

Should programmes be contractual?

STUART JORDAN* discusses whether works programmes should have contractual status and whether these 'contractual' programmes can be made to work.

SHOULD the programme/schedule be a contract document? Whatever people answer, it is usually a quick "Of course" or "Of course not". Is this response a matter of deep principle or simply out of habit?

In fact, a lot depends on the contractual status of a programme and, from experience, I see more contracts in the Gulf than elsewhere that provide for "contractual" programmes. It is important that everyone understands the consequences.

To be clear: the documents which make up most construction contracts will include something that looks like a programme, whether it is a preliminary tender submission or a short-term skeleton look-ahead. These, however, might be included just for illustrative purposes, with no contractual impact.

A programme is truly contractual when rights and/or obligations depend on it – most commonly, when the contractor is required to proceed in accordance with the programme. Or, for example, the programme can be a mandatory reference point for extension of time claims, for prolongation and disruption claims or obligations to accelerate.

Equally, a contract might not physically include a programme at signature but can provide for a programme to be submitted by the contractor and approved by the employer after works commencement. This programme will still have contractual force if rights and obligations are connected to it in the ways mentioned above.

Most contracts do not follow this approach. Programmes, in most cases, are provided simply as a tool for the understanding of works progress – past and future. Some newer standard forms follow good practice in the required format and

content of programmes, and in the way they should be updated throughout the build.

These are welcome developments which increase the usefulness of the programme but, generally, contracts still do not require the contractor to work to that programme.

So why make a programme contractual? Some employers seek, above all, the benefits of control and certainty: they can direct what is to be done on a day-to-day basis and can see whether those directions are being followed. They can hold the contractor to account immediately – at least that is the theory. One problem is that detailed sequencing imposed by the employer may not be the most efficient way to plan the works. Contractors are bound to price-in this inefficiency.

Additionally, a "contractual" programme has problems dealing with change. This manifests in two main ways:

First, any imposed programme is inflexible. Events will delay and disrupt progress throughout the build. Unless and until the programme is updated to recognise those events, the contractor is technically in breach of his obligation to work to the programme simply by being late. Additionally, the contractor cannot unilaterally resequence to work efficiently around the existing delay without being in additional (and willful!) breach.

Second, this process of updating can be complicated, assuming the employer wants to direct the revised programme in



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the same way as he directed the original plan – including steps to mitigate delays. By the time the programme is re-set, the opportunity for agile mitigation is surely lost and contractors' claims for time and money will inevitably be higher.

Contracts can address these problems with allowances for emergency "off-programme" steps and for contractor input to revised plans – but many do not. Contracts also do not usually address the difference between critical and non-critical

delay. A contractor working to a "contractual" programme may have a good argument for a time extension whenever an activity is delayed by an employer-risk event, regardless of whether it was critical to completion on time. Employers, on the other hand, usually expect to have the latitude to deny the extension if the activity was not, in fact, on the critical path; effectively ignoring the previously-mandated sequencing. When expectations are mismatched, disputes follow.

Overall, "contractual" programmes can be made to work but it requires care in drafting for all consequences – and this is often not done. This is another situation where employers can harm their position by trying too hard. Taking away contractors' control over the arrangement of the works removes their obligation to mitigate delay and disruption efficiently – and their valuable expertise in doing so.

We should be wary of investing too much in the programme by making it the sole means to show claims entitlement, change management, obligations to accelerate and all other future obligations on works progress. Where parties have done this, I have seen them expend most of their time arguing about how the programme should be manipulated or about the contractor's failure to follow it, even where this makes no difference to works completion.

In my view, a well-maintained programme works best as a tool to reflect reality, not to impose it. ■

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