FIDIC 2023 Guide: Navigating Risk Effects and Contractor Relief Amidst COVID-19, Inflation and War

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The COVID-19 pandemic and the ongoing war have posed unprecedented challenges to the construction industry worldwide. Projects have faced significant disruptions, delays, and cost escalations due to factors such as unavailability of goods, supply chain disruptions, and fluctuating market conditions. In such scenarios, it is crucial for the parties involved to understand the contractual provisions and mechanisms available to them for relief under the FIDIC contract forms.

In this article, references are made to the FIDIC 2017 Red, Yellow, and Silver Books.

On 21 March 2023, FIDIC issued a Guidance Memorandum titled (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) to provide a comprehensive guide linking the risk effects of these global events to the relevant provisions in the FIDIC contracts.

To navigate the complexities arising from the COVID-19 pandemic and the war, the FIDIC Guide presents a concise checklist of conditions for relief under the respective FIDIC contract clauses.

Establishing causation between the risk events and the impact

on project performance is critical, and for Force Majeure or Exceptional Events (FM/EE), the party must demonstrate that prevention of performance has indeed occurred.

Additionally, it is essential to comply with the notice requirements outlined in the FIDIC contracts. In accordance with Sub-Clause 1.3 (Communications), any notice provided under the conditions must be in writing and adhere to the stipulated format and content requirements.

And it is imperative for the users to thoroughly analyze the facts, adhere to the detailed procedures specified in the General Conditions, as well as any amendments introduced by the Particular Conditions.

The risk events covered in this article are:

- Unavailability of goods due to COVID-19, with or without alternative sources of supplies.
- Unavailability of goods because of the war in Ukraine, with or without alternative sources of supplies.
- Unavailability of goods due to trade bans against Russia, with or without alternative sources of supplies.
- Damage or loss to the goods, works, or Contractor’s documents due to the war.
- Inflation of costs resulting from the global events.
- Unbearable inflation or the continuing performance of the contract being economically non-viable.
- Impossibility to continue the project due to war or COVID-19.

This article elaborates on the risk events, their contractual and legal basis, entitlements, and conditions as proposed by the FIDIC Guide.

Unavailability of Goods Due to COVID-19

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to the COVID-19 pandemic

can disrupt a project and result in delays and increased costs.

Contractual/Legal Basis: This situation is covered under Sub-Clause 18.4 (Exceptional Events) and Sub-Clause 8.5 (Delay Damages) of the Red and Yellow Books. The Contractor may be entitled to an extension of time (EOT) and reimbursement for cost increases due to inflation.

Entitlement: If the Contractor can prove that the unavailability of goods was caused by a prevention event as per SC 18.2, they may be eligible for relief. The Contractor must follow the claim procedure outlined in SC 20.2, which includes providing timely notice, mitigation efforts, and evidence of the impact.

Conditions: The Contractor must adhere to the requirements in SC 18.2 (prevention), SC 18.2 (Notice), SC 18.3 (mitigation), SC 18.3 (Notices), and SC 20.2 (Claim procedure) to be entitled to relief.

Unavailability of Goods Due to War in Ukraine

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to the war in Ukraine can lead to project delays and increased costs.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 18.4 (Exceptional Events), which allows the Contractor to claim an extension of time (EOT) and cost, including prolongation costs and additional costs.

Entitlement: If the Contractor can prove that the unavailability of goods was caused by an exceptional event as per SC 18.4, they may be eligible for relief. The Contractor must follow the claim procedure outlined in SC 20.2.

Conditions: The Contractor must adhere to the requirements in SC 18.4, which are the same as mentioned in the COVID-19 risk

event above.

Unavailability of Goods Due to Trade Bans Against Russia

Risk Event: The unavailability of goods, with or without alternative sources of supplies, due to trade bans against Russia can result in project delays and increased costs.

Contractual/Legal Basis: This situation is covered under Sub-Clause 13.6 (Changes in Laws) and SC 20.2 (Claim procedure). The Contractor may be entitled to an extension of time (EOT) and cost, including prolongation costs and additional costs.

Entitlement: The Contractor must prove that the unavailability of goods was caused by a change in the laws of the Country of the Site. They must follow the claim procedure outlined in SC 20.2 to be eligible for relief.

Conditions: The Contractor must adhere to the requirements in SC 20.2 (Claim procedure).

Damage or Loss to Goods, Works, and Contractor's Documents Due to War

Risk Event: Damage or loss to goods, works, or Contractor's documents due to war can lead to project delays and increased costs.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 18.4 (Exceptional Events) for EOT and prolongation costs, and Sub-Clause 17.2 (Variation) for cost and profit related to instructed damage/loss rectification.

Entitlement: If the Contractor can prove that the damage/loss was caused by an exceptional event as per SC 18.4 and follows the rectification instructions (deemed Variation), they may be eligible for relief.

Conditions: The Contractor must adhere to the requirements in SC 18.4 (as mentioned in the COVID-19 risk event above) and SC

17.2 (Variation) for dealing with instructed damage/loss rectification.

Inflation of Costs

Risk Event: Inflation of costs can impact the cost of labor, goods, and other inputs to the works, affecting the financial viability of the project.

Contractual/Legal Basis: This situation is covered under Sub-Clause 13.7 (Adjustment in the cost of labor, goods, and other inputs), Schedule(s) of Cost Indexation in the Contract, and SC 20.2 (Claim procedure). The Contractor may be entitled to an adjustment in costs if they can prove that inflation is above the relief provided under SC 13.7.

Entitlement: The Contractor must follow the claim procedure outlined in SC 20.2 and provide evidence that the cost of labor, goods, and other inputs have increased above the relief provided under SC 13.7.

Conditions: The Contractor must adhere to the requirements in SC 20.2 (Claim procedure) and the Schedule(s) of Cost Indexation in the Contract.

Unbearable Inflation or Economic Non-Viability

Risk Event: Unbearable inflation or the continuing performance of the contract being economically non-viable can lead to project termination.

Contractual/Legal Basis: This situation is addressed under Sub-Clause 15.5 (Termination by Employer) and Sub-Clause 18.5 (Costs and Termination by Contractor). The Contractor may be entitled to costs per SC 18.5 and, if terminated under SC 15.5, additional losses or damages suffered.

Entitlement: The Employer has the discretion to terminate the contract under SC 15.5, subject to a 28-day notice and return of Performance Security. Termination under SC 18.5 requires

prevention for more than 84 days or multiple periods totaling more than 140 days.

Conditions: The Contractor must adhere to the requirements in SC 15.5 and SC 18.5.

Impossibility to Continue Due to War or COVID-19

Risk Event: The impossibility to continue the project due to war or COVID-19 can lead to release from performance.

Contractual/Legal Basis: This situation is covered under Sub-Clause 18.6 (Release from Performance) and SC 18.5 (Costs). The Contractor may be entitled to costs per SC 18.5 if it becomes impossible or unlawful to continue, and the parties cannot agree on an amendment to the contract.

Entitlement: The Contractor must provide notice under SC 18.6 that it has become impossible or unlawful to continue the project, and the parties are unable to agree on an amendment to the contract.

Conditions: The Contractor must adhere to the requirements in SC 18.6 and follow the procedures for claiming costs under SC 18.5.

Takeaway

The COVID-19 pandemic and the war have brought about unprecedented challenges in the construction industry, with far-reaching consequences on project timelines, budgets, and overall feasibility. By understanding and applying the relevant provisions of the FIDIC 2017 Red, Yellow, and Silver Books, parties involved in construction projects can navigate these challenges more effectively, seeking appropriate relief and mitigating the impact of these global events on their projects. The FIDIC Guide serves as an invaluable resource in this regard, providing a clear, concise, and comprehensive overview of the risk events and the associated contractual

provisions, conditions, and entitlements.

In conclusion, while the current crisis demands tailored remedies and a flexible, open-minded approach, it is crucial to maintain an objective perspective when evaluating the impact of these global events on construction projects. Causation remains a critical factor, and parties must be diligent in distinguishing the challenges arising from the post COVID-19 inflation and war from those that would have been experienced regardless of these extraordinary circumstances. By carefully assessing the facts, adhering to the contractual provisions, and demonstrating clear causation, stakeholders can effectively navigate the complexities of this unprecedented situation and seek appropriate relief under the FIDIC contract forms.

FIDIC Guide: https://www.fidic.org/sites/default/files/Guidance%20Memo%20-%20War%20memorandum_170323_final.pdf

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