

RURAL ACCESS PROGRAMME

Conditions of Contract – 1. Extensions of Time & Control

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Conditions of Contract - Topics

- 1. Extensions of Time & Control**
- 2. Contractual Claims (Costs)**
- 3. Disputes and Termination**

Contents

- ❖ Introduce GCC Provisions
- ❖ Establishing Entitlement (to EoT)
- ❖ Contractor's and Employer's Risks
- ❖ Quantification (of EoT)
- ❖ Liquidated Damages
- ❖ Insurance (and its relationship)
- ❖ Case Studies

General Conditions of Contract

- ❖ PPMO Standard Bidding Document (> NRs 6M 2014)
- ❖ Amended from PPMO SBD (2010)
 - ❑ Contractor's Design (e.g. temp works)
 - ❑ Enhanced Safety & Env Protection provisions
 - ❑ Appointment of Adjudicator / DRC
 - ❑ PM has 30 days to certify payments (GCC 40.2)
 - ❑ Comp. Event – 'Force Majeure as determined by PM' added (GCC 42.1(I))
 - ❑ Performance Security also from 'A' class bank (GCC 50.1)
 - ❑ Recovery of all Advance prior to 80% of contract period (SCC 49.3)
- ❖ Based on World Bank – Small Works (~FIDIC)

Key Players

- ❖ **Employer** – employs (and pays) the Contractor to perform the Works,
- ❖ **Contractor** – the party whose bid has been accepted by the Employer to carry out the Works
- ❖ **Project Manager** – the person appointed by the Employer to administer the Contract, who *‘shall decide contractual matters between the Employer and Contractor in the role representing the Employer’*

Time Control – Key Provisions

- ❖ Programme (GCC 26.1) – submitted within specified time following LoA for PM's acceptance:
 - ❑ General methods and arrangements
 - ❑ Order and timing
 - ❑ Must be logical, permissible and resourced
- ❖ Updates (GCC 26.2)
 - ❑ At specified intervals or payment amounts withheld (or if specifically requested)
 - ❑ Indicates actual progress and any necessary adjustments (recovery of delay, VOs, EoT etc.)
 - ❑ Don't lose track of 'original programme' (e.g.. squeezing more and more into less and less)

Key Stages in EoT Assessment

1. Establish **entitlement** (in principle, Y or N?), if YES:
2. **Assess** (analyse & quantify)
3. **Award** (note: usually requires Employer's prior consent).

Establishing Entitlement

Entitled if a VO is issued or Compensation Event occurs which makes timely completion impossible without (GCC 27.1):

- ❖ Contractor taking steps to accelerate, and which,
- ❖ Would cause the contractor additional cost.

Examples (extra cost)

Event	Steps Taken	Extra Cost?	Remarks
1. Earth excavation quantity doubles	Contractor increases his excavator resources from 1 to 2 units	NO – the unit cost remains exactly the same	EoT may not be necessary
2. Location of earth excavation is moved adjacent to river	Contractor has to order sheet piles from abroad and engage water pumps	YES – the unit cost will increase	EoT seems likely, OR pay additional costs of working night shift to stay on programme.

Compensation Events (GCC 42) 1 of 2

- a) Employer delays giving possession of site
- b) Changed schedule of Employer's other contractors
- c) PM orders a delay or does not issue drawings, instructions etc. on time
- d) PM orders additional tests which prove compliant
- e) PM unreasonably refuses to approve a sub-contract
- f) Ground conditions are substantially more adverse than could be expected

Compensation Events (GCC 42) 2 of 2

- g) Instructed additional work or unforeseen condition caused by Employer
- h) Non performance of utilities or Employer's other contractors
- i) Advance payment is delayed
- j) Effects on the Contractor of any of the Employer's Risks
- k) PM unreasonably delays issuing a Certification of Completion
- l) 'Force Majeure' event as determined by PM (added in 2014 rev. but not in WB GCC)

Contractors / Employer's Risks

Employer's Risks (GCC 11)	Contractor's Risks (GCC 12)
From Start Date (thru DLP):	
a) <u>Personal injury</u> / death, damage / loss to <u>property</u> due to: <ul style="list-style-type: none"> i. Unavoidable result of the Works ii. Negligence or breach by the Employer b) Damage to <u>Works</u> due to: <ul style="list-style-type: none"> i. Employer's fault ii. Employer's design iii. War or radiation 	Everything that is not an Employer's risk is by definition a Contractor's risk i.e. <u>everything else</u>
From Completion Date (thru DLP):	
a) <u>All</u> Damage to Works <u>except</u> : <ul style="list-style-type: none"> i. Contractor's work defect ii. Contractor's risk arising before Completion iii. Contractor's Activities after Completion 	ditto

Contractor's Obligations

The Contractor has certain obligations in his handling of any delay situation:

- ❖ **Early Warning** (GCC 27.2 & 31.1): Contractor must warn PM as soon as he becomes aware of any event that may delay the Works otherwise the delay caused by this omission shall not be considered.
- ❖ **Management Meeting** (GCC 30): Either PM or Contractor may require the other to attend a management meeting to decide how to deal with an 'early warning' situation.
- ❖ **Obligation to Mitigate** (GCC 31.2): Contractor must cooperate in dealing with the delay and take actions to minimise its impact.

Quantification of EoT (1 of 2)

- ❖ ‘The PM shall decide whether and by how much to extend the intended Completion Date within 21 days (of the Contractor’s request for decision on the effect of CE or VO submitted with full supporting information at least 7 days prior to due Completion Date)’
GCC 27.2
- ❖ Tools for Quantification:
 - ❑ Original and Current accepted Programmes
 - ❑ Daily Diaries, correspondence, photos, etc.
 - ❑ Other records (e.g.. press reports, site information, geographical / geological data etc.)

Quantification of EoT (2 of 2)

❖ Considerations

- ❑ Was 'early warning' issued (if appropriate)?
- ❑ What events did the Contractor expect to do - when, how in what order (Programme and method Statements etc.)?
- ❑ What breaks were expected for holiday, festival and season?
- ❑ Were the works appropriately resourced, did Contractor react reasonably by adjusting resources?

❖ Analysis

- ❑ A comparison of the durations (or anticipated durations) of work performance:
 - Original expectations (had the event not occurred)
 - Actual (or expected) performance (assuming appropriate effort)
 - Avoid any 'double counting' (same period awarded twice for different events)

EoT Evaluation Report / Approval

- ❖ The PM has to 'obtain specific approval of the Employer' before determining any EoT
- ❖ Report should discuss:
 - Principle of the EoT Claim
 - Quantification and Analysis
- ❖ Extracts from the accepted Programmes should be included together with copies of other relevant supporting documentation.
- ❖ Letter of Award (to Contractor) can be countersigned by Employer (e.g.. LDO)

Liquidated Damages (GCC 47) 1 of 2

- ❖ In international contract law 'Liquidated Damages' must be a genuine pre-estimate of the anticipated costs that Employer will face (e.g.. cost of extra supervision etc.).
- ❖ Practically it is quoted in a standard notional % of the original contract price up to a max (SCC 47.1 states 0.05% p.day & 10% respectively – takes 200 days).
- ❖ Apply from Intended (due) Completion until date that Completion is determined by PM.

Liquidated Damages (GCC 47) 2 of 2

❖ Interim Liquidated Damages:

- ❑ A non-standard approach used as an attempt to enforce early pressure against slow delivery (SCC 47.1),
- ❑ Usually apply in ascending tranches against % progress milestones (e.g.. 0.005% p.d for 15% at 1/3rd and 0.025% for 70% at 2/3rd),
- ❑ Can be difficult to precisely define particularly when EoT becomes awardable,
- ❑ Legally should probably be reconciled when formal (final LDs are applied)

Insurance Considerations (1 of 3)

- ❖ *‘The Contractor shall provide insurance in the joint names of the Employer and the Contractor from the Start Date to the end of the Defects Liability Period, in the amounts and deductibles stated in the SCC for the following events which are due to the Contractor’s risks:’ (loss or damage to the Works, etc.). GCC 13.1*

Insurance Considerations (2 of 3)

❖ Contractor's Risks?

- ❑ *'From the Starting Date until the Defects Liability Certificate has been issued, the risks of personal injury, death, and loss of or damage to property (including, without limitation, the Works, Plant, Materials, and Equipment) which are not Employer's risks are Contractor's risks.'* (GCC 12.1)

❖ Employer's Risks?

- ❑ *'From the Start Date until the Defects Liability Certificate has been issued, the following are Employer's risks:
(b) The risk of damage to the Works, Plant, Materials, and Equipment to the extent that it is due to a fault of the Employer or in the Employer's design, or due to war or radioactive contamination* (GCC 11.1.b)
- ❑ **BUT !!!!!**

Insurance Considerations (3 of 3)

❖ Employer's Risks?

□ *'From the Completion Date until the Defects Liability Certificate has been issued, the risk of loss of or damage to the Works, Plant, and Materials **is an Employer's risk** except loss or damage due to: (defects, etc.)'* (GCC 11.2)

❖ Common Pitfalls (lack of cover):

1. Not informing Insurer of delayed Completion
2. Defective Work (not meeting Specification)
3. Defective Design (e.g. inadequate foundation)

End of Module

Case Study Follows