

Can a Main Contractor prevent an Employer from appointing a New Main Contractor?

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If an employer decides to terminate a construction contract entered into with a main contractor, and to appoint a new main contractor, will the former main contractor be legally entitled to prevent the employer from appointing the new main contractor, pending the evaluation of the site or it is an absolute right of the employer to appoint a new contractor following the termination of the construction contract?

We explore in this article whether a main contractor can prevent the appointment of a new main contractor based on our recent experience advising and representing a main contractor before the Dubai Urgent Matters Court (“**DUMC**”).

Background of dispute

An employer entered into a construction contract with a main contractor to construct a number of villas in a prime location in Dubai.

The contract was based on FIDIC (1987) with particular conditions. The main contractor almost completed the project, and was ready to initiate the testing and commissioning for the project. According to the last interim payment certificate, the consultant had certified that around 87% of the main contractor's works had been successfully completed.

Due to the existence of several disputes between the employer and the contractor relating to the latter's claim for variations, extension of time, prolongation costs, and overdue payments related to work done on site, the employer terminated the contract. Following the termination, the main contractor applied to DUMC to appoint engineering experts to visit the site, evaluate the percentage of work done, record the status of the work done and scope of the material and equipment on site.

The main contractor sought legal representation when the employer tried to evict the main contractor from the site. Following our advice, a notice was served on the employer warning the employer that, among other things, the site status should remain as is until the DUMC appoints an engineering experts' committee to visit the site and record the work done and material and equipment on site. The notice also made it clear to the employer that no new contractor should enter the site, pending the inspection by the aforesaid engineering experts committee.

The employer opted to disregard the notice, and decided to appoint a new main contractor. Consequently, the employer applied to the appropriate authority in Dubai to substitute the main contractor with another one in the records of the authority.

Al Tamimi & Company, as legal counsel for the main contractor, immediately drafted a request to the DUMC highlighting the following:

1. the certification by the project's consultant confirmed that construction was approximately 87% completed;
2. the employer had purportedly terminated the contract, and alleged that the main contractor had breached its contractual obligations;
3. following the purported termination, the main contractor had applied to the DUMC to appoint an engineering experts' committee to record the work done on site and the material and equipment on site;
4. the employer had attempted to evict the main contractor from the site, and the employer had accordingly been notified that the site's status should remain as is and no new main contractor should be appointed until the DUMC appointed engineering experts committee had examined and recorded the works done on site and the material and equipment on site; and
5. the employer had not responded to the notice, and had applied to the relevant authority to change the main contractor with a new one which would allow this new contractor to enter upon and disturb the site.

Having regard to the above, the DUMC were requested to issue an order addressed to the relevant authority rejecting the employer's request to substitute the main contractor with a new one thereby preventing the new main contractor from interfering with the site.

“The DUMC issued its decision within 72 hours, and accepted Al Tamimi & Company’s request that the site should be left undisturbed pending the appointment of the engineering experts’ committee in accordance with the main contractor’s case before Dubai Court.”

Dubai Urgent Matters Court’s Decision

The DUMC issued its decision within 72 hours, and accepted Al Tamimi & Company’s request that the site should be left undisturbed pending the appointment of the engineering experts’ committee in accordance with the main contractor’s case before Dubai Court and addressed an order to the relevant authority to suspend the employer’s request to change the main contractor.

Conclusion

Although employers may have the right to terminate a construction contract entered into with the main contractor, an employer should not engage a new main contractor until the work done on site and the material and equipment on site have been recorded by an expert agreed between the parties or appointed by the UAE Courts.

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