

## Issue Note: Practical Tips for EOT Claims under FIDIC & ME Laws

### 1 Introduction

- 1.1 COVID-19 has had a significant adverse impact on global business including the Construction & Engineering (**C&E**) Industry where it is potentially causing delay to the completion of a significant percentage of the C&E Projects across the globe, including those in the Middle East (**ME**).
- 1.2 As governments across the ME start to lift the emergency measures, such as imposing travel bans, quarantining citizens, restricting social interaction and attendance at offices, implemented to delay and stop the spread of COVID-19, the C&E Industry supply chain will be able to assess their C&E Project's position against its existing programmes and budgets i.e. "time and cost".
- 1.3 In this context, it is a matter of high probability that stakeholders will identify that COVID-19/ME governments' measures, have caused delay to existing C&E Projects, such as those relating to Expo2020 in Dubai and the FIFA World Cup 2022 in Qatar, and the Contractor to incur additional costs.
- 1.4 We are conscious, however, that COVID-19 may constitute one of several events causing delay to existing C&E Projects. Consequently, given that ME Countries use construction and engineering contracts based loosely on the FIDIC standard form contracts (**ME Contracts**), we discuss the typical grounds for an extension of time and additional costs claim (**EOT Claim**) below with reference to the 1999 FIDIC Yellow Book's sub clauses (**SC**) and adopting its definitions.
- 1.5 In addition, we provide the optimal approach to adopt within a Contractor's EOT Claim together with some key articles, within the law of the ME Countries, which will enhance a Contractor's prospect of success in both a Contractor's Claim and, in the worst case scenario, a formal "...dispute...".

### 2 Grounds for an EOT Claim

- 2.1 Generally, a C&E Contract will set out the grounds on which a Contractor may rely to raise an EOT Claim.

FIDIC Yellow Book

- 2.2 The Contractor has a right to raise an EOT Claim, subject to SC/20.1 Contractor's Claims, if a specific event/s occurs and causes critical delay to the C&E Project's Time for Completion including:
- (a) SC/8.4(a): An Engineer's instruction (SC/3.3) for a Variation (SC/13.3);
  - (b) SC/8.4(b): A "cause" within another Subclause e.g. Unforeseeable Physical Conditions (SC/4.12), Delays Caused by Authorities (SC/8.5), Suspension of Work (SC/8.8. & 8.9), Adjustments for changes in Legislation (SC/13.7) and Force Majeure (SC/19);
  - (c) SC/8.4(c): Adverse climatic conditions;
  - (d) SC/8.4(d): Epidemic or governmental actions causing unforeseeable shortages in personnel or Goods;
  - (e) SC/8.4(e): The Employer's personnel and other contractors' conduct/performance which constitute an "...impediment or [act of] prevention..." to the Contractor's performance of the Works (together the **Delay Event/s**).
- 2.3 SC/8.4 provides the Contractor with the right to an extension of the Time for Completion only and the Contractor's right to additional Cost or an adjustment to the Contract Price is set out within the Yellow Book's specific Subclauses. For instance;
- (a) The Engineer has a right to instruct the Contractor to vary the Work (SC/13.1) and if the same causes critical delay to the C&E Project the Contractor has a right to an extension of time (SC/8.4(a)) and an adjustment to the Contract Price (SC/13.3); and
  - (b) COVID-19 is a pandemic and, on any objective analysis, constitutes a Force Majeure event (SC/19.1) and Contractor has a right to an extension of time for any delay its causes to the C&E Project (SC/19.4(a)) and in certain circumstances additional Cost (SC/19.4(b)).
- 2.4 The Contractor should of course be mindful that it is required to notify the Engineer no later than 28 days from the date it became aware or should have become aware, of the Delay Event/s, causing critical delay to the Works, failing which it loses its right to claim (Cl./20.1).

### ME Contracts

- 2.5 Generally, ME Contracts similar to the Yellow Book, will provides Contractor's with the right to claim an EOT and additional Cost if certain events occur which cause critical delay to the C&E Project's progress and the Contractor to incur additional costs.
- 2.6 Specifically, an ME Contract, in most instances, will provide a Contractor with the right to additional time and costs for completing a Variation, however, it may well be subject to complying with a convoluted Variation procedure and ultimately the Employer's "...sole discretion..." to provide the same.
- 2.7 Similarly, the Contractor will have a right to claim relief due to a Force Majeure event. However, the clause may well set out a limited number of events such as "...War, act of foreign enemy, rebellion..." and will not include language which indicates the list is non-exhaustive and allows the Contractor to categorise other unforeseeable event outside its control, such COVID-19, as a Force Majeure event.
- 2.8 In addition, the clause may state that any delay caused by a Force Majeure event is an "...excusable delay...", however, neither party is entitled to any "...additional costs..." incurred in relation to the same.

### Summary and Observations

- 2.9 In summary, the Contractor, under the Yellow Book, has a right to claim an EOT if any or all the Delay Event/s occur (para. 2.2 above) during a C&E Project's lifecycle and in addition, in certain circumstances, the Contractor may include a claim for an adjustment to the Contract Price and/or any additional Cost it incurs – see Variations and Force Majeure e.g. COVID-19 (para. 2.3 above).
- 2.10 ME Contracts, similar to the Yellow Book, may well provide the Contractor with the right to claim additional time and costs if certain events, such as a Variation and/or a Force Majeure event, occur and cause critical delay to the C&E Project's progress and the Contractor to incur additional costs (para. 2.5 – 2.8 above).
- 2.11 In practice, however, an ME Contract will be a heavily amended version of a FIDIC contract which will attempt to allocate all the risk, regardless of the Party best suited to assume the same, to the Contractor including the "delay risk". Specifically, the ME Contract will include language which will attempt to limit the Contractor's rights/grounds on which it can rely to recover additional time and costs if delay events occur.
- 2.12 Consequently, the Contractor may discover that it has unwittingly assumed "delay risk" in relation to Delay Event/s for which the Yellow Book provides relief.

### **3 Delay Analysis / Common Sense Approach**

- 3.1 The Contractor's EOT Claim, whether it is working under an unamended Yellow Book or an ME Contract, must demonstrate that the Delay Event/s caused critical delay to the Time for Completion and the Contractor to incur additional costs.
- 3.2 Generally, to satisfy the above, the Contractor's legal team will review the C&E Contract and construe the same, "as a whole", to determine its meaning as a matter of the governing law. Specifically, the legal team should advise on the C&E Contract's allocation of the "delay risk" between the Employer and the Contractor in relation to the Delay Event/s together with identifying the relief the Contractor may claim e.g. additional time and costs or additional time only.
- 3.3 Subsequently, the Contractor and its legal team should identify and instruct a credible delay expert to complete a delay analysis which sets out the Delay Event/s, demonstrates that those events impacted the C&E Project's "critical path" and caused a period of delay to the Time for Completion (**Delay Report**) which in turn caused the Contractor to incur additional costs.
- 3.4 For ease, assuming an "as planned v as built" analysis, we summarise the process as follows:
  - (a) **Stage 1:** Legal Analysis: C&E Lawyer Identifies the contract's meaning, as a matter of the governing law, regarding which Party is liable in relation to the specific Delay Event/s including other relevant provisions e.g. notices/any requirement to adopt a specific delay analysis methodology;
  - (b) **Stage 2:** Factual Analysis: Contractor/Delay Expert identify the C&E Projects (a) total delay e.g. 1 year after initial Time for Completion and (2) the key period in which the delay occurred e.g. March – June 2020 (COVID-19);
  - (c) **Stage 3:** Factual Analysis: Contractor/Delay Expert identify the potential Delay Event's for both the Employer and Contractor using the contemporaneous evidence e.g. Governmental measures pertaining to COVID-19 such as imposing travel bans, quarantining citizens, restricting social interaction and prohibiting attendance at offices.
  - (d) **Stage 4:** Factual Analysis: Contractor/Delay Expert identify the C&E Project's "critical path" and the actual Delay Event's on which they rely together with demonstrating how the events impacted the "critical path" and caused delay e.g. 2 months, to the Time for Completion; and
  - (e) **Stage 5:** Legal Analysis: C&E Lawyer tests the Delay Report and incorporates the same in the EOT Claim which sets out the Contractor's legal arguments e.g. rights/obligations including that the Contractor has complied with the notices (para. 2.4 above) and any other relevant issues e.g. concurrent delay.

- 3.5 Of course, many of the above may be completed simultaneously, however, the objective is to sufficiently understand the position to advise the Contractor, as a matter of law, on its “prospects of success” and, if appropriate, advance its best case.
- 3.6 Generally a Contractor’s best case will include contesting that the delay is either an “excusable delay” or the Employer caused the same as a matter of fact and law - one of the keys to success is maintaining clear and accurate “...*contemporary records*...”

*Contemporary Records / Contemporaneous Evidence*

- 3.7 The Yellow Book, similar to other FIDIC contracts, places the Contractor under an obligation to “...*keep such contemporary records as may be necessary to substantiate any claim*...” (SC/20.1/para.4). Contemporary records constitute contemporaneous evidence of the progress of the Works as a matter of fact and carry the most “legal weight” to substantiate a Contractor’s Claim under SC/20.1 and/or a formal “...*dispute*...” under the Yellow Book’s tiered dispute resolution mechanism, which concludes with “*Arbitration*” (CI/20.6).

- 3.8 A recent decision in New Zealand reinforces this point:

- (a) In *White Construction Pty Limited (WCL) v PBS Holding Pty Limited (PBS)* [2019] NSWSC 1166 – WCL alleged, after the works were completed, that its subcontractor’s original design for a sewer was flawed and it took a significant period of time to provide a revised design which caused delay to the works. Both parties appointed delay experts and each expert adopted a separate methodology, which were listed in the Society of Construction Law’s Delay and Disruption Protocol 2017 and provided delay reports.
- (b) The Court reviewed the delay reports and assessed that they were unnecessarily complex and “*impenetrable*” – and appointed its own delay expert. The Court appointed expert reached a similar conclusion and adopted an “*open textured approach*” which included reviewing the available contemporaneous evidence.
- (c) In this context, WCL had adduced site diaries and while the diaries were well kept and clear, including referring to extensive rock excavation and inclement weather, they did not provide sufficient detail regarding WCL’s claim that it was waiting for the revised sewer design. In addition, the site diaries did not refer to the specific activities which the alleged event adversely impacted. Consequently, WCL did not satisfy the burden of proof and its EOT Claim failed.

(d) The Judge preferred a “...*common sense*...” approach and concluded that “[t]he only appropriate method is to determine the matter by paying close attention to the facts, and assessing whether [WCL] has proved, on the probabilities, that [the] delay ... delayed the project as a whole and, if so, by how much.”

3.9 The importance of “...*contemporary records*...” and a “...*common sense*...” approach to an EOT Claim, therefore, cannot be overstated.

#### **4 Conclusion**

4.1 In conclusion, the Contractor’s rights to raise an EOT Claim will differ between the Yellow Book and a ME Contract – the latter attempts to transfer all the “delay risk” to the Contractor.

4.2 It is a matter of high probability, however, that the ME Contract will be ambiguous which leaves the same open to interpretation. This allows the Contractor to formulate arguments regarding its meaning, adopting an objective analysis at the time of entering the ME Contract, as a matter of the governing law which includes helpful Mandatory Laws which a ME Contract may not amend/exclude.

4.3 In this context, the Contractors EOT Claim could rely on and apply several legal principles under ME Laws including, but not limited to, the following: (1) Contract Interpretation (Qatar: Arts. 169 & 170, Bahrain: Art. 125, Kuwait: Art. 193, Oman: Art. 165 and UAE: Art. 258), (2) Good Faith (Qatar: Art. 172, Bahrain: Art. 129, Kuwait: Art. 197, Oman: n/a, and UAE: Art. 246) and (3) Variations (Qatar: 709 , Bahrain: n/a, Kuwait: Art. 690, Oman: Art. 641 and UAE: Art. 887), (4) Force Majeure (Qatar: Art. 188, Bahrain: Art. 145, Kuwait: Art. 215, Oman: Art. 172 and UAE: Art. 273), (5) Exceptional and Unforeseeable Events (Qatar: Art. 171(2), Bahrain: Art. 130, Kuwait: Art. 198, Oman: Art. 159 and UAE: Art. 249) to formulate a robust EOT Claim and/or advance a claim as a matter of the “governing law” only.

4.4 Please see our detailed Issue Note titled “*FIDIC Contracts and the law of the countries in the Middle East provide Contractors with relief from the adverse impact of the Coronavirus*” for additional information regarding COVID-19 only EOT Claims.

