Quantity clause needs update

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The UAE has undergone dramatic changes in recent years and the building boom has led to increasingly sophisticated methods of procuring construction work. The speed of these changes has made it difficult for the legal framework to keep up. As a result, some provisions of UAE law can appear outdated and even in conflict with modern forms of contract.

One such provision is Article 886(1) of the Federal Law No 5 of 1985, which says: "If a contract is made under an itemised list on the basis of unit prices, and it appears during the course of the work that it is necessary for the execution of the plan agreed substantially to exceed the quantities on the itemised list, the contractor must immediately notify the employer thereof, setting out the increased price expected, and if he does not do so he shall lose his right to recover the excess cost over and above the value of the itemised list."

Some provisions of the Civil Code are flexible and allow the parties to agree alternative arrangements. Such provisions contain phrases like "...unless there is an agreement to the contrary" - Article 886(1), however, does not contain such a phrase.

It is uncertain whether such provisions will displace specific terms that the parties have agreed in their contract. One view is that it will depend upon the impact the provision would have to contradict the parties' written agreement. So, on the face of it, Article 886(1) would have a very significant impact.

Article 886(1) is intended to be an early warning mechanism to ensure the employer is kept up to date of increases in cost. Importantly, it appears to make the ‘giving of a notice' a condition precedent to payment for extra quantities.

The type of contract to which Article 886(1) applies is a re-measurement contract, which is where the employer provides a design and bill of quantities, which the contractor prices. The works are re-measured and the contractor is paid for the actual quantities of work executed.

This has been a common method of procuring construction works for many years. In the UAE, parties to such contracts often use the FIDIC Red Book conditions. The latest version of the FIDIC Red Book, the 1999 version, has built upon years of experience and contains, not surprisingly, provisions that deal with increases in quantities. The requirements of the FIDIC form in this respect are, however, different to and would conflict with the apparent intention of Article 886(1).

First, unlike Article 886(1), the FIDIC Red Book does not require the contractor to give the employer notice when the actual quantities are likely to exceed the estimated quantities. In other instances where the contactor seeks additional payment, it has to give notice pursuant to sub-clause 20.1 of the 1999 Red Book - this does not apply where the quantities have increased because, for example, the original quantities were incorrect.

The Red Book does recognise that the original quantities are only estimates and anticipates that the final quantities will be different, and therefore seeks to ensure that such instances will not go unnoticed. Each

month the contractor is required to submit a progress report to the employer, which must contain descriptions of progress of the works, comparisons of the actual and planned progress and details of any circumstances that could affect completion.

Secondly, in contrast with Article 886(1), payment for the additional quantities is not dependent upon the giving of a formal notice.

Even if the contractor provides accurate information in its monthly progress reports, it might not be sufficient for Article 886(1) in respect of both substance and timing.

If Article 886(1) is to be assumed to apply to such contracts, a failure to comply with its terms would have dire consequences for a contractor, since its employer might withhold monies due in respect of increases in quantities. This would be harsh on a contractor who has diligently complied with the contractual requirements and has carried out additional work in the expectation of being paid.

It is unlikely that any contractor would accept this situation without a fight, so if a settlement cannot be reached the dispute would be referred to either the courts or arbitration. However, it does seem unlikely that the courts or an arbitrator would rigidly follow Article 886(1), ignoring the agreed terms of the contract and give a decision that seems unfair.

This situation is made worse by ambiguities within Article 886(1). For instance, it requires that notice is given if the increase in quantities is substantial, but what is the measure of a substantial increase?

Similarly, if a notice was given, how do you determine whether it was given in sufficient time? Despite these problems, Article 886(1) does have some merit. In circumstances where there is no early warning mechanism in the contract, it protects the employer should the work exceed original estimates, without warning from the contractor.

Nevertheless, the conflict between the Article 886(1) and forms of contract like FIDIC suggest that the chapter of the Civil Code that deals with Muqawala (contract of work), might need updating.