

Guidance on Extension of Time in Construction Contracts

Shubham Singh¹, Chitesh Thakre², Amit Kumar³

¹Contracts and Claims, Larsen and Toubro Limited, Faridabad, 121003, India (ACI Arb, YIAG-LCIA, YSIAC, YAAF-ICC)

²Contracts Dept., G R Infraprojects Limited, Gurugram, 122015, India.

³Contracts Dept., G R Infraprojects Limited, Gurugram, 122015, India.

Abstract This paper provides an introduction to the concept of extension of time in construction contracts and explores the ideal way to formulate extension of time proposals. Construction projects often face unforeseen delays and disruptions, which may lead to the need for additional time to complete the project. Extension of time provisions in construction contracts provide a mechanism for the parties to adjust the contract completion date to account for these delays. Mostly, the disputes (like compensation for extended stay, LDs, price variation, escalation etc.) start after the Contractor's proposal for EOT. This paper examines the key principles of extension of time provisions, including the types of events that may entitle the contractor to an extension of time, the procedural requirements for making a claim, and the standard of proof required to establish entitlement. The paper also discusses the factors that should be considered when formulating an extension of time proposal, including the scope of the delay, the impact on other project activities, and the potential cost implications. By following a structured and systematic approach to formulating extension of time proposals, the parties can avoid disputes and ensure that the project is completed on time and within budget.

Keywords Extension of time (EOT), Construction Contracts, Contract, Contractor, Delay analysis, Claim, Dispute.

1. Introduction

An Extension of Time clause in a Contract envisages provision for the amendment of the original date of completion under agreed circumstances of Contract term.

A Contract validity period is a matter of agreement between the parties however, it must be definite. Parties can mutually agree to alter the timeline of work under the provision of Extension of Time in Contract Agreement.

1.1. Why parties apply for EOT?

The benefit of an EOT relieves the Contractor from the liability of delay damages (usually liquidated damages) and allows reprogramming of the balance works to completion however, condition apply which is explained in this paper.

The benefit of an EOT to the Employer is that it establishes a new contract completion date, prevents time for completion of the works becoming 'at large'.

1.2. What are the repercussions of working without valid date of completion or EOT?

When a specified completion date is not included in a contract, the timeframe for completion is considered 'at large.' In such cases, the provision of liquidated damages (LDs) becomes impractical as there is no fixed date from which LDs can be calculated. As a result, the LDs clause loses its viability. Both the parties to the contract are not totally obliged for the obligation under the Contract terms. This situation is termed as "Time at Large". Eclipse (Eclipse Overseas Transport Ltd) v. Palmaers Ltd (1993) is a notable case in UK contract law, particularly in relation to the concept of "time at large" in construction contracts.

Also, when a party to a Contract fails to perform any promise of which time is specified in Contract, the contract, or so much of it as has not been performed, becomes voidable at the option of the other party. Hence, in the event of non-completion of work due to reasons explained above, the parties should inform each other regarding the same and request for extension of time to avoid "time at large/termination/voidable contract".

1.3. What are the grounds for Extension of Time?

The Employer's Delay event encompasses several factors, including but not limited to: issues related to access, variations to the original scope of work, changes in specifications, delays caused by the need for necessary clearances and permits as per the terms of the contract, adherence to the design and drawings as specified in the contract, delays in approvals, delays in cash flow, and suspension of work.

Certain delay events may occur during the execution of a contract for which neither party can be held responsible. These events include, but are not limited to: changes in laws, occurrences of force majeure events, extreme weather conditions, suspension of work directed by the administration, and external risk events.

Contractor's delay events- Slow progress due to contractor's fault.

Delay due to	EOT Provision	Compensation Provision
Employer	Excusable	Compensable
Contractor	Non-Excusable	Non-compensable
Neither Party	Excusable	Non-compensable

Table-1 Relation in between the delay cause by party to the provision of EOT and Compensation.

2. Why EOT application is the very beginning of disputes?

EOT (Extension of Time) applications are often the very beginning of disputes in construction projects because they deal with a fundamental aspect of the project's timeline and schedule. When a project experiences delays or unforeseen events, it can impact the schedule and ultimately the completion date. In such cases, contractors may submit EOT applications to request an extension to the original completion date.

The request for an EOT can trigger a dispute between the contractor and the project owner, as the owner may not agree with the reasons for the delay or may not want to grant an extension. The parties may disagree on the amount of time needed for the extension, the costs associated with the delay, or other related issues. Additionally, EOT applications often involve complex contractual provisions and legal considerations, which can further complicate the situation and lead to disputes. *Patel Engineering Ltd v. Union of India (2015)*, *National Highways Authority of India v. Bumihway DDB Ltd (2010)* court judgments emphasize the need for clear and specific contractual provisions regarding extensions of time, notice requirements, obligations during the extended period, and deadlines for completion. They also highlight the importance of both parties acting reasonably and diligently to avoid disputes arising after an extension of time has been granted.

This is why it is crucial for both parties to carefully review the contract and follow proper procedures when submitting or responding to an EOT application. Overall, EOT applications are critical in construction projects, and any disagreement or delay in their processing can cause significant disruptions to the project's timeline and budget, leading to potential disputes. In this paper, we will discuss the ideal way to propose the extension of time request to increase the chances of acceptance without much disputes and also safeguarding the interest of parties.

3. What are the requirements of valid EOT proposal?

When a construction project experiences delays, the contractor may submit a request for an extension of time (EOT) to complete the project. To ensure that the EOT proposal is valid, it must meet certain essentials which is explained in this paper. The proposal should be well-supported by relevant documentation which are listed below. By meeting these requirements, the contractor can ensure that their EOT proposal is both viable and most likely to be accepted by the employer. The Contractor should notify the Engineer/Employer about the delay/impediments faced by him within the time frame as per the conditions specified in the Contract (FIDIC Based, EPC, HAM, BOT, etc.) and generate contemporaneous records.

- 3.1. Records (Contemporaneous records in support of EOT)
- 3.2. Adoption of Methodology
- 3.3. Concurrency
- 3.4. Detailed Analysis but easy to understand
- 3.5. Intension to claim compensation while proposing EOT

3.1. Records- The Contractor shall generate the records for supporting its claim of EOT, Cost claim etc. Some example of records that should be maintained are listed below:

- a. Contract Documents (including pre-bid replies, MoM during Bid stage).
- b. The Work programme can be proof check through DCMA 14-Points compliance i.e., Missing Logic, leads (Negative Lag), Positive Lags, Relationships, Hard Constraints, High Total Float, Negative Total Float, High Duration Activities, Invalid Dates, Resources, Missed Tasks, Critical Path Test Critical Path Length Index (CPLI), Baseline Execution Index (BEI). It helps the Contractor to support its proposed work programme and increases the possibility of acceptance by the Employer/Engineer without much observations.
- c. Correspondences (build contemporaneous record of every Risk event like delay in ROW, access, hindrances, approval from Engineer/Employer, MoMs, FMC, delay in issuance of materials from Employer, etc.)
- d. Resource records (Key persons, Machinery & labours mobilized at site, etc)
- e. Progress record (Monthly progress reports, Video records, tests, weather, utilization of manpower and machinery etc.)
- f. Cost records (Direct cost- labour, manpower, equipment, Indirect cost- overhead, rent, time related costs.) (IPC, Financial statements, business plans, tender history, etc.)
- g. Work programme (approved Baseline, as built programme, revised programmes etc.)

3.2. Adoption of Methodology (reference- SCL Protocol). In construction contracts, delay analysis is an essential tool for determining the causes of project delays and identifying potential extensions of time. To prepare for an extension of time claim, it is crucial to adopt a comprehensive methodology for delay analysis. This involves identifying the critical path of the project, establishing the baseline schedule, and accurately documenting the causes and effects of delays. A well-planned delay analysis methodology can provide clarity and transparency to the extension of time claim process, ensuring that all parties are aware of the reasons behind the delays and the potential impact on the project timeline. By adopting a sound methodology for delay analysis, construction stakeholders can avoid costly disputes and protracted legal battles, resulting in a more efficient and successful project delivery.

Methods of analysis	Analysis type	Critical path determination	Delay Impact Determination	Requirement
Impacted as Planned Analysis	Cause & Effect	Prospectively	Prospectively	Logic linked baseline programme. Delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	Logic linked baseline programme. Update programmes Delay events to be modelled.
Time slice window Analysis	Effect & Cause	Contemporaneously	Retrospectively	Logic linked baseline programme. Update programmes
As Planned vs As-Built window analysis	Effect & Cause	Contemporaneously	Retrospectively	Baseline programme. As-built data.
Retrospective Longest path Analysis	Effect & Cause	Retrospectively	Retrospectively	Baseline Programme. As-built programme.
Collapsed As-Built Analysis	Cause & Effect	Retrospectively	Retrospectively	Logic linked as-built programme. Delay events to be modelled.

Table-2 Method of delay analysis prescribe in SCL Delay and Disruption Protocol 2nd Edition

3.3. Concurrency Analysis

It is often incorrectly thought that an entitlement to an EOT automatically carries with it an entitlement to compensation for prolongation costs during the period of the EOT.

Concurrent delay is the occurrence of two or more delay events at the same time, one an Employer’s fault, the other a Contractor’s fault, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. 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.

It can be said that both Employer’s & Contractor’s delay events shall impact the Critical path/project completion at the same time to be Concurrent delay events.

It is often incorrectly thought that an entitlement to an EOT automatically carries with it an entitlement to compensation for prolongation costs during the period of the EOT. Respondent will always try to prove concurrency and thus Extension of time can be granted but compensation goes out of picture.

Delay Event-A	Delay Event-B	Remark	Result
Employer Risk event	Contractor Risk event	Excusable & Non-Compensable delays	EOT
Employer Risk event	Non-Excusable	Excusable & Non-Compensable delays	EOT
Employer Risk event	Employer Risk event	Excusable & Compensable delays	EOT & Compensation
Contractor Risk event	Neither Party	Excusable & Non-Compensable delays	EOT

Contractor Risk event	Contractor Risk event	Non-Excusable & Non-Compensable delays	LDs
Neither Party	Neither Party	Excusable & Non-Compensable delays	EOT

Table-3 Effect of parties' delay events on EOT and compensation.

3.4. Detailed Analysis but easy to understand

Delay analysis for an extension of time is a critical aspect of project management that involves identifying, analysing, and distributing delays that have occurred during the project execution. It is essential to conduct a detailed analysis of project delays while submitting the EOT proposal with complete detail of compensability and ownership of delay. However, it is equally important that the analysis is presented in a way that is easy to understand, particularly when the project team is seeking an extension of time. The delay analysis report must provide a clear and concise explanation of the causes and impacts of the delays in a manner that can be easily understood by stakeholders. To ensure that the delay analysis report is both detailed and easy to understand, it is essential to use a structured and organized approach that focuses on key aspects of the project.

This includes identifying the specific activities that are affected by the delay, determining the causes of the delay, and evaluating

													Programme Delay (Critical) - Days							
Sl. No	Act. Ids	Description	Ref. Baseline	Type Of Delay	Delay Start	Delay Finish	Duration	Pre-TIA Project Completion Date	Post-TIA Project Completion Date	Post Delay analysis	Cumulative Delay	Critical Activity (Y/N)	NN	DE	CD	END	Concurrent Delay	Period	Total Cumulative	
1	A.01	Original Baseline Programme	Baseline					8-Aug-22												
2	A.02	DE1 - Delayed procurement of ROW	Baseline 1	ECD	20 May 2022	22 May 2022	2.00			0.00		N								
2	A.03	DE2 - Delayed Hinderance due to Utility	Baseline 1	ECD	20 May 2022	25 May 2022	5.00		13-Aug-22	5.00	5.00	Y		5.00				5.00	5.00	
3	A.05	DE3 - FMC-COVID19	Baseline 2	END	19 June 2022	22 June 2022	3.00	12-Aug-22	15-Aug-22	3.00	3.00	Y			3.00			3.00	8.00	
5	A.07	DE4 - Procurement delay by Contractor	Baseline 3	NECD	05 August 2022	06 August 2022	1.00	15-Aug-22	15-Aug-22	0.00	0.00	N								
							Total			8.00		Total	0.00	5.00	3.00	0.00	8.00	8.00		

the impact of the delay on the project timeline and its compensability. Additionally, the report should use plain language and avoid technical jargon to make it more accessible and understandable to all stakeholders. In case of Simplex Infrastructure Ltd. v. Union of India (2019), the importance of performing a comprehensive critical delay analysis when assessing claims for extension of time was highlighted. Delhi High court stated that it was necessary to consider all the activities in the project network and identify the activities that had an impact on the project completion date. This judgement also emphasizes the need to consider the impact of delays on dependent activities and their effect on the critical path.

By conducting a detailed but easy-to-understand delay analysis for an extension of time, project managers can present a strong case for the extension and provide stakeholders with a clear understanding of the delays and their impacts. This can help facilitate

communication and cooperation among stakeholders, leading to a more successful project outcome. A simple abstract is tabulated below to show the final outcome of detailed delay analysis. It is clearly understandable from the table that the proposal is for 08 Days of extension of time out of which 05 Days compensation is applicable to the employer.

3.5. Intention to claim compensation while proposing EOT

While submitting request for Extension of Time, the Contractor should ensure showing its intention to claim for the compensation for extended stay or other losses. It is observed in many judgements of India Courts that the claim was not admissible in front of court because the contractor has proposed the EOT without any intention to claim compensation for extended stay at site. In case of *Sutlej Construction Ltd v. Union Territory of Chandigarh* (2018), the Supreme Court of India held that a contractor who has obtained an extension of time under a contract cannot claim compensation for delay unless they can prove that the delay was caused by the employer's breach of contract. The court held that the contractor must also show that they had taken all reasonable steps to mitigate the delay and that they had given proper notice to the employer regarding the delay and their intention to claim compensation.

4. Contractor's duty post EOT proposal

In case of NO determination or reply from Engineer/Employer, the Contractor should notify in written and try to make it obvious that the Contractor is supporting for early determination and provided all relevant data.

In case of impugned determination, the Contractor must submit its disagreement ASAP and clarify the erroneous consideration.

Financial implication due to extended stay and compensable delay events shall be submitted as per the timeline mentioned in the Contract. The Contractor shall also submit a mitigated revised work program to complete the project after getting extension as per the revised completion date of works.

Note that the Contractor can request acceleration measures. However, additional cost for acceleration shall be claimed by the Contractor for the Employer's/Engineer's delay events. And if acceleration is instructed and/or agreed, the Contractor is not entitled to claim prolongation compensation for the period of Employer Delay avoided by the acceleration measures. In this case, the Contractor can claim acceleration cost only.

5. Conclusion

It has been observed that most of the dispute arises after the Contractor's submission of EOT proposal. The major causes of dispute are lack of documentations, generating contemporaneous records of delay & disruption events, adoption of correct methodology, proper analysis of delay events, clear and precise outcome in the proposal etc.

This paper suggests the best practice that should be adopted while proposing extension of time including pre-EOT stage and post-EOT proposal. By following the guidelines discussed in this paper, most of the disputes that arise after EOT proposal may be prevented. Even if the dispute arises after the submission of EOT proposal, the chances to get the matter resolve easily by dispute board, arbitration proceeding, or by courts.

6. References

- i. SCL Delay and Disruption Protocol 2nd Edition: Feb-2017.
- ii. AACE International Recommended Practice No. 29R-03.
- iii. The Supreme Court of India Judgement: *Mcdermott International Inc. Vs Burn Standard Co. Ltd.* (2006).
- iv. The Bombay High court Judgement: *The Board of trustees of port of Mumbai vs M/s Afcons infrastructure Limited* (2016).
- v. The Delhi High Court Judgement: *NHAI Vs M/s Hindustan Construction Ltd.* (2017).
- vi. The Madras High Court Judgement: *M/s Express Infrastructure Private Ltd. Vs M/s B.L. Kashyap and Sons Ltd.* (2019).
- vii. The Bombay High court Judgement: *Larsen & Toubro Ltd. Vs Maharashtra State Electricity Distribution Co. Ltd.* (2019).
- viii. The Supreme Court of India Judgement: *National Highways Authority of India Vs Sayedabad Tea Company Pvt. Ltd.* (2019).
- ix. The Supreme Court of India Judgement: *IRCON International Ltd. Vs Umesh Kumar Singh* (2021).