

Board of Grievances

Signs of sympathy for unpaid contractors

There has been a recent trend at the Board of Grievances to dispense contractors from delay penalties imposed by Government authorities, if the contractor can show that the reason for its delay was due to late payment by the Government authority. This is an interesting development, as effectively this imposes a financial penalty on Government authorities for late payment – a matter that is often argued to be contrary to *Shari'ah* as a form of unlawful interest.

It is an acknowledged principle in the Board of Grievances (the country's Administrative Courts) that contracts for public works have an overriding importance that can outweigh the interests of the contractor party to the contract. One of the most fundamental examples of this is that a contractor is expected to continue working on a public works contract, so that execution of the contract is not delayed, even if the Government is late in making payment of the contractor's due fees.

This is expressly provided for in the Implementing Regulations of the Government Procurement Law (GPL), which states that a Contractor may not refuse to carry out its obligations on the grounds that the government authority is in default of its obligations¹. This is further supported by article 54 of the GPL, which provides that a contractor may claim against a government authority for failure to pay its due payments, indicating that this is the contractor's recourse for delayed payments, rather than an entitlement to suspend works.

Any contractual provision that seeks to contradict these provisions, such as by providing for the contractor to have a right to suspend work for non-payment, could be arguably unenforceable in court, based on the Implementing Regulations to the GPL, which confirms that "*contracts concluded by government authorities shall not include provisions inconsistent with the Government Tender and Procurement Law or with these Regulations. The latter's provisions shall prevail over those instruments and documents.*"²

Whilst cases in the Board of Grievances tend to support the principle that a contractor cannot justify late delivery by reason of late payment by the government authority, the recent trend we have seen is a willingness to award "compensation" to the contractor for the government authority's breach of contract in making payment late.

¹ Article 48 of the Implementing Regulations of the Government Procurement Law

² Article 154 of the Implementing Regulations of the Government Procurement Law

Rather than assessing such compensation in a manner that could be attributed to interest, we have seen several reported cases where the compensation is assessed as equivalent to the delay penalties that had been imposed on the contractor. This results in an award by the Board of Grievances of reimbursement of the delay penalties back to the contractor.

Therefore, Government authorities are advised to be mindful of this risk when imposing delay penalties on contractors in circumstances where due payments to the contractor are also delayed.

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