

EFFECTS OF COVID-19 ON FIDIC CONTRACTS

I. COVID-19 TO BE CONSIDERED AS FORCE MAJEURE IN TERMS OF FIDIC (FIDIC Art.19.1)

As COVID-19 is neither under the control of any party, nor an event that any party could foresee before signing the contract, not an event an party may reasonably avoid and it is a situation that cannot be attributed to any side, in terms of Article 19.1 of FIDIC COVID-19 might be considered as a force majeure. However, while making this evaluation, it is also necessary to pay attention to the laws of country, which is applicable to the contract, as some national laws may not define this situation as a force majeure.

19.1. Definition of Force Majeure

In this Clause, “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control,*
- (b) which such Party could not reasonably have provided against before entering into the Contract,*
- (c) which, having arisen, such Party could not reasonably have avoided overcome, and*
- (d) which is not substantially attributable to the other Party.’*

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,*
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,*
- (iv) 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, and*
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.*

II. NOTICE OF FORCE MAJEURE (FIDIC Art.19.2)

In accordance with FIDIC Article 19.2, “If a party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the Party of the event or circumstances constituting the Force Majeure and shall specify the obligations the performing of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure”. It is important to note, that a Party prevented from performance of its obligations may experience several events, which are different from the event determined in first Force

Majeure notification. Therefore, a Party shall notify the other Party on constantly basis about each event and a way how this event affected its obligations and works.

It is also necessary to pay attention to the last sentence of the article 19.2, which reads as “*Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract*”. Force Majeure will not prevent the parties' financial obligations, thus if any party delays payments due to Force Majeure, this is a breach of contract. Much attention should be paid to this.

19.2. Notice of Force Majeure

If a party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the Party of the event or circumstances constituting the Force Majeure and shall specify the obligations the performing of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

III. OTHER NOTIFICATIONS UNDER FIDIC (FIDIC Art.8.4; Art.8.5; Art.13.7)

Notices under FIDIC Article 8.4. (Extension Time for Completion):

Sub-paragraph “d” of the Article 8.4. (refer to the Article text below) is directly defining the COVID-19 situation. While giving the Force Majeure notification, we may also refer to 8.4. Therefore, FIDIC already offers another option when national laws do not define COVID-19 as Force Majeure.

8.4. Extension of Time for Completion

The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claim] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking-Over of the Works and Sections] is or will be delayed by any of the following causes:

...

(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions”

Notices under Article 8.5. (Delays caused by Authorities):

We also need to pay attention to FIDIC made 8.5 (refer to the Article text below), as delays due to COVID-19 may also fall within the scope of delays caused by the authorities, because the authorities can revoke some permits (work permit on site, permission to enter the country). Consequently, if there is any item in FIDIC that gives us the right to extend time, it is useful to refer to those items in the Force Majeure Notice as well.

8.5. Delays caused by Authorities

If the following conditions apply, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,*
- (b) these authorities delay or disrupt the Contractor's work, and*
- (c) the delay or disruption was unforeseeable,*

then this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.4. [Extension of Time for Completion].

Notices under Article 13.7. (Adjustments for Changes in Legislation):

On the other hand, when we look at FIDIC 13.7, the “change in the Laws of the Country” expression here should be interpreted by considering FIDIC 1.1.6.5. Therefore, it should not be forgotten that any country's measures taken due to COVID-19 could create a “Change in the Laws” status under FIDIC 13.7 and an assessment can be made in this context when making a Force Majeure notification. Of course, this evaluation will lead to mutual discussion, but under FIDIC article 20.1, the evaluation of “change in the Laws” should not be missing in order to request both time and additional payment. The main purpose of referring to Article 13.7. is to determine what the effects of Force Majeure will be in terms of time extension and additional payments. Many legal systems (national laws) and FIDIC at the same time suggests that the Contractor may take additional time due to Force Majeure events. However, the problem is mostly on the financial part of issue. For example, if the project is delayed by 3 months due to COVID-19, there is a debate on which party will be the financial burden occurred due to delays, i.e. from the salary of the project managers to the warehouse rent for storing the material. If we only make a Force Majeure notice, FIDIC will give us time extension, no money. Different arguments can be produced in legal systems. But when you look at 13.7, we are likely to win both money and time.

13.7. Adjustments for Changes in Legislation

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.

If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in Laws or in such interpretations, made after the Base Date, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and*
- (b) payment of any such Cost plus profit, which shall be included in the Contract Price.*

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5. [Extension of Time for Completion] to agree or determine these matters.

FIDIC Art. 1.1.6.5.:

“Laws” means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.

IV. NOTIFICATION TERM

According to FIDIC Article 19.2 *“The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure”*. However FIDIC does not regulate what will be the result of the Force Majeure notification not being made within 14 days.

However, once we look at FIDIC Article 20.1, it is stipulated that *“If the Contractor considers himself to be entitled to any extension of Time for Completion and/or any additional payment, ...The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance”*.

As a result, even though the fact that the Force Majeure notification was not given within 14 days in accordance with article 19.2, the latest term for notice shall be considered 28 days after becoming aware of the event preventing performance of the Party’s obligations. Otherwise, there will be no other chance to require time extension and additional payment due to Force Majeure.

V. SOME EXAMPLES ON BUSINESS COMPONENTS AFFECTED BY FORCE MAJEURE AND RECORDS TO BE KEPT

After the Force Majeure notices, the Contractor must embody the request, and the Employer must evaluate what these requests are. In this sense, business components affected by Force Majeure due to COVID-19 and records to be kept can be collected in the example of the following headings:

- 1) Transportation Shutdown (ülke sınırları kapandı, kargolarda aksama var)
- 2) Site Availability Issues
- 3) Labor/Workforce Availability
- 4) Labor Inefficiency/Consequential Effects
- 5) Additional Environmental and HSE Requirements

As an example below you may see records to be kept due to Site Availability Issues:

- Issue:
 - ✓ Shutdown of work by employer/government, delaying the start or progress of required works,
 - ✓ Work fronts that cannot proceed, plant and labor workin at reduced productivity or stood idle that cannot be reallocated to other activities
- Record:
 - ✓ Record of unworkable sections/parts of the works,
 - ✓ Record of idle personnel and equipment.

As an example below you may see records to be kept due to Labor/Workforce Availability

- Issue:
 - ✓ Ability to find skilled workers that can be affected by local market conditions, availability of skilled labor, and may result in increased wage scale cost.
- Record:
 - ✓ Increased labor costs due to new recruitment (previous wage and current wage)

- Issue:
 - ✓ Ability to fully staff crews, affecting productivity and labor efficiency
- Record:
 - ✓ Record of efficiency due to lack of qualified and required number of staff.

As an example below you may see records to be kept due to Labor Inefficiency/Consequential Effects

- Issue:
 - ✓ Loss of momentum on existing projects leading to a lack of productivity and higher cost
 - ✓ Loss of productivity to acceleration, trade stacking, re-sequencing and other potential effects
- Record:
 - ✓ Measured Mile calculations about productivity
 - ✓ Previous productivity and current productivity
 - ✓ Total productivity calculations

As an example below you may see records to be kept due to Additional Environmental and HSE Requirements

- Issue:
 - Additional Environmental and HSE actions taken to minimize risks
- Record:
 - ✓ Record of additional measures for HSE and Environmental Matter.

AFTERWORD

Please kindly take care of timely preparations and submissions of claim files and relevant notices. Even if you do not receive time extension and additional payments, you will have been strengthened your position with regard to disputes that may arise in future.

SOURCE:

SARIİBRAHİMOĞLU LAW OFFICE, Istanbul