

MDA CONSULTING



FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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FIDIC:

Introduction

In this edition of First Aid for Contracts, we examine clauses 8.4 and 8.6 of the FIDIC 1999 Red Book and discuss whether a Contractor is liable for delay damages incurred as a result of a delay caused by an Employer.

We explore the following situation:

- The Contractor is delayed by late access and delayed information.
- He does not give any notices under clause 2.1 (access) or clause 1.9 (information).
- In addition he fails to give any notices of his intention to claim within the period prescribed by clause 20.1.
- He is time barred and has lost the right to make any claim for the late access and delayed information.
- His claims, when he eventually notifies the Engineer of them, are rejected by the Engineer on the grounds of the time bar in clause 20.1.
- Furthermore he is behind programme as a result of the now unclaimable delays above.
- On the other hand the Employer instructs the Engineer to tell the Contractor to expedite completion under clause 8.6.

In this scenario:

"FIDIC Red Book: Can an Employer instruct a Contractor to accelerate under sub-clause 8.6 if Contractor's delay was caused by the Employer but the Contractor is time-barred from seeking an extension of time."

- Can the Employer instruct the Contractor under clause 8.6 to submit a revised programme in order to expedite progress and complete the works within the original Time for Completion if the Contractor has failed to submit an extension of time claim under Sub-Clause 20.1, or alternatively his claim has been time barred?
- Is it the intention of Sub-Clause 8.4 that the Contractor is not obliged to recover the time lost if he has suffered delay, but failed to process his claim correctly?
- Does the Employer have a right to claim liquidated delay damages should the Contractor fail to complete the works within the Time for Completion.

Clause 1.9 has two notice requirements, the first sets the date by which the drawing or instruction has to be provided. This is a condition precedent. Both these clause 1.9 and 2.1 are governed by the last paragraph of clause 20.1, which confers a discretion of the engineer to reduce a Contractor's claim to the extent that the Contractor's failure to give a notice has prejudiced his ability to investigate the claim at the time that it happened.

Sub-Clause 8.6 of FIDIC provides that:

If, at any time:

(a) actual progress is too slow to complete within the Time for Completion, and/or

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(b) progress has fallen (or will fall) behind the current programme under Sub-Clause 8.3 [Programme],

other than as a result of a cause listed in Sub-Clause 8.4 [Extension of Time for Completion], then the Engineer may instruct the Contractor to submit, under Sub-Clause 8.3 [Programme], a revised programme and supporting report describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete within the Time for Completion.

[Our emphasis]

The purpose of this Sub-Clause is to enable the Engineer to instruct the Contractor to accelerate its works at its own cost to ensure the project is completed on time. However, the highlighted wording appears to remove the right of the Engineer to instruct the Contractor to “accelerate” if the reasons for the delay in reaching the Time for Completion are due to a cause listed in Sub-Clause 8.4.

Notably, the Sub-Clause is not attached to the successful prosecution of a claim in terms of Sub-Clause 20.1, but rather the simple existence of the fact of a delay contemplated by Sub-Clause 8.4.

However, if the Contractor fails to complete the Works within the agreed time for completion then it will be in breach of contract¹. Sub-Clause 8.4 provides the set of events out of which the time for completion can be extended if claimed in terms of Sub-Clause 20.1; therefore these certain clearly defined circumstances will assist the Contractor only if the Contractor takes certain steps to give notice of its considered entitlement.²

If the Contractor does not follow the steps under Sub-Clause 20.1 within the prescribed time limits, it will lose the right to an extension of time, notwithstanding that it may have suffered a delaying event under Sub-Clause 8.4.

However, despite this failure the Engineer still cannot instruct the Contractor to furnish a revised programme to accelerate.

The effect is that, although the Engineer cannot force the Contractor to accelerate, should the Contractor not in fact accelerate, which costs will be for his own account, the Contractor could face incurring delay damages, even though the initial delay is due to the Employer’s actions or at the Employer’s risk.

If the Contractor loses the right to extension of time for the Employer’s breach of contract because the Contractor failed to provide effective notice, it could be argued that the Employer is not entitled to deduct delay damages for the delay caused by the breach as set out in the in the Australian case of *Gaymark Investments Pty Ltd v Walter Construction Group*³. In this case the court held that delay damages were irrecoverable when the Contractor had failed to serve a notice for an extension of time due to delays incurred as a result of the Employer’s actions because the completion date could not be identified since time had become “at large”.⁴

However, it is suggested that *Gaymark* case will not be followed in English law. In the Scots case of *City Inn Ltd v Shepard Construction Ltd*⁵ the court held that the Employer was entitled to deduct delay damages for the

¹Glover J & Hughes S “*Understanding the FIDIC Red Book: A Clause by Clause Commentary*” pg 190

²*Ibid*

³(2000) 16 BCL 449 Supreme Ct NT

⁴In the case of *Gaymark*, the contract provided for liquidated damages at \$6, 500 per week if the building was completed beyond the completion date. *Gaymark* was partially responsible for the delays that caused *Walter* to construct the works after the completion date. The court found that the delay constituted “acts of prevention” by *Gaymark* with the result that there was no date for practical completion and *Concrete Constructions* was then obliged to complete within a reasonable time.

⁵2002 SLT 781, [2001] SCLR 961

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Contractor's failure to complete and in a previous Australian case of *Turner Corporation Limited v Austotel Pty Limited*⁶ the court held that if the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention, which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing the contractual performance of the other party where it failed to exercise a contractual right, which would have negated the effect of that preventing conduct.

The net effect is that an Employer cannot "profit" from the Contractor's error to prosecute his claim in accordance with the contract by getting the Contractor to accelerate at his own cost when an Employer's risk event has occurred. The right to instruct acceleration can only be exercised when the Employer is not liable or not the cause of the delay/claim event.

Although this issue has not been tested in South Africa court, it appears that the Employer is entitled to claim delay damages if the Contractor breaches the contract by completing the works after the Time for Completion even though the cause for the delay was due to the Employers conduct.

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⁶1997 13 BCL 378

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