



# **PROLONGATION CLAIMS IN CONSTRUCTION PROJECTS**

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## **Introduction**

Sometimes evaluation of prolongation costs in construction projects arising out of delay and disruption is treated as a simple exercise.

A fairly common approach is to calculate the monthly or weekly expense for preliminaries/overheads and multiply this by the number of days or weeks of extension of time ('EOT') awarded. However, there often appear to be fundamental misconceptions in calculating the entitlement and is often rejected in arbitrations.

In majority of the instances the preliminaries/overheads in the original tender are divided by the contract period, to establish actual time-related costs applicable at the time the delay occurred. In some contracts there may be a pre-agreed rate for reimbursement in the event of compensable delay.

## **When are prolongation costs recoverable?**

Award of an extension of time does not give rise automatically to entitlement to reimbursement of a contractor's resulting prolongation costs. Necessary pre-conditions for recovery of prolongation costs are these:

- Delays for which the Employer is responsible
- A remedy under the conditions of contract for an extension of time for completion;

If the conditions of contract do not provide for extending time and entitlement to the compensation in these circumstances, then damages for breach of contract may apply instead.

## **The effect of concurrency**

If delay by the Employer occurs during a period when delay is already occurring for a cause which does not give rise to entitlement, then prolongation costs cannot be recovered. The contractor cannot recover damages for delay in circumstances where exactly the same loss would have been suffered due to causes within the contractor's control.

## **What kinds of costs are eligible for consideration**

Costs eligible for reimbursement are those which increase as a result of increased duration, than was originally allowed for in the contractor's tender price. The most obvious and straightforward examples of time-related costs include:

- Staff managing the project at site
- Site office staff, including general labour, cleaners and canteen staff

- Site offices and welfare facilities, and plant such as the generators needed to maintain them
- General lighting, power and water
- Labour camps, and associated staff
- Insurances for which the premium relates to fixed duration rather than value of the contract

Other less obvious examples include:

- Staff who are required on site during particular periods of the work where delay occurs, but not for the full project duration.
- Standing plant such as generators, tower cranes, concrete batching plants, and general plant such as forklift trucks. These will not be required throughout the project, but if there is delay when (for example) the tower crane is operational, delaying its planned removal, then additional costs will arise from its prolonged duration on site.
- Similarly, related costs for operators, drivers etc. associated with the above resources

Consideration must be given to whether the resource in question have already have been removed from site when the delay event occurred, and whether its retention and continued deployment genuinely arises from the delay event being claimed.

Access to the contractor's tender planned resources/schedule may provide some assistance in determining the originally-planned duration and resource extent and ascertaining whether it has been extended. However, this will not be conclusive: where the assumptions on which the tender allowance was based can be shown to have been unreasonably optimistic, an inadequate assessment will have resulted.

If resources have been engaged due to matters for which there are separate claims, any costs recovered by way of the prolongation claim in this way should of course be deducted from any separate claim to avoid duplication of recovery.

Other costs that may be eligible for consideration are increased costs of labour, materials or plant due to inflation. Increases in financing costs, loss of contribution to overheads, and loss of opportunity to earn profit from other jobs due to delay are also potential further consequences of project delay but are difficult claims to prove.

### **What kinds of costs are not eligible?**

Resources deployed to site for specific tasks are not time-related resources, but task-related resources. If they are for activities that are not on the critical path, any additional costs arising would not be the result of critical delay to project completion. They should therefore not be eligible for reimbursement as 'prolongation costs'.

Instead they may be eligible for consideration in a disruption or uneconomic working claim. However, if the activities for which these resources are specifically necessary have been delayed by project-wide critical delay, then there may be some overlap.

## Complications in major projects

On a very large project, separate facilities may be constructed at the same time over a large site area. As an example, consider a power project on which the contractor is providing utilities in one section and constructing the main facilities elsewhere.

If delay affects only one section i.e. utilities but not the others, and if that section is on the critical path for the project as a whole, critical delay to overall completion will be caused. The other sections can proceed unhindered because they are geographically separate and unlinked in the programme and progress for the delayed section. The resources are still capable of demobilisation according to the original programme. If so, only extended time-related resources related to the delayed section will be eligible for recovery as prolongation costs.

## Conclusions

There are more factors to consider when calculating prolongation costs than simply deriving a rate from preliminaries allowances in the contract and multiplying this by the length of extension of time awarded or by calculating the actual expense during the extended period. The contractor's accounting system plays a key role in identifying the 'Time related costs'.

## About the Author

**Rohit Singhal** is the Chief Executive Officer of Masin, a leading claim and expert witness company and is one of the renowned construction dispute expert. He has over 23 years of international consulting experience involving construction contract disputes analysis and resolution, arbitration / litigation support and expert testimony, project management, engineering/construction management, cost and schedule control, and process engineering.

Rohit Singhal has extensive arbitration and litigation experience, numerous expert appointments including 'hot tubbing' (witness conferencing) experience, appointed to undertake expert determination and has been appointed as expert witness more than 30 times on delay, technical and quantum matters covering re-measurement; variations / changes to work scope; disruption; delays and extensions to completion dates; acceleration and claims related to defects and incomplete work. Major international law firms have been instructing him time and again as expert in arbitrations.

His project experience includes refineries, petrochemical and chemical plants, onshore & offshore oil & gas facilities, power plants, bulk handling system, infrastructure, roads, commercial and industrial buildings. He has testified in court, as well as in international arbitrations (ICC, LCIA, SIAC & DIAC). Mr. Singhal has presented and published numerous

articles on the subjects of claims and disputes. He is a Gold Medallist in Civil Engineering from Indian Institute of Technology, Roorkee, India.

### **About Masin**

Masin is a renowned construction claims and expert testimony consultancy with offices in India, Dubai, Doha, Muscat and Kuwait. With experience of more than 150 arbitrations, it caters to all facets of construction disputes. For details, please visit the website [www.masinproject.com](http://www.masinproject.com).