

# Extensions of time and delay costs

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**Charles Blamire-Brown looks at the multitude of factors to consider when dealing with extensions of time and prolongation costs**

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**My contractor is 10 weeks behind programme due to a week of persistent rain that saturated the insulation between the frame and the cladding and during the same period left it unable to secure carpenters for 2 weeks because they went to another job. Is the contractor entitled to an extension of time and delay costs?**

Coming to a fair assessment of extensions of time and prolongation costs is never easy, especially where there are issues of concurrency. There are a multitude of factors to consider and it can be a bit of a legal and factual minefield. It is, of course, important to consider the various issues and arguments. However, this should not trump taking a step back and asking what is really driving the delay to completion: applying Occam's razor, the simplest answer is often the better one.

## NEC and JCT contracts

Let's break the scenario down: does adverse weather, in principle, entitle the contractor to an extension of time or delay costs? This will depend on the particular contract. Standard form [NEC](#) and [JCT](#) contracts treat weather events differently:

- **Under NEC:** adverse weather is a compensation event if it occurs on average less frequently than once in 10 years. This is an objective test by reference to weather data prescribed in the contract (only the difference is taken into account). In such instances the contractor will be entitled to additional time and costs.
- **Under JCT:** "exceptionally adverse weather conditions" is a relevant event. It will also be a relevant event if it is a "specified peril" (e.g. a storm or flood). Exceptionally adverse weather is undefined; however, a common rule of thumb is the weather that exceeds the long-term average for the time of year and location of the project by a significant amount. Weather, no matter how adverse, is not a relevant matter. The contractor will therefore be entitled to an extension of time but will not be entitled to any costs.

On the question of whether the contractor is entitled to an extension of time or delay costs for not securing labour, assuming the contractor was not prevented from doing so due to any action or impediment on the part of the employer, this will not be a compensation event or a relevant event/matter.

*Generally, the contractor will not normally be entitled to recover its delay costs in circumstances where there is concurrent delay*

The next question is whether the delay caused by the weather event was critical. The contractor must show that the weather has been in excess of what the contract allows and that performance has actually been affected. Moreover, the delay will need to impact the completion of the works as a whole/section. The contractor will thus have to show that the activities affected by the weather event are on the critical path for the whole project/section. The assessment will involve an identification of whether the activities in delay, and subsequently affected activities, will lead to a delay to the completion date.

It is often tempting to think that the only way of doing this is through detailed programme analysis. However, very often, applying a common sense approach will be sufficient, particularly where assessments are made during an ongoing project. Indeed, the courts have a tendency to take a dismissive approach to detailed theoretical programme analysis, instead favouring an analysis on the facts.

It would be remiss not to acknowledge that the case law in this area predominantly relates to JCT. NEC is a different beast where assessments of delay are made prospectively based on the accepted programme and at the time of notification of the compensation event.

## **Concurrent delay**

The legal test for concurrency is "a period of project overrun which is caused by 2 or more effective causes of delay which are of approximate equal causative potency". The events do not necessarily have to be concurrent but their delaying effects do.

The approach generally adopted by the courts is that the contractor is entitled to an extension of time for the period of delay notwithstanding the fact that there are 2 concurrent causes of delay, one of which is a relevant event (weather event), and the other is not (inability to secure carpenters). Generally, the contractor will not normally be entitled to recover its delay costs in circumstances where there is concurrent delay (although check the contract). The contractor must show that, but for the weather event, it would have incurred the delay costs (i.e. the weather event actually caused the delay costs).

So, there is a lot to consider but taking a methodical approach and always having in mind what is really driving delay to completion should result in a fair assessment.

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