

Contractor's Entitlement to Extension of Time and Prolongation Costs - Under Fidic 4th Edition

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Why is this page here? ABSTRACT

All modern building and engineering contracts contain provisions for extensions of time in the event of delay. The nature of the work and the environment in which the work is carried out are such that it is almost inevitable that events and circumstances will cause completion of the work to be delayed beyond the original completion date. Notwithstanding, claims for extension of time probably cause more disputes than any other contractual or technical issues. This article aims at discussing a contractor's entitlement to extension of time and prolongation costs under FIDIC 4th edition.

1.0 The Contractor's Entitlement to Extension of Time

Clause 44 is the only clause in FIDIC 4th Edition (1987) where the Engineer can determine an extension of time. The causes stated in sub-clause 44.1 (*Extension of Time for Completion*) are appropriate to whatever event causing delay which would fairly entitle the Contractor to an extension of time. Further, this sub-clause makes sure that the time is not set at large, and preserves the employer's right to deduct liquidated damages for late completion by the contractor.

Paragraph (a) of sub-clause 44.1 (*Extension of Time for Completion*) deals with the amount or nature of extra or additional work and is applicable to all sub-clauses related to variations and varied works, which are sub-clauses 51.1 (*Variations*), 5.2 (*Priority of Contract Documents*), 7.1 (*Supplementary Drawings and Instructions*), 13.1 (*Work to be in Accordance with Contract*), 18.1 (*Boreholes and*

Exploratory Excavations), 17.1 (*Setting-out*), 20.3 (*Loss or Damage Due to Employer's Risks*), 31.2 (*Facilities for Other Contractors*), 49.3 (*Cost of Remedying any Defects*) and 65.3 (*Damage to Works by Special Risks*). Apart from these sub-clauses paragraph (a) is applicable to sub-clause 38.2 (*Uncovering and Making Openings*) and 50.1 (*Contractor to Search*).

Paragraph (b) of sub-clause 44.1 (*Extension of Time for Completion*): "any cause of delay referred to in these Conditions" is applicable to all events causing delay for which the contractor is entitled to an extension of time stated in the other clauses. The sub-clauses related to paragraph (b) are sub-clause 6.4 (*Delays and Cost of Delays of Drawings*), 12.2 (*Not Foreseeable Physical Obstruction or Conditions*), 27.1 (*Fossils*), 36.5 (*Engineer's Determination where Test not provided for*), 40.2 (*Engineer's Determination following Suspension*), 42.2 (*Possession of Site and Access Thereto*) and 69.4 (*Contractor's Entitlement to Suspend the Work*).

Paragraph (c) of sub-clause 44.1 (*Extension of Time for Completion*) itself is the only provision that deals with the events related to exceptionally adverse climatic conditions. Paragraph (d) of sub-clause 44.1 (*Extension of Time for Completion*) "for any delay, impediment or prevention by the Employer" is applicable to sub-clauses 31.1 (*Opportunities for Other Contractors*) and 59.1 (*Definition of "Nominated Subcontractors"*). The last paragraph (e) of sub-clause 44.1 (*Extension of Time for Completion*) deals with "other special circumstances" and any event referred to in the Contract should not be considered as 'under special circumstances'.

Pursuant to sub-clause 44.2 (*Contractor to Provide Notification and Detailed Particulars*), the Contractor has to provide a notification to the Engineer with a copy to the Employer within 28 days after such an event has first occurred and must also provide detailed particulars of any extension of time to which he may consider himself entitled within 28 days or a reasonable time as may be agreed by the Engineer. Otherwise the Engineer is not bound to make any determination. However, sub-clause 44.3 (*Interim Determination of Extension*) further states that when such an event has a continuing effect and it is not practical for the contractor to submit detailed particulars within the period of 28 days, he can submit interim particulars at intervals of not more than 28 days and the final particulars within 28 days of the end of the effects resulting from the event.

2.0 The Contractor's Entitlement to Prolongation Costs

Under the above-mentioned sub-clauses related to extension of time, the amount of costs incurred in relation to such events should be added to the contract price, except for exceptionally adverse climatic conditions, for which there is no mention with regard to the entitlement of cost stated within those conditions of the FIDIC fourth edition. It is important to note that in relation to variations and varied works which are valued under Clause 52, the contractor is entitled to profit as well.

The 'prolongation costs' are the additional time related costs associated with delays caused by the employer. Generally, the prolongation costs include: prolonged site overheads, recovery of head office overheads, financial charges for the additional costs, financing charges due to delayed release of retention, etc. The prolongation costs should be apportioned to each event and it is always good for the contractor if he could show the additional payment due to each event separately in his claim.

3.0 Procedure for Claim

The contractor's entitlement to prolongation costs will be meaningless if he does not secure his right to the claim in a proper and timely manner, in line with the provisions of the contract. Pursuant to sub-clause 53.1 (*Notice of Claim*) of the sub-clause 44.1 (*Extension of Time for Completion*), the contractor has to give notice to the

engineer, with a copy to the employer, of his intention to claim any additional payment. Such a notice should be given within 28 days after the event giving rise to the claim has first arisen. Further, pursuant to sub-clause 53.2 (*Contemporary Records*), the contractor shall keep contemporary records as may reasonably be necessary to support any claim for which the notice has been given and he may subsequently wish to make. Such contemporary records include idle time of resources, resource utilization pattern, site overheads during a prolongation, etc.

Pursuant to sub-clause 53.3 (*Substantiation of Claim*), 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, within 28 days or such other reasonable time as may be agreed by the engineer. Generally the detailed particulars related to a claim are: facts, contractual provisions, arguments, client's liability to provide relief and the quantum, which includes the amount of extension of time amount of additional payment, etc. Sub-clause 53.4 (*Failure to Comply*) deals with the situation where the contractor fails to comply with any of his obligations under sub-clause 53.1 (*Notice of Claim*), 53.2 (*Contemporary Records*), or 53.3 (*Substantiation of Claim*) and defines the extent of his entitlement under such circumstances. If the contractor does not comply with the above mentioned procedure, his entitlement to payment may be limited. Pursuant to sub-clause 53.5 (*Payment of Claims*), the contractor is entitled to have included the amount in respect of any claim in any interim payment certified by the engineer pursuant to clause 60. Further, this sub-clause is intended to remove any possibility of contention that payment in respect of a claim must await the finalisation of the whole claim.

CONCLUSION

Generally, the granting of an extension of time is based on several factors such as the engineer's interpretation of the Contract, the engineer's assessment of the circumstances involved during the execution of the work, the basis for the claim stated by the contractor in his notification, etc. Therefore, to succeed in time extension and prolongation claims, the contractor must be aware of his entitlements under the contract and should comply with the conditions of contract in every circumstance possible.