ICCP

WEBINAR SERIES

Construction Clinic #26

Presented by

Cagdas Evren Bayrak

LLM, BScEng, DipAdj, FCIArb, FICCP,
MCIOB, CPCM, PMP, CCME &
FIDIC Adjudicator

www.proADR.net

QUESTION 1

- 1. Sub-Clause 12.3 (b) (FIDIC 1999) allows the Contractor to ask for new rate, if the following three conditions are satisfied;
- (i) the work is instructed under Sub-Clause 13
- (ii) no rate or price specified in the Contract and
- (iii) no specified rate or price is appropriate
- I have two questions on this;
- (a) the conditions mentioned under (ii) and (iii), both of them cannot be satisfied at the same time. either (ii) or (iii) can be satisfied at a time because (ii) says, there is no rate whilst (iii) says, there is a rate but not appropriate.
- In that case, we cannot fulfil all three conditions at a time. Please explain, my understanding is correct?

- (b) Can the "increase in material price" be considered as a reason for "specified rate in the Contract" is not appropriate?

ANSWER 1

- (a) – SC 12.3(b) states as follows:

or

(b) (i) the work is instructed under Clause 13 [*Variations and Adjustments*],
(ii) no rate or price is specified in the Contract for this item, and
(iii) no specified rate or price is appropriate because the item of work is not of similar character, or is not executed under similar conditions, as any item in the Contract.

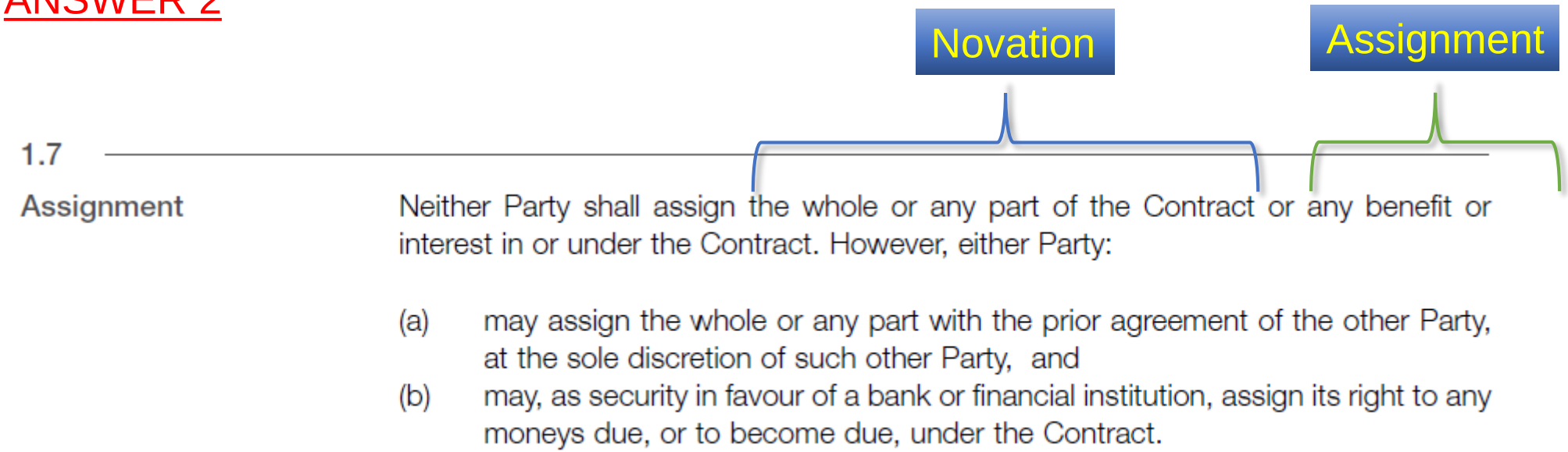
- The works should be instructed works AND there is no rate or price specified for this work in the Contract AND there is no similar rate or price for the Engineer to use either.
- So, all three conditions may be valid at the same time.

- (b) It depends on the specifics of the Contract (and the applicable law) but if the rates are not subject to fluctuation / escalation, then No. Because, the Contractor's commitment in the first place was not only carry out the works, but carry out varied works as well in accordance the Variation provisions of the Contract as well throughout the Project Term. However the Contractor may bring this to the Engineer's attention and the Engineer may take necessary actions for a seamless delivery of the Project.

QUESTION 2

What is meaning of Sub-Clause 1.7 (Assignments) in FIDIC 1999?. Can the Employer assign a portion of a Contract to another party (Sub Contractor) with a consent of the other party, with new rates if the main contractor is delaying some items, under this Sub-Clause?

ANSWER 2



That is, with the consent of the Main Contractor (including financial consequences), certain parts of the Works may be novated off to another contractor.

QUESTION 3

When the contract period is extended due to Employer's delay, Can the Contractor ask for new rates for the remaining works of the original scope on the grounds that, his rates were valid only for the original Contract period? If yes, under which clause is applicable?

ANSWER 3

Similar to Answer 1, it depends on the specifics of the Contract and the applicable law (especially in Civil Law Countries) but if the rates are fixed and are not subject to fluctuation / escalation, then I'd say No. Because, the Contractor's commitment in the first place was not only carry out the works, but carry out works with the relief mechanism set out in the Contract (e.g. extension of time + cost + profit) in case of an Employer risk event occurs. That said, there may be certain amount of flexibility there because the Contractor may after all claim for additional COSTS, and any costs which were not included in the original rates may be included within the Contractor's EoT submission.

However the Contractor may bring this to the Engineer's attention and the Engineer may take necessary actions for a seamless delivery of the Project.

QUESTION 4

Can the Contractor ask for new rates for imported goods due to currency fluctuations? If yes, under which sub-clause?

ANSWER 4

No, if there was no special provision in this regard in the first place (E.g. payment of the Contract Price in 2 different currencies, say, 30% in the local currency and 70% in US Dollars; and local currency to be paid for each month shall be calculated based on the official FX rates of the Central Bank of the Country… etc.)

However the Contractor may bring this to the Engineer's attention and the Engineer may take necessary actions for a seamless delivery of the Project.

QUESTION 5

If a FIDIC Contract is Lump Sum. Can the Contractor refuse an instruction for additional work because the rates in the Schedule of Rates are too low? Subclause 13.1 Right to Vary FIDIC Red Book 1999.

My understanding is that the Contractor can refuse the Variation because the market conditions changed

ANSWER 5

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that the Contractor cannot readily obtain the Goods required for the Variation. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

It depends on the specific provisions of the Contract and the applicable law, but if the rates are fixed, then, No. That is, it's a matter of assumption of risks by the Contractor: if, as an experienced contractor he accepted to carry out the works based on fixed rates (or a fixed price lump sum contract altogether) in the first place at he outset of the Contract, then he needs to carry out varied works as well.

However the Contractor may bring this to the Engineer's attention and the Engineer may take necessary actions for a seamless delivery of the Project. E.g. some Civil Codes allow relief to the Contractor if the varied works make the Contractor incur "exorbitant loss" (e.g. Article 171 of the Qatar Civil Code which states as follows)

Pacta sunt servanda i.e., a contract duly and properly concluded between the parties must be kept, and non-fulfilment of the respective obligations is a breach of that contract. Such a contract may be revoked or altered only by mutual consent of the parties or for reasons provided for by law.
Where, however, as a result of exceptional and unforeseeable events, the fulfilment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level.
Any agreement to the contrary shall be void.

QUESTION 6

CONTRACT: FIDIC Redbook 1999 First Edition – VARIATIONS & CLAIMS

Q1) For a Contractor's claim to be considered, how important is it for the Contractor to clearly state the legal / contractual basis of the claim? (Contractual / Extra-Contractual / Ex-Gratia)

Q1a) How would the Engineer respond to the claim if the Contractor fails to be specific and doesn't clarify / confirm the provisions relied upon? (Clauses / Sub-Clauses, Express / Implied terms etc)

ANSWER 6

A typical successful claim has certain pillars:
1- Procedural Requirements (Timely Notices, Submissions etc.)
2- Contractual / Legal Basis: If you want someone to pay you more then there needs to be a solid ground for it
3- Factual Grounds / Causation: The Claimer must demonstrate a solid link between the events and circumstances and their consequences which would grant him entitlement to relief

Q1- It is very important

Q1 (a) - The Engineer may simply reject the claim (or require the Contractor to rectify and resubmit properly this time.)

QUESTION 7

The Contractor has submitted a valid ‘notice of claim’ for an Employer delay event but then continues to fail to submit a ‘fully detailed claim’ within the prescribed period of 42 days (or any other period proposed / approved). Is the Employer entitled to claim Delay Damages under SC 8.7 [DD’s] if the Time for Completion / Revised Time for Completion is about to expire?

ANSWER 7

After expiry if the original Contract duration the Employer would be entitled to the LAD’s if the Contractor failed to follow the Claim procedural requirements under the Contract. However, if an EoT is likely to be granted to the Contractor, then it may be more prudent to notify the Employer’s entitlement (under SC 2.5) and start the actual deduction of the LAD’s from interim payments once the EoT process is completed.

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

QUESTION 8

Q3) Are there any limitations (financial or otherwise) by which a Variation may be instructed?

Q3a) What course of action is open to the Engineer in the situation where Contractor / Subcontractor fails to comply with a valid instruction and refuses to undertake the varied works?

ANSWER 8

Depending on the applicable law, there may be. For example in some jurisdictions (or e.g. if the Employer is a governmental entity subject to the Public Procurement Law of the country) then variations (additions or omissions) may be subject to a cap (e.g. any variation exceeding 20% of the contract price may not be issued or may necessitate certain financial terms of the Contract be re-negotiated). Or, e.g. for omissions, the Contractor may automatically be entitled to Loss of Profit. Acting in Good Faith also may be important (e.g. issuing a 19.99% variation just to keep it under the 20% threshold)

ANSWER 8 (cont'd)

The Contractor is obliged to carry out varied works as well, save for few exceptions (which were mentioned in previous questions). If the Contractor fails to fulfil those, then, he would be in breach of contract. The remedies available to the Employer and the course of action is the same as in any other breach: Issuing a Notice to Correct under 15.1, awarding the works to others and back-charge to the Contractor or ultimately, termination of the contract.

CONTACT DETAILS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

TELL ME MORE

To learn more about the ICCP please visit: **www.instituteccp.com.**

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

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