



## ICCP Public Webinar Series

### Webinar 6: Coronavirus – Is the Contractor Entitled to Claim under FIDIC, JCT and NEC? | 24<sup>th</sup> March 2020

*The following includes all questions that we did not have time to respond to during the live webinar. We have collated all question answers below for the benefit of all attendees.*

#### **Question 1**

**From:** Hisham Fanous

**Question:** What is the implication of concurrent delays; does it apply in this case so contractor is already late so cannot claim extension of time?

**Answer:** Concurrent delay is where two delays, one for which the employer is responsible and one for which the contractor is responsible, both affect the time for completion and both occur at the same time.

If the contractor is already late when a claimable delay event happens, the delays will not be concurrent, so he will still be entitled to an award to the extent that the claimable delay affected the time for completion. The selection of an appropriate method of delay analysis will ascertain the contractor's entitlement for the claimable delay.

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#### **Question 2**

**From:** Abdullah Akpinar

**Question:** If the general contractor is unable to perform his activities on site due to government action (i.e, curfew) even if his resources are available. Under this condition, do you expect GC can entitle extension of time plus payment for the idle time that is going to be spent ?

**Answer:** As always, everything would depend on the actual contract conditions and the conditions that define circumstances that allow the contractor to claim. If a government action prevents the contractor from working, entitlement may possibly be found under changes in legislation or delays by authorities.

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#### **Question 3**

**From:** Abdullah Fazleen

**Question:** What is best practice when any contracts after March 13th or later which is already not unforeseen? This question includes what the indications a particular condition mentions since the situation is foreseen but doesn't know till when?

**Answer:** I am not entirely sure of the meaning of this question, but we would recommend that before any contractor signs a contract or accepts a letter of award, the circumstances and



risks of the coronavirus are considered very carefully, It may be appropriate to attempt to clarify how the contract conditions deal with the circumstances and allocates the risk.

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#### **Question 4**

**From:** Abdullah Fazleen

**Question:** What is the timeline for submitted a detailed claim after notices have been provided? I believe its within 28-days as per the FIDIC Red Book. And what and how to justify the supporting documents?

**Answer:** The FIDIC contracts specify that each claim should be submitted within 42 days of the contractor becoming aware of the event.

The supporting documents should comprise *a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension or time and/or additional payment claimed*'. Basically, this means that the contractor's claim should demonstrate that he is entitled to an award and the amount of the award. Detailed advice on how to archive this is not possible here, but please check information that is available through the ICCP and Claims Class.

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#### **Question 5**

**From:** Frank Adjei

**Question:** How do you reconcile FIDIC clause 19.2 that stipulates notice should be given within 14 days and that of Sub-Clause 20.1 which states 28 days?

**Answer:** These are two separate notice requirements, and both must be complied with:

Sub-Clause 19.2 (*Notice of Force Majeure*) obliges the Parties to give notice that a force majeure is preventing performance of obligations.

Sub-Clause 20.1 (*Contractor's Claims*) obliges the Contractor to give notice if he considers himself entitled to an extension of time and/or additional payment as a consequence of the force majeure event.

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#### **Question 6**

**From:** Hulunayehu Denbel

**Question:** What precautionary actions should the client/employer take under FIDIC contracts in relation to the COVID-19 pandemic?

**Answer:** There are no contractual obligations, but we recommend that prudent employers and consultants should be discussing the situation with their contractors to attempt to jointly manage the situation in the best interest of the project. To just sit back and expect contractors to simply carry on as normal or to expect to be able to apply delay damages in this situation would be to the detriment of the project and be failing to work together proactively.



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### **Question 7**

**From:** Massimiliano Piermattei

**Question:** Any effect of call for Force Majeure by the Engineer on the Contractor's capability to claim under clauses 8.4 and 19.2 (FIDIC Red Book 1999)?

**Answer:** I am not sure of the meaning of this question, but ...

Sub-Clause 8.4 (*Extension of Time for Completion*), sub-paragraph (d), '*unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions*' provides entitlement to an extension of time in many situations.

Sub-Clause 19.2 (*Notice of Force Majeure*) obliges the Parties to give notice that a force majeure is preventing performance of obligations, so if this is the case, then any subsequent entitlement to make a claim is incumbent on such a notice being given.

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### **Question 8**

**From:** Simon Rowlands

**Question:** FIDIC Red Book 1999 1st edition - under which Clause should the Contractor claim? Is Sub-Clause 13.7 an option for the Coronavirus, assuming the government has implemented legislation?

**Answer:** Sub-Clause 8.4 (*Extension of Time for Completion*), sub-paragraph (d), '*unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions*' will provide entitlement to an extension of time in many situations.

In our opinion, Sub-Clause 19.4 (*Consequences of Force Majeure*) may provide entitlement to time and payment of cost, but this is not clear-cut.

Sub-Clause 13.7 (*Adjustments for Changes in Legislation*) is included under Clause 13 (*Variations and Adjustments*), so this is really intended to be used when legislation such as building regulations change and affect the design or specifications of the project. In our opinion, it would not be appropriate to attempt to link this to governmental actions restricting movement and the like as a result of the situation

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### **Question 9**

**From:** Simon Rowlands

**Question:** Can the Employer issue a notice under Sub-Clause 19.2? If so, what is the exceptional event, what obligation is the Employer being prevented from performing?

**Answer:** FIDIC Sub-Clause 19.2 (*Notice of Force Majeure*) actually obliges the Employer if he is or will be prevented from performing any of his obligations and this would also extend to the Engineer's obligations.



Examples would include the issue of design information, responses to submittals and the like, delivery of free issue material, work to be provided by other contractors and the like.

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### **Question 10**

**From:** Ahmed Sadek

**Question:** In FIDIC 1999 Red Book, is the Coronavirus covered under Sub-Clause 17.3 (h), i.e., *any operation of the forces of nature which is Unforeseeable or against which...*

**Answer:** FIDIC Sub-Clause 17.3 (*Employer's Risks*) deals with loss or damage to the Works Goods or Contractor's Documents caused by the types of events listed. It is unlikely that the coronavirus will cause loss or damage to such things, so this clause would not be applicable.

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### **Question 11**

**From:** Igor Zirojevic

**Question:** Any thoughts about the Engineer on a FIDIC White Book contract? Any notices to their Client?

**Answer:** A good question. We have been focussed on the Employer / Contractor arrangements, but consultants also need to take action if appropriate.

Sub-Clause 4.5 (*Changed Circumstances*) of the FIDIC White Book obliges the Consultant to give notice '*if circumstances arise for which neither the Client nor the Consultant is responsible and which make it irresponsible or impossible for the Consultant to perform in whole or in part the Services...*'

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### **Question 12**

**From:** Abdullah Fazleen

**Question:** Will there be any insurance involvement regards to the Coronavirus?

**Answer:** That is a question to ask the insurance companies and specialists.