

“How much”? Contractors’ Key Strategies to obtain relief from the Exponential Increase in Project Costs in relation to (1) Ongoing Projects and (2) New Projects, under FIDIC, English & Middle East Laws

Introduction

The global increase in demand and the consequential increase in the cost of construction materials and labour is adversely affecting Construction and Engineering (C&E) Projects across the globe including (1) Ongoing C&E Projects and (2) New C&E Projects, being planned and negotiated.

The C&E industry’s leading bodies indicate that globally the industry is experiencing the highest inflationary pressures in approximately 40 years and on balance, mindful of the current geo-political climate including the war in Ukraine, the position will not improve for the foreseeable future.

Experience informs us that the above pressures will cause Contractors to incur significant additional costs and critical delay to Ongoing Project’s and may cause New Projects to be deferred, reduced in scope or cancelled due to the prohibitive costs.

We summarise the Key Strategies below to assist Contractors in understanding and managing the above risks and to potentially obtain relief from the same under the FIDIC Design & Build Contract 1999 (**Yellow Book/99**) and English and Middle East Laws for Ongoing Projects and protecting their position in relation to New Projects going forward.

Ongoing C&E Projects

First, Contractors working on Ongoing Projects should review their Contracts.

Under the Yellow Book/99 the Contract Price (SC/1.1.4.2) is the “...*lump sum Accepted Contract Amount...*” (SC/14.1(a)) which may be adjusted in accordance with the Contract’s terms, which includes “*Adjustments for Changes in Cost*” (SC/13.8).

In the current circumstances the above “*Adjustments for Changes in Cost*” may be extremely helpful and, if SC/13.8 applies, the “...*amounts payable to the Contractor shall be adjusted for rises...in the costs of labour, Goods and other inputs to the Works...*” (SC/13.8/Para.1).

The Contractor should of course be aware of its Contract as a whole and in addition to above, or as an alternative, the Contractor may well be able to rely on *Force Majeure* for relief if the “...*war, hostilities (whether war to be declared or not), invasion, act of foreign enemies...*” (SC/19.1(d)(i)) in Ukraine, or any other sovereign state, is a substantive cause of the increase in the Project’s costs and/or a cause of critical delay to the Works.

Second, Parties should identify and understand how the law governing their C&E Contract operates and applies to the Contract (**Governing Law**).

Under the Yellow Book/99 the Governing Law is set out in the Appendix to Tender (SC/1.4) and includes all “...*legislation, statutes, ordinances and other Laws, and regulations and by-laws or any legal constituted public authority...*” (SC/1.1.6.5).

English Law

Under English Law, in addition to the potential relief under the Contract above, a Contractor may attempt to rely on case law in relation to *Force Majeure*, which is a creature of contract that the Courts define. For instance, the Court of Appeal has held that the word “*prevent*” within a *Force Majeure* clause means that the event must render performance “*legally or physically impossible*”, not merely “*difficult or unprofitable*” (Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd), and that the event was only “*beyond [a party’s] control*” if that party had taken all reasonable steps to avoid the event or mitigate its impact (Channel Island Ferries Ltd v Sealink UK Ltd).

Middle East Laws

Under the laws of countries in the Middle East (**ME Laws**), however, the Contractor may be able to obtain relief from incurring additional time and costs, due to the above risks, using the legal principle known as “*Unforeseen Exceptional Circumstances*”. This applies in “...*exceptional circumstances of a public nature...*” where the Contractor’s performance becomes “...*oppressive...*”, not impossible, and causes the Contractor to suffer “...*grave loss...*” (see Civil Codes of UAE: Art/246, Bahrain: Art/130, Kuwait: Art/198, Oman: Art/159 & Qatar: Art/171).

It’s extremely helpful to note that the above ME legal principle is a mandatory law. This means the “*Unforeseen Exceptional Circumstances*” principle applies regardless of the C&E Contract’s terms; however, Contractors should be aware that its application is limited and will depend on which of the above ME Laws constitutes the Governing Law in their C&E Contract.

If a Contractor has any doubt regarding the application of the above, it should obtain detailed legal advice on the same from an experienced C&E Solicitor.

New C&E Projects

Contractors that are negotiating New Projects should attempt to protect their position as much as possible in relation to the adverse effects of the exponential increase in demand and the increase in the cost of materials and labour on their New Projects. For instance, Contractors should attempt to:

- Ensure that the Contract Price can be increased for a potential rise in the Costs of completing the Works;
- Amend the *Force Majeure* clause to cover the appropriate risks and keep the clause’s application as broad as possible e.g., SC:19.1(d) uses the terms “*but is not limited to*” which means the list is not exhaustive;

- Include the forecasted increase in the fixed Cost offer to complete the Works e.g., 20% over the New Project's lifecycle; and
- Add float/additional time in the proposed programme for the New Project.

The Contractor does of course have to strike a balance between winning the New Project while protecting its position and ensuring that it does not lose money in the long run - as we all know losing money on project after project is not sustainable.

We provide the above few suggestions, therefore, to enhance the Contractor's knowledge, however, please be mindful that the legal risks and solutions will be different for each New Project. If a Contractor is unsure regarding its proposed approach, therefore, it would be wise to instruct an experienced C&E Solicitor to advise on the risk allocation in its proposed Contract to reflect its appetite for the same.

Additional Time and Costs Claims

Unfortunately, the above risks can lead to Contractors incurring additional time and costs on an Ongoing and/or New Project. Contractors should ensure, therefore, that they understand fully how their Contract operates, including its dispute resolution procedure (**DRP**), under its Governing Law.

Specifically, under the Yellow Book/99 the Contractor may raise a *Contractor's Claim* if it considers that it is entitled to additional time & costs obligation to particularise and substantiate its *Contractors Claims* (SC/20.1), which is identical to its obligation to satisfy the "*burden of proof*" in a formal dispute i.e., Arbitration (SC/20.6).

Further, the Contractor should of course send the relevant *Notices* within the required time frame (for example see SC/8.4 (EOT), SC/19.2 (FM) & SC/20.1) and be mindful that if it fails to submit a relevant *Notice* within the allocated time frame it may lose its right to claim i.e., "time barred".

Further, the Contractor, should ensure that it sets out the "*...full particulars...*" of the legal basis of its claims together with the "*...contemporary records as may be necessary to substantiate any claim...*" (SC/20.1). 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) and its Governing Law.

To be clear, the importance of a Contractor particularising and substantiating its claim using "*...contemporary records...*" cannot be overstated – if the Contractor fails to particularise and substantiate its *Contractor's Claim* or any other claim in a formal dispute, including Arbitration, it will lose the claim! In this context, if Contractors are unsure as to whether their claims are fully particularised and adequately substantiated, with contemporaneous evidence, to prove their claim they should obtain detailed legal advice from an experienced C&E Solicitor to advise on the same.

In our experience *the earlier* you instruct a C&E Solicitor to assist on your C&E Project *the better* – it saves time and cost in the long run!!!

Conclusion

We hope the above enhances your knowledge and assists in managing the above legal risks. We have advised Contractors in relation to the above on both Ongoing and New Projects and have used our experience to design a **“One to One” Complimentary Online Strategic Legal Consultation (30 mins)** which will:

- Enhance your understanding of the above risks and their potential adverse impact on your projects;
- Improve your ability to assess and manage the above risks throughout your project’s lifecycle;
- Highlight the 5 Stages and Key Strategies you should adopt in your claim for Additional Time and Costs on your Ongoing Project; and
- Increase your knowledge of the relevant **A.** English Law; and **B.** Middle East Laws / Mandatory Laws (UAE, Qatar, Bahrain, Kuwait, and Oman) on which Contractors may rely including the legal principles and mandatory laws pertaining to: **(1) Contract Formation (2) Freedom of Contract (3) Contract Interpretation (4) Good Faith**, and **(5) Unforeseen Exceptional Circumstances**, to run robust successful arguments; and
- Expand your knowledge of the Key Strategies to protect your position and manage the above legal risks on your New Projects.

Please email us directly on info@cels.global using **COST INCREASE** in the subject heading to book your **“One to One” Complimentary Online Strategic Legal Consultation (30 mins)**

We look forward to hearing from you.

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