

# Three years of contracting under the statutory FIDIC Forms:

## A practical approach to key contract management issues

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# The Importance of Good Contract Management

# The Statutory Conditions a solution to a problem or a problem requiring a solution

- March 2011 – Romania had substantial experience with the FIDIC Standard forms
- This experience was not a fortunate experience:
  - ✓ only few infrastructure projects were completed
  - ✓ at much higher prices than initially envisaged
  - ✓ important amounts became payable to contractors in ICC arbitration as a consequence of Contractor's claims

# The Statutory Conditions a solution to a problem or a problem requiring a solution

- The reason behind this unfortunate experience - bad contract management
- Nevertheless, Romania thought to change these facts by restricting the Contractor's rights to claim and imposed a set of mandatory particular conditions to the FIDIC standard conditions to that effect (Order 146/2011)
- The implementation of these conditions did not improve the contract management capacity and added on top of that the difficulties resulting from a less balanced contract

# The Access to the Site

## S.C. 2.1. The Right of Access to the Site

- Sub-Clause 2.1. [Access to the Site] - Particular Conditions of Contract - Order 146/2011
- *“Within 28 days from the Commencement Date, the Beneficiary shall grant the contractor the right of access to and possession of the Site”*
- *“The Contractor shall not put forward any claims in relation to the fact that the Site handing Over is due to be made by Sections and he will revise his programme of works accordingly so as to ensure the finalization of the execution of each Section by the expiry of the Time for Completion”*
- *“The Contractor shall be solely responsible for ensuring any right of access and possession with respect to any area of land, supplementary to the places where the Permanent works are due to be executed.”*

# The Access to the Site in Practice

- The purpose of the Site Handing Over is to enable the Contractor to effectively, physically, access and use the Site area for the purpose of the Works.
- The Site Handing Over Protocol confirms the right to access and “possess” the Site but is, in some circumstances, insufficient for the purposes of Sub-Clause 2.1. i.e. to permit contractors to physically access and progress with the necessary site investigations and the executions of the Works.
- The possibility to use the Site is a matter of fact. If a Contractor is not able at a certain point to effectively access and use the Site, the obligation provided for under Sub-Clause 2.1. cannot be considered fulfilled.

# Penalties



# The Role of Penalties

- Penalties are intended to allow early motorization of progress and to encourage the Contractors to progress as planned.
- Application of penalties should not get to the point where this purpose is reversed in the sense that the Contractors are actually prevented to progress as planned due to cash-flow difficulties caused by unreasonably applied penalties.

## Penalties under Sub-Clause 8.3 [Programme ]

- Under Sub-Clause 8.3 the Contractor is penalized if it does not submit revised programmes of works when provided under the Contract.
- These penalties are applied from the date when the Programme became due until such time when “a compliant” programme is effectively submitted.
- According to Sub-Clause 8.3 a compliant programme includes, among others references to: (a) *the Time for Completion* (b) *the date when the Contractor plans to complete the Works* and (c) *the current progress on each activity and the impact of the same on the outstanding works*

## Penalties under Sub-Clause 8.3 [Programme ]

- Are penalties applicable if the programme is submitted on time, is realistic but indicates a different date for the completion of the Works than the Time for Completion ?
- If yes, the penalty would apply unreasonably, and it cannot be deemed to serve the intend purpose that is to enable the works to progress as planned but become a source for later claims and damages payable by Employers

## Penalties under Sub-Clause 8.6 [Rate of Progress]

- SC 8.6 refers to the motorization of the Contractor's progress and is intended to ensure the timely completion of the Works by motivating the Contractor to complete in a timely manner the critical stages such as geotechnical investigations, mobilization, design, construction permitting, etc.
- To that effect, Sub-Clause 8.6 provides for a series 6 of milestones including the most important activities, critical to completion and in respect of which Sub-Clause 8.6 sets strict deadlines. With regard to the first 3 Milestones, the Contract provides penalties which become immediately payable in case of late completion.

## Penalties under Sub-Clause 8.6 [Rate of Progress]

- Milestone no.1 comprises of no less than 11 activities which need to be completed in the first 28 days from commencement, among which the approval of the Design Statement by CTE - a department in the structure of the Beneficiary.
- Milestone no.2 has to be completed within 70 days from commencement and includes, among others the completion of the Outline design
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- Milestone no.3 has to be completed within the first 90 days from commencement and includes, among others the completion of the Working Drawings , the completion of the permitting documentation , the issuance of the Construction Permit and the permit for site establishment.

## Penalties under Sub-Clause 8.6 [Rate of Progress]

- If the Design Statement (Milestone no.1) is not approved by CTE all three milestones will be delayed and the Employer will apply in relation thereto three different penalties which result in app. 1,5 Mio EUR penalties applied in the first 90 days of the project.
- This is definitely not in compliance with the very purpose of Sub-Clause 8.6 which is to enable to Contractor to progress as planned because the cash-flow difficulties created by the application of such penalties is difficult to manage particularly in such an early stage of the project.
- Still legally possible - Liquidated Damages
- Reduction of the 8.6 penalties could be considered both under the Old and under the New Civil Codes (articles 1070 and article 1541) which provide for the possibility to have liquidated damages reduced if the obligation has been partly fulfilled and the Beneficiary could benefit from such partial fulfillment

# The Variation Procedure

# The Variation Procedure under the Contract - No deadlines

- **Before the Variation Instruction:**
  - The Engineer secures the Beneficiary's express approval in relation to the variation
  - May ask the Contractor to submit a proposal describing the varied works, the time and cost implications and the impact if any on the safety of the Works
  - the Engineer shall, *as soon as practicable*, after receiving such a proposal, respond with approval, disapproval or comments. The Contractor shall not delay any works whilst awaiting a response
- **The Variation instruction :**
  - Shall be in writing
  - Shall contain a request for the registration of costs
  - Shall contain the Contractor's receipt confirmation
- **After the Variation Instruction :**
  - the Engineer will proceed in accordance with Sub-Clause 3.5. and shall endeavour to facilitate agreement or shall determine on the amendment of the Contract Price
  - If the Contract Price thus determined exceeds the Accepted Contract Amount the Variation becomes effective only if an Addendum is signed to this effect by the Parties.



# The Variation Procedure under the Contract - Possible Solutions

- **Cases which require the execution of Varied works as a matter of urgency**
- Cases of unforeseeable physical conditions which endanger the life of the persons on Site and require urgent solutions
- Cases which otherwise require prompt reactions/ interventions/ consolidation works, conservatory measures, etc
- **The judicial determination of the relevant deadlines under the New Civil Code – art. 1415**

*“The Court may, as well, fix a deadline when, by nature the obligation entails a deadline and there no agreement on the basis of which it could be determined.*

*The request for the determination of a deadline shall be settled in accordance with the rules applicable to injunction procedures, being subject to limitation which shall be considered started on the date of the conclusion of the Contract.”*

# **Unforeseeable Physical Conditions**

# Unforeseeable Physical Conditions – to claim or not to claim

- A typical example where the attempt to limit the Contractor's right to claim in relation to unforeseeable physical conditions resulted in inconsistent wording and unfortunately not a better result.
- The usual consequences in the current practice are substantial delays, important additional costs and disputes

# Unforeseeable Physical Conditions – to claim or not to claim

Clause 4.12 of the Yellow Book Contract identical to SC 4.12 of the FIDIC Silver Book Contract

*“Except as otherwise stated in the Contract:*

- (a) The contractor shall be deemed to have obtained all necessary information as to risks contingencies and other circumstances which may influence or affect the works,*
- (b) By signing the Contract the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works and*
- (c) The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs”.*

# Unforeseeable Physical Conditions – to claim or not to claim

Clause 4.10 of the Yellow Book remains unchanged

***“To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation): [...]”***

# **Unforeseeable Physical Conditions – to claim or not to claim**

- The restrictions under Sub-Clause 4.12. apply exclusively to the extent specified under Sub-Clause 4.10, i.e. to the extent to which it was practicable for the Contractor to foresee the works/ difficulties/ costs on the basis of the given Site Data and/ or on the basis of further investigations.

## Abusive Payment Clauses - Law 72/2013 Practical Example – Clauses 14.7 and 14.8

Exclude the possibility to apply penalties for late payment or

Clause 14.8 limits the Contractor's right to payment of penalties and conditions the same on the issuance of an invoice within 2 months from the date when the late payment became due

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Provide in respect of such penalties lower levels than those regulated under the law (8 percentage points above the reference rate of the National Bank of Romania )

Clause 14.8 provides that the penalty for late payment shall be calculated at the rate published of the Central Bank in the Country of the Beneficiary (i.e. at the level of the reference rate of the National Bank of Romania).

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Provide deadlines longer than 60 days with respect to payment and consequently with respect to the accrual of late payment penalties,

Clause 14.7 provides that the payment of any invoices is due within 28 days from the invoice, nevertheless, this deadline is further extended, at no penalty to 73, considering the 45 days grace period under SC 14.8

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Provide for deadlines in respect of the issuance of the invoices

Clause 14.7 provides that the Contractor should issue an invoice within 7 days from the date of the Beneficiary's notice of acceptance of the IPC

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# Conclusions

- Balanced contract conditions always benefit both contracting parties
- The cost of bad contract management is never apparent in an early stage
- The keys to good contract management
  - (a) good contract review, flagging the problems at commencement
  - (b) professional project management
  - (c) serious dispute resolution experience



**Thank You!**