ICCP

Construction Clinic
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Presented by

Cagdas Evren Bayrak

FIDIC President's List Adjudicator

LLM, BScEng, DipAdj, FCIArb, FICCP, MCIOB, CPCM, PMP, CCME

www.proADR.net / www.cagdasbayrak.com

Question 1

(https://www.linkedin.com/in/jamal-oqlah-alibrahim-52062b110/)

- Can Contractors claim a time extension if the Engineer elongates the period of approving the submitted materials?
- What tool we can use to approve that?
- Or how we can prove the elongation?

Answer 1

- Depends on the Conditions of Contracts & Specification (/Employer's Requirements)
- FIDIC 99:

7.2

Samples

The Contractor shall submit the following samples of Materials, and relevant information, to the Engineer for consent prior to using the Materials in or for the Works:

(a) manufacturer's standard samples of Materials and samples specified in the Contract, all at the Contractor's cost, and

(b) additional samples instructed by the Engineer as a Variation.

Each sample shall be labelled as to origin and intended use in the Works.

Answer 1

- If the Specification is silent too, ask for specific time-periods and “deemed approvals” prior to award
- After award it is more challenging to prove “delays” merely in connection with (physical) samples. However of course the Engineer / Employer should respond within a reasonable time.
- Note that approval of shop drawings etc. may be treated differently, constituting “Contractor’s Documents”

1.9 Delayed Drawings or Instructions	The Contractor shall give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Contractor within a particular time, which shall be reasonable. The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and details of the nature and amount of the delay or disruption likely to be suffered if it is late.

However, if and to the extent that the Engineer’s failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor’s Documents, the Contractor shall not be entitled to such extension of time, Cost or profit.

Question 2 (Part 1)

(Part 1) Given the recent introduction of the trade and investment court in Qatar and the potential drawbacks associated with expedited court procedures and inexperienced court-appointed experts, what kind of role do you see for yourself and other industry professionals in promoting the use of ADR mechanisms, especially for complicated construction claims such as prolongation, disruption, and acceleration, that require delay and quantum experts to review and seasoned experts to assess entitlement and quantum?

Answer 2 (Part 1)

- Law No. (21) of 2021 regarding the establishment of the Investment and Commerce Court
- Facilitates the appointment of party-nominated experts. Parties will find this encouraging and helpful since it allows for evidence from specialised, trained, experienced professionals, including those specialising in fields such as quantum and delay.
- I personally see this a step in the right direction because (especially in Qatar) court experts in general take their appointment for granted and not open to new techniques / methodologies moreover usually lack the required skillset altogether.

Question 2 (Part 2)

In your experience, what are some best practices for navigating the potential pitfalls of the trade and investment court and leveraging ADR mechanisms to ensure fair and efficient resolution of complex construction claims in Qatar, and what kind of involvement, if any, should government authorities, as well as other bodies such as the Qatar International Court and Dispute Resolution Centre (QICDRC) and the Qatar International Center for Conciliation and Arbitration (QICCA), have in supporting and promoting the use of ADR mechanisms in the local construction industry?

Answer 2 (Part 2)

- Investment and Trade court processes are swift (unlike conventional litigation in Qatar) and no enforcement issues. The court decisions are enforceable per se.
- Big fan of Qatar International Court and Dispute Resolution Centre (QICDRC) – transparent, effective and common-law based. Qatar International Center for Conciliation and Arbitration (QICCA) frankly not so much. **Q-Construct** under QFC was a great initiative – but didn't come through
- Appointing QICDRC as the "competent court" for the purposes of dispute resolutions on construction contracts would be a straightforward solution
- Mediation (evaluative Mediation in particular) is also trending in Qatar especially after ratification of the Singapore Convention on Mediation

Question 3

My Contract is a -3-year contract with a Price Adjustment Clause. The contract period has been extended to five years due to Employer's delay and some instructed Variations.

EoT has been granted. However, due to high inflation, the Contractor is complaining that they are not fully recovering the cost of materials from the Monthly Price Adjustment indices published by the Government.

They have proved that they are losing money on Cement, Rebar and Fuel considering the applicable monthly Price Adjustment Percentages when the tender prices compared with the actual invoice prices.

My question to you is: Is the Contractor entitled to recover such additional costs under a Prolongation Claim which is now under preparation?

Answer 3

- Depends on the Conditions of Contract and applicable law, and to be considered separately for Variations and Employer Delays:

- **Variations:** Note that the Contractor did not only accept the original scope in the first place – but accepted to deliver the original scope + varied scope. If contract provisions in relation to valuation of variations does not allow for escalation, then I'd say it is difficult for the Contractor to reject the Variation merely because his original anticipated margins will go shorter. That said, for substantial variations that could perhaps render the whole project commercially unfeasible, the Contractor should be careful about accepting the Variation in the first place (if agreed Variation) and if an instructed variation, then the Contractor commence the claim / dispute process set out in the contract.
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- **Employer-Culpable Delays:** I reckon there is more room under the contract and the law for the contractor in relation to Employer-culpable Delays because the Contractor may include such additional costs he incurred within its (EoT) claim submission.

Question 4

Can we expect to be successful for Cost Reimbursement claims on disruptions caused by the COVID-19 pandemic and what is the best strategy to adopt under FIDIC 1999? Please quote any such case references.

Answer 4

FIDIC has published useful (free) guidance memorandums in this regard:

https://www.fidic.org/node/40343

1) FIDIC Guidance Memorandum - FIDIC Contracts guidance on the effects of inflation and the unavailability of goods and labour following the global COVID-19 pandemic and the war in Ukraine
2) FIDIC Guidance Memorandum - COVID-19 Impact to the Consultant's services under the FIDIC Suite of Contracts & Agreement
3) COVID-19 guidance memorandum for users of FIDIC standard forms of works contract
4) COVID-19 guidance memorandum for on-site working and project team organisation

QUESTIONS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

CONTACT DETAILS

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For general enquiries please contact Nina Hewitt-Tyrrell: **nina.hewitt@instituteccp.com.**

For membership specific enquiries please contact: **membership@instituteccp.com.**