

“Unforeseeable Conditions” under FIDIC Contract, Yellow Book perspective – Contract Conditions for Equipment and Constructions, including Designing, for electrical and mechanical equipment, for buildings and works designed by the Contractor

The Government Decision no 1405/2010, which became effective on 20th January 2011, reinstalled in Romania the FIDIC Contract Conditions – Red Book and Yellow Book. Art. 3 of the GD 1405/2010 states “*Special Contract Conditions, for modifying/appending the contract conditions mentioned by art. 1, will be approved through an order of the Ministry of Transportation and Infrastructure*”. These Ministry Orders are:

- **No. 146/2011/01.03.2011** concerning approval of the use of the Contractual Conditions for Equipment and Constructions, including Designing, for electrical and mechanical equipment, for buildings and works designed by the Contractor and Contract Conditions for buildings and works designed by the Employer drawn by the International Federation of Consulting Engineers (FIDIC) for investment objects in the transport infrastructure financed by public funds and of national interest,
- **No. 211/2012/12.03.2012** for modifying and appending Decree no.146/2011

According to **FIDIC Yellow Book** – General Conditions and Special Conditions, sub-clause **1.1.6. Other Definitions, paragraph 1.1.6.8 “Unforeseeable”** means not reasonably foreseeable by an experienced Contractor, by the Tender submission date.

Sub-clause **4.12 Unforeseeable Physical Conditions** has been modified by SCC¹ to become “*Except situations otherwise mentioned in the Contract: (a) The Contractor will be obliged to have obtained all necessary information with regard to various and unforeseen risks, including other circumstances that may affect or are affecting the Works; (b) by signing the Contract, the Contractor takes full responsibility that he has foreseen all difficulties and costs for the successful completion of the Works, and (c) The Contract Price shall not be adjusted to consider any difficulty or unforeseen cost.*”

Approaching the “unforeseeable” subject for execution purposes can be done according to the following sub-clauses:

- **8.4 Extension of Time for Completion:** *The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of the Time for Completion if and to the*

¹ SCC – Specific Contract Conditions

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: ...(c) exceptionally adverse climatic conditions that have a direct influence over the progress of works and which occur between March and November,... (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions...”,

- **8.5 Delays Caused by Authorities** “*If the following conditions apply, namely: ...(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]. The Contractor shall not be entitled to any payment of profit related to any delay or disruption*”
- **17.3 Employer’s Risks** “*... (h) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.*”

Detailed analysis of the subject compels a series of observations, which will lead to specific conclusions:

✚ **Adverse special Climatic Conditions:** the unforeseen factor is imposed by mentioning in this category only the conditions which are exceptional for the geo-climatic profile of the area, meaning that not every precipitation overflow or temperature limit excess enter under in this category; therefore a calculation formula is set, including the analysis of the climatic conditions over the last 10 years.

The Contractor’s entitlement is limited to extension of time.

✚ **Unforeseeable shortages in the availability of Personnel or Goods caused by epidemic or governmental actions:** assesses the socio-political conditions for the project development in the area, considering the obstruction in creating normal premises for contracting goods and personnel is the state’s responsibility.

The Contractor’s entitlement is limited to extension of time

✚ **Delays or unforeseen disruptions caused by authorities:** This sub-clause does not consider the regular situations of obtaining some approvals or agreements, which due to incomplete or erroneous technical documentations produced by the Contractor cannot be properly finalized. There are situations when the Authority in question issues a preliminary approval, requesting the correction of the Technical Project prepared by the Contractor and the latter refuses to implement the corrections or necessary adjustments, without offering technical grounds for his refuse. On the other hand, the Contractor, which delayed or

interrupted the works execution according to the Base Program of Works, does not consider unusual to claim extra costs and extension of time for a situation to which he contributed, although it is not entirely his to be blamed for. Actually, in these situations, the culpability for non-compliance to the Base Program of Works is divided between 3 or 4 parties:

- **The Authority** which requests modifications or correction, trying to impose its own rules, without considering the project's national interest facet and the Employer/Contracting Authority's rules and procedures;
- **The Contractor**, which without having sufficient technical reasons, refuses to operate the necessary adjustments to the Technical Project;
- **The Employer**, which as state agent and stakeholder in the Project, fails to mediate between the involved Authority and the Contractor and sometime
- **The Engineer** whose involvement and risk assessment of the circumstances fail to resolve the case, either due to the approach method, or as an effect of his reduced authority, stipulated under FIDIC Contract Conditions – SCC.

In this case also, the Contractor's entitlement is restricted to extension of time.

✚ **17.3 Employer's Risks** "... (h) any operation of the forces of nature which is unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions."

In this case, the Contractor is attracted to include any other unwanted events, obstacles or risks that he has come across during design and execution, without analyzing the generating, responsible causes and factors, either because he cannot do it, or because it is not in his interest to do so. The unidirectional approach of some events, with the purpose to reach the expected conclusion, namely that are unforeseen factors which are the basis for some disruption or modification of the technical solution, method statements, materials used etc. could have undesirable effects, especially on projects that are co-financed through European non-reimbursable funds.

In DB Contracts, this approach could be based on a weak acknowledgement and understanding of risks distribution towards Contractor, especially of design related ones. The prior use in Romania, almost exclusively, of the FIDIC Contract Conditions – Red Book for road infrastructure, has determined that the majority of the participants to this market has not exercise and has limited knowledge of the FIDIC Condition of Contract – Yellow Book.

The Contractors' tendency is to assume reduce responsibility with to regard the technical solution proposed, under the idea that any modification of the Technical Design could be assigned, if not to the Employer's errors as per FIDIC GC Red Book, at least to some *unforeseeable* external factors.

The Contractor neglects that in FIDIC GC Yellow Book projects, the adjudicated price of the tender is higher, including an estimated percentage for covering the risks associated to the design.

The solution modifications, operated by the Contractor throughout the project time life, for: adjustment to the site conditions, correction of some design failures, completing the design upon the production and execution necessities and possibilities, should be correctly included as part of those risks covered by the Contract Price. The deficiencies or lack of complete design preliminary climatic, geological, surveying investigations within the site area could often be the source of the design errors.

The Contractors usually decline responsibility for the design errors, looking for excuses in the erroneous data made available by the Employer according to **4.10 Site Data** and **4.7 Setting out**.

Many times, the insufficient site investigation performed by the Contractor, as required preliminary activity of the Technical Design, non-correlation of the solutions to the results that followed investigations or frequently, Designer's lack of experience or professionalism, as associate or part of the Contractor's company, have led to design solutions that are inapplicable or have negative impact on all project works and surrounded area.

It is also true that, disregarding the method statements, consisting in: protective measures for works' performance, prevention of unpleasant incidents and observing the sequence of activities for ensuring proper execution, is also the cause of unforeseeable and undesired occurrences, with destructive effect over the works items, excluding the "*unforeseeable*" character of these events.

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