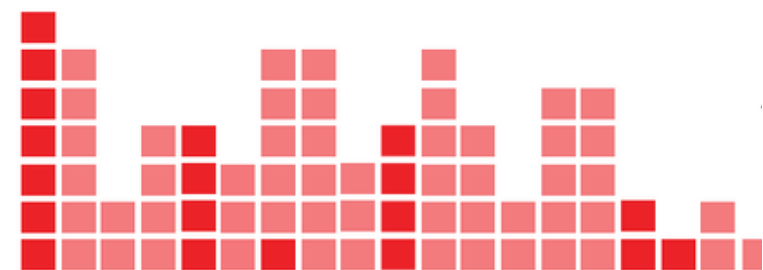





PRINCIPLES OF CONSTRUCTION **ADJUDICATION**



An aerial photograph of a city skyline at dusk. The sky is a deep red, and the buildings are illuminated with warm lights. In the foreground, several construction cranes are visible, indicating ongoing development. The city is densely packed with skyscrapers and commercial buildings.

Construction adjudication has become an essential tool for resolving disputes in the construction industry, providing parties with a speedy and cost-effective way of resolving their differences

-Sir Rupert Jackson

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Day 2

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About the Training

The Principles of Construction Adjudication training offered by the Construction Law Institute is designed to provide participants with a comprehensive understanding of the principles, practices, and procedures of construction adjudication.

The program is tailored to meet the needs of construction professionals, including engineers, architects, quantity surveyors, project managers, and lawyers. By completing the training, participants will be equipped with the necessary skills and knowledge to effectively navigate the construction adjudication process and resolve disputes in a timely and efficient manner.



The Training in Summary:



2 Days



15 sessions



10 Topics



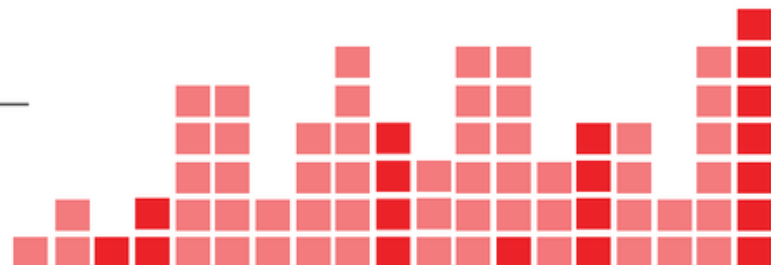
4 Trainers



18 Hours



4 Professions



Day 1

PROGRAMME

11TH MAY 2023

8:30- 8:50AM

Welcome and Introduction to Construction Law Institute, the Course, Facilitators and Participants.
Mr. Kenneth Akampurira and Mr. Ronald Tusingwire

8:50AM- 9:00AM

Grand Opening of the Training by the President of the Uganda Institution of Professional Engineers.
Eng. Andrew Muhwezi

9:00- 10:00AM

OVERVIEW OF THE FORMS OF CONTRACT

Topics:

- The FIDIC suite of contracts.
- The PPDA Standard Contract.
- The East African Institute of Architects Contract (Blue Book).
- Form Selection

Trainers:

Mr. Victor Odongo
Ms. Joan Kyomugisha

10:00-11:00AM

THE OBLIGATIONS OF THE PARTIES

Topics:

- The Engineer/Project Manager/Architect (Blue Book).
- The Employer
- The Contractor
- The Sub-Contractor.
- Risk allocation.

Trainers:

Mr. Victor Odongo
Ms. Joan Kyomugisha

11:00 - 11:20PM

Coffee Break.

11:20 -12:00PM

CASE STUDY ON CHOICE OF CONTRACT AND OBLIGATIONS OF THE PARTIES

Trainers:

Mr. Victor Odongo.
Ms. Joan Kyomugisha.
Eng. Ian Bakiza.

Day 1

PROGRAMME

11TH MAY 2023

12:00 - 1:00PM	<p>CONTRACTORS CLAIMS</p> <p>Topics:</p> <ul style="list-style-type: none">• Extension of Time.• Costs.• Costs and Profit.• Force Majeure <p>Trainer: Mr. David Kaggwa</p>
1:00-2:00PM	<p>LUNCH</p>
2:00-3:00PM	<p>EMPLOYERS CLAIMS</p> <p>Topics:</p> <ul style="list-style-type: none">• Liquidated Damages.• Time at Large.• Termination. <p>Trainer: Eng. Ian Bakiza</p>
3:00-4:00PM	<p>VARIATIONS</p> <p>Topics:</p> <ul style="list-style-type: none">• Variation Procedure.• Value Engineering.• Quantum Meruit. <p>Trainer: Mr. Victor Odongo</p>
4:30 - 4:45PM	<p>CASE STUDY ON CONTRACTOR'S AND EMPLOYER'S CLAIMS</p> <p>Trainers: David Kaggwa. Eng Ian Bakiza.</p>
4:45 - 5:00PM	<p>Question and Answer Session. Mr. Kenneth Akampurira</p>
5:00PM-5:30PM	<p>Tea Break and End of Day 1.</p>

8:30- 8:45AM

Recap from Day 1

Mr. Kenneth Akampurira and Mr. Ronald Tusingwire

8:45- 9:45AM

EFFECTIVE PROJECT MANAGEMENT

Topics:

- Project Planning, Programme and Progress reports.
- Notices/Early Warning.

Trainer:

Eng Ian Bakiza.

9:45-11:00AM

HOW TO COMPUTE PROLONGATION COSTS

Topics:

- Price escalations.
- Effects of Force Majeure.
- Scarcity of Goods and Materials.
- The Hudson and Emden Formula for computation of overhead costs.

Trainer:

Mr. Victor Odongo

11:20- 12:00PM

CASE STUDY ON PROJECT MANAGEMENT AND COMPUTATION OF COSTS

Trainers:

Mr. Victor Odongo.
Eng. Ian Bakiza.

12:00 – 1:00PM

CONSTRUCTION ADJUDICATION DISPUTES

Topics:

- Adjudication under UIPE.
- Disputes Adjudication Boards under FIDIC (DAB and DAAB).

Trainer:

Ms. Joan Kyomugisha

1:00-2:00PM

LUNCH

2:00- 3:00PM

CONSTRUCTION ARBITRATION

Topics:

- Arbitration under CIArb, LCIA, CADER, ICAMEK, ICC.
- Ad hock Arbitration.
- Interim reliefs by Court pending Arbitration.

Trainer:

Mr. David Kaggwa.

3:30 - 4:30PM

CONTRACTUAL ISSUES

Topics:

- Suspension and Acceleration.
- Completion, tests on completion and taking over.
- Termination of the Contract.
- Consequences of termination.

Trainer:

Eng. Ian Bakiza.

3:00-3:30PM

CASE STUDY ON DISPUTES

Trainers:

Mr. David Kaggwa
Ms. Joan Kyomugisha.
Eng. Ian Bakiza.

3:30 - 4:00PM

Question and Answer Session

Mr. Kenneth Akampurira

4:00 - 4:30PM

Award of Certificates

To be awarded by **Eng. Andrew Muhwezi**

Mr. Kenneth Akampurira and Mr. Ronald Tusingwire to coordinate the awarding ceremony

4:30-5:00PM

TEA AND DEPARTURE

About your Trainer



David Kaggwa

LLM (Construction Law & Arbitration) RGU Arberdeen

David Kaggwa is an International Arbitrator and Construction lawyer with over 18 years' experience in representing clients in resolving complex disputes involving major Infrastructure and Construction projects. He is the Chairman of the Chartered Institute of Arbitrators – Uganda, a Senior Partner at Kaggwa & Kaggwa Advocates.

David has acted as Counsel and Arbitrator in several construction related arbitral disputes brought under the major arbitration rules including; the United Nations Commission on International Trade Law (UNCITRAL Rules), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the Chartered Institute of Arbitrators (CI Arb). David has delivered Arbitral awards which have all been enforced by the Court.

He is a Fellow of the Chartered Institute of Arbitrators (FCI Arb), a Fellow of the Institute of Construction Claims Practitioners (FICCP), a Member of the London Court of International Arbitration (LCIA), member of International Center for Mediation & Arbitration in Kampala (ICAMEK), member of the Center for Arbitration & Dispute Resolution and a member of the International Bar Association.



Victor B. O. Odongo

**B.A Build Econ(Hons), F.I.S.U,
M.A.A.K(QS),
C.I.Q.S.K, MCI Arb**

Mr. Odongo has over thirty (30) years experience as a Quantity Surveyor and Project Manager. He has handled several projects for both the Public and Private Sectors. Victor has been involved in Monitoring and Evaluation assignments and value for money Audits for the public and private sectors.

He is registered as an Arbitrator/Mediator by the Center for Arbitration and Dispute Resolution (CADER) and has been referred to involved in Alternative Dispute Resolution as an Expert Witness, Mediator or Arbitrator in several disputes that have been referred to him by both the Commercial Division of the High Court and private litigants.

Victor is a Principal Partner at Buildcost Associates, a firm of consulting quantity surveyors and building economists. He is also the Managing Director of Buildcost Project Management Ltd , a Project Management Consultancy. He is the current Vice President (Eastern Region) of the African Association of Quantity Surveyors (AAQS).

He is a member of the Chartered Institute of Arbitrators (UK). He is also a registered Arbitrator with the International Center for Arbitration and Mediation in Kampala (ICAMEK).

About your Trainer



Joan Kyomugisha
LLM (Chicago), LLB (MUK)

Joan Kyomugisha an advocate of the High Court of Uganda. She holds a Bachelors Degree in Law, a Diploma in Legal Practice, a Masters Degree in Law from Northwestern University, Chicago Illinois, USA. She also obtained FIDIC Certification from FIDIC Certified Trainers, holds a Certificate in Contract Management from the International Law Institute, Certificate in Claims Management from the CLAIMS Class, Certificate in Utility Regulation from the London School of Economics and is currently pursuing membership to the Chartered Institute of Arbitrators.

She has over 14 years work experience as a Legal Advisor in various Government Agencies. At UNRA where she is currently employed in the Directorate of Legal Services, she oversees Contracts and Claims. These contracts include Development Partner funded contracts: African Development Bank, European Union, World Bank, JICA, Islamic Development Bank, Exim bank etc. She has played a pivotal role in the standardization of road construction contracts signed between the Government of Uganda, International and Local Construction Companies.

She provides legal advisory services and participates in Contract Negotiations and Contract Management for various Construction Projects. She has participated in various dispute settlement processes through Dispute Adjudications, Arbitration and Amicable Settlements.



Eng. Bakiza Ian Paul
BCiv(MUK), R.Eng, M.U.I.P.E

Eng. Bakiza is a Registered Professional Civil Engineer and Construction Claims Practitioner with over a decade experience in Project and Construction Claims Management, Engineering Design, Construction Programming, Public Procurement Contracting and Environmental and Social Safeguards Management.

He is a Professional Member/Corporate Member – Uganda Institution of Professional Engineers (UIPE), Registered Member – Engineers Registration Board, Member – Institute of Construction Claims Practitioners (ICCP), Member of Faculty – International Centre for Mediation and Arbitration Kampala (ICAMEK)

He also has extensive demonstrable experience managing large scale, complex engineering infrastructure projects and programs, construction claims mediation, adjudication.

He possesses extensive knowledge of international construction contract formats such as FIDIC conditions of Contract, PPDA conditions of contract, EDF conditions of contract and project management procedures through managing various development partner financed projects such as European Union, African Development Bank and the International Development Agency/World Bank.



Day 1

11th MAY 2023

OVERVIEW OF CONSTRUCTION CONTRACTS

Day 1 Session 1



Joan Kyomugisha
LLM (Chicago), LLB (MUK)

What is FIDIC?

FIDIC is a French language acronym that stands for *Fédération Internationale Des Ingénieurs-Conseils* which means International Federation of Consulting Engineers.

FIDIC is a standard form of Contract used for large value works.

FIDIC was started in 1913 by the trio of France, Belgium and Switzerland. The United Kingdom joined the federation in 1949.

FIDIC headquarters are in Switzerland. FIDIC is used in over 200 countries.

Who uses FIDIC Contracts?

FIDIC contracts are used in Public Infrastructure projects including:



Roads/Bridges



Dams



Plant & Machinery



Oil and gas Projects

FIDIC may be used for Private Contracts. (White book and Green book)

BENEFITS OF USING FIDIC CONTRACTS?

- FIDIC contracts are standardized & hence preferred by International Contractors who deem it as fair.
- Clarity of contracts, consistent wording
- Covers all kinds of issues that may arise during construction
- Provides a Dispute Resolution Mechanism as works progress
- Has best practices in the industry and addresses the common issues
- Condition for Multilateral Development Banks (MDBs)
- FIDIC is used for Development projects funded by MDBs for use in aid-funded projects. Project Financiers in Uganda include:

1. AfDB
2. World Bank
3. European Union
4. China Exim Bank
5. JICA-Japanese International Corp. Agency
6. BADEA – Arab Bank for Economic Development in Africa



PARTIES TO FIDIC CONTRACTS.

Employer

Owner of project e.g Government Agency (UNRA, Ministry of Energy, KCCA etc)

Engineer

Agent appointed by the Employer to act as Employer's representative (Consulting Engineer/Supervisor) – Red, Yellow & Pink book. *Silver book does not specify an Engineer.

Contractor

Party with responsibility to carry out the works.

Two Contracts are formed for civil works projects:

- Between Consulting Engineer & Employer
- Between Employer & Contractor

Role of Employer;

- Appoint the Engineer
- Give Possession of Site to Contractor
- Give Instructions & Notices
- Nominate Sub-contractors
- Pay the Contractor for works

Role of Engineer;

- Act as Employer's representative
- Supervise/Inspect work done by Contractor
- Administer the contract - give Instructions, make fair & independent determinations, certify works.

NB: Engineer is supposed to be impartial

OVERVIEW OF CONSTRUCTION CONTRACTS

Role of Contractor;

- Construction & Completion of works in accordance with program & expeditiously
- Provide Guarantees/Securities and Insurances
- Advance Payment Guarantee (10-20% of Contract amount used for Mobilization)
- Performance Security (10% of contract amount)
- Retention Guarantee
- NB: Guarantees, Securities from Bank domiciled in Uganda
- Insurance Policies - Contractor's All Risk, Workman's Compensation, Plant & Equipment Insurance



FIDIC BOOKS

FIDIC Contracts are operated through the FIDIC General Conditions of Contract found in the FIDIC Books.

Main difference in the books is the risk apportionment between Employer & Contractor. Who does the Design/Who bears risk for change in quantities?

RED BOOK

The Red Book provides conditions of contract for construction works where the Building & Engineering.

Works are designed by the Employer. Employer designs & hence bears the risk for changes in quantities. Contract is admeasurement based contract.



The Red Book provides conditions of contract for construction works where the Building & Engineering.

Works are designed by the Employer. Employer designs & hence bears the risk for changes in quantities. Contract is admeasurement based contract.

PINK BOOK

Conditions of Contract for Construction for Building & Engineering works designed by the Employer.

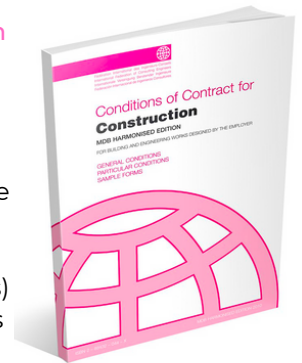
Contractor constructs the Works in accordance with design provided by the Employer.

Multilateral Development Banks (MDBs) require their borrowers or aid recipients to adopt the FIDIC Conditions of Contract.

MDBs that participated in the preparation of the Pink Book include:

- African Development Bank
- International Bank for Reconstruction and Development (The World Bank)
- Islamic Bank for Development Bank

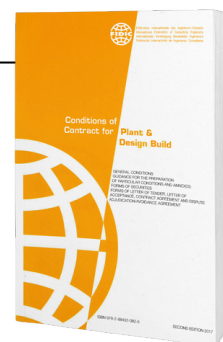
Used for Development projects funded by Multilateral Development Banks (MDBs) for use in aid-funded projects.



YELLOW BOOK

Conditions of Contract for Plant and Design Build for Electrical & Mechanical plant, and for Building & Engineering works designed by the Contractor.

Contractor bears the risk for changes in quantities. Contract is a lumpsum based contract.



OVERVIEW OF CONSTRUCTION CONTRACTS

SILVER BOOK/TURNKEY

Conditions of Contract for EPC/Turnkey Projects.*Engineer, Procure and Construct. EPC contractor is responsible for the engineering design of the works, its procurement and subsequent construction.

Turnkey, in principle, means a contract whereby the contractor provides whatever is necessary for the project and on completion hands over a key to the Employer.

Turnkey Projects are characterized by:

- Certainty of Final price
- Certainty of Completion date
- More expensive type of contracts
- Contractor has total responsibility for design and execution of project with minimal involvement of Employer.
- Wider range of risk is borne by the contractor
- Employers risk is war, terrorism, force majeure



Golden Book

Conditions of Contract for Design, Build and Operate Projects (DBO)

The Gold Book is used in projects where the design-build work and the operation and

Maintenance work are to be carried out by the same contractor.

Usually used for projects with an operation phase of 20 years.
Greater risk is borne by the Contractor.



QUICK
TIPS

ON FIDIC

FIDIC Books have various Editions, most recent is the 2017 Edition of the Red, Yellow and Silver books.

Parties to FIDIC contracts have distinct responsibilities.

FIDIC contracts typically include:

- 1) General Conditions of Contract(GCC)
- 2) Particular Conditions of Contract(PCC) Access to site, Completion Time, Commencement date, % Liquidated damages, % Retention.

Liquidated damages are chargeable when a contractor delays to complete works within the duration for completion indicated in the contract.

FIDIC Contracts provide for Claims and how they are to be lodged. Notice must be issued within 28 days from when the Contractor became aware of the events/circumstances giving rise to the claim.

Note that FIDIC 2017 provides that if a Party cannot meet the 28 days Notice period, it should notify the Engineer and give reasons for delay.

Common Triggers for Construction Claims

- Delayed Access to Site
- Variations
- Delayed Drawings
- Unforeseeable Physical Conditions
- Idle Equipment and Manpower
- Exceptionally adverse climate
-

Contractors often make the following claims:

- Claims for Variations Instructed
- Claims for Extension of Time (EoT)
- Claims for Prolongation Costs/Loss of Profit
- Claim for idle Equipment & Manpower/Personnel
- Claim for Acceleration & Disruption ETC
- Claims must be substantiated. Record keeping is essential during construction projects.

Legal Principle: He who claims must prove.

- FIDIC provides for Dispute Resolution Mechanism through a Dispute Adjudication Board (DAB)

Note: FIDIC 2017 refers to DAB as DAAB – Dispute Avoidance & Adjudication Board.



OVERVIEW OF PPDA CONTRACTS



Joan Kyomugisha
LLM (Chicago), LLB (MUK)

PPDA Contracts Law & Applicability

PPDA contracts are governed under the PPDA Act, 2003 and the PPDA Regulations. They are applicable to all Government Agencies, Departments, statutory corporations and Ministries. S.3 PPDA Act, 2003
PDE – Must follow the Procurement process as stipulated under the law.

PPDA Contract Types

Procurement under the PPDA Act is categorized into four types;

- (i) Works
- (ii) Supplies
- (iii) Consultancy
- (iv) Non-consultancy

PRE-CONDITIONS FOR PPDA CONTRACTS

- Lapse of Period specified under the Regulations
- Reg. 5(1) S.I No. 14 of 2014 provides for a standstill period – It prohibits signing of the contract within ten working days after the display of the Notice of Best evaluated Bidder.
- S.90(7) prohibits an Accounting Officer from entering a contract during the Administrative Review Period.
- Availability of Funding
- A PDE/Accounting Officer must ensure availability and commitment of funds before signing a contract.
- This is to avoid committing government
- An award decision by the Contracts Committee.
- AO must confirm that the price does not exceed the market price established at commencement of the procurement.
- All approvals have been obtained (Attorney general, Donors – No Objection etc)

Note: In case of an emergency, AO may dispense with the CC decision, standstill period and BEB notice requirements.

General Facts/Information

- All GoU funded contracts must be priced in Ug shillings (Per 2016 PSST, MoFPED circular)
- Promotion of Local Content – BUBU policy launched by the Min of Trade in 2017. Reserves 30% value of works for local companies.
- Change Order
- A change order shouldn't increase the original contract price beyond 0.1% for a single change or beyond 1% for cumulative changes.
- Allows the contract manager flexibility to manage small changes.
- Must be approved by the Accounting Officer.
- Must be consented to by both Parties.



COMPOSITION OF PPDA CONTRACT

- Contract Agreement
- Contract Bid - BoQs
- General Conditions of Contract
- Special Conditions of Contract
- Scope of Works, Drawings and Schedules
- Performance Security
- Advance Payment Guarantee

OVERVIEW OF PPDA CONTRACTS

- All GoU funded contracts must be priced in Ug shillings (Per 2016 PSST, MoFPED circular)
- Promotion of Local Content – BUBU policy launched by the Min of Trade in 2017. Reserves 30% value of works for local companies.

Change Order

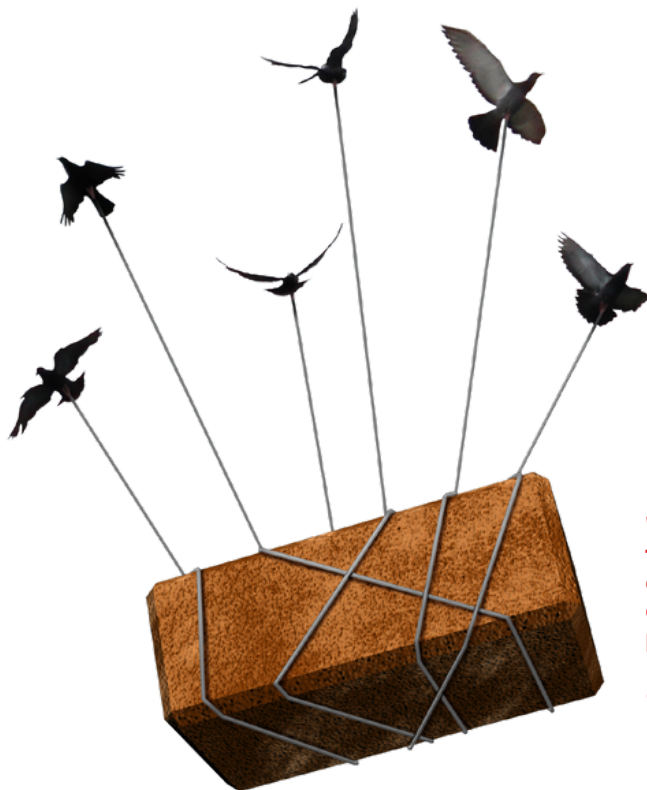
- A change order shouldn't increase the original contract price beyond 0.1% for a single change or beyond 1% for cumulative changes.
- Allows the contract manager flexibility to manage small changes.
- Must be approved by the Accounting Officer.
- Must be consented to by both Parties.

Contract Amendments

- All other changes to a contract not effected by way of Change Order are made by amending the contract.
- A change to a contract which increases the contract amount beyond 0.1% for a single change or 1% for cumulative changes is effected by an amendment.
- A single contract amendment is limited to 15% of the original contract price and cumulatively to 25%.
- Require approvals from Contracts Committee and Attorney General.

SELECTION OF TYPE OF CONTRACT

- **Nature of the procurement:** Works, Supplies, Consultancy, Non-Consultancy, Framework. Donor Funded – FIDIC or other, if so which FIDIC book best suits.
- **Risk Allocation** - Need to minimize risk: Government does not often choose to assume risk. Works contracts, risk allocation is done based on the determination of which party is best placed to manage the risk.
- **Complexity of Project:** Likelihood of delays or unforeseen circumstances e.g. infrastructure projects.
- **Maximize value for money:** Selection based on what will deliver best value.
- **Repetitive Need:** In case of fuel, cement, stationary, maintenance, vehicle repairs – Framework contract will be preferred.



"A good construction contract is one that is clear, concise, and comprehensive, and sets out the expectations and obligations of all parties involved in the project."

- Professor John Uff QC

EAIA FORM OF CONTRACT



VICTOR ODONGO

- Quantity Surveyor, Project Manager & Arbitrator/Mediator
- Vice President, AAQS East African Region
- Principal Partner, Buildcost Associates
- B.A Build Econ(Hons), R.S.U, F.I.S.U, M.A.A.K(QS),C.I.Q.S.K, MCIArb

The version of this contract include:

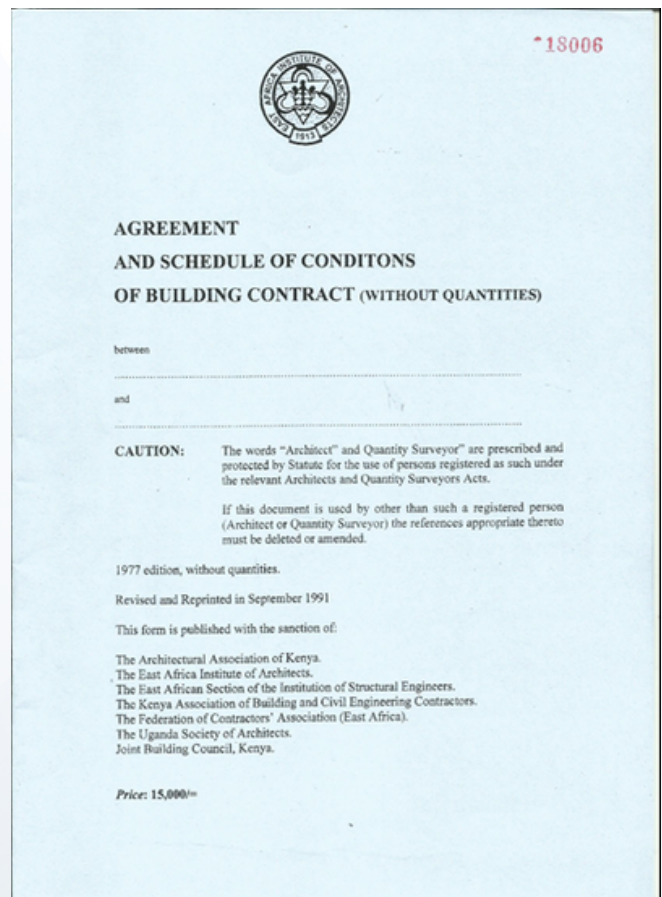
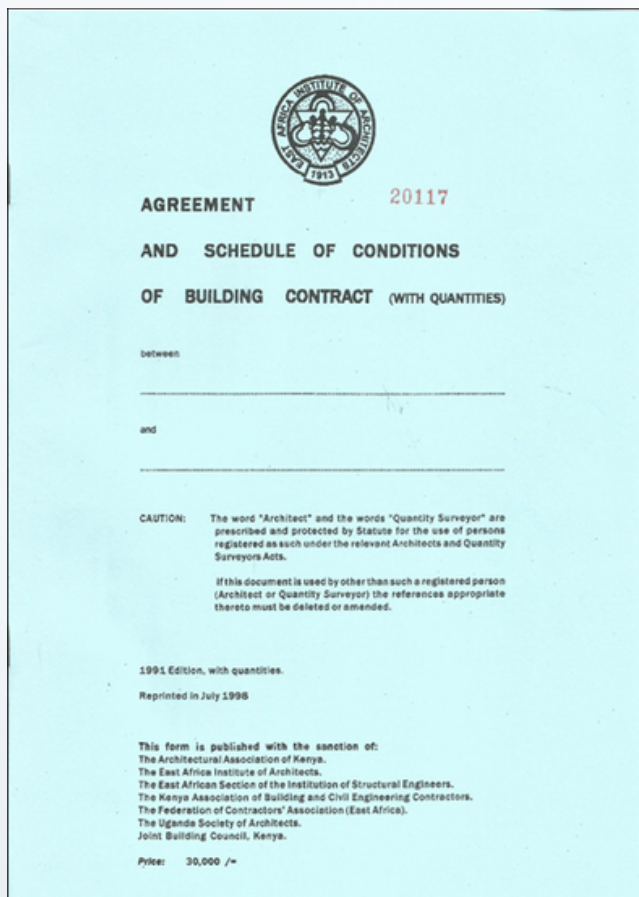
- The Agreement and Schedule of Conditions of Building Contract (with Quantities)
- The Agreement and Schedule of Conditions of Building Contract (without Quantities)
- Agreement and Schedule of Conditions of Building Sub-Contract

The latest edition is a 1977 edition and they were revised and reprinted in 1991. The sanctioning bodies are stated on the cover pages

- Uganda, Tanzania and Rwanda continue to use these forms of Contract
- Kenya abandoned the use of these Forms of Contract and published "Agreement and Conditions of Building Contract for Building Works" by the Joint Building Council, Kenya and is sanctioned by the Architectural Association of Kenya and the Kenya Association of Building and Civil Engineering Contractors and it is used exclusively in Kenya. This document has undergone several revisions since

In Uganda, it is usually sold by the Uganda Society of Architects at Ugx 30,000 per copy (with Quantities) and Ugx 15,000 (without quantities).

The Sub-contract document is not readily available on the Ugandan market



2.0 LIST OF CLAUSES

For both “with quantities” and “without quantities” are as follows

Clause	Title
1	Contractor’s Obligations
2	Architect’s Instructions
3	Contract Documents
4	Statutory Obligations, Notice, Fees and Charges
5	Levels and Setting out of the Works
6	Materials, Goods and Workmanship to Conform to Description, Testing and Inspections
7	Royalties and Patent rights
8	Foreman in Charge
9	Access for Architect to the Works
10	Clerk of Works
11	Variations, Provisional and Prime Cost Sums
12	Contract Bills
13	Contract Sum
14	Unfixed Goods and Materials
15	Practical Completion and Defects Liability
16	Sectional Completion
17	Assignment and Sub-letting
18	Injury to Persons and Property and Employer’s Indemnity
19	Insurance against Injury to Persons and Property
20	Insurance of the Works against Fire, etc
21	Possession, Completion and Postponement
22	Damages for Non-completion
23	Extension of Time
24	Loss and Expense caused by disturbance of regular progress of the Works
25	Determination by Employer
26	Determination by Contractor
27	Nominated Sub-contractors
28	Nominated Suppliers
29	Artists and Tradesmen
30	Certificates and Payments
31	Bond
32	Fluctuations
33	War Risks
34	War Damage
35	Antiquities
36	Arbitration

Appendices (providing specific additions to selected clauses) to this form of contract

Item	Clause	Title
(i)	15, 16 & 30	Defects Liability
(ii)	20(A)	Percentage to Cover Professional Fees
(iii)	21	Date for Possession
(iv)	22	Date for Practical Completion
(v)	30(3)	Percentage of Certified Value Retained
(vi)	30(3)	Limit of Retention Fund
(vii)	30(5)	Period of Final Measurement and Valuation
(viii)	31	Name of Surety in Standard Form
(ix)	31	Amount of Surety

For Building Sub-Contract Form of Contract are as follows

Clause	Title
1	Sub-Contract Sum
2	Notice of the Main Contract to the Sub-Contractor
3	Execution of the Sub-Contract Works
4	Sub-Contractor's liability under in-incorporated provisions of the Main Contract
5	Insurance against injury to persons and property
6	Damage by Fire
7	Policies of Insurance
8	Variations, etc
9	Completion
10	Defects, Shrinkages, etc
11	Sub-Contract Sum - Valuation of Variations
12	Certificates and Payments
13	Interim Payments to the Sub-Contractor
14	Retention Money
15	Dispute as to Certificate
16	Right of Sub-Contractor to suspend execution of Sub-Contract Works.
17	Special Interim Payments
18	Final Payment to the Sub-Contractor
19	Sub-Contractor's claim to Rights and Benefits under the Main Contract
20	Contractor's right to Deduction or Set Off
21	Right of Access of Contractor and Architect
22	Sub-letting of Sub-Contract Works.
23	Provision of Water, etc for Sub-Contract Works
24	Temporary Workshops, etc
25	Sub-Contractor's Use of Scaffolding of Contractor
26	Contractor and Sub-Contractor not to make wrongful use of or interference with the property of the other
27	Plant, Tools, etc, of Sub-Contractor
28	Determination of this Sub-Contract by the Contractor
29	Determination of the Main Contract
30	Wages and Conditions
31	Bond
32	Fluctuations in Duties and Exchange rates
33	War Risks
34	War Damage
35	Arbitration

Key players in the Contract

THE ARCHITECT

- Is the Administrator of the Contract.
- The titles "Architect or Quantity Surveyor" are both protected by Statute for the use of persons registered under the relevant Architects and Quantity Surveyors Acts
- The Architect can be replaced upon death or "on ceasing to be the Architect".
- Contractor can object to the replacement Architect "for reasons considered to be sufficient by an Arbitrator appointed in accordance with Clause 36

THE CONTRACTOR

- The party to the Contract that undertakes to;

"...carry out and complete the Works shown upon the Contract Drawings and described by or referred to in the Contract Bills and in the said Conditions of Contract".

NOMINATED PARTIES IN THE CONTRACT

NOMINATED SUB-CONTRACTORS

- These are Specialist Sub-contractors or selected by the Employer with whom the Contractor is obliged to enter into a Sub-contract in accordance with clause 27.
- The Contractor earns Attendance and Profit on the works by Nominated Sub-contractors

RISK ALLOCATION

Employer's Risks

- Design & Contract Documents Defects (Clause 1 & 3)
- Statutory Requirements (Clause 4)
- Insurance of the Works (Clause 20B – New Works)
- Insurance of the Works (Clause 20C – Alteration or Extensions of an Existing Building)
- Loss and Expense caused by disturbance of regular progress of the works (Clause 24)
- Artists and Tradesmen (Clause 29)
- War Risks (Clause 33)
- War Damage (Clause 34)

RISK ALLOCATION

- There is no Adjudication clause in the EAIA (Blue Book)
- Arbitration is provided for (Clause 36) and the clause states in clause 32(2) as follows;

“...Such reference, except on article 3 or article 4 of Articles of Agreement, or on the questions whether or not the issue of an instruction is empowered by these Conditions, whether or not a certificate had been improperly withheld or is not in accordance with these Conditions, or on any dispute or difference under Clauses 33 and 34 of these Conditions, shall not be opened until after Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Contractor's employment under this Contract, or abandonment of the Works, unless with the written consent of the Employer or the Architect on his behalf and the Contractor”.

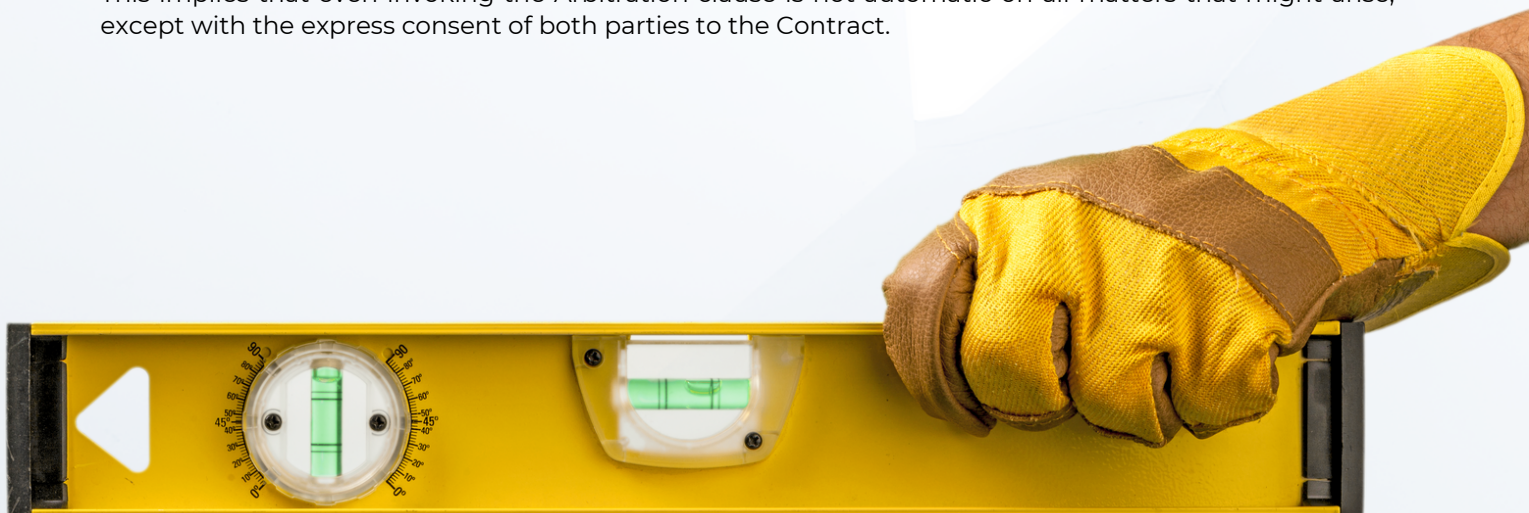
This implies that even invoking the Arbitration clause is not automatic on all matters that might arise, except with the express consent of both parties to the Contract.

NOMINATED SUPPLIERS

- These are Specialist Suppliers selected by the Employer with whom the Contractor is obliged to place orders for the specified Materials and/or Goods in accordance with clause 28.
- The Contractor earns Attendance and Profit on the supplies by Nominated Suppliers.

Contractor's Risks

- These are Specialist Suppliers selected by the Employer with whom the Contractor is obliged to place orders for the specified Materials and/or Goods in accordance with clause 28.
- The Contractor earns Attendance and Profit on the supplies by Nominated Suppliers.





CONSTRUCTION OF SIMBA HYDRO DAM.

In a project to construct the Simba Hydroelectric power station complete with associated dam, tunnel, spillway, approach roads, staff quarters and related facilities in Northern Uganda. The client is the Government of Uganda through the Ministry of Energy and Mineral Development.

The Consulting Engineers are Dolphin Engineering Limited. The dam is urgently required to provide irrigation free of charge to local farmers; and the power station is to sell electricity to neighbouring African states.

Funding is available in principle from the World Bank provided they are satisfied that all environmental concerns are properly addressed.

The project will need to provide for the resettlement of Project Affected Persons into a new village. Employment of the local community on the project will be necessary to ensure that a threat of guerrilla action against the project does not materialise. The engineers have expressed concerns about the proposed location of the dam following a geological survey. The survey also noticed some heaps of empty and rusted barrels marked only with something that looks like a skull and crossbones. The remote location of the site makes the construction of roads a priority task.

QUESTION:

1. Advise the Government of Uganda on the most suitable contract and why?
2. Discuss the obligations of the players based on the choice of contract.



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CONSTRUCTION CLAIMS

Day 1
Session 3



David Kaggwa, FCI Arb, FICCP
LLM (Construction Law & Arbitration) RGU Arberdeen

What is a Construction Claim?

A construction claim is defined as a request by either party to the contract, usually the Contractor, for compensation for damages caused by failure of the other party to fulfil his part of obligations as specified in the contract.

What is a Construction Dispute?

A construction dispute arises because of disagreements between the parties to a contract. They are due to a perceived or real violation of a construction contract and the obligations set forth therein such as failure to administer the contract; and unsubstantiated or incomplete claims being made by the parties involved.

KEY DEFINITIONS UNDER THE PPDA CONTRACT

1.1 (b) The “Adjudicator” is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance.

(e) “Compensation Events” are those defined in Clause 44.

(y) The “Project Manager” is the person named in the SCC (or any other competent person appointed by the Employer and notified to the Contractor, to act as a representative of the Contract Manager) who is responsible for supervising the execution of the Works and administering the Contract.

(z) The “Contract Manager” is the person appointed by the Accounting Officer from the user department or another Procuring and Disposing Entity to manage the contract.

COMMON TRIGGERS FOR CONSTRUCTION CLAIMS

Trigger 1

Delayed Access to Site

Trigger 2

Variations

Trigger 3

Delayed Drawings

Trigger 4

Unforeseeable Physical Conditions

Trigger 5

Idle Equipment and Manpower

Trigger 6

Exceptionally adverse climate

Trigger 7

Exceptionally adverse climate.

Trigger 8

Delayed instructions.

Trigger 9

Third parties: local authorities

Trigger 10

Contractor delays

See Clause 44 of the PPDA Standard Contract.



CONSTRUCTION CLAIMS

VARIATIONS

40. Payments for Variations

- 40.1 The Contractor shall provide the Project Manager with a quotation for carrying out the Variation when requested to do so by the Project Manager.
- The Project Manager shall assess the quotation, which shall be given within seven days of the request or within any longer period stated by the Project Manager and before the Variation is ordered.
- 40.5 The Contractor shall not be entitled to additional payment for costs that could have been avoided by giving early warning.

ACCELERATION & EMPLOYER DELAYS

29. Acceleration

- 29.1 When the Employer wants the Contractor to finish before the Intended Completion Date, the Project Manager will obtain priced proposals for achieving the necessary acceleration from the Contractor.
- If the Employer accepts these proposals, the Intended Completion Date will be adjusted accordingly and confirmed by both the Employer and the Contractor.
- 29.2 If the Contractor's priced proposals for an acceleration are accepted by the Employer, they are incorporated in the Contract Price and treated as a Variation.

30. Delays Ordered by the Project Manager

- 30.1 The Project Manager may instruct the Contractor to delay the start or progress of any activity within the Works.

EXTENSION OF TIME

28.1 The Project Manager shall extend the Intended Completion Date if a Compensation Event occurs or a Variation is issued which makes it impossible for Completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work, which would cause the Contractor to incur additional cost.

28.2 The Project Manager shall decide whether and by how much to extend the Intended Completion Date within 21 days of the Contractor asking the Project Manager for a decision upon the effect of a Compensation Event or Variation and submitting full supporting information.

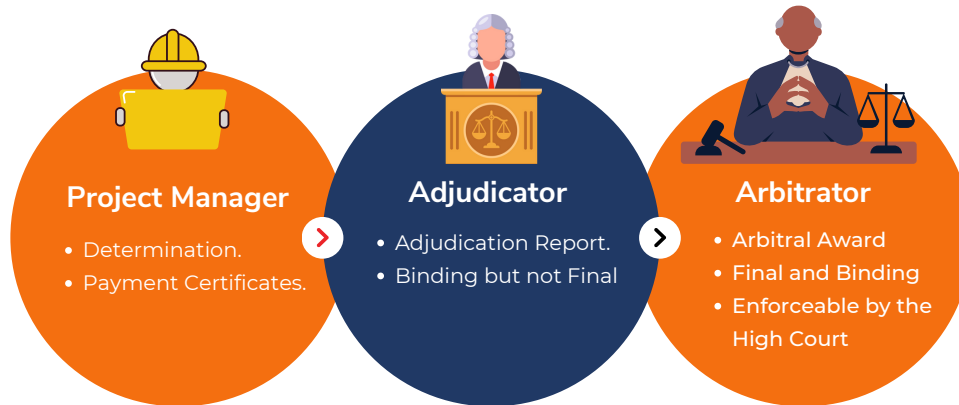
If the Contractor has failed to give early warning of a delay or has failed to cooperate in dealing with a delay, the delay by this failure shall not be considered in assessing the new Intended Completion Date.

PAYMENT

- 42.1 The Contractor shall submit to the Project Manager statements of the estimated value of the work executed less the cumulative amount certified previously. Unless otherwise specified in the SCC, such statements shall be submitted monthly.
- 42.3 The value of work executed shall be determined by the Project Manager.
- 43.1 Payments shall be adjusted for deductions for advance payments and retention.
- The Employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of each certificate.
- If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment.



THE CLAIMS PROCEDURE



THE CLAIMS PROCEDURE (PPDA)

32. Early Warning

32.1 The Contractor shall warn the Project Manager at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract Price or delay the execution of the Works. The Project Manager may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate shall be provided by the Contractor as soon as reasonably possible.

WHAT IS A VALID NOTICE?

6. Notices

- 6.1 Any notice given by one party to the other pursuant to the Contract shall be in writing to the address specified in the SCC.
- The term "in writing" means communicated in written form with proof of receipt.
- 6.2 A notice shall be effective when delivered or on the notice's effective date, whichever is later.

WHAT IS REASONABLE TIME?

- English law frequently requires things to be done in reasonable time but 'reasonable time' is never defined. The acceptable period for any particular case brought before the law may be established by referring to trade practice, custom or where there are similar precedents.
- The word 'reasonable' is open to interpretation and depends on questions of fact and circumstances which will cause legal difficulties.
- The Contractor will have to demonstrate what a "reasonable" time is.
- The Employer will still have the right to claim delay damages from the Contractor, so the Employer will attempt to demonstrate that the time taken is not "reasonable". The burden of proof is on who alleges.



CONSTRUCTION CLAIMS

PREPARATION OF A VALID NOTICE

- The letter should be a stand-alone document. A reader with no prior knowledge should be able to understand it without reference to any other documents.
- Quote the Contractual Clause that gives rise to the Claim and the Entitlement. E.g. GCC 44.1 (a) Delayed Access to Site.
- Quotations are very powerful, use quotations from other records or the contract.
- Never use abbreviations or acronyms.
- Avoid the use of words such as 'they', 'him' and 'it' when referring to the parties, people or companies, because this often leads to misunderstanding and confusion. Use the contractual names – 'the Employer', 'the Contractor', 'the Engineer' or their actual names.
- Substantiate facts put forward and statements made in the letter. 'As recorded under Minute 12.3 of the Site Meeting Minutes held on 14 August 2019, we were instructed to suspend work in Area B' is better than 'We were instructed to suspend work in Area B on 14 August 2019'.
- Be specific. Phrases such as 'This is for your information and action', 'we reserve our rights' or 'please do the needful' are meaningless. Specifically state what action is necessary, what rights you are entitled to, and what 'the needful' actually is.
- Finally, this advice applies equally to the compilation of minutes, reports, claims responses, determinations, decisions, instructions, and anything else that will form part of the project records.



CONSTRUCTION CLAIMS

The object of a claim is to demonstrate that on the balance of probability, the claimant is entitled to compensation and the amount of such compensation. In the case of a construction claim, the compensation would more than likely consist of additional time, additional payment or both. The claim must be demonstrated, substantiated and justified so as to achieve the desired result.

The elements that are absolutely essential to include in a claim or determination are as follows:



CONSTRUCTION CLAIMS

THE CLAIMS PROCEDURE (FIDIC).

- Clause 2.1 (Right of Access to the Site), If the Contractor suffers delay or incurs costs as a result of late possession of the site, he is to give notice to the Engineer and is entitled to additional time and money provided that he complies with Clause 20.1.
- The Engineer determines the entitlement under Clause 3.5 (Determinations). The principal variation from clause to clause is whether the Contractor is entitled to “reasonable profit” in addition to “Cost” which is defined as “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 profit”.

CONTRACTOR'S CLAIMS

Contractor's Claims FIDIC SUB-CLAUSE 20.1

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 circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have 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 shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The notice is to be given within 28 days of when the Contractor became aware or should have become aware of the relevant events.

If a Contractor fails to give notice within 28 days, he loses entirely his claim and the Employer is released from his liability. This sanction appears to apply also to variations which are instructed under Clause 13.1 (Right to Vary). Clause 13 provides no other notification regime. It may not be every legal system that would permit an Employer to have the benefit of additional work ordered as a variation without obliging him to pay for it.

CLAIMS ARISING FROM THE SAME EVENT.

The Covid19 Force Majeure claims were made under the FIDIC Sub-Clause 19.1 which allows Extension of Time for Completion and Prolongation Costs.

PREPARATION OF A VALID NOTICE

HOW TO PREPARE OF A VALID NOTICE

1

The letter should be a stand-alone document. In other words, a reader with no prior knowledge should be able to understand it without reference to any other documents.



2

Quotations are very powerful, so rather than describing things in your own words, use quotations from other records or the contract. When you do use quotations, make sure that you identify them as such.



3

Never use abbreviations or acronyms. Even if these are in general use on the project, they may not be understood by someone who is unfamiliar with the project. It takes hardly any additional time to type the words out in full and this is time well spent.



4

Avoid the use of words such as 'they', 'him' and 'it' when referring to the parties, people or companies, because this often leads to misunderstanding and confusion. Use the contractual names – 'the Employer', 'the Contractor', 'the Engineer' or their actual names.

5

When referring to the contract, use the names of clauses as well as the clause numbers. 'Sub-Clause 20.1 (Contractor's Claims)' is much more effective and helpful than just 'Sub-Clause 20.1', which relies on the reader having intimate knowledge of the contract

6

Substantiate facts put forward and statements made in the letter. 'As recorded under Minute 12.3 of the Site Meeting Minutes held on 14 August 2019, we were instructed to suspend work in Area B' is better than 'We were instructed to suspend work in Area B on 14 August 2019'.

7

Be specific. Phrases such as **"This is for your information and action"**, **"we reserve our rights"** or **"please do the needful"** are meaningless. Specifically state what action is necessary, **what rights you are entitled to**, and what **'the needful'** actually is.

8

Finally, this advice applies equally to the compilation of minutes, reports, claims responses, determinations, decisions, instructions, and anything else that will form part of the project records.



DELAY ANALYSIS

In the case of delays, programmes will become an essential means of demonstrating the effects of the delays on the completion date and hence, the contractor's entitlement to an extension of time.

- The contractor's intended programme should be prepared and agreed early in the contract period.
- Those responsible for administering the contract on behalf of the Employer should not insist on an unreasonable level of detail, bearing in mind the timeframe for submission of the programme.
- The programme is supposed to reflect the intentions of the parties at the time of contract and should not include post-contract events.
- Updated programmes that record progress to date and predict the completion date should be produced and agreed on a periodic basis.
- If the 'ownership' of float is not stipulated in the contract, early agreement between the parties on its allocation is recommended.
- An essential part of any claim for an extension of time is a demonstration that the delay event actually had an effect on the time for completion.
- There must be a programme from which to measure the effect of a delay. Whatever programme is used for the delay analysis, it is necessary to make reference to it within the claim, possibly with an explanation as to how it came about. It is also necessary to include substantiation to demonstrate that it was approved or accepted by the Engineer and to include the programme within the appendices.
- It must be remembered that delay does not automatically lead to an extension of time. For example, a 25-day delay to an activity will not automatically result in entitlement to an extension of time of 25 days because, in order to have an effect on the completion date, the delay event must impact the critical path of the programme.
- It could well be the case that a delay event will only use up float, or that the delayed activities are not on the critical path. Alternatively, it could be the case that the delay event uses up the entire available float, thus making the activity part of the critical path and therefore affecting the date for completion.

CAUSE AND EFFECT

Often the best way to deal with the event itself is to present the details through a chronology. The chronology should describe what happened, when it happened and provide substantiation of the events by way of reference to the project records. The project records should, of course, be included in an appendix for verification and reference. We should also split the chronology into sections that deal with cause and effect so that it is very clear that we have these essential elements covered.

The chronology will demonstrate the cause, i.e. what happened and is usually a matter of fact. The effect is a little more subjective and often takes a little more work to demonstrate. The effect section should conclude with the following:

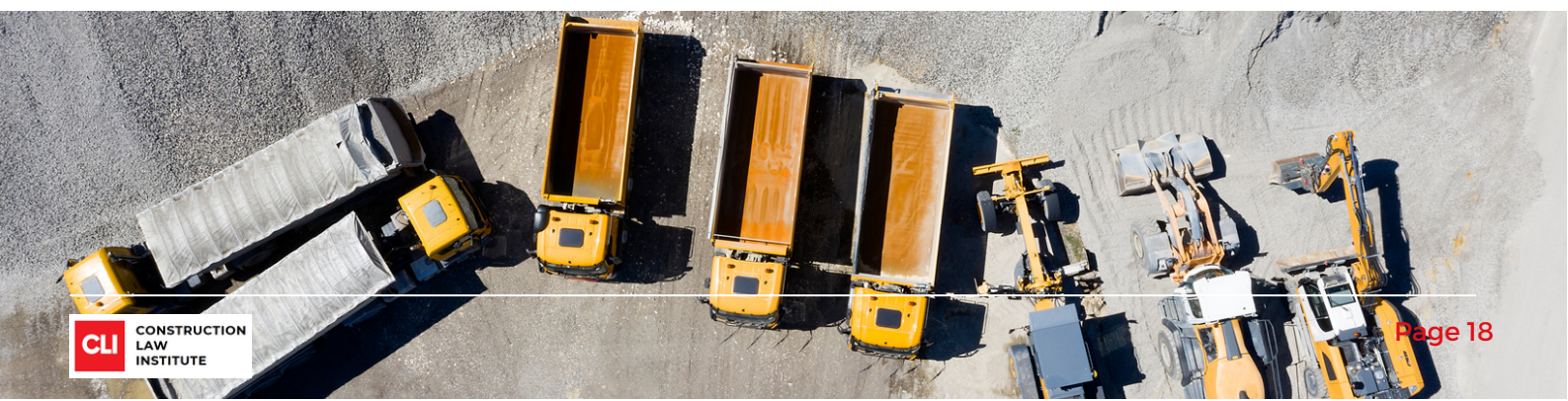
- What activity(ies) were affected; When did the delay start; When did the delay finish.
- Once we have established the facts of the matter, it is necessary to demonstrate that the delay event or events actually delayed the time for completion and by how much. The above information can therefore be used to create a delay analysis to show the effect on the completion date.

CONCURRENT DELAY

Where two delays occur at the same time or concurrently and one of the concurrent delays is the responsibility of the Contractor and the other is the responsibility of the Employer, the entitlement of the Contractor to an extension of time is not negated. Concurrency affects the payment of prolongation costs, but not time.

One of the frequently-used methods of delay analysis is to impact the delay into the current programme to produce an 'impacted as-planned' programme and this may be done by adding the delay event itself as a new activity within the programme.

If this method is chosen, the appropriate logic links must be introduced. The resulting impacted as-planned programme will show the effect of the delay event on the critical path and consequently, on the completion date. The revised completion date will, in turn, demonstrate the extension of time to which the claimant is entitled.



FORCE MAJEURE

Force majeure is a provision in a contract that relieves the affected party from performing their contractual obligations when circumstances beyond their control arise that make performance of the contract impossible.

A force majeure clause is referred to as an act of God and it includes events such as earthquakes, floods, war, an epidemic and government orders or directives.

The FIDIC Conditions of Contract, 1999 define force majeure to mean an exceptional event or circumstance which is beyond a party's control, which such party could not have anticipated before entering into such a contract, which having arisen, such party could not have reasonably avoided or overcome and which is not substantially attributable to the other party.

FORCE MAJEURE IN THE FIDIC CONTRACT

"Force Majeure" is defined at clause 19 of the 1999 FIDIC Red Book as an exceptional event or circumstance which :- is beyond a Party's control;
- such Party could not reasonably have provided against before entering into the Contract;
- having arisen, such Party could not reasonably have avoided or overcome; and
- is not substantially attributable to the other Party.

The party giving the notice will be entitled to an extension of time (although it must mitigate delay) and payment of additional cost.

If the Force Majeure event subsists for a continuous period of 84 days or multiple periods totaling 140 days, either party may terminate the contract after notice.

THE SALIENT FEATURES OF A SUCCESSFUL CONSTRUCTION CLAIM.

The object of a claim is to demonstrate that on the balance of probability, the claimant is entitled to compensation and the amount of such compensation. In the case of a construction claim, the compensation would more than likely consist of additional time, additional payment or both. The claim must be demonstrated, substantiated and justified so as to achieve the desired result.

The elements that are absolutely essential to include in a claim or determination are as follows:



CEES *CAUSE

- The Cause is generally a statement of fact, which if adequate substantiation is provided, is usually fairly easily established by way of the project records.
- The Cause is the occurrence of the event, which has given rise to the claim. Typically, this could be: Late or restricted access to the site, The issue of an instruction to carry out additional work, The issue of a revised drawing, Late issue of instructions or information, The issue of an instruction to suspend the works, The issue of an instruction to accelerate the works, Exceptionally adverse climatic conditions, Changes in government legislation, Force Majeure, Delay caused by the Employer or other parties engaged by the Employer, An act of prevention by the Employer, his agents or contractors.

CEES *EFFECT

- Effect: For a claim to succeed, it will be necessary to demonstrate that the effect on which the claimed compensation is based, was in fact caused by the event by linking the cause with the effect.
- The Effect of the event is usually a little more complicated to establish and to link directly to the cause, because this is often a subjective matter, which requires to be both demonstrated and substantiated. E.g: Late or restricted access to the site. a. What effect will this have on the programme? b. Will this give rise to entitlement to an extension of time? c. Will this give rise to entitlement for additional payment for prolongation? d. Will this require acceleration measures and thus, the entitlement to claim for additional payment for providing such measures?



CPC FREIGHT SERVICES LTD -VS- UGANDA PROPERTY HOLDINGS LIMITED

- Any party seeking to assert the force majeure clause has the burden of proving that the event was beyond its control.
- The party must also show that it has taken reasonable steps to mitigate/avoid the effects of the force majeure event and in situations where prompt notification is a contractual condition, this must be implemented.
- The events relied on to plead force majeure must have been included in the force majeure clause.
- The events must be such that any diligent party ought to reasonably have taken into account at the time of preparing their bid and not after signing the contract.
- A force majeure claim must be inevitable and unforeseeable and must make the execution of the contract wholly impossible.

CEES *ENTITLEMENT

- A demonstration of the cause and effect of an event will not automatically contain entitlement to an extension of time and/or additional payment. The claim will either flow from a remedy contained in the contract conditions, or from a breach of the contract giving rise to damages under the law and could possibly fall under both categories.
- It is of vital importance to set out precisely on what contractual basis the claim is made. A substantial part of any contract is the allocation of risk between the parties and it is therefore necessary to demonstrate that the event on which the claim is based is something that the contract, or the law to which the contract is subject, provides entitlement to the claimant.
- It is therefore, imperative to state precisely on what contractual basis the claim is founded. The first place to check for entitlement is the Contract.

CEES *SUBSTANTIATION

- The last essential element of the claim is substantiation or, in other words, proving to a reasonable level that all statements made, points relied on, calculations submitted and the like are correct.

For a claim to succeed, it is essential to include the following:

- An examination of the cause;
- And examination of the effect, with a linkage to the cause;
- A demonstration of entitlement under the contract or at law;
- Substantiation of all the above. Remember CEES!

EMPLOYERS CLAIMS

Day 1
Session 4



Eng. Ian Bakiza – R. Eng.,
M.U.I.P.E

LIQUIDATED DAMAGES (LD's)

- Liquidated Damages(LDs) – A fixed sum usually per week or perday writtten into the contract in the event that works are not completed by the contract completion date (original or extended)
- LD's avoid the difficulty of proving and assesing actual loss where delay occurs and Liquidated damages may apply to sectional handover
- LD's applied if works not taken over by the employer by the time for completion and extensions of time (if any)
- Employer to issue relevant notices
- LD's should not be extravagant unconcionable and therefore unenforceable at law (Penalty)
- Condition precedent as it relates to LD's.

TIME AT LARGE

- If completion takes place after the agreed date for completion then the contractor is liable for liquidated damages unless Time is “at large” because of a delay caused by the employer and there remains some period of culpable delay
- There may also be circumstances which arise rendering a completion period fixed by the contract as no longer operable, again rendering time at large e.g. where a delay is caused by the employer and the terms of the contract make no provision for extending the completion date due to delays by the employer.
- Time may also be considered “at large” where the contractor submits a valid extension of time claim, but this is either not responded to, or an extension of time is not awarded and the contractor completes later than the contractual completion date.



TERMINATION

- Contract termination is when one party to a contract wishes to end the contract before the other party can fulfil the agreement
- Occurs where there is default or breach by either Party of their obligations in the Contract
- Both the Employer and the Contractor may terminate the Contract.
- Clause 15 sets out the procedure for Employer termination and
- Clause 16 sets out the procedure for Contractor termination
- The Employer may also terminate under Sub-Clause 11.4 [Failure to Remedy Defects], and both Parties may terminate under Sub-Clause 19.6 [Optional Termination, Payment and Release]
- Care must be taken not to issue termination notices prematurely as they may amount to repudiatory breaches or material breaches under law.

TERMINATION BY EMPLOYER - Why?

- Contractor fails to submit the contractually required performance security/letters of guarantee;
- Contractor fails to comply with a contractual notice to correct;
- Contractor abandons the Works or demonstrates the intention not to continue performance of his obligations under the Contract;
- Contractor fails to proceed with the Works without reasonable excuse
- Contractor fails to remedy any defects in the Works without reasonable excuse;
- Contractor subcontracts the whole Works or assigns the Contract without the Employer's agreement;
- Contractor becomes bankrupt or insolvent; or
- Contractor Bribery in relation to the Contract

EMPLOYER'S TERMINATION FOR CONVENIENCE - SC 15.5

- The Employer may terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor.
- The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. T
- Employer shall not terminate the Contract for convenience in order to execute the Works himself or to arrange for the Works to be executed by another contractor.
- After this termination, the Contractor shall proceed in accordance with Sub-clause 16.3 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid in accordance with Sub-clause 19.6 [Optional Termination, Payment and Release]."
- The Costs compensable to the contractor as a consequence of the employers termination for convenience are intended to restore the Contractor to the financial position it would have been in had the project never commenced (i.e. no allowance for profit).
- It follows that the Employer is not entitled to terminate the Contract in order to complete the Works himself or by engaging a new (and potentially cheaper) Contractor.

OPTIONAL TERMINATION, PAYMENT AND RELEASE [FORCE MAJEURE]

- If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub- Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract.
- In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub- Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment]

TERMINATION BY CONTRACTOR - Why?

- The Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 in respect of a failure to comply with Sub-Clause 2.4 [Employers Financial Arrangements]
- The Engineer fails within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate
- The Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [Payment] within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 [Employer's Claims])
- The Employer substantially fails to perform his obligations under the Contract.
- The Employer fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment].
- The Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws)has a similar effect to any of these acts or events.

TERMINATION BY CONTRACTOR – EMPLOYER’S OBLIGATIONS

- If the Contractor terminates under Sub-Clause 16.2 [Termination by Contractor], the Employer is required to promptly:
 1. return the Performance Security to the Contractor,
 2. pay the Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release], and
 3. pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.”
- Sub-Clause 16.2 deals with the Termination by the Contractor. There are seven grounds specified.
- In most cases the Contractor may give 14 days’ notice if it intends to terminate the contract;
- However, the Contractor may by notice terminate immediately, where there has been a prolonged suspension under Sub-Clause 8.11 [Prolonged Suspension] or, bankruptcy, liquidation, insolvency or receiving or administration orders have been made against the Employer

TERMINATION BY CONTRACTOR VS OPTIONAL TERMINATION

- Under Sub-Clause 16.3(b) the Contractor will have handed over only the items for which he has received payment. However under Sub-Clause 19.6(a) he is entitled to be paid for work done and under Sub-Clause 19.6(b) to be paid for Plant and Materials ordered for the Works.
- He is then required to hand over anything paid for by the Employer. Thus it is possible that the Contractor will, under Sub-Clause 16.3 be required to take away certain Plant and Materials, but under Sub-Clause 19.3, be entitled to be paid for them and required to return them.
- Employers should therefore not assume that because the Contractor has removed any Goods from the Site – as required under Sub-Clause 16.3, they will not be obliged to pay for them.
- Sub-Clause 16.4 (c) requires the Employer to pay loss of profit or other loss or damage sustained by the Contractor as a result of this termination.
- This contrasts with a termination under Sub-Clauses 15.5 and 19.6 under which only cost is paid.
- From an Employer’s point of view a termination under Sub-Clause 15.5 (which is always the Employer’s right) or Clause 19.6 (which is possible though unlikely) or Sub- Clause 15.2 will be preferable to a Contractor’s termination under Clause 16.2.



VARIATIONS

Day 1 Session 5



VICTOR ODONGO

- Quantity Surveyor, Project Manager & Arbitrator/Mediator
- Vice President, AAQS East African Region
- Principal Partner, Buildcost Associates
- B.A Build Econ(Hons), R.S.U, F.I.S.U, M.A.A.K(QS),C.I.Q.S.K, MCI Arb



01. Definition

A variation is **an alteration to the scope of work** originally specified in the contract through:

- ✓ Addition, omission or substitution to the works
- ✓ Change to the manner in which the works are to be carried out

02. CAUSES OF VARIATIONS

01

Client requirements/ design

- Insufficient client involvement in design phase
- Lack of understanding of client requirements
- Change in mind or requirements
- Fast track projects (construction prior to design completion)

02

Work scope

- Inadequate planning at project definition phase
- New circumstances that cause change in scope

03

Financial circumstances

- Client's budget constraints or need for savings in project
- Improvement in Client's financial circumstances

04

Conflicting contract docs

- Misinterpretation of project requirements where contract documents and details are not clear, sufficient or with room for misinterpretation

05

Decision making process

- Decisions should be taken promptly to avoid delays and extra costs
- Delayed decisions result in variations and extra costs

VARIATION PROCEDURE

1

Contractor Request

- Prepares a variation order request form and submits to the Client.
- Request is reviewed and evaluated by the Client and approved if deemed necessary.
- Upon approval of request, the document is discussed between the client and the contractor including the time and cost effect of variation.
- Upon agreement, signed variation order including the scheduling and cost breakdown is submitted to the Client by the contractor.
- Client accepts and signs/formally approves the variation order and the work described in the variation order may start

2

Client Issued

- Client identifies the need for a variation and the variation order proposal is initiated.
- Initiator variation order is prepared and submitted to the contractor.
- Variation order is evaluated by the contractor.
- After contractor review, the document is discussed between the client & contractor including the time and cost effect of variation.
- Upon agreement, final version of the signed variation order including the scheduling and cost breakdown is submitted to the Client by the contractor.
- Client accepts and signs the variation order and the work described in the variation order may start.

FIDIC RED BOOK

Clause	Title
GCC 13	Variations and Adjustments
13.1	Right to vary
13.2	Value Engineering
13.3	Variation Procedure
13.4	Payment in Applicable Currencies
13.5	Provisional Sums
13.6	Daywork
13.7	Adjustments for Changes in Legislation
13.8	Adjustments for Changes in Cost



PPDA CONTRACT

Clause	Title
GCC 41	Early Warning
GCC 46	Bill of Quantities or Activity Schedule
GCC 47	Changes in the Bill of Quantities or Activity Schedule
GCC 48	Variations
GCC 49	Payment for Variations
GCC 53	Compensation Events

EAIA (BLUE BOOK) CONTRACT

Clause	Title
Clause 11	Variations, Provisional and Prime Cost Sums
Clause 12	Contract Bills
Clause 13	Contract Sum

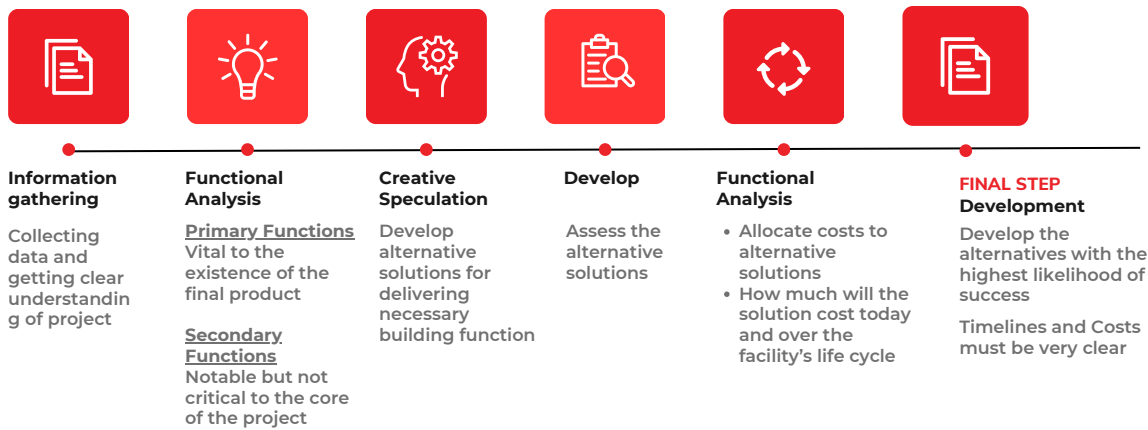


VALUE ENGINEERING

Definition:

- An organized effort directed at analyzing designed building features, systems, equipment, and material selections for the purpose of achieving essential functions at the lowest life cycle cost consistent with required performance, quality, reliability, and safety.
- During the Design Stage - Value engineering considers alternative design solutions to optimize the expected cost/worth ratio of projects at completion. Value engineering is aimed at maintaining or enhancing results while reducing life cycle costs.
- In the Construction Stage - Contractors are encouraged through shared savings to draw on their special 'know-how' to propose changes that cut costs while maintaining or enhancing quality, value, and functional performance

PROCEDURE



FIDIC RED BOOK

GCC 13.2 – Value Engineering

PPDA CONTRACT

Value Engineering is not specifically provided for

EAIA (BLUE BOOK) CONTRACT

Value Engineering is not specifically provided for

QUANTUM MERUIT

Quantum meruit, which is a Latin term, means "as much as he had earned."

In legal usage, quantum meruit states that "someone must not be forced to pay an amount that exceeds the total cost of services".

Application:

- The expression quantum meruit means "the amount he deserves" or "what the job is worth".
- Generally a quantum meruit claim cannot be made if there is an existing contract between the parties that stipulates or allows for the calculation of the sum to be paid.

Circumstances under which Quantum Meruit can be invoked;

In Contract with no price:

- Scope of Work is outline but there is no fixed price or method of calculating costs
- Think of "Dayworks", "Cost", "Cost plus profit", etc

Work outside of contract:

- Contract is for specific and well defined work.
- Contractor does work outside the Scope at the Client's request

Void unenforceable or terminated contract

- Contract is void or is rendered unenforceable by operation of statute
- Where a contract is repudiated by the Principal

Circumstances under which Quantum Meruit can be invoked;

Heads of agreement by contractor cannot claim payment

- Contractor may have signed a heads agreement which sets out key terms to negotiate before signing a final contract.
- The head of agreement may not be legally binding or subject to the final contract and also do not include a scope of work and a method of calculating the cost.
- During negotiations, Contractor may have done some initial works



“ — —
In construction, quality
is never an accident; it is
always the result of
intelligent effort.

-John Ruskin



CONSTRUCTION OF SAVANNAH HOTEL KAMPALA

Savannah Holdings Limited (SHL) is a conglomerate of international luxury hotels and resorts and wishes to open shop in Uganda. Savannah Kampala Hotel will be a 5-star hotel on a site located along Windsor Crescent Kololo in Kampala Uganda at Plot 5 which was formerly occupied by factory. The Contract includes information that all existing structures foundations, bases and services have been removed and the Site has been left by the demolition contractor at ground level.

The hotel project comprises a five-story building consisting of a basement parking area, a ground floor retail area, and 50 luxury hotel rooms on Floors 1 to 4 with lobbies on each floor, staircases and a lift are contained in a central core and the roof contains a heated infinity swimming pool with a swim up bar.

The Employer is Savannah Holdings Limited (SHL), the Contractor is Impala Construction Limited (ICL) and the Consultant/Project Manager is Amalgamated Architects Limited (AAL).

The Contract is the FIDIC, Conditions of Contract for Construction, for Building and Engineering designed by the Employer, First Edition 1999. A Letter of Acceptance was issued by the Employer on 15 June 2020. The formal contract was entered into by the Parties on 25 July 2020. The Accepted Contract Amount as confirmed in the Letter of Acceptance is US \$ 10,000,000.

The Commencement Date was 2nd July 2020. The Completion Date is 31st December 2021. Consequently, the contract period is 18 months. On 26th July 2020, the Contractor submitted his programme to the Engineer. The programme was reviewed jointly between the Engineer and the Contractor and a few minor amendments were agreed

On 31st July 2020, the Contractor submitted a revised programme to the Engineer incorporating the agreed changes. On 2nd August 2020, the Engineer confirmed that he had no objection to the programme as submitted. The Contractor's programme is enclosed herewith as "Appendix A".

The Site was handed over to the Contractor on the Commencement Date, 2nd July 2020 and the Contractor started setting up his site facilities on the same day. Mobilisation including site fencing, site clearance and site mobilisation took place between 2nd and 17th July 2020.

The Contractor commenced construction activities with the reduced level excavation which took place as planned, between 18th and 24th July 2020. The excavator broke down on 25th July 2020 and was not repaired until the afternoon of 14th August 2020. As a result, no works took place until the 15th August 2020. The Engineer wrote to the Contractor about the delay.

The planned start of the basement excavation was delayed by 5 days. On 30th August 2020, the Contractor uncovered a 150mm ductile iron pipeline running through the center of the basement in a North-South Direction at around 1200mm below ground level. The Contractor immediately verbally advised the Engineer, who gave verbal instructions to carefully expose the pipe but to otherwise not to disturb it, pending further investigations.



Case Study 2

The location of the pipeline prevented the Contractor from gaining access to approximately 50% of the basement area, the Contractor had carried out all the excavation possible without disturbing the area surrounding the pipe.

The ground floor raft slab is designed to link to the basement retaining wall, which in turn is linked to the basement raft. The design and construction operations dictated that the Contractor needed to backfill the over-excavation and working space behind the basement retaining wall before the ground floor slab could be commenced, so construction operations were effectively stopped from this point in time.

On 24th September 2020, the Engineer advised the Contractor via a Site Instruction that after investigations it had been ascertained that the pipeline was a redundant water main and instructed the Contractor to break it out and remove it from site.

The Contractor cut up and removed the pipeline on the 27th and 28th September 2020 and was able to resume his basement excavation operations on 29th September 2020.

On the 18th of October 2020, there was a tremor in Kampala and once of the basement floors cracked, the Minister for Kampala asked all people to stay home for 14 days until the situation normalized and the works continued on the 15th day.

QUESTION :

- I. What are the potential claims that either party may make under these circumstances?
- II. WHAT clause or clauses under the Contract provide the entitlement?
- III. What notices ought to be issued by either party?
- IV. Examine the Contract and explain what the contractual outcome would be if either party failed to comply with the notice provisions contained in the contract.



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DAY 2

12TH MAY 2023



PROLONGATION COSTS

Day 2 Session



VICTOR ODONGO

- Quantity Surveyor, Project Manager & Arbitrator/Mediator
- Vice President, AAQS East African Region
- Principal Partner, Buildcost Associates
- B.A Build Econ(Hons), R.S.U, F.I.S.U, M.A.A.K(QS),C.I.Q.S.K, MCI Arb



Delay by employer = Prolongation costs to Contractor (loss & expense)

Delay by contractor = Liquidated damages to Employer

- Employer is responsible for the delays and therefore the Contractor to remedy.
- Time-related costs incurred by the Contractor as a result of critical delay to the Works where Contractor is not responsible.
- Are intended to compensate the Contractor for its time-related costs which it would not have incurred but for the Employer-risk delay event.
- “Costs and losses incurred as a result of delays to the activity in question or the works as a whole which have led to critical delay to the contract completion date” (*Keating on Construction Contracts*)
- “The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred” (*The SCL Delay & Disruption Protocol*)

Principles of Prolongation costs

Facts

Financial element of a Contractor delay claim upon granting Extension of time
Claims by contractors for delay or disruption related loss and expense must be proved.

- *Events leading to loss & expense*
- *The events caused delay/disruption*
- *The relationship between delays/disruption and loss & expense*

Claim submission must include:

- *Sufficient information to ascertain loss & expense*
- *Comprehensive supporting information.*

Clarifications

- No automatic entitlement to loss and expense or damages even if a right to an extension of time is established
- No requirement for the Contractor to provide “every conceivable detail”. Architect & Quantity Surveyor are not strangers to the project in considering what needs to be provided to them
TCC's judgment in Walter Lilly & Company Limited v Giles Patrick Cyril Mackay [2012] EWHC 1773 (TCC)

Heads of Prolongation Costs by Contractor

Contractor is entitled to Prolongation Costs under the following circumstances

- *Requisite notices and early warning were given in accordance with the contract*
- *Submission of Claim for Extension of time on time in accordance with the Contract.*
- *Extension of Time is granted by the Project Manager/Engineer/Architect.*

Key items that a Contractor submitting a Claim for Prolongation must observe

- *The rules of the contract must be followed*
- *Causation must be established.*
- *Evidence is key.*
- *The Contractor should seek to establish its actual costs and losses incurred.*

Head 1 - On-site preliminaries / overheads

- Labour Costs
- Plant and equipment
- Preliminaries

Head 2 -Head office (off-site) overheads

- Increased head office overheads
- Lost contribution to head office overheads
- Preliminaries

Head 3 – Loss of profit

- Reduced turnover for project delay (affecting upcoming tenders or other projects)
- Loss of turnover profitability at time of delay.

HEADS OF PROLONGATION COSTS BY EMPLOYER

Liquidated and ascertained damages ('LAD' or just 'LD', or even "Delay Damages")

- As agreed upon by both parties to deal with delays and specified contract breaches.
- Provide certainty to consequence of breaches.
- Are a time and cost efficient solution as parties avoid costly debates about how much the defaulter should pay for a breach.

Supreme court (2021, Triple Point Technology and EWB v Dobler) guidance on LAD

- *The accrual of LAD comes to an end upon termination of a contract*
- *After this, the aggrieved party must seek damages for breach of contract under the common law or tort law*
- *The Triple Point decision removes the need to draft express provisions for the termination of a contract prior to completion of the Works in LAD clauses and provides certainty to contracting parties regarding the enforceability of LAD clauses, specifically where completion of the Works has been delayed.*

Prolongation costs reference clauses in contracts

PPDA FORM OF CONTRACT

- General section (14No)
GCC 10,15,16,17,19,21-22,26-28,32-35
- Time Control section (5No.Clauses)
GCC 36-41
- Quality Control section (2No. Clauses)
GCC 42-43
- Cost Control section (8No. Clauses)
GCC 48,51-53, 56,58-59,61
- Finishing the contract section (5No. Clauses)
GCC 64-66,68,70

EAIA (BLUE BOOK)

18No Clauses
Clauses 1-3,11,15-16,21-25,29-30,32-34,36

ACCELERATION COSTS

Claims for payment made as a result of the costs associated with speeding up work consisting of:

- *Overtime payment*
- *Compensation for increased scope of work.*
- *Change orders.*
- *Supplementing the workforce.*
- *Expedited Procurement of Materials (local & imported)*

HEADS OF PROLONGATION COSTS BY EMPLOYER

Liquidated and ascertained damages ('LAD' or just 'LD', or even "Delay Damages")

- As agreed upon by both parties to deal with delays and specified contract breaches.
- Provide certainty to consequence of breaches.
- Are a time and cost efficient solution as parties avoid costly debates about how much the defaulter should pay for a breach.

Types of Acceleration cost.

Voluntary Acceleration

- Contractor's self drive to accelerate their work
- The contractor is not entitled to acceleration claims

Directed acceleration

- Contractor is formally instructed by change order to accelerate the work
- Compensation is made for that acceleration

Constructive acceleration

- Occurs when the contractor faces an excusable delay and requests an extension of time
- Constructive acceleration arises in the event the extension request declined and the contractor must instead accelerate work to catch up with the project schedule
- To make a claim for this type depends on the process under which it was undertaken; that is
- Was the Employer aware, or a statement made or action made by the Employer to that could be interpreted as an order?
- Did the contractor provide notice of constructive change?

Acceleration costs reference clauses in contracts

PPDA FORM OF CONTRACT

Time Control section (1No.Clause)

§GCC 38 - Acceleration

EAIA (BLUE BOOK)

4No Clauses

- *Cl.21 – Possession, Completion and Postponement*
- *Cl.22 – Damages for non-completion*
- *Cl.23 – Extension of Time*
- *Cl.24 – Loss and Expense caused by disturbance of regular progress of the works*

PRICE ESCALATIONS (FLUCTUATIONS)

A Price Escalation clause (or 'cost escalation clause') is a pre-determined contractual mechanism that facilitates the contractor passing on changes in basic costs (both increases and decreases) to the employer

The contractor retains the ability to adjust the contract price in line with the fluctuating costs of raw materials in the market and other elements of the works at the time

This clause has the advantages:

- *Price change risks are transferred from the Contractor; more predictability in contractors' bids received*
- *More realistic and lower bids are received*
- *"Disagreement" between the parties due to unforeseeable fluctuations in the market is eliminated*
- *By including a "cap" on the amount of fluctuations, the Employers' Risk is eliminated by including a Provisional Sum to cover the Cost of fluctuations*

The frequency of calculating and notifying the Employer of the effects of the Price Adjustment should be clear

The following MUST be included in the Bidding Documents and the Contract Agreement:

- *Price Fluctuation formula*
- *Source of the Cost Fluctuation Data*
- *Base Date for Price Adjustment*
- *Upper and Lower Limits for the Price Adjustment to apply.*
- *A Provisional Sum to provide the Budget for Price Adjustment*

PRICE ESCALATION UNDER PPDA FORM OF CONTRACT

This is provided for under GCC and SCC Clause 56 (Price Adjustments)

The PDE has the option of eliminating GCC 56 through the Special Conditions of Contract.

The guideline on whether or not to include GCC 56 (Price Adjustment) is given under PPDA Reg. (Contracts) 40 (1) which clarifies that

- *Applicable to contracts extending beyond eighteen months*
- *At PDE's discretion where it is more economical for the PDE to accept the inflation risk than to pay an additional cost for the supplier to accept the risk*

Clause GCC 56 (Price Adjustment) explained

56.1 Prices payable (as stated in contract) are subject to adjustment to reflect changes in cost of labour and material components using the formula:

$$\Delta P = P_0 \left(a + b \frac{L_1}{L_0} + c \frac{M_1}{M_0} \right) - P_0$$

in which:

ΔP = adjustment amount payable to the Provider.

P_0 = Contract Price (base price).

a = fixed element representing profits and overheads included in the Contract Price and generally in the range of five (5) to fifteen (15) percent.

b = estimated percentage of labour component in the Contract Price.

c = estimated percentage of material component in the Contract Price.

L_0, L_1 = labour indices applicable to the appropriate industry in the country of origin on the base date and date for adjustment, respectively.

M_0, M_1 = material indices for the major raw material on the base date and date for adjustment, respectively, in the country of origin.

The coefficients a , b , and c shall be specified by the procuring and disposing entity in the bidding documents. The sum of the three coefficients should be one (1) in every application of the formula.



The key requirements of GCC 56 are as follows:

a) Source of indices

b) Base date = thirty (30) days prior to the deadline for submission of the bids

c) Date of [commencement of] adjustment

d) Limitations set for the application of price adjustment such as;

- Result increase or decrease upon adjustment is more than a specified %age of contract price
- Not applicable for periods of delay for which the caused by the contractor
- There must a cap/ceiling expressed as a %age of the contract price for the total price adjustment
- Application of a correction factor for work items differing from the currency of contract
- Not applicable to advance payment (GCC 56.2)

e) Changes in indices used after calculation are updated in subsequent payments (GCC 56.3)

f) Under the PPDA form of Contract

- The source of Indices is usually the Uganda Bureau of Statistics (UBOS) – Construction Sector Indices.
- The source of the Rates of Exchange is usually the Bank of Uganda
- All the factors related to the price adjustment formula must be stated in the Contract

Price adjustment computation sample

a) Computation of Price adjustment factor;

ANNEX 1 TO SCC: TABLE OF PRICE ADJUSTMENT DATA

Determination of price adjustment factor (f) for prices of work items/groups Source of Indices: **UBOS**

Price adjustment factor $f = [a_1+a_2(A_1/A_0)+b(L_1/L_0)+c(M_1/M_0)+d(D_1/D_0)]$ Source of Exchanges Rate: **BOU**

Bid Date: **5 March 2014**

Base Date: as provided/signed in contract & 28 days before bid submission **5 February 2014**
(exchange rate N_0)

Cert. 01 Date: **11 February 2020**

Item	UBOS Indices Available or Not	Description	Agreed component percentage (Coefficient)					UBoS Indices										PAF component, f						
			Profit	Over-heads	Labour	Material	Plant	Overheads (Non-Residential Buildings)		Labour		Materials		Plant		USD - UGX Exchange Rate (Material)								
								a_1	a_2	b	c	d	A_1	A_0	L_1	L_0	M_1		M_0	D_1	D_0	N_1	N_0	
A		PRELIMINARIES																						
1	Y	Project/Site administration	2.5	2.5	95	0	0	249.24	236	343.16	298	343.16	298	276.20	271									1.145
2	N	Insurance, Gurantees	2.5	2.5	0	95	0	249.24	236	343.16	298	0.00	1	276.20	271	3,666	2,515							1.436
3	Y	Tools, Plant, Scaffolding	2.5	2.5	0	0	95	249.24	236	343.16	298	276.20	271	276.20	271									1.020

b) Application of computed price adjustment factor;

Item	Description	Unit	Contract Amount			Executed Work Amount (USHS)	Adjustment Factor(f)	Price Adjustment (P ₁)	Net Adjustment Amount (P ₁ - Net Amount)
			Qty	Rate (USHS)	Amount (USHS)				
<u>BILL NO.3</u>									
<u>PRELIMINARIES</u>									
1/5C(9)	Personnel	ITEM	1	400,000,000	400,000,000	50,000,000	1.145	57,250,000	7,250,000
1/5C(13)	Insurance	ITEM	1	135,000,000	135,000,000	135,000,000	1.436	193,872,770	58,872,770

ITEM	DESCRIPTION	NET PRICE ADJUSTED AMOUNT (UGX)										LESS: PORTION OF CONTRACT PRICE PAID AS ADVANCE PAYMENT (-10%) AS CLAUSE GCC 47.2	SUB-TOTAL IV UGX	VALUE ADDED TAX @ 18%	EVALUATED AMOUNT TOTAL UGX	%AGE OF CONTRACT PRICE		%AGE OF CONTRACT PRICE	
		PRELIMS	OFFICE BUILDING	MECH INSTALLATION	ELEC INSTALLATION	EXTERNAL WORKS	SUB-TOTAL I UGX	VARIATIONS UGX	SUB-TOTAL II UGX	SUB-TOTAL III UGX	NET					CUMULATIVE	RECOMMENDED AMOUNT UGX	NET	CUMULATIVE
1	INTERIM CERT NO. 1	66,122,770	118,777,390	0	0	4,575,000	189,475,159	951,097	190,426,256	-19,042,626	171,383,630	30,849,053	202,232,684	0.56%		202,232,684	0.56%		
2	INTERIM CERT NO. 2	-4,450,000	129,221,828	0	0	0	124,771,828	0	124,771,828	-12,477,183	112,294,645	20,213,036	132,507,682	0.37%	0.93%	132,507,682	0.37%	0.93%	
3	INTERIM CERT NO. 3	178,000	44,330,810	0	0	0	44,508,810	0	44,508,810	-4,450,881	40,057,929	7,210,427	47,268,356	0.13%	1.07%	47,268,356	0.13%	1.07%	
4	INTERIM CERT NO. 4	0	54,615,753	0	0	0	54,615,753	0	54,615,753	-5,461,575	49,154,178	8,847,752	58,001,930	0.16%	1.23%	58,001,930	0.16%	1.23%	
5	INTERIM CERT NO. 5	0	37,899,232	0	0	0	37,899,232	0	37,899,232	-3,789,923	34,109,309	6,139,676	40,248,984	0.11%	1.34%	40,248,984	0.11%	1.34%	
6	INTERIM CERT NO. 6	0	22,927,101	0	0	0	22,927,101	0	22,927,101	-2,292,710	20,634,391	3,714,190	24,348,581	0.07%	1.41%	24,348,581	0.07%	1.41%	
7	INTERIM CERT NO. 7	12,750,000	57,712,938	0	0	0	70,462,938	0	70,462,938	-7,046,294	63,416,645	11,414,996	74,831,641	0.21%	1.62%	74,831,641	0.21%	1.62%	
8	INTERIM CERT NO. 8	1,061,538	64,039,957	0	0	0	65,101,496	0	65,101,496	-6,510,150	58,591,346	10,546,442	69,137,789	0.19%	1.81%	69,137,789	0.19%	1.81%	
9	INTERIM CERT NO. 9	707,692	33,758,066	0	0	0	34,465,759	0	34,465,759	-3,446,576	31,019,183	5,583,453	36,602,636	0.10%	1.91%	36,602,636	0.10%	1.91%	
10	INTERIM CERT NO. 10	653,846	63,921,305	0	0	0	64,575,151	0	64,575,151	-6,457,515	58,117,636	10,461,174	68,578,810	0.19%	2.10%	68,578,810	0.19%	2.10%	
11	INTERIM CERT NO. 11	980,769	75,603,573	0	0	0	76,584,342	0	76,584,342	-7,658,434	68,925,908	12,406,663	81,332,572	0.23%	2.33%	81,332,572	0.23%	2.33%	
12	INTERIM CERT NO. 12	2,184,615	38,934,994	0	0	0	41,119,610	0	41,119,610	-4,111,961	37,007,649	6,661,377	43,669,025	0.12%	2.45%	43,669,025	0.12%	2.45%	
13	INTERIM CERT NO. 13	1,092,308	64,256,966	0	0	0	65,349,273	0	65,349,273	-6,534,927	58,814,346	10,586,582	69,400,928	0.19%	2.64%	69,400,928	0.19%	2.64%	
14	INTERIM CERT NO. 14	1,092,308	67,622,611	0	0	0	68,714,919	0	68,714,919	-6,871,492	61,843,427	11,131,817	72,975,244	0.20%	2.85%	72,975,244	0.20%	2.85%	
15	INTERIM CERT NO. 15	1,092,308	29,563,786	0	0	0	30,656,094	0	30,656,094	-3,065,609	27,590,485	4,966,287	32,556,772	0.09%	2.94%	32,556,772	0.09%	2.94%	
16	INTERIM CERT NO. 16	2,788,462	54,771,839	0	0	0	57,560,301	0	57,560,301	-5,756,030	51,804,271	9,324,769	61,129,040	0.17%	3.11%	61,129,040	0.17%	3.11%	
17	INTERIM CERT NO. 17	1,115,385	33,899,070	0	0	0	35,014,455	0	35,014,455	-3,501,445	31,513,009	5,672,342	37,185,351	0.10%	3.21%	37,185,351	0.10%	3.21%	
18	INTERIM CERT NO. 18	1,195,055	50,965,230	0	0	0	52,160,285	0	52,160,285	-5,216,029	46,944,257	8,449,966	55,394,223	0.15%	3.37%	55,394,223	0.15%	3.37%	
19	INTERIM CERT NO. 19	2,310,440	65,391,153	67,536	0	0	67,769,129	0	67,769,129	-6,776,913	60,992,216	10,978,599	71,970,815	0.20%	3.57%	71,970,815	0.20%	3.57%	
20	INTERIM CERT NO. 20	1,195,055	58,562,051	0	0	0	59,757,106	0	59,757,106	-5,975,711	53,781,395	9,680,651	63,462,046	0.18%	3.75%	63,462,046	0.18%	3.75%	
21	INTERIM CERT NO. 21	3,082,967	32,135,939	852,032	0	0	36,070,938	0	36,070,938	-3,607,094	32,463,844	5,843,492	38,307,336	0.11%	3.85%	38,307,336	0.11%	3.85%	
22	INTERIM CERT NO. 22	1,491,758	39,292,081	0	0	0	40,783,839	0	40,783,839	-4,078,384	36,705,455	6,606,982	43,312,437	0.12%	3.97%	43,312,437	0.12%	3.97%	
23	INTERIM CERT NO. 23	2,983,516	60,481,272	13,988,641	0	0	77,463,430	486,559	77,950,000	-7,745,343	70,204,657	12,547,456	82,752,113	0.23%	4.20%	82,752,113	0.23%	4.20%	
24	INTERIM CERT NO. 24	1,591,209	101,104,920	4,963,675	0	823,663	108,483,467	0	108,483,467	-10,848,347	97,635,120	17,574,322	115,209,442	0.32%	4.52%	115,209,442	0.32%	4.52%	
25	INTERIM CERT NO. 25	2,983,516	68,753,228	573,917	0	0	72,310,661	0	72,310,661	-7,231,066	65,079,595	11,714,327	76,793,922	0.21%	4.74%	76,793,922	0.21%	4.74%	
26	INTERIM CERT NO. 26	3,082,967	61,795,452	3,670,689	0	0	68,549,108	0	68,549,108	-6,854,911	61,694,198	11,104,956	72,799,153	0.20%	4.94%	72,799,153	0.20%	4.94%	
27	INTERIM CERT NO. 27	1,591,209	233,738,106	14,825,505	10,622,327	4,515,908	265,293,055	0	265,293,055	-26,529,305	238,763,749	42,977,475	281,741,224	0.79%	5.73%	281,741,224	0.79%	5.73%	
28	INTERIM CERT NO. 28	3,779,121	326,237,432	12,802,556	0	0	342,819,109	486,559	343,305,668	-34,330,567	308,975,101	55,615,518	364,590,619	1.02%	6.74%	364,590,619	1.02%	6.74%	
29	INTERIM CERT NO. 29	0	132,601,285	299,129,969	200,921,273	822,968	633,475,495	5,435,090	638,910,585	-63,891,058	575,019,526	103,503,515	678,523,041	1.89%	8.64%	678,523,041	1.89%	8.64%	
30	INTERIM CERT NO. 30	0	397,193,887	144,588,813	42,681,546	0	584,464,245	2,602,638	587,066,883	-58,706,688	528,360,195	95,104,835	623,465,030	1.74%	10.38%	623,465,030	1.74%	10.38%	
31	INTERIM CERT NO. 31	0	529,657,480	20,485,980	218,331,201	227,442	768,702,103	11,195,820	779,897,922	-77,989,792	701,908,130	126,343,463	828,251,594	2.31%	12.69%	828,251,594	2.31%	12.69%	Exceeds limit
32	INTERIM CERT NO. 32	0	759,245,516	178,948,529	120,978,548	1,729,410	1,060,902,002	4,992,092	1,065,894,093	-106,589,409	959,304,684	172,674,843	1,131,979,527	3.16%	15.84%	1,131,979,527	3.16%	15.84%	Exceeds limit
33	INTERIM CERT NO. 33	0	787,400,079	135,705,846	523,306,211	4,187,421	1,450,599,557	9,965,125	1,460,564,682	-146,056,468	1,314,508,214	236,611,479	1,551,119,693	3.30%	20.17%	1,551,119,693	3.30%	20.17%	Exceeds limit
TOTAL		112,656,814	4,696,412,332	830,603,687	1,116,841,106	16,881,811	6,773,395,749	35,628,420	6,809,024,169	-680,902,417	6,128,121,752	1,103,061,915	7,231,183,667	20.17%		3,584,905,747	10.00%		

Price Escalation under EAIA Contract (Blue Book)

This is provided for under Clause 32 (Fluctuations)

The clause notes that this is applicable where the Contract is not a Fixed Price Contract. In the event of a Fixed price Contract, this clause is struck out.

Under the EAIA (Blue Book) Form of Contract

- *The source of Price Fluctuation Data is stated as the Joint Building Council (JBC) of Kenya.*
- *The Base JBC Cost Data must be included in the Contract Agreement.*

The calculation of Price Fluctuations in this form of Contract is similar to the one under the PPDA Form of Contract.

Clause 32(Fluctuations) explained

32(1) This Clause caters for changes in duties affecting the cost of materials that may arise during construction. It defines duties as all customs and exercise charges, tariffs, taxes and other duties imposed in the country where work is being executed.

32(2) This Clause caters for changes in exchange rates affecting the cost of materials that may arise during construction. The base date for exchange of rates is the exchange rate at the date of Tender.

32(3) This Clause defines the framework for computation of changes in labour rates and material prices as construction progresses. It requires that Contract comprises a schedule of Basic rates as published by the JBC at date of tender. These rates are then varied (as a %age) reflecting the change in basic rates as indicated in subsequent publications in the JBC as construction progresses.

Limitations set for the application of fluctuations include:-

- **The provisions of Sub clauses (1) [changes in duties] and (2)[changes in exchange rates] do not apply to any materials listed in the schedule of basic rates**
- **All computations are limited up to the date of practical completion/extended time as defined in the contract**
- **They do not apply to Nominated Subcontractors unless specified in the sub-contract agreement**
- **Do not apply to Nominated Suppliers**

EFFECTS OF FORCE MAJEURE

A clause that is included in contracts to remove liability for unforeseeable and unavoidable catastrophes that interrupt the expected course of events and prevent participants from fulfilling obligations

Force Majeure events are commonly referred to as "... an act of God".

Three main pre-requisites are that the events that cause 'Force Majeure' must be:

- Unforeseeable
- External to both parties of the contract
- Unavoidable

Contractual Requirements

It should include an illustrative list of events such as:-

- Flood, fire, earthquake, explosion, or other potential disasters.
- War, invasion, hostilities, terrorist threats or acts, riot or other civil unrest.

- Government order, law, or actions.
- Embargoes or blockades.
- National or regional emergencies
- New human threats, such as cyber, nuclear, and biological warfare capabilities

It is accompanied by general, sweeper wording such as "and any other event beyond the affected party's control"

Contracts will often include express mitigation wording requiring a party to, "take all reasonable steps" or "use best endeavors" to avoid the force majeure event or mitigate its effects

SOME POINTS OF LAW ON FORCE MAJEURE

The Principle of “Pacta Sunt Servanda”

- Latin reference for “agreements must be kept” and not wiggled out of.
- This Principle is a key concept in civil and international law and it is also mentioned in common law.
- It is not supposed to be easy to escape contractual liability, and proving that events were unforeseeable, for example, is difficult by design.

Common Law

- In common law systems, (United Kingdom), the clauses are acceptable but must be more explicit about the events that would trigger the clause.
- The concept of force majeure originated in French civil law and is an accepted standard in many jurisdictions that derive their legal systems from the Napoleonic Code.

International Chamber of Commerce

- The International Chamber of Commerce has attempted to clarify the meaning of force majeure (although it is not included in the organization’s Incoterms)
- It applies a standard of “impracticability,” meaning that it would be unreasonably burdensome and expensive, if not impossible, to carry out the terms of the contract.

Procedure

- Check governing law
- Check the definition of force majeure events in the Contract
- Establish causation
- Check notice provisions
- Submit the “Force Majeure” Claim
- Demonstrate that the party has, “taken all reasonable steps” or “used best endeavors” to avoid the force majeure event or mitigate its effects

Consequences

- Suspension
- Termination
- Compensation
- Negotiation

FORCE MAJEURE AND COVID-19

- If COVID-19 made it impossible for a party to perform its contractual obligations, then, yes, it could qualify as force majeure. Emphasis should be put on the word “impossible” here.
- If the party is able to perform its obligation, it would not constitute force majeure, regardless of how much more difficult or expensive honoring this commitment became in a COVID-19 environment.
- COVID-19 is not necessarily an unforeseeable event any longer. Several years have passed since the outbreak was first reported, and measures have been put in place to prevent the virus from spreading.
- Contracting parties will be expected to do everything in their power to mitigate the effects of COVID-19.
- Contracts signed after the beginning of 2020 with force majeure clauses will stress that the COVID-19 pandemic does not apply



PPDA FORM OF CONTRACT

It is not specifically mentioned in the PPDA form of Contract.

The Clause under which a Contractor might seek relief for "Force Majeure" events are

- §GCC 37 – Extension of the intended Completion Date
- §GCC 39 – Delays ordered by the Project Manager
- §GCC 41 – Early Warning
- §GCC 53 – Compensation Events

EAIA (BLUE BOOK)

It is mentioned in Clause 23(a), Extension of Time, and the wording is;

“Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect, and if in the opinion of the Architect the completion of the Works is likely to be or has been delayed beyond the Date for Practical Completion stated in the appendix to these Conditions or beyond any extended time previously fixed under this clause, (a) by force majeure, or...”



SCARCITY OF GOODS AND MATERIALS

The risk of Supplying Good and Materials is a Contractor's Risk unless otherwise explicitly stated that they shall be supplied by the Employer.

This Scarcity first started with the COVID-19 pandemic that led to factory closures and supply chain disruptions. It has been further worsened by the Russia -Ukraine conflict as it;

- has driven fuel, copper, and aluminum prices higher.
- delayed or halted the movement of Cargo ships in the area.
- denied to certain commodities as a direct result of the conflict and/or sanctions imposed on Russia

Management of Scarcity of Goods and Materials

Causes

- Factory Closures
- Price Inflation
- Higher Energy Prices
- Supply Chain Disruptions

Mitigation

- Pre-order the Materials
- Pre-purchasing and stockpiling materials at the outset of a project
- Pay a Premium to jump the manufacturing queue for bespoke orders
- Deal directly with manufacturers instead of supplier (middle-men)
- Expedite delivery of delayed procurement by use of Air-freight.
- Map Out the Purchasing Process.



Use of the Formula

There are two opinions on how Head Office Overheads should be evaluated in a claim for Loss and Expense which involves delay (Prolongation);

- Only those Costs identifiable as a result of the delay are reimbursable
- The Contractor should receive a contribution to the total Head Office Overheads

Where it is established that the Contractor should receive reimbursement for Head Office Overheads, the use of Formulae is an accepted method



The Two Formulas

Hudson Formula

Uses the percentage in the Contractor's tender for overheads (and profit if applicable) as a basis for the Contractor's loss of contribution to overhead (and profit) as a result of delay

The formula:

$$\frac{\text{H.O Overheads (profit) \%}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of delay}$$

Refer to *Ellis-Don v. Parking Authority of Toronto (1978) 28 BLR 98*

Emden's Formula

It is similar to Hudson's Formula but the Head Office Overhead (and profit) used in the formula must be the actual percentage based on the Contractor's accounts

The formula:

$$\text{H.O (profit) percentage} = \frac{\text{Total Overhead Cost (Profit)}}{\text{Total turnover}} \times 100$$

Refer to *Whitthall Builders Company Ltd v. Chester-le-Street District Council (1985)* – unreported





CONSTRUCTION OF SAVANNAH HOTEL KAMPALA – PHASE 2.

The construction of SAVANNAH Kampala Hotel was split into two phases. Phase 1 is comprised on the main hotel building and Phase 2 is comprised of the health club which includes a tennis court, basketball court, gymnasium, steam bath and sauna, spa and a club hotel.

Phase 2 of the hotel contains the installation of electrical equipment including power distribution, lighting, electric heating, IT and telephone distribution and are subject to a provisional sum for the works to be awarded to a nominated subcontractor. The fitting out of the gymnasium areas is also the subject of a provisional sum, again with the work to be awarded to a nominated subcontractor.

The construction details include lifts to be provided and installed by a subcontractor selected from a list contained within the specifications, electrical installations, including power distribution, lighting, electric radiators, IT and telephone distribution to be awarded to a nominated subcontractor for installation in parallel with the fitting out works, fitting out works including floor, wall and ceiling finishes, office partitions, internal doors, joinery, toilet cubicles, kitchen units, painting and decorating to be awarded to a nominated subcontractor.

On 14th June 2020, a letter of acceptance was issued to Lion Construction Limited (LCL) as the contractor. The Consultant/Project Manager is Amalgamated Architects Limited (AAL). The Contract is the FIDIC, Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, First Edition 1999 (Yellow Book).

The formal contract was entered into by the Parties on 15th June 2020. The Accepted Contract Amount as confirmed in the Letter of Acceptance is US \$ 5,000,000.

The Commencement date was 18 June 2020. The Completion Date is 17 June 2021. On 11th July 2020, by way of letter reference SCL/01/20, the Contractor submitted his programme to the Engineer, who wrote to confirm acceptance on 20th August 2020 via letter reference AAL/2001.

The programme included the following non-contractual milestones: nomination of the electrical subcontractor – 21st January 2021; b. nomination of the fitting out subcontractor – 21st January 2021. The nomination of the electrical subcontractor was linked to a 20-day mobilisation and procurement period and a start of the electrical works on 11 February 2021.

The nomination of the fitting out subcontractor was linked to a 27-day mobilisation and procurement period and a start of the electrical works on 18 February 2021. (A copy of the Contractor's programme is included herein under Appendix A.)

Upon commencement of construction of phase 2, a concrete septic tank and soak pit were discovered, the Contractor was in a hurry to lay the ground floor slab so he quickly excavated them out and disposed of the sewage somewhere in Kapeeka.



In one of the site meetings, the Contractor intimated that he would need a time extension of 14 days and more money for having dealt with the septic tank. He proposed that time be extended to 1st July 2021. Following the site meeting, the Contractor submitted a revised programme dated 30th October 2020 which indicated the proposed extended Time for Completion of 1st July 2021.

The adjustment of the programme shifted the nomination dates for both the electrical and fitting out works to 4th February 2021. (A copy of the Contractor's revised programme is included herein under Appendix B.)

On 6th January 2021, the Contractor had not received either of the nominations and he wrote to the engineer as follows:

"...As you are aware, our latest programme shows that we require the nomination of the subcontractors for the electrical and fitting out works no later than 4th February 2021. Given the fact that the fitting out work is on the critical path, we would advise you that any delay to the nomination date will have a corresponding effect on the completion date and will also cause us to incur additional costs. We would therefore be grateful for your nomination as soon as possible in order not to cause any delay."

On 7th February 2021, having still not received the nominations by the programmed date of 4th February 2021, the Contractor wrote to the Engineer as follows;

"Further to our letter dated 6th January 2021 advising that the nominations for the electrical and fitting out subcontractors were required no later than 4th February 2021, we wish to record that as of today's date, we have not received the nomination instructions. We are consequently obliged to notify you that the delay in the issue of the nominations is causing us to suffer delay and to incur cost. We further notify you that we consider that this entitles us to claim for an extension of time and additional payment and that we shall submit our claim in due course."

The instruction for the nomination of the electrical subcontractor was received by the Contractor on 23rd February 2021. The instruction for the nomination of the fitting out subcontractor was received by the Contractor on 28th February 2021.

Before any works would take shape, the Covid19 pandemic led to a national lockdown, the Minister for Health issued the Public Health (Covid19) Regulations which restricted travel to Uganda, closed hardware shops, closed all sites and the Contractor was unable to travel to China to ship all the finishes for the hotel. The Contractor sent a note to the Engineer that the completion date will December 2021.

QUESTION B:

1. What are the potential claims that the Contractor may make under these circumstances?
2. What are the potential claims that the Employer may make under these circumstances?
3. WHAT clauses under the Contract provide the entitlement?
4. Examine the Contract and explain what the contractual outcome would be if either party failed to comply with the notice provisions contained in the contract.

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CONSTRUCTION ADJUDICATION DISPUTES

Day 2
Session 3



Joan Kyomugisha
LLM (Chicago), LLB (MUK)

Disputes are inevitable in any contractual relationship.
A good contract should provide a dispute resolution mechanism.

Dispute Avoidance.

- Non-adversarial approach to disputes should always be considered by the Parties.
- Better for parties to prevent situations escalating into a dispute.
- FIDIC 2017 has an additional responsibility for the Dispute Board i.e. Dispute Avoidance (DAAB)

Notice serves as a warning of a potential disagreement in the making.

Most contracts provide for notices to be in writing and properly addressed.

A notice is effective when delivered on or before the notice's effective date.

Notice allows the other party to remedy defects.

Under FIDIC contracts, a party intending to claim against another must give notice within 28 days from the date they first/ought to have become aware of the circumstances giving rise to the claim. Failing this, the other party will be discharged from such claim.

MODES OF DISPUTE SETTLEMENT

Mode: Amicable Settlement

- This is the first step of the dispute resolution process. Most recommended method of dispute settlement.
- Both PPDA and FIDIC provide for Amicable Settlement.
- It saves time and cost.
- Helps maintain an amiable relationship between the contracting parties.
- Enhances continuous cooperation in delivery of the contract.
- Parties have the power to manage the dispute at this stage.
- Each party should be willing to make compromises and persuade the other to reach a settlement.
- May take time and may/not yield result in a single sitting.
- Non binding on the parties.
- Likely No costs involved at this stage.

Third Party Involvement



ADJUDICATION

- Dispute resolution process where one party (a Claimant) refers a dispute to a third party (the Adjudicator) for a decision.
- Appointment of Adjudicators is stipulated in the contract.
- Adjudication is usually conducted on the basis of documents submitted and may not involve hearings.
- Issues referred to adjudication may include disputes over:
 - Extension of Time & costs
 - Unpaid invoices
 - Interest computation
 - Variation Instructions
 - Defective work etc.

DISPUTE ADJUDICATION BOARD (DB/DAB/DAAB)

- Appointment of DB/DAB/DAAB is done by Parties to Contract.
- Adjudicators are selected from FIDIC Presidents' lists.
- Either Party may refer a dispute to the DAB.
- DAB decision is final and binding unless it is appealed.
- DAB can either be :
 - sole member DAB (Mutually agreed to by the parties; or
 - Three member DAB, each party nominates and then they mutually agree on the 3rd member. Enter a Tripartite Agreement.
- Remuneration of DAB Members: Agreed upon by the parties and each pays half.

REASONS FOR USING A DAB

- Involvement in project from the onset.
- Cheaper to use DAB than going for Arbitration
- DAB process is not excessively formal, avails some flexibility.
- Faster resolution of disputes to ease progress & completion of works
- DAB brings objectivity/neutrality (Impartiality in decision taking)
- Project continues as DAB hears the dispute

DISPUTE ADJUDICATION PROCESS UNDER FIDIC

- Notice of Claim (within 28 days)
- Engineer's Determination (Determination within 42days)
- Dispute Adjudication Board (Declare & refer dispute)
- Decision (Decision within 84 days. If a party is dissatisfied, gives notice within 28 days. If no dissatisfaction notice is issued then decision becomes final & binding on both parties)
- Notice of Dissatisfaction
- Amicable Settlement - Parties can opt for amicable settlement when NOD has been issued or else commence Arbitration)
- Parties decide to go for Arbitration.
- Contents of Notice of Dissatisfaction (NoD)
 - Must indicate that it is issued under sub-clause 20.4 [Obtaining Dispute Board's Decision].
 - Must refer to the decision per its date.
 - Provide the Grounds for Dissatisfaction. (did the DB err in law or in fact or both?)

DISPUTE ADJUDICATION PROCESS UNDER PPDA

- GCC 24, 25, 26 of the PPDA standard contract
- GCC 24 - a party who believes that a decision taken by the Project Manager was wrongly taken shall refer such decision to an Adjudicator within 14 days of notification of the Project Manger's decision.
- Contract provides for appointment of an Adjudicator by Uganda Institute of Professional Engineers (UIPE).
- 1 Party nominates and the other gives a *no objection* or *objects* and nominates another.



PROLONGATION COSTS

Initial meeting/Scheduling meeting the Parties agree on the these:

1. Party Representatives
2. Timelines for the submissions of Claimant & Respondent.
Claimant Statement of Case should include:
 - Matter of dispute
 - Factual Background
 - Contractual basis of the Claim
 - Justification of the Claim
 - Entitlement (quantum or otherwise)
 - Respondent's Rebuttal. Respondent's detailed defence to the respective allegations of the Claimant.
3. Location of Hearing
4. Agree on the Fees & when / how payments will be made. Billing Timesheets.
5. Agree on Format of the Hearing
 - Presentation of Claimants Statement of Case
 - Presentation of Respondents Rebuttal
 - Questions by Adjudicator to both Parties
 - Questions by the Parties
 - Extra Information that is not included in the written submissions should be officially written and submitted and either Party allowed to respond to it.
 - Closure of Hearing



A dissatisfied Party may refer the decision to a Court of competent Jurisdiction within 28 days of the decision. If neither party refers the dispute to court within 28 days, the Adjudicators decision becomes final & binding.



CONSTRUCTION ARBITRATION

Day 2
Session 4



David Kaggwa, FCI Arb, FICCP
LLM (Construction Law & Arbitration) RGU Arberdeen

DISPUTES.

24.1 If the Contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.

25.2 Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision.

ARBITRATION.

Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision.

If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.4 Any arbitration shall be conducted in accordance with the Arbitration and Conciliation Act 2000 or such other formal mechanism specified in the SCC, and in the place shown in the SCC.

AMICABLE SETTLEMENT.

Sub-Clause 20.5 (Sub-Clause 20.7 in the Gold Book) provides that: "both Parties shall attempt to settle the dispute amicably before the commencement of arbitration".

If the Parties fail to settle their dispute, either Party may refer the dispute to arbitration on or after the 56th day following the date that the notice of dissatisfaction was given even if no attempt at amicable settlement has been made

ARBITRATION UNDER THE ICC RULES

Rules of Arbitration of the International Chamber of Commerce (ICC Rules) – unless agreed otherwise.

- ICC arbitration is administered and scrutinised. It is paid for by the Parties on an ad valorem basis (i.e. based on the amount in dispute).
- A consequence of arbitrating under ICC Rules is that the Parties agree to waive their rights to appeal insofar as permitted by the law governing the arbitration.



SEAT OF ARBITRATION

Choosing the seat of arbitration.

The Parties should agree the 'seat' or 'place' of the arbitration and include this in the contract in the Particular Conditions.

DAB A PRECONDITION TO ARBITRATION

Sub-Clause 20.4 states that "Disputes shall be adjudicated by a DAB...".

BUT: Sub-Clause 20.8 (Sub-Clause 20.11 in the Gold Book) provides that a Party may refer a dispute directly to arbitration without obtaining a DAB decision or attempting to settle the dispute amicably if "there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise"



FIDIC 2017

Where there is no DAAB in place "whether by reason of the DAAB's appointment or otherwise", Sub-Clauses 21.4 and 21.5 will not apply, and the Dispute may be referred directly to arbitration under Sub-Clause 21.6 without prejudice to any other rights.

- There may be cost penalties for failing to cooperate in constituting a DAAB (Sub-Clause 21.6).
- The failure to comply with a DAAB decision is a Dispute which may itself be referred directly to arbitration whether binding or final and binding (Sub-Clause 21.7).

The arbitral tribunal may enforce the decision on an interim or provisional basis via "a summary or other expedited procedure".

Non-compliance with a binding or final and binding DAAB decision under Sub-Clause 21.4 is now a ground for suspension and/or termination under Sub-Clauses 15.2.1(a)(iii), 16.1(d) and 16.2.1(d) to the extent that such failure constitutes a "material breach" of the Employer's obligations under the Contract

FINALITY

- ICC Arbitration is final.
- ICAMEK rules, Arbitration is final.
- CADER rules, Arbitration is final.
- Either party may apply to set aside the award on limited grounds under S. 34 of the Arbitration and Conciliation Act (Cap. 4).





Eng. Ian Bakiza
R. Eng. , M.U.I.P.E

SUSPENSION BY CONTRACTOR –SC 16.1

- The Contractor has the right under the Contract to suspend in only 3 circumstances.
- Contractor must give notice to the Employer prior to suspension. The right is then to suspend work or reduce the rate of work.
 1. if the Engineer fails to certify in accordance with sub-Clause 14.6 (Issue of Interim Payment Certificates).
 2. If the Employer fails to comply with Sub-Clause 14.7 (Payment).
 3. If the Employer fails to comply with Sub-Clause 2.4 [Employer's Financial Arrangements]
- The right to suspend does not affect the Contractor's entitlement to terminate or claim financing charges.
- In the event that the Contractor suffers delay or cost as a result of suspension it must give notice under Sub-Clause 20.1 [Contractor's Claims].
- Sub-Clause 16.3 deals with Cessation of Work by the Contractor and Removal of the Contractor's Equipment.
- This Sub-Clause applies where the termination takes place under Sub-Clause 15.5 [Employer's Entitlement to Termination]; Sub-Clause 16.2 [Termination by Contractor]; or Sub-Clause 19.6 [Optional Termination, Payment and Release].

TAKING OVER and TESTS ON COMPLETION

- Taking Over is a critical milestone part of any project which constitutes confirmation that the works have been satisfactorily completed by the contractor (save for minor defects and outstanding items of works) and signifies the beginning of the defects notification period.
- Contracts should clearly specify the requirements prior to taking over i.e. what needs to be done for the works to be accepted by the employer.
- The specific requirements will depend on the nature of the project and typical requirements include that the works can be used for their intended purpose. These are typically referred to as Tests on Completion.

Employer's Taking Over – Clause 10

- Clause 10 deals with the Taking-Over of the Works, Sections, or parts of the Works.
- Sub-Clause 10.1 deals with the Taking-Over of the Works and Sections.
- Taking-Over by the Employer happens when the Works
 - pass the Tests on Completion;
 - are substantially complete;
 - any contractual requirements relating to Taking-Over have been met; and
 - the Taking-Over Certificate has been issued or is deemed to have been issued.
- Sub-Clauses 10.2 and 10.3 deal with deemed Taking-Over where the Employer uses part of the Works or interferes with the Tests on Completion for more than 14 days.
- The failure to issue a Taking-Over Certificate by the Engineer, where the Employer has taken into commercial use the Works, will amount to a breach of contract.

TESTS ON COMPLETION – CLAUSE 9

- Sub-Clause 9.1 requires the Contractor to give notice when it is ready to carry out the Tests on Completion. Tests on Completion are a defined term at Sub-Clause 1.1.3.4.
- Sub-Clause 9.2 deals with delayed testing caused by either the Employer or the Contractor.
- Sub-Clause 9.3 deals with retesting after a failure to pass the Tests on Completion.
- Sub-Clause 9.4 deals with a failure to meet the requirements of the contract after retesting.

ACCELERATION IN CONSTRUCTION

- Acceleration in construction contracts occurs whereby a contractor is compelled to deploy additional resources, re-sequence activities in his program in order to complete the project at an earlier completion date.
- There are 03 types of acceleration on construction projects i.e. directed acceleration, constructive acceleration and voluntary acceleration

01. DIRECTED ACCELERATION

Directed acceleration occurs when the Employer of Engineer issues a specific order to the contractor under the contract provisions to;

- complete the project earlier than the originally scheduled completion date,
- re-sequence the work and/or utilize overtime, additional shifts, and/or extra engineering or construction labor, supervision, or equipment to complete the base contract work plus additional or changed work within the original contract time
- re-sequence the work and/or utilize overtime, additional shifts, and/or extra engineering or construction labor, supervision, or equipment to make-up for contractor-caused delays that threaten the on-time completion of the project. These measures can result in costs being incurred that would not otherwise have been required.

03. VOLUNTARY ACCELERATION

- Voluntary acceleration occurs when a contractor unilaterally decides to accelerate its own work in contrast to directed acceleration or constructive acceleration,
- A contractor is not entitled to damages and a contractor may voluntarily accelerate its work out of necessity, i.e., to make up lost time for the contractor's own delays or to complete its own work
- To determine whether a constructive acceleration condition exists, one must look at the facts of each particular case. Generally, a request, as opposed to a directive, to accelerate is sufficient to constitute a constructive acceleration order.
- Sub-clause 8.3 give the the Engineer the power to instruct the contractor to accelerate the work, particularly if the contractor is falling behind due to its own performance problems.

02. CONSTRUCTIVE ACCELERATION

- Constructive acceleration occurs when a contractor encounters excusable delay during its performance of the contract work, such as design changes, added scope, unusually severe weather, differing site conditions, force majeure, or owner-caused delays.
- Thus, the contractor is entitled to a time extension equivalent to the time of excusable delay
- The contractor is constructively accelerated when it is not granted the time extension. The contractor must then decide whether to accelerate its performance to meet the mandated completion date.
- If the contractor is compelled by such circumstances to accelerate its performance, it may be entitled to recover damages based on a theory of constructive acceleration.



- Where a contract provides for acceleration, payment for acceleration should be on the basis of the terms of the contract.
- Where a contract does not provide for acceleration then the Parties must agree on what measures are to be undertaken and what records are to be kept/maintained prior to acceleration
- Where acceleration is agreed, then the Contractor is not entitled to claim prolongation compensation for the period of the employer delay avoided by acceleration.



- Sub-Clause 4.21 sets out detailed requirements at paragraphs (a) to (h) of information which must be included in the reports.
- The Contractor is required to provide detailed descriptions of progress, equipment and personnel as well as photographs, charts, test results, procurement and manufacture, contractual notices and claims , safety data and other statistics.
- Information connected with environmental and public relation activities is also necessary.
- Sub-clause 14.3 (application for interim payment certificates) requires that the contractor submits the progress reports along with the application



NOTICES

- There are 58 obligations under the FIDIC red book for the Parties or the Engineer to give notice under the FIDIC 1999 red book i.e. Contractor: (33) Employer or Engineer (19) Either Party (06)
- Notices generally fall into the following categories:
- Notice that an action required or permitted under the Contract has been, or will be, taken
- Notice that an event has occurred which could cause, or is causing, delay
- Notice that an event has occurred which could cause, or is causing, the occurrence of additional cost
- Notice that the Contractor considers that the Contractor is entitled to an extension of time
- Notice that either Party considers that the Party is entitled to additional payment from the other Party
- Notice of instructions by the Engineer or the Employer
- Notice of an error or default by one of the Parties
- Notice of agreement or determination
- Notice of disagreement or dissatisfaction

NOTICES – REQUIREMENTS

Sub-Clause 1.3 (*Communications*) requires:

- notices to be in writing
- notices to be delivered by the means stated in the Appendix to Tender
- notices to be sent to the addresses stated in the Appendix to Tender
- that all parties are sent copies of notices.

Generally the Notices in the 1999 FIDIC contracts stipulate time frames which must be complied with. And use phrases such as;

- 'Promptly',
- 'As soon as practicable',
- 'Not less than (a stipulated number of) days',
- 'Not later than (a stipulated number of) days after the Contractor became aware, or should have become aware, of the event or circumstance'

CLAUSE 20.1 – NOTICES TIME BAR

Sub-Clause 20.1 (*Contractor's Claims*) provides that:

'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 circumstance giving rise to the claim. The Notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have 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 shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim...'

This constitutes a "condition precedent" or "time bar" and generally contractors must ensure that the contractually required notices are issued promptly and without delay.



TRAINING EVALUATION FORM



TRAINING EVALUATION FORM



Please answer the following questions to provide feedback on the training you received.

Overall, how would you rate the training?

- Excellent
- Good
- Average
- Below average
- Poor

Did the training meet your expectations?

- Yes, it met my expectations
- No, it did not meet my expectations

Was the training relevant to your job?

- Yes, it was very relevant
- Yes, it was somewhat relevant
- No, it was not relevant

Was the material presented clearly and effectively?

- Yes, the material was presented clearly and effectively
- Somewhat, the material was presented adequately
- No, the material was not presented clearly and effectively

Did the training provide you with new knowledge and skills?

- Yes, I learned a lot of new knowledge and skills
- Somewhat, I learned some new knowledge and skills
- No, I did not learn any new knowledge and skills

Was the pace of the training appropriate?

- Yes, the pace was appropriate
- No, the pace was too slow
- No, the pace was too fast

Were the trainers knowledgeable and experienced?

- Yes, the trainer was very knowledgeable and experienced
- Somewhat, the trainer was adequately knowledgeable and experienced
- No, the trainer was not knowledgeable and experienced

Was the training environment conducive to learning?

- Yes, the environment was conducive to learning
- Somewhat, the environment was adequate
- No, the environment was not conducive to learning

Was the training material relevant and helpful?

- Yes, the material was very relevant and helpful
- Somewhat, the material was somewhat relevant and helpful
- No, the material was not relevant and helpful

Would you recommend this training to others?

- Yes, I would highly recommend this training
- Somewhat, I would recommend this training
- No, I would not recommend this training



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