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THE NEW SUITE OF FIDIC CONTRACTS GOOD NEWS OR BAD?

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CLAUSE 21.4.3

- However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

CLAUSE 20

- Process for claims by both Employer and Contractor governed by same provision.
- Notices as conditions precedent to entitlement to time and money is a standard feature of standard form construction contracts.
- Onus on Engineer to respond to Notice and Statement [20.2.4(b);
 - Clause 20.2.2 & Clause 20.2.4
 - Deemed valid Notice or Statement in absence of Engineer's Notice.
- Clause 20.2.2 and 20.2.4 also provides a right for the claiming party to apply for relief from the time bar by providing reasons to justify the late submission of the Notice or the Statement in the Fully Detailed Claim.
- Additional responsibility to adjudicate disputes over whether or not the Notice or Statement should be treated as valid.

ISSUES ARISING

- More work for Engineer who needs to be proactive.
- Potential liability of Engineer to owner in negligence if Engineer fails to issue Notice where Notice of Claim is out of time.
- Factors for consideration in time bar applications (Clause 20.2.5):
 - extent of prejudice
 - evidence of other Party's prior knowledge
 - evidence of other Party's prior knowledge of contractual legal basis of claim
- The factors to consider under Clause 20.2.5 involve some level of subjectivity and risk for further disputes.

CLAUSE 21 DISPUTES AND ARBITRATION

- Clause 21.1
FIDIC pressing parties to accept standing DABs, default provisions to secure appointment for the life of the project.
- Clause 21.3
FIDICS newly charged emphasis on dispute avoidance.
- Clause 21.1
Principal function of dispute adjudication maintained.
- Guidance
Can resort to 1999 DAB ad hoc, but just adjudication. [Equally could provide for standing DAB as in 1999 Form.] Also ICC Mediation.

Issues arising:

- Multiplicity of dispute resolution provisions, Engineer, DAAB, Arbitration.
- Risk/cost vs benefit analysis.

CLAUSE 21 DISPUTES AND ARBITRATION

- Clause 21.4.1
The reference of a Dispute to the DAAB stops the running of any statute of limitation.
- Clause 21.4.3
The DAAB proceeding is not deemed to be an arbitration.

Issues arising:

- Does 21.4.1 create a false sense of security?
- Time bar may apply depending on the governing law.

CLAUSE 21.7

FIXING THE PROBLEM IN PERSERO I

Right to refer a party's failure to comply with DAAB decision directly to arbitration under Sub-Clause 21.6.

Note: FIDIC also has taken the opportunity to state that any failure to comply with an Agreement or binding and final Engineer's Determination under clause 3.7 [as opposed to just binding], is also immediately referable to Arbitration under clause 21.6 without reference to the DAAB.

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