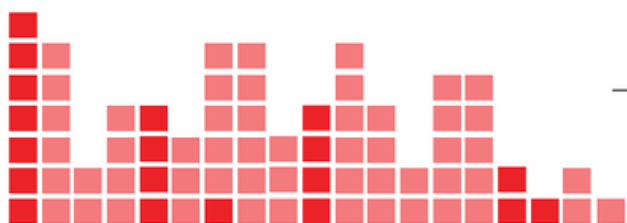




The Practice of FIDIC Contracts



A FIDIC Contract is an international engineering contract that governs the construction of large and complex engineering projects. The contract is designed to minimize disputes and to ensure a fair distribution of risk.



Table of Contents

Day 1

Overview of construction contracts	2
Obligations of the Parties	6
Case study 1	8
Management of projects	11
Instructions, Variations & Certification & Payments	15

Day 2

Contractor's Claims	21
Case study 2	30
Employer Claims	33
Case Study 3	36
Construction Claim Presentation	39





About the Training:

The Practice of FIDIC Contracts Training is a specialized program designed to equip professionals in the construction and engineering industry with essential knowledge and skills related to the FIDIC (International Federation of Consulting Engineers) contract forms. FIDIC contracts are widely used in international construction projects and provide a standardized framework for managing various aspects of construction and engineering contracts. This training aims to enhance participants' understanding of FIDIC contracts, their administration, and effective implementation in real-world projects.

Background:

The International Federation of Consulting Engineers (FIDIC) is an international organization founded in 1913 with its headquarters in Switzerland. FIDIC's primary objective is to promote and improve the consulting engineering industry worldwide. Over the years, FIDIC has developed a set of standard contract forms that have gained widespread acceptance and use in the construction and engineering sectors.

FIDIC contracts offer a balanced and fair approach to contractual arrangements between project owners (employers) and contractors, ensuring that both parties' interests are protected throughout the project lifecycle. These contracts have been employed in a diverse range of projects, including infrastructure development, building construction, energy facilities, water supply schemes, and transportation networks, among others.

However, due to the complexity of construction projects and the diversity of international jurisdictions, properly understanding and implementing FIDIC contracts can be challenging for practitioners. To bridge this knowledge gap and empower professionals with the necessary expertise, The Practice of FIDIC Contracts Training was developed by the Construction Law Institute.

Programme

The Programme



Day 1 | 14th September 2023

8:30- 8:50AM	<p>Welcome and Introduction to Construction Law Institute, the Course, Facilitators and Participants. Mr. Kenneth Akampurira and Mr. Ronald Tusingwire</p>
8:50AM- 9:00AM	<p>Grand Opening of the Training Dr. Ronald Ssengendo, Chairman, Uganda Surveyors Registration Board.</p>
9:00- 10:30AM	<p>OVERVIEW OF FIDIC SUITE OF CONTRACTS</p> <p>Topics:</p> <ul style="list-style-type: none">• Overview of FIDIC and its role in the construction industry.• Understanding the different types of contracts in the FIDIC suite (e.g., Red Book, Yellow Book, Silver Book).• Identifying the parties involved and their respective roles and responsibilities. <p>Trainers: Ms. Joan Kyomugisha</p>
10:30 -11:30AM	<p>RESPONSIBILITIES OF PARTIES</p> <p>Topics:</p> <ul style="list-style-type: none">• Employer's Responsibilities in FIDIC Contracts.• Contractor's Responsibilities in FIDIC Contracts• Engineer's Responsibilities in FIDIC Contracts. <p>Trainers: Mr. David Kaggwa Eng. Ian Bakiza</p>
11:30 - 11:45PM	<p>Coffee Break.</p>
11:45 - 1:00PM	<p>CASE STUDY 1</p> <p>Trainers: Mr. Victor Odongo Ms. Joan Kyomugisha Eng. Ian Bakiza.</p>
1:00-2:00PM	<p>LUNCH</p>

Day 1 | 14th September 2023

2:00-4:30PM

MANAGEMENT OF PROJECTS

Topics:

- Commencement
- Programming
- Instructions
- Variations
- Certification & Payment
- Completion & handover

Trainers:

Eng. Ian Bakiza | Mr. Victor Odongo

4:30 – 5:00PM

Tea Break and End of Day 1.

Day 2 | 15th September 2023

8:30- 8:45AM	Recap from Day 1 Mr. Kenneth Akampurira Mr. Ronald Tusingwire
8:45- 9:45AM	CONTRACTORS CLAIMS <ul style="list-style-type: none">• Overview of Construction Claims• Computation of Construction Claims Trainers: Mr. David Kaggwa Mr. Victor Odongo
9:45-10:45AM	CASE STUDY 2 Mr. David Kaggwa Mr. Victor Odongo Eng. Ian Bakiza Ms. Joan Kyomugisha
10:45-11:00AM	COFFEE BREAK
11:00-12:00PM	EMPLOYERS CLAIMS <ul style="list-style-type: none">• Overview of Employer's claims• Computation of Employer's Claims Trainers: Eng. Ian Bakiza Ms. Joan Kyomugisha
12:00-1:00PM	CASE STUDY 3
1:00-2:00PM	LUNCH
2:00-4:00PM	PRESENTATION OF CLAIMS Templates; <ul style="list-style-type: none">• Notices• Determinations• Responses• Statements of Claim Trainers: Mr. Ronald Tusingwire Mr. David Kaggwa
4:00-4:30PM	AWARD OF CERTIFICATES Dr. Ronald Ssengendo, Chairman, Uganda Surveyors Registration Board.

Your Trainers



David Kaggwa, FCI Arb, FICCP

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).

Your Trainers



Joan Kyomugisha

LLM (Chicago), LLB (MUK)

Joan Kyomugisha is 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.



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.

Your Trainers



**Kenneth Akampurira,
MCI Arb**

Kenneth is an esteemed lawyer, Advocate, Chartered Arbitrator, and Mediator, with a wealth of knowledge and experience in construction law and the various FIDIC Books. As the Founding Partner of Amber Solicitors Advocates (formerly Kenneth Akampurira Advocates Solicitors), he has dedicated his career to providing expert legal guidance in the construction industry.

With a deep understanding of the different FIDIC Books, Kenneth is well-versed in the intricacies and complexities of these standard forms of construction contracts. He is equipped to navigate the potential issues that may arise during the lifecycle of a construction project, such as contract interpretation, payment disputes, variations, delays, and defects.

Moreover, Kenneth is well-versed in international construction law principles, allowing him to handle cross-border construction disputes with a global perspective.



**Ronald Tusingwire,
MCI Arb**

With over 16 years of expertise in dispute resolution and advisory in both the commercial and construction industry, Ronald possesses a comprehensive understanding of construction law and related areas.

With a deep knowledge of FIDIC contracts and their application, Ronald provides invaluable guidance on interpreting and implementing these standard forms of construction contracts. His expertise ensures that clients have a clear understanding of their rights and obligations under FIDIC contracts.

Ronald's expertise extends to procurement disputes, and he routinely appears before the Public Procurement Appeals Tribunal. His experience in this emerging area of practice in Uganda equips him to effectively assist clients facing procurement challenges in the construction industry.

As a construction law trainer, Ronald's vast experience and diverse legal background make him an exceptional resource. His ability to break down complex legal concepts into practical knowledge enables him to educate and empower individuals in the construction industry.

Participants can benefit from his insights on FIDIC contract issues, construction dispute resolution strategies, and procurement challenges.

Day 1

14th September 2023

OVERVIEW OF CONSTRUCTION CONTRACTS

Day 1
Session 1



By:
Joan Kyomugisha
• LLM (Chicago), LLB (MUK)
• Manager, Contracts and Claims (UNRA)



What is FIDIC?

FIDIC is the international umbrella body for consulting engineers.

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.

FIDIC Membership

There are three categories of FIDIC membership as follows:

- Member Association
- Associate Member
- Affiliate Member

<https://fidic.org/membership>

*Uganda Association of Consulting Engineers is both a Member Association and Associate Member.

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)

FIDIC is used for Development projects funded by MDBs for use in aid-funded projects. Project Financiers in Uganda include:

- AfDB
- World Bank
- European Union
- China Exim Bank
- JICA-Japanese International Corp. Agency
- BADEA - Arab Bank for Economic Development in Africa

BENEFITS OF USING FIDIC CONTRACTS?

- FIDIC contracts are standardized & hence preferred by International Contractors who deem them 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).

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:

- (1) Between Consulting Engineer & Employer.
- (2) Between Employer & Contractor.

FIDIC RAINBOW SUITE

- 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?

FIDIC BOOKS

- Red Book
- Pink Book
- Yellow Book
- Silver Book
- Golden Book
- White Book
- Green Book
- Blue Book

Colours relate to the type of works

RED BOOK

The Red Book provides conditions of contract for construction works where the Building & Engineering Works are designed by the Employer.

Projects: Fortpotal Kyenjojo, Fortpotal Hima, Hima Katunguru, Tororo Busia, Koboko Yumbe Nebbi

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



Differences between Red Book 1999 and Pink Book(MDB) Harmonised Edition 1999

Sub Clause

Amendment

1.1 Definitions

“Appendix to Tender” became “Contract Data”
 “Dispute Adjudication Board” becomes “Dispute Board”
 “Defects Notification Period” now “extends over 365 days except if otherwise stated in the Contract Data”
 “Site” the places where Permanent Works are to be executed include ‘storage & working areas’

Differences between Red Book 1999 and Pink Book(MDB) Harmonised Edition 1999

Sub Clause

2.4 Employer’s Financial Arrangements

Amendment

1999 Red Book, the Employer is required to submit reasonable evidence that financial arrangements have been made and are being maintained to enable the Employer to pay the Contract Price, within 28 days of the Contractor’s request to do so.

The Pink Book requires the Employer to submit the reasonable evidence “before the Commencement Date” as well as within 28 days of the Contractor’s request. In addition, the evidence that the Employer provides must demonstrate that it is able to pay the Contract price “punctually”.

Differences between Red Book 1999 and Pink Book(MDB) Harmonised Edition 1999

Sub Clause 4.1: Contractor’s General Obligations

Amendment

The Pink Book requires the contractor to source all equipment, material and services for use on the Works from an eligible source country (as defined by the Bank).

Sub Clause 4.2: Performance Security | 14.2 Advance Payment

Amendment

The Pink Book requires the P.S and APG to be issued by “a reputable bank or financial institution” selected by the Contractor. Unlike the Red Book there is no requirement for the Employer to approve the entity and country from which it is issued.



Differences between Red Book 1999 and Pink Book(MDB) Harmonised Edition 1999

Sub Clause	14.1: The Contract Price
Amendment	Under the Pink Book, Construction Equipment is exempt from import duties when imported.

Sub Clause	16.1: Contractor's Entitlement to Suspend Work
Amendment	If the Bank suspends payment of the funds from which the Contractor is paid, and no alternative funds are available, the Contractor can suspend or reduce the rate of work it performs at any time (having received a notice from the Bank).

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.

Projects: Kampala Flyover, New Jinja Nile Bridge, Rukungiri Kihhi, KEE, Kira – Matugga, Najanankimbi – Busabala, Oil roads



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.

Isimba Dam is an example of a turnkey project.

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 Facts on FIDIC

- FIDIC Books have various Editions, most recent is the 2017 Edition of the Red, Yellow and Silver books.
- Always check/confirm which book & edition is applicable to a contract/dispute before you.
- Parties to FIDIC contracts have distinct responsibilities.
- FIDIC contracts typically include:
- 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
- Claims for idle Equipment & Personnel
- Claims for Acceleration or/and 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.

Changes Introduced by FIDIC 2017

The Role of the Engineer: 2017 version specifies that the Engineer must be a professional engineer holding suitable qualifications, experience, and competence to act as the Engineer. There is a reminder to “act neutrally” when making determinations.

Advance Warning: 2017 Red Book introduces advance warning provisions, which require each Party to advise the other “in advance of any known or probable future events which may (a) adversely affect the work of the Contractor’s Personnel; (b) adversely affect the performance of the Works when completed; (c) increase the Contract Price; and/or (d) delay the execution of the Works or a Section (if any).”

New provisions concerning best practice

The Contractor can ask the Employer (and Employer can ask the Contractor) to remove persons engaged in fraud, corruption and similar practices (Sub-Clauses 2.3 and 6.9).

Fraud/corruption were added to the list of triggers for termination under Clauses 15 and 16 (in place of the more limited bribery wording which existed previously).

OBLIGATIONS OF THE PARTIES TO THE CONTRACT.

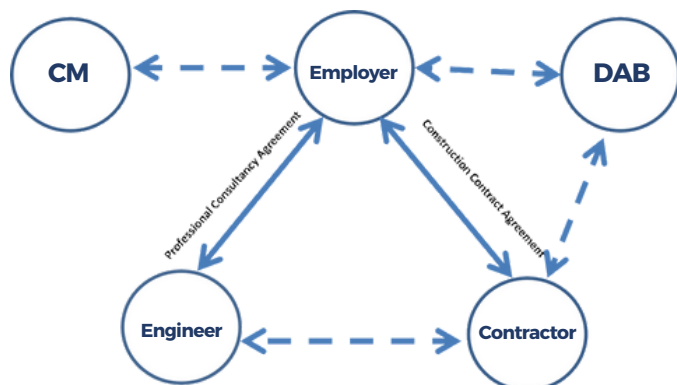
Day 1 Session 2



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



Parties to the Contract



Clause 2 – The Employer

Role of the Employer is dealt within Clause 2 of the 1999 editions:

- Right to Access to the Site.
- Permits, Licenses or Approvals.
- Employer's Personnel.
- Employer's Financial Arrangements.
- In case of Employer's Claims, the Employer is required to give notice and particulars to the Contractor if the Employer considers him self entitled for payment.

Appointment of the Engineer.

Engineer's roles are:

- continuing design
- administrative role as the Employer's agent
- supervisory
- certifying
- adjudicating.
- Possession of Site
- Access to Site
- Employer responsible for providing access to the Site in the time stated in Appendix to Tender.
- Permits and Approvals
- Assist the Contractor for permits: Employer shall reasonably assist the Contractor in obtaining permits, licenses and approvals.
- Employer shall be responsible for the good co-operation of his personnel with the Contractor.
- Employer will take on similar safety measures and environment protection as required for the Contractor.
- Employer's instructions
- Supply of materials and carrying out works
- Nominate specialists contractors
- Payments
- Appointing a DAB
- Submitting his financial arrangements when required

- Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained enabling the Employer to pay the Contract Price.
- Employer's Claims If the Employer considers himself to be entitled to any payment under any clause of the Contract, the Employer or the Engineer shall give notice

2.1: Right of Access to the Site

- Employer to give Contractor right of access to and possession of all parts of the Site as stated in the Contract.
- Right to access to and possession of the Site not exclusive.
- If Contractor suffers delay or incurs costs due to the failure by the Employer to give access, provided he gives notice he maybe entitled to an extension of time and payment of any costs(plus reasonable profit).

2.: Permits, Licenses and Approvals

To the extent that the Employer can, the Employer shall assist the Contractor:

- to obtain copies of the relevant laws which are not readily available; and
- in the making of any applications for permits, licenses and approvals which the Contractor will need to make in accordance with those laws.

2.3. Employer's Personnel - Key issues

- Employer shall be responsible for ensuring that the Employer's Personnel and his other contractors:
- co-operate with the Contractor to the limited extent provided for in Sub-Clause 4.6; (comply with the health & safety requirements set out in Sub-Clause 4.8);
- take all reasonable steps to protect the environment both on and off the Site as required by Sub-Clause 4.18.

2.4: Employers Financial Arrangements-Key issues

- If the Contractor so requests, the Employer shall provide within 28 days reasonable evidence that financial arrangements are in place to pay the Contract Price in accordance with Clause 14.
- Employer must give notice to the Contractor if he intends to make any material change to his financial arrangements.
- If that evidence is not provided, Contractor may, subject to the provision of the necessary notices, suspend work or even terminate the Contract.

3.3 Clause 3 – The Engineer

Two contracts are traditionally formed:

- A Contract between the consulting engineer and the Employer: the Contractor is not a party.
- A Contract between the Employer and the Contractor: the Engineer is not a party.
- Construction Contract Sub-Clause 3.1 provides that the "Engineer shall carry out the duties assigned to him in the Contract". Engineer is given certain authority either specified in, or implied from, the Contract.

Typical duties of the Engineer

- Design: implementing the design.
- Quality control:
- Cost accountancy and certification: the Contract is based on interim payments made mostly on a monthly basis by the Employer to the Contractor.
- Administration and management: Progress on-site depends on the availability of information required by the Contractor.

3.5: Determinations- Key issues

- Where the Engineer is required by the Contract or to reach a determination, the Engineer is bound to consult with both Parties in order to reach agreement.
- If no agreement is reached, the Engineer's duty is to provide a fair determination in accordance with the Contract and having regard to all the circumstances.
- Engineer must provide a reasoned notice of his determination.

The Contractor

- Construction and completion of the Works with due diligence and within the time for completion.
- Use of Materials, Plant and Workmanship as described in the Contract and in accordance with the Engineer's instructions.
- Provision of securities, indemnities and insurances in respect of such work.
- Supply of information and notices required for the execution of the Works and for alerting the Employer when an event occurs which may increase the cost or the completion time.
- Performance of administrative and other functions (including, if explicitly required, the design of certain elements).

4.8: Safety Procedures-

Contractor must:

- Comply with the applicable safety regulations and take care for the safety of every one entitled to be on the Site;
- Keep the site clear of unnecessary rubbish;
- Provide site security until the issue of the Taking Over Certificate;
- Provide any Temporary Works which may be necessary as a consequence of the impact of the Works on the areas surrounding the Site.



CASE STUDY 1

CONSTRUCTION OF GULU HYDRO DAM.

In a project to construct the Gulu 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 Nile 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 from the World Bank provided they are satisfied that all ESG 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 skulls and crossbones. The remote location of the site makes the construction of roads a priority task.

QUESTIONS:

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.





By:
Eng. Ian Bakiza
R. Eng.
M.U.I.P.E



Commencement

Sub-Clause 8.1 defines when the construction works will commence.

The Engineer (Red Book) and Employer (Silver Book) are required to give the Contractor not less than 7 days notice of the Commencement Date (which is defined as the date notified under this Sub-Clause).

Unless otherwise provided for, the Commencement Date must be within 42 days of the Letter of Acceptance. Thereafter the Contractor must commence as soon as reasonably practicable.

Notice to Commence shall prescribe a Commencement Date which shall then be the beginning of the Time for Completion of Works.

If the Engineer or Employer failed to give notice of the Commencement Date such an act would be a breach of contract and the Contractor might be entitled to claim an extension of time and Costs under Sub-Clause 8.4.

The Sub-Clause should be read together with Sub-Clause

2.1 –Right of Access to the Site.

Access for the Contractor must be given from commencement, in accordance with the prescribed time in the Appendix to Tender

If no time is prescribed then the Employer must make sure that such parts of the Site are made available so that the Contractor can pursue the intended sequence and methods he set out in the Programme submitted under Sub-Clause 8.3

COMMENCEMENT (FIDIC 2010 PINK BOOK)

- Clause 8.1 under FIDIC MDB 2010 –PINK BOOK provides the following conditions precedent to Commencement
- signature of the Contract Agreement by both Parties, and if required, approval of the Contract by relevant authorities of the Country;
- delivery to the Contractor of reasonable evidence of the Employer's Financial arrangements (under Sub-Clause 2.4 [Employer's Financial Arrangements]); except if otherwise specified in the Contract Data,
- effective access to and possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [Compliance with Laws] as required for the commencement of the Works;
- receipt by the Contractor of the Advance Payment under Sub-Clause 14.2 [Advance Payment] provided that the corresponding bank guarantee has been delivered by the Contractor.

If the Engineer does not issue to the Contractor a notice within 180 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Clause 16.2 [Termination by Contractor].

CONTRACTOR'S PROGRAMME

- Programme is used as a tool for monitoring progress and enables the parties understand the contractor's plan for undertaking the works and accessing any delay and disruption claims)
- Programme is typically prepared by software such as Microsoft Project or Primavera P6 that shall show a series of activities intended to be implemented by the Contractor to complete the project.
- Programme activities should be linked by appropriate logic links, and may be constrained by sequence or available resources.
- Programme must show a critical path that defines the longest sequence of dependent tasks in a project for which any delay shall affect the completion date.
- Program shall be updated to record actual progress, variations, changes in logic, methods, sequence, accelerations and extension of time granted.
- Sub-Clause 8.3 sets out the requirements for the program submitted by the Contractor showing the manner and sequence in which he plans to carry out the works e.g design, procurement, manufacturing,
- Sub-Clause 8.3 does not empower the Engineer either to give or withhold approval, only to notify if the Programme does not comply with the Contract.
- Programme shall therefore not be used as the basis for the unquestionable validation of a claim for an extension of the Time for Completion. **Glenlion v Guinness Trust.**

- If the Programme is included as a contract document (Tender), then the Contractor's inability to work in accordance with a programme or method could give rise to a claim for a variation and costs - Yorkshire Water Authority v Sir Alfred McAlpine
- The Contractor must proceed with the Programme he has submitted in the absence of notice from the Engineer that it is non-compliant.
- The Employer's Personnel are entitled to rely on the Programme for the planning of their activities.
- Once on Site, the Contractor must 'proceed with the Works with due expedition and without delay'. This is however only directed at activities which are or may become critical. Jackson LJ held that this clause was not directed at every task-
- Obrascon Huarte Lain SA v HM Attorney General for Gibraltar
- Sub-Clause 8.6[Rate of Progress] requires the contractor to proceed with the works with due expedition and without delay and is to be measured against the updated and not the superseded programme.
- Contractor is expressly obliged to revise his program whenever the current Programme is inconsistent with actual progress or with his obligations or,
- Contractor to give notice of specific probable future events or circumstances which may adversely affect or delay the execution of the Works..
- Sub-Clause 15.2 does allow an Employer to terminate if the Contractor without reasonable excuse fails to 'proceed with the Works in accordance with Clause 8'. i.e programme

COMPLETION OF PROJECTS

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.
- Sub-Clause 10.1 provides that "within 28 days of the Contractor's application for a Taking-Over Certificate it shall be issued or rejected. If the Engineer fails to issue or reject the application within 28 days and "if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued."
- "Substantially in accordance with the Contract" allows for "minor outstanding works and defects" to exist which do not substantially affect the "intended purpose" of the Works.
- Sub-Clause 10.1 deals with the Employer's obligation of Taking-Over of the Works. This Sub-Clause applies except as stated in Sub-Clause 9.4 [Failure to Pass Tests on Completion].
- Taking-Over by the Employer happens when the Works (a) pass the Tests on Completion; (b) are substantially complete; (c) any contractual requirements relating to Taking-Over have been met; and (d) 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.

PERFORMANCE CERTIFICATE

- The Engineer shall issue to the Contractor a Performance Certificate within 28 days of the latest expiry of the dates of the Defects Notification period stating the date on which the Contractor completed his obligations under the Contract. The issuance of which shall be deemed to constitute acceptance of the Works.
- This signifies that the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects.
- A copy of the Performance Certificate shall be issued to the Employer.
- Sub-Clause 11.10 states "After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation which remains unperformed at that time. For the purposes of determining the nature and extent of unperformed obligations, the Contract shall be deemed to remain in force."



FINAL PAYMENT CERTIFICATE

14.11

Application for Final Payment Certificate

Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Engineer, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Engineer:

- (a) the value of all work done in accordance with the Contract, and
- (b) any further sums which the Contractor considers to be due to him under the Contract or otherwise.

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed. This agreed statement is referred to in these Conditions as the "Final Statement".

However if, following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Engineer shall deliver to the Employer (with a copy to the Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement. Thereafter, if the dispute is finally resolved under Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] or Sub-Clause 20.5 [*Amicable Settlement*], the Contractor shall then prepare and submit to the Employer (with a copy to the Engineer) a Final Statement.

14.13

Issue of Final Payment Certificate

Within 28 days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Engineer shall issue, to the Employer, the Final Payment Certificate which shall state:

- (a) the amount which is finally due, and
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

DISCHARGE

When submitting the Final Statement, the Contractor shall submit a discharge which confirms that the total of the Final Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract. This discharge may state that it becomes effective when the Contractor has received the Performance Security and the outstanding balance of this total, in which event the discharge shall be effective on such date.



INSTRUCTIONS, VARIATIONS AND CERTIFICATION & PAYMENTS



By:
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INSTRUCTIONS

What is an Instruction:

- A request, order or command from one party to another.
- Typically, the person issuing the instruction requests a course of action or a sequence of events to be implemented by the party that has received the instruction. Instructions usually have to be obeyed or implemented

In construction, consultants, clients and contractors issue instructions continually to ensure buildings are completed as specified, on time and to budget. Examples include:

- Engineer's Instruction
- Contract Administrator's Instruction or,
- Employer's Instruction
- Architect's Instruction

An instruction in written form, usually to the contractor which may be given:

- To vary the works.
- To postpone the works.
- To remedy workmanship, goods or materials which are not in accordance with the contract.
- To sanction a variation made by the contractor.
- In relation to the expenditure of provisional sums.
- To open up work for inspection.
- To carry out tests.
- To exclude persons from the site.
- Any other instructions empowered by the contract

Instructions may also be given by:

- Employer
- Dispute Adjudication Boards (DAB) - 1999 or,
- Dispute Avoidance/Adjudication Board (DAAB) - 2017
- An Arbitrator,
- Courts of Competent Jurisdiction,
- Contractors (to Sub-contractors or Suppliers)

Engineer's Instruction;

"a written interpretation of the Contract issued by the Engineer for the guidance of the Contractor"

INSTRUCTIONS UNDER THE FIDIC CONTRACTS

Red Book

1999

Sub-Clause GCC 3.3 - Instructions of the Engineer

The Engineer may issue to the Contractor **(at any time)** instructions and additional or modified drawings which may be necessary for the **execution of the works and the remedying of any defects, all in accordance with the Contract.** The Contractor shall only take instructions from the Engineer, or from an assistant to whom the appropriate authority has been delegated under this clause. **If an instruction constitutes a Variation, clause 13 [Variations and Adjustments] shall apply.**

2017

Sub-clause GCC 3.5 - Engineer's Instructions

The Engineer may issue to the Contractor **(at any time)** instructions and additional or modified drawings which may be necessary for the **execution of the works, all in accordance with the Contract.** The Contractor shall only take instructions from the Engineer, or from the Engineer's Representative (if appointed) or an assistant to whom the appropriate authority to give instruction has been delegated under Sub-clause 3.4 [Delegation by the Engineer]. Subject to the following provisions of this Sub-clause, the Contractor shall comply with the instructions given by the Engineer or the Engineer's Representative (if appointed) or delegated assistant, on any matter related to the Contract. If an instruction states that it constitutes a Variation, **Sub-clause 13.3.1 [Variation by Instruction]** shall apply.

1999

Sub-Clause GCC 3.3 - Instructions of the Engineer

The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. **Whenever practicable, their instructions shall be given in writing.** If the Engineer or delegated assistant:

- gives an **oral instruction,**
- receives a **written confirmation of the instruction,** from (or on behalf of) the Contractor, within two working days after giving the instruction, and
- **does not reply by issuing a written rejection and/or instruction within two working days** after receiving the confirmation.

then the confirmation shall constitute the written instruction of the Engineer or delegated assistant (as the case may be)

2017

Sub-clause GCC 3.5 - Engineer's Instructions

If an instruction states that it constitutes a Variation, **Sub-clause 13.3.1 [Variation by Instruction]** shall apply. If not so stated, and the Contractor considers that the instruction:

- constitutes a Variation (or involves work that is already part of an existing Variation); or
- does not comply with applicable laws or will reduce the safety of the works or is technically impossible

the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Engineer with reasons. **If the Engineer does not respond with 7 days** after receiving this Notice, **by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction.** Otherwise the Contractor shall comply with and be bound by the terms of the Engineer's response.

Yellow Book

1999

Sub-Clause GCC 3.3 - Instructions of the Engineer

The Engineer may issue to the Contractor **(at any time)** instructions which may be necessary for the **execution of the works and the remedying of any defects, all in accordance with the Contract**. The Contractor shall only take instructions from the Engineer, or from an assistant to whom the appropriate authority has been delegated under this clause. **If an instruction constitutes a Variation, clause 13 [Variations and Adjustments] shall apply.**

The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. These instructions shall be given in writing.

2017

Sub-clause GCC 3.5 - Engineer's Instructions

The Engineer may issue to the Contractor **(at any time)** instructions which may be necessary for the **execution of the works, all in accordance with the Contract**. The Contractor shall only take instructions from the Engineer, or from the Engineer's Representative (if appointed) or an assistant to whom the appropriate authority to give instruction has been delegated under Sub-clause 3.4 [Delegation by the Engineer].

Subject to the following provisions of this Sub-clause, the Contractor shall comply with the instructions given by the Engineer or the Engineer's Representative (if appointed) or delegated assistant, on any matter related to the Contract. If an instruction states that it constitutes a Variation, **Sub-clause 13.3.1 [Variation by Instruction]** shall apply

GREY BOOK

1999

Sub-Clause GCC 3.4 - Instructions

2017

Sub-clause GCC 3.4 - Instructions

If not so stated, and the Contractor considers that the instruction:

- constitutes a Variation (or involves work that is already part of an existing Variation); or
- does not comply with applicable laws or will reduce the safety of the works or is technically impossible

the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Employer with reasons. **If the Employer does not respond** with 7 days (or such other time as may be agreed between the Parties) after receiving this Notice, **by giving a Notice confirming, reversing or varying the instruction, the Employer shall be deemed to have revoked the instruction**. Otherwise the Contractor shall comply with and be bound by the terms of the Employer's response.

1999

Sub-Clause GCC 3.3 - Instructions of the Engineer

2017

Sub-clause GCC 3.5 - Engineer's Instructions

If not so stated, and the Contractor considers that the instruction: constitutes a Variation (or involves work that is already part of an existing Variation); or

- does not comply with applicable laws or will reduce the safety of the works or is technically impossible
- the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Engineer with reasons. **If the Engineer does not respond** with 7 days after receiving this Notice, **by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction**. Otherwise the Contractor shall comply with and be bound by the terms of the Engineer's response.

BASIC INGREDIENTS ON AN INSTRUCTION

The basic ingredients on an instruction are that it must be;

- In writing (or confirmed in writing)
- In accordance with the Contract.
- Issued by the Correct Party - Engineer (or Employer's Representative - Grey book), Engineer's Representative, Authorized Assistant.
- State the relevant clause or contractual obligation(s) under which it has been issued.
- Clear if it constitutes a Variation.
- In accordance with the applicable law.
- Not compromise the safety of the works or be technically impossible.
- Consistent with the applicable Notification periods regarding Instructions.
- Consistent with any limitations (or prior approvals to be given by the Employer) that are imposed through Particular Conditions of Contract (PCC) and/or the Consultancy Contract

GREY BOOK

1999

Sub-Clause GCC 3.4 - Instructions

The Employer may issue to the Contractor instructions which may be necessary for the Contractor to perform his obligations under the Contract. Each instruction shall be given in writing and shall state the obligations to which and the Sub-clause (or other term of the Contract) in which the obligations are specified. If any such instruction constitutes a Variation, Clause 13 [Variations and Adjustments] shall apply.

The Contractor shall take instructions from the Employer, or from the Employer's Representative or an assistant to whom appropriate authority has been delegated under this Clause

2017

Sub-clause GCC 3.4 - Instructions

The Employer may, through the Employer's Representative or an assistant as stated below, issue to the Contractor **(at any time)** instructions which may be necessary for the **execution of the works, all in accordance with the Contract**. Each instruction shall the obligation(s) to which it relates and the Sub-Clause (or other term of the Contract) in which the obligation(s) are specified.

The Contractor shall only take instructions from the Employer's Representative or an assistant to whom the appropriate authority to give instruction has been delegated under Sub-clause 3.2 [Other Employer's Personnel]. If an instruction states that it constitutes a Variation, **Sub-clause 13.3.1 [Variation by Instruction]** shall apply.

VARIATIONS

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

CAUSES OF VARIATIONS

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)

Work scope

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

Financial circumstances

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

Conflicting contract docs

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

Decision making process

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

VARIATION PROCEDURE

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.

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

VARIATIONS UNDER THE FIDIC CONTRACTS

1999

GCC CLAUSE 13 - VARIATIONS & 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

2017

GCC CLAUSE 13 - VARIATIONS & ADJUSTMENTS

- 13.1 - Right to vary
- 13.2 - Value Engineering
- 13.3 - Variation Procedure
- 13.4 - Provisional Sums
- 13.5 - Daywork
- 13.6 - Adjustments for Changes in Laws
- 13.7 - Adjustments for Changes in Cost

SUB-CLAUSE 13.1 - RIGHT TO VARY

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works

Contractor shall execute and be bound by each Variation, unless ".....the Contractor cannot readily obtain the Goods required...."

Variations may include;

- a) changes to the quantities of any item...,
- b) changes to the quality and other characteristics ...,
- c) changes to the levels, positions and/or dimensions ...,
- d) omission of any work ...,
- e) any additional work, Plant, Materials or services necessary,
- f) changes in the sequence or timing ...,

The Contractor shall not make any alteration and/or modification ..., until the Engineer instructs or approves a Variation.

SUB-CLAUSE 13.2 - VALUE ENGINEERING

Contractor may at any time submit to the Engineer a written proposal which if adopted will,

- accelerate completion,
- reduce the cost to the Employer of executing, maintaining and operating the works,
- improve the efficiency or value to the Employer of the completed works
- otherwise be of benefit to the Employer

It is prepared at the Cost of the Contractor including the cost of design and attendant contractual obligation under Sub-clause 4.1 [Contractor's General Obligations]

Contractor is entitled to 50% of the reduction in Cost that is achieved as a result of successful Value Engineering

SUB-CLAUSE 13.3 - VARIATION PROCEDURE

Contractor either responds that they can't execute the Variation (with reasons) or if able to execute, then they submit;

- description of works and program,
- any modification to the programme in accordance with Sub-clause 8.3 [Programme]

Engineer to evaluate in accordance with Clause 12 [Measurement and Evaluation] Instructions to proceed are issued. Keen interest should be taken on Sub-clause 12.3 [Evaluation] which guides on how to establish the rates for Variations for both works in the contract as well as new items of work

SUB-CLAUSE 13.4 – PAYMENT IN APPLICABLE CURRENCIES

Variations are paid for in the same currencies as the Contract

SUB-CLAUSE 13.5 – PROVISIONAL SUMS

To be expended in accordance with the Engineer's Instructions

Can be expended on;

- works to be executed by the Contractor and valued under Sub-clause 13.3 [Variation Procedure]
- plant, Materials or Services to be purchased by the Contractor from a Nominated Sub-contractor under Clause 5 [Nominated Sub-Contractor]. The Contractor is paid the actual price paid PLUS Over-heads and Profit as stated in the Particular Conditions of Contract (PCC)

SUB-CLAUSE 13.6 – DAYWORK

Daywork means “the method of valuing the work on the basis of the time spent by the workmen, the materials used and the plant employed”.

This is used for works of minor or incidental nature.

The Daywork schedule should be included in the Contract.

The procedure for executing any works using Daywork is well articulated in this Sub-clause 13.6 [Daywork].

SUB-CLAUSE 13.7 – ADJUSTMENT FOR CHANGES IN LEGISLATION

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country..... made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.”

The Contractor suffers (or will suffer) delay or additional cost, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-clause 20.1 [Contractor's Claims] to the following;

- an extension of time under Sub-clause 8.4 [Contractor's Claims],
- payment of any such Cost

After receiving the notice, the Engineer shall proceed in accordance with Sub-clause 3.5 [Determinations] to agree or determine these matters.

Always from the Particular Conditions of Contract (PCC) if this Sub-clause 13.7 [Adjustment for Changes In Legislation] is applicable in the Contract

SUB-CLAUSE 13.8 – ADJUSTMENT FOR CHANGES IN COST

If this Sub-clause is applicable, “the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in this Sub-clause.

This is also referred to “Price Adjustment” or “Price Fluctuation” in other forms of Contract.

The Particular Conditions of Contract (PCC) will state if this Sub-clause is applicable

The Particular Conditions of Contract shall also contain the following;

- a)The Applicable Formulae
- b)Source of Cost Indices
- c)Base date for Adjustment for Changes in Cost.
- d)Source of Rate of Exchange
- e)Upper and Lower Limits of the Cost Adjustment

The Contract should also contain either Cost Adjustment Contingencies or a Provisional Sum to cater for the Cost Adjustment;

CERTIFICATES AND PAYMENTS

A Payment Certificate is a document which results in payment being made by the Employer to the Contractor or vice-versa.

REFERENCE CLAUSES IN THE FIDIC CONTRACTS

RED AND YELLOW BOOKS

1999	2017
GCC CLAUSE 14 – CONTRACT PRICE & PAYMENT	GCC CLAUSE 14 – CONTRACT PRICE & PAYMENT
14.1 – The Contract Price	14.1 – The Contract Price
14.2 – Advance Payment	14.2 – Advance Payment
14.3 – Application for Interim Payment Certificates	14.3 – Application for Interim Payment
14.4 – Schedule of Payments	14.4 – Schedule of Payments
14.5 – Plant and Materials intended for the Works	14.5 – Plant and Materials intended for the Works
14.6 – Issue of Interim Payment Certificates	14.6 – Issue of IPC
14.7 – Payment	14.7 – Payment
14.8 – Delayed Payment	14.8 – Delayed Payment
14.9 – Payment of Retention Money	14.9 – Release of Retention Money
14.10 – Statement at Completion	14.10 – Statement at Completion
14.11 – Application for Final Payment Certificate	14.11 – Final Statement
14.12 – Discharge	14.12 – Discharge
14.13 – Issue of Final Payment Certificate	14.13 – Issue of FPC
14.14 – Cessation of Employer's Liability	14.14 – Cessation of Employer's Liability
14.15 – Currencies of Payment	14.15 – Currencies of Payment

GREY BOOK

1999	2017
GCC CLAUSE 14 – CONTRACT PRICE & PAYMENT	GCC CLAUSE 14 – CONTRACT PRICE & PAYMENT
14.1 – The Contract Price	14.1 – The Contract Price
14.2 – Advance Payment	14.2 – Advance Payment
14.3 – Application for Interim Payment Certificates	14.3 – Application for Interim Payment
14.4 – Schedule of Payments	14.4 – Schedule of Payments
14.5 – Plant and Materials intended for the Works	14.5 – Plant and Materials intended for the Works
14.6 – Issue of Interim Payment Certificates	14.6 – Issue of IPC
14.7 – Timing of Payments	14.7 – Payment
14.8 – Delayed Payment	14.8 – Delayed Payment
14.9 – Payment of Retention Money	14.9 – Release of Retention Money
14.10 – Statement at Completion	14.10 – Statement at Completion
14.11 – Application for Final Payment	14.11 – Final Statement
14.12 – Discharge	14.12 – Discharge
14.13 – Final Payment	14.13 – Final Payment
14.14 – Cessation of Employer's Liability	14.14 – Cessation of Employer's Liability
14.15 – Currencies of Payment	14.15 – Currencies of Payment

The Contract Price – 14.1

Defines the how the Contract Price for both Admeasured (with Bills of Quantities) and Lump Sum Contracts (Drawings, Specifications and Payment Schedule) shall be agreed or determined (Sub-clause 12.3)

Mentions the effect of Sub-clause 13.7 [Adjustments for Changes in Legislation], if applicable

Advance Payment - 14.2

Advance Payment to be made MUST be stated in the Particular Conditions of Contract (PCC)

Advance Payment is made when;

- Application for Advance Payment has been made (Sub-clause 14.3)
- Employer receives the Performance Security (Sub-clause 4.2)
- Employer receives the Advance Payment Guarantee (Sub-clause 14.2). This is usually a Bank or Insurance Guarantee.
- Guarantee must remain valid and enforceable until full recovery of the Advance Payment but may be progressively reduced by the amount repaid by the Contractor as indicated in the Payment Certificates

3.2.3 The Method of recovery must be stated in the Particular Conditions of Contract (PCC)

3.2.4 Full recovery must be made prior to issuance of Taking Over Certificate or Termination

Application for Interim Payments - 14.3

Contractor to make detailed monthly submissions of the amounts to which the Contractor considers himself to be entitled.

The submission “..... shall include the report on progress during the month in accordance with Sub-clause 4.21 [Progress Reports]”.

The Application shall state;

- Estimated Value of Works Executed (Contract Value & Variations) – Admeasured.
- Additions due to Changes in Legislation (13.7) & Changes in Cost (13.8)
- Deductions for Retention (14.9)
- Deductions or additions for Advance Payment (14.2)
- Additions and Deductions for Plant and Materials (14.5)
- Additions or deductions under Clause 20 [Claims, Disputes and Arbitration]
- Deductions for Previous Payment Certificates

Schedule of Payments

- For Contracts which include a “Schedule of Payments” specifying the installments to be paid.
- The schedule will establish “the Estimated Value”
- Payment for Plant and Materials will not apply.
- If Schedule is not tagged to completion milestones, the Engineer will invoke Sub-clause 3.5 [Determinations] to address this.

Plant and Materials intended for the Works - 14.5

If this Sub-clause is applicable, Interim Payment Certificates shall include;

- Value of Plant and Materials sent to the site for Permanent incorporation into the works
- Deductions once that Value has been included in the permanent works

The list of Plant and Materials to be considered for Payment should be included in the Particular Conditions of Contract (PCC)

Interim Payments - 14.6

- Performance Security must be valid and enforceable for Interim Certificates to be issued.
- Engineer to issue within 28 days after receiving the full and complete application

Timing of Payments - 14.7

- This can be amended in the Particular Conditions
- Advance Payment – 21 days after receipt of Performance Security and Advance Payment Security (whichever is later)
- Interim Payments – 56 days after Engineer receives application (28 days after issuance of Interim Payment Certificate)
- Final Payment – 56 days after Employer receives this Payment Certificate

Delayed Payment - 14.8

- Contractor is entitled to receive financing charges which are compounded monthly on the unpaid amount.
- The finance charges shall be three percentage (3%) points above the Central Bank discount rate unless stated otherwise in the Particular Conditions of Contract

Take note of circumstances under which either delayed issue of Payment Certificate or delayed Payment shall lead to either;

- Suspension of Works under Sub-clause 16.1 [Contractor’s Entitlement to Suspend Work] or,
- Termination of the Contract under Sub-clause 16.2 [Termination by Contractor]

Payment of Retention Money - 14.9

- The first half the retention (50%) is released upon issuance of the Taking Over Certificate (first moiety)
- The second half of the retention (50%) is released upon issuance of the Final Completion certificate (second moiety)
- Where Taking Over certificate is issued for a “Section or part of the works”, the sub-clause guides on how to handle that retention (40% instead of 50% as first release)
- Take note of circumstance under which “Retention Security” and be used to release the retention

Statement at Completion - 14.10

To be submitted within 84 days after receiving the Taking Over Certificate in accordance with Sub-clause 14.3 [Application for Interim Payment Certificate]

Engineer to certify in accordance with Sub-clause 14.6 [Issue of Interim Payment Certificates]

Application for Final Payment - 14.11

The Draft o be submitted within 56 days of receiving the Performance Certificate to the Engineer for review
Engineer and Contractor to agree and Contractor to submit “Final Statement”

In the event the Engineer and Contractor fail to agree;

- Engineer to deliver an Interim Payment Certificate for the agree parts
- When dispute is finally resolved through Sub-clause 20.5 [Obtaining Dispute Adjudication Board's Decision] or Sub-clause 20.5 [Amicable Settlement], the Contractor to prepare and submit to the Employer a Final Statement

Discharge -14.12

The Final Statement must include “a written discharge which confirms that the total of the Final Statement represents the full and final settlement of all moneys due to the Contractor under or in connection with the Contract”.

This is also called the signed “Final Account”.

Issue of Final Payment Certificate -14.13

- To be issued with 28 days of receiving Final Statement and written discharge as per Sub-clause 14.11 [Application for Final Payment Certificate] and Sub-clause 14.12 [Discharge]
- If Contractor fails to submit the application within 28 days after being reminded by the Engineer, the Engineer shall issue the Final Payment Certificate.

Cessation of Employer's Liability - 14.14

Employer's liability is limited to items contained in the Final Statement

Currencies of Payment - 14.15

This shall be as per the agreed Contract Amount and any other provisions stated in the Particular Conditions of Contract



Day 2

15th September 2023





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



A Construction Claim.

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

A 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.

CONTRACTOR'S CLAIMS AND NOTICES

- FIDIC Contracts provide for Claims and how they are to be presented. 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.
- FIDIC 1999 provides under SC 20.1 that failure to give Notice extinguishes the claim.

COMMON CLAIMS IN FIDIC

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

THE CLAIMS PROCEDURE

- 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.
- Due to Covid most Countries passed laws to Prevent the spread Covid, Uganda passed the Public Health (Prevention of Covid19) Regulations which introduced social distancing, closure of hardware shops, closure of the airport and lock downs.
- Claims were made under both Clause 19 for Force Majeure and under Sub –Clauses 8.4 (d) delay due to unavailable labour and supplies 8.5 (delay by authorities), SC 13.7 for change in Laws and due to scarcity of labour and supplies.

PREPARATION OF A VALID NOTICE

- 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.
- 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.

SUCCESSFUL CLAIMS AND DELAY ANALYSIS

PROGRAMME OF WORKS

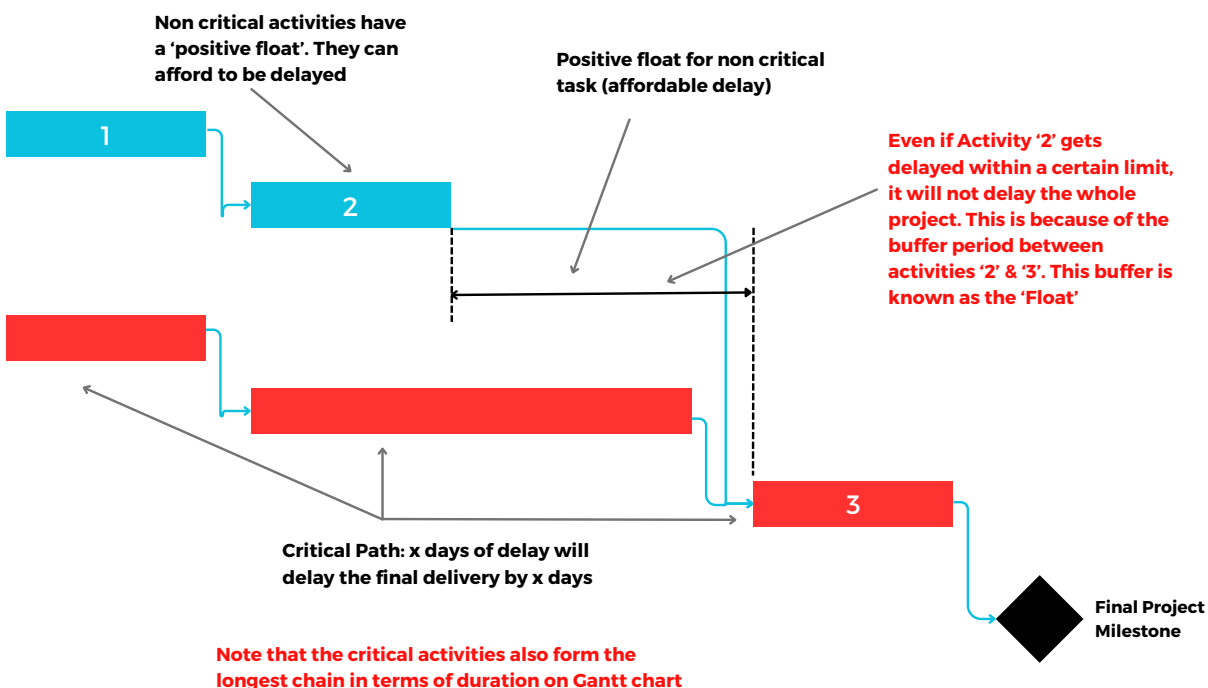
- A programme is a planned series of future events In Construction a programme is a tool that divides the works into a series of activities, each with a duration and logic links to preceding and succeeding activities, forming a network of activities.
- The programme may be depicted in a number of different forms: Gantt or PERT chart, line-of-balance diagram, pure logic diagram, time-scaled logic diagram or as a time-chainage diagram, depending on the nature of the works

FIDIC RED BOOK 8.3

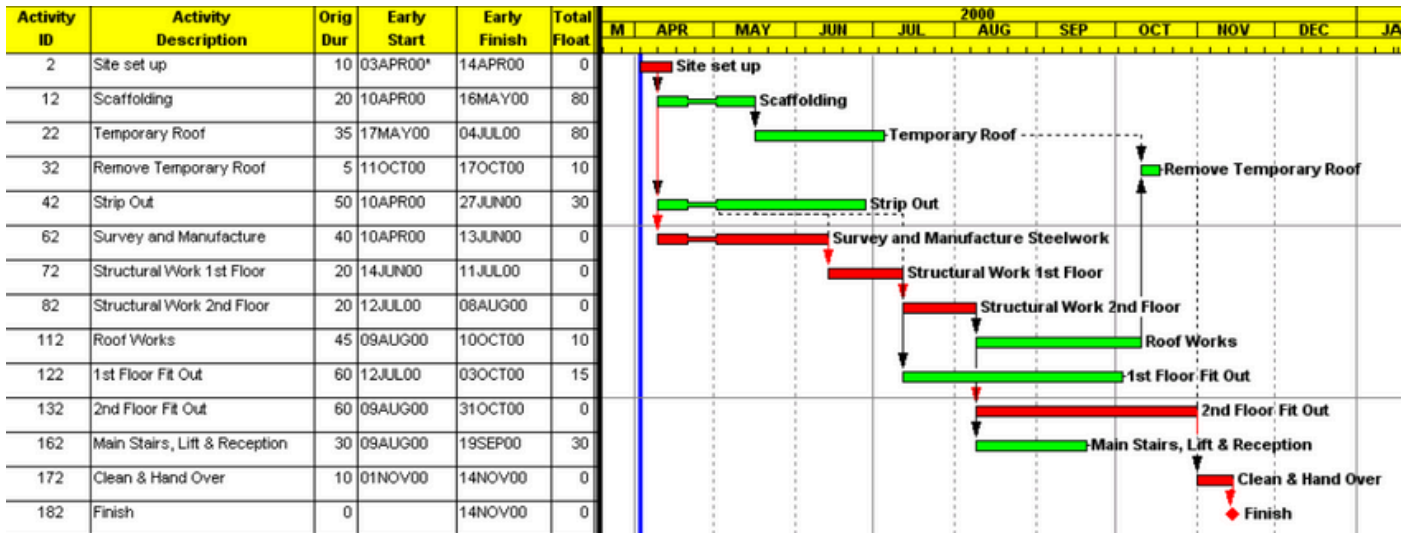
The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations.

Unless the Engineer, within 21 days after receiving a programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other obligations under the Contract. The Employer's Personnel shall be entitled to rely upon the programme when planning their activities.

GANTT CHART FOR A CONSTRUCTION PROJECT



GANTT CHART FOR A CONSTRUCTION PROJECT



CRITICAL PATH & FLOAT

- The critical path is a path (sequence of activities) with least float.
- The Critical path runs through activities and dependencies that have zero float The Critical Path.
- Why it is important? - Determines the anticipated earliest completion date for the project.
- Determines the anticipated earliest and latest completion dates for individual activities.
- Calculates float - Identifies which activities are important to the completion of the project - Identifies areas of risk - Identifies areas where action should be taken to reduce the project duration or recover from delays

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.

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.

BEST PRACTICE PROGRAMMING

- Good projects require good contractors
- Good contractors need good management
- Good management requires a good programme
- Good programmes cover all works, are resourced, priced and used
- If an employer event delays - Good contractor needs to re-programme
- Contractor always needs to be working to the most efficient programme
- This can only happen if EoT is awarded at the time. If not has to accelerate!
- If the EoT is awarded the project remains a good project to completion
- If a contractor event delay the programme the Contractor should consider resequencing / acceleration
- The contractor should always work to a realistic programme to completion

PROGRAMMING RISKS

- Weather - Too hot / cold / windy / wet
- Labour, material, plant, subcontractor - Availability
- Labour, subcontractor, management - Quality
- Outputs achievable
- Failures of subcontractors
- Health & Safety Risks
- Economic risks
- Political risks
- Unforeseen and unanticipated circumstances
- Ground condition / Existing conditions
- Acts of God/Force Majeure: pandemics, war, riots.
- Design / Specification uncertainty

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?**

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!



Summary of Contractor's claims

TABLE 1 - CONTRACTOR'S CLAIMS

Cl No.	Clause title	Red			Yellow	Silver
		Event	Notice	Cost/Profit		
1.9	Delayed drawings or Instructions	Late drawing or instruction	Reasonable prior notice + 20.1	Cost + profit	N/a (Errors in ERs)	N/a (Confidentiality)
2.1	Right of Access to the Site	Late access or possession	20.1	Cost + profit	✓	✓
4.7	Setting-Out	Error in specified reference points (not reasonably discoverable by experienced Contractor)	20.1	Cost + profit	✓	✗
4.12	Unforeseeable Physical Conditions	Adverse unforeseeable physical condition	As soon as practicable +20.1	Cost	✓	✗
4.24	Fossils	Compliance with instructions	Promptly +20.1	Cost	✓	✓
7.4	Testing	Instruction for additional passed test, or delay for which Employer responsible	20.1	Cost + profit	✓	✓
8.4	<i>Extension of time for Completion</i>	<i>Various</i>	<i>20.1</i>	<i>n/a</i>	✓	✓ (not weather or shortages)
8.5	Delays caused by Authorities	Delays caused by authorities	20.1 (via 8.4)	✗	✓	✓
8.9	Consequences of Suspension	Suspension	20.1	Cost	✓	✓
10.2	Taking over of Parts of the Works	Employer's use of part of Works without Contractor's agreement	20.1	Cost + profit	✓	Employer may not take early possession without consent
10.3	Interference with Tests on Completion	Prevention of tests	20.1	Cost + profit	✓	✓
11.2	Cost of Remedying Defects	Defects not Contractor's responsibility	Notice by Employer + 20.1?	V.O.	✓	✓
11.8	Contractor to Search	No Contractor defect found	20.1?	Cost + profit	✓	✓

Cl No.	Red				Yellow	Silver
	Clause title	Event	Notice	Cost/Profit		
12.4	Omissions	Omission of work	Notice with particulars	'Cost' incurred anyway	N/a Claim for delayed Tests after Completion	N/a Claim for delayed Tests after Completion
13.2	Value Engineering	Approved proposal changes design	20.1?	50% of net saving	✗	✗
13.3	<i>Variation Procedure</i>	<i>Re-rating justified</i>	<i>12 + 20.1</i>	<i>V.O.</i>	✓	✓
13.7	Adjustments or Changes in Legislation	Change in law	20.1	Cost	✓	✓
15.5	Employer's Entitlement to Termination	Employer terminates at will	16.3/19.6	Value of work + Cost	✓	✓
16.1	Contractor's Entitlement to Suspend Work	Contractor suspends due to Employer's default	21 days prior + 20.1	Cost + profit	✓	✓
16.4	Payment on Termination	Contractor terminates due to Employer's default	14 days prior (or immediate)	Release of bond, value + Cost, profit, loss and damage	✓	✓
17.4	Consequences of Employer's Risks	Loss or damage to Works etc. due to Employer's risk	Promptly/ 20.1	Cost (+ profit in two instances)	✓	✓
19.4	Consequences of Force Majeure	Prevented from performing any obligation	Within 14 days/20.1	Cost (except natural catastrophes)	✓	✓
19.6	Optional Termination, payment and Release	Prolonged prevention	7 days' notice	Value + Cost	✓	✓
19.7	Release from Performance under the Law	Impossible, unlawful or released by law	'Upon notice'	Value + Cost	✓	✓
20.1	<i>Contractor's claims</i>	<i>Contractor considers himself entitled to EOT or extra payment</i>	<i>28 days (42 days for fully detailed claim)</i>	-	✓	✓

TABLE 2 – CONTRACTOR’S OTHER ADDITIONAL PAYMENTS

Clause no.	Clause title	Event	Procedure
1.6	Contract Agreement	Stamp duty etc.	Cost to be borne by Employer – 20.1?
4.6	Co-operation	Unforeseeable Cost of allowing others to work on or near Site	Variation
13.8	Adjustments for Changes in Cost	Increased costs	Interim Payment Certificate
14.8	Delayed Payment	Late payment	No procedure specified – 20.1? Discount rate +3%
18.1	General Requirements for Insurances	Employer fails to insure	20.1

Summary of Employer's claims

TABLE 3 - EMPLOYER'S CLAIMS/DEDUCTIONS

Clause No.	Clause title	Event	Procedure	Comments
2.5	<i>Employer's Claims</i>	<i>Various</i>	<i>Notice + particulars as soon as practicable</i>	
4.2	Performance Security	Specified failures (a) to (d)	None	
4.19	Electricity, Water and Gas	Amounts consumed	2.5/3.5	Notice not required (2.5)
4.20	Employer's Equipment and Free Issue Material	Amounts due for use	2.5/3.5	Notice not required (2.5)
7.5	Rejection	Additional costs due to rejection and retesting	2.5	
7.6	Remedial Work	Contractor fails to comply with remedial instruction	2.5	
8.6	Rate of Progress	Revised methods cause Employer to incur costs	2.5	
8.7	Delay Damages	Contractor fails to comply with Time for Completion	2.5	May be reduced under 10.2
9.4	Failure to Pass Tests on Completion	Part of works useless	Termination	All sums paid for Part, financing, clearing
ditto	ditto	Value reduced	Agreement + TOC or TOC/3.5	Reduced value
11.3	Extension of Defects Notification Period	Part of works useless due to defect	2.5	Max extension: + 2 years
11.5	Failure to Remedy Defects	Failure to remedy within reasonable time	Prior reasonable notice of reasonable time	Cost of works by others or reasonable reduction or, for useless works, all sums paid, financing, clearing
11.11	Clearance of site	Non-clearance by Contractor	-	Cost of sale
15.4	Payment after Termination	Termination by Employer	2.5	Extra cost to complete, losses and damages
18.1	General Requirements for Insurances	Contractor fails to insure	2.5	Premiums

CASE STUDY 2

1. Following the advice of experts, the Government of Uganda has decided to execute the GULU HYDRO DAM project in three parts as follows: -
 - Dam, roads, and staff quarters: RED BOOK.
 - Head-race tunnel and control building: YELLOW BOOK.
 - Power station: SILVER BOOK.
2. Dolphin Construction Limited (DCL), an experienced contractor, was the successful bidder for the three lots and was awarded the respective contracts. The three contracts were separate.
3. Nile Engineering Limited was appointed as Engineer for the Red and Yellow contracts and the Employer's representative for the Silver Book contract.
4. Two months after work had commenced on the dam, roads and staff quarters, the Employer requested a proposal for the construction of a basic airstrip alongside the road near the site for the power plant. DCL objected that such a variation was outside the scope of the contract. Under protest, DCL submitted a proposal indicating that this would add 5% to the overall contract price and 4 months extension from the Time for Completion. A site meeting was held and NEL insisted that the variations would add 3% to the contract price and no time consequence since the extra work could be executed alongside the planned activities. Subsequently, NEL issued the Variation Instruction to DCL.
5. DCL objected to the instruction and instead issued a Notice to the Employer to avail them proof of funds to pay the cost of the variation. The Under Secretary in the Ministry of Energy and Mineral Development wrote a letter to DCL informing them that even if the World Bank funds were insufficient, the Government of Uganda was interested in the project and would fund it.
6. The Employer indicated its intention to omit the permanent staff quarters from the present contract with a plan to execute the work at a future time using a simpler design and by engaging a local and cheap contractor. DCL has threatened to suspend the works.

Qn: 1 Advise the parties on their contractual rights.

EMPLOYER CLAIMS

Day 2
Session 2



By:
Joan Kyomugisha
• LLM (Chicago), LLB (MUK)
• Manager, Contracts and Claims (UNRA)



A Claim is a demand for something due, an assertion of a Party's right under the terms of a contract or under the law.
A Claim can be made by either the Contractor or the Employer.

FIDIC Contracts provide for **Claims** and how they are to be lodged.

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.

Claims must be substantiated. Record keeping is essential during construction projects. Both Parties **MUST** maintain contemporaneous site records of the events or circumstances giving rise to the claims.

Legal Principle:
He who claims must prove.

EMPLOYER CLAIMS

Sub Clause 2.5

If the Employer considers himself to be entitled to any payment under any clause in connection with the contract, and/or to any extension of the Defects Notification Period, the Employer or Engineer shall give notice and particulars to the Contractor.

Notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim.

Sub-Clause 2.5 states:

"However, notice is not required for payments due under Sub- Clause 4.19 [**Electricity, Water and Gas**], under Sub-Clause 4.20 [**Employer's Equipment and Free-Issue Material**], or for other services requested by the Contractor."

EMPLOYER CLAIMS LIQUIDATED DAMAGES/DELAY DAMAGES

A **Fixed or Agreed sum** that does not require approval by court, arbitration or adjudication, it is agreed to by the Parties through the signed contract.

EMPLOYER CLAIMS PURPOSE OF LIQUIDATED DAMAGES / DELAY DAMAGES

- Monetary compensation to the Employer in event of late completion of project.
- Employer does not have to prove its losses due such delay. Simply invokes the clause on Delay damages.
- Certainty for both Parties. Each can assess & price the risk prior to contract signature.
- Removes uncertainty, cost, time & risk of suing at common law for damages caused by the breach of contract.
- Sub clause 8.7 If a Contractor fails to comply with sub clause 8.2 (Time for Completion) the Contractor shall subject to sub clause 2.5 (Employer's Claims) pay delay damages to the Employer for this default.

SAMPLE CONTRACT CLAUSES ON DELAY DAMAGES

		Monday to Friday 08-00 to 17-00, 08-00 to 13-00 on Saturday
Delay damages for the Works	8.7 & 14.15(b)	0.05 % of the Contract Price per day, in the currencies and proportions in which the Contract Price is payable.
Maximum amount of delay damages	8.7	10% of the final Contract Price.
Provisional Sums	13.5.(b)(i)	Adjustment of Provisional Sums shall require employers approval

SAMPLE CONTRACT CLAUSES ON DELAY DAMAGES

Completion		"the method of calculation to be used that given in Clause 1219, of the Specification"
Delay damages for the Works	8.7 & 14.15(b)	UGX 60 million per day
Maximum amount of delay damages	8.7	10% of the final Contract Price.

COMPUTATION OF LIQUIDATED DAMAGES/DELAY DAMAGES

Delay damages are calculated based on the % indicated in the contract signed between the Parties.

Delay damages are a sum stated in the contract which shall be paid for every day or week which shall elapse between the relevant Time for Completion and the date stated in the Taking Over Certificate.

3 Year civil works contract with 1 year DNP.

- Contract Sum - UGX. 4,500,000,000
- Completion Date - 31st December 2019
- Contractor Completed - 30th June 2020 (Taking - Over Certificate Issued)

Delay Damages per Contract - 0.05% contract price per day. Maximum amount of Delay damages 10% of contract.

What is the amount due to the Employer in Delay Damages?

10% of 4,500,000,000 = **450,000,000**

0.05% X 4,500,000,000 = **2,250,000**

No. of Days Delayed = **181 calendar days** (1st Jan 2020 to 30th June 2020)

Total Delay Damages chargeable = 181 days X 2,250,000 = **407,250,000**

Note: The total amount due (payable) as Delay Damages must not exceed the maximum amount of delay damages stated in the Contract.

Employer has the option to terminate the contract if the maximum is reached and the Contractor still has not completed BUT must weigh.

Time is at large - Contractor no longer has a Time for Completion.

EMPLOYER CLAIMS LIQUIDATED DAMAGES/DELAY DAMAGES

Note: Charging Delay Damages does not in any way relieve the Contractor from his obligations to complete the Works or from any other duties/ obligations/responsibilities under the contract.

WHEN ARE DELAY DAMAGES WAIVED?

Where the failure to complete the Project within the Time for Completion is as a result of the fault of the Employer, then the Employer cannot charge the Contractor Delay Damages.

He who comes to Equity must come with clean hands.

OTHER EMPLOYER CLAIMS

Claim for Extension of DNP

Sub clause 2.5 Red Book 1999 impliedly provides for this claim.

'A notice relating to any extension of the Defects

Notification Period shall be given before the expiry of such period.'

Extension of DNP may be claimed by the Employer where there are still defects/snags on the project and yet the Notification period is approaching end.

Cost for Maintaining the Engineer

The Employer can make this claim where the Contractor delays works on the project (owing to Contractor's fault) and in turn the Employer has to maintain the Engineer for a longer duration on the project. This entails maintaining of the Engineer's facilities and personnel.

Loss of Revenue - Impact on Employer

The Employer can claim loss of revenue resulting from a Contractor's delay to complete the project within the time stipulated under the contract.

e.g Tenants waiting to use a commercial building or a Government is waiting to start using/charging a Toll road.

For a claim to succeed: **Cause, Effect, Entitlement, and Substantiation.**

Claim of Abatement

Para 5 - subclause 2.5 - "The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

If the Employer does make deductions from the interim payments without having followed the process set out in Sub-Clause 2.5, the Contractor will be treated as not having been paid part of the amount due. This will be treated as non-payment of a sum due under an Interim Payment Certificate and will (if the non-payment is not remedied in time) give the Contractor the right to suspend, reduce the rate of working or terminate under Sub-Clauses 16.1 and 16.2.

A claim for an abatement is a further exception to the rule that Employer's claims need to go through the Sub-Clause 2.5 and 3.5 procedure.

An **abatement can occur** where "the work for which the contractor is seeking a payment was so poorly carried out that it does not justify any payment, or that it was defectively carried out so that it is worth significantly less than the contractor is claiming."

In 2006 in **Cleveland Bridge v Multiplex**, one of the **legal principles relating to abatement** laid down was: in a contract for labour and materials where performance has been defective the employer is entitled to maintain a defence of abatement.

NOTICE

NH International (Caribbean) Limited v National Insurance Property Development Company Limited (Trinidad and Tobago).

- On 6 March 2003, the contractor and employer entered into a contract based on the FIDIC Redbook for the construction of a hospital in Tobago.
- Project started in March 2003 & the original completion date was March 2005.
- The contractor suspended the works on 23 September 2005 and terminated the contract on 3 November 2006.
- Disputes arose and were referred to arbitration.
- Contractor claimed damages arising out of the termination of the contract and the employer submitted various counterclaims in the arbitration proceedings.
- The contractor only became aware of the counterclaims during the arbitration proceedings since the employer had failed to deliver a notice in terms of sub-clause 2.5 at any stage following the conclusion of the contract.
- The contractor contended that the employer was precluded from raising any counterclaims in the arbitration proceedings.
- The Arbitrator decided that the Employer was allowed to raise the claims. The High Court & Court of Appeal agreed with the Arbitrator.
- However the Privy Council overruled this decision, on the basis that claims for which notice was not issued in accordance with sub-clause 2.5 should not be entertained, in any case the engineer's role to determine such claims would be usurped if they were directly sent to an Arbitrator.

Employer Claims - Changes introduced by FIDIC 2017

1999 Red Book	FIDIC 2017
Sub clause 2.5	Sub-Clause 2.5 (Employer's Claims) was deleted. Employer's claims are now dealt with together with Contractor's claims under Sub-Clauses 20.1 (Claims) and 20.2 (Claims For Payment and/or EOT).
Notice: As soon as practicable after the Employer became aware	Notice of claim no later than 28 days after the event or circumstances giving rise to the claim. *Engineer to give notice within 14 days indicating that the notice was given outside the 28 day window. If the Engineer does not do so then the notice is considered valid.

CASE STUDY 3

The Time for Completion has passed, and no extension of time has been issued by the Engineer to DCL.

The Engineer issued to DCL an Interim Payment Certificate in the sum of US \$ 250,000. The Contractor has received from the Employer payment of US \$ 100,000. The Employer has indicated the deductions from the IPC as follows: -

- US \$ 50,000 for electricity and water provided to the Contractor by the Employer.
 - US \$ 75,000 for customs clearance advanced by the Employer to the Contractor for the tunneling machinery.
 - US \$ 25,000 for delay damages. The Contractor made a claim for extension of time due to customs delays, but no determination has been made by NEL.
3. A site meeting was held and the Contractor disputes all the money that was deducted from the IPC. NEL stated in the meeting that the deductions by the Employer were reasonable.
 4. The Contractor has issued a Notice to Suspend all works.

QN 1: Advise the parties on their respective contractual remedies.





Ronald Tusingwire,
MCI Arb



A claim is defined under GCC 1.1.5 (Yellow Book), GCC 1.1.6 (Red Book) and GCC 1.1.3 (Silver Book) to mean a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the works.

It has also been defined as a demand for something due. i.e. an assertion of a Party's right under the terms of the Contract or under the Law.

The Claim must arise from the Contract or under the law. The law in this case is the law that the Parties agreed will govern the execution and interpretation of the contract. The 2017 FIDIC Conditions of Contract (GCC 1.4 Law and Language – Yellow Book- -- Red Book and Silver Book) provide that:

“the Contract shall be governed by the law of the country (or other jurisdiction) stated in the Contract data (if not stated, the law of the Country), excluding any conflict of law rules”

GCC 1.1.18 (Silver Book) and GCC 1.1.21 (Red Book and Yellow Book), define “Country” to mean the country in which the Site (or most of it) is located, where the Permanent Works are to be executed.

Contract data on the other hand is defined under GCC 1.1.11 (Yellow Book), GCC 1.1.9 (Silver Book), and GCC 1.1.12 (Red Book) to mean “the pages, entitled contract data which constitutes Part A of the Particular Conditions”.

What precedes a Claim?

When an event or events have occurred that a contractor considers give rise to the need to submit a claim, it is important to consider certain matters before proceeding with submission of the claim. Some of the matters to consider include the following:

1) Have you given notice before the Claim?

A Notice is defined under GCC 1.1.56 (Red Book and Yellow Book), GCC 1.1.48 (Silver Book) to mean “written communication identified as a Notice and Issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]

GCC 1.3 (Red, Yellow and Silver Books) provide for what constitutes a Notice i.e. it shall be;

- Notice must be in writing
- A paper-original signed by the Contractor's Representative, the Engineer, or the authorised representative of the Employer (as the case may be)
- An electronic original generated from any of the systems of electronic transmission stated in the Contract Data (if not stated, systems acceptable to the Engineer) where the electronic original is transmitted by the electronic address uniquely assigned to each of the authorised representatives; or both, as stated in these Conditions of Contract.
- It must be identified as a Notice i.e. if it is another form of communication, it shall be identified as such and include the provision of the Contract under which it is issued.
- It must be delivered by hand (against recipient), or sent by email or courier (against receipt) or transmitted using any of the systems of electronic transmission under the contract;
- It must be delivered to the address for the recipient's communications as stated in the Contract Data. (N.B. if the recipient gives Notice of another address, all Notices and other communications shall be delivered accordingly after the Sender receives such Notice)

Note:

- The Notice is effective when it is received (or deemed to have been received) at the recipient's current address
- An electronically transmitted Notice is deemed to have been received on the day after transmission, provided no non-delivery notification was received by the sender;
- All Notices must not be unreasonably withheld or delayed
- Where a notice is issued to the by a Party, or the Engineer, the paper and/or electronic original shall be sent to the intended recipient and a copy sent to the Engineer or the other Party as the case may be.
- [Both the Red Book and Yellow Book refer to the Engineer while the Silver Book refers to the Employer's Representative]

Establish the Value of the claim – i.e. how much are you claiming, this will assist in determining whether to pursue the claim or not.

Establish who to address the Claim.

The person/entity to address the claim is usually the same as the one to whom the Notice is addressed and submitted. Most importantly under this head is the person likely to make the determination. Will the person be persuaded by the claim submission? What is the relationship between the Contractor and the Employer as at the time of submitting the claim, is there animosity between the Employer and the Contractor?

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Contents of the Construction Claim

The Construction Claim should be fully detailed and professionally presented and should contain the following:

1) Cover Page is the starting point showing the viewer that a Party to the Contract has submitted a contractual claim arising from the Contract. The Cover page should invite the viewer to look inside the document to find out more about what is inside. The Cover page should be neatly drawn and show following:

- a) That the submission is a Claim;
- b) The Claimant's name
- c) The Project Title including the project number which is stated in most of the projects undertaken by Government for example **CONTRACT NO. MEAC/WRKS/17-18/0002465**,
- d) The Parties to the Construction Project
- e) The Claim title or brief description of the claim, for example "Contractor's Claim for Extension of Time and Additional Cost due to Disruption"
- f) The entity submitting the Claim. This can be the Contractor directly, the Contractor's Project Manager, Contractor's Claims Consultants, a Law firm, the Employer or the Employer's Consultant.
- g) Claim Number, this is important in case the project has had several claims submitted for determination during its cycle.

A Table of content, index which guides the reader of the Claim where to find the various heads of claim or the arguments in support of the claim. The importance of the index or table of content is that most of the Claim documents are voluminous with lots of project documents submitted as evidence of the entitlement or substantiation of the various heads of claims.

Interpretation or definition page to define the various terms and acronyms used in the industry in as far as they relate to the claim.

The Claim should have an Executive Summary

The purpose of the executive summary is that it provides an overview of what the larger document and is usually the first thing the reader will see. Often times, executive summaries are the only place decision makers will go to determine if a quick action is warranted on a particular claim.

In any construction project, there are various key decision makers or players that are affected/impacted by the project who are not necessarily technical persons like Engineers, Architects, Quantity Surveyors name it, but include the owners of the project, financiers, auditors, accounting officers etc. The executive summary is intended to give all these actors a concise statement of what the Claims are and for them to understand what the Contractor is claiming to be entitled and be able to make a decision or seek guidance quickly.

The introduction

This part introduces all the relevant Parties to the Contract and to the Claim giving all their details for example, the Employer, the Employer's Representative (in the case of the Silver Book) or the Engineer (in the case of the Red and Yellow Books), the Contractor, the Contractor's Representative in the Claim

The Contract Particulars

Under this head, you state the key contract particular about the project from which the claim arises i.e. when was the contract signed, the obligations of the Contractor under the contract, the obligations of the employer under the contract, commencement of the works, site hand over, the law of the contract, contract price and payment terms, time for completion, contract amendments if any, contract provisions relevant to the claims, the specific clause under which the Contractor is submitting its claims what that the clause states in summary.

Details of the Contractor's Claims. – under this headline, you dig deeper into the claims upon which you want a determination to be made and why it should be made in your favor. Particularly, the Details of the Contractor's claims must illustrate the following:

•Background to the claim, this is snapshot of how the particular claim arises. The background should give a chronology of events starting as soon as an event (s) occurred which resulted into the claim (s). This will help to demonstrate and tell the story in a chronological way that leads the reviewer to a logical conclusion.

•The cause of the Claim. This is the event that has given rise to the Claim. It could be for example late or restricted access to the site, instructions to carry out additional works, late issue of instructions etc. the cause is a statement of fact and is usually fairly and easily established from project records.

•The effect of the cause: This is a demonstration of the impact of the event causing the Claim. For a claim to succeed, it is important 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. For example, did the delay to issue the instructions cause the contractor to incur additional cost?

•The entitlement: Under this head, we must demonstrate that the event on which the claim is based is something for which the contract, or the law to which the contract is subject, provides entitlement to the claimant. The claim will flow either from a remedy contained in the contract conditions, or from a breach of the contract giving rise to common law damages and could possibly fall under both categories. You must set out the contractual basis that gives rise to your entitlement and the first place to check for this, is the contract itself.

•The substantiation: This evidence is being relied on to prove the entitlement. This evidence is usually contained in the project record which must be kept by the Contractor at all times

Conclusion. This is a summation of the claims showing justification why you are entitled to a determination in your favor
9) Attach the Appendices/Annexures which contain the documents relied on such as programs, calculations and project records that have been prepared to support, illustrate or substantiate the claims.

The Claim document must be paginated and the various annexures clearly numbered and differentiated by separators
11) Neatly bind the Claim submission document to avoid some papers falling out or being removed to your detriment.

•There are four key points to bear in mind when preparing a claim document. These four points have been tested and proven to go a long way towards helping a just claim succeed seamlessly and they include:





1. Make the reader's job as easy and as pleasant as possible
2. Ensure that the submission is a stand-alone document
3. Assume the reviewer has no prior knowledge of the project or the circumstances
4. Do not include irrelevant information in the document





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