FIDIC; RIGID TIMEFRAME OR ANOTHER PIECEMEAL APPLICATION?

Soheyla Dad explores how the UAE civic code sits with the FIDIC conditions of contract for construction and sets out the various circumstances in which rights of work suspensions and terminations arise.

With the ever growing construction issues arising from the financial crisis, both employers and contractors are using every tactic in the book to try and claim for compensation for their delays, with cash flow difficulties and mounting third party liabilities.

Extension of Time Claims, better known as “EOT” claims in the industry are the most common claims raised by Contractors under FIDIC contracts in an attempt to minimise their delay liabilities. However, how effective are the provisions governing these EOT claims and can an employer defend such claims simply based on the strict time-frames to which they must adhere? Do the rigid FIDIC time-frame restrictions really fit into the UAE Civil Code or is it another case of piece-meal application in the UAE?

THE STRICT FIDIC INTERPRETATION

Both the 1987 and 1999 editions of the FIDIC standard form contain a number of requirements that particular things shall be done within a set period of time.
The Conditions of Contract impose specific time restraints on the Contractor in relation to EOT claims: 44.1 In the event of:

a) the amount or nature of extra or additional work, or
b) any cause of delay referred to in these Conditions, or
c) any delay, impediment or prevention by the Employer, being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Project Manager shall, after due consultation with the Engineer and the Employer and the Contractor, determine the amount of such extension as soon as reasonably practicable and in any event within 56 days from either of (which ever is the latter)
d) receipt by the Project Manager of detailed particulars pursuant to Sub-clause 44.2 or (as the case may be) Sub-Clause 44.3 hereof, or
e) cessation of the circumstances giving rise to a request for an extension of time of the Time for Completion of the Works provided that detailed particulars have been received by the Project Manager pursuant to Sub-clause 44.2 or (as the case may be) Sub-Clause 44.3 hereof, and shall notify the Contractor accordingly, with a copy to the Employer. Nothing in this clause shall prevent the award of interim extension(s) of time in accordance with clause 44.3.

44.2 Provided that the Engineer is not bound to make any determination unless the Contractor has

a) within 28 days after such event has first arisen notified the Engineer with a copy to the Employer, and
b) within 28 days, or such other reasonable time as may be agreed by the Engineer, after such notification submitted to the Engineer detailed particulars of any extension of time to which he may consider himself entitled in order that such submission may be investigated at the time.

44.3 Provided also that where an event has a continuing effect such that in the determination of the Project Manager it is not practicable for the Contractor to submit detailed particulars within the period of 28 days referred to in Sub-Clause 44.2, he shall nevertheless be entitled to an extension of time provided that he has submitted to the Project Manager interim particulars at intervals of not more than 28 days and final particulars within 28 days of the end of the effects resulting from the event. On receipt of such interim particulars, the Project Manager shall, as soon as reasonably practicable and in any event within 56 days thereafter, make an interim determination of whether, in principle, an extension of time should be granted and, on receipt of the final particulars, the Project Manager/Engineer shall review all the circumstances and shall determine an overall extension of time in regard to the event. In both such cases the Project Manager shall make his determination after due consultation with the Engineer, and the Employer and the Project Manager, and shall notify the Contractor of the determination, with a copy to the Employer."

The aim of such clauses is to promote proper management of the event by both parties and to enable the employer to make informed decisions to avoid or mitigate the effects. The above provisions provide clear detailed timeframes, which are to be observed by both the contractor and the engineer. Although not expressly stated as in the 1999 FIDIC Redbook, it is implied that the contractor’s failure to comply with the detailed procedure and timeframes waives his entitlement to claim an extension of time and the employer’s liability ceases.
**THE FIDIC 1999 REDBOOK**

Further, such interpretation is supported by the 1999 FIDIC Redbook, which has clarified the ambiguities of the 1987 form by including a condition precedent notice provision.

Sub-clause 20.1 of the new version states:

“If the Contractor considers himself to be entitled to any extension to 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 circumstances giving rise to the claim. The notice shall be given as soon as practicable as and not later than 28 days after the Contractor became aware or should have become aware of the event or circumstances.

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. Otherwise, the following provisions of this Sub-clause shall apply.”

Similar to Sub-clauses 44.1, 44.2 of the 1987 FIDIC Redbook, Sub-clause 20.1 then goes onto reiterate the timeframes for the submission of the detailed particulars and the response of the engineer.

The key difference between the 1987 version of FIDIC and the 1999 version in respect of notice requirements is that Sub-clause 20.1 is a clear condition precedent whereas the provisions of the 1987 version do not expressly state that the contractor will not be entitled to a claim where he has failed to adhere to the timeframes. One could therefore argue that the purpose of Sub-clause 20.1 is to clarify any ambiguity in respect of the strict adherence to time frames set out in the 1987 version.

If one is therefore to rely on Sub-clause 20.1 and interpret clauses 44.1, 44.2 and 44.3 in terms of a condition precedent, the Employer has a complete defence to any claim for time by the contractor not started in the required time frame.

**THE CIVIL TRANSACTIONS CODE (CTC)**

Notwithstanding the strict interpretation of the FIDIC Conditions of Contract, any such contractual restraints must be read in accordance with the UAE CTC.

The following articles in particular should be considered, which may have the effect of softening the strict interpretation in FIDIC:

**UNLAWFUL**

Article 106
(1) A person shall be held liable for an unlawful exercise of his rights.
(2) The exercise of a right shall be unlawful:
   a) if there is an intentional infringement (of another’s rights);
   b) if the interest which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari’ah, the law, public order, or morals;
   c) If the interests desired are disproportionate to the harm that will be suffered by others; or
   d) If it exceeds the bound of usage and customs.”
**GOOD FAITH**

Article 246 (1)
The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.

**UNJUST ENRICHMENT**

Article 318
No person may take the property of another without lawful cause, and if he takes it he must return it.

Article 319
(1) Any person who acquires the property of another person without any disposition entitling him so to do must return it if that property still exists, or similar property or the value thereof if it no longer exists, unless the law otherwise provides. (2) If the property of any person leaves his possession without his so intending and by unavoidable process merges with the property of another person in such a way that it cannot be separated therefrom without causing harm to one of the owners, the property of the lesser value shall be regarded as part of the property of the greater value after paying the value thereof, and if (the two parts) are of equal value then the property shall be sold and the proceeds distributed, unless there is an agreement or a provision of law to the contrary.

The interpretation of the FIDIC contract must not be such as to breach the provisions of the CTC by exercising any rights in a manner which is oppressive and abusive and which unjustly enriches the employer or where the employer acts in bad faith by sticking rigidly to the strict time restraints.

The obligation to act in “good faith” above all is one which applies to all contracts which, in a construction contract, is likely to impose an obligation to cooperate. A failure to comply with the duty of good faith amounts to a breach of contract. For example, where the employer was made aware of the claim by way of a formal minute or written report, he may be considered to be acting in bad faith if he was to then go back and penalise the contractor for not formally providing a “notice” as defined under the contract. However, the importance of acting in good faith is not the sole requirement of any contract and thus must be used as a general code of conduct rather than the basis on which to defend a claim.

Accordingly, it is important to also consider the following articles of the CTC:

Article 243 (2)
With regard to the rights (obligations) arising out of the contract, each of the contracting parties must perform that which he is obliged to do under the contract.

Article 259
There shall be no scope for implication in the face of clear words.

Article 265 (1)
If the wording of a contract is clear, – it may not be departed from by way of interpretation to ascertain the intention of the parties.

Although the CTC may soften the strict interpretation of the FIDIC Conditions of Contract, the foundations of the CTC are built upon the agreement of the parties to abide by the terms they have agreed upon.

Thus trying to argue that the time frames (agreed upon) in the Contract hold little or no weight and should be set aside is to go against the principle of the CTC. Article 246 (1), although
requiring good faith, still gives importance to the contract being performed in accordance with its content.

AGREE TO DISAGREE

With regards to the strict wording of the 1987 FIDIC Conditions of Contract, and the further support of the conditions precedent in the 1999 FIDIC Conditions of Contract, one could imply that contractual timeframes should be adhered to in order to entitle the contractor to claim for any extension of time. Nevertheless, one cannot dismiss the requirements of good faith outlined in the CTC and laying at the heart of the UAE commercial practice.

It seems therefore the everlasting argument over the inflexible grasp of the law versus the realities of commercial practice, once again rears its head. However, can they both simply not agree to disagree?

Surely a claim submitted 30 days outside of the permitted timeframe cannot be painted with the same brush as one delayed by three days? It is then that the provisions of “good faith” under the CTC should be applied to minimise any unjust consequences which may occur on the strict adherence to the FIDIC conditions? For example, if the technicalities of the timeframes would mean the contractor would suffer serious financial loss; or where the delay in submitting a valid extension of time claim did not cause any substantial loss to the Employer would it still be fair to strike out a claim for an extension of time?

Although in theory the use of the concept of good faith to fill in the gaps of the FIDIC technicalities seems like the most practical solution – this may not necessarily clarify the situation but may in fact give rise to one of the most discussed legal “grey areas”; what is a reasonable amount of delay?