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FIDIC: APPLICATION OF CLAUSE 2.5 – EMPLOYER’S CLAIMS

+ Author: Odette Potgieter

Contractors are often faced with employer’s claims which are often as a result of the application of delay damages as provided for in clause 8.7 of the general conditions of contract at the end of a contract or “concealed” as counterclaim raised by the employer when a contractor declares a dispute.

Under these circumstances the issue of ‘fairness’ is often raised by the contractors and the question is asked ‘why should the contractor submit its claim within a prescribed period but the employers can notify and submit their claim at any time?’. We have recently been involved in several adjudications where this have been the situation.

The question is, is it intended that the provisions of clause 2.5 could limit the employers ability to recover monies from the contractor?

Clause 2.5 – Employer’s claim

The general conditions of contract¹ provides for and states that

“If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer’s Equipment and Free-Issue Material], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.”

Do the provisions of clause 2.5 contain a ‘time-bar’?

The recent judgment handed down by the Privy Council shed some light on the particularities of clause 2.5 and the requirements set out therein. [Some of you might ask ‘Who is the Privy Council?’ The Privy Council was established in 1833 and is the court of final appeal for the UK overseas territories and Crown Dependencies. To read more on the Privy Council please see <https://www.jcpc.uk/>]

In the matter of NH International (Caribbean) Limited v National Insurance Property Development Company Limited (Trinidad and Tobago)² the Privy Council stated that the purpose of clause 2.5 is

“..to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable’. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer’s claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer’s function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served ‘as soon as practicable’.”

The Privy Council further stated that “the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise” and made it clear that, if the Employer wished to raise such a claim, the Employer “must do so promptly and in a particularised form”. Should the employer fail to raise a claim as required by the earlier part of clause 2.5, “the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim”.

Even though a definition for ‘as soon as practicable’ was not provided by the Privy Council, the judgment suggested that employers’ claims are also like the contractors claims under clause 20.1, subject to time-bar³.

This time-bar has two parts:

- i. The employer must make a claim as soon as practicable; and
- ii. The employer must also provide particulars and substantiation.

This position, particularly the purpose/intention of clause 2.5, is affirmed in the pre-release versions of the FIDIC conditions of contracts⁴. These versions now provide for and deals with employer and contractor claims in a comprehensive clause 20 [Claims]. The draft wording, which we do not believe will be amended when the second editions are formally published by FIDIC for use in the market place (we hope later this year), provides for a 28-day period within which an employer’s notice of claim should be submitted. Should the employer fail to submit such notice, the employer’s claim will be time barred and the employer will not be entitled to any additional payment, a reduction in the contract price.

While the wording of the new clause 20 of the pre-release versions will provide certainty and clarity as to the time period in which the employer’s notices and claims should be submitted, the judgment handed down by the Privy Council provides noteworthy insight in the application of clause 2.5. It now restricts/prevents employer’s from raising claims or imposing penalties at the death of a contract, way after the event/circumstances occurred and when the maximum exposure has been reached. Unfortunately, this is becoming a common occurrence.

1 Conditions of Contract for Construction for building and engineering works designed by the Employer (red book) and Conditions of Contract for 2 Plant & Design Build (yellow book) - First Edition, 1999
[2015] UKPC 37 Privy Council

3 Depending on the definition of ‘as soon as practicable’ this time-bar is potentially stricter than the 28-day time bar contractors are subject to.

4 Conditions of Contract for Plant & Design Build (yellow book) and Conditions of contract for Construction for Building and Engineering Works designed by the Employer (red book), Pre-Release Second Edition, 2017