



## مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

بخش سوم:

توسعه و مدیریت برنامه در فاز طراحی (Design Phase) برای مدیریت ادعاء و جلوگیری از دعاوی و اختلافات در پروژه

ارائه دهنده:

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## What we will learn?

- ☐ Claims management planning
- ☐ Design management
- ☐ Design review
- ☐ Project management during the design phase
- ☐ Other parts of project management
- ☐ Contract documents
- ☐ Development and review of construction contract(s) terms and conditions

## اصلاحیه جلسه سوم

در جلسه سوم در عناوین قراردادهای داخلی اشتباهی صورت گرفته بود:

- ❑ قراردادهای همسان EPC غیرصنعتی (جلسه قبل) = قراردادهای همسان EPC صنعتی
- ❑ قراردادهای همسان EPC صنعتی (جلسه قبل) = قراردادهای همسان طرح و ساخت غیرصنعتی

این موارد در جزوه جلسه سوم اصلاح شده است!

پس در ویدیوی جلسه سوم به این موضوع دقت بفرمایید!

## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Right to vary (13.1)

Variations may be initiated by the Engineer under Sub-Clause 13.3 [Variation Procedure] at any time before the issue of the Taking-Over Certificate for the Works.

Other than as stated under Sub-Clause 11.4 [Failure to Remedy Defects], a Variation shall not comprise the omission of any work which is to be carried out by the Employer or by others unless otherwise agreed by the Parties.

The Contractor shall be bound by each Variation instructed under Sub-Clause 13.3.1 [Variation by Instruction], and shall execute the Variation with due expedition and without delay, unless the Contractor promptly gives a Notice to the Engineer stating (with detailed supporting particulars) that:

- (a) the varied work was Unforeseeable having regard to the scope and nature of the Works described in the Specification;
- (b) the Contractor cannot readily obtain the Goods required for the Variation; or
- (c) it will adversely affect the Contractor's ability to comply with Sub-Clause 4.8 [Health and Safety Obligations] and/or Sub-Clause 4.18 [Protection of the Environment].

**Do you remember  
“Differing Site  
Conditions?”**

## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Right to vary (13.1)

Promptly after receiving this Notice, the Engineer shall respond by giving a Notice to the Contractor cancelling, confirming or varying the instruction. Any instruction so confirmed or varied shall be taken as an instruction under Sub-Clause 13.3.1 [Variation by instruction].

Each Variation may include:

- (i) changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation);
- (ii) changes to the quality and other characteristics of any item of work;
- (iii) changes to the levels, positions and/or dimensions of any part of the Works;
- (iv) the omission of any work, unless it is to be carried out by others without the agreement of the Parties;
- (v) any additional work, Plant, Materials or services necessary for the Permanent Works, including any associated Tests on Completion, boreholes and other testing and exploratory work; or
- (vi) changes to the sequence or timing of the execution of the Works.

The Contractor shall not make any alteration to and/or modification of the Permanent Works, unless and until the Engineer instructs a Variation under Sub-Clause 13.3.1 [Variation by Instruction].

**Do you consider this as your right for a change order?**

## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Value engineering (13.2)

**Remember**  
**“Proposal Request?”**

The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor's opinion) will, if adopted:

- (a) accelerate completion;
- (b) reduce the cost to the Employer of executing, maintaining or operating the Works;
- (c) improve the efficiency or value to the Employer of the completed Works; or
- (d) otherwise be of benefit to the Employer.

The proposal shall be prepared at the cost of the Contractor and shall include the details as stated in sub-paragraphs (a) to (c) of Sub-Clause 13.3.1 [Variation by Instruction].

## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Value engineering (13.2)

The Engineer shall, as soon as practicable after receiving such a proposal, respond by giving a Notice to the Contractor stating his/her consent or otherwise. The Engineer's consent or otherwise shall be at the sole discretion of the Employer. The Contractor shall not delay any work while awaiting a response.

If the Engineer gives his/her consent to the proposal, with or without comments, the Engineer shall then instruct a Variation. Thereafter, the Contractor shall submit any further particulars that the Engineer may reasonably require, and the last paragraph of Sub-Clause 13.3.1 [Variation by Instruction] shall apply which shall include consideration by the Engineer of the sharing (if any) of the benefit, costs and/or delay between the Parties stated in the Particular Conditions.

If a proposal under this Sub-Clause, to which the Engineer gives his/her consent, includes a change in the design of part of the Permanent Works, then unless otherwise agreed by both Parties:

- (i) the Contractor shall design this part at his/her cost; and
- (ii) sub-paragraphs (a) to (h) of Sub-Clause 4.1 [Contractor's General Obligations] shall apply.

## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Variation procedure (13.3)

Subject to Sub-Clause 13.1 [*Right to Vary*], Variations shall be initiated by the Engineer in accordance with either of the following procedures:

##### 13.3.1 Variation by Instruction

**Do you remember**  
**“Construction**  
**Change Directive?”**

The Engineer may instruct a Variation by giving a Notice (describing the required change and stating any requirements for the recording of Costs) to the Contractor in accordance with Sub-Clause 3.5 [*Engineer's Instructions*].

**Homework 4: Compare these clauses with ones**  
**provided by AIA A201-2017**



## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Variation procedure (13.3)

The Contractor shall proceed with execution of the Variation and shall within 28 days (or other period proposed by the Contractor and agreed by the Engineer) of receiving the Engineer's instruction, submit to the Engineer detailed particulars including:

- (a) a description of the varied work performed or to be performed, including details of the resources and methods adopted or to be adopted by the Contractor;
- (b) a programme for its execution and the Contractor's proposal for any necessary modifications (if any) to the Programme according to Sub-Clause 8.3 [Programme] and to the Time for Completion; and
- (c) the Contractor's proposal for adjustment to the Contract Price by valuing the Variation in accordance with Clause 12 [Measurement and Valuation], with supporting particulars (which shall include identification of any estimated quantities and, if the Contractor incurs or will incur Cost as a result of any necessary modification to the Time for Completion, shall show the additional payment (if any) to which the Contractor considers that the Contractor is entitled). If the Parties have agreed to the omission of any work which is to be carried out by others, the Contractor's proposal may also include the amount of any loss of profit and other losses and damages suffered (or to be suffered) by the Contractor as a result of the omission.

**Homework 4: Compare these clauses with ones provided by AIA A201-2017**



## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Variation procedure

(13.3)

#### **Homework 4: Compare these clauses with ones provided by AIA A201-2017**

Thereafter, the Contractor shall submit any further particulars that the Engineer may reasonably require.

The Engineer shall then proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine:

- (i) EOT, if any; and/or
- (ii) the adjustment to the Contract Price (including valuation of the Variation in accordance with Clause 12 [Measurement and Valuation] using measured quantities of the varied work)

(and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date the Engineer receives the Contractor's submission (including any requested further particulars) shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3). The Contractor shall be entitled to such EOT and/or adjustment to the Contract Price, without any requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT].



## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

- ❖ Variation procedure  
(13.3)

**Homework 4: Compare these clauses with  
ones provided by [AIA A201-2017](#)**

#### 13.3.2 Variation by Request for Proposal

The Engineer may request a proposal, before instructing a Variation, by giving a Notice (describing the proposed change) to the Contractor.

The Contractor shall respond to this Notice as soon as practicable, by either:

- (a) submitting a proposal, which shall include the matters as described in sub-paragraphs (a) to (c) of Sub-Clause 13.3.1 [*Variation by Instruction*]; or
- (b) giving reasons why the Contractor cannot comply (if this is the case), by reference to the matters described in sub-paragraphs (a) to (c) of Sub-Clause 13.1 [*Right to Vary*].



## Potential killer contract clauses – Change orders

### ❑ FIDIC-2017

#### ❖ Variation procedure

(13.3)

#### Homework 4: Compare these clauses with ones provided by **AIA A201-2017**

If the Contractor submits a proposal, the Engineer shall, as soon as practicable after receiving it, respond by giving a Notice to the Contractor stating his/her consent or otherwise. The Contractor shall not delay any work whilst awaiting a response.

If the Engineer gives consent to the proposal, with or without comments, the Engineer shall then instruct the Variation. Thereafter, the Contractor shall submit any further particulars that the Engineer may reasonably require and the last paragraph of Sub-Clause 13.3.1 [*Variation by Instruction*] shall apply.

If the Engineer does not give consent to the proposal, with or without comments, and if the Contractor has incurred Cost as a result of submitting it, the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to payment of such Cost.

## Potential killer contract clauses – Change orders

**Is limitation for variation only exist in Iran?**

<https://www.levelset.com/blog/variation-in-quantity-clauses/>

Sometimes this requirement is modified by provisions in the contract that provide for an equitable adjustment of a unit price when the actual quantity of an activity or work item on the proposal varies more than a stipulated percentage above or below the quantity first estimated by the architect-engineer. Values of 15 to 25 percent are often used in this regard (Clough et al., 2015).

## Potential killer contract clauses – Change orders

### ❑ قرارداد همسان EPC صنعتی

۲۷-۱-

«دستور **تغییر** کار»، سندی است که افزایش، کاهش و یا **تغییر** کار و **تغییرات** در مدت و مبلغ پیمان ناشی از آن‌ها، در آن درج شده است و به امضای کارفرما و پیمانکار می‌رسد.

مشابه کدام حالت در چارت پیشنهادی هستند؟

### ماده ۴۹- تغییر در کارها

۱-۴۹-

کارفرما، در چارچوب کلی موضوع پیمان، در هر زمانی در طول مدت پیمان تا پیش از تحویل موقت، می‌تواند کاهش، افزایش، حذف برخی از کارها و یا تغییر در مشخصات آن‌ها را از پیمانکار بخواهد و پیمانکار موظف به انجام آن‌ها، با رعایت سایر بندهای این ماده و مفاد پیمان است.

۲-۴۹-

پیمانکار، می‌تواند برای افزایش کیفیت، بازدهی و یا ایمنی کارها، تغییراتی را در کارها به کارفرما پیشنهاد کند. کارفرما محق است این گونه تغییرات را قبول یا رد کند. عدم پذیرش تغییرات پیشنهادی پیمانکار از سوی کارفرما، رافع مسئولیت پیمانکار در اتمام و تحویل کارها طبق مشخصات فنی پیمان نیست.

## Potential killer contract clauses – Change orders

### □ قرارداد همسان EPC صنعتی

۳-۴۹-

با دریافت دستور و یا تأیید کارفرما، در انطباق با بندهای «۱-۴۹» و «۲-۴۹»، پیمانکار موظف است، تأثیر انجام تغییرات در هزینه و مدت پیمان را محاسبه و به کارفرما منعکس کند، هزینه تغییر کارها، براساس بند «۲-۵۶» محاسبه می‌شود. مبالغ کارهای افزایش یافته یا کاهش یافته، با احتساب تغییرات موضوع بند «۶-۴۹» (به تنهایی)، نباید بیش از بیست و پنج درصد مبلغ پیمان شود. پیمانکار می‌تواند ضمن اتمام کارهای در دست اقدام، تقاضای خاتمه پیمان را طبق ماده (۶۹)، بنماید و یا کاهش یاد شده را بپذیرد. تغییرات مدت پیمان ناشی از تغییر کارها، براساس ماده (۶۴)، تعیین می‌شود.

۴-۴۹-

انجام تغییرات کارهای موضوع بندهای «۱-۴۹» تا «۳-۴۹»، پس از صدور «دستور تغییرکار» که در آن، جزئیات کامل تغییر کار و هر نوع تغییر در قیمت و یا تغییر در مدت پیمان و سایر اصلاحات موردنیاز برابر مفاد پیمان، درج شده است، تنظیم می‌شود و به امضای دوطرف می‌رسد و به عنوان یکی از ضمایم پیمان محسوب می‌گردد.

آیا این حالت مشابه **Change order** نیست؟

اگر به توافق نرسند؟

## Potential killer contract clauses – Change orders

### □ قرارداد همسان EPC صنعتی

#### آیا این حالت مشابه Change Directive نیست؟

۵-۴۹-

هرگاه دو طرف در مورد تغییرات هزینه و مدت پیمان، ناشی از تغییر کارها، ظرف مدت معقولی که اجرای کارهای دیگر موضوع پیمان را دچار تأخیر نکند، به توافق نرسند، در این صورت کارفرما انجام یا عدم انجام تغییرات توسط پیمانکار را به وی ابلاغ می‌کند. در صورت دستور کارفرما مبنی بر اجرای تغییرات، به رغم عدم حصول توافق در مورد هزینه و مدت، پیمانکار موظف به انجام تغییرات است و متعاقباً مذاکرات خود را با کارفرما برای حصول به توافق ادامه می‌دهد. در صورتی که ظرف مدت ۶۰ روز، کماکان دو طرف به توافق نهایی نرسند، موارد طبق ماده (۷۵)، رسیدگی و تعیین تکلیف می‌شود. تا قبل از حل اختلاف، پرداخت به پیمانکار، طبق مبلغ تغییر یافته پیمان، براساس محاسبات کارفرما انجام می‌شود.

#### چقدر مشابهت بین این متن و چارت پیشنهادی وجود دارد؟

۶-۴۹-

برای مواردی که بخشی از کارها براساس فهرست بها برآورده شده باشد، اختلاف مقادیر کارهای انجام شده طبق پیمان، در مقایسه با مقادیر اولیه پیمان، نیاز به صدور دستور تغییر کار موضوع بند «۴-۴۹» را ندارد و تغییرات مبلغ پیمان، براساس قیمت‌های فهرست بها بارعایت سقف تعیین شده در بند «۳-۴۹»، تعیین می‌گردد.

۷-۴۹-

تغییرات ناشی از قصور پیمانکار در انجام کارهای اصلی و مورد تعهد وی، تغییر کار تلقی نمی‌شود و پیمانکار موظف به انجام این گونه تغییرات پس از تأیید مشاور کارفرما، به هزینه خود و در مدت پیمان است.

## Potential killer contract clauses – Delays and extension of time

❑ Many extension of time **claims** flounder on the method of delay analysis that should be used to demonstrate the **effect of delays**.

1. The Contractor often wishes to perform **one method** of delay analysis and
2. The Engineer considers that **another method** is more appropriate.

*Such disagreements will only serve to*

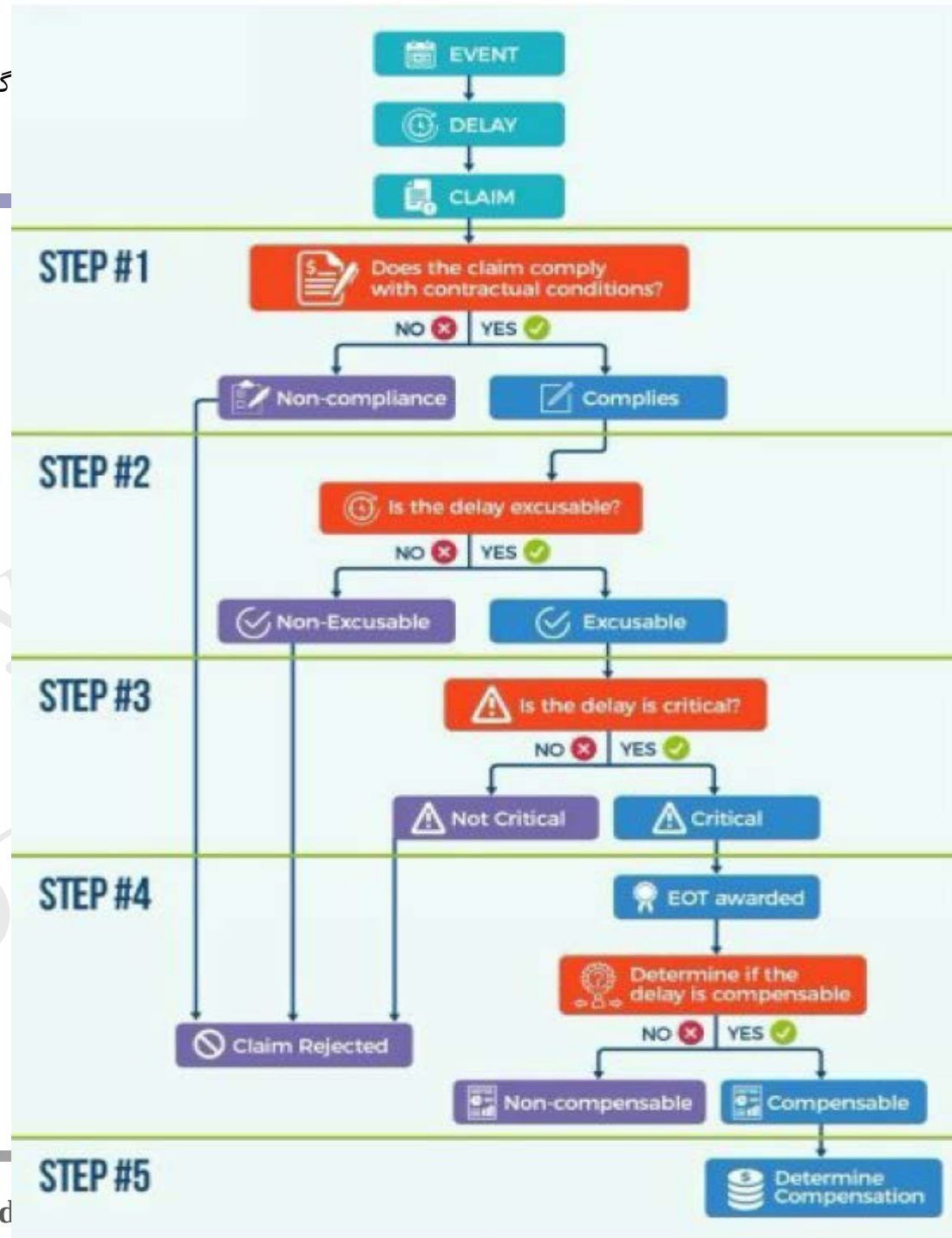
1. **Prolong** the resolution of a claim
2. Involve the parties in **additional expense**.

❑ It is suggested that if the Employer or Engineer prefers a specific method of delay analysis to be utilized,

*then this requirement is **included within the Contract**.*

## Delay claims

- Construction Delay Analysis
- Simplified: A step-by-step guide for the analysis and formulation of delay claims (2020)





## Potential killer contract clauses – Delays and extension of time

### ❑ AIA A201-2017: General conditions for construction

#### ❖ Contractor's entitlement to EOT

##### § 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## Potential killer contract clauses – Delays and extension of time

نشریه ۴۳۱۱ □

❖ ماده ۳۰- تغییر مدت پیمان: درخواست تمدید از سوی پیمانکار

### ۳۰-الف)

در صورت وقوع هریک از موارد زیر که موجب افزایش مدت اجرای کار شود، پیمانکار می‌تواند درخواست تمدید مدت پیمان را بنماید. پیمانکار درخواست تمدید مدت پیمان را با ارائه محاسبات و دلایل توجیهی، به مهندس مشاور تسلیم می‌کند و مهندس مشاور پس از بررسی و تأیید، مراتب را برای اتخاذ تصمیم به کارفرما گزارش می‌کند و سپس نتیجه تصمیم کارفرما را به پیمانکار ابلاغ می‌نماید.

عدم توافق؟

زمان درخواست؟

آیا Notice نیاز است؟

حالا نمونه AIA را ببینیم!

## Potential killer contract clauses – Delays and extension of time

### ❑ AIA A201-2017: General conditions for construction

#### ❖ Contractor's entitlement to EOT

##### § 15.1.5.1 Claims for Additional Time

If the Contractor wishes to make a Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.

##### Note:

1. Estimate of cost
  2. Probable effect
  3. Continuing delay
- What else do you see here?

محل مسکوت....



## Potential killer contract clauses – Delays and extension of time

### ❑ Federal Acquisition Regulation (FAR)

#### ❖ Un-excusable delays

If the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting Officer, without additional cost to the Government. In this circumstance, the Contracting Officer may require the Contractor to increase the number of shifts, overtime operation, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.<sup>9</sup>

**Clearly expressed submittal of schedule**

## Potential killer contract clauses – Delays and extension of time

### ☐ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### 5.3 DELAYS AND EXTENSIONS OF TIME

5.3.1 OWNER CAUSED DELAY Subject to the subsection immediately below, if the commencement or progress of the Subcontract Work is delayed without the fault or responsibility of the Subcontractor, the Subcontract Time shall be extended by Subcontract Change Order and the Subcontract Amount equitably adjusted to the extent obtained by the Constructor under the Subcontract Documents, and the Progress Schedule shall be revised accordingly.

**This has two parts:**

- 1. Claims relating to owner**
- 2. Claims relating to constructor**

## Potential killer contract clauses – Delays and extension of time

### ☐ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

5.3.2 CLAIMS RELATING TO OWNER The Subcontractor agrees to initiate all claims for which the Owner is or may be liable in the manner and within the time limits provided in the Subcontract Documents for like claims by the Constructor upon the Owner and in sufficient time for the Constructor to initiate such claims against the Owner in accordance with the Subcontract Documents. At the Subcontractor's request and expense to the extent agreed upon in writing, the Constructor agrees to permit the Subcontractor to prosecute a claim in the name of the Constructor for the use and benefit of the Subcontractor in the manner provided in the Subcontract Documents for like claims by the Constructor upon the Owner.

5.3.3 CLAIMS RELATING TO CONSTRUCTOR The Subcontractor shall give the Constructor written notice of all claims not included in subsection 5.3.2 within three (3) Days of the facts giving rise to the event for which claim is made. Thereafter, the Subcontractor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties agree upon a longer period of time. The Constructor shall respond in writing denying or approving, in whole or in part, the Subcontractor's claim no later than fourteen (14) Days after receipt of the Subcontractor's documentation of claim. The Constructor's failure to respond shall be deemed a denial of the Subcontractor's claim. All unresolved claims, disputes, and other matters in question between the Constructor and the Subcontractor not relating to claims included in subsection 5.3.2 shall be resolved as provided for in ARTICLE 11.

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Extension of time (8.5)

The Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to Extension of Time if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over the Works and Sections] is or will be delayed by any of the following causes:

- (a) a Variation (except that there shall be no requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT]);
- (b) a cause of delay giving an entitlement to EOT under a Sub-Clause of these Conditions;
- (c) exceptionally adverse climatic conditions, which for the purpose of these Conditions shall mean adverse climatic conditions at the Site which are Unforeseeable having regard to climatic data made available by the Employer under Sub-Clause 2.5 [Site Data and Items of Reference] and/or climatic data published in the Country for the geographical location of the Site;
- (d) Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions; or
- (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Extension of time (8.5)

The Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to EOT if the measured quantity of any item of work in accordance with Clause 12 [Measurement and Valuation] is greater than the estimated quantity of this item in the Bill of Quantities or other Schedule by more than ten per cent (10%) and such increase in quantities causes a delay to completion for the purposes of Sub-Clause 10.1 [Taking Over the Works and Sections]. The agreement or determination of any such Claim, under Sub-Clause 20.2.5 [Agreement or determination of the Claim], may include a review by the Engineer of measured quantities of other items of work which are significantly less (by more than 10%) than the corresponding estimated quantities in the Bill of Quantities or other Schedule. To the extent that there are such lesser measured quantities, the Engineer may take account of any favourable effect on the critical path of the Programme. However, the net effect of all such consideration shall not result in a net reduction in the Time for Completion

**Could Engineer take back EOT granted? Remember the rule mentioned in Delay Analysis course?**

When determining each EOT under Sub-Clause 20.2 [Claims For Payment and/or EOT], the Engineer shall review previous determinations under Sub-Clause 3.7 [Agreement or Determination] and may increase, but shall not decrease, the total EOT.

**Remember concurrent delay?**  
**Potential risk for a dispute**

If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances).

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Rate of progress

(8.7)

If, at any time:

- (a) actual progress is too slow to complete the Works or a Section (if any) within the relevant Time for Completion; and/or
- (b) progress has fallen (or will fall) behind the Programme (or the initial programme if it has not yet become the Programme) under Sub-Clause 8.3 [Programme],

other than as a result of a cause listed in Sub-Clause 8.5 [Extension of Time for Completion], then the Engineer may instruct the Contractor to submit, under Sub-Clause 8.3 [Programme], a revised programme describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete the Works or a Section (if any) within the relevant Time for Completion.

**Be mindful of the 28 days to submit and 14 days of limitation to review**

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Rate of progress

(8.7)

**Employer can claim extra costs such as management costs in the site!**

1. **Cost of recovery**
2. **Delay damages**

Unless the Engineer gives a Notice to the Contractor stating otherwise, the Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Contractor's Personnel and/or the Goods, at the Contractor's risk and cost. If these revised methods cause the Employer to incur additional costs, the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment of these costs by the Contractor, in addition to Delay Damages (if any).

Sub-Clause 13.3.1 [Variation by Instruction] shall apply to revised methods, including acceleration measures, instructed by the Engineer to reduce delays resulting from causes listed under Sub-Clause 8.5 [Extension of Time for Completion].

## Potential killer contract clauses – Delays and extension of time

نشریه ۴۳۱۱ □

❖ ماده ۳۰: تغییر مدت پیمان

### ۳۰-الف)

در صورت وقوع هریک از موارد زیر که موجب افزایش مدت اجرای کار شود، پیمانکار می‌تواند درخواست تمدید مدت پیمان را بنماید. پیمانکار درخواست تمدید مدت پیمان را با ارائه محاسبات و دلایل توجیهی، به مهندس مشاور تسلیم می‌کند و مهندس مشاور پس از بررسی و تأیید، مراتب را برای اتخاذ تصمیم به کارفرما گزارش می‌کند و سپس نتیجه تصمیم کارفرما را به پیمانکار ابلاغ می‌نماید.

### ۳۰-الف-۱)

در صورتیکه طبق بندهای "الف" و "ج" ماده ۲۹، مبلغ پیمان تغییر کند.

### ۳۰-الف-۲)

هرگاه به دستور کارفرما یا مهندس مشاور، نقشه‌های اجرایی یا مشخصات فنی تغییر اساسی کند.

در دوره آنالیز تاخیرات مابقی این موارد بررسی شده است!

## Potential killer contract clauses – Delays and extension of time

نشریه ۴۳۱۱ □

❖ ماده ۳۰: تغییر مدت پیمان

**۳۰-ب)**

اگر وقوع برخی از موارد درج شده در بند "الف"، موجب **کاهش** مدت پیمان شود، مهندس مشاور با کسب نظر پیمانکار، **کاهش** مدت پیمان را تعیین می‌کند و مراتب را برای اتخاذ تصمیم به کارفرما گزارش می‌نماید، و سپس نتیجه را به پیمانکار ابلاغ می‌کند.

چه تفاوتی می‌بینید؟

## Potential killer contract clauses – Delays and extension of time

### □ قرارداد همسان EPC صنعتی

❖ ماده ۶۴: تغییرات مدت پیمان: تمدید مدت پیمان

#### ماده ۶۴- تغییرات مدت پیمان

۱-۶۴-

تمدید مدت پیمان

تمام زمان‌ها و مدت‌های پیش‌بینی شده برای شروع و خاتمه و مقاطع اصلی کارها، تنها در صورت وقوع هر یک از شرایط زیر، می‌توانند افزایش یابند.

۱-۱-۶۴-

صدور دستور تغییر کار موضوع بند «۴۹-۴»، که منجر به افزایش مدت پیمان شود.

۲-۱-۶۴-

عدم انجام برخی از تعهدات کارفرما مرتبط با کار موضوع ماده (۴۷)، با رعایت و ملاحظات پیش‌بینی شده در آن، که مانع از انجام به موقع کارهای موضوع پیمان و یا بخش‌هایی از آن شود.

۳-۱-۶۴-

بروز شرایط قهری، موضوع ماده (۷۳).

۴-۱-۶۴-

تغییر قوانین و مقررات، که به‌طور مستقیم باعث تأخیر در انجام بخش‌هایی از کار شود.

۵-۱-۶۴-

بروز شرایط جوی استثنایی مانع انجام کار.

## Potential killer contract clauses – Delays and extension of time

### ❑ قرارداد همسان EPC صنعتی

❖ ماده ۶۴: تغییرات مدت پیمان: تمدید مدت پیمان

۶۴-۱-۶-۱

تصمیم کارفرما مبنی بر به کارگیری پیمانکاران دیگر در محدوده کار پیمانکار، به شرح درج شده در بند «۲-۳۸».

۶۴-۱-۷-۱

تعلیق مدت پیمان، موضوع ماده (۶۵).

۶۴-۱-۸-۱

وقوع سایر عوامل و شرایط غیرقابل پیش‌بینی که ناشی از قصور پیمانکار نبوده و باعث تأخیر در اجرای کار شود.

در اثر هر یک از شرایط یاد شده، پیمانکار درخواست تمدید مدت پیمان را همراه با اسناد و مدارک مثبته به کارفرما تسلیم می‌کند، تا پس از بررسی کارفرما و توافق دو طرف، مدت تمدید مشخص و ملاک عمل قرار گیرد و به تناسب، برنامه‌های زمانی کارهای باقیمانده، به وسیله پیمانکار اصلاح شده و مجموعه مدارک، ضمیمه پیمان گردد.

طی چه مدتی؟

## Potential killer contract clauses – Delays and extension of time

### □ قرارداد همسان EPC صنعتی

❖ ماده ۶۴: تغییرات مدت پیمان: کاهش مدت پیمان

۲-۶۴-

کاهش مدت پیمان

تمام زمان‌ها و مدت‌های پیش‌بینی شده در پیمان، در شرایط زیر می‌توانند کاهش یابند:

۱-۲-۶۴-

صدور دستور تغییر کار، موضوع بند «۴۹-۴» (تغییر در کارها)، که منجر به کاهش مدت پیمان شود.

۲-۲-۶۴-

کارفرما می‌تواند اتمام زودتر از برنامه زمانی پیمان را با در نظر گرفتن امکانات و توانایی‌های پیمانکار، درخواست کند. در این صورت، پیمانکار با بررسی شرایط مورد نظر کارفرما و با استفاده از قیمت‌های پیمان، سایر اسناد و مدارک لازم را تنظیم نموده، پیشنهاد خود را مبنی بر اضافه مبلغ احتمالی و امکانات مورد درخواست به کارفرما تسلیم می‌کند.

در چه بازه ای؟ احتمالاً همان ۱۵ روز و یک هفته که در بخش برنامه اولیه ذکر شده ملاک باشد!

## Potential killer contract clauses – Delays and extension of time

### ❑ قرارداد همسان EPC صنعتی

❖ ماده ۶۴: تغییرات مدت پیمان: کاهش مدت پیمان

۳-۲-۶۴-

پس از توافق کارفرما و پیمانکار دایر بر کاهش مدت پیمان، براساس بندهای «۱-۲-۶۴» و «۲-۲-۶۴»، تاریخ جدید به عنوان تاریخ اتمام پیمان تعیین می‌شود. پیمانکار باید برنامه زمانی اجرای کارهای موضوع پیمان را، به تناسب شرایط و تاریخ جدید اتمام پیمان، مورد تجدیدنظر قرارداده، برای بررسی مشاور کارفرما و تأیید او، تسلیم کند. برنامه زمانی جدید پس از تصویب کارفرما، به پیمانکار ابلاغ می‌شود؛ و از آن پس، سایر مفاد پیمان در مورد اتمام به هنگام کار، بر مبنای تاریخ جدید، نافذ خواهد بود. در صورت عدم تحقق کاهش مدت پیمان، در پایان مدت توافق شده موضوع این بند، اضافه مبلغ توافق شده پیمان به تناسب مدت کاهش نیافته، کاهش می‌یابد و پیمانکار از این بابت مشمول خسارت تأخیر نمی‌شود.

در شرایط بروز تاخیر به سبب **کارفرما**، پیمانکار از دریافت خسارت تاخیر حتی با وجود نافذ شدن تاریخ جدید منع می‌گردد؟  
هزینه های Disruption چطور؟

ابهام بسیار بزرگ!  
در صورت عدم تحقق به واسطه قصور کارفرما یا پیمانکار؟

این موضوع در ۴۳۱۱ چگونه است؟

## Potential killer contract clauses – Delays and extension of time

نشریه ۴۳۱۱ □

### بخش اول قبلا بررسی شده است...اما

(ج-۱۸)

در صورتیکه در حین اجرای کار، پیمانکار تشخیص دهد که تغییراتی در برنامه زمانی تفصیلی ضروری است، موظف است که پیش از رسیدن موعد انجام کارهایی که به نظر او باید در برنامه آن تغییر داده شود، مراتب را با ذکر دلیل، به مهندس مشاور اطلاع دهد. مهندس مشاور، تغییرات مورد تقاضای پیمانکار را در قالب برنامه زمانی کلی رسیدگی می‌کند و آنچه را که مورد قبول است، پس از تصویب کارفرما، به پیمانکار ابلاغ می‌کند. بدیهی است که این تغییرات در حدود مندرجات پیمان، از میزان تعهدات و مسئولیت‌های پیمانکار نمی‌کاهد.

اگر تغییر برنامه زمانی تفصیلی از سوی مهندس مشاور مطرح شود، پیمانکار با توجه به نظر مهندس مشاور، تغییرات برنامه زمانی تفصیلی را تهیه می‌کند و به شرح پیش‌گفته، برای طی مراتب بررسی و تصویب، تسلیم مهندس مشاور می‌نماید.

این تغییر هر آنچه که باشد نه محدودیتی برای آن ذکر شده و نه درباره تاریخ جدید و ممانعت برای تسریع موضوعی مطرح شده است.  
چیزی که از شواهد مشخص است، در این بخش **دست پیمانکار بازتر است.**

## Potential killer contract clauses – Delays and extension of time

❑ The **contractor** is generally **responsible** for providing the owner with **timely notice of delay** to prove

1. Amount of time extension
2. Amount of compensation

**Regardless of whether** a **notice clause** for delay is contained in the **contract or not**,

1. **Constructor** should **immediately notify the Owner**, with
2. **Copies to the Design Professional**,  
of **all delays**.

## Potential killer contract clauses – Delays and extension of time

❑ Owners do **not generally** direct acceleration unless a delay **has occurred**, but often

1. Underlying **cause of delay** and
2. **Responsibility** for the need to **accelerate**

are in dispute.

❖ If the need for acceleration is in dispute,

the contractor should take steps to preserve its rights to a time extension and the associated costs of owner-directed or Constructive Acceleration.

❖ Constructive Acceleration is **acceleration** of the construction works following **failure by the employer** to recognize that the contractor has encountered **employer delay** for which the contractor is **entitled to an extension of time** and which failure required the contractor to accelerate its progress in order to complete the project.

## Potential killer contract clauses – Delays and extension of time

The doctrine of Constructive Acceleration originated in the US in the 1960's and was devised to allow claims to be advanced under the contract as opposed to being presented as breach of contract.<sup>12</sup> At that time the US BCA had no jurisdiction to deal with breaches of contract directly and therefore characterised certain actions of the Employer as a 'constructive request' to the Contractor to accelerate. As such, the doctrine of Constructive Acceleration arose as a legal convenience as opposed to a necessity; such claims could have been advanced on other basic principles of contract law or breach of contract.

'The doctrine of Constructive Acceleration in the US arose as a legal convenience'

## Potential killer contract clauses – Delays and extension of time

- ❑ *What is Constructive about Acceleration? By Nelson, Hill International, Inc. (2013)*
- ❑ There are **three situations** in which **constructive acceleration** occurs:
  1. First, an **Employer/CA claims** the Contractor is **behind schedule** and issues a **written or verbal direction** to complete the work **earlier than would be required** if an appropriate EOT was issued.
  2. Second, the **Contractor** is **entitled to an EOT** but the **Employer/CA threatens** the imposition of liquidate and ascertained damages ('LAD's') or termination because the Employer/CA claims that the Contractor is **behind schedule**.
  3. Third, a **Contractor requests** and is entitled to an **EOT**, **yet** the Employer/CA **denies or fails to grant** the extension in a timely manner.

*It is important that the **Contractor advises** the Employer/CA that any efforts undertaken by the Contractor to accelerate performance are **not voluntary**.*

## Potential killer contract clauses – Delays and extension of time

### ❑ *What is Constructive about Acceleration? By Nelson, Hill International, Inc. (2013)*

In M.S.I. Corp. , the General Services Board of Contract Appeals ('BCA') held that the Contractor was entitled to adjustment of the price because the government directed it to accelerate the work. The opinion set out the five elements required for a constructive acceleration claim in the US. These are:

1. An excusable delay entitling the Contractor to an EOT;
2. A timely request for such an extension;
3. The Employer or CA's refusal of that request;
4. A demand for completion within the original performance period; and
5. The incurrence of extra costs after acceleration.

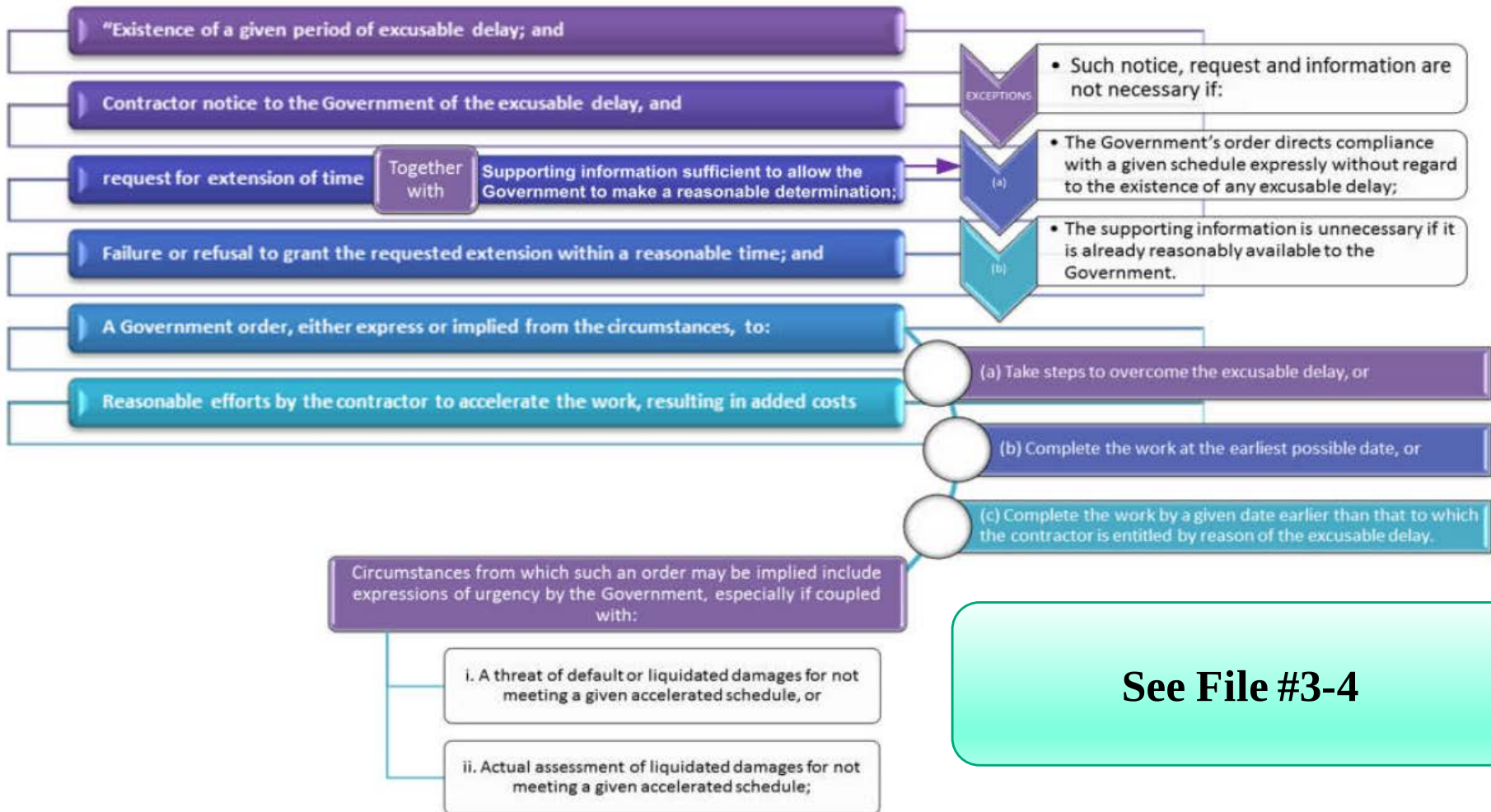


## Potential killer contract clauses – Delays and extension of time

### Entitlement

#### • Test for Constructive Acceleration

The Board of Contract Appeals in *Fermont Div., Dynamics Corp. of America*, ASBCA No. 15806, 75-1 BCA ¶ 11,139, set out the following test for constructive acceleration.



See File #3-4

## Potential killer contract clauses – Delays and extension of time

### ☐ Upon receipt of a request for a **recovery schedule**,

**contractor** should **ask the owner** to clarify in **writing**

1. **Reasons why** the owner believes a recovery schedule is **necessary**,
2. **How much time** the owner desires to be **recovered**,
3. **Which party** the owner expects to **pay**

*for any acceleration effort necessary to achieve the **recovery schedule dates**.*

**What if the contractor disagrees with the owner's evaluation?**

## Potential killer contract clauses – Delays and extension of time

- ❑ Upon receipt of a request for a recovery schedule,

What if the contractor disagrees with the owner's evaluation?

- ❑ If the contractor disagrees with the owner's evaluation,  
it should **respond in writing** stating its position,  
noting that it will develop a recovery schedule to **comply** with the  
owner's request but  
that it is reserving its rights for any **associated**  
**acceleration costs** that may be incurred.

## Potential killer contract clauses – Delays and extension of time

### ☐ Upon receipt of a request for a recovery schedule,

When acceleration is not undertaken voluntarily, a contractor should

1. Request that the **owner's direction** to accelerate be issued in **written detail**;
2. Provide notice to the owner that the **contractor is accelerating**;
3. Reserve its rights if the **contractor** believes it **did not cause** the need to accelerate;
4. Provide the **owner with options** regarding
  1. **How the acceleration** will be accomplished
  2. **How much time** and **cost** each option will recover
5. Maintain accurate records of **additional costs** associated with the acceleration
6. Make a **timely request** for an **equitable adjustment** to the **contract**.

## Potential killer contract clauses – Delays and extension of time

### ☐ Upon receipt of a request for a recovery schedule,

When acceleration is not undertaken voluntarily, a contractor should

### ☐ When **coupled** with

1. **Existence of excusable delay**

2. **Timely and properly submitted request** for **time extension** prior to the acceleration effort

*A contractor may be entitled to recover acceleration damages from an owner, for a time recovered.*

**no compensation** paid in excess of acceleration damages in this case!

Sometimes, it is **beneficial** for the owner to **recover the schedule** rather than letting the project to be **delayed!**

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Exceptional events (18.1)

Under the 2017 edition of the FIDIC Rainbow Suite, **clause 19** which was headed “force majeure” has been **replaced** by **clause 18**, “exceptional events”.

**This is an interesting change;** the term **“force majeure”** is typically provided for within most **civil codes**,

*whereas it is not a term of art under the common law.*

## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

#### ❖ Exceptional events

(18.1)

**(i) to (iv) should all be satisfied to have “Exceptional Event”**

“Exceptional Event” means an event or circumstance which:

- (i) is beyond a Party's control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party.

An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) above are satisfied:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (c) riot, commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; or
- (f) natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.



## Potential killer contract clauses – Delays and extension of time

### ❑ FIDIC-2017

- ❖ Consequences of an exceptional event (18.4)

چه فرقی با حوادث قهری در ۴۳۱۱ دارد؟

If the Contractor is the affected Party and suffers delay and/or incurs Cost by reason of the Exceptional Event of which he/she gave a Notice under Sub-Clause 18.2 [Notice of an Exceptional Event], the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to:

- (a) EOT; and/or
- (b) if the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country, payment of such Cost.

Contractor may be entitled to an extension of time and/or recovery of costs incurred as a result. If the exceptional event is prolonged, the option of termination may **arise**.



## Potential killer contract clauses – Delay damages clauses

- ❑ The **Owner** can insert a **no-damage-for-delay clause** in the Contract, thus attempting to shift the burden of risk for delays to the Contractor.
  - ❖ **However**, the use of this type of **Exculpatory Language** **may increase** the **amount bid** by a Contractor and is still **no guarantee** that a **dispute over delays** will be **prevented**.
  - ❖ The **Owner** should **research** the use of a **no-damage-for-delay clause** with **qualified counsel** before including it in the Contract.
  - ❖ An **alternative approach** is to specify **limits** to what **types of damages** are **allowable** in the event of a delay.
    - ✓ **Some government agencies** use this approach.

We saw many of them in delay analysis course!



## Potential killer contract clauses – Delay damages clauses

- ❑ One of the biggest risks **contractors and subcontractors** face on construction projects is **liability for consequential damages**, although many of them may not even know about that risk, much less understand it.
- ❑ If the project is **not completed on time**, the owner will **lose the benefit** of that **revenue** and the contractor and responsible subcontractors can **face liability** for that **loss of revenue**, i.e., Consequential Damages.

From this case came a **shift** in the 1997 revisions to the AIA contract documents, in particular, the A201 General Conditions.

**Beginning in 1997**, A201 included a mutual **waiver of consequential damages** provisions which today (**2017 version**) reads as NEXT SLIDE:



## Potential killer contract clauses – Delay damages clauses

### ☐ AIA A201-2017: General conditions for construction

What do you think about this clause?

This may even require TIA...

May result in misinterpretation

#### § 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given before proceeding to execute the portion of the Work that is the subject of the Claim. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

#### § 15.1.7 Waiver of Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.

What is the difference between owner and GC?

## Potential killer contract clauses – Delay damages clauses

But what about liquidated damages?

- ❑ Liquidated damages (LDs) generally represent an **attempt** made at the contracting stage to estimate and then agree (liquidate) to the amount of damages the owner will suffer in the event the project is not completed on time or certain milestones are not timely met.
- ❑ LDs typically end at substantial completion but
  - ❑ risk of consequential damages may exist post-completion due to warranty issues,  
i.e., the manufacturing plant has to *shut down post-completion* due to a problem with the HVAC system which was covered by the contractor's warranty. The result is consequential damages in the form of **lost revenue**.

Not only the contractor is responsible for the cost of repairing, but also he/she should pay the consequential damages.

## Potential killer contract clauses – Delay damages clauses

But what about liquidated damages?

- ❑ To protect against this sort of post-completion consequential damages risk, and other risks,

be sure to include **waiver of consequential damages language**  
*even if the contract has an LD provision.*

## Potential killer contract clauses – Delay damages clauses

- ❑ There are **several nuanced modifications** that can be made to this language  
*such as agreeing to liability for such damages “only to the extent covered by insurance.”*
- ❑ Often times it is difficult to negotiate away entirely the risk of consequential damages (or liquidated damages), but in contract negotiations owners, contractors and subcontractors **must consider** the level of risk one party assumes when it bears 100% of the risk of consequential damages.

As a compromise, parties will often agree to **cap consequential damages** either at a specific dollar amount or a specific percentage based upon the **contract value**.

**Let's see another contract clause that limits Consequential Damages!**

## Potential killer contract clauses – Delay damages clauses

### ❑ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### ❖ Limited mutual waiver of consequential damages

#### 5.4 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

5.4.1 Except for any (a) liquidated, consequential, or other damages that the Owner is entitled to recover against the Constructor under the prime agreement, and (b) losses covered by insurance required by the Subcontract Documents, the Constructor and the Subcontractor mutually waive all claims against each other for consequential damages, including damages for loss of business, loss of financing related to the Project, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency. Similarly, the Subcontractor shall obtain in another agreement from its Subsubcontractors mutual waivers of consequential damages that correspond to the Subcontractor's waiver of consequential damages herein. The provisions of this subsection shall also apply to and survive termination of this Agreement.

The **Survival** clause specifies which contract provisions **will remain in effect after the termination or expiration** of the agreement.

## Potential killer contract clauses – Delay damages clauses

### ❑ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### ❖ Liquidated damages

**Could you take more LDs from SCs  
compared to what incurred to you as a GC?**

5.5.1 If the Subcontract Documents provide for liquidated damages or other damages for delay beyond the completion date set forth in the Subcontract Documents that are not specifically addressed as a liquidated damage item in this Agreement, and such damages are assessed, the Constructor may assess a share of the damages against the Subcontractor in proportion to the Subcontractor's share of the responsibility for the damages. However, the amount of such assessment shall not exceed the amount assessed against the Constructor. This section shall not limit the Subcontractor's liability to the Constructor for the Constructor's actual damages caused by the Subcontractor.

**This is a great clause!**

***However, the last part may cause a dispute!***

## Potential killer contract clauses – Delay damages clauses

### ☐ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### ❖ Liquidated damages

5.5.2 To the extent the prime agreement provides for a mutual waiver of consequential damages by the Owner and the Constructor, damages for which the Constructor is liable to the Owner, including those related to section 9.1, are not consequential damages for the purpose of this waiver. Similarly, to the extent the agreement between the Subcontractor and Subsubcontractor provides for a mutual waiver of consequential damages by the Owner and the Constructor, damages for which the Subcontractor is liable to lower-tiered parties due to the fault of the Owner or Constructor are not consequential damages for the purpose of this waiver.

**Read it yourself!**



## Potential killer contract clauses – Delay damages clauses

### ❑ AIA A401-2017: General contractor and subcontractor

#### ❖ Contractor's claim related to SC's claim

§ 5.3 The Subcontractor shall make all Claims promptly to the Contractor for additional cost, extensions of time and damages for delays, or other causes in accordance with the Subcontract Documents. A Claim which will affect or become part of a Claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such Claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's Claim must be made. Failure of the Subcontractor to make such a timely Claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

**If SCs could not make it, he/she bears the same consequences as GC!**

**CANNOT EMPHASIZE MORE ON NOTICES! TAKE IT SERIOUS!**



## Potential killer contract clauses – Delay damages clauses

### ☐ AIA A401-2017: General contractor and subcontractor

§ 9.2.4 If the Subcontractor fails to achieve substantial completion as provided in this Section 9.2, liquidated damages, if any, shall be assessed as set forth in Section 3.4.

#### § 3.4 Claims by the Contractor

§ 3.4.1 Liquidated damages, if provided for in the Prime Contract, shall be assessed against the Subcontractor only to the extent caused by the Subcontractor or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract.

§ 3.4.2 The Contractor's Claims for the costs of services or materials provided due to the Subcontractor's failure to execute the Work shall require

- .1 seven days' notice prior to the Contractor's providing services or materials, except in an emergency; and
- .2 written compilations to the Subcontractor of services and materials provided by the Contractor and charges for such services and materials no later than the fifteenth day of the month following the Contractor's providing such services or materials.

**Read it yourself!**



## Potential killer contract clauses – Delay damages clauses

### ❑ FIDIC-2017

#### ❖ Delay damages (8.8)

There is no such phrase of  
“Liquidated Damages” in  
FIDIC

Don't forget to include a  
maximum!

If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment of Delay Damages by the Contractor for this default. Delay Damages shall be the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the relevant Date of Completion of the Works or Section. The total amount due under this Sub-Clause shall not exceed the maximum amount of Delay Damages (if any) stated in the Contract Data.

These Delay Damages shall be the only damages due from the Contractor for the Contractor's failure to comply with Sub-Clause 8.2 [Time for Completion], other than in the event of termination under Sub-Clause 15.2 [Termination for Contractor's Default] before completion of the Works. These Delay Damages shall not relieve the Contractor from the obligation to complete the Works, or from any other duties, obligations or responsibilities which the Contractor may have under or in connection with the Contract.

This Sub-Clause shall not limit the Contractor's liability for Delay Damages in any case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor.

## Potential killer contract clauses – Delay damages clauses

### 2. CONTRACTOR'S CLAIMS

#### ❑ FIDIC-1999

❖ <https://www.linkedin.com/pulse/guide-claims-fidic-red-book-1999-farrukh-riasat-b-eng-pmp-/>

| Clause | Title                                                         | Entitlement     |
|--------|---------------------------------------------------------------|-----------------|
| 1.9    | Delayed drawings or instructions                              | Money and time  |
| 2.1    | Right of access to the site                                   | Money and time  |
| 4.7    | Setting out (errors)                                          | Money and time  |
| 4.12   | Unforeseen physical conditions                                | Money* and time |
| 4.24   | Fossils                                                       | Money* and time |
| 7.4    | Testing                                                       | Money and time  |
| 8.4    | Extension of time for completion                              | time            |
| 8.5    | Delay caused by authorities                                   | time            |
| 8.9    | Consequences of suspension                                    | Money* and time |
| 10.2   | Taking over of part of works                                  | Money           |
| 10.3   | Interference with tests on completion                         | Money and time  |
| 11.8   | Contractor to search                                          | Money and time  |
| 12.4   | Omissions (by variation)                                      | Money*          |
| 13.2   | Value engineering                                             | Money           |
| 13.7   | Changes in legislation                                        | Money* and time |
| 14.8   | Delayed payment                                               | Money           |
| 16.1   | Contractor's entitlement to suspend                           | Money and time  |
| 16.4   | Payment on termination                                        | Money           |
| 17.1   | Indemnities (by employer)                                     | Money*          |
| 17.4   | Consequences of employer's risks                              | Money and time  |
| 18.1   | General requirements for insurances (if supplied by employer) | Money*          |
| 19.4   | Consequences of force majeure                                 | Money and time  |
| 19.6   | Optional payment termination                                  | Money           |
| 20.1   | Procedure for contractor's claims                             | Money and time  |

**Note:** In most cases, the contractor can claim cost and a reasonable profit. However, for some items he can only claim cost. These items are marked with (\*) in the entitlement column.

## Potential killer contract clauses – Delay damages clauses

درباره خسارت تاخیر در قراردادهای داخلی در دوره آنالیز تاخیرات به شکلی مفصل صحبت شده است!

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

1. Type 1 DSC: Erroneous indications in the contract documents
2. Type 2 DSC: Unknown site conditions of an unusual

- ❖ Federal Acquisition Regulation (FAR)
- ❖ AIA Contract Provisions
- ❖ ConsensusDocs Contract Provisions
- ❖ FIDIC
- ❖ Other

## Potential killer contract clauses – Site conditions

### ❑ “Differing site conditions” clause of the Federal Acquisition Regulation (FAR):

Look at the word “Promptly”

- (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

## Potential killer contract clauses – Site conditions

### ❑ “Differing site conditions” clause of the Federal Acquisition Regulation (FAR):

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor’s cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

**Look! Increase or decrease...**

## Potential killer contract clauses – Site conditions

### ❑ “Differing site conditions” clause of the Federal Acquisition Regulation (FAR):

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

**If you do not notice, you may lose your right!**

## Potential killer contract clauses – Site conditions

### ❑ “Differing site conditions” clause of the Federal Acquisition Regulation (FAR):

- (d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

**If request made after final payment, you will lose your right!**



## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ AIA A201-2017: General conditions for construction

##### § 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.

**In no event later than 14 days after first observance!**

**In AIA, owner and AE should be notified!**

**Objection to determination? Submit a claim on time!**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ AIA A201-2017: General conditions for construction

#### ❑ One **key difference** is that

1. FAR requires “**prompt**” notice,
2. AIA provision gives the contractor a **14-day window**.

*A contractor must use its best judgment as to whether it really should wait 14 days to advise the owner that the contractor has encountered an unexpected, potentially problematic condition.*

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

❖ The ConsensusDocs, “Worksite Conditions” is similar in meaning but not language:

❖ Worksite visitation

3.4 WORKSITE VISITATION Before commencing the Subcontract Work, the Subcontractor shall conduct a visual inspection of the Worksite to become generally familiar with local conditions and to correlate Worksite observations with the Subcontract Documents. If the Subcontractor discovers any discrepancies between its Worksite observations and the Subcontract Documents, such discrepancies shall be promptly reported to the Constructor.

**Read it yourself**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

### ❑ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### ❖ Worksite visitation

7.3 CONCEALED OR UNKNOWN SITE CONDITIONS Verification of site conditions including sub-surface is the responsibility of the Subcontractor. The Subcontractor shall take all site conditions into consideration and shall include any and all costs associated with such conditions in the Subcontract Amount. If the conditions encountered at the Worksite are (a) subsurface or other physical conditions materially different from those indicated in the Contract Documents, or (b) unusual and unknown physical conditions materially different from conditions ordinarily encountered and generally recognized as inherent in Work provided for in the Contract Documents and could not have been known prior to the execution of the Subcontract, the Subcontractor shall stop affected Work after the condition is first observed and give prompt written notice of the condition to the Constructor. The Subcontractor shall not be required to perform any Work relating to the unknown condition without the written mutual agreement of the Parties. Any change in the Contract Price or the Contract Time as a result of the unknown condition shall be determined as provided in ARTICLE 5.

**Read it yourself**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ FIDIC-2017

##### ❖ Setting out (4.7)

#### 4.7.2 Errors

If the Contractor finds an error in any items of reference, the Contractor shall give a Notice to the Engineer describing it:

- (a) within the period stated in the Contract Data (if not stated, 28 days) calculated from the Commencement Date, if the items of reference are specified on the Drawings and/or in the Specification; or
- (b) as soon as practicable after receiving the items of reference, if they are issued by the Engineer under Sub-Clause 2.5 [*Site Data and Items of Reference*].

**Is it differing site condition or errors in documents regardless of site conditions?**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ FIDIC-2017

##### ❖ Setting out (4.7)

If, under sub-paragraph (b) above, an experienced contractor would not have discovered the error:

- (i) Sub-Clause 13.3.1 [*Variation by Instruction*] shall apply to the measures that the Contractor is required to take (if any); and
- (ii) if the Contractor suffers delay and/or incurs Cost as a result of the error, the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to EOT and/or payment of such Cost Plus Profit.

**EOT + COST + PROFIT**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ FIDIC-2017

- ❖ Unforeseeable physical conditions (4.12)

In this Sub-Clause, “physical conditions” means natural physical conditions and physical obstructions (natural or man-made) and pollutants, which the Contractor encounters at the Site during execution of the Works, including sub-surface and hydrological conditions but excluding climatic conditions at the Site and the effects of those climatic conditions.

**What is a difference between FIDIC and AIA?**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ FIDIC-2017

##### ❖ Unforeseeable

physical

conditions (4.12

If the Contractor encounters physical conditions which the Contractor considers to have been Unforeseeable and that will have an adverse effect on the progress and/or increase the Cost of the execution of the Works, the following procedure shall apply:

#### 4.12.1 Contractor's Notice

After discovery of such physical conditions, the Contractor shall give a Notice to the Engineer, which shall:

- (a) be given as soon as practicable and in good time to give the Engineer opportunity to inspect and investigate the physical conditions promptly and before they are disturbed;
- (b) describe the physical conditions, so that they can be inspected and/or investigated promptly by the Engineer;
- (c) set out the reasons why the Contractor considers the physical conditions to be Unforeseeable; and
- (d) describe the manner in which the physical conditions will have an adverse effect on the progress and/or increase the Cost of the execution of the Works.



## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❑ FIDIC-2017

##### ❖ Unforeseeable

physical

conditions (4.12)

**EOT + COST**

**NO PROFIT!**

***Similar to Error?***

#### 4.12.2 Engineer's inspection and investigation

The Engineer shall inspect and investigate the physical conditions within 7 days, or a longer period agreed with the Contractor, after receiving the Contractor's Notice.

The Contractor shall continue execution of the Works, using such proper and reasonable measures as are appropriate for the physical conditions and to enable the Engineer to inspect and investigate them.

#### 4.12.3 Engineer's instructions

The Contractor shall comply with any instructions which the Engineer may give for dealing with the physical conditions and, if such an instruction constitutes a Variation, Sub-Clause 13.3.1 [Variation by Instruction] shall apply.

#### 4.12.4 Delay and/or Cost

If and to the extent that the Contractor suffers delay and/or incurs Cost due to these physical conditions, having complied with Sub-Clauses 4.12.1 to 4.12.3 above, the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to EOT and/or payment of such Cost.

## Potential killer contract clauses – Site conditions

□ نشریه ۴۳۱۱

### ۱۶-ج)

محل اجرای کار را دیده و بررسی کرده است و از وضعیت آب و هوا، بارندگی و امکان اجرای کار در فصل‌های مختلف سال، با توجه به آمار ۲۰ سال پیش از تاریخ ارائه پیشنهاد قیمت و در نظر گرفتن مدت اجرای کار، اطلاع یافته است.

### ۱۶-ه)

در تهیه پیشنهاد قیمت، سود مورد نظر خود و تمام هزینه‌های ناشی از مفاد بندهای بالا را در نظر گرفته و بعداً از هیچ بابت، حق درخواست اضافه پرداختی ندارد.

به هر حال، پیمانکار تأیید می‌نماید که هنگام تسلیم پیشنهاد، مطالعات کافی انجام داده و هیچ موردی باقی نمانده است که بعداً در مورد آن استناد به جهل خود نماید.

## Potential killer contract clauses – Site conditions

### □ قرارداد همسان EPC صنعتی

#### ماده ۳۷- تأییدات پیمانکار

پیمانکار تأیید می‌کند:

##### ۱-۳۷

تمام اسناد و مدارک پیمان را به شرح ماده (۲) موافقت‌نامه (به استثنای اسناد و مدارکی که پس از امضای پیمان تهیه و ضمیمه پیمان می‌شوند)، به دقت مطالعه کرده، از مفاد آنها کاملاً آگاه است.

##### ۲-۳۷

از محل کار بازدید به عمل آورده، از شرایط جغرافیایی و عمومی منطقه، از جمله وضعیت آب و هوا، راه‌های دسترسی، نیروی انسانی، مصالح، و ماشین‌آلات ساختمانی قابل تأمین از محل، و سایر شرایطی که به نحوی در قیمت، سرعت پیشرفت کار و کیفیت آن مؤثراند، آگاهی کافی حاصل نموده است.

##### ۵-۳۷

تمام نقشه‌ها و گزارش‌های گمانه‌زنی و یا اکتشافی و سایر آزمایش‌های مربوط به شناخت شرایط زیرزمینی محل اجرای کار و یا محوطه‌های مجاور آن را که از سوی کارفرما دریافت کرده است، به دقت مطالعه کرده، و از شرایط **فیزیکی** محل اجرای کار، کاملاً آگاه شده است.

##### ۶-۳۷

تمام اسناد، مدارک، نقشه‌ها، گزارش‌ها و اطلاعات درج شده در اسناد پیمان را، بامشاهدات محلی، اطلاعات جمع‌آوری شده، و سایر بررسی‌ها و نتایج حاصل از آزمایش‌ها، اکتشاف‌ها و مطالعات، تطبیق داده و موارد مغایرت، اشتباه و ناهمگونی اطلاعات را به اطلاع کارفرما می‌رساند و پاسخ کارفرما برای وی قابل قبول است و تأیید می‌کند که اسناد و مدارک پیمان، به‌طور کلی برای درک تمام جنبه‌های پیمان در جهت اجرای کارهای موضوع پیمان، کافی است.

## Potential killer contract clauses – Site conditions

### ❑ قرارداد همسان طرح و ساخت غیر صنعتی

❖ مشابه فیدیک

#### ۷-۴- پیاده کردن کارها

پیمانکار، باید کارها را نسبت به نقاط، خطوط، و ترازهای مبنایی که در پیمان تعیین شده یا از سوی مهندس مشاور اعلام می‌شود، پیاده کند. پیمانکار، مسؤول پیاده کردن درست همه اجزای کارهاست و باید هر اشتباه در موقعیت، تراز، اندازه و راستای کارها را اصلاح کند.

کارفرما، مسؤول هر اشتباهی در مبناهای مشخص شده در بالاست. اما، پیمانکار موظف به تلاش و انجام اقدامهای معقول، برای کسب اطمینان از دقت و صحت این مبناها، پیش از به کار بردن آنهاست

اگر پیمانکار دچار تأخیر یا متحمل هزینه‌هایی بشود که الزاماً ناشی از اشتباه در اقلام مبنای یاد شده باشد و پیمانکار با تجربه‌ای به گونه‌ای معقول نمی‌توانست چنین اشتباهی را کشف کند و از چنین تأخیر و یا هزینه‌ای جلوگیری نماید، پیمانکار باید موضوع را به مهندس مشاور اعلام کند و طبق ماده ۱-۲۰ [دعاوی پیمانکار]، محق خواهد بود به:

## Potential killer contract clauses – Site conditions

### ❑ قرارداد همسان طرح و ساخت غیر صنعتی

❖ مشابه فیدیک

اگر پیمانکار دچار **تأخیر** یا متحمل هزینه‌هایی بشود که الزاماً ناشی از اشتباه در ارقام مبنای یاد شده باشد و پیمانکار با تجربه‌ای به گونه‌ای معقول نمی‌توانست چنین اشتباهی را کشف کند و از چنین **تأخیر** و یا هزینه‌ای جلوگیری نماید، پیمانکار باید موضوع را به مهندس مشاور اعلام کند و طبق ماده ۱-۲۰ [دعاوی پیمانکار]، محق خواهد بود به:

(۴-۷-الف)

تمدید مدت برای چنین تأخیری، در صورتی که تکمیل کارها به **تأخیر** افتاده یا خواهد افتاد، طبق ماده ۸-۴ [تمدید مدت تکمیل]،

(۴-۷-ب)

دریافت چنین هزینه‌هایی به علاوه سودی معقول، که جمع این مبالغ باید در مبلغ پیمان گنجانده شود.

پس از دریافت این اعلام، مهندس مشاور طبق ماده ۳-۵ [تصمیم‌ها]، در مورد این که آیا اشتباه وجود داشته و میزانی از اشتباه که به گونه‌ای معقول قابل کشف نبوده، با **تأخیر** قابل جلوگیری نبوده، و ۲) درباره موارد الف و ب پیش گفته، اقدام می‌کند.

## Potential killer contract clauses – Site conditions

### ❑ قرارداد همسان طرح و ساخت غیر صنعتی

❖ مشابه فیدیک

#### ۴-۱۲-شرایط فیزیکی غیر قابل پیش بینی

در این ماده، «شرایط فیزیکی» یعنی شرایط فیزیکی طبیعی یا بشر ساخته، و هر مانع و آلوده کننده فیزیکی که پیمانکار حین انجام کارها در کارگاه، با آن‌ها برخورد می‌کند. شرایط فیزیکی، شامل شرایط زیر سطحی یا هیدرولوژی می‌شود، اما شرایط آب و هوایی را شامل نمی‌گردد.

اگر پیمانکار، به شرایط فیزیکی نامساعدی برخورد کند که به نظر او غیر قابل پیش بینی است، باید مراتب را در زودترین زمان عملی، به مهندس مشاور اعلام کند.

این اعلام، باید به گونه‌ای شرایط فیزیکی را تشریح کند، که آن شرایط برای مهندس مشاور قابل بازرسی باشد. علاوه بر این باید حاوی دلایلی باشد که توضیح دهد چرا پیمانکار آن‌ها را غیر قابل پیش بینی می‌داند. پیمانکار، باید اجرای کارها را با به کارگیری اقدام‌های شایسته و منطقی، برای آن شرایط فیزیکی ادامه داده و طبق هر دستوری که مهندس مشاور بدهد، عمل کند هرگاه دستوری مصداق تغییر باشد، فصل ۱۳ [تغییرها و اصلاح‌ها] کاربرد خواهد داشت.

در صورت برخورد با شرایط فیزیکی غیر قابل پیش بینی و در حدی که پیمانکار چنین وضعی را اعلام می‌کند، و به میزانی که دچار تأخیر و یا متحمل هزینه اضافی شده است، پیمانکار طبق ماده ۲۰-۱ [دعاوی پیمانکار] محق به:

مشابه فیدیک... خودتان مطالعه بفرمایید!

## Potential killer contract clauses – Site conditions

### ❑ قرارداد همسان طرح و ساخت غیر صنعتی

❖ مشابه فیدیک

در صورت بر خورد با شرایط فیزیکی غیرقابل پیش‌بینی و در حدی که پیمانکار چنین وضعی را اعلام می‌کند، و به میزانی که دچار **تأخیر** و یا متحمل هزینه اضافی شده است، پیمانکار طبق ماده ۱۲۰-۱ [دعاوی پیمانکار] محق به:

(۱۲-۴ الف)

تمدید مدتی برای چنین تأخیری، طبق ماده ۴-۸ [تمدید مدت تکمیل]، هر گاه تکمیل به **تأخیر** افتاده یا خواهد افتاد

(۱۲-۴ ب)

دریافت هزینه مربوط، که باید در مبلغ پیمان گنجانده شود، است.

بعد از دریافت اعلام یاد شده و بازرسی و یا تحقیق در مورد این شرایط فیزیکی، مهندس مشاور باید طبق ماده ۳-۵ [تصمیم‌ها]، برای تأیید یا عدم تأیید غیرقابل پیش‌بینی بودن شرایط فیزیکی و میزان آن، در صورت تأیید، در مورد بندهای الف و ب پیش گفته، اقدام کند.

خودتان مطالعه بفرمایید!



## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ Other

#### ✓ Use Geotechnical Baseline Report

The primary objectives of the GBR are to:

1. Provide a summary of the ground conditions, ground behavior, groundwater, and in-ground obstructions, contamination, and gas conditions in order to facilitate the Design–Builder’s and owner’s project management team’s understanding of the geotechnical features and ground behavior to be addressed during proposal preparation and during design and construction of the underground facilities.
2. Establish baselines for the anticipated geotechnical conditions, to be relied upon in the preparation of proposals, in bid submittals, and in the design and the construction of the underground facilities.
3. Assist in administering the differing site conditions clause contained in the Contract Documents by providing a basis for their evaluation.

**This is also great!**

**This is like schedule baseline**

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ Other

##### ✓ Use Geotechnical Baseline Report

- **Used** on projects with a **significant risk of DSC**
- **Establishes baseline** of geotechnical conditions
- **Reduces** uncertainty, allocates risk properly to each party, influences bid prices/change orders/time
- **Affects** owner, designer, and contractor **behavior**
- **Reduces** uncertainty

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ Other

##### ✓ Use Geotechnical Baseline Report

- **Defines** the geotechnical conditions used for the **basis of the design**
- **Used** for the **basis of the bids**
- **Used** to identify **potential DSC's** during **construction**
- **Contractual baseline**, not necessarily geotechnical fact

## Potential killer contract clauses – Site conditions

### ❑ Types of differing site conditions

#### ❖ Other

#### ✓ Use Geotechnical Baseline Report

##### ➤ Defining the baseline *allocates the risk properly*:

- **Risk for Contractor:** Contractor accepts risk for conditions **consistent** with or **more favorable** than **GBR**
- **Risk for Owner:** Owner accepts risk for conditions **less favorable** than the **GBR**
- Owner receives **more competitive bids**

See File #3-5



## Potential killer contract clauses – Payment

### ❑ AIA A201-2017: General conditions for construction

#### ❖ Failure of payment

#### § 9.7 Failure of Payment

If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents, the amount certified by the Architect or awarded by binding dispute resolution, then the Contractor may, upon seven additional days' notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided for in the Contract Documents.

1. AE: No certificate for payment from AE
2. Owner: No payment of the amount certified
3. Owner: No payment amount awarded by binding dispute resolution

#### Consequences of Failure of Payment due to stop the work:

1. EOT
2. Compensation



## Potential killer contract clauses – Payment

### ☐ AIA A201-2017: General conditions for construction

#### ❖ Failure of payment

#### § 13.6 INTEREST

Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

**Is contractor able to also terminate the contract due to delayed payment?**

**Yes, you will see later!**

1. **Financing charges**
2. **EOT and Compensation due to stop the work**
3. **Termination of the contract**



## Potential killer contract clauses – Payment

### ❑ ConsensusDocs-750-2011-Revised 2014: Contractor and subcontractor

#### ❖ Payment delay

8.2.6 PAYMENT DELAY If the Constructor has received payment from the Owner and if for any reason not the fault of the Subcontractor, the Subcontractor does not receive a progress payment from the Constructor within ten (10) Days after the date such payment is due, as defined in the subsection immediately above, or, if the Constructor has failed to pay the Subcontractor within a reasonable time for the Subcontract Work satisfactorily performed, the Subcontractor, upon giving ten (10) Days' written notice to the Constructor, and without prejudice to and in addition to any other legal remedies, may stop work until payment of the full amount owing to the Subcontractor has been received. The Subcontract Amount and Time shall be adjusted by the amount of the Subcontractor's reasonable and verified cost of shutdown, delay, and startup, which shall be effected by an appropriate Subcontractor Change Order.

**Similar to AIA-A201...Read it yourself!**



## Potential killer contract clauses – Payment

### ☐ AIA A401-2017: General contractor and subcontractor

#### § 4.8 Remedies for Nonpayment

If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to any other available remedies, upon seven additional days' notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate Modification, be increased by the amount of the Subcontractor's reasonable costs of demobilization, delay, and remobilization.

**Similar to AIA-A201...However, no mention of time expressly?!**

## Potential killer contract clauses – Payment

### ☐ AIA A401-2017: General contractor and subcontractor

#### § 11.4 Interest

Payments due and unpaid under this Subcontract shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

*(Insert rate of interest agreed upon, if any.)*

\_\_\_\_\_ % \_\_\_\_\_

Similar to AIA-A201...



## Potential killer contract clauses – Payment

### ❑ FIDIC-2017

❖ Delayed payment (14.8)

❖ Interim payment certificate (IPC)

**Look at this word...This is not  
used in our contract!**

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the expiry of the time for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of sub-paragraph (b) of Sub-Clause 14.7) of the date on which any IPC is issued.

**Do you see the difference between  
AIA and FIDIC?**

**Is there an adjustment for time? Will see later!**

**Does GC have the right to stop the work? Will see later!**

***Both issuance of “Payment Certificate” and “Time of Payment” are considered in AIA,  
however **IPC is not a case in FIDIC!*****



## Potential killer contract clauses – Payment

### ❑ FIDIC-2017

#### ❖ Delayed payment

(14.8)

A **prime borrower** is someone who is considered a below-**average** credit risk.

*This type of **borrower** is considered likely to make loan payments **on time and likely** to repay the loan in full.*

**Don't forget to compound it monthly if remains unpaid!**

Unless otherwise stated in the Contract Data, these financing charges shall be calculated at the annual rate of three percent (3%) above:

- (a) the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment, or
- (b) where no such rate exists at that place, the same rate in the country of the currency of payment, or
- (c) in the absence of such a rate at either place, the appropriate rate fixed by the law of the country of the currency of payment.

The Contractor shall by request be entitled to payment of these financing charges by the Employer, without:

- (i) the need for the Contractor to submit a Statement or any formal Notice (including any requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT]) or certification; and
- (ii) prejudice to any other right or remedy.

## Potential killer contract clauses – Payment

### ❑ FIDIC-2017

❖ Suspension by the contractor (16.1)

If:

- (a) the Engineer fails to certify in accordance with Sub-Clause 14.6 [Issue of IPC];
- (b) the Employer fails to provide reasonable evidence in accordance with Sub-Clause 2.4 [Employer's Financial Arrangements];
- (c) the Employer fails to comply with Sub-Clause 14.7 [Payment]; or
- (d) the Employer fails to comply with:
  - (i) a binding agreement, or final and binding determination under Sub-Clause 3.7 [Agreement or Determination]; or
  - (ii) a decision of the DAAB under 21.4 [Obtaining DAAB's Decision] (whether binding or final and binding)

and such failure constitutes a material breach of the Employer's obligations under the Contract,

the Contractor may, not less than 21 days after giving a Notice to the Employer (which Notice shall state that it is given under this Sub-Clause 16.1), suspend work (or reduce the rate of work) unless and until the Employer has remedied such a default.

**We will see this later, however look at the suspension due to detailed payment!**

**EOT? Cost? Profit?**

## Potential killer contract clauses – Payment

### ❑ FIDIC-2017

- ❖ Suspension by the contractor (16.1)

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to EOT and/or payment of such Cost Plus Profit.

**Is contractor able to also terminate the contract due to delayed payment?**

**Yes, you will see later!**

1. **Financing charges**
2. **EOT and Compensation due to suspension**
3. **Termination of the contract**



## Potential killer contract clauses – Payment

□ نشریه ۴۳۱۱ و قراردادهای همسان EPC صنعتی و طرح و ساخت غیرصنعتی

درباره تاخیرات در پرداخت صورت وضعیت در دوره تاخیرات به صورت مفصل صحبت کردیم.

۱. در ۴۳۱۱ شرایط **تمدید زمانی** وجود داشته و البته این شرایط دلیلی بر **عدم امکان اخذ خسارت تاخیر نیست!**

۲. در EPC صنعتی شرایط **جبران هزینه (شرایط خصوصی)** و **خاتمه** پیمان بعد از سه ماه قرار گرفته، اما شرایط

**تعلیق از سمت پیمانکار دیده نشده است!**

۳. در طرح و ساخت غیرصنعتی که مشابه فیدیک است، علاوه بر **شرایط جبران هزینه (شرایط خصوصی یا نرخ**

**سود سپرده گذاری بلند مدت پنج ساله مورد عمل بانک ملی ایران)**، **شرایط تعلیق و تمدید زمانی و خسارت**

**تاخیر و سود به واسطه تعلیق** دیده شده است. شرایط **خاتمه** نیز در این قراردادها به واسطه تاخیر در پرداخت نیز

**دیده شده است!**

## Potential killer contract clauses – Termination or suspension (GC and owner)

### ❑ AIA A201-2017: General conditions for construction

#### 1. Termination

- i. Termination by the contractor
- ii. Termination by the owner for cause
- iii. Termination by the owner for convenience

#### 2. Suspension

- i. Suspension by the owner for convenience

There is no “suspension by the contractor” in AIA, however the term  
“stop the work” is used instead!

*AIA-A201 (Financing arrangement (2.2.2) and Failure of payment (9.7))*

## Potential killer contract clauses – Termination by the contractor

### ❑ AIA A201-2017: General conditions for construction

*If things are consecutive, they happen one after the other with no break.*

#### ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

##### § 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

**Evidence of the Owner's Financial Arrangements**



## Potential killer contract clauses – Termination by the contractor

Suspension by the owner  
for convenience

### ❑ AIA A201-2017: General conditions for construction

§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days' notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.

§ 14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, or their agents or employees or any other persons or entities performing portions of the Work because the Owner has repeatedly failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Section 14.1.3.

Remember HOOH COST?

EICHLEAY FORMULA

Let's see 4311

## Potential killer contract clauses – Termination by the contractor

□ نشریه ۴۳۱۱

### موارد خاتمه پیمان در شرایط عمومی پیمان

| ردیف | شماره ماده | موضوع ماده                                      | شرایط خاتمه پیمان                                                                                                                                                                                                                                                        |
|------|------------|-------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ۱    | ماده ۲۸    | تحويل کارگاه                                    | اگر مدت تاخیر از ۳۰ درصد مدت پیمان یا ۶ ماه، هر کدام که کمتر است بیشتر شود و مبلغ کارهای پیش بینی شده در محلهای تحويل نشده بیشتر از ۲۵ درصد مبلغ اولیه پیمان باشد، در صورت اعلام خاتمه پیمان از سوی پیمانکار، پیمان خاتمه یافته و طبق ماده ۴۸ عمل می شود.                |
| ۲    | ماده ۲۸    | تحويل کارگاه                                    | اگر کارفرما نتواند هیچ قسمت از کارگاه را به پیمانکار تحويل دهد و پیمانکار پس از انقضای ۳۰ درصد مدت پیمان یا ۶ ماه، هر کدام که کمتر است، مایل به ادامه یا اجرای کار نباشد، با اعلام او، قرارداد طبق ماده ۴۸ خاتمه می یابد.                                                |
| ۳    | ماده ۲۹    | تغییر مقادیر کار، قیمتهای جدید، تعدیل نرخ پیمان | جمع مبلغ مربوط به کاهش مقادیر و حذف آنها نباید از ۲۵ درصد مبلغ اولیه پیمان بیشتر شود. اگر این مبلغ، از حد تعیین شده بیشتر شود و پیمانکار پیمانکار مایل به اتمام کار نباشد، پیمان طبق ماده ۴۸ خاتمه داده می شود.                                                          |
| ۴    | ماده ۳۹    | تحويل موقت                                      | اگر با توجه به بند "الف" ماده ۲۹، عملیات موضوع پیمان تا حد ۱۲۵ درصد مبلغ اولیه پیمان انجام شود، ولی کارهای اجرا شده قابل بهره برداری نباشد و پیمانکار برای ادامه کار موافقت نکند، کارفرما طبق ماده ۴۸ به پیمان خاتمه می دهد.                                             |
| ۵    | ماده ۴۳    | بروز حوادث قهری                                 | اگر کارفرما ادامه یا اعاده کارها به وضع اولیه را ضروری تشخیص ندهد، یا اگر وضعیت قهری بیش از شش ماه ادامه یابد، بدون رعایت بند "د" ماده ۴۸، طبق ماده ۴۸، به پیمان خاتمه می دهد.                                                                                           |
| ۶    | ماده ۴۴    | ممنوعیت قانونی                                  | در حالت (ب) - تغییراتی که در دستگاههای دولت یا کارفرما پیش آید) به محض وقوع منع قانونی، پیمانکار مکلف است که مراتب را به کارفرما اعلام کند و در صورتی که مانع قانونی رفع نشود، کارفرما به پیمان خاتمه می دهد و طبق ماده ۴۸ با پیمانکار عمل می کند.                       |
| ۷    | ماده ۴۸    | خاتمه پیمان                                     | هر گاه پیش از اتمام کارهای موضوع پیمان، کارفرما بدون آنکه تقصیری متوجه پیمانکار شود، بنا به مصلحت خود یا علل دیگر، تصمیم به خاتمه دادن پیمان بگیرد، خاتمه پیمان را با تعیین تاریخ آماده کردن کارگاه برای تحويل، که نباید بیشتر از ۱۵ روز باشد، به پیمانکار ابلاغ می کند. |
| ۸    | ماده ۴۹    | تعليق                                           | در صورت عدم موافقت پیمانکار با تعليق بیش از سه ماه، پیمان خاتمه یافته و طبق ماده ۴۸ عمل می شود.                                                                                                                                                                          |

## Potential killer contract clauses – Termination by the contractor

### □ قرارداد همسان EPC صنعتی

#### ماده ۶۹- خاتمه پیمان به درخواست پیمانکار

۱-۶۹-

پیمانکار، در موارد زیر می‌تواند درخواست خاتمه پیمان را از کارفرما بنماید:

۱-۱-۶۹-

تأخیر در پرداخت پیش‌پرداخت و یا صورت‌وضعیت‌های تأیید شده از سوی کارفرما، به مدت ۹۰ روز از زمان پیش‌بینی شده در پیمان.

۲-۱-۶۹-

تأخیر در تحویل زمین موضوع ماده (۴۰)، به مدت ۹۰ روز از زمان پیش‌بینی شده در پیمان، و یا تأخیر در تحویل قسمتی از زمین که باعث توقف اجرای بیش از ۲۵ درصد مبلغ پیمان شود.

۳-۱-۶۹-

تأخیر در انجام کار، و تأمین تسهیلات، مصالح و تجهیزات در تعهد کارفرما، موضوع مواد (۴۶) و (۴۷).

به نحوی که در اثر این تأخیرها به مدت ۹۰ روز متوالی، امکان انجام حداقل ۲۵ درصد از میزان کار پیش‌بینی شده برای این ماه‌ها، با رعایت مفاد ماده (۴۷)، برای پیمانکار فراهم نشود.

## Potential killer contract clauses – Termination by the contractor

### □ قرارداد همسان EPC صنعتی

۲-۶۹-

پس از دریافت درخواست پیمانکار، کارفرما در طول پانزده روز، پیمانکار را برای مذاکره و توافق در مورد ادامه کار، دعوت می‌کند. در صورتی که ۱۴ روز پس از دعوت کارفرما و تشکیل اولین جلسه مذاکره، دو طرف در مورد ادامه کار به توافق نرسند، به پیمان خاتمه داده می‌شود و اقدام‌های پس از آن، براساس ماده (۶۷) به اجرا گذاشته می‌شود.

مفاد ۷۰- خاتمه پیمان به علت وقوع حوادث قهری

در صورت وقوع حوادث قهری موضوع ماده (۷۳)، و ادامه آن به مدت بیش از ۱۸۰ روز، پیمان خاتمه یافته و اقدام‌های پس از آن، براساس ماده (۶۷) اجرا می‌شود.

## Potential killer contract clauses – Termination by the owner for cause

### What does “Substantial Breach” mean?

- ❑ It is common for building contracts to differentiate between breaches of a nature serious enough to justify termination of the Contract, and breaches which are not deemed serious enough to suffice as a basis upon which to terminate.
  1. A breach which is not sufficiently serious will only entitle the *innocent party to damages*,
  2. A breach which is sufficiently serious will allow the innocent party to refuse to undertake any further performance of their own obligations – *effectively terminating the contract* (James Morrison & Co., Ltd v Shaw, Savill & Albion Co., Ltd., [1916] 2 K. B. 783).
- ❑ Often Contracts will use a defined term, such as ‘substantial breach’, to differentiate
  - ❖ However these **partial definitions** are often fairly open ended and leave a lot open to interpretation.

Let's see some examples!

## Potential killer contract clauses – Termination by the owner for cause

A good example of a typical definition of substantial breach is as follows:

The Owner is in substantial breach of this Contract if the Owner:

- *does not give the builder uninterrupted access to, and control of the land;*
- *does not pay a Progress Payment which is due and payable;*
- *takes possession of the Works before paying the final claim, without written consent from the Builder; or*

### **The following is not considered as a “Substantial Breach”**

For example the builder usually agrees to a clause committing to complete the works within the building period. This may be analogous to an intermediate clause. If the builder is running a few days late, this would generally not be grave enough to warrant termination. However if the building period has expired by 12 months, and the builder is yet to pour the slab, it may be argued that this is a breach of sufficient gravity.

*The demarcation between a substantial breach and something less than a substantial breach is not always going to be clear cut.*

## Potential killer contract clauses – Termination by the owner for cause

### ❑ AIA A201-2017: General conditions for construction

#### § 14.2 Termination by the Owner for Cause

##### § 14.2.1 The Owner may terminate the Contract if the Contractor

- .1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors or suppliers in accordance with the respective agreements between the Contractor and the Subcontractors or Suppliers;
- .3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or
- .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§ 14.2.2 When any of the reasons described in Section 14.2.1 exist, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may, without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 Exclude the Contractor from the site and take possession of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 Accept assignment of subcontracts pursuant to Section 5.4; and
- .3 Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

## Potential killer contract clauses – Termination by the owner for cause

### ❑ AIA A201-2017: General conditions for construction

§ 14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§ 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Initial Decision Maker, upon application, and this obligation for payment shall survive termination of the Contract.

## Potential killer contract clauses – Termination by the owner for cause

نشریه ۴۳۱۱ □

❖ ماده ۴۶- فسخ پیمان

۴۶-الف)

این امر در این بخش تنها در شرایطی ممکن است که

۱. بر روی مسیر بحرانی تاثیر گذارد.

۲. پیمانکار قابلیت جبران تاخیر را نداشته باشد.

کارفرما می‌تواند در صورت تحقق هر یک از موارد زیر، پیمان را طبق ماده ۴۷ فسخ کند.

۴۶-الف-۱)

تأخیر در تحویل گرفتن کارگاه از جانب پیمانکار بیش از مهلت تعیین شده در بند "ب" ماده ۲۸.

۴۶-الف-۲)

تأخیر در ارائه برنامه زمانی تفصیلی به مدت بیش از نصف مهلت تعیین شده برای تسلیم آن.

۴۶-الف-۳)

تأخیر در تجهیز کارگاه برای شروع عملیات موضوع پیمان، بیش از نصف مدت تعیین شده در بند "ج" ماده ۴ موافقت‌نامه. فسخ پیمان در این حالت، در صورتی مجاز است که کارفرما قسمتی از پیش پرداخت را که باید بعد از تحویل کارگاه پرداخت کند، پرداخت کرده باشد.

این بخش مشابه

Termination by the owner for cause

۴۶-الف-۴)

تأخیر در شروع عملیات موضوع پیمان، بیش از یک دهم مدت اولیه پیمان یا دو ماه هر کدام که کمتر است.

## Potential killer contract clauses – Termination by the owner for cause

□ نشریه ۴۳۱۱

❖ ماده ۴۶- فسخ پیمان

(۴۶-الف-۵)

تأخیر در اتمام هر یک از کارهای پیش‌بینی شده در برنامه زمانی تفصیلی، بیش از نصف مدت تعیین شده برای آن کار با توجه به ماده ۳۰.

(۴۶-الف-۶)

تأخیر در اتمام کار به مدت بیش از یک چهارم مدت پیمان با توجه به ماده ۳۰.

(۴۶-الف-۷)

عدم شروع کار پس از رفع وضعیت قهری موضوع ماده ۴۳ و ابلاغ شروع کار از سوی کارفرما.

(۴۶-الف-۸)

بدون سرپرست گذاشتن کارگاه یا تعطیل کردن کار، بدون اجازه کارفرما، بیش از ۱۵ روز.

(۴۶-الف-۹)

عدم انجام دستور مهندس مشاور برای اصلاح کارهای انجام شده معیوب، طبق بند "د" ماده ۳۲.

## Potential killer contract clauses – Termination by the owner for cause

□ نشریه ۴۳۱۱

❖ ماده ۴۶- فسخ پیمان

۴۶-الف-۱۰)

انحلال شرکت پیمانکار.

۴۶-الف-۱۱)

ورشکستگی پیمانکار یا توقیف ماشین‌آلات و اموال پیمانکار از سوی محاکم قضایی به گونه‌ای که موجب توقف یا کندی پیشرفت کار شود.

۴۶-الف-۱۲)

تأخیر بیش از یک ماه در پرداخت دستمزد کارگران، طبق بند “ و ” ماده ۱۷.

۴۶-الف-۱۳)

هرگاه ثابت شود که پیمانکار برای تحصیل پیمان یا اجرای آن به عوامل کارفرما حق‌العمل، پاداش یا هدایایی داده است، یا آن‌ها یا واسطه‌های آن‌ها را در منافع خود سهیم کرده است.

## Potential killer contract clauses – Termination by the owner for cause

□ نشریه ۴۳۱۱

❖ ماده ۴۶- فسخ پیمان

۴۶-ب)

در صورت احراز موارد زیر، کارفرما پیمان را فسخ می‌کند.

۴۶-ب-۱)

واگذاری پیمان به شخص ثالث.

۴۶-ب-۲)

پیمانکار مشمول ممنوعیت قانونی ماده ۴۴ گردد، به استثنای حالت پیش‌بینی شده در بند "ب" آن، برای شمول ماده ۴۸.

### ماده ۴۴- ممنوعیت قانونی

پیمانکار اعلام می‌کند که در موقع عقد پیمان، مشمول قانون منع مداخله، مصوب بیست و دوم دیماه یکهزار و سیصد و سی و هفت نیست و در صورتیکه خلاف آن برای کارفرما محرز شود، پیمان فسخ و طبق ماده ۴۷ رفتار می‌شود.

## Potential killer contract clauses – Termination by the owner for cause

❑ نشریه ۴۳۱۱

❖ ماده ۴۷- اقدامات فسخ پیمان

(۴۷-الف)

در صورتی که بعلت بروز یک یا چند مورد از حالت‌های درج شده در ماده ۴۶، کارفرما پیمان را **فسخ** تشخیص دهد، نظر خود را با ذکر مواردی که به استناد آن‌ها پیمانکار را مشمول فسخ می‌داند، به پیمانکار ابلاغ می‌کند.

پیمانکار مکلف است که در مدت ۱۰ روز از تاریخ ابلاغ کارفرما، در صورتی که دلایلی حاکی از عدم انطباق نظر کارفرما با موارد اعلام شده داشته باشد، مراتب را به اطلاع کارفرما برساند. اگر ظرف مهلت تعیین شده، پاسخی از سوی پیمانکار نرسد یا کارفرما دلایل اقامه شده او را مردود بداند، کارفرما **فسخ** پیمان را به پیمانکار ابلاغ می‌کند و بدون احتیاج به انجام دادن تشریفات قضایی، به ترتیب مفاد این ماده، عمل می‌نماید.

در صورتیکه تصمیم کارفرما برای **فسخ** پیمان به استناد موارد درج شده در بند الف ماده ۴۶ باشد، موضوع **فسخ** پیمان باید بدواً به وسیله هیأتی متشکل از سه نفر به انتخاب وزیر یا بالاترین مقام سازمان کارفرما (در مورد سازمان‌هایی که تابع هیچ یک از وزارتخانه‌ها نیستند) بررسی و تأیید شود و مورد موافقت وزیر یا بالاترین مقام سازمان کارفرما قرار گیرد و سپس به پیمانکار ابلاغ شود.

## Potential killer contract clauses – Termination by the owner for cause

نشریه ۴۳۱۱ □

این بخش را خودتان مطالعه کنید و در صورت سوال در گروه پشتیبانی بپرسید!

❖ ماده ۴۷- اقدامات فسخ پیمان

تبصره(الحاقی ۱۳۹۸)

برای **فسخ** پیمان در مورد طرح‌ها و پروژه‌های استانی، که بخشی یا تمام اعتبار آن از محل اعتبارات بودجه عمومی استانی تامین و توسط دستگاه‌های اجرائی استانی اجرا می‌شوند و همچنین طرح‌ها و پروژه‌های ملی استانی شده، کارفرما موظف است، حداکثر ظرف مدت دو هفته از اتمام مهلت تعیین شده (ده روزه) برای پیمانکار پس از ابلاغ اخطار، مستندات لازم را به دبیرخانه شورای فنی استان (سازمان مدیریت و برنامه ریزی استان) جهت طرح و استماع دفاعیات طرفین توسط "کارگروه پیمان وضوابط فنی" و اعلام نظر به شورای فنی استان و اتخاذ تصمیم در شورای فنی ارسال نماید. نتیجه تصمیم شورای فنی استان، حداکثر ظرف مدت دو هفته، توسط رئیس سازمان به دستگاه اجرائی و پیمانکار، اعلام و در صورت تصویب **فسخ** پیمان، دستگاه اجرائی نیز پس از دریافت مصوبه، بلافاصله نسبت به ابلاغ و اعمال آن اقدام می‌نماید. سایر مفاد ابلاغیه فوق‌الذکر به قوت خود باقی و نافذ بوده و بخشنامه شماره ۱۰۰/۷۰۱۶ مورخ ۱۳۸۸/۰۱/۳۱ با این ابلاغ ملغی می‌گردد. موارد **فسخی** که قبل از ابلاغ این بخشنامه در هیات مربوطه مطرح شده و در حال پیگیری است، طبق بخشنامه سابق انجام می‌شود.

## Potential killer contract clauses – Termination by the owner for cause

نشریه ۴۳۱۱ □

❖ ماده ۴۷- اقدامات فسخ پیمان

این بخش مشابه

**Termination by the owner for cause**

با این تفاوت که در AIA بحث Surety مطرح بود و اینجا ضبط تضامین مطرح است!

(۴۷-ب)

کارفرما تضمین انجام تعهدات و تضمین حسن انجام کار کسر شده را ضبط و به حساب خزانه واریز می‌کند و بی‌درنگ کارگاه، تأسیسات و ساختمان‌های موقت، مصالح و تجهیزات ماشین‌آلات و ابزار و تمام تدارکات موجود در آن را در اختیار می‌گیرد و برای حفاظت آن اقدام معمول می‌دارد. سپس بی‌درنگ از پیمانکار دعوت می‌کند که ظرف یک هفته نماینده‌ای برای صورت‌برداری و تهیه صورت‌مجلس کارهای انجام شده و تمام مصالح و تجهیزات ماشین‌آلات و ابزار و تمام تدارکات دیگر که در کارگاه موجود است، معرفی نماید. هرگاه پیمانکار از معرفی نماینده ظرف مدت تعیین شده خودداری کند یا نماینده معرفی شده از جانب او در موعد مقرر برای صورت‌برداری حاضر نشود، کارفرما به منظور تأمین دلیل، با حضور نماینده دادگاه محل، برای صورت‌برداری اقدام می‌نماید و پیمانکار حق هیچ‌گونه اعتراضی در این مورد را ندارد. پس از صورت‌برداری، پیمانکار بی‌درنگ، طبق ماده ۴۰، اقدام به تهیه صورت‌وضعیت قطعی از کارهای انجام شده می‌کند.

## Potential killer contract clauses – Termination by the owner for convenience

### ❑ AIA A201-2017: General conditions for construction

#### § 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner's convenience, the Contractor shall

- .1 cease operations as directed by the Owner in the notice;
- .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
- .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

§ 14.4.3 In case of such termination for the Owner's convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.

**It is highly recommended for GC to include  
termination fee in the contract**

**Let's see 4311**

## Potential killer contract clauses – Termination by the owner for convenience

نشریه ۴۳۱۱ □

این بخش مشابه

Termination by the owner for convenience

❖ ماده ۴۸- خاتمه پیمان

هرگاه پیش از ایام اتمام کارهای موضوع پیمان، کارفرما بدون آنکه تقصیری متوجه پیمانکار باشد، بنا به مصلحت خود یا علل دیگر، تصمیم به خاتمه دادن پیمان بگیرد، خاتمه پیمان را با تعیین تاریخ آماده کردن کارگاه برای تحویل، که نباید بیشتر از ۱۵ روز باشد، به پیمانکار ابلاغ می‌کند. کارفرما کارهایی را که ناتمام ماندن آنها موجب بروز خطر یا زیان مسلم است در این ابلاغ تعیین می‌کند و مهلت بیشتری به پیمانکار می‌دهد تا پیمانکار بتواند در آن مهلت، این گونه کارها را تکمیل کند و کارگاه را آماده تحویل نماید.

## Potential killer contract clauses – Termination by the owner for convenience

□ نشریه ۴۳۱۱

❖ ماده ۴۸- خاتمه پیمان

در مورد مصالح و تجهیزات موجود و سفارش شده، به شرح زیر، اقدام می‌شود:

### ۴۸-ج-۱)

مصالح و تجهیزات موجود در کارگاه که طبق مشخصات فنی بوده و برای اجرای موضوع پیمان تهیه شده است، اندازه‌گیری و بهای آن‌ها بر اساس نرخ متعارف روز در تاریخ خرید، که مورد توافق دو طرف باشد، در صورت وضعیت قطعی منظور می‌شود.

در صورت اعلام نیاز کارفرما، موارد تادیه شده به حساب پیمانکار لحاظ میشود و مابقی بهای خرید به عهده کارفرما

### ۴۸-ج-۲)

پیمانکار با دریافت ابلاغ خاتمه پیمان، بی‌درنگ فهرست مصالح و تجهیزات ارائه شده برای اجرای کار را همراه با شرایط خرید آن‌ها برای کارفرما ارسال می‌نماید. کارفرما تا ده روز از دریافت فهرست پیش‌گفته، اقلامی از مصالح و تجهیزات سفارش شده را که مورد نیاز تشخیص می‌دهد به پیمانکار اعلام می‌نماید تا پیمانکار قرارداد خرید آن‌ها را به کارفرما منتقل نماید. مبالغی که بابت خرید این مصالح و تجهیزات از سوی پیمانکار تأدیه شده است، در مقابل تسلیم اسناد و مدارک آن به حساب طلب پیمانکار منظور می‌گردد و تأدیه بقیه بهای خرید و هر نوع تعهد مربوط به آن‌ها به عهده کارفرما خواهد بود.

در صورت عدم نیاز کارفرما، قراردادهای پیمانکار خاتمه می‌یابد.  
شباهت با AIA دارد!

### ۴۸-ج-۳)

پیمانکار باید بیدرنگ پس از دریافت ابلاغ خاتمه پیمان، تمام قراردادهای خود با پیمانکاران جزء و اشخاص ثالث را خاتمه دهد. خاتمه قراردادهای خرید مصالح و تجهیزاتی که مورد نیاز کارفرما نیست پس از اعلام نظر کارفرما طبق بند ۲، انجام می‌شود.

## Potential killer contract clauses – Termination by the owner for convenience

□ نشریه ۴۳۱۱

❖ ماده ۴۸- خاتمه پیمان

شبهت با AIA دارد!

(۴۸-د)

در صورتیکه پیمانکار به منظور اجرای موضوع پیمان، در مقابل اشخاص ثالث تعهداتی کرده است و در اثر خاتمه دادن به پیمان ملزم به پرداخت هزینه و خسارتهایی به آن اشخاص گردد، این هزینه‌ها و خسارت‌ها، پس از رسیدگی و تأیید کارفرما، به حساب بستانکاری پیمانکار منظور می‌شود.

## Potential killer contract clauses – Suspension by the owner for convenience

### ❑ AIA A201-2017: General conditions for construction

Time and cost increases clearly expressed!

#### § 14.3 Suspension by the Owner for Convenience

§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

1. that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or
2. that an equitable adjustment is made or denied under another provision of the Contract.

Does it mean concurrent delay?

Read the contract carefully since another adjustment may be expressed in another provision

Let's see 4311

## موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

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