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FIRST AID FOR CONTRACTS



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CONSTRUCTION MAFIA – WHAT’S TO BE DONE?

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“The gangs demand to be part of these projects and burn the properties to the ground.”¹ – Webster Mfebe – Chief Executive of the South African Forum of Civil Engineering Contractors (SAFCEC) commenting on the rise of the “construction mafia” in South Africa.

The construction industry is going through a trying time – from some of the largest national construction companies being placed under business rescue, to the infamous construction mafia who have been wreaking havoc on an already fragile industry. Many Contractors have faced delays and losses as a result of this tumultuous environment. This article aims to address the redress that a Contractor may have under the General Conditions of Contract 2015 (GCC).

Some of the common problems faced by Contractors when the mafia makes its unwelcome entrance into

the area where the works are being executed are:

- Limited or no access to the site as a result of the site being “hijacked” by these persons
- Damages to works in progress
- Increased costs as a result of such delays and/or reparations to damaged works
- Penalties enforced for such delays

These issues may be summarized into two categories namely; damages to the works that may be caused by the mafia, and delays to the works (either as a result of not being able to actually access the site to progress the works, or the time taken to repair any such damages works).

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<http://www.sabuilder.co.za/wp-content/uploads/2019/05/SABuilderApril2019.pdf>

A Contractor will want to recover such losses or damages; be awarded an extension of time and essentially wants to be in the position he would have been in, had the disturbance not occurred.

Some of the relevant clauses of the GCC 2015 to consider in addressing these issues are as follows:

1. An extension of time for delays caused

Clause 8 [*Care of the Works*] of the GCC provides a remedy for loss of time and money as a result of an excepted risk materialising and sets out a list of excepted risks.

“Excepted Risks” are:

“risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of...

...

8.3.1.4 *“strike, riot, commotion, disorder, violent demonstration, sabotage or any form of civil disturbance (whether lawful or not) which is not attributable to any action or inaction of the employees of the Contractor or his Subcontractors”*. [our emphasis].

Supposing that these mafiosos (who must, by the way, not be employees of the Contractor or Subcontractor) cause civil unrest or commotion or the like, which results in the Contractor not being able to proceed with his works in accordance with his programme, Clause 8.3.2 provides that:

“If, in carrying out the Works, any of the excepted risks, other than pertaining to the damage or physical loss referred to in clause 8.2.2.2, causes the Contractor to suffer delay to Practical Completion and/or brings

about proven additional costs, the Contractor shall be entitled to make a claim in accordance with 10.1”.

Clause 10.1 allows the Contractor (within 28 days after the event) to claim for an extension of time and proven additional cost by submitting a claim to the Engineer.

It must be concluded that civil unrest or interference by the construction mafia falls into the definition of an “excepted risk”, meaning that the Contractor is able to make a claim for an extension of time and additional payment.

2. A claim for loss and damages

Clause 8.2 provides that from the date that the site is handed over to the Contractor, until the certificate of final completion, the Contractor is responsible for the care of the works. However, the Contractor is excused from repairing any damage or loss to the works arising from an excepted risk. Clause 8.2.2 states:

“If there is any damage to the Works, or any part thereof, or to the said Plant or materials, or physical loss occurs:

8.2.2.1 *From any cause whatsoever (other than the excepted risks defined in Clause 8.3.1) while the Contractor is responsible for the care thereof, the Contractor shall, at his own cost, repair and make good...”* [our emphasis]

8.2.2.2 *Arising from any of the excepted risks, referred to in Clause 8.3, the Contractor shall, if ordered by the Employer’s agent, repair and make good the same and the cost of such work shall be valued and paid in accordance with clause 6.4”* ...

It has already been established above that civil unrest or commotion by the mafia would more than likely be viewed as an excepted risk. Hence, if there is any loss or damage to the Works caused by these unwelcome guests, the Contractor would be entitled to receive an order from the Employer's Agent to repair such loss or damage and the Employer would have to pay for it under Clause 6.4.

3. The GCC twist

The GCC has an interesting twist that is not found in the other standard form contracts. This is found in Clause 9.1.2.

Clause 9.1.2 states that where an excepted risk occurs, *"and if any such event beyond the control of the Contractor shall materially affect carrying out the Works, or the supply of labour or materials, or physically interfere with access to the Site, or constitute a material risk to persons or property associated with the Contract, the Contractor shall, unless and until the Contract is terminated in terms of this Clause, endeavor to complete the Works to the best of his ability..."*.

It is well known that the mafia do not come in peace. Their presence on site is often marred with violence and threats. If this is the case, clause 9.1.2 provides an interesting alternative to the parties to enable the Works to proceed (if possible). However, this does not come without cost.

- Clause 9.1.2.1 states:
"Either the Employer or the Contractor shall, if such state of affairs continues for a period of at least 20

consecutive working days, or for two or more periods aggregating not less than 40 working days in any period of six months, be entitled to terminate the Contract by written notice to the other party..."

At first glance, it looks like the employer and contractor have equal rights to terminate the contract. But if you look a little closer, clause 9.1.2.2 states:

"If the Employer shall undertake, in writing, to bear any resultant additional costs involved in continuing the Works, the Contractor shall not exercise his right to terminate the Contract"

In other words the Employer can elect to bear resultant additional costs and "force" the Contractor to do what he can to proceed with the Works to the best of his ability. Practically, this may not be desirable for the Contractor, particularly where there is no restriction on the duration of this undertaking.

For interest sake, the other standard forms of contract contain similar provisions to the GCC when it comes to loss or damage to the Works caused by the mafioso. For example, under the FIDIC Red Book a Contractor will find recourse under Clause 17.3 (c), as long as the actions of the mafioso can be classified as being *"riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors"*. In this instance, the Engineer instructs the Contractor to rectify the loss or damage to the Works and where this rectification results in the Contractor suffering a delay, the Contractor may claim an extension of time and Cost in terms of Clause 20.1 (Contractor's Claims).

4. Insurance

Clause 8.6.1 [Insurances] of the GCC provides that:

“Except if provided otherwise in the Contract Data, the Contractor, without limiting his obligations in terms of the Contract, shall as part of the documentation required before commencing with the Works in accordance with Clause 5.3.1, at his own cost, effect and maintain the following insurances in the joint names of the Employer and Contractor:

8.6.1.1 Insurance of the Works, Plant intended for incorporation in the Works, and of all materials on the Site intended for incorporation in the Works against damage or physical loss arising from whatever cause (except the causes set out in Clause 8.3.1), for the period for which the Contractor is responsible for the Works in terms of Clause 8.2.1, and for a sum insured.....” (our emphasis)

and

“8.6.1.2 A Coupon Policy for Special Risks Insurance issued by Sasria unless otherwise stated in the Contract Data.”

Clause 8.6.1.1 excludes insurance cover for excepted risks (clause 8.3.1) and the Contractor will not have a claim against his ordinary insurance policy for damage or physical loss caused by actions of the construction mafia under this Clause. The Contractor may have a claim against their insurer in terms of 8.6.1.2 for damage or loss arising as a result of an excepted risk, provided that the adequate cover has been taken with Sasria. Sasria provides Special Risks Insurance which covers riots, strikes, terrorism, civil commotion and public disorder for claims relating to the permanent and/or temporary Works. However, this is dependent

on the type of cover taken.

Conclusion

The construction mafia are often violent and destructive. A Contractor will have recourse under the GCC 2015 for an extension of time and cost where riots, commotions, disturbances, petrol bombs etc by the construction mafia leads to delays as well as the opportunity to get paid for additional work to repair loss and damage to the works caused by them.

Contractors must, however, ensure that the required notice provisions in the contract are followed. A claim by the Contractor under a Sasria policy may also provide compensation for damages or loss to the temporary and/or permanent works, provided that such policy provides for such eventualities; and this may aid the Contractor significantly.

An election by the employer to require the contractor to proceed with the works to the best of his ability under 9.1.2.2 buys the Employer time to remove the “mafia impediment” without the contractor being able to terminate the contract. The additional costs being offered by the employer in this situation might not compensate the contractor (or his employees for that matter) for the trauma involved in staring fear in the face while trying to complete the works.