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## The Importance of Extension of Time Provisions

Have you heard of the black swan theory? It is a metaphor that describes an event that comes as a surprise. A black swan event on a project would be where the specification was so well defined and precise there was no change in any form necessary – that is not to say it's impossible, but it's highly improbable.

Typically, contracts specify a completion date or other specified dates for which certain elements of work or product should be delivered ready for customer use. Should a delay to these dates occur, the consequences for all the parties involved (customer, manufacturer, supply chain, etc) will be detailed.



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Most contracts will have provisions dealing with adjusting the contractual dates which are generally recorded within a project programme. These provisions are commonly referred to as extension of time provisions.

### What is an extension of time?

An extension of time clause is an express contractual provision that contemplates the adjustment of the contract completion date in defined circumstances i.e. an extension of time is granted when the progress of the work has been impacted because an excusable delaying event has occurred.

An extension of time provision grants the manufacturer or supplier relief to complete its work after the contractual completion date, without becoming liable to pay the customer liquidated damages (or, where no provision exists for liquidated damages, general damages for delay).

A manufacturer or supplier has no statutory or common law entitlement to an extension of time if it is late completing its work due to its own issues. Therefore, any entitlement will depend on the provisions specified in the contract.

Most contracts contain express provisions for an adjustment to the specified date(s) to be made in specific circumstances. Although similarities exist, the grounds and procedures which grant an extension of time will vary between contracts. Typically, it will be up to the manufacturer or supplier to initiate the process, via the provisions under the contract, to request an extension of time from the customer.

For a customer, the extension of time provisions protect their right to levy liquidated damages it needs to be able to adjust the specified date(s). The risk of not having an extension of time provision could mean the programme would be 'at-large' and the manufacturer or supplier would have a 'reasonable' period in which to complete the project without damages being able to be levied (more on this later).

### What are the typical grounds for seeking an extension of time?

There are two types of delay for which the manufacturer may seek to claim for an extension of time:

- I. Delays caused by the customer; and
- II. Other delays that are not the manufacturer's responsibility under the contract.

Most contracts will include a comprehensive list of events which entitle the manufacturer to make an application to the customer to extend the specified

date(s). These typically include: (1) variations; (2) changes in law; (3) failure for customer to approve documentation; (4) delays caused by nominated suppliers; (5) infrastructure availability (or lack of); (6) exceptionally adverse weather; (7) force majeure; and (8) acts of prevention by the customer.

It must be emphasised that some contracts will not include common events such as those illustrated above. Where this is the case, the manufacturer should consider risk allowances for not having these events under the contract during the tender phase and price the works accordingly.

#### **How do I apply for an extension of time?**

First, ascertain that an extension of time provision is included in your contract. When applying for an extension of time, the next step for the manufacturer or supplier is to notify the customer that a delay event has or will occur which it considers will cause delay. The delay event will mean works overrun beyond the delivery date and the manufacturer or supplier must detail the estimated delay period.

The wording within the contract will stipulate the amount of detail required in the notification as to the cause and effect of the delay. Some contracts require the notice to include the full details of the delay event, along with an estimate of the delay's impact on progress of the works. Other contracts will simply require a notice to alert the customer of the cause of delay and provide further details in due course.

#### **How should an extension of time claim be assessed?**

Once the manufacturer has issued notification of the delay event, the customer should consider the application and respond. Under the contract, the customer should be required to notify the manufacturer of its decision within a period stipulated under the contract.

The response should indicate whether the customer agrees or disagrees in awarding an extension of time to fix a new completion date. The decision to award the extension of time should be based on the terms of the extension of time provisions in the contract. If it is not, the decision should be challenged.

If a certain delaying event is not covered within the extension of time provisions, a manufacturer or supplier may be able to rely on the prevention principle in seeking an adjustment to the contractual completion date.

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#### **What is the prevention principle?**

The doctrine of prevention (the prevention principle) allows the law to reflect reality. If the customer was to delay the manufacturer or supplier in completing the work, the customer could not then rely on the manufacturer's failure to complete the work by the contractual completion date as though the customer's own default had never happened. In effect, a customer cannot take advantage of its own act of prevention.

A more far-reaching aspect of the doctrine is in consequence of an act of prevention: time is rendered at large, and the liquidated damages provision is no longer operative.

**What is 'time at large'?**

Time will become 'at large' if a manufacturer or supplier has been prevented from completing works by the contractually specified date(s) as a result of actions taken by the customer and where the contract does not contain an operable mechanism for adjusting the specified dates and completion date (awarding an extension of time).

In the absence of an extension of time clause, the party who carries the contractual risk for an event which has prevented completion is responsible for the consequences. Therefore, if the customer is responsible for an act of prevention, the specified date will lapse (time becomes at large) and the customer can no longer deduct liquidated damages. However, it is important to note that the manufacturer will still be obliged to complete the works within a reasonable time.

**Summary**

The extension of time clause in a contract serves a dual purpose. For a manufacturer, it grants additional time to complete the project in the event of a delay. For a customer, it protects the right to levy liquidated damages where the manufacturer has delayed the project.

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