

Extension of Time and Liquidated Damage Issue in Construction Contract: Nepalese Legal Provision and Practice

Binod Shrestha*

Abstract

The construction project in Nepal is severely facing the problems of on-time project completion. Poor planning, preparation, and ad-hoc methods of fixing the project completion duration and milestones create confusion and disputes in the construction industry. In numerous construction projects, new project completion dates are fixed to complete the work. The side effects of the extension of time to complete the works are cost overrun, time overrun, disputes, etc. Public Procurement Act 2007 and Public Procurement Regulation 2007 has provisions to address this delay issue. The FIDIC condition of the contract has also similar to legal provisions as Nepalese Act and Regulations. The Supreme Court of Nepal has also made a landmark decision about the liabilities after the entitlement extension of time to accomplish the project. It is the collective effort of all stakeholders to finish the project on stipulated time.

Keywords: project completion time, construction contract duration (CCD), milestones, extension of time (EOT), liquidated damage (LD), and estimation of construction time, cost overrun, time overrun

Introduction

Nepal has been investing a huge percentage of national GDP for the construction of infrastructure projects which has resulted the vibrating construction industries. However, infrastructure construction projects are not accomplished on the intended completion time. In the fiscal year 2022/23, 19.35% of the total annual budget was allocated to the infrastructure development (water resource & irrigation, water supply and sanitation, road transport, energy, and urban development) ministries.

For the successful implementation of the project, the procurement contract should be executed properly. If the procurement contract will not be completed as per the intended completion time, extra time is provided to accomplish the task after evaluation of different circumstances, which is called an extension of time.

Problem Statement

The engineering procurement contracts are rarely finished within the intended completion time in the Nepalese context. Different circumstances

are evaluated after the delay but not in planning and preparation phase of the projects. The project duration are not fixed on a realistic and logical basis. Most of the national pride projects are delayed and unable to finish on time. The adverse effects of such procrastinated projects are cost overrun, time overrun, disputes, public dissatisfaction and frustration, corruption, losing the credibility of implementing agencies etc.

Objectives

This research paper aims to describe about the different clause and condition related to the project completion time. It also attempts to explain the prevailing legal provision of construction contract duration issues and its management practices in Nepal.

Literature Review

The completion of the project within the intended duration mainly depends upon the performance

* Technical Lieutenant Colonel, Budune Camp Commander (Civil Engineer) at KTFT Road Project, Nepali Army.
<lettertobinod@gmail.com>

of three actors. They are i) Clients/Employer ii) Contractors iii) Consultants. The roles of the three parties are equally important to accomplish the project on the intended completion time. The delay of the projects is caused by these three actors and some external factors i.e. force majeure.

Delayed by Employers/Clients

During the planning phase of the project, employer can fix the project duration unrealistic, technically unjustifiable, and illogical. Employer should analyse the detailed scheduling. Similarly, not providing access to the site, no on-time payment, variation of project scope during works, corruption, termination of variation orders, ambiguous contract documents, poor coordination and communication among stakeholders, insufficient information on project reports, impractical contract duration, unrealistic delay penalties, slow and long decision-making procedure, etc. are the common causes of a delay from Employers/clients side.

Delayed by Contractors

Problems in funding (credit lines) and poor financial discipline, poor experience, delay in submission of design and working drawings, delay in equipment and manpower mobilization, delay in site arrangement, sub-contractor, and vendor-related delays, payment-related issues, poor coordination and communication, construction material issues, quality and quantity of construction materials issues, rigid in decision making, conflict, corruption, labor strikes, etc. are the major causes of delay from contractors.

Delayed by Consultants

Lack of competency, disagreement with a design engineer, delay in checking and approving the design, drawings, and reports, lack of knowledge and experience, poor site investigation, delay in approving the interim payment certificates, insufficient coordination and communication among project stakeholders, errors in design documents and discrepancies, etc. are the major cause of delay from consultants.

Delayed by External factors

Natural calamities, variation in project-related

existing rules and regulations, alterations in global economic conditions as well as export-import system, war, access to the site issues, for example, tree cutting, electricity, road and water, sociocultural factors, government policy, and priority, geology, raw material availability or any other force majeure, etc. are also very much crucial factor about the delay of the project.

Estimation of construction duration

Estimation of the construction duration of the project is a crucial part in the planning phase. It should be calculated scientifically and based on the norms which depends upon the magnitude of the works, application of technology, location, special feature of the project, and productivity of human resources. In the golden principle of FIDIC for the construction duration, it is also mentioned that "All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration". Department of Road (DoR) has prepared the guidelines for the determination of appropriate and consistent contract periods with the logical basis for the estimation of construction time for road and bridge work.

Project Milestones

To monitor the progress of the project, project milestones are set which is very useful tools to monitor the project management. Milestone helps to track financial progress, activities, and specific dates as well in the project timeline. By assigning the milestones, the deviations from the planned schedule will be easily detected which allows for timely adjustments and risk mitigation of the project. In some construction contracts, multiple milestones may be set for smoother execution of the projects. Extension of time (EOT) or liquidated damage (LD) can be started on this milestone date as well.

Case Example: Department of Roads et. al. Vs Waiba Bhairab Construction JV Samakhushi, (NKP 2076, Vol No 63, No 2, Decision No 10645

This is the leading case in the Nepalese construction industry, where the contractor has made a procurement contract agreement for the

construction of a highway bridge with Department of Road (DoR). During the execution, the employers could not provide the correct data to the contractor so that the project works was not completed on the intended completion duration. Then the contractor claims against the employers for prolongation cost for extension of time and idle cost of manpower and equipment due to delay caused by the employer. They also claimed for payment of interest on delayed payment of IPC. An arbitration tribunal board had been formed and the arbitration board made the awards for the contractors. Then DoR filed this case to the Supreme Court, In this case, the Supreme Court has made a landmark decision to pay the prolongation cost for extension of time and idle cost of manpower and equipment due to delay caused by the employer.

According to the legal analysis from the court about not paying prolongation cost and saving public money, the various governmental agencies shall make the contract for the implementation of plans, program, and projects. In such type of contract, government agencies are not in the position of using the sovereign authority. It is also a normal contract made under statutory power having equal footing. When an agreement is made on an equal footing between parties, it must be respected and obeyed by both parties.

Methodology of research

This research paper is the qualitative types of study that analyze legal propositions or legal theories or doctrines and explore existing statutory propositions about the extension of time (EOT) in construction contracts. It includes the description, interpretation, verification, and evaluation of research papers, governmental acts and regulations, reviews, and expert views.

Legal provision of Extension of Time/Liquidated Damage issues

Non completion of the work, supply, or service delivery by the contractor/supplier/service providers/consultant on the contract time will

be provided extra time to accomplish the works from their concerned public entity based on the evaluation of the reasons behind the request for a time extension, which is mentioned in the Nepal Public Procurement act 2007 and Procurement rules 2007.

In the Public Procurement Act 2007 section 56 and Sub-section (1), if the period of the procurement contract is to be inevitably extended due to force majeure, failure of the public entity to make available the materials to be made available by it or other reasonable causes on the prescribed grounds upon submission of application by the person obtaining procurement contract. Whereas Liquidated damages are implied for failure of performance within the specified time by the delay of contractor/supplier/service providers/consultants as mentioned in section 52 of the Public Procurement Act 2007. The latest amendment (13th amendment of Public Procurement Rules 2007) on March 2024 has empowered the authority for extension of time (EOT).

If the work under the procurement contract can not be completed within the contract time, because of the occurrence of the circumstance set out in Section 56 of the Act, and rule no 120 of the regulation, the concerned contractor/supplier/service provider/consultant shall make an application, stating the reason of delay and required extension time, at least twenty-one days before the expiration of the contract. The concerned authority shall make necessary inquiries to know the reasons behind the delay. If the justifications are found reasonable, an extension of time (EOT) with duration will be granted.

International Federation of Consulting Engineers (FIDIC), the condition of the contract has a provision to pay the bonus in clause no 8. Commencement, Delays, and Suspension section. In this section, the rate of bonus payment to the contractor/supplier/service provider/consultant per day shall be 0.05% of the contract price, if the completion of the works is earlier than the finish date as per the contract. The maximum bonus percentage that can be awarded will be not more than 10% of the contract price.

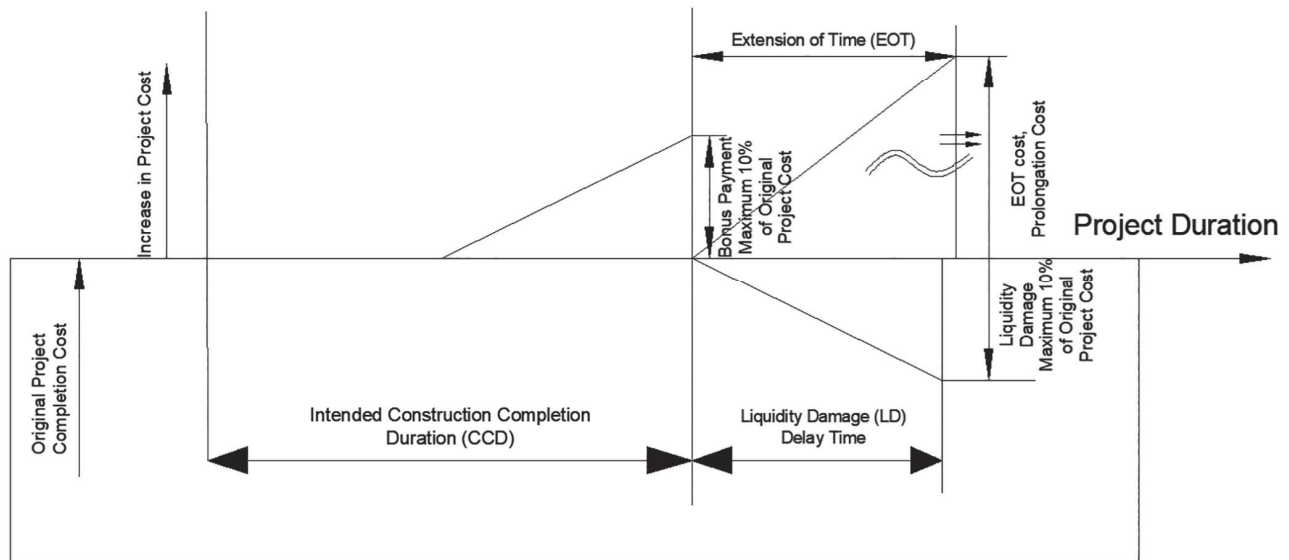


Fig: Graphical presentation of Extension of Time (EOT), Liquidated Damage (LD) & Bonus on Project Cost Vs Project Duration

Liquidated Damage

If the contractor/supplier/service provider/consultant could not accomplish the work within the procurement contract period, liquidated damage (LD) is charged as a penalty. According to Nepal Public Procurement Act 2007 in section 52 and Public Procurement Regulation 2007 on rule no 121 (a) In the event of non-completion of a work set forth in the procurement contract within the period set forth in the contract owing to delay caused by the contractor/supplier/service provider/consultant shall pay liquidated damages in a sum to be set by zero decimal zero five percent of contract price per day but not exceeding ten percent of the contract price. Provided that such party shall not be liable to pay such liquidated damages when the delay in performance or delivery is due to a force majeure event or without the fault or negligence on his or her part, and (b) That the concerned party shall not be relieved of the liability to perform the work set forth in the procurement contract by virtue of payment of liquidated damages referred to in Clause (a).

Consequences of Extension of Time (EOT)

The entitlement of Extension of Time (EOT) affects to many dimensions for example timelines, cost,

forms, and outputs of the project. It increases the construction cost i.e. cost overrun and completion time i.e. time overrun. In some projects, the project may be terminated before completion or ends not as initial planning.

Project Cost Overrun

More budget is required to accomplish the same works after entitlement of Extension of Time (EOT) to contractor/supplier/service provider/consultant, i.e. cost overrun. It is because of the prolongation cost i.e. insurance extension cost, performance bond extension cost, insurance of the products, manpower, machine, and resources costs, resource idle cost and overhead cost, etc. Similarly, additional payment is needed in multiyear projects where a cost price adjustment (CPA) provision is applicable. Whereas, Failure to accomplish the works on time by their own fault results the charging of liquidated damages (LD) which will bring back the money.

Source of claims and disputes

However, it is mentioned in the Public Procurement Rules 2007 on rule no 120, that such EOT may not result in any financial burden to the project. It is a cross-cutting issue in the procurement regulations. Usually, the reason behind the entitlement of

extension of time is due to the force majeure or from employer's weakness or some errors in the system. Entitlement of EOT due to the employer's own weaknesses or force majeure and not paying the consequential cost to the other party may not be the justifiable which will be the main source of claims and disputes.

Credibility of Implementing Agency

The failure to complete the project on time endures the institutional credibility and confidence of implementing agency to work on the next project. It triggers disappointment and dissatisfaction in the public.

Consequences of Liquidated Damage

The charging of Liquidated damage (LD) charges the fines as a penalty to the contractor/supplier/service provider/consultant which saves the budget of the project but the occurrence of a dispute is equally possible among the parties.

Conclusion

The frequent change in the extension of time clauses in public procurement regulation by the government shows the importance of the project completion time in the contract. The extension of time or Liquidated damage entitlement significantly affects the implementation of any project. Proper, realistic, and logical project duration estimation, following

scientific and practical scheduling techniques, and allocation of the construction duration should be made for successful project completion which will propel the smooth flow of progress ahead without problems and disputes.

References

- Public Procurement Act, (2007) Nepal, Section 52, 56
- Public Procurement Regulation, (2007), Nepal, Rule 119,120,121
- Nepal Arbitration Act, (1999), Nepal
- DoR (2015), Guidelines for Estimation of Construction Time for Road and Bridge Works, Department of Road
- Kayastha, G.P.,(2022), Prolongation cost claim, Retrieved from <https://www.nepca.org.np/prolongation-cost-claims/>
- Brian Eggleston (2009), Liquidated Damages and Extensions of Time: In Construction Contracts, Third Edition. © 2009 Brian Eggleston. ISBN: 978-1-405-11815-6
- Department of Roads et. al. Vs Waiba Bhairab Construction JV Samakhushi, (NKP 2076, Vol No 63, No 2, Decision No 10645)