

The lucrative & synergetic game between the Actors

I _ References Clauses / Sub-Clauses of FIDIC

(i) _ SC04.4 [Sub-Contractors], (ii) _ SC05.2 [Nominated Sub-Contractor] : Engineer instructs/intimidates to deploy S/C in conjunction with (iii) - SC13.1 / .2. & .3 [Variation Procedure] with elevated evaluated prices [SC12.3 Evaluations]

II _ Considerations in all phases of the project cycle / hierarchical levels

What is to do / to check / to validate / to verify in order to carry out ...

- A _ Proper designed / “engineered” **Tender Dossier** with clearly described information in GCC+PCC
- A1 _ About the S/C like **name & address**
 - A2 _ **Date** of signing
 - A3 _ specified **Purpose** of the Contract :
 - supply of material / goods only ,
 - labour leasing only
 - equipment rent only
 - production of work packages, measured and paid in line of BoQ-items
 - A4 _ **Scope of works** covered plus ancillary / auxiliary / temporary works
 - A5 _ Details about the **quantity** of
 - material supply
 - skilled and unskilled labour leased
 - equipment rented
 - works package to cover defined BoQ-items and recorded in the SC04.21
 - A6 _ **28 days’ notice to commence S/C works** / planned commencement data
 - A7 _ Notice of **actual commencement** data
 - A8 _ Notice about **Planned and Actual completion** of the S/C works
 - A9 _ **Value** of the works in **local currencies** only, if allowed in foreign currencies too.
 - A10 _ Terms and **conditions of payment** (local + foreign currencies, **base date rate, i.e. 1,30 USD/Euro**)
- B _ Variation Procedures with “**elevated**” new quantities + rates/new prices subject to SC 12.3 [Eval]
- C _ accountable **Disruption & Delay Analysis** / forensic investigation and/or
- D _ credible **Technical & Financial Audits by our Team** www.ppe61.de/01.15.pdf

III _ Actions in Procurement phase, Implementation phase and DNP.

- 1_ **Validation and Verification** of the Facts gathered by Contractor’s evidences and Engineer’s recordings. Besides Minutes of meetings provide data to validate the consistency of the work programmes (SC08.3), rate of progress documented on a monthly basis and Monthly Progress Report (SC04.21). The S/C-data provides a good opportunity to trace back the reality on Site
- 2 _ Variation procedure with exaggerative **quantities and high elevated evaluated** rates/prices
- 3 _ **Disruption and delay analysis** can be carried out in comparison of the Work programme SC08.3 + Monthly Progress Report SC04.21, esp. (h) and the proper documentary evidences, monitored and controlled with the Engineer’s legal correspondences and his diary.
- 4 _ **Technical and Financial** audits helps to identify **discrepancies to claim or prevent in future.**

IV _ Identification of Commissions derived ... refer to File 04.4+SCBD.pdf

www.PPE61.de/04.4+SCBD.pdf Break Down of 20% Brokerage / Commissions / Provisions / Wealth 2nd income

**Contracting of "ordinary" Sub-Contractors for "Provisional Sums" in Millions
due to misconception to pay in foreign Currency without Tax**

"Nominated" Sub-Contractor's compensation is already defined in the "Award of ACA / Contract Price" or **"instructed by Engineer to employ the sub-contractor** [SC05.1(b)] in conjunction with a Variation Procedures [Clause 13]

Description	Unit Rate for permanent works with temporary and auxilliary works only. The P&G / preliminary and general costs for Site Establishment, time- and value-related costs, and demobilization seperately paid with Bill No 100.	Unitrate with incorporated / P&G Indirect costs due to ZERO definition of site establishment, running and value related costs, demobilization in Bill No 100 P&G/
Unit Rate in BoQ (with or without P&G)	100%	100%
e.g. the UR differs ... P&G surcharge	100 Euro	123 Euro
Bill No 100 : P&G in seperate BoQ measured and paid, without shift costs - must be seperately claimed. Assume: 23% without additional shift costs.	0%	23%
Bill No 200 - 2100 : permanent works with temporary and auxilliary works linked to the respective BoQ-item	100%	77%
Available Turnover for Sub-Contractor of the UR (without or with incorporated P&G)	100%	77%
Main Contractor's Superintendence over the ordinary Sub-Contractor (Note: mostly limited to 5% for Provisional Sums SC13.5)	-5%	-5%
Provisions / split commission paid by Sub-Contractor for brokerage to ? Eng / Emp ?	-20%	-20%
Subcontractors remaining contingent out of the Unit Rate to carry out his works	75%	52%
Consequences: squeeze out the payment of the workforce and save money for bribes.	These actions are aim against the work force (approx. 85% of the population) to get exploited by low wages & salaries. These It impedes the economic development of the beneficiary country.	
Loss of Main Contractor, if he does not consider his P&G incorporated in his BoQ-Rates. The Contractor will not be able to recover his 23% indirect costs + 5% superintendence + additional shift / acceleration costs, if he buys the SC-works for 72% of the BoQ-Unit Rate.	Sub-contractors "buying" Unit Rate = 100% BoQ Unit Rate mins [-23% (IDC) - 5% (Superintendence) - 3% shift / acceleration costs = minus 31%] = 69%. However in this case, the Subcontractor is said to be intimated to pay out the 15%-20% brokerage commission to the beneficiaries..	

Avoid Disputes by proper Breakdown of Contract Price CP

A _ PLAN		We look for a long-lasting, trustworthy relationship with our Sub-Contractors.						
Sub-Contractor offer								
Pile production		100 days	1000 lin meter	Production rate = 10 meters only/day				
Initially agreed Contract price	100.000 Euro							
Production time 20 working days per month								
Type of Cost		Allocation	End M1	End M2	End M3	End M4	End M5	Check
Site Establishment	9%	9.000	9.000	-	-	-	-	9.000
Running cost per month	10%	10.000	2.000	2.000	2.000	2.000	2.000	10.000
Other costs / risk coverage	3%	3.000	600	600	600	600	600	3.000
Site Demobilization, Cleaning	3%	3.000	-	-	-	-	3.000	3.000
Indirect costs IDC without Profit	25%	25.000	11.600	2.600	2.600	2.600	5.600	25.000
5% default profit	5%	5.000	1000	1000	1000	1000	1000	5.000
Direct cost for permanent works	70%	70.000	14000	14000	14000	14000	14000	70.000
Turnover / Earning per month	100%	100.000	26.600	17.600	17.600	17.600	20.600	100.000

B _ S/C Claim for de-scoping of 25.000 Euro > Turnover 75.000 Euro only.							
Execution time = fixed / unchanged		Plan	descope / absorbed		not absorbed		
Turnover decrease due to omission of works		100.000	75.000		25.000		
absorbed IDC with the initial Contract Price / not absorbed due to decrease Contract price (de-scoped)		25.000	18.750		6.250		
5% Profit Loss (deficit), if he has not other chance to recover by other work load		5.000	3.750		1.250	!!!	
Other preparatory works not included in permanent works (Design Costs, on store, - residual value)							not known for now
Claim amount by Sub-Contractor					30%	7.500	plus increase

Refer Red FIDIC Book / MDB2010 > to SC12.4 Omission

[04.4+Subcontractor-Omission+ContractPriceIncrease.pdf](#)

M/C - Owner's Claim for INCREASE of Contract Price by 25.000 Euro							
Execution time = fixed / unchanged		Plan	increase of / overpaid IDC		overpaid		
Turnover increase (direct + indirect cost + profit)		100.000	125.000		-25.000	to cover unjust E.	
absorbed IDC with the initial Contract Price / overpaid IDC due to increased Contract price		25.000	31.250		-6.250		
5% Profit for "additional works" cannot be bereaved		5.000	6.250		xxx	physical works done	
Other preparatory works not included in permanent works (Design Costs, on store, - residual value)							not known for now
Owner's Claim amount due to Contract Price increase					25%	-6.250	plus increase

AGREEMENT >>>

www.ppe61.de/03.5+NoticeofDetermination-ByAGREEMENTofParties.pdf

ASCERTAINMENT >>>

www.ppe61.de/03.5+NoticeofDetermination-ByASCERTAINMENTofEngineer.pdf

All data : >>>

www.ppe61.de/03.5+NoticeofDetermination-All.pdf

Exploitation of **untalented professionals vs. unjust enrichment:**

www.ppe61.de/S+UnjustEnrichment.pdf

File Name of this document

www.ppe61.de/04.4+Subcontractor-Omission+ContractPriceIncrease.pdf

Black Box : Directed/Instructed nominated Sub-Contractors by Engineer

Procurement Phase

Employer's / Consultant's **Responsibility:**
 Incompetence or "deliberate" approach
 1 _ **Design** defaults
 2 _ **Specification** not according to GIIP / state-of-art
 3 _ **Provisional sums** in BoQ, and extra displayed in the Contract Price, however, **vague described**, but with high values
 4 _ Transparency for **preliminary and general provisions** in Bill #1 is missing
 5 _ imprecise defined **Shifts / Working hours** for the Service and Work Contractors, causes confusion / pro referentem. Contractors do not ask for clarifications for such essential issues".

Implementation Phase

Employer's / Engineer's **Responsibility:**
 1_ Use **Design** defaults to initiate Variations SC13.1
 2_ Change the outdated **Specifications** for **material** modifications
 3_ **Instruct "nominated" Contractors** to be paid out the large values of the **Provisional sums**
 4_ The high Unit rates - due to incorporated indirect costs in Bill No1: preliminary and general provisions - are misused for **new rates and new price Evaluations (SC12.3) for Services and Works**
 5_ Despite porose drafted Tender Documents (i.e. **Working hours / shifts SC**) the Employer / Engineer press the Contractor to take over the Consultant's Service expenditures for the second shift.

"Flexibility" - Objectives to incorporate design defaults with obsolete Specifications to reach unjust enrichment by instructed Variations in the Design and Implementation Phase.

The question remains: incompetence or deliberate intent to **produce Variations as much as possible.**

A _ **Design Modification** > design modification duties shift to Contractor www.ppe61.de/S+DesignDuties.pdf

B _ **Specification** > **Material trading** in context with S/C www.ppe61.de/04.4+Synergy.pdf

C _ **Provisional Sums** > **non-defined, vague expressed works** will be instructed to "nominated S/C" by Engineer

D _ **New Rates/Prices** > The Unit Rates / UR **comprise indirect cost.** Hence new rates and prices are **overpaid.**

E _ **Shift / contra proferentem** > Contractor pays the Consultants for their **shift presence.** Conflict of Interest, isn't it?

Main Objective: Discover irregularities during Design, Cost Estimates, Procurement and Implementation Stage to safeguard Value for Money ... www.ppe61.de/01.15+Audit-Success.pdf

Our Offer: We are the competent and experience professionals to give utmost support for Donors. We **perform fully** in compliance with the **Donor's policy, their standards,** and their expected outcomes. Our AUDITS / Mid-Term-Reviews, Monitoring/Evaluation Missions will **discover irregularities** www.ppe61.de/01.15+Audit01.pdf of the Parties.

Donors and other clients can trust and rely on our excellent delivered services.

Today's Cleverness: Chinese are clever, they roll out **max. 70%** of the "Bid Contract Price" only.

Chinese finance the **"real value"** www.ppe61.de/OLAF1.pdf.

Tomorrow's Improvement:

The Donors and accountable Governments have to improve

(i) **their procurement System** with benchmarks like **external** review of **Cost Estimates**, range of **award envelop:** below – reject underestimated offers / above – www.ppe61.de/01.15+adapt procurement docs, new procurement for Service and Works Contracts. involve external experts in **technical and financial** evaluations

(ii) Government shall be **responsible for any increase of any Contract price** due to Claims and Variations of **design & specifications, instructed nominated Sub-Contractors.**

(iii) No loan with grace periods and minimum interest rates or No funds will be provided by IFIs.

(iv) **Recovered Assets/Bribes** shall be **awarded for Whistle Blowers and impunity for Crown Witnesses.** Without the introduction of a **10-15% award** of Whistle Blowers of recovered assets, nothing will work. www.ppe61.de/15.6+Trustee.pdf

Our Offer: We are ready to provide our advice to avoid collaborations between the Parties to **save a lot of monies.** Donors and Governments should think about their spendings. **Taxpayers will be lucky.**

Main Contractors may not be liable for the Nominated Subcontractors' Delay

Ahmad Ghoneim - Partner - Litigation / Construction and Infrastructure
a.ghoneim@tamimi.com - Abu Dhabi

The UAE Civil Transaction Code (“CTC”) provides in article (890) that the main contractor may sub-contract the construction contract, in whole, or in part, unless otherwise agreed in the construction contract. However, this article highlights that the main contractor, and not the subcontractor, will remain liable towards the employer.

This article does not differentiate between the domestic subcontractors whom being selected and appointed by the main contractors, and the nominated subcontractors whom being selected or nominated by the employers or the consultants.

Therefore, the question now whether, or not, the UAE local courts recognize the difference between these two types of the subcontractors, and thus, the main contractors’ liability regarding the subcontractors’ defaults, as per article (890) of the UAE CTC, may not be applicable, if the subcontractors are nominated subcontractors. We will answer this question throughout the following case study.

Background of case

An employer (“Employer”) entered into a construction contract (“Contract”) with a main contractor (“Main Contractor”) to construct a building, in Dubai, consisting of a basement floor, ground floor, and a further seven floors (“Project”). The construction period set out in the Contract was (365) day. The Contract imposed a delay penalty on the Main Contractor for each day in delay, with a cap of (10%) of the value of the Contract. The Contract empowered the Employer and/or the consultant (“Engineer”) to nominate subcontractors (“Nominated Subcontractors”) to execute certain provisional sum items of the Contract. However, the Main Contractor signed the subcontract agreements with the Nominated Subcontractors after the Engineer and/or the Employer nominated them.

The completion date of the Project was delayed, and therefore, the Employer retained monies owing to the Main Contractor by applying the contracted delay penalty. The Main Contractor submitted a claim to the Engineer, for extension of time since the delay occurred in the Project was contributed by the Nominated Subcontractors, and thus the Main Contractor requested to release the value of the delay penalty and to calculate the prolongation costs allegedly owed to the Main Contractor. The Engineer rejected the Main Contractor’s claim.

The Employer filed a case against the Main Contractor to establish the Main Contractor’s delay in completing the Project, and thus, to establish the Employer’s right to retain the value of the delay penalty. Meanwhile, the Main Contractor filed a counterclaim against the Employer to claim for the payment of the sums retained by the Employer in respect of the delay penalty, prolongation costs, as the Nominated Subcontractors were responsible for the Project’s delay.

Court of First Instance

The Court of First Instance appointed an engineering expert to establish whether the Project completion date was delayed, or not, and if so, to identify who was responsible for the delay, the exact period of delay, and the due compensation, if any.

The Court-appointed expert prepared a report, in which the expert highlighted that the Project’s completion date was delayed because of the Nominated Subcontractors, and accordingly the Employer did not have the right to apply the delay penalty to the detriment of the Main Contractor. The expert further pointed out that the Main Contractor was owed AED 937,434.00 for work done, which the Employer retained based on its unjustified claim to apply the delay penalty on the Main Contractor. The expert did not calculate the prolongation costs claimed by the Main Contractor.

The Employer objected to the result of the expert's report, and argued that the expert should not release the Main Contractor from the liability of the Project's delay. The Main Contractor also objected to the report, and argued that the Court-appointed expert should have had calculated the prolongation costs that the Main Contractor suffered due to the Nominated Subcontractors' delay.

Consequently, the Court remitted the case file, including the objections raised by the Employer and the Main Contractor regarding the expert's report, to the appointed expert for his response.

The expert prepared a supplementary report, in which he asserted the validity of the result of its first report, except the Main Contractor's entitlement for the claimed prolongation costs, which was not calculated in the first report. The expert added in its supplementary report that the Main Contractors should be entitled for an additional amount of AED 351,142.00 as a prolongation costs.

The Court of First Instance issued its judgment, in which the Court rejected the Employer's case, as the Nominated Subcontractors were responsible for the Project's delay. Meanwhile, the Court accepted part of the Main Contractor's claim against the Employer, which is the outstanding amount of AED 937,434.00 that was retained by the Employer against the delay penalty.

Thus, the Court of First Instance did not allow the Employer to apply the delay penalty on the Main Contractor, as it determined that the Nominated Subcontractors were responsible for the Project's delay. The Court did not award the Main Contractor its claimed prolongation costs.

Appeal Court

The Employer filed an appeal, and requested the Appeal Court to withhold the judgment issued by the Court of First Instance, based on the Main Contractor's liability for the Nominated Subcontractors' delay, as the Main Contractor was the party who contracted with the Nominated Subcontractors, even though the nomination for those Nominated Subcontractors was initiated by the Engineer. The Employer further argued that the Main Contractor was responsible for supervising the Nominated Subcontractors' work, and there was no contractual relationship between the Employer and those Nominated Subcontractors. Therefore, the Employer asserted to the Appeal Court that the Main Contractor should pay the delay penalty to the Employer.

The Main Contractor filed an appeal, and requested the Appeal Court to amend the judgment issued by the Court of First Instance in respect of its rejection of the prolongation costs claim, and thus the Main Contractor requested the Appeal Court to add the prolongation costs to the amount awarded by the Court of First Instance.

The Appeal Court issued its judgment, in which it rejected the Employer's appeal, and accepted the Main Contractor's appeal, and therefore amended the judgment issued by the Court of First Instance by adding the prolongation costs in an amount of AED 352,142.00 to the amount awarded to the Main Contractor. The Appeal Court determined that the Nominated Subcontractors' delay was due to the Engineer's delay in nominating them, although the Main Contractor requested the Engineer several times to nominate those Nominated Subcontractors to avoid any delay in the Project's completion date.

Cassation Court

The Employer filed a cassation appeal, and requested the Dubai Cassation Court to withhold the judgment issued by the Appeal Court, based on article (890) of the UAE CTC, which stipulates that the Main Contractor is liable towards the Employer, for the subcontractors' defaults, including the subcontractors' delay. The Employer asserted to the Cassation Court that the Appeal Court misapplied the law when it

relieved the Main Contractor of the Nominated Subcontractors' delay, and accordingly, awarded the Main Contractor compensation (i.e. prolongation costs) for the delay occurred in the Project. The Employer reiterated its arguments related to the non-existence of any contractual relationship between the Employer and the Nominated Subcontractors, as the Main Contractor is the party who **contracted** with them, and therefore these subcontractors should be considered as domestic subcontractors, and not Nominated Subcontractors, even though the nomination of those subcontractors came from the Engineer. In addition, the Employer argued again that the Main Contractor was supervising the work of the Nominated Subcontractors, and accordingly should be liable for their delay.

The Dubai Cassation Court issued its judgment number (266/2008), in which it held that article (890) of the UAE CTC is applicable to the domestic subcontractors selected by, and contracted with the main contractor. The Cassation Court held that article (890) of the UAE CTC is not applicable to nominated subcontractors, even though the main contractor is the party who contracted with them, as long as the consultant and/or the employer nominated them to the main contractor.

The Cassation Court further pointed out that the employers are responsible for any default may occur by their nominated subcontractors, even where they were nominated by the engineer.

Therefore, the Cassation Court rejected the Employer's cassation appeal.

Conclusion

Although article (890) of the UAE CTC **does not** differentiate between domestic subcontractors and nominated subcontractors (nominated by the consultant and/or the employer), the UAE local courts **do differentiate** between these two types of subcontractors.

Article (890) of the UAE CTC is not applicable to the nominated subcontractors, as long as the consultant and/or the employer nominated them to the main contractors, even though their contracts are with the main contractor.

The main contractors should not be responsible for the defaults of the nominated subcontractors, unless the main contractors contributed to these defaults.

For further information please contact [Ahmad Ghoneim \(a.ghoneim@tamimi.com\)](mailto:a.ghoneim@tamimi.com).

