

Claims Management

By:

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What are Claims?

- Definition of Claims

- 1.1.{6, 5, 3} “Claim” means a request or assertion by one Party to the other Party for entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.

– البند الفرعي رقم 1, 1 {3, 5, 6} "المطالبة" تعني طلبًا أو تأكيدًا من أحد الطرفين للطرف الآخر للاستحقاق أو الإعفاء بموجب أي شرط من هذه الشروط أو غير ذلك فيما يتعلق بـ أو ما ينشأ عن العقد أو تنفيذ الأشغال.

Claims and Counter-Claims

▶ Categories of Claims

- ▶ Claims under the contract
- ▶ Claims arising out of or in connection with the Contract
- ▶ Claims under the principals of the applicable law
- ▶ Claims arising out of quantum meruit
- ▶ Claims for ex gratia payment

Categories of Claims

▶ Claims under the Contract

- ▶ Events arising claims under the contract may be one of two types;
- ▶ a) claims as a result of certain anticipated and specified events and for which a remedy is designated; and
- ▶ b) claims as a result of an event where a certain term of the contract is breached and for which a remedy is designated in the contract

Attendees to give examples

Categories of Claims

▶ Claims under the contract

The events which may cause claims to arise may include the following:

- ▶ Variations
- ▶ Measurement changes
- ▶ Adverse physical conditions
- ▶ The employer's risks
- ▶ Compliance with statutes , regulations, price fluctuations, currency and other economic causes
- ▶ Failure to commence
- ▶ Extension of time
- ▶ Exceptional Events & Force majeure

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Categories of Claims

- Claims arising out of or in connection with the Contract
 - ▶ This category is related to claims not under the contract but arising out of or in connection with the contract.
 - ▶ This may be in the form of breach of contract or misrepresentation of certain important facts leading to the formation of contract
 - ▶ If the claim is valid, the remedy lies under the applicable law of the contract.

Categories of Claims

- ▶ Claims under the principals of the applicable law
 - ▶ The third category relates to claims arising under the application of the principals of the applicable law, either by the parties to the contract or against third parties.
 - ▶ This could lead to a claim under the law of tort / delict. قانون المسؤولية التقصيرية/ الجنحة

Categories of Claims

- Claims arising out of quantum meruit (الاستحقاق الكمي)
 - ▶ This category comprises claims where no contract exists between the parties, or if one existed, it is deemed to be void;
 - ▶ It is based on the principal that an individual has the right to be compensated a reasonable remuneration for work done;
 - ▶ The principals of quantum meruit have been applied to cases where there is a contract in existence but the price is not stipulated.

Categories of Claims

- Claims for ex gratia payment (على سبيل الهبة)
 - ▶ These are not claims which arise based on contractual entitlement but they are sometimes entertained by the Employer and the Engineer as a matter of expedience to avoid arbitration or litigation and to maintain the good-will necessary to complete the project;
 - ▶ There is no applicable legal or contractual basis for such payments.

Employer's and Contractor's Claims (Red, Yellow and Silver Books)

- ▶ Sub-Clause 20.1 [*Claims*] addresses when a Claim may arise,
 - ▶ (a) if the Employer considers that he/she is entitled payment or extension of the DNP,
 - ▶ (b) if the Contractor considers that he/she is entitled additional payment or extension of the Project Time for Completion, or
 - ▶ (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party.
- ▶ In case of (a) & (b) above, Sub-Clause 20.2 shall apply. It is not applicable in case of item (c).
- ▶ The Claimant Party {applies to the Employer and the Contractor}.

Notices of Claims

- ▶ Notices may be given by either the Employer to the Contractor or by the Contractor to the Employer.
- ▶ In the 4th edition of the FIDIC red book, sub-clause 68.1 deals with notices by the Employer to the Contractor, sub-clause 68.2 deals with the notices by the Contractor to the Employer and sub-clause 68.3 deals with the change of address.
- ▶ Both sub-clauses 68.1 and 68.2 state that “notices ... shall be sent by post, cable, telex, or facsimile transmission to or left (at the other party given address).

Notices of Claims

- ▶ The FIDIC 1999 suite of Contracts Sub-Clause 1.3 allows for agreed electronic transmission in exchanging notices.
 - ▶ The communications shall be in writing, and
 - ▶ Shall be delivered, sent or transmitted to the address for the recipient's communications as stated.
- ▶ In the 2017 FIDIC release of Contracts:
 - ▶ The Notice shall be a paper original signed, or
 - ▶ An electronic original generated from any of the systems of electronic transmission stated in the Contract Data;
 - ▶ The Notice shall be identified as a Notice.

Notices of Claims

Time bars

General Discussion

- ▶ Time bars of Notices by the Employer and the Contractor under:
 - 1) the General Conditions of Contract
 - 2) FIDIC 1987 4th edition Red book
 - 3) FIDIC 1999 suite of Contracts
 - 4) FIDIC 2017 Suite of Contracts

Sub-Clauses relevant to Employer's Claims In 1999 & 2017 Suite of Contracts:

- ▶ Most relevant Sub-Clauses in respect of Employer's Claims against the Contractor:

Sub-Clause		Description	Sub-Clause		Description
1999	2017		1999	2017	
	2.6	Employer-Supplied Materials and Employer's equipment	12.3	12.3	P& DB Retesting
4.19		Electricity, Water and Gas	12.4	12.4	P& DB Failure to Pass Tests after Completion
4.20		Employer equipment and Free Issue Material	13.7	13.6	Adjustments for Change in Legislation Adjustments for Change in Law
7.5	7.5	Defects and Rejection	14.4	14.4	Schedule of Payments
7.6	7.6	Remedial Work	15.3	15.3	Valuation at Date of Termination Valuation after Termination for Contractor's Default
8.6	8.7	Rate of Progress	15.4	15.4	Payment after Termination for Contractor's Default
8.7	8.8	Delay Damages	17.1		Indeminties
9.4	9.4	Failure to Pass tests on Completion		17.4	Indeminties by Contractor
10.2	10.2	Taking-Over of Parts of the Works		17.6	Shared Indeminties
11.3	11.3	Extension of Defects Notification Period	18.1	19.1	General Requirements for Insurances
11.4	11.4	Failure to Remedy Defects	18.2	19.2	Insurance for Works and Contractor's Equipment (last paragraph) Insurance to be provided by the Contractor
12.3	12.3	CONS: Evaluation Valuation of the Works	19.6	18.5	Optional Payment, Termination and Release Optional Termination

Sub-Clauses relevant to Contractor's Claims In 1999 & 2017 Suite of Contracts:

- ▶ Most relevant Sub-Clauses in respect of Contractor's Claims against the Employer:

Sub-Clause		Description	Sub-Clause		Description
1999	2017		1999	2017	
1.9	1.9	CONS - Delayed Drawings or Instructions	8.5	8.6	Delays Caused by Authorities
1.9	1.9	P&DB - Errors in Employer's Requirements	8.9	8.10	Consequences of Employer's Suspension
2.1	2.1	Right of Access to the Site	10.2	10.2	Taking-Over of Parts of the Works
4.7	4.7	Setting Out	10.3	10.3	Interference with tests on Completion
4.12	4.12	Unforeseeable Physical Conditions	11.8	11.8	Contractor to Search
4.24	4.23	Fossils Archaeological and Geological Findings	12.2	12.2	P&DB - Delayed Tests
7.4	7.4	Testing by the Contractor	12.3	12.3	CONS Evaluation Valuation of the Works
8.4	8.5	Extension of Time for Completion	12.4	12.4	CONS Omissions

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1999	2017		1999	2017	
12.4	12.4	P&DB - Failure to Pass Tests After Completion	17.1		Indeminties
13.2	13.2	CONS Value Engineering	17.4		Consequences of Employer's risks
13.3	13.3	Variation Procedures		17.5	Indeminties by Employer
13.7	13.6	Adjustments for Change in Legislation Adjustments for Change in Law		17.6	Shared Indeminties
14.4	14.4	Schedule of Payments	18.1	19.1	General Requirements for Insurances
14.8	14.8	Delayed Payment	18.2	19.2	Insurance for Works and Contractor's Equipment (last paragraph) Insurance to be provided by the Contractor
16.1	16.1	Contractor's Entitlement to Suspend the Work Suspension by Contractor	19.6	18.5	Optional Payment, Termination and Release Optional Termination
16.4	16.4	Payment on Termination Payment after Termination by Contractor			

Claims Avoidance

- ▶ From previous slides we found that Claims could arise as a result of:
 - ▶ Variations
 - ▶ Insufficient information in the drawing and poor designs
 - ▶ Failure to provide access to site
 - ▶ Obtaining necessary permits
 - ▶ Delayed payments
 - ▶ Poor performance of any or all the parties to the Contract
 - ▶ Adverse physical conditions or obstructions
 - ▶ And so on

Claims Avoidance

- ▶ Claims may result in either or all of the following:
 - ▶ Disruption to the Works thus incurring additional costs
 - ▶ Prolongation of the project duration where the Contractor and the Employer will incur additional cost and suffer from the consequences of the delay.
 - ▶ The Employer may lose the benefits should the Works not finish on time, such as property income, property use for public sector as schools and roads, incurring additional staff and administrative costs including the professional services, etc.

Claims Avoidance

- ▶ Claims may result in either or all of the following (Cont'd):
 - ▶ The Contractor may lose other business opportunities, increased direct and indirect expenditures, negative impact on reputation, etc.
 - ▶ One of the worst impacts could be the tension that would be created in the job site and resulting negative impacts on the progress of works

Claims Avoidance

- ▶ Avoidance
 - ▶ Can claims be completely avoided?
 - ▶ If not, how can we minimize the recurrence of claims in a construction Contract?
 - ▶ What action the Employer need to do to minimize the risks of claims and reduce the negative impacts?
 - ▶ What actions the Contractor has to take to be protected from the impacts of the claims and their delayed process.

Claims Avoidance

▶ Avoidance (Cont'd)

- ▶ The choice of the good designers, consultants and contractors by the Employer is the first step and most important one to minimize the occurrence of claims.
- ▶ Proper pre-qualification process will assist in the proper choice of the Engineer and the Contractor.
- ▶ Each party to a contract should ensure that they understand their duties and obligations under the contract and that they have the ability to perform these duties and obligations as required by the contract
- ▶ Employers should ensure that a project is well planned from the outset to minimize the need for change orders or change directives.

Claims Avoidance

- ▶ Avoidance (Cont'd)
 - ▶ Both Employers and contractors should do what they can to ensure proper management and administration of the project, including proper and adequate staffing and co-ordination of the project and trades.
 - ▶ While it may be initially attractive to a party to shift all of the risk in the contract to the other party for matters such as insufficient plans and specifications and unexpected site conditions, a contract overly skewed in favor of one party over the other results in a higher chance of there being a dispute and hence, a construction claim
 - ▶ a contract that protects the interests of all parties and that does not include an overly unfair allocation of risk will result in a decreased likelihood of construction claims.

Claims Avoidance

- ▶ Avoidance (Cont'd)
 - ▶ Ensure proper and adequate documentation for the project.
 - ▶ Acknowledge and settle claims which have merit at an early stage.
 - ▶ Ensure that the contract has an adequate ADR process for dispute resolution.
 - ▶ All parties benefit from an atmosphere of mutual trust and respect and each party should do what they can to engender such an atmosphere.

Claims Procedures

► The main procedural steps are:

- (1) give a notice of intention to claim within 28 days of the event giving rise to claim. The notice is required whether the claim is pursuant to a clause of the red book or otherwise. It does not have to include any details of the claim itself;
- (2) Keep contemporary record
- (3) Inspect the records (by the Engineer)
- (4) Provide authority to instruct the Contractor to further contemporary records (by the Engineer)
- (5) Within 28 days of the notice or an agreed period, submit particulars of the claim in respect of amounts and grounds upon which it is based.
- (6) Interim and accumulated accounts to be submitted for continuing effects
- (7) Final accounts to be submitted at end
- (8) A copy of accounts to be sent to the Employer, by the Contractor, if so required by the Engineer.

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Claims Presentation

- ▶ Presentation of claims (Records)
 - ▶ Actual and accurate records and information are necessary to establish the costs incurred as a result of any of the events leading to a claim and the provisions of Conditions of Contract (**Which Sub-Clauses?**) must be complied with. It is recommended that records include:
 - ▶ Clauses related to program setting out what the contractor had intended for the order, sequence and timing of the various activities at the time of the tender.
 - ▶ An estimate of resources and anticipated expenditures in units of time, which are required to achieve the Clauses related to program
 - ▶ Any updated revisions of Clauses related to program together with records of the actual resources and actual expenditures.

Claims Presentation

- ▶ Presentation of claims (Records)
 - ▶ Progress photographs and / or videos
 - ▶ Drawings register (with details of amendments and updates, if any)
 - ▶ Site diaries
 - ▶ Approved Minutes of Meetings
 - ▶ daily reports
 - ▶ Labor and plant allocation sheets

Claims Presentation

- ▶ Presentation of claims (Records)
 - ▶ Whether a claim is submitted to the Engineer or to an arbitrator as part of a statement of claim, it should be coherent but not wordy presented in a clear and logical manner.
 - ▶ A well prepared and documented claim should have the following:
 - ▶ Introduction providing details of the parties, the contract, the project, relevant dates and other pertinent information.
 - ▶ Brief description of the works as required and specified in the relevant documents.
 - ▶ Description of the Claim events as they occurred and the nature of the resultant problems encountered.
 - ▶ A section containing a statement of facts, so that facts can be established.

Claims Presentation

- ▶ Presentation of claims (Records)
 - ▶ An analysis of the facts showing the legal basis upon which the claim is founded, citing the relevant provisions and clauses of the conditions of contract under which the relief is claimed.
 - ▶ Description of the procedural steps already taken in dealing with the claim event, including notices given,
 - ▶ Calculation of claimed extensions of time, if any showing critical and non-critical delays encountered.
 - ▶ Calculation of disruption experienced, if any, and the method use to calculate its impact.
 - ▶ Appendices which should include all contemporaneous records and relevant correspondences relied on.

Contract Management and Methods of Negotiation & Dispute Resolution

• THANK YOU

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