

COVID-19 IMPACT – IT’S NOT ONLY ABOUT THE POSSIBILITY OF RECOVERING TIME!



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We are in unprecedented times, amid a pandemic that has seen the rapid spread of the coronavirus (Covid-19) across the globe in a matter of weeks. This has resulted in extensive delay and disruption to the supply chain for construction projects in the Middle East region, including, amongst other issues, shutdown of manufacturing facilities, delays to exports and deliveries, border closures, travel restrictions and 14-day quarantine periods. This article aims to provide some practical guidance to those contractors and subcontractors that have experienced delay and disruption caused by government actions reacting to Covid-19.

Typically, the standard forms of construction contract used in the Middle East are based on a version of FIDIC 99 (Red and Yellow books), as such, these have been used as the basis for this article. These standard conditions contain provisions that expressly set out the contractual remedies available should these circumstances arise. These provisions are included in Sub-clause 8.4 [Extension of Time for Completion], Clause 17 [Risks and Responsibility] and Clause 19 [Force Majeure].

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“A contractor’s entitlement to extension of time and/or payment of additional costs following government actions implemented as a consequence of Covid-19 will depend on the specific wording of the contractor’s contract; the impact of the actions on the contractor’s supply chain, resources and performance; and its ability to demonstrate the effects of these through its contemporaneous records.”

Extension of Time

Sub-clause 8.4 provides that the contractor shall be entitled, subject to Clause 20.1, to an extension of time if the completion date is or will be delayed by an *‘unforeseeable shortage in the availability of personnel or Goods caused by epidemic or government actions’*. The contractor under this provision should be entitled to an extension of time due to delays caused by Covid-19 as it is considered to be an epidemic. Probably of greater impact though, are the consequences of the government actions that have been put in place to curtail the spread of the virus, as they are far more reaching and have a far wider effect than the direct impact of the virus on the contractor and its subcontractors and suppliers.

Employer's Risks

Sub-clause 17.1 refers specifically to sickness, disease or death. It provides that *'The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damage, losses and expenses (including legal fees and*



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expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover,...'. If the employer, the employer's personnel or agents negligently, wilfully or in breach cause damage, loss or expense to the contractor by transmitting the coronavirus to the contractor's supply chain or its personnel, then the Employer shall indemnify and hold the contractor harmless. HKA considers that this includes relief from liquidated damages resulting from delays and the additional costs or expenses it has incurred by virtue of these acts.

Force Majeure

To claim force majeure, the contractor will have to demonstrate that:

- a force majeure event has occurred which is beyond its control;
- it has prevented, hindered or delayed its performance of the contract; and
- it has taken all reasonable steps to avoid or mitigate the event or its effects.

Clause 19 in the FIDIC 99 suite of General Conditions of Contract (Red, Yellow and Silver books) sets out the criteria for defining a force majeure event and the contractual remedies available if a force majeure event arises preventing the contractor from performing its obligations under the contract.

Sub-clause 19.1 of FIDIC 99 (Yellow book) provides that force majeure means an *exceptional event or circumstance* which:

- a) "is beyond a Party's control;
- b) such Party could not reasonably have provided against before entering into the contract;
- c) having arisen, such Party could not reasonably have avoided or overcome; and
- d) is not substantially attributable to the other Party.

Sub-clause 19.1 provides a list of *exceptional events or circumstances* that might constitute force majeure. These include:

- i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- iii) riot, commotion, disorder, strike or lockout by persons other than the contractor's personnel and other employees of the contractor and subcontractors;
- iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the contractor's use of such munitions, explosives, radiation or radio-activity; and
- v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

This list does not expressly include contagions, epidemics or pandemics as *exceptional events or circumstances*. However, it is noted that this list is not stated to be exclusive and it is considered that other events may constitute force majeure provided that they satisfy the criteria (a) to (d) in Sub-clause 19.1. Applying these criteria to the coronavirus pandemic, all four appear to be satisfied, constituting a force majeure event.

More pertinently, it is possibly arguable that work could have continued despite the pandemic, and that it is the actions taken by governments around the Middle East region, such as closing their borders, restricting travel and entry, and imposing quarantines, that from a wide-perspective have resulted in country *lockouts*, preventing contractors, subcontractors and suppliers from fulfilling their obligations.

Cost Claims

Sub-clause 19.4 provides that *'if the Contractor suffers delay and/or incurs cost by reason of the Force Majeure event that it shall be entitled, subject to Sub-clause 20.1, to an extension of time and payment of its additional costs.'* Thus, if the force majeure event causes a delay, the contractor is entitled to an extension of time. Concerning the recovery of costs, it is more complicated due to the construction of Sub-clause 19.4(b), as it expressly states which categories of *exceptional events or circumstances* the contractor is entitled to recover its costs. These categories do not include contagions, epidemics or pandemics. However, the government actions have effectively created country *lockouts* where the permanent works are being executed. In HKA's opinion, this may allow the contractor to recover its costs under Sub-clause 19.4(b), although such claims will not be without their challenges.

To support and substantiate any claim, the contractor may wish to make in the future, it is suggested that the contractor maintains and updates daily, a register of the impact that Covid-19 has had upon its works. This register should include:

- delays to plant and equipment being manufactured in countries affected by Covid-19 (manufacturing progress, suspension periods, and planned and actual delivery dates);
- staff prevented from returning to the country of the project (names, country visited and dates);
- staff quarantined upon return or having had contact with a person infected with Covid-19 (names and dates);
- shipping imports under quarantine before being allowed to dock (plant/equipment, vessel name, port, date of shipment, date and duration of quarantine);
- work fronts that cannot proceed, plant and labour working at reduced productivity or stood idle that cannot be reallocated to other activities;
- subcontractors that are delayed and disrupted in performing their activities; and
- action taken to minimise any delay in the performance (description of action implemented, e.g. instructing leave, banning travel to countries, purchasing locally, etc.).

Based on FIDIC 99 General Conditions of Contract (Red and Yellow books), it appears that the aforementioned actions taken by governments to prevent the spread of Covid-19 constitute force majeure, preventing contractors from achieving their contractual obligations, entitling them to extension of time, if they have suffered delay, and providing an argument for payment of costs they have incurred.

Conclusion

A contractor's entitlement to extension of time and/or payment of additional costs following government actions implemented as a consequence of Covid-19 will depend on the specific wording of the contractor's contract; the impact of the actions on the contractor's supply chain, resources and performance; and its ability to demonstrate the effects of these through its contemporaneous records.