

FRIDAY 21 APRIL 2006

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**Tony Caletka** The Midlands Expressway case has underlined the importance of agreeing the impact of changes before a job starts – and the usefulness of the SCL delay protocol

## Right from the start

IT USED TO BE THE CASE THAT CONTRACTORS on PFI projects could claim for additional payment or time only if the project company was also entitled to do so under its project agreement. That may no longer be the case after Mr Justice Jackson's decision in *Midlands Expressway*. He found that the restrictions on subcontractors' entitlements, known as "equivalent project relief", were not enforceable. The judge drew a parallel between this practice and pay-when-paid clauses (paid-if-paid in this case), and found that it went against the intentions of the Construction Act.

Why should this affect parties who need to assess the impact of change on PFI projects? Well, for a start it should ram home the need for a pre-agreed method of assessing the impact of

Parties need a method by which they can pre-agree how the impact of events will be determined. This protocol provides a framework

change at the time of an event to define the amount of time and/or money at risk. It is now more important than ever to establish the effect of events as early as possible so that additional funding can be sought when equivalent project relief is not available.

Agreeing the impact of an event at the time it occurs, rather than waiting to the end of the project, involves transferring the risk of that event through a final and binding change order. Negotiating the impact of changes at the time of the event is the only way to establish certainty. Investors who are about to commit to a 25-year deal need to have confidence in the construction

phase. They want certainty about the completion date, the outturn costs, and most importantly, the level of funding required to finish the project, with or without equivalent project relief.

The project company would then be left to negotiate the effect of the same event upstream and there would be little or no doubt over the impact of the event, with only the contractual entitlement the subject of a potential dispute – a legal interpretation of the project company's main PFI agreement.

Traditionally the contractor has also been the main investor in the PFI project companies, which has meant the risk associated with equivalent project relief was an accepted hazard. But where contractors do not have a significant PFI equity stake disputes regarding EPR are more likely.

All of this means that parties need a method by which they can pre-agree how they are going to measure the impact of change. The SCL delay and disruption protocol, published in 2002, provides a framework from which parties can agree such a method. It simply recommends measuring the impact of changes or events against the updated and approved programme. Also known as the time impact analysis method, this approach is perfectly suited for negotiating the impact of change at the time.

This 85-page document is often misquoted and misinterpreted, mainly because people choose to focus on only four pages of it (section four) which were intended to apply only if "the recommendations of the protocol and guidance

have not been adopted".

For example, Nick Lane stated (17 February, page 60) that the SCL protocol "recommends only one technique in all circumstances". The protocol clearly sets out guidance for the use of other techniques, and also clarifies that "users of the protocol should apply its recommendations with common sense".

The protocol is not perfect but considering the impact of *Midland Expressway*, its recommendations for managing programmes and measuring delays on live projects are worth reading again. The protocol has raised awareness of the factors that need to be addressed in contracts (float provisions, concurrent delays, extensions of time measurement, and so on).

It is unlikely you will ever read about a protocol-compliant project in the legal section of any magazine or law report. The impact of change is transparent on these projects, the method of determining the compensation for delay is agreed in advance and long-term disputes are avoided.

Tony Caletka is managing director of international operations at programme management consultant Greyhawk. He is also an expert witness and was on the SCL drafting committee.

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