



Key project and
procurement concepts

03 How to draft time related clauses

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Introduction

Extension of time (**EOT**) clauses are an essential element of infrastructure contracts.

Legally an EOT regime is required to preserve the ability of the Principal to claim liquidated damages. In some contracts, the entitlement to an EOT for delays caused by the Principal's acts of prevention is not specified. If the Contractor is delayed by such an act of prevention, both the date for completion and the obligation to pay liquidated damages for delays to that date will be set aside and replaced with an obligation to complete within a reasonable time. Such an obligation and the calculation of damages resulting from its breach (as opposed to pre-agreed liquidated damages) are too uncertain to be the basis of a sound commercial agreement and would undermine the expectations of the parties to the contract and other stakeholders, such as lenders.

Accordingly, it is essential to draft EOT and related clauses with great care.

In broad terms, the EOT regime will have five elements:

- the claims process
- the assessment process
- the dispute process
- a number of rules that govern how the process operates
- the availability of costs arising out of the delays.

A well drafted EOT clause requires consideration of the following matters:

- the required notices
- the grounds for an EOT claim
- the administrative and timing requirements for the claim
- the measurement of the extension
- the role of the assessor
- the exercise of the unilateral right to extend
- concurrent delay
- the role of the Programme
- the consequences of the Principal's failure to comply with the process
- the connection with delay costs and liquidated damages.

Notices

The EOT process usually requires three types of notice:

- a notice of delay (**NOD**), which notifies likely delays to completion irrespective of whether they are caused by an EOT ground
- the EOT claim
- a delay costs notice.

As discussed below, both steps will usually have mandatory administrative and timing requirements.

The NOD is intended to alert the Principal as to the possibility of a delay so that it can prepare for the claim and possibly investigate mitigation measures.

The EOT claim must contain such detail as is required to permit the Principal and the assessor to determine whether the claim is justified and, if so, the period of the extension.

The delay costs notification must set out the likely costs that will result from the delay, if any.



Grounds for an EOT

The EOT grounds must include Principal Acts of Prevention.

'Act of Prevention' is usually defined as 'an act of the Principal or its Associates or the omission of the Principal or its Associates to act in a manner that is required of them under the contract.'

An alternative formulation is 'any act or omission of the Principal or its Associates'.

The difficulty with the second formulation is that it gives rise to the inference that an omission can be an Act of Prevention even where there is no contractual obligation to act in the first place, thereby, arguably, giving rise to an implied obligation to assist the Contractor beyond the Principal's express obligations.

An Act of Prevention can be an action that is permitted by the contract. For example, the issuing of a variation is permitted by the contract, however, it is an Act of Prevention.

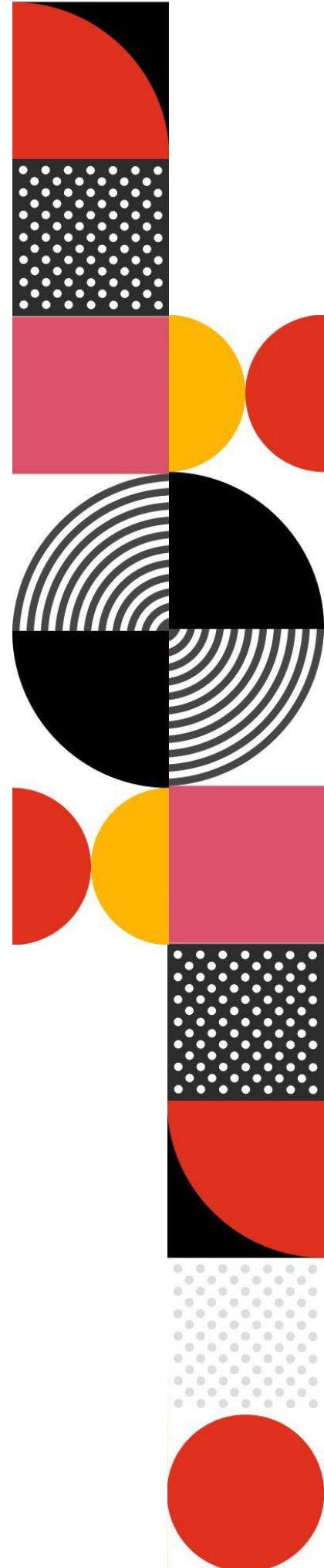
Other EOT grounds are a matter of negotiation. Grounds might include extreme weather, widespread industrial disruption, latent conditions, authority delays and claims by third parties. It is also permissible to allocate the risk of delay by agreeing that the Principal will accept the delay risk of either specific EOT grounds or all grounds up to an agreed limit and that the Contractor accepts the risk thereafter.

The contract should distinguish between delays that occur after the date for completion and before the date for completion. Once the date for completion has passed, the EOT grounds should be limited to Acts of Prevention.

The parties must decide whether there is to be an opportunity for such a dispute and, if so, how the dispute is to be conducted.

Time related disputes are very expensive and can be quite artificial in that they rely on re-creating events, often some years after they have occurred and are largely based on expert programming evidence.

Accordingly, the parties might opt to make some assessments, up to an agreed level, final and binding and to refer other disputes to a summary expert process.



Administrative and timing requirements

The contract should stipulate the requirements for the EOT claim.

The administrative requirements will typically include:

- the requirement that the notices and claims be in writing and addressed to the Principal (usually through the Principal's Representative) and the assessor
- the information to be included, such as a description of the delay event, the effect of the delay, the duration of the delay, the mitigation being undertaken and a markup of the Programme.

Compliance with the administrative requirements and the timing requirements are usually expressed as conditions precedent to the entitlement to an extension of time. If that is done and the requirements are not met, then the Contractor will lose its ability to claim the EOT.

It is important for all parties that the administrative requirements are sensible. The purpose of the administrative requirements is to allow EOT claims to be assessed in a fair and timely manner and for delays to be addressed. They should not be used to trap Contractors or to create an administrative burden that will inevitably affect the performance of all of the parties.

All of the steps in the EOT process should be subject to sensible timing requirements.

The purpose of the timing requirements is not to set up unreasonable barriers to claims, but to ensure that EOT claims can be dealt with efficiently and in a timely manner so that all parties know the status of the Programme.

Where the administrative requirements are important, which will usually be the case, they should be expressed as conditions precedent to the Contractor's entitlement to an EOT. If that approach is not taken, the failure to comply with the requirements will only be a breach of contract, leaving the Contractor entitled to the extension and the Principal with an ineffective right to claim damages arising out of the failure to comply.

A sample clause is as follows:

Notice of Delay Event

The Contractor must immediately give notice to the Principal of all incidents, circumstances or events of any nature affecting or likely to affect the progress of the Contractor's Activities which might reasonably be expected to result in a delay to the achievement of any Milestone by its Milestone Date and/or achieving Practical Completion by the Date for Practical Completion (**Delay Event**).

Further notice

Within ten Business Days after a notice is submitted in accordance with clause [#], the Contractor must submit to the Principal a further notice referring to this clause [#] which must include:

- a) the material circumstances of the Delay Event including the cause(s)
- b) the nature and extent of any delay caused by the Delay Event
- c) the corrective action already undertaken or to be undertaken
- d) the effect on the critical path noted in the Programme
- e) whether, in its opinion, the Delay Event qualifies as an Extension Event, and if it does, the period (if any) by which in its opinion the Milestone Date and/or Date for Practical Completion should be extended.



Measurement

The extension of time granted should be the duration of the delay to completion, taking into account reasonable mitigation, the Contractor's contribution to the delay, if any, opportunities for mitigation and concurrency.

The initial step is for the parties to agree who 'owns the float' in the Programme.

Float is the period of time that can be lost before completion is actually delayed beyond the contractual date for completion.

If the Principal owns the float, the Contractor will only be granted an extension of time to the extent that completion is delayed beyond the date for completion. In other words, if the delay does not cause the likely date of completion to be later than the contractual date for completion, there is no extension of time. The rationale for that approach is that the purpose of the EOT clause is to alleviate the Contractor's obligation to pay liquidated damages and that is not triggered until the date for completion has been reached.

If the Contractor owns the float, the Contractor is entitled to an EOT to the extent that the delay has postponed completion, irrespective of whether the delay has pushed the likely date of completion to beyond the date for completion. The rationale for that approach is that the Contractor is entitled to the buffer in the Programme in order to fully protect itself from liquidated damages.

The ownership of the float will be a matter of commercial negotiation in the context of the project details.

The contract will usually oblige the Contractor to take reasonable steps to mitigate the effects of the delay event and to reduce the EOT entitlement to the extent that it fails to do so and will reduce the EOT to the extent that the Contractor has caused the delay.

A sample clause dealing with measurement and the administrative requirements is set out below.

Conditions precedent

If the Contractor fails to submit any of the notices required under clauses [#] to [#] within the time required, or fails to comply with any other notice requirement under this Contract in relation to a Delay Event (including, in the case of a Force Majeure Event, the notice under clause [#]), then:

- a) *the Contractor has no entitlement to an extension of time*
- b) *the Contractor must comply with the requirements of this Contract to meet the Milestones by the Milestone Dates and achieve Practical Completion by the Date for Practical Completion.*

Notwithstanding clause [#], it is a further condition precedent to the Contractor's entitlement to an extension of time that:

- a) *the Contractor is or actually will be prevented from meeting the Milestone by its Milestone Date and/or achieving Practical Completion by the Date for Practical Completion by an Extension Event*
- b) *the relevant delay is demonstrable on an assessment of the actual and then current critical path to meeting the Milestone by its Milestone Date and/or achieving Practical Completion by the Date for Practical Completion.*

The Contractor will not be entitled to an extension of time under this clause [#]:

- a) *if the Contractor can meet the Milestone by its Milestone Date and/or achieve Practical Completion by the Date for Practical Completion without the extension of time*
- b) *to the extent that the Contractor has or will overcome a relevant delay by accelerating the Contractor's Activities in accordance with clause [#]*
- c) *to the extent that the delay was caused or contributed to by an act or omission of the Contractor or its Personnel.*

The assessor

Generally, EOTs are determined by either a representative of the Principal or a third party jointly appointed by both the Contractor and the Principal.

The assessor will be provided with guidelines for the assessment either in the contract or, where an independent third party is appointed, in the agreement making that appointment.

At a basic level, the assessor must act independently and reasonably.

Where the assessor is a representative of the Principal, the Principal will be obliged to ensure that the assessor acts independently.

Where the assessor is a third party, the appointment agreement will oblige the assessor to warrant to both parties that it will act honestly and reasonably.

In both cases it is important that the dispute process makes it clear that the assessor's determination can be reopened and considered afresh.

The assessment process will usually entail:

- delivery of the NOD to the Principal and the assessor
- delivery of the EOT claim to the Principal and the assessor
- an opportunity for the assessor to seek further information and the provision of that information
- the assessment, which is delivered to the Contractor and the Principal.

The unilateral right to extend

It is important for the contract to contain a unilateral right for the Principal to extend time even where there has been no claim made by the Contractor or no determination issued by the assessor.

The purpose of such a clause is to ensure that the Principal can preserve the contractual date for completion and the liquidated damages regime if there has been a failure to comply with the EOT process.

The right must be vested in the Principal, not its representative, to avoid the obligation to act reasonably; and must be cast as an absolute discretion.

A sample clause is as follows:

Discretion to extend

- Without limiting clause [#], notwithstanding that the Contractor is not entitled to or has not claimed an extension of time to a Milestone Date and/or the Date for Practical Completion, the Principal may at any time grant an extension to a Milestone Date and/or the Date for Practical Completion.*
- Without limiting clause [#], the Principal has no obligation to grant, or to consider whether it should grant, an extension of time under clause [#] and is not required to exercise this discretion for the benefit of the Contractor.*

Concurrent delay

Concurrent delay clauses exclude the entitlement to an EOT to the extent that the delay caused by an EOT ground occurs at the same time as a delay that is not caused by an EOT ground. For example, if an Act of Prevention causes a delay between 1 January and 31 January and the Contractor has itself caused delays that have impacted from 1 January until 15 January, the EOT entitlement will be reduced to 16 days.

Concurrency can be difficult to assess, however it is a standard provision in Australian contracts.

A sample clause is as follows:

Concurrent delays

If there are two or more concurrent causes of delay and at least one of those delays would not entitle the Contractor to an extension of time under this clause [#] then, to the extent of that concurrency, the Contractor is not entitled to an extension of time.



The Programme

The Programme sets out the sequence in which the Contractor will perform its activities, the duration of each activity, and the inter-relationship between the activities. Programmes are developed using computer programs and are based on assumptions about the way the project will be designed and constructed. Those assumptions and the other rules that result in the Programme are called the program logic.

Complex contracts will set out extensive requirements for the Programme, including the ability to read the Programme in native form, that is, with all logic disclosed.

It is important to note that the Programme is usually created by the Contractor: it sets out the Contractor's best assessment about how it will perform its activities in order to reach completion by the date for completion; and it can change, either because of intervening events or to correct errors in logic.

The Contractor should be free to amend the Programme provided that it does not have a detrimental effect on the Principal or third parties who must provide inputs to the project, such as authorities.

The Contractor should be required to update the Program regularly to reflect actual as compared to planned progress; and should be required to amend the Programme if the logic changes.

The Programme can be used as a guide to the assessment of an EOT but it should only be one tool used in that process.

Protection of the Principal if the process is not followed

Sometimes the Principal or its representative fails to comply with the process.

In such instances the Principal should be protected from the complete failure of the EOT regime.

A sample clause is as follows:

Time not set at large

Neither:

- a) *the failure of the Principal to grant an extension of time to the Date for Practical Completion in accordance with this clause [#] or at all*
- b) *the existence of any Dispute between the Contractor and the Principal as to the Contractor's entitlement to, or the extent of, any extension of time to a Milestone Date and/or the Date for Practical Completion*

will cause the Milestone Dates or the Date for Practical Completion to be set at large or prevent the Principal from subsequently exercising its discretion under clause [#].

Any principle of Law which might render a Milestone Date or the Date for Practical Completion immeasurable and liquidated damages unenforceable (including any entitlement to relief and the prevention principle) does not apply under or in connection with this Contract.

Delay costs and liquidated damages

Some EOT events will also be compensation events in that they will give rise to an entitlement for the Contractor to claim delay costs.

The contract should stipulate how delay costs are to be calculated. In simple contracts the method might be as simple as reasonable cost.

The failure to achieve completion by the contractual date for completion will entitle the Principal to delay liquidated damages.

The contract should stipulate:

- the rate at which liquidated damages accrue
- the liquidated damages cap
- the consequence of reaching the cap termination or extension of the cap
- how the liquidated damages are paid
- the entitlement to call on the security if they are not paid.

A sample clause is as follows:

Compensation Events

- Subject to the other terms of this clause [##], if the Contractor has been granted an extension of time under clause [##] in relation to an Extension Event that is also a Compensation Event, the Contractor is entitled to all extra costs it necessarily incurs (which do not include non-Project specific overheads, profit or loss of profit) as a direct consequence of that delay (Delay Costs).*
- The Contractor must, at the same time as submitting a notice in accordance with clause [##] or a final notice in accordance with [##] (as the case may be), give notice to the Principal of its claim for all extra costs that, in its opinion, should qualify for reimbursement as Delay Costs in accordance with clause [##], including all available particulars and supporting documentation and a statement that it is a notice under this clause [##].*
- Upon receipt of a notice in accordance with clause [##], the Principal must assess and decide as soon as reasonably practicable the Delay Costs that qualify for reimbursement in accordance with clause [##].*
- It is a condition precedent to the Contractor's entitlement to Delay Costs under clause [##] that the Contractor provide the notices referred to in clause [##].*
- Delay Costs incurred in connection with extensions of time in accordance with:*
 - paragraph (a) of the definition of Compensation Event must be assessed under clause [##] only*
 - paragraph (b) of the definition of Compensation Event must be valued as a Variation under clause [##]*
 - paragraph (c) of the definition of Compensation Event must be valued as a Variation under clause [##]*
 - paragraph (d) of the definition of Compensation Event must be assessed under clause [##].*
- In all other circumstances that are not each a Compensation Event, an extension of time (if any) is the limit of the Contractor's entitlement for the delay and the Contractor is not entitled to claim any additional cost or expense or any adjustment to the Contract Price or to make any claim under this Contract, any applicable Law or otherwise.*
- The sums payable for Delay Costs represent the Contractor's sole entitlement to compensation for delay or disruption, including delay or disruption caused by the Principal, whether in breach of contract or otherwise and are in substitution for and exclude the Contractor's rights and remedies under this Contract, at Law or otherwise (including the right to recover damages for breach of contract or otherwise).*

Delay Liquidated Damages

- The Contractor warrants that it will meet the Milestones by the Milestone Dates and achieve Practical Completion by the Date for Practical Completion.*
- If the Contractor fails to meet the Milestones specified in Schedule [##] by the Milestone Dates and/or achieve Practical Completion by the Date for Practical Completion, the Contractor must pay to the Principal the Delay Liquidated Damages specified in Schedule [##].*

Payment

- a) *Delay Liquidated Damages must be invoiced by the Principal in respect of each day of delay after the relevant Milestone Date and/or Date for Practical Completion on a weekly basis.*
- b) *The Contractor must pay the Delay Liquidated Damages invoiced by the Principal in accordance with clause [#] within ten Business Days after the date of the relevant invoice, unless the Principal has agreed to deduct or set off such amounts against payments due and payable to the Contractor.*
- c) *If, after the expiration of the period for payment by the Contractor specified in clause [#], an amount of Delay Liquidated Damages invoiced by the Principal has not been paid by the Contractor, the outstanding amount:*
 - i. *will be a debt due and payable by the Contractor to the Principal on demand*
 - ii. *may be deducted from any payments otherwise due from the Principal to the Contractor*
 - iii. *may be recovered by the Principal having recourse to the Security.*

Genuine pre-estimate of loss and damage

The parties agree that the Delay Liquidated Damages are a genuine pre-estimate of the loss and damages likely to be sustained by the Principal as a result of the Contractor's failure to meet the Milestones specified in Schedule [#] by the Milestone Dates and/or achieve Practical Completion by the Date for Practical Completion.

Payment is not a release

The payment of Delay Liquidated Damages does not relieve the Contractor from any of its obligations to meet any Milestone and/or achieve Practical Completion or from any of its other warranties, obligations and liabilities under or in connection with this Contract.

Delay Liquidated Damages Cap

The aggregate liability of the Contractor for Delay Liquidated Damages under clause [#] will not exceed the Delay Liquidated Damages Cap.

If the Principal is disentitled from claiming Delay Liquidated Damages

- a) *If this clause [#] (or any part thereof) is found for any reason to be void, invalid or otherwise inoperative so as to disentitle the Principal from claiming Delay Liquidated Damages, the Principal is entitled to claim against the Contractor for damages at Law for the Contractor's failure to meet the Milestones specified in Schedule [#] by the Milestone Dates and/or achieve Practical Completion by the Date for Practical Completion.*
- b) *If clause [#] applies, the damages claimed by the Principal must not, in aggregate, exceed the Delay Liquidated Damages Cap.*

Exclusion of consequential loss does not apply

The Contractor is not entitled to the benefit of the exclusion in clause [#] in any claim for Delay Liquidated Damages or damages at Law by the Principal against the Contractor under clauses [#] or [#] for failure to meet the Milestones specified in Schedule [#] by the Milestone Dates and/or achieve Practical Completion by the Date for Practical Completion.

Expiry of Delay Liquidated Damages

If the Contractor fails to achieve Practical Completion by the date on which the Principal has become entitled to the maximum amount of Delay Liquidated Damages specified in clause [#], the Principal may:

- a) *have the Works or any part of the Works completed by itself or by others and the Contractor must pay the Principal's costs in doing so*
- b) *require the Contractor to grant the Principal such reduction in the Contract Price as may be agreed between the parties, or in the absence of agreement, determined to be a reasonable reduction, with reference to the ongoing delay, any incomplete Works and the effect on the Project in accordance with clause [#], and the Contractor must promptly pay to the Principal such reduction unless the parties agree otherwise*
- c) *require the Contractor to complete the Works and achieve Practical Completion*
- d) *terminate this Contract in accordance with clause [#].*

How to contact us



If you have any questions about this paper, please contact the editor, Damian McNair, Partner, Energy Transition.

PwC Australia has a dedicated Energy Transition business, consisting of a hub of 132 multidisciplinary and highly-skilled experts helping to facilitate Australia's successful transition to a decarbonised economy by 2050. We are helping accelerate our clients through the energy transition and their related ESG priorities as Australia moves to a net zero economy.

Damian McNair

PwC | Partner, Energy Transition

M: +61 421 899 231

E: damian.mcnaair@pwc.com

[LinkedIn](#)

Varya Davidson

PwC | Partner, Energy Transition

M: +61 478 303 103

E: varya.davidson@pwc.com

[LinkedIn](#)

Luke Westmore

PwC | Partner, Energy Transition

T: +61 402 074 040

E: luke.westmore@pwc.com

[LinkedIn](#)

Rhiannon Hough

PwC | Director, Energy Transition

M: +61 403 514 687

E: rhiannon.hough@pwc.com

[LinkedIn](#)



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