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GCC: WHEN A CONTRACTOR “PACES” HIS WORK, DOES THIS AFFECT HIS ENTITLEMENT TO AN EXTENSION OF TIME?

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In the Management guide to the General Conditions of Contract 2010 (“GCC 2010”), first edition 2010 and to the GCC 2015, second edition, the following is stated:

“if the Engineer issues a Variation Order that uses float that does not add to the critical path, extensions of time would normally not be awarded. In practice, it is rarely as straight forward as this, because an Employer’s delay may overlap with a Contractor’s delay or an Employer’s saving on another activity, while the Contractor may decide not to hasten the execution of a non-critical activity, which is called pacing”.¹

In making an assessment of the effects of a delay event, (such as in a retrospective delay analysis) it is

usually assumed that the Contractor has progressed with the work at as fast a rate as possible under the circumstances. Where the Contractor, of his own volition slows his rate of progress on a non-critical activity, because the work to the critical or the longest path on the contract has been delayed, does this affect the contractor’s rights if subsequently, the work that was paced is delayed by an employer event and becomes critical?

On acceptance of a Contractor’s programme setting out the activities to be undertaken to complete the works, the contractor is generally entitled to decide how it intends performing the work and how it shall apply resources to the work, subject to it complying with its contractual obligations to complete the work by the agreed date for completion.

When a contractor paces a section of work it uses up float that has been created or increased owing to an event that has delayed the completion of other work that is on the critical path.

Float represents the period of time when a delay of a scheduled activity, will not result in a delay to the works. Generally, there are 3 types of float, project float, available either to the employer or the contractor, on a first come first served basis, to mitigate delays caused by slow progress. Secondly, free float, which is the time allowed in each activity by the contractor to account for the risk of not completing that activity in the minimum possible time. This float is owned by the contractor. Lastly, terminal float which is the duration between the planned completion and the current contract completion date. This float is also owned by the contractor.

In this regard when an Employer causes a delay on the critical path, it is submitted that it is permissible for the contractor to slow down his progress of other, non-critical work (i.e., pace the work) to the extent it does not impact the critical path. The contractor's decision to pace is solely dependent on the employer's delay and the contractor merely uses the available float created by that employer's delay. It is in such instances that the phrase *'why hurry up and then have to wait'* is common.

Normally a contract sets out the delays for which a contractor is entitled to extension of time. Such delays are known as excusable delays. In addition, most contracts provide for instances when a

contractor is entitled to recover the costs it has incurred due to an employer caused delays. These are known as compensable delay. For all other delays which a contractor is responsible for, it is not entitled to additional time or to recover its costs. In this regard, we talk of non-compensable delays.

Ordinarily, a contractor's claim for extension of time would not be granted until the available float is consumed for the specific activity.²

What happens in a situation where there is a further employer delay, after the contractor's decision to pace and the paced section of work, owing to the second employer delay, becomes critical and an extension of time should be due? Is the Engineer entitled to reject the claim for extension of time on the basis that, had the contractor not paced and continued working according to the schedule, float would be available and would or should have absorbed the effect of the further, Employer delay?

To determine the answer to this question, a number of factors should be considered.

1. The principle that the project float is available to either party on a first come first services basis, is an accepted practice.
2. The Engineer must understand the decision to pace, was on a non-critical path activity which would not have impacted the critical path and thus consumed float.

3. That the Contractor had the ability to start and complete the activity (that was paced) timeously had it not been for the Employer caused delay, choosing to mitigate its losses at the moment by consuming the float on the project.
4. Notwithstanding the consumption of the available float, it is the Employer's further delay which had an impact on the critical path. At the time of the delay the paced activity may or may not have been on the critical path activity, but was put on the critical path and therefore delayed the completion as a result of the Employer's further delay.
5. An analysis of the delay period would reveal that the proximate cause of the delay was the further Employer delay despite the Contractor's pacing.

In the case of *Weaver v Bailey*³ the court was asked to consider claims regarding the availability of float, and rejected the Employer's allegation that the Contractor's failure to execute its work according to schedule, during the periods when float was available, excused it from its responsibilities and the consequences flowing from its variation instructions required later when the float had been consumed. The facts of the case related to an increase of work which the contractor was originally not aware of.

In conclusion, a Contractor may consider pacing activities that are not on the critical path (i.e. slowing down non-critical activities so that they proceed at the same relative pace as the delayed activities on the critical path. The Delay and Disruption Protocol recommends that if the Contractor intends to pace non-critical activities, then it should notify the Engineer of its intention in that regard, along with its reasons for doing so.⁴ This will assist by confirming that the decision to pace the work was deliberate and that the Contractor is willing and able to resume the work at an un-paced rate had there not been a preceding delay. It would therefore be difficult for the Engineer to argue against the claim for extension of time as a result of a subsequent delay by the Employer.

¹ The Management Guide to the General Conditions of Contract, 1st Edition, 2010 and 2nd Edition 2015

² Contract Scheduling Provisions, RJ Long P.E

³ *Weaver v Bailey* 19 Cl. Ct 474(1990)

⁴ Society of Construction Law Delay and Disruption Protocol, 2nd edition February 2017, page 41