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ICE Learned Event
Managing your FIDIC Contract
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• **Yellow Book 1999** – Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and for Building and Engineering Works Designed by the Contractor (first Ed 1999).

• **Silver Book 1999** – Conditions of Contract for EPC/Turn Key Projects (first Ed 1999).

• **Blue/Green Book “Dredging Form”** – Form of Contract for Dredging and Reclamation Works (first Ed 2006).


• **Pink Book “MDB Form”** - Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition) for Building and Engineer Works Designed by the Employer (Second Ed, 2006 and Third Ed 2010).

• **Red Book Subcontractor** – Conditions of Subcontractor for Construction for Building and Engineering Works Designed by the Employer (first Ed 2011).
Current FIDIC Agreements

• **White Book** – Client – Consultant Module Services Agreement (fourth Ed 2006).
• **Sub-Consultancy Agreement** (first Ed 1992).
• **JV (Consortium) Agreement** (first Ed 1999). Note this is for a Consultant JV not a Contractor’s JV.
• **Module Representative Agreement** (first Ed 2013).
FIDIC Guidance and Published Amendments

- FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract (1 April 2013).
Sequence of principle events under the FIDIC Contracts

**Typical sequence of Principal Events during Contracts for Construction**

1. The Time for Completion is to be stated (in the Appendix to Tender) as a number of days, to which is added any extensions of time under Sub-Clause 8.4.
2. In order to indicate the sequence of events, the above diagram is based upon the example of the Contractor failing to comply with Sub-Clause 8.2.
3. The Defects Notification Period is to be stated (in the Appendix to Tender) as a number of days, to which is added any extensions under Sub-Clause 11.3.
Risk Allocation

- Unforeseeable ground conditions.
- Setting out.
- Design liability.
- Errors in the Employer’s Requirements.
• FIDIC Red Book Sub-Clause 4.12 (Yellow Book is the same):

“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”.

• The Contractor gives notice to the Engineer as soon as practicable.
• The Contractor must also issue a Sub-Clause 20.1 Notice in so far as an EoT and/or additional costs are claimed.
• The Contractor is to proceed in accordance with the Sub-Clause 3.5 [Determinations].
• The Engineer may consider and review whether the physical conditions are similar or more favourable than could reasonably have been foreseen when the Contractor submitted the Tender. If so a reduction could be determined. However, there should be no net reduction in the Contract Price.
• Gold Book – same as Red/Yellow except notice is given to the Employer’s Representative.

• Silver Book – is quite different:
  • The Contractor is deemed to have obtained all necessary information as to the risks, contingencies and other circumstances which may influence or affect the Works;
  • The Contractor accepts total responsibility for having foreseen all difficulties in costs successfully completing the Works; and
  • The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.
Setting out information

- FIDIC Red Book – Sub-Clause 4.7 Setting Out:
  - The Contractor sets out the Works based on the “points, lines and levels specified” in the Contract or notified by the Engineer.
  - The Contractor is responsible for any error in the setting out.
  - The Employer is responsible for any errors in the specified or notified reference and items, but the Contractor is to use reasonable efforts to verify their accuracy.
  - If the Contractor suffers delay or cost because “an experienced Contractor would not reasonably have discovered such error and avoided this delay and/or cost” the Contractor must give a Sub-Clause 4.7 Notice and once again the usual Sub-Clause 20.1 Notice.
  - The Engineer is to issue a Sub-Clause 3.5 Determination.
• FIDIC Silver Book – Clause 4.7:

“The Contractor shall set out the Works in relation to the original points, lines and levels of reference specified in the Contract. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works”.
FIDIC Yellow Book – Sub-Clause 5.1 General Design Obligations:

- The Contractor is to carry out and be responsible for the design of the Works as if prepared by qualified Engineers who comply with any criteria set out in the Employer’s Requirements.
- The Contractor warrants that the designers and design subcontractors have experience and the capability for the design.
- The Contractor is to give notice to the Engineer of any error, fault or other defect found in the Employer’s Requirements.
- The Engineer then determines whether a Sub-Clause 13 [Variations and Adjustments] is required by considering if an experienced Contractor exercising due care would have discovered the error, fault or other defect when examining the Site or the ERs before submitting the Tender.
FIDIC Silver Book – Sub-Clause 5.1:

“The Contractor shall be deemed to have scrutinised, prior to the Base Date, the Employer’s Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy of such Employer’s Requirements (including design criteria and calculations), except as stated below. The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer’s Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information, except as stated below. Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from his responsibility for the design and execution of the Works.
However, the Employer shall be responsible for the correctness of the following portions of the Employer’s Requirements and of the following data and information provided by (or on behalf of) the Employer:

(a) Portions, data and information which are stated in the Contract as being immutable or the responsibility of the Employer.

(b) Definitions of intended purposes of the Works or any part thereof.

(c) Criteria for the testing and performance of the Completed Works, and

(d) Portions, data and information which cannot be verified by the Contractor, except as otherwise stated in the Contract.”
The Role of the Engineer and Employer’s Representative

• Red and Yellow Book:

“Engineer means the person appointed by the Employer to act as the Engineer for the purposes of the Contract …”

• Silver Book (Sub-Clause 1.1.2.4):

“Employer’s Representative means the person named by the Employer in the Contract or appointed from time to time … who acts on behalf of the Employer …”

• Gold Book – Employer’s Representative (Sub-Clause 1.1.35).
The Engineer – under the Red Book (Clause 3)

- The Engineer is appointed to carry out the role and duties of the Engineer assigned to him under the Contract.
- The Engineer cannot amend the terms of the Contract.
- If the Engineer exercises any authority for which the Employer’s approval is required then deemed approval has been given.
- The Engineer may delegate to suitably qualified assistants.
- Instructions – the Engineer can issue instructions to the Contractor at any time including additional or modified drawings necessary for the execution of the Works. The Contractor must comply, and may only take instructions from the Engineer or a delegated assistant with the appropriate authority.
- If an instruction is a Variation then Clause 13 [Variations and Adjustments] applies.
- If the Employer wants to replace the Engineer, then the Employer is to give the Contractor 42 days’ notice before the intended date of replacement identifying the replacement Engineer. The Contractor may raise reasonable objections (Sub-Clause 3.4).
• A Sub-Clause 3.5 Determination requires the Engineer to:
  • Consult with each Party “in an endeavour to reach agreement”; 
  • In the absence of agreement make a fair determination in accordance with the Contract;
  • Give notice to both Parties of each agreement or determination together with supporting particulars;
  • The Parties are bound by any agreement or determination until revised under Clause 20 [Claims, disputes and Arbitration].
Employer’s Obligations

• Possession (Sub-Clause 2.1):
  • Shall give access to the site;
  • Possession might not be exclusive;
  • As may be required in order to comply with the Sub-Clause 8.3 programme.
• Assist the Contractor to obtain permits, licences or approvals (Sub-Clause 2.2).
• Ensure its employee’s co-operate (Sub-Clause 2.3)
• Provide “reasonable evidence” of financial arrangements (Sub-Clause 2.4).
• Give notice to the Contractor of any claims (Sub-clause 2.5).
• Contractor can request at any time:
  “… reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contractor Price (as estimated at that time) in accordance with Clause 14 [Contractor Price and Payment]”

• Employer must provide “reasonable evidence”.

• Contractor may suspend work on 21 days notice if reasonable evidence is not provided within 28 days (Sub-Clause 16.1).

• Contractor is entitled to an EOT and payment of Costs incurred plus profit (Sub-Clause 16.1, 4th paragraph).

• Must recommence work “as soon as reasonably practical” once reasonable evidence is provided.

• Contractor may terminate on 14 days notice if “reasonable evidence” is not provided within 42 days from the clause 16.1 notice (Sub-Clause 16.2 (a)).
Sub-Clause 2.4 continued…

• On termination (Sub-Clause 16.4 and Sub-Clause 19.6):
  • Performance security returned;
  • Employer must pay for work done;
  • Employer to pay for costs or liabilities “reasonably incurred by the Contractor in the expectation of completing the Works”;
  • Employer to pay demobilisation costs; and
  • Employer to pay loss of profit or other loss or damage caused by the termination.
NH International (Caribbean) Limited v National Insurance Property Development Company

- Construction of a public hospital in Tobago.
- Arbitration, Trinidad & Tobago High Court, Court of Appeal and then Privy Counsel, London.
- Chronology:
  - 3rd September 2014 – 2.4 request issued
  - 29th December 2004 – project administration unit, Ministry of Health, issued letter stating the Cabinet approved additional funding for the project of TT$ 59.1 million
  - 28th April 2005 – Further 2.4 request made
  - 23rd June 2005 – Contractor reduces rate of work
  - 5th July 2005 – Permanent Secretary, Ministry of Health issues letter estimating final costs of TT$ 286,992,070 stating that “without prejudice that funds are available in sum to meet the final cost to completion”
  - 8th July 2005 – Contractor queries meaning of “without prejudice”. Has Cabinet approved funding?
NH International (Caribbean) Limited v National Insurance Property Development Company Continued...

• 23rd September 2005 – Contractor suspends work
• 19th October 2006 – New Permanent Secretary writes stating:
  • Project is of the highest priority
  • The current estimated value of the work is TT$ 224,129,801.99
  • Funds are available from the consolidated fund to pay the Employer, for onward payment to the Contractor
  • Money certified will be paid by the Government
  • Government stands fully behind the project and will meet the contractual financial requirements for completion
• 27th October 2006 – Contractor requests confirmation that Cabinet has approved the funds
• 3rd November 2006 – Contractor issued notice of termination under clause 16.2
Arbitrator concluded that evidence had not been provided, so Contractor entitled to terminate

This was based on evidence that funding for Government projects in Trinidad required cabinet approval

As a result “reasonable evidence” should for Trinidad include some evidence of cabinet approval

Even though the cabinet had approved funding, sufficient reasonable evidence had not been provided to the contractor
Court, Trinidad & Tobago

- **High Court** - **Approved** the arbitrators award
- **Court of Appeal** - **Reversed** the decision at first instance
- CA considered that the errors included:
  - A written assurance from the Government should not have been disregarded
  - Direct mandate from the Government was reasonable evidence
  - Cabinet approval would have been the best evidence, but the assurance came from a relevant person within the Government (the Permanent Secretary) and that was sufficient.
The test in relation to “reasonable evidence” is an objective one. You do not have to meet the Contractor’s subjective expectations.

The Sub-Clause 2.4 notice might have lapsed by the time the contract was terminated (noted by the court but not argued by the parties).

Arbitrator was wrong (error in law) in holding the Employer to the higher sum of TT$ 286 million when the Engineer had certified only TT$ 224 million.
• Arbitrator’s award was partially upheld.
• No error of law. The arbitrator had jurisdiction to consider what “reasonable evidence” was and this was a question of fact not law. The court should not intervene in an arbitrator’s consideration of the facts.
• The Court of Appeal had in reality considered that the arbitrator had applied a higher standard in relation to “reasonable evidence”. The court must not replace the arbitrator’s judgment.
• The Privy Counsel did give some guidance, by approving some of the Court of Appeal’s analysis:
  • A relevant consideration is the wealth and financial ability of the Employer to pay the contract price;
  • Permanent Secretary assurances in writing are reasonable evidence. Reasonable evidence needed only to relate to the probably assessed contract sum, not a higher figure proposed by the Contractor.
Ramifications of *NH International*

- Will Employers delete Sub-Clause 2.4?
- Could Sub-Clause 2.4 be further clarified to identify the meaning of reasonable evidence and how the contract price is to be ascertained at the particular point of time for the purposes of reasonable evidence.
- Is 28 days enough for an Employer?
- Are repeated requests from a contractor unreasonable?
- Must the contractor suspend and terminate promptly in accordance with the clause in case the notice is lapsed?
- How does one objectively assess the documentation provided by the employer?
- What sources of finance might be available in the public domain that could inform both parties about the financial arrangements?
Clause 2.5 – Employer Claims

• Employer considers himself to be entitled to payment “under or in connection with the Contract”

• Employer or Engineer shall give notice and “particulars” to the Contractor

• Notice is not required for payments in relation to electricity, water, gas, employers equipment, free issue materials or services requested by the contractor (Sub-Clause 4.19 & Sub-Clause 4.20)

• Notice to be given, as soon as practical after the Employer became aware of the event or circumstances given rise to the claim.

• Notice extending the defects notifications period must be given before the expiry of that period

• “Particulars” must specify the clause or other basis of the claim and should include substantiation of the amount and extension to which the Employer considers himself entitled
Clause 2.5 – Employer Claims Continued…

- Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination]
- Amount may be deducted from the contract price and payment certificates, but Employer can only set off if Sub-Clause 2.5 mechanism is followed
• Arbitration – Sub-Clause 2.5 is not a condition precedent
• T&T High Court and Court of Appeal – agrees
• Privy Counsel – overturns – Sub-Clause 2.5 is a condition precedent
• Any claims which the employer wishes to raise (whether they are to be relied on as set offs or cross claims) are not to be allowed unless they are subject to Sub-Clause 2.5 notice.
• The notice must be given as soon as practicable.
• Failure to serve a notice might not prevent a claim in abatement (i.e. one that reduces the price due because of the defective or badly completed nature of the work). Note that a notice in relation to abatement is probably still required before completion of the defects notification period.
• Employer’s claims that have not been notified under Sub-Clause 2.5 “must be disallowed” unless they are true abatement claims.
• Notification of Employer’s claims is a condition precedent to recovery and/or set off.
• The notice must be particularised when it is issued.
Sub-Clause 2.5 - Ramifications

• Note the time barring nature of Sub-Clause 2.5.
• Employers and in particular the Engineer must review any claims and issue Sub-Clause 2.5 notices as soon as possible. If in doubt a notice should be issued.
• Employers now need to behave like Contractors in relation to Sub-Clause 20.1 and issue notices, and manage claims and adjustments to the Contract Price as the work proceeds
• Delete Clause 2.5?
• Amend Sub-Clause 2.5 – state that it is not a condition precedent to recovery?
• Amend Sub-Clause 2.5 – identify time periods?
• Amend Sub-Clause 2.5 – set out what particulars are required, perhaps giving a longer period for their submission?
Contractor’s Obligations – Sub-Clause 4

“the Contractor shall design (to the extents specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineers instructions, and shall remedy any defects in the Works.” (Sub-Clause 4.1).

- Deliver performance security to the Employer within 28 days of the Letter of Acceptance (Sub-Clause 4.2).
- Extend the performance certificate until the works have been completed or defects remedied.
- Appoint a contractor’s representative and give them authority (Sub-Clause 4.3).
Contractor’s Obligations Continued…

• Not subcontract the whole of the works (Sub-Clause 4.4). Obtain prior consent from the engineer for subcontractors, and notify the engineer not less than 28 days before the commencement of the subcontractor. All subcontractors should include assignment provisions in the event of termination.

• Cooperate with the Engineer (Sub-Clause 4.6).

• Deemed to be satisfied as to the sufficiency of the accepted contract amount (Sub-Clause 4.11).

• Deemed to be satisfied as to the suitability and availability of the access to the site (sub-Clause 4.15).

• Be responsible for all power, water and other services for the works (Sub-Clause 4.19).

• Issue detailed progress reports (Sub-Clause 4.21).

• Keep unauthorised persons off the site (Sub-Clause 4.22).
• Engineer gives contractor 7 days notice of the commencement date (Sub-Clause 8.1) within 42 days after the Letter of Acceptance.

• Complete by the Time for Completion including passing any Tests on Completion and completing all of the work in the contract (for any section as necessary).

• Delay caused by authorities – if Contractor diligently follows procedures laid down by authorities then any delay or disruption is unforeseeable may be claimed (Sub-Clause 8.5).

• If the rate of progress is slow, the engineer may instruct the Contractor to submit a revised programme to expedite progress and complete within the Time for Completion.
Commencement, EOT and Programme Continued…

• Delay damages – for failure to complete by the Time for Completion. May be subject to a maximum amount set out in the appendices to tender. These are the only damages for delay, other than in the event of termination.

• Suspension of work:
  • Engineer may suspend any time (Sub-Clause 8.8);
  • Contractor due an EOT and payment of any costs;
  • Engineer must issue a Sub-Clause 3.5 determination.

• Prolonged suspension – after 84 days the Contractor may request permission to proceed. If no permission after 28 days the Contractor may give notice to treat the suspension as an omission of the affected works or termination (Sub-Clause 8.11).
Programme – Sub-Clause 8.3

- The Contractor must submit a detailed programme within 28 days of receiving the Notice for Commencement of the works.
- A revised programme should be submitted when a previous programme is inconsistent with actual progress.
- A programme must include:
  - The order in which the Works are to be carried out;
  - Stages for design, submission of Contractor’s documents, procurement, manufacture, delivery of plant, construction, erection and tests on completion;
  - Any stages to be carried out by a nominated subcontractor;
  - The sequence and timing of any inspections and tests;
• A supporting report describing the method which the Contractor intends to adopt, for the major stages as well as the execution of the works, and provide details of the Contractor’s planned resources (number of person etc).

• The Engineer has 21 days to review the programme.

• The Contractor must promptly give notice of “specific probable future events or circumstances which may adversely effect the work, increase the contract price or delay the execution of the work.”

• The Engineer may request the Contractor at any time to provide a revised programme.
EoT – Sub-Clause 8.4

- If the contractor considers himself to an EoT, then he must serve:
  - Sub-Clause 8.4 notice identifying the cause or causes;
  - A Sub-Clause 20.1 [Contractor’s Claims] notice.
- The Engineer may review previous determinations, and may increasing an EoT or may not decrease the total EoT.
EOT Causes – Sub-Clause 8.4

• Causes of an EoT are:
  • A Variation (unless an adjustment to the Time for Completion has been agreed);
  • A substantial change in the quantity of an item;
  • A recognised cause of delay under any of the Conditions;
  • “Exceptionally adverse climatic conditions”;
  • Unforeseeable shortages in availability for personal or Goods caused by epidemic or Government actions;
  • “Any delay, impediment or prevention caused by or attributable to the Employer, the Employer’s Personal or the Employer’s other contractors on the Site.”
Taking Over

• The Contractor may apply for a Taking Over Certificate not earlier than 14 days before the Works will in the Contractor’s opinion be complete (Sub-Clause 10.1).

• The Engineer has 28 days to issue a Taking Over Certificate stating the date on which the Works or section were completed (save any minor defects) or reject the application giving reasons.

• If the Engineer fails to respond within 28 days a Taking Over Certificate is deemed to have been issued on the last day of that period.

• The Engineer may at the sole discretion of the Employer issue a Taking Over Certificate for any part of the permanent works (Sub-Clause 10.2).
• Tests on completion (Sub-Clause 9.1):
  • Contractor gives the Engineer at least 21 days notice of the date of the tests;
  • The Engineer takes account of any use of the Works by the Employer that may have had an impact on tests;
  • Contractor submits a certified report of the results to the Engineer;
  • If the tests on completion are unduly delayed by the Contractor the Engineer may give the Contractor 21 days notice to carry out the test (Sub-Clause 9.2);
  • If the Contractor fails to comply with that notice the Employer’s Personal may proceed with the tests at the risk and cost of the Contractor;
  • If any tests are failed then the Engineer or Contractor may require the fail test to be repeated (Sub-Clause 9.3).
• If the tests fail (on Retesting) the Engineer has an option:
  • Order a repetition of the tests
  • If the failure “deprives the Employer substantially the whole benefit of the Works….” reject the Works….
  • Issue a taking over certificate if the Employer agrees
Payment Events Sequence

14.3 Contractor submits statement to the Engineer

14.6 Engineer issues interim Payment Certificate

14.7 Employer makes the payment to the Contractor

Each of the Monthly (or Otherwise) Interim payments <56d

<28d

The final payment Engineer verifies the Statement, Contractor submits information

<28d

14.11 Contractor submits draft final statement to the Engineer

14.11 Contractor submits Final Statement and the 14.12 discharge

14.13 Engineer issues Final Payment Certificate

<56d

14.7 Employer makes payment

Typical sequence of Payment Events envisaged in Clause 14
Price and Payment

• The Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] (Sub-Clause 14.1)
• If **Bills of Quantities** apply, then it is the correct and actual quantities that are applicable
• An **Advanced Payment** is an interest free loan for mobilisation once the Contractor submits a guarantee (Sub-Clause 14.2)
• Interim payments – Sub-Clause 14.3
• Schedule of payments – Sub-Clause 14.4
• Interim payment certificates – Sub-Clause 14.6
• Payment within 56 days after the engineer receives the statement and supporting documents (Sub-Clause 14.7)
• Delayed payment – finance charges (Sub-Clause 14.8)
• Payment of **retention** – Sub-Clause 14.9
On completion

- Statement at completion – 84 days after taking over the contractor submits a statement at completion and all supporting documents (Sub-Clause 14.10).
- Application for final payment certificate – 56 days after receiving a performance certificate the Contractor submits a draft final statement with supporting documents (Sub-Clause 14.11).
- Discharge – the Contractor confirms the total final statement represents the full and final settlement (Sub-Clause 14.12).
- Issue of final payment certificate – 28 days after receiving the final statement and written discharge the Engineer issues the final payment certificate (Sub-Clause 14.13).
Termination by Employer

• Termination for default (on 14 days notice):
  • Employer issues a Notice to Correct requiring rectification within a reasonable period; and
  • Contractor fails to comply
• If Contractor fails to provide or maintain performance security
• Contractor abandons the Works or demonstrates the intention not to continue
• Without reasonable cause the Contractor fails to commence the works as soon as reasonably practicable
• The Contractor fails to proceed with “due expedition without delay…”
• Contractor subcontracts the whole of the works or assigns without consent
Termination by Employer Continued…

• Employer can terminate immediately if:
  • The contractor becomes bankrupt or insolvent; or
  • Contractor or its personnel, agents or subcontractors give or receive, directly or indirectly a bribe, gift, gratuity, commission etc.

• Termination for convenience – on 28 days notice (Sub-Clause 15.5).
Obrascon Huarte Lain SA v AG Gibraltar (Court of Appeal) June 2015

- Construction of a road and tunnel under the runway at Gibraltar Airport
- Two year contract duration
- Terminated after two and a half years, but only approximately 25% of the work complete
- Interpretation of termination provisions in Sub-Clause 15.1/15.2 (FIDIC 1999)
- Notice requirements under Sub-Clause 20.1
- Liability of the Contractor in respect of information provided by the Employer under Sub-Clause 4.10
“the Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer’s position on the subsurface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employers position after the Base Date. The Contractor shall be responsible for interpreting all such data.

To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingences and other circumstances which may influence or effect Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, it’s surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):

a) The form and nature of the Site, including sub-surface conditions
Obrascon – Site Data and Unforeseeable Conditions

- Employer included a desktop study to tenders indicating 10,000 metres cubed of contaminated soil. This turned out to be a significant underestimation.
- CA held the contractor cannot just rely on the site data. It must make its own assessment.
- Contractor’s claim was dismissed.
- CA stated that the Contractor should make provision for a “possible worse case scenario”. (Paragraph 223 of TTC decision confirmed by CA).
Obrascon – Termination by Employer

- A Notice to Correct (Sub-Clause 15.1) should only be issued for “more than significant contractor failures”.
- So for a trivial breach a Notice to Correct should not be issued. This is a question of fact.
- However, a breach need not amount to a repudiatory breach in order to trigger termination
- A Notice to Correct can only be issued in relation to actual failures (not estimated or potential future failures).
- The time for correcting the works must be reasonable in all the circumstances prevailing time at which the notice was issued. It should take into account problems that are solely at the Contractor’s risk.
- It can also take into account the circumstances leading up to the Notice to Correct. If the Contractor has ignored requests then less time might be reasonable, but if the notice were issued immediately without any prior warning.
Suspension and Termination by Contractor

- Contractor may suspend (Sub-Clause 16.1):
  - If the Employer fails to certify and interim payment; or
  - If the Employer fails to comply with Sub-Clause 2.4; or
  - Make payment
- After giving not less than 21 days notice to the Employer, may suspend or work at a reduced rate until remedied.
- If remedied, the Contractor is to resume normal working as soon as practicable
- Contractor entitled to an EOT and/or any costs plus reasonable profit
- Engineer must make a Sub-Clause 3.5 determination
Termination by Contractor - Sub-Clause 16.2

• Contractor is entitled to terminate if:
  • Reasonable evidence under clause 2.4 not received within 42 days.
  • Engineer fails within 56 days after receiving a statement of supporting documents to issue a payment certificate.
  • Payment of an interim payment is not made within 42 days of the expiry of the payment period.
  • The Employer “substantially fails to perform his obligations under the Contract”.
  • The Employer fails to issue the contract agreement for signature or attempts to assign the contract.
  • The Employer becomes bankrupt or insolvent etc.
• Upon 14 days notice to the Employer the Contractor may terminate.
Actions on termination

• After the notice of termination the Contractor shall:
  • Cease all further work (unless it relates to the protection of life or property or safety);
  • Handover documents, plant and materials providing payment has been made in relation to them; and
  • Remove all of the goods from the site, except as necessary in order to keep the site safe.

• In relation to payment the Employer shall:
  • Return the performance security;
  • Pay the Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release]; and
  • Pay to the Contractor loss of profit or other loss or damage sustained by the Contractor as result of termination.
“If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these conditions or otherwise in connection with the Contract, the contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and no later than 28 days after the Contractor became aware, or should of become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion should not be extended, the Contractor shall be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim….”

The Contractor “shall keep such contemporary records as may be necessary to substantiate any claim…”
• Notice of a claim (condition precedent).
• Formation of Dispute.
• Referral of dispute to the DAB.
• Standing or *Ad Hoc* DAB?
• 84 day procedure.
• Written DAB decision.
• Notice of Dissatisfaction – 28 days.
• Referral to arbitration:
  • Amicable Settlement (Sub-Clause 20.5)
  • Sub-Clause 20.6;
  or
  • Sub-Clause 20.7.
**Dispute Events (Clause 20)**

8.1 Commencement Date

20.2 Parties appoint DAB

20.4 A Party refers a dispute to the DAB

20.4 A Party may issue a “notice of dissatisfaction”

20.6 A Party may initiate arbitration

Typical sequence of Dispute Events envisaged in Clause 20

- <28d
- <84d
- <28d
- <56d

DAB gives its decision

Amicable settlement

Arbitrator/s appointed
DAB

- Red book – standing DAB
- Yellow book – ad hoc DAB
- Appointment of DAB members
- Tri-party Agreement
- Procedural rules
- FIDIC President’s list of adjudicators
Questions?

Nicholas Gould
Partner, Fenwick Elliott LLP
Visiting Professor, King's College London
Questions?
CPD Certificates

The procedure for ICE members to record CPD, is at MyICE. By logging into your membership profile at www.ice.org.uk you can record all CPD activities on-line.
Inquiries

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