



Fenwick Elliott

## **THE CHANGE MANAGEMENT SUPPLEMENT**

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### **SPEECH GIVEN AT THE PICKAVANCE CONSULTING CONFERENCE ON DELAY AND DISRUPTION IN CONSTRUCTION CONTRACTS**

The workings of the Protocol have been outlined for you, and there seems to be a remarkable degree of consensus in the Industry that it is a good thing. However, like many good ideas, there is a huge gulf between concept and implementation. When Keith Pickavance, who was on at the SCL drafting committee, came to consider how the Protocol might be made to work in practice, he decided (and I am sure he is right) that the only way this could be achieved would be by drafting specific amendments to all the major forms of construction contract. There was no other way that the Protocol provisions could be introduced into construction projects in a way that was both legally binding and consistent with the rest of the contract terms.

And, certainly, for it to work, it was clear that the Protocol would have to be made binding. The thinking was that if it was not binding, it would probably be ignored - especially as its operation inevitably requires a fair amount of time and cost. Also, its operation is not really compatible with the way that most major contracts are drafted, especially in respect of fixing extensions of time. Therefore, there had to be specific legal changes. It was not enough just to set out of a general method statement.

So it is against that background that we have started the exercise of producing a version of our Change Management Supplement for each of the major standard forms, setting out the changes and additions that will have to be made to each contract to make them Protocol compliant.

So, perhaps, the first and most important general point is that, as I have said, the Supplement is intended to give the parties specific binding contractual obligations. As we will see if, for example, the Contractor fails to provide information that the Supplement requires he will be liable for liquidated damages. Compliance is not optional. However, we have also recognised that the supplement will work best where, in practice, it is embraced enthusiastically by the parties as an important tool to assist the efficient running of the contract, and is not just another set of boxes to tick.

Therefore, its benefits will be most apparent where the Contractor and risk manager (whom I will talk about in a minute) cooperate openly and honestly in the way that so called partnering contracts are intended to work. But we have deliberately avoided the language of some partnering contracts, like the supposed duty to cooperate that you see in contracts such as the NEC or PPC 2000 - because we do not think that they work very well as enforceable legal obligations.

And another important preliminary point I want to make now is that we recognise that there is undoubtedly both an up front and an administrative cost in implementing the Supplement. However, we do not think that the cost is going to be so great that the parties should be deterred from using it even for relatively small contracts, which is why there is a version for the Intermediate Form. The main reason for that is that much of the Supplement merely sets out what ought to be done anyway as a matter of good practice.

I think we would also acknowledge that, perhaps, 10 years ago it would not have been so easily possible to expect compliance with the sort of things that the Supplement requires. But advances in software mean that working it should be easily within the capacity of most Contractors. And, whilst the Supplement does need input from both sides of the contractual fence, this should not be a problem even for one off employers, because they will be guided by their Risk Manager.

The drafting is now complete for the first major set of contracts being: JCT 98, JCT with Contractors' Design, the IFC and the Major Projects form. But it is a painstaking process because it is hugely difficult making sure that all the necessary consequential changes are made to all parts of each contract. But, and I know I am courting disaster saying this, we are pretty confident that we have not missed too much.

What I am going to do this morning is give you an overview and introduction to the general scheme of the Supplement. Later speakers will then take us through some of the most important aspects of it in a lot more detail.

Now, in addition to the actual contract drafting, we have also produced a pretty detailed manual setting out everything you wanted to know about change management principles but were afraid to ask. That manual is the Practice Note which I believe you will find in your course material. In the time I have got today I am only covering the Supplement pretty generally and I recommend the Practice Note for further details. We are confident that once it takes off, it is easily going to outsell J K Rowling.

We write in the introduction that "we are not gifted with the Promethean ability to see into the future" and it is for this reason that we have to make provision for change. Prometheus was, of course, the chap who was chained to a rock and had his liver eaten out every day by vultures and restored at night and so I suspect that he must have been the Greek demigod of contract managers.

But, anyway, change is what concerns the SCL Protocol and the Supplement. And the idea of both is to move away from the traditional approach whereby the obligation to manage risk is placed on the Contractor but the consequences of change lie wholly with the employer.

The benefit of the Supplement to the employer is that it enables him to be closely involved in the change process rather than leaving the whole business to the Contractor and hoping he will get it right.

And the benefit to the Contractor is that the likelihood of things going wrong in the first place is reduced; and, so far as they do go wrong - perhaps because of external risks that he can not do anything about - he will be working with the employer to get back on track (rather than everything degenerating into the unedifying bun fight that usually occurs).

The twin pillars upon which the Supplement is founded are:

First, that the Contractor has to be told what management information he has to provide and he has to be paid for providing it and;

Secondly, if the Contractor fails to provide the information services necessary to enable the employer to manage his risks, the Contractor has to compensate the employer.

### **Management Information Structure**

Fundamental to making any contract Protocol compliant is:

Firstly, to make the management information that the Contractor usually keeps in his possession until a claim is made, available to the employer throughout the contract; and

Secondly, to make the Programme that is current at the time a change event or delay happens, the tool for calculating the effect of that event for the purposes of extensions of time and prolongation.

### **Programme**

So, as the programme is such a fundamental aspect of the drafting, we'll have a look at that next.

It's important to realize that the Programme does not become a contractual document in the sense of making the Contractor legally bound to comply with it. That is to say, he will not be in breach of contract if, at any stage, he fails to keep up with it. What it does do, however, is become a working tool to enable both the employer and the Contractor to work out where they have got to, and how they have got there; and to plan for the future in the event of change or delay.

An important aspect of programming contained in the Supplement relates to completion. JCT 98 defines the Completion Date as "the Date for Completion as stated in the Appendix or any date fixed under Clause 25 or in a confirmed acceptance of a Clause 13 A Quotation", and the Date for Completion as "the date fixed and stated in the Appendix."

That structure is radically changed in the Supplement. In the Supplement the Completion Date is the date set down in the Appendix as the date by which the works are to be completed, or a variation of that date fixed by means of an extension of time under Clause 25, or by collateral agreement under Clause 13A. And the date for completion as

the date indicated on any Programme by which the Contractor intends to complete the Works by reference to that Programme.

In practice this is simpler than it sounds. What this means, is that the Date for Completion becomes the date set out on any Programme by which the Contractor, at any given time, *plans* to complete the work. That is to say, the Date for Completion becomes the date on which the works are expected to be finished. And that date may not be the date upon which the Contractor is legally bound to complete. In other words, it reflects reality: the time when the parties actually expect completion.

I am not going to go into the detail of the make-up of the Programme itself as it is going to be gone into in more detail by later speakers. But note, for present purposes, that it comprises a critical path network and method statement which have to be read together.

The purposes of the Programme are set out Clause 5A.3. You will note that they include:

- Planning and sequencing of activities;
- Identifying dates for requesting information and for the supply of plant and materials;
- Identifying contingencies and float;
- Calculating the effect of employer's Cost and Time Risk Events; and
- Recording actual progress.

Now, that introduces two new terminologies: employer's Time Risk Events and employer's Cost Risk Events.

Employer's Time Risk Events are events that, if they delay progress, entitle the Contractor to an extension of time; so they are the equivalent of relevant events in the JCT.

Employer's Cost Risk Events are events initiated by the employer, or deemed to be under his control which, if they occur, entitle the Contractor to recover any loss and expense. They are what the JCT calls "matters" and relate to prolongation and disruption.

There are one or two other new definitions to which I would like to draw your attention.

The first is **key dates**. Key dates are the dates by which the start or end of any particular element of the works is to be monitored.

The next is **milestones**. Milestones are particular activities linked to key dates. The point behind this linkage is to enable the impact of change to be assessed against the particular activities within the Programme. That is against the usual position where regard is only had to the impact of change on the completion date or a sectional completion date. This means that the viability of the whole Programme, and not just the end date, is being checked all the time. So if there is a problem it can be sorted out at an early stage.

And the other definition to note is **publication**. Publication is the provision of any information required by the contract in electronic form. The supply of information is, of course, fundamental to the Protocol and the Supplement. However, we recognise that a lot of that information, such as, for example, resource details, may be commercially very sensitive. Therefore, the Supplement provides, by a new Clause 56, that the employer must return them on request and delete any computer records of them.

### **The Risk Manager**

And now, before looking further about how the contract operates in practice, I should like to introduce a new and very important animal. It is called the Risk Manager. The Risk Manager is there to do “exactly what it says on the tin”; that is, to manage risk on behalf of the employer. He is the employer’s risk expert. We envisage that he may well be a separate appointment and his role will be distinct from that of any of the other consultants. This is because his role is going to be pretty demanding in itself, and other consultants may not, in any event, have the necessary programming skills. However, it will all depend on the circumstances of the particular project, and there is no reason in principle why that role should not be given to the PQS or PQA.

We have not, as yet, produced a pro forma Risk Manager’s appointment, but we envisage that he will be involved at the pre contractual stage as well as once the contract is under way.

Pre-contract he will work with the employer and the other consultants to identify those elements of the design and of the method of procurement that are likely to be critical from the point of view of risk management. He will then ensure that those elements are inserted as key dates and milestones into the Schedules as matters that the Contractor must include in the Master Programme. Once included in the Master Programme the key dates and milestones will be subject to monitoring so that both the Contractor and the employer will have a clear understanding of progress and be better able to manage the effects of change.

In addition, the risk manager will advise on the techniques to be used to prepare the Programme, the software to be used, and the general nature of the management information that the Contractor will be expected to produce. That information will also be specified in the Schedules.

Next, I will deal briefly with the incorporation of the Programme into the project - again, only in skeleton form, because you’ll hear a lot more about it later.

The relevant provisions are in Clause 5A of the Supplement. The Supplement provides for the Architect to instruct the Contractor to prepare and Publish his first draft Programme; and the Contractor has 28 days to comply.

At this point, matters are turned over to the Risk Manager, who then has a choice. One option is to accept the draft Programme as being the Master Programme. If he does, the Master Programme is accepted as being conclusive evidence of the Contractor’s intentions as to the programming and carrying out of the works.

Note that what we are talking about is evidence of the Contractor's *intention*. As I have said, he's not in breach of contract simply for failing to live up to those intentions. However, his Programme is likely to be pretty compelling evidence as to the reasons for, and effect of, any delay. And being able to understand why delays have occurred is a large part of the reason for the whole programming exercise. However, failure to meet any key date or milestone will not be a breach of contract in itself.

Now, acceptance of the draft Programme was the Risk Manager's option 1. Alternatively, the Risk Manager can reject the Programme and make the Contractor produce an amended version. However, he can only do so if, acting reasonably, he considers that the Programme does not comply with the contract. His entitlement to reject has to be subject to an objective test. That is because preparing the Programme is going to cost time and money and it is necessary to ensure that the Risk Manager is not able to abuse his position by making endless demands for revisions. He can only make such demands if his view is a reasonable one. The Risk Manager has seven days to reject the Programme. If he does not reject it, it is deemed to be accepted.

If the Risk Manager *has* rejected it the Contractor has seven days to submit a new one. But we have also included the possibility of the Contractor and Risk Manager sitting down together and finishing off the Programme jointly.

If none of this produces an agreed Master Programme the parties can trot off to dispute resolution. We hope that will not happen very often, but it's important to provide for the possibility. There are those, I know, who seem to think that providing in the contract for dispute resolution makes disputes more likely to occur. However, I think that that is about as logical as saying that making a will makes it more likely that you are going to die. It's important to have in the fall-back position instead of just hoping things will not go wrong.

Once the Master Programme is in place, the Contractor has to update it. He must do so in any event at the intervals the contract stipulates in the appendix (and which will vary from contract to contract). But he must also do so every time there is a material departure from the existing Master Programme. That means that the Programme is constantly brought up to date.

At practical completion, the Contractor publishes his final update of the Master Programme. That update records the actual duration and sequence of every activity carried out during the works; and this gives the parties the full as-built situation.

### **Liquidated Damages**

Now, one of the problems with an obligation to provide information of the kind we have been discussing is what to do if it is not provided. So we decided that it was necessary to have a sanction for non-compliance. And that sanction is liquidated damages. So Clause 5B provides for liquidated damages to be deducted or recovered as a debt if the Contractor fails to Publish information as the contract requires.

Liquidated damages are, of course, a convenient remedy because proving the extent of *actual* loss in a case like this is not generally going to be easy. However, we were alive

to the fact that liquidated damages clauses have to be a genuine pre-estimate of loss if they are to be effective and not struck down for being a penalty.

Therefore, we recommend that the level of liquidated damages in the Appendix is set according to the employer's estimate of how much it would cost him to put together the programming information himself (so far, of course, as it is possible for him to do so) - if the contractor fails to do so.

Note that it is also provided that if the Contractor makes good his default in Publishing information, he is entitled to be repaid his liquidated damages (albeit without interest) - but only if the employer's risk management position has not been prejudiced by the delay.

### **Variations**

Next, turning briefly to variations, the consequences of variations on the Programme are set out in Clause 13. You will hear a lot more about this during the day. But note, for now, that there is an obligation on the Contractor to estimate what the effects of the variation are likely to be on time and resources, so that the employer can decide whether or not to go ahead with it. If he accepts it, it is incorporated into the Master Programme.

### **Extensions of Time**

In respect of extensions of time, the JCT version of the Supplement has been reworked pretty significantly with entirely new subclauses 25.1 to 25.3.6. However, the effect of the amendments is very much what you would expect in this context, and, again, involve the Contractor's updating the Master Programme, and the Architect, on the advice of the Risk Manager, setting a new Completion Date.

### **Disruption**

Turning to disruption, there are, similarly, changes to Clause 26. The Risk Manager estimates the effect of disruption on any given activity, or on the productivity of any resource. The Architect then, if necessary with the assistance of the Quantity Surveyor, ascertains the amount of any loss and expense suffered by the Contractor.

### **Prolongation**

Next, note clause 26.7 which makes provision for the calculation of prolongation, and loss and expense arising out of prolongation caused by employer's Cost Risk Events.

### **Acceleration**

Finally, note that there is an acceleration provision contained in clause 25A to Clause 25C. 25A deals with acceleration to recover Contractor delay, and 25B covers recovery of employer's risk delay. The big difference is, of course, that the Contractor is compensated for recovering employer risk delay; but not for recovering his own delay. In either case the Risk Manager has to consult with the Contractor before he can instruct the Contractor to reschedule activities or increase resources.

And Clause 25C.2 makes it clear that if the Contractor fails to accelerate, the employer can recover unliquidated damages for the delay. That right is separate from and additional to, the employer's right to recover liquidated damages. Obviously though, the Contractor cannot achieve a double recovery and, if he takes unliquidated damages, he will have to give credit for any liquidated damages he receives.

This provision arises from a case where Keith Pickavance was adjudicator and I acted for one of the parties. In this case there was a provision in a bespoke contract for acceleration. However, the acceleration clause did not contain any express entitlement to unliquidated damages and Keith, quite deplorably, found against my client that unliquidated damages were not available as a separate entitlement from liquidated damages. We therefore thought we had better make the position clear in the Supplement.

### **Conclusion**

That brings me to the end of my overview of the Supplement. You will hear more details about its working as the day progresses. We certainly hope that it will be of benefit to the Industry in improving efficiency and reducing claims. And we are very interested in any views anyone has about the drafting - however minor - at any time.

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