

MDA CONSULTING



FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

Third Edition – March 2013

GCC: GCC 2010 CONDITIONS PRECEDENT AND TIME BAR PROVISIONS. THE EFFECT OF CLAUSE 10.2

1. Introduction

- 1.1 This article examines the Sometimes poorly understood, contractual requirements of conditions precedent and their relationship to time bar provisions and what obligation, challenge and consequence they present to Contractors who are seeking to rely on such provisions for the purposes of pursuing a claim under the terms and conditions of the revised General Conditions of Contract for Construction Works, second edition 2010 (hereinafter called “GCC 2010”).
- 1.2 The Project Management and Construction Division (PMCD) of the South African Institution of Civil Engineering (SAICE) penned the *Management guide to the General Conditions of Contract 2010, first edition 2010* (hereinafter called “the management guide”), to assist in the correct interpretation and implementation of GCC 2010.

This article sets out the hurdles, be they pre-emptive conditions precedent or time bar provisions, contained in the new General Conditions of Contract for Construction Works, 2010 that the Contractor must vault over to avoid his claim being dismissed on the basis of contractual non compliance.

2. Conditions precedent

2.1 A condition precedent is in essence exactly what it says – a condition that must first be met before one can proceed any further.

2.2 GCC 2010 is littered with pre-emptive conditions or conditions precedent that create clear unambiguous obligations on the Contractor to send the Engineer the appropriate written notice in order to preserve his right to submit a claim in terms of Clause 10 [*Claims and disputes*] for either an extension of time to complete the Works or additional costs.

2.3 The following conditions precedent extracted from GCC 2010 are summarised below:

2.3.1 *Adverse physical conditions: If the Contractor encounters adverse physical conditions that could not have been reasonably foreseen by an experienced contractor, and additional work may be required, he **shall** submit a written notice in terms of sub clause 2.2.1 and sub clause 2.2.2 to the Engineer, as the circumstances require;*

2.3.2 *Instructions: If the Contractor requires additional information to what is contained in the scope of Works or drawings then he **shall** give adequate written notice to the Engineer in terms of sub clause 5.9.3 for the additional requirements;*

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2.3.3 *Examination of the Works: The Contractor **shall** give adequate written notice to the Engineer when the Works are ready for testing in terms of sub clause 7.5.3.*

2.4 The word **shall** is used in each of these clauses (which are conditions precedent which must be complied with in order to earn the right to make a claim) because it places the pre-emptive obligation on the Contractor to submit the required written notice before he can proceed any further in obliging the Engineer to deal in any meaningful way with his claim.

3. Time bar provisions

3.1 Once the Contractor has vaulted over the first hurdle and complied with the conditions precedent, he will find himself ready to clear the next hurdle, submission of his claim within the required notice period.

3.2 Failure to do so shall result on his claim being time barred.

3.3 A time bar provision is something that can be used by either party in a dispute as a justifiable defence to a claim, and if successful it negates the successful party (being the party that succeeded with the time bar defence) having to either factually or contractually defend each and every aspect of the claim being brought against him.

3.4 In other words where the contract places an obligation on either party to do something within a specific time, and they do not do it timeously, then their failure to comply with the time period within which to act is a complete defence and may result in the other party being discharged of all liability in respect of the claim.

3.5 It is however, strongly advisable in adjudication, arbitration or even court proceedings, to have an alternative defence to a time bar whereby the whole claim is fully defended in case the time bar defence fails.

3.6 Sub clause 10.1 [*Contractor's claim*] of GCC 2010 sets out the process and procedure to be followed by the Contractor to claim either an extension of time to complete the Works or additional payment or compensation in respect of the works.

3.6.1 Sub clause 10.1.1.1 provides that:

*"The Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to this Clause and setting out: ..."*¹

3.7 There it is, the second hurdle. Within **28 days** after the event arises the clock starts ticking for the Contractor to submit his claim.

3.8 The drafters of this sub clause took cognisance of a situation arising whereby the Contractor may not have all the information immediately at his disposal to formulate a complete claim, therefore they made allowance for the Contractor to keep the Engineer updated of the events or circumstances every 28 days until the Contractor is in a position to deliver a complete claim.

3.8.1 Sub clause 10.1.1.3 provides that:

*"If the events or circumstances relating to the claim are of an ongoing nature, the Contractor shall, in addition to delivering the said notice within 28 days, each month deliver to the Engineer, in writing, updated particulars required in terms of Clause 10.1.1.1: and, within 28 days after the end of the events or circumstances, deliver his final claim."*²

¹General Conditions of Contract for Construction Works, second edition 2010, page 64

² Ibid

- 3.9 The consequence to the Contractor for failing to adhere to the required time frame is unequivocally set out in sub clause 10.1.4.
- 3.10 Essentially the Contractor shall not be entitled to additional payment, the completion date of the Works shall not be extended and the Employer will be discharged of liability in connection with the Contractors claim because the Contractors claim is time barred.

4. Effect of clause 10.2

- 4.1 Sub clause 10.2 permits the Contractor to disagree with a decision made by the Engineer by submitting a dissatisfaction claim supported by particulars and substantiated. The dissatisfaction claim should be used only for matters that are not required to be dealt with in terms of sub clause 10.1 of the Contract.
- 4.2 The Contractor must take heed of the time bar provision contained in sub clause 10.2.2, whereby notice of a parties dissatisfaction (both the Employer and Contractor can give notices of dissatisfaction) must be given within 28 days after the cause of the dissatisfaction, failing which the Contractor (or the Employer) loses his right to raise any further dissatisfaction in respect of that particular matter.
- 4.3 The management guide sets out the following typical situations that could arise and lead to a dissatisfaction claim:
- 4.3.1 *“Variations: If the Contractor is dissatisfied with the evaluation of variations set out in Clause 6.4, he may lodge a dissatisfaction claim.*
- 4.3.2 *Payment certificate: Clause 6.10 deals with the issue of interim payment certificates as well as the additions and deductions allowed in this regard. All these matters may be subject to a dissatisfaction claim.*
- 4.3.3 *Quality control: There are, and always will be, certain quality decisions that the Engineer has to make based on his personal judgement. In this regard, Clause 7.6.1 allows the Engineer to give instructions on the making good of Plant, workmanship and materials. This may lead to a dissatisfaction claim.*
- 4.3.4 *Penalty: Dissatisfaction may develop about the appropriateness of the reduction in penalty determined by the Engineer in accordance with Clause 5.13.2.*
- 4.3.5 *The Contractor or the Employer may disagree with a number of decisions by the Engineer, for example:*
- 4.3.5.1 *The cost to be paid by the Contractor to the Employer for urgent remedial work to be done by others (Clause 7.9).*
- 4.3.5.2 *The rates for the use of construction equipment in day works when negotiations in this regard fail (Clause 6.5.1).*
- 4.3.5.3 *The value of the Works (Clause 6.7.2).*

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4.3.5.4 *Increased or reduced cost subsequent to legislation (Clause 6.8.4).*

4.3.5.5 *Adjusting General Items following variations exceeding 15% when negotiations in this regard fail (Clause 6.11).”³*

5. Conclusion

5.1 Accordingly the onus remains on the Contractor to act swiftly from the moment the “*circumstance, event, act or omission giving rise to such a claim has arisen or occurred*”⁴, and if the Contractor is not presently in the position to deliver a complete claim to the Engineer, then he must timeously provide the monthly updates to the Engineer.

5.2 Before the Contractor submits his claim he must scrutinize it to establish:

5.2.1 Whether his claim is one that must be dealt with in terms of Clause 10.1;

5.2.2 Whether there are any conditions precedent contained in any other provision of the contract that he must comply with;

5.2.3 Whether he has done all things and taken all necessary steps to submit the claim timeously, without fear of it being time barred;

5.2.4 Clauses 5.2.1 to 5.2.4 allow him to challenge it in terms of Clause 10.2.

5.3 In conclusion if the Contractor can honestly affirm that he has adhered to these pre-emptive contractual obligations then he should have no fear that his claim may be challenged on the basis of contractual non-compliance or that the Employer will be discharged from liability but rather that he is in the best possible position to submit a complete claim to the Engineer to rule on.

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³ Management Guide to the General Conditions of Contract 2010, first edition, page 122 to 123

⁴ GCC 2010, supra at page 64