

## **CLAIMS UNDER THE NEW FIDIC CONDITIONS OF CONTRACT**

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### **SUMMARY**

The FIDIC Conditions are used extensively on international construction projects, notably for major infrastructure work. The FIDIC Forms are used on projects funded by the World Bank, and the drafts of them were reviewed by it, and by the Asian Development Bank. Claims often arise, and this paper refers to the Clauses under which claims may arise, the responsibilities of each party, and the procedures for dispute adjudication and arbitration.

### **KEY WORDS**

Claims, Notices, Particulars, Adjudication, Arbitration

## **INTRODUCTION**

### **Background**

This paper refers to the Conditions of Contract for Construction, which is the ‘measure and value’ version of the FIDIC Forms. This is the first edition of this new Contract from FIDIC. It is known as ‘the Red Book’.

In order to understand the spirit of the book, we should pause for a moment to look at FIDIC as a body. There are some helpful notes inside the front cover, telling us what FIDIC is and does. It also has a very informative website at [www.fidic.org](http://www.fidic.org). It is well worth a visit. Note also the international nature of the contributors to the book, on the acknowledgements page.

### **Structure of the Book**

The Red Book is divided into three sections, namely:

1. The General Conditions, including the General Conditions of Dispute Adjudication Agreement and Procedural Rules
2. Guidance for the Preparation of Particular Conditions, including example Forms of Parent Company Guarantee, Tender Security, Performance Security Guarantee (both ‘on demand’ and ‘upon default’) and Advance Payment Guarantee
3. Forms of Letter of Tender, Appendix to Tender, Contract Agreement and Dispute Adjudication Agreement (for both one-person and three-person Dispute Adjudication Board)

## **RULES GOVERNING ALL CLAIMS**

### **Notices of Claims**

Under Clause 20.1, the Contractor must give notice of any claim, whether for time or money, not later than 28 days after the Contractor became aware, or should have become aware, of the circumstances giving rise to the claim. If he does not comply with this rule, he will not receive an extension of time, and he will not be entitled to additional payment, and the Employer is discharged from all liability in connection with the claim.

Note that this applies to a claim made 'otherwise', as well as claims made under the Conditions. This can include a claim made under the general law, such as for breach of contract, or for negligence.

### **Particulars**

Clause 20.1 requires the Contractor to follow up his notice within 42 days of the occurrence of the circumstances giving rise to the claim (not within 42 days of giving the notice) with 'a fully detailed claim which includes full supporting particulars' of the claim.

The nature of these particulars will be discussed later. For the moment, it is vital to keep in mind these rules.

## **CLAIMS FOR EXTENSIONS OF TIME**

### **Contractor's Basic Entitlement**

The basic Clause for the Contractor to claim an **extension of time** is Clause 8.4. It is there to allow the Contractor to point out where he has been delayed by reasons beyond his control. If he could not do this, and the Engineer did not have the power to give him an extension of time, he would be liable for liquidated damages for delay.

Further, if the Contractor obtains an extension of time, he may be in a position to recover his time-related costs of remaining on site longer. However, there is no natural link between Clause 8.4 and money. It is a time Clause.

### **Assessment of Delay**

The Clause can be activated when the Contractor suffers delay, or will be delayed. The only realistic way of assessing delay is by comparison with the Clause 8.3 programme. If the programme is of sufficient quality, it should form a good basis for assessing delays.

### **Grounds for Extensions of Time**

The possible grounds for an extension of time are:

- Variations
- A cause of delay referred to in the Conditions (see below)
- Exceptionally adverse climatic conditions
- Unforeseeable shortages of personnel or Goods, caused by epidemics or governments
- A delay caused by the Employer or a party under his control

### **A cause of delay referred to in the Conditions**

These are found throughout the Conditions. Try to find them! The following is a list:

- Clause 1.9 – late information
- Clause 2.1 – denied or late access or possession
- Clause 4.7 – errors in setting out information
- Clause 4.12 – adverse physical conditions
- Clause 4.24 – fossils
- Clause 7.4 - testing
- Clause 8.5 – delays caused by authorities
- Clause 8.9 – Engineer’s instructions to suspend work
- Clause 10.3 – Employer’s interference with Tests on Completion
- Clause 16.4 – termination by Contractor
- Clause 17.4 – Employer’s Risks
- Clause 19.4 – *force majeure*
- Clause 19.6 – optional termination

### **Unforeseeable Physical Conditions**

Physical conditions are defined in Clause 4.12 as ‘natural physical conditions and man-made and other physical obstructions and pollutants’. According to the definition in Clause 1.1.6.8, the criterion for judging what is unforeseeable is what is ‘not reasonably foreseeable by an experienced contractor by the date for submission of the Tender’.

### **Full Supporting Particulars: Basic Requirements**

The Contractor is to provide full supporting details of his application within 42 days of the occurrence of the delaying event. In practice, it will be difficult for the Contractor to produce full supporting particulars within 42 days, especially if the project has been underway for some time, and is complex. This makes continuous keeping of good records, and the rapid compilation of the claim, imperative.

In reality, the quality of details varies considerably. Some claims are simply not detailed, and some are not even particularised. That type of claim does not deserve success. The basic requirement is for the claim to be particularised. If there are several different causes of delay, a period of delay should be attributed to each cause. That is the basic requirement of linking cause and effect. If there is concurrent delay, then the Contractor needs to say so. He then needs to decide which delay, if any, caused more overall delay.

In order to do this, the Contractor will have to go through and produce factual evidence. It is a discipline, which will help him put his case, and helps the Engineer follow and understand his arguments. The particulars should reasonably include correspondence, meeting minutes and other documents.

### **Full Supporting Particulars: Presentation**

However, the mere inclusion of hundreds of sheets of photocopied letters and other documents will not get the claim home on their own. There has to be some narrative, which refers to the documents, and then draws some conclusions. It is not necessary, or even desirable, to repeat and quote at length from documents.

What is most helpful is to let the facts speak for themselves, but add some interpretative information. In these days of electronic documents, it is not unreasonable to expect a contractor of substance to produce schedules to his claim, by way of Microsoft Excel or Project documents, and, using digital cameras, some photographs.

Excel is a very good way of showing events chronologically, and annotating them with a short comment. Types of delay can be listed on separate worksheets, with particular items highlighted in different colours. Text can be turned to a vertical orientation in column headings, and letters or numbers entered into cells to show what the Contractor is alleging.

Project is a very telling and potent evidential programme. Remember that a picture paints a thousand words. Project has the advantage that it enables the Contractor to compile an as-built programme, and set it alongside the Clause 8.3 programme, showing delaying events. Links can be added, if they help.

Photographs are invaluable. If anyone's memory is cloudy, as it often is, a photograph, dated and given a descriptive title, can provide the conclusive evidence.

### **The Engineer's Obligations**

By Clause 20.1, the Engineer is directed to respond with approval, or with disapproval and detailed comments, and in any event, respond on the principles of the claim. In making a determination of an extension, he must proceed in accordance with Clause 3.5. That requires him to consult with the Contractor, to try to reach agreement. If it is not possible to reach agreement, he must make a fair determination of the extension of time.

The Engineer is the first-step adjudicator or arbitrator. However, he is an informed adjudicator or arbitrator, unlike the tribunals who come on to the scene later on. The Engineer is not there to reject claims, but to deal with them fairly. That does not mean he has to allow unmeritorious claims. What it means is that, if the Contractor makes valid points, the Engineer should look into them, and arrive at a reasoned conclusion.

Given that he is an informed adjudicator or arbitrator, the Engineer will have knowledge of the facts. This means he should not put the Contractor to proof of absolutely everything, in the way that a tribunal might expect.

Note also that, under Clause 8.4, the Engineer may make a number of determinations. When doing so, he must review, and may revise, previous determinations. However, he may not decrease them.

## **CLAIMS FOR PAYMENT**

### **Procedures**

The way in which such claims are to be dealt with is contained in Clause 20.1. The need for the Contractor to comply with the requirements of these provisions cannot be underestimated. Put bluntly, the Contractor is not entitled to payment if he does not comply with the procedural requirements. On the other hand, if there are genuine reasons why the times cannot be strictly observed, the Engineer should hear the Contractor's point of view. If the Employer is not prejudiced, it seems to matter little if something is a day or two late.

### **Notices and Supporting Particulars**

The Contractor's obligations are set out in Clauses 20.1. Basically, he must start by giving **notice** of his intentions. Then, he must start putting together his **particulars**, and he must keep records.

Some people say if he fails to give a notice and particulars on time his claim fails. That is a harsh view, especially in regard to particulars, and is probably not sustainable in front of a lot of arbitrators. If the Employer does not suffer prejudice as a result of the lack of notice, and the Contractor is hardly late at all, it is hard to see why the claim should be rejected.

The real penalty for the Contractor is that, if the Engineer is not alerted to the Contractor's intention to claim, or the Contractor's claim is late, or it is not adequately substantiated, the Engineer may well not arrive at the sort of figure the Contractor is looking for. In fact, Clause 20.1 does anticipate that the Contractor may take some time to provide all of the information. It allows payment to him of claims, for which sufficient particulars have been provided.

The requirements for particulars for each head of claim are given under the relevant head below.

### **Engineer's Obligations in Regard to Claims**

The Engineer has to arrive at a decision on the claim. He cannot merely reject it, or deny it completely for want of one or two pieces of paper. On the other hand, he is not there to make the Contractor's claim for him, or to certify payment due from the Employer in a carefree manner. It can be a hard balance to strike.

It may be helpful, when dealing with a contractor who is about to make a claim, to write and ask him for his particulars, or to keep records, using the Clause number and the exact terminology used in the Clause. In this way, he cannot accuse the Engineer

of trying to obtain something the Engineer should not be asking for. It also means he cannot complain later that the Engineer had been unfair to him.

If the Engineer receives a claim, he cannot put it on the shelf and leave it until the project has finished. The Engineer's duty is owed to the Contractor as well as to the Employer. If the claim is paid later than it should have been, because the Engineer has kept it on the shelf for months, the Employer may be liable for financing charges. And he may sue the Engineer for them!

### **Contractor's Basic Entitlement**

The Contractor's basic entitlement is summarised in Clause 12.1, which says that the Works shall be measured and valued. The onus is on the Engineer to do this.

### **Variations**

Clause 13.3 sets out the procedure for variations. It is easy enough to follow. The valuation rules are contained in Clause 12.3. The onus is on the Engineer to measure and value variations, but, in reality, the Contractor may well wish to claim more than the Engineer's valuation.

### **Other Claims Clauses**

The genesis of claims lies in a number of Clauses throughout the Conditions, in addition to variations. A claim under the variations Clause is to have work valued. Other claims, such as those listed under the time claims Clauses, which also allow money claims, are cost based. Some allow profit as well.

### **Heads of Claim**

The heads of claim would normally be, as a maximum:

- Direct cost
- Indirect cost
- Overheads
- Financing Charges
- Profit
- Loss of Profit

Costs of preparing the claim, economic loss and consequential loss are generally not allowable, and nor is cost which is remote (see below).

### **Recovery of Cost**

The first three of the items listed above are primary costs. Financing is a secondary cost, and is dealt with separately below. So, taking the direct and indirect costs, and the overheads together, what is the criterion for recovery of cost? The usual rule is that applied in the leading case of *Hadley v. Baxendale (1854)*.

The matters in respect of which claims for cost are made are breaches of contract. The inclusion in the Conditions of the claims Clauses provides the Engineer and the Contractor with the mechanism for agreeing damages, instead of the Contractor having to sue for them. The cost recoverable by the Contractor must therefore follow the common law damages rule. This relies on showing that the damage flows from the breach, or the cost flows from the event complained of.

This is causation. The Contractor must link cause and effect. He should not be required to provide as much evidence, especially oral evidence, as he would in arbitration, because the Engineer should be well acquainted with the facts. Nevertheless, the Engineer must ask himself if the cost flows from the event. There can be a temptation on the part of contractors to include all costs in their claims, without any apparent attempt to link cause and effect.

The measure of damage can be a difficult matter. The general rule is that damages should put the claiming party back into the position he would have been in, had the breach not taken place. That rule is given in the case of *Robinson v. Harman (1848)*. It is often helpful for the Engineer to ask himself, what would the Contractor have done, **but for** the breach?

Particulars of cost should not prove to be a problem. Direct costs are the site labour and plant. Any sensible contractor will have record sheets. They will show who and what was on site. What they probably will not show is (1) what the resources were doing and (2) why they were doing it. This will inevitably lead to some assessment being made.

Head office overheads can usually be proved by reference to pricing information behind the tender, or by using the Contractor's audited accounts. If the accounts for years, other than those in which the Works were carried out, are used, care should be taken to ensure that the attribution of overheads to the project is appropriate, and not inflated.

### **Financing Charges**

Financing charges became a head of claim as a result of the case of *F G Minter v. Welsh Health Technical Services Organisation (1980)*. It established that there are two types of financing charge. One is the loss of interest on capital which the Contractor has not been paid, and been able to put into his bank account. The other type is the interest he incurs by way of overdraft in using his own money to finance work, whereas he would normally expect to use the money paid to him under the Contract.

Financing charges are a secondary cost. If his claim for costs fails, his claim for financing will fall with it. If the primary cost claim succeeds, it can be inferred that he has incurred financing charges. There is not usually anything to be gained by looking at bank statements. They may show the Contractor had an overdraft, but that could be due to any reason, not necessarily connected with the matters claimed. In general, it is sensible to use a typical bank lending rate, plus 2%.

## **Profit**

In certain instances, profit is allowed on Cost. The level of profit should be comparable to that in the Tender, which can be proved by reference to the Tender pricing information, and the Contractor should be prepared to produce it.

## **Loss of Profit**

Loss of profit is usually the expression used to describe the damage suffered when the Contractor is kept on the project longer than anticipated, thereby losing the opportunity to earn profit on another project. It is difficult to establish, and will almost certainly suffer from being too remote.

## **Global Claims**

Global claims achieved acceptance in the case of *Crosby & Sons Ltd v. Portland Urban District Council (1967)*. There is a string of cases on global claims. As a result, some people think that they have been outlawed. That is not true. However, the Contractor's first step must always be to try to particularise his claims in as much detail as possible. If it becomes impossible to do that, he may put forward his claim in a composite fashion, to the extent that it is unavoidable.

Obviously, care must be taken not to be overwhelmed with a weight of evidence and the blanket contention that, if there are so many variations, there must have been delay and disruption!

## **Common Law Claims**

These are included in the claims made 'otherwise'. There is nothing to stop the Contractor from making a claim for breach of either a contractual or tortious duty. If the Engineer receives such a claim, he should treat it in the same way as any other claim. The grounds for making it should be clearly expressed and there should be a link between cause and effect.

The circumstances in which a breach cannot be brought within any of the Clauses must be few. Framing a claim for breach can be difficult, and it may prove interesting to see how a contractor does it.

## **DISPUTE ADJUCIATION BOARDS ('DABs') AND ARBITRATION**

Clauses 20.2, 20.3, and 20.4, together with the General Conditions of Dispute Adjudication Agreement and the annexed Procedural Rules, refer to the relatively new phenomenon of the **DAB**.

Beyond the DAB is the usual sanction of **Arbitration** in Clause 20.6. The two routes, of the DAB and Arbitration, should be looked at together, as they are linked in an important fashion. We could spend some time discussing the provisions. They are probably worthy of a half-day seminar on their own, but I shall give you the most important aspects. With the advent of adjudication as an almost instant means of



contractors having their claims dealt with, it is quite possible that any of you could find yourself in front of a DAB. For that, you need to be equipped.

Naturally, one hopes that any claims can be settled, and can be resolved by the **Amicable Settlement** route in Clause 20.5. All funding agencies I have come across prefer to do a deal under this route. They want to fund projects, not arbitrations.