

NOTICES – AN EMPLOYER’S PERSPECTIVE



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Introduction

A notice is a communication from one party to another warning of a probable, possible, or expected event or circumstance that may adversely affect a project. A notice, when issued in relation to a contract between parties (employer and contractor), is often referred to as a contractual notice. Recent, and indeed most, published opinions on contractual notices are tailored to suit the contractor’s perspective. This article provides an opinion from an employer’s perspective in the Middle East region. The FIDIC 99 suite of contracts is the most commonly used contract type in the region, and as such, reference is made to relevant clauses of the International Federation of Consulting Engineers Conditions of Contract for Plant & Design-Build (First Ed, 1999) [commonly referred to as the FIDIC 99 yellow book] to emphasise common notice requirements.

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Purpose of a Notice

A notice is primarily for the benefit of the employer. The purpose of a notice is to bring to the employer’s attention, as soon as practically possible, an event or circumstance that has arisen which may have an adverse impact on a project. There are several reasons why an employer would want to know about such events and circumstances as soon as possible. These include:

- a) considering and taking action to address and resolve the event or circumstance;
- b) implementing measures to mitigate its effects;
- c) forecasting the impact on the master programme and project budget; and
- d) advising other project stakeholders for timely intervention on their part.

Employers are often frustrated with contractors who fail to submit timely notices, as the delayed notification reduces their ability to take prompt action to manage the effects. The requirement for timely notification is emphasised by Clause 8.3 of the FIDIC 99 yellow book which obligates the contractor to provide the engineer with an early warning of potential events or circumstances which may adversely affect the project. Clause 8.3 states, *inter alia*:

‘The Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect

the work, increase the Contract Price or delay the execution of the Works.”

Drafting of the provisions will often highlight the relevant importance of the issue being notified, with some being drafted as condition precedents. Clause 20.1 provides, *inter alia*:

‘If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstances.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. [emphasis added]

Unfortunately, in HKA's experience such strictly drafted clauses have had a consequential effect of many contractors losing sight of the primary purpose of notices and seldomly providing notices under Clause 8.3. Instead, contractors seem more focused on submitting notices as part of the claims procedure under Clause 20.1 to maintain their rights to extension of time and additional payments.

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Potential Remedy

In the writer's opinion, the interpretation of Clause 3.5 of the FIDIC 99 yellow book may have a role to play in this practice. Clause 3.5 states that, *inter alia*:

‘When these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.’

It is considered that this provision is sufficiently wide to encompass the extent to which the employer is prejudiced by the contractor's failure to submit timely notice. However, the burden of proof is on the employer to demonstrate this. For evaluation purposes, the employer will need to submit details of the actions it would have taken had it received a timely notice and that it had the capacity and capability to implement these actions at the time the notice should have been received.

Conclusion

In the writer's view, when a contractor does not submit notices in a timely manner, denying the employer the opportunity to take timely action to remedy or mitigate the adverse effects of an event or circumstance, the extent to which the employer has been prejudiced may be taken into account by the engineer when determining the contractor's claims.

If you require any further information, please contact Jeffrey Badman on JeffreyBadman@hka.com