

Technical Note: FIDIC 2017 – how to make *Site Conditions* and site risk allocation work in follow-on contracts in major projects.

[Clause 4.12 and related]

[Note: for the purpose of these comments, the 2017 Yellow Book is used as the example.]

Background

1. Site conditions; ground conditions and the concept of *unforeseeable* are complex and complicated matters and, as we all know, a constant source of project disputes. In the FIDIC conditions the scheme that is principally in cl 4.12 (Unforeseeable Physical Conditions) has changed little in the 2017 revisions from the 1999 version. Essentially, if the contractor can show that he has encountered physical conditions that can meet the definition of *Unforeseeable*, he can claim time (*EOT*) and money (*Costs*), subject to correctly following the required administrative procedures.

Unforeseeable is defined as:

1.1.87 “Unforeseeable” means not reasonably foreseeable by an experienced contractor by the Base Date. [i.e., 28 days before tender]

2. It is not the purpose of this note to discuss the terms of cl 4.12 or the risk allocation that comes with the use of the test “...not reasonably foreseeable by an experienced contractor”. For an example of the analysis the UK court(s) might apply to cl 4.12 see [OHL v Gibraltar](https://www.bailii.org/ew/cases/EWHC/TCC/2014/1028.html) [2014 for the first instance] at <https://www.bailii.org/ew/cases/EWHC/TCC/2014/1028.html>
3. The focus of this note is the situation whereby there are follow-on contractors, contractors whose work will be carried out and installed on top of the earlier work of others. In major and complex projects, it is quite standard for the Employer to award first the civils and structural contracts, so that the works can commence, and then move to the procurement of specialist systems and plant and equipment. Examples are:
 - *Airports*: where the Employer generally selects (and either nominates or procures by direct contract) systems such as baggage handling; UPS; MEP for fire and life safety; elevators/escalators/travelators; security systems (incl CCTV).
 - *Rail systems*: packages for signalling; power and telecommunications as well as the train units are all normally the subject of an Employer

procurement programme after the first phase of site preparation and civil and structural contracts are awarded and started.

- *Power stations and generation plants*: again, these types of projects can be delivered on a turn-key basis. But it is also quite common for the Employer to want to get the steel and concrete started for the structure and then to have a separate programme to select the generation units (based on KPRs and performance criteria) from the specialist market of manufacturers of power units:

4. In these circumstances, the “site” to be taken over and used by the follow-on contractor(s) is in fact what the prior civils contractor (in this example) has built. Even more relevant is the fact that almost without exception, the follow-on contractor will have to start work before the civils or prior major contractor has finished.
5. With respect to the FIDIC drafting committee, neither the 1999 nor the 2017 versions contemplate that the Site (as defined) might be live; under construction and evolving both physically and contractually for follow-on contractors. Perhaps that is due to the FIDIC contracts having the Red Book as their primary parent. Simply, the FIDIC scheme does not address this situation – as common and important as it is - such that substantial contract amendments are needed to both scope the issues and then allocate risk or responsibility.

The objective of this note is to suggest and draft what those amendments might be.

Site issues for subcontractors are present even in greenfield projects

6. Further, these are not only head contact issues. In the first instance, the issues of the Site, for follow-on work, being the under construction site, is a matter which will confront a head contractor when he is drafting his *back-to-back* subcontracts. In the area of site and site conditions, and risk allocation, even if the head contract is a clean greenfield form, the major subcontractors will still have to work in a live, dynamic and evolving environment. It would be a significant risk for a head contractor simply to *back-to-back* a form of cl 4.12 into the major subcontracts and

hope that the language and concepts in cl 4.12 will pass the necessary risks to the subcontractor(s). They almost certainly will not.

Before addressing Site issues – it is crucial to review the Force Majeure provisions in the contract, or equivalent.

7. In the contract drafting of any scheme related to allocating project risk, it is essential that cognizance be taken of:
 - a. The other contract provisions that make effect what you draft in one section (here, say, in cl 4.12); and
 - b. The local or applicable legal landscape, whereby there could be laws that will influence any risk allocation that the contract seeks to establish.
8. In the 2017 FIDIC contract conditions, the Force Majeure provisions previously in cl 19 have now been made “*Exceptional Events*” in cl 18. For the purpose of this note, and for all intents and purposes, the terms of 2017’s cl 18 are essentially the same as the 1999 version of Force Majeure in cl 19.

In the 2017 conditions it says that:

18.1 Exceptional Events

“Exceptional Event” means an event or circumstance which:

- (i) is beyond a Party’s control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party.

An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) above are satisfied:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (c) riot, commotion or disorder by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors;
- (d) strike or lockout not solely involving the Contractor’s Personnel and other employees of the Contractor and Subcontractors;
- (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to

- the Contractor's use of such munitions, explosives, radiation or radio-activity; or
- (f) natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.

9. Where a Contractor encounters adverse site or ground conditions, the standard form FIDIC contract does not preclude a Contractor making a claim of *Force Majeure*, in the 1999 version, or in the 2017 version, *Exceptional Event*.

And that claim can be made separately to a claim under cl 4.12 where that route might be needed if the contractor did not follow the administrative scheme for notifications).

So, to make cl 4.12 the *exclusive* scheme for unforeseeable physical conditions, you will need to amend cl 18 (2017) to exclude its use. The form of amendment could be along these lines:

“Exceptional Event” means an event or circumstance which:

- (i) is beyond a Party's control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party,

but which does **not** include:

- a) an event or circumstance for which a party accepted under the contract (either expressly or impliedly) the risk of it occurring; or
- b) specifically, ground and sub-surface conditions at or under the Site referred to in cl 4.12 as Unforeseeable.

10. Separately, in countries with a civil code legal system (as in the Middle East), there will be provisions in the Code that address changed circumstances or hardship or even force majeure expressly.

In the U.A.E, there are the general sections like Articles 249 and 287 which deal with concepts of:

Art 249: *If exceptional events of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes onerous for the obligor.....*

Art 287: *If a person proves that the harm arose out of an extraneous cause in which he played no part such as a natural disaster, sudden incident, force majeure, act of a third party, or act of the person suffering harm, he shall not be bound to make it good in the absence of a provision of the law or an agreement to the contrary.*

And then for *muqawala* contracts, contracts for the construction of something:

Art 893 mentions:

If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be cancelled or terminated as the case may be.

Art 894 also states:

If the contractor commences performance and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work he has completed and to the expenses he has incurred in the performance up to the amount of the benefit the employer has derived therefrom.

11. These avenues of relief cannot be contracted out of but, the courts in the UAE, for example, will respect the terms of a contract and should enforce a bargain whereby the contractor takes the risk of external events. But as always, every situation will depend on its own facts.

So what provisions might be needed in a FIDIC style contract to make the concept of the Site, work for follow-on contractors?

12. The text that is offered here for discussion is drafted on behalf of a notional Employer or, equally, a head contractor looking to draft his principal subcontracts. So, the terms express a position of passing or placing the site risk with the contractor or subcontractor. The provisions below do not include the concept of *unforeseeable* and thereby some degree of risk sharing between the contracting parties. Of course, if you wish to have that form of commercial and technical arrangement in the contract, the provisions below would need to be amended appropriately.
13. There are a number of themes that run through these provisions, which might be better indicated as an introduction:
 - The *Site* is geographically a wide definition and for these purposes includes not only the location of the permanent works, but also all locations for the delivery of goods within the country.
 - The *Site Conditions* (as defined) include the *Operating Environment* which is a concept that goes directly to the design and specification responsibilities of the contractor (or specialist subcontractor).

- There is a concept of *Site Information*, which is supplied to the Contractor by (or on behalf of) the Employer and both before and after the date of the contract. This “*after*” concept is consistent with the notion that it is the responsibility of the contractor/subcontractor to continually up-date himself and accept that the prior works in or around which he will install his works, are still being constructed. The relevant site information is normally supplied to bidders and then the selected contractor via an e data room.

14. Against this background an example of provisions that have been used in a major Middle East project are as follows:

Interfacing Parties" means any Authority, other contractors or consultants (including adjacent civil works contractors, maintenance contractors, station contractors and any civil works contractor):

- (a) who interface with, or will interface with, the Contractor in the execution of the work under the Contract; or
- (b) whose works or services interface with, or will interface with, the work under the Contract.

"Site" means all places in the Country (i) to which the Works and Goods or any of them are to be delivered or installed in accordance with the Contract, (ii) within which the Project is situated (including the Project itself) and (iii) any other places as may be specified in the Contract or advised by the Employer as forming part of the Site and shall include any part of the Site.

"Site Conditions" means all conditions and characteristics of the Site and its surrounds and the areas above and below them including

- (i) physical conditions,
- (ii) the Operating Environment and
- (iii) the proximity of the Site, the Project and the Works to other structures, which may affect
 - (a) the Contractor's performance of any of the work under the Contract and
 - (b) the ability of the Permanent Works to meet the requirements of the Contract when being tested, operated and maintained.

"Site Information" means any information relating to the Site, or Site Conditions, which is supplied or made available to the Contractor by or on behalf of the Employer, whether or not the information comprises part of the Contract and whether the information was provided to the Contractor before or after the date of the Contract.

"Operating Environment" means:

- (a) the operational, climatic and environmental conditions (including heat or dust);
- (b) all physical, mechanical, electrical and other conditions, under which the Works will be used and need to perform when being operated or maintained, including within any enclosed areas of the Project such as tunnels or underground parts of the Project.

Site Data

1. The Employer previously made available to the Contractor for information purposes only (and with no express or implied warranties or representations as to correctness, completeness or adequacy) the Site Information and data regarding Site Conditions, including environmental aspects. The Contractor shall be responsible for interpreting all such information.
2. The Employer shall have no liability in connection with any Claim, and the Contractor shall have no Entitlement or right to make a Claim, arising out of, or in connection with:
 - (a) Site Information;
 - (b) the actual Site, climatic and surrounding conditions encountered by the Contractor;
 - (c) the Operating Environment;
 - (d) Site Conditions affecting the Contractor's performance of the work under the Contract so as to become more costly or taking longer to achieve than the Contractor anticipated or allowed for;
 - (e) the manner in which the land, buildings and environment around and nearby the Site affect the Contractor in the performance of the work under the Contract, causing the Contractor to incur Cost or suffer delay.
3. The Contractor is required at all times to continue to obtain, all necessary information as to risks, contingencies and other circumstances which may influence or affect the carrying out of the Works or the work under the Contract including in relation to the Site, its surroundings, the Site Information, the design, specification and technical parameters of the Project and all other available information, and to be satisfied as to all relevant matters, including (without limitation):
 - (a) the Site Conditions;
 - (b) the nature, scope and design submitted and to be submitted to the Employer by other contractors in respect of all civil engineering, construction, tunnelling, track laying and related testing and commissioning of these civil engineering and tunnelling aspects for the Project;
 - (c) the facilities and locations of other Interfacing Parties (in each case within and outside the Country);
 - (d) the availability, access to and provision of facilities, plant and equipment required from other Interfacing Parties for the work under the Contract;
 - (e) hydrological and climatic conditions;
 - (f) the extent and nature of the work and Goods necessary for the performance of the work under the Contract;

- (g) the Laws, Technical Standards procedures and labour practices of the Country;
- (h) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and other services when carrying out work in the Country;
- (i) the sources of supplies of Goods, water and power;
- (j) the possibility of port congestion and procedures for obtaining clearance of Works;
- (k) the procedures for obtaining visas and clearances for mobilising staff and labour to perform the work under the Contract;
- (l) the environmental protection and safety requirements that the Contractor shall adhere to;
- (m) the anticipated programme of development of the Project and the expected density of construction works on adjacent sites including the need to provide and maintain access routes to and within the Site to served adjacent sites,

in each case to the extent that they may affect the Contractor's performance of the work under the Contract.

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