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DOI: 10.35117/A_ENG_21_06-07-08_02

The COVID-19 epidemic and contracts for construction works concluded on the general terms and conditions of FIDIC under the Act on Public Procurement

Abstract: The COVID-19 epidemic does not stop investment processes. Moreover, the stimulation of the economy will consist, inter alia, in the strong stimulation of the public investment sector. Therefore, entrepreneurs who currently meet the challenges will not cease to fulfill their obligations and will meet the contractual conditions have a chance to implement further contracts - otherwise, they risk being excluded from future proceedings.

What should be kept in mind? Conditions under which contracts for construction works were concluded

The FIDIC contract terms - also in Poland - constitute a commonly used contract standard, the basic and most frequently used types of which are the "red book" (concerning the traditional "build" contract model), "yellow book" (including the "design and build" formula) and " silver book "(general implementation of investments, so-called" turnkey "). The following remarks apply to all the mentioned types of FIDIC contracts, referring to the editions dated 1999, still commonly used in Poland, however, the equivalents of the cited provisions should be easy to find in the newer editions published in 2017 (the wording of the updated provisions may only be slightly changed or in some cases identical).

COVID-19 outbreak. There were serious and objective obstacles in the performance of works - what next?

When looking for a basis for a contractual claim under FIDIC conditions, one should, first of all, indicate Sub-Clause 19.1 FIDIC, which establishes an open catalog of circumstances that may indicate force majeure. Thus, an "event or circumstance" was identified as force majeure, beyond the control of (i) the parties to the contract; (ii) the consequences of which cannot be hedged; (iii) which cannot be avoided or overcome; (iv) if the other party cannot be blamed for the occurrence of a particular event or circumstance.

Therefore, the identification of force majeure was left to the party claiming its existence, and the rest of Sub-Clause 19.1 The FIDIC only contains a (no less very important) catalog of exemplary "events or circumstances" of an exceptional nature. Importantly, listed in the second part of Sub-Clause 19.1 FIDIC circumstances marked as (i) - (iv) are closely related to the action of human factors such as war, terrorism, strike, exposure to explosives or radioactive contamination. Only the last of the sub-items (v) mentioned in the described sub-clause refers to a "natural disaster", which - according to the authors - can also be identified with an epidemic (pandemic) of an infectious disease.

Interestingly, on the basis of FIDIC, only Subcl. 8.4 (d) of the FIDIC relating to the extension of the time for completion in the event of "unforeseen inability to employ staff or availability of goods caused by an epidemic or government action".

In view of the ongoing COVID-19 pandemic, it is the lack of staff that will be the main problem for investors (e.g. limited human resources due to mandatory quarantine or the need to look after children). Moreover, there may be problems with the availability of the necessary building materials.

What are the contractors' options?

In the first place, the contractor will be obliged to notify the investor (the contracting authority) of the occurrence of force majeure, which makes it difficult or impossible to perform the investment in a manner consistent with the contract, causing delay or additional costs.

In the event of force majeure, contractors pursuant to Sub-Clause 19.4 The FIDIC may have the right to:

- (i) extend the time for completion;
- (ii) payments for additional costs incurred in connection with the occurrence of force majeure - however in strictly defined cases, because Sub-Clause 19.4 FIDIC allows the contractor to claim the costs incurred only if the force majeure event is caused by human factors. Therefore - on the basis of FIDIC - the occurrence of natural disasters (pandemic, other natural disasters) will not entitle the contractor to claim additional costs from the contracting authority, incurred, for example, to remove the effects of an epidemic.

In the event of force majeure, a party that cannot meet a contractual obligation should notify the other party pursuant to Sub-Clause 19.2 FIDIC within 14 days from becoming aware of the event or circumstances (in addition, the party affected by force majeure is obliged under Sub-Clause 19.3 of FIDIC to reduce the delay in performing its contractual obligations).

With regard to the 14-day period referred to in Sub-Clause 19.2 FIDIC, it should be noted that it should not be considered a deadline within the meaning of the Civil Code, which is related to the decision of the Supreme Court of 23 March 2017, file ref. act. : V CSK 449/16, made on the basis of the legal nature of Sub-Clause 20.1 FIDIC. Therefore, it will be legitimate to argue that the effect of the expiry of the contractor's claim in the event of failure to meet the deadline in 19.2 FIDIC can only be spoken of in terms of contractual liability, and the time limit provided for in Sub-Clause 19.2 FIDIC, as a rule, should not limit the contractor's right to pursue possible claims under the Civil Code.

An independent premise for the contractor to obtain additional remuneration in the event of an epidemic may also be Sub-Clause 13.7 FIDIC regarding adjustments resulting from changes in the legal status. However, it should be noted that, unfortunately, it is often deleted on the basis of special contractual conditions by Polish ordering parties! The cited clause seems to correspond to the rebus sic stantibus clause known from the Polish Central Committee (Art. 3571 and 632 § 2 of the Civil Code). Thus, even in the case of deleting Sub-Clause 13.7 FIDIC, it should be considered that the contractor essentially retains its rights under the Civil Code (See the judgment of the Supreme Court of April 26, 2016, file reference number: I CSK 306/15). Nevertheless, it should be noted that the vast majority of participants in the investment process would prefer the planned implementation of the investment, even in the face of such extraordinary circumstances as the COVID-19 pandemic.

What are the possibilities of changing the contractor's remuneration under the PPL?

Clause 19.4 of the FIDIC on force majeure may be used directly in public procurement contracts as a justification for changes to material contractual provisions within the meaning of Art. 144 sec. 1 point 3 of the Public Procurement Law.

The change of the remuneration of the contractor implementing the contract concluded as a result of the public procurement procedure could be made primarily on the basis of the provision of Art. 15r paragraph 4 point 3 of the "Act of March 2, 2020" on special solutions related to the prevention, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them ", which indicates as a premise for amending the contract the statement of circumstances related to the occurrence of COVID-19, which may or affects the proper performance of a public procurement contract. The cited provision of the Act strictly refers to the premises for amending the contract, in this case, pursuant to art. 144 sec. 1 point 3

of the Public Procurement Law, and therefore on the basis of an annex concluded on the basis of a consensus of the parties to the contract.

Therefore, in order to amend a public procurement contract on the basis of the aforementioned premise, the unanimous will of the parties to the contract is necessary, moreover, it is primarily the contracting authority that will be obliged to confirm the existence of the premises of "circumstances related to the occurrence of COVID-19" (in particular on the basis of information obtained from the contractor), related to the possibility of applying Art. 144 sec. 1 point 3.

The amount of the contractor's additional remuneration should be determined pursuant to Sub-Clause 3.5 FIDIC.