

Main Contractors may not be liable for the Nominated Subcontractors' Delay

Ahmad Ghoneim - Partner - Litigation / Construction and Infrastructure
a.ghoneim@tamimi.com - Abu Dhabi



The UAE Civil Transaction Code (“CTC”) provides in article (890) that the main contractor may sub-contract the construction contract, in whole, or in part, unless otherwise agreed in the construction contract. However, this article highlights that the main contractor, and not the subcontractor, will remain liable towards the employer.

This article does not differentiate between the domestic subcontractors whom being selected and appointed by the main contractors, and the nominated subcontractors whom being selected or nominated by the employers or the consultants.

Therefore, the question now whether, or not, the UAE local courts recognize the difference between these two types of the subcontractors, and thus, the main contractors’ liability regarding the subcontractors’ defaults, as per article (890) of the UAE CTC, may not be applicable, if the subcontractors are nominated subcontractors. We will answer this question throughout the following case study.

Background of case

An employer (“Employer”) entered into a construction contract (“Contract”) with a main contractor (“Main Contractor”) to construct a building, in Dubai, consisting of a basement floor, ground floor, and a further seven floors (“Project”). The construction period set out in the Contract was (365) day. The Contract imposed a delay penalty on the Main Contractor for each day in delay, with a cap of (10%) of the value of the Contract. The Contract empowered the Employer and/or the consultant (“Engineer”) to nominate subcontractors (“Nominated Subcontractors”) to execute certain provisional sum items of the Contract. However, the Main Contractor signed the subcontract agreements with the Nominated Subcontractors after the Engineer and/or the Employer nominated them.

The completion date of the Project was delayed, and therefore, the Employer retained monies owing to the Main Contractor by applying the contracted delay penalty. The Main Contractor submitted a claim to the Engineer, for extension of time since the delay occurred in the Project was contributed by the Nominated Subcontractors, and thus the Main Contractor requested to release the value of the delay penalty and to calculate the prolongation costs allegedly owed to the Main Contractor. The Engineer rejected the Main Contractor’s claim.

The Employer filed a case against the Main Contractor to establish the Main Contractor’s delay in completing the Project, and thus, to establish the Employer’s right to retain the value of the delay penalty. Meanwhile, the Main Contractor filed a counterclaim against the Employer to claim for the payment of the sums retained by the Employer in respect of the delay penalty, prolongation costs, as the Nominated Subcontractors were responsible for the Project’s delay.

Court of First Instance

The Court of First Instance appointed an engineering expert to establish whether the Project completion date was delayed, or not, and if so, to identify who was responsible for the delay, the exact period of delay, and the due compensation, if any.

The Court-appointed expert prepared a report, in which the expert highlighted that the Project’s completion date was delayed because of the Nominated Subcontractors, and accordingly the Employer did not have the right to apply the delay penalty to the detriment of the Main Contractor. The expert further pointed out that the Main Contractor was owed AED 937,434.00 for work done, which the Employer retained based on its unjustified claim to apply the delay penalty on the Main Contractor. The expert did not calculate the prolongation costs claimed by the Main Contractor.

The Employer objected to the result of the expert's report, and argued that the expert should not release the Main Contractor from the liability of the Project's delay. The Main Contractor also objected to the report, and argued that the Court-appointed expert should have had calculated the prolongation costs that the Main Contractor suffered due to the Nominated Subcontractors' delay.

Consequently, the Court remitted the case file, including the objections raised by the Employer and the Main Contractor regarding the expert's report, to the appointed expert for his response.

The expert prepared a supplementary report, in which he asserted the validity of the result of its first report, except the Main Contractor's entitlement for the claimed prolongation costs, which was not calculated in the first report. The expert added in its supplementary report that the Main Contractors should be entitled for an additional amount of AED 351,142.00 as a prolongation costs.

The Court of First Instance issued its judgment, in which the Court rejected the Employer's case, as the Nominated Subcontractors were responsible for the Project's delay. Meanwhile, the Court accepted part of the Main Contractor's claim against the Employer, which is the outstanding amount of AED 937,434.00 that was retained by the Employer against the delay penalty.

Thus, the Court of First Instance did not allow the Employer to apply the delay penalty on the Main Contractor, as it determined that the Nominated Subcontractors were responsible for the Project's delay. The Court did not award the Main Contractor its claimed prolongation costs.

Appeal Court

The Employer filed an appeal, and requested the Appeal Court to withhold the judgment issued by the Court of First Instance, based on the Main Contractor's liability for the Nominated Subcontractors' delay, as the Main Contractor was the party who contracted with the Nominated Subcontractors, even though the nomination for those Nominated Subcontractors was initiated by the Engineer. The Employer further argued that the Main Contractor was responsible for supervising the Nominated Subcontractors' work, and there was no contractual relationship between the Employer and those Nominated Subcontractors. Therefore, the Employer asserted to the Appeal Court that the Main Contractor should pay the delay penalty to the Employer.

The Main Contractor filed an appeal, and requested the Appeal Court to amend the judgment issued by the Court of First Instance in respect of its rejection of the prolongation costs claim, and thus the Main Contractor requested the Appeal Court to add the prolongation costs to the amount awarded by the Court of First Instance.

The Appeal Court issued its judgment, in which it rejected the Employer's appeal, and accepted the Main Contractor's appeal, and therefore amended the judgment issued by the Court of First Instance by adding the prolongation costs in an amount of AED 352,142.00 to the amount awarded to the Main Contractor. The Appeal Court determined that the Nominated Subcontractors' delay was due to the Engineer's delay in nominating them, although the Main Contractor requested the Engineer several times to nominate those Nominated Subcontractors to avoid any delay in the Project's completion date.

Cassation Court

The Employer filed a cassation appeal, and requested the Dubai Cassation Court to withhold the judgment issued by the Appeal Court, based on article (890) of the UAE CTC, which stipulates that the Main Contractor is liable towards the Employer, for the subcontractors' defaults, including the subcontractors' delay. The Employer asserted to the Cassation Court that the Appeal Court misapplied the law when it

relieved the Main Contractor of the Nominated Subcontractors' delay, and accordingly, awarded the Main Contractor compensation (i.e. prolongation costs) for the delay occurred in the Project. The Employer reiterated its arguments related to the non-existence of any contractual relationship between the Employer and the Nominated Subcontractors, as the Main Contractor is the party who contracted with them, and therefore these subcontractors should be considered as domestic subcontractors, and not Nominated Subcontractors, even though the nomination of those subcontractors came from the Engineer. In addition, the Employer argued again that the Main Contractor was supervising the work of the Nominated Subcontractors, and accordingly should be liable for their delay.

The Dubai Cassation Court issued its judgment number (266/2008), in which it held that article (890) of the UAE CTC is applicable to the domestic subcontractors selected by, and contracted with the main contractor. The Cassation Court held that article (890) of the UAE CTC is not applicable to nominated subcontractors, even though the main contractor is the party who contracted with them, as long as the consultant and/or the employer nominated them to the main contractor.

The Cassation Court further pointed out that the employers are responsible for any default may occur by their nominated subcontractors, even where they were nominated by the engineer.

Therefore, the Cassation Court rejected the Employer's cassation appeal.

Conclusion

Although article (890) of the UAE CTC does not differentiate between domestic subcontractors and nominated subcontractors (nominated by the consultant and/or the employer), the UAE local courts do differentiate between these two types of subcontractors.

Article (890) of the UAE CTC is not applicable to the nominated subcontractors, as long as the consultant and/or the employer nominated them to the main contractors, even though their contracts are with the main contractor.

The main contractors should not be responsible for the defaults of the nominated subcontractors, unless the main contractors contributed to these defaults.

For further information please contact [Ahmad Ghoneim](mailto:a.ghoneim@tamimi.com) (a.ghoneim@tamimi.com).

