

クレーム意図通知の 28 日以内提出について

FIDIC レッドブックの 1987 年版（第 4 版）ではクレームを引き起こすような事象が発生してから 28 日以内に請負者はエンジニアに通知することとなっている。28 日の厳密性について検討した結果は以下のとおりである。

1) 第 4 版では工期クレームは 44.2 条、費用クレームは 53 条と別々に取り扱っている。

2) 工期クレームについては、28 日以内に通知しなかった場合に " the Engineer is not bound to make any determination " となっており、自動的にクレームを無効とするような規定とはなっていない。

3) 費用クレームについては、 " assessing the claim considers to be verified by contemporary records " となっており、クレームは当時の状況証拠に基づき評価することになるという制約があるものの、クレームを無効とするような規定ではない。

以上より、28 日以内通知がなされない場合、クレームの権利が消滅するものではないことに留意する必要がある。28 日以内に請負者が通知していないので、クレームは無効ではないかとのベトナムの発注者からの質問に対する回答を参考までに添付する。

FIDIC レッドブックの 1999 年版では以下の規定となっており、28 日の拘束力が強化されている。

20.1 Contractor's Claims

（第 2 パラグラフ）

If the Contractor fails to give notice of a claim within 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

28 日以内に請負者が通知しなかった場合の救済策は 20.1 条の最後のパラグラフ(下記参照) となるが、この場合でも上記第 2 パラグラフにより、無効となる可能性がある。

If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

DRAFT LETTER

With referred to your letter No. 1103/EVN/HT-DM/BL and 1104/EVN/HT-DM/BL, we would like to clarify as follows:

1) 1103/EVN/HT-DM/BL (Notice of Claim Intention)

a) Sub-Clause 44.2 Contractor to Provide Notification and Detailed Particulars

As mentioned in your letter, Sub-Clause 44.2 describes:

Provided that the Engineer is not bound to make any determination unless the Contractor has

(a) within 28 days after such event has first arisen notified the Engineer with the Employer,

With this Sub-Clause, Contractor's failure to notice within 28 days does not automatically invalidate his entitlement to claim and the Engineer can make determination based on contemporary records available to him.

Mr. E.C. Corbett, who is an internationally renowned British lawyer, describes in his publication titled "FIDIC Legal Guide" as below:

This clause raises the question whether a failure to give the requisite notice would be fatal to a Contractor's application for extension of time. The clause says that the Engineer "is not bound to make any determination" so it is still open for him to do so if he so wishes. How the Engineer should exercise his discretion in these circumstances is debatable. Clause 2.6 (Engineer to act impartially) presumably applies so the Engineer has to act impartially to reconcile the conflicting interests of Employer and Contractor. If he should grant the extension if deserved, the notice procedure is rendered redundant. If not, the preservation of the Engineer's power might be thought pointless. It is submitted that the Engineer should exercise his discretion in the manner suggested by clause 53 (Procedure for claims), namely to allow extensions which are verified on contemporary records but disallow very late claims of which his team had no knowledge and which the Contractor seeks to support by new or oral evidence only. In short, the Engineer should have regard to the purpose of notice provisions, namely to avoid surprises and "claims-by-ambush", and should not allow valid claims to be ruled out on technicalities.

It should also be noted that the Contractor has not claimed any extension of time for completion of the Works in his claim submissions dated 27 November 2000.

b) Sub-Clause 53.1 Notice of Claims

Sub-Clause 53.1 provides the requirement of claim notice as follows:

Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

We have to read this Clause in conjunction with Sub-Clause 53.4 “Failure to Comply” which describes:

If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Employer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Employer's notice as required under Sub-Clauses 53.2 and 53.3).

As seen in the above text, Sub-Clause 53.4 is of benefit in establishing that failure to comply with the provisions of Sub-Clauses 53.1, 53.2 or 53.3, and does not bar the Contractor's entitlement to additional payment to the extent that is verified by contemporary records.

c) Conclusions

Although it is deemed that the Lot-2 contractor failed to strictly comply with a timing of claim notice specified in the above clauses in many cases, we believe that our assessment of the claims has been fairly and reasonably made with the following reasons:

- (1) Failure to notice within 28 days is not a fatal failure to entitlement of claim as described in above sections a) and b).
- (2) We made the assessment of claims based on the contemporary records. When contractor's data was ambiguous, we used our own data and experience.
- (3) Strict enforcement of time limit (for example within 28 days) is controversial. For example, the force of Sub-clause 53.1 is mitigated by the phrase "...if the Contractor intends to claim...": If the Contractor can demonstrate that at the relevant time he did not intend to claim, perhaps because he was unaware of the potential for such a claim, then the notice requirement is inapplicable.