

Pacing Delays, Quantum Issues

Pacing occurs when one party realises there is, or will be, a critical delay caused by the other party, and decides to slow down selected work activities to "keep pace with the other's delay".

Recently we encountered a contractor's pacing claim on a linear project (such as a road, railway, tunnel, or pipeline). The contractor planned to start at one end of the alignment but suffered significant delays in mobilisation. The owner was due to hand over the alignment's other end sometime after commencement, but as the project progressed, it became apparent that this part of the site would not be available until much later than planned.

Following extensive forensic delay analysis, the parties agreed that the owner's delay was dominant and entitled the contractor to an extension of time (EOT) up to the project completion date.

The focus then turned to the quantum of the claim. There was no dispute that the full EOT meant relief from liquidated damages owed to the owner. But there was an enormous difference regarding the loss and expense due to the contractor.

It is settled law that a contractor can only recover loss and expense if it satisfies the "but for" test. This means the claim will fail if there is another cause of loss for which the contractor is responsible, even if the cause relied on is the dominant cause [after Keating]. Legal cases have also acknowledged a contractor's right to slow down to pace owner-caused delays. However, this goes against the requirements in most construction contracts that "time is of the essence" or "a contractor shall diligently perform the work", requiring a contractor to expedite the completion of the work.

In the present case, the owner argued that compensation was only due for the time between the actual completion date and when it would have ended but for the owner's delay, but could not identify this period from the EOT delay analysis. The owner perceived the alleged "pacing delay" as another term for "concurrent delay", making the issue more complicated to resolve.

On the other hand, the contractor sought compensation for the time between the actual completion date and when it would have ended without pacing. The contractor also argued that it would have accelerated to catch up on its initial delays had it not been for the owner's delay. Thus the contractor claimed loss and expense for the whole delay period. However, the contractor had not given notice of its intent to "pace" its performance, nor did it provide any contemporaneous records of reprogramming activity, nor demonstrate the possibility of acceleration.

The owner perceived that pacing was being argued in hindsight and treated it with caution and scepticism. The lack of notice denied the owner the opportunity to take part in the decision to decelerate the work. Given the high monthly plant charges, slowing down resulted in significant additional costs. There would be a point where it would be more cost-effective to complete the available work, demobilise and come back when access was available. This goes to the contractor's obligation to mitigate costs, but the contractor did not bring it to the owner's attention until after the event. Thankfully the parties in our case ultimately settled the dispute. However, based on this experience and others, we offer the following recommendations for contractors concerning pacing delay situations:

- Contractors seeking recovery of loss and expense should not attempt to pace an owner delay. Cost recovery is more certain and maximised if a contractor maintains its original schedule, thus increasing the time between the actual end date and the but for date.
- Contractors who decide to pace an owner delay to mitigate costs should provide contemporaneous written notice of pacing, fully advising the owner of how they intend to proceed. They should also prepare and submit a written pacing plan and attempt to reach an agreement with the owner concerning the cost issues.
- A retrospective pacing claim is inherently risky as the owner's defences will include arguments regarding lack of notice, contractor delay, concurrent delay, and float consumption. The burden of proof is on the contractor to show that the costs claimed would not have been incurred in any case, so the chances of such an approach succeeding are limited.

PROJECT NEWS

A HK\$1.97 billion contract has been awarded to CREC Joint Venture for the site formation and infrastructure work for Yuen Long South First Phase Development – Contract 2.

The works will mainly include site clearance and formation (including land decontamination works), nullah deckings at various locations, construction of various roads and slip roads, and improvement of various roads in the surrounding area, as well as construction of associated water mains, drainage works, sewerage systems, cycle tracks, footpaths, utility tunnels, slope works, retaining walls, landscaping works and E&M works. Noise barriers and low-noise road surfacing will also be employed for mitigating noise in the area.

Works commenced in December 2022 and are anticipated for completion in 2028.

Chun Wo – Sinohydro JV have been awarded the contract for the Relocation of Diamond Hill Fresh Water and Salt Water Service Reservoirs to Caverns. The Contract, valued at HK\$2.1 billion is for the construction of a caverns completion for accommodating the relocated Diamond Hill Fresh and Salt Water Reservoirs and associated facilities. The aim is to allow the areas currently occupied by the reservoirs to be released for housing and other uses beneficial to people's livelihood, whilst ensuring adequate and quality water supply for the areas. This is a NEC4 ECC Option C contract, and work commenced in December 2022 and is scheduled for completion in December 2027.

Staff News

We are pleased to welcome Henry Chan and Anson Chan to our team.

Henry is joining us as a Quantity Surveyor who will provide contracts administration and claims support services on the 3RS project at Hong Kong International Airport, and brings with him a range of QS experience from various disciplines and sectors of construction.

Anson has joined us as a QS Trainee so we can mentor and train Anson and guide her through the early stages of her career.

We welcome them all to our growing team!

