1999, does not consider the Program to form a part of the contract documents.

Although it does not form a part of the contract documents, the Program is an important time management tool that manages and monitors the relevant parties coordination of the Program's

project, allowing various contractors (and/or subcontractors) to cooperate with each other and it is obviously the evidence/ground for the parties to determine to whom responsibilities for delays and the resulting damages shall lie with and to what extent it will affect the Program.

Events/Circumstances Leading to Extension of Time

With respect to the EOT Claim, it is worth noting that (i) the determination as to which events/circumstances entitles or does not entitle the Contractor to an extension of time (Extension of Time Events); and (ii) which **one** out of the Extension of Time Events will definitely result in a delay in the executing and completing the Works (the Critical Path) and which event the Contractor is likely to overcome without much delay in the Works.

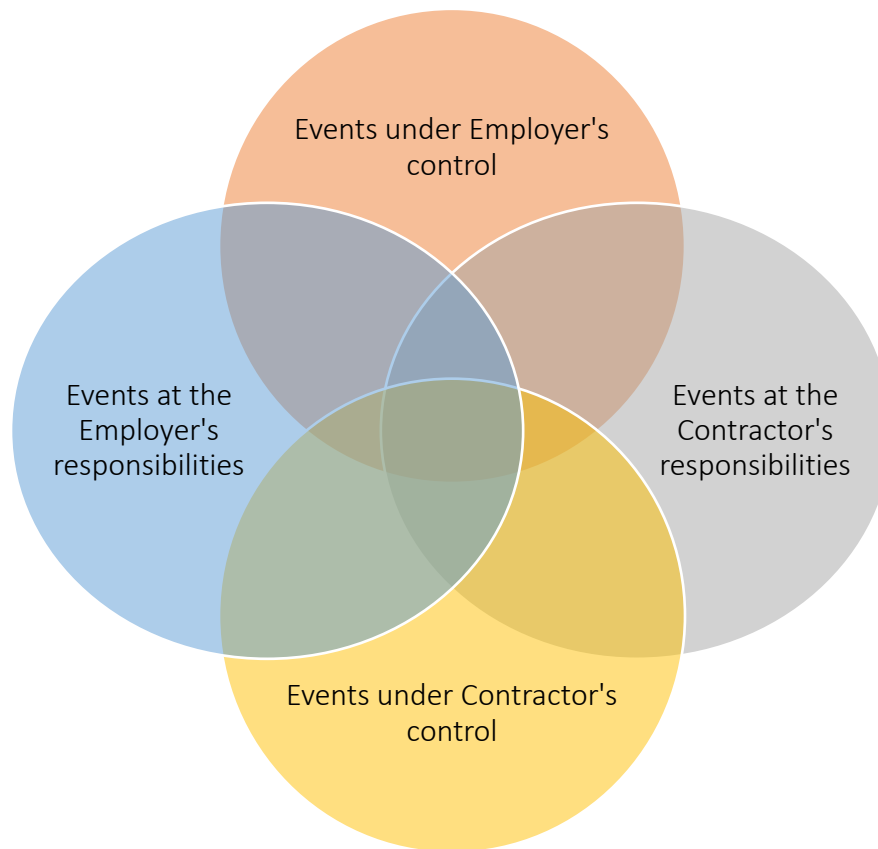
Practitioners may identify an appropriate Extension of Time Event(s), from the list below, for the parties of the contract to consider.

- (i) Delayed Drawings and/or Instructions;
- (ii) Delays in or suspension of Works due to Employer failure to obtain approvals, acceptances, and/or permits from relevant competent authorities;
- (iii) Late transfer (handing-over) of the Site;
- (iv) Lack of cooperation between various Site contractors;
- (v) Errors in the original points, lines, and levels of reference;
- (vi) Unforeseeable Physical Conditions;
- (vii) Changes in legislation (from government action, third parties or utility entities) affecting transportation and/or routines of the Site Contractor;
- (viii) Fossil matter;
- (ix) Contractor's compliance or non-compliance with the Employer's instruction and guidance for testing and inspecting the Works;
- (x) Defects that the Contractor must rectify of which is caused by or attributed to the Employer, or Force Majeure;
- (xi) Variations of the Works;
- (xii) Exceptional adverse climate or environmental conditions;
- (xiii) Unforeseeable shortages in the availability of personnel or materials caused by epidemic or governmental actions;
- (xiv) Any delay, impediment, or prevention caused by or attributed to the Employer, the Employer's Personnel, or the Employer's other on-Site contractors;
- (xv) Changes in quantity on the Bill of Quantity exceeding ten-percent (10%);

- (xvi) Delays caused by Authorities;
- (xvii) Suspension of Work or a part thereof due to reasons that are not the Contractor's fault;
- (xviii) Delayed Completion Tests;
- (xix) Changes in legislation;
- (xx) Contractor's exercising entitlement to suspend the Works as a result of the Employer's default;
- (xxi) Force Majeure.

Depending on the position, experience, purpose, and other facts affecting a specific construction contract, the Extension of Time Events could be categorized as outlined and illustrated below:

First, based upon the parties' allocation of risk, the risks are categorized as shown:



Categorised Extension of Time Events

Secondly, based upon costs incurred, the Extension of Time Events could be categorized into (i) compensation events and (ii) non-compensation events.

Regardless of the category, the Contractor is challenged with an occurrence of any Extension of Time Event, as it is not easy to determine the proper category within which the Extension of Time Events belong to along with the outcome of such events, and finally, the selection and implementation of the EOT Claim pursuant to the contract.

Specifically, the “flooding/storm” could be, under this contract, considered as (i) a Force Majeure, and therefore allows the Contractor to submit an EOT Claim; (ii) but under another contract it shall not be an Extension of Time Event if that contract provides that weather conditions are the Contractor’s risks, and (iii) under other situations, it could only form a part of a series to which the Contractor is entitled to an EOT Claim

Concisely, what will be most helpful to the Contractor(s) is a keen awareness of the nature of each event:

- (i) Reliable justification for an EOT claim
- (ii) The disadvantages that the Contractor might contend with during preparation and submission of EOT claims or which possibly allows such Extension of Time Event to have a period of time extended.

Contractors with extension of time experience on various levels – as a result of solid knowledge, technique, insight, and external assistance - will know and understand what to expect.

Procedure for Extension of Time for Completion

In assessing any EOT Claim, it is important to consciously understand that *“Extension of Time could not be considered as an obviously automatic procedure and it shall not be affected by any agreement in the contract for such automation”*. The reasons to confirm this statement include, but are not limited to:

- (i) Automatic procedures granting the extension of time results in an arbitration, that is, it is unable to manage the time under the contract;
- (ii) Provided an automatic procedure is accepted, then it automatically affects other contractors performing their respective works at the Site;
- (iii) It is unable to determine the exact cause that leads to an extension of time if an automatic procedure is applicable; and
- (iv) Expenses that each party are likely to suffer or have if an automatic procedure for EOT Claim is applicable.

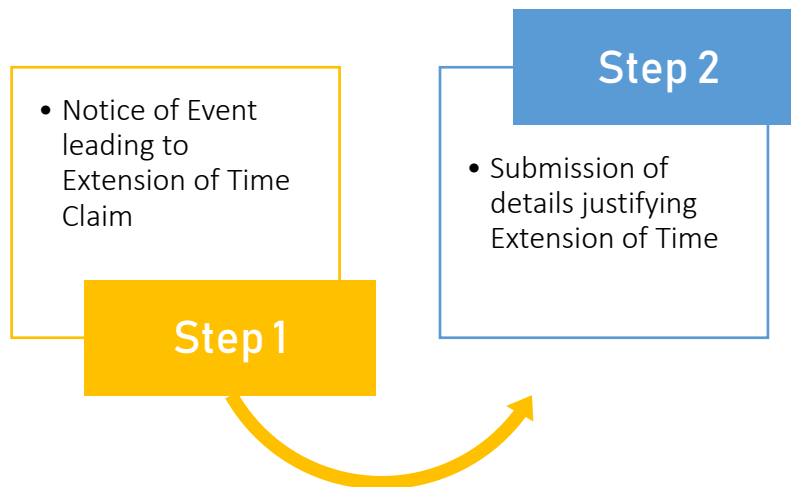
In other words, sufficient grounds to determine any EOT Claim requires the Contractor prepare and submit their claim in a timely manner to the relevant party in charge of the EOT assessment under a special procedure. Therefore, setting proper procedures to submit and assess an EOT Claim plays an important part in determining whether (i) acceptance of an EOT Claim is possible, and (ii) if so, to what extent is it relevant.

Once an EOT Claim fails to meet the strict requirements/special procedures, the following risks will likely occur - specifically:

- (i) Inability to provide sufficient evidence, description, explanation to the Extension of Time Event in a clear, exact matter that could impact the performance of the Works and to the Program;
- (ii) Being wrongfully judged or with prejudice under the viewpoint of the assessor to the EOT Claim that should have been reviewed long before;
- (iii) Inability to distinguish various reasons that might cause simultaneous delays and the effects of each on others.;
- (iv) Inability to allow a party to properly act upon, mitigate, or rectify the impact of events;
- (v) Losing documentation or replacing personnel pertaining to the extension of time issue; and
- (vi) Inability to reach agreement between various delay analytic methods, and the assessment of such method to the delay.

Two-Steps Procedure for Each EOT

Therefore, the procedure for each EOT Claim may be divided into two stages, which include:



Extension of Time Claim – Step by Step Procedure

The first step is vital and requires diligent punctuality on the part of the Contractor - untimely submission of the Notice of Claim will likely lead to losing the right to an extension of time for completion of the Works— losing the right as a result of procedural matters (not merit of the case)¹³.

¹³ See more at 20.1 [*Contractor's Claims*], FIDIC Red Book, First Edition 1999; FIDIC Yellow Book, First Edition 1999; and FIDIC Silver Book, First Edition 1999.

In Vietnam, a similar provision requires the Contractor to submit an EOT Notice within a specific period of time. However, this provision is presently under controversial discussion that is not likely to end very soon.

Controversial Discussion

Objections to this viewpoint – denying an entitlement to an extension of time due to lateness or absence of notice - assert that it is too strict and prejudiced toward the Contractor. Nevertheless, in some situations, such notice is not necessary, because:

- (i) Such provisions have revoked the Contractor's entitlements to an Extension of Time, but the reality is that there is an event leading to such a claim;
- (ii) In addition, regardless of whether the notice of EOT Claim could be served, the Employer became aware or should have become aware of the event leading to the Extension of Time for Completion, especially in the event that the Contractor has submitted weekly, monthly, or quarterly reports concerning the Employer's default to the payment, accessible to the Site, or the issuance of instruction or decision etc.;
- (iii) There definitely are situations in which the contractor is unable to overcome and/or mitigate the effects of delayed events and thus prolongs the execution of the Works.;
- (iv) When a Contractor has focused their best efforts on overcoming and/or mitigating the effects of delayed events and *mistakenly* neglected to submit and EOT application, they have *obviously* made an honest mistake. Denial of the Contractor's entitlement to an Extension of Time under this situation creates unfair obligations and interests between the parties, in which a dispute might arise.

Conversely, the idea to support such requirements alleges that Notice of the Extension of Time Claim is a must, because it establishes the starting point and baseline for the parties to proceed with the EOT procedure. Unless and until the Employer receives such Notice of Extension of Time Claim, addressing the event leading to such claim (thereafter, a submission in particular) then the Employer has grounds to make an appropriate decision or take appropriate action. In situations in which it is the Employer is in default, they know how best to cease or mitigate the cause of the events.

After 17-years of applicable experience, FIDIC has adopted a second edition contract, which took into account a plethora of client feedback, perspectives, discussions, and comments from global practitioners to conclude that a Notice of Extension of Time Claim is still necessary, and failure to submit such notice results in a revocation of such entitlement¹⁴. However, the approach that

¹⁴ See more at Sub-Clause 20.2.1 [*Notice of Claims*], FIDIC Red Book, Second Edition 2017; FIDIC Yellow Book, Second Edition 2017; and FIDIC Silver Book, Second Edition 2017.

encompasses and balances the parties' interests allows for the possibility for resolutions of such failures to grant the Contractor an opportunity to claim an Extension of Time for Completion¹⁵.

The second step, involves the parties to the contract continuing to struggle with various matters affecting the settlement of an Extension of Time Claim, and it requires a diligent and meticulous approach to justify the effects of the Extension of Time Events entitling the Contractor to an extension of time. The analysis below serves as a guideline.

Guiding the parties through preparation and submission of EOT Claims is the second edition of the Society of Construction Law, which introduced the "*Delay and Disruption Protocol*", in January 2017. This introduction has been eagerly welcomed by all project stakeholders, and FIDIC itself, by referring to this edition at Sub-Clause 8.5 [*Extension of Time for Completion*] in the Guidance for the Preparation of Particular Conditions in late December 2017 - in the three suites of Rainbow Contract.

Methods Used for the Delay Analytic

Apart from detailed contemporary records pursuant to contract requirements such as, the start and cessation of EOT Events, associated costs, periods of time impacted by the EOT Event, necessary resources used, legal/contractual basis allowing the EOT entitlement, each EOT Claim requires the Contractor to factually justify the extent to which the EOT Event causes/caused delays.

Unfortunately, due to the complexity of the EOT Event, there exists an inability to agree on a single method that should be used for analyzing the delay. It recognizes in fact that available methods could be used - depending on conditions, budget, available information, etc. - to analyze the events of the delay, which include¹⁶:

- (i) As-Planned vs. As-Built method: The analyst compares dates and durations of selected activities shown on the as-planned schedule with the actual dates and durations on an as-built schedule and considers the difference to be the delay on the job.
- (ii) Impacted As-Planned method: In this method the analyst lists the excusable delays (or delays where a time extension is owed to the contractor) and inserts the extended duration to the relevant activities.
- (iii) Collapsed As-Built or "But for" method: In this method, the analyst takes the actual as-built schedule and takes out the duration of all the excusable delays (delays rightfully owed to the contractor).

¹⁵ See more at Sub-Clause 20.2.2 [*Engineer's Initial Responses*], FIDIC Red Book, Second Edition 2017; FIDIC Yellow Book, Second Edition 2017; and FIDIC Silver Book, Second Edition 2017.

¹⁶ See more at: <https://www.tasenet.com/Knowledge-Center/Articles/ArtMID/477/ArticleID/343536/Construction-Delays-Analysis-Methods>

- (iv) Window Analysis method: This method is based on analyzing the delay over the entire schedule, dividing it into windows with a selected duration, most commonly a period of a month.
- (v) As-Built method: This method is used in the absence of reliable schedules on the job. In this case, the analyst recreates a schedule based on actual information.
- (vi) Contemporaneous method: The preferred method of analyzing delays in which the analyst reviews the schedule and actual site progress on the starting date of each delay and then inserts the delays in the schedule.

In conclusion, the analyst has to select the best method to use for analyzing delay claims. Each approach has advantages and disadvantages. Sometimes, the nature of the case, available time, document availability, or budget considerations influences the method chosen.

Due to the complexities and variances of each methods used for analyzing delays and the acknowledgement of EOT Claim differences, each EOT Claim could lead to different outcome. This leads to common disputes between the parties, because of the lack of agreement for each EOT Claim.

Under Vietnamese context, it is not easy to find reliable service provider(s) who are qualified, experienced, and have the necessary resources (including reputation), to assess, analyzes, clarify, and advise parties to agreement on EOT Claims.

Conclusion

As aforementioned, Due to the challenges and complexity of assessing an EOT Claim, it is recommended that the Contractor approach the EOT Claim based on the principle of immediacy - don't wait and see the effects of prolonging EOT Events and be especially aware of the nature of the EOT Claim before making any notice or claim.

The true purpose and meaning of the EOT assessment is to enable the Employer and the parties to have opportunities to properly plan the Program and mitigate the occurrence of potential risks or damages. Succinctly, if the Contractor prepares the EOT Claim primarily aiming at avoiding liability for the delay damages, or another, with the aim at having more time to complete the Works, then the preparation of such EOT Claim is likely not to be persuadable and errors are likely to happen.

Aside from complicated disputes in the construction contracts and disputes concerning the Extension of Time playing key factors for determining (i) the possibility of have an entitlement or to bear responsibility due to the extension/or non – extension of time; (ii) the possibility of an entitlement to compensation/payment for associated costs, including inflation costs, therefore, affecting(iii) the possibility to use or not use arbitration/litigation for such disputes.

Within limited resources, references to experts (including delay experts, construction experts, legal experts, contract experts, and quantity surveyors) becomes necessary.

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