

Why Contractors Lose Extension of Time Claims

An Extension of Time claim is not simply a request for additional days. It is a contractual submission that must clearly demonstrate why an event occurred, who was responsible, and how that event delayed the contractual date for completion.

Many contractors can establish that a delay event occurred. However, the claim often becomes weaker when it comes to proving the effect of that event on the construction programme.

A delay event does not automatically create entitlement

Late drawings, restricted access, variations, delayed approvals and unexpected site conditions may all affect the progress of the works. However, the existence of an event does not automatically mean that the contractor is entitled to an Extension of Time.

The contractor generally needs to establish:

- that the event qualifies for an Extension of Time under the contract;
- that the required notices were submitted within the contractual timeframe;
- that the event affected the critical path;
- that the claimed delay period is reasonable and supported by records; and
- that the delay was not caused or materially affected by the contractor's own performance.

Australian government guidance recognises that delay to an activity may affect completion where the activity is already on the critical path or where the delay causes it to become critical.

The critical path is not clearly demonstrated

One of the most common weaknesses in EOT claims is the failure to connect the delay event to the project completion date.

A claim may contain correspondence, photographs, variation instructions and meeting minutes, but still fail to demonstrate:

1. which programme activities were affected;
2. when the effect occurred;
3. how the delay passed through the programme logic; and
4. how many days the event delayed completion.

A strong claim should explain the complete chain of cause and effect. It should identify the affected activities, relevant relationships, available float, critical or near-critical paths and the resulting movement in the completion date.

Programme updates are unreliable or inconsistent

A delay analysis is only as reliable as the programme information supporting it.

Common programme problems include:

- progress entered after the programme data date;
- missing actual start or finish dates;
- unrealistic remaining durations;
- broken or open-ended logic;
- excessive constraints;
- unrecorded changes to activity logic;
- unexplained changes to the critical path; and
- retrospective updates that do not match contemporaneous project records.

Where the programme has not been properly maintained, it becomes difficult to establish what was genuinely critical when the delay occurred.

Notices and records are incomplete

Even where the delay impact is valid, the claim may fail because the contractor did not comply with the notice provisions of the contract.

Contracts commonly require notification within a specified period after the contractor becomes aware, or should reasonably have become aware, of the delay. The notice may also need to identify the cause, expected impact and measures proposed to mitigate the delay.

The contractor should retain supporting records such as:

- approved and updated programmes;
- site diaries and progress reports;
- labour and plant records;
- instructions and variation records;
- requests for information;
- drawing and submission registers;
- meeting minutes;
- photographs; and
- correspondence showing when information was requested and received.

NSW Government contract-management guidance identifies the contract programme, photographs, meeting minutes and records of variations and Extensions of Time as important project-control records.

Contractor delay and concurrency are not addressed

A claim can also be weakened where the contractor does not consider its own delays.

For example, an employer-caused design delay may have occurred at the same time as delayed procurement, insufficient labour or late subcontractor mobilisation. The analysis must determine which delay was controlling completion during the relevant period.

Ignoring contractor-responsible delay does not make it disappear. It usually allows the opposing party to challenge the credibility of the entire submission.

Mitigation is not demonstrated

Contractors are generally expected to take reasonable steps to reduce the impact of delay. This does not necessarily require acceleration at the contractor's own cost, but the contractor should demonstrate that practical mitigation options were considered.

Mitigation may include:

- resequencing non-dependent work;
- opening alternative work fronts;
- prioritising critical submissions;
- reallocating labour or plant;
- engaging alternative suppliers; or
- requesting timely decisions from the principal.

What makes an EOT claim stronger?

A defensible EOT claim brings the contract, programme and project records together into one clear explanation.

It should establish:

Cause: What happened?

Responsibility: Which party carried the contractual risk?

Effect: Which activities were affected?

Critical-path impact: How did the event delay completion?

Entitlement: Which contract provision provides relief?

Substantiation: What contemporaneous records support the claim?

The best EOT claims are prepared progressively while the project records, programme logic and circumstances remain clear. Waiting until the end of the project often turns a manageable entitlement exercise into a costly reconstruction.

This article provides general information only and does not constitute legal advice. Entitlement depends on the wording of the applicable construction contract and the circumstances of the project.