

Study on Cultivation of Adjudicators for Promotion of Dispute Board in the Asian Region

Study Report

March 2013

Japan International Cooperation Agency

**Nippon Koei Co., Ltd.
Association of Japanese Consulting Engineers**

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PROMOTION OF DISPUTE BOARD IN THE ASIAN REGION

STUDY REPORT

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Abbreviations

ACESL	:	Association of Consulting Engineer, Sri Lanka
ADB	:	Asian Development Bank
ADR	:	Alternative Dispute Resolution
AJCE	:	Association of Japanese Consulting Engineers
AAW	:	Adjudicator Assessment Workshop
ATW	:	Adjudicator Training Workshop
APA	:	Assessment Panel for Adjudicators
CECOPHIL	:	Council of Engineering Consultants of the Philippines
DAB	:	Dispute Adjudication Board
DB	:	Dispute Board
DRBF	:	Dispute Resolution Board Foundation
FIDIC	:	International Federation of Consulting Engineers
INKINDO	:	National Association of Indonesian Engineering Consultants
JICA	:	Japan International Cooperation Agency
MA	:	FIDIC Member Association
MDB	:	Multilateral Development Bank
VECAS	:	Vietnam Engineering Consultant Association
WB	:	World Bank

Chapter 1 Outline of the Study

1.1 Background of the Study

The Japan International Cooperation Agency (JICA) revised its “Sample Bidding Documents under the Japanese Official Development Assistance (ODA) Loans - Procurement of Works” in June 2009, harmonising the procurement process with other international organizations. It also adopted the “Conditions of Contract for Construction, MDB Harmonised Edition” issued by the International Federation of Consulting Engineers (FIDIC) in cooperation with multilateral development banks (MDBs). In the MDB Harmonised Edition, the Dispute Board (DB)¹ was introduced as a new resolution instrument for contract disputes.

There is a pressing need to develop DB adjudicators, especially in the Asian Region where many of the recipient countries of the JICA’s ODA loans are located. Since the establishment of DB in the project is considered to be rapidly increasing, the availability of qualified DB adjudicators is necessary for the smooth implementation of the projects financed by JICA. This is recognized as a DB supply-side issue. On the other hand, it is necessary for owners of the projects, who are in the position to prepare bid documents, to understand the DB mechanism properly. This is considered as a DB demand-side issue.

Under this situation, JICA has carried out the following studies since 2008 as part of the preparation for the introduction and dissemination of DB in Japanese ODA loan projects:

1) Countermeasures for the DB supply-side issues:

- Development of a JICA training kit for adjudicator candidates;
- Drafting of qualification procedural rule for adjudicators (draft version);
- Survey on actual status of the National List of Adjudicators;
- Trial adjudicator training and assessment workshops in Japan; and
- Consultation regarding establishment of the National List of Adjudicators with four FIDIC Member Associations (FIDIC MA) in Asia, i.e., Indonesia, Vietnam, Sri Lanka, and the Philippines.

2) Countermeasures for the DB demand-side issues:

- Holding of DB promotion seminars in Indonesia, Vietnam, Sri Lanka, Philippines, Cambodia, Bangladesh, India, and Japan.
- Dialogue regarding use of DB with concerned authorities for JICA ODA loan projects in the countries where the Dispute Adjudication Board (DAB) promotion seminar was

¹ Dispute Adjudication Board (DAB), which was introduced in the FIDIC Red Book 1999 edition, was redefined as Dispute Board (DB) in the FIDIC MDB edition. The roles of DAB and DB are basically similar. In this report, DB is adopted in principle; however, DAB is used when referring to past events.

delivered.

- Survey on the actual status of DB operation in projects financed by MDBs including the World Bank, Asian Development Bank, and Inter-American Development Bank.
- Preparation of the guidelines on application of DB in projects funded under the Japanese ODA loans.
- Development of the JICA DB Manual.
- Conduct of a Mock DB Seminar in Indonesia.

Through the consultations made with the four FIDIC MAs in Indonesia, Vietnam, Sri Lanka, and the Philippines in 2011, the following facts have been confirmed:

- 1) There are potential candidates for DB adjudicators in each country.
- 2) All FIDIC MAs are willing to cultivate DB adjudicators.
- 3) All FIDIC MAs wish to have a National List of Adjudicators within capable adjudicators can be registered.

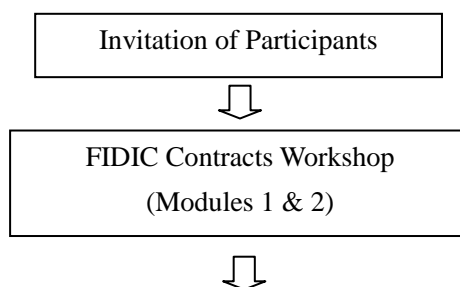
This JICA study provides an Adjudicator Training Workshop (ATW) and Adjudicator Assessment Workshop (AAW) for adjudicator candidates in four countries, applying the same procedure, and using the same training materials in the workshops carried out in Japan in 2010. Based on the actual capabilities of candidates observed in the workshops and the result of the assessment workshop, a future cultivation plan for adjudicators is to be proposed as an outcome of this study.

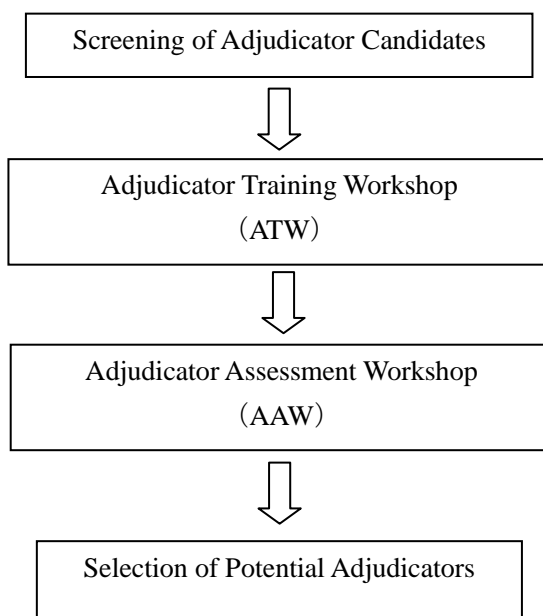
1.2 Purpose of the Study

The present study aims to deliver FIDIC contracts workshops (Modules 1 and 2), Adjudicator Training Workshop (ATW), and Adjudicator Assessment Workshop (AAW) for adjudicator candidates of Indonesia, Vietnam, Sri Lanka, and the Philippines, and to formulate future development plan of adjudicator in the Asian Region based on the observations in the series of workshops.

1.3 Workflow of the Study

The training and assessment were carried out in the following procedure:





1.4 Study Team

The study has been carried out through a joint venture between Nippon Koei Co., Ltd. and Association of Japanese Consulting Engineers (AJCE). The four members assigned to the study are shown in the following table:

Table 1.1 Study Team Members

	Position	Name	Organization
1	Team Leader/Trainer (International Contracts)	Yukinobu Hayashi	Nippon Koei
2	Trainer (Dispute Resolution in International Construction Contracts)	Toshihiko Omoto	Nippon Koei (Toshihiko Omoto Construction Project Consultant)
3	Trainer (Management of National List of Adjudicators)	Yoshihiko Yamashita	AJCE
4	Expert for Planning and Coordination	Takayuki Miyoshi	Nippon Koei

(Source: Study Team)

In addition, the following table presents the five international experts who joined the Study Team as trainer or assessor:

Table 1.2 List of International Experts

No.	Position	Name
1	Trainer in Modules 1 & 2	Mr Geoffrey Smith
2	Trainer in ATW	Mr Gordon L. Jaynes

3	Trainer in ATW	Mr Richard Appuhn
4	Assessor in AAW	Mr Volker Jurowich
5	Assessor in AAW	Dr Götz-Sebastian Hök

(Source: Study Team)

1.5 Time Schedule of the Study

The study was carried out in eight months, from August 2012 to March 2013. The major milestones in the course of the study are as follows:

- 1) Contract Date : August 8, 2012
- 2) Submission of Inception Report : August 10, 2012
- 3) FIDIC Contracts Training Workshop (Modules 1 & 2) : August 13 to 18, 2012
- 4) Adjudicator Training Workshop (ATW) : October 29 to November 2, 2012
- 5) Adjudicator Assessment Workshop (AAW) : November 5 to 7, 2012
- 6) Study Report Submission : March 11, 2013

Chapter 2 Recruitment of Candidates

2.1 Process of Candidates Recruitment

Potential candidates who were recruited include those who satisfy the qualifications required to become adjudicators and have the intention to register in the National List. It was deemed necessary to recruit potential candidates from several JICA ODA recipient countries in Asia where FIDIC MAs have been operating. JICA requested FIDIC MAs in Vietnam (VECAS), Sri Lanka (ACESL), Indonesia (INKINDO), and the Philippines (CECOPHIL) to recruit potential candidates. In the past DB study conducted in 2011, it was confirmed that these FIDIC MAs expressed positive intention to establish their own National Lists.

JICA sent letters dated 27 March 2012, addressed to the presidents of the four FIDIC MAs. The outline of the letters is as follows:

- JICA has been working to promote DB with the recognition of its contribution to the sound management of construction contracts. In this connection, JICA would like to carry out programs that would help in the creation of DB National Lists in ODA partner countries.
- The proposed programs are composed of:
 - 1) FIDIC Contracts Training Workshop (Modules 1 and 2): five days;
 - 2) Adjudicator Training Workshop: five days; and
 - 3) Adjudicator Assessment Workshop: three days.
- A list of maximum ten qualified candidates, who are able to speak and write in English fluently, shall be submitted on April 27, 2012. In the candidates list, information such as name, affiliation, title, availability of attendance when workshop is conducted abroad, and selection criteria are provided.
- JICA recommends the “Adjudicator Procedural Rules and Guidelines” drafted by the Association of Japanese Consulting Engineers (AJCE) as a guiding reference in the process of candidate selection.

Following the letter from JICA, four FIDIC MAs recommended a total of 35 qualified candidates as below:

Table 2.1 Candidates List by Country

Country	FIDIC MA	Number of Candidates
Philippines	CECOPHIL	10
Indonesia	INKINDO	7
Sri Lanka	ACESL	9
Vietnam	VECAS	9
Total		35

(Source: JICA Study Team)

Table 2.2 Profiles of Candidates

Nation	Mean Age	Sex		Occupation			
		Male	Female	Consultant	Lawyer	Government	Industrial Association
Philippines	51.9	7	3	3	7	0	0
Indonesia	45.9	6	1	6	0	1	0
Sri Lanka	53.8	9	0	6	0	3	0
Vietnam	40.4	7	2	8	0	0	1
Total	48.2	29	6	23	7	4	1

(Source : JICA Study Team)

Following the recommendations from the four FIDIC MAs, JICA sent the invitation letter on the proposed programs to all the candidates on July 30, 2012.

2.2 Qualification Requirements

In JICA's letter addressed to the presidents of the FIDIC MAs, AJCE's "Procedural Rules, Annex 1 Adjudicator Assessment Application Guidelines" was attached as a guiding reference to set up the qualification requirements suitable for conditions applicable in each nation. (AJCE's "Adjudicator Application Guidelines" is attached in Appendix 2.1)

Each FIDIC MA set up their own qualification requirements based on the criteria set forth by AJCE below:

- 1) Qualification equivalent to Professional Engineer, First-class architect, First-Class Civil Engineering Works Execution Managing Engineer, Attorney-at-law, or other appropriate professional qualifications.
- 2) To have ten or more years of working experience in consulting engineering industry or construction industry, except for the Attorney-at-law.
- 3) To have all of the experiences listed below:
 - Experience in international construction work (either as contractor, consulting engineer, or contract advisor) .
 - Experience in working with FIDIC contracts.
 - Experience in resolution of contractual disputes (either as a dispute resolution provider, e.g., a mediator or an arbitrator, the Engineer under FIDIC contracts, a consultant or a disputing party, including its representatives).
- 4) To be fluent in English and able to compose concise sentences.
- 5) To complete FIDIC Module 1 and Module 2 training programs:
 - Module 1: Practical Use of the FIDIC Conditions of Contracts

Module 2: Management of Claims and Dispute Resolution Procedures

- 6) To complete FIDIC Modules 3 and 3A or the Adjudicator Training Workshop:
Modules 3 and 3A: Management of Dispute Adjudication Board Procedures
- 7) To have an intention to register on the AJCE List.
- 8) To have an intention to serve as a DB member upon request.

Regarding the above requirement, CECOPHIL, INKINDO, and ACESL set up equivalent qualification as Professional Engineer, Chartered Engineer, Chartered Architect, Attorney-at-law, Chartered Quantity Surveyor, or any other professional qualifications.

VECAS set up equivalent qualification as a highly qualified engineer certified by authority, Architect, Attorney-at-law, and qualifications obtained in overseas such as Professional Engineer, Chartered Engineer, Chartered Architect, Quantity Surveyor, etc.

Chapter 3 FIDIC Contracts Training Workshop (Modules 1 & 2)

3.1 Purpose of the FIDIC Contracts Training Workshop

In order to enable the 35 adjudicator candidates learn the basic structure of the FIDIC conditions of contract and resolution process of claims and disputes, training workshops Modules 1 and 2 (whose frameworks were defined by FIDIC) were delivered in Manila.

Module 1: Practical Use of the FIDIC Contracts

Module 2: Management of Claims and the Resolution of Disputes

In addition, the following lectures were presented to the participants for better understanding of JICA's initiative on dissemination of DB, as well as the setting up and administration of the national list of adjudicators in Japan:

- 1) JICA's Activities on Promotion of DB
- 2) Creation of National List of Japanese Adjudicators

3.2 Appointment of Trainers

Modules 1 and 2 workshops were given by Mr Geoffrey Smith who worked five times as a trainer of Module 1 workshop organized by JICA between February 2010 and February 2012.

Mr Geoffrey Smith has delivered a lot of workshops as an accredited trainer of FIDIC, also in the Asian Development Bank. Since his graduation as a civil engineer in 1975, he has worked in civil and infrastructure projects as contracts specialist in Asia, Africa, and Europe. His experience in litigation and arbitration is mostly international but often in Asian countries. He is in the FIDIC President's List of Approved Adjudicators as well as in the National List of Adjudicators in France. He serves as the Chairman of the MDB Committee of the Dispute Resolution Board Foundation (DRBF).

3.3 Training Workshop Programme

The workshop was carried out in four days from August 13 to 16, 2012 in accordance with the programme indicated in Appendix-3.1.

The outline of each module is described below:

- 1) Module 1: Practical Use of the FIDIC Contract
 - (1) Introduction and Principles of FIDIC Contract Documents
 - (2) Responsibilities of Main Parties
 - (3) The Management of Projects
 - (4) Financial Clauses and Procedures

- (5) Risk Force Majeure and Termination
- 2) Module 2: Management of Claims and the Resolution of Dispute
 - (1) Managing Variations
 - (2) The Management of Claims
 - (3) The Resolution of Dispute
 - (4) Dispute Adjudication Boards

In the workshop, training was conducted not only through lectures but also by means of case analysis and examinations to promote understanding among the participants.

Appendices 3.2 to 3.5 show training materials used in the workshop.

All 35 participants have successfully completed the workshop program and have been presented with completion certificates, a sample of which is shown in Appendix 3.6.

3.4 Selection of Candidates for ATW/AAW

Selection of the candidates for ATW/AAW was done by having them go through a combination of a multiple choice test in the afternoon of the day following the last day, and individual interview in the morning of the last day of Modules 1 and 2 workshops. Twenty-one candidates, which is the maximum number acceptable for ATW/AAW, were allowed to proceed to ATW/AAW, out of the 35 participants in the modules.

1) Written/Multiple Choice Tests

Multiple choice tests were administered to examine the participants' understanding of the FIDIC Red Book. The number of correct answers to each question is not necessarily only one and therefore, every wrong answer is minus one point.

Written tests were made out of two case studies both of which may ask about the contractor's entitlements to additional payments and extension of time. The answers must be explained.

2) Individual Interview

Mr Smith and Professor Omoto jointly interviewed the 35 participants in Modules 1 and 2 for five to ten minutes each. The interview was done to confirm the participant's understanding of the FIDIC Conditions of Contract, and their willingness and reasons for proceeding to ATW/AAW.

3) Test Result

Mr Smith and Professor Omoto unanimously agreed to select 21 candidates to be allowed to proceed to ATW/AAW. The result is as follows:

Table 3.1 Result of the Selection

Country	Modules 1 & 2 Participants	Passed
Philippines	10	8
Vietnam	9	3
Indonesia	7	3
Sri Lanka	9	7
Total	35	21

(Source : Study Team)

The result of the selection was reported by JICA to each of the four countries' FIDIC MA.

3.5 Result and Analysis of the Questionnaire Survey

The questionnaire survey was carried out using the Questionnaire Form shown in Appendix 3.7. This survey aims to examine the outcome of the ATW/AAW and to identify future improvements by collecting and analyzing opinions of trainees about the lecture programme and the level of their understanding of the workshops.

1) Profile of the Participants

(1) Years of Work Experience

With respect to years of work experience in international construction projects, the data reveal that each one of the categories one to three years and three to five years experience account for 9% of the surveyed participants. About 3% accounts for work of five to ten years; and 14% have worked for a period of ten to 15 years. The biggest chunk of 51% of the surveyed participants reported more than 15 years of experience doing international construction projects. This denotes that senior experts dominate the trainees in the workshop (see Figure 3.1).

(2) Type of Organization/Company

In response to the question about the type of organization, 21 (60%) are engineering consultants, 7 (20%) are law firm/legal advisors, 4 (11%) are affiliated with the government, 2 (6%) are self-employed, and 1 (3%) is in industrial association. The profile connotes that majority of the trainees, in one way or another, are engaged in public works (see Figure 3.2).

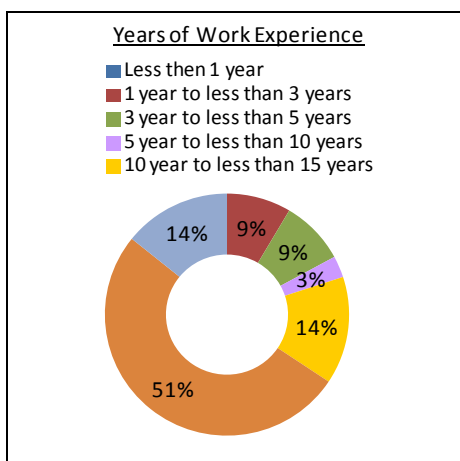


Figure 3.1

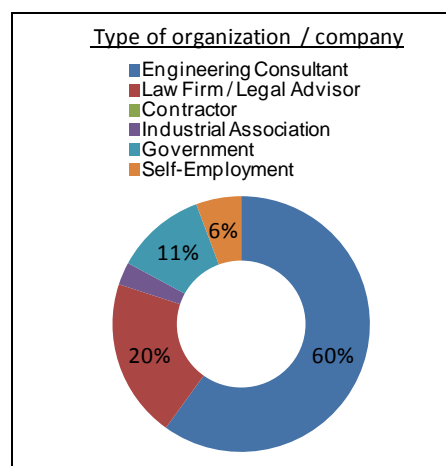


Figure 3.2

2) Record of Training on FIDIC Contracts

Nearly 70% of the trainees answered that they have experience in FIDIC contract training programs, and many of them participated in such workshops held in their countries several times. It is presumed that most of the participants have high potentials to be engaged in international construction projects which use FIDIC contracts (see Figure 3.3).

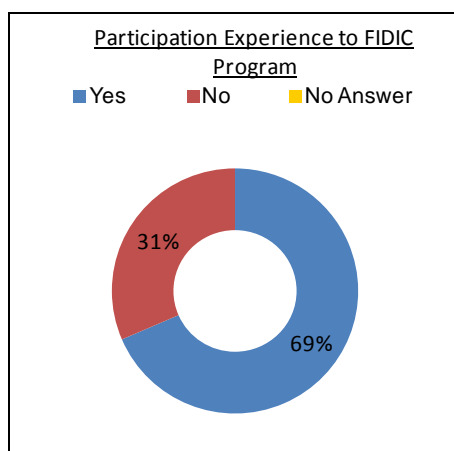


Figure 3.3

3) Lecture Contents

(1) Module 1

Appendix 3.8 shows the evaluation of the Module 1 workshop by the trainees. The categories in the survey questionnaire that came highly appreciated by the participants (with qualitative rating of “extremely “ and “very much”) are “understanding of the session” (nearly 90%), “usefulness for the future” (100%), “enhancement of own capacity” (nearly 100%), “workshop materials” (80%), “the duration of the program” (70%), “ satisfaction of Q and A session” (90%), and “application to your country” (over 90%). Most of the participants highly appreciated the evaluation questions about the lecture. It can be concluded that the level of satisfaction was quite high for Module 1.

The following comments have been obtained with the aim of improving the contents and method of the workshop:

- Training materials should be given in advance
- I want to know the actual examples how to solve disputes by DAB members.
- More time for the exercise is needed.
- I want to have more exercises through case studies.
- Illustrations would be helpful to understand the lecture more deeply.
- Audio-visual presentation of the problems / illustrations would be helpful.

From the opinions above, there are requests for more specific examples such as references of case-studies. It can be deduced from the above information that trainees are hoping to learn more about what to do in actual situation through the use of case studies. Likewise, there are requests to take advantage of the lecture not only to transfer learning but also to have discussion of the kind of situations where the knowledge can be applied.

(2) Module 2

Appendix 3.9 shows the evaluation of Module 2 by the trainees. About two-third responded “appropriate” on the item, “the duration of the program” while the following categories were highly appreciated: “understanding of the session” (nearly 90%), “usefulness for the future” (100%), “enhancement of own capacity” (nearly 100%), “workshop materials” (nearly 90%), “satisfaction on Q&A session” (90%), and “applicability to your country” (nearly 100%). Since more than 30% answered that “the duration of the program” is “short,” it can be implied that keeping up with lectures was hard for trainees. Based on the fact that almost all categories got high scores, it can be concluded that the level of satisfaction for the Module 2 was high as is Module 1.

The following comments for the “proposal for improvement of contents and method of the workshop” were obtained:

- Time for the lecture is too short.
- It will be great to have one day off between two workshops in order to communicate between participants from different countries. On the other hand, it is recommended to have 1 or 2 days for the site visit.
- I want to have time to discuss about problems what each participant faces in each country.
- I want to know case studies in each country including Japan.

There were many requests on inclusion of specific case study, which is similar with responses to Module 1. While this workshop has to achieve specified contents of lectures as official program of FIDIC, by way of including lectures corresponding to specific situations or problems in the participating countries, it can be considered in order to facilitate better understanding of individual circumstances in each country. In addition, the importance of providing opportunity between participants from different

countries was pointed out. It was reconfirmed that the workshop played an important venue for people to exchange ideas and insights about international construction market.

Chapter 4 Adjudicator Training Workshop

4.1 Purpose of the Adjudicator Training Workshop

Prior to the Adjudicator Assessment Workshop (AAW), the Adjudicator Training Workshop (ATW) was conducted in order to have the participants gain the necessary knowledge that an adjudicator should possess and be aware of the acceptable behavior as an adjudicator. The participants acquired the following specialized expertise from the ATW:

- 1) Role and functions of DB
- 2) Capabilities to be possessed by the adjudicator
- 3) Cost of DB
- 4) Site visit
- 5) Informal advice and dispute avoidance
- 6) Referral of dispute
- 7) Hearing
- 8) DB decision

4.2 Appointment of Trainers

The ATW was carried out by three trainers, including Professor Omoto, who is a member of the Study Team, and the following trainers who worked with Professor Omoto in the ATW held in Tokyo in 2010. All three trainers are among those listed on the FIDIC President's List of Approved Dispute Adjudicators.

- 1) Mr Gordon Jaynes (residing in the United Kingdom)

Mr Jaynes, an American lawyer, has over 40 years experience in the international construction industry. He renders advice to owners, consultants, contractors, subcontractors, and process engineering companies, and serves as party's attorney, arbitrator, and DB adjudicator. He is one of the reputable construction lawyers in the world in the field of construction contract and dispute resolution. Especially, he has often been appointed as a neutral arbitrator or DB adjudicator, who is required to be independent and impartial to the parties involved.

He had been part of the Assessment Panel of Adjudicators (APA) for the FIDIC President's List of Approved Dispute Adjudicators from the beginning of this system.

In 2009, he was part of the team which conducted the JICA study entitled, "Study on the Introduction and Dissemination of DAB/Adjudicators in the Asian Region", and contributed to the preparation of the JICA DB Training Kit.

- 2) Mr Richard Appuhn (residing in Italy)

Mr Appuhn has 40 years of experience in engineering. He specializes in civil engineering and

engineering geology, a registered Professional Engineer (PE) and engineering geologist in the United States of America (USA). He has been working for consultants and contractors in international construction projects in the US, South Africa, Italy, etc. He became independent in 2000 and started his own consulting firm. He has often been appointed as DB adjudicator. He has been a director in charge of education and training in the DRBF and is a FIDIC-accredited trainer. His expertise includes conducting training for DB adjudicators.

4.3 Workshop Participants

JICA invited 21 participants to the ATW and AAW, who passed the screening process conducted after the Modules 1 and 2 workshops as described in Chapter 3.4. However, only 20 candidates participated in the ATW and AAW, since one of the participants from Vietnam declined the invitation at the last minute due to health problems.

Table 4.1 Participants in ATW and AAW

Country	Number of Participants
Philippines	8
Indonesia	3
Sri Lanka	7
Vietnam	2
Total	20

(Source : Study Team)

Table 4.2 Profile of Participants

Country	Mean Age	Sex		Occupation			
		Male	Female	Consultant	Lawyer	Government	Industrial Association
Philippines	54.1	6	2	3	5	0	0
Indonesia	48.7	3	0	2	0	1	0
Sri Lanka	55.0	7	0	4	0	3	0
Vietnam	39.5	1	1	1	0	0	1
total	52.2	17	3	10	5	4	1

(Source : Study Team)

4.4 Training Workshop Programme

The ATW was conducted for five days from October 29 to November 2, 2012, in accordance with the program in Appendix 4.1.

The ATW was structured by combining lectures based on the materials included in the kit, case studies using scenarios prepared by the trainers, and simulated situations during the mock DB hearings.

1) Lectures

Three trainers took turns in giving lectures using PowerPoint slides, which were included in the training kit. Trainers ascertained the understanding of the candidates by asking questions. The lectures covered the following subjects:

- Characteristics of DB (efforts to avoid disputes);
- Types of DB (standing, ad hoc);
- Selection of DB members (qualification, costs);
- Operation of DB (site visits, providing informal opinion, referral, hearing, decision);
- Remuneration to DB members;
- Proceedings after DB Decision (efforts to reach amicable settlement, arbitration); and
- Expiry of DB membership.

As shown in the analysis of answers to questionnaires in the following section, most of the candidates evaluated that the kit and lectures based on the kit are suitable training materials.

2) Case Study as Homework

Trainees were given assignments to answer how to deal with issues that may arise during the different stages of the DB process, in case they are tasked as DB chairperson. They wrote both informal opinion(s) and decision(s) for the case(s) included in the scenario.

- Homework Day 1
 - How to establish a DB when one of the parties is not cooperative
 - How to select DB members, for example, utilizing the lists of adjudicators
 - How to calculate the costs of DB
 - Homework Day 2
 - Important matters during site visits, requirements to be satisfied when DB provides an informal opinion, etc.
 - How to write a DB site visit report
 - How to communicate and distribute information during site visits
 - Homework Day 3
 - Time bar for referral, formal referrals, hearing
 - Decision writing
 - Homework Day 4
-

➤ Decision-writing for the mock hearing conducted on Day 4

3) Mock Hearing

Mock DB hearings were conducted by using scenarios prepared by the trainers. The case studies were about how to conduct DB proceedings dealing with 1) an Extension of Time (EOT) and additional payment claims in a construction of a by-pass road project, and 2) an EOT claim in the construction of a hydroelectric power plant. The trainers demonstrated how to do a mock hearing before playing their respective roles. Trainees were divided into six teams, each consist of three members (two teams had four members). Three teams, respectively played the role of the Employer, Contractor, and DB. During the mock hearing, trainers advised on how to behave and proceed. Trainees who have no experience on hearings learned through these exercises.

4) Decision-Writing

Trainees exercised in writing the decision for the mock hearing and the trainers advised the trainees individually for better writing.

Completion certificates shown in Appendix 4.2 were given to all trainees at the end of the final day.

Chapter 5 Adjudicator Assessment Workshop

5.1 Purpose of the Adjudicator Assessment Workshop

The Adjudicator Assessment Workshop (AAW) was conducted to evaluate the capability and competence of the candidates for adjudicator who completed the ATW and to provide such result to FIDIC Member Associations in the Philippines, Indonesia, Sri Lanka, and Vietnam - countries intending to create a National List of Adjudicators in the future.

5.2 Formation of Assessment Panel for Adjudicators (APA)

The AAW was carried out by three assessors, including Professor Omoto, who is part of the Study Team, and the following two assessors, who worked as assessors together with Professor Omoto in the AAW held in Tokyo in 2010. All three are among those listed on the FIDIC President's List of Approved Dispute Adjudicators. Among the panel of assessors, Mr Jurowich was elected as the chairperson.

1) Mr Volker Jurowich (residing in Germany)

After serving as civil engineering faculty of a technical university in Germany in 1969, Mr Jurowich worked with a major German international contractor, Züblin, until his retirement as a board director in 2003. He has gained design experience in the company and is a specialist in dam construction. He is well-experienced in dispute resolution such as arbitration and has often been appointed as DB member. He has been appointed as a member of the assessment panel for National List of Adjudicators in Germany since 2007 and in France in 2011. He served as the chairman of DRBF from 2011 to 2012.

2) Dr Sebastian Hök (residing in Germany)

Dr Hök is a partner of a German law firm and also a lecturer of applied science at the Berlin University. He is an expert in arbitration law and construction law, and well-experienced in handling international construction disputes. He has served as a member of the assessment panel for National List of Adjudicators in Germany and in France with Mr Volker Jurowich. He is a FIDIC-accredited trainer.

5.3 Assessment Workshop Programme

The AAW was conducted for three days from November 5 to 7, 2012, in accordance with the program in Appendix 5.1.

Using the five testing techniques below, the knowledge and capability in international construction contracts (especially of the FIDIC MDB Harmonised Edition), skills of managing the DB process, capability of making decisions, and the ability in communicating and writing in English were examined.

1) Multiple Choice Test

- Twenty questions were prepared on conditions of contracts, claims procedures, procedures for disputes and DB, and the application of this basic knowledge.

2) Case Study

- To draft an agenda for the DB's first site visit to a breakwater and container berth construction project.

3) DB Decision Writing

- Based on the scenario of a rock-fill dam construction, decision writing was practiced concerning contractor's claims of an extension of time (EOT) and additional payments due to unforeseeable underground conditions and employer's counter claim over liquidated damages due to contractor's delay.
- Drafting a decision as to the validity of DB for a highway project.
- Drafting decisions for contractor's entitlement arising from several types of delay in the approved baseline programme.

4) Oral Examination

- Based on the intermediate assessment of the candidates after multiple choice test and DB decision writing, candidates were selectively subject to oral examination.
- Subjects of the examination include notice of claim, specifications, ambiguities of contract provisions, and employer's right to set-off.

5) Interview

- Each candidate was interviewed by APA at the end of the AAW. Intermediate assessment was reconfirmed and the communication ability was assessed.

All candidates were presented with an Assessment Workshop Completion Certificate, enclosed in Appendix 5.2, at the end of AAW.

5.4 Result of the Assessment

Based on the assessment of all stages of the AAW as a whole, 11 out of 20 candidates were judged to have necessary capabilities required for a DB adjudicator.

APA submitted to JICA the Overview Report of the Assessment Panel (Appendix 5.3) and the result of the assessment.

5.5 Analysis of Result of the Assessment

1) Multiple Choice Test

It was found that some candidates were not very much familiar with FIDIC MDB Harmonised Edition. The results ranged widely between good and bad. Candidates who have not passed this time are recommended to thoroughly study the MDB Harmonised Edition.

2) DB Decision Writing

It was judged that all candidates were capable of writing good English. However, many of the candidates were not proficient at identifying issues involved in the scenarios and in developing the case logically in accordance with the conditions of contract. This is likely because Asian engineers have no education and training for such skills, which must be considered as definitely necessary for a DB member. Lawyers, registered or in-house, are much better in decision writing. Meanwhile, engineers are advised to undergo training, with the lawyers' help, with regards to identifying issues and developing a case.

3) Oral Examination and Interview

It was generally observed that candidates from three countries other than Vietnam have enough capability in speaking English. It was found that there are some lawyers who consider Dispute Board the same as arbitration or mediation. They should study the DB concept all over again.

5.6 Result and Analysis of the Questionnaire Survey

The following questions were asked in the questionnaire:

- Motivation for applying to ATW and AAW;
- Evaluation of the training and the training kit;
- Proposal for improvement of the training kit; and
- Proposal for improvement of the ATW and AAW.

The result of the questionnaire survey is shown in Appendices 5.5 and 5.6, and is summarized as follows:

1) Motivation in Applying for ATW and AAW

- Motivation

There were 19 answers obtained from 20 trainees. Fifteen replied that they have desires to become DB adjudicators while five want to learn DB and dispute resolution, in general. More than 75% of the trainees were very positive to serve as adjudicators, thus, the purpose of the ATW and AAW were considered to be accomplished.

- Workshop Fee

The attendance fees for this kind of two-day workshop in Europe range between JPY 100,000 and JPY 150,000, while that for a four- to five-day workshop is about JPY 300,000, which still attract participants. It is said that these fees are normally paid by individuals, and not by their employers. Trainers were asked on how much they would be willing to pay personally for this ATW and AAW. With a fee of EUR 2000 given as an example, nine replied positively while 11 answered negatively. The range of acceptable fees according to the number of trainees is as follows:

◇ EUR 500 (including USD 500):	4 trainees
◇ EUR 700:	1 trainee
◇ EUR 1,000 (including USD 1,000):	3 trainees
◇ EUR 2,000:	9 trainees

The above survey results showed that there are professionals who are ready to pay such high fees just to participate in this kind of workshop, which seems to illustrate that DB adjudication is a new promising profession. This trend is very helpful in the development and maintenance of a DB national list.

- Intention to Apply to the FIDIC President's List of Approved Dispute Adjudicators

Seventeen out of 20 trainees expressed their intention to apply to the list. Two out of 20 desired attaining this prestigious qualification to contribute to the international construction industry. It was confirmed that there were several participants who had high aspirations.

2) Evaluation of the Training and Training Kit

- Is the kit good for self-study?

Majority (19) of the trainees evaluated that the kit is useful for self-study.

- Is the combination of the training and the kit good?

All evaluated that the combination of the training and the kit was effective.

- Is the training workshop good for users of DB?

Majority (19) of the trainees answered that it was effective for the education of users.

- Is the training workshop good for training of DB adjudicators?

All evaluated that the training was effective.

- Was TW difficult to follow?

Three replied it was difficult while 17 thought otherwise. There are several reasons for the “difficult” rating, such as time pressure and too much homework. However, this method will not be expected to change in the future because this was intentionally designed for the trainees to cope with similar situations that often occur in actual DB operation.

- Are you confident that you can serve as a DB member after this training?

All trainees except one person of no answer, answered positively. This suggests that the ATW workshop was evaluated as effective.

3) Proposal for Improvement of the Training Kit

The training kit was generally evaluated as a good material.

- Quite a lot of trainees wanted to have more case studies based on the scenarios in the kit. However, it is considered much better that scenarios be based from actual experiences of the trainers.

4) Proposal for the Improvement of the ATW

There were quite a number of proposals to improve the ATW in relation to homework. There were other proposals such as an extension of time spent for case studies, as well as requests regarding the training kit.

- Reducing the Volume of Homework

This request was sounded-off during the ATW. However, this format is the same as the workshops in other countries. Thus, this method is important in preparation for the ATW and will not be changed.

- DB Mock Hearing

As mentioned above, the total duration should be extended and more time should be allocated to conduct DB mock hearing. It is noted that trainers should also participate in the mock hearing.

In addition, a participant from the Philippines as a host country pointed out the following item, which should be considered as a future and subsequent agenda:

“Please provide the participants from the host country with accommodation. For this workshop, all the participants from the Philippines had to commute everyday. Compared with the participants from outside of the host country who are provided with accommodation in the same location as the workshop venue, it was disadvantageous to spend three hours time in the early morning and evening traffic jam.”

5) Evaluation of the AAW

- Was the TW suitable preparatory course for AW?
-

All evaluated that the training was effective. There was a proposal that it was better to have comparison among other FIDIC books. Corresponding to this, a comparison table was distributed in the workshop.

- Was AW fair to follow up TW?

A majority answered it was fair. This connotes that the AAW was evaluated as effective.

- Was AW difficult to follow?

Six replied it was difficult while 14 thought otherwise. There are several reasons for the “difficult” rating, such as learning a lot of knowledge in a short period. As to the proposal to homework, the trainers will not relieve the trainees from this obligation because the assignment of the homework is traditional in this kind of assessment and it was adopted also in the assessment of the FIDIC President List’s of Adjudicators and Arbitrators in UK.

6) Proposal for the Improvement of the AAW

There were requests to have jury’s comments included in their homework and written decisions. However, since the workshop is for assessment purposes, such request was not granted. There was also another request by a number of trainees about the necessity of longer time for the homework, but it will not be changed due to the same reason for “difficulty” mentioned above.

Chapter 6 Cultivation Plan for Adjudicators

6.1 Availability of the Adjudicators

FIDIC conducted an assessment workshop for the FIDIC President’s List of Approved Adjudicators in May 2012 for the first time in three years and 61 adjudicators are registered on the list at present. There is only one adjudicator whose nationality is of an Asian country, i.e., Professor Omoto from Japan.

In addition to the FIDIC President’s List of Adjudicators, 58 National List of Adjudicators are identified at the FIDIC website, as follows;

Table 6.1 Number of National List of Adjudicators

Country	FIDIC Member Association	Adjudicators
France*	SYSTEM-INGENIERIE	10
Germany*	VBI	10
Poland	SiDR	31
Japan*	AJCE	7
Total		58

(Source : FIDIC Website)

Note : * Successful candidates were examined by the “Adjudicator Guidelines” that reflect the “FIDIC Guidelines for National Lists”.

If all of the 11 candidates for adjudicator selected through the AAW in this study would be registered on the National List of the FIDIC MA in each country, the number of Asian adjudicators related to FIDIC becomes eighteen ($18 = 7 + 11$) in total. This corresponds to only 13% ($=18/130$) of total number of FIDIC adjudicators in the world, thus the availability of adjudicators in Asia is still considered to be very small.

6.2 Demand for Adjudicators

The major standard bidding documents issued by JICA and the MDBs employ the DB system as the standard dispute resolution process in recent days, as shown below:

Table 6.2 Use of Dispute Board in Standard Bidding Documents of JICA/MDBs

	Standard Bidding Document	JICA Version	Conditions of Contract	Dispute Resolution (First Step)
1	Works	1.0 (2012)	FIDIC MDB Harmonised Edition, 2010	Standing Dispute Board
2	Plant Design, Supply and Installation	1.0 (2010)	ENAA form	Standing Dispute Board
3	Small Works	1.0	MDB original	Adjudicator

		(2010)		
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(Source: JICA Study Team)

Thus, in theory, this is supposed to push up the demand for adjudicators in these days. However, in reality, the growth rate of the demand is deemed to be limited due to the following reasons:

- 1) Replacement of standing DB with ad-hoc DB in drafting bidding documents and
- 2) Intentional delay or postponement of the setting-up of DB by the contract parties.

If the formation of a DB is not made in accordance with JICA standard bidding documents, the dispute avoidance function of DB may not be exercised and the disputes cannot be resolved effectively when they arise. This situation should be rectified and avoided. Since the cornerstone for the dissemination of DB is the Employer's positive commitment, an awareness campaign is required to be continued, especially for the Employer.

As stated above, the demand for adjudicators is expected to surely increase in the medium- to long-term basis because the DB becomes a default dispute resolution mechanism in the standard bidding documents of JICA and the MDBs.

6.3 Cultivation Plan for Adjudicators

The previous Sections 6.1 and 6.2 discussed and confirmed needs for more adjudicators in the Asian Region. Based on this, the future development plan for the DB is proposed as described below:

1) Training of Candidates for Adjudicator

- (1) As described in Chapter 5, 11 out of 35 candidates were judged to have the necessary capabilities required for a DB adjudicator, thus, the assessment passing rate was 31%. Although all the participants have experience working on contract administration in construction projects, many needed more training and experience before participating in the assessment workshop.
- (2) The participants who failed to pass the assessment workshop generally lack the knowledge and experiences as stated below. More actual practice on the job and training will be required to build their capabilities.
 - (a) Lack of working experience in construction (construction management, time scheduling, quality control and safety management) and/or lack of knowledge on construction work.
 - (b) Lack of working experience in contract administration and claims settlement.
 - (c) Lack of working experience in construction dispute resolution, from any standing point.
- (3) The result of the questionnaire survey confirmed that Modules 1 and 2 workshops provide very effective opportunities for the candidates to learn about the overall aspects of FIDIC

contracts.

- (4) All the participants answered that the ATW with the JICA training kit had very high training effect, making this program worthy to be reiterated for the capacity building of adjudicator candidates.
- (5) All the trainers appointed in this study were in the FIDIC President's List of Approved Adjudicators and the lectures were based on their extensive career involvement with contract administration and dispute resolution. Similarly, in order to ensure quality of the training program, the workshops should also be given by those in the FIDIC President's List of Approved Adjudicators or equivalent experienced persons.
- (6) In summary, the Modules 1 and 2 workshops, together with the five-day ATW, are excellent training opportunities for candidates for adjudicators.

2) Assessment of Adjudicator Candidates

- (1) The method of assessment applied this time, namely a candidate is evaluated through the three-day assessment workshop by three assessors, has been used for the FIDIC President's List of Adjudicators as well as the National List of Adjudicators in Germany, Japan, and France. The members of the APA conducted in this study were all registered on the FIDIC President's List. It is desirable to apply this similar assessment method to future assessments in order to maintain the capacity and competence of the adjudicator to be selected.
- (2) Twenty candidates participated in the ATW and AAW this time. More participants will make an in-depth assessment more difficult; on the other hand, less participants will create financial challenges. It is recommended to maintain the numbers of candidates to more or less 20 persons through a prior screening, if there are too many participants.

3) Implementation Structure for Development of Adjudicators

- (1) It is assumed in this study that the selected candidate through the AAW will be registered on the National Lists to be created by the FIDIC MAs in the future. It is the most realistic and efficient way to continue the development program of adjudicators in the framework of FIDIC that supports the creation of National Lists by FIDIC MAs.
- (2) The supporting program provided by FIDIC on the promotion of the National List includes the following:
 - To introduce and maintain linkage to National Lists at the FIDIC website;
 - To provide the "FIDIC Guidelines for National List" as a reference for the MA that intends to create a National List;
 - To provide FIDIC contracts training courses (Modules 1 to 4);
 - To provide "Training Pupilage" for National List of Adjudicators;

-
- (3) FIDIC MAs will take major roles in nurturing of adjudicators, i.e., through training, assessment, and registration in Asia. It is possible for each MA to proceed with the development program individually; however, as it has been implemented this time, it is more practical to implement the program jointly with several MAs from the viewpoint of economy of scale.
 - (4) There is a regional group of FIDIC MAs in Asia called ASPAC (FIDIC Asia-Pacific Member Associations), although it does not keep any permanent staff. Therefore, it will be more realistic to set up an ad-hoc committee under the FIDIC MAs to administer implementation of the joint ATW/AAW.
 - (5) The recruitment of applicants for the ATW/AAW will be done by each MA. It was observed however, that in some countries, occupations of participants were a bit unbalanced with many consulting engineers and lawyers (see Chapter 2, Section 2.1.). Therefore, the MA is advised to recruit from a wide range of participants from the other industries such as contractors.
 - (6) As described in Chapter 5, Section 5.6, the maximum out-of-pocket expenses which can be incurred by an individual would be some 2,000 Euro. On the other hand, actual expenses for trainer fees and travel expenses incurred for the implementation of the ATW and AAW in the study was about 6,000 Euro per participant. In reality, the costs for the workshop venue, logistic support and travel of a participant is additionally required to carry out the program. Therefore, several assistance measures would be essential to reduce the personal financial burden in the realization of an adjudicator training and assessment workshop similar to this study.
 - (7) The following assistance measures are proposed for the stakeholders concerned:
 - a) JICA/MDB
 - To encourage FIDIC MAs to utilize Modules 1 and 2 training materials and adjudicator training kit developed by JICA.
 - To provide Module 1, Module 2 and ATW under the capacity development program.
 - To provide workshop venue at no cost.
 - b) FIDIC
 - To provide FIDIC contracts training workshop at low cost.
 - To formulate a working committee under the existing committee (for example, Contract Committee) who will be engaged in the promotion of DB and provide various supports to international financial institutions and MAs.
 - To cooperate with international financial institutions like World Bank and the Asian Development Bank for institutionalization and introduction of DB in their projects.
 - c) DRBF
 - The DRBF is an international NPO devoted to the promotion of DB and training of DB
-

members. DRBF has members registered as FIDIC President's List Adjudicator and/or have ample experience as DB member. If these members could work as trainers or assessors in the ATW and AAW as volunteers, it will be a great help to FIDIC MAs.

d) FIDIC MA who intends to cultivate adjudicators

- To provide logistic support for operation of workshops by staff of FIDIC MAs.

e) AJCE

- To provide advice to FIDIC MAs regarding creation and maintenance of the National List of Adjudicators.

APPENDICES

AJCE Adjudicator Assessment Application Guidelines
(Extracted from Adjudicator Assessment Procedural Rules - Annex-1)

(Purpose)

Article 1 These Guidelines provide the application guidelines required for taking examination and screening of adjudicators for FIDIC conditions of contracts ("Adjudicator Assessment") conducted by the Association of Japanese Consulting Engineers ("AJCE").

(Application Requirements)

Article 2 Applicant, in principal, must satisfy all of the conditions listed below.

- (1) To possess qualification as the Professional Engineer, the First-Class Architect, the First-Class Civil Engineering Works Execution Managing Engineer, the Attorney or other appropriate professional qualifications. However, those who have the intra-corporate legal experience, provided that they are vastly experienced in constructional contracts, may be deemed to have the qualification.
- (2) To have 10 or more years of working experience in consulting engineer's industry or construction industry. However, this shall not apply to an attorney.
- (3) To have all of the experiences listed below as 1), 2), 3).
 - 1) Experience in international construction work (either as contractor, consulting engineer, or contract advisor)
 - 2) Experience in working with FIDIC contracts
 - 3) Experience in resolution of contractual disputes (either as a dispute resolution provider, e.g. a mediator or an arbitrator, the Engineer under FIDIC contracts, a consultant or a disputing party, including its representatives.)
- (4) To be Fluent in English and being able to compose concise sentences.
- (5) To have completed Module 1 and Module 2, contractual training programs the outline thereof are provided by FIDIC.

Module 1: Practical use of the FIDIC Conditions of Contracts

Module 2: The management of claims and dispute resolution procedures
- (6) To have completed FIDIC Module 3 and 3A or Adjudicator Training Workshop that utilizes Dispute Board Training Kit developed by JICA in 2010.

Module 3 and 3A: Management of Dispute Adjudication Board procedures
- (7) To have an intention to register in the AJCE List of adjudicators and opened to public when accepted.
- (8) To have an intention to assent when appointed as an adjudicator.

FIDIC Contracts Training Workshop

Japan International Cooperation Agency

FIDIC Contracts Training Workshop

PROGRAM

Module 1: Practical Use of the FIDIC Contracts

**Module 2: Management of Claims and
the Resolution of Disputes**

Date: August 13th to 17th, 2012

Venue: Asian Development Bank (ADB), Manila

[Auditorium Zone C - No. 1860C]

Organizer: Nippon Koei Co., Ltd.



DAY1 Monday, August 13



9:00-9:05 **Opening Remarks**, Mr. Sakata Shokichi. Deputy Director General, JICA
9:05-9:10 **Opening Remarks**, Mr. Ignatius Santoso, OIC COSO, ADB
9:10-9:30 **Orientation**, Yukinobu Hayashi, General Manager, Nippon Koei Co., Ltd.

9:30-12:00 **Session 1**
FIDIC Module 1 (1 of 4), Geoffrey Smith, Accredited Trainer, FIDIC
(Coffee Break in between)

Module 1: Practical Use of the FIDIC Contracts **FIDIC Contract Documents: Introduction and Principles**

What is FIDIC and where do the FIDIC contracts come from? Why are FIDIC contracts structured the way they are? Which FIDIC contract should you use for your project? How do you set up a FIDIC contract? These are some of the basic aspects that will be addressed during the first session:

- Introduction to the FIDIC organization
- Background to FIDIC contracts
- Structure of the documents
- Preparation of Conditions of Contract
- Risk Analysis
- Which form to use?

12:00-13:00 **Lunch**

13:00-17:00 **Session 2**
FIDIC Module 1 (2 of 4), Geoffrey Smith, Accredited Trainer, FIDIC
(Coffee Break in between)

Responsibilities of the Main Parties

Understanding the role and responsibilities of each of the main parties to a FIDIC contract is one of the keys to the success of the project and misunderstandings of the responsibilities are often the source of disagreements and disputes.

- General Provisions
- Workshop Session: Order of Priority
- The Employer
- The Contractor
- The Engineer
- Nominated Subcontractors
- Design

DAY2 Tuesday, August 14



9:00-12:00

Session 3

FIDIC Module 1 (3 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

Module 1: Practical Use of the FIDIC Contracts (Cont'd)

The Management of Projects

As well as setting out the fundamental terms agreed between the Parties to the contract, FIDIC contracts contain detailed obligations and procedures that are intended to help the Parties to efficiently manage their project. These obligations and procedures deal with matters such as:

- Staff and Labour
- Plant Material and Workmanship
- Commencement, Delays and Suspension
- Workshop Session : Commencement
- Tests on Completion
- Employer's Taking Over; Defects Liability

Workshop Exercise - No.1: Taking Over

12:00-13:00 Lunch

13:00-17:00

Session 4

FIDIC Module 1 (4 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

Financial Clauses and Procedures

FIDIC contracts also include detailed procedures and timetables with respect to the assessment of amounts due from one Party to the other and procedures for paying these amounts:

- Construction Contract: Measurement and Evaluation
- Variations and Adjustments
- Contract Price and Payment

Risk, Force Majeure and Termination

Construction is a risky business and the sharing of responsibility for those risks is of major importance. This final session of Module 1 looks at what to do when your project "goes wrong."

- Risk and Responsibility,
- Liability and Insurance
- Termination by Employer
- Suspension and Termination by Contractor

DAY3 Wednesday, August 15



9:00-12:00

Session 5

FIDIC Module 2 (1 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

**Module 2: Management of Claims and the Resolution of Disputes
Managing Variations**

Many claims can be avoided if the variation procedure under FIDIC contracts is understood and properly administered. In this section we will look at how Clause 13 works and relates to other Sub-Clauses plus review how and when a variation should be instructed, and what powers the Engineer has under the Contract.

- Contract definitions
- Timing and authority to issue Variations
- Variations covered by Clause 13 and related Clauses
- Initiation and instruction of variations
- The Contractor's rights and obligations
- Practical Management Suggestions
- Avoiding typical claim issues related to Variations

12:00-13:00 **Lunch**

13:00-16:00 **Session 6**

FIDIC Module 2 (2 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

Module 2: Management of Claims and the Resolution of Disputes (Con't) The Management of Claims

Notices and Claims Procedures

Both the Contractor and the Employer are required to follow well defined procedures when a potential claim arises. These procedures help both parties follow the evolution of the Contract more accurately and in "real time," which increases predictability for both parties and reduces claims.

- Clauses requiring notices by the Contractor
- Employer's/ Engineer's Claims, Sub-Clause 2.5

Contractor's Claims Sub-Clause 20.1

FIDIC contracts detail many areas where events may trigger the Contractor's right to claim for additional payments and/or an extension to the Time for Completion. In this section we will review both the scope and procedure of a Contractor claim, plus the documentation required to support a claim and the role of the Engineer.

- Notification of claims
- Contemporary records
- Preparation of claims
- Engineer's assessment and principles of claim
- Engineer's valuation
- Engineer's determination, Sub-Clause 3.5

Claims for Delay

In this section, we will look at how an extension to the Time for Completion is handled under FIDIC, and how damages are calculated.

- Extension of time, Sub-Clause 8.4 and 8.5
- Force Majeure, Sub-Clause 19.4

16:00-16:20 **Session 7**

JICA's Activities on Promotion of Dispute Board

Yukinobu Hayashi, General Manager, Nippon Koei Co., Ltd.

16:20-17:00 **Session 8**

Creation of National List of Japanese Adjudicators

Yoshihiko Yamashita, Association of Japanese Consulting Engineers (AJCE)



DAY4 Thursday, August 16



9:00-12:00

Session 9

FIDIC Module 2 (3 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

Module 2: Management of Claims and the Resolution of Disputes (Con't)

The Management of Claims

Claims for Delay (Con't)

- Delay damages

Claims for Additional Payment

After delay, the most common source of claims arising from the Contractor's side are related to ground conditions, late possession and payment difficulties. The FIDIC procedure on treating these claims are reviewed in detail in this section.

- Ground Conditions, Sub-Clause 4.12
- Late possession, Sub-Clause 2.1
- Breaches of Contract

Employer's Financial Claims

Of course the Employer can suffer damages due to failures to perform on the part of the Contractor. These damages and resulting Employer's claims, typically are for Contractor delay or defective work, which may result in a call on the Contractor's Performance and/or Retention Security. This section covers how the Employer/ Engineer should work their way through these matters.

- Delay damages
- Defects in the works and/or design
- Retention and bonds

12:00-13:00 **Lunch**

13:00-16:00

Session 10

FIDIC Module 2 (4 of 4), Geoffrey Smith, Accredited Trainer, FIDIC

(Coffee Break in between)

Module 2: Management of Claims and the Resolution of Disputes (Con't)

The Resolution of Disputes

Dispute Adjudication Boards (DABs)

Dispute Adjudication Boards (DAB) have proven to be an effective way of solving disputes at an early stage. The Red Book and Multilateral Development Bank Harmonized Edition of the FIDIC suite of contracts use standing DABs, which allows for the early detection and efficient resolution of disputes and potential disputes. This section explains the purpose of DABs, how they work, their cost and how a DAB decision comes about and operates.

- Dispute Adjudication Board principles
- Dispute Adjudication Board working
- Post-DAB decision processes

The JICA Alternative Particular Conditions

The JICA Standard Bidding Documents has anticipated that some modification may be needed in certain countries or situations. This section discusses these alternatives, and their implementation and implications, with a special focus on dispute boards.

- General
- Inspections and Audit by the Bank
- Employer's Financial Arrangements
- Exemptions From Duties and Taxes
- Protection of the Environment
- Appointment of the Dispute Board

Workshop Exercise No.2 – Notices

In this workshop the participants will work in groups of 4-6 people on a case study designed to examine the functioning of the various notices clauses under the FIDIC contracts.

Workshop Exercise No.3 – Variations

Arbitration Claims (Not to be presented – materials only)

No contract can guarantee the parties will not have litigation at some point either during or after the execution of the works. FIDIC contracts have selected arbitration as the dispute resolution mechanism of last resort. In this final section of Module 2, we will briefly look at the arbitration process under the International Chamber of Commerce (ICC) Rules.

- ICC Rules
- Selecting arbitrators
- Use of experts

16:00-17:15

Session 11

Comprehension Test for Module 1 and 2



DAY5 Friday, August 17



9:00-13:00 **Session 12**
Individual Interview

13:00-14:00 **Lunch**

14:00-14:30 **Conferment of FIDIC Certificate**

14:30:14:40 **Closing Remarks**, Mr. Hiroto Mitsugi, Senior Representative, JICA Philippines Office

14:40-15:00 **Photo Taking**

FIDIC Contracts Training Workshop



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Mr. Yukinobu Hayashi is the General Manager of Nippon Koei Co., Ltd. and vice chairman of the Professional Training Committee of AJCE. He has over 30 years of professional experience in project management for various types of infrastructure development projects in Asia, Middle East, Africa and Latin American countries. Since his graduation from University with a B. Sc. in mechanical engineering in 1977, he has been involved in construction planning and scheduling, project cost estimate, tender document preparation, tender evaluation, and assessment of contractual claims for the projects undertaken by the firm. As a member of AJCE, he has drafted Japanese versions of FIDIC contracts including Red Book 1999, Yellow Book 1999 and FIDIC Contract Guide.



Mr. Yoshihiko Yamashita is the Secretary General, Association of Japanese Consulting Engineers (AJCE), and a Professional Engineer registered in Japan, holding Doctor of Philosophy. in Ocean Engineering, and Master's Degree in Mechanical Engineering awarded by University of Hawaii. He has engaged in plan, design, supervision and management of water environment and its related infrastructure both in Japan and overseas. After working for 27 years in consulting firms in Japan, he has been working for AJCE for 4 years. He has been involved with FIDIC activities since 1991 in various committees, attending annual conferences, and possesses abundant network among FIDIC member associations. He is aware of the importance of FIDIC contract documents in international projects. Through JICA projects, he has been disseminating and promoting the use of FIDIC contract documents and dispute board mechanism. He is a member of drafting Japanese versions of FIDIC contracts including Red Book 1999 and Yellow Book 1999.

Contract Management for International Construction

Manila
13 - 17 August 2012



Module 1 Practical Use of the FIDIC Contracts

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Outline

1. FIDIC Contract Documents: Introduction & Principles
2. Responsibilities of the Main Participants
3. The Management of Projects
4. Financial Clauses & Procedures
5. Risk, Force Majeure & Termination



Session 1

FIDIC Contract Documents: Introduction & Principles



FIDIC Contract Documents: Introduction & Principles

1. Introduction to the FIDIC organisation
2. Background to FIDIC Contracts
3. Structure of the documents
4. Preparation of Conditions of Contract
5. Risk Analysis
6. Which Book to use?



1. Introduction to FIDIC

- Founded in 1913.
- Composed of national associations of consulting engineers.
- Promotes and implements the consulting engineering industry's strategic goals.
- Members endorse FIDIC statutes and policy statements and comply with FIDIC Code of Ethics.
- Develops and promotes business practice: Business Integrity Management; Project Sustainability Management; Quality Management, Risk Management.



1. Introduction to FIDIC

Organises:

- Extensive programme of seminars and conferences.
- International Training Programme (courses; workshops)
- Capacity Development Programme (accredited trainers, training suppliers, programmes and events).

Publishes:

- Business practice guides
- International professional services agreements
- Works Contracts.



2. Background to FIDIC Contracts

- First FIDIC Works Contract was published in 1957 – *"Conditions of Contract (International) for Works of Civil Engineering Construction"* – known as the "Red Book".
- Second edition was published in 1969 & reprinted in 1973.
- The 1973 version followed closely the fourth edition of the English "ICE Conditions of Contract".
- It was written: *"as a general comment, it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions"*.



2. Background to FIDIC Contracts

- Thus, as in the UK, an important role was reserved for "*The Engineer*", and the Contractor was to be paid according to the actual quantities executed by application of unit rates.
- Third edition of the Red Book published in 1977 consisted of *General Conditions* and *Conditions of Particular Application* - suggestions upon which the Parties were required to make their own agreements.
- As with the English ICE Conditions there was also a Form of Tender and Appendix to Tender, and a Form of Agreement.



2. Background to FIDIC Contracts

- The first three editions of the Red Book assumed that the detailed design would be provided to the Contractor by the Employer or the Engineer.
- Thus Red Book was unsatisfactory for contracts where major items of Plant and alike were manufactured away from site.
- This led to the first edition of the FIDIC Yellow Book for mechanical and electrical works in 1963, with an emphasis on testing and commissioning and more suitable for the manufacture and installation of Plant.
- The second edition was published in 1980.



2. Background to FIDIC Contracts

- New editions of both the Red and Yellow Books were published in 1987.
- Red Book 4th Edition 1987 introduced an express term which required the Engineer to act *impartially* when giving a decision or taking any action which might affect the rights and obligations of the Parties.



2. Background to FIDIC Contracts

- A Red Book 4th Edition Supplement was published in 1996 which gave an option for a *Dispute Adjudication Board*, and an option for payment on a *lump sum basis* instead of by reference to Bills of Quantities.
- By this time FIDIC had responded to the increasing popularity of projects being procured on a design and build or turnkey basis. This resulted in the "Conditions of Contract for Design-Build and Turnkey" (1995 Orange Book).



2. Background to FIDIC Contracts

- 1995 Orange Book replaced the traditional “Engineer” by the “Employer’s Representative”.
- The express requirement to be impartial was also removed, although when determining value, costs or extensions of time the Employer’s Representative had to *“determine the matter fairly, reasonably and in accordance with the Contract”*.
- Need to submit matters to the Engineer for his “Decision” prior to an ability to pursue a dispute, was eliminated.
- In its place - an independent Dispute Adjudication Board (DAB) was foreseen as the standard provision.



2. Background to FIDIC Contracts

- Updates of Red, Yellow and Orange Books were published in 1999 as “Construction”, “Plant and Design-Build” and “EPC/Turnkey” Contracts.
- Aims:
 - standardise the terminology;
 - make the documents as user-friendly as possible;
 - solve the problem of the Engineer not seen as acting impartially while he was employed and paid by the Employer (all Books contain DAB provisions).



FIDIC now publishes 5 widely-used Works Contracts & distributes 25000 copies each year



2. Background to FIDIC Contracts

- The Construction Contract (Red Book) is based on design provided by the Employer and payment is made on a re-measurement basis.
- The Plant Contract (Yellow Book), the Design, Build & Operate Contract (Gold Book) and the EPC/Turnkey Contract (Silver Book) are based on design by the Contractor and payment is made on a lump-sum basis.



Since 2005
Multilateral Development Banks
use the General Conditions of
the MDB Harmonised Edition of
the FIDIC Construction Contract
(3rd Edition 2010)



There are also guides available to
the main contracts and to the
MDB version.



2. Background to FIDIC Contracts

- For the time being, there is no MDB Edition of the Yellow, Green, Gold or Silver Books.
- The main differences between the Pink Book and the Red Book are that the Pink Book:
 - allows for the involvement of the bank;
 - includes provisions for dealing with suspension of disbursements by the bank;
 - imposes similar deadlines on the Employer as on the Contractor;
 - has a much greater emphasis on social issues;
 - has a greater emphasis on anti-corruption measures.



3. Structure of the documents

- Each book includes:
 - General Conditions
 - Guidance for the Preparation of the Particular Conditions
 - Letter of Tender, Contract Agreement and Dispute Adjudication Agreements
 - Appendix to Tender (giving essential project data)
 - Example Forms.
- General Conditions are intended to be used unchanged.
- Changes to suit an Employer's own requirements are illegal and in breach of copyright.
- All project- and country-specific info in Particular Conditions.



3. Structure of the documents – General Conditions

- Similar defined words and phrases are used in all 1999 editions, the main exception being descriptions of the documents in the Contract:
 - Construction (Red Book): Contract Agreement, Letter of Acceptance, Letter of Tender, Conditions of Contract, Specification, Drawings, Schedules.
 - Plant (Yellow Book): Contract Agreement, Letter of Acceptance, Letter of Tender, Conditions of Contract, Employer's Requirements, Schedules, Contractor's Proposal.
 - EPCT (Silver Book): Contract Agreement, Conditions of Contract, Employer's Requirements, Tender.



3. Structure of the documents – General Conditions

- MDB Harmonised Edition (Pink Book): General Conditions, Particular Conditions (Part A: Contract Data & Part B: Special Provisions), Sample Forms.
- The Pink Book is extensively based on the FIDIC Red Book (1999) – which means that it is intended for use in relation to contracts where:
 - the Contractor is provided with the design by the Employer and
 - he is paid on a re-measurement basis, applying agreed unit rates to the actual quantities executed.



3. Structure of the documents – General Conditions

- **Clause 1: General Provisions** - subjects which apply to the Contract in general, e.g. definitions, applicable language and law, priority of documents, use of various documents.
- **Clauses 2 - 5: The Employer; The Engineer; The Contractor; nominated Subcontractors** - deal with the duties and obligations of the different organisations that play a part in the execution of the Works.
- **Clauses 6 & 7: Staff and Labour; Plant, Materials and Workmanship** - deal with the requirements for the items which the Contractor brings to the site.



3. Structure of the documents – General Conditions

- **Clauses 8 - 11: Commencement, Delays and Suspension; Tests on Completion; Employer's Taking Over; Defects** - follow the sequence of events during the construction.
- **Clauses 12 - 14: Measurement and Evaluation; Variations and Adjustments; Contract Price and Payment** - procedures for the Employer to pay the Contractor for his work.
- **Clauses 15 & 16: Termination by Employer; Suspension and Termination by Contractor** - logically at the end of the construction sequence.



3. Structure of the documents – General Conditions

- **Clause 17: Risk and Responsibility** - relates to the project as a whole and includes sub-clauses which are only used rarely, together with matters which are critical to the Parties' responsibilities and overlap with the requirements of other important sub-clauses.
- **Clause 18: Insurance** - includes important procedures, which must be implemented at or before Works' commencement.
- **Clause 19: Force Majeure** - general clause that will only be used when the particular problem occurs.



3. Structure of the documents – General Conditions

- **Clause 20: Claims, Disputes and Arbitration** - probably the most frequently used clause in the Conditions of Contract. Includes procedures, such as the submission and response to Contractor's claims, which must be used when a problem has arisen. It also includes the procedures for the appointment of the Dispute Adjudication Board, which must be used at or before the commencement of the Works.



3. Structure of the documents – Contract Data

The "Contract Data" provide a convenient check-list of all the essential data required for the various sub-clauses:

- Time for Completion
- Defects Notification Period
- Law
- Language
- Time for Access
- Performance Security
- Delay Damages
- Adjustment Data
- Advance Payment
- Currencies
- Retention
- Insurance
- DAB appointment
- Sections



3. Structure of the documents

- **Example Forms:**
 - ✓ *Letter of Bid;*
 - ✓ *Letter of Acceptance;*
 - ✓ *Contract Agreement;*
 - ✓ *Dispute Board Agreements (Sole member & 3 member);*
 - ✓ *Performance Security ("On Demand" or "Surety");*
 - ✓ *Advance Payment Guarantee;*
 - ✓ *Retention Money Guarantee;*
 - ✓ *Parent Company Guarantee;*
 - ✓ *Bid Security.*
- **"Dispute Board Agreements"** are short, because they refer to **"General Conditions of Dispute Adjudication Agreement"** which are appended to the General Conditions.



4. Preparation of Conditions of Contract

- The Conditions on their own are not complete. Certain information must be provided in other documents in order to make them complete, notably **"Contract Data"**, **"Special Provisions"** and **"Specifications"**.
- Information must be carefully co-ordinated with the other documents in order to ensure that the contract, as a whole, will serve its intended purpose.



4. Preparation of Conditions of Contract

The Specifications may include matters which are referred to in the Conditions of Contract such as:

- Requirements for Contractor's Documents
- Permissions being obtained by the Employer
- Phased possession of foundations, structures, plant or means of access
- Contractor's designs
- Work by other contractors on the Site
- Setting out information
- Environmental constraints
- Electricity, water and other services available on Site
- Employer's equipment
- Nominated Subcontractors
- Facilities for Personnel
- Testing
- Provisional Sums



4. Preparation of Conditions of Contract

- Where changes are made to the General Conditions (via the Special Provisions), the Form of Agreement, the Form of Tender, Form of Acceptance or Annexes are made, care must be taken to ensure that no ambiguity is created between the documents.
- It is essential that such drafting tasks, and the entire preparation of the tender documents, be entrusted to personnel with the relevant experience, including the contractual, technical and procurement aspects.
- The bid documents should be prepared by suitably-qualified engineers, familiar with the technical aspects of the Works and reviewed by suitably-qualified lawyers.



5. Risk Analysis

The main participants in a FIDIC contract are :

Employer:	Service agreement with the Engineer (FIDIC White Book) & Works Contract with the Contractor
Engineer:	Administers Works Contract on behalf of Employer
Contractor:	Works Contract with Employer
Nominated Subcontractors:	Initial agreement with Employer – transferred to Contractor
DAB:	Agreement between Employer / Contractor and 1 or 3 Members of DAB



5. Risk Analysis

- The Employer when allocating the functions and risks to various parties must consider management and the method of valuing the work done and how the work is paid. He should consider whether or not he is prepared to share these risks with the other parties and if so, the extent of such sharing.



5. Risk Analysis

- The Employer should carefully analyse:
 - Allocation of the essential functions found in a construction project and in particular the design function.
 - Allocation of the risks inherent in the project.
 - Allocation of the management role.
 - Method and timing of remuneration for the Contractor.
- *Applicable Law* - allocates the risks envisaged in the contract to the contracting parties.
- *Contract* - either affirms the allocation or re-allocates risks from one to the other contracting party or spreads them to third parties.



5. Risk Analysis

- With respect to the Engineer the Employer should ensure that his responsibilities as stated in his agreement with the Employer (e.g. a FIDIC Client/Consultant Model Services Agreement) are identical with those required under the contract for the Works.
- Discrepancies in respect of the Engineer's responsibilities and authorities, under the respective contracts, could lead to contractual disputes and could expose the Engineer to liability.
- It is not uncommon for the Employer to limit, under the service agreement, the Engineer's authorities to vary the Works, issue Variation instructions, determine unit payment rates for new work items, award Extensions of Time for Completion, and/or render determinations of Contractor's claims, etc., without the Employer's prior written approval.



5. Risk Analysis

- But Clause 3.1 states that whenever the Engineer exercises any authority under Contract for which he is supposed to obtain prior approval from the Employer, he is deemed to have obtained that approval before exercising the authority.
- This means that:
 - The Employer is bound by the actions of the Engineer;
 - The Contractor does not have to worry about whether or not the Engineer exceeded his authority;
 - The Engineer may find himself sued by the Employer for the additional expense.



5. Risk Analysis

- If Nominated Subcontractors are to be used:
 - What is the position with respect to anti-competition rules?
 - Will the Nominated Subcontractors be appointed before the Invitation to Bid for the main Contract?
 - If not, when will the appointments be made?
 - How will payments be made?
 - What guarantees are required and in favour of whom?
 - Who will design their Works?
 - Who will check the designs?



5. Risk Analysis

- With respect to the Dispute Board:
 - Will it be one person or three?
 - Will it be "standing" or "ad hoc"?
 - Is a list of potential candidates to be included in the Bid Package?
 - Who will be the appointing authority if the Parties fail to agree on the appointments?
 - Are the General Conditions of Dispute Adjudication Agreement to be modified?



5. Risk Analysis

Project risks are divided into :

- *Mainly insurable risks*: risks of loss, damage or injury occurring during the contract, including: consequences of accidents due to defective design, defective material and defective workmanship; fire; human error; failure to take adequate precautions
- *Mainly uninsurable risks*: risks leading to financial and/or time loss with their impact on the project, including: late possession of the site; delay in receipt of necessary information; changes in design; variations in the original contract.

Remember that if the Employer puts too much risk on the Contractor, the price will go up, maybe there will be no bidders or maybe he will only get inexperienced bidders who cannot see (and allow for the risk).



6. Which Book to use?

When selecting the contract, the following checklist should be used:

- What is the nature of the Works?
- Choice of design and whether or not it has an exclusive nature?
- How and when is payment to be made?
- What degree of certainty is required with respect to the final cost of the project?
- What amount of control is required during construction?
- What is the possibility or probability of having a Variation or change in the Works after entering into the Contract?
- Who is financing the project and do the financiers have specific requirements?



6. Which Book to use?

- A. Relatively small value, short construction time or involving simple or repetitive work: *Short Form* (Green Book)
- B. Larger or more complex projects:
 - Employer (or the Engineer) to do most of the design - *Construction Contract* (Red Book/Pink Book)
 - Contractor to do most of the design – *Plant & DB* (Yellow Book)
 - Contractor to do most of the design & to take responsibility for operation – *DBO* (Gold Book)
 - The Employer (who provides the finance) wishes to implement the project on a fixed-price basis with little involvement – *EPC/T* (Silver Book)
 - Contractor takes total responsibility for the financing, construction and operation with little supervision from the Employer – *EPC/T* (Silver Book)



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End of Session 1


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Session 2

Responsibilities of the Main Participants


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Responsibilities of the Main Participants

1. General Provisions
2. The Employer
3. The Contractor
4. The Engineer
5. Nominated Subcontractors
6. Design


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1. General Provisions

It is necessary to be familiar with some general provisions in the FIDIC Contracts and the MDB Edition in order to correctly understand and interpret the specific clauses found elsewhere in the Contracts. Most of these provisions are set out under Clause 1 and include the so-called “Boiler-plate” provisions.

1. Definitions:

- Defined terms begin with capital letters – except for “day” and “year”.
- All FIDIC Contracts include many.
- The MDB Edition includes more and there are important differences between the standard FIDIC Contracts and the MDB Edition.

(Clause 1.1)


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1. General Provisions

2. Interpretation:

- Clause 1.2 describes how the Contract is to be interpreted.
 - In the MDB Edition, the word “tender” is taken to be the same as “bid”, the word “tenderer” the same as “bidder” and the expression “tender documents” the same as “bid documents”.
 - In the MDB Edition, the expression “Cost plus profit” requires this profit to be 5% of the Cost unless indicated otherwise in the Contract Data.

3. Communications:

- Clause 1.3 sets out the rules for official communications among all of the participants – care is required in fixing these details.



1. General Provisions

3. Communications (continued):

- Clause 1.3 also includes a very important provision: **Approvals, certificates, consents and determinations are not to be unreasonably withheld or delayed.**

4. Law & Language:

- The Contract is to be governed by the law of the country stated in the Contract Data..
- The ruling language of the Contract shall be that stated in the Contract Data.
- The language for communication can be different from the ruling language (but better to avoid). If none is stated in the Contract Data, it shall be the same as the ruling language. (Clause 1.4)



1. General Provisions

5. Priority of Documents:

- The documents forming the Contract are mutually explanatory but in the event of conflict between them, the order of priority is :
 - The Contract Agreement (if any)
 - The Letter of Acceptance
 - The Letter of Tender
 - The Particular Conditions – Part A
 - The Particular Conditions – Part B
 - The General Conditions
 - The Specification
 - The Drawings
 - The Schedules and any other documents forming part of the Contract.



Workshop Exercise – Order of Priority



2. The Employer

The role of the Employer is covered to a large extent by five sub-clauses of Clause 2:

- 2.1 Right of Access to the Site;
- 2.2 Permits, Licences or Approvals;
- 2.3 Employer's Personnel;
- 2.4 Employer's Financial Arrangements; and
- 2.5 Employer's Claims.



2. The Employer

However, the Employer's role and obligations are also mentioned elsewhere in the Contract and can be summarised in the order in which they appear in the General Conditions.

1. Definitions – "Contract Data":

The Employer is required to provide the Contract Data, within Part A of the Particular Conditions.

2. Obtain building permit, etc.:

The Employer must obtain planning, zoning, building permits or similar permission for Permanent Works and any permits described in the Specifications as to be obtained by the Employer. (Clause 1.13)



2. The Employer

3. Give right of access to and possession of the Site:

- The Employer is to give the Contractor the right of access to and possession of the Site and special or temporary rights of way necessary for the Works.
- He may withhold doing so until the Performance Security has been received.
- The Site means the places where the Permanent Works are to be executed, including storage and working areas and areas to which Plant & Materials are to be delivered and any other places specified in the Contract as forming part of the Site.
- Right of access and possession must be given within the times stated in the Contract Data. If no times are stated, they must be given to allow the Contractor to proceed without disruption.



2. The Employer

4. Assist the Contractor for permits:

The Employer shall provide reasonable assistance to the Contractor to obtain:

- copies of relevant laws, not readily available, &
- any permits, approvals etc. the Contractor needs for the Works, for the delivery of Goods including customs clearance and for the export of his equipment. (Clause 2.2)

5. Ensure the co - operation of his Personnel:

The Employer must ensure that his Personnel and his other contractors cooperate with the Contractor and take actions similar to those required of the Contractor with respect to safety and protection of the environment. (Clause 2.3)



2. The Employer

6. Provide evidence of financial arrangements:

- The Employer must provide reasonable evidence that financial arrangements have been made and are being maintained to enable him to pay the Contractor punctually.
- He must do so before the Commencement Date but also within 28 days after receiving any request from the Contractor.
- Before making any material change to his arrangements, he must notify the Contractor and give detailed particulars.
- If the Bank suspends disbursements under the project loan, the Employer must notify the Contractor within 7 days of being notified by the Bank & provide details of alternative arrangements. (Clause 2.4)



2. The Employer

7. Employer's Claims

- The Employer (or the Engineer) must give notice and particulars to the Contractor of any claim by the Employer for payment in connection with the Contract and/or for any extension of the Defects Notification Period (DNP).
- The notice must be given as soon as practicable and no more than 28 days after the Employer became aware or should have become aware of the event or circumstances.
- The notice must specify the basis for the claim and substantiate the amount and/or extension claimed.
- Any claim for an extension of the DNP must be made before the expiry of the DNP.



2. The Employer

8. Appoint the "Engineer":

The Employer is required to appoint the "Engineer" and name him in the Contract Data.

He must promptly inform the Contractor of any change to the authority of the Engineer. (Clause 3.1)

If he intends to appoint a replacement Engineer, he must give notice to the Contractor at least 21 days beforehand and he must give full and fair consideration to any objection raised by the Contractor. (Clause 3.4)



2. The Employer

9. Release Contractor's Security:

- The Employer must return the Performance Security to the Contractor within 21 days after receiving a copy of the Performance Certificate.
- He must not make any claim under the Performance Security except for amounts to which he is entitled under the Contract.
- He must indemnify the Contractor against all damages, losses & expenses (including legal fees) resulting from an unjustified claim under the Performance Security. (Clause 4.2)



2. The Employer

10. Provide access to the Site:

- The Employer must provide effective access to the Site including special and/or temporary rights of way. (Clause 4.13)



2. The Employer

11. Supply Equipment & Materials:

- The Employer shall make the Employer's Equipment (if any) available to the Contractor in accordance with the details, arrangements & prices stated in the Specification.
- He is responsible for the Employer's Equipment except when it is in the possession or under the control of the Contractor.
- Any "free-issue" Materials are to be issued by the Employer at his risk and cost, at the time and place specified in the Contract.
- They are to be visually checked by the Contractor and he must give prompt notice of any shortage or defect. The Employer shall immediately rectify. (Clause 4.20)



2. The Employer

12. Nominate specialist subcontractors:

- The Employer must choose any subcontractor who the Contractor is required, by the Contract, to appoint as a nominated Subcontractor.
- If the Contractor raises reasonable objection to the appointment of the nominated Subcontractor, the Employer must indemnify the Contractor against the consequences of proceeding with the appointment or he must choose another subcontractor without delay.



2. The Employer

13. Appoint a Dispute Board:

- The Employer shall participate in the appointment of a Dispute Board (DB) – 1 or 3 members.
- He may include in the tender documents a list of potential DB members to be included in the Contract, if agreed by the successful tenderer.
- Regardless of whether or not a list has been included in the Contract, he must propose someone as a member of the DB within the time fixed in the Contract (3 member DB) or if the Contract states that the DB shall have one member, he must attempt to agree with the Contractor on the appointment within the time fixed in the Contract.



3. The Contractor

The Contractor's broad obligations are set out under Clause 4 but others are spread throughout the whole document. Some of the more evident obligations include:

1. Compliance with applicable Laws:

- The Contractor shall, in performing the Contract comply with applicable Laws.
- He shall give all notices, pay all taxes, duties and fees and obtain all permits, approvals, etc. required by the Laws in relation to the execution and completion of the Works and the remedying of defects.
- He must indemnify the Employer against the consequences of any failure to do so unless he is impeded in doing so and shows evidence of his diligence. (Clause 1.13)



3. The Contractor

2. Allow Inspections & Audit by the Bank:

- The Contractor must permit the Bank or its representatives to inspect the Site and/or his accounts and records and have these audited by auditors appointed by the Bank. (Clause 1.15)

3. Provide the Personnel, Goods, Plant, etc.:

- The Contractor must provide the Plant and Contractor's Documents specified in the Contract and must provide all Personnel, Goods, consumables and services required in and for the execution, completion and remedying of defects.
- All Plant, Materials and services required for the Works shall have their origin in any eligible source country as defined by the Bank. (Clause 4.1)



3. The Contractor

3. Provide the Personnel, Goods, Plant, etc. (continued):

- Whenever required by the Engineer, he shall submit details of the arrangements and methods he proposes to use for the execution of the Works (Clause 4.1).
- Prior to the Tests on Completion, he must submit the "as-built" documents for Works designed by him and, if applicable, operation and maintenance manuals in accordance with the Specification.

4. Provide the Performance Security:

- The Contractor shall provide a Performance Security in the required form and in the amount and currencies stated in the Contract Data, within 28 days after receiving the Letter of Acceptance (with a copy to the Engineer).



3. The Contractor

4. Provide the Performance Security (continued):

- He must ensure that the Performance Security remains valid and enforceable until he has executed and completed the Works and remedied any defects.
- Whenever the Engineer determines an addition or reduction in the Contract Price of more than 25% in a specific currency due to changes in costs and/or legislation or due to a Variation, the Contractor must increase the value of the Performance Security at the request of the Engineer or may decrease as the case may be. (Clause 4.2)



3. The Contractor

5. Appoint his Representative:

- The Contractor must appoint the Contractor's Representative and give him all the necessary authority to act on his behalf.
- Unless the person is named in the Contract (unusual) the Contractor must submit his name and details prior to the Commencement Date.
- The Contractor must not revoke the appointment of the Contractor's Representative or appoint a replacement without the prior consent of the Engineer.
- The Representative must be fluent in the language of the Contract, if not, competent interpreters must be available during working hours. (Clause 4.3)



3. The Contractor

6. Obtain the Engineer's consent to a Subcontractor:

- The Contractor must obtain the Engineer's consent before appointing a Subcontractor, unless the Subcontractor is to supply materials only or is already named in the Contract.
- He must give the Engineer at least 28 days notice of the intended date of the commencement of Subcontractor's work.
- Each subcontract shall permit the assignment of the benefit to the Employer under given circumstances.
- The Contractor shall not subcontract the whole of the Works.
- He must give fair and reasonable opportunity to local Subcontractors, where practicable. (Clause 4.4)
- He remains liable for the acts and defaults of Subcontractors.



3. The Contractor

7. Cooperate with others:

- The Contractor must allow appropriate opportunities for work by others on or near the Site, as specified in the Contract or as instructed by the Engineer.
- Any such instruction will be a Variation if and to the extent that it causes the Contractor to suffer delays and/or to incur Unforeseeable Costs. (Clause 4.6)

8. Shall set out the Works:

- The Contractor must set out the Works on the basis of information and reference points provided to him.
- He is responsible for the correct setting out unless due to errors in the information & reference points. (Clause 4.7)



3. The Contractor

9. Satisfies himself regarding access routes to the Site:

- The Contractor is deemed to have satisfied himself as to the suitability and availability of access routes to the Site at the Base Date (28 days prior to the last date for submission of bids).
- He is responsible (unless otherwise stated in the Contract) for maintenance, signs, etc.
- He cannot claim for costs due to non-availability or non-suitability of the access routes. (Clause 4.15)
- He must obtain at his own risk and cost any additional rights of way or facilities outside the Site, which the Employer is not obliged to provide. (Clause 4.13)



3. The Contractor

10. Protect the Environment:

- The Contractor must take all reasonable steps to protect the environment (both on and off Site) and to limit damage and nuisance to people and property from pollution, noise, etc.
- He must ensure that emissions, discharges and effluent stay within limits fixed in the Specification or by applicable Laws.

11. Responsible for power, water & other services for construction activities & tests:

- Contractor is responsible for providing power, water etc. for his construction activities and for tests, except as stated elsewhere in the Contract.



3. The Contractor

12. Maintain the Site in an orderly manner

- The Contractor must confine his activities to the Site and any additional areas agreed by the Engineer as additional working areas.
- He must take all necessary precautions to stay off adjacent land.
- He must keep the Site free of unnecessary obstructions and properly store or dispose of his Equipment or surplus Materials.
- He shall clear away any rubbish, Temporary Works, etc. and shall leave the Site in a clean and safe condition.
- He must keep unauthorised persons off the Site.



4. The Engineer

- Clarify any ambiguity or discrepancy in the Contract documents. (Clause 1.5)
- Issue any additional drawings or any instructions that might be necessary (Clauses 1.9 & 3.3)
- Obtain any necessary approval from the Employer before exercising authority given to him under the Contract (Clause 3.1)
- Respond in writing within 28 days of receipt of any request from the Contractor (Clause 3.1)
- State by letter to the Contractor and Employer details of the delegated powers and responsibilities and names of the Engineer's project team. (Clause 3.2)
- Make fair determinations as required after consulting the Parties (Clause 3.5)



4. The Engineer

- Require Contractor to submit details of methods he intends to use for execution of Works (Clause 4.1)
- Give or withhold consent to the choice of Contractor's Representative (Clause 4.3)
- Review details of proposed Subcontracts and give or withhold consent for subcontracting parts of the Works (Clause 4.4)
- Instruct the Contractor, if necessary, with respect to cooperation with other contractors (Clause 4.6)
- Audit the Contractor's QA system (Clause 4.9)
- Monitor the Contractor's consumption of electricity, water and gas, supplied by the Employer (Clause 4.19)



4. The Engineer

- Monitor the Contractor's use of Employer's Equipment (Clause 4.20)
- Give instructions with respect to fossils or antiquities (Clause 4.24)
- Ensure nominated Subcontractors are properly appointed by the Contractor and that appropriate Subcontract Conditions of Contract are used (Clause 5.2)
- Certify and monitor payments from Contractor to nominated Subcontractor (Clauses 5.3 & 5.4)
- Monitor the Contractor's resources (Equipment and manpower) (Clause 6.10)
- Review samples submitted by Contractor (Clause 7.2)



4. The Engineer

- Inspect the Works regularly and particularly before any item is covered up (Clause 7.3)
- Attend tests or give notice on intention not to attend (Clause 7.4)
- Reject work that is not in accordance with the Contract (Clause 7.5)
- Instruct the Contractor with respect to remedial work (Clause 7.6)
- Notify the Contractor of the Commencement Date after fulfilment of the conditions precedent (Clause 8.1)
- Review the Contractor's programme(s) for compliance with Contract (Clause 8.3)
- Instruct the Contractor to submit revised programme(s) (Clause 8.6)



4. The Engineer

- If necessary, instruct the Contractor to suspend work and to resume work (Clause 8.8)
- Attend Tests on Completion (Clause 9.1)
- Carry out inspections prior to Taking Over of the Works
- Issue the Taking Over Certificate for parts or all of the Works (Clause 10.1)
- Monitor completion of any work or defects left outstanding at Taking Over
- Notify the Contractor of any defects found during the Defects Notification Period (Clause 11.1)
- Issue the Performance Certificate when all notified defects have been rectified (Clause 11.9)



4. The Engineer

- Measure and agree the quantities of work executed (Clause 12.1)
- Value the Works on the basis of the measured quantities and unit rates (Clause 12.3)
- Adjust unit rates, when permitted, due to major changes in quantity (Clause 12.3)
- Agree or fix new rates when necessary (Clause 12.3)
- Instruct the Contractor with respect to Variations (Clause 13.1)
- Instruct the Contractor with respect to Provisional Sums (Clause 13.5)
- Monitor resources used in relation to Dayworks (Clause 13.6)
- Agree adjustments to the Contract Price (Clauses 13.7 & 13.8)



4. The Engineer

- Issue Interim Payment Certificates (Clause 14.6)
- Certify release of Retention (Clause 14.9)
- Issue Final Payment Certificate (Clause 14.13)
- Issue notices to correct (Clause 15.1)
- Determine amounts due to the Contractor following termination (Clauses 15.3, 16.4 and 19.6)
- Verify that insurance requirements are met and premiums paid (Clause 18.1)
- Review Contractor's claims, check his contemporary records and instruct him with respect to the keeping of specific records (Clause 20.1)



5. Nominated Subcontractors

- A nominated Subcontractor is someone who is either so-named in the Contract or who the Engineer has instructed the Contractor to employ as a Subcontractor.
- A “Subcontractor” can be a supplier of Goods and/or Materials.
- There are three potential advantages to the Employer or Engineer of using a nominated Subcontractor:
 - involvement in the choice of a specialist subcontractor;
 - involvement in the choice of Plant;
 - the avoidance of participation in the co-ordination of the interface between the nominated Subcontractor's and the Contractor's Works.



5. Nominated Subcontractors

- Disadvantages in using nominated Subcontractors include:
 - lack of commitment from the Contractor to manage a Subcontractor that he feels was imposed upon him;
 - nominated Subcontractors are sometimes chosen because of close links to the Employer's organisation rather than because of their ability;
 - delays often occur in the appointment of the nominated Subcontractor, thereby delaying completion of the Works.
- If there are to be nominated Subcontractors, the Employer should make this clear in the tender documents so that the Contractor can take account of this in his bid.



5. Nominated Subcontractors

- The Employer and/or Engineer cannot unilaterally impose a Subcontractor on the Contractor as Sub-clause 5.2 provides that a Contractor can raise a reasonable objection to any proposed appointment .
- An objection is deemed reasonable if it arises from (among other things):
 - there are reasons to believe the nominated Subcontractor lacks competence or sufficient finances or resources;
 - the nominated Subcontractor does not accept to indemnify the Contractor against his negligence or misuse of Goods.



5. Nominated Subcontractors

- The nominated Subcontractor does not accept to enter into a subcontract under which the nominated Subcontractor shall
 - have similar obligations and liabilities as the Contractor;
 - indemnify the Contractor against all obligations and liabilities arising from any failure by the Subcontractor to perform;
 - be paid only if and when the Contractor has received payment from the Employer for sums due under the Subcontract.
- In respect of this latter point, the Contractor shall pay the nominated Subcontractor amounts shown on the Subcontractor's invoices approved by the Contractor and which are certified by the Engineer as being due.



6. Design

- The premise upon which the Red Book (1999) and the MDB Edition are based is that the Contractor shall be provided with the design by the Employer.
- The full title of the Red Book (1999) is:
"Conditions of Contract for Construction for Building and Engineering Works designed by the Employer"
- The Foreword to both Contracts states:
"Under the usual arrangements for this type of contract, the Contractor constructs the Works in accordance with a design provided by the Employer. However, the works may include some elements of Contractor-designed civil, electrical and/or construction works."



6. Design

As part of his role at the pre-contract stage the following aspects of the project would normally have been determined by the Engineer or the Employer's designer:

- Shape, form and dimensions of the project.
- Function which the Project is expected to perform and the level and quality of performance.
- Selection of materials and workmanship to produce the shape, form and dimensions of the project; and the production of documents necessary to express and communicate the design precisely and clearly to the Employer and to prospective contractors.



6. Design

In general, the design should normally be very well advanced by the time of contract award.
 However, as part of his role during the post-contract stage (during the execution phase), the Engineer will normally issue additional or modified design Drawings and information.



6. Design

- "The Contractor shall design (*to the extent specified in the Contract*), execute and complete the Works in accordance with the Contract and with the Engineer's instructions and shall remedy any defects in the Works" (Sub-Clause 4.1)
- If the Contractor is required to design any part of the Works, the extent of this design work must be clearly stated in the Contract.
- Otherwise, the Contractor does not undertake design but merely produces his shop/working drawings in order to show **how to build the Works**.



End of Session 2



Session 3

The Management of Projects



The Management of Projects

1. Staff and Labour
2. Plant, Material and Workmanship
3. Commencement, Delays and Suspension
4. Tests on Completion
5. Employer's Taking Over; Defects Liability



1. Staff and Labour

- Clause 6 of the Red Book (1999) and the MBD Edition places a number of obligations upon the Contractor with respect to the proper treatment of staff and labour.
- The MDB Editions of 2005 & 2006 went much further than the Red Book (1999) and contained 22 sub-clauses dealing with “social issues” compared to only 11 in the Red Book (1999).
- The MDB Edition 3rd Edition (2010) goes even further with 24 such sub-clauses. (The two additions deal with the right to belong to trade unions and with non-discrimination/equal opportunity.)



1. Staff and Labour

These sub-clauses cover:

- **Engagement of Staff and Labour**

The Contractor must engage and pay the necessary staff and labour and arrange feeding, transport and when appropriate, housing. He is encouraged to employ staff and labour, with appropriate qualifications and experience from the Country of the Works.

- **Rates of Wages & Conditions of Labour**

The Contractor must respect local rates of wages. He must inform his Personnel of their liability to pay income taxes and has to fulfil his legal duties with respect to deductions.



1. Staff and Labour

- **Persons in the service of the Employer**

The Contractor must not attempt to recruit the Employer's Personnel.

- **Labour Laws**

He must respect all the relevant labour Laws and shall require his employees to obey all applicable Laws.

- **Working hours**

No work is allowed outside normal working hours or on locally recognised rest days, unless allowed by the Contract, agreed by the Engineer or is necessary for safety reasons.



1. Staff and Labour

- **Facilities for Staff and Labour**

He must provide all necessary accommodation & welfare facilities (including for Employer's Personnel if this is stated in the Specification). Accommodating workers in the Permanent Works is not allowed.

- **Health and Safety**

He must take all reasonable measures to maintain health & safety of his Personnel. He shall ensure that medical staff, etc. are available at all times on Site and at accommodation provided by him. He must appoint a qualified accident-prevention officer and give him the necessary authority to take action in order to avoid accidents. He must maintain records and immediately report any accident.



1. Staff and Labour

• Health and Safety (Continued)

He must regularly provide HIV-AIDS education among his workers, those involved in the project and the local community. He shall provide condoms and screening for both HIV-AIDS and STI. He shall propose an alleviation programme in respect of STI, STD and HIV-AIDS, the cost of which will be covered by a Provisional Sum included in the Accepted Contract Amount.

• Contractor's Superintendence

He must provide all necessary superintendence by a sufficient number of qualified persons having adequate knowledge of the language for communications, for satisfactory and safe execution of the Works.



1. Staff and Labour

• Contractor's Personnel

Engineer may require the removal from Site of any person who

- persists in any misconduct or lack of care;
- carries out duties incompetently or negligently;
- fails to conform with the Contract;
- persists in conduct which is bad for safety, health or the environment.

• Records of Personnel & Equipment

Every month the Contractor must provide the Engineer with details of the number and class of Contractor's Personnel and of each type of equipment on Site.



1. Staff and Labour

• Disorderly Conduct

Contractor must take all reasonable precautions to prevent disorderly conduct and to prevent damage or injury to property and persons on or near Site.

• Foreign Personnel

Contractor may bring foreign Personnel allowed by the Laws. He must organise visas, work permits and return of the Personnel to their place of recruitment or domicile. In the event of death he must arrange for the return of the body or burial.

• Supply of Foodstuffs

If required by the Specification, he shall provide a sufficient supply of suitable food at reasonable prices.



1. Staff and Labour

• Supply of Water

Contractor shall provide an adequate supply of drinking and other water on Site.

• Insect & Pest Nuisance

Contract must take necessary measures to protect Contractor's Personnel from insect & pest nuisance.

• Alcoholic liquor or drugs

Contractor shall not, otherwise than in accordance with the Laws, import, sell, give, barter etc. alcohol or drugs and shall not allow his Personnel to do so.



1. Staff and Labour

- **Arms & ammunition**

He must not give, barter or dispose of arms or ammunition and shall not allow his Personnel to do so.

- **Festivals & Religious Customs**

He must respect locally recognised festivals, days of rest and religious or other customs.

- **Funeral Arrangements**

To the extent required by local regulations, he is responsible for making funeral arrangements for local employees.



1. Staff and Labour

- **Forced or Compulsory Labour**

He will not employ labour to do work which is not voluntarily performed but is extracted under threat of force or penalty.

- **Harmful Child Labour**

He will not employ any child to do work that is economically exploitative, is likely to be hazardous, to interfere with the child's education or to be harmful to his health or development.

- **Employment Records of Workers**

He shall keep complete and accurate labour records – names, ages, gender, hours worked and wages paid. They shall be summarised and submitted on a monthly basis and can be inspected by the Engineer during normal working hours.



2. Plant, Material and Workmanship

- Clause 7 deals with the requirements for the items of Plant and Materials which the Contractor brings to the Site in order to execute the project.

- It covers the Contractor's obligations concerning the quality of his work and the procedures to be followed for tests and in the event that an item of work fails the test.

- The matter of the time when an item of Plant or Materials becomes the property of the Employer is covered at Sub-Clause 7.7 and Royalties are dealt with at Sub-Clause 7.8.



2. Plant, Material and Workmanship

The Contractor must carry out his work:

- in the manner specified in the Contract;
- in a *workmanlike and careful* manner;
- in accordance with *recognised good practice*;
- with *properly equipped facilities* and using non-hazardous materials, unless otherwise specified in the Contract. (Clause 7.1)

The quality of materials and standard of workmanship will be specified elsewhere in the contract documents, which will normally refer to the national standard specifications of the country of the project.



2. Plant, Material and Workmanship

- However, phrases such as “proper workmanlike and careful manner”, “recognised good practice” and “properly equipped facilities” are not precise.
- These requirements will have to be interpreted by the Engineer in relation to the actual goods that are supplied and work that is executed by the Contractor.



2. Plant, Material and Workmanship

- The Contractor is to submit samples of Materials, and relevant information, to the Engineer for consent prior to using the Materials in or for the Works. (Clause 7.2)
- Samples are:
 - manufacturer's standard samples of Materials and samples specified in the Contract, all to be provided at the Contractor's cost, and
 - additional samples instructed by the Engineer as a Variation.
- Under Sub-Clause 1.3, the Engineer cannot unreasonably withhold his consent to the use of Materials. Any decision by the Engineer to reject certain Materials will thus need to be supported by scientific evidence (e.g., laboratory reports).



2. Plant, Material and Workmanship

- The Employer's Personnel shall:
 - at all reasonable times have full access to all parts of the Site and to all places from which natural Materials are being obtained, and
 - during production, manufacture and construction (at the Site and elsewhere), be entitled to examine, inspect, measure and test the materials and workmanship, and to check the progress of manufacture of Plant and production and manufacture of Materials.
- The Contractor must give notice to the Engineer whenever any work is ready and before it is covered up.



2. Plant, Material and Workmanship

- The Engineer shall then either carry out the examination, or testing without unreasonable delay, or promptly give notice to the Contractor that he does not require to do so.
- If the Contractor fails to give the notice, he must, if and when required by the Engineer, uncover the work and then reinstate at his own cost. (Clause 7.3)



2. Plant, Material and Workmanship

- The Contractor shall provide everything necessary to carry out the tests specified, unless otherwise stated in the Contract.
- He shall agree with the Engineer, the time and place for the specified testing.
- The Engineer may vary the location or details of specified tests, or instruct the Contractor to carry out additional tests.
- If these varied or additional tests show that the item is not in accordance with the Contract, the additional or varied tests shall be at Contractor's expense.



2. Plant, Material and Workmanship

- The Engineer must give the Contractor not less than 24 hours' notice of his intention to attend the tests. If he does not attend at the time and place agreed, the Contractor may proceed with the tests unless otherwise instructed by the Engineer and the tests shall be deemed to have been made in the Engineer's presence and to be accurate. (Clause 7.4)
- If any Plant, Material or workmanship is found to be defective, or not in accordance with the Contract, the Engineer may reject it by notifying the Contractor. However, Engineer must not unreasonably withhold approval.



2. Plant, Material and Workmanship

- If the Engineer requires this Plant, Materials or workmanship to be retested, the tests must be repeated under the same terms and conditions.
- If the Employer suffers additional costs due to the retesting, the Contractor shall pay these costs to the Employer. (Clause 7.5)
- The Contractor must, within a reasonable time, comply with any Engineer's instruction to:
 - remove and replace any Plant or Materials which do not conform with the Contract; or
 - remove and re-execute any works which do not conform with the Contract.



2. Plant, Material and Workmanship

- The Engineer should only insist upon removal and replacement when it would be unreasonable to repair.
- The Contractor must comply immediately with any Engineer's instruction to execute works, which are urgently required for the safety of the Works.
- If the Contractor fails to comply with the Engineer's instruction, the Employer will be entitled to employ others to carry out the instruction at the Contractor's cost. (Clause 7.6)



2. Plant, Material and Workmanship

- Unless the Laws of the Country provide otherwise, items of Plant and Materials will become the property of the Employer either:
 - when they are incorporated in the Works; or,
 - when the Contractor is paid for them, whichever takes place first. (Clause 7.7)
- The Contractor must pay all royalties and similar charges in relation to natural materials obtained outside the Site and for the disposal of materials arising from demolition, excavation, etc. (Clause 7.8)



3. Commencement, Delays and Suspension

- In general, a number of conditions must be satisfied before the Commencement Date. These include:
 - Signature of the Contract Agreement by both Parties (together with any necessary approval from relevant authorities);
 - Provision by the Employer of reasonable evidence of his financial arrangements;
 - Possession of the Site and such permissions as are required for commencement, are given to the Contractor; and
 - Receipt by the Contractor of the Advance Payment (provided that the corresponding guarantee has been delivered by the Contractor).



3. Commencement, Delays and Suspension

- In addition, the Engineer must issue an instruction recording that both Parties agree on fulfilment of the conditions and instructing the Contractor to commence.
- If this instruction is not issued within 180 days from receipt by the Contractor of the Letter of Acceptance, the Contractor may terminate the Contract.
- After receiving the instruction, Contractor must proceed without delay and must complete the whole of the Works and any Section within the Time for Completion of the Works or Section. (Clauses 8.1 & 8.2)



Workshop Exercise – Notice to Commence



3. Commencement, Delays and Suspension

- Contractor must submit to the Engineer a Programme within 28 days after receiving the instruction to commence. The Programme is important because:
 - it is the basis for monitoring the Contractor's progress and planning Employer/Engineer activities and obligations;
 - It becomes a base reference for the Engineer's determination of Contractor's claims for extensions of Time for Completion arising from alleged disruption or delay.



3. Commencement, Delays and Suspension

- Programme must show:
 - order of execution of the Works, dates for Contractor's Documents, procurement, off-site manufacture and fabrication, delivery, construction, erection, and testing;
 - sequencing of the Works, taking into account the lead time for obtaining any approvals;
 - detail of works performed by nominated Subcontractors;
 - the sequence and timing of inspections and tests;
 - that the Works will be completed within the Time for Completion.



3. Commencement, Delays and Suspension

- Programme is to be detailed (the Specification may require the Programme to be computer-generated using software and showing the critical path).
- It should be accompanied by a supporting report (Method Statement) setting out how the Contractor intends to execute the Works and the resources he intends to use.
- Engineer must:
 - give notice to the Contractor within 21 days of how the Programme does not comply with the Contract;
 - not give comment on its attainability (he should only acknowledge receipt).



3. Commencement, Delays and Suspension


- Contractor is required to give advance notice or early warning to the Engineer of probable events which might adversely affect or delay the Works. There is no similar obligation on the Engineer or Employer.
- The Engineer may request the Contractor to submit an estimate of the effect of such events and/or a financial proposal for dealing with them.
- The requirement for notice has a far wider application than just in relation to the programme. The purpose is to enable the Contractor and Engineer to work together to minimise the effects of the potential delay event. The notice gives the Engineer the opportunity to take action to overcome the problem before the Contractor incurs delay or additional cost.



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3. Commencement, Delays and Suspension


- Linked to the requirement to maintain valid programmes and to advise the Engineer of potential delaying events, is the requirement to submit monthly progress reports (Clause 4.21).
- Each report must include charts and detailed descriptions of progress, photographs, details of the manufacture of each major item of Plant & Materials, records of Contractor's Personnel, copies of QA documents, etc., lists of notices given with respect to Employer's and Contractor's claims, safety statistics and comparisons of planned and actual progress with details of measures to overcome delays.


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3. Commencement, Delays and Suspension

- The submission of the monthly report is a pre-requisite for issue of the Interim Payment Certificate for the period covered by the report.
- If any of the circumstances listed under Clause 8.4 occurs, the Contractor shall be entitled to an extension of the Time for Completion, provided that he complies with the procedures set out under Clause 8.4 and elsewhere in the Contract.


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3. Commencement, Delays and Suspension

- If the Contractor is not entitled to an extension of the Time for Completion and the rate of progress of the Works is:
 - too slow to complete the Works within the Time for Completion;
 - or
 - the Contractor has fallen (or will fall) behind the current Programme;

the Engineer can instruct the Contractor to submit a revised programme and supporting report describing the revised methods he proposes to adopt, at his own risk and cost, to expedite progress and comply within the Time for Completion.


- If these methods cause the Employer to incur additional costs, the Employer may claim these costs from the Contractor.


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3. Commencement, Delays and Suspension

- If, on the other hand, he is entitled to an extension of the Time for Completion but the Engineer instructs him to take measures in order to reduce the delay, he must be paid the additional costs of the measures. (Clause 8.6)
- If the Contractor fails to complete within the Time for Completion (after taking account of any entitlement to extensions of time), he must pay delay damages to the Employer, at the rate stated in the Contract.
- The Employer shall not be entitled to the delay damages unless he issues a notice to the Contractor within the 28 days' limit set out in Clause 2.5 .


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3. Commencement, Delays and Suspension

- The subject of delay damages needs to be considered within the context of the applicable Law.
- In some countries, the Employer is entitled to delay damages even if the delay does not cause him any loss.
- In others, he must be able to show some loss before he can claim delay damages.
- In some countries, the right to delay damages can be lost if a legal procedure is not followed (rather than a contractual procedure).



3. Commencement, Delays and Suspension

- The Engineer may instruct the Contractor to suspend the Works (partially or entirely) (Clause 8.8).
- During such suspension, the Contractor must protect that part of the Works against any deterioration, loss or damage.
- The Engineer is not obliged to give the reason for the suspension but “may” notify of the cause. A reasonable Engineer should tell the Contractor the reason and likely extent of the suspension in order that he can decide how to meet his obligation to “protect, store and secure” that part of the Works.



3. Commencement, Delays and Suspension

- If the cause is notified and is the responsibility of the Contractor, he will not be entitled to any extension of time or additional payment due to the suspension.
- Otherwise, he will be so entitled and will also be entitled to payment for Plant and/or Materials that have not yet been delivered to Site, if :
 - the suspension in relation to this Plant and/or Materials has lasted more than 28 days and
 - the Contractor has marked the Plant and/or Materials as the Employer's property. (Clauses 8.9 & 8.10)



3. Commencement, Delays and Suspension

- He is also entitled to be paid for repairing, on the Engineer's instruction, any damage that has occurred during the suspension.
- If the suspension lasts more than 84 days, the Contractor may request permission to recommence.
- If permission is not given within 28 days, the Contractor may treat the suspension as an omission of the suspended Works or may terminate the Contract if the whole of the Works is affected by the suspension.



4. Tests on Completion

- Prior to commencing the Tests on Completion, the Contractor must:
 - submit "As-built" documents and operation and maintenance manuals for parts designed by the Contractor;
 - give at least 21 days' notice to the Engineer of the date after which he will be ready to carry out the Tests.
 - The Tests on Completion shall be carried out within 14 days after the above-stated date, on the day or days chosen by the Engineer. (Clause 9.1)



4. Tests on Completion

- If the Tests on Completion are unduly delayed by the Employer, the Contractor is entitled in the first place to an extension of time and/or additional payment.
- If the delay continues for more than 14 days, the Employer shall be deemed to have Taken Over the Works on the date when the Tests should have been completed.



4. Tests on Completion

- If the Tests on Completion are unduly delayed by the Contractor, the Engineer may instruct the Contractor to carry out the Tests within 21 days, on dates fixed by the Contractor.
- If the Contractor fails to do so, the Employer may proceed with the Tests on Completion at the risk and cost of the Contractor.
- In such a case, the Tests will be deemed to have been carried out in the presence of the Contractor and the results will be deemed to be accurate. (Clause 9.2)
- If the Works fail to pass, the Engineer or the Contractor may require the failed Tests and Tests on Completion of related work, to be repeated. (Clause 9.3)

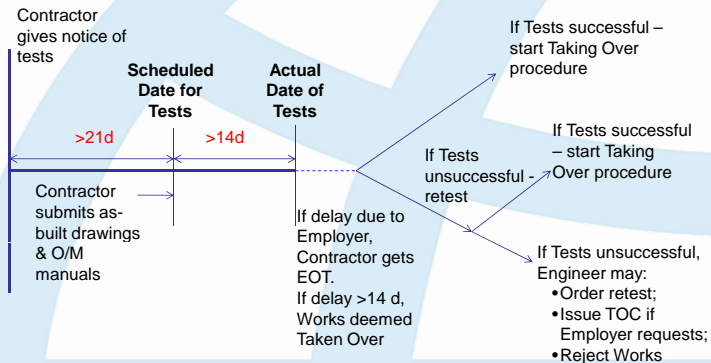


4. Tests on Completion

- If the Works fail to pass the repeated Tests on Completion, the Engineer may:
 - order further retesting;
 - issue a Taking-Over Certificate, but only if the Employer so requests;
 - reject the Works if the failure deprives the Employer of substantially the whole of the benefit of the Works, in which case, the Employer may terminate the Contract as a whole or in respect of any major part which cannot be put to the intended use and recover the amounts paid to the Contractor for the rejected part, together with financing costs and the cost of dismantling. (Clauses 9.4 & 11.4(c))



Sequence of Tests on Completion



5. Employer's Taking Over; Defects Liability

- When the whole or a part of the Works is nearing completion, Contractor applies by notice to Engineer for a Taking-Over Certificate (TOC).
- The notice must be given less than 14 days before the Works are expected to be complete.



5. Employer's Taking Over; Defects Liability

- Issuing of the TOC for the whole of the Works is a significant event. The date indicated in the TOC is the date from which:
 - Employer takes responsibility for care & maintenance;
 - Contractor's obligation to insure the Works ends;
 - part of the Retention Money is to be paid to the Contractor;
 - time begins to run for the Contractor's submission of a Statement at Completion;
 - the Employer's entitlement to delay damages ends, and
 - the Defects Notification Period (DNP) starts to run.



5. Employer's Taking Over; Defects Liability

- Before issuing the TOC, the Engineer must verify that any pre-conditions have been satisfied:
 - statutory requirements affecting Taking Over;
 - Contractor has submitted As-Built Drawings (if required) and Operating/Maintenance Manuals (if any);
 - Works have passed Tests on Completion (if any).



5. Employer's Taking Over; Defects Liability

- Engineer must **within 28 days** after receipt of the Contractor's notice applying for a TOC, either:
 - issue a TOC stating the date on which the Works were completed in accordance with the Contract; or
 - issue a TOC with a list of work to be completed or rectified during the DNP; or
 - give written instruction to the Contractor specifying all the work which is required to be done by the Contractor before the issue of the TOC.
- If the Engineer fails to respond **within 28 days** of receipt of the Contractor's notice, and the Works are substantially in accordance with the Contract, the TOC shall be deemed to have been issued on the last day of that 28 days period.



5. Employer's Taking Over; Defects Liability

In accordance with the procedures for the whole of the Works, Contractor may request and Engineer shall issue a TOC for:

- any **Section** in respect of which a separate Time for Completion is provided in the Contract (customarily in the Contract Data); or
- any **part** of the Permanent Works - but at the sole discretion of the Employer; or
- any **part** of the Permanent Works which the Employer has decided to use prior to completion (other than as a temporary measure specified in the Contract or agreed by the Contractor).



5. Employer's Taking Over; Defects Liability

- The part is deemed to be Taken Over on the date at which it was first used and from such date:
 - responsibility for care & maintenance of part is Employer's;
 - the Contractor's obligation to insure part ends;
 - a proportion of the Retention **based on the value of the taken-over works relative to the total value of the Permanent Works Money**, is paid to the Contractor;
 - the Employer's entitlement to delay damages is reduced in proportion to the value of the part of Works.
- The DNP for that part does not end until the end of the DNP for the relevant Section or for all the Works.



5. Employer's Taking Over; Defects Liability

- The TOC may be:
 - a simple letter of certification to the Contractor;
 - some Employers have a standard format of certificate.
- In the event that remaining works and/or defects correction are permitted to be completed during the DNP, a Snagging List of such works and defects corrections should be referenced in the TOC and appended thereto.



5. Employer's Taking Over; Defects Liability

- There is no fixed procedure for listing works to be completed or defects to be corrected prior to or after issuing a TOC.
- Upon receipt of Contractor's notice of completion of the Works (or a Section) and request for a TOC, Engineer should:
 - give notice to the Contractor of an inspection of the Works on or near the date that the Contractor has advised that the Works will be completed and ready for taking over;
 - invite the Employer to participate in the inspection;
 - based on the inspection, prepare a list of work remaining to be completed or identified defects to be corrected.

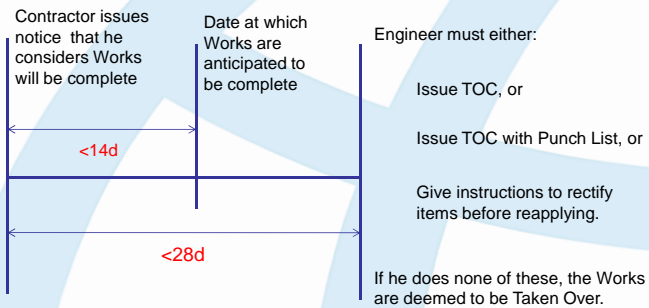


5. Employer's Taking Over; Defects Liability

- If the remaining work and/or defects corrections are too extensive for a TOC to be issued, Engineer must notify the Contractor of work and defects to correct **before re-applying**.



5. Employer's Taking Over; Defects Liability



5. Employer's Taking Over; Defects Liability

- Defects Notification Period (DNP) is the period for notifying defects that the Contractor is required to correct. It is 12 months unless stated otherwise in the Contract Data:
 - from the date of completion of the Works certified in the TOC for the whole of the Works;
 - in the event of more than one TOC having been issued, from the respective dates so certified.



5. Employer's Taking Over; Defects Liability

- Contractor is required:
 - to complete remaining works or rectify defects listed in the Snagging List within a reasonable time during the DNP. In the event of default, Employer is entitled to pay others to execute;
 - to rectify notified defects at his own cost but if not done within the stated or reasonable time: Employer is entitled to recover from the Contractor the Employer's **costs reasonably incurred** and as verified by the Engineer, of the remedial actions/works performed by others – but the Contractor shall have no responsibility for the work done by others.



5. Employer's Taking Over; Defects Liability

- The Contractor is obliged, at his cost, to rectify any notified defect attributable to:
 - any design for which the Contractor is responsible;
 - Plant, Materials or workmanship not in accordance with the Contract,
 - failure by the Contractor to comply with any other obligation;
- but not :
 - “fair wear and tear”;
 - defects which are attributable to faults of design not performed by the Contractor;
 - damage not caused by/attributed to Contractor in the DNP. (Clause 11.2)



5. Employer's Taking Over; Defects Liability

- Employer may choose to rectify defects or damage that are not attributable to the Contractor by:
 - a request by the Employer (or on his behalf by the Engineer) that the Contractor perform the remedial works, for which the Contractor's agreement and jointly agreed payment terms would be necessary (as a Variation under Sub-Clause 13.3);
 - the Employer executing the remedial works outside the Contract, by himself or by others.



5. Employer's Taking Over; Defects Liability

- If an argument arises as to whether or not a defect is attributable to the Contractor, he shall, upon instruction of the Engineer:
 - search for the cause of the defect;
 - if, as a result of the search, it is determined that the defect is the Contractor's responsibility, then the Contractor shall bear the cost of the search (this may include costs of the Employer's and/or Engineer's participation).
- If the cause of the defect is not the responsibility of the Contractor, then the Contractor is entitled to reimbursement of the Cost (of the search) plus a profit. (Clause 11.8)



5. Employer's Taking Over; Defects Liability

"The Employer shall be entitled.... to an extension of the Defects Notification Period for the Works or a Section if and to the extent that the Works, Section or a major item of Plant (as the case may be, and after taking over) cannot be used for the purposes for which they are intended by reason of a defect or damage. However a DNP shall not be extended by more than two years". (Clause 11.3)

- If any Section or Plant cannot be used for a certain time period, then the relevant DNP should be extended by that time period.



5. Employer's Taking Over; Defects Liability

- If the work of rectifying any defects may have affected the performance of the Works, the Engineer may require a repetition of any test prescribed in the Contract, within 28 days after remedying of the defect or damage.
- The cost of performing repeated tests shall be borne by the Party liable for the cost of rectifying the defects. (Clause 11.6)



5. Employer's Taking Over; Defects Liability

- The Engineer is required to issue the Performance Certificate:
 - within 28 days after expiry of the DNP; (or
 - if different DNPs have become applicable to different parts of the Works, within 28 days after expiry of the latest); or
 - as soon thereafter as any works instructed by the Engineer have been satisfactorily completed and tested.
- Certificate may be a simple letter stating the date on which, in the Engineer's determination, the Contractor completed his obligations under the Contract.



5. Employer's Taking Over; Defects Liability

- FIDIC Contracts state that:

"Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued a Performance Certificate to the Contractor....."

and

"Only the Performance Certificate shall be deemed to constitute acceptance of the Works." (Clause 11.9)



5. Employer's Taking Over; Defects Liability

- However, the statement in the PC, of the Contractor's completion of his obligations cannot be taken literally.
- Under the "Unfulfilled Obligations" clause (Clause 11.10), after the PC has been issued each Party remains liable for the fulfilment of any obligation which is unperformed at that time, and for this purpose the Contract is deemed to remain in force.
- Obligations include:
 - Contractor's clearance of Site;
 - Contractor's submission of a Final Statement;
 - Employer's Final Payment.



End of Session 3



Workshop Exercise – Taking Over



Session 4


Financial Clauses & Procedures



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Financial Clauses and Procedures


1. Measurement and Evaluation
2. Variations and Adjustments
3. Contract Price and Payment


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1. Measurement and Evaluation


- The Contract is signed on the basis of the **“Accepted Contract Amount”** – but this is only an estimate of the amount actually to be paid to the Contractor.
- The amount actually to be paid to the Contractor (the **“Contract Price”**) is to be determined by the Engineer on the basis of **measurement of final quantities** of work executed and taking account of **Variations** and certain **Adjustments**.


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1. Measurement and Evaluation


- Under the Red Book (1999) and the MDB Edition, the Bill of Quantities (BoQ) is a Bill of estimated Quantities and unit rates fixed in the Contract.
- The Quantities set forth against Items in each Bill are estimates of each kind of work included in the Contract. There is no guarantee that the Contractor will be required to perform the quantities under any particular item in the BoQ, or that the quantities will not differ from those stated.


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1. Measurement and Evaluation

- The brief descriptions of items given in the BoQ are purely for purposes of identification and shall not modify or supersede the detailed description given in the Technical Specifications and Drawings.
- The BoQ must be read in conjunction with the Preambles to BoQ and with the Method of Measurement (MoM).
- The MoM should describe the coverage of works and activities under each item of the BoQ.
- Any item included in the BoQ for which the Contractor indicates no rate or price is deemed to be included in other rates and prices in the BoQ and is not paid separately.


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1. Measurement and Evaluation

- Interim payments to the Contractor are based upon monthly measurement of quantities of work, applying the rates and prices from the BoQ.
- The Engineer:
 - performs measurements;
 - gives written notice to the Contractor of measurements.
- It is recommended that the Engineer and Contractor :
 - perform measurements together;
 - pre-agree any methods for the calculation of measurements from drawings and records.



2. Variations and Adjustments Provisional Sums

- If the Contract includes a Provisional Sum the Engineer may instruct work to be executed, or Goods, Materials, Plant or services to be supplied under the Provisional Sum:
 - by the Contractor (the Contractor is entitled to payment in accordance with the Contract provisions for **Variations**);
 - by a nominated Subcontractor (the Contractor is entitled to payment of the actual amount due to the Nominated Subcontractor, plus a sum for the Contractor's overhead and Profit calculated from the relevant percentage rate stated in the BoQ or Contract Data).



2. Variations and Adjustments

Variations

- In any construction project, there will be need to change the initial requirements as construction proceeds:
 - Employer changes his mind about some requirement;
 - Engineer may need to issue further information which involves changes to the initial requirements;
 - to correct a mistake in the information which has been issued to the Contractor.
- Engineer is only authorised to instruct Variations under the Contract. Not empowered to instruct a variation of the Contract (a variation of the Contract can be made only by the Parties to the Contract).



2. Variations and Adjustments

- Engineer may instruct any Variation that he considers necessary.
- He has authority (subject to restrictions specified in the Contract) to instruct the Contractor to:
 - Increase or decrease the quantity of any work;
 - omit any work unless it is to be carried out by others;
 - change the character or quality of any such work;
 - change the levels, positions and/or dimensions of any part of the Works;
 - execute additional work needed to complete the Works;
 - change any sequence or timing of construction / execution of the Works.



2. Variations and Adjustments

- The principles of evaluation with respect to Variations are:
 - Variations are to be valued at the Contract's rates and prices;
 - if the Contract has no rates & prices for the varied work because the work is not of similar character or is not executed under similar conditions, Contract rates & prices are to be used as the basis for developing new rates (enhanced or star rates);
 - failing which, after due consultation by the Engineer, suitable rates or prices shall be agreed on the basis of reasonable Costs plus profit.



2. Variations and Adjustments

- Until rates or prices are agreed or fixed, the Engineer shall determine provisional rates (as soon as the work commences) to enable the Engineer's certification of on-account payments to the Contractor.
- If an instruction to vary the Works is necessitated by some default or breach of Contract by the Contractor or for which he is responsible, any additional cost so attributable shall be borne by the Contractor.



2. Variations and Adjustments

Omissions

- If the Variation concerns omitted work and:
 - the Contractor incurs cost which, if the work had not been omitted, would have been covered by part of the Accepted Contract Amount;
 - the omission will result in the sum not forming part of the Contract Price; and
 - the cost is not included in the evaluation of any substituted work;

the Engineer shall determine the amount to be added to the Contract Price to cover such cost, based on information submitted by the Contractor.



2. Variations and Adjustments

Adjustments

- Contract Price can be adjusted for any increase or decrease in Cost arising from a change in the Laws of the Country made after the Base Date.
- Engineer should only certify payment of such increased / decreased costs after verifying particulars of a claim.
- Contractor to submit a claim for increased costs, and the Employer to submit a claim for decreased costs.
- Price adjustment shall, in general, be inadmissible for changes in Law occurring after the Time for Completion (exceptions: varied works instructed to be done during the DNP).



2. Variations and Adjustments

- The MDB Edition provides for adjustment of the amounts payable to the Contractor to take account of rises or falls in the cost of labour, Goods and other inputs to the Works – provided that the Contract contains a Schedule with a completed “table of adjustment data”.
- The Contract proposes a formula to be used to determine a “multiplier” which, when applied to the estimated contract value of the work carried out during the month, will yield the adjusted amount:

$$P_n = a + b \frac{L_n}{L_o} + c \frac{E_n}{E_o} + d \frac{M_n}{M_o} + \dots$$



2. Variations and Adjustments

- Employer :
 - can define the coefficients in the given formula and also all the sources of the cost indices in the “table of adjustment data” for each currency
- or he may leave it to the Contractor, in his bid, to define the coefficients and their sources.
- In the event that the Contractor does not complete the whole of the Works within the Time for Completion, the adjustment multiplier for works executed after the Time for Completion must be capped at its value applicable to the month during which the Time for Completion expired.



2. Variations and Adjustments

- New rates may be established for any items of the BoQ whose measured quantities exceed or fall below a specified percentage of the quantities stated in the original BoQ.
- Applicable only if all of the following criteria apply:
 - the measured quantity of the item is changed by more than 25% from the original BoQ quantity;
 - this change in quantity multiplied by the specified unit rate for this item exceeds 0.25 % of the Accepted Contract Amount;
 - the change in quantity directly changes the Cost per unit quantity of this item by more than 1 %; and
 - this item is not specified in the Contract as a “fixed rate item”.



2. Variations and Adjustments

- Example:

Item	Unit	Q	Rate (\$)	Amount (\$)
Original Quantity:				
Cut to fill	m3	110 000	3.60	396 000
Final Quantity:				
Cut to fill	m3	150 000	3.60	540 000
Accepted Contract Amount				25 000 000

Increase in Quantity = 40000 m3 = 36.4% > 25%
 Increase in Accepted Contract Amount = 144000 = 0.576% > 0.25%

Original Cost/m3 = \$ 3.24
 Revised Cost/m3 = \$ 3.18
 Decrease in unit cost = \$ 0.06 = 1.85% > 1%
 Adjusted Rate = \$ 3.54



2. Variations and Adjustments

Daywork

- Engineer can instruct varied works to be executed on a Daywork basis (payment will be made according to rates and prices in the *Daywork Schedule*, based on daily records submitted by the Contractor).
- Unless the Engineer verifies the resources applied to Daywork, there may be a temptation for a Contractor to exaggerate resources. So emphasis put on the proof of materials used and on provision of records of other resources applied – **no later than the day following the day on which the Daywork was done**. The Engineer must ensure that: Daywork resources are monitored closely and that the records are corrected or agreed promptly.



3. Contract Price & Payment

- The Contract Price is not to be adjusted for taxes, duties and fees that the Contractor is required to pay (unless there is a change in legislation)
- But the MDB Edition states that the Contractor shall be exempt from import duties and taxes on his Equipment and essential spare parts for his Equipment, imported for the sole purpose of executing the Works.



3. Contract Price & Payment

- Interim payments to the Contractor are based on monthly measurement of quantities of work, applying the unit rates and prices from the BOQ.
- Some contracts may have payment based on a Schedule of Payments, but if no such Schedule is included in the Contract then interim payments must be based on monthly measurement of works executed.
- A re-measurement contract will typically require that the Contractor submit a Statement to the Engineer at the end of each month showing the amounts to which he considers himself entitled to the end of the month.



3. Contract Price & Payment

- Contractor's Statement must be accompanied by:
 - supporting documents necessary for the Engineer to verify amounts claimed;
 - Contractor's Monthly Progress Report for the period to which the Statement corresponds.
- Contractor's Statement must be submitted in a form approved or prescribed by the Engineer.



3. Contract Price & Payment

- However, the Statement must set out **in the following order**:
 - the estimated value of the Works executed up to the end of the month including Variations;
 - any additions & deductions for changes in Laws and adjustments for changes in cost;
 - the amount to be deducted for Retention;
 - the amount to be added for the Advance Payment and deducted as repayment;
 - amounts to be added and deducted for Plant & Materials delivered to Site;
 - other additions or deductions which may be due, including Claims;
 - deduction of amounts previously certified.



3. Contract Price & Payment Retention

- Retention Money - retained by the Employer from monies otherwise due to the Contractor - is effected by:
 - deducting in IPC's the amount calculated by applying the percentage of Retention given in the Contract Data;
 - until the amount retained reaches the Limit of Retention Money (if any) stated in the Contract Data.
- There is usually a provision for 10% Retention until reaching a Limit of Retention Money expressed as 5% of the Accepted Contract Amount.



3. Contract Price & Payment

- Engineer to certify payment to the Contractor of part of the Retention Money upon issue of:
 - a Taking-Over Certificate (TOC) for the whole of the Works, the Engineer shall certify for payment 50% of the Retention Money;
 - a TOC for a part of the Works (if applicable), the Engineer shall certify for payment 50% of the proportion of the Retention Money that corresponds to that part.



3. Contract Price & Payment

- Upon expiration of the Defects Notification Period (DNP) the Engineer shall certify for payment the remainder of the Retention Money, provided that:
 - if Works remain to be executed upon expiry of the DNP, the Engineer should withhold certification of the cost of completing the remaining work;
 - if different DNP's are being applied to different Sections of the Works for which TOC's were issued, then until the last DNP expires, the Engineer shall certify for payment a proportion of the Retention Money for each Section whose DNP has expired.



3. Contract Price & Payment

- Such certifications must be made under IPC's, either separately or together with other payment entitlements.
- Contract not to be considered as completed until the Engineer signs and delivers to the Employer a **Performance Certificate**.
- Issue of such certificate is not a condition precedent to payment of the Retention Money (the remainder of Retention Money must be certified for payment by the Engineer promptly upon expiration of the DNP).



3. Contract Price & Payment

- Under the MDB Edition, following issue of the TOC and certification for payment of the first half of the Retention Money, the Contractor may submit a guarantee acceptable to the Employer in the amount of the second half of the Retention Money.
- On receipt of the guarantee, the Engineer must certify and the Employer must pay the second half.
- If the Performance Guarantee is in the form of a demand bond and the amount guaranteed under it, at the date of the TOC, is more than half of the Retention Money, then a Retention guarantee is not required.



3. Contract Price & Payment

- If the amount guaranteed by the Performance Security at the date of TOC is less than half of the Retention Money, then the Retention guarantee will be required but only for the difference between half of the Retention Money and the amount guaranteed under the Performance Security.



3. Contract Price & Payment

Advance Payment

- The advance payment (AP) is due within 42 days of the Letter of Acceptance or 21 days after receipt of the IPC or the Payment Security, whichever is the latest.
- It is repaid to the Employer by deductions applied in the IPC's once the value of work executed reaches 30%.
- The deductions are made at the percentage stated in the Contract Data.
- The AP must be fully repaid before 90% of the Accepted Contract Amount less any Provisional Sums has been certified for payment.
- As the AP is repaid, the amount of the AP Security should be reduced accordingly.



3. Contract Price & Payment

Plant & Materials for the Works

- Contractor may claim payment of 80% of the cost of Plant and Materials sent to or delivered to Site, **but not yet incorporated in the Works** (the amounts certified are deducted in subsequent Interim Payment Certificates).
- Engineer must carefully read the Contract provisions.
- If the kind of Plant and Materials is not listed in Schedules attached to the Contract as being covered by this provision, no payment is due until the Plant and Materials are incorporated in the Works.



3. Contract Price & Payment

- Engineer shall within 28 days of receiving the Statement deliver to the Employer an Interim Payment Certificate (IPC) stating the amount of payment which the Engineer determines due and payable, provided that:
 - no IPC shall be issued until the Contactor has submitted and the Employer has accepted the Performance Security;
 - prior to the issue of the Taking Over Certificate, the Engineer is not obliged to issue an IPC if the amount would be less than the minimum amount stated in the Contract Data;
 - after the issue of the Taking Over Certificate, even if the amount certified falls below the minimum stated in the Contract Data, the Engineer must issue the IPC in response to a Contractor's Statement.



3. Contract Price & Payment

- Engineer must provide all supporting particulars for any reduction or withholding made by him in issuing the IPC.
- The Engineer is not permitted to withhold the IPC for any reason other than as a result of the amount being less than the minimum amount stated in the Contract Data.



3. Contract Price & Payment

- If the Engineer fails to issue an IPC on time, the Contractor may, after giving not less than 21 days notice, suspend work (or reduce the rate of work) unless and until he receives the IPC.
- Such action would probably incur additional cost and/or delay that would likely precipitate a subsequent claim, costs of which the Employer could subrogate to the Engineer.



3. Contract Price & Payment

- If the Engineer fails to issue the IPC within 56 days after receipt of the Statement and supporting documents, the Contractor would be entitled to terminate the Contract.
- Certification for payment should not be withheld by the Engineer for executed works which the Engineer has no reason to believe will not, after testing, satisfy Contract requirements. If later tests show the works to be defective, then appropriate corrections of certified amounts can be made in subsequent IPC's until the defects are corrected.



3. Contract Price & Payment

- If executed works are unfinished or defective, the Engineer should give consideration to:
 - whether or not the defect can be remedied;
 - if the defect cannot be remedied, then payment cannot be certified;
 - if it can be remedied, the cost of the remedial work.
- If the Contractor has a record of many executed works having been defective, then the Engineer may be justified in withholding the contract value of any executed but untested works until the Contractor's performance improves.



3. Contract Price & Payment

- To correct and/or adjust the Contractor's Statement the Engineer should:
 - clearly mark the Contractor's Statement to show changes;
 - obtain the Contractor's Representative's agreement before issuing the corresponding IPC;
 - if the Contractor is uncooperative, then the Engineer should notify the Employer and Contractor of his reasons for making the not-agreed corrections and adjustments.



3. Contract Price & Payment

- The Employer must pay the Contractor **within 56 days after receipt by the Engineer of the Contractor's Statement** (i.e. irrespective of the date when the Engineer issues an IPC).
- The Employer must make payment in full of the amounts certified by the Engineer in his Payment Certificates, irrespective of any claim which the Employer may have against the Contractor, until such claim has been agreed or determined.



3. Contract Price & Payment

- Making payments to the Contractor in full and on time is the Employer's contractual obligation, in default of which the Contractor can recover financing costs.
- Contractor may also be entitled to:
 - If payment is not by due date: suspend work or reduce the rate of work (after giving notices), either of which could give the Contractor valid grounds to claim Extension of Time for Completion and/or additional costs.
 - If payment is not within 42 days after the due date: Contractor may terminate the Contract (after giving the appropriate notice).



3. Contract Price & Payment

- Employer must pay financing charges on late payments at the rate specified in the Contract.
- Financing charges are damages deemed to have been incurred as a consequence of the Employer's breach of Contract.
- The Contractor is entitled to financing charges without there being a notice or certification.
- But:
 - the Contractor may include financing charges in his Statement;
 - the Engineer should not certify payment of financing charges unless the Contractor has claimed them;
 - if the Contractor has included financing charges in a Statement, the Engineer is obliged to certify such valid and correct charges in his corresponding IPC.



3. Contract Price & Payment

- Unless payment of financing charges is illegal or unenforceable under the Law of the Contract, the Employer's failure to pay such charges is a breach of Contract subject to the same contractual repercussions as apply to late payment or non-payment of any other amounts due under the Contract.



3. Contract Price & Payment

Contractor's Statement at Completion

- Within 84 days after receiving the TOC for the whole of the Works, the Contractor must submit to the Engineer a Statement at Completion with supporting documents showing in detail:
 - value of all work done in accordance with the Contract up to the date of completion stated in the TOC;
 - any further sums which the Contractor considers due;
 - an estimate of other amounts which the Contractor considers will become due to him under the Contract, with the estimated amounts shown separately.
- **If the Contractor does not claim an entitlement in his Statement at Completion, he loses it.**



3. Contract Price & Payment

Engineer's IPC at Completion

- Within 28 days after receipt of the Contractor's Statement at Completion, Engineer must certify to the Employer the amount which he fairly determines to be due.
- Notwithstanding that the Contractor's Statement at Completion contains "*estimates of amounts which the Contractor considers will become due under the Contract*", Engineer shall certify for payment only those amounts that he determines to be due for works already acceptably completed and other payment entitlements.



3. Contract Price & Payment

Draft Final Statement

- Within 56 days after receiving the PC, Contractor must submit a "draft final statement" with supporting documents showing in the form approved by the Engineer:
 - the value of all work done in accordance with the Contract;
 - any further sums which the Contractor considers to be due to him under the Contract or otherwise.
- If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the "Final Statement" as agreed.



3. Contract Price & Payment

"... if, following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Engineer shall deliver to the Employer (with a copy to the Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement.

Thereafter, if the dispute is finally resolved the Contractor shall then prepare and submit to the Engineer (with a copy to the Employer) a Final Statement." (Clause 14.11)



3. Contract Price & Payment

Discharge

- At the time of submitting the Final Statement, the Contractor is required to submit a Discharge stating that the total of the Final Statement represents full and final settlement of all moneys due to the Contractor. (Clause 14.12)
- The clause states that the discharge **may** state that it becomes effective when the Contractor has received the Performance Security and the outstanding balance of this total, in which event the discharge shall be effective on such date.




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3. Contract Price & Payment

Final Payment Certificate

- Engineer shall, **within 28 days** after receipt of the Contractor's Final Statement, and the Contractor's written Discharge, issue to the Employer a Final Payment Certificate stating:
 - the amount that is finally due to the Contractor;
 - after giving credit for all amounts previously paid and for all sums entitled under the Contract, the balance due.


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3. Contract Price & Payment

Final Payment Certificate

- If Contractor has not applied for a Final Payment Certificate within the prescribed time and/or has not submitted a Discharge, the Engineer requests the Contractor to do so.
- If Contractor fails to do so **within 28 days** the Engineer issues the Final Payment Certificate for an amount he determines – but he cannot submit a Discharge on behalf of the Contractor.



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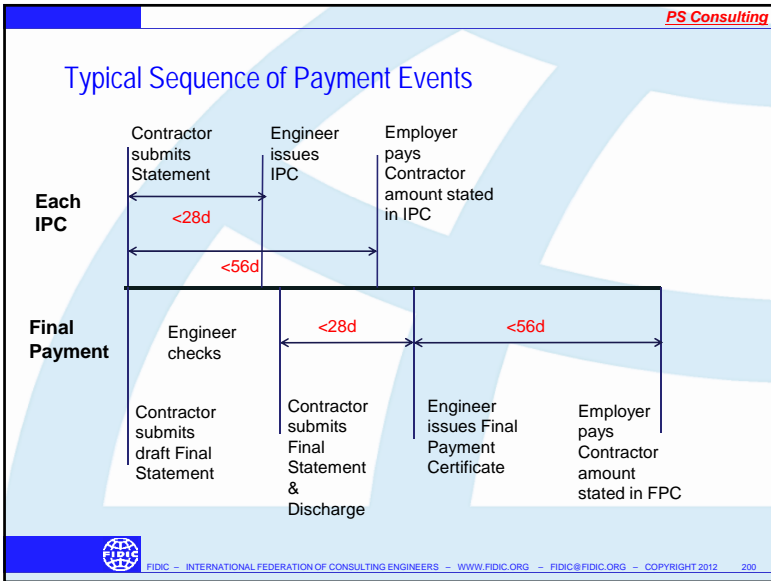
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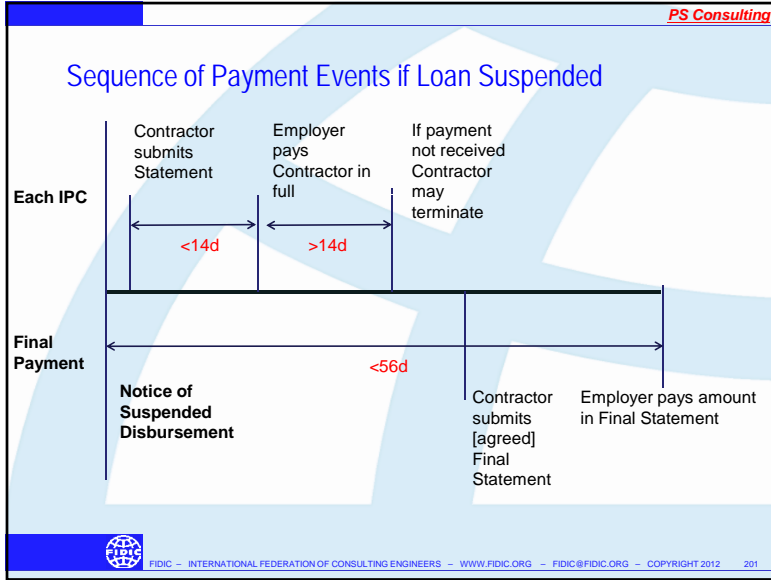
3. Contract Price & Payment

Final Payment

- The Employer shall make the Final Payment to the Contractor **within 56 days** after the date of his receipt of the Engineer's Final Payment Certificate.


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End of Session 4

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Session 5

Risk, Force Majeure & Termination

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- ### Risk, Force Majeure & Termination
1. Risk and Responsibility
 2. Liability & Insurance
 3. Termination by Employer
 4. Suspension and Termination by Contractor
 5. Force Majeure
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1. Risk and Responsibility

- Contractor must take full responsibility for the care of the Works and Goods from the Commencement Date until the TOC is issued (or deemed issued).
- If any loss or damage occurs to the Works during this period other than a matter listed as an Employer's Risk, the Contractor shall rectify the loss or damage at his own risk and cost.
- Contractor will be liable for any damage caused by his actions after the issue of the TOC.



1. Risk and Responsibility

Employer's Risks include:

1. War, hostilities, invasion, act of foreign enemies
2. Rebellion, terrorism, sabotage by persons other than the Contractor's Personnel, revolution, civil war, etc. in the Country
3. Riot, commotion or disorder within the Country
4. Munitions of war, explosives, radiation, radio-activity within the Country ...
5. Pressure waves caused by aircraft, ...
6. Use or occupation by the Employer of any part of the Permanent Works, except as specified in the Contract.



1. Risk and Responsibility

7. Design by the Employer's Personnel or others for whom Employer is responsible
8. Any operation of the forces of nature that was Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

If any of the above Employer's Risks results in loss or damage to the Works, Goods or Contractor's Documents, Contractor shall promptly notify the Engineer and rectify the loss or damage to the extent required by the Engineer.

If he suffers delay and/or additional cost from rectification, he shall be entitled to an extension of time and payment of the Costs (and in the case of items 6 & 7, Costs + profit)



1. Risk and Responsibility

- Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit or any indirect or consequential damage, **other than as specifically provided under the Contract.**
- Except in the case of fraud, deliberate default or reckless misconduct, the total liability of the Contractor to the Employer in connection with the Contract shall not exceed the sum resulting from the application of the multiplier to the Accepted Contract Amount, as stated in the Contract Data or if no multiplier is stated, the Accepted Contract Amount.



2. Liability & Insurance (Clause 18)

- FIDIC contracts require the following to be insured:
 - Works & Contractor's Equipment
 - Injury to Persons & Damage to Property
 - Contractor's Personnel
- The insurances are to be taken out by the "Insuring Party" – who is the Contractor unless otherwise stated in the Particular Conditions.
- Evidence of insurance & copies of policies are to be provided - within period stated in Contract Data.
- Professional indemnity insurance:
 - if, under the Contract, the Contractor designs major parts of the Works, professional indemnity insurance may be required.



2. Liability & Insurance

- If the Insuring Party fails to take out or maintain the insurances, the other Party may do so and claim reimbursement of the cost from the "Insuring Party".
- If neither Party takes out the insurances, in the event of loss or damage, the Insuring Party shall pay the amount that should have been reimbursed under the insurances.
- The insurance can be obtained from any eligible source country.
- If, more than a year after the Base Date, the Contractor can no longer obtain insurance for the Works on commercially reasonable terms, he must inform the Employer who will then be entitled to claim payment from the Contractor of an amount equivalent to commercially reasonable terms but he will be deemed to have accepted the lack of insurance cover.



3. Termination by the Employer (Clause 15)

Employer entitled to terminate the Contract for default if the Contractor:

1. fails to maintain an acceptable Performance Security;
2. fails to comply with a notice to correct.
3. abandons the Works or plainly demonstrates an intention not to continue performance of his obligations under the Contract;
4. fails to proceed with the Works
5. fails to comply with instructions to rectify defects within 28 days of receipt;
6. subcontracts the whole of the Works;
7. becomes bankrupt or insolvent, enters into liquidation or dissolution;
8. gives or offers any bribe, gift, gratuity or commission.



3. Termination by the Employer

FIDIC contracts do not require any certification by the Engineer.

In any of the above, the Employer may give 14 days' notice to the Contractor of termination; except that immediate notice may be given in the event of reasons (7) and (8).

If the Employer gives notice and then wishes to withdraw it, the Parties may agree that the notice shall be of no effect or, it may be agreed that the notice be put on-hold.

Employer should take legal advice before giving notice of termination.



3. Termination by the Employer

After expiry of the Employer's notice of termination:

- Employer may complete the Works himself or arrange for others to do so;
- Employer, or his other contractors, may use any of the Contractor's Equipment, Materials, etc. as they deem fit (Engineer to instruct Contractor not to remove any facilities from Site; Employer may need to obtain a court order to enforce this);
- Facilities should be released to the Contractor only after receipt by the Engineer of a notice to that effect from the Employer, which might not be until the Works have been completed.



3. Termination by the Employer

- Employer is entitled to require the Contractor to assign to him the benefit of any agreements or subcontracts;
- Engineer shall determine sums due to the Contractor;
- Employer is entitled to withhold further payments until the expiration of the DNP and then until the costs of completing the Works and remedying defects, damages for delay, and other related expenses have been established;
- At such time, Contractor is entitled to receive the amount to which he would have been entitled at the date of termination less the Employer's costs, his losses and damages.



3. Termination by the Employer

Employer's Termination for Convenience

- Employer is entitled to terminate the Contract at any time for his own convenience by giving notice to the Contractor.
- Termination takes effect **28 days after the later of the dates on which the Contractor receives the notice or the Employer returns the Contractor's Performance Security.**
- Employer cannot terminate the Contract in order to execute the Works himself or by other contractors or to avoid a termination by the Contractor.



3. Termination by the Employer

- After expiry of the Employer's notice of termination:
 - Contractor ceases all further work, except as may be instructed for the safety of life, property and the Works;
 - Contractor hands over to the Employer any documents, Plant, Materials and other work for which he has received payment;
 - Contractor removes from Site all his Equipment and facilities, and leaves the Site.



3. Termination by the Employer

- Engineer determines and Employer **promptly** pays to the Contractor (less any entitled deductions):
 - amounts payable for works acceptably performed;
 - the cost of Plant and Materials ordered by the Contractor;
 - any other cost or liability reasonably incurred;
 - cost of removal of Temporary Works and Contractor's Equipment from Site and their return to the Contractor's home base;
 - cost of repatriation of the Contractor's staff and labour;
 - any loss or damage sustained as a result of this termination.



4. Suspension and Termination by the Contractor (Cl.16) Suspension

- The Contractor is entitled, subject to giving 21 days' notice, to reduce his rate of work or to suspend work:
 - if the Engineer fails to issue the IPC within 28 days;
 - Employer fails to pay the Contractor within the times prescribed;
 - Employer fails to provide proof of his financial arrangements within 28 days.
- The Contractor is entitled, subject to giving notice, to suspend work 7 days after the Bank notifies the Employer that disbursements are suspended and no alternative funds are available.



4. Suspension and Termination by the Contractor

Contractor is entitled to terminate if :

1. the Employer fails to provide proof of his financial arrangements within 42 days after receiving a notice of slow-down;
2. the Engineer fails to issue an IPC within 56 days after receiving Contractor's Statement and supporting documents;
3. the Employer has not paid the Contractor the amount due under IPC 42 days after the due date for payment;
4. the Employer substantially fails to perform his obligations;
5. the Employer fails to sign the Contract Agreement within 28 days after the Letter of Acceptance;
6. the Employer assigns the Contract to a third party;
7. a prolonged suspension affects the whole of the Works;
8. the Employer becomes bankrupt or goes into liquidation;
9. the Contractor does not receive the Engineer's notice to commence.



4. Suspension and Termination by the Contractor

- For each of the above events, the Contractor may give 14 days' notice to the Employer of termination; except that he may give notice of immediate termination for (7) or (8).
- If the Bank suspends disbursements and the Contractor does not receive payment within 14 days of submission of his Statement, the Contractor may either suspend work or may terminate the Contract 14 days after serving notice of termination on the Employer.
- If the Contractor gives notice and then wishes or agrees to withdraw it, the Parties may agree that the notice shall be of no effect
- or, it may be agreed that the notice be put on-hold.



4. Suspension and Termination by the Contractor

- After expiry of the Contractor's notice of termination:
 - Contractor ceases all further work, except as may be instructed for the safety of life, property and the Works;
 - Contractor hands over to the Employer any documents, Plant, Materials and other work for which he has received payment;
 - Contractor removes from Site all his Equipment and facilities, and leaves the Site;
 - Employer **promptly** returns the Contractor's Performance Security.



4. Suspension and Termination by the Contractor

- Engineer determines and Employer **promptly** pays to the Contractor (less any entitled deductions):
 - amounts payable for works acceptably performed;
 - the cost of Plant and Materials ordered by the Contractor;
 - any other cost or liability reasonably incurred;
 - cost of removal of Temporary Works and Contractor's Equipment from Site and their return to the Contractor's home base;
 - cost of repatriation of the Contractor's staff and labour;
 - the amount of any loss or damage sustained by the Contractor as a result of the termination.
- Note that the Red Book refers to "loss of profit or other loss or damage".



5. Force Majeure (Clause 19)

- "Force Majeure" means an exceptional event or circumstance:
 - which is beyond a Party's control,
 - which such Party could not reasonably have provided against before entering into the Contract,
 - which, having arisen, such Party could not reasonably have avoided or overcome, and
 - which is not attributable to the other Party.
- Clause 19.1 gives examples of the kind of event that Force Majeure may include. These are similar to the Employer's Risks except that the Employer's Risk event "*Unforeseeable operation of the forces of nature ...*" is replaced by "*natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.*"



5. Force Majeure

- If a Party is or will be prevented from performing its substantial obligations under the Contract by Force Majeure, it must give notice to the other Party of the event and specifying the obligations, the performance of which is prevented. The notice must be given **within 14 days** of becoming aware or when the Party should have become aware of the event.
- Having given notice, the Party is excused from performance for so long as the Force Majeure prevents performance – except with respect to obligations to pay the other Party under the Contract.
- When performance is no longer prevented, the party whose performance has been affected must notify the other.



5. Force Majeure

- If the Contractor is prevented from performing its substantial obligations by Force Majeure and has given notice to the Employer, he is entitled, subject to giving further notice under Clause 20.1, to:
 - an extension of time with respect to delay incurred, and
 - reimbursement of his Costs unless the Force Majeure event was:
 - a natural catastrophe, or
 - a rebellion, terrorism, riot, commotion, strike, etc. outside the Country of the Works or
 - munitions, explosives, radiation, etc encountered outside the Country of the Works.
 - Costs can include the costs of repair not reimbursed by the insurance company.



5. Force Majeure

- Contract may be terminated if the execution of substantially all the Works in progress is prevented by Force Majeure for a **continuous period of 84 days or for multiple periods totalling more than 140 days** due to the same Force Majeure event.
- In such circumstances, the Party seeking to terminate must give notice to the other Party and the notice shall take effect **7 days** after being given.



5. Force Majeure

- After notice of termination:
 - Contractor ceases all further work, except as may be instructed for the safety of life, property and the Works;
 - Contractor hands over to the Employer any documents, etc. for which he has received payment;
 - Contractor removes from Site all his Equipment and facilities, and leaves the Site.
- Engineer determines and Employer must pay to the Contractor (less any deductions to which the Employer is entitled under the Contract) as for Employer's termination for convenience except for "any loss or damage".



End of Session 5


Thank You



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FIDIC Contracts Module 2
Management of Claims and the Resolution of Disputes


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Outline


1. Managing Variations
2. The Management of Claims - Contractor's Claims
3. The Management of Claims - Employer's Claims
4. The Resolution of Disputes

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Session 1


Managing Variations

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Managing Variations

1. Definitions
2. Timing and Authority to Initiate Variations
3. Initiation and Instruction of Variations
4. Value Engineering
5. Valuing Variations


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1. Definition

- FIDIC Contracts define **"Variation"** as

"any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments]."
- Do FIDIC Contracts define the term **"Variation Order"**?



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1. Definition

According to Clause 13, a Variation may involve:


- changes in quantities; (but are changes in quantities always a Variation?)
- changes to the quality and other characteristics;
- changes to the levels, positions, etc.
- omissions unless work is to be carried out by others;
- additional work necessary for the Permanent Works;
- changes to the sequence or timing of the execution of the Works.


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2. Timing and authority to initiate Variations


- Who has authority to initiate a Variation?
 - The Engineer.
- Under Sub-Clause 3.1:
 - The Engineer shall have no authority to amend the Contract;
 - The Engineer is required to obtain the approval of the Employer before awarding any extension of time or additional payment or before instructing a Variation for an amount exceeding that stated in the Contract Data.
- However, if the Employer's approval is required before the Engineer issues an instruction and the Engineer does issue such an instruction, the Employer is deemed to have given his approval.


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2. Timing and authority to initiate Variations


- Unless & until the Engineer instructs a Variation (or approves a Variation suggested by the Contractor) the Contractor is to continue working according to the original design.
- Once the Contractor has received a Variation instruction, he is to execute and be bound by that Variation.
- However under both the Red Book and MDB Version, the Contractor is not bound by a Variation if he cannot readily obtain the Goods required for the Variation.
- The MDB Version provides a second "escape route" in that the Contractor is not bound by a Variation if it *"triggers a substantial change in the sequence or progress of the Works."*


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2. Timing and authority to initiate Variations


- When can a Variation be initiated?
 - "... at any time prior to issuing the Taking-Over Certificate"
- But note that if the Employer or Engineer requests the Contractor to do work during the Defects Notification Period that is not his responsibility it is to be treated as a Variation under Sub-Clause 13.3.


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3. Initiation and instruction of Variations

- Engineer has two ways to initiate a Variation:
 - a direct instruction under Sub-Clause 13.1, or
 - a request for a proposal from the Contractor under Sub-Clause 13.3, prior to issuing an instruction.
- The instruction is to be in writing but if it is given orally, it can be confirmed in writing by the Contractor within 48 hours after receipt of the instruction and unless the Engineer contests this confirmation within the next 48 hours, the instruction is deemed to have been given.
- If the Engineer does not state that the instruction represents a Variation, the Contractor must submit a notice of claim under Sub-Clause 20.1 if he intends to claim additional payment and/or time.



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3. Initiation and instruction of Variations

Request for proposal.

- The Contractor shall respond as soon as practicable.
- The response shall include:
 - A description of the proposed work and a programme for its execution.
 - A proposal for modifications to the Time for Completion and the programme pursuant to Sub-Clause 8.3.
 - A proposal for evaluation of the Variation.



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3. Initiation and instruction of Variations

Questions regarding a proposal.

- How does timing of the proposed Variation impact a decision to instruct a Variation or request a proposal?
- Keep in mind that the Contractor must not delay any work whilst awaiting a response.
- Is a proposal automatically considered to be a fixed price and time offer?
- No. Clause 12 [*Measurement and Evaluation*] applies unless the Engineer instructs otherwise.



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3. Initiation and instruction of Variations

Questions regarding a proposal.


- Can the Contractor claim for his Costs associated with the preparation of the proposal?
- The FIDIC forms are silent on this point – but the “FIDIC Contracts Guide” suggests that they cannot be claimed – unless the Contractor was required to do some design work in order to prepare the proposal.


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3. Initiation and instruction of Variations


- Once he has received the Contractor's proposal
 - The Engineer must reply as soon as practicable either approving, disapproving or with comments.
 - In the meantime, the Contractor is to continue working as though there had been no request for a proposal (a request is not an instruction).
 - However, even if the proposal process has been started the Engineer may nevertheless initiate an instruction prior to receiving or completing discussions on the proposal.


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4. Value Engineering


- Under Sub-Clause 13.2, the Contractor has the right but not an obligation to make his own proposals if he believes he knows how to:
 - accelerate completion,
 - reduce the construction or operating costs of the Works,
 - improve efficiency or value of the completed Works, or
 - otherwise benefit the Employer.


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4. Value Engineering


- The Contractor may not claim his Costs for preparing his proposal under Sub-Clause 13.2, but is remunerated by a split savings formula if his proposal is approved.
- The split savings are based on the difference between the “reduction in contract value”, and the “reduction (if any) in the value to the Employer of the varied works.”
- The Contractor receives 50% of the difference.


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4. Value Engineering


- A Variation instruction following approval of a Contractor's value engineering proposal, may involve changes of design.
- If so, the design work is to be done by the Contractor.
- However the Red Book and MDB Contracts generally anticipate that the design will be the Employer's responsibility.
- Therefore, the Employer and the Engineer need to carefully consider how this shared liability for design is to function.
- Is this sharing of liability the best solution?
- Does the Employer take the Contractor's design, have it approved by the Engineer and re-issued as an instruction i.e. does the original designer assume responsibility?
- Or does the Contractor take responsibility for his part of the design?


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4. Value Engineering

- If so, what unintended consequences are there with respect to the original designer's overall responsibility?
- The Insurance provisions of the Contract will most likely require revision in the latter case.



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5. Valuing Variations

Rates

- Disputes often arise over the setting of new rates.
- These disputes fall into one of two categories:
 - adjustment of existing rates due to major changes in quantities under Sub-Clause 12.3 (a) (i-iv), or
 - the fixing of star rates or new rates due to Variations or other changes under Sub-Clause 12.3 (b) (i-iii).



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5. Valuing Variations

Rates

- A key element in settling disputes over adjustments due to changes in quantities is separating out the value of any fixed portion of the rate corresponding to any necessary temporary works such as scaffolding, hoisting equipment, or other preliminaries.
- Disputes over this subject can be minimized by including sufficient details of temporary works and other preliminaries in the Bill of Quantities or by the Contractor providing a break-down of his rates at an early stage in the Works.



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5. Valuing Variations

Rates

- When valuing Variations, existing rates are to be used as far as possible.
- If the existing rates are not applicable because the work is dissimilar from other items in the BoQ or the work is executed under different circumstances, new rates (or star rates) should be derived from existing rates.
- If this is not possible, new rates must be built up based on the reasonable Cost of executing the work plus profit.
- In the MDB Version "profit" is defined as 5% of reasonable Costs.


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5. Valuing Variations

Dayworks

- Engineer can instruct Variation to be executed on a Daywork basis (payment will be made according to rates and prices in the *Daywork Schedule*, based on daily records submitted by the Contractor).
- Unless the Engineer verifies the resources applied to Daywork, there may be a temptation for a Contractor to exaggerate resources. So emphasis put on the proof of materials used and on provision of daily records of other resources applied. The Engineer must ensure that: Daywork and resources are monitored daily.


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5. Valuing Variations

Time

- The Engineer may issue a Variation instruction under Sub-Clause 13.3, which changes the sequence or timing of the execution of the Works, but he cannot change the Time for Completion (other than through an Extension of Time).
- He cannot instruct acceleration but can request a proposal from the Contractor to overcome delay for which the Contractor is not responsible.
- Otherwise, if the Contractor considers a Variation instruction has an impact on the Time for Completion, he must issue a notice of claim under Sub-Clause 20.1 and Sub-Clause 8.4 [*Extension of Time for Completion*] shall apply.


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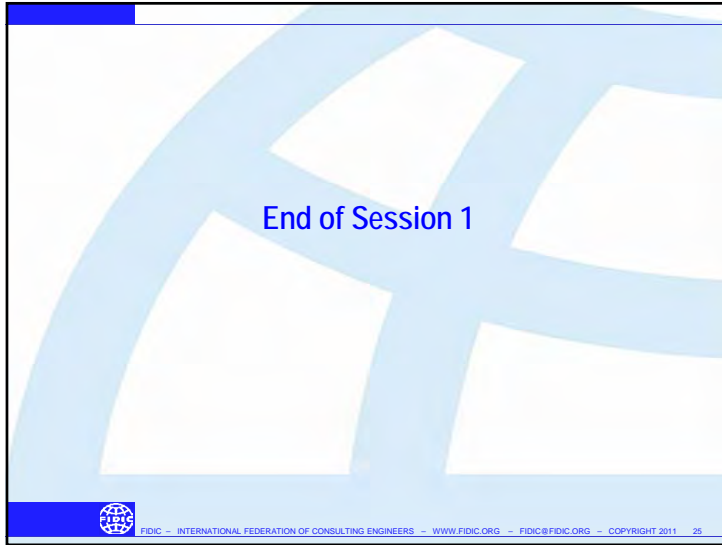
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5. Valuing Variations

Time

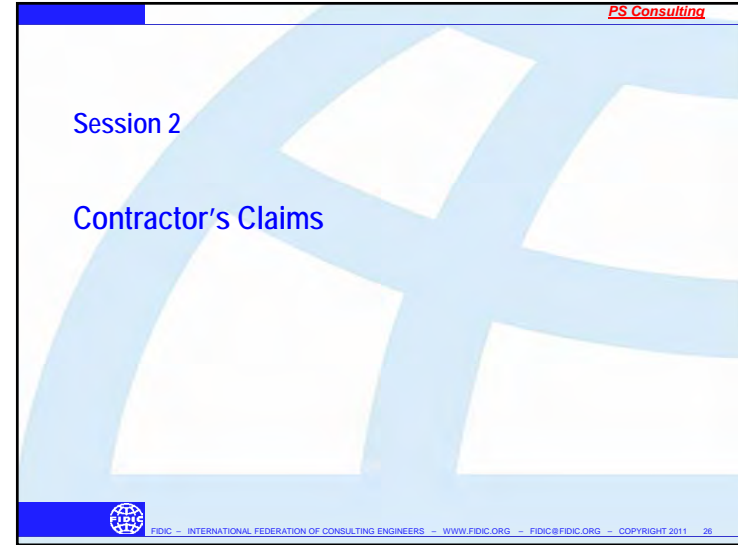
- Although the Contractor has the express right to an Extension of Time in relation to Variations, there is no such express right to recover time-related costs – these must be assessed at the time of agreeing the value of the Variation.
- This means that even if the Engineer does not ask for a proposal, the Contractor must assess the effect of the Variation on his programme and determine if he is likely to incur additional time-related Costs.

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End of Session 1

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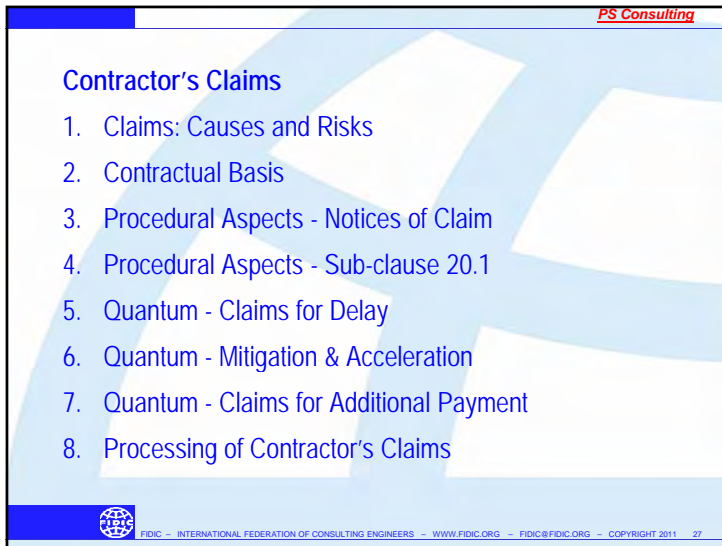


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Session 2

Contractor's Claims

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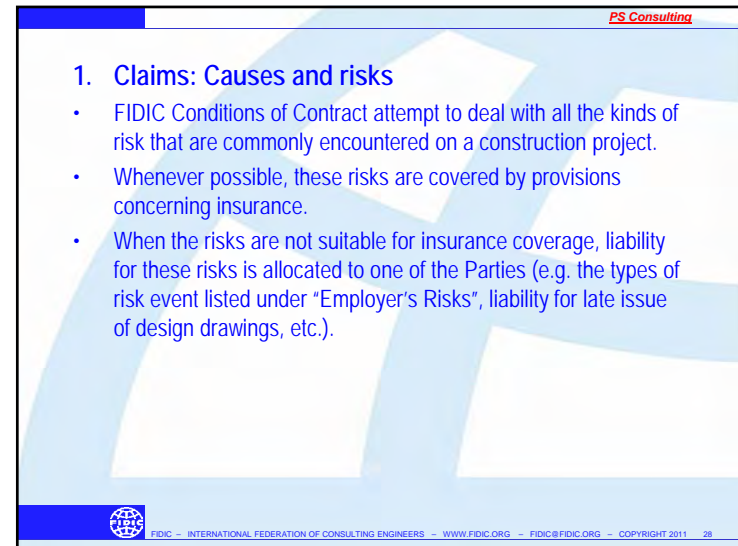


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Contractor's Claims

1. Claims: Causes and Risks
2. Contractual Basis
3. Procedural Aspects - Notices of Claim
4. Procedural Aspects - Sub-clause 20.1
5. Quantum - Claims for Delay
6. Quantum - Mitigation & Acceleration
7. Quantum - Claims for Additional Payment
8. Processing of Contractor's Claims

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1. Claims: Causes and risks


- FIDIC Conditions of Contract attempt to deal with all the kinds of risk that are commonly encountered on a construction project.
- Whenever possible, these risks are covered by provisions concerning insurance.
- When the risks are not suitable for insurance coverage, liability for these risks is allocated to one of the Parties (e.g. the types of risk event listed under "Employer's Risks", liability for late issue of design drawings, etc.).

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1. Claims: Causes and risks


- The objective is to ensure that the Employer pays only if the risk event occurs rather than having to pay for risk events that do not happen but for which the Contractor built in an allowance in his bid price.
- In the FIDIC Red Book, there are about twenty circumstances that expressly entitle the Contractor to an EoT. Some also entitle him to recover his additional costs (some with or some without profit). Some clauses entitle him to recover his costs but not additional time.
- This is because additional time and additional payment are different remedies and should generally be dealt with separately.

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1. Claims: Causes and risks

- A grant of an extension of time does not automatically give rise to a right to additional payment and vice versa.
- The following list of Sub-Clauses covers the main areas which permit the Contractor to claim an extension of time or additional payment or both (with or without profit).

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1. Claims: Causes and risks

Sub-Clause	Time	Costs	Profit
1.9 Delayed Drawings or instructions	Yes	Yes	Yes
2.1 Right of Access to the Site	Yes	Yes	Yes
4.7 Setting Out	Yes	Yes	Yes
4.12 Unforeseeable Physical Conditions	Yes	Yes	No
4.24 Fossils	Yes	Yes	No
7.4 Testing (Additional/delayed)	Yes	Depends	Depends
8.4 Extension of Time for Completion	Yes	No	No
8.5 Delay caused by authorities	Yes	Silent	Silent

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1. Claims: Causes and risks

Sub-Clause	Time	Costs	Profit
8.9 Consequences of Suspension	Yes	Yes	No
10.2 Taking Over Parts of the Works	No	Yes	Yes
10.3 Tests on Completion (Delays)	Yes	Yes	Yes
11.8 Contractor to search	No	Yes	Yes
12.4 Omissions	No	Yes	No
13.7 Adjustments for Changes in Legislation	Yes	Yes	No
16.1 Contractor's Entitlement to Suspend Work	Yes	Yes	Yes
17.4 Consequences of Employer's Risks	Yes	Yes	Some
19.4 Consequences of Forces Majeure	Yes	Some-times	No


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1. Claims: Causes and risks

Contents of a Claim

Contractual Basis	"Principle"
Facts	
Cause & Effect link	"Quantum"
Effects	
Supporting Particulars (Contemporary Records, Programmes, Invoices, etc)	


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2. Contractual Basis

Sub-Clause 1.9 [*Delayed Drawings or instructions*]

- "The Contractor shall give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any drawing or instruction is not issued to the Contractor within a particular time..."
- "The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and the nature and amount of delay or disruption likely to be suffered if it is late."

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2. Contractual Basis

- Sub-Clause 2.1 [*Late Possession*]
- The key disputes over access to and possession of the Site revolve around cases of:
 - Right of access.
 - Means of access to the Site.
 - Partial possession of the Site.
 - Shared possession of the Site.
 - Access to land not directly associated with the Permanent Works (e.g. storage areas, quarries), or subsidiary to the main location of the Permanent Works (e.g. power line pylon installations.)

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Right of access to the Site:

- "The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender."
- The Contractor has the right of access to and possession of the whole of the Site, unless the Employer / Engineer have taken care to spell out any sequencing or restrictions / partial handovers etc. in the Contract Data.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Means of access to the Site:

"If, under the Contract, the Employer is required to give (to the Contractor) means of access, the Employer shall do so in the time and manner stated in the Specification."

- However Sub-clause 4.12 of the "Pink Book" states that unless otherwise specified in the Contract the Employer shall provide effective access to and possession of the Site including special or temporary rights of way necessary for the Works.
- If nothing is stated in the Specification, or elsewhere in the Contract, the Contractor is responsible, at his cost and risk, for obtaining additional rights of way outside the Site, even if the needed land is owned by third parties.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Shared possession of the Site:

"The right [of access] and possession may not be exclusive to the Contractor."

- The General Conditions of Contract do not specifically state that work anticipated by other parties in parallel with the Contractor has to be detailed in the Specification or elsewhere.
- However, if the Employer knows work will be done by third parties, it should be described in the tender documents to allow tenderers to anticipate the consequences.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Shared possession of the Site:

- If information regarding third party operations on Site is not described under the Contract, the Contractor cannot bar the third party from entering the Site, but he may submit a notice of claim under Sub-Clauses 8.4 & 20.1 for an extension of the Time for Completion to the extent the third party interferes with his work.
- However in most cases, the Engineer should issue a Variation instruction.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Shared possession of the Site:

- This situation is linked to Sub-Clause 4.6 [*Co-operation*], which states the Contractor shall, as specified in the Contract or as instructed by the Engineer, allow appropriate opportunities for carrying out work to third parties, public authorities and the Employer's Personnel.
- Sub-Clause 4.6 also states that any instruction shall constitute a Variation if and to the extent it causes the Contractor to incur Unforeseeable Costs.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Access to land not directly associated with the Permanent Works:

- The exact boundaries of the Site should be clearly shown or described in the Contract. The terms "Site" with a capital "S" should be used, keeping in mind the definition of Site at Sub-Clause 1.1.6.7:

- "*Site*" means the places where the permanent Works are to be executed, including storage and working areas, and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site."

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Access to land not directly associated with the Permanent Works:

- Unless the definition of Site covers the special situation, the Contractor is responsible for obtaining access to other areas such as quarries, additional lay down space, or access to parcels of land needed for Works such as pylons leading from a power plant for example.
- In the interest of the project however, it is advisable for the Engineer/ Employer to anticipate these matters as much as possible, and inform the tenderers.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Time for Site possession:

- The time for Site possession should be indicated in the /Contract Data in terms of number of days from the Commencement Date.
- If no time is prescribed, the Employer is to make the Site available pursuant to the Contractor's Programme submitted under Sub-Clause 8.3.

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2. Contractual Basis

Sub-Clause 2.1 [*Late Possession*]

Claims for failure to provide timely Site possession.

- Note that this type of claim occurs at the start of the project when the Contractor is supposed to be mobilising.
- Frequently the Contractor is late in mobilising. The Engineer should monitor mobilisation carefully as this is often a source of concurrent delay with late Site possession.
- In such cases no additional payment would be due, but entitlement to an extension of the Time for Completion would probably still remain.


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2. Contractual Basis

Sub-Clause 4.12 [Unforeseeable Physical Conditions]

- *"In this Sub-Clause, 'physical conditions' means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when Executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions."*
- *"If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable."*


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2. Contractual Basis

Sub-Clause 4.12 [Unforeseeable Physical Conditions]

- ***'Unforeseeable'** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender."*
- The verb to "foresee" has a synonym; "foreknow." There is therefore a suggestion of likelihood and predictability attached to the word.
- An event which is 'imaginable' is therefore not necessarily "reasonably foreseeable by an experienced contractor."


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2. Contractual Basis

Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- Under Sub-Clause 4.10, the Employer shall make available "all relevant data" in his possession, and shall make available all such relevant data which comes into the Employer's possession after the Base Date.
- The Contractor is responsible for interpreting the Site Data, and for obtaining other information, so far as practicable.
- However, these obligations will be viewed in the perspective of the thoroughness of the Site Data, and the time available and the accessibility of the Site at the Tender stage.


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2. Contractual Basis

Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- Failure to provide all relevant data will have a significant impact on determining whether a physical condition was foreseeable.
- The law in some countries may entitle the Contractor to terminate if the data has been negligently withheld.


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2. Contractual Basis

Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- The Contractor's notice is required to describe the physical conditions so that they can be inspected by the Engineer, and shall set out reasons why the Contractor considers them to be Unforeseeable.
- Unless instructed otherwise, *"the Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions."*
- The Contractor shall also comply with any instruction given by the Engineer.



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2. Contractual Basis

Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- The Engineer's instruction may constitute a Variation, as an unforeseen physical condition frequently necessitates a change in design or methods.
- Sub-Clause 4.12 generally entitles the Contractor to an extension of time and additional payment of Costs (without profit) to the extent he encounters Unforeseeable physical conditions.



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2. Contractual Basis

Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]

- Sub-Clause 4.12 contains a rather unique mechanism for balancing Unforeseen physical conditions against more favourable than foreseen physical conditions.
- The Engineer has the power to review whether other physical conditions in similar parts of the Works (if any) were more favourable than could have been foreseen.
- If and to the extent these more favourable conditions were encountered, the Engineer may take account of the reduction in Costs that result.
- However the resulting reduction in Costs shall not result in a net reduction in the Contract Price.



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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- If any of the circumstances listed under Clause 8.4 occurs, the Contractor shall be entitled to an extension of the Time for Completion, provided that he complies with the procedures set out under Clause 8.4 and elsewhere in the Contract.
- When determining each extension of time the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time.
- Sub-Clause 8.4 makes no mention whatsoever of additional payment.



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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- The causes listed under Clause 8.4 are:
 - A Variation or other substantial change in the quantity of an item of Work;
 - A cause of delay giving an entitlement under another Sub-clause;
 - Exceptionally adverse climatic conditions;
 - Unforeseeable shortages of personnel or Goods caused by epidemic or governmental actions;
 - Any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel or the Employer's other contractors on the Site.


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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- What are :
 - *"exceptionally adverse climatic conditions"?*
- The FIDIC Contracts Guide 2000 states the following:
 - *"...it might be appropriate to compare the adverse climatic conditions with the frequency with which events of similar adversity have previously occurred at or near the Site. An exceptional degree of adversity might, for example, be regarded as one which has a probability of occurrence of four or five times the Time for Completion of the Works (for example, once every eight to ten years for a two year contract).*


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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- Note that there is no corresponding entitlement to additional payment under FIDIC for such an extension of time.
- There may appear to be a conflict between "exceptionally adverse climatic conditions" and "operation of the forces of nature" under Sub-Clause 17.3 [Employer's Risk] which does give rise to entitlement for additional payment pursuant to: *"any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to take adequate preventative precautions."*
- However, In the latter case, the entitlement is to recover Costs for rectifying damage rather than the Costs of delay.


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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- Under Sub-Clause 8.4(e), the Contractor may be entitled to an extension for:
 - *"any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site."*
- Under most common law jurisdictions, the Employer must specifically allow himself the right to grant a time extension for delays to the Works that he (or his agents) has caused.


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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- If he has not specifically granted himself this power, he may not extend the Time for Completion, however if the Employer has delayed the project, the Contractor will be excused from achieving the Works by the Time for Completion, and thus no delay damages can be applied.
- Time is said to be "**at large**", and the Contractor is entitled to take a "**reasonable**" Time to Complete the Works
- It is then up to the Employer to prove that the Contractor took a time that was not reasonable and that as a result, the Employer suffered loss. The amount of this loss must be proved.



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2. Contractual Basis

Sub-Clause 8.4 [*Extension of Time for Completion*]

- Note that as Sub-Clause 8.4 does not mention any entitlement to payment of Costs, the Contractor does not have any contractual right to recover such Costs that are caused by an act of prevention by the Employer or his agents.
- Any claim for such Costs would have to be made under the applicable Laws.



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2. Contractual Basis

Sub-Clause 8.5 [*Delays Caused by Authorities*]

- *If the following conditions apply, namely:*
 - a) *the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,*
 - b) *these authorities delay or disrupt the Contractor's work, and*
 - c) *the delay or disruption was Unforeseeable,**then this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.4.*



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2. Contractual Basis

Sub-Clause 8.5 [*Delays Caused by Authorities*]

- This is the only Sub-Clause, other than 8.4, which makes no mention of the financial impact in addition to the time impact of the claim event or circumstance.
- The FIDIC Contracts Guide states that this does not mean that the Contractor is not entitled to recover his Costs, but that it would depend on circumstances. For example if the delay occurs at the outset of the project before mobilisation, there may be no Costs involved.



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2. Contractual Basis

Sub-Clause 19.4 [*Force Majeure*]

- Sub-Clause 19.1 describes the general meaning of an Event of Force Majeure under the Contract at Sub-Clause 19.1(a)-(d).
- In Sub-Clauses 19.1(i) to (v), we find a non exhaustive list of the kind of events which can be considered as Force Majeure events.
- Sub-Clause 19.4 describes the consequences of various Force Majeure events.


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2. Contractual Basis

Sub-Clause 19.4 [*Force Majeure*]

- According to Sub-Clause 19.4(a), and provided the Contractor has given notice pursuant to Sub-Clause 19.2 of the occurrence of the Force Majeure event and also under Sub-Clause 20.1, the Contractor shall be entitled to a time extension in case of delay due to the Force Majeure event.
- According to Sub-Clause 19.4(b) however additional payment in respect of a Force Majeure event is limited to those kind of cases described specifically under Sub-Clauses 19.1(i)-(iv) and only if the event has occurred in the Country where the Works are situated.

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2. Contractual Basis

Sub-Clause 19.4 [*Force Majeure*]

- Under Sub-Clause 19.4 therefore the Contractor does not have entitlement to claim for additional payment in respect of a Force Majeure event as described in Sub-Clause 19.1(v) :

"natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."


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3. Procedural Aspects - Notices of Claim

- The procedure for a claim by the Contractor is set out principally under Clause 20.
- The Contractor is required to give a notice of his claim to the Engineer describing the event or circumstances giving rise to the claim.
- The Contractor has only 28 days to do this after he became aware or should have become aware of the event or circumstances:


"If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment."

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3. Procedural Aspects - Notices of Claim


- The notice is only a warning that the Contractor might have a claim. It is not the claim itself.
- The reason for having a notice obligation with a time bar clause is to give the Engineer and the Employer the possibility to:
 - a) Mitigate the circumstances if possible. For example; cancel an instruction, adjust a Variation, or take action against a third party.
 - b) Issue instructions regarding the type of Cost records the Contractor should keep and inspect those records in order to avoid later disputes over damages.

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3. Procedural Aspects - Notices of Claim


- Several Sub-Clauses contain a requirement for more than one notice (for example, Sub-Clauses 1.9, 16.1, 16.2, 17.3, 19).
- Minutes of meetings, programmes, or other correspondence which do not specify the applicable Sub-Clause(s) are not generally considered to be “notices.”
- Notices must be sent in the manner set out in Clause 1.3 and in the Contract Data.
- Some notices must be sent to the Engineer and copied to the Employer.
- Some notices must be sent to the Employer and copied to the Engineer.

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3. Procedural Aspects - Notices of Claim

- Watch for usage and practice during the execution of the Contract *vis à vis* time bars.
- In many jurisdictions the Employer may lose his right to time bar a claim if during the administration of the Contract this provision is systematically or frequently ignored.
- If an Employer ever ignores or waives his time bar rights, he should clearly state in writing that such consideration is an exception, and cannot be interpreted as a waiver of any future recourse to the time bar provisions.

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3. Procedural Aspects - Notices of Claim


Some tips on drafting of Notices:

- State what actually happened (with dates & references of relevant correspondence, minutes of meetings, etc.)
- Remain as neutral as possible, avoiding open criticism. Instead of referring to people by name, use their titles:

“A reply was received from the Engineer on 05 May 2005”

 instead of :

“Mr. Smith did not reply until 05 May 2005”.


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3. Procedural Aspects - Notices of Claim

Some tips on drafting of Notices:


- Cite the Sub-Clauses that require the notice to be given:
"... extension of time under Clauses 1.9 (a) and 8.4 and reimbursement of the additional costs under Clauses 1.9 (b) and 20.1"
- Specify the subject using expressions contained in the Contract:
- "Notice of Delay"; "Notice of Claim for Additional Costs"
- Send the notice to the correct person at the correct address.


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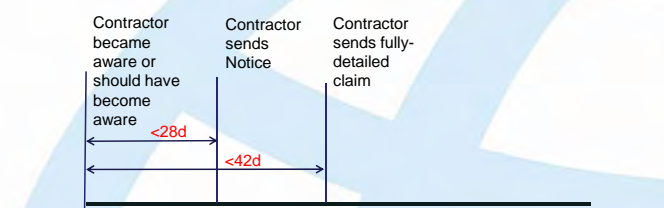
4. Procedural Aspects - Sub-Clause 20.1

- The Contractor must submit his fully detailed claim with supporting particulars within 42 days after he became aware or should have become aware of the event or circumstance – not 42 days from when he submitted the notice.
- If the event or circumstance is continuing, this first claim is considered as "Interim" and the Contractor must submit updates every month until the effects of the event or circumstance end. Thereafter, he must submit his final claim within 28 days after the effects have ended.
- These periods of 42 days (for the initial claim) and 28 days (for the final claim) can be relaxed upon request by the Contractor if he has reasonable grounds for so requesting.


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Sequence for Contractor's Claims



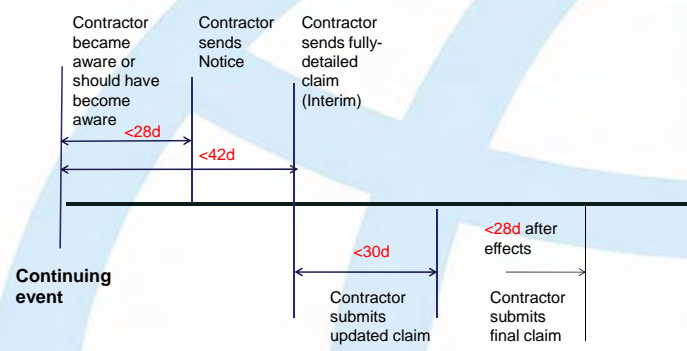
The diagram shows a horizontal timeline for a 'Short event'. Three vertical lines mark key milestones: 'Contractor became aware or should have become aware', 'Contractor sends Notice', and 'Contractor sends fully-detailed claim'. A red double-headed arrow between the first and second milestones is labeled '<28d'. Another red double-headed arrow between the second and third milestones is labeled '<42d'.

Short event


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Sequence for Contractor's Claims



The diagram shows a horizontal timeline for a 'Continuing event'. Three vertical lines mark key milestones: 'Contractor became aware or should have become aware', 'Contractor sends Notice', and 'Contractor sends fully-detailed claim (Interim)'. A red double-headed arrow between the first and second milestones is labeled '<28d'. Another red double-headed arrow between the second and third milestones is labeled '<42d'. Below the main timeline, a second section shows 'Contractor submits updated claim' and 'Contractor submits final claim'. A red double-headed arrow between these two points is labeled '<30d'. A final red double-headed arrow, starting from the end of the updated claim and ending at the final claim, is labeled '<28d after effects'.

Continuing event



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4. Procedural Aspects - Sub-Clause 20.1

Contemporary records

- "The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records, and shall (if instructed) submit copies to the Engineer"


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4. Procedural Aspects - Sub-Clause 20.1

Contemporary records

- The Contractor is ultimately responsible for keeping contemporary records if he wants to be able to prove any claims for costs or delays.
- The Engineer should however not hesitate to be proactive and instruct and inspect records as he sees fit. If the Contractor is keeping records, and these are made available to the Engineer, the Engineer may have difficulty complaining about the accuracy of these records later if he has remained silent.
- The Engineer may even wish to keep his own independent records in some cases.

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4. Procedural Aspects - Sub-Clause 20.1

Contemporary records

- With regard to contemporary records the FIDIC Contracts Guide 2000 states:
"The importance of good record-keeping cannot be over-emphasised. The resolution of disputes frequently rests on the adequacy of contemporaneous records. If a party declines to agree matters for record purposes on the spurious ground that agreement of facts indicates admission of liability, the DAB or arbitrator(s) may decide to rely upon the other party's unchallenged contemporaneous records."

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4. Procedural Aspects - Sub-Clause 20.1

Contemporary records

What is a "contemporary record"?

- "A register of contemporaneous information furnished by those who had direct knowledge of the facts."
 (A.G. of the Falklands Islands v Gordon Forbes)
- A witness statement can be used in the very limited situation to explain a contemporaneous document.

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5. Quantum - Claims for delay

"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 ... is or will be delayed by any of the following causes: ..."

Sub-Clause 8.4

- This means that the Contractor must be able to demonstrate by means of his programme that the critical path will be impacted by the event or circumstance giving rise to the claim.
- For this he will need a good programme.


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5. Quantum - Claims for delay

Sub-Clause 8.3 requires that the Contractor's programme must show:


- order of execution of the Works, dates for Contractor's Documents, procurement, off-site manufacture and fabrication, delivery, construction, erection, and testing;
- sequencing of the Works, taking into account the lead time for obtaining any approvals;
- detail of works performed by Nominated Subcontractors;
- the sequence and timing of inspections and tests;
- that the Works will be completed within the Time for Completion.

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5. Quantum - Claims for delay


- It must be accompanied by a supporting report (Method Statement) setting out how the Contractor intends to execute the Works and the resources he intends to use.
- Engineer must:
 - give notice to the Contractor within 21 days of how the Programme does not comply with the Contract;
 - not give comment on its attainability (he should only acknowledge receipt).

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5. Quantum - Claims for delay

- It is essential for the Contractor to correctly prepare a programme in accordance with Sub-Clause 8.3 and to keep it updated in order to reflect all changes of logic and the actual progress of the Works.
- This programme should be prepared using the software specified in the Contract ("Suretrack"; "Primavera"; ...).
- The critical path should be identified.


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5. Quantum - Claims for delay

The programme should show obligations of the Engineer and Employer, such as:


- dates when parts of the site are to be made available;
- dates when drawings are to be supplied or approved;
- dates when materials and equipment are to be chosen or approved (and the subsequent delivery periods);
- dates by which Nominated Suppliers or Subcontractors are to be chosen.


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5. Quantum - Claims for delay


- These details must be linked to the tasks concerned rather than be shown as isolated dates, so that actual dates move according to the progress of earlier activities.
- The programme should be accompanied by a *"Method Statement"* (Sub-Clause 8.3.(d)) and a *"Cash Flow Forecast"*. (Sub-Clause 14.4)
- The Engineer should insist the Contractor submit his programme within 28 days. The Engineer has 21 days to notify any extent to which the programme does not comply with the Contract. Failure to establish a clear and reasonable baseline programme at the outset of the project is a major source of disputes.


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5. Quantum - Claims for delay


- Note that the Engineer does not approve the programme, and by implication, the Contractor has broad freedom to determine how he will execute the Works. If the Engineer or the Employer intend that the Contractor must use any set methods or sequences, these need to have been defined in the Contract.


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5. Quantum - Claims for delay


- The programme must be updated to take account of actual progress at least once per month for inclusion in the Monthly Progress Report.
- After taking account of actual progress a task or a sub-programme should be inserted to represent each cause of delay for which the Employer is liable and the effects determined.
- If the logic of the programme is modified during updating, these modifications should be explained in the accompanying report.
- The report should give details of measures which the Contractor proposes to take to overcome or reduce delays. If the cause of delay is due to the Contractor, the measures are at his cost. If the cause is the Employer's responsibility, the Contractor need not increase his costs to overcome the delay.


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6. Quantum - Mitigation & Acceleration


- Under most FIDIC Contracts, although the Contractor can be instructed to take measures to recover his own delays, neither the Engineer or the Employer, have the power to instruct the Contractor to accelerate to complete prior to the Time for Completion.
- The Contractor may propose an accelerated programme under Sub-Clause 13.2 – but agreement is required between the Parties (the Employer and the Contractor) if the Time for Completion is to be advanced.
- Under the Sub-Clause 8.6 of the "Pink Book" the Engineer does have the power to instruct the Contractor to take acceleration measures and the Contractor is to be paid for these measures.


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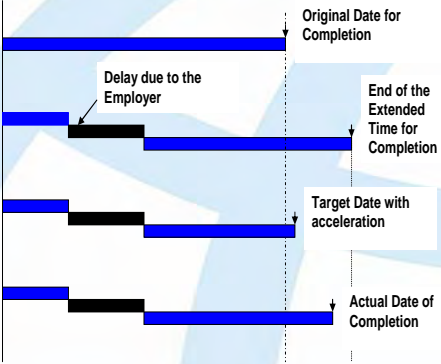
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6. Quantum - Mitigation & Acceleration

- If an earlier Time for Completion is to be agreed or acceleration measures instructed, it is important to first settle the question of liability for delay damages under Sub-Clause 8.7.
- The right to delay damages is not automatically advanced with an agreement for an earlier Time for Completion - on the contrary.
- A specific agreement to reset the delay damages at the end of the shortened Time for Completion is required. Alternatively, a diminishing bonus arrangement is a frequently used solution.


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6. Quantum - Mitigation & Acceleration

- A frequent problem arises when the Works are delayed, but the Parties disagree which Party bears the responsibility for the delays.
- What happens when the Engineer instructs the Contractor to issue a revised programme under Sub-Clause 8.6 [*Rate of Progress*] while the Contractor has submitted a claim for an extension of the Time for Completion?



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6. Quantum - Mitigation & Acceleration

- The FIDIC Contract Guide 2000 states the following:


"[Sub-Clause] 3.3 requires the Contractor to comply with acceleration instructions given by the Engineer, although he is not empowered to instruct the Contractor to complete prior to the Time for Completion. If the Contractor receives such an instruction, he must obey it, but he may consider it advisable to notify the Employer immediately and advise him of the likely effect on the final Contract Price."


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6. Quantum - Mitigation & Acceleration


- In other words the Contractor should accelerate and claim. This is often called a claim for "Constructive Acceleration".
- This suggestion may be viable in most civil law jurisdictions and certain common law jurisdictions such as some USA states, but can run into problems where UK practice is followed which does not allow claims for "Constructive Acceleration".


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6. Quantum - Mitigation & Acceleration

- Where the UK rule applies, the Contractor must decide to either stand firm in his belief an extension of time is due (in which case he does not accelerate but claims his prolongation Costs) - or he accelerates for fear of the delay damages and foregoes any claim for his acceleration Costs.
- Clearly this is one more reason for both Parties to be fair and reasonable with regard to extension of time requests.


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7. Quantum - Claims for Additional Payment

Cost v Price

- At law, the Contractor has the right to reimbursement of his costs unless the Contract expressly states otherwise.
- *"Cost" means all expenditure reasonably incurred (or to be incurred), by the Contractor, whether on or off the Site, including overhead and similar charges but does not include any allowance for profit"*

(Sub-Clause 1.1.4.3)
- The use of "Preliminaries" or other PRICES in order to evaluate prolongation costs should therefore be avoided.



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7. Quantum - Claims for Additional Payment

Different categories of Costs


- **Direct Costs** (Labour, Equipment, Materials, Sub-contractors).
- **Indirect Site Costs** (Management & Supervisory staff, Support staff, Offices, Consumables, Insurances, etc.) – sometimes called Site Overheads.
- **Indirect Head Office Costs** – sometimes called Head Office Overheads.
- **Inflation**
- **Financing Costs**

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7. Quantum - Claims for Additional Payment

- The Contractor must be able to prove that he has actually incurred or will incur the Costs claimed.
- Often actual costs cannot be ascertained before the end of the Works – but this does not release the Contractor from his obligation to provide interim details on the basis of the best information available.


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7. Quantum - Claims for Additional Payment

Prolongation Costs due to Variations or Increases in Quantity:

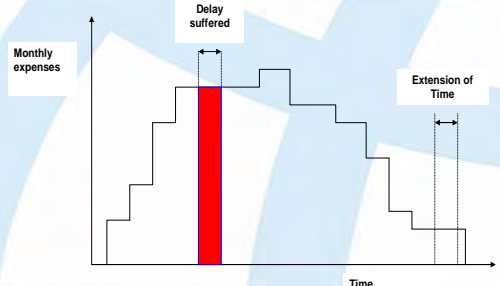
- Are not expressly foreseen by the Contract.
- Must be claimed via new prices under Clause 13.3, if the Engineer asks for a proposal from the Contractor before confirming his instruction to execute the Variation.
- Are to be assessed at the time of pricing the Variation – this means that the extension of time due to the Variation must also be assessed.


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7. Quantum - Claims for Additional Payment

Period to be taken into account for evaluating Additional Costs




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8. Processing of Contractor's claims


- Under Sub-Clause 20.1, the Engineer is allowed up to 42 days, or other such period as agreed between the Engineer and Contractor, to respond with approval or disapproval and detailed comments.
- The Engineer may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim, within the said period.
- An early approval or disapproval of the principle, or basis of the claim is essential to the efficient management of claims and control of associated costs and time.

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8. Processing of Contractor's claims


- If the principle is approved, the Contractor can proceed confidently in the expectation of interim payments and/or a time extension.
- Likewise the Employer has advance notice of the changed circumstances and can re-plan and/or organise financing accordingly.
- If the principle is disapproved, the Contractor can decide whether to request a formal Engineer's determination prior to submitting the dispute to the DB.

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8. Processing of Contractor's claims

- If the Engineer disapproves the claim, Sub-Clause 20.1 requires him to provide detailed comments in support of the disapproval.
- These comments should include a reasoned argument why the Contractor is considered to have no contractual entitlement to pursue the claim, and/or why any of the supporting particulars are insufficient.
- In the event only part of the claim is disapproved, the Engineer should provide his detailed comments as to why such part is disapproved.


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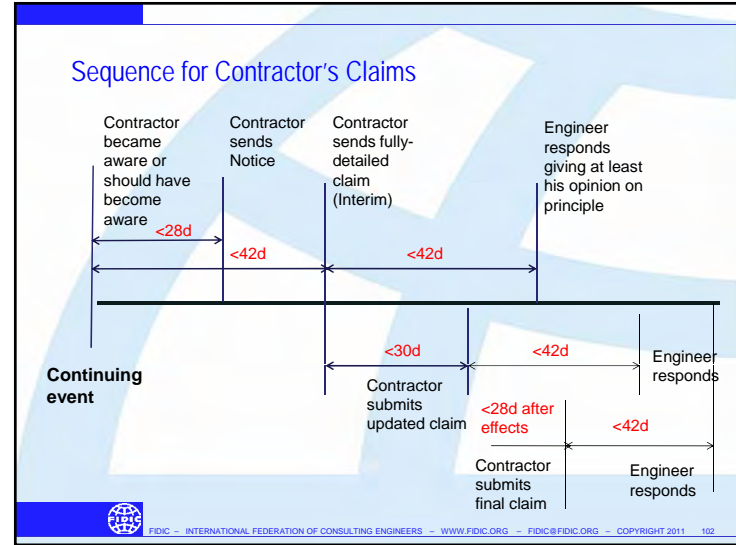
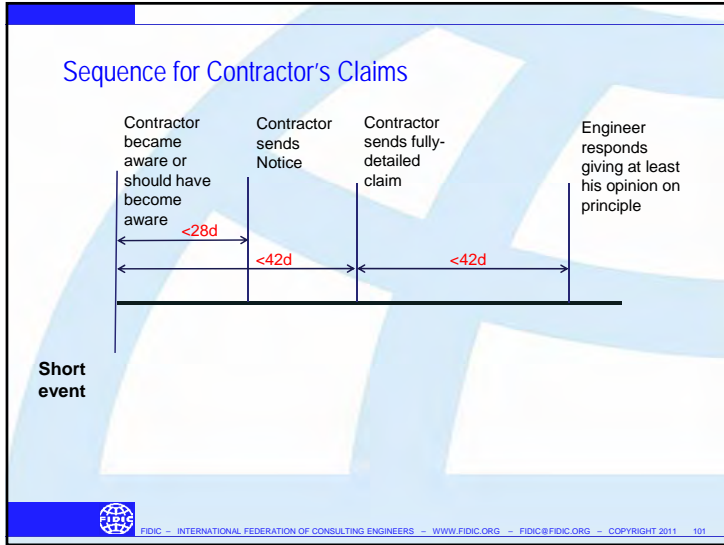
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8. Processing of Contractor's claims

- There is no restriction on the number of times the Engineer may request further and better particulars of a claim, however note the following citation from the FIDIC Contracts Guide 2000.

"[the Contractor] is entitled to prompt payment of 'such amounts as have been reasonably substantiated as due', without waiting until he has submitted every element of substantiation of a particular claim. His claim would have typically arisen from an event or circumstance for which he was not blameworthy, so it would be unreasonable for him not to receive prompt payment..."

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8. Processing of Contractor's claims

Engineer's Determination, Sub-Clause 3.5

- The Engineer's first job when acting under Sub-Clause 3.5 is to attempt to achieve the agreement of both Parties through consultations.
- Failing an agreement within a reasonable time, the Engineer shall make "a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."
- The Engineer's determination is to be accompanied with supporting particulars.
- In most cases under the MDB Edition, it must be subject to the Employer's approval before issue.

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8. Processing of Contractor's claims

Engineer's Determination, Sub-Clause 3.5


"Each Party shall give effect to each agreement or determination unless and until revised by the next higher step in the dispute resolution procedure."

- This almost always means a referral to the DB.

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End of Session 2




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Session 3

Employer's Claims




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Employer's Claims

Sub-Clause 2.5

- *"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor."*
- Sub-Clause 2.5 lists two exceptions to the notice requirement:
 - Sub-Clause 4.19 [*Utilities*],
 - Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Materials*]




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Employer's Claims

Notice Periods

- Red Book:
 - *"The Notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim."*
- MDB Version:
 - *"The Notice shall be given as soon as practicable **and no longer than 28 days** after the Employer became aware, or should have become aware, of the event or circumstances giving rise to the claim."*




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Employer's Claims

Content of the Notice


- Red Book & MDB Version:
- *"The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract."*


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Employer's Claims


- Do the particulars and the notice have to be given together?
- The language could be interpreted that they are to be given at the same time, and some commentators have written this.
- But how does one give final details of the amount of delay damages within 28 days of the end of the Time for Completion – the amount usually increases over a period of 100 days?


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Employer's Claims


- In fact, there is no obligation to give particulars at the same time as the notice.
- According to the FIDIC Contracts Guide 2000:
"Particulars may be given at any time, but excessive delay in their submission may be construed as an indication that the Employer will not be proceeding with the notified claim."


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Employer's Claims

- Generally, claims by the Employer fall within 4 categories:
 - Delay damages
 - Costs arising from defective work
 - Costs arising from termination of the Contract
 - Prolongation of the Defects Notification Period



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Employer's Claims

Delay damages

- The Employer's delay damages are covered by Sub-Clause 8.7, and compensate the Employer if the Contractor fails to comply with the Time for Completion.
- In most common law jurisdictions, these delay damages must be based on a "genuine pre-estimate" of the Employer's likely loss for delay.
- This should be the object of a calculation by the Employer or a consultant prior to the award of Contract, and a record of the calculation, proving its date, kept in the Employer's files.


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Employer's Claims

Delay damages

- The amount should be clearly calculable, without ambiguity. The Contractor may be able to escape delay damages if an ambiguous formula has been used, or if the date at which the delay damages apply is not clear.
- In civil law countries delay damages will likely be considered as a penalty. As such, they are not subject to the same provisions regarding the concept of a "genuine pre-estimate of loss."
- In civil law countries however, it is not uncommon for a judge to adjust the percentage of the "penalty".


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Employer's Claims

Delay damages

- In both legal systems, delay damages, whether a genuine pre-estimate of loss or a penalty, are usually capped at between 5% and 15% of the Contract Price.
- The percentage to be applied daily for delay, and the maximum delay damages, expressed as a percentage of the final Contract Price, are to be stated in the Contract Data.


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Employer's Claims

Delay damages

- Note, FIDIC does not specifically address delay damages for intermediate milestones – except with respect to Sectional Completion (Sub-Clause 10.2).
- If delay damages are to be applied for an intermediate date, the Engineer/Employer will need to define these in the Particular Conditions, and set the amount of the delay damages.
- In doing this keep in mind the rules already covered.
- The Employer may also wish to include a bonus for accelerated completion, and there is a draft Particular Condition in the Guidance section of the Red Book for this.

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Employer's Claims


Delay damages

"These damages are the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2."

- This means that the Employer cannot claim both delay damages and the additional cost of supervision by the Engineer.

"...the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default."

- As discussed previously the Employer must make a claim and have an Engineer's determination under Sub-Clause 3.5 in his favour before being allowed to deduct delay damages.


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Employer's Claims

Delay damages

- Note the following cautionary words in the FIDIC Contracts Guide 2000:

"Before the Employer deducts delay damages from moneys due to the Contractor, he could consider whether the delay is a reflection of cash flow shortfall from interim payments. If so, further diminution of cash flow (by withholding delay damages) could exacerbate the situation."


- If the Employer does not immediately exercise his right to deduct delay damages, he should write to the Contractor reserving his right to do so at a later date – but still submit the notice within 28 days.


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- Delay can be a cause for termination pursuant to Sub-Clause 15.2(c)(i) if without reasonable excuse the Contractor fails to proceed with the Works in accordance with Clause 8 [*Commencement, Delays and Suspension*].
- After giving 14 days' notice to the Contractor under Sub-Clause 15.2, the Employer may terminate the Contract.
- Termination in these conditions opens the Employer's rights to claim his losses and damages incurred and any extra costs of completing the Works, including the Cost of remedying any defects.


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Employer's Claims

- The Employer's claims in this regard are again subject to compliance with Sub-Clause 2.5, and thus an Engineer's determination will be necessary.
- The Employer is entitled to delay damages in addition to the above damages, which are triggered at termination, if the Time for Completion had expired prior to the date of termination.


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Employer's Claims

Defects in Works and/or design

There are three periods when the question of defects can arise:

- During construction, in which case the relevant provisions with regard to financial claims are found under Sub-Clause 7.6 [*Remedial Works*].
- During the Tests on Completion, in which case the relevant provisions with regard to financial claims are found under Sub-Clause 9.4 [*Failure to pass Tests on Completion*].
- During the Defects Notification Period, in which case the relevant provisions with regard to financial claims are found under Sub-Clause 11.4 [*Failure to Remedy Defects*].

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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- Starting backwards, here is a look at Sub-Clause 11.4 [*Failure to Remedy Defects*].
- According to Sub-Clause 11.1:
 - "...the Contractor shall... (b) execute all work required to remedy defects or damages, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works or Section..."
- This work is of course at the Contractor's risk and cost if and to the extent that the work is attributable to:
 - (a) any design for which the Contractor is responsible,

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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- This work is of course at the Contractor's risk and cost if and to the extent that the work is attributable to:
 - a) any design for which the Contractor is responsible,
 - b) Plant, Materials or workmanship not being in accordance with the Contract, or
 - c) failure of the Contractor to comply with any other obligation.
- If the defect is attributable to any other cause, the Contractor shall be notified by (or on behalf of) the Employer, and Sub-Clause 13.3. [*Variations*] shall apply with respect to the valuation.

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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- If the Contractor fails to comply with the notice of defect issued under Sub-Clause 11.1, the Employer may initiate the procedure described in Sub-Clause 11.4 regarding failure to remedy defects.
- The Employer (or someone acting on his behalf) must fix a reasonable date by which the Contractor is expected to remedy the defect.
- It is very important that the Contractor be given a reasonable opportunity to remedy the defect himself.


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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- If the Contractor fails to remedy the defect by the reasonable date notified, the Employer has several options:
 - a) The Employer can carry out the repair himself and subject to Sub-Clause 2.5, the Employer can recover his reasonable costs expended.
 Note, however that the Contractor shall have no responsibility for the work in this case.
 - b) Have the Engineer, via Sub-Clause 3.5, agree or determine a reasonable reduction in the Contract Price.
 Note, at law if a defect does not substantially impact the use of the Works, and the cost of repair is very high, this option may be imposed on the Employer, for public policy reasons of economic waste.


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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- c) If the defect deprives the Employer of substantially the whole benefit of the Works, or any major part, then the Employer may terminate the Contract and recover damages directly including:
 - all sums paid for the Works
 - plus financing costs
 - Costs of dismantling, clearing the Site and returning Plant and Materials to the Contractor.
- The foregoing is without prejudice to any other rights under the Contract or otherwise.


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Employer's Claims

Sub-Clause 11.4 [*Failure to Remedy Defects*]

- Under Sub-Clause 11.6 [*Further Tests*], if the Employer incurs costs related to new tests, which must be done after repairs have been made, his costs are recoverable.
- Keep in mind Sub-Clause 11.8 [*Contractor to Search*] - the Engineer can require the Contractor to search for the cause of any defect.
- The Party ultimately responsible for the defect will bear the cost of this search and testing. If the Contractor is not responsible, Sub-Clause 3.5 shall apply and he shall recover his Costs plus profit.


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Employer's Claims

Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]

- If, after retesting under Sub-Clause 9.3, the Works fail to pass a Test on Completion, one option available to the Engineer is for the Engineer to instruct further retesting.
- After unsuccessful retesting under Sub-Clause 9.3, the Engineer may reject the Works if the failure to pass the Test on Completion deprives the Employer of substantially the whole benefit of the Works.
- In this case, the remedy pursuant to Sub-Clause 11.4 would apply.

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Employer's Claims

Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]

- The third possibility is for the Engineer to issue a Taking-Over Certificate (if the Employer so requests), however:

"... the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure."

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Employer's Claims

Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]

"Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Employer may require the reduction to be

- i. agreed by both Parties (in full satisfaction of this failure only) and paid before the Taking-Over Certificate is issued, or*
- ii. determined and paid under Sub-Clause 2.5 [Employer's Claims] and Sub-Clause 3.5 [Determinations]."*

-How do you calculate such a reduction?

-Defining a sliding scale in the Particular Conditions based on a minimum performance level is one possible way.

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Employer's Claims

Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]

- Possibly tie the reduction in Price to loss of revenue. But note Clause 17.6 regarding limitations of liability and the exclusion of indirect or consequential losses. Moreover, this does not go to the heart of the question, which is the value of the Works.
- Possibly consider a third party professional evaluation of the asset as specified versus as delivered.

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Employer's Claims

Sub-Clause 7.6 [*Remedial Work*]

- If at any time any part of the Works, Plant or Materials is found not to be in accordance with the Contract, the Engineer may instruct removal and replacement of Plant or Materials, and removal and re-execution of any other work.
- This right is regardless of any apparently successful previous test or certification.
- Note at Sub-Clause 7.3 [*Inspection*] that the Contractor shall give notice to the Engineer prior to covering up any part of the Works to allow for inspection within a reasonable time.


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Employer's Claims

Sub-Clause 7.6 [Remedial Work]

- Should the Contractor fail to give such notice, the Engineer may require the Contractor to open up the work, and make good at his cost, regardless of the outcome of the inspection.
- If the Contractor fails to comply with such instruction(s), the Employer shall be entitled to employ others to carry out the work.
- The Employer can recover all his costs subject to Sub-Clause 2.5, after taking account of any amount to which the Contractor would have been entitled for carrying out the work – the Employer can only claim the “extra-over” cost.


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Employer's Claims

Sub-Clause 7.6 [Remedial Work]

- Similarly to Sub-Clause 11.4, the Contractor must complete the remedial work within a reasonable period. This period can be fixed by the Engineer or it may be immediate if urgency is required.
- It is recommended to keep the Contractor informed of the costs being incurred for the remedial work in advance, so as to reduce potential claims that the expense was unreasonable.


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Employer's Claims

Sub-Clause 7.6 [Remedial Work]

- Unlike Sub-Clause 11.4 (a), there is no mention of who will be responsible for the warranty relative to remedial work done by others.
(Sub-Clause 11.4 clearly states that the Contractor is not responsible in a similar situation during the DNP).
- This is another reason in favour of giving notice to the Contractor prior to replacing him under Sub-Clause 7.6. Such notice should indicate the Employer's intention to maintain the Contractor's liability for the repairs. It may be advisable to allow the Contractor access to observe the repairs.


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Employer's Claims

Sub-Clause 7.6 [Remedial Work]

- Ultimately, the ability to impose on the Contractor the liability for the repair work may not be tenable under applicable law.

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Processing Employer's Claims

- Once the Engineer has received the Employer's particulars, Sub-Clause 2.5 states:
"The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period]."

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Processing Employer's Claims

- Unless the parties reach an early agreement regarding the Employer's claim, no deduction from Payment Certificates can be made until the Engineer's determination is issued.
- Sub-Clause 2.5 states:
"This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

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End of Session 3

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Session 4


The Resolution of Disputes

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Processing of Claims & the Resolution of Disputes

1. Dispute Adjudication Board Principles
2. DAB/DB Workings
3. Arbitration



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1. Dispute Board Principles

Background to Dispute Resolution under FIDIC Contracts

FIDIC 1st Edition 1957 (*The Decision of the Engineer*)

- A dispute shall in the first place be referred to and settled by the Engineer.
- The decision in respect of matters so referred shall be final and binding upon the Employer and the Contractor.
- If no claim to arbitration has been communicated ... within ... 90 days ... the .. decision shall remain final and binding upon the Employer and the Contractor.
- No arbitration until after the completion or alleged completion of the Works.



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1. Dispute Board Principles

Background to Dispute Resolution under FIDIC Contracts

FIDIC 1996 Supplement to 4th Edition 1987 (Option) -

- Allow Parties to refer disputes to the decision of either one or three impartial individual(s).
- Parties should not disregard the possibility to seek an opinion from the Board on any matter to avoid a potential dispute.
- No formal notice of dispute is required to make a formal referral.
- The Board is then required to give notice of its decision, including reasons within 84 days.



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1. Dispute Board Principles

Background to Dispute Resolution under FIDIC Contracts

FIDIC 1st Editions 1999 (The DAB)

- Same principles as in the 1996 Supplement.
- The DAB is to be named by the date stated in the Appendix to Tender.
- The DAB shall conduct regular Site Visits and shall be available on 28 days' notice.
- The appointment of the DAB (including each member) shall expire with the transmission of the Contractor's Discharge immediately prior to the return of the Performance Security .
- The DAB shall render its decision within 84 days of receipt of a referral.




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1. Dispute Board Principles

Background to Dispute Resolution under FIDIC Contracts

- Standing Dispute Boards
 - Construction form (Red Book), and the Design, Build and Operate form (Gold Book)
- Ad hoc Dispute Boards
 - Plant and Design/Build (Yellow Book) and the EPC/Turnkey forms (Silver Book)
- The MDB Edition (Pink Book) has a Standing Board – known as a “Dispute Board” (DB) instead of a “Dispute Adjudication Board” (DAB).


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1. Dispute Board Principles

Background of Dispute Resolution under FIDIC Contracts


- The legal status of the DAB/DB is found in the Contract itself.
- Under the FIDIC forms of Contract the Parties sign on to a two-tiered dispute resolution process.
- The first tier is found in Clause 20 where the Parties submit to the DAB/DB process.
- If that fails, the dispute passes to the second tier - arbitration.

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1. Dispute Board Principles

- Composition of the 3-person Board
 - construction professionals?
 - lawyers?
 - A balance of disciplines?
- Composition of the 1-person Board
 - construction professionals?
 - lawyers?

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1. Dispute Board Principles

- DAB services (of the Board or of a Member) may be terminated at any time by agreement between the Parties (but not by a Party acting alone), with 42 days' notice to the Board or Member.
- DAB services (of the Board or of a Member) may be terminated at any time by the Parties with immediate notice for failure of the DAB to comply with Conditions of the Dispute Adjudication Agreement.
- Sanctions
 - refund of fees and of abortive costs to the Parties.
- The DAB may terminate its services in the event of failure by one or both of the Parties to comply with Conditions of the Dispute Adjudication Agreement.


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1. Dispute Board Principles

The Standing (Full Term) DAB

- Retainer Fee
 - be available on 28 days' notice
 - becoming and remaining conversant with all project developments
 - all office and overhead expenses including secretarial services, photocopying and office supplies
- Payable from appointment until TOC at full rate then at 50% of the rate until issue of Contractor's Discharge when he submits his Final Statement.



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1. Dispute Board Principles

The Standing (Full Term) DAB

- Daily Fee
 - travel up to two days in each direction,
 - each day spent reading submissions, attending hearings, preparing decisions, or making site visits.
- Reasonable Expenses
- Fixed for 24 months



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2. DAB/DB working

The method of appointing the DAB is set out in Sub-Clause 20.2 *[Appointment of Dispute Adjudication Board]*

- The DAB shall comprise either one or three suitably qualified persons.
- If three persons, each Party shall nominate one member for the approval of the other.
- The Parties shall consult both members and shall agree upon the third member – the chairman.


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2. DAB/DB working

- If :
 - the Parties fail to agree upon the appointment;
 - either Party fails to nominate a member;
 - the Parties fail to agree upon the appointment of the third member;

the appointing entity named in the Appendix to Tender, upon the request of either or both of the Parties and *after due consultation* with both Parties, shall appoint a member or the DB. **This appointment shall be final and conclusive.**

Sub-Clause 20.3 *[Failure to Appoint the DAB]*.

- Each Party shall be responsible for paying one-half of the cost of the appointing entity.



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2. DAB/DB working

Dispute Adjudication Agreement

- The DAB enters into a contract with the Parties (TPA)
- The TPA comprises the General Conditions of Dispute Adjudication Agreement.
- The TPA includes details of any amendments to the General Conditions of Dispute Adjudication Agreement.
- It includes the terms of payment and the undertaking of the Employer and the Contractor to be jointly and severally liable to ensure that the DB is paid.
- The TPA becomes effective on the date that it is signed by the three parties.


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2. DAB/DB working

The Standing DAB/DB Responsibilities as a member of the Project team.


- Be available for site visits and hearings;
- Become and remain conversant with project developments;
- Treat the details of the Contract and DB activities as private and confidential;
- Be available to give advice and opinions;
- Conduct regular visits to the site and meet with the Parties and the Engineer to exercise its role in dispute avoidance and establish procedures.

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2. DAB/DB working


- DB shall visit the site at intervals of not more than 140 days, including at times of critical construction events;
- and on request of either the Employer or the Contractor.
- Timing and agenda for each site visit to be agreed jointly by the DB and the Parties or in the absence of agreement, to be decided by the DB.
- Site visits shall be attended by the Employer, the Contractor and the Engineer.

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2. DAB/DB working


- The DB to make special effort during regular visits to the site to promote open discussion between the Employer, the Contractor and the Engineer concerning problems causing delays to progress of the Works and disputes that may arise.
- The DB to encourage the Parties to seek advisory opinions in respect of problems that occur on the Site.
- The DB must produce its site visit report before leaving the Site.

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2. DAB/DB working

- The DB must hold itself available to the Employer and the Contractor to give advisory opinions if asked to do so.
- Critical for dispute avoidance role
- Contractor and Employer should avail themselves of this role, and if not;
- DB should offer.
- A successful DB is one that never receives a referral.


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2. DAB/DB working

Under Article 8 of the Procedural Rules, DB has power to:

- Establish the procedure to be applied in deciding a dispute.
- Decide upon the DB's jurisdiction, and the scope of the dispute.
- Conduct a hearing as it thinks fit.
- Take initiative to ascertain the facts and matters required for the decision.
- Make use of its own specialist knowledge.
- Decide upon provisional relief such as interim or conservatory measures.
- Open up, review and revise certificates, decisions, or determinations.

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2. DAB/DB working

The referral should be a reasoned statement of case submitted by the claimant.

DB to review the referral in terms of scope and complexity:

- does the DB possess the specialized knowledge necessary in order to decide?
- will the issue require a hearing?
- can the DB decide on the basis of its own knowledge of the Contract and on the document exchanges?
- will the matter require one or two submission exchanges?

After this review the DB should fix the procedural time-table (84 days)


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2. DAB/DB working

The DB must determine a time-table that will allow:

- at least one exchange (more probably two) of position papers.
- the time required to conduct the oral hearing
- the time required to write its decision.
- the DB to comply with time for giving its decision.

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2. DAB/DB working

The Referral:

- Contractual basis for the claim.
- The facts and analysis in support of the claim.
- The decisions sought.

The Response:

- Contractual argument in response
- Reply to the factual basis of claim.
- The decisions sought.


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2. DAB/DB working

After receiving the Referral and Response, the DB determines:

- if it is in possession of sufficient facts in order to make its decision.
- whether to ascertain the facts through its own initiatives - which might involve referring the matter to outside experts.
- the extent to which it admits evidence statements without opportunity to hear and question witnesses
- whether to require "hot tubbing" of (or consultations between) experts from both sides where conclusions or opinions are in conflict.

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2. DAB/DB working

Site visit before hearing

The DB may require a pre-hearing site visit if:

- physical conditions are the cause of the dispute
- defective workmanship is the fundamental cause of the dispute.

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2. DAB/DB working

Attendees

The DB may decide to limit the persons attending the hearing or require that oral presentations be made by persons familiar with or resident at the site:

- Presence of lawyers?
- Presence of third party experts?

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2. DAB/DB working


Conclusion of the Hearing

The DB declares the hearing closed when:

- it has received and understood all written submissions
- it is satisfied that it is in possession of sufficient factual evidence

It may, on occasion, require post-hearing submissions.

The DB retires to write its decision.


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2. DAB/DB working

Decision

- The decision of the DB shall be reasoned.
- The decision of the DB to the extent possible should be unanimous.

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2. DAB/DB working

Decision

It should contain at least the following elements:

- an introductory section setting out the generalities of the Contract, the names of the Parties and the Engineer,
- a statement establishing its jurisdiction.
- a description of the dispute(s) and the background(s)
- the claimant's position(s)
- the respondent's position(s)
- the DB analysis and findings, and
- the decision(s).


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2. DAB/DB working

Enforcement of Decisions

- A decision is immediately binding on the Employer and the Contractor.
- Unless and until the decision is overturned in arbitration the Employer and the Contractor shall comply.
- A Party who disagrees with a decision must issue a notice of dissatisfaction within 28 days after receipt of the decision – but must still comply.
- If such a notice of dissatisfaction is served on time, either Party may commence arbitration after 56 days from the date of notice, after attempting amicable settlement.


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2. DAB/DB working

Enforcement of Decisions


- If no notice of dissatisfaction is served within the period of 28 days following receipt of the DB decision, the decision becomes final and binding on the Parties.
- A Party can immediately commence arbitration in order to force the other Party to comply with the DB decision, if no notice of dissatisfaction has been served.
- If a notice of dissatisfaction has been served but one Party fails to comply with the DB decision, the other Party can request the arbitral tribunal to enforce compliance through an Interim Award while awaiting a Final Award with respect to the merits of the DB decision.

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3. Arbitration


- Historically, FIDIC contracts have always included international arbitration as the final step in the dispute resolution process.
- This is because of a combination of two reasons:
 - FIDIC contracts are designed for international use (where the Contractor & Employer are from different countries) and
 - because it can be easier to enforce an international arbitral award in another country than it is to enforce a judgement from a foreign court (New York Convention 1958)

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3. Arbitration


- Arbitration can be of two types:
 - Administered – where an institution organises and manages the arbitration according to its own rules or rules chosen by the Parties (for a fee)
 - Ad-hoc – where the arbitrators themselves must organise and manage the proceedings.
- FIDIC contracts have traditionally favoured administered arbitration using the ICC in Paris but in recent years other institutions have flourished.
- The name of the chosen institution must be stated in the Contract Data.

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3. Arbitration

- The arbitration provisions in the Pink Book (Sub-Clause 20.6) differentiate between projects executed by foreign contractors and those executed by local or “domestic” contractors.
- For foreign contractors, there are 3 possibilities:
 - International arbitration administered by the institution named in the Contract Data, conducted under the institution's rules;
 - International arbitration under UNCITRAL rules, administered by the named institution; or
 - If no institution is named, international arbitration administered by ICC under ICC rules (unless the project is financed by the Asian Development Bank, in which case, the institution is SIAC using SIAC rules).

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3. Arbitration

- For "domestic contractors", arbitration shall be conducted in accordance with the laws of the Employer's country.
- What happens when the Contractor is a local subsidiary of a foreign company?
- What happens if there are no local arbitration laws?
- Is local arbitration quicker or more reliable than court proceedings?

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End of Session 4a

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Session 4b

The JICA Alternative Particular Conditions

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The JICA Alternative Particular Conditions


1. General
2. Inspections and Audit by the Bank
3. Employer's Financial Arrangements
4. Exemptions From Duties and Taxes
5. Protection of the Environment
6. Appointment of the Dispute Board

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1. General


- Part B of the Particular Conditions – “Specific Provisions”
 - *“Specific Provisions of the PC are intended to address country, project and contract specific requirements not covered by the GC.” [p. 282 of the JICA SBD]*
 - *“Whoever drafts the Specific Provisions should be thoroughly familiar with the provisions of the GC and with any specific requirements of the Contract. Legal advice is recommended when amending provisions or drafting new ones.” [p. 282 of the JICA SBD]*


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1. General


- The main purpose is to cover either local legal requirements or logistic constraints not possible to cover in a standard contract.
- If changes to the GC absolutely have to be made, they are made in Part B to the Particular Conditions.
 - *“The standard text of the General Conditions chosen must be retained intact to facilitate its reading and interpretation by Bidders and its review by the Bank.” [p. 157 of the JICA SBD]*


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1. General


- *“The use of standard conditions of contract for all civil Works will ensure comprehensiveness of coverage, better balance of rights or obligations between Employer and Contractor, general acceptability of its provisions, and savings in time and cost for bid preparation and review, **leading to more economical prices.**”*
[p. 157 of the JICA SBD]


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2. Inspections and Audit by the Bank


- The standard Sub-Clause 1.15 [*Inspections and Audit by the Bank*] allows inspection of the Contractor’s accounts and records.
- One of the possible alternative provisions proposed in the SBD is to delete this provision entirely.
- This should be accepted only under the most exceptional of cases.


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3. Employer's Financial Arrangements


- With regard to the Sub-Clause 2.4 [*Employer's Financial Arrangements*] the SBD notes: "*Considering circumstances particular to each individual project, this Sub-Clause may be deleted entirely*". [p. 282 of the JICA SBD]
- Recall this provision allows the Contractor to demand that the Employer present proof of financing at any time in the Time for Completion.
- While JICA financing may be rock solid, it is a good idea to keep this provision in case of changes during execution of the Works not notified or agreed by JICA.


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3. Employer's Financial Arrangements


- If this provision is deleted, note that it has knock on effects on other GCs.
- Namely, failure to provide the requested proof of financing gives the Contractor the right to suspend and terminate the Works.
- JICA has therefore included appropriate modifications to Sub-Clauses 16.1 [*Contractor's Entitlement to Suspend*] and Sub-Clause 16.2 [*Termination by Contractor*], which must be used in conjunction.


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4. Exemptions from Duties and Taxes


- In reference to Sub-Clause 14.1 [*The Contract Price*] and Sub-Clause 6.2 [*Rates of Wages and Conditions of Labour*], JICA has noted that when applicable, exemption from taxes shall be indicated as appropriate.
- Note, other GCs may need modification depending on the exemptions granted.

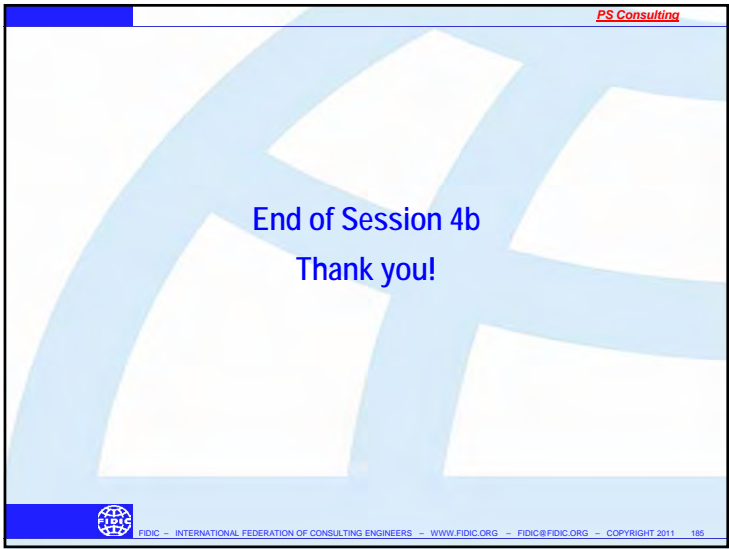

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5. Protection of the Environment

- The alternative Particular Conditions proposed by JICA, allows for the possibility that the Loan Agreement may contain more stringent provisions than the GCs stipulate.
- There is therefore the possibility to enumerate these additional conditions as an additional paragraph to Sub-Clause 4.18 [*Protection of the Environment*].


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FIDIC Contracts Training Workshop

JICA's Activities on Promotion of Dispute Board

August 2012
Manila, Philippines


Yukinobu Hayashi
Nippon Koei Co., Ltd



FIDIC Contracts Training Workshop

Presentation Topics

- Background
- Activities for DB Supply-side Issues
- Activities for DB Demand-side Issues




FIDIC Contracts Training Workshop 2

Background (DB Supply-side Issue)

1. Increasing demand of adjudicators

- MDBs started to use FIDIC MDB Harmonized edition in 2005.
- JICA adopted MDB Harmonized edition for Works contract in 2009.
- JICA's other Standard Bidding Documents including Plant works and Small Works also use Dispute Board/adjudicator since 2010.
- Trend to move from ad-hoc DB to standing DB in design build contract?




FIDIC Contracts Training Workshop 3

Background (DB Supply-side Issue)

JICA Standard Bidding Documents and Dispute Board

	JICA SBD	Version (year)	Conditions of Contract	Dispute Resolution (First Step)
1	Works	1.1 (2009)	FIDIC MDB harmonized edition	Standing Dispute Board
2	Plant Design, Supply and Installation	1.0 (2010)	ENAA form	Standing Dispute Board
3	Small Works	1.0 (2010)	MDB original	Adjudicator



FIDIC Contracts Training Workshop 4

Background (DB Supply-side Issue)

2. Insufficient numbers of adjudicator to cope with increasing demand

- FIDIC President's List
 - 47 adjudicators
 - only one Asian adjudicator (Prof. Toshihiko Omoto)
 - assessment at about 3 years interval
- FIDIC encourages its Member Associations (MAs) to establish their own National Lists*.

Note : List of Adjudicators established by each FIDIC MA is called National List.

 **More qualified adjudicators needed !**

Background (DB Demand-side Issue)

2. Lack of proper understanding on DB by users

- Many of the users are reluctant to use DB
 - it's quite new!
 - expensive?
 - effectiveness?
- What is a real benefit to use DB?

 **Raising Awareness of DB needed!**

Activities for Supply-side Issues (1)

- i. Good Practice Survey for Establishment of National List
- ii. Development of a JICA training kit for adjudicator candidates
- iii. Drafting of qualification procedures for national list adjudicators
- iv. Trial adjudicator training and assessment workshops in Japan
- v. Discussion with member associations of FIDIC in Vietnam, Sri Lanka, Philippines, and Indonesia for possible development of national lists of local adjudicators.

Activities for Supply-side Issues (2)

1. Good Practice Survey of National List

- Visit to MAs in Germany (VBI), Poland (SIDir) and Romania (ARIC)
- VBI National List
 - well prepared training program and assessment process
 - 3-days assessment held annually since 2007
 - 9 listees at present

Activities for Supply-side Issues (3)

2. Development of JICA Dispute Board Training Kit

- training kit for candidate of adjudicator
- designed for 5-days training workshop
- covers FIDIC Module 3/3A
- trainer's version and trainee's version
- about 300 pages comprehensive training material



Activities for Supply-side Issues (4)

3. Trial adjudicator training and assessment workshops in Japan

- Adjudicator Training Workshop
- Adjudicator Assessment Workshop



AJCE National List of Adjudicators



Activities for Demand-side Issues (1)

- i. DB promotion seminars in Indonesia, Vietnam, Sri Lanka, Philippines, Bangladesh, India, and Japan,
- ii. FIDIC Contracts Training Workshop
- iii. Dialogue with executing agencies of JICA's ODA loan projects regarding the use of DB
- iv. Survey on the actual status of DB operation in projects financed by MDBs
- v. Development of Dispute Board Manual.
- vi. Delivering Mock Dispute Board Seminar in Jakarta



Activities for Demand-side Issues (2)

1. DB Promotion Seminars

No.	Date	Country	No. of Participants
1	July 2008	Japan (Kyoto)	9
2	July 2008	Japan (Tokyo)	123
3	August 2008	India (Delhi)	16
4	August 2008	Philippines (Manila)	111
5	November 2009	Cambodia (Phnom Penh)	77
6	November 2009	Vietnam (Hanoi)	157
7	January 2010	Bangladesh (Dhaka)	53
8	February 2010	Sri Lanka (Colombo)	105
9	February 2010	Japan (Tokyo)	73
10	January 2012	Vietnam (Hanoi)	67
11	January 2012	Sri Lanka (Colombo)	86
12	February 2012	Philippines (Manila)	66
13	February 2012	Indonesia (Jakarta)	100
14	March 2012	Japan (Tokyo)	87
Total			1,140



Activities for Demand-side Issues (3)

2. FIDIC Contracts Training Workshop (Module 1&2)

	Date	Venue	Participants
1	February, 2010	Tokyo, Japan	47
2	July, 2010	Jakarta, Indonesia	36
3	October, 2010	Hanoi, Vietnam	61
4	November, 2011	Tokyo, Japan	58
5	February, 2012	Hanoi, Vietnam	60
	Total		262



Activities for Demand-side Issues (4)

3. Frequently Asked Question

- Q1: When the country's legal system does not deal with DB, I think the DB's decision does not have a binding effect. What is your comment on this?
- A1: The dispute resolution procedure with DB is agreed by contract parties based on the principle of "freedom to contract". We do not think the DB process has any conflict with the national legal system. If a law related to alternative dispute resolution (ADR) is available, it may support DB mechanism; however, it is not a prerequisite for effectiveness of the DB's decision. Furthermore, the successive process, including amicable settlement and arbitration, is stipulated in the FIDIC contract, when either party is dissatisfied with the DB's decision.



Activities for Demand-side Issues (5)

- Q2: When either party is dissatisfied with the DB's decision, it can proceed with the arbitration. In this case, can the DB cost be regarded as wasted expense?
- A2: According to statistics in the United States, only 2% of disputes referred to DB went to arbitration. This means that most of disputes were settled at the project site level and this fact should be well recognized. Furthermore, a standing DB is able to mitigate the outbreak of the dispute by its dispute prevention function. The dispute may result in the delay of completion of the project entailing huge socioeconomic loss to a nation. The benefits brought by DB can be sufficiently justified by such reasons.



Activities for Demand-side Issues (6)

- Q3: The cost of DB can be covered by JICA ODA loans?
- A3: JICA considers that the DB cost is not a legal cost but a part of project management cost, therefore it is an eligible cost under JICA ODA loans. JICA will discuss the establishment of DB with the executing agency of the JICA ODA project during the project appraisal stage so that the cost allocation for DB will be ensured under the loan for upcoming projects.
- Q4: It would be very effective to compile a report regarding the operations of DB in past projects in order to demonstrate the real benefits of DB for further dissemination of the DB system.
- A4: This matter is also discussed in DRBF. It was noted as an outstanding issue in the promotion of DB.



Activities for Demand-side Issues (7)

4. JICA Dispute Board Manual

Acknowledgement

Preface

1. Introduction
2. Brief Explanation of DB
3. Consideration at Pre-implementation Stage
4. Consideration in Preparation of Tender Documents
5. Selection of DB Members
6. Remuneration of DB Members
7. Site Visit
8. Information to DB during Intervals between Site Visit
9. DB Informal Opinions
10. Referral and DB Decision
11. Amicable Settlement
12. Arbitration



Thank you for your attention !






FIDIC Contract Training Workshop

Creation of National List of Japanese Adjudicators

Japan International Cooperation Agency (JICA)

Yoshihiko Yamashita
Association of Japanese Consulting Engineers


FIDIC Contracts Training Workshop 2012



Presentation Topics

1. Prior Preparation
2. Adjudicator Assessment Procedural Rules
3. Adjudicator Registration Procedural Rules
4. Training and Assessment Programs
5. AJCE List


FIDIC Contracts Training Workshop 2012 2



1. Prior Preparation

- Establishment of Adjudicator Committee
 - 1) Initiate realization of adjudicator AJCE List
 - 2) List up necessary preparation works and draft action plan
 - 3) Collaboration with FIDIC
- Drafting Rules on Adjudicators
 - 1) Rules provide for necessary procedures for AJCE to prepare AJCE list of adjudicator under FIDIC contracts ("AJCE List").
 - 2) Adjudicator Assessment Procedural Rules
 - 3) Adjudicator Registration Procedural Rules

FIDIC Contracts Training Workshop 2012 3



2. Adjudicator Assessment Procedural Rules

- Purpose

Applies on the procedure for assessment of candidate for adjudicators under FIDIC contracts conducted by AJCE
- Contents
 - 1) Establishment of Assessment Panel
 - 2) Announcement in public - 6 months prior to the Assessment
 - 3) Documentary examination
 - 4) Workshop (FIDIC Modules 3 and 3A)
 - 5) Reporting results
 - 6) Others: Fee, Miscellaneous Provisions, Revision and Repeal

FIDIC Contracts Training Workshop 2012 4



2-1 Application Guidelines

■ Purpose

Provide guidelines for relevant qualification to be an applicant for adjudicator assessment conducted by AJCE

■ Contents

- 1) Application requirements
- 2) Application documents
- 3) Assessment fee
- 4) Assessment procedure
- 5) Annex
 - Application form, Adjudicator assessment program



2.2 Qualification Criteria

FIDIC Qualification Criteria	AJCE Qualification Criteria
Member of FIDIC MA	No limitation
Professional Qualification	PE, First-class architect, First-class Manager on Civil Works, Attorney, in-house legal experience
Experience in Industry	More than 10 years in CE/ Construction Industry
Experience in Oversea Projects	AJCE requires experience in international construction works,
Knowledge on FIDIC Documents	experience in working with FIDIC documents, and experience in
Experience in Dispute Resolution	resolution of contractual disputes
Assessment Workshop	FIDIC Module 3 and 3A (Module 1 and 2 are prerequisite)
Communication Skill	To be fluent in English
Availability upon Appointment	Essential requirement
Impartiality	Essential requirement
Others	Intention to Register on AJCE List




2.2 Qualification Criteria

- 1) Possess appropriate qualification
Professional Engineer, First-class architect,
First-Class engineer on construction management,
Attorney or other appropriate professional qualifications.
(in-house law expert having sufficient experience in FIDIC contract is
qualified as well)
- 2) Possess 10 or more years of working experience in
consulting engineering industry or construction industry.
However, this shall not apply to an attorney.




2.2 Qualification Criteria

- 3) Possess all of the experience as specified below:
 - (1) International construction works : work experience,
consulting services, construction supervision or advice
(any one of them is sufficient)
 - (2) FIDIC Contract Documents
 - (3) Dispute resolution

 **2.2 Qualification Criteria**

- 4) Fluent in English and able to compose concise sentences
- 5) To have complete FIDIC contractual training programs: FIDIC Modules 1 and 2
- 6) To have completed FIDIC Adjudicator Training workshop: FIDIC Module 3/3A
- 7) To have an intention to register on AJCE List
(AJCE List prepared by AJCE and opened to public when registration is accepted)
- 8) To be listed on AJCE List and have an intention to accept upon appointment

FIDIC Contracts Training Workshop 2012 9

 **3. Adjudicator Registration Procedural Rules**

- Purpose


Applied for judging capability of successful applicants who could be listed on AJCE List, and for the procedure for registration and the renewal of the AJCE List.
- Contents
 - 1) Operation of AJCE List
 - 2) Requirements and Application of registration
 - 3) Confirmation of applicants for registration
 - 4) Term of registration
 - 5) Renewal of registration (re-registration)
 - 6) Others : Fees, Deletion, Disclaimer, miscellaneous provisions, Revision and Repeal

FIDIC Contracts Training Workshop 2012 10

 **3. Adjudicator Registration Procedural Rules**

- 1) New Registration (after passing AAW)**
 - Issue Certificate of Qualification (COQ)
 - Submit application form
(Copy of COQ, CV, Letter of Pledge, Letter of consent)
 - Examination of application form
 - Payment of registration fee
 - Issue Registration Certificate
 - Announce adjudicator on AJCE List (Max. 3years)
- 2) Re-registration (renewal)**
 - Submit application form
(Record of CPD, Copy of COQ, Letter of Pledge, Letter of consent)
 - Follow the same procedure as New Registration
 - Remedy for those who did not re-register

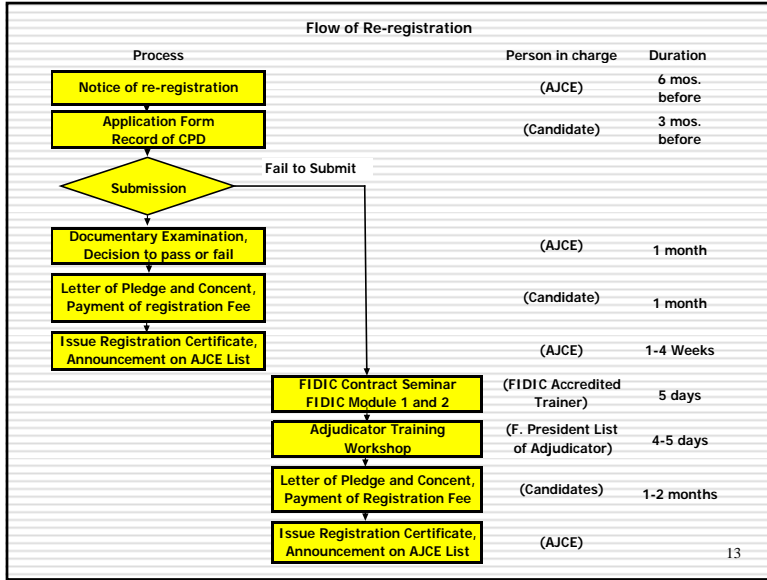
FIDIC Contracts Training Workshop 2012 11

 **Overall Procedure**

```

graph TD
    A[FIDIC Module 1 and 2 (Nov/2010)] --> B[Examination of Qualification (Oct/2010)]
    C[Application (Sep/2010)] --> B
    B --> D[Adjudicator Training Workshop (ATW) (Dec/2010)]
    D --> E[Adjudicator Assessment Workshop (AAW) (Dec/2010)]
    E --> F[Registration]
    F --> G[Establishment of AJCE National List (May/2011)]
    
```

FIDIC Contracts Training Workshop 2012 12



4. Training and Assessment Programs

Trainers/ Assessors

	Program	Duration	Trainer/Assessor
1	Module 1 and 2	5 days	Mr. James Perry Mr. Geoff Smith
2	Training Workshop	4 days	Mr. Gordon Jaynes Mr. Richard Appuhn Prof. Toshihiko Omoto
3	Assessment Workshop	3 days	Mr. Volker Jurowich Dr. Götz-Sebastian Hök Prof. Toshihiko Omoto

FIDIC Contracts Training Workshop 2012

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4. Training and Assessment Programs

FIDIC Module 1 and 2

Module 1: Practical Use of the FIDIC Contracts		
Day 1	FIDIC Contract Documents: Introduction and Principle Responsibilities of the Main Parties	
Day 2	The Management of Projects Financial Clauses and Procedures Risk, Force Majeur and Termination	
Day 3	FIDIC Contract Documents and JICA ODA Loan Projects FIDIC Contract Documents and Dispute Resolution	
Module 2: Management of Claims and Resolution of Disputes		
	Introduction Managing Variations	
Day 4	The Management of Claims Notice and Claims Procedures Contractor's Claims Sub-clause 20.1 Claims for Delay Claims for Additional Payment Employer's Financial Claims	
Day 5	The Resolution of Disputes Dispute adjudication Boards (DABs) The JICA Alternative Particular Conditions Workshop Exercise The Resolution of Disputes Arbitration Claims	

FIDIC Contracts Training Workshop 2012

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4. Training and Assessment Programs

Adjudicator Training Workshop (ATW)

	AM	Introduction of Trainers/Trainees
		Introduction to Dispute Board
Day 1	PM	Setting up a DB DB Costs Prepare a draft CV (Evening Homework)
	AM	Operation of Dispute Board (1) Operation of Dispute Board (2)
Day 2	PM	Operation of Dispute Board (3) Preparation for Mock Hearing (Evening Homework)
	AM	Operation of Dispute Board (4) Operation of Dispute Board (5)
Day 3	PM	After the Decision Preparation for Drafting of mock decision (Evening Homework)
Day 4	AM	Review and discussions of draft "Decisions"
	PM	Review and discussions of draft "Decisions"

FIDIC Contracts Training Workshop 2012

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4. Training and Assessment Programs

Adjudicator Assessment Workshop (AAW)


Day 1	AM	Introduction of the Assessment Panel and Assessers DAB organisation
	PM	Multiple Choice Test Case Studies
Day 2	AM	Collection of Case Study Multiple Choice Test Review Procedural Rules: Q & A
	PM	Case Study Case Study
Day 3	AM	Collection of Case Study Oral examinations
	PM	Individual interviews

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5. AJCE List



Open to Public:
May 2011



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National Lists in the World

- Germany (VBI) [List](#)
- Hungary (AHCEA) [List](#)
- Philippines(CECOPHIL) in formation [Contact](#)
- Poland (SIDR) [List](#)
- Romania (ARIC): Contact [Bogdan Oprea](#)
- South Africa (SCAACE) [List Course](#)
- UK (ACE) in formation [Course](#)
- Japan (AJCE) [List](#)

(Source : FIDIC Website)

FIDIC Contracts Training Workshop 2012 19

Photographs






FIDIC Contracts Training Workshop 2012 20

 **Photographs**

FIDIC Contracts Training Workshop 2012 21



Thank you for your attention !

FIDIC Contracts Training Workshop 2012



FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS
INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS
INTERNATIONALE VEREINIGUNG BERATENDER INGENIEURE
FEDERACION INTERNACIONAL DE INGENIEROS CONSULTORES



This is to certify that

Mr. XXXX XXXXX

successfully completed training course on

Practical Use of the FIDIC Contract (Module 1)
and

Management of Claim and the Resolution of Dispute (Module 2)

at

the FIDIC Contracts Training Workshop,
from August 13th to 17th, 2012 in Manila, Philippines

sponsored by the Japan International Cooperation Agency (JICA) and
organized by Nippon Koei Co., Ltd. and the Association of Japanese
Consulting Engineers (AJCE).

Geoffrey Smith
Accredited Trainer, FIDIC

Mr. Hiroto Mitsugi
Senior Representative,
JICA Philippines Office

3. Questions about Module 2

Q1. Was the module easy to understand?

extremely very much fair not very much not at all

Q2. Was the module useful for your future?

extremely very much fair not very much not at all

Q3. Will the knowledge gained in the module help to enhance your capacity?

extremely very much fair not very much not at all

Q4. Were the seminar materials enough to explain the contents?

extremely very much fair not very much not at all

Q5. Do you find the duration of the program appropriate?

long appropriate short

Q6. Were you able to get satisfactory advice/answer by lecturers when you raise any question?

← Yes No →
 5 4 3 2 1

Q7. Do you think this module is useful for the person who wishes to serve as a Dispute Board Adjudicator in future?

extremely very much fair not very much not at all

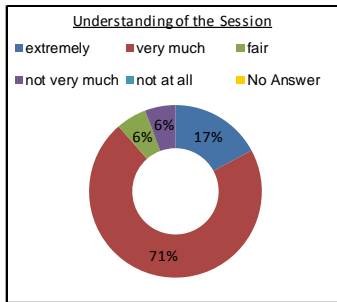
Q8. Please give your comments/suggestion to improve this module.

Thank you very much for taking your time.

Result of Questionnaire Survey for Module 1

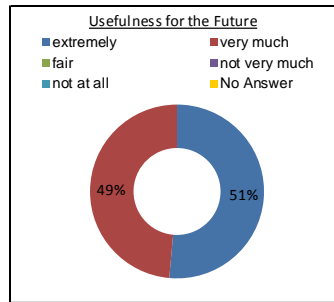
Q1. Was the module easy to understand?

Answer	Res No.	
extremely	6	17%
very much	25	71%
fair	2	6%
not very much	2	6%
not at all	0	0%
No Answer	0	0%
Total	35	100%



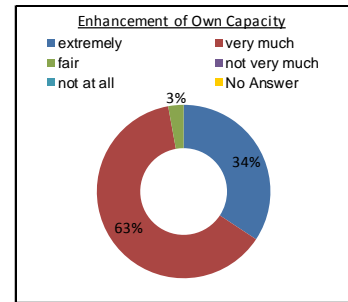
Q2. Was the module useful for your future?

Answer	Res No.	
extremely	18	51%
very much	17	49%
fair	0	0%
not very much	0	0%
not at all	0	0%
No Answer	0	0%
Total	35	100%



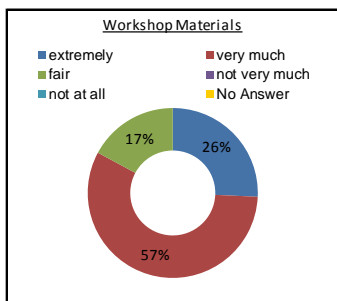
Q3. Will the knowledge gained in the module help to enhance your capacity?

Answer	Res No.	
extremely	12	34%
very much	22	63%
fair	1	3%
not very much	0	0%
not at all	0	0%
No Answer	0	0%
Total	35	100%



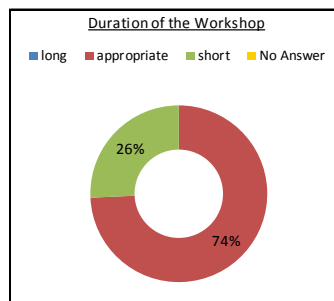
Q4. Were the seminar materials enough to explain the contents?

Answer	Res No.	
extremely	9	26%
very much	20	57%
fair	6	17%
not very much	0	0%
not at all	0	0%
No Answer	0	0%
Total	35	100%



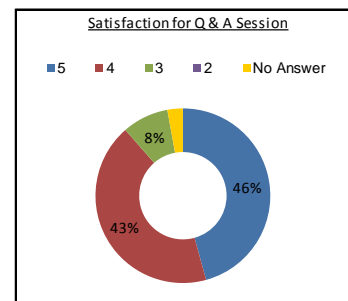
Q5. Do you find the duration of the program appropriate?

Answer	Res No.	
long	0	0%
appropriate	26	74%
short	9	26%
No Answer	0	0%
Total	35	100%



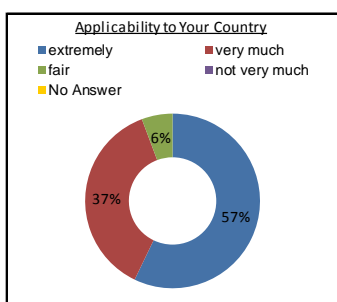
Q6. Were you able to get satisfactory advice/answer by lecturers when you raise any question?

Answer	Res No.	
5	1	46%
4	15	43%
3	3	9%
2	0	0%
1	0	0%
No Answer	1	3%
Total	35	100%



Q7. After you return to your country, are you going to diffuse the knowledge gained in this module in your organization or country?

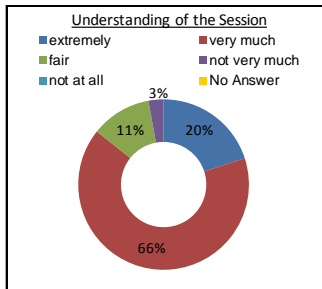
Answer	Res No.	
extremely	20	57%
very much	13	37%
fair	2	6%
not very much	0	0%
not at all	0	0%
No Answer	0	0%
Total	35	100%



Result of Questionnaire Survey for Module 2

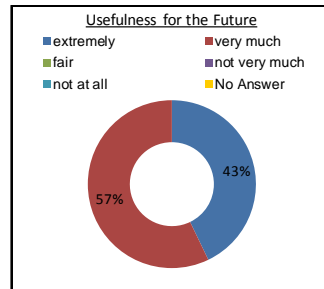
Q1. Was the module easy to understand?

Answer	Res No.	
extremely	7	20%
very much	23	66%
fair	4	11%
not very much	1	3%
not at all	0	0%
No Answer	0	0%
Total	35	100%



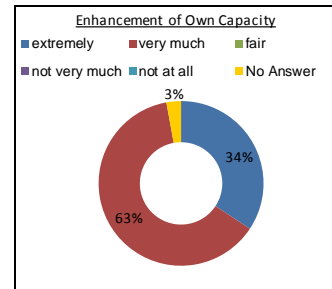
Q2. Was the module useful for your future?

Answer	Res No.	
extremely	15	43%
very much	20	57%
fair	0	0%
not very much	0	0%
not at all	0	0%
No Answer	0	0%
Total	35	100%



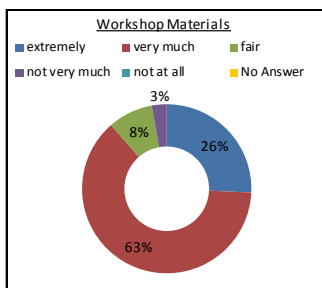
Q3. Will the knowledge gained in the module help to enhance your capacity?

Answer	Res No.	
extremely	12	34%
very much	22	63%
fair	0	0%
not very much	0	0%
not at all	0	0%
No Answer	1	3%
Total	35	100%



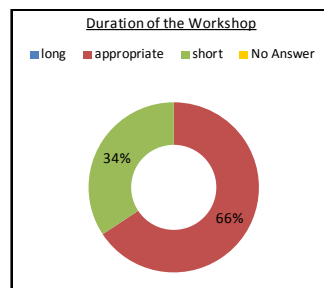
Q4. Were the seminar materials enough to explain the contents?

Answer	Res No.	
extremely	9	26%
very much	22	63%
fair	3	9%
not very much	1	3%
not at all	0	0%
No Answer	0	0%
Total	35	100%



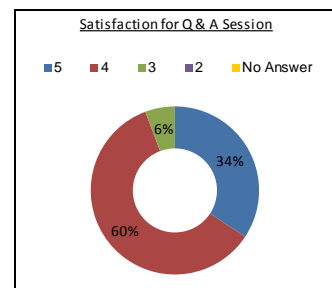
Q5. Do you find the duration of the program appropriate?

Answer	Res No.	
long	0	0%
appropriate	23	66%
short	12	34%
No Answer	0	0%
Total	35	100%



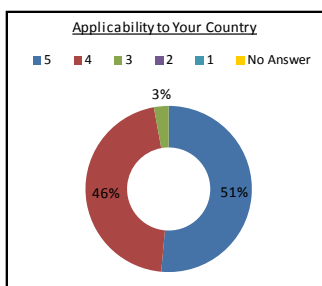
Q6. Were you able to get satisfactory advice/answer by lecturers when you raise any question?

Answer	Res No.	
5	12	34%
4	21	60%
3	2	6%
2	0	0%
1	0	0%
No Answer	0	0%
Total	35	100%



Q7. After you return to your country, are you going to diffuse the knowledge gained in this module in your organization or country?

Answer	Res No.	
5	18	51%
4	16	46%
3	1	3%
2	0	0%
1	0	0%
No Answer	0	0%
Total	35	100%





Dispute Board Adjudicator Training Workshop

1. Date :
29 October (Mon) to 2 November (Fri), 2012

2. Time :
 - Morning Session : 9:00 to 12:00
 - Afternoon Session : 13:00 to 17:00 (Nov. 2 : 13:00 to 15:30)

3. Venue :
Oakwood Premier Manila
17 ADB Avenue,
Ortigas Center Pasig City 1600,
Philippines

4. Trainers :
 - Mr. Gordon L. Jaynes
 - Mr. Richard Appuhn
 - Prof. Dr. Toshihiko Omoto

5. Workshop Materials :
 - 1) JICA DB Training Kit
 - 2) JICA Sample Bidding Documents - Procurement of Works (2009)
 - 3) JICA Dispute Board Manual (2012)

Programme for A Five-Day Training Workshop

AM / PM	Program	In charge	Purpose
Day 1			
Day 1	AM	Registration (8:30 to 9:00 am)	
		Opening Remarks (9:00 -)	Mr. Takashi Ito Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
		Opening Remarks	Mr. Dominic Reyes Aumentado Senior Procurement Specialist, World Bank (Philippines)
		Orientation Introduction of Trainers/Trainees	Yukinobu Hayashi
		Introduction to Dispute Board <ul style="list-style-type: none"> • What is FIDIC? • What is a Dispute Board? • Arbitration Rules <p style="text-align: right;">(Coffee Break / 10:30-10:45)</p>	Gordon Jaynes <ul style="list-style-type: none"> - Review of history / Structure / Current status of FIDIC - Review of history/Concept of DB - Arbitration as the final resort of dispute resolution
12:00-13:00	Lunch		
PM	Setting up a DB <ul style="list-style-type: none"> • Procedure • DB Member's Qualifications • Adjudicator's Lists DB Costs <p style="text-align: right;">(Coffee Break / 15:00-15:15)</p>	Toshihiko Omoto Richard Appuhn	<ul style="list-style-type: none"> - Contractual procedure of setting up a DB, Professional requirements of DB members, application of existing adjudicators lists - Right understanding of Cost components of DB
Evening Home-Work	Questionnaire		<ul style="list-style-type: none"> - To test the comprehension of Day 1.
Day 2			
Day 2	AM	Operation of Dispute Board (1) <ul style="list-style-type: none"> • Site visits • DB meeting 	Toshihiko Omoto <ul style="list-style-type: none"> - Understand and acquire the knowledge and practice of DB function, point out and consider the things to remember at each stage of DB

AM / PM	Program	In charge	Purpose	
	<ul style="list-style-type: none"> Site tour Informal discussion of potential disputes Operation of Dispute Board (2) <ul style="list-style-type: none"> Site visit report Supplying information to DB Members during intervals of Site visits <p style="text-align: right;">(Coffee Break / 10:30-10:45)</p>	Richard Appuhn	<p>operation.</p> <ul style="list-style-type: none"> Understand and acquire the knowledge and practice of DB function, point out and consider the things to remember at each stage of DB operation. 	
12:00-13:00	Lunch			
PM	Operation of Dispute Board (3) <ul style="list-style-type: none"> Referral & Time Limit Written Submissions Hearing(s) Transcripts <p style="text-align: right;">(Coffee Break / 15:00-15:15)</p>	Gordon Jaynes	<ul style="list-style-type: none"> Proper understanding and acquiring knowledge and practice of procedure of referral / hearings / documentation/ transcript 	
Evening Home-Work	Questionnaire		To test the comprehension of Day 2.	
Day 3				
Day 3	AM	Operation of Dispute Board (4) <ul style="list-style-type: none"> DB Decision Purpose DB Decision Structure DB Dissents Ending DB <p style="text-align: right;">(Coffee Break / 10:30-10:45)</p>	Richard Appuhn	<ul style="list-style-type: none"> Learning writing a decision in a proper structure satisfying requirements, what to be done if unanimous decision is not possible?
	12:00-13:00	Lunch		
	PM	After the Decision <ul style="list-style-type: none"> “Amicable Settlement” period Enforceability of DB decision <p style="text-align: right;">(Coffee Break / 15:00-15:15)</p>	Gordon Jaynes	<ul style="list-style-type: none"> After a decision is given, what should be done if either or both parties are not satisfied? Duty to make efforts for amicable settlement? Understanding and acquiring knowledge about enforceability of a DB decision and remedies when the decision is not complied with Review of single issue decisions

AM / PM		Program	In charge	Purpose
	Evening Home-Work	Drafting of Mock Decision		
Day 4				
Day 4	AM	Operation of Dispute Board (5) <ul style="list-style-type: none"> • Mock Hearings by trainers • Mock Hearings by workshop participants <p style="text-align: right;">(Coffee Break / 10:30-10:45)</p>	All	- Understanding and acquiring knowledge and practice: Rules of hearing, role of each participant, proper reaction at a difficult situation
	12:00-13:00	Lunch		
	PM	Individual Interview <p style="text-align: right;">(Coffee Break / 15:00-15:15)</p>	All	
	Evening Home-Work	Questionnaire		- To test the comprehension of Day 4.
Day 5				
Day 5	AM	Trainer' s comments on the draft decision <p style="text-align: right;">(Coffee Break / 10:30-10:45)</p>	All	- Interactive review of draft decision of each participant Assessment of draft decision of each participant
	12:00-13:00	Lunch		
	PM	Questions and Answers	All	
		Award of Completion Certificate (15:00 -15:20)	Mr. Takashi Ito	Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
		Closing Remarks (15:20 -15:30)	Mr. Ignatius Santoso	Director, Central Operations Services Division 1, Central Operation Service Office, Asian Development Bank (ADB)

Profile of Trainers



Mr. Gordon L. Jaynes is a lawyer in private practice, based in England and specialized in contractual aspects of international construction projects. He is Chairman Emeritus of the International Bar Association Committee on International Construction Projects and Founding Chairman of the Inter-Pacific Bar Association of the same name. He served on the Editorial Boards of *The International Construction Law Review* and *Construction Law International* and is an experienced trainer in various countries on all forms of engineering and construction contracts. His experience in international Dispute Boards began in 1994 when he served as: a consultant to The World Bank in establishing its contract provisions for use in such Boards. He was a member of the Task Force which produced the ICC Dispute Board Rules, and a founding member of FIDIC's Assessment Panel for Adjudicators, vetting applicants for entry to the FIDIC President's List of Approved Adjudicators, for service in DABs on contracts using FIDIC Conditions. Gordon has received the DRB Foundation's Al Mathews Award for outstanding service in promoting international use of Dispute Boards. The Award is the Foundation's highest honour. Gordon currently chairs two Dispute Boards in China and Romania.



Mr. Richard Appuhn is a certified FIDIC trainer and adjudicator and serves on its Task Group for the drafting of General Conditions of Subcontract. He has BS and MS degrees in Civil Engineering and Engineering Geology from the University of California, Berkeley, is a registered Civil Engineer and Engineering Geologist in California. He is an arbitrator and adjudicator and has served and is currently serving on Dispute Boards in Romania (Motorway, Infrastructure Rehabilitation and Residential Development Projects), Vietnam (Building Construction), Ethiopia (Road Rehabilitation), Tanzania (Road Rehabilitation), Madagascar (Mineral Port Construction) and Mozambique (Airport Rehabilitation Project). His professional and dispute resolution experience includes the use of the entire Suite of FIDIC Contracts including the FIDIC MDB Harmonized Edition.



Prof. Dr. Toshihiko Omoto is a First Class Civil Engineer in Japan, holding Master's and Doctor's Degrees in Civil Engineering awarded by Kyoto University, Japan, and Master's Degree in Construction Law and Arbitration awarded by King's College, University of London. He has over 35 years experience in the construction industry, including 30 years experience in the international projects. He worked for a major Japanese contractor for 25 years, for 15 years of which, he was involved in resolution of engineering and construction disputes, both by amicable settlement negotiations and by arbitration. In year 2000, he began his independent consultancy, specializing in dispute resolution. He has worked in 25 countries, representing and/or advising owners, contractors and insurers.

In 2006, he became a full time Professor at the Graduate School of Management (MBA) of Kyoto University and after retirement in 2010, he is teaching as a Visiting Professor. He is a Fellow of the Chartered Institute of Arbitrators, UK, and currently serves as a Neutral such as a Dispute Board Member, an arbitrator and a mediator. He is the Japan Representative of the Dispute Resolution Board Foundation and the Senior Advisor of the Japan Chapter of the Chartered Institute of Arbitrators. He regularly lectures on construction law and dispute resolution at several universities in Japan. He also authors frequently papers for publication in professional and academic journals.



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INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS
INTERNATIONALE VEREINIGUNG BERATENDER INGENIEURE
FEDERACION INTERNACIONAL DE INGENIEROS CONSULTORES



This is to certify that

Mr. XXXX XXXX

has successfully completed

Dispute Board Adjudicator Training Workshop

held

from October 29 to November 2, 2012 in Manila, Philippines,
organized by the Japan International Cooperation Agency (JICA).

Richard Appuhn
FIDIC President's List
Dispute Adjudicator

Gordon L. Jaynes
FIDIC President's List
Dispute Adjudicator

Toshihiko Omoto
FIDIC President's List
Dispute Adjudicator

Mr. Takashi Ito
Director of Loan Procurement Policy
and Supervision Division,
Financing Facilitation and Procurement
Supervision Department, JICA



Dispute Board Adjudicator Assessment Workshop

1. Date :
5 November (Mon) to 7 November (Wed), 2012

2. Time :
 - Morning Session : 9:00 to 13:00
 - Afternoon Session : 14:00 to 17:00

3. Venue :
Oakwood Premier Manila
17 ADB Avenue,
Ortigas Center Pasig City 1600,
Philippines

4. Assessment Panel :
 - Dipl.-Ing. Volker Jurowich
 - Dr. Götz-Sebastian Hök
 - Prof. Dr. Toshihiko Omoto

5. Workshop Materials :
 - 1) JICA DB Training Kit
 - 2) JICA Sample Bidding Documents - Procurement of Works (2009)
 - 3) JICA Dispute Board Manual (2012)

Programme for A Three-Day Assessment Workshop

Date	Time	Topics		Case Study
Day 1	8:30 –9:00	Registration		
	9:00 – 9:05	Opening Remarks	Mr. Takashi Ito	Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
	9:05 – 9:15	Orientation	Mr. Yukinobu Hayashi	Team Leader, JICA Study Team
	09:15	Welcome & Introduction of the Assessment Panel and Assesseees		
	10:30	DAB organisation		Case Study 1
	13:00	Lunch		
	14:00	Multiple Choice Test		
		Case Studies		Overnighter: Case Study 2
Day 2	09.00	Collection of Case Study		
	09.15	Multiple Choice Test Review & Questions		
	11.30	Procedural Rules: Questions + Answers Delay Analysis		
	13.00	Lunch		
	14.00	Case Study		Case Study 3
		Case Study		Overnighter: Case Study 4
Day 3	09.00	Collection of Case Study		
	09.15	Oral examinations + short scenario & questions		
	10.30	Individual interviews		
	13.00	Lunch		
	14.00	Individual interviews		
	16.00-16.30	Award of Completion Certificate Closing Remarks	Mr. Takashi Ito	Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA

Coffee Break / 11:00-11:15(morning), 15:30-15:45(afternoon)

Profile of Assessor



Dipl.-Ing. Volker Jurowich is a civil engineer, Technical University, Aachen, Germany. He has been working with a major German international contractor for 35 years, the last 15 of which as an Executive Director. His responsibilities were part of the local business and all of the international business outside of the European Union. Projects under his direct responsibility include major infrastructure works, hydroelectric projects, harbour construction, drill and blast as well as TBM tunnelling and building works. He has experience in dispute resolution by negotiation, by mediation, by dispute boards and by arbitration. Volker is now working as a contract consultant and in dispute resolution. He was member of the Executive Board of Directors of the DRBF from October 2006 to May 2010, President of DRBF Region 2 from October 2008 to May 2010 and is now President of its Executive Board. He holds the diploma in International Commercial Arbitration from Queen Mary and Westfield College, University of London. He served on the ICC task force for Dispute Boards. Volker has served on a DAB in South Africa and as Chairman of a Panel of Experts in Sudan. Presently Volker chairs four DBs on road projects in Kazakhstan and one DAB on a road project in Tanzania.

As consultant Volker chairs a Panel of Experts on a major hydroelectric project in Ecuador. He is lecturer at the University of Stuttgart on international construction. Volker is listed on the FIDIC President's List of Approved Adjudicators. He is Chairman of the Assessment Panel for the German National List of FIDIC Adjudicators.



Dr. Götz-Sebastian Hök graduated in Law from Göttingen University and is a German solicitor registered at the Berlin Bar. He has extensive international project and commercial experience gained while living and working in Europe, the Middle East, Africa and Asia. For the past 20 years he has been partner and senior partner of Dr. Hök, Stieglmeier & Kollegen. Dr. Hök is acting as arbitrator, adjudicator and legal counsel and also an accredited FIDIC trainer. He is a lecturer at Berlin University of Applied Science for construction contract management law. Since 2009 he is a FIDIC listed Adjudicator. In 2011 he was appointed as the Legal Advisor of the FIDIC Task Group Design & Build Subcontract and FIDIC Task Group ODB. He is also a Member of the FIDIC Assessment Panel for Trainer Accreditation. Dr. Hök has written various books and articles in French, English and German on FIDIC forms of contract. He is a co-author of the book FIDIC for Practitioners and member of the German Dispute Adjudication Assessment Panel and former past Chairman of Eurojuris Commission International Litigation. Sebastian has served on DABs in Bosnia, Germany, Mali and Tanzania and as mediator in Palestine.



Prof. Dr. Toshihiko Omoto Toshihiko Omoto is a First Class Civil Engineer in Japan, holding Master's and Doctor's Degrees in Civil Engineering awarded by Kyoto University, Japan, and Master's Degree in Construction Law and Arbitration awarded by King's College, University of London. He has over 35 years experience in the construction industry, including 30 years experience in the international projects. He worked for a major Japanese contractor for 25 years, for 15 years of which, he was involved in resolution of engineering and construction disputes, both by amicable settlement negotiations and by arbitration. In year 2000, he began his independent consultancy, specializing in dispute resolution. He has worked in 25 countries, representing and/or advising owners, contractors and insurers.

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This is to certify that

Mr. XXXX XXXX

has completed

Dispute Board Adjudicator Assessment Workshop

held

from November 5 to 7, 2012 in Manila, Philippines,
organized by the Japan International Cooperation Agency (JICA).

Götz-Sebastian Hök

FIDIC President's List of
Approved Adjudicator

Volker Jurowich

FIDIC President's List of
Approved Adjudicator

Toshihiko Omoto

FIDIC President's List of
Approved Adjudicator

Mr. Takahiro Sasaki

Chief Representative,
JICA Philippines Office

FIDIC-JICA

Dispute Board Adjudicator Assessment Workshop

Manila, 05 to 07 November 2012

Overview Report of the Assessment Panel

Assessment Panel:

- Prof. Dr. Toshihiko Omoto, Tokyo, Japan
- Dr. Götz-Sebastian Hök, Berlin, Germany
- Dipl.-Ing. Volker Jurowich, Stuttgart, Germany

The Assessment Panel was approved by FIDIC and JICA.

The Panel Members agreed on Mr. Jurowich to act as Chairman.

All three Panel Members are listed on the FIDIC President's List of Approved Dispute Adjudicators.

Prof. Omoto is Member of the Assessment Panel for the FIDIC President's List.

Dr. Hök and Mr. Jurowich are Members of the Assessment Panel for the German National List of FIDIC Adjudicators, established by VBI (Verein Beratender Ingenieure, Berlin, Germany), the German Member Association of FIDIC.

Assessment Workshop Format:

The format of the Assessment Workshop was established on the basis of experience gained from executing multiple Assessments for the FIDIC President's List, for the German National List, for the Japanese National List and for the French National List

The basic elements of the Assessment Workshop were:



- One (1) multiple choice test
- Four (4) nos. case studies, two of which as homework to be prepared by the candidates overnight.
- Evaluation of various delay scenarios regarding entitlements for extension of Time for Completion and financial compensation.
- Oral examinations covering: DAB organization, DAB Procedural Rules, understanding of contract clauses, Price Adjustment, Variations, etc.
- Individual Interviews.

The Assessment Workshop is a strenuous exercise for the candidates, as is Dispute Adjudication.

Objective of the Assessment Workshop:

The objective of the Assessment Workshop is to assess the candidates':

- Familiarity on Condition of Contract of FIDIC MDB Harmonised Edition
- Ability of applying condition of contract on claims and to extract potential contract problems
- Ability in writing clear, reasoned and persuasive decisions
- Ability in decision-making (proficiency for adjudication)
- Ability of working under time constraint
- Ability of verbal communication skill with concerned parties
- Ability to interpret contract clauses
- Ability to put given situations into a contractual context
- Understanding of the role of, the rules for and the requirements upon a Dispute Adjudicator
- Ability to identify issues in a dispute
- Understanding of the dispute avoidance priority

Admission of the Candidates:

The selection of candidates was done on the 35 participants in the Modules 1 & 2 Training Seminar which was carried out during 13 and 16 August 2012.

A total of twenty (20) candidates (8 from Philippines, 3 from Indonesia, 7 from Sri Lanka and 2 from Vietnam) were admitted to the Assessment Workshop, out of which fourteen (14) are engineers and six (6) are lawyers.

General Comments:

Dispute Adjudication, as incorporated in the FIDIC Forms of Contracts, is the first tier of a two tier dispute resolution procedure. As such, decisions made by the Adjudicators, will only put an end to the disputes by acceptance of the decisions by all Parties.

It is therefore important that the Adjudicators do not only have the ability to make the right decisions in line with the Contract concluded by the Parties, but also that they are able to make the Parties understand the reasons basis for decisions and at all times are able to demonstrate a conduct of highest standards of ethics and competence.

If that is safeguarded, Dispute Adjudication will continue to be the most efficient and successful dispute resolution process.

With that in mind the Assessment Panel proceeded. The chosen format was well able to establish the candidates' qualifications as Dispute Adjudicators individually.

There was sufficient occasion to check candidates individually on certain issues, when a previous test was not entirely convincing.

Result of the Assessment Workshop:

The Assessment Panel has come to a unanimous decision to qualify as "PASSED" 11 out of 20 candidates. The names of the candidates who passed the assessment will be reported separately.

The Assessment Panel hereby expresses its congratulations to the successful candidates and wishes them success in their future activities.

It is recommended that for a first assignment as Adjudicator service as Single Adjudicator or Panel Chair be avoided.

The Assessment Panel further wishes to encourage the unsuccessful candidates to improve their qualifications through further training and training workshops.

Assessment Workshop Venue:

The Assessment was conducted at the Oakwood Premier Joy-Nostalg Center, Manila,



Philippines. The Assessment Panel was very pleased with the facilities and the services provided which were entirely suitable

Recognition:

The Assessment Panel would like to express its gratitude to FIDIC, JICA and with the execution of the Assessment, and also to the candidates, all of whom are experienced and reputed professionals, for allowing us to assess them.

Assessment Panel for Adjudicators



Prof. Dr. Toshihiko Omoto - Dipl.-Ing. Volker Jurowich - Dr. Götz-Sebastian Hök

Questionnaires on Adjudicator Training Workshop (ATW) & Assessment Workshop (AAW)

Date: _____

Question		Answer and Comments		
Your Name:				
Motivation	Why did you apply to TW and AW?			
	Would you have applied if TW & AW had cost you, say, 2,000 Euro in total?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	if No, how much is affordable cost for you?
	Do you want to apply to FIDIC President's List of Approved Dispute Adjudicators?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Please specify the reason.
Availability	Are you available if you are appointed as a DB member at this moment?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, when will you be available?
Training and Training Kit	Is the Kit good for self study?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.

Date: .

Question		Answer and Comments		
	Is the combination of the training and the kit good?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.
	Is Training Workshop good for users of DB?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.
	Is Training Workshop good for training of DB adjudicators?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.
	Was TW difficult to follow?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If Yes, please specify the reason.
	Are you confident that you can serve as a DB member after this training?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.

Date: .

Question		Answer and Comments
	What do you suggest to improve Training Kit?	
	What do you suggest to improve TW?	

Questionnaires on Adjudicator Training Workshop (ATW) & Assessment Workshop (AAW)

Appendix-5.4

Date: .

Question		Answer and Comments		
Assessment Workshop	Was TW suitable preparatory course for AAW?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If No, please specify the reason.
	Was AAW fair to follow up TW?			
	Was AAW difficult to follow?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	If Yes, please specify the reason.
	What do you suggest to improve AAW?			
	Will you apply again if you fail the assessment?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Please specify the reason.

Result of Questionnaire Survey for ATW/AAW (2)

Question		Comments
Name (if you do not mind)		
Motivation	Why did you apply to TW and AW?	<ul style="list-style-type: none"> * To gain knowledge on the workings of DBs and skills as DB member / Adjudicator. * I have been advocating of FIDIC/DRBF to conduct this training & assessment to become an accredited DAB/DB since 2008. * To be an accredited adjudicator in a Dispute Board; in the FIDIC President's list and National list. * ADR is my professional advocacy. I am an arbitrator and mediator. To be an adjudicator is the next step. * I want to be accredited/listed as a Philippine dispute adjudicator. * As a lawyer involved in construction & construction disputes (at arbitration), I often found it troublesome that Projects got stalled and relationships broken for reasons that could have been resolved at a much earlier date. This experience prompts me to consider ways and means to get involved in a construction project before positions are entrenched. Having taken up and advocated alternative dispute resolution mechanisms as part of my legal practice including mediation, this progression to being an adjudicator is a natural one. I get to decide disputes early but use skills of persuasion and negotiation to even avoid them. * I would like to become an adjudicator for construction projects and would like to receive training and be accredited. * These workshop & Assessment prepare me to be an adjudicator. * Because I want to be and Adjudicator in my country. * To be listed in FIDIC National List and also to improve my knowledge in contract Administration & Dispute Resolution. * I intend to practice in the field of Dispute Resolution associated with major Engineering projects in home and abroad. Therefore this formal training is required. * To get a good knowledge about "FIDIC" condition of contracts, And to join with the National Adjudicator team if selected. * To be a Full Time DB & Arbitrator which I do now as a part time work in addition to be a Resident Engineer. * To be trained and assessed in adjudicators, so that I could be a better adjudicator and better prepared to serve in Dispute Board. * Had been a consultant Engineer for 34 years and interested to be a learned adjudicator. * I believe that I have the required competencies and skills to become an adjudicator and therefore applied to attend this and act with the intension of becoming and adjudicator one day. * I want to be a adjudicator in the future and, I want to establish the National List of Adjudicator in Vietnam as the purpose of Organizers. * I want to be selected as an adjudicator in Vietnam to involve in DB operation in the future. There seem more disputes raised in the construction recently and the role of DB is important to avoid disputes.

Result of Questionnaire Survey for ATW/AAW (2)

Question				Comments
	Would you have applied if TW & AW had cost you, say, 2,000 Euro in total?	<input type="checkbox"/> Yes 9	<input type="checkbox"/> No 11	if No, how much is affordable cost for you? * 500 USD. (2) * 500 Euro. (2) * 700 Euro. * 1,000 USD. * 1,000 Euro.(2) * 2,000Euro is quite reasonable for a two past expert training course. * No. Because it is so high with my income in Vietnam. * No. For more reasonable price to my income.
	Do you want to apply to FIDIC President's List of Approved Dispute Adjudicators?	<input type="checkbox"/> Yes 17	<input type="checkbox"/> No 2	Please specify the reason. * Yes. It's the List FIDIC users want to be in. * No. At this time, I believe I need to build my experience as an adjudicator before attempting to be included in the President's lists. Hopefully, in the future, when I have more DB experience. * Yes. To make myself more marketable and getting more experiences in international projects. * Yes. Because if I have listing, I can get opportunity to be a DB. * Yes. I intend to be highly and fully qualified as an Adjudicator and it will help in this regard. * Yes. To share my experience in the engineering dispute solution events. And to learn and improve my knowledge willing with experts. * Yes. If cost is affordable, no extensive training is involved. * Yes. There is only 1 president list member for this part of the world, while it was a proportionally lower populate and economic growth & hence projects. * Yes. Infinite goal of mine is to apply and become and adjudicator in the FIDIC President List. * Yes. In case the Adjudicator National List established because the Adjudicators grown abroad would spend more expenses.
Availability	Are you available if you are appointed as a DB member at this moment?	<input type="checkbox"/> Yes 19	<input type="checkbox"/> No 1	If No, when will you be available? * Yes. I am available to serve as DB, once accredited at this moment. * Yes. Beginning December 2012. * Yes. From middle next year (2013). * No. My contract is four or more years, therefore I will.
Training and Training Kit	Is the Kit good for self study?	<input type="checkbox"/> Yes 19	<input type="checkbox"/> No 1	If No, please specify the reason. * Yes. Yes, my good and basically consolidated as a Kit them after the training. * Yes. Excellent reference materials, especially JICA DB Manual. * No. The information does not think in without a live and inter-active component. * Yes. Very useful.
	Is the combination of the training and the kit good?	<input type="checkbox"/> Yes 20	<input type="checkbox"/> No 0	If No, please specify the reason. * Yes. Very good since we were able to use as core reference with the lecture * Yes. Please include videos, please. * No. But only some sessions were effective and involving

Result of Questionnaire Survey for ATW/AAW (2)

Question				Comments
	Is Training Workshop good for users of DB?	<input type="checkbox"/> Yes 19	<input type="checkbox"/> No 1	If No, please specify the reason. * Yes. However the Training Workshop should be more focus to be claims a Contractor and Engineer and its disputed DB * Yes. Very much. I learned a lot through course, too!
	Is Training Workshop good for training of DB adjudicators?	<input type="checkbox"/> Yes 20	<input type="checkbox"/> No 0	If No, please specify the reason. * Yes. Very effective. * Yes, of course.
	Was TW difficult to follow?	<input type="checkbox"/> Yes 3	<input type="checkbox"/> No 17	If Yes, please specify the reason. * Yes. At first yes, but after the 1st day it getting better. * No. It was quite interactive and not boring because the three trainers took turns speaking on different topics. * Yes. Due to pressure of time and homework, anyway I have tried to manage and overcome.
	Are you confident that you can serve as a DB member after this training?	<input type="checkbox"/> Yes 19	<input type="checkbox"/> No 1	If No, please specify the reason. * Yes. Yes, but on the safe side, it could be best to first seat as member of DB (3 Person DB) * Yes. With other experienced DB members only. * Yes. I try to develop confidence to be a sole member after this.

Result of Questionnaire Survey for ATW/AAW (2)

Question		Comments
	What do you suggest to improve Training Kit?	<ul style="list-style-type: none"> * Printing should provide sufficient space on the right hand corner of the pages for the participants to make their marginal notes on key points of the material / lecture. * The kit is sufficient enough for training of future DB. * Include complete file folder of the whole FIDIC color series. * Include a sample agenda. * Include a sample version which is longer and more formal form. The present sample will be the short form. * Include an FAQ of the possible problems and issues encountered during the operation of the DB. * Use more pictures of DB in action, especially JICA projects. * Maybe a set of Test Questions can be provided to check readers comprehension of each topic or segment. * To improve the training kit, I would suggest adding more “practical exercises” – exercises that would allow the DB trainees to appreciate how a DB operates “in reality”. Also, when and if possible, to add samples of decisions, site visit reports and “transcripts” of hearings or site meetings. This would give us a feel of how DB adjudication is truly like. Although nothing beats the mock hearing, the “read” of such events would help. * For the Sample Bidding Documents, (1) the procedural rules on pp. 274-275 should be numbered (Clauses 1-9), and (2) there should be an index of sub-clauses included (1). If possible, the lit should also include materials or other or more information about the other FIDIC contracts, The kit focused on the Pink Book. * Give more samples with the success case and unsuccessful case. * Case study should be given before start the training, so they can read prior to TW. * Add few more case studies together or separately. * If possible, please provide summary copies of other FIDIC versions. * To my knowledge, the “Training Kit” has sufficient material. * Include other FIDIC Editions yellow etc. also in application as done for MDB harmonized edition. * The Training Kit to have more information on the other form of contract such as yellow, silver and gold bodies. * It is already well planned. Anyhow we suggest that if the time span is increased, it would have been easier to absorb. * More samples, More case studies with answers from teachers. * Better presentation with wording divided into graph and bullet points. * More applicable case study should be presented with clear presentation in English.

Result of Questionnaire Survey for ATW/AAW (2)

Question		Comments
	What do you suggest to improve TW?	<ul style="list-style-type: none"> * Provide more case studies on actual DB Cases (successful or not). Participants are specially interested on how DB address or come out of a difficult situation when parties get into heated arguments. * We should be more interested and helpful if the trainers will give more example of difficulties they encountered as DB and how they were able to handle. We need more of "Lesson learned" * Provide time during the workshop for trainees to work on take home assignment to reduce the work at night. Early dismissal is OK if there is home assignment. * Reduce the intimidation by the trainers. The DB is supported to be a proactive, persuasive team member, but the DB trainers are too stiff and formal. They should model the DB as effective mediators and facilitators, not merely experts and old men. * The facts of some exercises are sketchy and bare. Some are one-sided and could be more balanced so that the conflicting facts and arguments are more clearly contrasted. * The training workshop was an intense experience. As I had to go to work in addition to the training, I was too tired most of the time. I suggest that the participants be first informed of the schedule requirements so they can fix their schedules accordingly and focus on the TW. Also. more mock hearings with fixed term sheets for every participant (one for DB, one for engineer, Employer and Contractor) would help. These fixed term sheets (which need not be uniform for all "personalities") would prevent the participants from "inventing" facts that benefit their positions. This is done in negotiations & mediation workshops I have attended. Lastly, if the TW may be expanded to cover more days to add more practical exercises especially mock hearings and site meetings. it would be helpful. * More time should be allotted to the training workshop to enable the participants to do the assignments and group work and to have more interaction with the trainers. * It appears that the AW assessed us not only on the red book but also the other books. * Create the teacher for local expert and used local language. After that improve using foreign language (English prefer). * In general OK, utilizing the well known expert. * An assessment of the participants before commencement so that more attention can be paid to weaken areas. After a discussion with the participants the trainers should summarize and give clear guidance on the issue. * Little more time for the home works pretended. * TW is reasonably arranged and well organized. * The TW should have more time for the other forms of contracts, with further explanation of differences of the contracts, and differences in DB procedure. * It was good. * More time for AAW. * More applicable case study should be presented in English.

Result of Questionnaire Survey for ATW/AAW (2)

Question				Comments
Assessment Workshop	Was TW suitable preparatory course for AW?	<input type="checkbox"/> Yes 20	<input type="checkbox"/> No 0	If No, please specify the reason. * Yes. But, please include a segment on the other FIDIC Books also, and a table of comparison of the differences of each. * Yes. But, they should be more training on the use of other FIDIC contracts. * Yes. But there were some gaps especially related to books other than Red Book.
	Was AW fair to follow up TW?			* Yes. What was learned in the training is still fresh in the manual. * Yes. Yes, of course. It is also good that the assessors are different from the trainers. * Yes. It provided a good take off point on both the substantive procedural, and practical concepts of adjudication. * I think so. * As a personal experience, the assessment was not what I thought it would be. As emphasis was on the pink book, it was a surprise that the AW covered other books as well. Nevertheless, other than that, the AW was fair. * It was a benefit to us to have a TW before the AW. The TW helped us prepare for situation concerning the DAB and gave us a good understanding of the Pink book. * Yes. Again there were subtle difference between the views of trainers and assessors. * Yes. But time allocated forward not sufficient in home work events. * Sometimes the trainers give different view from AW lecturer. * Yes, because the AW will help the assessor to assess the qualified committees.
	Was AW difficult to follow?	<input type="checkbox"/> Yes 6	<input type="checkbox"/> No 14	If Yes, please specify the reason. * No. It was definitely tough. * No. But there is too much to do in short a time. The quality of the drafts could have improved with additional time. * Yes. Some of the questions were difficult to follow but it gives "That is life!". * Yes. It is tough but can manage. I think it gave a big experience. * Yes. Different accent difficult often microphone was not used. * Yes. We had to gather lot of knowledge in a short period. * No. It is given with pressure and exercise.

Result of Questionnaire Survey for ATW/AAW (2)

Question				Comments
	What do you suggest to improve AW?			<ul style="list-style-type: none"> * Give more time to prepare the case studies. * This is suggested if the local resident participants be also in Live-in status so they can focus on this time on the after class homework. * Provide more time for homework by early dismissal or have part of the work be done during the day. * Maybe make a 5 day course instead of 3 day. * The AW was grueling if only because we had too much to do with so little time. The physical exhaustion may thus prevent participants from being their best. If the time allocation is lengthened, perhaps, then the AW may better to assess each participant's abilities. * More time should be allotted to prepare for the decision especially for problems concerning multiple referrals. * More time should be allotted to answer the multiple questions if the participants are expected to provide reasons for their answers. The choices are not clear cut and may require the participants to provide reasons for their answers. Most of the multiple questions do not deal with situation where the answer is clear cut and the answers / choices are not also specific. For this reason, it is required to provide explanations. * Provide solutions to case studies for us to learn. * No, suggestion the AW given now is enough. * Q&A should be prepared in printed, not by writing in white board. Difficult to follow. * Some involvement of trainers in the assessment. * I think it is OK. Good it little more time is available. * Found some differences in opinions of AW and ATW. * AW is too hectic. * AW can have discussion on the case studies after the candidates have expand to it, with time to able question on case study as received. * It is already well planned. * The time need to extend one or two more days. * The multiple choice questions test is quite hard and interesting. The EOT exercise is interesting.

Result of Questionnaire Survey for ATW/AAW (2)

Question				Comments
	Will you apply again if you fail the assessment?	<input type="checkbox"/> Yes 17	<input type="checkbox"/> No 2	Please specify the reason. * No. Another round of that workshop & assessment may no longer be good to my health. Pressure is too much. * Yes. I have been advocating the use of DB in the country and I want to be on an active part on a dispute avoidance advocator. * Yes. After the first assessment, I will have heard already how to prepare to pass the assessment. * Yes. I think I will pass the second time. I have learned so much and it would be a waste if I would not reapply. * Yes. If the reason is no due to my personality which I cannot change, lack of skill or knowledge can be corrected by more education and training. * Yes. Because I will be a Adjudicator in my country. * Yes. I earnestly want to be involved in Dispute resolution. * Yes. If costs are affordable only when no sponsorship is available. * Yes. I am like to join with the adjudication team in the sector of DB's. * Yes. But I hope I will not fail. * Yes. I eager to be a National Adjudicator for FIDIC. * No. The content I absorbed from the courses were sufficient. * Yes. I want to complete AW. But I wonder about the financial resources.

FIDIC Contracts Training Workshop (Module 1 and 2)



Opening Address by Mr S. Sakata, JICA



Opening Address by Mr Ignatius Santoso, ADB



Lecture by Mr Geoffrey Smith



Lecture by Mr Y. Hayashi



Lecture by Mr Y. Yamashita



Individual Interview



Workshop Overview



Paper Examination



Closing Address by Mr H Mitsugi,
JICA Philippines Office



Award of Completion Certificate



Workshop Overview



Group Photograph

Adjudicator Training Workshop (ATW)



Opening Address by Mr. T. Ito, JICA



Opening Address by Mr Dominic Reyes Aumentado, World Bank



Lecture by Mr Gordon Jaynes



Lecture by Mr Richard Appuhn



Lecture by Prof. T. Omoto



Mock Hearing by Trainers



Mock Hearing by Trainees



Mock Hearing by Trainees



Individual Interview



Individual Interview



Closing Address by Mr Ignatius Santoso, ADB



Group Photograph

Adjudicator Assessment Workshop (AAW)



Session by Mr Volker Jurowich



Oral Examination by Dr Götz-Sebastian Hök



Session by Prof. T. Omoto



Individual Interview



Closing Address by Mr T. Ito, JICA



Group Photograph after AAW