

AN EXPERT'S OBSERVATION OF THE KEY DESTRUCTIVE RISKS IN CONSTRUCTION PROGRAMMING

- FOUAD EL CHIKHANI

BUILDLAW - ISSUE NO 9 MARCH 2011



Fouad El Chikhani
Expert & Specialist in
Time-related claims

The observations in this article are based on the expert's widespread experience along with technical knowledge and skills in preparing and defending time-related claims within New Zealand and USA (some being on the principal's side and others being on the contractor's). These claims include an iconic project in New Zealand, government projects in NY USA (NY Department of Environmental Protection), US Embassy in Bamako Mali Africa, and US ANA Regional Brigade Facilities Power Distribution (Mazar E-Sheriff Afghanistan).

Construction time-related claims are perhaps the most common and misunderstood disputes in the construction industry and are often confused with being either Disruption or Delay disputes

Over the years, with technological advancement and an increase in complex projects and composite business relationships, construction programming has become increasingly more vital especially in relation to properly planning and managing complex construction projects, **while maintaining their legal aspects required for time-related claims.**

Unfortunately, the line of construction programming these days presents prevalence of schedules that are aesthetically pleasing and healthy, with content that is in essence defective, and in a lot of cases useless. The investigation required to identify faulty schedules and to then determine the nature of every error as well as assessing the implications and consequences of these errors is very complex and requires highly experienced and intellectual scheduling specialists.

Over 90% of construction projects do not finish within the original timeframe. Robust construction programming can help mitigate the issues confronted throughout the project and ensure on time; in-scope delivery of projects.

Key destructive programming risks on projects are:

- 1. Programme Credibility:** The lack of time spent to establish a feasible and realistic programme that has the participation and buy-in of key stakeholders, critical suppliers and subcontractors.
- 2. Programme Maintenance:** The adequacy, frequency and methodology used to accurately maintain, adapt and update the programme.

3. Programme Documentation: Daily record keeping of information and evidence of specific and critical events. Those three risks can be severely harmful when things go wrong on a project, not disregarding the fact that over 90% of construction projects do not finish per the original time frame.

RISK 1 – PROGRAMME CREDIBILITY

In a large number of construction projects there appears to be a disconnect between the project team (specifically site managers) and the programmer/s, resulting in meaningless and non-useful programme/s in the field. If the programme does not reflect a realistic plan for the sequence, duration, and resources required to complete a project within a set timeframe, and if it is not properly maintained and updated, then the programme becomes useless as a record for parties and analysts to evaluate actual performance and does not allow delays and/or disruptions and the responsible party to be identified.¹

The absence of a realistic programme for planning the actual work in the field can be the start of another disagreement/dispute about which programme shall be used for time-related claims, unless explicitly stated in the contract time-specifications. However, this also leads to the quality of time-specifications and the level of details provided being called into question which in turn can develop into another layer of disagreement/dispute due to the difference in opinions and experience.

In a number of cases, courts and boards of contract appeals have refused to accept CPM programmes that were not used to actually schedule and manage the work in the field.²

RISK 2 - MAINTAINING & UPDATING THE PROGRAMME

Maintaining and updating the programme are equally important to having a realistic/credible programme. In fact, for a programme to remain realistic it has to be properly and frequently maintained and updated.

Common mistakes that lead to programme desertion are:

- A non-realistic programme
- A lack of commitment by the project team to use the programme as a valuable tool to manage the work in the field
- A lack of understanding around the legal aspects of the programme

The critical path in a construction programme may constantly change, and sometimes projects end up with multiple critical paths throughout the life of the project due to deviations from the original plan (regardless of the causes and the responsible party).

Failing to accurately and frequently update the project schedule, makes it near impossible to prove the transformation of the critical path/s and the impact of the deviations. Without frequent and accurate schedule updates the schedule remains a document that reflects the contractor's original wishes and intentions and not the actual process of the project.

RISK 3 – RECORD KEEPING

Equally important to risks 1 & 2, the need for robust, accurate and complete records is vital to maintain effective control of a construction project. Moreover, records are essential to support time-related claims. Without accurate records the integrity of a time-related claim can be interrogated and the claim, in most cases, will have no merits.

It is advantageous to use a document control system that provides the project team with control over the storage, retrieval, and archiving of all documentation on the project. Necessary records for scheduling and time-related claims are (as a minimum):

- Site meeting minutes
- Site manager's daily diary
- Daily and weekly construction reports
- Request for Information
- Log of release and approval of shop drawings
- Updated Risk Register
- Contract Instructions
- Weather condition
- Progress photos
- Cost records
- Records of subcontractors and resources on site including the tasks performed during every attendance

It is crucial to maintain accurate and detailed records to establish entitlement for claims and breaches of contract, as well as quantum of recovery.

¹ Pathman Constr. Co., ASBCA No. 23,392, 85-2 BCA 18,096 (1985); Nello L. Teer Co., ENGBCA No. 4376, 86-3 BCA 19,326 (1986)

² See Fortec Constructors v. United States, 8 Cl. Ct. 490 (1985), aff'd, 804 F02d 141 (Fed. Cir. 1986); Chaney & James Constr. Co., FAACAP No. 67-18, 66-2 BCA 6066 (1967)

CONTRIBUTIONS:

Contributions to **BuildLaw** are welcome. **BuildLaw** is published four times a year in March, June, September and December. Readers are invited to submit material to be considered for publication by email to the editor at editor@buildingdisputestribunal.co.nz. Contributions may consist of articles, case notes, book reviews, news of forthcoming events and other matters of interest to readers. Contributors are entirely responsible for the accuracy of case names and citations, quotations and other references, spelling etc. All contributions should be in final form and in word format.

DISCLAIMER:

BuildLaw is published by Building Disputes Tribunal. **BuildLaw** is a newsletter and does not purport to provide a comprehensive analysis of the subjects covered or to constitute legal advice.

BuildLaw is intended to promote and engender discussion, debate, and consideration of all matters in relation to the development and application of construction law, the resolution of building and construction disputes, and the processes that are used for the resolution of those disputes. Articles, commentaries and opinions are intended to raise questions rather than to be emphatic statements on the subjects covered and the views expressed are the views of the author and are not necessarily those of the directors, servants and agents of the Tribunal.

Information published is not guaranteed to be correct, current or comprehensive and the Tribunal accepts no responsibility for the accuracy of any information published in **BuildLaw** and no person should act in reliance on any statement or information contained in **BuildLaw**. Readers are specifically advised that specialist legal advice should be sought in relation to all matters in relation to, or in connection with, the subjects covered and articles published in **BuildLaw**.

COPYRIGHT:

This issue of **BuildLaw™** and all material and information contained herein are subject to the full protection given by the Copyright Act 1994. In many cases the copyright of individual articles remains the property of the author and articles and commentaries should not be reproduced without first obtaining the express authorisation of the relevant third party copyright owner concerned. If you are in any doubt as to whether a proposed use is covered by this licence please consult the Editor.

© Building Disputes Tribunal (NZ) Limited. All rights reserved

BUILDLAW®:

- Reaches you first with the construction law news you need to know
- Gives you access to important judgments when they are delivered
- Gives you expert commentary and analysis of key legal developments and issues affecting your business
- Explains complex issues clearly and simply



BUILDING DISPUTES TRIBUNAL
TE TARAIPIUNURA MŌ NGĀ TAUTOHE WHARE

For further information, please contact
FC International on:

+64 800 333 009