



مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

بخش پنجم:

اجرای برنامه و مدیریت ادعاء، دعاوی و اختلافات در فاز ساخت/اجرا (Construction Phase)

ارائه دهنده:

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What we will learn?

☐ Claims management

- ❖ Introduction
- ❖ Project and claim documentation
- ❖ Contract and claim administration
- ❖ Types of claim
- ❖ Claim and dispute notification
- ❖ Claim and dispute tracking and processing
- ❖ Notes to consider before writing the claim

☐ Claims and disputes resolution

- ❖ Resolution methods
- ❖ Contract forms

What we will learn?

☐ Parties' considerations

- ❖ Construction manager
- ❖ General contractor and subcontractors
- ❖ Design consultant

☐ Lessons learned from case studies

- ❖ Recommendations
- ❖ Examples

☐ Final recommendations



AIA document A201-2017: General conditions for construction

☐ **Arbitration** **Consolidation** is the act of **combining multiple lawsuits** into a single suit.
Joinder is the act of **bringing additional parties** into a lawsuit.

§ 15.4.4 Consolidation or Joinder

§ 15.4.4.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation, (2) the arbitrations to be consolidated substantially involve common questions of law or fact, and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 15.4.4.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent.

§ 15.4.4.3 The Owner and Contractor grant to any person or entity made a party to an arbitration conducted under this Section 15.4, whether by joinder or consolidation, the same rights of joinder and consolidation as those of the Owner and Contractor under this Agreement.

AGC document 655-1998-Revised 2009: Contractor and subcontractor

☐ Dispute resolution

Read it yourself!

11.1 INITIAL DISPUTE RESOLUTION if a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through direct discussions. If the dispute cannot be resolved through direct discussions, the parties shall participate in mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to any other form of binding dispute resolution. The location of the mediation shall be the location of the Project. Once a party files a request for mediation with the other party and with the American Arbitration Association, the parties agree to commence such mediation within thirty (30) days of filing of the request. Either party may terminate the mediation at any time after the first session, but the decision to terminate must be delivered in person to the other party and the mediator. Engaging in mediation is a condition precedent to any other form of binding dispute resolution.

AGC document 655-1998-Revised 2009: Contractor and subcontractor

☐ Dispute resolution

Read it yourself!

11.2 WORK CONTINUATION AND PAYMENT Unless otherwise agreed in writing, the Subcontractor shall continue the Subcontract Work and maintain the Progress Schedule during any dispute resolution proceedings. If the Subcontractor continues to perform, the Contractor shall continue to make payments in accordance with this Agreement.

11.3 NO LIMITATION OF RIGHTS OR REMEDIES Nothing in this Article shall limit any rights or remedies not expressly waived by the Subcontractor which the Subcontractor may have under lien laws or payment bonds.

AGC document 655-1998-Revised 2009: Contractor and subcontractor

☐ Dispute resolution

Read it yourself!

11.4 MULTIPARTY PROCEEDING The parties agree that to the extent permitted by Subcontract Document all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding. To the extent disputes between the Contractor and Subcontractor involve in whole or in part disputes between the Contractor and the Owner, disputes between the Subcontractor and the Contractor shall be decided by the same tribunal and in the same forum as disputes between the Contractor and the Owner.

AGC document 655-1998-Revised 2009: Contractor and subcontractor

☐ Dispute resolution

Read it yourself!

11.5 DISPUTES BETWEEN CONTRACTOR AND SUBCONTRACTOR In the event that the provisions for resolution of disputes between the Contractor and the Owner contained in the Subcontract Documents do not permit consolidation or joinder with disputes of third parties, such as the Subcontractor, resolution of disputes between the Subcontractor and the Contractor involving in whole or in part disputes between the Contractor and the Owner shall be stayed pending conclusion of any dispute resolution proceeding between the Contractor and the Owner. At the conclusion of those proceedings, disputes between the Subcontractor and the Contractor shall be submitted again to mediation pursuant to Paragraph 11.1. Any disputes not resolved by mediation shall be decided in the manner selected in the agreement between the Owner and the Contractor.

AGC document 655-1998-Revised 2009: Contractor and subcontractor

☐ Dispute resolution

Read it yourself!

11.6 COST OF DISPUTE RESOLUTION The cost of any mediation proceeding shall be shared equally by the parties participating. The prevailing party in any dispute arising out of or relating to this Agreement or its breach that is resolved by a dispute resolution procedure designated in the Subcontract Documents shall be entitled to recover from the other party reasonable attorneys' fees, costs and expenses incurred by the prevailing party in connection with such dispute resolution process.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

11.1 WORK CONTINUATION AND PAYMENT Unless otherwise agreed in writing, the Subcontractor shall continue the Subcontract Work and maintain the Progress Schedule during any dispute mitigation or resolution proceedings. If the Subcontractor continues to perform, the Constructor shall continue to make payments on the portion of the work not in dispute in accordance with this Agreement.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

11.2 DISPUTES BETWEEN CONSTRUCTOR AND SUBCONTRACTOR If the dispute resolution provisions between the Constructor and the Owner in the Subcontract Documents do not permit consolidation or joinder with disputes of third parties, such as the Subcontractor, or if such dispute is only between the Constructor and the Subcontractor, then the Parties shall submit the dispute to the dispute resolution procedures set forth in the section below.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

❖ Constructor-Subcontractor dispute resolution

11.3.1 DIRECT DISCUSSIONS If the Parties cannot reach resolution on a matter relating to or arising out of the Agreement, the Parties shall endeavor to reach resolution through good faith direct discussions between the Parties' representatives, who shall possess the necessary authority to resolve such matter and who shall record the date of first discussions. If the Parties' representatives are not able to resolve such matter within five (5) business Days, the Parties' representatives shall immediately inform senior executives of the Parties in writing that resolution was not affected. Upon receipt of such notice, the senior executives of the Parties shall meet within five (5) business Days to endeavor to reach resolution. If the matter remains unresolved after fifteen (15) Days from the date of first discussion, the Parties shall submit such matter to the dispute resolution procedures selected in ARTICLE 11.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

❖ Constructor-Subcontractor dispute resolution

11.3.2 MEDIATION If direct discussions pursuant to the subsection immediately above do not result in resolution of the matter, the Parties shall endeavor to resolve the matter by mediation through the current Construction Industry Mediation Rules of the American Arbitration Association (AAA), or the Parties may mutually agree to select another set of mediation rules. The administration of the mediation shall be as mutually agreed by the Parties. The mediation shall be convened within thirty (30) working Days of the matter first being discussed and shall conclude within forty-five (45) working Days of the matter being first discussed. Either Party may terminate the mediation at any time after the first session by written notice to the non-terminating Party and to the mediator. The costs of the mediation shall be shared equally by the Parties.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

❖ Constructor-Subcontractor dispute resolution

11.3.3 BINDING DISPUTE RESOLUTION If the matter is unresolved after submission of the matter to a mitigation procedure or to mediation, the Parties shall submit the matter to the binding dispute resolution procedure using the current Construction Industry Arbitration Rules of the AAA and administered by the AAA.

11.3.4 COSTS The costs of any binding dispute resolution procedure and reasonable attorneys' fees shall be borne by the non-prevailing Party, as determined by the adjudicator of the dispute.

11.3.5 VENUE The venue for any binding dispute resolution proceeding shall be Kansas City, Missouri.

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

Read it yourself!

❖ Constructor-Subcontractor dispute resolution

11.3.6 Neither Party may commence arbitration if the claim or cause of action would be barred by the applicable statute of limitations had the claim or cause of action been filed in a state or federal court. Receipt of a demand for arbitration by the person or entity administering the arbitration shall constitute the commencement of legal proceedings for the purposes of determining whether a claim or cause of action is barred by the applicable statute of limitations. If, however, a state or federal court exercising jurisdiction over a timely filed claim or cause of action orders that the claim or cause of action be submitted to arbitration, the arbitration proceeding shall be deemed commenced as of the date the court action was filed, provided that the Party asserting the claim or cause of action files its demand for arbitration with the person or entity administering the arbitration within thirty (30) Days after the entry of such order.

11.3.7 An award entered in an arbitration proceeding pursuant to this Agreement shall be final and binding upon the Parties, and judgment may be entered upon an award in any court having jurisdiction

ConsensusDocs 750-2011-Revised 2014: Contractor and subcontractor

☐ Dispute mitigation and resolution

❖ Constructor-Subcontractor dispute resolution

Read it yourself!

11.4 MULTIPARTY PROCEEDING All parties necessary to resolve a matter agree to be parties to the same dispute resolution proceeding. To the extent disputes between the Constructor and Subcontractor involve in whole or in part disputes between the Constructor and the Owner, disputes between the Subcontractor and the Constructor shall be decided by the same tribunal and in the same forum as disputes between the Constructor and the Owner.

11.5 NO LIMITATION OF RIGHTS OR REMEDIES Nothing in this article shall limit any rights or remedies not expressly waived by either Constructor or Subcontractor.

AIA document A401-2017: GC and SC

❑ Claims and disputes

❖ Mediation

Read it yourself!

§ 6.1 Mediation

§ 6.1.1 Claims, disputes, or other matters in controversy arising out of or related to this Subcontract, except those waived as provided for in Sections 6.4 and 11.3.2, shall be subject to mediation as a condition precedent to binding dispute resolution.

§ 6.1.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Mediation Procedures in effect on the date of the Agreement. A request for mediation shall be made in writing, delivered to the other party to this Subcontract and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of binding dispute resolution proceedings but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration is stayed pursuant to this Section 6.1.2, the parties may nonetheless proceed to the selection of the arbitrators(s) and agree upon a schedule for later proceedings.

§ 6.1.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.



AIA document A401-2017: GC and SC

☐ Claims and disputes

❖ Binding dispute resolution

Read it yourself!

§ 6.2 Binding Dispute Resolution

For any Claim subject to, but not resolved by mediation pursuant to Section 6.1, the method of binding dispute resolution shall be as follows:

(Check the appropriate box.)

- ☐ Arbitration pursuant to Section 6.3 of this Agreement
- ☐ Litigation in a court of competent jurisdiction
- ☐ Other: *(Specify)*

AIA document A401-2017: GC and SC

☐ Claims and disputes

❖ Arbitration

Read it yourself!

§ 6.3 Arbitration

§ 6.3.1 If the Contractor and Subcontractor have selected arbitration as the method of binding dispute resolution in Section 6.2, any Claim subject to, but not resolved by, mediation shall be subject to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of this Agreement. The arbitration should be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

AIA document A401-2017: GC and SC

☐ Claims and disputes

❖ Arbitration

Read it yourself!

§ 6.3.2 A demand for arbitration shall be made no earlier than concurrently with the filing of a request for mediation but in no event shall it be made after the date when the institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitations. For statute of limitations purposes, receipt of a written demand for arbitration by the person or entity administering the arbitration shall constitute the institution of legal or equitable proceedings based on the Claim.

§ 6.3.3 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

§ 6.3.4 The foregoing agreement to arbitrate, and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement, shall be specifically enforceable under applicable law in any court having jurisdiction thereof.



AIA document A401-2017: GC and SC

❑ Claims and disputes

❖ Arbitration

Read it yourself!

§ 6.3.5 Consolidation or Joinder

§ 6.3.5.1 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may consolidate an arbitration conducted under this Agreement with any other arbitration to which it is a party provided that (1) the arbitration agreement governing the other arbitration permits consolidation; (2) the arbitrations to be consolidated substantially involve common questions of law or fact; and (3) the arbitrations employ materially similar procedural rules and methods for selecting arbitrator(s).

§ 6.3.5.2 Subject to the rules of the American Arbitration Association or other applicable arbitration rules, either party may include by joinder persons or entities substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration, provided that the party sought to be joined consents in writing to such joinder. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a Claim, dispute, or other matter in question not described in the written consent.

§ 6.3.5.3 The Contractor and Subcontractor grant to any person or entity made a party to an arbitration conducted under this Section 6.3, whether by joinder or consolidation, the same rights of joinder and consolidation as the Contractor and Subcontractor under this Agreement.

AIA document A401-2017: GC and SC

❑ Claims and disputes

❖ Waiver of claims for consequential damages

Read it yourself!

§ 6.4 Waiver of Claims for Consequential Damages

The Contractor and Subcontractor waive claims against each other for consequential damages arising out of or relating to this Subcontract, including without limitation, any consequential damages due to either party's termination in accordance with Article 7. Nothing contained herein shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of this Agreement.

§ 11.3.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied. Acceptance of final payment by the Subcontractor shall constitute a waiver of claims by the Subcontractor, except those previously made in writing and identified by the Subcontractor as unsettled at the time of final Application for Payment.

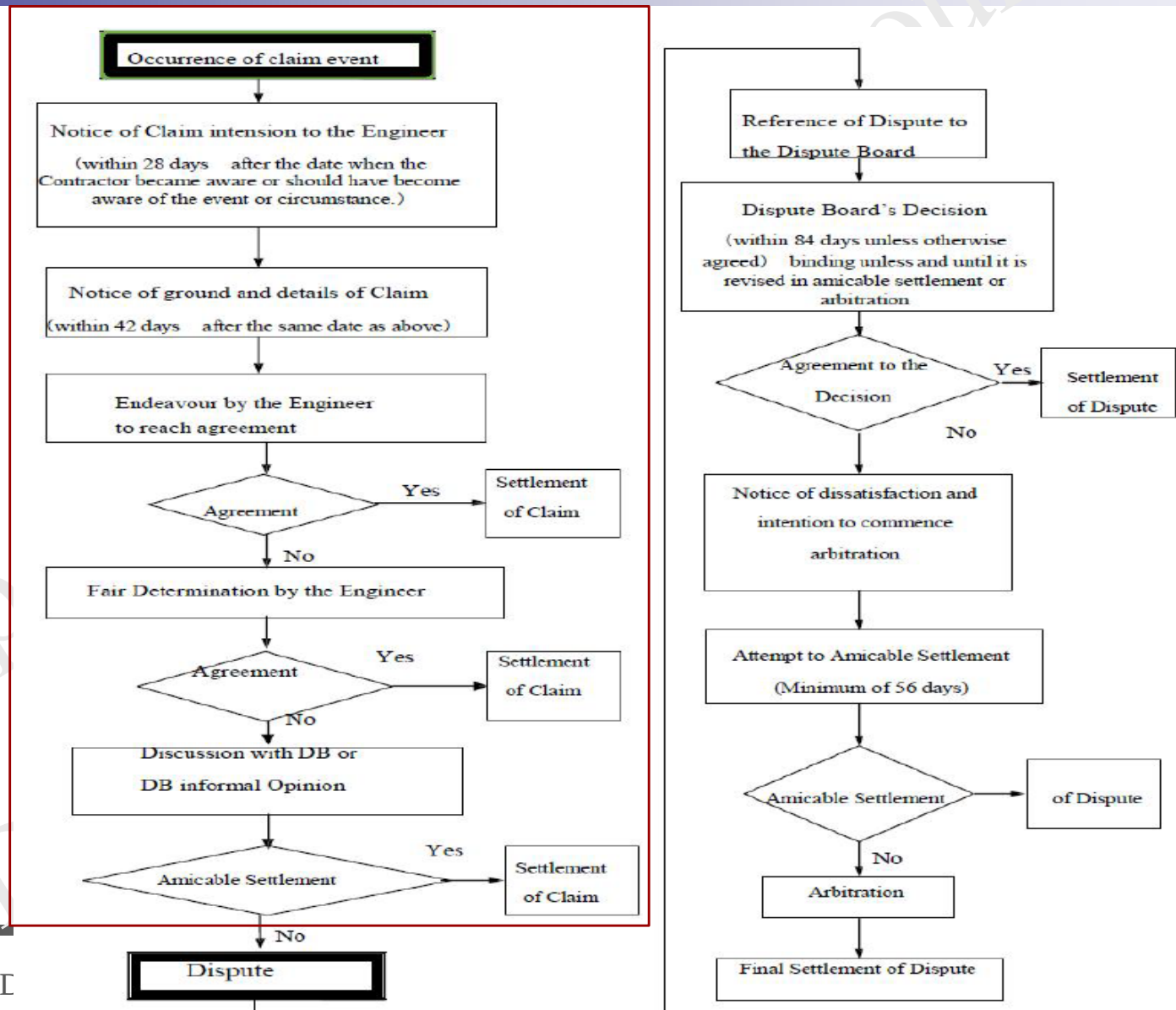


FIDIC (Red Book)

- ❑ **Dispute Resolution Board:** As is well known, the **procedure** for the settlement of disputes in **Clause 20** of the **New Red Book** provides that disputes must be submitted **initially to the Engineer** for decision **before** they may be referred to **arbitration**.
- ❑ Under this new alternative, **instead** of having disputes submitted to the **Engineer** for settlement **before arbitration**, they would be submitted to the **Board**.
 - ❖ Where this **alternative procedure** is adopted, the **Engineer** would **no longer** have any **involvement** in deciding disputes under **Clause 20**.

How the board is constituted and how it should operate?

FIDIC (Red Book)





FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims (20.1)

- ✓ DNP = Defects notification period

A Claim may arise:

- (a) if the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/or to an extension of the DNP;
- (b) if the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT; or
- (c) if either Party considers that he/she is entitled to another entitlement or relief against the other Party. Such other entitlement or relief may be of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or valuation of the Engineer) except to the extent that it involves any entitlement referred to in sub-paragraphs (a) and/or (b) above.

This part has been received a great change and improvement compared to 1999

FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims (20.1)

In the case of a Claim under sub-paragraph (a) or (b) above, Sub-Clause 20.2 [Claims For Payment and/or EOT] shall apply.

In the case of a Claim under sub-paragraph (c) above, where the other Party or the Engineer has disagreed with the requested entitlement or relief (or is deemed to have disagreed if he/she does not respond within a reasonable time), a Dispute shall not be deemed to have arisen but the claiming Party may, by giving a Notice refer the Claim to the Engineer and Sub-Clause 3.7 [Agreement or Determination] shall apply. This Notice shall be given as soon as practicable after the claiming Party becomes aware of the disagreement (or deemed disagreement) and include details of the claiming Party's case and the other Party's or the Engineer's disagreement (or deemed disagreement).

FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

If either Party considers that he/she is entitled to any additional payment by the other Party (or, in the case of the Employer, a reduction in the Contract Price) and/or to EOT (in the case of the Contractor) or an extension of the DNP (in the case of the Employer) under any Clause of these Conditions or otherwise in connection with the Contract, the following Claim procedure shall apply:



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.1 Notice of Claim

The claiming Party shall give a Notice to the Engineer, describing the event or circumstance giving rise to the cost, loss, delay or extension of DNP for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance (the "Notice of Claim" in these Conditions).

If the claiming Party fails to give a Notice of Claim within this period of 28 days, the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced (in the case of the Employer as the claiming Party), the Time for Completion (in the case of the Contractor as the claiming Party) or the DNP (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.2 Engineer's initial response

If the Engineer considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [Notice of Claim] the Engineer shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause and disagrees with the Engineer or considers there are circumstances which justify late submission of the Notice of Claim, the claiming Party shall include in its fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed claim] details of such disagreement or why such late submission is justified (as the case may be).



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.3 Contemporary records

Remember this?

In this Sub-Clause 20.2, "contemporary records" means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.

The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.

Without admitting the Employer's liability, the Engineer may monitor the Contractor's contemporary records and/or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Engineer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Engineer. Such monitoring, inspection or instruction (if any) by the Engineer shall not imply acceptance of the accuracy or completeness of the Contractor's contemporary records.

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.4 Fully detailed Claim

In this Sub-Clause 20.2, "fully detailed Claim" means a submission which includes:

- (a) a detailed description of the event or circumstance giving rise to the Claim;
- (b) a statement of the contractual and/or other legal basis of the Claim;
- (c) all contemporary records on which the claiming Party relies; and
- (d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

Within either:

- (i) 84 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim, or
- (ii) such other period (if any) as may be proposed by the claiming Party and agreed by the Engineer

the claiming Party shall submit to the Engineer a fully detailed Claim.

FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

So, let's see 20.2.6 [claims of continuing effect] first,
and
then talk about 20.2.5 [agreement or determination of the claim]

If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.

If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

If the claiming Party receives a Notice from the Engineer under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be).

If the event or circumstance giving rise to the Claim has a continuing effect, Sub-Clause 20.2.6 [Claims of continuing effect] shall apply.



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.6 Claims of continuing effect

**Do not forget that both
Employer and Contractor
can claim!**

Contractor:

1. Additional payment
2. EOT

Employer:

1. Reduction of the contract price
2. Extension of DNP

If the event or circumstance giving rise to a Claim under this Sub-Clause 20.2 has a continuing effect:

- (a) the fully detailed Claim submitted under Sub-Clause 20.2.4 [Fully detailed Claim] shall be considered as interim;
- (b) in respect of this first interim fully detailed Claim, the Engineer shall give his/her response on the contractual or other legal basis of the Claim, by giving a Notice to the claiming Party, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];
- (c) after submitting the first interim fully detailed Claim the claiming Party shall submit further interim fully detailed Claims at monthly intervals, giving the accumulated amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party); and
- (d) the claiming Party shall submit a final fully detailed Claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the claiming Party and agreed by the Engineer. This final fully detailed Claim shall give the total amount of additional payment claimed (or the reduction of the Contract Price, in the case of the Employer as the claiming Party), and/or extension of time claimed (in the case of the Contractor as the claiming Party) or extension of the DNP (in the case of the Employer as the claiming Party).



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

20.2.5 Agreement or determination of the Claim

After receiving a fully detailed Claim either under Sub-Clause 20.2.4 [*Fully detailed Claim*], or an interim or final fully detailed Claim (as the case may be) under Sub-Clause 20.2.6 [*Claims of continuing effect*], the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine:

- (a) the additional payment (if any) to which the claiming Party is entitled or the reduction of the Contract Price (in the case of the Employer as the claiming Party); and/or
- (b) the extension (if any) of the Time for Completion (before or after its expiry) under Sub-Clause 8.5 [*Extension of Time for Completion*] (in the case of the Contractor as the claiming Party), or the extension (if any) of the DNP (before its expiry) under Sub-Clause 11.3 [*Extension of Defects Notification Period*] (in the case of the Employer as the claiming Party),

to which the claiming Party is entitled under the Contract.



FIDIC (Red Book)

❑ Employer's and Contractor's Claims (20)

❖ Claims for payment and/or EOT (20.2)

If the Engineer has given a Notice under Sub-Clause 20.2.2 [*Engineer's initial response*] and/or under Sub-Clause 20.2.4 [*Fully detailed Claim*], the Claim shall nevertheless be agreed or determined in accordance with this Sub-Clause 20.2.5. The agreement or determination of the Claim shall include whether or not the Notice of Claim shall be treated as a valid Notice taking account of the details (if any) included in the fully detailed claim of the claiming Party's disagreement with such Notice(s) or why late submission is justified (as the case may be). The circumstances which may be taken into account (but shall not be binding) may include:

- whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
- in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
- in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.



FIDIC (Red Book)

❑ FIDIC-2017

- ❖ Agreement and
determination
(3.7)

When carrying out his/her duties under this Sub-Clause, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer.

Whenever these Conditions provide that the Engineer shall proceed under this Sub-Clause to agree or determine any matter or Claim, the following procedure shall apply:

❑ FIDIC-2017

❖ Agreement and determination (3.7)

3.7.1 Consultation to reach agreement

The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavour to reach agreement. The Engineer shall commence such consultation promptly to allow adequate time to comply with the time limit for agreement under Sub-Clause 3.7.3 [Time limits]. Unless otherwise proposed by the Engineer and agreed by both Parties, the Engineer shall provide both Parties with a record of the consultation.

If agreement is achieved, within the time limit for agreement under Sub-Clause 3.7.3 [Time limits], the Engineer shall give a Notice to both Parties of the agreement, which agreement shall be signed by both Parties. This Notice shall state that it is a "Notice of the Parties' Agreement" and shall include a copy of the agreement.

If:

- (a) no agreement is achieved within the time limit for agreement under Sub-Clause 3.7.3 [Time limits]; or
- (b) both Parties advise the Engineer that no agreement can be achieved within this time limit

whichever is the earlier, the Engineer shall give a Notice to the Parties accordingly and shall immediately proceed as specified under Sub-Clause 3.7.2 [Engineer's Determination].



FIDIC (Red Book)

❑ FIDIC-2017

❖ Agreement and determination (3.7)

3.7.2 Engineer's Determination

The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.

Within the time limit for determination under Sub-Clause 3.7.3 [*Time limits*], the Engineer shall give a Notice to both Parties of his/her determination. This Notice shall state that it is a "Notice of the Engineer's Determination", and shall describe the determination in detail with reasons and detailed supporting particulars.

3.7.3 Time limits

The Engineer shall give the Notice of agreement, if agreement is achieved, within 42 days or within such other time limit as may be proposed by the Engineer and agreed by both Parties (the "time limit for agreement" in these Conditions), after:

- (a) in the case of a matter to be agreed or determined (not a Claim), the date of commencement of the time limit for agreement as stated in the applicable Sub-Clause of these Conditions;
- (b) in the case of a Claim under sub-paragraph (c) of Sub-Clause 20.1 [*Claims*], the date the Engineer receives a Notice under Sub-Clause 20.1 from the claiming Party; or
- (c) in the case of a Claim under sub-paragraph (a) or (b) of Sub-Clause 20.1 [*Claims*], the date the Engineer receives:
 - (i) a fully detailed Claim under Sub-Clause 20.2.4 [*Fully Detailed Claim*]; or
 - (ii) in the case of a Claim under Sub-Clause 20.2.6 [*Claims of continuing effect*], an interim or final fully detailed Claim (as the case may be).

❑ FIDIC-2017

❖ Agreement and determination (3.7)

The Engineer shall give the Notice of his/her determination within 42 days or within such other time limit as may be proposed by the Engineer and agreed by both Parties (the "time limit for determination" in these Conditions), after the date corresponding to his/her obligation to proceed under the last paragraph of Sub-Clause 3.7.1 [Consultation to reach agreement].

If the Engineer does not give the Notice of agreement or determination within the relevant time limit:

- (i) in the case of a Claim, the Engineer shall be deemed to have given a determination rejecting the Claim; or
- (ii) in the case of a matter to be agreed or determined, the matter shall be deemed to be a Dispute which may be referred by either Party to the DAAB for its decision under Sub-Clause 21.4 [Obtaining DAAB's Decision] without the need for a NOD (and Sub-Clause 3.7.5 [Dissatisfaction with Engineers determination] and sub-paragraph (a) of Sub-Clause 21.4.1 [Reference of a Dispute to the DAAB] shall not apply).

❑ FIDIC-2017

❖ Agreement and determination (3.7)

3.7.4 Effect of the agreement or determination

Each agreement or determination shall be binding on both Parties (and shall be complied with by the Engineer) unless and until corrected under this Sub-Clause or, in the case of a determination, it is revised under Clause 21 [Disputes and Arbitration].

If an agreement or determination concerns the payment of an amount from one Party to the other Party, the Contractor shall include such an amount in the next Statement and the Engineer shall include such amount in the Payment Certificate that follows that Statement.

If, within 14 days after giving or receiving the Engineer's Notice of agreement or determination, any error of a typographical or clerical or arithmetical nature is found:

- (a) by the Engineer: then he/she shall immediately advise the Parties accordingly; or
- (b) by a Party: then that Party shall give a Notice to the Engineer, stating that it is given under this Sub-Clause 3.7.4 and clearly identifying the error. If the Engineer does not agree there was an error, he/she shall immediately advise the Parties accordingly.



FIDIC (Red Book)

❑ FIDIC-2017

❖ Agreement and determination

(3.7)

3.7.5 Dissatisfaction with Engineer's determination

The Engineer shall within 7 days of finding the error, or receiving a Notice under sub-paragraph (b) above (as the case may be), give a Notice to both Parties of the corrected agreement or determination. Thereafter, the corrected agreement or determination shall be treated as the agreement or determination for the purpose of these Conditions.

If either Party is dissatisfied with a determination of the Engineer:

- (a) the dissatisfied Party may give a NOD to the other Party, with a copy to the Engineer;
- (b) this NOD shall state that it is a "Notice of Dissatisfaction with the Engineer's Determination" and shall set out the reason(s) for dissatisfaction;
- (c) this NOD shall be given within 28 days after receiving the Engineer's Notice of the determination under Sub-Clause 3.7.2 [Engineer's Determination] or, if applicable, his/her Notice of the corrected determination under Sub-Clause 3.7.4 [Effect of the agreement or determination] (or, in the case of a deemed determination rejecting the Claim, within 28 days after the time limit for determination under Sub-Clause 3.7.3 [Time limits] has expired); and
- (d) thereafter, either Party may proceed under Sub-Clause 21.4 [Obtaining DAAB's Decision].



FIDIC (Red Book)

□ FIDIC-2017

❖ Agreement and determination (3.7)

If no NOD is given by either Party within the period of 28 days stated in sub-paragraph (c) above, the determination of the Engineer shall be deemed to have been accepted by both Parties and shall be final and binding on them.

If the dissatisfied Party is dissatisfied with only part(s) of the Engineer's determination:

- (i) this part(s) shall be clearly identified in the NOD;
- (ii) this part(s), and any other parts of the determination that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the determination; and
- (iii) the remainder of the determination shall become final and binding on both Parties as if the NOD had not been given.

In the event that a Party fails to comply with an agreement of the Parties under this Sub-Clause 3.7 or a final and binding determination of the Engineer, the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case the first and the third paragraphs of Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] shall apply to such reference in the same manner as these paragraphs apply to a final and binding decision of the DAAB.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

Disputes shall be decided by a DAAB in accordance with Sub-Clause 21.4 [Obtaining DAAB's Decision]. The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance.

The DAAB shall comprise, as stated in the Contract Data, either one suitably qualified member (the "sole member") or three suitably qualified members (the "members"). If the number is not so stated, and the Parties do not agree otherwise, the DAAB shall comprise three members.

The sole member or three members (as the case may be) shall be selected from those named in the list in the Contract Data, other than anyone who is unable or unwilling to accept appointment to the DAAB.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

If the DAAB is to comprise three members, each Party shall select one member for the agreement of the other Party. The Parties shall consult both these members and shall agree the third member, who shall be appointed to act as chairperson.

The DAAB shall be deemed to be constituted on the date that the Parties and the sole member or the three members (as the case may be) of the DAAB have all signed a DAAB Agreement.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAAB consults, shall be mutually agreed by the Parties when agreeing the terms of the DAAB Agreement. Each Party shall be responsible for paying one-half of this remuneration.

❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAAB. Unless the Parties agree otherwise, a replacement DAAB member shall be appointed if a member declines to act or is unable to act as a result of death, illness, disability, resignation or termination of appointment. The replacement member shall be appointed in the same manner as the replaced member was required to have been selected or agreed, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the term of the DAAB (including the appointment of each member) shall expire either:

- (a) on the date the discharge shall have become, or deemed to have become, effective under Sub-Clause 14.12 [Discharge]; or
- (b) 28 days after the DAAB has given its decision on all Disputes, referred to it under Sub-Clause 21.4 [Obtaining DAAB's Decision] before such discharge has become effective,

whichever is later.

When submitting the Final Statement or the Partially Agreed Final Statement (as the case may be), the Contractor shall submit a discharge which confirms that the total of such Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract. This discharge may state that the total of the Statement is subject to any payment that may become due in respect of any Dispute for which a DAAB proceeding or arbitration is in progress under Sub-Clause 21.6 [Arbitration] and/or that it becomes effective after the Contractor has received:

- (a) full payment of the amount certified in the FPC; and
- (b) the Performance Security.

If the Contractor fails to submit this discharge, the discharge shall be deemed to have been submitted and to have become effective when the conditions of sub-paragraphs (a) and (b) have been fulfilled.

A discharge under this Sub-Clause shall not affect either Party's liability or entitlement in respect of any Dispute for which a DAAB proceeding or arbitration is in progress under Clause 21 [Disputes and Arbitration].

FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Constitution of the Dispute Avoidance and Adjudication Board (DAAB)

However, if the Contract is terminated under any Sub-Clause of these Conditions or otherwise, the term of the DAAB (including the appointment of each member) shall expire 28 days after:

- (i) the DAAB has given its decision on all Disputes, which were referred to it (under Sub-Clause 21.4 [*Obtaining DAAB's Decision*]) within 224 days after the date of termination; or
- (ii) the date that the Parties reach a final agreement on all matters (including payment) in connection with the termination

whichever is earlier.

❑ Disputes and Arbitration (21)

- ❖ Failure to appoint DAAB members (21.2)

Read it yourself!

If any of the following conditions apply, namely:

- (a) if the DAAB is to comprise a sole member, the Parties fail to agree the appointment of this member by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the DAAB*]; or
- (b) if the DAAB is to comprise three persons, and if by the date stated in the first paragraph of Sub-Clause 21.1 [*Constitution of the DAAB*]:
 - (i) either Party fails to select a member (for agreement by the other Party);
 - (ii) either Party fails to agree a member selected by the other Party; and/or
 - (iii) the Parties fail to agree the appointment of the third member (to act as chairperson) of the DAAB;
- (c) the Parties fail to agree the appointment of a replacement within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, illness, disability, resignation, or termination of appointment; or
- (d) if, after the Parties have agreed the appointment of the member(s) or replacement, such appointment cannot be effected because one Party refuses or fails to sign a DAAB Agreement with any such member or replacement (as the case may be) within 14 days of the other Party's request to do so,

then the appointing entity or official named in the Contract Data shall, at the request of either or both Parties and after due consultation with both Parties, appoint the member(s) of the DAAB (who, in the case of sub-paragraph (d) above, shall be the agreed member(s) or replacement). This appointment shall be final and conclusive.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Avoidance of disputes (21.3)

If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.

FIDIC (Red Book)

❑ Disputes and Arbitration (21)

- ❖ Obtaining
DAAB's
decision (21.4)

If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [Avoidance of Disputes]) and the following provisions shall apply.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.1 Reference of a Dispute to the DAAB

The reference of a Dispute to the DAAB (the "reference" in this Sub-Clause 21.4) shall:

- (a) if Sub-Clause 3.7 [*Agreement or Determination*] applied to the subject matter of the Dispute, be made within 42 days of giving or receiving (as the case may be) a NOD under Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*]. If the Dispute is not referred to the DAAB within this period of 42 days, such NOD shall be deemed to have lapsed and no longer be valid;
- (b) state that it is given under this Sub-Clause;
- (c) set out the referring Party's case relating to the Dispute;
- (d) be in writing, with copies to the other Party and the Engineer; and
- (e) for a DAAB of three persons, be deemed to have been received by the DAAB on the date it is received by the chairperson of the DAAB.

The reference of a Dispute to the DAAB under this Sub-Clause shall, unless prohibited by law, be deemed to interrupt the running of any applicable statute of limitation or prescription period.

❑ Disputes and Arbitration (21)

- ❖ Obtaining
DAAB's
decision (21.4)

21.4.2 The Parties' obligations after the reference

Both Parties shall promptly make available to the DAAB all information, access to the Site, and appropriate facilities, as the DAAB may require for the purposes of making a decision on the Dispute.

Unless the Contract has already been abandoned or terminated, the Parties shall continue to perform their obligations in accordance with the Contract.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.3 The DAAB's decision

The DAAB shall complete and give its decision within:

- (a) 84 days after receiving the reference; or
- (b) such period as may be proposed by the DAAB and agreed by both Parties.

However, if at the end of this period, the due date(s) for payment of any DAAB member's invoice(s) has passed but such invoice(s) remains unpaid, the DAAB shall not be obliged to give its decision until such outstanding invoice(s) have been paid in full, in which case the DAAB shall give its decision as soon as practicable after payment has been received.

The decision shall be given in writing to both Parties with a copy to the Engineer, shall be reasoned, and shall state that it is given under this Sub-Clause.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

The decision shall be binding on both Parties, who shall promptly comply with it whether or not a Party gives a NOD with respect to such decision under this Sub-Clause. The Employer shall be responsible for the Engineer's compliance with the DAAB decision.

If the decision of the DAAB requires a payment of an amount by one Party to the other Party

- (i) subject to sub-paragraph (ii) below, this amount shall be immediately due and payable without any certification or Notice; and
- (ii) the DAAB may (as part of the decision), at the request of a Party but only if there are reasonable grounds for the DAAB to believe that the payee will be unable to repay such amount in the event that the decision is reversed under Sub-Clause 21.6 [Arbitration], require the payee to provide an appropriate security (at the DAAB's sole discretion) in respect of such amount.

The DAAB proceeding shall not be deemed to be an arbitration and the DAAB shall not act as arbitrator(s).

❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

21.4.4 Dissatisfaction with DAAB's decision

If either Party is dissatisfied with the DAAB's decision:

- (a) such Party may give a NOD to the other Party, with a copy to the DAAB and to the Engineer;
- (b) this NOD shall state that it is a "Notice of Dissatisfaction with the DAAB's Decision" and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and
- (c) this NOD shall be given within 28 days after receiving the DAAB's decision.

If the DAAB fails to give its decision within the period stated in Sub-Clause 21.4.3 [The DAAB's decision], then either Party may, within 28 days after this period has expired, give a NOD to the other Party in accordance with sub-paragraphs (a) and (b) above.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Obtaining DAAB's decision (21.4)

Except as stated in the last paragraph of Sub-Clause 3.7.5 [*Dissatisfaction with Engineer's determination*], in Sub-Clause 21.7 [*Failure to Comply with DAAB's Decision*] and in Sub-Clause 21.8 [*No DAAB In Place*], neither Party shall be entitled to commence arbitration of a Dispute unless a NOD in respect of that Dispute has been given in accordance with this Sub-Clause 21.4.4.

If the DAAB has given its decision as to a matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties.

If the dissatisfied Party is dissatisfied with only part(s) of the DAAB's decision:

- (i) this part(s) shall be clearly identified in the NOD;
- (ii) this part(s), and any other parts of the decision that are affected by such part(s) or rely on such part(s) for completeness, shall be deemed to be severable from the remainder of the decision; and
- (iii) the remainder of the decision shall become final and binding on both Parties as if the NOD had not been given.

FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Amicable settlement (21.5)

Where a NOD has been given under Sub-Clause 21.4 [*Obtaining DAAB's Decision*], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth (28th) day after the day on which this NOD was given, even if no attempt at amicable settlement has been made.



FIDIC (Red Book)

❑ Disputes and Arbitration (21)

❖ Arbitration (21.6)

*The **language for communications** shall be that stated in the **Contract Data**.*

*If **no language is stated** there, the language for communications shall be the **ruling language of the Contract**.*

Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) the Dispute shall be settled by one or three arbitrators appointed in accordance with these Rules; and
- (c) the arbitration shall be conducted in the ruling language defined in Sub-Clause 1.4 [Law and Language].

❑ Disputes and Arbitration (21)

❖ Arbitration (21.6)

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination (other than a final and binding determination), instruction, opinion or valuation of the Engineer, and any decision of the DAAB (other than a final and binding decision) relevant to the Dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

In any award dealing with costs of the arbitration, the arbitrator(s) may take account of the extent (if any) to which a Party failed to cooperate with the other Party in constituting a DAAB under Sub-Clause 21.1 [Constitution of the DAAB] and/or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)].

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAAB to obtain its decision, or to the reasons for dissatisfaction given in the Party's NOD under Sub-Clause 21.4 [Obtaining DAAB's Decision]. Any decision of the DAAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced before or after completion of the Works. The obligations of the Parties, the Engineer and the DAAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

If an award requires a payment of an amount by one Party to the other Party, this amount shall be immediately due and payable without any further certification or Notice.

❑ Disputes and Arbitration (21)

- ❖ Failure to comply with DAAB's decision (21.7)

Read it yourself!

In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 21.6 [Arbitration] in which case Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 21.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.

In the case of a binding but not final decision of the DAAB, such interim or provisional measure or award shall be subject to the express reservation that the rights of the Parties as to the merits of the Dispute are reserved until they are resolved by an award.

Any interim or provisional measure or award enforcing a decision of the DAAB which has not been complied with, whether such decision is binding or final and binding, may also include an order or award of damages or other relief.

❑ Disputes and Arbitration (21)

❖ No DAAB in place (21.8)

If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAAB in place (or no DAAB is being constituted), whether by reason of the expiry of the DAAB's appointment or otherwise:

- (a) Sub-Clause 21.4 [Obtaining DAAB's Decision] and Sub-Clause 21.5 [Amicable Settlement] shall not apply; and
- (b) the Dispute may be referred by either Party directly to arbitration under Sub-Clause 21.6 [Arbitration] without prejudice to any other rights the Party may have.

FIDIC (Red Book)

❑ APPENDIX

- ❖ General conditions of dispute avoidance/adjudication agreement
- ❖ DAAB procedural rules

WILL BE TAUGHT IN CONSULTING COURSE

خبری از Notice در هیچکدام نیست! اساسا برای این
موضوع Notice دیده نشده!

❖ ماده ۵۳- حل اختلاف

۵۳-الف)

هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش آید، دو طرف می‌توانند برای حل سریع آن، قبل از درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داوری طبق بند "ج" بر حسب مورد، به روش تعیین شده در بندهای ۱ و ۲ عمل نمایند.

آیا زمان پاسخگویی استعلام مشخص است؟ آیا حق و حقوقی برای عدم
پاسخگویی به موقع دیده شده است؟

۵۳-الف-۱)

در مورد مسائل ناشی از برداشت متفاوت دو طرف از متون بخشنامه‌هایی که به استناد ماده ۲۳ قانون برنامه و بودجه از سوی سازمان برنامه و بودجه ابلاغ شده است، هر یک از دو طرف از سازمان برنامه و بودجه چگونگی اجرای بخشنامه مربوط را استعلام نماید و دو طرف طبق نظری که از سوی سازمان برنامه و بودجه اعلام می‌شود، عمل کنند.

چه شرایطی؟ جزئیات؟ بازه‌های به توافق رسیدن؟ زمانی مشخص شده؟

۵۳-الف-۲)

در مورد اختلاف نظرهایی که خارج از شمول بند ۱ است، رسیدگی و اعلام نظر درباره آن‌ها به کارشناس یا هیأت کارشناسی منتخب دو طرف واگذار شود و دو طرف طبق نظری که از سوی کارشناس یا هیأت کارشناسی، در چارچوب پیمان و قوانین و مقررات مربوط اعلام می‌گردد، عمل کنند.

خبری از Notice در هیچکدام نیست! اساسا برای این
موضوع Notice دیده نشده!

❖ ماده ۵۳- حل اختلاف

برای عدم توافق بازه ای مشخص شده؟

۵۳-ب)

در صورتیکه دو طرف در انتخاب کارشناس یا هیأت کارشناسی موضوع بند ۲، به توافق نرسند یا نظر اعلام شده طبق بندهای ۱ و ۲، مورد قبول هر یک از دو طرف نباشد برای حل اختلاف طبق بند "ج" اقدام می‌گردد.

۵۳-ج)

هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش آید، هر یک از طرف‌ها می‌تواند درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داور یا به رئیس سازمان برنامه و بودجه ارائه نماید.

رئیس سازمان برنامه و بودجه چقدر مهلت پاسخگویی دارد؟ این بخش نشریه ۴۳۱۱ در قیاس با قراردادهایی که دیدیم ریسک بالا و بلامانع است. زیرا برای پیمانکار به همراه خواهد داشت!

(پرسش)

سایت حقوق احداث

با سلام لطفا اعلام فرمایید که در ماده ۵۳ منظور از رئیس سازمان مدیریت برنامه‌ریزی چه کسی می‌باشد؟

(پاسخ)

عطف به نامه شماره ۴۱۱/۵۱/۲۵۸۶۶ مورخ ۱۳۸۱/۱۰/۲۲ به آگاهی می‌رساند:

۱- بند ج ماده ۵۳ شرایط عمومی پیمان جدید تصریح می‌نماید هرگاه در اجرا یا تفسیر مفاد پیمان بین دو طرف اختلاف نظر پیش‌آید. هر یک از طرف‌ها می‌تواند درخواست ارجاع موضوع یا موضوعات مورد اختلاف به داوری را به رئیس سازمان برنامه و بودجه ارائه نماید، که منظور رئیس سازمان مدیریت و برنامه‌ریزی کشور می‌باشد و اشاره به رئیس سازمان مدیریت و برنامه‌ریزی استان ندارد.

در تبصره (۱) ذیل بند ج ماده ۵۳ قید گردیده، چنانچه رئیس سازمان مدیریت و برنامه‌ریزی کشور با تقاضای مزبور موافق نمود مرجع حل اختلاف شورای عالی فنی خواهد بود که عبارت مذکور شورای فنی استان یا کمیته فنی استان را دربر نمی‌گیرد.

۲- در مورد فسخ پیمان نیز عینا مانند مفاد ۱ و ۲ بالا، داوری موضوع از اختیارات رئیس سازمان و برنامه‌ریزی کشور و مرجع حل اختلافات شورای عالی فنی می‌باشد.

نشریه ۴۳۱۱

□ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

تبصره-۱)

سوال اینجاست که آیا حتما باید ۵۳-الف اتفاق افتد تا بتوان به داوری رجوع کرد؟
"میتواند" در بخش دولتی لازم الاجراست؟
به خاطر دارید که در AIA به صراحت ذکر شده بود در شرایطی که INITIAL
DECISION MAKER هنوز تصمیمی نگرفته است شرایط MEDIATION عملیاتی
نیست؟ اما از این دست ادبیات به هیچ عنوان در ۴۳۱۱ ذکر نشده!

چنانچه رئیس سازمان یاد شده با تقاضای مورد اشاره موافقت نمود، مرجع حل اختلاف شورای عالی فنی خواهد بود.

تبصره-۲)

رسیدگی و اعلام نظر شورای عالی فنی، در چارچوب پیمان و قوانین و مقررات مربوط انجام می شود. پس از اعلام نظر شورای یاد شده، طرف ها بر طبق آن عمل می نمایند.

چه شرایطی؟ جزئیات؟ بازه های زمانی بررسی؟ آیا رای نهایی و لازم الاجراست؟

شرایط قبول داوری قراردادهای از جانب شورای عالی فنی کدامند؟

1. پیش بینی داوری شورای عالی فنی در اسناد و مدارک پیمان
□ مانند ماده ۵۳ شرایط عمومی ۴۳۱۱
2. عمرانی بودن محل اعتبار طرح
3. عدم طرح اختلاف در مراجع قضایی بر اساس درخواست خواهان
4. عدم تسویه حساب نهایی و یا هر گونه توافق مبنی بر عدم ارجاع اختلاف به داوری

مقایسه کنید با شرایط تفکیکی که در AIA قبل از اتمام بازه اصلاحات کار و پس از آن تا مدت ۱۰ سال مقرر شده!

**اگر در قرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند،
مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟**

به نمونه ای که در سایت **claimlaws** قرار داده شده نگاهی بیندازیم!

اگر در قرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند، مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟

به نمونه ای که در سایت [claimlaws](http://claimlaws.com) قرار داده شده نگاهی بیندازیم!

تاریخ رای نهایی: ۱۳۹۳/۱۰/۲۴ شماره رای نهایی: ۹۳۰۹۹۷۰۲۲۰۱۰۱۳۹۶

رای بدوی (نمونه)

در خصوص دعاوی شرکت س به نمایندگی م.ش. به طرفیت دهیاری صالح آباد شرقی آقای م.ع. به خواسته مطالبه مبلغ ** ریال بابت تعدیل صورت وضعیت قطعی قرارداد شماره ** مورخ ** به انضمام ضرر و زیان و دیرکرد و هزینه‌های دادرسی از خواننده، نظر به اینکه حسب ماده ۵۳ قرارداد فی‌مابین خواهان و خوانده در صورت اختلاف فی‌مابین، داور می‌بایست اعلام نظر نماید فلذا طرح دعوی در دادگستری و جاهتی نداشته دادگاه به استناد ماده ۲ قانون آئین دادرسی مدنی قرار عدم استماع دعوی را صادر و اعلام می‌نماید. قرار صادره ظرف ۲۰ روز از تاریخ ابلاغ قابل تجدیدنظر در دادگاه تجدیدنظر استان تهران می‌باشد.

رئیس شعبه ۴ دادگاه عمومی حقوقی شهرری - عسگری توانی

اگر در قرارداد ذکر شده باشد که طرفین "می‌توانند" به داوری مراجعه کنند، مراجعه به داوری اختیاری خواهد بود؟ یا طرفین مکلف به مراجعه به داوری هستند؟

به نمونه ای که در سایت claimlaws قرار داده شده نگاهی بیندازیم!

رأی دادگاه تجدید نظر (نمونه)

تجدیدنظرخواهی شرکت س. از دادنامه شماره ۹۳۰۰۴۸۴ مورخ ۱۳۹۳/۱۱/۲۲ صادره از شعبه چهارم دادگاه عمومی شهرری که به موجب آن قرار عدم استماع دعوی تجدیدنظرخواه به خواسته مطالبه مبلغ ** ریال بابت تعدیل صورت وضعیت قطعی قرارداد شماره ** مورخ ** به انضمام ضرر و زیان و دیرکرد و هزینه‌های دادرسی صادر گردیده وارد و موجه نیست و رأی صادره صحیحاً و با رعایت اصول و مقررات و قواعد دادرسی اصدار گردیده و با عنایت به اینکه مطابق مواد ۴۵۴ و ۴۵۵ قانون آئین دادرسی در امور مدنی تعیین داور و کیفیت مراجعه به داوری منوط به تراضی طرفین دارای اهلیت برای اقامه دعوی گردیده و قید کلمه می‌تواند در قرارداد استنادی موجب خروج شرط داوری از توافق طرفین که بر اساس اراده آنها صورت پذیرفته نخواهد شد مضافاً بر اینکه موضوع داوری و صلاحیت دادگاه با بقاء شرط موصوف مورد ایراد تجدیدنظرخوانده نیز قراگرفته است بنابراین با وصف مراتب تجدیدنظرخواهی را در مجموع غیرموجه تشخیص و با رد اعتراض دادنامه معترض‌عنه را با استناد به ماده ۳۵۳ از قانون مرقوم تأیید می‌نماید این رأی قطعی است.

نشریه ۴۳۱۱

□ نشریه ۴۳۱۱

❖ ماده ۵۳- حل اختلاف

۵۳-د)

ارجاع موضوع یا موضوعات مورد اختلاف به شورای عالی فنی، تغییراتی در تعهدات قراردادی دو طرف نمی‌دهد و موجب آن نمی‌شود که یکی از دو طرف به تعهدات قراردادی خویش عمل نکند.

□ نکته مهم در EPC صنعتی

❖ ماده ۴-۵۷

۴-۵۷-

با تأیید صورت وضعیت قطعی از سوی دو طرف، پیمانکار، از هر گونه ادعایی علیه کارفرما در رابطه با پیمان، صرف نظر می کند، مگر در مورد ادعاهایی که قبل از تأیید صورت وضعیت قطعی مطرح کرده باشد، اما حل و فصل آن توسط دو طرف، به زمان های بعد موکول شده باشد.

Parties' Considerations

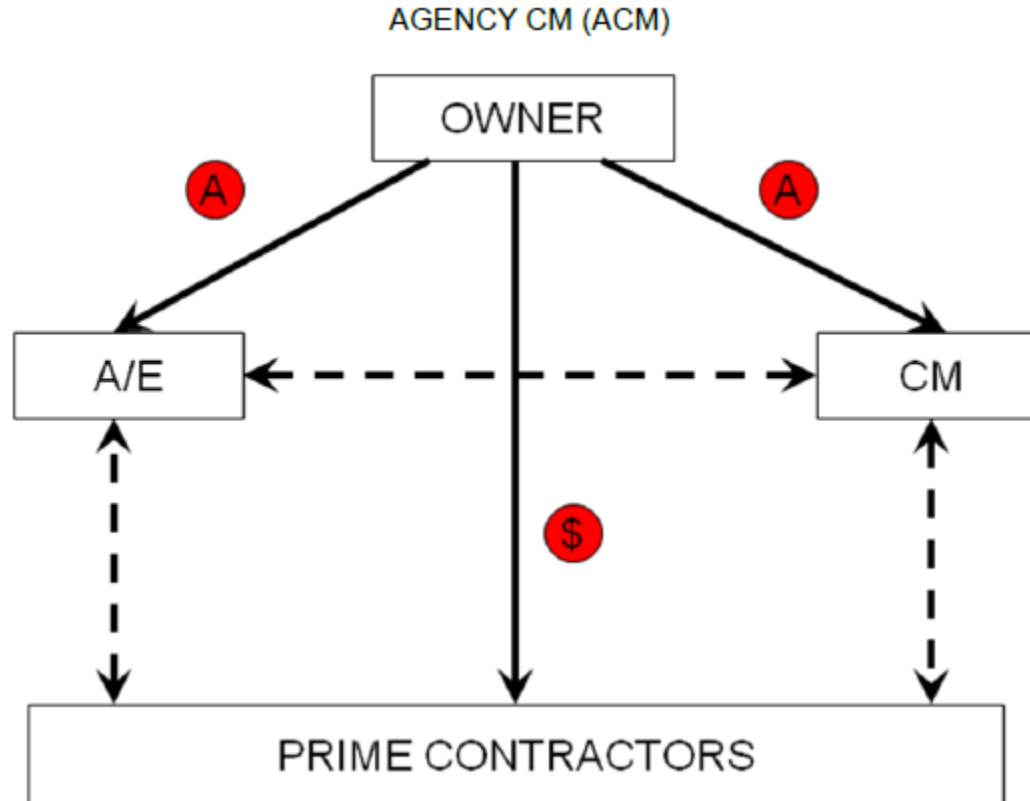
(Construction Manager)

Construction manager's considerations

- ❑ The **CM** can be hired by the **Owner** as **its construction representative**, in which case the **CM** is responsible for **representing the Owner** and **protecting** the best **interests of the Owner**.
 - ❖ This arrangement is typically called **“agency CM.”**

Project delivery system

Agency CM (ACM) (CM-for-fee)

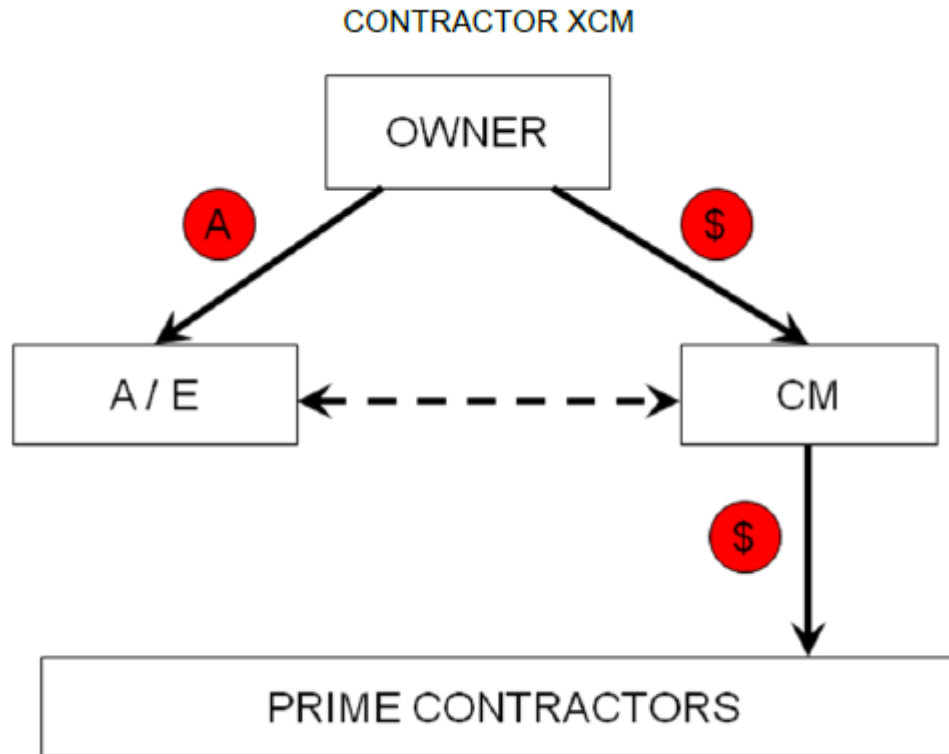


Construction manager's considerations

- ❑ In **other cases**, the CM may have a **financial interest** in the Project and may be performing the Project at a pre-established maximum cost, often called a “**guaranteed maximum price,**” or GMP.
 - ❖ The CM may be working in a **GMP arrangement** with some sharing of the savings **below** the GMP.
 - ❖ These types of arrangements are often called **“CM at Risk.”**

Project delivery system

Contractor XCM (CM-at-Risk)



Construction manager's considerations

Other variations exist, but the discussion of these relationships is beyond the scope of this course.

Project time

- ❑ **Even** with the **best planning**, **delays might occur**.
- ❑ The **CM** must be able to **foresee delays** and **take proactive measures** to **mitigate** or **recover** from delays.
- ❑ Often, **Project delays** will be caused by the **performance or lack of performance** of one or more of the **Project participants**.
 - ❖ The **CM** must keep **detailed accurate records** of the **performance** of **all the parties** so that it can evaluate liability for delays.

Once again, the **CM** is expected to be the **expert** who has the **responsibility** to **sort out** **Project delays** for the **benefit of all parties** including the **Owner**.

Managing changes

- ❑ Along with **managing** time and schedule, the **CM** must **manage changes** and the **change order process**.
- ❑ **Change orders** must address the **additional cost** of the **changed work** and the **time** required to perform the changed work.
- ❑ By **properly maintaining**
 - ❖ Current **CPM schedule**
 - ❖ **Detailed performance records**,
 - ❖ Seeking **adequate information from the contractor**,the CM should be able to evaluate **time extensions** and **additional costs**.

Managing changes

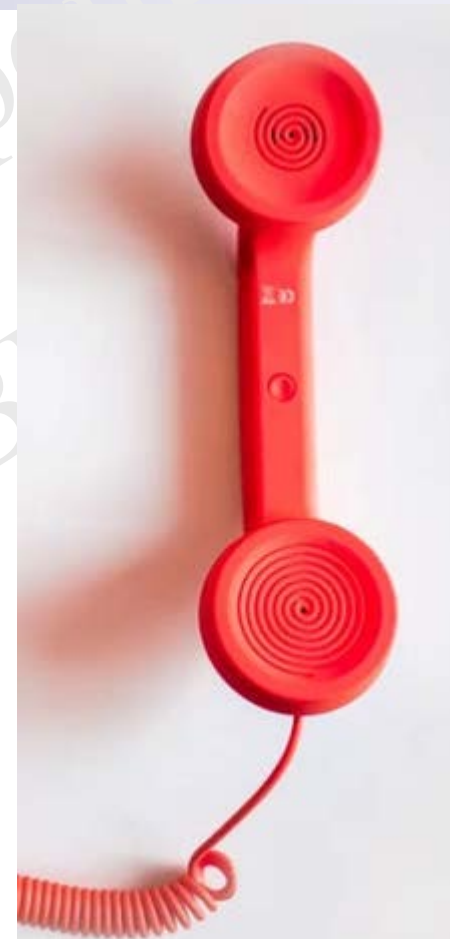
- ❑ All too often, **only additional costs** resulting from changes are **addressed**, and additional time or time extension requests are **left out** of the change order.

*The “postponing” or “delaying” of the management and assessment of **time** is not recommended and usually results in unnecessary disputes.*

*The **CM** should be proactive in **preventing** this common problem.*

Alternative dispute resolution

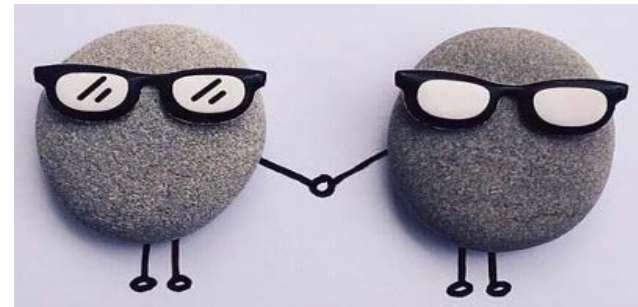
- ☐ An **owner** may choose to have **counsel involved**.
- ☐ The **CM** should be prepared to **discuss all aspects** of the **disputes** and **claims** with the **owner's counsel**.
- ☐ The **owner** and its **outside counsel** may choose to **engage outside experts** in **forensic scheduling**, **accounting**, and **other technical matters**.
- ☐ The **CM** needs to **interface** with **those experts** to discuss **project details**.



Alternative dispute resolution

Some important points to remember as a CM while working with counsel and experts

- ❑ Remember you are on the **same side** (project success)
- ❑ Understand that **difficult questions** need to be asked
- ❑ Be **clear and open** as to any **weaknesses** even in the contract and methods you proposed
- ❑ The **CM's primary role** is to **provide record** and **testimony** of the facts
- ❑ Everyone has the benefit of conception but the **CM** has the **benefit of contemporaneous insight**
- ❑ If you have the benefit of **counsel or expertise** during the **construction phase before arising the dispute**, make use of it.



Alternative dispute resolution

Some important points to remember as a CM in arbitration (or litigation)

- ❑ The CM will likely be a **key percipient witness** on behalf of the owner in the **arbitration hearing** and may be responsible for **organizing the document production** allowed by the arbitration panel.



Alternative dispute resolution

Some important points to remember as a CM in arbitration (or litigation)

- ❑ The CM may become involved in **legal discovery** if they are required to produce project **documentation**.
- ❑ A **well organized management process** makes the discovery process **much easier**.

The CM should protect and preserve project documentation, in accordance with documentation retention policies...

CMAA Claims Management Guidelines 2018

Parties' Consideration
(General Contractor and Subcontractors)

General contractor's considerations – CPM Schedules

- ❑ Trying to recreate the **progress on a Project**, after it is completed, is **far more laborious** than contemporaneously updating the Project schedule.
- ❑ CPM schedules consider not only time but resources.
 - ❖ It is the efficient use of **resources** that will allow the Contractor to **maximize its profits**.
- ❑ If delays arise on the Project, the **CPM schedule** is probably the **most effective tool** that the Contractor has to **demonstrate the delays** that occurred to both critical and noncritical activities.

General contractor's considerations – Risk to subcontractors

- ❑ The **General Contractor** may **pass some requirements** on to its Subcontractors.
- ❑ **Passing risk** to the **Subcontractors** is not always as easy as including a general pass-through clause.
- ❑ For example, a subcontract may include the following **general language**:
“All of the conditions of the Contract between the Owner and the General Contractor are incorporated herein by reference and are binding upon the Subcontractor.”



Subcontractor's considerations – Schedule

- ❑ Normally, the General Contractor **dictates** the Subcontractor's schedule.
- ❑ At times, the **schedule requirements** incorporated into subcontract agreements **may be undefined or unreasonable**.

For example, subcontract agreements commonly state that the Subcontractor will perform its work in accordance with the General Contractor's schedule and will adjust accordingly so as not to delay the job.

- ❖ Since this statement **leaves** the work period undefined, the Subcontractor may have to **accelerate** its work for the **entire duration** of the job.

Subcontractor's considerations – Schedule

- ❑ **Subcontractors** can **insist** on a lot of things regarding their contracts, but **few Subcontractors** can expect **much success** with this.
- ❑ **What** the Subcontractor does **need** to make **clear** is that it **bid** the Project for the **Contract start** and **completion dates** in the **bid**.
- ❑ The Subcontractor will have its **own idea** of **how long** it needs to perform the work, and **if** the **General Contractor** requires a **shorter duration** or a **work sequence** that the **Subcontractor did not contemplate** in its **bid**,
the Subcontractor should **carefully examine** its **ability to perform** and request a **Contract increase** **before** agreeing to a change in the schedule.

Subcontractor's considerations – Schedule

The Subcontractor should insist that schedules be included in the terms of the subcontract agreement.

Subcontractor's considerations – Contract language

- ☐ **Subcontractors** should seriously consider **whether** to **bid on contracts** with **extensive exculpatory (General Contractor protective)** language.
- ☐ **Many General Contractors** have their own **specific contracts written** to suit them, and they **strongly resist** any Subcontractor changes to the language.
- ☐ A **Subcontractor** should review the **General Contractor's agreement** before bidding and **find out** if the General Contractor is **open** to Contract changes.

Subcontractor's considerations – Contract language

- ❑ Subcontractors must become **thoroughly familiar** with **all clauses** in their contracts.

For instance, it is common to see clauses that state that for Subcontractor claims, the General Contractor will “pass through the claim to the Owner.”

The Subcontractor will **accept whatever damages** the General Contractor is able to **collect** and will also share in any costs for litigation or arbitration.

Clauses of this nature may not sound fair, but they are common.

Subcontractor's considerations – Contract language

❑ It is also **common** to see clauses that **state that**

if the Subcontractor is delayed by another Subcontractor, it must seek compensation directly from that Subcontractor.

- ❖ Obviously, the clause is **not desirable** and **creates legal problems** for the **Subcontractor** who suffers the loss.
- ❖ Clearly, the **General Contractor** may **not always** be **motivated to act in the Subcontractor's best interests.**

Parties' Consideration

(Design Consultant)

Designer as owner's representative

- ☐ **Designers** who act as the **Owner's representative** during construction should require the Contractor to **submit a detailed schedule for construction**.
- ☐ The **Designer** then **reviews** the **schedule submitted** by the Contractor and **monitors progress** during construction.
- ☐ It is **advisable** to **establish procedures ahead of time** with the Contractor for schedule **monitoring**.

Designer inputs

- ☐ Normally, the **Designer** provides **input** on the **duration** of the Project.
- ☐ Such **observations** should **not be formed** or communicated **casually**.
- ☐ It is a **subject** that should be **analyzed** in a careful, **detailed manner** to determine the **time required** to perform the work considering the **Project**, the **site**, the **weather**, and so **forth**.

Changes

- ❑ **If** the Designer as the **Owner's representative** makes a **change** to the Project because of **Owner decisions or errors and omissions** in the plans and specifications, it should **assess the time effect** of that change on the Project.
 - ❖ Designers should **resist** the **tendency to deny** any **time extension** simply because they **fear** it might negatively reflect upon them.
- ❑ **If** a **change** necessitates a **valid extension** to the duration of the Project, the **problem** can be **resolved much sooner** and usually at **far less cost** if assessed (fairly and impartially) **as soon as it arises**.

- ❑ Being the Project Designer and the Owner's representative is a **difficult dual role** because there is a perceived, if not an actual, conflict of interest.
- ❑ Virtually **all projects** have design problems, this is **one of the reasons** construction contracts are **unique** in having a changes provision.
- ❑ If a Contractor submits a change request because of a **design problem**, the Designer must take all **necessary measures** to ensure that its **decisions** are fair and impartial.

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