Delay Claims in Data Centre Construction: Part 2

What to do when the delays occur, how to manage delays on the project and how to make a claim in respect of critical delay caused

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Part 1 of this article examined how and why data centre construction differs from traditional sectors, and considered common causes of delay and their impact on progress. This concluding Part 2 considers how to manage delays to the construction of a data centre and how to make a claim in respect of critical delay caused.

The need for proactive management of delay

"Everybody has a plan until they get punched in the face." Mike Tyson

During installation, careful planning and coordination are required to manage area occupancy and trade handovers in confined spaces. For example, civil access dates dictate fire systems and electrical containment schedules. Weathertightness must be achieved before installing sensitive equipment.

The commissioning stage is even more volatile. It is a staged process requiring individual equipment to be installed and individually tested before systems can be integrated, and systems to be tested before full area testing can begin. This network of dependencies creates a fragile programme where delay anywhere in the chain may ripple across multiple areas of the schedule. Accordingly, prioritising the installation and testing of critical assets, such as power distribution units, is essential to achieving commissioning milestones.

However, a plan is only as good as the reaction to the inevitable delays. Proper management ensures causes of delay are identified well in advance and addressed ***before*** they cause delay to the project. Effective mitigation hinges on:

- **Dynamic scheduling**: providing regular programme updates, revised baselines when logic fundamentally breaks, and reliable weekly or biweekly look ahead schedules;
- **Clear communication**: clearly documenting any assumptions or constraints to achieving the target dates in planning documents or in coordination meetings; and
- **Tracking**: maintaining accurate and comprehensive progress records, including construction, procurement, installation, inspection and commissioning trackers, as well as a live record of risks, constraints and progress blockers.

Modern delivery utilises tools such as BIM, integrated project scheduling and 360-degree photography to track progress and resolve conflicts in real time. Good practice ensures that even if the original programme is lost, the mitigation measures are grounded in accurate, contemporaneous records.

Poor management of a project will inevitably prevent contractors/subcontractors from working in an efficient manner giving rise to disruption claims as well as delay/prolongation claims. Due to commercial pressures and a desire to please end-customers, contractors/subcontractors often incur acceleration costs to recover schedule delays caused by others. Contractors/subcontractors must not forget that such costs are only recoverable with their counterparty's prior agreement.

Making delay claims

Delay notices & interim claims

Typically, contracts require both an initial notification and initial/interim claims within a prescribed period, often making the initial notice a condition precedent to entitlement. On a dynamic data centre site, hundreds of daily impediments, such as restricted access, late information, incomplete design details or unavailable work fronts, can cause delay and/or disruption. Contractors must log these events and issue notices immediately.

Identifying contemporaneously which of these events will later emerge as a cause of critical delay, notwithstanding any mitigation measures, can be difficult. Nevertheless, where contractors are obliged to submit interim claims, they should do so identifying as far as possible the actual impact on progress of the delay events relied upon. In addition to being a contractual requirement, interim claims are an important part of the documentary record identifying the contemporaneous position on the impact of a delay event.

Commercial pressures vs. contractual necessity

Commercial pressures can result in contractors and subcontractors refraining from submitting claims in order to preserve wider commercial relationships, often with end-clients rather than the contractual counterparty. This is far from ideal: a failure to comply with an obligation to submit a claim may damage the claim's prospects of success. But where a commercial decision is taken not to pursue a claim until the end of a project, it is essential that the process of preparation of that claim – especially documenting the causes and extent of delay – take place over the course of the works.

Contemporary records such as 360-degree walkdowns, RFI logs, contemporaneous programmes, commissioning trackers and vendor reports all play an important role in demonstrating how events unfolded. For real value, the content of these records should be summarised contemporaneously in a written narrative so as to produce a clear, reliable periodical record of the issues causing delay in each working area. This record can provide the basis for an extension of time claim which may be pursued in dispute resolution proceedings years later. A little time investment by the project team contemporaneously will provide significant time (and cost) savings in future. It is also likely to produce a more reliable account of events than can be produced after the fact.

Identifying the actual delay and its cause

Delay claims are frequently brought towards the end of a project or after completion. The focus of courts, arbitrators and adjudicators therefore will be on understanding the actual delay suffered. This is achieved by identifying the critical path contemporaneously and measuring the extent of the delay retrospectively, taking into account the impact of any mitigation measures and progress across the project. An analysis of ***actual*** critical delays suffered is necessary to support a claim for ***actual*** costs incurred as a result of prolongation of the works.

In recent times, courts (and arbitrators) have emphasised that delay and causation are ultimately matters of fact to be determined applying a common-sense assessment, rather than by rigid adherence to programming analysis. In order to assist the court/tribunal, delay analysis must go beyond consideration of programming links and durations. Analysts must examine how the work was actually executed as recorded in underlying contemporaneous project documentation in order to unravel which activities, as a matter of fact, delayed completion and the cause of the delays to those activities (recognising that is ultimately a matter for the court or arbitrator to decide).

On data centre delay claims, experts play an important role in explaining scheduling complexities arising from the interdependence of systems. As noted above, the full

consequences of delays may not become apparent until a later stage of the project. For example, the root cause of delays to commissioning of systems and equipment may arise not from the commissioning process but from the late installation of interconnected equipment in another area which might (for example) have been caused by delays ensuring the building was weathertight.

It is also important to make a distinction between critical delay to interim milestones, which is typically relevant to relief from liquidated/unliquidated damages, and critical delay to overall completion, which is likely also associated with prolongation costs.

Back-to-back provisions

A further complication for subcontractors pursuing delay claims is that their entitlements are usually expressed to be back-to-back with entitlements up the contractual chain. This is frequently a basis for subcontractors' extensions of time and costs claims to be rejected. However, the critical path to completion of the project as a whole may not be the same as the critical path to completion of a particular subcontractor's works. A critical delay to a subcontractor's works is not necessarily a critical delay to a main contractor's works. Reliance on back-to-back provisions to reject claims is misplaced when the causes of delay sit with main contractors, for example by running through delays to another subcontract package for which the main contractor is responsible. Consequently, as dispute resolution proceedings progress, reliance on back-to-back provisions to reject a claim becomes increasingly difficult for a main contractor to sustain.

Conclusion

Data centre projects are technically complex, highly interdependent and subject to market forces that exacerbate risk. This creates an environment in which delays are both likely to arise and may be particularly complex to analyse.

For subcontractors, the solution lies in careful contract negotiation, meticulous record-keeping, and the disciplined submission of notices and claims. For employers and main contractors, realistic scheduling, robust interface management and coordination, and an appreciation of supply chain constraints are essential. As the data centre industry continues to expand, and as AI drives further increases in the size and complexity of data centres, these issues will only intensify. Understanding these dynamics is essential for managing risk, avoiding disputes and, where necessary, succeeding in them.

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