



COVID-19 GUIDANCE MEMORANDUM TO USERS OF FIDIC STANDARD FORMS OF WORKS CONTRACT

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COVID-19 is having a material impact on the execution of construction projects in Nigeria and the world. Interestingly, while most construction projects in Nigeria are governed by bespoke contracts, others are modeled after the International Federation of Consulting Engineers' ("FIDIC") standard forms of contract for the construction and engineering industry ("FIDIC Contracts").

As a means of avoiding adversarial attitudes and encouraging cooperation and trust between contracting parties navigating through these tough times, FIDIC recently published its COVID-19 Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract (the "Guidance Memorandum").[1]

The Guidance Memorandum outlines provisions in the general conditions of contract for Works in The Red Book ("RB")[2], The Yellow Book ("YB")[3], The Silver Book ("SB")[4], The Green Book ("GB"), The Pink Book ("PB")[5], The Gold Book ("GB")[6] and, The Emerald Book ("EB")[7] that will aid parties in reaching mutually satisfactory solutions and help them avoid disputes arising between them. The provisions are outlined below:

1. Extension of Time (EOT)

The Contractor is entitled to an extension of the time for completion of the project. Under the FIDIC Contracts,[8] time for completion can be extended in favour of the Contractor on the ground of 'Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions'.[9]

Under this provision, the Contractor would be entitled to EOT in the following circumstances:

(a) Where no new piece of legislation or regulation banning construction activity or works on site has been promulgated but the Contractor faces difficulties in mobilizing his personnel who fear for their safety, and in obtaining goods due to issues in his supply chain;



[1] The Guidance Memorandum can be accessed on the FIDIC website at <https://fidic.org/sites/default/files/COVID%2019%20Guidance%20Memorandum%20-%20PDF.pdf>

[2] The Red Book provides conditions of contract for construction works where the design is carried out by the Project Owner.

[3] The Yellow Book provides conditions of contract for construction works where the design is carried out by the Contractor.

[4] The Silver Book is suitable for use on process, power and private-infrastructure projects where a Contractor is to take on full responsibility for the design and execution of a project.

[5] The Pink Book is the form of contract used by Multilateral Development Banks (MDBs) for construction projects (building and engineering works designed by the Project Owner) for which MDBs are providing finance first published the contract in May 2005 and then published revised editions in March 2006 and June 2010.

[6] The Green Book is a short form of contract which is recommended for engineering and building works of relatively small capital value.

[7] The Emerald Book is known more formally as Conditions of Contract for Underground Works. The Emerald Book aims to address the risks particular to subsurface construction projects, which are dependent on the ground's geological, hydrogeological and geotechnical properties and intends to meet the developments in the rapidly growing underground market sector.

[8] Clause 8.4 (d) of RB 1999, YB 1999 and SB 1999; Clause 8.5(d) of RB 2017, YB 2017 and EB, and Clause 9.3 (d) of GOB.

[9] It is noteworthy that the clause entitling the Contractor to an extension of time makes no mention of financial remedy. The Contractor may, however, explore this remedy elsewhere under the FIDIC Contracts.

(b) Where no new piece of legislation or regulation banning construction activities or works on site has been promulgated but the Contractor suffers delays caused by authorities (making repeated inspections on the site); and

(c) Where the Contractor suffers delay and/or incurs additional cost due to slow decision making from the Project Owner's personnel (Engineer or representative) who work remotely and are often away from the Site[10].

2. Variations and Adjustment due to Changes in Laws[11]

Under the FIDIC Contracts, a contract can be treated as a variation and consequently adjusted[12] where changes to the Laws restricting construction activities and works on the Site as promulgated by the government or local authorities have caused the Contractor to suffer delays and/or incur an additional cost. In such a case, the Contractor is entitled to an EOT for delays suffered and/or payment of additional cost incurred.[13]

It is noteworthy that these Laws are not restricted to Acts of Parliament. Consequently, orders, regulations, and bye-laws of any legally constituted public authority also qualify as Laws.[14]

In Nigeria, the COVID-19 related Orders restricting movement and requiring everybody (including Construction workers on-site) to observe health and safety measures such as social distancing, use of hand sanitisers and face masks – would qualify as relevant changes in the Law. These COVID-19 related Orders constitute legal changes and the Contractor is likely to incur additional costs or suffer delays as a result.

3. Force Majeure/Exceptional Event[15]

The Force Majeure clause provides a remedy in circumstances where the Contractor and/or Project Owner may be unable to proceed to the Site and perform their obligations under the contract due to an event or circumstances which are beyond their control and which they could not have reasonably avoided or overcome.[16]

[10] Clause 8.4 (e) of RB 1999 and YB 1999; Clause 8.3 (e) of SB 1999; Clause 8.5(e) of RB 2017 and YB 2017; Clause 8.5(c) of SB 1999.

[11] Clause 13.7 in RB 1999, YB 1999 and SB 1999.

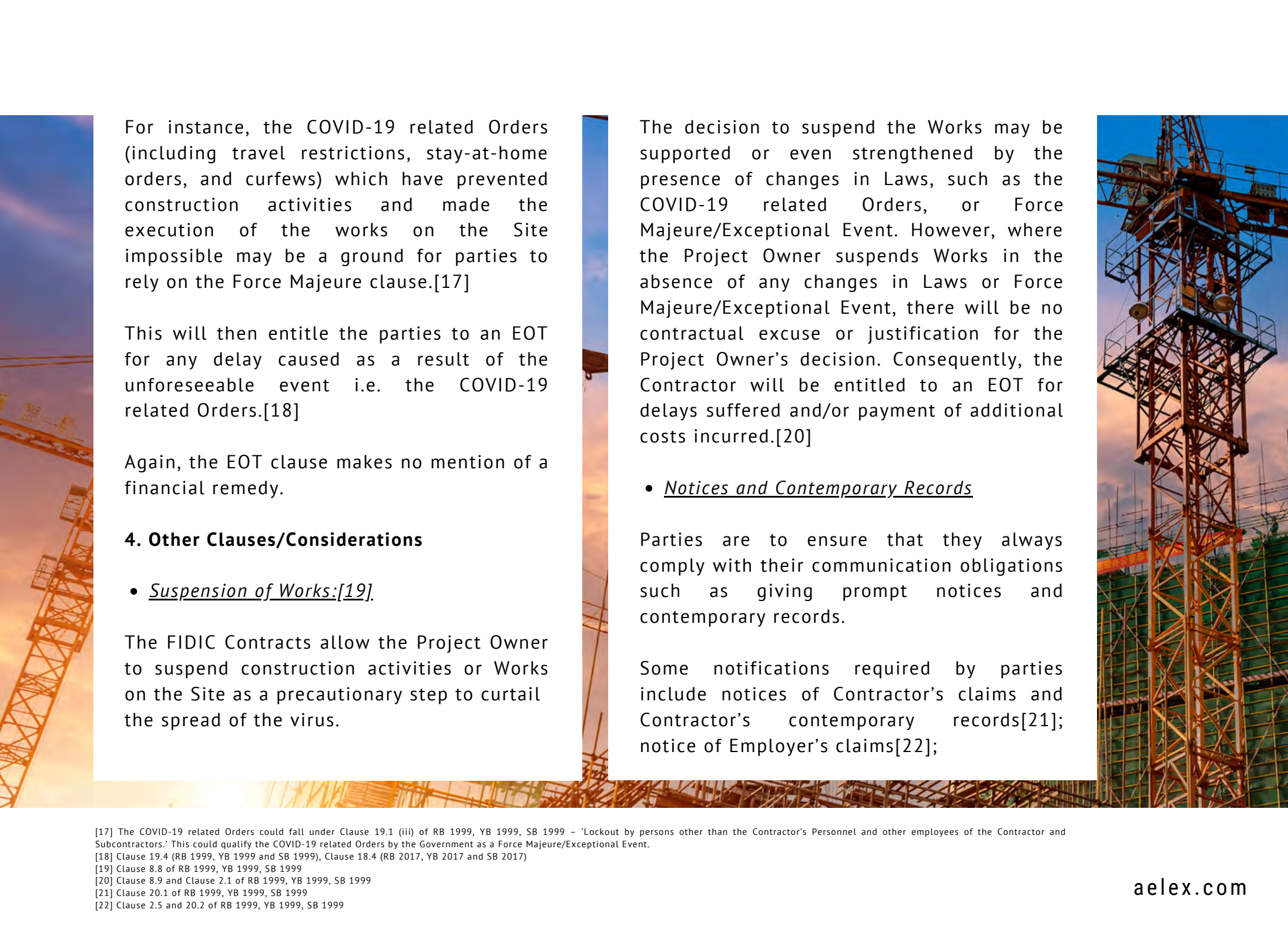
[12] Ibid

[13] Ibid.

[14] Clause 1.1.29 of RB 2017

[15] Clause 19.1 in RB 1999, YB 1999 and SB 1999, Clause 18.1 in RB 2017, YB 2017 and SB 2017.

[16] Ibid



For instance, the COVID-19 related Orders (including travel restrictions, stay-at-home orders, and curfews) which have prevented construction activities and made the execution of the works on the Site impossible may be a ground for parties to rely on the Force Majeure clause.[17]

This will then entitle the parties to an EOT for any delay caused as a result of the unforeseeable event i.e. the COVID-19 related Orders.[18]

Again, the EOT clause makes no mention of a financial remedy.

4. Other Clauses/Considerations

- Suspension of Works:[19]

The FIDIC Contracts allow the Project Owner to suspend construction activities or Works on the Site as a precautionary step to curtail the spread of the virus.

The decision to suspend the Works may be supported or even strengthened by the presence of changes in Laws, such as the COVID-19 related Orders, or Force Majeure/Exceptional Event. However, where the Project Owner suspends Works in the absence of any changes in Laws or Force Majeure/Exceptional Event, there will be no contractual excuse or justification for the Project Owner's decision. Consequently, the Contractor will be entitled to an EOT for delays suffered and/or payment of additional costs incurred.[20]

- Notices and Contemporary Records

Parties are to ensure that they always comply with their communication obligations such as giving prompt notices and contemporary records.

Some notifications required by parties include notices of Contractor's claims and Contractor's contemporary records[21]; notice of Employer's claims[22];

[17] The COVID-19 related Orders could fall under Clause 19.1 (iii) of RB 1999, YB 1999, SB 1999 – 'Lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors.' This could qualify the COVID-19 related Orders by the Government as a Force Majeure/Exceptional Event.


[18] Clause 19.4 (RB 1999, YB 1999 and SB 1999), Clause 18.4 (RB 2017, YB 2017 and SB 2017)

[19] Clause 8.8 of RB 1999, YB 1999, SB 1999

[20] Clause 8.9 and Clause 2.1 of RB 1999, YB 1999, SB 1999

[21] Clause 20.1 of RB 1999, YB 1999, SB 1999

[22] Clause 2.5 and 20.2 of RB 1999, YB 1999, SB 1999




notice of cause for the Employer's Suspension of works[23]; notice of Force Majeure event[24]; notice of Exceptional event[25] and notices of money and time claims[26].

- The Dispute Board:[27]

The Dispute Board is a potent dispute avoidance tool. It can provide opinions and advice on the best way parties can handle the effect of the COVID-19 pandemic in light of the contract terms and facts on the contract.[28] The aim is to assist in bringing parties back to an amicable ground and/or providing quick decisions to matters in dispute.

My thoughts

It is commendable that the Guidance Memorandum proffers remedies aimed at saving the contract while encouraging an amicable relationship between parties. This may be why FIDIC left out the issue of termination of the contract.



Even though the aim is to prevent adversarial attitudes among parties, it is also important to note that parties may need a more decisive option if COVID-19, the Force Majeure/Exceptional event persists for a longer period.[29] In this case, the termination clause will most likely be triggered.

CONCLUSION

The Guidance Memorandum couldn't have come at a better time as it reminds users of the FIDIC Contracts of the options at their disposal during the COVID-19 pandemic. By applying these options to their unique cases and keeping an objective view, disputes are likely to reduce and contracts could be kept active. Although not stated in the Guidance Memorandum, parties can mutually terminate the contract if the pandemic persists for a longer period. Again, this clause is aimed at preventing the emergence of any disputes. It is therefore important that parties seek to apply any of these options to their unique cases through cooperation, negotiation, and open dialogue.

[23] Clause 8.8 of RB 1999, YB 1999, SB 1999

[24] Clause 19.2 of RB 1999, YB 1999, SB 1999

[25] Clause 18.2 of RB 2017, YB 2017, SB 2017

[26] Clause 20.2.1 of RB 1999, YB 1999, SB 1999, RB 2017, YB 2017, SB 2017.

[27] Also referred to as Dispute Adjudication Board, Dispute Avoidance/Adjudication Board.

[28] Clause 20.2 of RB 1999, YB 1999, SB 1999 and Clause 4(k) of the General Conditions of Dispute Adjudication Agreement.

[29] Clause 19.6 of RB 1999, YB 1999, SB 1999



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