

CLAIM SYSTEM UNDER FIDIC



An introduction to the claim system under FIDIC
from a Danish perspective

INTRODUCTION

In the construction industry claims tends to arise between the involved parties often as a result of either delays or other unforeseen changes during the construction phase. Most construction contracts provide their own procedures as to how and when claims should be handled between the parties. In international construction contracts, FIDIC's, (International Federation of Consulting Engineers) standard contracts are often used, commonly referred to as "The Rainbow Suites". FIDIC was started in 1913 by the trio of France, Belgium and Switzerland.

In the following we will provide a brief overview of how the FIDIC claim system works. This article fo-cuses on FIDIC's Red Book - The Construction Contract, Section 20 "Employer's and Contractor's Claims". FIDIC's Red Book was the first standard contract published in 1957. FIDIC launched the second edition of the Red Book in December 2017. The process of claims has been rewritten and includes significant changes in Clause 20 and 21. The FIDIC Red Book is primarily intended for building and engineering works where the employer performs the design.

CLAIMS UNDER FIDIC

There is no doubt that the claims procedure under FIDIC is comprehensive. FIDIC provides a wide range of regulation concerning the parties' rights and obligations in relation to a claim ("Claim") and the rise, submission, reception and assessment of such. Compared to the rules under Danish construction law, one will find significant differences when examining the rules under the FIDIC claim system.

However, during the past recent years the construction industry, in general, has had an increased focus on the regulation of the more procedural rights and obligations during a construction project, including claim procedures. This change of focus is also a reality in the Danish construction industry, latest exemplified by the revision of the Danish standard construc-



tion contract, General Conditions of 2018 (in Danish: AB 18), which is - amongst other standard contracts - inspired by the procedural rules of FIDIC.

As we know from most other standard contracts within the construction industry, a Claim under FIDIC may arise in 3 main situations;

- (a) the Employer considers to be entitled to additional payment or reduction of contract price and/or to an extension of the defect notification period ("DNP")¹;
- (b) the Contractor considers to be entitled to additional payment and/or to an extension of time ("EOT")²; or
- (c) a party considers to be entitled to any other entitlement/relief against the other party³

As further set out below, under the rules of FIDIC a Claim under (a) and (b) ("Claims for time and payment") shall be considered differently than a Claim under (c) ("Other Claims").

Claims for time and payment

Claims for time and payment are the most common Claims in legal disputes within the construction industry. Such Claims are subject to the rules provided in FIDIC Clause 20.2.

1 Clause 20.1 (a)

2 Clause 20.1 (b)

3 Clause 20.1 (c)

Notice of Claim

According to Clause 20.2.1, a claiming party shall give a notice of the Claim (“Notice of Claim”) as soon as practicable, and no later than 28 days after the claiming party became - or should have become - aware, of the event or circumstance giving rise to the claim.

Firstly, when bringing forward a Claim a party shall be aware of FIDIC’s definition of a “Notice” which provide that any Notice under FIDIC - meaning any sort of communication between the parties - shall be given in accordance with Clause 1.3 and therefore be;

- (I) in writing and identified as a “Notice”
- (II) either a paper-original (signed by an authorized person) and/or an electronic original generated from any of the systems of electronic transmission stated in the contract;
- (III) include a reference to the relevant provision in question; and
- (IV) delivered by hand or sent by mail or courier, or by using any of the systems of electronic transmission in accordance with the contract to the address stated in the contract.

Secondly, the Notice of Claim shall be addressed to the Engineer⁴ and shall as a minimum provide a description of the event and circumstance giving rise to the Claim. The Engineer shall on that basis consider whether the requirements of the Notice of Claim has been fulfilled and give an *initial response*.

If the Engineer does not give Notice within 14 days after receiving the Claim, the Notice of Claim shall be deemed valid. Only if the party receiving the Claim puts forward a notice of disagreement, the validation of the Notice of Claim can be challenged. In that case, the Notice of Claim being in question shall be subject to an *agreement or determination*⁵ and a review by the Engineer under Clause 20.2.5, cf. Clause 3.7.

If the Engineer considers the requirement for the Notice of Claim to be neglected by the claiming party, the Engineer shall give notice of his/her opinion thereof within 14 days after receiving the Claim. If the claiming party disagrees with the Engineer, the claiming party shall provide the Engineer with details of such disagreement in the claiming party’s so-called *Fully detailed Claim* under clause 20.2.4.⁶

It is important to note that if a claiming party neglects the requirements of the Notice of Claim, that party shall be cut off all rights to additional time or payment under that Claim while the party receiving the Claim shall be exempted from all liability as to the event or circumstance giving rise to the Claim.

Fundamentally, this principle of sanctioning such formal and normative obligations is contrary to the rules under Danish construction law. According to Danish construction law, formal and normative obligations shall - in most cases - be deemed as “rules of proof”, meaning that the neglect of such will not affect the material right of a claim but merely the assessment of evidence (the burden of proof) in a later legal dispute.

The formal and normative obligations under FIDIC means that the claim system is of great importance to all parties involved. If a claiming party under a FIDIC contract is not vigilant and careful as to the compliance of the claim procedures, it can have serious consequences including the party being discharged from an otherwise legitimate Claim.

Follow up (Fully detailed Claim)

After giving a Notice of Claim, the claiming party is obliged to follow up on the first Notice of Claim as the claiming party in accordance with Clause 20.2.4 shall submit to the Engineer a “Fully detailed Claim”. This Fully detailed Claim shall be submitted within 84 days - if no other period has been agreed upon - after the time where the claiming party became or should have become aware of the event or circum-

4 The Engineer is the first-step adjudicator e.g. in order to handle the parties’ claims at an early stage.

5 Cf. section 2.5 below.

6 Cf. below under section “Follow up”

stance giving rise to the Claim and shall include the following;

- (I) a detailed description of the event or circumstance giving rise to that Claim;
- (II) a statement of the contractual and/or other legal basis of the Claim;
- (III) all contemporary records on which the claim party relies; and
- (IV) detailed supporting particulars of the amount of additional payment/reduction of contract price and/or the EOT/DNP claimed

If the Fully detailed Claim has not been submitted with a statement of the contractual and/or other legal basis of the Claim, cf. (ii), within the time limit (84 days), the Notice of Claim shall be deemed to have passed and shall no longer be considered as a valid Notice. In that case the Engineer shall - on the same terms as set out in Clause 20.2.2 - give Notice to the claiming party within 14 days after the expiration of the time limit.

If the Engineer does not give Notice (within 14 days), the Notice of Claim shall be deemed as a valid Notice. However, if a party receiving the Claim disagrees with such deemed valid Notice of Claim that party can challenge the deemed valid Notice by providing the Engineer with its own Notice of his disagreement. Thereafter, the disagreement shall be subject to an *agreement or determination* under Clause 20.2.5.

Other Claims

Claims according to Clause 20.1 (c) is not as common as Claims for time or payment. Notice of such Claim shall be given as soon as practicable after the claiming party became - or should have become - aware of the event or circumstance giving rise to that Claim. If a disagreement arises in relation to Other Claims, a dispute shall not be deemed to have arisen, but the claiming party may by giving a Notice refer the Claim to the Engineer and to an *agreement or determination* under Clause 3.7.

CONTEMPORARY RECORDS

Under FIDIC, “contemporary records” means records prepared or generated at the same time, or immediately after, the event or cir-

cumstance giving rise to the Claim. According to Clause 20.2.3 the claiming party shall keep contemporary records as may be necessary to substantiate the Claim. The Engineer may decide to monitor such records and/or instruct the claiming party to keep additional contemporary records.

AGREEMENT OR DETERMINATION OF THE CLAIM

After receiving a Fully detailed Claim (including an interim Claim, cf. section 2.6 below), the Engineer shall subject to FIDIC Clause 3.7 *agree or determine* if and to what extent the claiming party may be entitled to (i) a Claim for additional payment or reduction of contract price and/or (ii) a Claim for EOT or DNP. The agreement or determination shall include whether the Notice of Claim shall be treated as a valid Notice.

CLAIMS OF CONTINUING EFFECT

If the event or circumstance giving rise to a Claim for time or payment has a continuing effect, the Claim shall be considered as interim as it shall be assessed in three steps, cf. Clause 20.2.6;

- (I) first; the claiming party shall submit the interim Fully detailed Claim and the Engineer shall, as usual, respond on the contractual or other legal basis of this as usual
- (II) secondly; after submitting the first interim Claim the claiming party shall provide a monthly update by submitting further interim Fully detailed Claims
- (III) lastly; the claiming party shall submit a final Fully detailed Claim within 28 days - if no other period has been agreed upon - after the end of the effects resulting from the event or circumstance, including the total amount of the additional payment or EOT/DNP claimed.

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