

Presentation Notes on:
CLAIMS PROCEDURES

Speaker: CHRISTOPHER WADE, Chief Engineer, SWECO International, Stockholm, Sweden¹, and Chairman of FIDIC Contracts Committee

1. Introduction

This talk deals with the procedure for claims contained in FIDIC's new (1999) Standard Forms of Contract for major works, viz.:

- **Conditions of Contract for Construction** for Building and Engineering Works
Designed by the Employer : *The Construction Contract*
- **Conditions of Contract for Plant and Design-Build** for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor : *The Plant and Design/Build Contract*
- **Conditions of Contract for EPC/Turnkey Projects** : *The EPC/Turnkey Contract*

Based on long experience of often mismanaged and/or late claims from many contractors, and, indeed, general mishandling of claims by some employers/engineers, the drafters of the New Books have sought to generally tighten up the rules concerning all claims. This has resulted in several innovations.

2. Claims from the Contractor

Much of the trouble with mismanaged claims from contractors has been the lack of accurate records, and, for late claims, the possibility of making other arrangements because timely information on the potential claim has not been forthcoming.

- Sub-Clause 20.1 - which is the same in all the three New Books - requires 'notice' to be given within 28 days.

- it is the giving of notice that is important, so that all involved are aware that here is an event or circumstance where extra time or payment may be due to the Contractor
- proper records can then be kept and agreed, to avoid future argument
- alternative measures may also be possible to reduce the effects
- and hopefully the matter can be resolved at an early date
- note that the 'notice' can be just a simple statement
- if the event or circumstance turns out to be of insignificant effect, then it is not necessary to follow up with a formal claim.

In the previous FIDIC Books claims for time extension and extra payment were covered by different clauses.

- In the Old Red Book, time extension claims were made under Cl 44 and claims for extra payment under Cl 53
- in the Old Yellow Book the respective clauses were 26 and 34
- in the Orange Book 8.3 and 20.1
- in the New Books *all* claims, whether for time extension or for extra payment or for both, have to follow the procedure laid down in Cl 20.1

There are many individual Sub-Clauses which give the Contractor (or the Employer) entitlement to claim extension of time or additional payment. (These are listed on pages 90-93 of The Guide). In the -various Sub-Clauses the Contractor's entitlements to claim are expressed similarly, e.g. 'If the Contractor suffers delay and/or incurs Cost ... the Contractor shall give notice ... and shall be entitled *subject to Sub-Clause 20.1* to: (a) an extension of time ... (b) payment of any such Cost...' Thus ALL claims have from the Contractor have to follow the procedure set out in Sub-Clause 20.1.

Thus, Sub-Clause 20.1 requires notice:

- Contractor shall give notice as soon as practicable
- and not later than 28 days after becoming aware, or should have become aware, of event
- describing the event or circumstance
- the notice need not state time or amount claimed or contractual basis of claim
- notice shall comply with Cl 1.3, i.e. in writing and properly delivered
- progress reports - C14.21(f) - must list notices given
- no response required from Engineer (Employer)

- *NB. if Contractor fails to give notice within 28 days he loses entitlement to his claim*

The first notice starts the claims procedure:

- any other notices and supporting details may also be required by specific clauses
- contemporary records to be kept
- records may be inspected by Engineer (Employer)
- fully detailed claim to be submitted within 42 days of event (or other agreed time)
- importance of good record keeping cannot be over-emphasised
- provision for on-going claims and submittal of their details
- *within 42 days of receiving the claim with details 'the Engineer (Employer EPCT) shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time'.*
- this is the first time that a time limit has been imposed on the Engineer to reply to a claim
- 'each payment certificate shall include such amounts for any claim as have been reasonably substantiated'
- the Engineer (Employer EPCT) shall determine under Cl 3.5 time extension or additional payment to which the Contractor is entitled under the Contract.
- any other specified requirements must also be satisfied.

A further difficulty with claims in the past - from the Contractor's point of view - has been the Engineer who sits on claims without answering, or who 'stonewalls' claims by asking for more and more details, and generally delays giving a definite answer. It is hoped that the introduction of a time-limit within which the Engineer (Employer EPCT) has to give a definitive answer will help reduce this problem.

In the Old Red and Yellow Books, if the Contractor was not happy with the Engineer's response to his claim, then he could ask for the 'Engineer's Decision' (Red Book Cl 67.1). In the New Books, the Engineer no longer has this pre-arbitral decision. This task is now taken over by the DAB (but, as an option, if agreed, the Engineer may still be given this task).

3. Claims from the Employer

In the past Employers or their Engineers have often summarily withheld payment of monies which they considered were - for one or another reason - not due to the Contractor. Sometimes they have similarly de facto extended the Defects Liability Period. To try to prevent unfair withholding of monies or extensions of the 'guarantee' period, the New Books - in an entirely new Sub-Clause 2.5 - prescribe a procedure which *has* to be followed by the Employer if he considers himself to be entitled to *any* payment under or in connection with the Contract, or considers himself to be entitled to an extension of the Defects Notification Period (the new, more correct, term for the Defects Liability Period).

Sub-Clauses which may give the Employer entitlement to claim payment from the Contractor or an extension of the Defects Notification Period are listed on pages 90-93 of the Contracts Guide.

Thus, Sub-Clause 2.5 requires notice and particulars:

- Employer shall give notice as soon as practicable after becoming aware of event or circumstance giving him entitlement to any payment from Contractor
- notice relating to extension of DNP to be given before expiry of such period
- particulars to specify Clause or other basis for claim, with substantiation
- extension of Defects Notification Period as Cl 11.3 for defect or damage preventing use
- notice shall comply with Cl 1.3, i.e. in writing and properly delivered
- progress reports - C14.21(f) - must list notices given
- no response required from Contractor
- particulars may be given at any time
- claim then subject to C13.5, i.e. Engineer (EPCT Employer) endeavours to agree and settle the claim, failing which he determines
- any amount so determined is deducted from Payment Certificates (EPCT moneys due)
- any extension so determined is added to DNP
- by Cl 14.7 Employer has to pay the amount certified (CONS and P&DB)
- for EPCT Cl 14.7 Employer must pay the net amount actually due, not the amount the Employer considers to be due
- if the DAB decides that Employer has paid less than the amount due, Contractor would be entitled to financing charges under Cl 14.8

Sub-Clause 2.5 therefore imposes a claims procedure on the Employer and *prohibits him from making deductions from payments due to Contractor until claims procedure has*

been followed which is a new requirement.

Certain people have complained that Employer only has to give notice 'as soon as practicable', and that this 'demonstrates an unfair imbalance' compared with the case of claims from Contractor. The reason is simply that in the great majority of cases, as far as claims are concerned, it is the Contractor 'who is in the driving seat'. Usually the Contractor is the one asking for extra time or payment, and it is he who usually (nowadays) has the organisation that is on the look-out for matters causing him extra time or cost. Employers, on the other hand, as a rule are more passive (if not sometimes unconscious) of their claim right against the Contractor. It is often not until some part fails that an Employer begins to consider a claim against his Contractor. It is easy for a lawyer to shout 'unfair imbalance', but the reason is obvious to a practical engineer.

4. Conclusion

It is hoped that the new stricter rules, with the requirement for both the Contractor and the Employer to follow a specified procedure, will reduce some of the difficulties currently being met with regarding claims. For the Contractor, a strict time limit has been introduced for notification of his claim, so that all parties are made aware that a claim exists and can keep proper records and perhaps avoid unnecessary consequences. For the Engineer, he is now required to give his response, at least on the principles of the claim, within a set time (which was not the case before). For the Employer, he now is not entitled to deduct any monies, nor extend the Defects Notification Period, unless he has followed the set procedure of notification, and then determination.

¹ SWECO International, Box 34044, SE 100 26 Stockholm, Sweden. (Tel.: +468 695 6059 [E-mail: christopher.wade@sweco.se](mailto:christopher.wade@sweco.se))