



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

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	تعلیق	در صورت عدم موافقت پیمانکار با تعلیق 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 جدید

ماده ۶۹ - خاتمه پیمان توسط پیمانکار ناشی از نقض تعهدات کارفرما^{۴۶}

- ۱-۶۹ پیمانکار می تواند در موارد زیر با اعلام کتبی قبلی و با رعایت مفاد بند ۶۹-۲ پیمان را خاتمه دهد:
- ۱-۶۹-۱ تأخیر در پرداخت پیش پرداخت و یا هر یک از اقساط آن، مطابق بند ۵۳-۱ و پیوست شماره ۵ پیمان، به مدت ۹۱ (نودویک) روز از زمان پیش بینی شده در اسناد پیمان؛
- ۱-۶۹-۲ تأخیر در پرداخت صورت وضعیت های تأیید شده از سوی کارفرما، به مدت ۹۱ (نودویک) روز از زمان پیش بینی شده در اسناد پیمان؛

Potential killer contract clauses – Termination by the contractor

❑ قرارداد همسان EPC صنعتی جدید

۳-۱-۶۹ تأخیر در تحویل قسمتی از زمین که باعث توقف اجرای بیش از ۲۵ (بیست و پنج) درصد مبلغ بخش ساختمان و نصب پیمان گردد و مدت تأخیر بیش از ۹۱ (نود و یک) روز به طول انجامد و یا تأخیر در تحویل قسمتی از زمین که باعث توقف اجرای کمتر از ۲۵ (بیست و پنج) درصد مبلغ بخش ساختمان و نصب پیمان گردد و مدت تأخیر، بیش از ۱۸۲ (صد و هشتاد و دو) روز به طول انجامد؛

Potential killer contract clauses – Termination by the contractor

❑ قرارداد همسان EPC صنعتی جدید

- ۴-۱-۶۹ تأخیر در اخذ بیمه نامه ها، تأمین تسهیلات دوران ساختمان و نصب و انجام کار و تأمین مصالح و تجهیزات در تعهد کارفرما، موضوع مواد ۴۴، ۴۶ و ۴۷ به نحوی که بر اثر این تأخیرها به مدت ۹۱ (نودویک) روز متوالی، امکان انجام حداقل ۲۵ (بیست و پنج) درصد از میزان کار پیش بینی شده برای این ماه ها برای پیمانکار فراهم نشود؛
- ۵-۱-۶۹ عدم صدور دستور شروع مجدد کار توسط کارفرما در پایان مدت تعلیق مطابق زیربند ۳-۱-۶۵؛
- ۶-۱-۶۹ تجاوز از حد مجاز تغییر در کارها مطابق بند ۳-۴۹؛
- ۷-۱-۶۹ عدم تحقق شرایط شروع کار ناشی از قصور کارفرما، موضوع تبصره ذیل بند ۲-۵ موافقت نامه؛

Potential killer contract clauses – Termination by the contractor

□ قرارداد همسان EPC صنعتی جدید

۳-۱-۶۵ پیمانکار باید ظرف ۱۴ (چهارده) روز قبل از پایان مدت تعلیق، موضوع را برای اتخاذ تصمیم نهایی، به کارفرما منعکس کند. هرگاه پس از ۱۴ (چهارده) روز از دریافت درخواست پیمانکار، دستور شروع مجدد کار از سوی کارفرما به پیمانکار صادر نشود، پیمانکار می تواند مطابق ماده ۶۹، پیمان را خاتمه دهد. کارفرما می تواند با رعایت زیربند ۱-۱-۶۵ مدت تعلیق را در مجموع تا سقف ۹۱ (نودویک) روز رأساً تمدید نموده و به پیمانکار ابلاغ نماید. لیکن تمدید مدت تعلیق بیش از سقف مذکور تنها در صورت موافقت پیمانکار، امکان پذیر می باشد.

۱-۱-۶۵ کارفرما می تواند در طول مدت اجرای پیمان، دستور تعلیق قسمتی از کار و یا تمام کار را در ۲ (دو) نوبت و مجموعاً حداکثر برای مدت ۹۱ (نودویک) روز صادر کند. در ابلاغیه کارفرما، باید تاریخ شروع و مدت تعلیق، مشخص شود. پیمانکار موظف است پس از دریافت دستور کارفرما، اجرای آن قسمت از کار و یا کل کار را به حالت تعلیق درآورد.

Potential killer contract clauses – Termination by the contractor

❑ قرارداد همسان EPC صنعتی جدید

۶۹-۲ در صورتی که به علت هریک از موارد بند ۶۹-۱، پیمانکار در نظر داشته باشد پیمان را خاتمه دهد، وی باید مراتب را با درج موارد نقض تعهدات کارفرما به وی اعلام نماید. اگر کارفرما ظرف ۲۱ (بیست و یک) روز از اعلام پیمانکار، تعهد خود را انجام ندهد و یا طرفین پیمان ظرف همان مهلت، در مورد ادامه کار به توافق نرسند، موارد اختلاف مطابق ماده ۷۵ مورد بررسی قرار می گیرد. در صورت تأیید نقض تعهد کارفرما توسط مراجع ذیصلاح موضوع ماده ۷۵، پیمانکار می تواند پیمان را خاتمه دهد که در این صورت وی باید طی ابلاغیه ای خاتمه پیمان را به کارفرما اعلام نماید. کارفرما و پیمانکار موظفاند اقدام های پس از آن را، بر اساس ماده ۶۷ اجرا نمایند.

Potential killer contract clauses – Termination by the owner for cause

What does “Substantial Breach” mean?

- ❑ It is common for construction 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) (۱)

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

۴۶-ب-۱) (۲)

واگذاری پیمان به شخص ثالث.

۴۶-ب-۲) (۳)

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 مشمول **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

اقدامات پس از خاتمه دادن پیمان به شرح زیر است:

۴۸-الف)

کارفرما آن قسمت از کارها را که ناتمام است، طبق مقررات درج شده در ماده ۴۱ تحویل قطعی و آن قسمت را که پایان یافته است طبق مقررات تعیین شده در ماده ۳۹ تحویل موقت می‌گیرد. اگر معایبی در کارهای نیمه تمام مشاهده شود، پیمانکار مکلف است، به هزینه خود، در مدت زمان مناسبی که با توافق کارفرما تعیین می‌شود، رفع عیب نماید و سپس تحویل قطعی دهد. در صورتیکه پیمانکار در مهلت مقرر رفع نقص نکند، کارفرما طبق بند "د" ماده ۳۲ اقدام به رفع نقص می‌کند.

تا حدی که مورد لزوم و درخواست کارفرماست، پیمانکار باید نقشه‌ها، کاتالوگ‌ها، قراردادهای با پیمانکار جزء و سایر مدارک اجرای کار را تحویل کارفرما دهد.

۴۸-ب)

صورت وضعیت کارهای انجام شده طبق ماده ۴۰ تهیه می‌شود.

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

Potential killer contract clauses – Suspension by the owner for convenience

نشریه ۴۳۱۱ □

❖ ماده ۴۹- تعلیق

آیا اشاره ای به دلیل تعلیق مانند AIA شده است؟

۴۹-الف)

کارفرما می‌تواند در مدت پیمان، اجرای کار را برای یک بار و حداکثر سه ماه معلق کند در این صورت باید مراتب را با تعیین تاریخ شروع تعلیق به پیمانکار اطلاع دهد. در مدت تعلیق، پیمانکار مکلف است که تمام کارهای انجام شده، مصالح و تجهیزات پای کار، تاسیسات و ساختمان‌های موقت را براساس پیمان به‌طور شایسته، حفاظت و حراست کند.

کدام بالاسری؟

1. بالاسری پروژه

2. بالاسری سازمان

۴۹-ب)

کارفرما هزینه‌های بالاسری پیمانکار را در دوران تعلیق، به میزان تعیین شده در اسناد و مدارک پیمان، به پیمانکار می‌پردازد. اگر در اسناد و مدارک پیمان، تعیین هزینه‌های یاد شده، به توافق طرفین در زمان ابلاغ تعلیق موکول شده باشد، کارفرما در مورد میزان آن با پیمانکار توافق می‌نماید. در صورتی که در اسناد و مدارک پیمان، هیچ نوع پیش‌بینی برای پرداخت هزینه‌های بالاسری پیمانکار در دوره تعلیق نشده باشد، کارفرما ماهانه مبلغی معادل ۱۰ درصد متوسط کارکرد فرضی ماهانه به پیمانکار می‌پردازد. اگر به دستور کارفرما، قسمتی از کار متوقف شود، بابت هزینه‌های پیش‌گفته در مدت تعلیق، ماهانه مبلغی معادل ۱۰ درصد متوسط کارکرد فرضی ماهانه، به تناسب مبلغ کار متوقف شده، به پیمانکار پرداخت می‌شود. برای تعیین هزینه تعلیق، کسر ماه به تناسب ارائه می‌شود.

Potential killer contract clauses – Suspension by the owner for convenience

نشریه ۴۳۱۱ □

❖ ماده ۴۹- تعلیق

(۴۹-تبصره)

در صورتیکه پیش از آغاز عملیات موضوع پیمان، تعلیق پیمان از سوی کارفرما ابلاغ شود، ۸۰ درصد هزینه تعلیق محاسبه شده طبق این بند، به پیمانکار پرداخت می‌شود.

اگر هزینه ماشین آلات به عنوان بالاسری منظور شده باشد، پیمانکار مجاز است دو بار این هزینه را اخذ کند؟

(۴۹-ج)

کارفرما و پیمانکار در مورد ماشین‌آلاتی که پیمانکار مایل است در مدت تعلیق از کارگاه خارج نماید، بدون پرداخت هیچ نوع هزینه‌ای، توافق می‌کنند اجاره مربوط به دوران توقف آن تعداد از ماشین‌آلات که در کارگاه باقی می‌مانند، براساس توافق طرفین به پیمانکار پرداخت می‌شود.

(۴۹-د)

در صورتیکه تعلیق بیش از سه ماه ضروری باشد، کارفرما می‌تواند با موافقت پیمانکار، مدت تعلیق را برای یک بار و حداکثر سه ماه، با شرایط پیش‌گفته افزایش دهد. در صورت عدم موافقت پیمانکار با تعلیق بیش از سه ماه، پیمان خاتمه یافته و طبق ماده ۴۸ عمل می‌شود.

(۴۹-ه)

هرگاه عوامل موجب تعلیق کار برطرف شود، کارفرما با تعیین مهلتی برای پیمانکار به منظور آماده نمودن کارگاه، تاریخ شروع مجدد کار را به پیمانکار ابلاغ می‌کند.

Recommended clauses – Termination or suspension (GC and owner)

☐ FIDIC-2017

- 1. Employer's suspension**
- 2. Termination by employer**
- 3. Suspension and termination by contractor**

Potential killer contract clauses – Employer's suspension

❑ FIDIC-2017

❖ Employer's suspension (8.9)

Many forms of agreements state that if suspension is a result of **contractor's fault, then contractor is not entitled to EOT and Compensation!**

The Engineer may at any time instruct the Contractor to suspend progress of part or all of the Works, which instruction shall state the date and cause of the suspension.

During such suspension, the Contractor shall protect, store and secure such part or all of the Works (as the case may be) against any deterioration, loss or damage.

To the extent that the cause of such suspension is the responsibility of the Contractor, Sub-Clauses 8.10 [Consequences of Employer's Suspension], 8.11 [Payment for Plant and Materials after Employer's Suspension] and 8.12 [Prolonged Suspension] shall not apply.

What damages should be paid?

Consequences of Employer's Suspension + Plant and materials + Prolonged suspension

---AIA = Any adjustment in **cost and profit**

Potential killer contract clauses – Employer's suspension

❑ FIDIC-2017

❖ Consequences of Employer's suspension (8.10)

We talked about this. Remember?

If the Contractor suffers delay and/or incurs Cost from complying with an Engineer's instruction under Sub-Clause 8.9 [Employer's Suspension] and/or from resuming the work under Sub-Clause 8.13 [Resumption of Work], 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.

The Contractor shall not be entitled to EOT, or to payment of the Cost incurred, in making good:

- (a) the consequences of the Contractor's faulty or defective (design, if any) workmanship, Plant or Materials; and/or
- (b) any deterioration, loss or damage caused by the Contractor's failure to protect, store or secure in accordance with Sub-Clause 8.9 [Employer's Suspension].

Remember that this was also mentioned in AIA, however 4311 is silent about that

Potential killer contract clauses – Employer's suspension

❑ FIDIC-2017

❖ Payment for plant and materials after employer's suspension (8.11)

The Contractor shall be entitled to payment of the value (as at the date of suspension instructed under Sub-Clause 8.9 [Employer's Suspension]) of Plant and/or Materials which have not been delivered to Site, if:

- (a) the work on Plant, or delivery of Plant and/or Materials, has been suspended for more than 28 days and
 - (i) the Plant and/or Materials were scheduled, in accordance with the Programme, to have been completed and ready for delivery to the Site during the suspension period; and
 - (ii) the Contractor provides the Engineer with reasonable evidence that the Plant and/or Materials comply with the Contract; and
- (b) the Contractor has marked the Plant and/or Materials as the Employer's property in accordance with the Engineer's instructions.



Potential killer contract clauses – Employer's suspension

❑ FIDIC-2017

❖ Prolonged suspension (8.12)

If the suspension under Sub-Clause 8.9 [Employer's Suspension] has continued for more than 84 days, the Contractor may give a Notice to the Engineer requesting permission to proceed.

If the Engineer does not give a Notice under Sub-Clause 8.13 [Resumption of Work] within 28 days after receiving the Contractor's Notice under this Sub-Clause, the Contractor may either:

(a) agree to a further suspension, in which case the Parties may agree the EOT and/or Cost Plus Profit (if the Contractor incurs Cost), and/or payment for suspended Plant and/or Materials, arising from the total period of suspension;

or (and if the Parties fail to reach agreement under this sub-paragraph (a))

(b) after giving a (second) Notice to the Engineer, treat the suspension as an omission of the affected part of the Works (as if it had been instructed under Sub-Clause 13.3.1 [Variation by Instruction]) with immediate effect including release from any further obligation to protect, store and secure under Sub-Clause 8.9 [Employer's Suspension]. If the suspension affects the whole of the Works, the Contractor may give a Notice of termination under Sub-Clause 16.2 [Termination by Contractor].

In case of prolonged suspension:

1. EOT + Cost + Profit
 2. Plant and materials
- Or

Omission of the affected part or Terminate the contract



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Termination for
contractor's
default (15.2)

Termination of the Contract under this Clause shall not prejudice any other rights of the Employer under the Contract or otherwise.

15.2.1 Notice

The Employer shall be entitled to give a Notice (which shall state that it is given under this Sub-Clause 15.2.1) to the Contractor of the Employer's intention to terminate the Contract or, in the case of sub-paragraph (f), (g) or (h) below a Notice of termination, if the Contractor:

- (a) fails to comply with:
 - (i) a Notice to Correct;
 - (ii) a binding agreement, or final and binding determination, under Sub-Clause 3.7 [*Agreement or Determination*]; or
 - (iii) a decision of the DAAB under 21.4 [*Obtaining DAAB's Decision*] (whether binding or final and binding)

Homework 5

Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

❖ Termination for
contractor's
default (15.2)

Homework 5
Compare this clause with the
one (termination by the owner
for cause) provided by
AIA A201-2017 and 4311

and such failure constitutes a material breach of the Contractor's obligations under the Contract;

- (b) abandons the Works or otherwise plainly demonstrates an intention not to continue performance of the Contractor's obligations under the Contract;
- (c) without reasonable excuse fails to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension] or, if there is a maximum amount of Delay Damages stated in the Contract Data, his failure to comply with Sub-Clause 8.2 [Time for Completion] is such that the Employer would be entitled to Delay Damages that exceed this maximum amount;
- (d) without reasonable excuse fails to comply with a Notice of rejection given by the Engineer under Sub-Clause 7.5 [Defects and Rejection] or an Engineer's instruction under Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it;
- (e) fails to comply with Sub-Clause 4.2 [Performance Security];
- (f) subcontracts the whole, or any part of, the Works in breach of Sub-Clause 5.1 [Subcontractors], or assigns the Contract without the required agreement under Sub-Clause 1.7 [Assignment];
- (g) becomes bankrupt or insolvent; goes into liquidation, administration, reorganisation, winding-up or dissolution; becomes subject to the appointment of a liquidator, receiver, administrator, manager or trustee; enters into a composition or arrangement with the Contractor's creditors; or any act is done or any event occurs which is analogous to or has a similar effect to any of these acts or events under applicable Laws;

Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Termination for
contractor's
default (15.2)

Homework 5
Compare this clause with the
one (termination by the owner
for cause) provided by
AIA A201-2017 and 4311

or if the Contractor is a JV:

- (i) any of these matters apply to a member of the JV, and
- (ii) the other member(s) do not promptly confirm to the Employer that, in accordance with Sub-Clause 1.14(a) [*Joint and Several Liability*], such member's obligations under the Contract shall be fulfilled in accordance with the Contract; or
- (h) is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract.



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Termination for
contractor's
default (15.2)

Homework 5
Compare this clause with the
one (termination by the owner
for cause) provided by
AIA A201-2017 and 4311

15.2.2 Termination

Unless the Contractor remedies the matter described in a Notice given under Sub-Clause 15.2.1 [Notice] within 14 days of receiving the Notice, the Employer may by giving a second Notice to the Contractor immediately terminate the Contract. The date of termination shall be the date the Contractor receives this second Notice.

However, in the case of sub-paragraph (f), (g) or (h) of Sub-Clause 15.2.1 [Notice], the Employer may by giving a Notice under Sub-Clause 15.2.1 immediately terminate the Contract and the date of termination shall be the date the Contractor receives this Notice.



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

❖ Termination for
contractor's
default (15.2)

15.2.3 After termination

After termination of the Contract under Sub-Clause 15.2.2 [Termination], the Contractor shall:

- (a) comply immediately with any reasonable instructions included in a Notice given by the Employer under this Sub-Clause:
 - (i) for the assignment of any subcontract; and
 - (ii) for the protection of life or property or for the safety of the Works;
- (b) deliver to the Engineer:
 - (i) any Goods required by the Employer,
 - (ii) all Contractor's Documents, and
 - (iii) all other design documents made by or for the Contractor to the extent, if any, that the Contractor is responsible for the design of part of the Permanent Works under Sub-Clause 4.1 [Contractor's General Obligations]; and
- (c) leave the Site and, if the Contractor does not do so, the Employer shall have the right to expel the Contractor from the Site.

Homework 5

Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Termination for contractor's default (15.2)

15.2.4 Completion of the Works

After termination under this Sub-Clause, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and/or these entities may then use any Goods and Contractor's Documents (and other design documents, if any) made by or on behalf of the Contractor to complete the Works.

After such completion of the Works, the Employer shall give another Notice to the Contractor that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall then promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold (to the extent permitted by applicable Laws) by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

Homework 5
Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

❖ Payment after termination for contractor's default (15.4)

The Employer may withhold payment to the Contractor of the amounts agreed or determined under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default] until all the costs, losses and damages (if any) described in the following provisions of this Sub-Clause have been established.

After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor's Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of:

- (a) the additional costs of execution of the Works, and all other costs reasonably incurred by the Employer (including costs incurred in clearing, cleaning and reinstating the Site as described under Sub-Clause 11.11 [Clearance of Site]), after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default];
- (b) any losses and damages suffered by the Employer in completing the Works; and
- (c) Delay Damages, if the Works or a Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor's Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.



Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

❖ Termination for
employer's convenience

(15.5)

❖ “Performance security”
also known as
“performance bond”

The Employer shall be entitled to terminate the Contract at any time for the Employer's convenience, by giving a Notice of such termination to the Contractor (which Notice shall state that it is given under this Sub-Clause 15.5).

After giving a Notice to terminate under this Sub-Clause, the Employer shall immediately:

- (a) have no right to further use any of the Contractor's Documents, which shall be returned to the Contractor, except those for which the Contractor has received payment or for which payment is due under a Payment Certificate;
- (b) if Sub-Clause 4.6 [Co-operation] applies, have no right to allow the continued use (if any) of any Contractor's Equipment, Temporary Works, access arrangements and/or other of the Contractor's facilities or services; and
- (c) make arrangements to return the Performance Security to the Contractor.

Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Termination for
employer's
convenience
(15.5)

Termination under this Sub-Clause shall take effect 28 days after the later of the dates on which the Contractor receives this Notice or the Employer returns the Performance Security. Unless and until the Contractor has received payment of the amount due under Sub-Clause 15.6 [Valuation after Termination for Employer's Convenience], the Employer shall not execute (any part of) the Works or arrange for (any part of) the Works to be executed by any other entities.

After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [Contractor's Obligations After Termination].

Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

❖ Valuation after termination for employer's convenience (15.6)

After termination under Sub-Clause 15.5 [Termination for Employer's Convenience] the Contractor shall, as soon as practicable, submit detailed supporting particulars (as reasonably required by the Engineer) of:

- (a) the value of work done, which shall include:
 - (i) the matters described in sub-paragraphs (a) to (e) of Sub-Clause 18.5 [Optional Termination], and
 - (ii) any additions and/or deductions, and the balance due (if any), by reference to the matters described in sub-paragraphs (a) and (b) of Sub-Clause 14.13 [Issue of FPC]; and
- (b) the amount of any loss of profit or other losses and damages suffered by the Contractor as a result of this termination.

The Engineer shall then proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine the matters described in sub-paragraphs (a) and (b) above (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date the Engineer receives the Contractor's particulars under this Sub-Clause shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3).

The Engineer shall issue a Payment Certificate for the amount so agreed or determined, without the need for the Contractor to submit a Statement.

Potential killer contract clauses – Termination by employer

❑ FIDIC-2017

- ❖ Payment after
termination for
employer's
convenience
(15.7)

The Employer shall pay the Contractor the amount certified in the Payment Certificate under Sub-Clause 15.6 [*Valuation after Termination for Employer's Convenience*] within 112 days after the Engineer receives the Contractor's submission under that Sub-Clause.

Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

- ❖ Suspension by contractor (16.1)
- ❖ Dispute avoidance and adjudication board (DAAB)

A material breach is a substantial breach

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.

In both FIDIC and AIA, the contractor can stop the work, *however no right mentioned in 4311*



Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

❖ Suspension by contractor

(16.1) This action shall not prejudice the Contractor's entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [Termination by Contractor].

If the Employer subsequently remedies the default as described in the above Notice before the Contractor gives a Notice of termination under Sub-Clause 16.2 [Termination by Contractor], the Contractor shall resume normal working as soon as is reasonably practicable.

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.



Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

❖ Termination by contractor (16.2)

16.2.1 Notice

Termination of the Contract under this Clause shall not prejudice any other rights of the Contractor, under the Contract or otherwise.

The Contractor shall be entitled to give a Notice (which shall state that it is given under this Sub-Clause 16.2.1) to the Employer of the Contractor's intention to terminate the Contract or, in the case of sub-paragraph (g)(ii), (h), (i) or (j) below a Notice of termination, if:

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving a Notice under Sub-Clause 16.1 [*Suspension by Contractor*] in respect of a failure to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*];
- (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate;
- (c) the Contractor does not receive the amount due under any Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [*Payment*];
- (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)

Homework 6: Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311

Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

❖ Termination by contractor (16.2)

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

- (e) the Employer substantially fails to perform, and such failure constitutes a material breach of, the Employer's obligations under the Contract;
- (f) the Contractor does not receive a Notice of the Commencement Date under Sub-Clause 8.1 [*Commencement of Works*] within 84 days after receiving the Letter of Acceptance;
- (g) the Employer:
 - (i) fails to comply with Sub-Clause 1.6 [*Contract Agreement*], or
 - (ii) assigns the Contract without the required agreement under Sub-Clause 1.7 [*Assignment*];
- (h) a prolonged suspension affects the whole of the Works as described in sub-paragraph (b) of Sub-Clause 8.12 [*Prolonged Suspension*];
- (i) the Employer becomes bankrupt or insolvent; goes into liquidation, administration, reorganisation, winding-up or dissolution; becomes subject to the appointment of a liquidator, receiver, administrator, manager or trustee; enters into a composition or arrangement with the Employer's creditors; or any act is done or any event occurs which is analogous to or has a similar effect to any of these acts or events under applicable Laws; or
- (j) the Employer is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract.

Homework 6: Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311

Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

❖ Termination by contractor

(16.2)

16.2.2 Termination

Unless the Employer remedies the matter described in a Notice given under Sub-Clause 16.2.1 [Notice] within 14 days of receiving the Notice, the Contractor may by giving a second Notice to the Employer immediately terminate the Contract. The date of termination shall then be the date the Employer receives this second Notice.

However, in the case of sub-paragraph (g)(ii), (h), (i) or (j) of Sub-Clause 16.2.1 [Notice], by giving a Notice under Sub-Clause 16.2.1 the Contractor may terminate the Contract immediately and the date of termination shall be the date the Employer receives this Notice.

If the Contractor suffers delay and/or incurs Cost during the above period of 14 days, 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.

**Homework 6: Compare this
clause with the one
(termination by the owner
for cause) provided by
AIA A201-2017 and 4311**



Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

❖ Contractor's
obligations
after
termination
(16.3)

After termination of the Contract under Sub-Clause 15.5 [Termination for Employer's Convenience], Sub-Clause 16.2 [Termination by Contractor] or Sub-Clause 18.5 [Optional Termination], the Contractor shall promptly:

- (a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works. If the Contractor incurs Cost as a result of carrying out such instructed work the Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to be paid such Cost Plus Profit;
- (b) deliver to the Engineer all Contractor's Documents, Plant, Materials and other work for which the Contractor has received payment; and
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.

Homework 6: Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311



Potential killer contract clauses – Suspension and termination by contractor

❑ FIDIC-2017

- ❖ Payment after termination by contractor (16.4)

Homework 6: Compare this clause with the one (termination by the owner for cause) provided by AIA A201-2017 and 4311

After termination under Sub-Clause 16.2 [*Termination by Contractor*], the Employer shall promptly:

- (a) pay the Contractor in accordance with Sub-Clause 18.5 [*Optional Termination*]; and
- (b) subject to the Contractor's compliance with Sub-Clause 20.2 [*Claims For Payment and/or EOT*], pay the Contractor the amount of any loss of profit or other losses and damages suffered by the Contractor as a result of this termination.



Potential killer contract clauses – Claims and disputes

BASED ON PMBOK CONSTRUCTION EXTENSION

It is rare that a stakeholder plans for a claim or contract dispute. For the most part, stakeholders are optimistic toward their contracts and seek to avoid claim situations. In the event that a claim situation arises, the stakeholder should be prepared to identify the situation in a timely manner and be forthright in its evaluation to determine if the potential claim is justified. Owners should require a project management plan that details systems, policies, processes, procedures, and documentation. Such a procedure, if followed diligently, makes document processing effective and efficient and has proven to mitigate delays and decrease disputes and subsequent claims.



Potential killer contract clauses – Claims and disputes

☐ AIA A201-2017: General conditions for construction

ARTICLE 15 CLAIMS AND DISPUTES

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term “Claim” also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.

We saw this before, remember?

We will talk about this in “Construction Phase”



Potential killer contract clauses – Claims and disputes

□ نشریه ۴۳۱۱

❖ 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.

در فاز Construction درباره این ماده صحبت میکنیم!

در واقع در فاز Construction درباره خیلی نکات اجرایی دیگر در حین اجرا صحبت خواهیم کرد!



مدیریت ادعاء و اختلافات در طول چرخه حیات پروژه

بخش چهارم:

برنامه ریزی فاز تدارکات/مناقصه (Procurement/Bidding Phase) برای مدیریت ادعاء و جلوگیری از دعاوی و اختلافات در پروژه

ارائه دهنده:

سید محمدرضا علوی پور

(PhD, PMP, CMIT)

دانشگاه Illinois Tech آمریکا

What we will learn?

- ☐ Procedure of procurement/bidding phase
- ☐ Recommendations for general contractors at the time of bidding
- ☐ Contract risk management
 - ❖ By GC/CM
 - ❖ By SC

Procedure of Procurement/Bidding Phase



Procedure

☐ The procedure includes the following:

1. Bidder pre-qualification and review
2. Pre-bid inquiries
3. Addendums
4. Bid reviews
5. Pre-purchase of special equipment or materials
6. Award recommendations
7. Notice to proceed
8. Subcontractor and product lists
9. Schedule of values



Bidder pre-qualification review

- ❑ The **owner** may **desire**, or be **required**, to **pre-qualify** potential bidders.
 - ❖ The **CM** should assist in developing a **list of relevant qualifications**.
- ❑ The **request for qualifications (RFQ)** should be **sent** to a wide range of **potential bidders** and advertised as required by **code and local jurisdictions**.
 - ❖ The **qualification criteria** should be **detailed** in the **RFQ** to be sure all respondents are **aware** of the **desired factors**.
- ❑ The **CM** develops a **scoring or ranking system** for objective review of the qualification packages received, which can be **included in the RFQ**.
- ❑ Specific project and contract circumstances **may** warrant pre-qualification of **subcontractors**.



Bidder pre-qualification review

- ❑ The **qualification packages** should be reviewed by a **committee** set up for this **specific purpose**.
 - ❖ It is **advisable** that the **CM** and **design** professional be on the **committee** or at least serve as **committee advisors**.
 - ❖ The **committee** should adhere to the **scoring methodology** proposed and distributed during the **RFQ process**.

*By doing so, the **likelihood** that an **unqualified bidder** may be awarded the contract for construction is **reduced** and the ensuing **problems** that would arise during construction are **avoided**.*



Pre-bid inquiries

- ❑ **Potential bidders** should be allowed adequate **time to review** the bid documents and transmit any **questions** prior to preparing their bid.
- ❑ The **bid documents** should clearly identify a **single point of contact** to whom **all such questions** should be directed.
- ❑ A **pre-bid meeting** should be held to discuss the **project requirements**.
 - ❖ It should be clearly established **if attendance** at the **pre-bid meeting** is a **mandatory requirement** for a bid to be **accepted**.
 - ✓ Coordinating the meeting with a **site visit or “showing.”**
 - ❖ **Any questions** rendered at this meeting should be **addressed** by **addendum to the bid documents (if correction needed, correct the documents)**.
 - ❖ Prepare and issue **meeting minutes** as an **addendum**
 - ❖ **Answer** pre-bid questions promptly and in **writing**



Pre-bid inquiries

☐ The **CM** should also, in **conjunction with the designer and the owner**,

set a **closing date for questions** allowing sufficient time to

1. Address the questions
2. Issue addenda

*By **clearly documenting and responding to all such inquiries**, the CM has established any information or **clarifications provided to bidders** and which may subsequently become the subject of disputes or claims.*



Addendums

❑ The owner, CM, or design professional **may have information** that was **not available** when the bid documents were issued.

❖ **These questions** must be addressed by **addendum issued to all bidders**.

✓ Where possible, **addenda** should **answer questions** by **directing** the bidder to the **pertinent section of the bid documents**.

Addenda

Precontract revisions include revisions made prior to signing the agreement. Such revisions include written addenda or graphic information issued to clarify, revise, add to, or delete information in the original procurement documents or in previous addenda. Typically, an addendum is issued prior to the receipt of bids or proposals. Other revisions may include items affecting the contract documents are contract document revisions and should be enforced during the administration of the contract.

Contract Modifications

Contract modifications include modifications after the construction agreement has been signed and may include additions to, deletions from, or modifications of the work to be done. These are accomplished by change orders, change directives, field orders, and minor changes. These can be issued at any time during the contract period.



Addendums

- ☐ The CM should **advise the owner** that the **bidding period may need to be extended** in the event the **scope of the information** included in the **addenda** would warrant such an extension.

*It is critical that the scope of the work is clearly stated, **through the issuance of addenda**, so that subsequent disputes and claims regarding the intent of the contract documents are **avoided**.*



Bid reviews

☐ The **CM** should **review all bids** received for **compliance with the bid requirements** for submission in the following order.

1. Pre-qualify per process mentioned (if used).
2. License as required by local jurisdictions.
3. Submit all required documents and affidavits.
4. Properly complete and sign bid form.
5. Properly complete and sign bond form.
6. Ensure bid does not contain irregularities, omissions, or non-requested stipulations and exceptions.



Bid reviews

If the bidder(s) pass all the points mentioned satisfactorily, then the **following steps** should be taken:

1. Review all bids for proper mathematical calculations and extensions.
2. Tabulate all bids for comparison of individual and total prices.
3. Compare tabulation with the engineer's estimate for the project.
4. Compare the bids for obvious discrepancies or unbalanced pricing.
5. If applicable, identify the bid scoring criteria established in the RFP.



Bid reviews

- ❑ Once the **lowest and responsive bidder** is identified,
the bid should be **reviewed** to determine if any **bid items vary significantly** from the **other bidders** or the **engineer's estimate**.
 - ❖ If a **significant variance** is identified, the bid should be **confirmed** with the **contractor**.

Additionally, the **CM** should advise the owner to **include language** in the bid documents to **prohibit unbalanced bids**.

*The **CM** should perform these tasks **objectively and promptly** to **avoid unnecessary delays** to the **award of the contract**.*



Pre-purchase of special equipment or materials

- ❑ In some projects, the **design cannot be completed** unless
the **exact equipment and/or material** is **known**.
- ❖ For this reason, this **equipment or material** may be purchased by the **owner**
before a contractor is **awarded the contract**.
 - ✓ This **pre-purchase** should be **managed by the CM** and executed in a
manner that is **consistent** with the **terms of the construction contract**
to
*both facilitate installation and to avoid potential disputes or
claims by the contractor.*



Award recommendations

- ❑ The **CM** should assemble the **proposal evaluations** and **scoring**
- ❑ The **CM** then should **present the findings** in a **written report** to the owner.

Any discrepancies, abnormalities, and resulting actions taken should be noted in the report.

- ❑ The **CM** should also offer considerations for **differences between the contractors** or the **cost estimate**.
- ❑ The **CM** should **recommend award** or **rejection of bid(s)** and the **justification** for this recommendation.
 - ❖ *If the apparent low bidder is **significantly** and **unreasonably** below other bidders, there is the **potential** that the contractor will **try to recover its flawed bid** by **aggressively pursuing changes** on the project.*

This will likely lead to disputes and claims.



Notice to proceed

- ☐ The **notice to proceed** establishes the **beginning date of construction** and directs the contractor to begin the project.
- ☐ The **CM** or **architect/engineer (A/E)** may prepare the **notice to proceed**;
however, it is **signed by the owner** because the owner's signature is required on **contractual authorizations** to the contractor.



Notice to proceed

❑ Contracts that contain **liquidated damages** or **penalty/bonus clauses** commonly use the **notice to proceed** to officially announce the **start of construction** and the beginning of the time **allowed by the contract** for the project.

❖ Because of the **importance of this document**,

*it should be **delivered to the contractor** by a method that **documents receipt**.*

(۴-ج)

تاریخ **شروع** کار، تاریخ نخستین صورت مجلس تحویل کارگاه است که پس از مبادله پیمان، تنظیم می شود.

(۲۸-ب)

کارفرما پس از مبادله پیمان، تاریخ **تحویل کارگاه** را که نباید بیشتر از ۳۰ روز از تاریخ مبادله پیمان باشد، به پیمانکار اعلام می کند. پیمانکار باید در تاریخ تعیین شده در محل کار حاضر شود و طی صورت مجلس هایی، اقدام به تحویل گرفتن کارگاه نماید. در صورتیکه حداکثر ۳۰ روز از تاریخ تعیین شده برای **تحویل کارگاه** حاضر نشود، کارفرما حق دارد که طبق **ماده ۴۶**، پیمان را فسخ کند.

ODCC

NOTICE TO PROCEED

Date: _____ Project: _____

Owner: _____ Owner's Contract Number: _____

Contract: _____ Engineer's Project Number: _____

Contractor: _____

Contractor's Address (send certified mail, return receipt requested): _____

You are notified that the Contract Times under the above Contract will commence to run on _____ . On or before that date, you are to start performing your obligations under the Contract Documents. In accordance with Article 4 of the agreement the date of Substantial Completion is _____ , and the date of readiness for the final payment is _____ [(or) the number of days to achieve Substantial Completion is _____ , and the number of days to achieve readiness for the final payment is _____].

Before you may start any Work at the Site, Paragraph 2.01.B of the General Conditions provides that you and Owner must each deliver to the other (with copies to Engineer and other identified additional insureds and loss payees) certificates of insurance which is required to purchase and maintain in accordance with the Contract Documents.

Also, before you may start any Work at the site, you must:

_____ [add other requirements].

_____ Owner

_____ Give by: _____

_____ Authorized signature

_____ Title

_____ Date

☐ Notice to Proceed

❖ Engineers Joint Contract

Documents Committee (EJCDC

C-550)



و جلوگیری از دعاوی و اختلافات در پروژه

Notice to proceed

☐ Notice to Proceed by
Construction Specification
Institute (CSI)



Knowledge for Creating
and Sustaining
the Built Environment

NOTICE TO PROCEED

Project: _____ Date: _____

A/E Project Number: _____
To: _____ Contract For: _____

You are hereby notified that the Contract Times stated for the Project will commence on _____. On that date, start performing the obligations required by the Contract Documents. (Date)

Before commencing Work at the Project Site, deliver the certificates of insurance to the Owner as required by the Contract Documents.

Also before commencing Work at the Project Site, perform:

Authorized By: _____
(Owner)

(Authorized Signature)

(Title)

Accepted By: _____
(Contractor)

(Authorized Signature)

(Title)

(Date)

☐ Attachments

Copies: ☐ Owner ☐ A/E ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ File

Subcontractor and product lists

ماده ۵ - تاریخ شروع اعتبار، شروع کار و مدت پیمان

۱-۵ تاریخ شروع اعتبار:

این پیمان پس از تسلیم تضمین انجام تعهدات، امضای پیمان و مبادله (یا ابلاغ از سوی کارفرما) معتبر و نافذ است. تسلیم تضمین انجام تعهدات قبل از امضا و مبادله پیمان الزامی است.

۲-۵ تاریخ شروع کار:

تاریخ شروع کار حداکثر ۲۸ (بیست و هشت) روز پس از تاریخ شروع اعتبار پیمان است که باید توسط کارفرما به پیمانکار ابلاغ شود. در غیر این صورت پایان مهلت ۲۸ (بیست و هشت) روز، تاریخ شروع کار تلقی می شود. تاریخ صدور ابلاغیه شروع کار توسط کارفرما نباید کمتر از ۱۴ (چهارده) روز قبل از تاریخ شروع کار باشد.

تبصره: چنانچه شروع کار منوط به تحقق شرایطی از جمله پرداخت بخشی از پیش پرداخت^{۱۰} پس از ارائه تضمین پیش پرداخت توسط پیمانکار، گشایش اعتبار اسنادی یا تحویل زمین توسط کارفرما باشد، باید این شرایط و مهلت کارفرما برای ابلاغ تاریخ شروع کار، در شرایط خصوصی بیان شود. در صورت عدم تحقق شرایط شروع کار توسط کارفرما مطابق شرایط خصوصی، پیمانکار می تواند مطابق ماده ۶۹ شرایط عمومی، پیمان را خاتمه دهد.



Subcontractor and product lists

بخش اول – موافقتنامه

- ۱- تغییر، حذف یا اصلاح جملات و عبارات موافقتنامه به هیچ نحوی مجاز نمی باشد و تنها جاهای خالی که در موافقتنامه پیش بینی شده است باید تکمیل گردد.
- ۲- در ماده ۱، نام پروژه و محل احداث آن در محل مربوط ذکر می شود.
- ۳- در ماده ۳، مبلغ مشروط مجموع مبالغ مشروطی است که در پیوست شماره ۱ ذکر شده است که نباید از ۱۰ (ده) درصد مبلغ پیمان تجاوز نماید.
- ۴- در تبصره ذیل بند ۵-۲ موافقتنامه، چنانچه شروع کار توسط پیمانکار منوط به انجام برخی کارها توسط کارفرما باشد، باید جزئیات مربوط به این کارها در شرایط خصوصی پیمان بیان شود.



Subcontractor and product lists

- ❑ FIDIC and AIA general conditions require the contractor to **submit a list of proposed subcontractors.**
- ❑ Some owners may require these to be **submitted** with the contractor's bid or proposal.
- ❑ These lists are prepared by the contractor, submitted to the CM or A/E for review, and **forwarded by the CM or A/E to the owner for final approval.**

(۲۴-ب)

پیمانکار می‌تواند به منظور تسهیل و تسریع در اجرای قسمت یا قسمت‌هایی از عملیات موضوع پیمان، پیمان‌هایی با پیمانکاران جزء ببندد، مشروط به آنکه آنان را از واگذاری کار به دیگران ممنوع کند. در صورتیکه در اسناد و مدارک پیمان، کارفرما، لزوم تأیید صلاحیت پیمانکاران جزء را پیش‌بینی کرده باشد، پیمانکار موظف است که، تأیید کارفرما را در این مورد تحصیل نماید. این واگذاری نباید از پیشرفت کار طبق برنامه زمانی اجرای کار بکاهد، و به هر حال به هیچ روی، از مسئولیت و تعهدات پیمانکار نمی‌کاهد. پیمانکار مسئول تمام عملیاتی است که توسط پیمانکاران جزء یا کارکنان آنها انجام می‌شود. در پیمان‌های بین پیمانکار و پیمانکاران جزء باید نوشته شود که در صورت بروز اختلاف بین آنها، کارفرما حق دارد، در صورتی که مقتضی بداند، به مورد اختلاف رسیدگی کند. پیمانکار و پیمانکار جزء نیز می‌پذیرند که نظر کارفرما در این مورد قطعی است و تعهد می‌کنند که الزاماً آن را اجرا کنند.



Subcontractor and product lists

What happens if the owner or the A/E objects to any of the proposed subcontractors?



Subcontractor and product lists

What happens if the owner or the A/E objects to any of the proposed subcontractors?

- ❑ If the **owner or the A/E objects** to any of the proposed subcontractors, the **A/E notifies the contractor** of the objection in **writing**.
- ❑ **Changes to the lists** may entitle the contractor to changes in the **contract sum** if the contractor **incurs additional costs** because of the changes.

*The standard AIA and EJCDC general conditions state that the contractor will **not be forced** to use subcontractors to which the contractor has an objection.*

محل مسکوت در ۴۳۱۱؟



Subcontractor and product lists

§5.2.3 If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. If the proposed but rejected Subcontractor was reasonably capable of performing the Work, the Contract Sum and Contract Time shall be increased or decreased by the difference, if any, occasioned by such change, and an appropriate Change Order shall be issued before commencement of the substitute Subcontractor's Work. However, no increase in the Contract Sum or Contract Time shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

Subcontractor and product lists



Knowledge for Creating
and Sustaining
the Built Environment

SUBCONTRACTORS AND MAJOR MATERIAL SUPPLIERS LIST

Project:

From (Contractor):

Date: _____

To (A/E):

A/E Project Number:

Contract For:

List Subcontractors and Major Material Suppliers proposed for use on this Project as required by the Construction Documents. Attach supplemental sheets if necessary.

[illegible]☐ Attachments

Signed by:

Date:

[illegible]



Subcontractor and product lists

❑ **Product lists** may also be **required** and are a **means** for the **CM** or **A/E** to **verify** that the contractor will use **only specified products** or approved substitutions.

❖ **Product lists** are **not to be used** to propose **substitutions**.

✓ Even the smallest project contains hundreds of products, and **these lists** can be **extensive and time consuming** to produce.

***Only critical products** are usually important enough to be listed and verified, and the **contract documents need to be clear** about which products need to be included.*



Schedule of values

- ❑ **Many standard conditions of the contract**, including general conditions prepared by **AIA and FIDIC**, require the **contractor to submit a schedule of values** before beginning the work.
 - ❖ It is **prepared by the contractor** for use as the basis of the **contractor's applications for payment**.
 - ❖ The **schedule of values** breaks the work down into **smaller, measurable** portions that the **A/E and owner** are able to observe, measure, and use to **determine the percent complete**.
 - ❖ **Separation of work activities** into separate **labor and material** categories makes for easier review that allows for **easier processing**.

The AIA publishes a standard form for this purpose, AIA Document G703,

Continuation Sheet.



Schedule of values

- ☐ The schedule of values is **submitted to the A/E and approved before** *work on the project begins or prior to submission of the initial pay application.*
- ☐ A **draft schedule** is often submitted by the contractor to ***ensure** that it **contains sufficient detail** to meet with the A/E's approval **prior** to the contractor preparing the **final schedule of values**.*
- ☐ *Front-end loading* is a **deceptive technique**, raising the amount of mobilization costs, supervision, or early work activities to improve contractor cash flow.
- ☐ As **construction proceeds**, the **schedule is updated** to include amounts authorized by change order.

Schedule of values – AIA: G703 – 1992

Continuation Sheet

AIA Document G702, APPLICATION AND CERTIFICATION FOR PAYMENT, containing Contractor's signed certification is attached.

In tabulations below, amounts are stated to the nearest dollar.

Use Column I on Contracts where variable retainage for line items may apply.

APPLICATION NO:

APPLICATION DATE:

PERIOD TO:

ARCHITECT'S PROJECT NO:

[illegible]



Schedule of values – AIA: G703 – 1992

Schedule of Values

Project Name:

Project #:

Contractor:

Application #:

Application Date:

Period to:

Item #	Description of Work	Scheduled Value	WORK COMPLETED		Stored Materials (not in Work Completed)	Total Completed Stored to Date	% Complete	Balance to Finish	Retainage*
			Previous Application	This Period					10%
9970	Demolition	\$ 3,000.00	\$ 2,000.00	\$ -	\$ -	\$ 2,000.00	67%	\$ 1,000.00	\$ 200.00
9955	Drywall & Carpentry	\$ 36,000.00	\$ 11,000.00	\$ 4,200.00	\$ 1,800.00	\$ 17,000.00	47%	\$ 19,000.00	\$ 1,700.00
9940	Doors & Hardware	\$ 1,000.00	\$ -	\$ 500.00	\$ -	\$ 500.00	50%	\$ 500.00	\$ 50.00
9943	Electrical	\$ 7,000.00	\$ 1,000.00	\$ 3,000.00	\$ 850.00	\$ 4,850.00	69%	\$ 2,150.00	\$ 485.00
Totals		\$ 47,000.00	\$ 14,000.00	\$ 7,700.00	\$ 2,650.00	\$ 24,350.00	52%	\$ 22,650.00	\$ 2,435.00

Recommendations for General Contractors at the Time of Bidding



General contractor's considerations

These considerations parallel those of the Owner, with a slightly different perspective.



General contractor's considerations – Assess the time allowed in the contract

- ❑ Like the Owner, the **General Contractor** also **must assess** the **risks of delays** to the **Contract completion**.
- ❑ The **Contractor** should **assess the time allowed** by the Contract to determine if **enough time** is **provided** to perform the work **without** the use of extraordinary resources.
 - ❖ The **Contractor** must include in its bid the **cost** for additional effort (**such as overtime**) required to meet the Contract completion date.



General contractor's considerations – Assess exculpatory language

- ❑ If the Contract is dominant with **exculpatory language**, especially in the area of **no-damages-for-delay**, the Contractor should carefully consider **accepting the risks** involved.
 - ❖ Some projects are **not worth** the **risk of bidding**.
- ❑ The **Contractor** should **consult** with **qualified counsel** before entering into a **highly restrictive Contract** with **exculpatory language**.
 - ❖ Again, if the **risk is too great**, the Contractor may consider **not bidding** on the project or **pricing** it accordingly.



General contractor's considerations – Assess exculpatory language

- ❑ **Not only** must Contractors assess the **risk of exculpatory language** in a Contract, but they must also **read, understand, and comply** with the **Contract provisions**, particularly with respect to **changes** and **claims**.

*For instance, the Contract may specify a **time limit** for issuing notice of a **change** or for **filing a claim**.*

*The **Contractor** must **comply** with these requirements.*

*Also, the **Contractor** should make sure to **submit all information** and **documentation** required by the **Contract**.*

Contract Risk Management

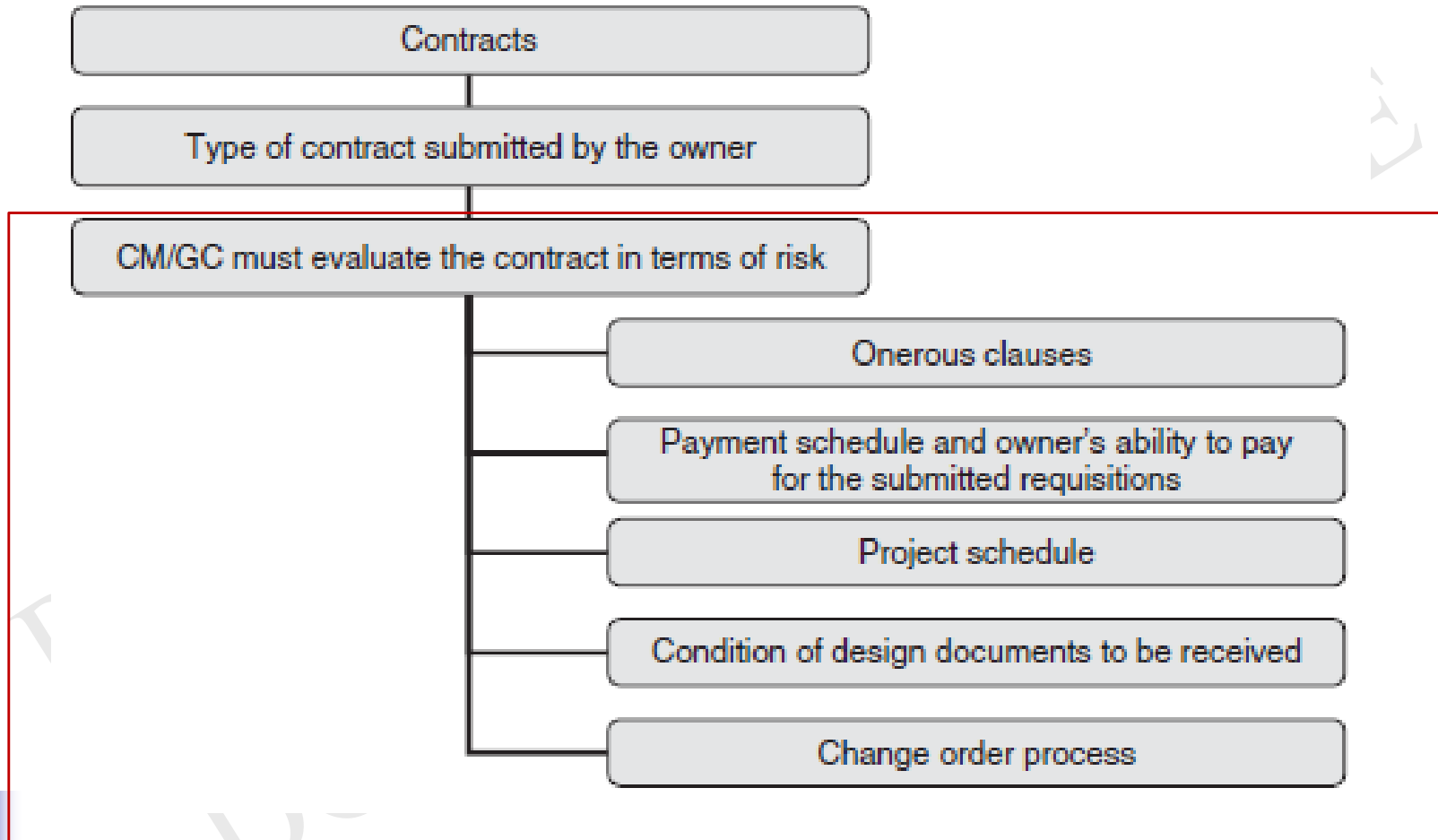
(By GC/CM)



Preparing for contract risk management

- ☐ The **risks** are too numerous, too great, and too detailed to be completed **solely by the owner** of the company.
- ☐ It is the **responsibility** of the **owner** of the company to know the **management responsibilities** in the **contract**.
- ☐ The **risk management team** and their **respective roles** are described later in this section.

Preparing for contract risk management





Contract provisions that must be reviewed for clarification

1. Owner's responsibility

- Drawings and specifications (construction documents)
- Site layout
- Soil borings and site conditions
- Environmental reports and approvals
- Reduction of any hazardous material
- Special studies (traffic, water, utilities)
- Permits clarification
- Utilities
- Disputes with adjacent owners or municipality
- Testing responsibility
- Other areas where the owner has control and must submit the information



Contract provisions that must be reviewed for clarification

2. Schedule

- Type that has to be prepared
- Updates required
- Penalty clauses
- Substantial completion provisions
- Delays (not covered by force majeure)
- Extensions
- Delays caused by owner or owner's subcontractors or vendors



Contract provisions that must be reviewed for clarification

3. Costs

- As defined in the contract
- Allowances and how to be used
- Definition of allowance items
- Contingency and how it is to be used and who controls it?
- General condition's clarifications (what is included and what is excluded?)
- Inflation clause
- Costs covered by the owner
- Value engineering
- New regulations by municipal and government agencies
- Auditing of project by the owner



Contract provisions that must be reviewed for clarification

4. Change orders

- How defined
- Method for developing costs
- Approval process
- Who signs off on any change orders?
- Will rates change if new agreements are agreed upon?



Contract provisions that must be reviewed for clarification

5. Dispute resolution

- Records that have to be kept
- Type of daily reports that have to be maintained
- Owner and CM/GC executive review
- Independent review board
- Mini trials
- Mediation
- Arbitration
- Other legal means, including litigation
- Notice provisions



Contract provisions that must be reviewed for clarification

6. Requisitions and retainer

- Schedule of values required? When is it paid and how often?
- What is required with submittal?
- Waiver of liens and from whom?

A construction lien is a claim made against a property by a contractor or subcontractor who has not been paid for work done on that property.

- Subcontractors invoices
- Percentage of retainer
- When will the retainer be released?
- Will retainer be held on fee, bonds, or insurance?
- Final payment (In what manner?)

The construction retainer is the final payment



Contract provisions that must be reviewed for clarification

7. Insurance

- Coverage
- Is builder's all risk policy required?
- Will wrap-up insurance be considered?

*A liability policy that serves as **all-encompassing insurance** which protects all contractors and subcontractors working on a large project.*

- Understanding the requirements
- Who is to be covered?



Contract provisions that must be reviewed for clarification

8. Bonds

- Types (i.e., bid, performance, payment, lien)
- Enforcement
- Circumstances in which they will be evoked



Contract provisions that must be reviewed for clarification

9. Unforeseen conditions

- Foundations and bearing capacity
- Property lines
- Utilities



Contract provisions that must be reviewed for clarification

10. Owner's representative, architect, and consultants

- Definition of role
- Changes of scope
- Means and methods
- Review shop drawings and RFIs



Contract provisions that must be reviewed for clarification

11. Coordinated drawings

- CM/GC vs. the design team
- What is to be coordinated?



Contract provisions that must be reviewed for clarification

12. Close-out

- Punch lists
- Final waiver of liens and claims
- Department of Buildings sign off
- Close-out documents
- Warranties (what is covered and when does it start?)
- Maintenance agreements (if any)
- Specific equipment use and maintenance classes
- Maintenance costs required?



Contract provisions that must be reviewed for clarification

13. Termination

- Under what circumstances?
- Define payment

Is it enough? No!

GC/CM should also check potential Onerous Contract Clauses



Potential onerous contract clauses

The **CM/GCs** should review certain clauses in the contract to make sure that any potential risk involved is within acceptable levels, including, but not limited to the following:

1. Payment
2. Retainage or Retention
3. Change orders
4. Authorization
5. Liquidated damages or consequential damages
6. Force majeure
7. No damages for delay (by the owner)
8. Warranty
9. Allowances
10. Construction documents
11. Dispute resolution
12. Construction acceleration
13. Schedule
14. Approval process
15. Implied warranty
16. Coordination of drawings
17. Unforeseen conditions
18. Owner's responsibility
19. Inflation clauses
20. Shop drawings

Contract Risk Management

(By SC)

Contract risk management by specialty contractor

Contract risk assignments

Contract clause	Specialty contractor's owner	Project manager	Construction superintendent	Estimator	Scheduler	Insurance agent	Attorney
Indemnification	•					•	•
Coordination of trades		•	•		•		
Schedule acceleration		•	•		•		
Waiver of future claims	•	•					
Concealed conditions			•	•			
No damages for delay				•	•		
Time extensions		•	•	•	•		
Extras and changes	•	•	•				
Pass through	•	•	•				
Pay when paid	•	•					

- ❑ The **indemnification clause** **contractually shifts** the **risk of economic loss** from one party to another. Through the indemnification clause, the **specialty contractor** may be required to assume certain liabilities of the owner, prime contractor, or other specialty contractors.
- ❑ **Pass-through clauses** **bind specialty contractors** to the **provisions of the prime contract** that affect their work. The main purpose is to **require the specialty contractor to be bound by the same performance standards** as the prime contractor **even though** these obligations are **not expressly contained in the subcontract**.



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:

سید محمدرضا علوی پور

(PhD, PMP, CMIT)

دانشگاه Illinois Tech آمریکا

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

Claims Management

(Introduction)

While virtually all the actions taken in the pre-design and design phases represent measures that help the owner avoid claims, the actions taken by the CM during the construction phase also help mitigate the potential impacts of unforeseen issues that may develop into disputes and claims.

Suggested terminology by CMAA

❑ A **typical hierarchy** of **potential disagreements** may include the following:

1. *A request for change*
2. *A request for equitable adjustment*
3. *A formal claim*
4. *Litigation*



Suggested terminology by CII

If the **owner admits** the claim of contractor and **grants him extension of time or reimbursement of additional cost**, or both,

the issue is sorted out.

However, if the **owner does not agree** to the claim put out by contractor and there are **differences in the interpretations**,

the issue takes the form of a dispute

Dispute

It is “**any contract question or controversy** that must be settled **beyond** the jobsite management”

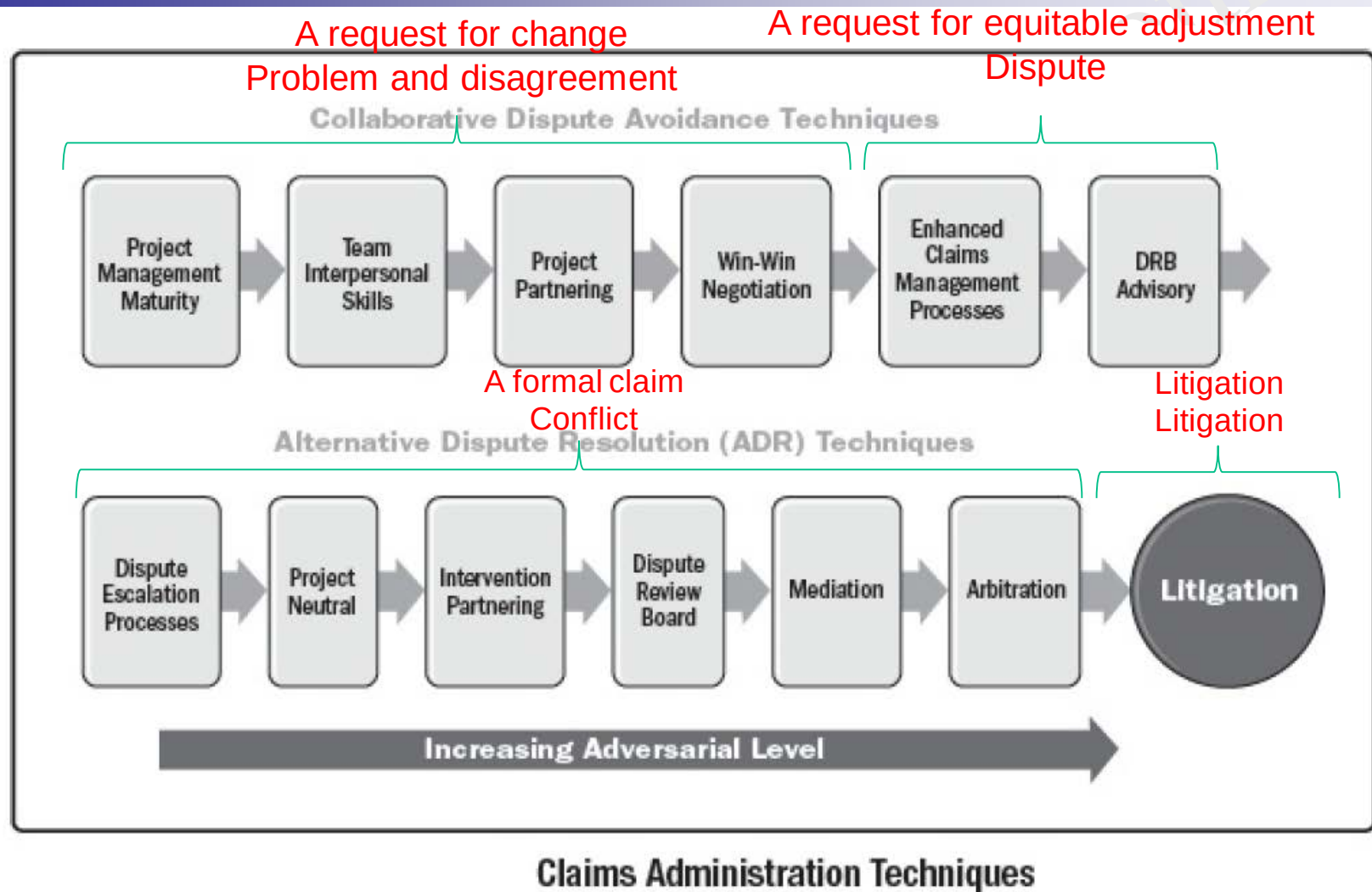
Individuals Involved	Stages in the Claims Process				
	Problem	Disagreement	Dispute	Conflict	Litigation
Litigators					Formal court documentation and proceedings
Consultants & Neutrals				Assist with quantification and entitlement on an issue-by-issue basis	
Sponsors, Standing Advisors & Standing Neutrals			Attempts at resolution removed from day-to-day management		
Project Managers	Routine discussions & negotiations	Substantial honest negotiation on defined problem			
Level of Resolution	On the Project			Removed from the Project	

A formal claim

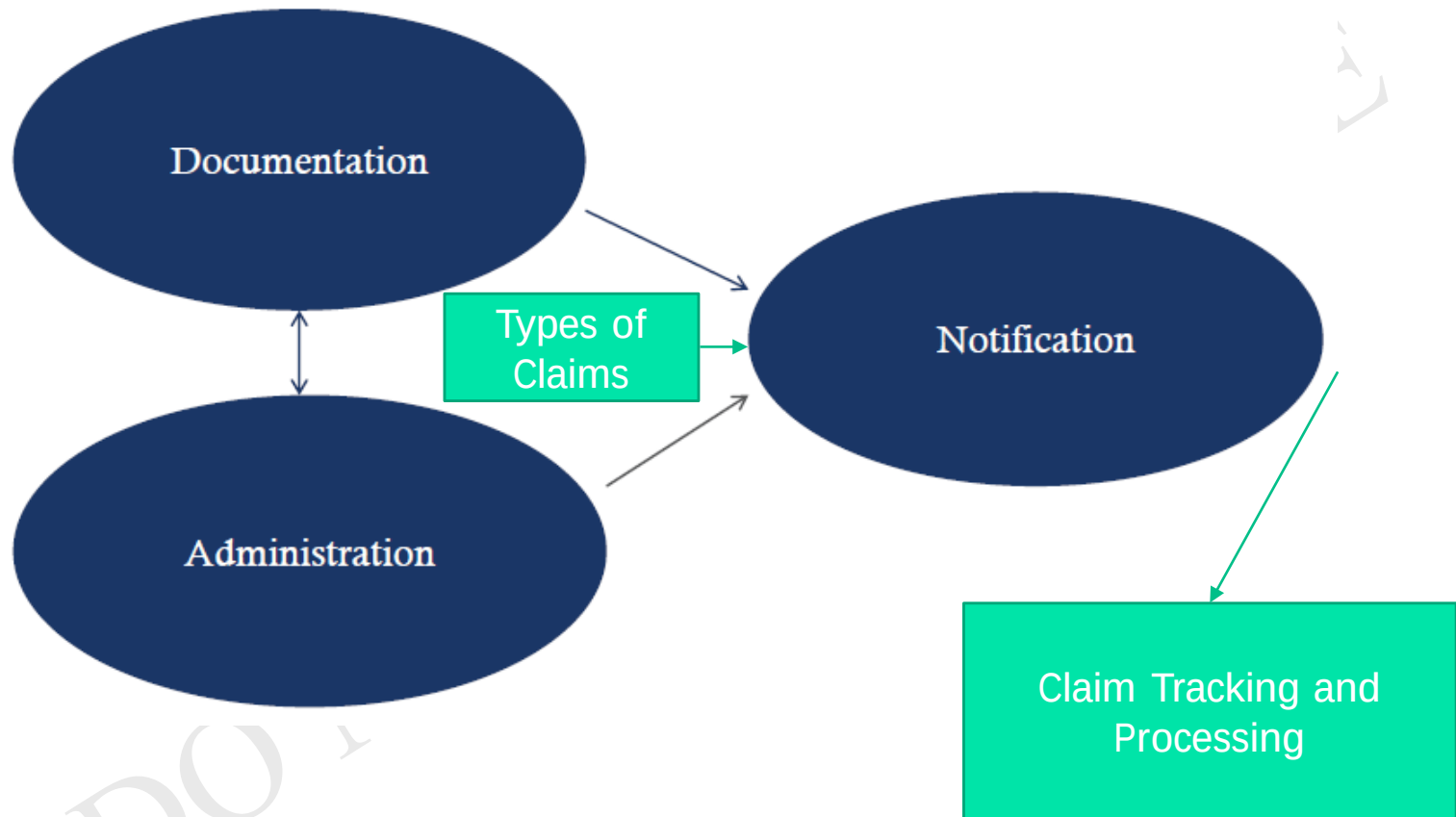
A request for equitable adjustment

A request for change

Suggested terminology by PMI



Suggested terminology for claim management in Construction Phase





Elements of every claim

❑ Every claim consists of **three elements**:

(1) **Identification of and entitlement to recovery**

- ❖ To identify a possible claim, **project personnel** must **understand** the **conditions entitling the contractor** to pursue such relief.

(2) **Impacts**

- ❖ The **contractor** must be able to **demonstrate** the **impacts** of the **change**.

(3) **Quantification**

- ❖ Quantification defines the **dollars and days** for which you believe you are **entitled to recover**.
 - ❖ These are your **“damages.”**
 - ❖ This often requires **proof** that:
 - i. **Owner** proximately **caused** the breach
 - ii. **Resultant damages** were reasonably **foreseeable**

Claims Management

(Project and Claim Documentation)

Importance of complete project documentation

KEY POINT:

- ❑ The **standard dictum** of **“put everything in writing”** applies here.
- ❑ It is to be noted in this regard that, to be effective,
*documentation **must be prepared during the construction process.***
 - ❖ Records created **after the fact** will **not** generally receive **consideration.**
- ❑ **Project photographs, dated and identified,** can be **very effective** when documenting for claims.

Importance of complete project documentation

KEY POINT:

It is also noted that frequently when a dispute arises and when the **contractor presents his documentation** or evidence to support his position, including photographs, *the other party will frequently seek to reach a settlement rather than allowing the claim and the dispute resolution process to proceed.*

Thorough and complete documentation is the key.

Importance of complete project documentation

- ❑ **Avoid** claims and disputes or at least **reduce** disputed issues.
- ❑ **Preserve** **right** to claim
 - ❖ A sense of entitlement **without proof** of **entitlement** leads **nowhere**
- ❑ **Defend** against **claims of others**

Remember that many claims and disputes **don't happen** on the
real time on the project,
but **significant disputes** happen **years after the claim arises.**

Remember that you don't know what is going to happen!

What to document?

Choose what data and level of detail should be tracked for defending against a claim

Remember the documents we mentioned in delay analysis course?

1. Programme records
2. Progress records
3. Resource records
4. Costs records
5. Correspondence and administration records
6. Contract and tender documents

Claims Management

(Project and Claim Documentation)

Record keeping and reporting by construction contract administration (CCA)

Introduction

- ☐ Documentation created by **construction contract administration (CCA)** is effective for
 1. **Communication** of the construction stage activity.
 2. **Historical record** of the construction stage activity.
- ☐ The documentation should be **maintained in a format** that can be **easily retrieved**.

Let's see some of them!

Non-conforming work notice

- ❑ **AIA Document A201** states that work **not conforming to the requirements** of the contract documents may be considered **defective**.
 - ❖ The A/E has the authority to **reject work** that does not conform to the requirements of the contract documents.
 - ❖ Only the owner **can accept nonconforming work**; the **A/E is not authorized** to do so.
 - ❖ The A/E, upon **discovery of nonconforming work**, should
 1. **Document** the **deficiencies in a field observation report** and
 2. **Present copies** to the contractor and the owner
 - ✓ A specific document in the **form of a Notice of Nonconforming Work** is an aid in **documenting and tracking nonconforming work** and the remedy.

NONCONFORMING WORK NOTICE

Project: _____ Report Number: _____
 _____ From: _____
 To: _____ Date Observed: _____ Date Reported: _____
 _____ A/E Project Number: _____
 Re: _____ Contract For: _____

Specification Section:	Paragraph:	Drawing Reference:	Detail:
------------------------	------------	--------------------	---------

Nature of Nonconformance:

Signed by: _____ Date: _____ Date Response Needed: _____

Proposed Correction (Response):

Amount of Time for Correction:

☐ Attachments

Response From:	To:	Date Rec'd:	Date Ret'd:
----------------	-----	-------------	-------------

Signed by: _____ Date: _____

Copies: ☐ Owner ☐ A/E ☐ Consultants ☐ _____ ☐ _____ ☐ _____ ☐ File

Field observation reports

- ❑ The **A/E's record of site visits** consists basically of
 1. Site observations and
 2. Communications
- ❑ Having the **previous site report** in hand while performing the **new observation** **provides continuity** as well as an opportunity to **update and close open items**.
- ❑ These reports are for the **benefit of the A/E** and may be used as **a means of communication** with the owner and the contractor.
 - ❖ AIA Document G711, Architect's Field Report, is a useful format.

*What should be included in the **field observation reports**?*

موسسه مهندسی و مدیریت ساخت علوی پور (ACEMI)

دفتر آموزش



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