

# Contractor's Claims under the FIDIC Civil Engineering Contract, Fourth (1987) Edition — II

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## Other claims

As was indicated in Part I of this article (September 1991 *IBL*, pp 395-404), the Conditions

contain more than 30 clauses under which the contractor may be entitled to additional payment or an extension of time for completion of the works, or

both. While it is not feasible to examine them all here, the relevant clauses may be briefly listed:

Clause or sub-clause	Description of claim	Clause or sub-clause	Description of claim
6.4	Delay and cost of delay in issue of drawings or instructions;	52.1	Valuation of variations;
12.2	Delay and cost of adverse physical obstructions or conditions;	52.2	Power of engineer to fix rates;
17.1	Expense of errors in the position, levels, dimensions or alignment of the works;	52.3	Variations and adjustments upon measurement of the estimated quantities which result in additions to or deductions from the contract price exceeding 15 per cent;
18.1	Value of boreholes or exploratory excavation instructed;	52.4	Instruction of the engineer that any varied work be executed on a daywork basis and, this, be paid at daywork rates;
20.3	Value of work to rectify loss or damage resulting from 'employer's risks';	58.1	Provisional sums;
22.3	General indemnity by the employer for matters referred to in sub-clause 22.2;	59.4	Payments to nominated sub-contractors;
25.4	Indemnity for failure by the employer to comply with insurance policy conditions;	60.1	Interest at stipulated rate on delayed payments;
27.1	Delay and cost of carrying out the engineer's instructions for dealing with fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest discovered on the site;	63.3	Payment after termination by the employer under clause 63;
30.3	Indemnity for third-party claims for damage to bridges or roads communicating with or on the routes to the site;	65.3	Payment if the works or any materials or plant or any of the contractor's equipment is destroyed or damaged by 'special risks';
31.2	Cost of providing facilities to other contractors employed by the employer or duly constituted authorities, in accordance with the written request of the engineer;	65.5	increased costs of the execution of the works arising from 'special risks';
36.5	Delay and cost of certain tests required by the engineer;	65.8	Payment if the contract is terminated due to outbreak of war which materially affects the execution of the works;
38.2	Cost, in certain cases, of uncovering any part of the works or making openings in or through the same;	66.1	Payment if any circumstances outside parties' control renders it impossible or unlawful for either party to fulfil his contractual obligations or under the law governing the contract the parties are released from further performance;
40.2	Delay and cost of certain suspensions in the progress of the works ordered by the engineer;	69.3	Payment in the event the contractor terminates his employment under the contract for default by the employer under sub-clause 69.1;
42.2	Delay and cost of failure of the employer to give possession of the site;	69.4	Delay and cost if the contractor suspends work or reduces the rate of work pursuant to sub-clause 69.4;
44.1	Extensions of time for completion of the works, or any section or part thereof;	70.1	Changes in cost of labour and/or materials or any other matters affecting the cost of the execution of the works as determined in Part II of the Conditions;
49.3	Cost of executing work of amendment, reconstruction, remedying of defects, shrinkages or other faults, not due to the contractor, during the defects liability period;	70.2	Changes in cost due to subsequent legislation; and
50.1	Cost of searching for any defect, shrinkage or other fault in the works prior to the end of the defects liability period, for which the contractor is not liable;	71.1	Loss or damages due to currency restrictions and/or transfer of currency restrictions in relation to the currency or currencies in which the contract price is to be paid.
51	Variations;		

## Claim procedures and disputes

### (A) Procedure for claims

In addition to any notice of claim which the contractor may be obliged to give by virtue of an individual contract clause, as mentioned earlier, he must also comply with the procedure for the notification, substantiation and payment of claims laid down in clause 53. Clause 53 deals with five matters:

- (a) The requirement of an initial notice of claim (sub-clause 53.1);
- (b) The requirement to keep contemporary records to support a claim (sub-clause 53.2);
- (c) The requirement to substantiate a claim to the engineer (sub-clause 53.3);
- (d) The penalty for failure to comply with the procedure for claims in the previously mentioned sub-clauses (sub-clause 53.4); and
- (e) The manner in which claims are to be paid (sub-clause 53.5).

Clause 53 is concerned only with claims for the payment of money. Claims for extension of time are separate.<sup>69</sup>

#### (a) The requirement of an initial notice of claim (sub-clause 53.1.7)

If the contractor intends to claim any additional payment pursuant to the Conditions or otherwise, he must give a notice of his intention to do so pursuant to sub-clause 53.1. Sub-clause 53.1 provides as follows:

'Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.'

Like all notices under the Conditions, such notice must be given in writing and in accordance with clause 68. It would appear that such notice need do no more than refer to the event giving rise to the claim and inform the engineer of the contractor's intention to claim for such event. It need not specify the grounds for the claim or give details as to its amount.

The prompt notification of claims serves several objectives. The engineer can investigate the facts of a claim and its financial consequences while the evidence is still fresh and available. The employer receives prompt notice of possible adjustments to the contract price and, thus, to his budget. Finally, the earlier claim situations are

identified, the sooner they may be resolved.

#### (b) The requirement to keep contemporary records (sub-clause 53.2)

Upon the happening of the event that is the subject of the contractor's claim notice, the contractor is required to keep such 'contemporary records' as may reasonably be necessary to support his claim. Sub-clause 53.2 provides as follows:

'Upon the happening of the event referred to in Sub-Clause 53.1, the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Employer's liability, the Engineer shall, on receipt of a notice under Sub-Clause 53.1, inspect such contemporary records and may instruct the Contractor to keep any further contemporary records as are reasonable and may be material to the claim of which notice has been given. The Contractor shall permit the Engineer to inspect all records kept pursuant to this Sub-Clause and shall supply him with copies thereof as and when the Engineer so instructs.'

The term 'contemporary records' is not defined as, possibly, the records that may be appropriate to support a claim will vary with each case.

The engineer's inspection of the contractor's contemporary records provided for in this sub-clause would appear to protect the contractor. After such an inspection, and assuming the contractor complies with any instructions of the engineer as to the types of contemporary records which he should maintain, it would be more difficult for the engineer or the employer to challenge the adequacy of the contractor's records supporting the claim.

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**Christopher R Seppala was Chairman of the Subcommittee on the FIDIC (Civil Engineering) Conditions of Contract of SBLs Committee T (International Construction Contracts), from 1985 to 1989. In 1991 he became a member of FIDIC's Civil Engineering Contracts Committee. The views expressed herein are those of the author and do not necessarily reflect those of any other person or organisation.**  
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#### (c) The requirement to substantiate a claim (sub-clause 53.3)

Within 28 days of the notice of claim under sub-clause 53.1 or such longer period ('reasonable time') as may be agreed by the engineer, the contractor is required under clause 53.3 to send to the engineer an account giving:

- (1) detailed particulars of the amount claimed, and
- (2) the grounds upon which the claim is based, eg specifying the relevant clauses on the Conditions.

Where the event giving rise to the claim has a continuing effect, the contractor is required to submit interim accounts and a final account.

Sub-clause 53.3 provides as follows: 'Within 28 days, or such other reasonable time as may be agreed by the Engineer, of giving notice under Sub-Clause 53.1, the Contractor shall send to the Engineer an account giving detailed particulars of the amount claimed and the grounds upon which the claim is based. Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the Contractor shall, at such intervals as the Engineer may reasonably require, send further interim accounts giving the accumulated amount of the claim and any further grounds upon which it is based. In cases where interim accounts are sent to the Engineer, the Contractor shall send a final account within 28 days of the end of the effects resulting from the event. The Contractor shall, if required by the Engineer so to do, copy to the Employer all accounts sent to the Engineer pursuant to this Sub-Clause.'

#### (d) The penalty for failure to comply with the procedure for claims in the previously mentioned sub-clause (sub-clause 53.4)

To enforce compliance with the new procedure for claims in clause 53, sub-clause 53.4 provides that if the contractor fails to comply with clause 53 his entitlement in respect of any claim shall not exceed the amount that can be verified by contemporary records. The sub-clause provides as follows:

'If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by

contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub-Clauses 53.2 and 53.3)!

Thus, for example, if the contractor should fail to:

(1) give notice of his intention to claim to the engineer, with a copy to the employer, within 28 days pursuant to sub-clause 53.1, or

(2) permit the engineer to inspect the contemporary records to support a claim and to supply him with copies thereof, pursuant to sub-clause 53.2, or

(3) send to the engineer the account or accounts required by sub-clause 53.3, the contractor's right to payment in respect of the claim concerned will not exceed such amount as may (in the view of the engineer or arbitrator/s) be considered to be verified by contemporary records.

It is not clear whether sub-clause 53.4 is intended as the exclusive sanction for a failure to comply with clause 53. For example, if the contractor keeps contemporary records that could enable him to support the full amount of a claim, may his failure to comply with another requirement of clause 53 still be open to sanction?

Moreover, sub-clause 53.4 does not distinguish between major and minor failures to comply with clause 53. Thus, a failure to give notice of intention to claim until 29 days (instead of within 28 days as required by sub-clause 53.1) after the event, or to give a copy thereof to the employer, is subject to the same sanction as a failure to comply with clause 53 in its entirety.

It is suggested here that (i) clause 53.4 not be interpreted as establishing the exclusive sanction for a failure to comply with clause 53, and (ii) it would be more in keeping with the intention of such a clause for the opening words of sub-clause 53.4 to be interpreted as requiring a material or substantial failure to comply with clause 53.4.

*(e) The manner in which claims are to be paid (sub-clause 53.5)*

Under prior editions of the Conditions it was unclear whether claims were to be certified by the engineer and paid by the employer under clause 60, or whether they were to be paid on some other, unspecified, basis. Sub-clause 53.5 indicates that the contractor is now to apply for the payment of its claims, as for other amounts regularly due under the contract, by its monthly statement to the engineer under sub-clause 60.1. Such statement shall include for 'any other sums to which the Contractor may be entitled under the Contract' (sub-

clause 60.1(e)) which would allow for claims based on the Conditions. The engineer may only certify such amount in respect of any claims as the engineer, after due consultation with the employer and the contractor, may consider to be due. Sub-clause 53.5 provides as follows:

'The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer, after due consultation with the Employer and the Contractor, may consider due to the Contractor provided that the Contractor has supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim, the Contractor shall be entitled to payment in respect of such part of the claim as such particulars may substantiate to the satisfaction of the Engineer. The Engineer shall notify the Contractor of any determination made under this Sub-Clause, with a copy to the Employer.'

This new sub-clause is advantageous to the contractor as it implies that the contractor should include his claim on his monthly statement under sub-clause 60.1 and, under sub-clause 60.2, the engineer must 'within 28 days' of receiving a statement under sub-clause 60.1 certify to the employer the amount of payment to the contractor which the engineer considers due and payable, after due consultation with the engineer and the contractor. The engineer must act upon the contractor's claim within a fixed time period, 28 days. Though the engineer may consider the particulars furnished by the contractor to be insufficient to substantiate the whole of a claim, the contractor is, nevertheless, entitled to payment in respect of such part of the claim as such particulars may substantiate to the engineer's satisfaction. If the employer should fail to pay any duly certified claim (or part of a claim) within 28 days then such certified amount, like other certified amounts under the contract, will bear interest at the rate stated in the appendix to tender.<sup>70</sup>

**(B) Cut-off date for claims**

If, upon substantial completion of the whole of the works, the contractor should have any unasserted or unpaid claims, these must be included in a document described as a 'statement at completion', which the contractor is required to submit to the engineer not later than 84 days after the issue of the taking-over certificate in respect of the

whole of the works.<sup>71</sup>

In addition, these claims (to the extent not certified and paid as part of the statement at completion), together with any other unasserted or unpaid claims in respect of matters arising after the issue of the taking-over certificate, must be included in both the draft final statement which the contractor is required to submit to the engineer 56 days after the issue of the defects liability certificate and in the final statement.<sup>72</sup>

It is essential that the contractor observe these precautions, as otherwise any pending unsettled claim may be cut off pursuant to sub-clause 60.9, which provides as follows:

'The Employer shall not be liable to the Contractor for any matter or thing arising out of or in connection with the contract or execution of the Works, unless the Contractor shall have included a claim in respect thereof in his Final Statement and (except in respect of matters or things arising after the issue of the Taking-Over Certificate in respect of the whole of the works) in the Statement at Completion referred to in Sub-Clause 60.5.'

**(c) Disputes**

In practice, the contractor will usually submit his claims in the first instance to the engineer's representative, who, unlike the engineer, will usually be located at the site. If the contractor is dissatisfied with the treatment of the claim by the engineer's representative, the contractor can then refer the matter to the engineer under sub-clause 2.3(b) who must then confirm, reverse or vary the action of the engineer's representative.

If the contractor disagrees with the engineer's disposition of any claim, the contractor may then treat such disagreement as constituting a 'dispute' with the employer. In this event, the procedure laid down under clause 67 becomes applicable. Very briefly, under this procedure, the contractor is obliged to re-submit the matter, as a dispute, to the engineer for a decision. If the contractor is dissatisfied with the engineer's decision (or if the engineer fails to give notice of his decision within 84 days), the contractor may give notice of his intention to commence arbitration as to such dispute.<sup>73</sup> Thereafter, unless the matter is amicably settled,<sup>74</sup> the contractor may refer the dispute to arbitration.<sup>75</sup> The Conditions provide for arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.<sup>76</sup>

Detailed consideration of Clause 67 of

the Conditions (which the author has discussed elsewhere)<sup>77</sup> is beyond the scope of this article.

## Conclusion

A contractor who intends to contract upon the basis of the Conditions must familiarise himself beforehand with his claim rights thereunder. After the contract is signed, he should also ensure that: claim situations are promptly identified when they arise, the facts giving rise to the claims are recorded in as much detail as possible in correspondence and other records at the time, the necessary claim notices and documents are addressed to the engineer (with copies to the employer) in the appropriate form and within the required time limits, relevant contemporary records are maintained, and all the other measures are taken under the contract to secure and advance his rights. These measures imply, among other things, the

training of staff in claims procedures and the constitution of files in which project correspondence, documents and financial data are carefully maintained. The importance of creating and conserving proper contemporary records of claim situations (such as correspondence, site reports, minutes of site meetings, drawings, experts' reports and financial data) is more important than ever under the fourth edition. A prudent contractor should always be preparing for the eventuality of having to arbitrate a claim. His chances of prevailing in arbitration will depend largely upon his ability to produce the necessary supporting records. Precautions such as these are essential if the contractor is to recover the additions to the initial contract price to which he is entitled. □

applicable to monetary claims in sub-clauses 53.1 and 53.3. While in clause 44 there is no requirement to maintain contemporary records as is to be found in clause 53.2, if the contractor also seeks monetary compensation for the extension period he will have to comply with clause 53 with respect to his claim for compensation.

70 Sub-clause 60.10.

71 Sub-clause 60.5.

72 Sub-clause 60.6.

73 Sub-clause 67.1.

74 Sub-clause 67.2 provides for a mandatory 56-day period for this purpose.

75 Sub-clause 67.3.

76 Unless other arbitration rules are provided for in the Contract: Sub-clause 67.3.

77 For commentaries on clause 67, see the author's, 'The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract' 3 ICLR 315 (1986) (commentary on clause 67, third edition) and 'The Principal Changes in the Procedure for the Settlement of Disputes (clause 67)' 6 ICLR 177 (1989) (commentary on clause 67, fourth edition). See also the author's 'Pre-Arbitral Decisions of Construction Disputes: the Decisions made by the Engineer', published in English and French in *Revue de Droit des Affaires Internationales* No 3, 1991, at 331.

### Footnotes

69 See clause 44 which provides a procedure for time extensions which is similar to that