'What's sauce for the goose is sauce for the gander'. By Roger Gibson

Congratulations to the drafting team of the SCL's Delay and Disruption Protocol. They have tackled and 'put their money where their mouth is' in a document that addresses the thorny area of delay and disruption. In an article on their dedicated website, the gang of 11 (the drafting team) say they have used three tests as the criteria for judging the outcome of their endeavours and they consider that their Protocol passes these tests with flying colours. Does it?

Test one: "Is it clear? (Does it indeed bring clarity to the legal grey areas?)".
The Protocol covers three phases; namely, (i) pre-contract: providing model clauses for inclusion in specifications and contract documentation (ii) post-contract: guidelines for dealing with extensions of time during the course of the project, and (iii) disputes: guidelines for dealing with disputed extensions of time after completion of the project.
In principle, the model clauses should be adopted by the industry; for if followed they will ensure that programmes and record keeping will improve, thereby reducing areas of conflict in the resolution of time-related disputes.
I do have reservations with the guidelines for dealing with extensions, and disputed extensions of time and these are expressed under test two below.

Test two: "Is it comprehensive? (Does it assist you all the way from the change event to determination of time and money entitlement)".
This is where I part company with the gang of 11. They have put their money on the 'time impact analysis' method of assessment using a 'first past the post' approach, (i.e. sequential analysis of individual delay events).
The time impact analysis' methodology is one form of assessment that could be adopted, but as the 'gang of 11' quite rightly point out, it relies on a credible as-planned programme in network format and good as-built records. More often than not, this information is not available in the majority of disputes, and making good these deficiencies makes the results of the analysis very subjective. In essence this method uses the contractor's intentions and sequence in his as-planned programme (usually prepared on day 1 of the project), and his as-built records which are derived from his *actual* sequence of working, i.e. original thinking and what actually happened. Apples and oranges. These are then fed into the computer, and using the contractor's as-planned programme sequence and work durations for the remaining works, hey presto – an extension of time is mathematically calculated. Not only do we have apples and oranges put pears as well!
A further major flaw with this methodology is that whilst calculating the likely impact of employer caused delays, it does not take into account contractor caused delays. For example, whilst calculating the effect of, let's say, an employer's design change on mechanical ductwork, what about the affect of the contractor's late submission for approval of his mechanical subcontractor which is ongoing and partly concurrent with the employer's design change.
Another flaw is that future activities are not adjusted to take into account the contractor's actual progress. Again, for example, his bricklayers may only be laying bricks at an average of 60 number per hour against a planned rate of 100 per hour.

In other words "what's sauce for the goose (should be) sauce for the gander".
Further, the first past the post approach, analyses events in sequential date order. What happens if two events, one employer responsibility and one contractor responsibility, occur on the same day? Is the one that happened at 8.30 am analysed before the one that occurred at 10.30? What if the earlier one take up the entire available programme float so that 2 hours later there is no float for the second event?

Test three: "Is it, on the whole, fair?". No, mainly for the reasons I give in relation to test two.
I also consider that the Protocol should give more weight to other methods of analysis, such as 'collapsed as-built' and 'windows technique'. These are described sparsely by the 'gang of 11', but cast aside in favour of the 'time impact analysis' method.
However, as I said at the start of this article; the boys have done good in tackling the thorny area of delay and disruption, but greater consideration should be given to other methods of analysis and the shortcomings of 'time impact analysis' methodology and 'first past the post' approach should be addressed.

I look forward to the SCL taking onboard these views and those of others when they publish their first update of the Protocol.

Roger Gibson

Roger Gibson has over forty years experience in the planning and programming of construction & engineering projects. He has been appointed as an expert on time related issues in numerous disputes, carrying out forensic planning and delay analysis studies.