

7 Common Construction Disputes and their Solutions.

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11th May 2020



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The most popular standard construction contracts like FIDIC, NEC, JCT, ICE include well drafted tiered Arbitration clauses. The framers of these contracts and others in the Oil and Gas sector, envisage that disputes are likely to occur during and after the performance of those contracts. Through my experience as an Arbitrator and a Construction Lawyer, I have identified the most common construction disputes and their solutions. The contractual provisions have been drawn from the FIDIC Red Book.¹

1. Errors in Designs and Specifications.

The FIDIC Contracts attempt to draw a balance between the Employer and the Contractor by providing that both parties bear parts of the risks associated with implementation of the project. The project risks are allocated to the party that is in the best position to control them. Errors in designs and specifications usually lead to claims for additional money and time. In the FIDIC Red Book, the design responsibility lies with the Employer, therefore any risk that arises from errors in designs falls squarely on the Employer. Whereas the Contractor has the responsibility to correctly position all parts of the Works, the Employer bears the responsibility for any errors in the designs. In case of an error in the designs, which has the effect of delaying the Contractor's works and he incurs costs, the Employer is liable to pay those costs subject to the Contractor complying with the claim procedure.²

To avoid the design risk, some Employers have adopted the FIDIC Yellow³ and Silver⁴ Contracts which place the design responsibility and risk upon the Contractor.

2. Unforeseen Conditions.

Most construction projects are built on green fields, where there is little or no data about the ground conditions. Usually, the weather patterns are unpredictable, all these are breeding grounds for disputes. The Contractor is duty bound to notify the Engineer once he encounters adverse unforeseeable physical conditions.⁵ The Employer will bear this risk and is liable to pay the Contractor for any costs he may incur and for extension of time. The cause for a dispute arises when a Contractor makes a claim arising from unforeseeable ground conditions like weak soils. Some Employers reject such claims and maintain that the site was available for inspection at the time of the tender, therefore the Contractor ought to have investigated and discovered the ground conditions. To avoid such a claim, the Employers must inform the Contractors who wish to tender for the works, to inspect the site for ground conditions and include any costs in the tender price. The Employers should also provide sufficient site data in the tender documents to guide Contractors on the ground conditions.

3. Delays and Disruption.

The Employer bears the risk for delays or disruption in the works due to failure to issue any design or instruction to the Contractor or for delays caused by Authorities. Where such delays occur, and the Contractor has complied with the claim procedure, the Employer is obliged to extend time for completion of the contract and pay costs plus reasonable profit.⁶ However, in case the delay is occasioned by the Contractor, and it affects the time for completion, he is liable to pay the Employer delay or liquidated damages⁷ subject to making a claim to the Engineer.⁸ However, the Employer will be denied delay damages if he has engaged in any act of prevention such as preventing the Contractor to complete the works, delayed payments, delayed Certification etcetera.⁹ The prevention principle is born out of common law, that a party will not enforce a contractual obligation against another where it has prevented the other party from performing their obligation.¹⁰ Simply put, one cannot benefit from their own breach.¹¹ Once the Employer engages in any act of prevention, then time is deemed to be at large and the Contractor is no longer bound to complete the works on a specific date but within a reasonable time.¹² Employers should always act in good faith and if necessary, extend time for completion to preserve their entitlement to delay damages.

4. Extension of Time.

The Contractor is obliged to complete the works by the date of completion¹³ unless the Engineer extends the time for completion.¹⁴ The Contractor is entitled to Extension of Time for Completion if he demonstrates that: there was a variation to the works, there were exceptionally adverse climatic conditions, unforeseen shortages in availability of personnel or Goods caused by an epidemic or government actions or any delay, impediment or prevention by the Employer. In case of concurrent delay, put differently, delay events caused by both the Employer and the Contractor, the Contractor would nevertheless be entitled to the full extension of time¹⁵ but not additional payment for prolongation costs.¹⁶

5. Variations

A variation is any change to the Works, which is instructed or approved as a variation by the Engineer.¹⁷ A dispute arises when an instruction is given by the Engineer verbally or during site meetings and it is implemented by the Contractor without a Determination and or a Variation Order issued by the Engineer. In some cases, Employers have refused to pay the Contractor for such works for lack of a Variation Order. The Courts have applied the law of restitution and rejected this argument, they have allowed Contractors to recover money under quasi-contract based on the principle of unjust benefit.¹⁸

6. Failure to Issue Notices

The requirement to issue contractual notices within the prescribed time, is a condition precedent to any right of payment or remedy. The Notice prior to presentation of a claim should be issued within 28 days if, the Contractor considers himself entitled to a remedy and the time starts to run after the Contractor became aware of the event or should have become aware of the event or circumstance.¹⁹ If the Contractor fails to issue the Notice, he loses his right to claim for a relief and the Employer is discharged from any liability. The ambiguity in this clause has led to disputes arising from interpretation. Some Courts in Dubai have struck down this clause for being a penalty and therefore unenforceable. Contractors should comply with the Notice provisions since Engineers and Adjudicators are bound to enforce the contractual provisions.

At the commencement of the project, it is good practice for the Engineer to brief the parties about their respective obligations including the importance of issuance of Notices on time.

7. Practical Completion

When the works have been completed, the Contractor is entitled to a Taking-Over Certificate. Disputes arise as to whether a building has achieved practical completion and the Engineer delays or refuses to issue the Taking-Over Certificate.²⁰ Employers should take note, that even in the absence of a Taking-Over Certificate, a Contractor achieves practical completion of a project where it is fit for occupation by the Employer.²¹ The Contractor would be obliged to correct any defects during the defects liability period and thereafter he would be entitled to any outstanding sums of the contract price plus the retention.

Conclusion

Construction claims and disputes are an everyday occurrence. 50% of construction involves building and the other 50% are contractual problems.²² We can only deal with these problems but not to avoid them. Employers must act in good faith; Contractors must comply with their contractual obligations and the Engineers must effectively administer the contract.

¹ FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1999.

² FIDIC Sub-Clause 20.1 (Contractor's Claims).

³ FIDIC Conditions of Contract for Plant & Design Build, 1999.

⁴ FIDIC Conditions of Contract for EPC/Turnkey Projects, 1999.

⁵ FIDIC Sub-Clause 4.12 (Unforeseeable Physical Conditions).

⁶ FIDIC Sub-Clause 1.9 (Delayed Drawings or Instructions).

⁷ FIDIC Sub-Clause 8.7 (Delay Damages).

⁸ FIDIC Sub-Clause 2.5 (Contractor's Claims)

⁹ Holme v Guppy (1838) 2 N&W 387.

¹⁰ Wells v Army & Navy Cooperative Society Limited (1902) 86 LT 764.

¹¹ Alghussein Establishment -v- Eton College [1988] 1 WLR 587

¹² Shawton Engineering Limited v DGP International Limited (2005).

¹³ Percy Bilton Limited v Greater London Council [1982] WLR 794 HL

¹⁴ FIDIC Sub-Clause 3.5 (Determinations)

¹⁵ Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd [1999] 70 Con. L.R

¹⁶ Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC)

¹⁷ FIDIC Sub-Clause 1.1.6.9 (Other Definitions)

¹⁸ Moses v Macfarlane (1760) 2 BURR at page 10.

¹⁹ FIDIC Sub-Clause 20.1 (Contractor's Claims)

²⁰ FIDIC Sub-Clause 10.1.

²¹ Skanska Corporation v. Anglo-Amsterdam Corporation (2002).

²² Per, Tony Bingham, Barrister at Law.



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