

When the Clock is Ticking and the Contractor is in Delay: What Can You Do?

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A development company has engaged a contractor under a minimally-amended FIDIC construction contract on a time-sensitive project for the construction of a number of villas.

It has sold all of the villas off plan, and the purchase and sale agreements contain a fixed date for handover. If the development company fails to handover the villas on the specified date, it will be in breach of the purchase and sale agreements and liable to the owners for damages and may lose the agreements should the buyers elect to terminate the purchase and sale agreements. The contractor completes 75% of the work but begins experiencing cash flow problems and, as a result, slows its performance. 60 days prior to the handover date, it becomes clear that the contractor will be unable to meet the deadlines. The development company reviews the FIDIC contract and wants to know what its options are, if any, to achieve a commercial outcome without loss of reputation and money.

What can the development company do?

Under an un-amended FIDIC contract the development company will have limited options to ensure it meets the fixed handover date or to limit its liability. The FIDIC contract lacks sufficient rights and powers for employers who need to manage time-sensitive projects where the contractor is in delay.

Assuming the delay to the programme is for a cause for which the contractor is not entitled to an extension to the Time for Completion, the engineer may instruct the contractor to accelerate its performance at the contractor's own cost under clause 8.6. However, the contractor may not be in a position to accelerate its efforts especially where it is experiencing cash flow issues or has an insufficient workforce. Other than termination, the FIDIC contract does not provide for any sanctions to be imposed in instances where the contractor fails or refuses to accelerate after receiving instructions to do so. Termination of the contract may not be a solution as there will be delays in obtaining the necessary permits to complete the project and to have another contractor on site to carry out the work.

If the contractor's delay continues and the employer misses the Time for Completion, the FIDIC contract at clause 8.7 entitles the employer to levy delay damages on the contractor for each day of delay after the stipulated Time for Completion until actual completion. The delay damages may allow the employer to mitigate any damage it may be liable to pay under other contracts however the FIDIC contract normally caps the delay damages that may be imposed on a contractor to a percentage of the contract price. This may still leave the employer exposed to liability while the work also remains incomplete. In the scenario above, the development company may be exposed to a much higher liability under the purchase and sale agreements than the total delay damages for which the contractor is liable under the construction contract.

The FIDIC general conditions allow the employer to step in to complete the works at the contractor's cost only where the works are defective or if the contractor fails to rectify defective works during the defects liability period. Notably, the contract is silent as to the employer stepping in to complete the works where the contractor is delayed in performance. Any attempt by the

employer to forcefully step in during a delay may have legal and criminal ramifications if the contractor resists the employer's actions, and the employer resorts to force to enter the site.

The employer may issue a notice to correct and require the contractor correct the delay, failing which, the employer may terminate the contract for default. If the FIDIC contract has not been amended to include the proper references to the federal law, there is a further complication as the employer must obtain an order from a court or arbitral tribunal granting termination to lawfully terminate the contract in the UAE. In a worst case scenario, the contractor may claim it is owed money and exercise its rights at law to retain possession of the site preventing further work on the project until the decision in the arbitration is handed down several years later.

The employer may also consider initiating the dispute resolution process under the FIDIC contract however the processes in both the FIDIC 1987 and the 1999 construction contracts are protracted and require a determination by the engineer or the dispute adjudication board (which must be first appointed) to settle the dispute. These determinations may be challenged by either party and the parties must then commence arbitration to finally settle any disputes.

These mechanisms in the FIDIC contracts do not assist the time sensitive project, which could also include buildings with leases that are commencing, projects seeking to achieve a start date to make best use of the tourist season or landmark projects with announced completion times.

The employer with a time sensitive project should consider amending the FIDIC general conditions to add extra rights and powers to assist with managing the project. These amendments could include:

- Limiting the reasons for which an extension to the Time for Completion could be granted and not capping damages;
- Including a bonus for the contractor if it completes early or on time;
- The right to direct the contractor to accelerate the work for any reason and at any time. This right could be where the project is on time or where there is an employer delay (for which the employer will pay the acceleration costs);
- An obligation on the contractor to provide more regular and detailed progress reports so that the employer is kept informed of progress and possible delays;
- A right to not just terminate, but to step in and take over work, or any part of the works, where work is behind schedule;
- Requiring the contractor to include provision in all subcontracts and supply agreements for the contracts and agreements to be novated to the employer, or employer's nominee, where the employer exercises a right to step-in; and
- Managing the UAE law provisions concerning ability to terminate the contract and the contractor's right to retain possession of the site.

With the FIDIC contracts being widely used, it is a misconception that the contracts are suitable for and provide contractual parties sufficient coverage in terms of liability. For time sensitive projects special consideration is required to ensure that your rights as an employer are better protected.

Any changes need to be carefully drafted to ensure that the right outcome is achieved and that the terms are commercially acceptable. Our construction and infrastructure team at Al Tamimi can assist you manage these risks.