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Prevention is Cheaper than Cure

Second Edition - February 2017

FIDIC: REMEDIES AVAILABLE TO THE CONTRACTOR IF SITE DATA PROVIDED BY THE EMPLOYER (IN TERMS OF THE FIDIC RED BOOK) TURNS OUT TO BE WRONG. ARE THESE REMEDIES AS CLEAR AS THEY SHOULD BE?

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The FIDIC Red book, in Clause 4.10 states that the Employer is obliged to have provided the Contractor with all relevant data on sub-surface and hydrological conditions at the Site, including environmental aspects prior to the base date (the base date being the date 28 days prior to the latest date for submission of the Contractor's tender). The reasons for this are pretty obvious. Or are they? Does it mean that the Contractor can base its tender (be it methodologies or pricing or time) on that information with the guarantee that if the information is wrong that he would be entitled to a claim? What would happen if the Employer failed to provide all of the data that he had in his possession?

The clause further states:

"The Employer shall similarly make available to the contractor all such data which come into the "The Employer shall similarly make available to the contractor all such data which come into the Employer's possession after the Base Date. The Contractor shall be responsible for interpreting such data."

For me, it is particularly confusing when the very same clause provides that:

"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)

a) *The form and nature of the Site, including sub-surface conditions*
b) *The hydrological and climatic conditions*
c) *The extent and nature of the work and Goods necessary for the execution and completion of the Works and the remedying of defects..”*

The Clause does not say what happens when the Employer gets the information wrong, or hands the Contractor new information after the Base Date (either before or after the Contractor’s tender is submitted), nor if the Employer holds back any relevant data that he may have in his possession.

With regards to the withholding of data that the Employer has in his possession (perhaps to try and get a better price from the Contractor), this act or omission may give rise to private or criminal liability where certain injury occurs to persons. Although there are indemnities in the FIDIC Red Book (at Clause 17.1) where the Contractor indemnifies the Employer against any claims, loss, damage and expense in respect of personal injury, this is subject to the exclusion that it does not apply when the reason for the claim, loss, damage or expense is due to any negligence, wilful act or breach by the Employer. In South Africa, we have the Construction Regulations which require a “client” to prepare inter alia, a baseline risk assessment and prepare health and safety specifications for that project. Surely this can only be done with as much data as possible regarding the site and one must be careful of falling foul of this requirement by holding back data relevant to the Works. In addition, in South African common law, the withholding of data by the Employer may be seen as a material breach of the Contract, thus enabling the Contractor to terminate the Contract!

As you know, Clause 8.4 of the FIDIC Red Book is the Contractor’s way in to getting an extension to the Time for Completion (subject to compliance with Clause 20.1 of course). One of causes of delay is listed as being *“a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions”.* Littered throughout the FIDIC Red Book Clauses are specific cases of when, how and why the Contractor will be entitled to an extension to the Time for Completion (the clauses go further by setting out whether or not the Contractor will be entitled to Costs as well, or even Costs plus reasonable profit). So why then does Clause 4.10 not provide the Contractor with a right to an extension of time if it is found that the site data provided is incorrect? Or if new data is provided after the Base Date?

Is it because the second half of Clause 4.10 contains a deeming provision that the Contractor is deemed to have (before submitting the tender – remembering that the Base Date is a date 28 days prior to the latest date for tender submission) inspected and examined the Site, its surroundings, the data provided by the Employer and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including without limitation, *inter alia*, the form and nature of the Site, including sub-surface conditions?

Is the 28-day period there to allow the Contractor to then do the inspections, get any additional information that he feels necessary in order for him to accept that he is deemed to have satisfied himself as mentioned above? Once the Contractor is deemed to have done this does he then have a claim if the information (whether provided by the Employer or obtained by the Contractor) is wrong? I'm not so sure.

Clause 4.11 contains another deeming provision:

"The Contractor shall be deemed to:

a) *Have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and*
b) *Have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matter referred to in Sub-Clause 4.10 [Site Data]"*

Here again the indication is that the Contractor is required to attend to further inspections and interpretations of the data provided by the Employer (presumably within the 28-day period between the Base Date and the date for submission of the Tender). I'm still not sure what the remedy is for the Contractor (if any) if the employer's data is wrong?

Perhaps the answer lies in Clause 4.12.

Clause 4.12 provides for the instance where *"Unforeseeable physical conditions"* are encountered by the Contractor.

The definition of Unforeseeable is *"not reasonably foreseeable by an experienced contractor by the date of submission of the Tender."* Physical conditions are defined as *"natural physical conditions and man-made and other physical obstructions and pollutants which the contractor encounters on the site."*

If the physical conditions are encountered, and they are Unforeseen, the contractor has a specific right (in terms of clause 20.1) to claim for an extension to the Time for Completion and Costs.

So lets sum up what we have on our plates at the moment:

1. We have any Employer who gives the Contractor all the information that he has on the site (site data) at least 28 days before the date when the Contractor will be required to submit his tender.
2. We have a Contractor who:

a) is required to interpret the data before submitting his tender;

b) (to the extent practicable) 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) the form and nature of the Site, including sub-surface conditions.

c) is deemed to have based the Accepted Contract Amount on such inspections and examinations.

I'm not quite sure where that leaves us, I'm afraid. I still don't see (with clarity) how a Contractor would get to claim if the Employer's data is incorrect. Clause 4.12 only seems to kick in when the Contractor actually comes across physical conditions that weren't foreseen whilst he is busy executing the Works. It is a requirement of the clause that the Contractor demonstrates to the Engineer as to why he considers them Unforeseeable, whereas the requirement in Clause 4.10 is that the Contractor is only required to obtain further information (for example) *"to the extent which was practicable taking into account cost and time".*

Which is the test? Was not reasonably foreseeable by an experienced contractor? Or no, it was not practicable to undertake investigations? Confusing hey. Yes, well that's why we picked it as a topic.

Let's look a little further into the extension of time clause of FIDIC.

The extension of time clause in FIDIC (clause 8.4) entitles a contractor (subject to compliance with 20.1) to an extension of time for completion inter alia for *"a cause of delay giving an entitlement to an extension of time under a Sub-Clause of these conditions".*

Clause 4.12 is an example of such a clause. But as we have seen above, it's not so straight forward when it comes to the Unforeseeability aspect versus the deeming provision.

How is this handled in other contracts?

Let's compare this situation to the GCC2015. The GCC2015, at clause 2.1.1 provides:

"The Employer shall have made available to the Contractor, as part of, or by reference in the Site Information, data relevant to the Works obtained by or on behalf of the Employer, but the Contractor shall be responsible for his own interpretation thereof and deductions therefrom."

Clauses 2.1.2 and 2.1.3 provide:

"2.1.2 The Contractor shall be deemed to have inspected and examined the Site and its surroundings and to have studied all available information pertaining thereto before submitting his tender (as far as is reasonable). The Contractor shall thus be considered knowledgeable in respect of:

2.1.2.1 the form and nature of the Site and its surroundings;
2.1.2.2 Environmental, hydrological and climatic conditions …

2.1.3 The Contractor shall, in general, be deemed to have obtained all other available information on risks, contingencies, and all other circumstances which may influence or affect the Works (as far is reasonable)."

There's that blasted deeming provision again.

However, the main difference between the FIDIC Red Book and the GCC2015 is that further down in Clause 2 of the GCC2015, Clause 2.3.1 states that:

"the Contractor shall be deemed to have based his tender on the technical data provided in the contract and if, in the performance of the contract, any circumstances shall differ from the said technical data, which difference causes delay to practical completion and/or brings about proven additional cost, the Contractor shall be entitled to make a claim in accordance with Clause 10.1"

In the GCC, specific reference is made to differing *"technical information"* being a cause of action for a claim by the Contractor. It would be assumed that the *"event"* which then entitles the Contractor to submit a claim notification would be receipt of, or discovery of, such differing technical information. This is a direct access ticket to the applicability of the claims clause (Clause 10.1), which provides that (at Clause 10.1.1):

"The following provisions shall apply to any claim by the Contractor for an extension of time for the Practical Completion of the Permanent Works in terms of Clause 5.12, or in terms of any Clause that refers to 10.1…"

Clause 2.3.1 refers to Clause 10.1 and voila – you have your entitlement.

So what is the point of all of this? I think that as a Contractor who is entering into a FIDIC Red Book Contract, you will need to:

1. take note of what is practicable (taking into account cost and time) in respect of performing site inspections, interpreting the Employer's data and availability of other information when submitting your tender; and
2. ensure that you have (when doing so) done so as an experienced contractor would do.

This will hopefully bring you into the realm of 4.12 and assist you in demonstrating the "Unforeseeability" of the physical conditions.

The recent case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2015] EWCA Civ 712*[1] displayed how important it is for a Contractor to actually consider the data provided by the Employer prior to submission of his Tender. The court examined what would constitute unforeseeable physical conditions under clause 4.12. The court of appeal noted that the judge in the court a quo had:

"held that an experienced contractor would make its own assessment of all available data. In that respect the judge was plainly right. Clauses 1.1 and 4.12 of the FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information. The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable.".

The court, in determining whether the Contractor had encountered unforeseeable physical conditions, was required to consider the ground conditions that were reasonably foreseeable by an experienced Contractor at the date of the submission of the tender. The Contractor had been provided with site data, and had been told to **allow for a substantial volume of contaminated material, but had not done so.**

The court held that the Contractor should have carried out *"some intelligent assessment and analysis"* of why the Site was contaminated and what the real risk was of encountering more contaminated materials than had been envisaged at tender stage. The contractor had failed to do so and **therefore his claim was rejected.**

So Contractors – don't just assume that you can take the Site data provided to you by Employers at face value. Apply your minds. Use your experience and if further investigations are required before you submit your tender, make sure these get done. And of course, when physical conditions that were Unforeseen become apparent, promptly issue a notice to the Engineer (and the Employer), which notice should not only state that it is issued in terms of clauses 4.12 and 20.1, it should also describe the physical conditions. This allows the Engineer the opportunity to inspect the physical conditions, assess whether or not they are Unforeseeable and to issue the necessary instructions.

[1] http://www.bailii.org/ew/cases/EWCA/Civ/2015/712.html