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PRESENTS

# FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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**FIDIC**

## Introduction

Under the FIDIC forms of contract, a contractor that wishes to make a claim for either time or additional money must give a notice in accordance with sub-clause 20.1. Failure to comply with this condition precedent [1] bars the contractor's right to recover either time or money.[2]

**Contractor's Ability to claim assisted by recent contractor friendly interpretation of Clause 20.1. Can this interpretation be extended to the GCC 2010?**

### *Clause 20.1*

*If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.*

*If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.*

Time-bar clauses are strictly enforceable[3] and are notoriously difficult to overcome in circumstances where the time period has not been complied with.

Contracts based on the standard FIDIC conditions do not frequently come before courts and it just so happened that the English Technology and Construction Court addressed the interpretation of sub-clause 20.1 in the recent case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*.[4]

Although the decision applies English Law, the logic makes sense under any system and the judgment provides useful arguments as to the way in which Clause 20.1, and 8.4 should be interpreted.

This case arose out of contract by which the contractor (OHL) agreed to undertake the design and construction of a road and tunnel under the runway of Gibraltar Airport. The contract was based on the Plant & Design Build (Yellow Book) version of the FIDIC Conditions. One of the issues the court addressed was the interpretation and application of sub-clause 20.1.

In his opening address, the Judge stated that that it was clear that sub-clause 20.1 imposes a condition precedent and that he could see no reason why the clause should be construed strictly against the contractor, but "*can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good*

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[1] It is not essential that the very words "conditions precedent" have not been used. Their absence does not void the effect of clause 20.1 from being a conditions precedent. *Eagle Star Insurance Company Ltd v Cresswell & Ors [2004] EWCA Civ 602.*

[2] Tweeddal A *"FIDIC's clause 20 a common law view"* Construction Law International Volume 1 No2 June 2006.

[3] See the South African case of *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* [1995] 2 All SA 488 (T)

[4] [2014] EWHC 1028 (TCC)

*claims for instance for breach of contract by the Employer*".[5]

The judge held that notice of a claim for EOT does not have to be given for the purposes of sub-clause 20.1 until there actually is delay, although the contractor can give notice when it reasonably believes that it will be delayed.[6]

The judge considered that, at least in the context of extension of time, regard must be had to sub-clause 8.4, which identifies when and in what circumstances extension will be granted.[7]

The judge noted that under sub-clause 8.4, the entitlement to extension arises if and to the extent that the completion "is or will be delayed by" the various listed events, such as variations or "unforeseeable" conditions. In the judge's view, this suggested that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has been at least started to be incurred (a retrospective delay).[8]

The judge noted that the "event or circumstance" described in the first paragraph of sub-clause 20.1 in the appropriate context can mean either the incident (variation, exceptional weather or one of the other specified grounds for extension), or the delay which results or will inevitably result from the incident in question. Also, it was relevant that the wording in sub-clause 8.4 is "is or will be delayed by", not: "is or will be delayed whichever is the earliest".[9]

Accordingly, applying a broad construction, the contractor could validly give the notice after the onset of the delay within 28 days after it became aware (or should have become aware) of it.
The judge gave the following hypothetical example as an illustration:

Example

a) A variation instruction is issued on 1 June to widen a part of the dual carriageway well away from the tunnel area in this case.
b) At the time of the instruction, that part of the carriageway is not on the critical path.
c) Although it is foreseeable that the variation will extend the period reasonably programmed for constructing the dual carriageway, it is not foreseeable that it will delay the work.
d) By the time that the dual carriageway is started in October, it is only then clear that the works overall will be delayed by the variation. It is only however in November that it can be said that the works are actually delayed.

Applying his construction of sub-clause 20.1 to that example, the judge said that notice does not have to be given for the purposes of sub-clause 20.1 until there actually is delay (November), although the contractor could give notice with impunity when it reasonably believes that it will be delayed (October).

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[5]*ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar at 143*
[6]*ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar at 144*
[7]*ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar at 143*
[8]*Ibid*
[9]*ObrasconHuarte Lain SA v Her Majesty's Attorney General for Gibraltar at 144*

Clause 20.1 has generally been interpreted to mean that the contractor must give notice within 28 days from (actual or deemed) awareness of the event or circumstance, giving rise to the claim.

This case has brought welcomed clarity with respect to the interpretation of Sub-Clause 20.1. The notice period does not start running for the Contractor until the date on which he is aware (or should have been aware) of the delay resulting from a particular event or circumstance. Although the court only considered Sub-Clause 20.1 in respect of an extension of time, the same principle is expected to apply to claims for additional payment made pursuant to this provision.

However, it is important to note that whilst this judgment is likely to be viewed as positive for Contractors, it is certainly not free rein for the Contractor to disregard the notice provisions all together. The Contractor still has to comply with the 28-day period, which now starts a little later.

**Will this case assist with claims under GCC 2010?**

We now turn to deal with whether this interpretation of clause 20.1 of FIDIC could be applied to the extension of time clause in the General Conditions of Contract 2010 ("GCC 2010")?

The extension of time clause, clause 10.1 of the GCC 2010 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…"*

In considering this clause effect must be given to clause 5.12 which provides that:

*"If the Contractor considers himself entitled to an extension of time for circumstances of any kind whatsoever which may occur that will, in fact, delay Practical Completion of the Works, the Contractor shall claim in accordance with Clause 10.1 such extension of time as is appropriate."*

[Our emphasis]

Clause 5.12 of GCC 2010 is very similar to clause 8.4 of FIDIC 8.4 in that both clauses refer to an event that will delay the practical completion of the works.

The GCC 2010 goes one step further and states the contractor will be entitled to an EOT claim for an event "that will in fact delay" Practical completion of the Works.

In applying the reasoning set out in the aforesaid Gibraltar case to an EOT claim under the GCC 2010, the event, giving rise to the claim will only become an event, per se, once it has been established that this event will in fact delay the Practical Completion date of the Work.

We are therefore of the view that an argument could be made that the contractor would only have to give notice of a claim for EOT under 10.1, once it has been established for a fact that there will be a delay to the Practical Completion of the Works and not when the contractor first became aware of the event. Therefore the 28 days will only start to run once this impact of the event on the Practical Completion date has been established.

**Author: Cameron Staude**