

Some thoughts on how the 2017 FIDIC contract deals with time

Introduction

In December 2017, FIDIC finally unveiled the Second Edition of the 1999 Rainbow Suite, Red, Yellow and Silver Books. This short paper looks at how the FIDIC form deals with time and includes an Appendix detailing the changes made to clause 8, the primary clause which deals with time or “Commencement, Delays and Suspension” from the original 1999 contract.

Why have the contracts been amended?

FIDIC have explained that the underlying philosophy and core aim behind the update is to achieve increased clarity, transparency and certainty which should lead to fewer disputes and more successful projects. In the introductory Notes to the Second Edition of the Rainbow Suite, FIDIC state that the new contracts continue “*FIDIC’s fundamental principles of balanced risk sharing while seeking to build on the substantial experience gained from its use over the past 18 years*”. Unsurprisingly, the update also reflects current international best practice.

This is no doubt why a key theme of the Second Edition is the increased emphasis on dispute avoidance. One way that FIDIC have chosen to address this is to make many of the contract provisions more prescriptive, setting out step-by-step what is expected from the Employer, Contractor and Engineer. This helps to explain why (again) in the introductory Notes to the Second Edition of the Rainbow Suite, FIDIC go on to explain that the contracts also provide “*greater detail and clarity on the requirements for notices and other communications*”. If everyone understands precisely what is expected of them, then the theory goes that this lessens the potential scope of and possibility for disputes.

The programme: a key management tool

The changes to how the updated Rainbow Suite deals with time, primarily to be found within clause 8, provide a good example of how FIDIC have set about trying to achieve this. One of the key project management tools, whatever your contract, is the contract programme and the most obvious change to FIDIC’s approach to time within clause 8 can be found in the development or significant expansion of the programme requirements.

The 1999 edition of the Rainbow Suite required that the Contractor submit a “detailed programme”. However, it left the Contractor to decide how to achieve this, assuming that the Employer did not set out in the Employer’s Requirements what the Contractor was to do.

Now the Second Edition of the FIDIC form, following the approach of the 2011 Red Book subcontract, not only mandates the software to be used but also sets out that the contract programme must include all (logically linked) activities, and set out the sequence and timing of inspections and tests. In addition, all key dates must be identified, and all activities are to be logically linked, also identifying float, rest days and holidays as well as the delivery of materials. A supporting method statement is also required.

FIDIC's emphasis here is very much on a more effective approach to project management, including not just the activities on site but those activities that lead up to the effective construction work at the site; in other words, everything not only in relation to the contract but also in relation to the effective running of the project. This all helps explain why one of the final paragraphs of the new sub-clause 8.3 notes that:

"The Contractor shall proceed in accordance with the Programme, subject to the Contractor's other obligations under the Contract. The Employer's Personnel shall be entitled to rely on the Programme when planning their activities."

The programme is there to benefit the whole project. For example, sub-clause 2.1 notes that the Contractor is not given exclusive access to the site. Accordingly, the Employer and Engineer may well rely on the Contractor's programme information to plan the requirements of other parties who may need access to the site.

There is also a positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress. Further, by sub-clause 8.3(k)(v), the Contractor is required to provide proposals to overcome the effects of any delays to progress; perhaps another example of the movement towards transparency. It is also something that the Contractor may need to do, as part of the consultations following any advance warning given under sub-clause 8.4.

The importance of dispute avoidance

Another feature of dispute avoidance is the concept of advance warning, giving early notice of a potential problem. The new sub-clause 8.4 here is one of the new clauses which follow the lead given by the 2008 Gold Book. However, whilst the 2016 pre-release Yellow Book said that the Employer, Contractor and Engineer should "endeavour to advise" each other in advance of any known or probable future events or circumstances which may adversely affect the work, that obligation has been tightened to simply "shall advise" under the 2017 Second Edition. If the Parties can contemporaneously identify significant changes, either through a programme which is regularly updated or an early warning system, then this should help prompt solutions to overcome delays which should in itself assist in the timely completion of projects.

That said, there is no apparent sanction for failure to follow the clause. This is in contrast to the NEC approach which provides that a Contractor will only be compensated on the basis that an early warning had been given. Further, the relevant date of the warning will be based upon the date on which an experienced Contractor would have, or ought to have, recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures, in order to avoid inadequate cost recovery for those problems which may materialise later on.

FIDIC have adopted a more collaborative approach in recognising that for many this is a very new concept and change in the way Parties traditionally work. By encouraging (or in fact requiring) the Parties to give "early warnings", FIDIC anticipate that they

can then work together to resolve the potential difficulty at an early stage when it is relatively minor, and thereby prevent it from escalating into something altogether more serious and maybe avoid delay. Alternatively it gives the Employer the chance to have second thoughts about an issue that threatens to delay the project. This again is all part of FIDIC's decision to adopt enhanced project management procedures to promote more effective communication and reduce disputes.

Some contracts set up early warning registers and require regular early warning meetings. FIDIC do not provide for this, but sub-clause 3.8 now provides for management meetings. These meetings could easily include a section on early warning meetings. Equally, a Contractor may consider it prudent to make reference to early warnings that have been given under sub-clause 8.3 in the sub-clause 4.20 Progress Reports.

Whilst there is no express requirement to do this in sub-clause 4.20, Contractors are required to include descriptions of progress (sub-clause 4.20(a)), comparisons of actual and planned progress and any measures being taken to overcome delays (sub-clause 4.20(h)) in their Progress Reports. This makes the provision of up-to-date programming and progress information a precondition to payment, as sub-clause 14.3 applications for interim payment must be supported by the relevant report on progress.

Making claims for an extension of time

If the Contractor fails to complete his Works within the agreed time for completion then he will be in breach of contract. Sub-clause 8.5 provides the mechanism by which the time for completion can be extended, but only in certain clearly defined circumstances and only if the Contractor takes certain steps to give Notice of his considered entitlement.

As noted above, clause 20 of the Second Edition of the FIDIC form has a much more detailed claims procedure, although there is no requirement for the Contractor to follow the claims procedure in respect of the entitlement to extension of time for Variations. FIDIC have made it clear that a notice given under the new contract must clearly state that it is a "Notice". This is to try and reduce disputes about what is a notice, where Parties try and argue that references in a programme or progress report actually constitute notice of a claim. Sub-clauses 4.20 and 8.3 specifically note that neither a programme nor progress report can be used as a substitute for a formal Notice. That said, the new sub-clause 20.2.5 does provide the Engineer with the power to waive a failure to follow a time bar requirement. The Engineer can take the following into account:

- Whether the other Party would be prejudiced by acceptance of the late submission; and
- Whether the other Party had prior knowledge of the event in question or basis of claim.

Prior knowledge might be found in the regular programme updates.

So initially, a Notice of Claim, whether by a Contractor for time, or an Employer for the right to deduct delay damages as a result of delayed completion, must be issued as a condition precedent to entitlement. The Engineer will then proceed to determine the claim, in accordance with sub-clause 3.7.

New sub-clause 3.7 is headed “Agreement or Determination” which reflects the fact that the Engineer is under a positive obligation to encourage agreement of claims. If the Engineer fails to make a Determination within the stated time limits, then the Engineer will be deemed to have rejected the claim, with the result that the claim can be referred to the Dispute Board. When it comes to the Determination itself, when acting to seek to reach an Agreement or to make a Determination under new sub-clause 3.7, the Engineer is said not to be acting for the Employer but to be acting “neutrally” between the Parties.

The word “neutrally” is new, though it is not defined. FIDIC have said that in choosing the word, it did not mean “independent” or “impartial”. A better interpretation might be “non-partisan”. The word “neutral” has been chosen to make it clear that when making a Determination the Engineer is not, as noted above, acting on behalf of the Employer. This is something that undoubtedly will be the subject of much further debate.

Assessing an entitlement to an extension of time

FIDIC has not set a mechanism for assessing the extension of time. Therefore it is up to the Engineer, at first instance, who by sub-clause 3.7 must make a “fair determination” in accordance with the terms of the contract and taking due regard of all relevant circumstances. A good example of what might be an appropriate approach for the Engineer was set out by Mr Recorder Toulson QC, who in the English case of *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 BLR 31 set out the following criteria which should be considered in order to calculate a “fair and reasonable” extension of time:

- Apply the rules of the contract;
- Recognise the effects of constructive change;
- Make a logical analysis, in a methodical way, of the effect of relevant events on the contractor’s programme; and
- Calculate objectively, rather than make an impressionist assessment of the time taken up by the relevant events.

Of course, the Contractor must remember to demonstrate an entitlement. A simple narrative explaining what has happened on the project, complaining about the various ways in which it has been delayed, will never be enough, unless the Contractor can link specific complaints to specific periods of delay. To take another English example, HHJ LLoyd QC in *Balfour Beatty Construction Ltd v The Mayor and Burgess of the London Borough of Lambeth* [2002] BLR 288, para 30 said this in terms of a party establishing a right to an extension of time:

“By now one would have thought that it was well understood that, ... the foundation must be the [1] original programme (if capable of justification and substantiation to show its validity and reliability as a contractual starting point) [2] and its success will similarly depend on the soundness of its revisions on the occurrence of every event, so as to be able to provide a satisfactory and convincing demonstration of cause and effect. [3] A valid critical path (or paths) has to be established both initially and at every later material point since it (or they) will almost certainly change.”

This warning applies to Contractors operating under the FIDIC form. When preparing or determining a claim for an extension of time, it is important to bear the following in mind:

- The precise express terms of the contract;
- What records are available to substantiate the claim?
- What the Applicable Law says and requires;
- What is the factual and chronological sequence of events? By this we mean not just what happened at the point of delay and beyond but in the lead-up to the delay;
- What is the status of the project programmes? Have they been properly and regularly updated?
- Has a delay to the Completion Date been established?

Sub-clause 8.5 of the FIDIC Second Edition also makes a reference to concurrency, saying that if a delay caused by the Employer is concurrent with a Contractor delay, then the entitlement to an extension of time shall be assessed:

“in accordance with the rules and procedures stated in the Special Provisions”.

This rather neutral comment will of course have the effect of raising the issue of concurrency as a matter that needs to be dealt with by the Parties when they negotiate and finalise the contract. Unsurprisingly, different jurisdictions deal with concurrency in different ways. In England, following *Walter Lilly & Co Ltd v Mackay & Anr* [2012] EWHC 1773 (TCC), if there is a Relevant Event (under FIDIC a sub-clause 8.5 event), the Contractor is entitled to an extension of time regardless of any concurrent delay that might be his own fault (although it does not follow that it will recover associated loss and expense). Across the border in Scotland, the preferred approach is known as the “apportionment” approach. This follows the case of *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 where Lord Osborne said that:

“Where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, it will be open to the decision-maker, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event.”

Civil law codes tend not to make express provision for concepts such as concurrency. As a general consideration, if the contract does not provide the answer, then it is quite possible, bearing in mind the general requirements of good faith and fairness, that the civil law approach might tend to favour apportionment. The variety of approaches is probably why FIDIC have chosen not to make a definitive statement on this topic.

Delay damages

It is sometimes thought that extension of time provisions are solely for the benefit of the Contractor. This is, in reality, the opposite of the true intent. The primary purpose of an extension of time provision is to preserve a Contractor's obligation to complete within a specified time. The ability to extend the completion date, provided primarily by sub-clause 8.5, therefore preserves the Employer's right to Liquidated or Delay Damages under the FIDIC contract, even when, by prevention or breach of contract, the Employer has delayed the Contractor and is responsible in part for late completion.

The FIDIC Guide to the 1999 Edition notes that the purpose of Delay Damages is to compensate the Employers for losses they suffer as a consequence of delayed completion. Where the amount of Delay Damages is pre-agreed, the intention is that the Employer does not have to prove actual loss and damage. Whether that is entirely correct may depend on the Applicable Law.

The appropriate rates must be set out in the Contract Data. The Contract Data provides for the levying of Delay Damages on a daily basis until the date set out in the Taking-over Certificate. The Delay Damages are expressed in the Contract Data as a percentage of the final Contract Price which is calculated according to sub-clause 14.15(b). These damages can also be capped at a maximum percentage of the final Contract Price. From a Contractor's point of view, often the key question is whether or not (sub-clause 8.8) the Delay Damages clause will be enforceable.

Under English law, in the case of *Cavendish Square Holdings BV (Appellant) v Total El Makdessi (Respondent)* [2015] UKSC 67, the Supreme Court held that the correct approach in commercial cases was to have regard to the nature and extent of the innocent party's (e.g. the Employer's) interest in the performance of the obligation that was breached as a matter of construction of the contract. The test was whether the clause in question was:

"a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach ... compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations."

If the rate of Delay Damages imposes a "detriment out of all proportion to any legitimate interest of" the Employer, it will not be enforceable and the Employer will have to prove its actual loss. In South Africa under the Conventional Penalties Act 15 of 1962, the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if he receives the Delay Damages as specified in the Contract; in other words if the Employer is not suffering any loss due to the Contractor's delay. The onus, of course, is on the Contractor to show that the penalty is out of proportion to the loss suffered by the Employer.

In the UAE, Article 390(2) entitles the judge to vary the parties' agreement to reflect the actual loss. For example, the UAE High Federal Court in Abu Dhabi, case 25/24 – 1 June 2004 (Civil), stated that:

“delay fines clauses contained in construction contracts are, in substance, no more than an agreed estimate of compensation that would become due in case of the contractor’s failure or delay to perform its contractual obligations. According to Article 390 of the Civil Code, it is not sufficient – for the agreed compensation to become due – to establish the element of fault alone. It should be established, in addition, the element of loss which is suffered by the other party. If the contractor succeeds in establishing the absence of loss, the agreed compensation should be repudiated.”

Accordingly, the court may set aside entirely the Delay Damages, award lesser damages reflecting the actual loss, or award damages to the Employer of greater value than the Delay Damages figure. Here the burden of proof shifts according to where the potential benefit lies. That said, in practice, courts tend to attempt to respect the parties’ agreement and would be reluctant to overturn the original clause unless it was evident that the Delay Damages bore little resemblance to the actual loss. In this, courts around the globe take a similar view. Therefore whatever the jurisdiction, it is always sensible to keep a record and explanation of the reasons (perhaps including details of any negotiations) why the amount of the liquidated damages was set at the level it was, and why it represents a reasonable and proportionate protection of a legitimate commercial interest.

Conclusion

Whilst it was probably not drafted with the time provisions of clause 8 particularly in mind, the guidance given under the Introduction of Particular Conditions Part 2 - Special Provisions, published with each of FIDIC’s 2017 contract updates, is a useful reminder of FIDIC’s essential approach to time:

“Golden Principle 4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration ...

Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation. If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances.”

Appendix: what changes have FIDIC made to clause 8 [Commencement, Delays and Suspension]?

In summary FIDIC have made the following changes to clause 8:

Sub-clause 8.1 [Commencement of Works]

The main change here is that the Engineer must now give the Contractor not less than 14 days’ notice of the Commencement Date, instead of the previous 7 days’ notice.

Parties should remember that by sub-cl. 1.1.86, the Time for Completion is calculated from the Commencement Date. Therefore a Contractor need not seek an extension of time if the Notice of the Commencement Date is late.

The obligation in the final paragraph of sub-cl. 8.1, which requires the Contractor to commence execution of the Works “as soon as reasonably practicable” and to carry out those Works with “due expedition and without delay”, remains. These phrases are not defined in the Contract, and their meaning will depend on the law of the contract. However, the overriding obligation on the Contractor is to complete his Works within the Time for Completion of the Works.

Sub-clause 8.2 [Time for Completion]

There has only been a small change here, with the reference to passing the Tests on Completion being dropped. Given that the Tests on Completion form a part of the Taking Over requirements set out in sub-clause 10.1, there was no need to retain the reference here. As sub-clause 1.1.86 makes clear, the Time for Completion should be set out in the Contract Data.

Many contracts provide for milestones. These are different from and not covered by the reference to Sections in sub-cl. 8.2. A milestone is a completed stage in a project defined in the contract as a marker point, for example triggering an entitlement to payment when the foundations are installed or the roof is complete. If formal milestones are to be part of the Contract, then an additional or supplemental provision will be required. FIDIC have provided an example of such a clause in the Special Provisions. As the sample clause says, any such milestone “*should be clearly described in the Employer’s Requirements*”. The sample clause also provides that the Contractor “shall” include each milestone in every programme.

Sub-clause 8.3 [Programme]

As discussed above, there have been a number of changes to this sub-clause. In keeping with the trend in international contracts, and also clearly influenced by Annex F of the 2011 Red Book Sub-Contract, sub-clause 8.3 contains increased programming obligations set out in far more detail than those previously found in the 1999 Form. This requirement for a much more detailed programme is also a part of the more detailed contract management processes which are a key theme of the new contract.

Another key theme of the Second Edition is to try and reduce the number of disputes about what is and what is not a notice. For this reason, sub-clause 8.3 is clear that nothing in any programme or the supporting report shall be taken as, or relieve the Contractor from, any obligation to give a Notice under the Contract.

Sub-clause 1.1.67 defines the Programme as meaning the detailed time programme prepared and submitted by the Contractor to which the Engineer has given, or is deemed to have given, a Notice of No-Objection. The Engineer should be careful to remember that it will accordingly be open to the Contractor to argue that, by not rejecting a programme, the Engineer has impliedly given his approval to it.

The 2017 sub-clause 8.3 programme requirements include that the programme shall be prepared using the programming software stated in the Employer’s Requirements (or “ERs”). This is not the only clause which relates back to this document, and Employers should ensure that the ERs carefully and clearly reflect what is required on each

particular project. Whilst there is no specific requirement as to the form the programme should take, given the importance of the contract programme as a management tool to all parties, many contracts will no doubt specify exactly what form the programme is to take. That said, the details required by the new sub-clause include, for example, a requirement, by sub-clause 8.3(g), that “all activities (to the level of detail specified in the Employer’s Requirements)” are “logically linked and showing the earliest and latest start and finish dates for each activity, the float (if any), and the critical path(s)”.

The Contractor is also now required to set out a number of details which are of particular relevance to the Employer. These include, by sub-clause 8.3(b), details of when the Contractor requires access to (each part of) the Site and, by sub-clause 8.3(i), key delivery dates. One reason for requiring that the detail and order in which the works are to be carried out are set out in the Programme, and that the Contractor “shall proceed” in accordance with the Programme, is to provide at least a guide on which the Employer’s personnel can rely.

The Contractor is required to proceed as set out by his programme, unless he receives Notice from the Engineer stating that the programme does not reflect either the actual progress on site or the requirements of the Contract. Obviously this programme will not only be used to demonstrate progress, but also to demonstrate whether any delay may cause a delay to completion. By sub-clause 4.20(h), the Contractor must submit monthly progress reports. These must include a comparison of planned and actual progress. By sub-clause 14.3, these reports are a precondition to payment.

The positive obligation on the Contractor to update the programme whenever it ceases to reflect actual progress remains. Further, by sub-clause 8.3(k)(v), the Contractor is required to provide proposals to overcome the effects of any delays to progress; perhaps another example of the movement towards transparency. It is also something that the Contractor may need to do, as part of the consultations following any advance warning given under sub-clause 8.4.

8.4 [Advance Warning]

This completely new sub-clause has been discussed above.

This is a new clause although there is an advance warning clause in the Gold Book. The sub-clause is consistent with both the increased emphasis on dispute avoidance that is a particular feature of the 2017 FIDIC form and the prevailing trend in construction contracts, for example clause 16 of the NEC3. It is also consistent with the civil law requirements of good faith.

The clear purpose of the clause is that the earlier a potential issue is identified and brought out into the open, the greater the possibility that the issue can be resolved promptly and quickly without it developing into anything more serious. Cooperation between the parties at an early stage of any issue identified by way of early warning provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

There is no reference in this sub-clause to formal claims Notices under sub-clause 20.2 and nor could there be, as the underlying purpose here is to flag up any potential issue, which may or may not turn out to be a claim, not to give notice of a claim itself.

One question that may arise, if a party fails to act under this sub-clause, is whether a

timely early warning would have provided an opportunity to identify a more efficient manner of resolving the issues. If so, should a Contractor, for example, only be granted an extension of time and/or be paid for the consequences of the more economic method of dealing with the event in question had a warning been given. There is no apparent sanction for failing to give an early warning and sub-clauses 8.4, 8.5 and 20.2.7 are silent in this regard. In this, FIDIC have not followed the NEC3, which makes it clear that if a Contractor fails to give early warning of a matter in respect of which it subsequently gives notice of a compensation event, then the Contractor is assessed on the basis that an early warning had been given.

8.5 [Extension of Time for Completion]

The five grounds which entitle a Contractor to seek an extension of time remain, subject to minor changes.

At sub-clause 8.5(c), a description of exceptionally adverse climatic conditions has been added. Whether or not the adverse climatic conditions are exceptional or not will be judged against any climatic data made available by the Employer under the Site Data provisions to be found at sub-clause 2.5 or the local weather records. This is less objective than the approach of the NEC form which asks whether the adverse weather has occurred on average less frequently than once in ten years.

At sub-clause 8.5(d), Employer-Supplied Materials have been added to the list of unforeseeable shortages.

The sub-clause reinforces that the Contractor's entitlement to an extension of time is subject to having given proper notice under sub-clause 20.2, save that where the claim is made as a result of a Variation, the Second Edition states that a Notice is not required.

Finally, the sub-clause raises the question of concurrency. However, the addition does not provide any definition:

"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances)."

Therefore the actual approach will be determined by the words and law of the contract. To take one example, the second edition of the Society of Construction Law (which is referenced by FIDIC in the Special Provisions) defines concurrent delay at core principle 10 in this way:

"10. Concurrent delay – effect on entitlement to EOT

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due."

The Protocol goes on to say at paragraph 10.2 that:

“Where concurrent delay has been established, the Contractor should be entitled to an EOT for the Employer Delay to Completion ... The Contractor Delay should not reduce the amount of EOT due to the Contractor as a result of the Employer Delay.”

8.6 [Delays Caused by Authorities]

The 2017 form has added the words “private utility entities” to the umbrella description of “authorities” in recognition of the trend towards the privatisation of public utilities.

8.7 [Rate of Progress]

Sub-clause 8.1 notes that the Contractor “shall” proceed “with due expedition and without delay”. Contrast this with sub-clause 8.7 which says that if actual progress is too slow or “has fallen (or will fall) behind the Programme”, then the Engineer may instruct the Contractor to prepare a revised programme to explain how it can expedite progress. This was a part of the 1999 form. What is new to the Second Edition is the statement that where any acceleration or change to the programme is caused by an Employer-delay event under sub-clause 8.5, then the Variation process to be found at sub-clause 13.1 shall apply.

8.8 [Delay Damages]

There are two small but important changes to this sub-clause. First, the revised drafting stresses that an Employer is only entitled to deduct Delay Damages after having followed the claims procedures set out at sub-clause 20.

Second, whilst the sub-clause retains the cap on Delay Damages (as stated in the Contract Data), that cap will not apply “in any case of fraud, deliberate default or reckless misconduct...”

8.9 [Employer’s Suspension]

The main change here, and in the sub-clauses that follow, is to the sub-clause heading which refers to Employer’s Suspension and not simply “Suspension of Work”. Employers should note that they are now required to explain the causes of any suspension that is instructed.

8.10 [Consequences of Employer’s Suspension]

Where the Contractor incurs costs arising from an Employer’s suspension, then under the Second Edition they will be entitled to cost plus profit whereas before it was simply cost.

8.11 [Payment for Plant and Materials after Employer’s Suspension]

Here, the Contractor must now demonstrate that any Plant and Materials were completed, comply with the contract and/or are ready for delivery. However, this is the type of information that any Engineer would presumably have insisted upon previously in any event.

8.12 [Prolonged Suspension]

The basic premise of this clause remains as per the first edition. However, in keeping with FIDIC's general approach to the Second Edition, both the Contractor and Engineer should take care to give the appropriate Notices where any suspension period lasts for more than 84 days.

8.13 [Resumption of Work]

Here, the sub-clause is more detailed, but the basic intent remains the same. If work resumes following inspection, there should be a joint inspection recording the condition of the Site, including any deterioration, loss or damage or defects that may have occurred.



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