



**New South Wales Government  
Procurement System for Construction**

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**Procurement Practice Guide**

**Managing extensions of time**

**July 2008**

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# Managing extensions of time

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# Managing extensions of time

## 1 Introduction

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There are risks that failure to accurately assess delays to completion of a construction contract will result in:

- unnecessary extensions to the completion time;
- excessive delay-related costs; or
- disputes about a contractor's entitlements to extensions of time or delay costs.

The first and most effective step in managing these risks is to avoid or minimise delays caused by the Principal. The Procurement Practice Guide [Avoiding delay](#) suggest strategies to minimise the risks.

Ongoing monitoring of progress and accurate assessment of delays that occur will assist in minimising the adverse consequences.

The purpose of this Procurement Practice Guide is to assist agencies and their representatives to assess claimed delays to completion of construction contracts and grant appropriate extensions of time.

The Procurement Practice Guide [Handling prolongation and disruption claims](#) provide guidance for evaluating costs claimed on account of these types of delays.

## 2 Claims for extensions of time

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A construction contract will generally set a period for completion of the Works. That period may be specified in the tender documents or otherwise agreed with the contractor before a contract is awarded. The contract may impose liquidated damages, in the form of a charge per day or per week on the contractor, for failing to meet the specified completion time.

If a delay occurs that is not within the contractor's control, a contract will generally provide for the time for completion to be extended, subject to specific provisions.

Such delays may include:

- Inclement weather
- Industry-wide industrial conditions
- Delays caused by the Principal or agents of the Principal
- Variations
- Changes in the law
- Directions by a public authority
- Delays by a public authority

## 3 Establishing an entitlement

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### 3.1 Contract provisions

It would be unusual for the Principal to unilaterally extend the time for completion of a contract. Generally, an extension of time is given in response to a claim from a contractor.

The first step in establishing whether to grant an extension of time is to determine whether the contract provides for such an entitlement. A contractor should be required to identify the contract provision under which the claim is being made.

### **GC21 Contract provisions**

A **GC21** Contract provides for the time for Completion to be adjusted under clauses 41 (Site Conditions), 52 (Variations), 54 (Extensions of Time) and 56 (Acceleration).

Clause 41 provides that:

*the Contractor may ... be entitled to an extension of time for Completion under clause 54 for delays caused by the materially adverse Site Conditions occurring from the date of provision to the Principal of the written notice required by clause 41.2.*

The preamble to clause 54 states that:

*the Principal will extend the time for Completion if there is nothing the Contractor can reasonably do to avert circumstances beyond its control to avoid delay.*

If acceleration is instructed under clause 56, then there will be an adjustment to the time for Completion.

### **Provisions of the Minor Works standard form contract**

The NSW Government *Procurement System for Construction* **Minor Works** standard form contract provides for the time for Completion to be extended under clause 12.

## **3.2 The cause of the delay**

An extension of time is granted if a contractor has been delayed and the cause of the delay is one that gives the contractor an entitlement under the contract. A contractor should be required to supply facts about the delay, including identifying the event that led to the delay. The contractor must also provide proof of the events that were allegedly responsible for the delay.

Under a **GC21** Contract, according to clause 54.1.1, the Contractor is not entitled to an extension of time unless the cause of the delay:

*was beyond the control of the Contractor (including an act, default or omission of the Principal, but not including a Variation instructed or agreed by the Principal or otherwise determined.*

The Contractor does not have an entitlement to an extension of time for a delay on a day (or part of a day) when it 'contributed in any way to the delay' (clause 54.1.1).

Note that, under a **GC21** Contract, an extension of time caused by a Variation would be dealt with under the provisions of clause 52.

The **Minor Works** standard form contract contains similar provisions, entitling the Contractor to an extension of time if the delay is caused by an event beyond its control, or a breach of contract by the Principal or a direction of the Principal's Representative (unless the direction is to correct non-conforming work or suspend the work due to a default of the Contractor).

### **Obligation to mitigate**

A contractor has an obligation to mitigate delays and any related costs.

In a **GC21** Contract, this obligation is explicit. Clause 54.1.2 requires, as a condition for an entitlement to an extension of time, that the Contractor 'has taken all reasonable steps to avoid and minimise the delay and its effects' (clause 54.1.2). This provision may affect the number of days extension granted, if it can be shown that the Contractor could have taken certain reasonable actions to reduce the delay.

### **Notice requirements**

Most forms of construction contract include notice requirements that must be met to establish an entitlement to an extension of time.

A **GC21** Contract, at clause 54.2, requires the Contractor to provide the Principal with:

*notice of the delay, its cause, relevant facts and its expected impact, as soon as practicable after the delay commenced.*

Clause 54.3 states that the notice must be given within 14 days of commencement of the delay and that if the delay continues, a further notice must be given every 14 days thereafter, until the delay ends. Under clause 54.1.3, the Contractor's entitlement depends on these requirements being met.

The standard form **Minor Works** contract simply states that the Contractor is to notify the Principal 'within 14 days after the commencement of the delay' (clause 12.1).

### **3.3 Evidence of delay**

A delay to a contract activity will not necessarily cause delay to completion of the whole of the Works or a Milestone if the affected activity is not on the critical path.

However, instructing additional work to an activity that was not on the critical path could change the program relationships such that the activity becomes part of the critical path. Further, a contractor may claim that the variation instruction caused the contractor to take workers off a critical activity and hence take longer to construct the Works.

Contractors sometimes attempt to establish delay claims in a variety of ways which are without basis in law or logic (e.g. it took 'x' weeks longer than planned, therefore it is the Principal's fault). For example, a common approach where there have been many variations is for the contractor to claim that all the additional time spent on the contract, over and above the contract time as adjusted, was caused by acts and omissions of the Principal. Contractors often ignore the fact that some of the delay was the result of their own actions or inactions.

Contractors must be required to provide evidence of the events that are alleged to have caused the delay, including the actions or inactions of the Principal or other events beyond their control, and to demonstrate that the delay affected the critical path and hence delayed completion.

A **GC21** Contract requires the Contractor to demonstrate (clause 54.1.4) that;

*the delay occurred to an activity or activities on the critical path of the then current Contract Program.*

The Contractor must submit a Contract Program complying with Clause 25.9 with the notice of the claim, as a precondition of its entitlement to the extension of time.

Even where a contract does not expressly require this, the contractor should be requested to submit a marked-up construction program in support of a claim, showing how the contractor has been (or will be) delayed in completing the work.

### **3.4 Effect on completion**

Each delay claim must be considered in relation to the contractor's program current at the time the delay occurred. The critical path(s) may alter over time due to many factors. An extension to the period for completion should only be granted when the delay increases the time span of the critical path(s), thus delaying completion.

The assessment must be based on the merits of the claim, within the terms of the contract, independent of any consideration of the extra costs that might be borne by the Principal.

Where a contractor's construction program includes float, this should not be taken into account in determining the extension of time granted. The extension of time granted is to be related to the period over which critical activities are delayed and should not be reduced because completion could still be achieved by reducing the float in the contractor's program. The principle is that float 'belongs' to the

contractor. Note however that a claim for delay during a programmed period of float cannot, by definition of float, be a delay to completion.

When assessing extensions of time, always consider the number of working days for which an entitlement exists, taking into account rostered days off and public holidays. The GC21 Contract requires this approach, stating at clause 54.4 that:

*[an] extension of time is only given for delays occurring on days on which the Contractor usually carries out work for the Contract.*

Extend time from the previous date for completion to the appropriate calendar date.

### **3.5 Concurrent delays**

There may be two concurrent causes of a delay, one that may justify an extension of time (for example, wet weather) and the other that does not (for example, a strike over a safety issue where the responsibility lies with the contractor). In this situation, irrespective of which cause arose first, an extension of time should not be granted for any days on which the delay was not because of an event that entitles the contractor to an extension.

In support of this principle, the **GC21** Contract expressly provides (at clause 54.5):

*When concurrent events cause a delay in reaching Completion and one or more of the events is within the control of the Contractor, then to the extent that the events are concurrent, the Contractor will not be entitled to an extension of time for Completion notwithstanding that another cause of the delay is such that the Contractor would have had an entitlement to an extension of time.*

### **3.6 The ‘but for’ argument**

Contractors may argue that a delay encountered early in the contract period resulted in the contractor being faced with a later delay (for example, wet weather) which, ‘but for’ the earlier delay, would not have occurred until after the work was completed.

If a contractor can show that, but for an earlier delay for which the Principal was liable, the contractor would not have incurred a later delay, then the contractor may be entitled to extensions of time for both delays.

However, the law has developed principles of ‘remoteness’ and ‘foreseeability’ in relation to damages claims that may apply. For example, if a delay occurs early in a contract it is not foreseeable that later work will necessarily be delayed by wet weather. The probability of later work being delayed by wet weather is often no greater than it would have been had the delay not occurred.

Some later events, such as the Christmas shutdown in the construction industry, are certain. If it is foreseeable that a particular delay will necessarily push the contract into the Christmas period and that, but for the delay, work would be finished before Christmas, then a foreseeable consequence of the delay is that the contractor will be unable to complete the work until after Christmas. In this case, an extension of time could be justified. In some regions, the wet season is nearly as predictable as Christmas and a delay can push the contractor into the wet season and give an entitlement to an extension of time.

It is rare that one particular cause of delay can be identified as causing a contract to extend into a holiday period or the wet season. Usually, delay is caused by a combination of events, including delays for which compensation is payable; and strikes, wet weather, accidents, inefficiencies and other delays for which compensation is not payable. The principle that a contractor is not entitled to an extension of time for a delay caused by the Principal that was concurrent with a delay caused by the contractor should be applied. It might be that, but for any one of the events, the contractor would have completed the work before Christmas or the onset of the wet season. In that situation, the extra time required cannot be said to be

an inevitable consequence of a particular delaying event caused by the Principal and the additional time would not be granted.

## **4 Considerations for detailed evaluation**

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Factors that should be considered in assessing extension of time claims relating to different causes of delay claims are outlined below.

### **1 Industrial conditions**

If a contractor is affected by an industrial condition beyond the contractor's control before the date for completion (as adjusted), then demonstrated time delays due to the condition may be eligible for an extension of time.

The extension may not reflect the full extent of the industrial condition as the contractor may not be affected for the entire time the condition existed. The period granted would be from the day the critical path of the program is first delayed until the contractor is able to proceed with the interrupted program. For example if there is a two week strike in the concrete industry but other trades are not affected and the contractor is not ready for a critical pour until one week after the start of the strike, an extension of only one week is justified.

An extension should only be considered when the condition is industry wide or where, for example, the only supplier of a special item required for an activity on the critical path is affected by the condition. If, in this example, the item is available from an alternative supplier, an extension of time should not be granted.

### **2 Inclement weather**

A contractor may be entitled to an extension of time when work on one or more critical activities is prevented by inclement weather. The extension must cover the period that work was not possible during the inclement weather plus time required to clean up any mud or water which prevents recommencement of the work.

The contractor may sometimes be entitled to an extension for inclement weather that occurred away from the Site, such as rain elsewhere in the catchment that caused flooding of the Site.

Extensions should not be granted if only non-critical activities are delayed or the work area is covered and work is not affected by inclement weather.

### **3 Delays caused by the Principal or agents of the Principal**

The Principal may give instructions, or delay in taking action, or fail to act and as a result completion may be delayed. In such circumstances, a contractor should be granted an extension of time reflecting the actual delay to the critical path, providing the contractor establishes an entitlement.

### **4 Variations**

If a variation is instructed, unless it is a variation for the convenience of the contractor, then its effect on the time for completion must be considered. A reasonable extension of time should be granted if the contractor demonstrates that it affects the critical path(s) and will cause a delay to completion.

If the variation is for the convenience of the contractor, the issue of its effect on time should be taken into consideration before agreeing to the variation.

## 5 Changes in the law

A contractor may be entitled to an extension of time if a change to any applicable Law, Statute, Regulation or the like occurs after the time of tendering and causes the contractor to carry out additional work which delays completion.

## 6 Directions by a public authority

If it is necessary to instruct a contractor to carry out work to a public authority's regulation, the contractor is not entitled to an extension of time unless the requirements could not have been identified by the contractor at the time of tendering.

## 7 Delays by a public authority

A contractor may be entitled to an extension of time if a public authority delays the work, for example by delaying giving an approval. The contractor must demonstrate that the approval was requested in ample time.

# 5 The role of a construction program

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## 5.1 Program users

Both parties to the contract rely on a construction program. It can be used by:

- the Principal to monitor progress, identify potential problems, plan for delivery of Principal supplied materials and information, and highlight where delays have occurred; and
- the contractor to monitor progress, organise the work, anticipate construction difficulties and assist in establishing where delays have occurred.

## 5.2 Program requirements

Construction contracts frequently specify requirements for a program.

A Contract Program submitted under a **GC21** Contract must (clause 25.9):

- show the dates of, or, in the case of future activities and events, the dates for commencement and completion of *Design* and construction activities, other significant events, *Milestones* and the Works and also include *Contractual Completion Dates*;
- reflect *Scheduled Progress* and be consistent with all constraints on access, performance and co-ordination;
- show the logical relationship between activities and events shown in the program, identify time leads and lags, resource and other constraints and the sequence of activities which constitute the critical path or critical paths;
- show the dates when the contractor will require information, documents, materials or instructions from the Principal and the dates when the contractor will provide information or documents to the Principal. These dates are to be consistent with dates which the Principal could reasonably have anticipated at the Date of Contract that this information, documents, materials and instructions would be required and provided; and
- be in such form and include such detail as the Principal reasonably requires and be accurate, comprehensive and complete in all respects.

The Conditions of Tendering in the NSW Government *Procurement System for Construction* standard form **GC21** Contract require tenderers to submit a bar chart program with their tenders. The Contractor is then required to submit a Contract Program within 14 days of the Date of Contract (clause 25.6). Until the Contract Program is submitted, the Contract provides that the program submitted with the tender may be considered the contractual program, if the Principal so advises. There

need never be a time under a **GC21** Contract when there is no program against which to compare progress and alleged delays.

In a **GC21** Contract, the Contract Program must be updated whenever requested by the Principal (clause 25.8). Such a request should be made if there are significant changes, for example after a delay has occurred, or if the Contractor changes the order of the work, or if a major variation is instructed.

Copies of all programs submitted by a contractor, clearly marked with the dates received, should be kept by the Principal until all claims under the contract are finalised.

### 5.3 Recording progress

Record keeping and monitoring should clearly indicate the contractor's progress and provide basic information for reporting progress and predicting expenditure.

Records should be kept as to when particular work activities have been carried out and what resources were used to carry them out. Where the planned sequence of events outlined in the contractor's program has been followed, it is a simple task to mark 'as built' against planned. This should show where planned progress in a given time period is greater or less than planned.

In a contract without a specified delay cost rate, it can also assist in evaluating later claims for delay costs or disruption. The following example illustrates where good record keeping may be of value.

A particular construction activity was due to start on 15th July and take 14 working days. In fact, it did not start until 22nd July and took 19 working days to complete. Two questions arise. Firstly, why did work commence one week late and secondly, why did it take 4 days longer than planned? The answer may simply be that the contractor was one week behind program and had insufficient resources to do the work in the time span planned (or the original programmed allowance was too little). It is essential that answers to these questions be ascertained so the Principal can be in a position to refute a 'loss of productivity' claim or a 'delay' claim that may be made or detailed many months later.

In situations where the Principal has breached the contract or instructed variations or taken other actions that could entitle a contractor to additional time, the 'marked up' copy of the contractor's program maintained by the Principal must clearly show:

- when such events occur;
- what work activity is affected;
- what effect the events may have on the critical path; and
- whether, under the terms of the contract, the contractor has an entitlement to an extension of time.

A liability for additional costs may also flow from such actions.

Examples of the type of assessment required for some acts or omissions by the Principal are:

- **Failure to supply Principal supplied materials on time:** In this case the program submitted by the contractor should detail when such material is required and when the Principal was advised when the material would be required. If the material was supplied, say, 3 weeks late (after sufficient notice had been given by the contractor), this fact is to be marked on the program from which it can be ascertained:
  - if the item for which the material was required was on the critical path and if a delay was caused, is the completion time delayed 3 weeks or some other amount? If so, records must be kept of any plant, equipment or labour which may have been idle due to the delay. Did the contractor do everything possible to mitigate losses?

- if the item for which the material was required was not on the critical path, and the late delivery may only increase costs of that particular work time or may have had no effect at all.
- **Instructing a variation:** In this case the program needs to be ‘marked up’ to show where the construction work associated with the variation occurs. Does it affect the critical path? This is necessary to adequately assess the cost of the variation. On the one hand, it may be a variation that can easily be accommodated by the contractor letting a small subcontract for the work without affecting the main stream of work and thus the critical path. On the other hand, it may extend the time for completion of the contract, say by three weeks, in which case the overhead component cost of the variation may justifiably include the cost of maintaining facilities (e.g. sheds, office) on site for this longer period.

It is always preferable to have agreed the full cost and time effects of a variation before commencement of the variation is instructed. The Principal may, for example, prefer a variation at a higher cost but with less effect on the time for completion.