

MDA PRESENTS



FIRST AID FOR CONTRACTS



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WEATHER DELAYS UNDER THE NEW SANRAL FIDIC CONTRACT

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As contractors we dread receiving a tender enquiry document that is thicker than an Encyclopedia Britannica (for the youngsters – these were massive books found in our parents' library that we had to use to research school projects before the internet was invented – i.e huge books with very tiny writing).

Some comfort can usually be found when discovering that the employer has used one of the standard form contracts recommended by the CIDB. Yes, we know the FIDIC - however, these standard form contracts are often heavily amended and unfortunately, the SANRAL FIDIC contract is no exception.

While we don't like to believe that employers try to catch the contractors out by heavily amending the standard form contract (often to the contractor's detriment) we thought this was a good opportunity to write about one of the amendments to the standard

form FIDIC – weather delays under the new SANRAL FIDIC Contract – to help you in your way to understanding what you are actually agreeing to when you contract with SANRAL under these conditions.

The standard FIDIC Red Book (we note that SANRAL still uses the 1999 version) is not very clear when it comes to when the contractor is entitled to claim an extension of time for weather delays.

SANRAL used to amend the FIDIC Red Book in line with the COLTO specifications, however the new COTO Standard Specifications for Road and Bridge Works for South African Road Authorities was approved by the Committee of Transport Officials (COTO) on 18 August 2020 as a Draft Standard and replaces the COLTO Specifications.

The SANRAL website provides that existing contracts and tenders in the design phases based on the COLTO Standard Specifications (1998 Edition) will remain unaffected but were to be phased out and the COTO Standard Specifications (2020 Edition) was mandatory for use in procurement documents advertised as from 1 March 2021.

We therefore downloaded a tender document dated July 2021 containing reference to the COTO Standard Specifications to examine for the purposes of this article.

The tender document that we have examined refers to the Specifications as including:

“Volume 2: The COTO Standard Specifications for Road and Bridge Works for South African Road Authorities (Draft Standard October 2020 edition), issued by the Committee of Transport Officials which the tenderer shall obtain himself.”

(The COTO Specifications are easily downloadable from the SANRAL website).

Apart from the reference to the COTO Standard Specifications in the tender document, there are particular conditions that amend the standard FIDIC provisions. As per the usual SANRAL tenders, the form of contract to be used is the FIDIC Red Book 1999. The particular conditions relevant to this article commence at Clause 8.3 [Programme] as follows:

“The initial programme and each revised programme shall be submitted to the Engineer in one paper copy, one electronic copy and additional paper copies (if

any) as stated in the Appendix to Tender, and shall include:...

(k) “the expected delays as specified in the specification, resulting from inclement weather, as a terminal float””

Terminal float is not defined in the contract documentation and float or the concept of ownership of floats is not explicitly addressed in the standard FIDIC.

Clause 8.4 (extension of time for completion) states that: *“the contractor shall be entitled, subject to clause 20.1 [Contractor’s Claims], to an extension of the time for completion if and to the extent that completion for the purposes of clause 10.1 [Taking-over of the Works and Sections], is or will be delayed...”* The reason for the reference to clause 10.1 (itself referring back to clause 8.2 [Time for Completion]) appears to indicate that the float belongs to the project and it is not the Contractor’s float.

It will be shown below that this appears to be the intention of SANRAL – taking into account the wording of the COTO Specifications.

While the standard form FIDIC Clause 8.4 [Extensions of Time for Completion] states that the Contractor will be entitled, subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of the Time for Completion if and to the extent that completion, for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by:

...

(c) exceptionally adverse climatic conditions,

This clause has shown to be problematic in that one is not quite sure what exceptionally adverse climatic conditions are.

If we look the latest version of the SANRAL FIDIC conditions of contract Clause 8.4 has been amended as follows (amendments noted in red):

“The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor’s Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes and all float in the programme has been utilised: [wording in red is added wording to the standard FIDIC]

...

c) exceptionally adverse climatic conditions which for the purpose of these Conditions shall mean adverse climatic conditions at the Site which are exceptional having regard to climatic data made available by the Employer and/or climatic data published in the Country for the geographical location of the Site, and calculated as stated in the Appendix to Tender,” [wording in red is added wording to the standard FIDIC]

New sub-clause (f) has been added:

“(f) rain delays in terms of the Specification Data Clause A1.2.3.4 [Extension of time for delays caused by rainfall]. Claim for rain delays shall not be subject to Sub-Clause 20.1 [Contractor’s Claims]. The Cost payable for extension of time due to rain delays, shall be calculated in terms of Specification Data Clause A1.2.3.4 [Extension of time for delays caused by rainfall].”

Note that Specification Data Clause A1.2.3.4 [Extension of time for delays caused by rainfall] is the Specification Data from the COTO Specifications. The COTO Specifications Clause A1.2.3.4 in turn specifies the conditions under which extensions of time for rainfall delays will be measured.

The appendix to tender further contains the following:

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| <i>Extension of time for completion</i> | <i>An exceptional adverse climatic condition shall be considered where the return period of the climatic condition exceed a return period of 1:10</i> |
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The COTO Specifications

The wording of the previously utilized COLTO amendment B1215 is reflected in the COTO document which specifies under **A1.2.3.4 Extension of time for delays caused by rainfall**, that delays caused by rainfall shall be determined in terms of one of the three methods described in the clause, the application of which is specified in the Contract.

The delay determined using the specified methods entitles the Contractor to an equivalent extension of the time for completion without the need for formal claim procedures.

For the purposes of this article, the tender document that we reviewed specifies that method 3 shall be used. Method 3 (Critical path method without consequential delays) is referred to in the tender document as follows:

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| Method 3 (Critical path method without consequential delays) | Method 3 (Critical path method without consequential delays) is specified. The value of "N" is 10. In calculations of payment for approved extensions of time granted for delays caused by rainfall, payment will be made utilising the applicable payment items for which the unit of measurement is "month" but excluding payment items with negative rates and non-applicable payment items such as pay item C1.3.1.4. |
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Where the critical path method without consequential delays is specified in the Contract Documentation for determining the extension of time resulting from rainfall, it shall be applied as follows:

1. Delays caused by rainfall may be considered as extension to the time for completion only if the Engineer agrees that the event (and not the consequence of the event) occurred during the working day within the contract period and caused all progress on an item or items of work on the critical path of the Contractor's programme brought to a halt.
2. Each day, or portion of a day so agreed will accrue as 'n' days of delay over the duration of the contract. The summary of accrued agreed 'n' delays, which exclude any consequential delays as stated below, shall be recorded at each site meeting.
3. No limitation is placed on the quantity, severity or duration of the rainfall event as being the cause of

delay.

4. Expressly excluded from the measurement of 'n' days are consequential delays, which are taken to mean delays to critical path activities attributable to the rainfall event but occurring after (i.e. outside of and distinctly separate from) the duration of the rainfall event itself.
5. The Contractor shall make provision in the Contractor's programme of work for expected "N" working days caused by rainfall. This provision shall be shown as a terminal float on the Contractor's programme. The value of "N" shall be given in the Contract Documentation. (in this instance, N was given the value of 10).
6. Any extension to the time for completion caused by rainfall delays will only be considered once the agreed cumulative 'n' delays during the contract period up to the issue of the Taking-over Certificate exceed "N" working days. Extension of time for rainfall shall apply in addition to any approved contract extension of time due to other causes.
7. This method does not take into account any flood damage, which could cause further or concurrent delays and which should be treated separately in so far as extension of time is concerned. It also does not deal with other types of weather which may cause delays, for instance snowfalls, abnormally strong wind and extreme temperatures. All such delays shall be dealt with separately in accordance with the terms of the Conditions of Contract.

8. The delay shall be applied to the contract duration after any other approved contract extensions of time have been applied. The total delay caused by rainfall shall not exceed the duration past the issue of the Taking-over Certificate.

Delays caused by weather will only be considered “n” days if the Engineer agrees that the event occurred during the working day, and caused a delay to the critical path. The summary of accrued “n” delays is recorded at each site meeting, Any extension of time will only be considered once the agreed “n” days accumulate to more than the total “N” value of working days, AND the float is exhausted, AND completion will be delayed.

In summary, where the Standard COLTO Specification allows for rainfall delays to be calculated and claimed in monthly payment certificates, SANRAL have made the Contractor responsible for incorporating the expected delays over the duration of the Contract into their terminal float. Once the float is exhausted, the subsequent “n” days that exceed the expected delays over the contract duration, may be considered for an extension of time, providing they occur prior to the approved Time for Completion.

Consequential delays commonly allowed under most traditional contracting arrangements are not claimable and this needs to be allowed in addition to the “N” days prescribed by the Contract which are the rain delays that can be predicted to occur based on historical rainfall data.

It is also important to note that the payment for rain delays, based on the Preliminary and General time related items from the Bill of Quantities, is deemed to include the cost of the contractors equipment.

This changes, the omission of the consequential delay from any claim is a significant adverse change to the contractors risk exposure.

Whilst the payment of time related Preliminary and General items may be a welcome improvement from the traditional approach to weather delays where a contractor would get time but no payment, this may be cold comfort.

On road building contracts, the contractors equipment hire cost constitutes the most significant contribution to its costs. The loss of equipment cost recovery for the effect of all rain delays and all consequential delays will need to be allowed for in the contractor’s other tendered rates.