

# How to Deal with an Extension of Time / Cost Claims

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## Definition

Under Clause 1.1 sub clause (c) (1) FIDIC standard form of contracts explains, "Commencement Date" and Clause 1.1 sub clause (c) (2) explains "Time for Completion", which means the time for completion, the execution of and passing the tests on Completion of the Works or any section or part thereof as stated in the Contract (or as extended under Clause 44) calculated from the commencement date.

If project duration extends beyond the original date of completion, it is called a delay. This can happen due to Employer's failure, Contractor's failure or for reasons beyond the control of both parties. If it is not the Contractor's failure, he is entitled to request an extension of time to complete the project. Under FIDIC standard form of contracts 4th edition in 1987, Contractor's rights to reimburse his additional cost due to the delays of projects caused by Employer's failure is secured.

## Extension of Time

The Contractor shall be entitled subject to Clause 44.1 to an extension of the Time for Completion of the Work in the event of,

- a) the amount and the nature of extra or additional works
- b) any cause of delay referred to in these conditions
- c) exceptionally adverse climatic conditions
- d) any delay, impediment or prevention by the Employer
- e) other special circumstances which may occur, other than through a default of or breach of Contract by the Contractor or for which he is responsible.

The Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of such extension and shall notify the Contractor accordingly with a copy to the Employer.

## Claim

Claim can be defined as a legitimate request for additional compensation (cost and/or time) on account of a change in the terms of the Contract (Wideman, 1990).

FIDIC fourth edition 1987, explains the procedure for claims under Sub Clause no 53.1. It describes that, if the contractor intends to claim any additional payment pursuant to any clause of the these conditions or otherwise, the contractor shall give notice of his intention to the engineer, with a copy to the employer, within 28 days after the event giving rise to the claim has first arisen.

## Securing a Right

There are four key steps in securing the right as follows.

### 1. Identify the right

Studying the contract documents for a proper understanding of the agreement is essential to deal with claims. Acquired knowledge of the study should be investigated to find out the opportunities to claim for a right.

### 2. Reserve the right

FIDIC standard form of contracts Clause 53.1 clearly state that, if the Contractor intends to claim any additional payment, he shall give notice of his intention to the engineer within 28 days after the event giving rise to the claim has first arisen. This is reserving the right of the contractor to compensate his additional cost, incurred beyond his control.

Even Clause 44.2 expresses that the engineer is not bound to make any determination unless the contractor has,

- a) Within 28 days after such event has first arisen notified the Engineer with a copy to the Employer, and
- b) Within 28 days, or such other reasonable time as may be agreed by the Engineer, after such notification, submitted to the Engineer detailed particulars of any extension of time which he may consider himself entitled.

### 3. Claim the right

Sub Clause 53.3 expresses that, within 28 days or such other reasonable time as may be agreed by the Engineer, after giving notice under Sub Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based.

Here detailed particulars mean properly sorted contemporary records, which are the continuously generated details for day to day activities.

### 4. Prove the claim

Under FIDIC Sub Clause 53.2, upon the happening of the event referred to in Sub Clause 53.1, the contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make.

To prove the claim, the contractor must compile all contemporary records in such a manner as detailed particulars and demonstrate the claim step by step.

For this the contractor must comply with contemporary records specific with the relevant event such as,

- a) Idle time of resources
- b) Abortive work/protective measures
- c) Demobilisation/re-mobilisation
- d) Correspondence/photographs, etc.
- e) Resource utilization patterns/output.

And he has to attach general contemporary records such as,

- a) Daily site diaries
- b) Minutes of meetings
- c) Site overheads during a prolongation such as;
  - Site staff (Engineers/QSs/Admin staff etc.)

- Site equipment (scaffolding/cranes, etc.)
- Site facilities (cabins/furniture/yard, etc.)
- Site utilities (power/water/phone, etc.)

These detailed particulars can be categorized to substantiate a delay claim and a cost reimbursement claim. In delay claims, the contractor has to attach contemporary records relevant to the event, such as;

- Delay schedules
- Mitigating measures taken
- Correspondence/photographs, etc.

As general records, he has to attach,

- Project progress reports including weekly/monthly programme updates
- Daily site diaries
- Minutes of meetings

In cost reimbursement claim, the contractor has to attach,

- Facts:- Contemporary records  
Witness statements,  
Other appropriate evidence (news releases/weather reports etc.)
- Law:- Contractual/legal provisions
- Liability:- Client's liability to provide relief
- Quantum:- Duration of EOT/amount of additional payment, etc.

### Amount of the Additional Payment

Cost of delay has to be priced demonstrating all relevant contemporary records such as idle time of resources, abortive work/protective measures, demobilisation/re-mobilisation, correspondence/photographs, etc. Furthermore, contractor can be compensated for his financing charges due to reduced revenue, loss of productivity and subcontractor's claims.

Prolongation cost can be apportioned as prolonged site overheads, and head office overhead, financing the additional cost and financing charges due to late release of retention.

Here the contractor must show each event separately and price the additional amounts for those events individually with all relevant contemporary records in proper manner to claim the additional payment for the claim.

The cost which is not specific to work items and any additional costs the Contractor incurred due to extension

of time has to be priced under site overheads. Mainly these are preliminary items of the project. Head office overhead costs which are not specific to one site have to be priced separately and several methods have been introduced by various experts to calculate the head office overheads component.

Hudson formula is the one of such famous formulas which illustrated below:

$$\text{Head Office Overheads} = \frac{\text{H.O. Profit\%}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period (weeks)}} \times \text{Period of delay (weeks)}$$

This overhead claimable provision has been provided in the Sub-Clause 1.1 (g) (i) which states that “cost” means all expenditure properly incurred or to be incurred, whether on or off the Site, including overhead and other charges properly allocable thereto but does not include any allowance for profit.

Sub Clause 53.5 describes how to get payment of claims by the contractor from the employer. The contractor is entitled to include any interim payment certified by the engineer pursuant to clause 60 as expressed by the Sub-Clause 53.5. Then the engineer after due consultation with the employer and the contractor, may consider the amount due to the contractor provided that the contractor has supplied sufficient particulars to enable the engineer to determine the due amount. If such particulars are insufficient to substantiate the whole claim, the contractor shall be entitled to a payment in respect of such part of the claim as such particulars may substantiate to the satisfaction of the engineer.

If the event has a continuing effect and is not practical to submit the detailed particulars within a period of 28 days referred to in Sub-Clause 44.2(b), as per Sub-Clause 44.3, he shall nevertheless be entitled to an extension of time provided that he has submitted to the engineer interim particulars at intervals of not more than 28 days and final particulars within 28 days at the end of the effects resulting from the event.

## *Mark Alan Chapman -v- London Borough of Barking and Dagenham [1998]*

*The plaintiff was severely injured when a branch was broken from a tree in a high wind, and fell onto the van he was driving. The land-owner appealed a finding of liability in nuisance.*

*Held: The local authority were also the highway authority, and it was the defendants' duty regularly to inspect the tree for signs of danger, and to do what was necessary to maintain the tree in a safe condition. The evidence was that the danger arose from earlier prunings. The appeal was in effect an appeal on the facts, and therefore failed.*