
THE PROVISIONAL SUM LOOPHOLE IN THE MIDDLE EAST

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PROVISIONAL SUMS

Provisional Sums or Problematic Sums! There is no widely accepted definition of the term “Provisional Sum”, but generally it refers to an estimated lump sum amount included in a contract for work that is not fully specified in scope or not specified in scope at all which may or may not be instructed to be expended during the course of construction.

In the UK, there are two distinct types of provisional sum, if the Contract uses Bills of Quantities regulated by the Standard Method of Measurement (SMM7), titled “Defined” and “Undefined” provisional sums. For a sum to be classified as “Defined” pursuant to General Rule 10.3, the nature, location and scope must be known and the base specification and approximate quantity must be stated in the Tender Bills and the Contractor will then be deemed to have allowed in his Tender for the necessary Preliminaries (site based on-costs) in terms of cost and allowed programming/ planning time within the programme to complete the work within the Contract Period. In contrast if the provisional sum is stated to be “Undefined” then the scope still requires to be designed and settled or the sum is contingent in nature then such sums are deemed not to be included in the programme for the Works and no “Preliminaries” or other costs are deemed to be included in the Contract Sum.

From recent experience when using the FIDIC Red Book (1999) Standard form of Contract there is a significant lacuna when applying Clause 13.5 –

Provisional Sums. The FIDIC Red Book does not make any distinction between so called “Defined” and “Undefined” provisional sums but does at least provide a definition of what a Provisional Sum can contain and how they are to be valued.

Once the Engineer has issued an instruction to expend a provisional sum there may be an element of uncertainty concerning the time allowed within the programme to carry out these Works. This begs the question of what if the Contractor does not include any time within his programme for a provisional sum; will he be entitled to an extension of time when the Engineer instructs the expenditure of that sum?

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FINDING THE ANSWER IN THE MIDDLE EAST

Experience in the Middle East offers no conclusive answer and there remains a doubt as to whether expenditure of a Provisional Sum can bring entitlement to an extension of time. The FIDIC Red

Book at Clause 8.4, the extension of time clause, does not specifically mention Provisional Sums as grounds for an extension of time. Is the inference therefore that the Contractor has accepted the programming risk of such expenditure. Possibly so in that Clause 4.11, Sufficiency of the Accepted Contract Amount, states:

“Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor’s obligations under the Contract (including those under provisional sums, if any).”

This quotation is under a clause heading of *“Sufficiency of the Accepted Contract Amount.”* Whilst clause headings are not definitive the phrase *“the Contractor’s obligations”* may be sufficient inference that Provisional Sums are intended to be deemed included in the Contract Period.

But what is to happen where a stated value for a Provisional Sum proves to be understated? For example what if an AED 2 Million Provisional Sum is let at say AED 5 Million. Whilst it may be that a change in material accounts for the difference and the scope is similar then arguably the time will not be affected but if the additional cost is a result of additional work then what is the Contractor’s position. The answer may well be the use of Clause 8.4(a) which lists grounds for extension of time and states: *“a Variation... or other substantial change in the quantity of an item of work included in the Contract.”*

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If a delay can be proved to result from the additional expenditure then arguably the Contract should provide a remedy and it is likely that Clause 8.4(a) may be applicable.

Provisional sums are expended by engineer’s instruction and it is presumed that if the approved programme for the Works includes the expenditure of provisional sums then it is implicit that the Engineer must instruct the expenditure of such sums in

accordance with the specified dates in the programme. If he fails to do so then clause 1.9, Delayed Drawings or Instructions, may apply which provides the remedy for the Contractor of both additional time and cost if the Engineer issues late instructions which can be proved by the Contractor to delay the completion date.

The practice of inserting provisional sums into contracts is commonplace but doing so introduces risks for both parties and it is time (no pun intended) that the contractual provisions in FIDIC were amended to introduce clarity into the use of provisional sums. The alternative is to make amendments in the Particular Conditions to ensure that the matter is addressed to remove any potential dispute.