Liability Briefing

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The Society of Construction Law Delay and Disruption Protocol

The Society of Construction Law published its Delay and Disruption Protocol in October 2002.

It contains:

- Guidance on various issues which arise when making or dealing with claims for delay and disruption. For example, who owns the float? How should concurrent delay be dealt with?
- A model programming clause, describing in detail the mechanisms for drawing up a programme, its 'acceptance' by the contract administrator and its subsequent updating;
- Model clauses dealing with the keeping of records. There is a long and a short form depending on the size and complexity of the particular project.

1. It is dangerous to make the Protocol a tender document or a contract document. The Protocol is guidance

It is not intended that the Protocol should be a contract document. Nor does it purport to take precedence over the express terms of the contract or be a statement of the law.

The introduction states: 'Apart from the model clauses, the Protocol is not structured like a contract clause or part of the preliminaries. There is a high risk of confusion, which would be expensive to resolve, if the Protocol is incorporated into the building contract.'

2. The Protocol is incompatible with the standard forms of contract

The guidance in the Protocol suggests ways of dealing with delay and disruption which are completely different from the requirements of the JCT and ICE forms, for instance. If the employer and contractor have signed up to these forms, they must operate their terms when looking at delay and disruption. The Protocol itself states

this. The parties do not have an option (unless they both agree) to use any of the guidance in the Protocol where it contradicts what is in the contract.

If, by some accident, the Protocol has become a contract document it will be difficult, and very expensive, to work out how it applies to the standard form of contract, if at all.

3. Contract administrators take on more liability under the programming clause

This clause requires the contract administrator to 'accept' the contractor's programme (and regular updates). Acceptance means that the programme 'represents a contractually compliant, realistic and achievable depiction of the contractor's intended sequence and timing of construction of the works'. Most contract administrators do not know enough about how the contractor is intending to carry out the works to give an 'acceptance' in these terms. The contract administrator could find that if he has accepted a programme, he has become partly liable for it. Because of the rules on joint liability, this could mean that he is wholly liable for it if the programme is not achievable and the contractor becomes insolvent.

4. Read the programming clause before incorporating it into your contract

The model clause is long and detailed. Contractors will want to check whether it will help them to run the contract, or be another unjustified administrative burden.

The Society of Construction Law explains that the Protocol exists to provide guidance to all parties to the construction process when dealing the time/delay matters. It recognises that transparency of information and methodology is central to both dispute prevention and dispute resolution.

Copies of the Protocol can be obtained from www.eotprotocol.com.