Belated Determination of EOT

Article Published on AACEI

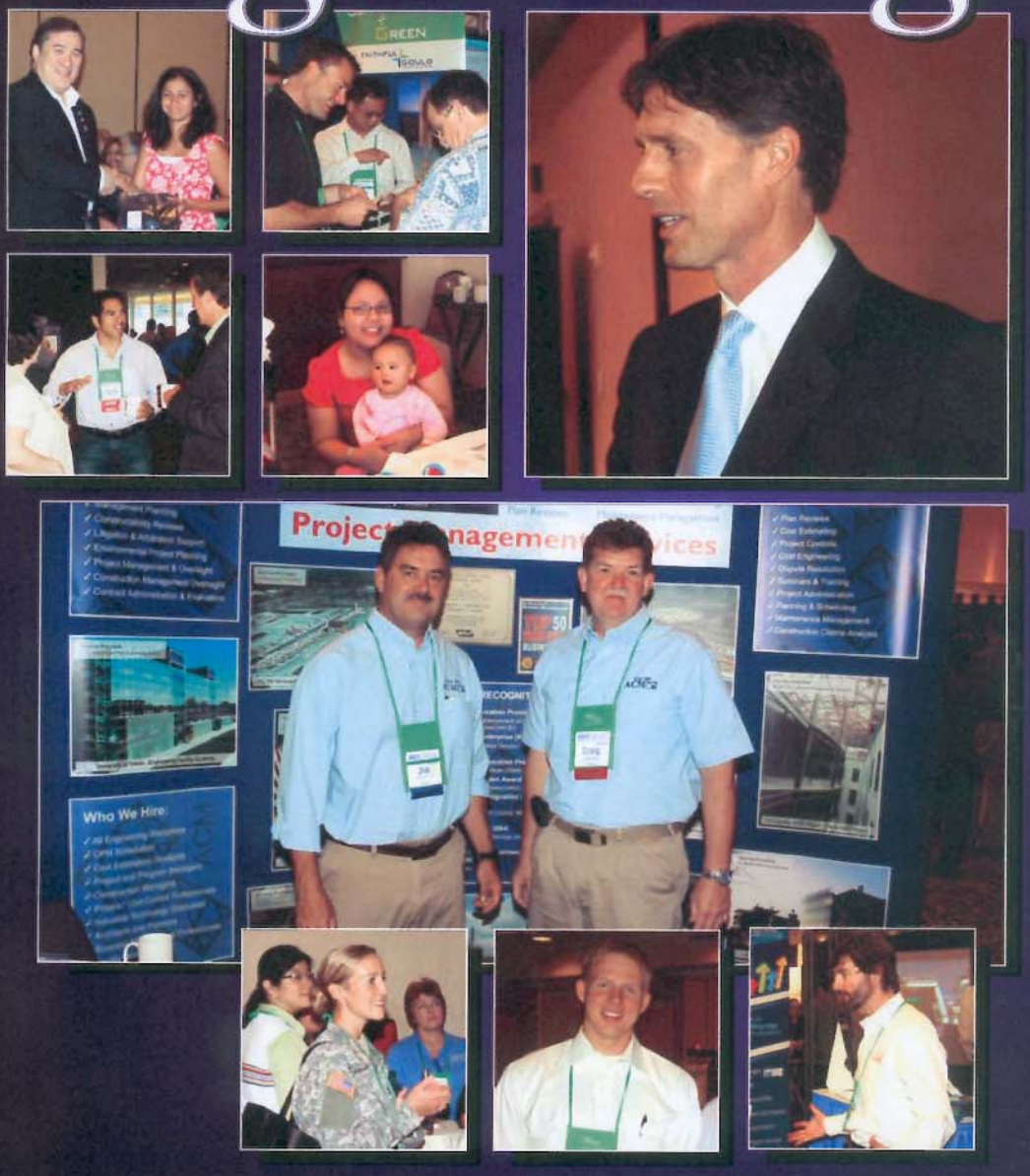
Cost Engineering Journal - August 2007

August 2009

Cost Engineering

The AACE International Journal of
Cost Estimation, Cost/Schedule Control, and Project Management

Promoting the Planning and Management of Cost and Schedules



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TECHNICAL ARTICLE — PEER REVIEWED

The Consequences of Belated Determination of Extension Claims Under FIDIC Contracts

Hilal A. Itani

ABSTRACT: The contents of this article on the consequences of belated determination of extension claims under the Federation Internationale Des Ingenieurs-Conseils (FIDIC) contracts are based on the author's own experience and academic background. FIDIC is the International Federation of Consulting Engineers. The acronym stands for the French version of the name. The contents of this article do not, by any means, reference any specific project management company, contract administration company, engineer, consultant, employer or owner. The purpose of this article is only to reflect some possible effects that may result from a belated determination of time extension claims. The purpose of this article is to shine light on the general and harsh conditions that are set out in contracts. These conditions are related to extensions of time and financial claims. This article will describe some of the time extensions and financial claim clauses that fall under the (FIDIC) 1987.

KEY WORDS: Claims, contracts, contractors, engineers, owners, and time extensions

Prior to the recent economic recession, during the last quarter of 2008, the construction industry was passing through a boom era, particularly in the Middle East and Gulf Regions.

Dubai, for example, has been attracting the attention of many regional and international contractors. Beirut, as another example, witnessed and is still witnessing, a refreshing leap after the settlement of a political disturbance that has been shaking Lebanon for more than three years.

This constructive environment has shifted the strategy of the employers' and/or owners' contract conditions, to stringent and harsh "take-it-or-leave-it" conditions. In turn, this shift has resulted in an increase of extension of time claims, as well as financial compensation claims, issued by the contractors. While most of the contracts prepared by the employers and/or owners request explicit timely submission of notifications and detailed particulars, the contracts remain silent regarding engineers' response time for contractors' entitlements for both time and cost reimbursements.

The purpose of this article is to shine light on the general and harsh conditions that are set out in contracts. These conditions are related to extensions of time and financial claims. This article will describe some of the time extensions and financial claim clauses that fall under the Federation Internationale Des Ingenieurs-Conseils (FIDIC) 1987. FIDIC is the International Federation of Consulting Engineers. The acronym stands for the French version of the name. These forms of contracts were reprinted 1992, as **The Conditions of Contract for Works of Civil Engineering Construction**, 4th edition. This book will hereafter in this article be referenced as the **Red Book** [2]. It defines the types of delays that may occur during the course of a contract. It also details the consequences of belated determinations of time extensions and financial claims by engineers and/or consultants.

The **Red Book** is recommended for general use for the purpose of construction of such works where tenders are invited on an international basis. The conditions, subject to minor modifications, are also suitable for use on domestic contracts. The version in English of the conditions is considered by FIDIC as the official and authentic text for the purpose of translation [2]

Contractual Background

The general conditions of contracts, as outlined in the Red Book include two clauses related to the procedure of submitting time extensions and financial claims. Clause 44 is divided into the following sub-clauses.

- **44.1**—[*Extension of Time for Completion*];
- **44.2**—[*Contractor to Provide Notification and Detailed Particulars*];
- **44.3**—[*Interim Determination of Extension*]; and
- **Clause 53**—[*Procedure for Claims*].

The outline of this general procedure is summarized in figure 1.

As stated in the introduction section of this article, most of the prepared tenders, if not all, are amending these conditions by applying additional stringent time limitations to the general condition time limitations that are already included.

An example of one such condition used states, "Failure of the contractor to meet the aforementioned notice and detailed particulars periods, shall explicitly waive the right of the contractor to claim..."

In this article, the legitimate application of the waiver of these rights will not be challenged, however the consequences of waiving these rights will be examined.

The general conditions of the **Red Book**, irrespective of the application of the particular conditions, imposes on the contractor certain time frames regarding time extensions and financial claims. However, the general conditions, in reference to particular conditions, remains silent when it comes to an engineer's determination and response time frames. The only time frame set out in the contract is the "without undue delay" time frame.

In addition, sub-clause **1.5** [*Notices, Consents, Approvals, Certificate and Determinations*] stipulates that determinations must not be "unreasonably withheld" or delayed.

However, most, if not all, construction contracts face the same problem of the belated determination of such claims. The contractor submits his first interim claim within the required 28 days, then he submits his next interim claim within another 28 days, then another and another. Having waited more than 28 days after submitting the latest claim, the engineer responds and calls upon the contractor to proceed with the contractual condition. Then the engineer usually issues a belated determination by drastically determining a very small portion of Contractor's entitlements, while the remaining portion is nullified.

Figure 1— General Sequence of Claims Procedure Under the Red Book

What does undue delay means? When does the determination become unreasonably withheld?

The FIDIC organization states that, "FIDIC does not impose a time limit on the engineer because the actual time needed for him to make his determination will depend on the circumstances and the details in the information provided by the contractor. However, the "without undue delay" emphasizes the need for the determination to be made as soon as possible.

Sub-Clause 1.5 also requires that any determination "shall not unreasonably be withheld or delayed." This gives the contractor the opportunity to raise a query if he needs the determination in order to plan his work" [6].

In addition, FIDIC further explains that: "The engineer must then respond with a given time (or a reasonable time) - he or she cannot wait until completion to see if the contract actually needs the time extension."

If the event occurs after the contractual time for completion and the contractor is running late, he may still be entitled to an extension, if the circumstances have caused him even more delay (and it was not his fault). If the engineer does not grant a time extension (or reply to the contractor's claim) within the time restraints of the contract, any relief decision will very much depend on the circumstances. I would suggest that the engineer cannot determine liquidated damages before he or she has replied to the contractor's claim and definitely rejected it.

As you will see, any matters concerning extensions of time depend very much on the circumstances at the time, and it is very difficult to give general answers. The intention of the FIDIC conditions is that the matter shall be dealt with as quickly as possible. This is so the contractor knows if he or she will get an extension and can therefore plan the rest of the work accordingly.

If the contractor is of the opinion that the engineer is unreasonably delaying the matter, he or she should read Clause 5.1 (both books) and see if this can help" [5].

By referring to court cases, in Hick v. Raymond & Reid Case (1983) AC 22, 29, Lord Herschell L.C. of the House of Lords said, "The only sound principle is that the "reasonable time" should depend upon the circumstances which actually exist."

In addition, in Perini v. Commonwealth of Australia (1969) 2 NSWR 530, J. MacFarlan of the Supreme Court of New South Wales said, "The measurement of a reasonable time... is always a matter of fact. Plainly the contract administrator must not delay, nor may he or she procrastinate, and in my opinion he or she is not simply entitled to defer a decision. On the other hand he or she is, in my opinion, ... necessarily obliged to have available for that consideration such time as necessary to enable him or her to investigate the facts which are relevant to make a decision. When that investigation is complete, I am of the opinion that the decision should be made."

As such, and based on the above referred to references and court cases, the "reasonable time," "undue delay," and "unreasonably withheld," are explained. Therefore, the author's opinion in this matter is as follows:

- The contractor is generally limited to a duration of 28 days, or any other agreeable duration, to submit detailed particulars, i.e., to investigate the facts, prepare, and properly substantiate.
- The reasonable time for the engineer to investigate the facts, in the author's opinion, should range between 14 days (half the duration of submittal) and 28 days, all including the necessary time for consultation.

The situation becomes more pressuring on the engineer in two cases; when the contractor is submitting interim claims, or when the time approaches completion and no extension of time is yet determined.

In the first case, the engineer should grant an interim extension, at least prior the submittal of the second interim. While in the second case, the engineer will subject himself, the contractor, and the employer in to the following tense situation where:

- The contractor is concerned about liquidated damages,
- The employer is concerned about "time at large" [1] and potential acceleration costs.
- The engineer might consider granting an unquantified extension of time, thus giving more excuse for the contractor to claim for acceleration costs, or granting an estimated/interim

quantified extension of time to permit for proper assessment.

Before proceeding any further with the consequences of such action by the Engineer, the next section of this article identifies the types of delays encountered under provisions of the **Red Book**.

Types of Delay

For the purpose of this section, the general definitions of the "Society of Construction Law – Delay and Disruption Protocol" [4] shall be adopted in identifying the following types of delay.

- **Culpable/Contractor Delay**—is an expression commonly used to describe any delay caused by a contractor. Nevertheless, there are two types of contractor delays: *contractor delay to progress* which does not impact the completion date of the project. And, *contractor delay to completion* which impacts the completion date of the project.
- **Employer Delay**—is an expression used to describe any delay caused by an employer. Again, there are two types of employer delays: *employer delay to progress* which does not impact the completion date of the project. And, *employer delay to completion* which impacts the completion date of the project.
- **Excusable Delay**—is used to describe employer delay in respect of which the contractor is entitled to an extension of time.
- **Non-Excusable Delay**—is used to describe contractor delay in respect of which the contractor is not entitled to an extension of time.
- **Compensable Delay**—is used to describe employer delay in respect of which the contractor is entitled to compensation.
- **Non-Compensable Delay**—is used to describe contractor delay in respect of which the contractor is entitled to compensation.
- **Concurrent Delay**—is used to describe the situation where two or more delays, one from the employer, the other from the contractor, arise at different times, their effect are felt (on whole or in part) at the same time. At this stage, several conflicting arguments and debates with respect to compensation of concurrent delay have been reviewed, nevertheless, rendering the issue of concurrent delay as a very debatable one. As far as this article is concerned, concurrent delay shall be considered as an excusable non-compensable delay.

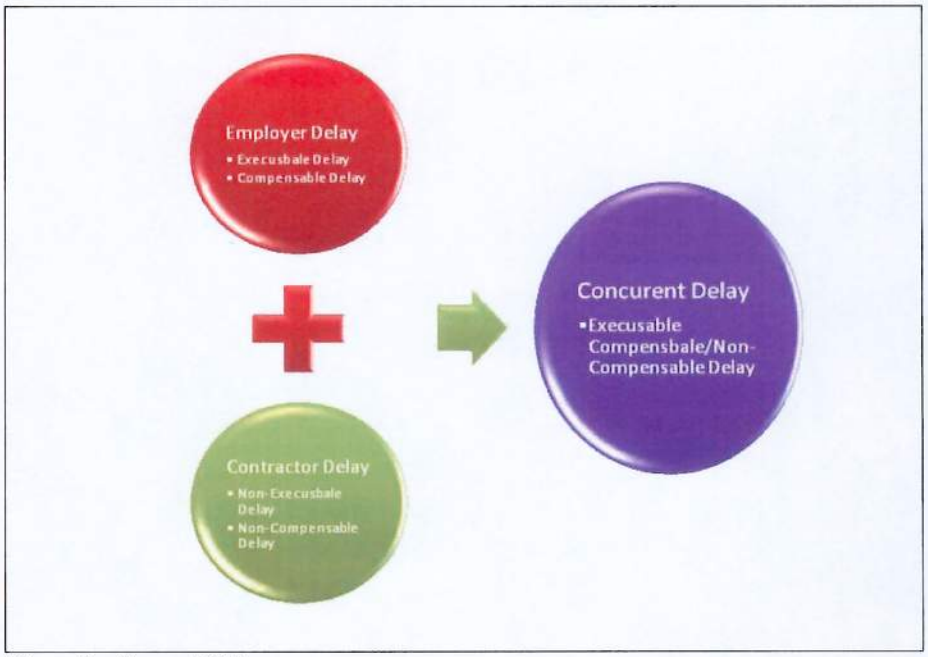

Figure 2— Types of Delay

To sum up, figure 2 illustrates the types of delays mentioned here. All are in accordance with the "Society of Construction Law – Delay and Disruption Protocol."

Consequences of Belated Determination of Time Extension Claims

What happens when the engineer's determination is delayed? Upon issuing the delayed determination, the contractor is surprisingly not entitled to his or her full rights. To make it worse, he or she is accused of concurrency, because he or she was delayed in executing the work during the impacted delayed claimed duration.

Contractors usually defend their position of being accused of concurrency by referring to "pacing delay" by proclaiming that in the realization of existence or potential existence of employer delay on the longest critical path, the contractor may decide to slow down their work on non-critical activities in order to keep pace with employer delay [7].

In other words, and in a normal sequence when the employer causes an event leading to a legitimate extension of time for the contractor, the engineer should issue promptly and without undue delay an interim time extension, setting a new completion date for the project.

In such a case, the contractor is legitimately entitled to reallocate his or her resources and efforts in a manner convenient to him or her and to change the sequence and duration of activities. This is as long as they occur within the time frame of the newly set completion date. This reallocation of efforts and modification of the contract is commonly referred to as "pacing."

To illustrate further, figures 3, 4, 5 and 6 show the usual controversy of who comes first in concurrent delays.

Figure 3 shows the consented / approved baseline schedule for which activity A dominates the longest critical path, while activities B, C & D are non-critical activities with a total float of 30 days.

Figure 4 shows that the employer has caused a delay of 70 days to activity C, thus shifting the longest critical path and shifting the completion date by 40 days. However, the contractor also incurred a delay of 30 days to activity D. In this situation, the contractor is entitled to a 40 day extension. However, the engineer, after delaying his determination of the extension of time, compensates the contractor for only 10 days. Thus, accusing the contractor of 30 days of concurrent delay.

However, in the author's opinion, the contractor is entitled to 40 days compensable delay because of the fact that

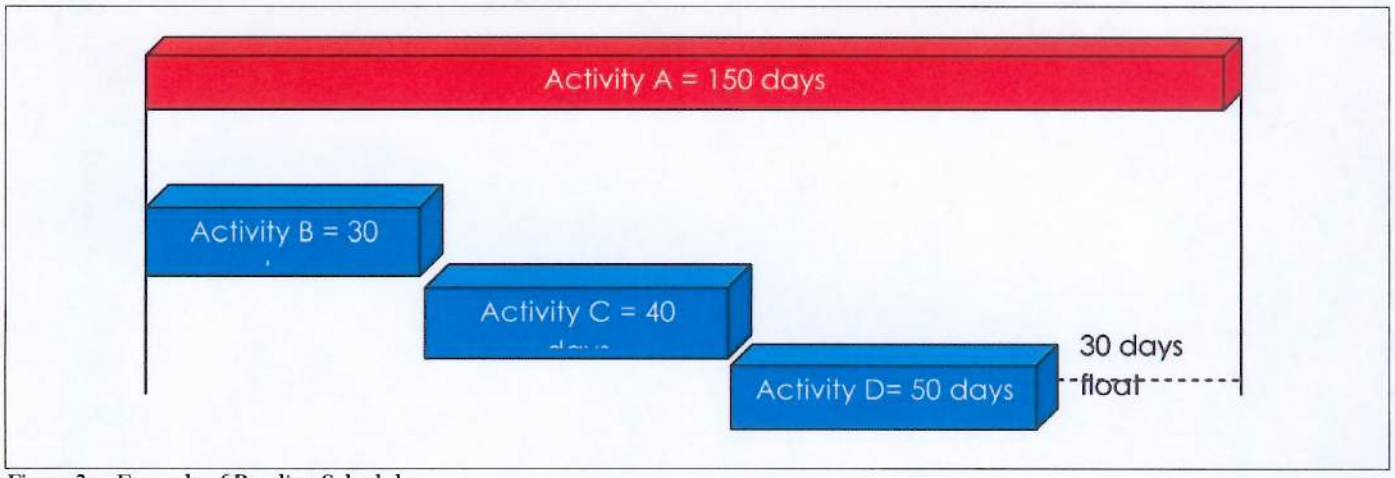

Figure 3— Example of Baseline Schedule

the contractor paced his works because of the existence and the impact of employer delay.

In figure 5, the contractor contributes to a 30 days delay to activity C, and then the employer contributes to another 70 days of delay. In this case, in the author's opinion, the contractor has consumed the allowed for float of 30 days and thus the contractor is entitled for a 70 days compensable delay.

What happens, if the contractor contributes to 40 days of delay, and then the employer to 70 days of delay?

In figure 6, the contractor consumed the 30 days float and another 10 days which puts him in culpable delay. However, the 70 days delay of the employer shifted the time for completion by 70 days. Therefore, the contractor should be entitled to 70 days excusable delay, out of which 60 are compensable and 10 are concurrent.

Furthermore, the disruption resulting from engineer's changes also affects and delays the unchanged activities by taking partially the contractor's efforts and resources planned for these activities toward other activities. This legitimate delay has also been disregarded by the engineer and unduly considered as a "concurrent" delay [3] and usually referred to as "cumulative delays," "ripple effect" or disruption.

Based on the above, "concurrent" delays whether their nature was pacing or legitimate delays to unchanged activities, or actual concurrency, all are being considered by a substantial number of engineers as "concurrent" delays.

Consequently, in order to avoid continuous conflicts, construction contracts now need to impose/illustrate the time frame for the engineer's determination, definition of concurrent delays, and definition of pacing delays. These, if implemented, will mitigate conflicts and their effects that may result from the belated determination to time extension claims.

All the analyses conducted in this article could have been avoided had engineers issued timely extension of time determinations. However, in the real world, this is not usually the case. The belated determination by the engineer may result to the following consequences:

The contractor, after pacing his works and accommodating himself or herself to a time for completion, as claimed by the contractor, becomes astounded by the long-awaited determination for a revised time for completion by the engineer. In addition, the contractor is accused of concurrency for the paced work.

Consequently, constructive acceleration claims will begin to rise because of the fact that the contractor considers that the time for completion became unreasonable and impractical to meet without taking such acceleration measures.

Moreover, when approaching such unreasonable time for completion, the employer has two choices; either to grant

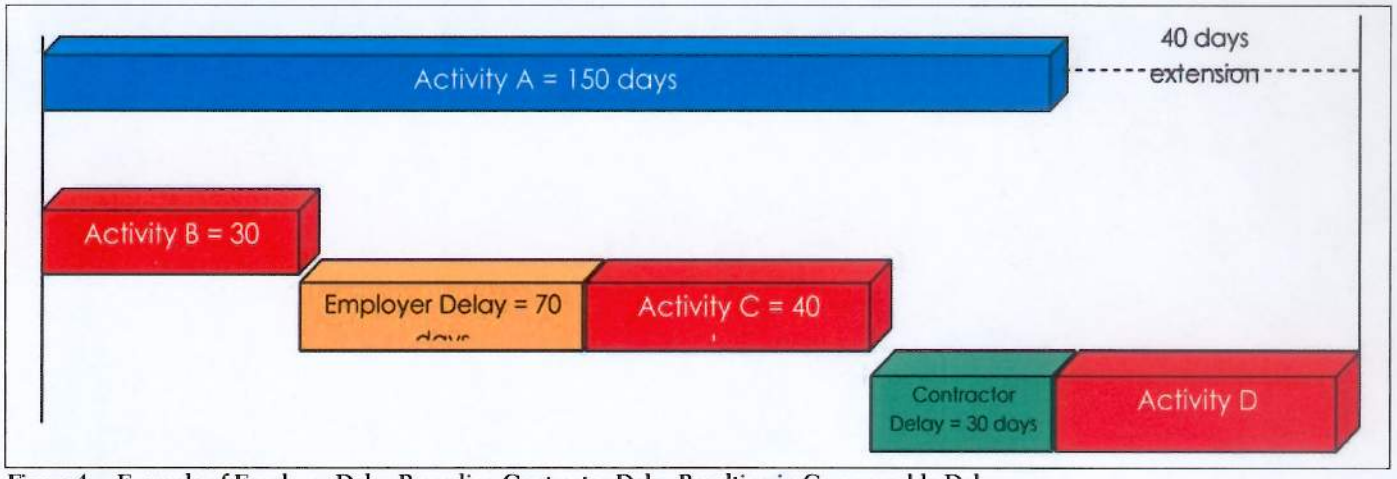

Figure 4— Example of Employer Delay Preceding Contractor Delay Resulting in Compensable Delay

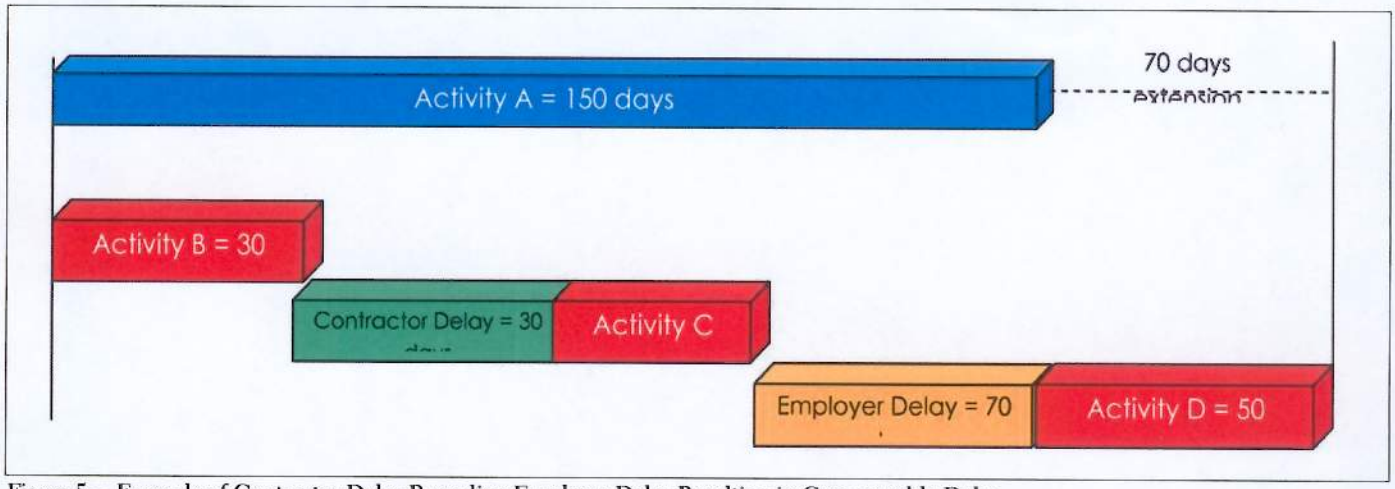

Figure 5— Example of Contractor Delay Preceding Employer Delay Resulting in Compensable Delay

another extension of time to cover up for additional time to complete the work, or to apply liquidated damages for each day of delay behind the pertinent time for completion. Failure to make any of these choices will put the project in a "time at large" situation; a status that no employer would like to reach [1].

In this context, the following two main questions may arise:

- What if the engineer does not reply and kept the time at large running?; and,
- What if the engineer does not determine and impose later liquidated damages?

These questions are not entertained in this article, and should be tackled in another illustrative article.

Nevertheless, the thought that liquidated damages are going to be applied, will do nothing but aggravate the tension between the contractors and employers, thus spending more time in sending contractual letters, allowing for the tedious arbitration procedures to commence, and damaging, if not ending, the contractor-employer relationship.

The author recommends and advises contractors to emphasize their needs on the clauses that set the responsibilities of the engineer. This is particularly true for the engineer's response time for time extension claims. When entering into agreements and/or negotiating tender conditions, remember that contractors have the right to amend the tendering conditions during final negotiations on certain jobs. This is the same right as the employer has acquired while issuing the tender. ◆

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ABOUT THE AUTHOR

Hilal A. Itani is the Contracts Manager at Hourie Enterprises - General Contractors. Mr. Itani holds a Diplomat degree in civil engineering from the Lebanese University and Masters degree in engineering management from the American University of Beirut. Mr. Itani is

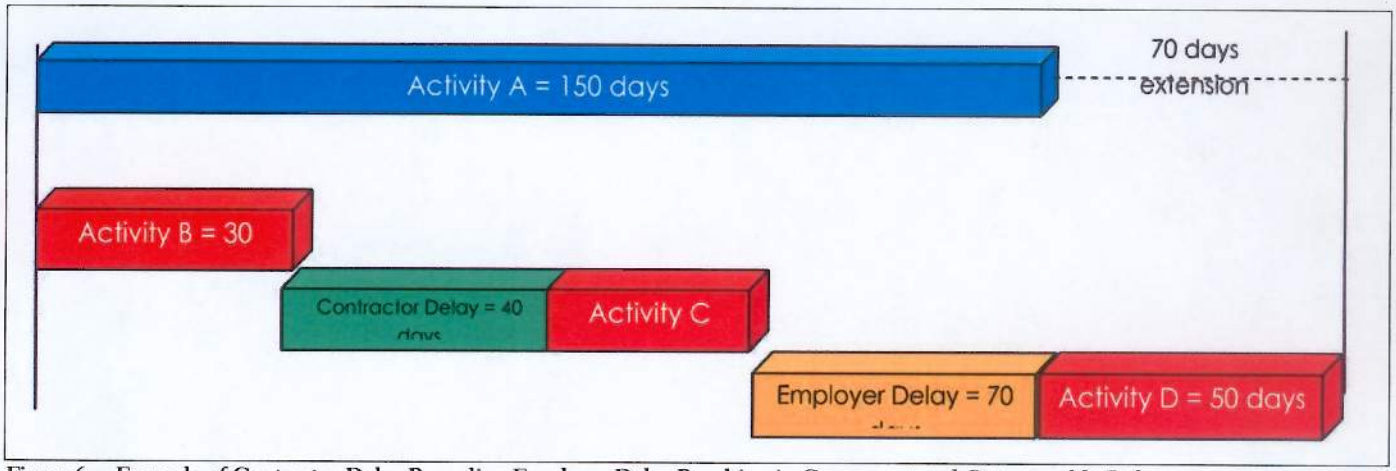

Figure 6— Example of Contractor Delay Preceding Employer Delay Resulting in Concurrent and Compensable Delay

also an associate member of the "Chartered Institute of Arbitrators" – Lebanese Branch # 024088, and a member of "Royal Institute of Chartered Surveyors" – Lebanese Branch (LACS). He can be contacted by sending e-mail to: hai@hourie.com, or: hilal.itani@gmail.com.

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