India: Delays In Construction Projects

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Introduction

The Ministry of Statistics and Programme Implementation, Government of India has reported that out of 782 construction projects in India monitored by it, a total of 215 projects are delayed with the time over-run ranging from 1 to 261 months. The primary causes which are noted are delays in land acquisition, obtaining forest/environment clearances, tie-up of project financing, finalisation of detailed engineering, tendering, ordering and equipment supply, lack of infrastructure support and linkages, changes in scope, delay in tendering, ordering and equipment supply, law and order problems, geological surprises, pre-commissioning teething troubles and contractual issues.[1]

Major impact of delays

1. Delays in projects have a direct bearing on the overall cost of construction. For example, from 2010 to 2015, the cost of cement (per bag) increased by 74%, steel increased by 34%, bricks increased by 69%, sand increased by 240% and skilled labour (on a per day basis) increased by 96%.[2] It is therefore, understandable, that the cost overrun in delayed projects has resulted in approx 24.77% increase in the original cost of the projects, amounting to Rs. 1,09,359 crore. [3]
2. Delays in a project also increase the likelihood of disputes between the parties and needless to say, these disputes may derail the project. The average duration for settlement of disputes is more than 7 (seven) years in India.[4]

In light of the above, this article aims to provide a general overview of the categories of delays that should be borne in mind before executing agreements for a construction project.

Delay events in construction projects may be classified as excusable or in-excusable based on which party bears the cost and time implication of such events. For example, an event of force majeure which impacts the work of the contractor is generally considered as an excusable delay, whereas delays caused by the sub-contractors appointed by the contractor are regarded as inexcusable.

A critical delay in a construction project is considered as a time lag in the completion of work vis-à-vis the time period prescribed in the contract for its completion. During the entire duration of the construction project, there may be various reasons (as discussed above) which push forward the final completion of the project. These reasons for delay may be attributable to the owner or the contractor.

Concurrent delay events: A concurrent delay is most commonly defined as the occurrence of two or more critical events of delay, occurring concurrently and in parallel during the lifecycle of a project, one of which is attributable to the owner and the other to contractor. Thus, even if one delaying event is absent, the other would still delay the project. For example, if there is a delay of 90 days in start of construction because the owner has not given possession of the land to the contractor, and if during this 90 day period, the contractor also fails to mobilise resources, such delay would be considered as a concurrent delay.

In certain projects a situation may arise where two or more delaying events may arise at different times and impact the same work to be performed. If one of the delaying events is attributable to the owner and the other to contractor, such delays are deemed to have a concurrent effect on the project and would also be considered as concurrent delay events.

Pacing delays: Another concept that has recently gained traction in the industry is that of pacing delays, where contractors pace the speed of construction works to manage the delay caused by the owner. Essentially, the contractor seeks to spread out the construction works relative to the delays caused by the owner for reasons such as optimal use of labour and resources,

availability of sub-contractors, stalling the delivery of equipment or commencement of work that is weather sensitive, etc. However, it is important to note that such strategic pacing of delays by the contractor should be communicated to the owner and/or done with the owner's permission to ensure that the owner does not argue that such delay in the works is attributable to the contractor.

How do contracts factor in the delays!

The manner in which the parties deal with the different kinds of delay events depends entirely on the contract negotiations between parties. Most contracts allow a contractor to receive additional time for delays attributable to the owner. However, the right of the contractor to claim compensation for such delay is limited. Au contraire, if the delay is attributable to the contractor, the owner is generally entitled to seek liquidated damages and the contractor does not receive any extension of time or compensation.

With respect to the other kinds of delay, the contracts do not generally address the issues of concurrent delay events and/or pacing delays. It is pertinent to mention that certain specific language in the contract like, '*time is of the essence*', may even be interpreted to argue that the contractor is under an obligation to expedite the completion of the work and mitigate its losses. This lack of an express understanding between the parties is quite unfortunate since it, more often than not, leads to disputes.

Parkinson's Law[5] and the old adage '*time is money*' are most apt for the construction industry. Therefore, it is important for the project stakeholders to understand the risks in a construction contract and identify the possible delays in the project lifecycle. This should enable the contractor to notify the owner, seek clarifications (where needed) and open a dialogue to ensure that the project remains on schedule and risks related to litigation, cost and time over-runs are mitigated.

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Footnotes

1. Annual Report 2015-16, Ministry of Statistics and Programme Implementation.

2. Study on Improvement in Rates and Ratios used in the Estimates of Gross Value Added Construction and Gross Fixed Capital Formation, Central Building Research Institute, published in October 2016.

3. Annual Report 2015-16, Ministry of Statistics and Programme Implementation.

4. Press Release dated 31 August 2016 issued by Press Information Bureau on the reform passed by the Cabinet Committee on Economic Affairs.

5. "*Work expands so as to fill the time available for its completion*"

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