Claim Everything. Explain Nothing. Deny Everything

What Makes a Good Contractor Claim For Time and Money?

The quote “Claim everything. Explain nothing. Deny everything” is ascribed to Prescott Bush, the grandfather of the famous political dynasty, known not only for its quotes. Here we’ll explore whether contractors should always trust the advice of politicians, at least when it comes to preparing claims in connection with extension of time on complex development projects.

At the end of the day, “What is due to Jupiter is not allowed to the bull,” as once coined by the Roman comedy playwright Publius Terence.

But what are the components of a successful claim that can withstand the scrutiny of not only a reluctant project owner (the employer), but also an arbitral tribunal and the owner’s forensic analysis team?

Surprisingly, there is a limited understanding among many of what the vital elements are that need to be better dealt with in if a good claim is to survive escalation beyond an ordinary working-level settlement.

Invest at the Time

More often than not, contractors tend to assume that circumstances surrounding the claim are so obvious that they do not warrant a significant investment when preparing. There are many reasons — operating compulsions, budget constraints or otherwise. Many believe that it suffices to prove that money was lost, and ‘voila’! Unfortunately, the investment in time and resource increases exponentially years later, when project knowledge is inevitably diminished, the causal nexus between the events and their effects is far less discernible, and external consultants or counsel come into play.

The author therefore advocates that — regardless of contractual or legal requirements — the following structure has proven to be helpful in the enforcement of contractor claims for additional time and associated prolongation costs.

1. That there has been an event or circumstance giving rise to a claim.
2. That liability for such event or circumstance under the contract rests with the owner.
3. That the contractor has timely notified the owner of such event or circumstance.
4. That the contractor suffers delay and/or incurs cost (if applicable) as a result of such event or circumstance.
5. That the contractor is not, at any relevant time, already or concurrently delayed in its progress when measured against the critical path.

6. That the contractor has provided adequate particulars and supporting evidence in substantiation of its claim.
7. That the contractor has complied with its obligation to mitigate its losses to the greatest extent possible

What Must a Contractor Succeed on to Have a Strong Claim?

1. Event of Circumstance

The seemingly obvious requirement to identify and describe the underlying event or circumstance (for simplicity, we shall refer to both as 'event') is often overlooked or insufficiently elaborated upon. This applies to initial source documents, owner communications, instructions, actions or inactions, design comments, regulatory requirements – anything that has triggered the chain of delays. Often a contentious element of the claim, it deserves to be carefully described and benefits greatly from a detailed and well-articulated chronology narrative.

Separating the Individual Events – A Case Study

A contractor claims late access to a section of the site during a staged handover. This was due to there still being temporary site facilities of another contractor in that section of the plot. Due to this, the contractor claims that it could not commence its geotechnical survey, resulting in delays to foundation design and civil works. Clear as day they think. The event must be the 'late access to site', with its direct effects ending when the survey report was completed. However, upon closer examination of the facts the event disintegrates into three independent events, each stand-alone and subject to the seven steps.

Firstly, the contractor never sought the owner's consent to enter the subject section of the site for the purposes of carrying out its geotechnical survey. The proposed survey boreholes were all outside the footprint of the existing temporary facilities, with nothing preventing these surveys if the owner was asked to grant access.

Secondly, the contract programme was ambiguous as to what constituted the handover date. While it showed a fixed date, the contract in fact commenced later than scheduled, with all other milestones and activities being linked to the 'project month' calendar, and not fixed dates. Clearly, a field day for lawyers digging into who bears the risk of contract ambiguities and into the dark art of the contract intent interpretation.

Thirdly, the time it took to prepare the geotechnical report was longer than planned for reasons that were outside of the owner's remit, thus introducing a new intervening event.

As shown, these are three individual events that should not be bound together, ultimately rendering the claim fundamentally flawed. The effect is deleterious and makes the claim vulnerable to a successful challenge. Each such individual event raises a different question of liability.

2. Liability

The basis of a claim must be unequivocally articulated. It is insufficient to establish that the contractor is not responsible for the event, as they must demonstrate that the nature of the contractual risk profile adopted by the parties places the liability for the event with the owner, or that the owner was in breach of the contract and clearly identify the provision of the Contract that it seeks remedy under. The author has encountered innumerable instances where contractors merely specified the clause regulating the claim process as the basis instead (e.g. 1999 FIDIC Clause 20.1), which is, in most cases, insufficient.

Moreover, some delay events where the risk is carried by the owner as far as completion is concerned, carry no entitlement to compensation for prolongation that may otherwise emanate from an extension of time. The Society of Construction Law terms these 'non-compensable employer risk events'.[1] Examples may include adverse weather or force majeure events.

3. Notice

The law evolves in many jurisdictions when it comes to enforcing the so-called 'time bar' provisions. Many contracts empower the owner to disallow claims where the contractor has flouted its obligation to timely submit a notice of its claim. Irrespective of the status of law, contractors must provide evidence of either; one, a formally compliant notice of its intention to claim additional time and/or money, or, if not available, two, evidence that the owner was aware of the event and, ideally, of its contemporaneous impact.

Clearly, in the second case the contractor would have to overcome a higher, yet still potentially surmountable, hurdle. Arbitral tribunals or courts may show sympathy for the harsh effects of a time bar clause, but any additional evidence of the owner's knowledge would help win such sympathy. The tribunal will also consider the owner's likely counterargument that the notice provisions are not a mere formality (however draconian their consequences may appear), but a notice enables matters to be investigated and acted upon while they are still current.

4. Delay and Cost

In this section of the contractor's claim, a discernible connection between the event and the consequent delay and loss or damage needs to be demonstrated. The inability to specify causal links between each cause of delay and disruption and all the consequences, may be very detrimental, if not fatal to the claim. It flows logically from points one and two as discussed above that the contractor shall demonstrate that there has been an event, that liability for the event lies with the owner, that the event has caused a delay to the critical path, and that the delay has caused prolongation costs and damages directly attributable to such delay event.

Firstly, a delay analysis should be included, visualising the effects of the delay event on the critical path of the programme by means of a Gantt chart, data analytics tools and/or visualization platforms for both analysis and presentation. The conclusions derived from such an analysis must be sound and logical and should bring the claim reviewer closer to the data. Any programme anomalies requiring correction or normalisation should be protocolled and explained.

Concerning the quantification of the prolongation claim, the renown SCL Delay and Disruption Protocol highlights the problem of establishing the link between an entitlement to additional time and to costs:

> *"It is a common misconception in the construction industry that if the Contractor is entitled to an EOT, then it is also automatically entitled to be compensated for the additional time that it has taken to complete the contract."*[2]

The core principle for the quantification of claims is that of damages under contract law, i.e. that the claimant shall be put in the position it would have been in had the claim event not occurred. This means that the correct approach is to ascertain the actual loss or expense incurred and not any hypothetical loss or expense that might have been incurred. This usually also precludes contractors from claiming profit unless explicit provisions to the contrary have been agreed in the contract.

It is important that the claimed prolongation costs are the ones incurred during the period when the effects of the underlying delay are felt, not at the extended period past the scheduled completion date, as so often advanced by contractors.

5. Concurrent Delays

The topic of concurrent delays, where two or more delaying events of equal causative potency take place, is thoroughly contentious. Contractors should ascertain that no factors for which the owner has no responsibility contributed materially to causation. Concurrent culpable delays are difficult for the owner to document and demonstrate, and so contractors tend to omit such apparently concurrent delays from their delay analysis entirely, leaving it to the owner to meet its burden of proof if it seeks to assert otherwise.

As noted in the SCL Delay and Disruption Protocol,[3]

> *"True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.*
>
> *In contrast, a more common usage of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time."*[3]

Needless to say, that obvious and well-documented concurrent delays should better be addressed in a claim if it were to survive any level of scrutiny instead of risking the veracity of the entire claim, in particular if prolongation costs are involved and not merely additional time. One has to distinguish between the time aspects and the compensation. As mentioned above, it is very unlikely that a true concurrent delay, involving both contractor and owner delays to the critical path, takes place.

As a general rule,

> *"Where employer delay to completion and contractor delay to completion are concurrent and, because of that delay the contractor incurs additional costs, then the contractor should only recover compensation if it is able to separate the additional costs caused by the employer delay from those caused by the contractor delay. If the contractor would have incurred the additional costs in any event because of contractor's own delay, the contractor will not be entitled to recover those additional costs"*[4]

FTI Consulting has issued numerous publications aimed at assisting the parties in understanding the nuances associated with the concurrent delay topic. We recommend the Austrian Yearbook on International Arbitration 2022 that contains some very pertinent articles on this subject.[5]

6. Particulars

An owner has the right to insist on strict particularization of the claim. A claim insufficiently particularized and substantiated, ostensibly 'self-explanatory', only provides an easy target for an adversarial counterpart. One important aspect is also often neglected by contractors. Their working-level counterparts may well sympathise with a just claim, but—particularly in case of state-owned organizations—they would be subject to strict internal and external audits, supervisory committees or other regulatory constraints beyond the project level. The contractor's purposes are therefore served better by rendering its claim unemotional, logical, structured and easily defendable internally within the owner's organisation or when facing an audit.

A Chinese proverb cautions that, "In a multitude of words, there will certainly be a mistake." Whilst the proverb is universally true, it may still be wise to include one document too many rather than one too few in support of the claim. A just claim should not be compromised by additional disclosure. Conversely, years down the line of a dispute escalation, when the relay is handed over to staff not intimately familiar with the matter or to external parties, such missing documentary evidence may never be identified or located again.

Consider twice if, for whatever reason, you are hiding something. The author advocates that you better answer the questions before they are asked by addressing and explaining the weak points rather than letting the other side do it for you (in a less favourable light) during a cross-examination in front of the tribunal.

Documents of seemingly peripheral relevance to the subject claim should also be included and ideally accompanied by particularization of why the contractor deems these related to or associated with the event. Some connections or consequences may not be obvious at the time so that any peripheral contemporary documents may prove helpful in the future.

7. Mitigation

The owner should be presented with evidence of any genuine and plausible mitigation measures planned or implemented with respect to the alleged delay event. It is always stimulative for an expeditious resolution to demonstrate genuine mitigation efforts, especially as most construction contracts postulate mitigation of its losses and delays as the contractor's direct obligation.

The duty to mitigate does not extend to eliminating the loss entirely or to adding additional resources but rather to taking steps in minimising its loss and avoiding unreasonable steps that would increase it. But if a contractor fails in its duty to mitigate, it may lose entitlement to recovery of avoidable damages which could have been reasonably mitigated.

In summary, as once correctly noted by the astronomer and famous author Carl Sagan, even though certainly in a different context, "Extraordinary claims require extraordinary evidence."

ADAM GRANT
adam.grant@fticonsulting.com

[1] Society of Construction Law 'Delay and Disruption Protocol', 2nd edition 2017, www.scl.org.uk.

[2] Society of Construction Law 'Delay and Disruption Protocol', 2nd edition 2017, www.scl.org.uk.

[3] Society of Construction Law 'Delay and Disruption Protocol', 2nd edition 2017, www.scl.org.uk.

[4] 'Extension of Time: Money for Nothing?' by Thomas Hofbauer, Austrian Yearbook on International Arbitration 2022, p.247.

[5] 'Extension of Time: Money for Nothing?' by Thomas Hofbauer, 'Delay and Quantum. Assessment of EOT and EOT related costs' by Nils Hanfstingl and Thomas Hofbauer, Austrian Yearbook on International Arbitration 2022.