



ADB

FIDIC Contract Management

Misconceptions about Contractor's Claims for Extensions of Time

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Delays & Extensions of Time

- The causes listed under Sub-Clause 8.4 Pink Book (PB)/ Sub-Clause 8.5 2017 Red Book (RB) are:

PB

8.4(a) Variations

2017 RB

8.5(a) Variations

Issue: Is Notification required and does time bar apply under SC 20.1/SC20.2?

PB

No notification for or time bar under SC 20.1 for direct Costs

Notification required and time bar for EOT and prolongation Cost claims

2017 RB

No notification or time bar of any kind [SC 8.5(a)]

Delays & Extensions of Time

- The causes listed under Sub-Clause 8.4 Pink Book (PB)/ Sub-Clause 8.5 2017 Red Book (RB) are:

PB

8.4(b) A cause of delay giving an entitlement under another Sub-Clause

2017 RB

8.5(b) A cause of delay giving an entitlement under another Sub-Clause

Delays & Extensions of Time

- The causes listed under Sub-Clause 8.4 Pink Book (PB)/ Sub-Clause 8.5 2017 Red Book (RB) are:

PB

8.4(c) Exceptionally adverse climatic conditions

2017 RB

8.5(c) Exceptionally adverse climatic conditions

Differences between PB and 2017 RB

PB

The FIDIC Contracts Guide 2000:

Probability of occurrence four or five times the Time for Completion

The above is not contractually binding

2017 RB

Now must be Unforeseeable per:

- SC 2.5 climatic data made available and/or
- Climatic data published in the Country for the location of the Site

Note the difference with SC 17.2(d): "any operation of the forces of nature", SC 17.2 is only applicable if the Works are damaged.

Delays & Extensions of Time

- The causes listed under Sub-Clause 8.4 Pink Book (PB)/ Sub-Clause 8.5 2017 Red Book (RB) are:

PB

8.4(d) Unforeseeable shortages in the availability of personnel or Goods
Caused by epidemic or governmental actions

PB

8.4 (e) Any delay, impediment or prevention caused by or attributable to the Employer, The Employer's Personnel, or the Employer's other contractors on the Site

2017 RB

8.5(d) Unforeseeable shortages in the availability of personnel or Goods (or Employer Supplied Materials) Caused by epidemic or governmental actions

2017 RB

8.4 (e) Any delay, impediment or prevention caused by or attributable to the Employer, The Employer's Personnel, or the Employer's other contractors on the Site

Delays & Extensions of Time

PB [SC 8.4] and **2017 RB** [SC 8.5]

The Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*]/ 20.2 [*Claims for Payment and/or EOT*] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [*Taking Over of the Works and Sections*] is or will be delayed by any of the causes stated above.

When determining each EOT, the Engineer shall review previous determinations and may increase but shall not decrease the total EOT

Delays & Extensions of Time

2017 RB added features [SC 8.5]

Clarified that an EOT is due if 10% increase in quantity of any item delays the Time for Completion

If 10% decrease in quantity of any item: Engineer can take into account favourable effect on the critical path of the Programme but cannot result in a net reduction to the Time for Completion

If delay is concurrent: the EOT shall be assessed in accordance with the rules stated in the Special Provisions. If not stated, concurrency is to be assessed as appropriate.

Contractor's claims

Sub-Clause (2017 RB in red if different)

Sub-Clause (2017 RB in red if different)	Time	Costs	Profit
1.9 Delayed Drawings or instructions	Yes	Yes	Yes
2.1 Right of Access to the Site	Yes	Yes	Yes
4.7 Setting Out	Yes	Yes	Yes
4.12 Unforeseeable Physical Conditions	Yes	Yes	No
4.24/ 4.23 Fossils	Yes	Yes	No
7.4 Testing (Additional tests/Delay)	Possibly	Possibly	Possibly
8.4/ 8.5 Extension of Time for Completion	Yes	No	No
8.5/ 8.6 Delay caused by authorities	Yes	Silent	Silent

Contractor's claims

Sub-Clause (2017 RB in red if different)

8.9 Consequences of Suspension

Time

Yes

Costs

Yes

Profit

No

10.2 Taking Over Parts of the Works

No

Yes

Yes

10.3 Tests on Completion (Delay)

Yes

Yes

Yes

11.8 Contractor to search

No

Possibly

Possibly

12.4 Omissions (Clarified in 2017 as part of Variation procedure)

No

Yes

No

Contractor's claims

Sub-Clause (2017 RB in red if different)

13.7/**13.6** Adjustments for Changes in Legislation

Time

Yes

Costs

Yes

Profit

No

16.1 Contractor's Entitlement to Suspend Work

Yes

Yes

Yes

17.4/**17.2** Consequences of Employer's Risks (**Liability for Care of the Works**)

Yes

Yes

Some

19.4/**18.4** Consequences of Forces Majeure (**Consequences of Exceptional Event**)

Yes

Sometimes

No

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. **The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.**

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

The time bar or “guillotine” clause

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

WARNING THIS PROVISION IS NOT AS AIRTIGHT AS IT LOOKS!

- A late notice of a claim with continuing effect might only be barred for the period prior to the notice.
- *Obrascon* – The date of issue of a Variation instruction might not start the 28 day clock running for a delay claim. The 28 day clock might start only at the date when the Works on Site start to experience actual delays.
- Failure to exercise this right throughout the Contract might be deemed to be a waiver of the right.

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

WARNING THIS PROVISION IS NOT AS AIRTIGHT AS IT LOOKS!

- Arbitrators and DB members generally do not like to “time bar” an otherwise valid claim on an administrative technicality.
- Note: **Gold Book Sub-Clause 20.1(a)**:
However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. **If the DAB considers that, in all the circumstances, it is fair and reasonable that the late submission be accepted, the DAB shall have the authority to overrule the relevant 28-day limit** and, if it so decides, it shall advise the Parties accordingly.
- Note: **2017 RB** weakens the time bar even further – discussed later.

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed.

There is no time bar under the PB however in the case of late submission of the fully detailed claim.

Delays & Extensions of Time - Step 1 SC 20.1 (PB)

- Balance of the amount of detail actually required is important.
- Frequent problem with Contractors not providing adequate details.
- However, frequent problem with Engineers requiring more than needed details.
- Be realistic about the validity of the claim.
- A DB or arbitral tribunal may find that an EOT was wrongfully denied.
- The above is true under the PB, 2017 RB or Gold Book

Delays & Extensions of Time - Step 1 SC 20.2.1 and 20.2.2 (2017 RB)

Some new definitions:

SC 1.1.6: **“Claim”** Means a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.

There is also a definition of **“Dispute”** (SC 1.1.29). Essentially a matter only becomes a Dispute following a rejection of an Engineer’s determination or if the Engineer fails to issue a determination in a reasonable time.

SC 1.1.56 **“Notice”** Means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [*Notices and Other Communications*].

SC 1.3 (b) “If it is a notice, it shall be identified as a Notice. If it is another form of communication, it shall be identified as such and include reference to the provision(s) of the Contract under which it is issued where appropriate.” Are Contract references required if the communication is identified as a Notice – No.

SC 1.3 (d) “ ... An electronically transmitted Notice or other communication is deemed to have been received on the day after transmission... ”

Delays & Extensions of Time - Step 1 SC 20.2.1 and 20.2.2 (2017 RB)

The time bar under the 2017 RB has become trickier to apply procedurally and can be waived by the Engineer or DAAB under certain circumstances.

Provisions of SC 20.1(a)&(b) [Notice of Claim] and 20.2.2 [Engineer's Initial Response]

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- If the Engineer thinks a Notice of Claim is time barred, he/she is to give a Notice to the claiming Party with "reasons" within 14 days.
- If the Engineer fails to do so – the Notice of Claim is deemed to be valid.
- **BUT**, if the other Party disagrees with the deemed valid Notice of Claim, the other Party can give a notice to the Engineer with "details" of disagreement.
- **Then**, the Engineer's determination of the Claim shall include a "review" of such disagreement.
- If the claiming Party receives a Notice and disagrees or considers that there are circumstances that justify a late submission, the claiming Party shall include "details" of such disagreement in its fully detailed claim.

Delays & Extensions of Time - Step 1 SC 20.2.1 and 20.2.2 (2017 RB)

There are now two types of Claims in the 2017 RB.

The second type of Claim is under SC20.1(c) and has no time bar language.

Provisions of SC 20.1(a)&(b) [*Notice of Claim*] and 20.2.2 [*Engineer's Initial Response*] are for Contractor's Claims for additional payment and/or EOT or for Employer's Claims for additional payment and/or extension of the DNP.

Provisions of SC 20.1(c) are for either Party's Claims for any other entitlement or relief.

These are essentially non-money claims for matters such as:

- Interpretation of a provision of the Contract
- Rectification of an ambiguity or discrepancy in the Contract.
- Access to the Site or to places where the Work is being carried out.
- However, it likely can include payment of an IPC where the Employer has not paid.
- No time bar language but 20.1(c) Claims are to be made "as soon as practicable".
- Expedited procedure going straight to Engineer's determination under SC 3.7.

Delays & Extensions of Time - Step 1 SC 20.2.1 and 20.2.2 (2017 RB)

New provisions of SC 20.2.4 [*Fully detailed Claim*]

- The claiming Party now has 84 days to submit fully detailed Claim. In the PB, the Contractor had only 42 days,
- In the PB there was no time bar for failure to submit a fully detailed claim within 42 days.
- In the 2017 RB there is a limited time bar which is applicable only if the claiming Party fails to submit a statement of the contractual and/or legal basis of the Claim within 84 days.
- If the Engineer thinks the fully detailed Claim is time barred, an identical procedure of Notices and counter Notices as described in the preceding slide is triggered.

Delays & Extensions of Time - Step 1 SC 20.2.1 and 20.2.2 (2017 RB)

What circumstances would justify a late submission of the initial Notice of Claim or a late submission of the statement of the contractual or legal basis of claim?

New provisions of SC 20.2.5 [*Agreement or determination of the Claim*]

The following “may” be taken into account but are not binding:

- Whether or to what extent the other Party would be prejudiced by acceptance of the late submission.
- In case of the time bar for the initial Notice, any evidence of the other Party’s prior knowledge of the event or circumstance giving rise to the Claim and/or
- In case of the time bar for the failure to provide the contractual/legal statement with the fully detailed Claim, any evidence of the other Party’s prior knowledge of the contractual and/or other legal basis of the Claim.

The Engineer is to make a fair determination, acting neutrally [SC 3.7].

The DAAB may revise the Engineer’s determination under Rule 5 [*Powers of the DAAB*].

CONCERN: Different Engineers and DAABs may apply the above inconsistently making reliance on a time bar defence unreliable.

Delays & Extensions of Time - **Step 2** SC 20.1 (PB)

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within the above defined time period.

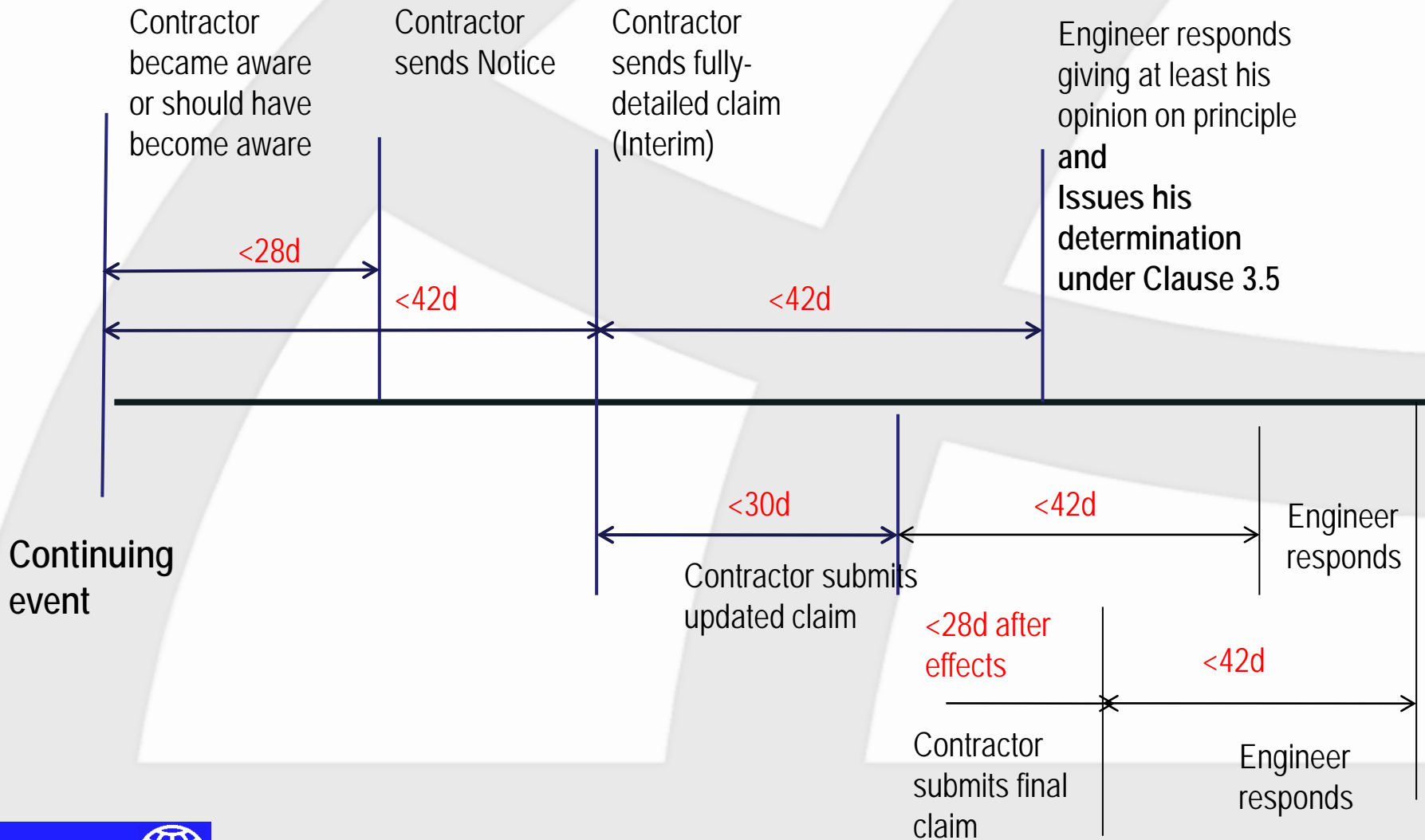
Delays & Extensions of Time - Step 2 SC 3.5 (PB)

Within the above defined period of 42 days, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

Delays & Extensions of Time - Step 2 SC 20.1/3.5 (PB)

- Some confusion in the PB and Gold Book Editions about the Engineer's obligation within the 42 days.
- No "guillotine" provisions like we saw for the Contractor's notice.
- **2017 RB: We have already seen the limited time bar provisions for failure to submit a statement of contractual or legal entitlement within 84 days.**
- The Contractor's claim under any FIDIC Contract can never be "deemed" to be accepted for failure to meet the 42 days.
- The determination can be issued after 42 days, but it is a breach of Contract. However, the Contractor will have difficulty proving that he suffered any damages for this breach.
- Note however that after 42 days, the Contractor's claim is deemed to be rejected and he can refer his claim to the DB/DAB/DAAB without waiting for the determination.
- **2017 RB: WARNING: The Contractor must now submit his claim to the DAAB when deemed rejected by expiry of the 42 days – or the claim is deemed time barred.**

Sequence for Contractor's Claims (PB)



Delays & Extensions of Time – Issue 1 (PB & 2017 RB)

What if the Engineer or Employer's Representative must have the Employer's approval to grant time extensions under the Particular Conditions of Contract?

- Does this mean he should not consult with both Parties and attempt to reach agreement? (No)
- Does this also mean he cannot issue a determination of a claim for EOT under his duty to make a fair determination in accordance with the Contract? (Very possibly he still has this obligation.)
- Even if the answer to the previous question were to be "yes", is delay in obtaining approval an excuse for not meeting the 42 days? (No)
- If the Engineer disagrees with the Employer, should he issue a determination anyway (very possibly – this creates a dilemma).

Delays & Extensions of Time – Issue 2 (PB)

Specific example of an instruction which is a Variation.

- Does the Engineer have to specifically state when an instruction is a Variation under Sub-Clause 13.1 [*Right to Vary*]?
- No. However, under Sub-Clause 3.3 [*Instructions of the Engineer*] if an Engineer's instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.
- There can be a dispute over whether an Engineer's general instruction (not expressly identified as a Variation) does in fact vary the Works and constitute a Variation.
- It is possible that the issue remains unresolved, or even unclaimed at all, for months or years before being resolved by the DB or arbitrators.

Delays & Extensions of Time – Issue 2 (PB)

Specific example of an instruction which is a Variation.

- If the “instruction” is eventually determined to be a Variation, what happens if the Contractor never issued a notice for an EOT under Sub-Clause 20.1?
- The claim is likely to be time barred under Sub-Clause 8.4(a): *A Variation or other substantial change in the quantity of an item of Work.*
- Is a claim for the direct cost of the Works, encompassed by the instruction, also time barred. **No**. Sub-Clause 8.4 only deals with time extensions, not additional payment for direct costs.

Delays & Extensions of Time – Issue 2 (2017 RB)

Specific example of an instruction which is a Variation.

- Under the 2017 RB, no notice is required for instructions which are Variations either for payment of the direct costs or for EOT and payment of prolongation costs.
- This has been made explicit by the language in SC 8.5(a).
- However, under the 2017 RB, if the Contractor considers that an instruction, which is not identified as a Variation, is in fact a Variation, he must now give a Notice with reasons “immediately” and before commencing any work.
- The Engineer has 7 days to confirm, reverse or vary the instruction or it is deemed to be revoked.
- Otherwise, the Contractor shall comply and be bound by the Engineer’s response. (SC3.5).
- Generally speaking, it is just as easy for the Contractor to lose its Claim for EOT under SC 3.5 of the 2017 RB as under SC 8.4 of the PB if he does not monitor regular instructions for “hidden” Variations.
- Keep in mind that a DAAB or arbitral tribunal can retroactively endorse the Contractor’s position that an instruction was in fact a Variation.

Delays & Extensions of Time – Issue 3 (PB) & (2017 RB)

What happens if the Time for Completion expires and the Contractor has not yet completed the Works?

- If no EOT is granted, but the Contractor keeps working after the expiry of the Time for Completion and the Employer does not terminate the Contract, is it possible to pay the Contractor?
- The answer is yes. In fact, the Employer is obliged to pay the Contractor even without an EOT. Under the terms of the any of the FIDIC Contracts the Employer is in breach of Contract if he fails to pay and the Contractor may slow down the rate of progress, suspend the Works or terminate.
- HOWEVER, many internal PIU/EA procedures require an EOT before they will make such payments after the expiry of the Time for Completion. This creates an exposure for the Employer.

Delays & Extensions of Time – Issue 3 (PB) & (2017 RB)

What happens if the Time for Completion expires and the Contractor has not yet completed the Works?

- Many administration staff consider that the FIDIC Contract expires when the Time for Completion expires. [This is not the case.](#)
- A FIDIC contract, like all international model forms of contract for construction, only expires when the Works have been taken over and the Defects Notification Period has expired and all the defects have been removed.
- This means, payments can and [must](#) continue after the expiry of the Time for Completion, if the Contractor keeps working (i.e. if he is not terminated by the Employer for delay)

Delays & Extensions of Time – Issue 3 (PB) & (2017 RB)

What happens if the Time for Completion expires and the Contractor has not yet completed the Works?

- Does any of the above change depending on whether or not there is a legitimate cause for granting an EOT? (i.e. does it matter if the delay was clearly the Contractor's fault?)
- No. The above is true whether the Contractor deserves an EOT, but it was not granted in time before the expiry of the Time for Completion, or if the Contractor is responsible for the delay

Delays & Extensions of Time – Issue 3 (PB) & (2017 RB)

What happens if the Time for Completion expires and the Contractor has not yet completed the Works?

- What can be done if the EA's finance or auditor absolutely refuses to allow a payment to be made?
- An EOT should ONLY be made by signed agreement between both Parties that the EOT is for administrative purposes only and that it is not determinative of the Contractor's right to an EOT. Both Parties typically reserve their rights in such agreements,
- An EOT should never be issued unilaterally by the Engineer or the Employer or the Employer will likely lose his right to collect delay damages and may also become liable for the Contractor's prolongation Costs.

Delays & Extensions of Time

Participants Questions & Discussion

Thank You!