ADDLESHAW GODDARD

THE SCL DELAY AND DISRUPTION PROTOCOL 2ND EDITION FEBRUARY 2017 – UPDATED AND IMPROVED

Summary – the main changes

- Emphasises the importance of early submission of claims and discourages 'wait and see assessments'.
- Recognises additional methods of delay analysis and no longer indicates preference for 'Time Impact Analysis' where the assessment is being made at a time distant from the event.
- Provides revised and enhanced guidance, including record keeping, global claims and concurrency and methods of disruption analysis.

What's it about?

The first edition of the SCL Delay and Disruption Protocol, dated October 2002, provided helpful guidance on many of the common issues relating to delay and (to a limited extent) disruption often found to occur on construction projects. It was generally well received, and it has enjoyed a wide readership both in and outside the UK. However, several issues have arisen since. One of the aims of the First Edition was that, in time, most contracts would adopt the Protocol's guidance as the best way to deal with delay and disruption issues. In fact this has not happened in practice and there are almost no cases in which the Protocol has been cited.

Further, the Protocol's clear preference for the use of Time Impact Analysis (**TIA**) as a method of delay analysis both during the project and for delay analysis after the event, was often cited by claims consultants and occasionally experts as a justification for the use of that method in making claims even when the results were erroneous and/or theoretical (often to the advantage of the contractor) rather than reflecting what actually happened.

At a 10-year anniversary conference in 2013, David Barry, Principal of Blackrock PM, proposed at the very least that the recommendation for the use of TIA for disputes after the event should be removed, and that the list of methods of delay analysis should be extended to include two additional methods now commonly in use – Time Slice Windows Analysis and As-planned v As-built Windows Analysis. The remit for the drafting committee was not to redraft the Protocol, but it was agreed that it should also review the following areas: identification of case law that references the Protocol, records, Global claims and concurrent delay, consideration of claims during the currency of the project, model clauses and disruption. These are the principal areas of change in the Second Edition published in February this year[1] . In Guidance Part A, the Protocol now defines delay, disruption and acceleration and their interrelationships, and in Guidance Part B the guidance on Core Principles is set out

Why does it matter?

It is no longer intended that the Protocol should be incorporated into a contract and the model clauses for doing so, included in the first edition, have been dispensed with.

1 See the SCL website: https://www.scl.org.uk/resources.

The areas of particular interest in the Second Edition are the revisions in Sections 1, 4, 10, 11 and 18. In section 1, it is recommended that a record keeping regime is agreed so that there are no disputes about the records after the event. In section 4, it is proposed that the prospective effect of delays is determined contemporaneously using the TIA method of delay analysis and that extensions of time should be assessed as close to the event as possible so that the common 'wait and see' approach is discouraged.

Section 10 sets out revised guidance on the meaning of concurrent delay and how it should be considered. Although, the approach proposed is likely to be correct in most circumstances, it will not find favour with all, and the correct approach may depend on the particular facts of the case in question.

Section 11 deals with the analysis of delay when the analysis is being carried out at a time that is distant from the delay event. This removes the preference for TIA for the retrospective analysis of delay and adds two, now commonly used, methods of delay analysis as described above. The following table summarising each method now referred to is included at paragraph 11.5:

METHOD OF ANALYSIS	ANALYSIS TYPE	CRITICAL PATH DETERMINED	DELAY IMPACT DETERMINED	REQUIRES
Impacted As-Planned Analysis	Cause & Effect	Prospectively	Prospectively	▶ Logic linked baseline programme. ▶ A selection of delay events to be modelled.
Time Impact Analysis	Cause & Effect	Contemporaneously	Prospectively	▶ Logic linked baseline programme. ▶ Update programmes or progress information with which to update the baseline programme. ▶ A selection of delay events to be modelled.
Time Slice Windows Analysis	Effect & Cause	Contemporaneously	Retrospectively	▶ Logic linked baseline programme. ▶ Update programmes or progress information with which to update the baseline programme.
As-Planned versus As- Built Windows 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. ▶ A selection of delay events to be modelled.

For those not familiar with each of these methods, a helpful summary of the question that in effect each of the above methods responds to is set out in the following table[2] :

2 This table is not to be found in the Protocol.

METHOD	THE QUESTION IT ANSWERS
Impacted As-Planned Analysis	What effect would this event(s) have had on the completion date assuming everything else went exactly as planned in the programme?
Time Impact Analysis	What was the likely effect of this event(s) on the completion date adjudged from the point in time when it was instructed or arose?
Time Slice Windows Analysis	What was the contemporaneous or actual critical path to completion throughout the works and what were the causes of delay thereto?
As-Planned vs As-Built Windows Analysis	What was the contemporaneous or actual critical path to completion throughout the works and what were the causes of delay thereto?
Retrospective Longest Path Analysis	What was the as-built critical path to completion, viewed retrospectively, and what were the causes of delay thereto?
Collapsed As-Built Analysis	But for the event(s) when would the completion date have been achieved?

Now what?

The second edition of the Protocol provides a valuable update and additional guidance, among others, in the areas of records, delay analysis (during and after project completion), concurrent delay, global claims and disruption; it removes any bias towards any particular method of delay analysis for the retrospective analysis of delay, and will no doubt be a helpful point of reference for the future debate on delay and disruption.

With thanks to:

ROBERT PALLES-CLARK
Director of Blackrock PM Limited
Delay and quantum Expert