

CLAIMING AND PROCESSING EXTENSION OF TIME (EOT) UNDER THE PAM CONTRACT 2006 (with/without quantities)

1.0 What is "Prevention Principle" ?

The principle of prevention is of general application in contracts. Simply put, it means, that one party cannot impose a contractual obligation on the other party, where he has impeded, or prevented, the other in the performance of that obligation. This flows from a generally stated principle, that a party cannot benefit from its own wrong, or in the words of Lord Denning in *Amalgamated Building Contractors Ltd v. William Holy Cross LIDC [1952]* ; and I quote :-

"the building owner cannot insist on the condition if it is his own fault that the condition has not been fulfilled."

In the building industry, the "Prevention Principle" is the most effective, and most used defence by the Contractor against liquidated damages. In such a case, the only remedy left for the Employer is to sue for general damages for such late completion as can be established. The liability left on the Contractor, on the other hand, is to complete within a reasonable time or face general damages for failure.

2.0 Why is there a need for extension of time (EOT) provision ?

Given the complexity of construction projects, the likelihood of variations, the difficulties of co-ordination, and unforeseen problems, it is almost impossible for the Employer to avoid being caught by the "Prevention Principle", unless some relief is made available. Such relief is provided by the EOT Clauses.

The provisions under **Clause 23** for the Architect to grant EOT to the Contractor are, therefore, made for the purpose of defeating the "Prevention Principle". In other words, Clause 23 is provided to ensure that the Employer's entitlement to Liquidated Damages is not compromised by any delay caused by his acts or omissions.

3.0 How to claim for EOT ?

3.1 Contractor to Apply

Under **Clause 23.1**, an EOT claim is initiated by the Contractor. This is because, contractually, the Contractor is responsible to programme, execute and complete the Works by the Completion Date. As such, the Contractor should, or ought to know, when the completion of the Works will be delayed.

Clause 23.1 states :- *"If the Contractor is of the opinion that the completion of the Works is or will be delayed by any of the Relevant Events stated in Clause 23.8"*, he may apply for an extension of time, provided always that he follows the procedure stated under **Clause 23.1(a)** and **Clause 23.1(b)**. Please note that, unlike the PAM 1998 form, such procedure is divided into two distinct stages. However, under certain circumstances, like an unforeseen flooding of the whole site, the 2-stage procedure may be combined into a single stage.

3.2 Condition Precedent to EOT Entitlement

Under **Clause 23.1(a)**, or **stage one**, the Contractor is obliged to give a *"written notice"* to the Architect informing him of the Contractor's *"intention to claim such extension of time"*. Such written notice must contain 3 elements :-

- (1) *"an initial estimate of the extension of time he may require"* duly supported with
- (2) *"all particulars of the cause of delay"* and
- (3) the notice must reach the Architect *"within twenty eight (28) Days from the date of the AI, CAI or the commencement of the Relevant Event, whichever is the earlier"*.

Thus, the Contractor is obliged to alert the Architect, within the stated time, any likely delay to the completion of the Works. The objective of this notice is to give the Architect the earliest possible opportunity to discuss with the Employer, on any measures to be adopted to mitigate, or neutralise, the delay. To ensure that the Contractor will so alert the Architect, **Clause 23.1(a)** also makes the giving of such written notice by the Contractor "*a condition precedent*" to an entitlement of extension of time. In other words, IF the Contractor fails to give such a notice to the Architect, in the specified manner, he will not be entitled to any EOT. This is consistent with **Hudsons 11th Edition paragraph 4.123** which states :-

"Building and engineering contracts frequently contain provisions requiring a contractor to give notice within a reasonable time of event occurring which he considers may entitle him to claim additional payment under the terms of the contract. Since the purpose of such provisions is to table the owner to consider the position and its financial consequences (by cancelling an instruction or authorising a variation, for example he may be in a position to reduce his financial liability if the claim is justified),.....there is no doubt that in many if not most cases the courts will be ready to interpret these notice requirement as condition precedent to a claim, so that failure to give notice within the required period may deprive the contractor of all remedy."

3.3 Timely Submission of Full Particulars

After having given the Architect the required written notice under **Clause 23.1(a)**, the Contractor shall, in **stage 2**, send to the Architect "*his final claim for extension of time*" under **Clause 23.1(b)**, "*within twenty eight(28) Days of the end of the cause of delay.*" Such final claim must be "*duly supported with all particulars*" to enable the Architect to assess any extension of time to be granted. As such, in addition to submitting his "*final claim*" within the stated time of "*twenty eight (28) Days*", the Contractor must also support his claim with "*all particulars*", necessary to demonstrate how the Relevant Event cited by him has delayed, or will delay, the completion of the Works by the length of extension of time claimed by him. The need for limiting the submission of "*final claim*" to "*twenty eight (28) Days of the end of the cause of delay*" is to enable the

Architect to assess the claim, before the facts surrounding the claim become blurred by the passage of time. *"If the Contractor fails to submit such particulars within the stated time (or within such longer period as may be agreed in writing by the Architect), it shall be deemed that the Contractor has assessed that such Relevant Event will not delay the completion of the Works beyond the Completion Date"*, and that he no longer requires the extension of time he notified the Architect under **Clause 23.1(a)**.

In short, if the claim is to be successful, it must :-

- be submitted in time;
- be supported by relevant information and details of the claim ; and
- demonstrate that the completion of the whole of the Works (and not any individual item of the Works) has been delayed by one or more of the specified Relevant Events.

The Contractor is also required under **Clause 23.2** to extend a copy of written notice given by him under Clause 23.1 to the Nominated Sub-Contractors concerned, if the particulars of such notice include references to them.

4.0 How to Process an EOT Claim ?

4.1 Insufficient Particulars

Under **Clause 23.3**, if the particulars submitted by the Contractor under **Clause 23.1(b)** are deemed to be *"insufficient to enable him to decide on the application for extension of time"*, the Architect must inform the Contractor of such deficiency *"within twenty eight (28) Days from receipt of the Contractor's particulars"* and the Architect *"may require the Contractor to provide such further particulars within a further twenty eight (28) Days or within such period of time as may be stated by the Architect in*

writing". The word *"may"* here means "is permitted to" and not "has the discretion to". Hence, if the Architect does not write to the Contractor *"within twenty eight (28) Days from receipt of the Contractor's particulars"*, it shall be deemed that the particulars so submitted are *"sufficient"* to enable the Architect *"to decided on the application for extension of time"*. The Architect must, then, give the Contractor his decision, within the time frame stipulated in **Clause 23.4**, i.e. within six(6) Weeks from the receipt of such particulars.

4.2 Processing EOT Claim After Receipt of Sufficient Particulars

"When the Contractor has submitted sufficient particulars for the Architect's consideration," the Architect, under **Clause 23.4**, must take into account **Clauses 23.5, 23.6 and 23.8**, when he processes the EOT Claim.

Firstly, he must consider whether the particulars so submitted by the Contractor support his claim, and whether such delay was caused by one, or more, of the Relevant Events stated in **Clause 23.8**. In assessing the effect of the Relevant Events, the Architect must base his assessment of such effect, at the time, when the Works were actually being executed, and not when they were programmed to be executed. In other words, IF the Relevant Events only delay certain items of the Works and have no effect on the overall completion of the Works, then, no EOT is due to the Contractor. Both "**CAUSE**" & "**EFFECT**" must be present, before EOT can be granted to the Contractor.

Secondly, "the Architect may take into account" **Clauses 23.5(a)** and **23.5(b)** which state :-

Clause 23.5(a) - " the effect or extent of any work omitted under the contract, provided always that the Architect shall not fix a Completion Date earlier than the Completion Date stated in the Appendix " (i.e. the original Date for Completion); [for eg. - Painting work omitted / additional time required to do some additional work can be set off against time save by the omission of painting work] ; and

Clause 23.5(b) - " any other Relevant Events which in the Architect's opinion will have an effect on the Contractor's entitlement to an extension of time." [for eg. Employer breach payment terms / Contractor intentionally not apply for EOT Prevention Principle / Time at large / No Liquidated Damages (LD)].

The phrase "the Architect may take into account..." does not give the Architect the "discretion" but rather the "permission" to take into account Clauses 23.5(a) & 23.5(b), when he assesses the extension of time due to the Contractor. This is because Clause 23.5 flows from Clause 23.4 which states, "*.....the Architect shall subject to Clause 23.5 ... considers the Contractor's submission*". As such, if he fails to take into account these two Clauses, he may be in breach of **Clause 23.5**, and such a breach may set the Completion Date at large, with the Employer losing his entitlement to LD.

Thirdly, the Architect must also take into account of **Clause 23.6** to see whether the Contractor has "*constantly use his best endeavour to prevent or reduce delay in the progress of the Works and also to do all that may reasonably be required to the satisfaction of the Architect to prevent and reduce delay or further delay in the completion of the Works beyond the Completion Date*". The 1st obligation of the Contractor to "constantly use his best endeavour..." is no more than a general obligation to show willingness to do what the contract requires. The 2nd obligation "*to do all that may reasonably be required to the satisfaction of the Architect*" does not empower the Architect to order acceleration of the progress of the Works, or instruct the Contractor to put in extra resources. How far should the Contractor's "best endeavour" be, shall depend on the circumstances of each case, but this proviso does not contemplate the expenditure of a substantial sum of money; in particular, if the delay has been caused by the Employer or his Architect or Consultant.

So, you Architects out there, don't go to town with Clause 23.6, and instruct the Contractor to do all sorts of things to catch up with the delay in completion, when press by your client to do so. Instruction to accelerate work is a valid Variation entitling the Contractor to additional payment. So, warn your client accordingly !

After having so considered the Contractor's submission, the Architect under Clause 23.4, is then obliged to *"either reject the Contractor's application or issue a Certificate of Extension of Time within six (6) Weeks from the receipt of sufficient particulars"*. If the Architect fails to do so within the stated time of *"six (6) Weeks"*, he will be in breach of contract and such a breach may set the Completion Date at large, resulting in the Employer losing his entitlement to Liquidated Damages.

Within the context of the foregoing provisions, the Architect under Clause 23.4, *"may issue the written notice of rejection or the Certificate of Extension of Time before or after the Completion Date"*. Hence, in the event the Architect received *"sufficient particulars"* from the Contractor close to, or after, the Completion Date, the Architect can still decide on the Contractor's application, and issue his written notice of rejection, or the Certificate of Extension of Time, within *"six (6) Weeks"* from the receipt of sufficient particulars.

4.3 Notifying the Nominated Sub-Contractors

Clause 23.7 requires the Architect to *"notify every Nominated Sub-Contractor in writing of each decision"* he makes *"when fixing a later Completion Date"*. This is to enable the Nominated Sub-Contractor, whose work programme may be affected by a later Completion Date, to adjust his work programme to establish a later Sub-Contract Completion Date with the Contractor, in accordance with **Clauses 15.1, 15.2 and 15.3** of **PAM Sub-Contract 2006**.

4.4 Relevant Events

The *"Relevant Events"* referred to in **Clause 23.1** are "Causes of delay" that will entitle the Contractor to claim for EOT. All such *"Relevant Events"* are listed under **Clause 23.8**.

Any delay to the completion of the Works, that is caused by events other than those listed under this Clause, will not entitle the Contractor to an extension of time. Such events are deemed to be business risks, that the Contractor has already priced for in the Contract Sum. For example: shortage of building materials, shortage of labours, seasonal inclement weather...etc.

The "Relevant Events" under **Clause 23.8** can be categorised into two groups :-

Group (a) : Neutral events that are beyond the control of the parties :-
Clauses 23.8 (a) to (d), (n), (p) & (q) ; and

Group (b) : Events that are within the control of the Employer :-
Clauses 23.8 (e) to (m), (f), (g), (h), (i), (j), (k), (l), (o) and (r) to (x).

The **Group (a)** Clauses do not entitle the contractor to recover loss and/or expense. They merely entitle him to an extension of time. Any, or all, of the **Group (a)** Clauses may be deleted from the Contract to make the Contractor liable to the Employer for liquidated damages arising from delay caused by such events, provided the Contractor has been given an opportunity to price for such risks in his tender; for eg. this can be done by stating such deletion in the "Preliminaries" of the BQ.

The **Group (b)** Clauses will entitle the Contractor to an extension of time, and where applicable, loss and/expense under **Clause 24**. Unlike the **Group (a)** Clauses, the deletion of any of the Clauses under **Group (b)** will not make the Contractor liable to the Employer for liquidated damages arising from delay caused by such Relevant Events. This is because such Relevant Events are matters within the control of the Employer, and the deletion of such Relevant Events has taken away the Architect's power to grant extension of time to the Contractor for delays caused by such Events. Consequently, time is set "at large" as a result of the effect of the "Prevention Principle". When time is "at large", there is no longer any firm Completion Date, and the obligation of the Contractor is to complete within a reasonable time. Since there is

no firm date from which to calculate the period of delay, Clause 22 is rendered inoperative, resulting in the Employer losing his entitlement to recover Liquidated Damages from the Contractor. As such, by deleting any of the **Group (b)** Clauses from the Contract, the Employer is deemed to have elected to take the risk, that he will not cause a delay to the Contractor by any of the deleted Relevant Events, which are within his control.

Append below are further elaborations on some of the Relevant Events :-

- Clause 23.8 (a) : Force Majeure

This is a term derived from French law, and is used to refer to the circumstances which are beyond the will and the control of man. However, in **PAM Contract 2006**, force majeure has a restricted meaning, expressly assigned to it under Article 7 (ad) of the Article of Agreement, where it is defined as "*any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters*". Events like : the Government's Foreign Worker Policy, SARS and Tsunami are some good examples.

- Clause 23.8(b) : Exceptionally Inclement Weather

This event is only relevant if :-

- (i) the weather at the Site is exceptionally inclement (not just inclement) for the time of the year, during which the delay occurs; and
- (ii) the nature of the affected Works is weather-sensitive.

- Clause 23.8(c) : Insurance Contingencies

This covers delay caused by the insurance contingencies under Clause 20.A.1, 20.B.1 and 20.C.1 such as "*fire, lightning, explosion, earthquake,.... etc.*" However, this Clause makes it quite clear, that the Contractor shall not be entitled to any extension of time, if the insurance contingency is caused by "*any negligence, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractors*".

- Clause 23.8(d) : Civil Commotion, Strike or Lockout

The provision of this Clause is clear. However, for it to operate, the strike, or other stated event, must be one that affects any of the "trades" expressly stated in this Clause i.e., any trade engaged in the preparation, manufacture or transportation of any materials and goods required for the Works.

- Clause 23.8(e) : Late Instruction or Information from the Architect

In order to found a claim under this Clause, the Contractor must :-

- (i) *"specifically applied in writing" to the Architect for "the necessary A.I." ; and*
- (ii) *submit such application to the Architect "in sufficient time before the commencement of construction of the affected Works, to enable the Architect to issue the necessary AI within a period which would not materially affect the progress of the affected Works, having regard to the Completion Date." Such "necessary A.I." however, does not include A.I. that was required "as a result of any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractor".*

- Clause 23.8(g) : Architect's Instruction

The relevant Architect's Instructions are :-

Clause 1.4 : Instructions arising from discrepancies in or divergences between any of the Contract Documents and any subsequent documents issued by the Architect ;

Clause 11.2 : Instructions requiring a variation ; and

Clause 21.4: Instructions postponing or suspending the executing of all or any part of the Works.

- Clause 23.8(j) : Employer's Tradesmen

Under this Clause, the Employer accepts liability for "delay on the part" of such people. However, its application is restricted to delay or failure in the execution of their work and not to delay caused by their returning to carry out remedial work after purported completion.

- Clause 23.8(l) : Inspection and Testing

The Architect is empowered by **Clause 6.3** to instruct the Contractor to submit any materials or goods, or to open up covered or completed Works, for inspection and testing. If the results of such inspection and testing establish no non-conformity with the Contract, the Contractor is entitled to be paid for the cost of such opening up and testing, as well as, the subsequent making good of the affected Works. This Clause ensures, that the Contractor will also be entitled for an extension of time, if he should suffer a delay in the completion of the Works, as a result of such inspection and testing.

The Contractor will, of course, not be entitled to any payment or extension of time, if

- (i) the results of such inspection and testing establish, that the workmanship or materials are not in accordance with the Contract ; or
- (ii) such inspection or test is ordered by the Architect, as a result of some previous *"negligence, omission, default and/or breach of contract by the Contractor"*.

- Remaining Relevant Events

The remaining Relevant Events are self-explanatory and need no further elaboration.

4.5 EOT After Certificate of Non-Completion

Under **Clause 23.9**, which is not found in PAM 98, the Architect is empowered to grant the Contractor an extension of time, when the completion of the Works is delayed by a Relevant Event, occurring *"after the issuance of the Certificate of Non-Completion,"* i.e, when the Contractor is in culpable delay. Such extension of time *"shall be added to the Completion Date"* to arrive at a new Completion Date. This provision is consistent with the case law established by the case of **Balfour Beatty Building Ltd. vs. Chestermount Properties.** The facts of the case are as follows :-

Facts :

- The building contract was based on the JCT 1980 Form.
- May 1989 - the contractor failed to complete the building work (without fit out work) by the contract completion date.
- Between February to July 1990, when contractor was already several months in delay in the building works, the architect issued a series of instructions for fit-out works.
- October 1990 - the contractor completed the building works.
- February 1991 - the fit-out works was completed.

Extension of time for 199 days were granted for the fit-out works. The 199 days were added to May 1989, the original date for completion of the building core works. The new completion date was accordingly extended to November 1989.

It must be noted that the extended completion date of November 1989 was before the date of the instruction for the fit-out works which was issued between February and July 1990.

The issue before the Court was, whether the architect had the power to order a variation instruction, when the contractor was already in culpable delay.

Contractor's Arguments :

- (a) The effect of issuing a variation instruction during a period of culpable delay rendered time at large, and that the employer would lose his right to levy liquidated damages.
- (b) Alternatively, the contractor contended that the architect should have granted an extension of time on a gross basis, that is to say, that the extra period for executing the work, which was 199 days, should have been calculated from the date when the variation instruction was given, and not from the original date for completion of the building work.

The Court held that :-

1. Under the JCT 1980 Form, the architect has the power to grant extensions **retrospectively** for all the grounds provided under Clause 25.3, and not merely to those which would be classified as 'acts of prevention'.

2. **The court further held that any extension of time should be on a net basis, that is by taking a date currently fixed, and adding to it the number of days which the architect regarded as a fair and reasonable extension of time.**

Clause 23.9 was drafted to reflect this Court's decision. As one of the Relevant Events concerns delay arising from the compliance of "AIs" [Clause 23.8(g)], **Clause 11.3** was added to further re-inforce the Architect's power to order Variation necessitated to meet the requirement of any Appropriate Authority and Service Provider after CPC, and to grant EOT after Certificate of Non-Completion under **Clause 23.9**.

4.6 **Review of EOT After Practical Completion**

Clause 23.10, which is also not found in PAM 98, grants the Architect the discretionary power "*within twelve (12) Weeks after the date of Practical Completion*" to review "*any of the Relevant Events*", whether or not such a Relevant Event has been considered in "*a previous decision*", and whether or not such a Relevant Event has been "*specifically notified by the Contractor under Clause 23.1*". After having taken into account the effect of such a Relevant Event and, where applicable, the effect of the Contractor's failure to notify the Architect under Clause 23.1, (i.e., would it make any difference, if the Contractor did notify the Architect ? - Would delay be avoided / mitigated ?), the Architect may "*fix a Completion Date later than that previously fixed, if in his opinion the fixing of such a later Completion Date is fair and reasonable*".

Such final review of extension of time must not result "*in a decrease in any extension of time already granted by the Architect*". If the fixing of such later Completion Date "*affects the amount of Liquidated Damages the Employer is entitled to retain, he shall repay any surplus amount to the Contractor within the Period of Honouring Certificate*".

Clause 23.10 provides the Architect with a final opportunity to review the Contractor's EOT entitlement to correct any "unreasonableness", before one of the parties elects to refer the issue to be reviewed by arbitration. This Clause stipulates that the Architect "*may*" review. As such, if the Architect is not reviewing the EOT after Certificate of Practical Completion, he should convey this to the Contractor in writing.

To give effect to these 2 new clauses (23.9 & 23.10), another new clause (Clause 22.3) was added - [**Read "Clause 22.3"** .]

4.7 Other Duties Of The Architect

Please note that no one can guarantee, that a building project commenced on time will finish on the due date. **Clause 23** is, therefore, set merely to reflect the realities of building operation. It is important for the Architect to explain this to the Employer, so that he does not commit himself to some course of action, which depends precisely upon the contract completion date. [For example: like schedule the sale of his existing house to move into the new one, based strictly on the Completion Date of the new one!]

Execution of extra work, instructed by the Architect by way of a Variation Order, does not entitle the Contractor to EOT, unless he can demonstrate that the work so executed has actually delayed the completion of the Works beyond the Completion Date. Do remember that the "*delay*" does not refer to the delay in a particular item or items of Works but to the delay in the completion of the whole of the Works, and that the onus of proving such delay rests with the Contractor. Hence, unless he is in a position to furnish the necessary documentary evidence to substantiate his claim, the Architect is in no position to grant him any EOT, no matter how much the Architect may sympathise with the Contractor. Neglect this and the Architect may very well have to compensate the Employer for his loss of Liquidated Damages.

Delay in the issuance of instruction, if it has not been brought about by the Employer's delay in making a decision, is something which rests squarely on the Architect's shoulders. Even delay by consultants may give rise to liability by the Architect, if he has failed to lay down and agree a firm programme for the consultants' works, as the co-ordination and integration of the works of consultants are part of the Architect's "Basic Services".

The granting of EOT under **Clause 23** does NOT automatically entitle the Contractor to extra money by way of extra Preliminaries, and the granting of EOT is also not a condition precedent to the recovery of direct loss and / or expense under **Clause 24**. One Clause has nothing to do with the other. In other words, the Contractor is entitled to loss & expense under **Clause 24**, without having first obtain an EOT under **Clause 23**.

The period of extension can rarely be arrived at by a simple process of arithmetic, but has to be the result of a consideration of various factors which include :-

- the effect of the Relevant Event in question [eg. 'cause' but no 'effect'] ;
- the actual progress (and not the programmed progress) vis-à-vis the projected delay in the progress of the Works [eg. work progress is ahead of schedule] ;
- the effect of any causes of delay which are not within **Clause 23** [e.g. in-adequate supervision on the part of the Contractor] ; and
- the effect of concurrent causes of delay (whether within **Clause 23** or not) and whether one of them is a critical or overriding cause ;

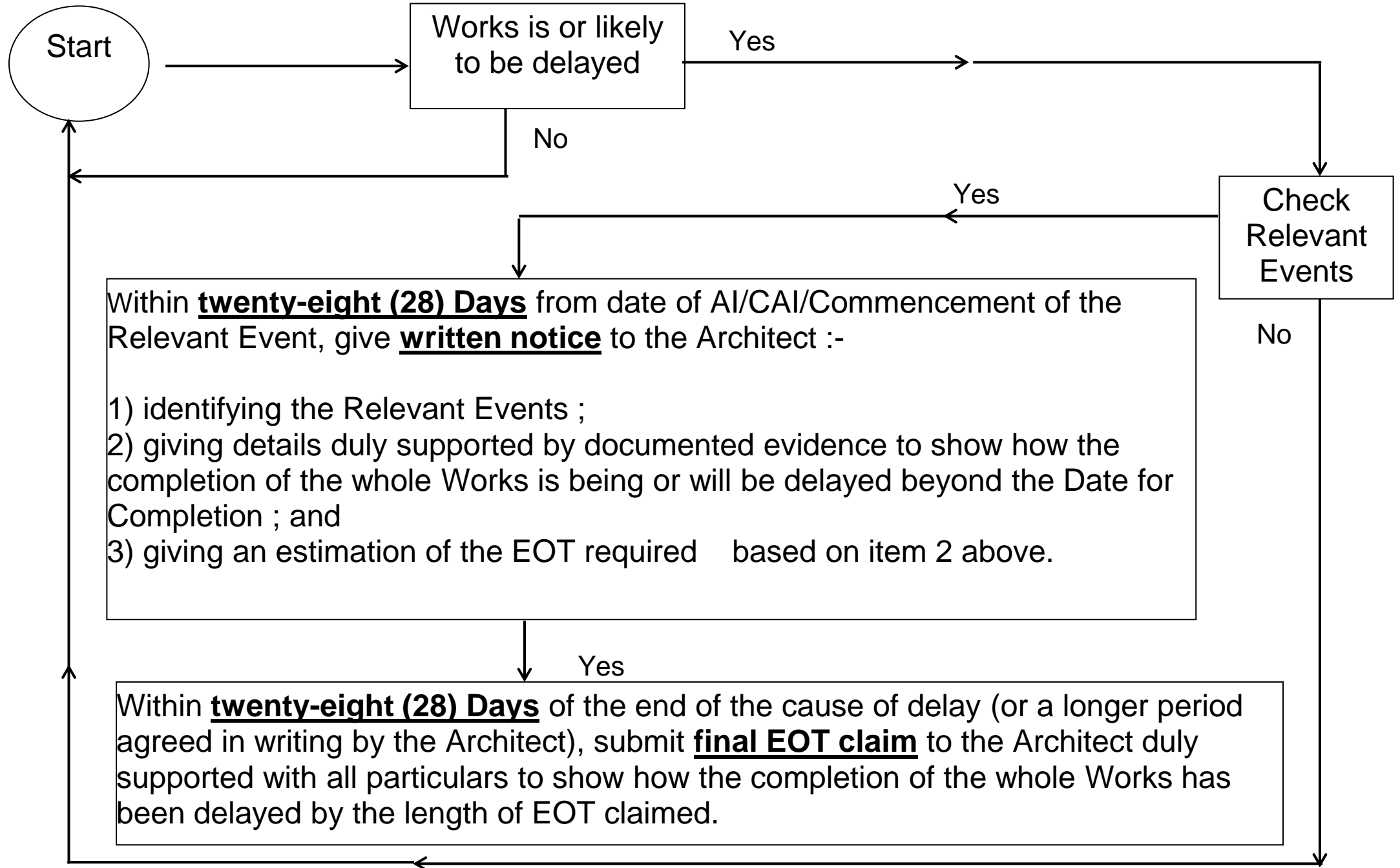
If work is delayed by two(2) competing causes of delay, one of which is caused by the Contractor (or subcontractor) and the other as a result of some fault of the Employer (or his Architect), the loss lies where it falls [e.g. one of the parallel delays is caused by the Contractor in correcting defects, whilst the other is caused by late instruction from the Architect, entitling the Contractor to an extension of time and loss and expense]. For the loss to lie where it falls, the Contractor should be allowed more time, but no compensation. The rationale is that the Employer cannot be allowed to recover liquidated damages, when he (or his Architect on his behalf) was the one who caused the delay. On the other hand, the Contractor should not be paid any extra, as he would have suffered loss due to the delay caused by correcting defective work.

5.0 Summary on Claiming and Processing of EOT

The two attached "Flowcharts" on the claiming and processing of EOT give a graphic summary of the respective duties of the Contractor and Architect.

Flowchart for EOT Claim (Chart no. 1:2)

Clause 23.0 : Contractor's Duties



Flowchart for EOT Assessment (Chart no. 2:2)

Clause 23.0 : Architect's Duties

