Delay claims are common on construction projects but proving responsibility for delay can be difficult. It can lead to complex and costly disputes, with associated risks and uncertainties for all parties involved. At the heart of such disputes is often the difficulty in identifying the impact of various delaying events on project completion.

This can be complicated further by the different methodologies used for analysing delay. However, it is vital to remember that what has caused delay is a question of fact. No amount of complex delay analysis or computer software should detract from this. Unfortunately, this is sometimes forgotten when delay claims are presented and parties find themselves spending significant time and cost undertaking detailed, after-the-fact analysis, which may not ultimately provide the clarity required.

The resulting cost and risks can be mitigated by taking steps to ensure that the all-important factual assessment of delay is undertaken and recorded when the delay actually occurs, rather than retrospectively. Contemporaneous records should always trump analyses produced at the end of a project.

BEFORE THE WORKS COMMENCE

At the beginning of the construction project, the parties involved should seek to agree upon a realistic, resource-loaded baseline programme that identifies the critical path. The baseline programme is the benchmark against which delays can be measured. The contract should make clear the level of detail required by the programme and the procedure for its updating. This should include tracking the effect of events on the critical path as and when they occur.

The contract should also require the parties to keep proper records to evidence the cause and impact of delays. The types of records may include:

- Daily site reports from the relevant foreman.
- Weekly progress reports tracking progress against the relevant activities in the programme. Ideally, these should be in sufficient detail to identify the relevant activity from the programme, the resources allocated to that activity and the progress actually achieved compared to the required progress for the week to meet the overall programme.
- Records of crew productivity to assist in forward planning of resources both in terms of numbers and allocation.

Contract procedures can also be put in place for the treatment of delay claims. For example, there should be a provision of notices for identifying alleged delaying events and prescribed time periods for submitting claims to substantiate the alleged effects of delaying events.

DURING THE PROJECT

It is no use putting in place detailed contractual procedures if they are not adhered to during the project. If possible, sufficient resources should be allocated for administering the contract. However, the realities of construction projects often dictate that agreed procedures are not followed as parties focus on the job at hand. Nevertheless, parties should be able to identify when projects are running into difficulties. This should alert them to possible claims and allow them to take steps to mitigate these, including:

- Ensuring that the types of records identified above are maintained.
- Undertaking a review of the progress of the works on site at a particular point in time. For example, through joint reviews of the key activities and producing detailed records of findings (including photographs).

Using this information to make a contemporaneous factual assessment of delays which will include recording the effect of certain events on the programme’s critical path. Outside assistance may be needed to ensure this process is undertaken correctly.

- Assigning additional resources for the administration of the contract to ensure that all relevant procedures can be followed going forward.

ONCE A CLAIM HAS BEEN MADE

However diligent the parties have been in their preparation, all construction projects have the potential to result in claims. The following steps will assist in reducing the risks associated with delay claims once they are underway:

- Ensuring that all records are retained.
- Appointing the right team (both internal and external) to advise on the claim and the strategy for its resolution.
- Ensuring that this team has access to the main factual witnesses involved in the works and delaying events.

The earlier steps are put in place to assist in the assessment of delay, the less likely it is that the parties will have scope for disagreement. This is not to say that putting in place these steps will remove the risk of claims. What it should do, however, is limit the risk and, when claims do arise, enable the parties to assess their respective positions at an early stage by reference to the facts as recorded during the works.

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