ABU DHABI EXECUTIVE COUNCIL CIRCULAR OUTLINES NEW PAYMENT PERIOD FOR CONTRACTORS AND SUPPLIERS

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INTRODUCTION

The Executive Council of Abu Dhabi, UAE has recently issued a circular in relation to the payment period to contractors and suppliers. The circular aims to reinforce the payment arrangements and provides commercial certainty to those providing services to the Government.

The circular calls for:

- pay contractors and suppliers within 30 days of receiving an invoice, and
- amend contracts that require contractors and suppliers to pay subcontractors within 30 days of receiving payment from government departments and state-owned entities.

It was stated by Lord Denning in 1971 presiding over Dawnays v Minter that *'Cashflow is the lifeblood of the construction industry"*, this is still very true today. Therefore, in commercial contracts, the timely release of payments is a key obligation and is fundamental to the successful execution of a project. Should this not occur, it is likely that the equilibrium of the entire contract will be disrupted, not only for the entities who enter into a contract with the Government but throughout the supply chain.

For existing contracts where payment duration exceeds 30 days, the circular could potentially limit the payment duration to 30 days. It is unclear how the parties will interpret the circular, but certainly, it is a step forward in addressing the commercial concerns of contractors and suppliers.

The Government not only intends to release the payments to its contractors and suppliers in 30 days but also wants to ensure that the effect of releasing payments should reach suppliers further down the supply chain. To ensure this, the Government intend to include an additional clause within existing contracts, in an agreed manner, which would obligate the main contractor or main supplier to pay to its sub-contractor or sub-supplier within 30 days too.

The Government should be cautious that the new clause is not of the "pay-when-paid" or "pay-if-paid" type of clause in the contract. The *'pay-when-paid"* or *'pay-if-paid"* type of clauses are another source of dispute in the construction industry and seen against the public policy in other jurisdictions.

Although the circular states the payment period, it does not indicate what would happen if the payment is not released in 30 days and what remedy the contractor or supplier has to address this. For example, Sub-Clause 14.8 of FIDIC Conditions of Contract for Construction, Second Edition 2017, provides a remedy for the late release of payment as follows:

> "If the Contractor does not receive payment in accordance with Sub-Clause 14.7 *[Payment]*, the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the expiry of the time for payment specified in Sub-Clause 14.7 *[Payment]*…"

It is interesting to note that Article 76 and 77 of UAE Commercial Transactions Laws (Federal Law No.18 of 1993) supports that a creditor should receive financing charges where a debtor delays payment, as follows:

> **Article (76)**
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> "A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract. If such rate is not stated in the contract, it shall be calculated according to the rate of interest current in the market at the time of dealing, provided that it shall not exceed 12% until full settlement"
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> **Article (77)**
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> "Where the contract stipulates the rate of interest and the debtor delays payment, the delay interest shall be calculated on basis of the agreed rate until full settlement."

Therefore, the release of payment would remain a challenge unless an automatic right to compensation, such as provided by FIDIC or UAE Commercial Transactions Laws stated above, is set out under the contract.

The release of the circular will no doubt provide a level of confidence to supply chain members involved in Government projects. It will be interesting to observe, over the coming months, how the circular will impact payments and cashflow.

About the author

Muhammad Imran Chaudhary is a Civil Engineer with more than 20 years' experience in contract administration, delay analysis, quantum and arbitration in the construction of hydraulic dams, power stations, tunnels, airports, buildings, roads & highways, industrial warehouses, barrages, and diaphragm wall projects.

Imran is experienced in delay analysis, cost claims and valuation of variations. He has extensive experience working with various forms of FIDIC contracts. He has acted as expert's assistant in an ICC arbitration relating to a design-build contract with an amount in dispute of over US$150m and has considerable experience in pre-contract administration issues.

Imran's geographical experience working on large infrastructure projects spans Iceland, Germany, Egypt, Qatar, Pakistan, and the United Arab Emirates.

Timely release of payment is a key obligation in a construction contract. Commercial uncertainty arising from delayed payment can be addressed by incorporating clauses into a contract specifying agreed payment periods and the remedy for non-payment.

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