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The Unescapable Importance of Proper Notices

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Intro

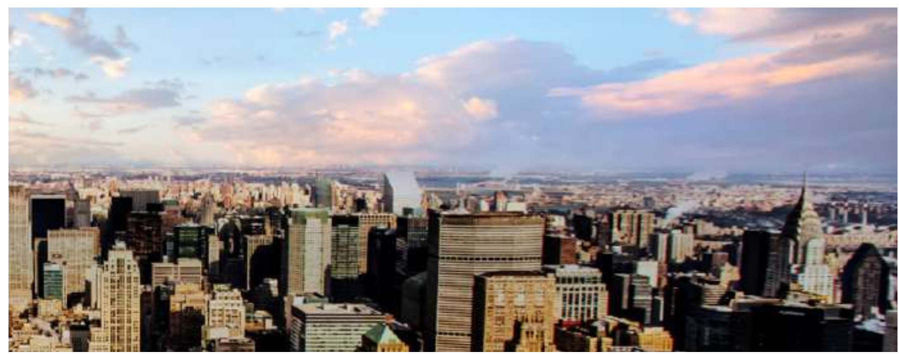
In certain countries, construction contracts, especially those dealing with Oil and Gas projects, are known to be quite prescriptive and restrictive. Furthermore, in most cases, contractual clauses and provisions are drawn in order to better protect the employer's best interest.

What would the chances of success be then when a contractor would need to claim under a form of bespoke contract which is generally not based on FIDIC conditions of contract when dealing with contractor's entitlements? Furthermore, what would the contractor be entitled to do in the event of an EPC form of contract (Engineering, Procurement and Construction) which provides, amongst others things, for the contractor to have a single point of responsibility for design and construction thereof?

Many would say that the probability of a claim being accepted by an employer would be "close to zero" since a typical EPC contract means that the contractor assumed all the risks relevant to design, procurement, execution and commissioning of the awarded works, included the cost of those risks within the tendered rates/lump sums following the employer's acceptance of the contractor's tender.

Furthermore, the employer would have its own priorities like the contract and project to be finalized within the allocated budget (lump sum), under the conditions of required quality, within the accepted time and to be "fit for purpose".

In these types of contracts, the Scope of Works becomes extensive: elaboration of Working Drawings based on the employer's requirements, subcontracting (also to local nominated subcontracting companies), construction, commissioning and testing, in order to provide the so called "turn-key" touch on behalf of the employer. Under these circumstances, the



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employer's only concern is to supervise the achievement of imposed Milestones, so that at the completion of the Project, with a "Turn of the Key", it will have the plant or other facility running smoothly, as intended when calling for such tender.

However, what happens when the employer's representative intervenes excessively and/or inappropriately with the Project? On one hand, most likely lack of required clear instructions, while on the other, it may both produce disruption/delay and additional costs to the contractor? How could the contractor prove its entitlement to Claim for additional Time and Money, considering the restrictions imposed by the Conditions of Contract?

Proper notification in this case related to - most relevantly – to the occurrence of disrupting and delaying events, and maintaining adequate contemporaneous records, will then become of outmost importance for the contractor's further strategy to recover or obtain compensation for cost, expense, loss and/or damage thereof.

Case study

Contractual Provisions

In the case study at hand, the conditions of the EPC Contract for the execution of works in the field of Oil and Gas plant construction had stipulated that notices and instructions were to be given in writing. Furthermore, the contract had provided rather rigid time limits for notices and instructions.

It provided specific timing and particulars that should have been complied with by the contractor when serving its notices in order to secure its entitlement, as follows:

- *"The Employer's Representative shall be under no obligation to negotiate for, or concede an extension to the scheduled Completion Date or compensate Contractor for increased costs, **unless Contractor has provided the correct notices and information in accordance with the requirements of Variations Sub-Clause and Claims Sub-Clause**"* (our emphasis);

In respect of the timing of the notices that had to be submitted by the contractor, the relevant contract clauses provided for different situations:

- In accordance with the **Clause Variations to Contract**, whenever the contractor considered that an instruction affected the agreed time schedule for completion of all or part of the Work, the contractor should have been entitled to any adjustment to the Completion Date only upon submitting a notice of such effect within fifteen (15) calendar days of the Instruction being issued;

- In accordance with the **Clause Variations to Contract**, the notice for additional cost must have been given by the contractor within fifteen (15) calendar days of the issue of the Instruction as well.

Furthermore, **the claims clause**, dealing with the circumstances when the contractor intended to claim any extension of time and additional payment provided that:

- *The Contractor shall give notice to the Employer's Representative as soon as possible and in any event within fourteen (14) calendar days from the date of the event or circumstances giving rise to the claim.*

- The detailed particulars of the amount and basis of the claim should have been submitted by the contractor within 28 days of such notice, followed by particulars as requested by the employer's representative, and within the time specified by the latter.

Moreover, a different Sub-Clause, regarding ***Delays***, provided that the notices had to be issued within seven (7) calendar days:

- *For delays considered to be attributable to the Employer, the Contractor shall, at first indication of delay, give notice to the Employer's Representative of any such effect within seven (7) calendar days.*

Given the above, it is quite evident that the contractor had to comply with three different contractual provisions in order not to lose entitlement, namely:

- for delay: give notice within seven (7) days;
- for claim: give notice within fourteen (14) days;
- for variation: give notice within fifteen (15) days.

Therefore, the contractor had the duty of diligently and timely writing and submitting its notices, which would have allowed it to set the specific starting dates of the notified events that could have been related to the programme of works and that impacted the critical path, in order to establish and reserve any contractor's entitlement to claim.

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The situation becomes even more intricate when analysing the relevant sub-clauses regarding the substantiation related to the served notices in accordance with the contract.

With regard to the first type of notices addressing possible delays, no substantiation was required by the conditions of contract. The contractor had the obligation to implement either mitigation or expediting measures unless the notified event would have been considered as a possible variation or claim event.

As to ***Variations***, following the abovementioned notifications, when the Contractor had submitted the correct notice for the likely effect of instructions on variations in cost and time, in accordance with the related relevant sub-clauses, the contractor should have provided the following within sixty (60) calendar days of notice being issued:

- full details of any additional payment,
- estimates of future possible effects,
- direct cost and /or impact on agreed time schedule-programme.

The details should have been forwarded in writing to the employer's representative; and if not done the contractor **would have forfeited** any rights of adjustment of the contract price and the programme of work as a consequence of such variation to contract (VTC).

As to any contractual **claim**, following the notice of claim being issued, *"the Contractor shall forward to the Employer's Representative an account, giving detailed particulars of the amount and basis of the claim"*, ***within twenty-eight (28) calendar days of such notice***, *"or such other time as may be agreed with the Employer's Representative"*. As the contract provides, the Contractor *"shall send such further particulars as requested by the Employer's Representative within the time specified by the Employer's Representative."* Where interim accounts are sent to the employer's representative, *"the Contractor shall send a final account within twenty-eight (28) calendar days of the end of the effects resulting from the event"*.

In addition, the contract specified that in the event that the contractor failed to comply with the provision of this sub-clause, *"the Contractor shall not be entitled to any additional payment"*.

In accordance with the foregoing, the only interpretation is that timely notifications and substantiations were of outmost importance in order to establish, prove and support the contractor's entitlements.

A contractor on this type of contract would have been bound to diligently notify and keep all contemporary records in order to demonstrate merits-causation and to submit the necessary substantiation for each of the notified events, in order to facilitate a possible acceptance from the employer's representative of contractor's claims at any given time.

Instructions in writing

As previously stated, the first step that had to be undertaken by the contractor in order to be entitled to any indemnification from the employer's representative was to submit proper notice as provided by the relevant contractual provisions.

Moreover, the contract stipulated that the contractor had a duty to notify the employer's representative *"of any errors, ambiguities or discrepancies, between or within any of the Contract sections, as and when they are identified"*. It is worthy of note that this sub-clause itself is not *per se* time-barring the contractor while notifying the errors to the employer. However, the contractor was required to promptly and diligently notify the employer to prevent any loss of entitlement.

At the same time, considering the type of contract (*i.e.* EPC) and its main feature, namely that the design responsibility rests with the contractor, the acceptance and endorsement of the design documentation provided by the employer's representative implied that the contractor undertook all risks in respect of any errors, ambiguities or discrepancies that it could have identified within such design later on during the construction process.

However, in case an instruction of the employer's representative was necessary in order to clarify the notified errors, ambiguities or discrepancies and the said instruction that would have changed the form, specification, quality or quantity of the works, the following provisions should have been taken into consideration by the contractor in order to prove its entitlement to the adjustment of the completion date and/or contract price:

- *"Such deficiencies shall be clarified by Employer's Representative in writing, and by Instruction if the clarification changes the form, specification, quality or quantity of the Work"*.

- The contractual definition of **Work** included *"all work to be carried out and all services rendered by Contractor including all temporary work, design, engineering, procurement, assembly, construction, installation and commissioning work to be performed by Contractor for and in connection with the permanent and temporary works, the provision and operation of all Construction Equipment, and all other work and services to be carried out by Contractor under the Contract".*

- The contractual definition of **Instruction** was *"a communication issued by the Employer's Representative in accordance with the Contract Clause Instructions and Variations requiring Contractor to alter all or part of the Work".*

Thus, the only possibility for the contractor to claim an adjustment of the completion date and/or contract price in respect of the works, including the design, was given on the basis of an instruction issued by the employer's representative, which would have changed the form, specification, quality or quantity of the works.

What if the Instruction was verbal, and not issued in writing? The employer's representative could then deny that an instruction was issued and the contractor would have had no entitlement to be paid for the work done. Considering the type of contract, any variations could have been disregarded by the employer's representative and considered included in the Scope of the Work.

Relevant sub-clauses of the contract contain the following provisions about verbal instructions:

- In case the Instruction issued by the employer's representative was verbal, then the conditions of sub-clause [Confirmation of verbal instructions] would have applied:
"Instructions should be issued in writing. However, if the Employer's Representative considers it necessary to issue an Instruction verbally, the Contractor shall immediately comply with such verbal request. Where the Employer's Representative confirm a verbal request in writing, either before or after carrying out of the Work, this shall be deemed an Instruction. If the Employer's Representative does not confirm such a verbal request in writing within seven (7) calendar days, then the Contractor shall so confirm within a period of seven (7) further calendar days and shall obtain the Employer's Representative's written agreement which shall be deemed an Instruction".

Furthermore, considering the Technical Specifications, relevant for the procedures regarding variations, the instruction was defined as:

- *"An Instruction in a form approved by the Employer's Representative (Doc. ref. xxxxx) shall be issued for alterations to the Work that are commensurate with the content and intent of the Scope of Work. Any Instruction that alters the Contract terms or prices shall be endorsed by Variations to Contract."*

In respect of any Instruction issued by the employer's representative that may have had an impact on the agreed time schedule, the technical specification has this to say about variations:

- *"Where the Contractor considers that an Instruction affects the agreed time schedule for completion of all or part of the Work, the Contractor shall give notice to the Employer's Representative of any such effect within fifteen (15) calendar days of an Instruction being issued. Any impact of an Instruction on such time schedule shall be agreed between the parties, provided that the correct notices have been given".*

As it may be noted the contractor was under the obligation to serve notices to the employer's representative in any event when such instruction was given verbally or in writing.

What went wrong: no clear written instruction from the Employer's Representative

In respect of the contractual procedure, the events notified by the contractor were either not timely notified, or requested by the Contractor to be considered under a notification to variation clause, thus, in this regard, the contractor had actually avoided notifying a claim under the relevant contractual clause for claims.

As a general remark, it should be underlined that a notice of claim is Not a Claim. A notice of claim served pursuant to the contractual provisions is the manner in which the contractor informs the other party that something is not right and may affect time and cost. By doing this, the Contractor would have protected its entitlements regarding additional time/costs due to events that were outside its control.

Furthermore, as mentioned above, the contractor had a duty to notify the employer's representative "of any errors, ambiguities or discrepancies, between or within any of the Contract sections" and these notifications would have also been issued for the benefit of the contract-project, so that the progress of the works could have been better monitored also in respect of the notified events or circumstances.

The course of action chosen by the contractor was to notify the employer's representative during the execution of the work by a letter named notification for variation, issued pursuant to the variations and instructions clause.

For the majority of the events claimed, the employer's representative replied that it was the contractor's responsibility to ensure full compliance with the contract specifications. Moreover, the employer's representative did not endorse the verbal instructions by confirming them in writing, by stating that the varied work was within the scope of the contract and that the contractor would proceed with the works at its own risk.

As it is not the scope of this article to debate on risk and cost implications on an EPC type contract, we shall focus only on the instructions part.

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In most cases, the events had turned out to be more of a discussion on technical terms, with each party having its own opinions on whether the event was included in the scope of works or not.

How it could have been approached by the Contractor

Albeit the Contractor had initially requested additional time and cost by serving a notice to variation, following any employer's representative's negative reply the contractor could have reconsidered its strategy.

Based on the contractual provisions, for each of the events that were refused to be acknowledged by the employer's representative as being Instructed variations, or being necessary, or having additional cost and time related impact, the contractor could have submitted notice within fourteen (14) days in accordance with the claims sub-clause. The notice in itself would have protected the contractor's entitlement to claim. Then, the required particulars of each claim (*i.e.* emails, records of the correspondence, chronology of each event, its argumentation of the merits, programming, delay analysis and quantum calculations, etc.) should have followed *"within twenty-eight (28) calendar days of such notice, or such other time as may be agreed with the Employer's Representative."*

Based on the situation of lack of written instructions from the employer's representative, without notices and relevant records to document the actions taken by the contractor and the demonstration of incurred related delay and costs, including mitigation actions taken by the contractor; the latter put itself in the situation where the actions related to its potential but not submitted claims could be regarded at best as acts of mitigation performed in good faith, rather than establishing entitlement to time and money.

Conclusions

In light of the above, the contractor must always carefully maintain site records, obtain written instructions or confirm verbal instructions as provided for by the contract, comply with the time limits for notices and provide the required particulars of its claims in due time.

It cannot be stressed enough that a notice of Claim is Not a Claim. A notice of claim under the relevant clauses (such as ***Claims*** sub-clause in the case at issue) would have protected the rights and entitlement of the contractor to receive additional cost and/or time, for events that were outside its control. If the notices shall later lead to valid claims or not, that is another matter, that in our opinion, is best handled by trained claims professionals who could generate to the advantage of the contractor substantial monetary entitlements.

Notwithstanding the initial comment that an EPC type contract is very restrictive and that a contractor has very few ways to pursue its rights to claim, yet diligent contract and real time claims management approach, done by specialised organisations preferably involved from the early stages of the Contract, will greatly assist in avoiding the predicament the contractor put itself into it. The importance of keeping proper records and to timely notify events in accordance with the contractual procedures cannot be overstated, and such diligence and due process would have significantly improved the case at hand.

As general advice, any contractor should be prepared for the required actions to be taken in accordance with the contract and be ready to use every instrument of communication in order to obtain and ensure the recording of data necessary to substantiate future claims. If during further analysis the contractor observes that the notified events of claim do not prove to have impacted the critical path, and hence the time for completion thus entitlement to extension of time, then maybe the strategy could change and only cost relief could be sought in the alternative or not.

But in all events, this would be done by respecting the contractual procedures and timely notifications requirements.

Moreover, due to lack of proper written/ confirmed verbal instructions issued by the employer's representative and specific data not provided by the contractor's notices for variations, the claimable events cannot be substantiated in respect of start and/or finish dates of cause and effect of each event, or prove whether they would impact the programme of works and its critical path.

The general and conclusive comment is always the same: **no timely notification, no claim. No claim, no possible entitlement for the contractor.**

Engineer and Dispute Avoidance / Adjudication Board – effective dispute resolution

Given that both parties to a contract wish to have a successful project, this requires not only a fair and balanced contract which sets out the role of the parties, but also ways to ensure any issues which may arise are dealt with promptly and fairly. With the evolution of the Engineer's role, and the introduction of the DAB to deal with disputes, FIDIC has now taken another step with dispute avoidance, undertaken by project team members through a DAAB.

With regard to the Engineer within FIDIC Conditions of Contract for Construction, Second Edition 2017 ("**FIDIC Red 2017**"), Sub-Clause 3.2 states therein, amongst other things that:

"There shall be no requirement for the Engineer to obtain the Employer's consent before the Engineer exercises his/her authority under Sub-Clause 3.7 [Agreement or Determination]. The Employer ***shall not impose*** *further constraints on the Engineer's authority."*

Most interestingly, the opening paragraph of Sub-Clause 3.7 [*Agreement or Determination*] goes to further state:

"When carrying out his/her duties under this Sub-Clause, the Engineer ***shall act neutrally*** *between the Parties and* ***shall not be deemed*** *to act for the Employer."*

Clause 21 when read as whole, yet particularly Sub-Clause 21.3 [*Avoidance of Disputes*], brings to the table a much-needed change in the mind-set of the Engineer and the Parties alike with relation to the agreement found therein for the DAAB to practice dispute avoidance.

When reading and understanding Sub-Clauses 3.2, 3.7, 8.4, 8.5 and Clauses 13, 20 and 21 and then assessing how these interrelate with regard to fairly balancing the provisions within the **FIDIC Red 2017** between the parties, it can be seen that in the Second Edition, FIDIC has aimed- to close the many open-ended terms found within the First Edition 1999, which together with the now agreed dispute avoidance found in the Second Edition, would potentially reduce the number of disputes that may arise at any given time and obviously cost.

However, what this means for the Engineer's perspective goes far beyond balancing the terms of the Contract and allowing the DAAB to practice dispute avoidance.

The prescriptive terms found within the **FIDIC Red 2017**, in nature apply to the Engineer too in a balanced manner, as opposed to the rather lose approach that was adopted within the First Edition 1999, related to the role and duties of the Engineer.

FIDIC Red 2017 is, in my opinion, finally a 'Project Management Tool', which notably, will require specialized Contract Management to be applied in real time, for that tool to operate in symbiosis with the prescriptive Contract aspects and terms found therein.

During the past years, the international construction industry output has increased considerably and in consideration of the latest technologies developed and continuing developing in this field, especially regarding new developed software for modelling, simulating, assessing risks, planning and designing works, the requirements to be fulfilled by competent Consulting Engineers has increased exponentially.

Generally, such requirements may be briefly summarized by stating that a competent Consulting Engineer should, at the least:

- be associated and recognized by a professional body as a professional engineer;
- be fluent in at least one international language (predominantly English and Spanish);
- be knowledgeable about the latest versions of software and technologies used in his/her industry;
- have in-depth knowledge of planning, costing and quantity surveying;
- have good knowledge of contract management and risk management;
- be familiar with most used international standard forms of Contracts within the international construction industry;
- be accustomed with best engineering practices and international standards;
- have good communication skills at all levels as well as leadership skills;
- have good computer literacy;
- possess developed project management skills;
- be experienced or at least knowledgeable in the most used claim and dispute resolution methodologies and procedures.

Professional Engineers are trained to work to prescriptive specifications, which fits well with their engineering back-ground and experience and this enables them to manage design, construction and contract interrelationships thereof. When considering how the FIDIC Red 2017 has been tailored to fulfil the challenging requirements and demands of the continuously transforming international construction industry, it shows that the role of the **FIDIC Engineer** has been elevated to a much higher level.

The new FIDIC Engineer's perspective is one that requires the Engineer to be more attentive while keeping the balance between the Parties, by **again** reverting to being 'neutral' and fair with regard to matters that could develop into disputes between the Parties and ensuing legal ramifications to the detriment of a Project.

Most relevantly, the Engineer will inevitably have to be the first stage of the dispute avoidance mechanism available to the parties and indeed to the DAAB, by acting 'neutral' in respect of matters ultimately related to Sub-Clause 3.7.

However, it goes deeper than that. The **FIDIC Red 2017** requires a different outlook for him/her to be able to deal with the prescriptive aspects applicable to the Engineer within the Contract, that relate particularly to the provisions found within Sub-Clauses 3.2, 3.7, 8.4, 8.5 and Clauses 13, 20 and 21, which together essentially spell 'dispute avoidance'.

By being required to be neutral, when it comes to the dispute avoidance mechanism found within the sub-clauses and clauses referred to previously, the professional Engineer will inevitably be required to act as a facilitator for the parties to reach 'agreement' and as an adjudicator when determining under the various sub-clauses and clauses, yet at same time acting as the Employer's Agent, Sub-Clause 1.1.33 refers.

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Will this requirement for being neutral work better under the FIDIC Red 2017 than it did under the FIDIC Fourth Edition 1987, as amended in 1992? My answer is frankly yes, because the Second Edition 2017 has indeed managed to close those open-ended terms that were found in FIDIC Fourth Edition 1987 as amended in 1992, and the Red Book First Edition 1999.

I would like to conclude with a word of caution for the Employers: do not under any circumstances alter the fair balance and risks' allocation that has been achieved by FIDIC within the FIDIC Red 2017, because if they do, in the end it will work against them.

The Engineer should be rendered and used as much as possible as a 'neutral' and less as the Employer's agent. Unless and until this happens, there will always be conflicts between the parties in a construction contract.

Often in practice, it is my experience that some Employers try to take advantage of the fact that they are the entity that has the funds to run a project and consequently they try, usually successfully, to reduce their Consulting Engineers to simply abide by their instructions no matter whether fair, contractual or otherwise.

Nobody denies that the Consulting Engineer and the Employer should have good communication and close cooperation. However, such Engineers are professionals with a high degree of specialization and professional integrity, and therefore the Employers should entrust the running of the projects in their hands within the limits imposed by the relevant consultancy agreements and let them do their job as FIDIC Red 2017 intends, without undue and improper interference, which unfortunately at times, does not happen.

And finally, my advice to my fellow Engineers: stay neutral at all times and be fair, no matter who is paying for your services. Ultimately, the judgement will be on the manner in which you performed your duties under the contract, more than the manner in which the parties performed theirs.

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The team of techno engineering & associates wishes you all a blessed Easter! We hope you find some time amidst the holiday celebration to wind down and relax with your loved ones.