

FIDIC Latin America Users' Conference

Managing Claims under FIDIC

by

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12 & 13 September 2017

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What is a claim?

= a **request** for what is rightfully yours under the Contract

... in other words:

= a request for an entitlement: money or time

or

= “the assertion of a right”



CLAIM ≠ DISPUTE



International Federation of Consulting Engineers

Lima, Peru
12 & 13 September 2017

CLAIM (by one Party)

DETERMINATION (by Engineer)

DISPUTE (by one Party)

DECISION (by Dispute Adjudication Board DAB)

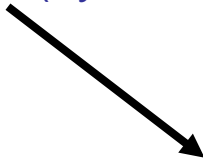
DISSATISFACTION (by one Party)

Amicable Settlement
INTERNATIONAL ARBITRATION

AWARD



CLAIM (by one Party)



DETERMINATION (by Engineer)

STAGE 1

DISPUTE (by one Party)



DECISION (by Dispute Adjudication Board DAB)

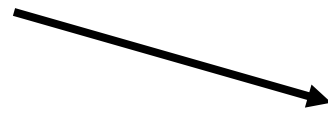


DISSATISFACTION (by one Party)



INTERNATIONAL ARBITRATION

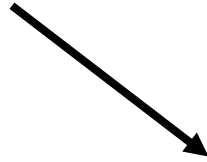
Amicable Settlement



AWARD



CLAIM (by one Party)



DETERMINATION (by Engineer)



STAGE 2

DISPUTE (by one Party)



DECISION (by Dispute Adjudication Board DAB)

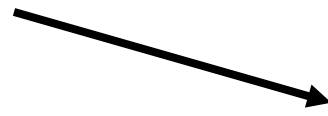


DISSATISFACTION (by one Party)



Amicable Settlement

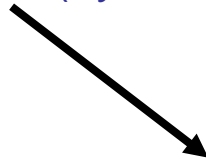
INTERNATIONAL ARBITRATION



AWARD



CLAIM (by one Party)



DETERMINATION (by Engineer)



DISPUTE (by one Party)



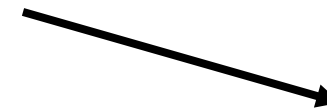
DECISION (by Dispute Adjudication Board DAB)



DISSATISFACTION (by one Party)



Amicable Settlement
INTERNATIONAL ARBITRATION



AWARD



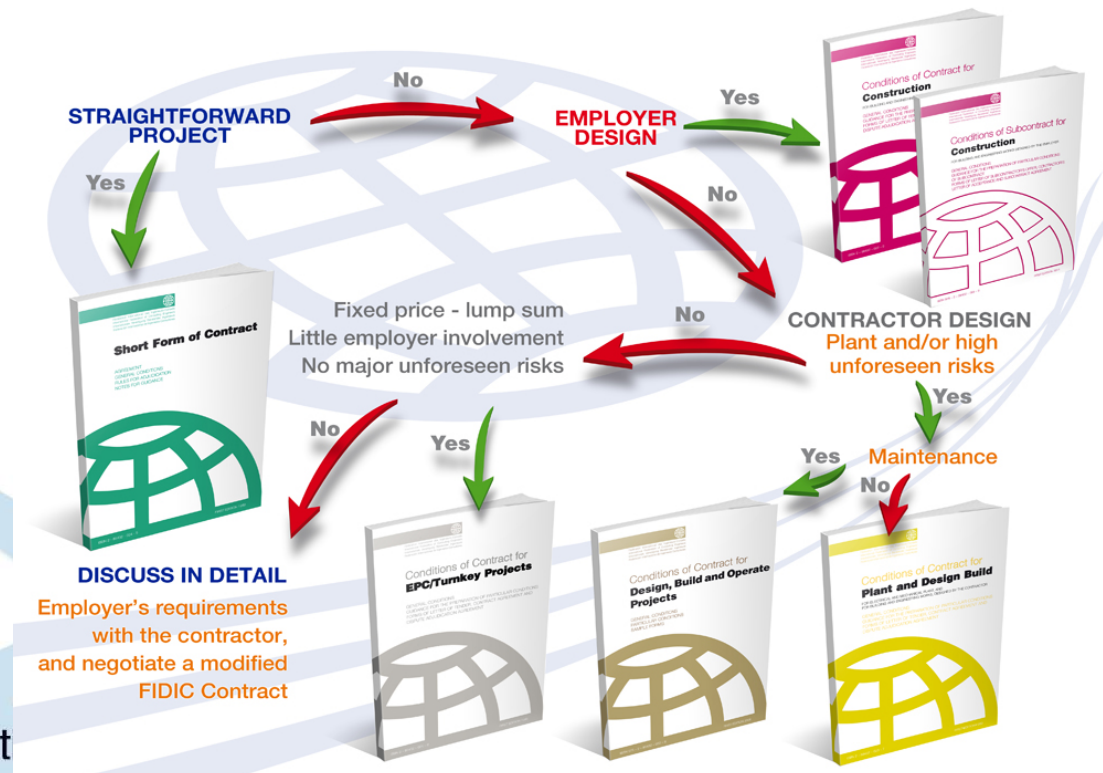
STAGE 3



Claims and procurement

CONTRACT STRATEGY: which form of contract is most suitable?

- who should carry out the design?
- remeasured quantities or lump-sum?
- Employer's willingness to pay a 'premium' for minimal risks?
- Employer's day-to-day involvement: hands-on? or hands-off?



THE ENGINEER* → who?

- **not a party** to the Contract but can give instructions and make determinations which are **binding** on the Parties
- appointed by the Employer → **named in the Appendix to Tender** → tenderers know, when preparing their tenders, who will be administering the contract when it is awarded → likely impact on tender price
- must have a clear understanding of his/her role:
 - to “**act for the Employer**” and in the best interests of the Employer,
 - but at the same time, when making determinations of **claims** and certifying payments he/she must act with **fairness and integrity**

→ **tenderers'/Contractor's trust in the Engineer?**

→ **more trust => less claims?**

[*No Engineer under the FIDIC Silver Book, an Employer's Representative *may* be appointed]



Reminder:

FIDIC Risk Allocation Philosophy:

- **balanced risk sharing*** between the Employer and the Contractor
- ⇒ the Party only pays for a risk allocated to it **when it actually happens**
- ⇒ mechanism under FIDIC contracts for **remedy** when one Party bears the consequences of a risk that is allocated to the other Party



FIDIC contract: certain risks are specifically allocated to the Employer
→ **the Contractor is liable for all risks not allocated to the Employer ... ?**
subject to the applicable law

- * **exception:** the Silver Book 1999 (turnkey form of contract)
- the Employer pays higher price to transfer most risks to the Contractor



Benefits to Stakeholders of balanced risk sharing:

- => fair between the parties
- => greater understanding of exactly what is expected of each Party => more certainty
- => greater contractor confidence in tendering and in pricing
- => **lower risk contingencies**
- => **↓\$ Contract Price**



**Practice shows that projects are more likely to be successfully completed
ON TIME and IN BUDGET!**

*“... “one sided contracts” actually affect **negatively** the smooth implementation of projects and consequently are considered to be **disadvantageous** to the Borrowers due, amongst other things, to the **late** completion of the project”*



Japan International Cooperation Agency (JICA)

“Check List for One Sided Contracts For use with ‘Sample Bidding Documents under Japanese ODA Loans - Procurement of Works’ June 2009 Edition”

March 2011 2017

PARTICULAR CONDITIONS – drafted by the Employer prior to Tender

Experience shows that if modifications in the Particular Conditions substantially alter the FIDIC balanced risk allocation, there can be serious problems → more claims!

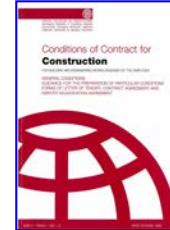
- capable contractors avoid tendering
- the contract is awarded to a tenderer who fails or is not capable of assessing or pricing the risks properly
 - => during construction seeks to recover costs for what was not priced properly in the Tender
- **repetition of groundless claims** from the Contractor
- **increased management time spent dealing with claims**
- breakdown of the Employer/Contractor relationship of mutual trust
- in extreme cases: termination of the Contract by one of the Parties



DESIGN

- Design by Employer:

→ is the design fully complete before tender?



- Design by the Contractor:

→ are the Employer's Requirements accurate?

→ are the Employer's Requirements complete?

→ performance criteria => performance guarantees

→ purpose => 'fit-for-purpose'



Employer's Requirements: the document of highest technical significance and impact in FIDIC Yellow Book (Plant & Design-Build) and FIDIC Silver Book (EPC/Turnkey Projects)

1.1.1.5 "Employer's Requirements" means the document entitled employer's requirements, as included in the Contract, and any additions and modifications to such document in accordance with the Contract. Such document specifies the purpose, scope, and/or design and/or other technical criteria, for the Works.

= the precise requirements for the completed Works, including:

- **purpose of the Works**
- **definition of the Site**
- **interfaces with other contracts**
- **design criteria**
- **quality and performance criteria**
- **tests and testing regime(s)**
- **special requirements: for example: training, spare parts, warranties**



→ in practice: the **completeness and accuracy** of the Employer's Requirements is crucial to the success or failure of the Project

→ design criteria should not be so detailed so as to restrict the Contractor in the design and so negatively impact the Contractor's responsibility for the design

→ importance of correct cross-references to Conditions of Contract and **consistency** of requirements between the two documents and of terminology

Examples of the Contractor's right to claim under FIDIC contracts:

Sub-Clause	Red Book	Yellow Book	Silver Book	Time	Cost	Profit
1.9 – Delayed Drawings or Instructions	yes	-	-	yes	yes	yes
1.9 – Errors in Employer's Requirements	-	yes	NO*	yes	yes	yes
2.1 – Right to access the Site	Yes	yes	yes	yes	yes	yes
4.7 – Setting out	yes	yes	NO	yes	yes	yes
4.12 – Unforeseeable physical conditions	yes	yes	NO	yes	yes	x
4.24 – Fossils (archaeology)	yes	yes	yes	yes	yes	x
7.4 – Testing	yes	yes	yes	yes	yes	yes
8.5 – Delays caused by Authorities	yes	yes	yes	yes	x	x
8.9 – Consequences of Suspension	yes	yes	yes	yes	yes	x
10.3 – Interference with Tests on Completion	yes	yes	yes	yes	yes	yes
13.7 – Adjustments for Changes in Legislation	yes	yes	yes	yes	yes	yes
17.4 – Consequences of Employer's Risks	yes	yes	yes	yes	yes	yes [#]
19.4 – Consequences of Force Majeure	yes	yes	yes	yes	yes	x

* with four specific exclusions

only in specific cases



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Sub-Clause	Red Book	Yellow Book	Silver Book	Time	Cost	Profit
1.9 – Delayed Drawings or Instructions	<u>yes</u>	-	-	yes	yes	<u>yes</u>
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Sub-Clause 17.4

*** with four specific exclusions**



- Design by Employer:

→ is the design fully complete before tender?



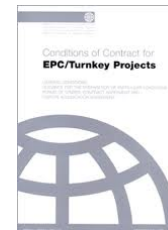
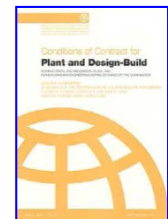
- Design by the Contractor:

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PERMITS LAND OWNERSHIP SITE

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17.4 – Consequences of Employer's Risks	yes	yes	yes	yes	yes	yes#
19.4 – Consequences of Force Majeure	yes	yes	yes	yes	yes	x

Is the land for the Site fully owned/controlled by the Employer?
 Has the Employer obtained all necessary permits, planning permissions, etc for the Works on the Site?

1.13

Compliance with Laws

The Contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Particular Conditions:

- (a) the Employer shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Specification as having been (or being) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and
- (b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain

PRE-TENDER SITE INVESTIGATIONS – detailed?

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“**Unforeseeable**” means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.”

→ level of information available to tenderers?



HOW TO AVOID CLAIMS BECOMING DISPUTES:

1. Assessment of the Claim

By: “the Engineer”

(“the Employer’s Representative”
under SB1999)



Did the claimed event actually occur? → investigate on Site

Has the claiming Party an entitlement? → examine the Contract

Consult with **both** Parties

→ facilitate **negotiation** for the Parties to agree = ‘mediation’



if no agreement → “**determination**” of the claim

→ “**fair**” between the Parties

→ “*in accordance with the Contract*”

→ “*due regard of all relevant circumstances*”

→ “*with supporting particulars*”

If correct and fair assessment, less probable that will be disputed!

2. Contractor's claims: Notice of Claim

- make sure efficient procedures are in place to send the Notice of Claim to the Engineer in time
- Clause 20.1 Contractor's claims: < 28 days from the date that the Contractor "***became aware or should have become aware***" of the event/circumstance
- late Notice of Claim
 - Engineer says 'time-barred' => no claim!
 - Contractor argues => dispute!



3. Records, records, records

- records **made on the Site at the time** that the works are being carried out are invaluable in dispute resolution = “*contemporary records*”
- the Contractor and the Engineer should keep their own
- Clause 20.1 Contractor's claims: express requirement to submit contemporary records
 - poor Contractor's records = poor claims**
 - more likely that claims will be rejected → more disputes
- Clause 3.5 Engineer's determination: compare Contractor's records with own records
 - **poor Engineer's records = poor assessment of Contractor's claim?**
 - more likely that the Engineer's determination will be rejected
 - more disputes



4. Standing DAB

- appointed at the start of the Contract
- time to gain the Parties' trust
- objective, impartial and neutral
- kept informed by the Parties about the progress of works on Site
- visits the works on Site at regular intervals (typically every 3 months)
- knowledge of the Works **and the people!**
 - help 'separate the people from the problem'!
- **can give an opinion** on a claim/determination that is disagreed but not yet a "dispute" - only if asked by *both* Parties



➤ **very important DISPUTE AVOIDANCE role!**



Thank You for
Your Kind
Attention

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