

THE SAD TALE OF THE NON-PERFORMING NOMINATED SUBCONTRACTOR UNDER FIDIC

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Under the FIDIC Red Book form of contract, the engineer may nominate a subcontractor, but once the contractor has accepted the nomination, the contractor becomes responsible for the actions of the subcontractor and may not submit a claim for extension of time for any failures by the subcontractor.

So, what recourse does a contractor have for the non-performance of a nominated subcontractor, when the contractor is not responsible for the selection of the subcontractor?

- Clause 5.2 (Objection to Nomination) provides that *'the Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Engineer as soon as practicable...'* . This clause goes on to list a number of criteria, which would be considered as reasonable grounds for objection.
- If the engineer or employer, after receiving an objection, still insist that the subcontractor be employed, then there is an option that the contractor may employ the subcontractor if the Employer agrees to indemnify the Contractor against and from the consequences of the matter. If this indemnity is agreed, then the contractor may claim from the employer if the subcontractor causes the contractor to fail in the contractor's obligations.

What happens if the contractor is unaware that the subcontractor will likely fail to perform and does not raise a formal objection at the time of the nomination?

- Clause 4.4 (Subcontractors) provides that *'The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or*

employees, as if they were the acts or defaults of the Contractor'.

- Unequitable as it may well seem, **the contractor has no recourse against the employer** for any defaults or damages caused by the subcontractor.
- The contractor **may** however be able to make a claim for damages against the subcontractor, **provided** that the subcontract contains language allowing for such a cause of action to be framed.

If contractors wish to avoid the scenarios above they must:

- perform a thorough investigation **at the time of nomination** and submit a formal notice of objection if they have reason to doubt the capability of the subcontractor;
- **seek legal advice** to ensure that the language of the subcontract contains language that would leave them an avenue for recourse in the event of non-performance on the part of the subcontractor.

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