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The contractor's entitlement to claim

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CONTRACTOR'S CLAIMS

INTRODUCTION

Contractor's claims in the construction industry are generally for additional time and/or additional cost. Whilst it is acknowledged that there are legal remedies for breach of contract under the applicable law, this article focuses on the contractual remedies agreed between the parties.

Not all contractual remedies are created equal

In relation to the contractual claims, the 2017 FIDIC Suite of Contracts contain detailed provisions under which the contractor may be entitled to cost and/or an Extension of Time (EOT) from the employer, if prescribed events or circumstances arise. Understanding these contractual provisions is the first step to good claims management.

The purpose of this article is to identify some of the basic principles to be considered when examining contractual provisions entitling the contractor to EOT and/or cost {or cost plus profit}, 'subject to Sub-Clause 20.2 [Claims For Payment and/or EOT]' under the 2017 FIDIC Red, Yellow and Silver Books. This article refers to the provisions under the 2017 FIDIC Suite of Contracts, however, it intends to identify principles that can be adopted generally in other contracts.

ESTABLISHING THE BASIS OF ENTITLEMENT

CLAUSES UNDER THE 2017 FIDIC CONTRACTS

One of the common flaws found in the contractual claims is the parties' reference to the wrong clause to establish a basis for entitlement.

It is of utmost importance for a contractor to examine its contract provisions entitling the contractor to EOT and/or cost on the occurrence of a particular event in order to persuade the employer of its case. Otherwise, uncertain basis of entitlement may lead to failure to recover compensation and delay the resolution of contractual claims.

The parties should match the event with the contractual remedy and satisfy the test on prescribed requirements, such as any specified notification requirements and time limits.

It is important to ensure that the pre-conditions stipulated in these clauses are complied with before submitting a claim. This article does not provide the details of these pre-conditions.

ENTITLEMENT VARIES UNDER DIFFERENT CLAUSES

The 2017 edition of the Red, Yellow and Silver Books contain 24, 26 and 22 sub-clauses, respectively. The sub-clauses, which entitle the contractor to claim cost {or cost plus profit} and/or EOT subject to 'Sub-Clause 20.2 [Claims For Payment and/or EOT]', are tabulated below.

Red (R), Yellow (Y), Silver (S)	Sub-Clause no.	EOT	Cost	Profit
R	1.9	✓	✓	✓
Y	1.9	✓	✓	✓
R, Y, S	1.13 ¹	✓	✓	✓
R, Y, S	2.1	✓	✓	✓
R, Y, S	4.6	✓	✓	✓
R, Y	4.7	✓	✓	✓
R, Y	4.12	✓	✓	✗
R, Y, S	4.15	✓	✓	✗
R, Y, S	4.23	✓	✓	✗
R, Y, S	7.4	✓	✓	✓
R, Y, S	7.6	✓	✓	✓
R, Y, S	8.5	✓	✗	✗
R, Y, S	8.6	✓	✗	✗
R, Y, S	8.10	✓	✓	✓
R, Y	10.2	✗	✓	✓
R, Y, S	10.3	✓	✓	✓
R, Y, S	11.7	✗	✓	✓
R, Y, S	11.8	✗	✓	✓
Y, S	12.2	✗	✓	✓
Y, S	12.4	✗	✓	✓
R, Y, S	13.3.2	✗	✓	✗
R, Y, S	13.6	✓	✓	✗
R, Y, S	16.1	✓	✓	✓
R, Y, S	16.2	✓	✓	✓
R, Y, S	16.3	✗	✓	✓
R, Y, S	17.2	✓	✓	✓
R, Y, S	18.4	✓	✓	✗

Table 1 – List of Sub-Clauses, which provide entitlement to the contractor to claim under Sub-Clause 20.2.

The following is an example of provisions contained in the 2017 FIDIC Contracts, which generally have similar wording to express the contractor's entitlements to claim:

"If the contractor suffers delay and/or incurs Cost ..., the contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to EOT and/or payment of such cost plus profit."

Sub-Clause 1.1.19 under the General Conditions of the Red and Yellow Books, provides a definition of 'Cost' and clearly states that the cost does not include profit. Sub-Clause 1.1.20 defines the 'cost plus profit' as 'Cost plus the applicable percentage for profit stated in the Contract Data (if not stated, five percent (5%))'.²

Only certain clauses allow the contractor to claim both EOT and payment of cost plus profit. Some clauses provide entitlement to EOT only and there are few provisions of the

contracts that do not allow the contractor to claim profit as shown in Table 1. The sub-clauses, which allow the contractor to claim profit, are generally for the events in relation to the employer's failure, and not to other risks³.

In some instances, the provisions are substantially the same, but certain clauses contained in the Red, Yellow, Silver Books are different from each other.⁴ The minor changes between the books are not identified in the following section, such as, Yellow and Silver Books refer to "*the Employer's Requirements*", but the Red Book refers to "*the Specifications*".

CONTRACTUAL ENTITLEMENT UNDER THE 2017 FIDIC CONTRACTS

The sub-clauses in the 2017 FIDIC Contracts (Red, Yellow and Silver Books), which entitle the contractor to claim EOT and/or cost and/or profit subject to Sub-Clause 20.2 [Claims For Payment and/or EDT], are briefly explained.

EOT AND/OR COST PLUS PROFIT

1.9 – Delayed Drawings or Instructions [Red Book]

If the engineer fails to issue the requested drawing or instruction within a reasonable time, the contractor is allowed to submit its contractual claim.

1.9 – Errors in the Employer's Requirements [Yellow Book]

If any error in the employer's requirements is found by the contractor which would not have been discoverable as an experienced contractor, the contractor has the right to claim.

1.13 – Compliance with Laws⁵

If the employer delays or fails to obtain any permit, permission, licence or approval for the works, the contractor is allowed to claim.

2.1 – Right of Access to the Site

If employer fails to provide the contractor right of access to site within time specified under the contract, the contractor is allowed to claim.

4.6 – Cooperation

As specified under the contract and/or instructed by the engineer, the contractor is obliged to cooperate with the employer's personnel, other contractors, authorities, and utility companies. The contractor has the right to claim, if the unforeseeable cooperation required for the project or the engineer's instruction cause a delay, then.

4.7 – Setting Out [Red, Yellow Books]

The employer shall provide the contractor with setting out information. If the contractor identifies an error in the setting-out data which would not have been discoverable as an experienced contractor, the contractor has the right to claim.

7.4 – Testing

The contractor is allowed to claim if the employer is responsible for the delay in testing.

7.6 – Remedial Work

If the employer and/or the employer's personnel are responsible for any remedial works, the contractor has the right to claim.

8.10 – Consequences of Employer's Suspension

The contractor can claim, if the engineer provides an instruction to the contractor to suspend or resume the works pursuant to Sub-Clause 8.9 or Sub-Clause 8.13.

10.3 – Interference with Tests on Completion

If the employer and/or the employer's personnel prevented the contractor from carrying out the tests on completion, the contractor has the right to claim.

16.1 – Suspension by Contractor

As a result of a material breach of the employer's obligations under the contract, if the contractor suspends the works, such as failure to pay amount certified, then the contractor can claim.

16.2 – Termination by Contractor

If the employer does not remedy matters stated in the sub-clause within the prescribed time, then the contractor may terminate the contract by giving a second Notice and claim.

17.2 – Liability for Care of the Works

The contractor is not liable for loss or damage caused by the events mentioned under this sub-clause.⁶

EOT AND/OR COST, BUT NOT PROFIT

4.12 – Unforeseeable Physical Conditions [Red, Yellow Books]

If the contractor encounters physical conditions which are unforeseeable as an experienced contractor, the contractor can claim.

4.15 – Access Route

If non-availability of an access route arises because of changes to that access route by the employer or a third party after the base date, the contractor can claim.

4.23 – Archaeological and Geological Findings

The contractor has the right to claim as consequences of the engineer's instruction to deal with an encountered archaeological and geological finding.

13.6 – Adjustments for Changes in Laws

The contractor can claim as a result of changes in the laws of the country.

18.4 – Consequences of an Exceptional Event

If the contractor suffers delay and/or incurs cost as a result of the exceptional event specified under Sub-Clause 18.1, the contractor can claim EOT and (in some cases)⁷ cost, but he is not entitled to profit.

EOT ONLY

8.5 – Extension of Time for Completion

Sub-Clause 1.1.34 defines EOT as an extension of the time for completion under Sub-Clause 8.5.

Sub-clause 8.5 provides several causes of delay that would give the contractor an entitlement to claim EOT for completion, however this clause does not entitle the contractor to recover any time related costs arising as consequences of an event giving rise to an EOT for completion. The causes for which the contractor has the right to claim EOT under Sub-clause 8.5 of the 2017 FIDIC Red Book are as follows:

- a) a Variation;
- b) a cause of delay giving an entitlement to EOT under a Sub-Clause of these Conditions;
- c) exceptionally adverse climatic conditions, which are Unforeseeable having regard to climatic data made available by the Employer;
- d) unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions; or
- e) any delay, impediment or prevention caused by or attributable to the employer, the employer's personnel, or the employer's other contractors on the Site."

Sub-clause 8.5 identifies causes of delay that would entitle the Contractor to claim EOT, however, this clause does not give the Contractor an entitlement to recover time related costs arising as a result of an event giving rise to an EOT.

In relation to each of causes listed under Sub-clause 8.5, the contractor seeks to recover time-related costs by reference to the following provisions⁸:

- a) Clause 13 – Variations and Adjustments, except that there is no requirement to comply with Sub-Clause 20.2.
- b) Sub-Clauses 1.9 – Delayed Drawings or Instructions, 1.13 – Compliance with Laws, 2.1 – Right of Access to the Site, 4.6 – Cooperation, 4.7 – Setting Out, 4.12 – Unforeseeable Physical Conditions, 4.15 – Access Route, 4.23 – Archaeological and Geological Findings, 7.4 – Testing, 7.6 – Remedial Work, 8.10 – Consequences of Employer's Suspension, 10.3 – Interference with Tests on Completion, 13.6 – Adjustments for Changes in Laws, 16.1 – Suspension by Contractor, 16.2 – Termination by Contractor, 17.2 – Liability for Care of the Works, 18.4 – Consequences of an Exceptional Event.
- c) Sub-Clause 18.1(f) – Exceptional Events and 18.4 – Consequences of an Exceptional Event.
- d) If conditions (i) to (iv) under Sub-Clause 18.1 – Exceptional Events, are satisfied, then the contractor may claim cost, but not the profit as per Sub-Clause 18.4 – Consequences of an Exceptional Event.
- e) If an event occurs related to *'delay, impediment or prevention caused by or attributable to the employer'*⁹, other than the events specified under the contract, the contractor may recover costs as damages for breach of contract under the law governing the contract.

There is no link between the context of Clause 8.5 and money as it refers to EOT only, relying on Sub-Clause 8.5 for the entitlement of cost is probably the most common mistake a contractor makes when submitting a claim pursuant to Sub-Clause 20.2.

8.6 – Delays Caused by Authorities

If authorities or entities delay or disrupt the contractor's work, which are unforeseeable, the contractor has the right to claim EOT. However, this Sub-Clause does not give the contractor an entitlement to any cost incurred in consequence of the event giving rise to an EOT.

COST PLUS PROFIT ONLY

10.2 – Taking Over of Parts of the Works [Red, Yellow Books]

If the contractor incurs cost as a result of the employer taking over and/or using a part of the permanent works, the contractor is allowed to claim.

11.7 – Right of Access after Taking Over

If the employer unreasonably delays its consent to access to the works during defects notification period, the contractor can claim.

11.8 – Contractor to Search

If the employer instructs the contractor to search for cause of a defect for which the contractor is not responsible, the contractor can claim.

12.2 – Delayed Tests [Yellow, Silver Books]

If the employer and/or the employer's personnel delay a test after completion, the contractor has the right to claim.

12.4 – Failure to Pass Tests After Completion [Yellow, Silver Books]

If the employer unreasonably delays access to the works or section, the contractor can claim.

16.3 – Contractor's Obligations After Termination

The contractor shall cease the further works after termination of the contract. If the engineer further instructs the contractor for the safety and protection of the works, then the contractor can claim.

COST ONLY

13.3.2 – Variation by Request for Proposal

If the contractor is requested to provide a proposal for a variation, however the engineer does not provide his consent to the proposal, then the contractor has the right to claim cost incurred as a result of submitting the requested proposal.

SUMMARY

This article sets out some of the basic principles to be considered when examining contractual provisions entitling the contractor to EOT and/or cost. Quite often, the contractor fails to identify applicable contractual provisions entitling the contractor to EOT and/or cost on the occurrence of a particular event, and therefore, incorrectly submits its claim, which may lead to failure to recover compensation and delay the resolution of contractual claims.

Only certain clauses allow the contractor to claim both EOT and payment of cost plus profit from the employer. Some clauses provide entitlement of EOT only and some of them do not allow the contractor to claim profit. Understanding these claim clauses is the first step to good claim management. It is important to keep in mind that the clauses of the 2017 FIDIC Contracts that provide entitlement to claim are not exclusive of remedies that may be available under the law governing the contract.

ABOUT THE AUTHOR

Birce Inaler is an Architect with ten years' experience in the construction industry in the Middle East, which includes over six years specialising in commercial management and claims preparation. She is currently working as a Senior Consultant in claims and dispute resolution.

Birce is dual qualified, holding a Bachelor of Architecture degree and Master of Science in Construction Management degree. She has worked on designing a wide variety of projects across Turkey. She specialises in commercial and claims management and has worked on large scale projects across Qatar, UAE, KSA and India including the construction of infrastructure projects (metro, rail, roads) and mixed-use developments which comprised high rise buildings, hotels, a shopping mall, offices, and residences.

Birce has drafted several claim submissions, rebuttal documents, dispute resolution documents on behalf of employer organisations and main contractors; and has provided assessment on numerous claims submitted by subcontractors against main contractors. She has worked on international arbitration proceedings and is experienced in acting as an assistant to the appointed quantum Expert.

If you require any further information, please contact Birce Inaler at birceinaler@hka.com

¹ Sub-Clause 1.12 in Silver Book.

² Sub-Clauses 1.1.19 and 1.1.20 in Red & Yellow Books are same in Silver Book, Sub-Clauses 1.1.16 and 1.1.17.

³ Unforeseeable physical conditions, archaeological and geological findings, adjustments for changes in laws, consequences of an exceptional event etc.

⁴ E.g. Sub-Clause 2.1 is different in the Red, Yellow and Silver Books

⁵ Sub-Clause 1.12 [Compliance with Laws] - Silver Book.

⁶ E.g. "any act or default of the employer's personnel or the employer's other contractors."

⁷ "... in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country, payment of such Cost."

⁸ This list is not exhaustive and depends on the relevant contract in use and the applicable law.

⁹ Sub-Clause 8.5 (e)