law, public order and propriety, and established valid commercial practice are observed.

Footnotes

[1]The 1986 calendar year totals indicate that the number of claims is still rising. In this period, 704 claims were filed, totaling more than RO 15 million.

[2]ASCD was established in 1981 by Royal Decree 79/81. However, rules governing ASCD hearings were not promulgated until April 1984 under Royal Decree No. 32/84. (For an account of the Authority and English translations of both decrees, see August 1984 MEER at pages 9 and 23.) In April 1984, ASCD replaced an earlier Committee for Settlement of Commercial Disputes. The Committee was composed of a formally-appointed Omani Chairman, senior local merchants and representatives from both the Ministry and Chamber of Commerce and Industry and was constituted as part of the Ministry of Commerce and Industry under the Commercial Companies Law of 1974. The Committee was a more informal body than ASCD, and because it had fewer cases, it was able to hear cases within a few months of the original claim being filed. Its benefits lay in the contribution by its individual members, who would frequently know about the background to the dispute and who could rapidly deal with the claim.

REGIONAL

Contractors' Claims Under The FIDIC International Civil Engineering Contract—II

by Christopher R. Seppala, Esq.

This is the second in a series of articles on contractors' claims under the FIDIC International Civil Engineering Contract and the steps contractors can take to secure and advance their rights. The first article, published in last month's issue, covered: Section I—An Overview (introduction); and Section II—The Role of the Engineer. This article begins Section III—the Contractor's Major Claims, covering (A) Unforeseen Conditions and Obstructions. Future articles will continue Section III, covering (B) Variations, and (C) Delays; Section IV—Other Claims; Section V—Claim Notification Procedure and Disputes; and Section VI—Conclusion.

As noted earlier, three of the major claim areas under the FIDIC Conditions are: (A) unforeseen conditions and obstructions (Clause 12); (B) variations or changes in the works (Clauses 51 and 52); and (C) delays (Clause 44 and others).

III. The Contractor's Major Claims

(A) Unforeseen Conditions Or Obstructions

A major risk in any construction project is that the Contractor may encounter unforeseen conditions or obstructions during the course of construction which cause an increase in his costs. For example, ground conditions may be substantially harder or softer than anticipated, permafrost or subsurface water may be discovered where none was foreseen, or good foundation rock may be found only at a substantially lower depth than had been expected.

In the invitation for tenders, the Employer will usually provide prospective tenderers with information about the site and its surroundings. During the tender period, the Contractor will ordinarily have carried out a site inspection and performed other investigations for purposes of preparing his tender. Nevertheless, despite the good faith efforts of the parties, it is quite likely in any major project that the Contractor will encounter some unanticipated conditions that increase his costs, possibly substantially.

Who should be made to bear these additional costs?

Basic Principle And An Exception

The traditional rule of law, in the common law countries at least, has been that regardless of the difficulties he may encounter, the Contractor must carry out the works at the agreed price.[30] Subject to some qualification (as discussed below), this basic principle is maintained in the FIDIC Conditions. Under them, the Contractor is generally responsible for completing the works, as designed, for the contract price.[31] If during construction unforeseen events occur that cause increased costs or delays, or both, these are ordinarily presumed to have been included in his tender price.[32]

In the United Kingdom and the United States, however, strict adherence to this principle has not been felt to be in the long-run interests of Employers. If the entire risk of unforeseeable events were placed on Contractors, then, in order to stay in business, Contractors would be expected to establish a reserve in their bids for each and every contingency that might arise. This practice would lead inevitably to higher bid prices. Employers would then, in turn, have to pay these higher bid prices as contract prices, whether the contingencies materialized or not. This practice, it was felt, would be more costly for Employers in the long run than if Employers themselves undertook to bear the risk of unforeseen events and thus only paid for them if, and to the extent that, they should actually arise. Accordingly, as an exception to the above principle, contracts in the United Kingdom and the United States often make the Employer bear the risk of specified unforeseeable events.[33]

The FIDIC Conditions give effect to this exception in Clause 12 by providing that if certain defined contingencies arise that cause the Contractor increased costs, the Contractor shall be entitled to claim compensation from the Employer. Clause 12 provides (in relevant part) as follows:

> If, however, during the execution of the Works the Contractor shall encounter physical conditions, other than climatic conditions on the Site, or artificial obstructions, which conditions or obstructions could, in his opinion, not have been reasonably foreseen by an experienced contractor, the Contractor shall forthwith give written notice thereof to the Engineer's Representative and if, in the opinion of the Engineer, such conditions or artificial obstructions could not have been reasonably foreseen by an experienced contractor, then the Engineer shall certify and the Employer shall pay the additional cost to which the Contractor shall have been put by reason

---

Christopher Seppala is a partner in the Law Offices of S.G. Archibald, Paris, France, and Chairman of the Subcommittee on the FIDIC Civil Standard Conditions of Committee T (International Construction Contracts) of the Section on Business Law of the International Bar Association. A French language version of this article appeared in 1985 Journal de Droit des Affaires Internationales 171 *(FEDUCI, Paris). The name of this journal has been changed to* Revue de Droit des Affaires Internationales.

of such conditions, including the proper and reasonable cost

(a) of complying with any instruction which the Engineer may issue to the Contractor in connection therewith, and

(b) of any proper and reasonable measures approved by the Engineer which the Contractor may take in the absence of specific instructions from the Engineer,

as a result of such conditions or obstructions being encountered.

The policy to relieve the Contractor of financial responsibility for certain unforeseeable risks is manifested in other clauses of the FIDIC Conditions.[34]

Three Conditions For Recovery

To recover under Clause 12, the Contractor must demonstrate three things, namely, that:

(a) he has encountered physical conditions or artificial obstructions;

(b) these could not have been reasonably foreseen by an experienced contractor; and

(c) they have caused him additional cost.

This clause also requires the Contractor to give immediate written notice to the Engineer's Representative. While it is always prudent to give prompt notice of claims, under English law, at least, a failure to do so under this clause would not necessarily bar the claim.[35]

(a) Physical Conditions or Artificial Obstructions. The second edition of the FIDIC Conditions referred simply to "physical conditions or artificial obstructions." The third (current) edition refers to "physical conditions, other than climatic conditions on the Site, or artificial obstructions." Thus, under the current edition, the Contractor is denied the right to claim for extra costs due to on-site climatic conditions that he could not reasonably have foreseen.[36]

The term "physical conditions" is so broad that it cannot be defined with precision. In British practice, at least, it is acknowledged to include such matters as unexpected ground conditions, geological faults and changes in water tables.[37] The term "artificial obstructions" appears, again according to British practice, to refer to nonnatural events that hinder or stop the Contractor's work. Examples are underground sewers and manholes, foundations and other man-made structures.[38]

The question often arises in practice whether these two terms are restricted to truly physical (that is, materially existing) objects or occurrences, or may extend to other phenomena—such as, to take some varied examples, port congestion, shortages of raw materials, interference with access to the site due to the presence of another contractor, changes in laws or regulations which interfere with the Contractor's work, and economic phenomena, such as inflation.

British authorities, when interpreting a virtually identical clause in the English ICE Conditions, are generally unwilling to extend these terms in this way.[39] However, British interpretations of such a clause in an English domestic form of contract should not be dispositive as regards the FIDIC Conditions. In domestic construction, the principal unforeseeable risks result ordinarily from soil and other conditions at the site (the examples referred to above cited by British authorities). In international construction, however, the range of unforeseeable risks is wider (*e.g.*, it includes political and economic conditions internationally, in the country of construction as well as in the Contractor's own country).

As Clause 12 is evidently designed to relieve the Contractor of unforeseeable risks and as its terms do not expressly exclude risks attributable to intangible phenomena, which risks are especially wide-ranging and significant in international construction, it is open to argument that the clause extends to them as well.

Consequently, until such time as the terms "physical conditions" and "artificial obstructions" are defined or replaced by more precise and restrictive wording, Contractors can be expected to continue to claim under this clause, based upon an expansive reading of these terms.[40]

(b) Not Reasonably Foreseeable by an Experienced Contractor. Assuming that there are such "physical conditions" or "artificial obstructions" as defined above, when are they not (1) reasonably foreseeable (2) by an experienced contractor?

(1) *Foreseeability.* The foreseeability of a particular event will be determined by reference to the following points:[41]

(i) The data on hydrological and subsurface conditions, if any, made available by the Employer in the tender documents.[42]

(ii) The information discovered as the result of what the Contractor is deemed to have done during the tender period under Clause 11, second sentence, which provides as follows:

> The Contractor shall also be deemed to have inspected and examined the Site and its surroundings and information available in connection therewith and to have satisfied himself, so far as is practicable, before submitting his Tender, as to the form and nature thereof, including the subsurface conditions, the hydrological and climatic conditions, the extent and nature of work and materials necessary for the completion of the Works, the means of access to the Site and the accommodation he may require and, in general, shall be deemed to have obtained all necessary information, subject as above mentioned, as to risks, contingencies and all other circumstances which may influence or affect his Tender.

The scope of this investigation is determined by the words "so far as is practicable." Thus, if the time allowed for the preparation of tenders is short, an extensive investigation will be less "practicable" than if adequate time has been allowed.[43] Similarly, a Contractor is not required to incur substantial costs in preparing to tender for a project which he, naturally, has no assurance of being awarded. This, too, would not be "practicable." Thus, the circumstances of the invitation to tender will be important in determining the extent of the information that the Contractor is expected to have discovered under Clause 11, second sentence.

(iii) The nature and extent of the works required by the contract. For example, where it is planned to build a pier out into a lake during seasonal low water level periods and, due to conditions off the site, the water levels fail to fall in accordance with published historical data in the tender documents, the change in water levels may, in that context, be an unforeseeable physical condition; but this would not necessarily be the case if the pier were to be built by a construction method that is not affected by the fluctuation of water levels.

(iv) General civil engineering knowledge (see below, under Experienced Contractor).

Thus, in order to prove that a "physical condition" or an "artificial obstruction" was unforeseeable within the meaning of Clause 12, the Contractor must demonstrate that none of the four points mentioned above would, at the time he submitted his bid, have reasonably indicated to an experienced contractor the "condition" or "obstruction" effectively encountered.

(2) *Experienced Contractor*. The requirement of foreseeability is determined not by what the above data or information would have revealed to a layman, but by what it would have revealed to an "experienced contractor"—that is, an experienced civil engineering works contractor. Thus, the fact that some "condition" or "obstruction" may have escaped the notice of the Employer would not entitle the Contractor to claim if an experienced contractor could reasonably have foreseen it.[44]

(c) Additional Cost. The "physical condition" or "artificial obstruction" must cause the Contractor "additional cost." "Cost" is defined to include overheads, whether on or off the site.[45]

Any "instruction" issued by the Engineer under Clause 12, paragraph (a) (*see* the quotation of Clause 12 above) may provide the Contractor with an additional basis for a claim, independent from Clause 12. For example, an "instruction," if given in writing, may also constitute in particular circumstances a suspension order under Clause 40(1) or a variation order under Clause 51 or entitle the Contractor to an extension of time under Clause 44. If it constitutes a variation order, then the Contractor would be entitled to profit on the extra work.[46] Therefore, whenever any "instruction" is or may have been given under Clause 12(a), the Contractor should consider claiming on the basis of these clauses, among others, as well as Clause 12.

The fact that the Engineer may deny that conditions or obstructions claimed could not have been foreseen under Clause 12, or may deny that any "instruction" he has given entitles the Contractor to compensation or time under Clauses 12, 40(1), 51 and 44, among others, is, in the last resort, legally irrelevant as generally all of the Engineer's decisions may be opened up, revised and reviewed in international arbitration.[47] The award of the arbitrators, who, unlike the Engineer, must ordinarily decide in law,[48] will be conclusive on these questions.

Footnotes

(Editor's Note: Footnotes in this series run consecutively from the first article through the last so that the entire article is a more useful research tool. The first footnote in this, the second article, is footnote 30.)

[30]DUNCAN WALLACE, *supra* note 1, at 11.

[31]Clause 8.

[32]This basic rule is also retained in the FIDIC Conditions, Clause 12, first sentence.

[33]This is the case, for example, in the English ICE Conditions and in U.S. federal procurement contracts. *See* JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 658-59 (West Publishing, St. Paul, Minn. 3rd. ed. 1985).

[34]*See, e.g.*, Clauses 20 (the Contractor may claim for damage to the works occasioned by "excepted risks") and 65 (the Contractor may claim for damage to the works, as well as for specified losses, attributable to "special risks"). The Contractor may also claim for an extension of time for unforeseeable risks under Clause 44.

[35]DUNCAN WALLACE, *supra* note 1, at 42. The Contractor is nevertheless required, under Clause 52(5), to send to the Engineer's Representative once in every month an account giving particulars of his claims which would include a claim under Clause 12. *See* Section V (Claim Notification Procedure and Disputes) in a future article of this series.

[36]According to the FIDIC NOTES, climatic conditions have been excluded because " . . . it is always difficult to assess whether such conditions could or could not have been foreseen by an experienced contractor." FIDIC NOTES, *supra* note 1, at 20.

[37]C.K. HASWELL and D.S. de SILVA, CIVIL ENGINEERING CONTRACTS—PRACTICE AND PROCEDURE 176-77 (Butterworth & Co. Ltd., London 1982).

[38]*Id.*; *see also* DUNCAN WALLACE, *supra* note 1, at 42-43.

[39]MAX W. ABRAHAMSON, ENGINEERING LAW AND THE I.C.E. CONTRACTS 65 (Applied Science Publishers Ltd., London 4th ed. 1979), *see also* DUNCAN WALLACE, *supra* note 1, at 42.

[40]Where the "physical condition" or "artificial obstruction" causes damage to the works itself, arguably, the Contractor's claim should be based on Clause 20, not Clause 12, as Clause 20 is specifically concerned with damages to the works attributable to "excepted risks" including "any such operation of the forces of nature as an experienced contractor could not foresee, or reasonably make provision for or insure against . . . ." *See* ABRAHAMSON, *supra* note 39, at 65.

[41]*See* JACK COTTINGTON & ROBERT AKENHEAD, SITE INVESTIGATION AND THE LAW 17-27 and 97-98 (Thomas Telford Ltd., London 1984).

[42]Clause 11, first sentence.

[43]What constitutes adequate time will necessarily vary with the nature and extent of each project. In general, eight to ten weeks' time for a substantial international project would appear insufficient. However, four to six months' time may be adequate for such a project. For one English engineer's view concerning the time that is adequate for the preparation of tenders, see A.C. TWORT, CIVIL ENGINEERING: SUPERVISION AND MANAGEMENT 27 (Edward Arnold, London 2nd ed. 1972).

[44]If such "condition" or "obstruction" should have been foreseen by the Engineer (*e.g.*, in the invitation for tender documents) but was not, this may help the Contractor to establish that the "condition" or "obstruction" at issue could not have been reasonably foreseen by an experienced contractor.

[45]Clause 1(4).

[46]Clause 52.

[47]Clause 67. *See also* Section III, subsection B (Variations—Clauses 51 and 52), subparagraph (b)(2) (Variation not Acknowledged by the Engineer) in the next article of this series.

[48]The arbitrators must decide in law unless the parties agree to give them powers of *amiables compositeurs*. See THE RULES OF CONCILIATION AND ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE, Article 13(4), whose application is provided for by Clause 67.

SAUDI ARABIA

No Downturn In Arms Spending

(Continued from page 9)

assistant U.S. attorney said the government intercepted two shipments, including models and technical data, intended for delivery to the Kingdom.)

Intermediaries

Direct sales also give a little more maneuvering space to the middlemen. Saudi law prohibits commissions to agents in government-to-government contracts and in contracts for arms or arms-related services. If the sale is administered by the United States or a European government, a second set of regulations is applicable and the law is more likely to be strictly applied. But with the foreign governments out of the picture, the conditions are amenable to interpretation by the Saudi purchasing agency alone. Since there is no authoritative definition of arms (though a gun, tank and fighter plane apparently qualify) or of arms-related services (the precedents here are all over the book), a well connected