Welcome and Introduction
Day 1  09:00
Speaker: SIMON DELVES
AME SEMINARS
SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Key Note Address – Keso Msita
Day 1  09:10
Speaker: KESO MSITA
GENERAL COMMENTS

• Commend the organisers of this seminar
• It is an honour and privilege on my part being required to give introductory remarks at the commencement of the seminar
• Intend to give some perspectives with respect to the use of FIDIC contracts
GENERAL COMMENTS

• FIDIC conditions of contracts are the mostly used standard conditions internationally
• They are equally mostly used for major infrastructure projects within the region
• The ever growing interest on their use in our region is partly an outcome of the demand by multilateral funding agencies and also lack of such comprehensive conditions of contracts in many jurisdictions
FEATURES WITH RESPECT TO PROJECT IMPLEMENTATION

• The quality of pretender information upon which tender/contract documents are prepared has not been encouraging
• Thus, poor tender/contract documents are encountered which reflect as poorly prepared projects
• These result into variations, additional works, and claims and disputes
FEATURES WITH RESPECT TO PROJECT IMPLEMENTATION

- A number of employers are not familiar with FIDIC contracts
- Not all contractors are familiar with FIDIC contracts
- In the region, we are witnessing an influx of contractors who are not familiar with FIDIC contract management features and procedures; and indeed some employers also have the same weaknesses
ROLE OF THE ENGINEER NOT WELL UNDERSTOOD

• FIDIC’S traditional approach has been to give authority to an independent and skilled third party called the engineer, in order to ensure projects are well managed and for holding a fair balance between the parties.

• Unfortunately, employers expect the engineer to solely work as their agent. The situation is partly an outcome of the requirement for approval from the employer prior to giving decisions on contractual matters.
SOME ISSUES OF CONCERN

- Wrong amendments made to standard forms, that mutilates the envisaged interdependence of provisions and severely tempers with the envisaged risk sharing policy
- In one Design and Build case, involving six contracts, major employer’s risks were shifted to contractors; a number of credible contractor’s did not tender as a result. Almost all projects encountered problems
- In certain situations amendments are not done in spite of the situation demanding so. Example is that of an unamended arbitration clause in a contract between a government agency and a local contractor that required disputes to be referred to the International Chamber of Commerce in Paris
SOME ISSUES OF CONCERN

- The definition of ‘cost’ is not understood and its implication with respect to risk sharing policy.
- That it excludes profit on matters which are beyond the control of both parties.
- Where profit is payable, that is explicitly provided for and it will be an outcome of a default the employer.
SOME ISSUES OF CONCERN

• Price fluctuation clause is wrongly applied
• Wrong indices are equally used
• As a result, employer’s find themselves have to pay more than they should
SOME ISSUES OF CONCERN

- Dispute Adjudication/Review Boards and processes are new regimes
- That they are not well understood by the parties and even supervising engineers
- Application of relevant provisions is problematic particularly regarding: appointment of members, frequency of site visits and costs involved
- Adequate awareness on arbitration is equally lacking in some countries
- There is limited capacity to handle adjudications and arbitrations
SOME ISSUES OF CONCERN

- Procurement oversight bodies have not embraced FIDIC as is the case with funding agencies
SOME ISSUES OF CONCERN

• A number of lawyers or legal counsels in the region lack exposure on FIDIC contracts
• That creates problems as they cannot advice as appropriate with respect to amendments made, on claims and disputes
SOME ISSUES OF CONCERN

- FIDIC forms of contracts, eg the Red Book, are well tried and tested documents
- But use and longevity are no bars to problems during contract administration and contractual disputes arising
- The reason is that there still some areas where no effective or no sanctions exist for non-compliance with contract terms
FIDIC’s NOT PERFECT

- FIDIC forms of contract are not perfect, but then nor are any other forms.
- It has its problems but are no more severe than other forms and indeed such problems are resolvable.
- Still attracted to FIDIC forms on the basis of their strength, particularly with respect to comprehensiveness and risk sharing policy (risk allocated to the party best able to bear it).
The wider interest on the use of FIDIC forms and the problems encountered on the ground has inspired increased training programmes.

FIDIC itself and its members have of late decided to support project implementation by improving and deepening the knowledge of its suite of contracts.

There is thus need to learn the strengths and weaknesses of FIDIC contracts to enable their better usage.
These seminars are very much being appreciated by consultants, employers and contractors.

We should thus equally thank the organisers of this seminar and indeed those who have taken trouble to attend.

It is expected that the seminar will deepen our understanding and allow us to appropriately apply the standard contracts and thereby contribute to successful project implementation.

I thus wish you the very best during the two days.
• Organisers are highly commended for this course; the big attendance should motivate them to conduct more and similar courses in different countries in the region
• Participants to this seminar are equally highly commended for taking time to attend the training and that we look forward for an experience sharing situation during the two days

• I THANK YOU FOR YOUR AUDIENCE.
Why Local Forms do not do the Job

DAY 1  09:40

Speaker: AMYN MUSSA
Why Local Forms Do Not Do The Job

The only local form of contract available is the Agreement and Conditions of Contract for Building Works, 1999 Edition (“JBC Contract”)

• **Background:**
  – Published by the Joint Building Council, Kenya which is established by:
    • Architectural Association of Kenya
    • Kenya Association of Building and Civil Engineering Contractors
Why Local Forms Do Not Do The Job

**Purpose:**
- Establish standard terms and conditions of the building construction industry
- To review and publish recommended prices for construction material and labour in the industry
Why Local Forms Do Not Do The Job

**Issues:**

1) Relevant to real estate developments
   - Does not work for other infrastructure developments:
     - Power Projects
     - Heavy Industrial Projects
     - Road Development Projects
   - Does not envisage construction under an EPC basis (where contractor is responsible for overall design, procurement and construction)
Why Local Forms Do Not Do The Job

- **Issues cont:**
  2) Poor drafting
  - Difficult to properly interpret provisions
  - Inconsistencies in use of terms e.g. interchangeable use of “agreement,” “contract” and “conditions”. Interchangeable use of “contract period” and “construction period”
  - Terms not well defined (e.g. force majeure, defects)
Why Local Forms Do Not Do The Job

• **Issues cont:**

3) **Architect’s control:**
   - Significant control of architect over project
   - Plays the role of “independent engineer”
   - Architect has authority to issue payment certificates, variations and grant extensions of time without approval of employer
   - Architect determines whether works are substantially complete and issues certificate of practical completion
   - Potential collusion with contractor
   - Instructions given directly by employer to contractor must be confirmed by the architect
Why Local Forms Do Not Do The Job

• **Issues cont:**
  4) Time not fixed
  • No provision for milestone dates or phases
  • Therefore cannot link payment, performance and liquidated damages to milestones or phases
  • Significant room for contractor to extend time. In addition to force majeure, time extensions granted for adverse weather conditions, unforeseen circumstances, delay caused by sub-contractors, inability to secure skilled labour etc.
Why Local Forms Do Not Do The Job

• Issues Cont.:
  5) Contract Price
    • Contract price not fixed.
      • Significant room for contractor to vary the contract price in the event of taxes and duties, exchange fluctuations, labour costs, material costs, “direct loss or expense for which the contractor would not be reimbursed” etc
      • Wide authority for architect to issue “variations” which affect the contract price without employer approval. Variations by contractor can be sanctioned by architect
      • Payment is not dependant on milestones.
6) Design Risk
   • Employer bears design risk.
   • “Any error in description or in quantity or any omission of items from the contract bills or specifications shall be corrected and deemed to be a variation required by an Architect.”
Why Local Forms Do Not Do The Job

• **Issues Cont.:**

  7) Permits and licences
  • Employer is responsible for all permits and approvals

  8) Site Issues
  • Employer bears the site risk
  • Employer has no unfettered control over Site
  • Employer can only access the Site at reasonable times
  • No provisions for dealing with multiple contractors using the site
Why Local Forms Do Not Do The Job

• Issues Cont.:

9) Standards
• Works to be carried out “to the reasonable satisfaction of the architect unless it is legally or physically impossible to do so”
• Goods, Materials & Workmanship
  • materials, goods and workmanship to comply to contract bills “so far as procurable”
  • If standards are not provided – left to discretion of Architect
  • Architect can approve retention of goods/material/works not up to standard with adjustment in contract price
Why Local Forms Do Not Do The Job

- **Issues Cont.:**
  10) Sub-contractors
    - Contractor can subcontract part of the works with notice to architect. No employer approval required.
    - No requirement for provision of collateral warranties
    - Extension of time can be granted to sub-contractors if architect approves.
Why Local Forms Do Not Do The Job

- **Issues Cont.:**
  - 11) Settlement of Disputes
    - Contract does not indicate the governing law
    - Arbitration provisions
      - Do not provide for the rules that would apply to arbitration
      - Do not provide a clear timelines and structure for amicable settlement of disputes and commencement arbitration proceedings
Why Local Forms Do Not Do The Job

• **Issues Cont.:**

12) Linkage with project financing agreements and sale agreements
- Fixed construction contract price to match fixed loan amount under financing agreement and fixed sale prices under sale agreement.
  - Difficult under JBC as contract price not fixed
- Draw downs under the financing agreements to match milestone payments under construction contract and sales proceeds under sale agreements.
  - No concept of performance milestones/phases under JBC
Why Local Forms Do Not Do The Job

- **Issues Cont.:**

  12) Linkage with project financing agreements and sale agreements
  - Time for completion should match completion date under sale agreement and loan completion date under financing agreement.
  - JBC is not fixed in time. Huge scope to vary completion period
  - Penalties for delay under financing agreements and sales agreements should match delay liquidated damages and performance securities under construction contract.
  - As JBC is not fixed in time, penalties could accrue under financing or sale agreements but contractor obtains extensions.
Why Local Forms Do Not Do The Job

• Issues Cont.:

12) Linkage with project financing agreements and sale agreements
   • Phased sales under sale agreement to match phased construction under construction agreement and phased loans under financing agreements
   • No milestones or phases under JBC
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

FIDIC and FIDIC Contracts – Rainbow Suite
DAY 1 10:10
Speaker: SIMON DELVES
An Introduction to FIDIC

• FIDIC stands for the Fédération Internationale des Ingénieurs-Conseils

• FIDIC was founded in 1913 and now has membership from over 80 countries

• Headquarters: Geneva

• Aim: Promote the business interests of consulting engineers.

It does this via seminars, conferences and discussions with national associations and financial institutions.
Introduction to the FIDIC suite of Contracts

The Traditional Forms of the FIDIC contract were:

  
  First published in 1957, the Red Book was based on the ACE’s Overseas (Civil) Conditions of Contract (which itself was based on an ICE form of contract). In 1987 the fourth edition was published. This was the last edition to the original Red Book. In 1999 FIDIC provided a completely new suite of contracts, including a new Red Book.

- Conditions of Contract for Electrical and Mechanical Works including Erection on Site (Yellow Book).
  

- Conditions of Contract for Design-Build and Turnkey (Orange Book).
  
  First published in 1995 in response to the growing trend of Design-Build and Turnkey contracting, this book has now been effectively replaced by the 1999 Yellow Book.
The 1999 Suite of Conditions of Contract

In 1999 FIDIC published a new suite of Contracts. The suite comprised:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (“the Construction Contract” or “the 1999” or “new” Red Book)

- Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works Designed by the Contractor (“the Plant and Design/Build Contract or “the 1999” or “new” Yellow Book)

- Conditions of Contract for Engineering Procurement and Construction/Turnkey Projects (“the EPC/Turnkey Contract” or “Silver Book”).

- Short Form of Contract (the “Short Form” or “Green Book”).

The contracts are also referred to as the “FIDIC Rainbow Suite” and are accompanied by the FIDIC Contracts Guide 2000.
Since publishing the 1999 suite FIDIC have introduced the following contracts:

- Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, for bank-financed projects only (“the MDB Construction Contract”, “the MDB Harmonised Edition” or “the Pink Book”).

- Conditions of Contract for Design, Build and Operate Projects (the “Gold Book”).

- Dredgers Contract, based on the Green Book (the “Blue Book”).

- Consultant Model Agreements, including the Model Representative Agreement (“the White Book”).

- A form of Sub-Contract.
Aims of the 1999 Suite

- Improved Drafting
- Consistent wording and layout
- More user-friendly
- Compatibility for use in both civil and common law jurisdictions
- To provide a manual of good engineering practice
Selecting the Appropriate Book

Who is doing the majority of the design?

- If the answer is the Employer or Engineer, the correct book will almost always be the 1999 Red Book

- If the answer is the Contractor, the correct book is probably the Yellow Book unless the project is a PPP/PFI, BOT or Turnkey project or similar (in which case the Silver Book will normally be more appropriate).
Let’s say I have a house in Mombasa which unfortunately I don’t and let’s say I want a garage built in the garden for my car. I go to my local builder, whom I trust, and say to him that I want a double garage built in my garden in my house in Mombasa. We agree a price of $25,000 payable up front. In English law and I believe most common laws a contract would then probably have been formed with a number of terms implied.
GARAGE IN MOMBASA

- 2 years later I get my garage
- My car has gone rusty during the wait
- The garage is made of wood
- It has a flat roof
- It has no windows
- It has been painted red
- My new larger car won’t fit

BUT

- It is well made
- It is dry
- The price has been fixed at $25,000

Has the builder complied with his obligations to design and build me a garage
AME SEMINARS
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Refreshment Break
DAY 1  10:30
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Contract Administration-Employer and the Engineer/ER
Day 1 10:50
Speaker: Malcolm Kelly
“The Players”

- The Employer
- The Engineer
- The Contractor
- The Sub-Contractor(s)
- Dispute Adjudication Board
“The Players”

- The Employer
- The Engineer
- The Contractor
- Subcontractor(s)
- Dispute Adjudication Board
The Employer
The Employer

- Sub-Clause 1.1.2.2 defines the Employer as ‘the person named in the Appendix to Tender and legal successors in title to this person’
- Once the Contract is in place, duties include:
  - Giving access to the Site (SC 2.1)
  - Providing assistance to the Contractor to obtain Laws of the Country (SC 2.2)
  - Evidencing that he can pay (SC 2.4)
  - Making claims against the Contractor (SC 2.5)
  - Appointing the Engineer
  - Making available ALL relevant data in his possession (SC 4.10)
  - Providing Employer’s Requirements (Yellow), Drawings and Specification (Red)
  - Ensuring setting-out information is correct
  - Paying the amounts certified by the Engineer
The Engineer’s role

- Sub-Clause 1.1.2.4 defines the Engineer as ‘the person appointed by the Employer and named in the Appendix to Tender’
  - Deemed to act for and fully represent the Employer except for SC 3.5
  - Administers and ensures compliance with the construction contract
  - Has to have staff comprising suitably qualified engineers and other professionals competent to carry out the duties (SC 3.1)
  - Responsible for delegating authority and assigning duties to assistants (SC 3.2)
  - **BUT** has no authority to amend the Contract
Duties of the Engineer

- Once the Contract is in place, duties include:
  - Issuing Instructions and Variations (C 3 and 13)
  - Making Determinations by consulting with both parties and endeavouring to reach agreement – if not then determination in accordance with the Contract (SC 3.5)
  - Carrying out approvals, certification, consents and other administrative duties. (Various)
  - Receiving notices regarding delays and potential extra cost and deal with them in a reasonable time under SC 3.5 or as set out in the Contract (Various eg 1.9, 2.1, 4.8, 4.12, 7.4, 19.2 and especially 20.1)
  - Reviewing and/or approving Contractor’s designs (C5 in Yellow)
  - Consenting to Sub-Contractors and additional working hours (SC 4.4 & 6.5)
  - Carrying out audits of Contractor’s Quality System (SC 4.9)
  - Carrying out tests (SC 7.4)
  - Reviewing and awarding an extension of the Time for Completion
Duties of the Engineer (2)

- Once the Contract is in place, duties include:
  - Receiving and reviewing programmes submitted under SC 8.3 and informing Contractor where programmes are inconsistent with actual progress or with Contractor’s obligations [Note: Not to approve or accept]
  - Suspending all or any part of the Works (SC 8.8)
  - Issuing Taking Over Certificates and Performance Certificate (SC 10.1 & 11.9)
  - Ensuring any defects or outstanding work is completed (C11)
  - Measuring and Valuing the Works (SC 12.1 Red)
  - Issuing interim and final payment certificates (SC 14.6 and 14.13)
  - Receiving notices of claim; considering and then responding to the claim within the prescribed time with approval or disapproval; monitoring and instructing contemporary records; then proceeding in accordance with SC 3.5 to determine the claim (SC 20.1)
Who can be the engineer?

- Individual or Company
- Qualifications
- Experience
- Reputation
- Engineer?
- Employer’s Project Manager?
- Contractor Acceptance?
- Local governance?
Assistants and Delegation

- S/C 3.2 Delegation by the Engineer
  - May assign duties to assistants*
  - May delegate authority to assistants*
  - Delegation to be ‘in writing’ and does not take effect until received by both Parties.
  - Assistants to be
    - suitably qualified,
    - competent to carry out the duties assigned and/or delegated
    - Fluent in the language for Communications
  - Assistants only authorised to issue instructions to the Contractor to the extent defined by the delegation
  - Any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test or similar act by an assistant shall have the same effect as though an act of the Engineer.
  - Contractor may question any instruction of an assistant through the Engineer
Instructions

- SC 3.3 [*Instructions of the Engineer*]
  - Engineer may issue instructions at any time:
    - Under Red includes additional or modified drawings necessary for the execution of the Works
    - Under Yellow includes any necessary for the execution of the Works
  - Contractor shall only take instructions from the Engineer or assistant with appropriate authority
  - Contractor shall comply with instruction
  - Instructions to be in writing
  - In the event of the Engineer gives an oral instruction (RED); receives confirmation from the Contractor within 2 working days of the oral instruction; does not reply by giving a written rejection and/or instruction within 2 working days of the confirmation then the confirmation constitutes the written instruction of the Engineer
Employer’s claims [S/C 2.5]

- S/C 2.5 [Employer’s Claims]
  - “If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, the Employer or the Engineer shall give notice and particulars to the Contractor. ..."
  - The notice shall be given as soon as practicable after the Employer became aware of the event or circumstance giving rise to the claim.....
  - The particulars shall specify the Clause or other basis of the claim and shall include substantiation of the amount and/or extension to which the Employer considers himself entitled ....
  - The Engineer shall then proceed in accordance with SC 3.5 ....
Contractor’s claims [S/C 20.1]

- **S/C 20.1 [Contractor’s Claims]**
  - “If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and **not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.**”
  - “If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim”
  - “The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.”
  - “The Contractor shall keep such contemporary records as may be necessary to substantiate any claim” + any required by the Engineer
  - “Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed.”
Contractor’s Claims [S/C 20.1]

- S/C 20.1 [Contractor’s Claims]
- “If the event or circumstance giving rise to the claim has a continuing effect:
  - this fully detailed claim shall be considered as interim;
  - the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
  - the Contractor shall send a final 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 Contractor and approved by the Engineer.”
  - Within 42 days after receiving the fully detailed particulars the Engineer responds with approval or disapproval. He may also ask for any further particulars but must nonetheless respond on the principles of the claim.
Procedure under S/C 20.1 – Contractor’s claims

Aware Date

Within 42 days

Within 28 days

Contractor submits notice of claim under S/C 20.1

Contractor submits fully detailed particulars

Engineer responds with Approval or Disapproval

Within 42 days
Determinations [S/C 3.5]

“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances”.

• What is the meaning of ‘fair’?

• Does the Engineer act as a ‘mediator’?

• From SC 3.2 [Delegation by the Engineer]
  – “However, unless otherwise agreed by both Parties, the Engineer shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [Determinations].”

• Where do they provide?
  – Essentially where time and/or money is involved eg SC 1.9, 2.1 and especially 20.1; Time eg 8.4 and 20.1; valuation of work – SC 12.3 R; valuation of Variations – SC13.3; unforeseeable physical conditions – SC 4.12
S/C 20.1 [Contractor’s claims], S/C 3.5 [Determinations]
And S/C 20.4 [Obtaining DAB Decision]
Constraints and Restrictions

• SC 3.1 – “...If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions.”

• Under SC 3.2 – Engineer cannot delegate authority to determine** under SC 3.5 unless agreed to by both Parties

• ** does this include authority to consult?
Seminar on FIDIC and EDF
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The Site
DAY 1  11:20
Speaker: MARK McGAW
“Most of the disputes in the world arise from words.”

Lord Mansfield *Morgan v Jones* (1773) Lofft 176
The Site

- Access and Possession
- Security
- Adverse Physical Conditions
- Safety
The engineering contract usually depends in a far greater degree than any other upon the terms expressed in the documents which constitute it, and there remains comparatively little room for legal implication…. For this reason… consideration and discussion …of case law, or even of the detailed terms of particular clauses, would be almost fruitless.’

Access Complaints Not New
• “Si home soit oblige a levier un mease, etc it est excuse si l’obligee ne voilt luy suffer a levier ceo, car il ne poet vener sur le terre san son volunt”

• (1479) (YB Mich 19 Edw IV f.2. pl.6)
• (If a man is obliged (by penal bond) to erect a house, he is excused if the obligee (employer) will not suffer him to erect it, because he cannot come onto the land without his will (ie permission))
The Jurists’ Tangled Path to Common Sense

- until well into the 19th century, a background legal/procedural issue about the interdependence of promises, of performance and payment, executory contracts. Plus, the entire contracts rule.
- From 1820s, after part performance, completion being prevented by the employer, a plaintiff, although precluded from suing for the price, could sue for damages. Prevention principle.
- Withholding of access to the site, an example of ‘act of prevention’: providing an excuse of non-performance by the contractor, and entitling him (subject to contract) to accept the repudiation and sue on for a quantum meruit. *Pontifex v Wilkinson* (1845)
The Site
The Default Position as Eventually Worked Out

- The employer shall hand over the site to the contractor within a reasonable time of entering into the contract.
- Doing so is a condition precedent to the builder’s obligation to carry out the works; failure to do so may in some circumstances amount to a repudiation.
- The contractor is entitled to continue in occupation for the entirety of any stated period in which the works are to be carried out and completed.
- The employer has in general no right to enter, or take back all or part of the site.
KING'S BENCH DIVISION.

[IN THE COURT OF APPEAL]

1914

PORTER v. TOTTENHAM URBAN DISTRICT COUNCIL.

Dec. 1.

By a contract in writing it was agreed that the plaintiff should build a school for the defendants, upon a site belonging to them, within ten months after the date of the contract, and that he should commence work and be at liberty to enter upon the site forthwith. The only access to the site was from a road adjoining other land of the defendants and over that land, and it was provided that the plaintiff should make a temporary sleeper roadway over that land from the street to the site. Possession of the site was given forthwith, and the defendants made a gateway through the fence separating their land from the street, and the plaintiff made and used the sleeper roadway through the gateway to the street. The owner of the soil of the street, alleging that it was not a public highway, prohibited its use by the plaintiff and threatened to sue him for an injunction. The plaintiff consequently ceased work for more than two months until after the defendants had sued the owner of the soil of the street and obtained a decision that it was a public highway.

The plaintiff claimed damages for loss caused by the delay of the work, alleging a breach of the defendants' implied contract to give free and uninterrupted possession of and access to the site.

 Held, that there was no warranty to be implied from the contract to the effect that the plaintiff should be at liberty to work upon the land without interruption, and that the defendants were not liable to indemnify the plaintiff against the loss caused by the wrongful interference of a third party with the means of access to the site.
Site (1.1.6.7)

'place(s)'

Where Permanent Works (1.1.5.4) are to be executed AND (or?) to which Plant (1.1.5.5) and (or?) Materials (1.1.5.5) are to be delivered (for incorp into Perm Wks)

Any other places as may be specified in the Contract (1.1.1.1) (ie spec, drawings, schedules)
The Site

- A general trend toward width and flexibility
- Eg ‘place’ – abstract concept
- ‘as may be specified’; was ‘specifically designated’ – seems less tight now
- World Bank version adds ‘including storage and working areas.’
Little Different from the 1930s

- **Site means** “the lands and/or other places on or under, into or through which work is to be executed under the contract and any other lands and/or places used by the Contractor for the purposes of the contract’ (ACE Civil Engineering Contract)”
Site means “the lands and/or other places on or under, into or through which work is to be executed under the contract and any other lands and/or places used by the Contractor for the purposes of the contract’ (ACE Civil Engineering Contract 1930)
The Site

Role of the ‘Site’ under the Contract

- Access to and possession of Site
- Co-operation on Site
- Contractor’s responsibility for Site
- Contractor’s pre-contract inspection of Site
The Site: Access and Possession

'Right' of access to, and possession of, all parts of the Site (2.1)

Employer 'shall give'

Time(s) stated in Appendix to Tender or if not, as may be required to proceed with (post-commencement) Programme (8.3)

Employer 'expels' Contractor from Site on termination for fault (15.2)

'may not' be exclusive

failure resulting in delay or Cost (1.1.4.3) means EOT/Cost plus

But (third party) rights of way for access are Contractor's responsibility (4.13)

cf 4.6 (appropriate opportunities of Employer and others to carry out work on or near Site – a Variation if Unforeseeable Cost incurred)

Employer ‘full’ access to ‘all parts of’ Site and to all places from which natural Materials are being obtained (7.3)
Employer responsibility for co-operation of other contractors on Site (2.3)

But appropriate opportunities for Employer and others to carry out work on or near Site (4.6) – a Variation if Unforeseeable Cost incurred)

Contractor notices of commencement on subcontractors on Site (4.4(c)) or Delivery of Plant or major Goods to Site (4.16)

NB Contractor’s Equipment delivered to Site not to be removed without Eng consent (4.17)

Plant and Materials become property of Employer on earlier of delivery to Site and entitlement to be paid (7.7)
The Site: Contractor’s Responsibility

Contractor to confine operations to the Site (4.23)

Responsibility for Site operations (4.1)

- Safety of persons on Site (4.8 (b))
- Reasonable efforts to keep Site and Works clear of unsafe obstructions (4.8 (c); 4.23)
- Fencing, lighting, guarding and watching of the Works (4.8(d))
- Keeping unauthorised persons off Site (4.22)
The Site: Contractor’s Inspection

Contractor inspection of Site

- Deemed to have inspected and examined Site (4.10) and access routes (4.15)
- Unforeseen Physical Conditions limited to the Site (4.12)

Employer made available all relevant sub-surface and hydrological data prior to Base Date (1.1.3.1) i.e. 28 before tender deadline as well as after (4.10)

Contractor responsible for interpreting
Ground Conditions

The Background

FIDIC approach
Default Position under Classic English Law

- Performance of an entire contract included everything necessary to complete the whole.
- Work and materials indispensibly necessary not extras
- The difficulty or even impossibility of doing the work does not excuse the contractor, except perhaps where the matter cannot have been in the contemplation of the parties
- Neither employer or engineer impliedly warrant that the works can be executed.
Background

and I hope it will not go out that any opinion has been given either way as to how far damages may be recovered at law by Trustees in a case of this sort for breach of a covenant not to sue in the Ecclesiastical Court.

Orders affirmed, with costs.

Lords' Journals, 12th May 1854.

WILLIAM RANGER, Appellant; THE GREAT WESTERN RAILWAY COMPANY and Others, Respondents [May 31, June 3, 6, 7, 9, 10, 13, 14, 16, 17, 1854].

[Mews' Dig. i. 48; iv. 638; x. 936; xv. 1778, 1802, 1805. S.C. below, 1 Rail. Cas. 1; 3 Rail. Cas. 298. On point as to liability of corporation for fraud, explained in Western Bank of Scotland v. Addie, 1867, 1. R. 1 Sc. and Div. 157; Mackay v. Commercial Bank of New Brunswick, 1874, L.R. 5 P.C. 414; and cf. Cornford v. Carlton Bank (1890), 1 Q.B. 392; (1900), 1 Q.B. 22. As to trade unions, see Taff Vale Ry. v. Amalgamated Society of Ry. Servants (1901), 1 Q.B. 170; Linaker v. Pitcher, Hewlett, and Others (1901), 17 T.L.R. 257. As to interest of judge, see note to Dines v. Grand Junction Canal Co., 3 H. L. C. 759; and as to engineer being arbitrator, see Eckerley v. Mersey Docks and Harbour Board (1841), 2 Q.B. 667; Ives and Barker v. Williams (1894), 2 Ch. 478; Jackson v. Barry Ry. Co. (1893), 1 Ch. 238.]

Corporation—Fraud—Interest of Judge—Penalties—Liquidated Damages.

A corporation of itself cannot be guilty of fraud, but where it can only accomplish the object for which it was formed, through the agency of individuals, who act fraudulently, the Corporation stands in the same situation with respect to the
Background

“The contractor must satisfy himself of the nature of the soil, of the general form of the surface of the ground, of the quantity of materials required for forming the embankment, and all matters which can in any way influence his contract; and no information upon any such matters, derived from the drawings or specification, or from the engineer, or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all the terms of this his contract.’

_Ranger v Great Western (1838-1854)_
While he most heartily endorsed the Author’s opinion as to the necessity for the taking of the greatest possible care to ensure that so far as possible Contractors were made fully aware of the circumstances of any work for which they were asked to tender, he felt that the greatest regard should be paid to “the spirit of the contract”; he ventured to differ in that one respect from Brunel’s view and to suggest that if Brunel had not insisted upon the observance of the “letter” as well as the “spirit” of the specification, the settlement of the final account would not have taken 14 years, and heavy legal expenses would thereby have been saved.
“…To settle and secure the adoption in civil engineering contracts of a standard form of contract embodying equitable conditions.”

Federation of Civil Engineering Contractors (1919)
Generally without success

“Generally under the engineering form of contract the contractor was asked to take the risks of difficulties of soil and other obstructions, and, to quote the most recent form of Government contract, ‘obstructions under the ground natural or otherwise’…”

(a late ‘30’s UK public contract)
In practice, fairness. And little construction litigation.

BUT…

“a legal basis was hardly ever necessary upon which to found a Contractor’s claim if the Contractor could persuade the Engineer that it would be a hardship to him if the claim were not admitted.”

Edward Rimmer, ‘Discussion’ (1939)
Journal of the ICE 29
Contracts little changed til ICE 1st

A century after *Ranger*, a near-identical clause in use:

“The Contractor shall satisfy himself or shall be deemed to have satisfied himself as to the nature of the ground, dimensions, levels, character and nature of sewers, drains, etc., which can in any way influence his tender, and no claims for extra works or otherwise will be allowed in consequence of any incorrect information on these points or any inaccuracies with reference thereto which may appear on the drawings or in this specification. Nor shall the Contract be nullified in consequence of any error, incorrect information or inaccuracies.”

Quoted by E McKaig (Consulting Engineer) 1942
Wartime and Post-War Upheaval Give the Contractors Their Chance

‘During the war, contract conditions had been drawn up with a much more open declaration of intentions.’

CM Norrie (1942)

NB Singular circumstances of immediate post-war conditions
Even then, some alternatives

“…more positive information should be given with inquiries, and…details of bore-holes should be more specific so as to eliminate gambling as far as possible. There was sufficient margin in the general layout of a contractor’s scheme and in his organization and ingenuity to make tenders competitive without the gambling influence being introduced.’

AM McTaggart (FCEC)
The Engineer in Decline

• “So far there was no insurance for the Engineer. There were policies in existence for architects, but he knew of none for engineers.”
  Sir Hugh Beaver (1942) Engineer

• S.14, Arbitration Act, 1934 – even known interest can now justify removal of Engineer as arbitrator. Ranger overruled.
And so now to FIDIC
More Positive Information to Tenderers

Site Data Before Base Date (4.10)

Eliminate Gambling (?)

Unforeseeable Physical Conditions claim (4.12)
A General Shift in Tone

ICE 1ST ed

- ‘construction completion and maintenance of the Works….and everything whether of a temporary or permanent nature required in and for such construction…so far as the necessity for providing the same is specified in or reasonably to be inferred from the Contract’ (5)

- ‘Save insofar as legally or physically impossible the Contractor shall execute complete and maintain the Works in strict accordance with the Contract to the satisfaction of the Engineer’ (13)

FIDIC 1999

- The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer’s instructions, and shall remedy any defects in the Works’ (4.1)
Site Data

**ICE 1ST ed**
- The contractor ‘shall himself obtain all necessary information’ (11)
- Only site investigation referred to is borehole taken on instruction of Engineer during works (18)
- In practice, pre-tender site investigation carried out and supplied?
- Inspect, examine Site and satisfy himself before tender as to the nature of the ground and sub-soil (so far as is practicable) (11)

**FIDIC 1999**
- Employer shall have made available prior to Base Date all relevant data in the Employer’s possession on sub-surface and hydrological conditions at the Site, including environmental aspects…and all such data which comes into Employer’s possession after the Base Date (4.10)
- Contractor ‘responsible for interpreting’ and is deemed to have based its tender on that data and (his own) interpretation (4.10-11)
- Deemed inspection of Site, data and other available information ‘to the extent practicable (taking account of cost and time)’ (4.10)
<table>
<thead>
<tr>
<th>ICE 1ST ed</th>
<th>FIDIC 1999</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘…unfavourable physical conditions and artificial obstructions…which in the opinion of the Engineer could not have been reasonably foreseen by an experienced contractor’ (12)</td>
<td>‘…adverse [natural physical conditions and man-made and other physical obstructions and pollutants…including sub-surface and hydrological conditions but excluding climatic conditions]…which are [not reasonably foreseeable by an experienced contractor by the date for submission of the Tender] (1.1.6.8, 4.12)</td>
</tr>
</tbody>
</table>
Sauce for Goose Not sauce for Gander

• Under FIDIC, if elsewhere physical conditions were more favourable than could reasonably have been foreseen, Engineer can offset associated reductions in cost…..

• But only in reduction of a ground conditions claim value – ‘shall not result in a net reduction in the Contract Price’ (4.12)
Conclusions

- The importance of planning, liaison and minimisation of concurrency of presence of employer and third parties, to give the contractor a fair clear run and no excuses.
- The tactics of ground investigation – too much/too little? Phraseology and tone of interpretative commentary to control outcome of unforeseeability issue?
- NB Guidance notes contemplating example of % sharing of Costs arising in case of a project involving major sub-surface works.
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

The Contractor’s Obligations
DAY 1  11:35
Speaker: SIMON DELVES
Contractor’s General Obligations
(Sub-Clause 4.1 of the Red Book and Yellow Book)
Contractor’s general obligations: construction
(Sub-Clause 4.1 of the Red Book and Yellow Book)

Main obligations:
• execute and complete the works in accordance with the Contract
• under the Red Book, also in accordance with the Engineer’s instructions
• remedy any defects in the Works

The Contractor is responsible for the adequacy, stability and safety of:
• all site operations
• all methods of construction
• under the Yellow Book, the Works

The Contractor submits details of arrangements and methods it proposes to adopt, whenever required by the Engineer. No significant alterations to these without previous notification to the Engineer
Contractor’s general obligations: construction
(Sub-Claususes 4.1 and 7.1 of Red book and Yellow Book)

The Contractor shall provide:
• the Plant (defined in Sub-Clause 1.1.5.5) and Contractor’s Documents (defined in Sub-Clause 1.1.6.1) specified in the Contract
• all Contractor’s Personnel (defined in Sub-Clause 1.1.2.7), Goods (defined in Sub-Clause 1.1.5.2), consumables and other things and services required for performance of all obligations (design and construction)

The Contractor shall carry out the manufacture of the Plant, the production and manufacture of Materials and all other execution of the Works:
• In the manner (if any) specified in the Contract
• In a proper workmanlike and careful manner, in accordance with recognised good practice
• With properly equipped facilities and non-hazardous materials, except as otherwise specified in the Contract
Contractor’s general obligations: design
(sub-clauses 4.1 and 5.1 of the Yellow Book)

Under the Yellow Book:

• shall design the Works
• when completed, the Works shall be fit for the purposes for Which the Works are intended as defined in the Contract
• the Works include any work which is necessary to satisfy the Employer’s Requirements, Contractor’s Proposals and Schedules, or is implied in the Contract
• the Works also include all works which (although not mentioned in the contract) are necessary for stability or for the completion, or safe and proper operation, of the Works
• on commencement of the Works, the Contractor scrutinises the Employer’s Requirements and gives notice of any defect found therein
Contractor’s general obligations: design
(Sub-Clauses 5.3 and 5.4 of the Yellow Book)

The Contractor undertakes that the design, the Contractor’s Documents, the execution and the completed Works will be in accordance with:

• the laws in the country, and
• the documents forming the Contract, as altered or modified by Variations

The design, the Contractor’s Documents, the execution and the completed Works shall comply with

• the country’s technical standards, building, construction and environmental laws
• the laws applicable to the product being produced from the Works
• other standards specified in the Employer’s Requirements or defined by the applicable laws
Contractor’s general obligations: design
(Sub-Clause 4.1 of the Red Book)

Under the Red Book:
• shall design the Works to the extent specified in the Contract
• except to the extent specified in the Contract, shall be responsible for:
  – all Contractor’s Documents and Temporary Works
  – such design of each item of Plant and Materials as is required for the item
to be in accordance with the Contract
• shall not otherwise be responsible for the design or specification of the Works
• where the Contractor is to design any part of the Permanent Works, it shall,
when the Works are completed, be fit for such purposes for which the part is
intended as are specified in the Contract, unless otherwise stated in the
Particular Conditions
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Variations
DAY 1   11:55
Speaker: SIMON DELVES
Variations

• Definition Sub-Clause 1.1.6.9.

“"Variation” means any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments] (In the Yellow Book Variation means any change to the Employer’s Requirements).

• It is when the work that the Contractor has agreed to do has been changed by the Engineer.
Variations

- Reasons for Variations

  - Employer has decided he wishes to change the work (Sub-Clause 13.1);
  
  - There may be unforeseeable physical conditions which necessitate a Variation (Sub-Clause 4.12);
  
  - The Contractor may be required to remedy defects for which he is not responsible (Sub-Clause 11.2).
  
  - Instruction of work covered by Provisional Sums (Sub-Clause 13.5).
Variations

• May be initiated by the Engineer or a request from Contractor.

• To be issued prior to the issue of the Taking-Over Certificate.

• May not omit work to give to others.

• The Contractor must carry out the Variation unless the Contractor cannot readily obtain the necessary Goods (Sub-Clause 13.1).

• (Under the Yellow Book the Contractor may object to a Variation in respect of design if it reduces the safety or suitability of the works or will have an adverse impact on any guarantees).
Variations

- Variations can include (Sub-Clause 13.1 a – f)

  a) changes to the quantities of the work;
  b) changes to quality and characteristics of the work;
  c) changes to levels, positions or dimensions of any part of the work;
  d) omission of work (save to give to others);
  e) additional work necessary for the Permanent Works;
  f) changes to sequence or timing of the execution of the Works.

- (The Yellow Book does not provide such a list).
Variations

• Contractor can make a proposal in the required form for

• Value engineering - Contractor’s proposals for
  
  ➢ acceleration of completion;
  
  ➢ reduction of cost of executing, maintaining or operating the Works;
  
  ➢ improve efficiency or value of the completed Works;
  
  ➢ Otherwise be of benefit to Employer.

(Sub-Clause 13.2)
Variations

• If the Engineer accepts the proposal and there is a saving the parties share the saving (Sub-Clause 13.2).

• The Engineer may request a proposal from the Contractor prior to instructing a Variation. The Contractor is to respond with details of the work, effect on programme and Time for Completion and a proposal for evaluation of the Variations or by giving reasons why he cannot respond with a proposal.

• The Engineer shall as soon as practical approve, disapprove or comment.

• It is the Engineer who instructs Variations.
Valuation of Variations – Clause 12

• If there is a rate or price in the Contract for the work it shall be used but shall be adjusted if

  ➢ the measured quantity is changed by more than 10% from the quantity in the Bill of Quantities; and

  ➢ the change in quantity multiplied by the rate is greater than 0.01% of the Accepted Contract Amount; and

  ➢ The change in quantity changes the cost per unit quantity of the item by more than 1%.

(Sub-Clause 12.3)
Valuation of Variations – Clause 12

• If there is no rate or price in the Contract.

• Or if the rate or price is not appropriate because the item of work is
  ➢ Not of similar character
  ➢ Not executed under similar conditions
  as any item in the contract

• Then a new rate has to be fixed by the Engineer.
Valuation of Variations – Clause 12

- The new rate
  - Should be derived from any relevant rate or price (i.e. not based on cost)
  - Adjustments should be made to take account of the relevant change of quantity, that the work is not of similar character or executed under similar conditions
  - If there is no relevant rate then the new rate should be derived from Cost.

- Omission – the Contractor is compensated if he is prejudiced by the omission of work on the basis of Cost incurred (Sub-Clause 12.4).
Variations – Extensions of Time Sub-Clause 8.4

• Subject to Sub-clause 20.1 the Contractor is entitled to an extension of time for
  • a Variation or other substantial change in the quantity of any item of work included in the Contract (Sub-Clause 8.4(a)).
• (Under the Yellow Book the Contract Price and any schedule of payments are adjusted by the Engineer under Sub-Clause 3.5).
Variations

Currencies (Sub-Clause 13.4)
- Where payment is to be made in more than one currency the split in currencies shall be specified by reference to the Cost of the varied work (Sub-Clause 13.4).

- Provisional Sums (Sub-Clause 13.5)
  - To be instructed by the Engineer
  - Generally to be valued as Variations

The Contractor is to provide quotations, invoices, vouchers etc in substantiation.
Variations

DAYWORK (SUB-CLAUSE 13.6)

- May be instructed for Variations of a minor or incidental nature.

- To be evaluated in accordance with the Daywork Schedule in the contract.

- The Contractor is to submit quotations for Goods.
Variations

DAYWORK (SUB-CLAUSE 13.6)

• The Contractor’s returns to the Engineer shall include details of
  
  (a) the names, occupations and times of Contractor’s Personnel;

  (b) the type and time of equipment and Temporary Works;

  (c) the quantities of types of Plant and Materials used.

• The Engineer signs these and the Contractor prices them.
Changes in Legislation
(SUB-CLAUSE 13.7)

- Changes after the Base Date – Contractor allowed increase or decrease in respect of Cost. Subject to Contractor’s compliance with Sub-Clause 20.1 Contractor shall be entitled to
  - an extension of time in respect of delay suffered;
  - Payment of Cost.
Adjustment for Changes in Cost (Sub-Clause 13.8)

• Allows amounts payable to the Contractor to be adjusted to take account of the rises and falls in cost of

  ➢ Labour

  ➢ Goods

  ➢ Other inputs to the Works.

• The adjustment is based upon a formula which relies upon a table of adjustment data included in the Appendix to Tender.
Adjustment for Changes in Cost
(Sub-Clause 13.8)

- The Employer or his consultant will have estimated and fixed the proportion of each cost element and applied to these will be the increase in cost indices from the Base Date.

- It may be necessary for the Engineer to determine a provisional index for Interim Payment Certificates if the cost index is not available.
Adjustment for Changes in Cost  
(Sub-Clause 13.8)

- If the Contractor is late in completing he will not receive adjustments for change in cost occurring after the Time for Completion.

- The weightings of the cost elements may require adjustment if there are major Variations which affect this.
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Sub-Contracting and Assignment
DAY 1 12:20
Speaker: MALCOLM KELLY
Sub Contracting

• Subcontractor means any person named in the Contract as a Subcontractor or any person appointed as a Subcontractor for part of the Works (SC 1.1.2.8)

• SC 4.4 – Subcontractors
  – Cannot subcontract the whole of the Works
  – Responsible for the acts or defaults of Subcontractor

  – Unless stated otherwise:
    • Not required to obtain consent of suppliers of Materials
    • Not required to obtain consent to a Subcontractor named in the Contract
    • Prior consent of the Engineer required for other Subcontractors
    • Give 28 days notice of commencement of each Subcontractor’s work and commencement on Site
    • Each subcontract to include provisions which entitle the subcontract to be assigned to the Employer (Red only)
Assignment

SC 1.7 – Assignment (of the Main Contract)

- Neither Party (Contractor or Employer) is allowed to transfer any or all of its obligations or rights under the Contract, except:
  
  - With the agreement of the other Party and at its sole discretion
  
  - In respect of payments due to it, which may be assigned in favour of its source of finance
Assignment

• SC 4.5 – Assignment of Benefit of Subcontract
  
  – The Contractor must assign the benefit of a Subcontractor’s obligations if instructed by the Engineer in circumstances where the S/Contractor’s obligations extend beyond expiry of relevant DNP.
  
  – In these circumstances and unless stated in the assignment the Contractor has no liability to the Employer for the S/Contractor’s work after the assignment takes effect.

  – GCC do not require a Contractor to notify the Employer of any continuing obligations after DNP
  
  – Consideration should be given to the terms of any assignment
Questions
DAY 1  12:35
In association with

AME SEMINARS

SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Lunch
DAY 1  12:45 – 14:00
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental

Payment
DAY 1  14:00
Speaker: SIMON DELVES
REMEASUREMENT (Sub-Clause 12.1)

• The basis of the Red Book is that the Works will be remeasured and evaluated on that basis.

• The Contractor is then paid on a monthly basis.

• The bills of quantities are thus merely an estimate of what the Contractor is to be paid but the amount is determined by remeasure.
PROCEDURE FOR MEASUREMENT OF THE WORKS

• The Engineer measures the Works.

• Whenever the Engineer requires any part of the Works to be measured he gives notice to the Contractor’s Representative.

• The Contractor’s Representative or an assistant is to assist the Engineer in making the measurement.

• If the Contractor fails to attend the Engineer’s measurement shall be accepted as accurate.
PROCEDURE FOR MEASUREMENT OF THE WORKS
(Sub-Clause 12.1)

- Permanent Works may be measured from records prepared by the Engineer.

- The Contractor, when requested, shall attend to examine and agree the records with the Engineer and sign them.
PROCEDURE FOR MEASUREMENT OF THE WORKS
(Sub-Clause 12.1)

- On disagreement with the records the Contractor shall notify the Engineer of the respects in which he disagrees within 14 days of being requested to examine them.

- If the Contractor does not give notice the records shall be accepted as accurate.

- If notice has been given the issue can be resolved in accordance with the dispute resolution procedure.
Payment

METHOD OF MEASUREMENT (Sub-Clause 12.2)

- Sets out the rules for measuring the Works.

- The Contract requires that measurement shall be of the

  \textit{“net actual quantity of each item of the Permanent Works”}

- Measurement shall be in accordance with the Bill of Quantities or applicable Schedules.
EVALUATION OF THE WORK (Sub-Clause 12.3)

- By the Engineer in accordance with Sub-Clause 3.5 which requires
  - consultation with each party;
  - an attempt to obtain agreement;
  - If not achieved the Engineer is to make a fair determination;
  - Can be revised in accordance with dispute resolution procedure.

- The appropriate rate for the item of work shall be multiplied by the quantity which has been measured.
EVALUATION OF THE WORK continued (Sub-Clause 12.3)
ADJUSTMENT OF RATE

• If the measured quantity is changed by more than 10% from that shown in the Bills of Quantities or other schedule
EVALUATION – YELLOW BOOK (Sub-Clause 14.1)

• The Contract price is the lump sum Accepted Contract Amount and subject to adjustments in accordance with the Contract.

• It is not therefore a measurement contract, however.

• Schedules may be incorporated into the Contract which set out price data.

• The Particular Conditions may provide for some of the works to be remeasured.
ADVANCE PAYMENT (Sub-Clause 14.2)

• In order to allow the Contractor to finance mobilisation and preparatory work the Employer is to make to the Contractor an interest free loan.

• This in return for a guarantee from the Contractor and will not be paid until the guarantee is received.

• The Appendix to Tender States
  - the total advance payment;
  - the number and timing of instalments;
  - the applicable currencies and proportions.
Payment

ADVANCE PAYMENT (Sub-Clause 14.2)

- The first instalment of the advance payment shall be certified by the Engineer after
  - receiving a statement from the Contractor under Sub-Clause 14.3;
  - receipt of the Performance Security in accordance with Sub-Clause 14.2;
  - receipt of the guarantee in the amounts and currencies equal to the advance payment;
  - the guarantee shall be from “an entity and forum within a country or other jurisdiction approved by the Employer”.

- The guarantee shall cover the Employer’s exposure in respect of the advance payment in terms of amount and duration.
Payment

REPAYMENT OF ADVANCE PAYMENT (Sub-Clause 14.2)

- Repayment shall be by deductions from Interim Payment Certificates.

- Repayment shall start when certified amounts exceed 10% of the Accepted Contract Amount less Provisional Sums.

- Deductions shall be made at the rate of 25% of the Payment Certificate (excluding the advance payment and retention) until the advance payment has been repaid.
APPLICATIONS FOR INTERIM PAYMENT CERTIFICATES
(Sub-Clause 14.3)

• The Contractor applies for payment, the Engineer certifies what is due and the Employer pays, monthly.

• At the end of each month the Contractor submits a Statement
  ➢ in 6 copies;
  ➢ in a form approved by the Engineer;
  ➢ showing in detail the amounts he believes he is entitled to;
  ➢ with supporting documents including a report on progress during the month (see Sub-Clause 4.21).
APPLICATIONS FOR INTERIM PAYMENT CERTIFICATES continued (Sub-Clause 14.3)

- The Statement shall include:

  (a) the estimated contract value of the Works executed (including Variations);

  (b) adjustments for changes in legislation (Sub-Clause 13.7) and Cost (Sub-Clause 13.8);

  (c) for deduction of retention;
APPLICATIONS FOR INTERIM PAYMENT CERTIFICATES continued (Sub-Clause 14.3)

(d) adjustments for the advance payment (Sub-Clause 14.2);

(e) adjustments for Plant and Materials (Sub-Clause 14.5);

(f) other additions under the Contract or otherwise; and

(g) the deduction of all amounts certified in previous Payment Certificates.
Payment

SCHEDULE OF PAYMENTS (Sub-Clause 14.4)
• This is where payment is predetermined and instalments are set out in a schedule.

• Where instalments are not defined in relation to progress of the Works
  ➢ If progress is found to be less than that upon which the instalments were based.
  ➢ The Engineer can adjust in accordance with Sub-Clause 3.5 to reflect reduction in progress.

• Where there is no schedule of payments the Contractor shall submit estimates for the payments he will require for each quarterly period. This shall be revised quarterly.
Payment

PLANT AND MATERIALS INTENDED FOR THE WORKS
(Sub-Clause 14.5)

- This Sub-Clause provides that
  - where Plant and Materials are listed in the Appendix to Tender for payment when supplied; or
  - where such are listed for payment when delivered to site.

- Interim Certificates shall include for payment for such when they are shipped or delivered.
Payment

PLANT AND MATERIALS INTENDED FOR THE WORKS
(Sub-Clause 14.5)

- When they are incorporated into the Permanent Works this payment shall be removed.

- The additional amount to be certified shall be 80% of the Engineer’s determination of the cost of the Plant and materials.
ISSUE OF INTERIM PAYMENT CERTIFICATES (Sub-Clause 14.6)

- No certification or payment until the Employer has received and approved the Performance Security.

- Engineer shall
  
  - Within 28 days after receiving the Contractor’s statement and supporting documents
  
  - Issue to the Employer an Interim Payment Certificate which states the amount which the Engineer fairly determines to be due, with supporting particulars.
ISSUE OF INTERIM PAYMENT CERTIFICATES continued
(Sub-Clause 14.6)

• The Engineer is not bound to issue an Interim Payment Certificate if the amount payable is less than the minimum amount shown in the Appendix to Tender.

• Interim Payment Certificates shall not be withheld.

• Where work is not in accordance with the Contract the cost of rectification or replacement may be withheld.
ISSUE OF INTERIM PAYMENT CERTIFICATES continued
(Sub-Clause 14.6)

• The Engineer may make adjustments in an Interim Payment Certificate to take account of amounts wrongly certified previously.

• A Payment Certificate shall not be deemed to indicate the Engineer’s approval or acceptance.
Payment

(Sub-Clause 14.7)

- The Employer shall pay to the Contactor
  
  - The advance payment within 42 days after issuing Letter of Acceptance or within 21 days of receiving the Performance Security/guarantee/Statement whichever is later.
  
  - The amount certified by the Engineer in each Interim Payment Certificate within 56 days after receiving the Statement and supporting documents.
  
  - The amount certified in the Final Payment Certificate within 56 days after the Employer receives the Payment Certificate.
Payment

DELAYED PAYMENT (Sub-Clause 14.8)

- Where the Contractor is not in receipt of payment in accordance with Sub-Clause 14.7.

- The Contractor is entitled to financing charges
  - on the amount outstanding
  - Compounded monthly
DELAYED PAYMENT (Sub-Clause 14.8) Cont’d

- On the period commencing on the date for payment specified in Sub-Clause 14.7

- Irrespective of whether payment is certified or not.

- Interest rate is 3% above the discount rate of the central bank in the country of the currency of payment.

- No notification is required.
PAYMENT OF RETENTION MONEY (Sub-Clause 14.9)

- 50% of retention money to be certified and paid on issuing of Taking-Over Certificate of the whole of the Works.

- For a Section on the issuing of a Taking-Over Certificate 40% of the retention money shall be certified and paid (40% of estimated value of the section ÷ the estimated final Contract Price).

- On expiry of the latest of the Defects Notification Periods the outstanding balance of retention shall be certified and paid.

- For expiry of Defects Notification Period for a Section a further 40% shall be certified and paid.
Payment

STATEMENT AT COMPLETION (Sub-Clause 14.10)

- Contractor to submit 6 copies of a Statement at completion 84 days after receiving the Taking-Over Certificate for the Works.

- The Statement is to show
  - Value of all work done
  - Further sums that the Contractor believes he is due
  - Estimate of other amounts Contractor considers will become due to him.

- The Engineer is to certify in accordance with Sub-Clause 14.6 (28 days).
APPLICATION FOR FINAL PAYMENT CERTIFICATE
(Sub-Clause 14.11)

- Within 56 days after receiving the Performance Certificate under Sub-Clause 11.9.

- (the Performance Certificate to be issued within 28 days of the last expiry date of the last Defects Notification Period (Sub-clause 14.11)).

- The Contractor is to submit 6 copies of the draft final statement showing
APPLICATION FOR FINAL PAYMENT CERTIFICATE
(Sub-Clause 14.11) Cont’d

- the value of all work done in accordance with the Contract

- any further sums to which he believes he is entitled.

• The Contractor is to submit such further information as the Engineer may reasonably require.

• Agreed changes are to be made to the draft final statement – called the “Final Statement”.

APPLICATION FOR FINAL PAYMENT CERTIFICATE Cont’d
(Sub-Clause 14.11)

• If the Final Statement cannot be agreed
  
  ➢ Engineer shall certify an Interim Payment Certificate for the agreed parts of the draft
  
  ➢ Upon resolution of the dispute the Contractor shall prepare and submit to the Employer a Final Statement.
WRITTEN DISCHARGE (Sub-Clause 14.12)

• The Contractor, with his Final Statement shall submit a written discharge which confirms

  ➢ The total of the Final Statement represents a full and final settlement of all monies due to the Contractor under or in connection with the Contract.

  ➢ The written discharge may state that it is effective when the Contractor has been paid and had the Performance Security returned to him.
Payment

ISSUE OF FINAL PAYMENT CERTIFICATE (Sub-Clause 14.13)

• Within 28 days after receiving the Final Statement and written discharge stating
  - Amount finally due
  - The balance due to the Contractor (or Employer).

• Or if the Contractor has failed to provide a Final Statement then the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines is due.

• Payment within 56 days (Sub-Clause 14.7(c)).
CURRENCIES OF PAYMENT (Sub-Clause 14.15)

- Proportions of currencies and exchange rates should be stated in Appendix to Tender.

- Provisional sums (Sub-Clause 13.5) and Adjustments for Changes in Legislation (Sub-Clause 13.7) shall be paid in appropriate currencies.

- If no rates of exchange are stated in the Appendix then those at the Base Date as determined by central bank shall apply.
CORRECTIONS TO PAYMENT CERTIFICATES (Sub-clause 14.6)

- Payment Certificates may not be corrected.

- Corrections may however be made in subsequent Payment Certificates.
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Risks, Responsibilities, Liabilities and Insurance
DAY 1  15:00
Speaker: ROYSON PENDLEY
Risk and Responsibility
(Clause 17)
Personal injury (Sub-Clause 17.1) - Contractor

Covers bodily injury, sickness, disease or death of any person

**The Contractor indemnifies Employer** against all claims, damages, losses and expenses in respect of any such injury arising out of the Contractor’s design (if any), the execution and completion of the Works and the remedying of any defects, **unless**

- the injury is attributable to the negligence, wilful act or breach of the Contract by the Employer, the Employer’s Personnel or agents
Covers bodily injury, sickness, disease or death of any person

The Employer indemnifies the Contractor against all claims, damages, losses and expenses in respect of:

- any such injury attributable to the negligence, wilful act or breach of the Contract by the Employer, the Employer’s Personnel or its agents

- the matters for which liability may be excluded from insurance cover under sub-clause 18.3(d)(i)-(iii)
Damage to property (Sub-Clause 17.1) - Contractor

Covers damage to or loss of any property *other than the Works*

*The Contractor indemnifies Employer* against all claims, damages, losses and expenses in respect of such damage, to the extent that:

- the damage arises out of the Contractor’s design (if any), the execution and completion of the Works and the remedying of any defects, and

- the damage is attributable to negligence, wilful act or breach of the Contract by the Contractor, the Contractor’s Personnel, agents or employees
The Employer indemnifies the Contractor against all claims, damages, losses and expenses in respect of the matters for which liability may be excluded from insurance cover under sub-clause 18.3(d).

E.g.
- the Employer’s right of occupation of the land for the Permanent Works (18.3(d)(i))
- An Employer’s Risk (17.3), except to the extent that cover is available at commercially reasonable rates (18.3(d)(iii))
Care of the Works (Sub-Clause 17.2)

Covers:

- Permanent Works and Temporary Works
- Goods, i.e. Contractor's equipment, materials and plant

The Contractor is responsible for the care of the Works from the Commencement Date to the Taking-Over Certificate.

Broadly, this means that:

- the Contractor rectifies at its own cost any loss or damage to the Works during this period, unless
- the loss or damage is caused by an Employer’s Risk in sub-clause 17.3
Employer’s risk in Sub-Clause 17.3

Include:

• war, hostilities, invasion

• rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country

• riot, commotion or disorder within the country (by persons other than the Contractor’s Personnel or employees or Subcontractors)

• use or occupation of the Permanent Works by the Employer, except as may be specified in the Contract

• design of any part of the Works by the Employer

• Unforeseeable forces of nature
Consequences of Employer’s Risks (Sub-Clause 17.4)

Loss or damage to the Works:

• Contractor rectifies loss or damage to extent required by the Engineer

• Contractor entitled to Extension of Time for any delay

• Contractor entitled to payment of any Cost incurred

Personal injury or damage to property other than the works:

• Contractor will be entitled to indemnity from the Employer under sub-clause 17.1 to the extent that insurance cover was not available at commercially reasonable terms
Claims by third parties alleging infringement of intellectual property rights (Sub-Clause 17.5)

Examples: infringement of patents, registered designs, copyright and trade marks

**The Employer indemnifies the Contractor** against claims alleging an infringement which is or was:

- an unavoidable result of the Contractor’s compliance with the Contract, or
- a result of the Works being used in a way not indicated by the Contract

**The Contractor indemnifies the Employer** against other claims arising from:

- manufacture, use etc of the Contractor’s equipment, materials, plant or temporary works
- any design for which the Contractor is responsible

**Note:** Sub-Clause 17.5 contains provisions for giving notice of and for settling or contesting any such claims
Indirect or consequential loss or damage:

- Neither Party shall be liable to the other for, or for loss of use of any Works, loss of profit or loss of any contract, other than under:
  - Sub-Clause 16.4 (Payment on Termination)
  - Sub-Clause 17.1 (Indemnities re personal injury and damage to property)
Limitations on liability (Sub-Clause 17.6) – Cont…

Total liability of the Contractor to the Employer shall not exceed:

- the sum stated in the Particular Conditions, or (if a sum is not so stated)
- the Accepted Contract Amount, i.e. the amount accepted in the Letter of Acceptance

other than liability under:

- Sub-Clause 4.19 (Electricity, Water and Gas)
- Sub-Clause 4.20 (Employer’s Equipment and Free-Issue Material)
- Sub-Clause 17.1 (Indemnities re: personal injury and damage to property)
- Sub-Clause 17.5 (Intellectual and Industrial Property Rights)

No limitation on liability in case of fraud, deliberate default or reckless misconduct
Insurances (Clause 18)
General requirements for insurances (Sub-Clause 18.1)

- This clause provides general requirements for the Party responsible for effecting and maintaining insurance under the relevant Sub-Clause.

- Where the insuring obligation falls upon the Contractor, each insurance must be approved by the Employer.

- Where the Employer is the insuring Party, it must be in terms consistent with the details annexed to the Particular Conditions.
General Requirements for Insurances (Sub-Clause 18.1) – cont…

These include:

• the period for submitting evidence that insurance has been effected and copies of the policies
• providing for what happens if the insuring Party fails to insure
• each Party must comply with the conditions of the insurance
• provisions for having additional joint insureds (e.g. Sub-contractors)
• insurance payments to be in currencies required to rectify loss and damage
• the insuring Party to keep insurers informed of relevant changes to the Works
• insurance does not affect the obligations of the Parties under the contract, **but**
• an insuring Party who fails to insure may have to pay any money that would have been recoverable (even if it would not otherwise have been payable by that Party)
Insurance for Works and Contractor’s Equipment (Sub-Clause 18.2)

Unless otherwise stated in the Particular Conditions:

- Insurance is effected and maintained by the Contractor
- in joint names of Contractor and Employer
- with insurers and in terms approved by the Employer (Sub-Clause 18.1)
- these terms shall be consistent with any terms agreed before the Letter of Acceptance (any such terms take precedence over Clause 18) (Sub-Clause 18.1)

Insurance for the Works, Plant, Materials and Contractor’s Documents must be:
- for not less than the full reinstatement cost
- maintained until issue of the Taking-Over Certificate and, for certain matters, until issue of the Performance Certificate

Insurance for the Contractor’s Equipment must be:
- for not less than full replacement value
- effective while being transported to site until no longer required
Insurance for Works and Contractor’s Equipment (Sub-Clause 18.2)

Unless otherwise stated in the Particular Conditions:

• the insurance covers all loss and damage from any cause not listed in Sub-Clause 17.3 (Employer’s Risks) but

• some of the Employer’s Risks should also be covered if they are insurable at commercially reasonable terms

• the insurance may exclude certain losses arising from a part of the Works in a defective condition or that has been taken over by the Employer

• the insurance need not cover Contractor’s equipment, materials, plant and Temporary Works while not in the Country (subject to Sub-Clause 14.5 – Plant and Materials intended for the Works for which an amount is included in an interim Payment Certificate)
Insurance against personal injury and damage to property (Sub-Clause 18.3)

This insurance must cover each Party’s liability for:

- loss or damage to any physical property (except things insured under Sub-Clause 18.2)
- death or bodily injury to any Person (except Persons insured under Sub-Clause 18.4)

which may:
- arise out of the Contractor’s performance of the Contract
- occur before the issue of the Performance Certificate
Insurance against personal injury and damage to property (Sub-Clause 18.3) – Cont...

Unless otherwise stated in the Particular Conditions:

- Insurance for personal injury is effected and maintained by the Contractor
- in joint names of Contractor and Employer
- The insurance is extended to cover liability for all loss and damage to the Employer’s property (except things insured under Sub-Clause 18.2) arising out of the Contractor’s performance of the Contract
- may exclude liability arising from the matters in Sub-Clause 18.3(d)
Insurance against personal injury and damage to property (Sub-Clause 18.3) – Cont...

Unless otherwise stated in the Particular Conditions, the insurance:

- with insurers and in terms approved by the Employer (Sub-Clause 18.1)
- these terms shall be consistent with any terms agreed before the Letter of Acceptance (any such terms take precedence over Clause 18) (Sub-Clause 18.1)

The insurance shall be for a limit per occurrence of:

- the amount stated in the Appendix to Tender
- with no limit on the amount of occurrences

If no amount is stated in the Appendix to Tender, this Sub-Clause shall not apply
The matters for which liability may be excluded from insurance cover under Sub-Clause 18.3(d)

Insurance cover under sub-clause 18.3(d) may exclude liability to the extent that it arises from:

- the Employer’s right of occupation of the land for the Permanent Works
- damage which is an unavoidable result of the Contractor’s obligations to execute the Works
- an Employer’s Risk under Sub-Clause 17.3, except to the extent that cover is available at commercially reasonable terms

**Note:** The Employer indemnifies the Contractor against injury and damage arising from such matters (Sub-Clause 17.1)
Insurance for Contractor’s Personnel (Sub-Clause 18.4)

This insurance:

- is effected and maintained by the Contractor
- to cover liability against claims arising from injury, sickness, disease or death of Contractor’s employees and other Contractor's Personnel
- for the whole time they are assisting with the Works
- must also indemnify the Employer and Engineer, but not for claims arising from their act or neglect
AME SEMINARS
SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Refreshments
DAY 1  15:30 – 15:50
AME SEMINARS
SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Workshop 1 – Variations
DAY 1 15:50
Questions for Workshop

**Background**

A. The Government (the Employer) in the country of Utopia has carried out a feasibility study for the construction of a new port as their existing one is dilapidated and out-dated and is unable to take the size of vessels now being used world-wide.

B. The Employer carries out some preliminary designs and decides, in conjunction with an international consultant to divide the project into Packages and to provide a new rail and road system linking into the port.

C. Although Utopia is ‘cash-rich’, as a safety net they have procured a loan through a well-known bank at very competitive rates. However, the bank has decreed that any contract is to be carried out under FIDIC including the use of DABs.

D. Some Packages will be Employer Design and some will be Contractor Design and Build

E. The railway together with several stations will be Design and Build.

F. The new road, a dual 3 lane expressway is to be Employer design as there are several schemes already in the construction stage elsewhere in Utopia and the designs can be utilised and adapted relatively quickly.

G. The Employer will be represented by a **Steering Committee** who will have full administrative powers for the Employer.

H. There will be 3 **Engineers** – One for the Port Works; one for the Railway Works; and one for the Highway Works. Each of these is provided by the **Programme Management Consultant** (I HAVE EYES EVERYWHERE - IHEE) and will report to the **Project Executive Director**, a Government employee.

I. The **PMC** is responsible for control of the Master Plan and Schedule and Supervision.

J. The Employer’s **Designer** is (WECANDRAW – WCD)

**PORT**

K. One of the first Packages is a contract for site preparation and earthworks under the FIDIC Red Book with a Commencement Date of Jan 2009. Time for completion 24 months.

L. The Packages for the Port are:

<table>
<thead>
<tr>
<th>Package</th>
<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>Site Preparation &amp; Earthworks</td>
<td>Red</td>
<td>Jan ’09</td>
<td>Dec ’11</td>
</tr>
<tr>
<td>P2</td>
<td>Dredging of Channels</td>
<td>Dredging</td>
<td>Oct ’09</td>
<td>Sept ’11 (estimated)</td>
</tr>
<tr>
<td>P3</td>
<td>Wharfs and Jetties</td>
<td>Red</td>
<td>Jan ’11</td>
<td>Dec ’13</td>
</tr>
<tr>
<td>P4</td>
<td>Container Terminal</td>
<td>Yellow</td>
<td>Jan ’12</td>
<td>April ’15</td>
</tr>
<tr>
<td>P5</td>
<td>Cruise Terminal</td>
<td>Yellow</td>
<td>July ’12</td>
<td>April ’16</td>
</tr>
<tr>
<td>P6</td>
<td>Access Roads within dock</td>
<td>Red</td>
<td>Oct ’11</td>
<td>Sept ’12</td>
</tr>
<tr>
<td>P7</td>
<td>Warehousing and Offices</td>
<td>Red</td>
<td>Jan ’12</td>
<td>Dec ’14</td>
</tr>
<tr>
<td>P8</td>
<td>Port Security</td>
<td>Red &amp; Yellow</td>
<td>Dec ’09</td>
<td>Jun ’15</td>
</tr>
</tbody>
</table>

M. Other Information

www.ameseminar.com
➢ Soil is predominantly a competent limestone according to a Soil Survey carried out in 1990.
➢ All Contracts will be a Lump Sum paid against Milestones.
➢ Communications are to be as SC 1.3 with electronic communication by fax.

RAILWAY

To be carried out under the FIDIC Yellow Book with several packages as follows:

<table>
<thead>
<tr>
<th>Package</th>
<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>R1</td>
<td>Permanent Way</td>
<td>Yellow</td>
<td>Oct ’10</td>
<td>Sept ’13</td>
</tr>
<tr>
<td>R2</td>
<td>Rolling Stock</td>
<td>Yellow</td>
<td>Oct ’10</td>
<td>Dec ’13</td>
</tr>
<tr>
<td>R3</td>
<td>Maintenance Facilities</td>
<td>Yellow</td>
<td>Oct ’11</td>
<td>April ’13</td>
</tr>
<tr>
<td>R4</td>
<td>Station 1</td>
<td>Yellow</td>
<td>Jan ’11</td>
<td>April ’14</td>
</tr>
<tr>
<td>R5</td>
<td>Station 2</td>
<td>Yellow</td>
<td>Oct ’11</td>
<td>Sept ’14</td>
</tr>
<tr>
<td>R6</td>
<td>Station 3</td>
<td>Yellow</td>
<td>Jan ’12</td>
<td>Dec ’15</td>
</tr>
</tbody>
</table>

N. All other information as for the Port except:
➢ Station 2 is to be built near a disused mine
➢ Part of the route of the line is through a residential area

HIGHWAY

O. The whole of the highway project is to be built within the same corridor as the railway and carried out under the Red Book.

P. The Commencement Date for the 2 year Contract is April ’12.
➢ The Contracts for previous construction projects were bespoke ones prepared in 1956 by the Roads Department
➢ The Contract is to be a re-measurable Contract with a Bill of Quantities.
Q.

Workshop 1

1. QUESTION 1 - GENERAL
   1.1. In terms of the 3 areas (Port, Rail and Highway) who is in control of the administration of the various contracts?
   1.2. Who gives delegation to the 3 Engineers?
   1.3. How much should be given?
   1.4. How much should be passed on to Assistants?

2. QUESTION 2 – PACKAGE P1 – Site Preparation & Earthworks
   The work includes:
   a) a rockfill causeway
   b) temporary access roads on embankment
   c) a spillway

   The Engineer instructs the Contractor to:
   i. extend his working day by 2 hours
   ii. widen the temporary access roads by 4 metres
   iii. flatten the side slopes of the causeway from 1 in 2 to 1 in 2.5
   iv. build a water treatment works adjacent to the Site so that potable water may be supplied to the region
   v. omit grouting works at the toe of the spillway so that it can be done directly by Grout Ltd

   In respect of each of i to v above:
   2.1 Is the Engineer empowered to instruct them under the Contract?
   2.2 what is the basis for valuation of the Variation?

3. QUESTION 3 – HIGHWAY CONTRACT
   In June 2010, the Contractor has just commenced earthworks, about 2 weeks after it shows on his programme. The Contractor has always intended to commence in the vicinity of the residential area as this is likely to take the longest and he perceives there may be problems. Within a week it is clear that not all the land is available and several residents are refusing to sell.
   3.1. What options are open to the Engineer?
   3.2. How should the Engineer proceed?
   3.3. How should the Contractor proceed?
4. QUESTION 4 – PORT PACKAGE P5
The Contractor is an International Contractor and has built numerous cruise terminals throughout the world.
Drawings are produced on a regular basis but the PED, who visited the Middle East during his holidays, and wants the buildings to be clad in a high class material similar to that he saw whilst he was there. Although the proposed material is compliant with the ER’s and manufacturing has started, the PED is insistent and that it should be at no additional cost.
4.1. How should the Engineer proceed?
4.2. How should the Contractor proceed?

5. QUESTION 5 – PACKAGE R5
The ERs stipulate the siting of Station 2 even though it is near to a disused mine.
Some 2 months after the commencement of the Contract, the Employer, after discussion with the PMC, decides he can save money by moving the station some 500 metres to the north and 100 metres to the west of the previous position. He instructs the Engineer accordingly.
However, the Engineer is not convinced and in order to be on the safe side requests a proposal from the Contractor.
5.1. Is the change to the positioning of the Station a valid ‘Variation’?
5.2. Is the Engineer wise to ask for a ‘proposal’ as this may delay the Contract?
5.3. What should the Engineer expect to receive from the Contractor?
5.4. On the basis the proposal is not accepted what does the Engineer then do?

IF NEEDED

6. QUESTION 5 – PORT PACKAGE P1
After a period of 3 months, the RE receives a copy of the SC 8.3 Programme and passes it to the DRE. The DRE says it looks very pretty and then writes to the Contractor as follows:

Dear Respectful Sir,
I have looked at your programme and find it to be one of the best I have seen in a long time.
I hereby approve it.
Your Obedient Servant
DRE

6.1. Please comment on whether you consider there is any procedural difficulty with the above-mentioned situation
6.2. How would you proceed in such a matter?

7. QUESTION 6 – RAILWAY PACKAGE R2
9 months into the work, the Project Executive Director finds that for some reason the budget on this Package up to this time is overspent and tells the Engineer to investigate and find a solution otherwise he can start looking for another job.

The Engineer finds that the RE has been giving extra work to the Contractor and failed to inform anybody. Most of the extra work involves changes to the Contractor’s Design.

The Engineer goes to the PED and suggests:

i. Replacement of the RE – rejected
ii. Impose constraints on the RE – accepted and Engineer informed to put into action
iii. Approach Contractor and ascertain whether there are actions that can be taken to reduce overspend – grudgingly accepted. Engineer told to put into action.

7.2. What are your views on these actions?
7.3. Is there anything wrong with any of these actions?
7.4. Are there any other actions you consider could be taken?

8. QUESTION 7 – PORT PACKAGE P1

After 6 months the RE decides he is getting too involved in the day-to-day running of the Contract and not playing enough golf, so he decides that he will re-delegate all matters to the DRE who is an employee of the Employer.

The RE Mr U No Who goes on holiday for 3 weeks and tells the Deputy RE that he is now in charge.

The Contractor is very strict in the application of the Contract, and refuses to carry out any instructions given by the DRE.

8.1. Is the Contractor within his rights?
8.2. What would you do in this situation
Workshop 2 –

1. QUESTION 1 – PACKAGE R1
   In his bid the Contractor proposed a Designer from another country outside Utopia, but nonetheless the references for previous work were considered adequate.
   Shortly after commencement of the Contract the Engineer gave the Contractor notice of a meeting in 3 days’ time to discuss with the Contractor the production of design drawings.
   The Contractor attended but the Designer did not.
   1.1. Do you consider there was a potential problem with this and if so why?
   1.2. If ‘yes’, how would you, as the Engineer, re-act?

2. QUESTION 2 – PACKAGE R5
   It is set out in the ERs that all the designs are to be approved. There is a schedule of key dates which were set in the Contract.
   2.1. How does the Contractor ensure that he complies with the key dates?
   2.2. How does the Engineer measure performance in respect of drawings?
   2.3. Are there any steps the Engineer can take to assist in progress?

3. QUESTION 3 – PACKAGE P7
   In this particular contract the Engineer has been restricted to a sum of money of 50,000 Utopian Dollars (UD) for each individual Variation beyond which he requires the permission of the Employer to issue one. He is also restricted to a total sum of 200,000 UD for all Variations.
   After 4 months, there have been a total of 160,000 UD worth of Variations. In Month 5 the Engineer considers that the siting of one of the office buildings is wrong and decides to issue a Variation saying that the Contractor must build the office in a different position.
   3.1. What do you suggest is the Engineer’s way forward?
   3.2. Does he have the power to issue this Variation?
   3.3. What do you do as the Contractor?

4. QUESTION 4 – PACKAGE R6
   The Contractor’s design programme shows the following:
   I. General layout – end April 2012. This is to permit a start to earthworks at the end of the rainy season (generally from September to April).
   II. Foundation Drawings – end June 2012
   III. Substructure Drawings – end August 2012
   IV. Superstructure Drawings – end October 2012
   V. Finishing – end November 2012
By the middle of May 2012, only a few draft drawings have been prepared and although the Engineer has been pressing for final layout drawings the Contractor states these are unlikely before the end of the month.

4.1. Give your view as to the actions the Engineer should take

The Contractor eventually submits his final drawings under a transmission slip for the General Layout at the end of May.

4.2. Is a ‘transmission slip’ sufficient?
4.3. Give your impressions of what should happen next
Workshop 3

1. QUESTION 1 – PACKAGE P3
   At the start of the Contract in Jan ’11, a Schedule of Payments was agreed and included as part of the Contract.
   By Feb ’12 the Contractor was 4 months behind his programme but was still submitting Interim Applications for Payment according to the agreed schedule.
   1.1 What should the Engineer do?

2. QUESTION 2 – HIGHWAY CONTRACT
   After 3 months the Contractor submits an IAP but the RE, who is delegated to sign certificates, is taken ill one week before he is due to sign it. In his absence, the QS on Site, who has prepared all of the information and carried out the measurements, signs.
   However, the QS disputes the value of a large Variation claimed by the Contractor and strikes it out entirely.
   The Contractor immediately refers this to the DAB claiming payment of the sum claimed together with interest at an exorbitant rate. The basis of the claim is that the QS has no delegated authority and therefore had no right to sign.
   2.1 Was the QS within his rights to sign the IPC?
   2.2 If not is the Contractor correct to refer to the DAB?

3. QUESTION 3 – HIGHWAY CONTRACT
   By Month 6, the Contractor has submitted 10 claims for various causes, including lack of access and lack of drawings at the end of Month 1. To this extent he is now 3 months behind his programme.
   However, there are no substantiating details included in the IAP for Month 5, neither is there any application for payment of the sums claimed.
   3.1 Has the Contractor complied with the Contract?
   3.2 Should the Engineer include any sums in the IPC and if so on what basis?
   3.3 What would you do if you were the Contractor?

4. QUESTION 4 – PACKAGE P1
   The Contractor eventually completes the work but is 4 months late.
   The Engineer receives an IAP and in his IPC deducts damages as stated in the Contract at 20,000 UD per day up to a maximum of 2 Million UD.
   4.1. What sum should the Engineer deduct?
   4.2. What should the Contractor do?
Questions
DAY 1  17:00
Risks in Infrastructure Projects in Africa
DAY 2  09:00
Speaker: AMYN MUSSA
Risks in Infrastructure Projects in Africa

1) Political Risks
   – Economist Intelligence Unit Report: Political Risk is main investment constraint
   – Typical Political Risks:
     • War, insurrection, civil commotion
     • Expropriations
     • Change in law & taxes
     • Failure to issue or renew authorisations
     • Currency inconvertibility
     • Arbitration award defaults
Managing Political Risks

A. Political Risk Insurance (PRI) instruments issued by MIGA:

- MIGA is part of the World Bank Group
  - Host government more likely to abide by their promise
  - Commercial banks unlikely to participate without MIGA
- MIGA insures equity, quasi equity and commercial bank debt
- MIGA does not insure DFI debt
- Coverage includes:
  - Forex transfer restrictions
  - Expropriation
  - War, civil disturbance, etc
Managing Political Risks Cont.

B. Debt and Equity Investments by Development Financial Institutions:
   – Implicit Political Risk Cover
     • IFC
     • AfDB

C. A-B Loan Structures used by DFIs
   – Mitigates transfer and convertibility risk
   – Preferred creditor status
Managing Political Risks Cont.

D. Government Guarantees/Support Letters
   — Government must pay compensation for political event
   — Compensation must at least cover:
     • Debt service for short term political risk; and
     • Entire debt for prolonged political risk
Risks in Infrastructure Projects in Africa

2) Regulatory Risks

A. Lack of Robust Regulatory Environment

- Regulations required, which many African countries don’t have:
  - PPP regulations
  - Public procurement regulations
  - Independent regulatory authority
  - Energy regulations
  - Sound Grid Code
2) Regulatory Risk Cont

B. where legislation exists but is insufficient
   • Insufficient provisions relating to LNG in the Energy Act

C. Constraints in procuring licences and permits
   • Too many permits required and processes take too long
Risks in Infrastructure Projects in Africa

2) Regulatory Risk Cont

D. Local ownership restrictions

• Telecommunications sector
• Listed companies
• Land ownership restrictions

E. Regulators

• Can be inefficient, inadequate, corrupt, bureaucratic
2) Regulatory Risk Cont

F. Lack of clarify in tax regulations

– Provision of appropriate tax breaks needed:
  • Incentives:
    – Investment allowances
    – Waivers of customs duty & VAT
  • Deterrents:
    – Taxes on equity distributions (effect on equity IRR)
3) Financial constraints

A. Low or nonexistent sovereign credit ratings
   • Only 18 of 48 African countries have foreign currency debt ratings (Kenya has B+)
   • Only 1 of the 18 has a BBB rating (South Africa).

B. Difficulty in accessing commercial lending
   • Only DFI funding available for such projects
3) Financial constraints cont

C. Credit Risk of Offtaker

   - Challenges
     
     • Small balance sheet
       - Cannot justify payment of fixed capacity charges
       - Take or pay structures
     
     • Poor collections from ultimate consumers
     
     • Inability to pass through various costs to consumers (forex & fuel cost)
3) **Financial constraints cont**

Mitigations available which are not being pursued aggressively

- Privatizations and public listed companies on the local stock exchange (e.g. KPLC)
- Liquid security instruments
  - Letters of credit from offtaker
  - Partial Risk Guarantee issued by IDA
  - MIGA Guarantee securing commercial risk
- Infrastructure and sovereign bonds
- Using PPP structures
4) Lack of Infrastructure (chicken and egg situation)

- Lack of roads
  - Only 40% of rural Africans live within 2 kms of an all-season road
  - Movement of freight is below 12 kms an hour

- Lack of grid connection
  - Chronic power shortages affect 30 African countries
  - Installed generation capacity of Sub Saharan countries is 68 gigawatts (same as Spain’s)
  - 25% of capacity is unavailable because of aging plants
4) Lack of Infrastructure Cont.

- Lack of water
  - Less than 60% of Africa’s population has access to drinking water
- Insufficient telecommunications and ICT
- Lack of government support to provide ancillary infrastructure support
- Project company has to provide ancillary infrastructure and bear the cost
5) **Mindset of Governments**
   - Public sector best placed to deal with large infrastructure projects
   - Therefore:
     - Few privatizations and PPP projects
     - Private sector participation in infrastructure projects not encouraged
6) Bankability Test

   - Bar for achieving bankability is higher in Sub Saharan Africa
     - Projects being financed on non-recourse project finance basis
   - Agreements are significantly more detailed with added provisions:
     - Political Risk
     - Change in Law
     - Change in Tax
   - Level of scrutiny of documents is significantly higher
6) Bankability Test Regarding Construction Agreements

- Significant risk is required to be passed to contractor
  - Fixed in price and fixed in time contracts required
  - Contractor required to provide significant additional security (performance bonds)
- Contractors are less willing to take on additional risks in African projects
- Therefore, very difficult to negotiate contracts
6) Bankability Test Regarding Construction Agreements

- Not considered bankable most of the time:
  - FIDIC Yellow contracts
  - FIDIC Silver contracts

- Required:
  - Fully wrapped turnkey construction contract
  - Long term, fixed price O&M or service and maintenance contracts

- To achieve the above, there is significant increase in project cost
QUESTIONS?

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Risks in Infrastructure Projects in Africa
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Completion of the Works
DAY 2  09:30
Speaker: MALCOLM KELLY
Topics

- Commencement Date
- Time for Completion
- Sectional Completion
- Partial Completion
- Tests
- Taking Over of the Works
- Taking Over a part of the Works
- Performance Certificate
Commencement Date

- **S/C 8.1 [Commencement of Work]**
  - Defined as the date notified under S/C 8.1
  - Letter of Acceptance defined as the formal letter signed by the Employer comprising agreements signed by both Parties. If no such letter exists then it means Contract Agreement.
  - The Engineer to give not less than 7 days notice of the Commencement Date
  - The Commencement Date to be within 42 days of receipt by the Contractor of the Letter of Acceptance.
  - Contractor must then commence the execution of the Works as soon as practicable after receipt of the notice from the Engineer.
  - Contractor then to proceed with due expedition and without delay.
Time for Completion

- **S/C 8.2 [Time for Completion]**
  - Defined as the time for completing the Works or Section under S/C 8.2 as stated in the Appendix to Tender (or as extended) calculated from the Commencement Date.
  - Thus what signifies ‘Completion’?
     - S/C states ‘the whole of the Works’ and each Section
     - Includes achieving the passing of all Tests on completion – see Clause 9
     - Completing all work which is stated in the Contract as being required for the Works to be considered to be completed for the purposes of taking over.
     - Also includes
       - ‘Training’ – S/C 5.5
       - ‘As-Built drawings’ – S/C 5.6
       - ‘Operation and Maintenance Manuals’ – S/C 5.7
Sectional Completion

- Defined as a part of the Works specified in the Appendix to Tender as a Section.
- Thus, it has to be set out in the AtT prior to Contract.
- It will have its own Time for Completion
- It will have its own Delay Damages
- Covered more in Taking Over
Partial Completion

• What is partial completion?
  – Could be defined as part of the Contract which is:
    Incomplete
    Fragmentary
    Imperfect
    Limited
    Uncompleted
    Unfinished

  Suggests ‘work’ is still outstanding

So, can partial completion ever happen as completion is for the whole of the Works or a Section? Contractor’s obligation is “to complete the whole of the Works (S/C 8.2) within the Time for Completion”.

We will consider further under Taking Over with particular reference to ‘outstanding work’
Tests

- 2 Types of Tests
  - Clause 9 [Tests on Completion]
    • Tests required by the Employer to determine whether Works or Section have reached the stage to be taken over
    • As-Built and O&M Manuals are pre-requisites to testing
    • To be carried out in accordance with S/C 7.4 [Testing]
    • Under Yellow, Tests on Completion to be carried out in a particular sequence (unless stated otherwise) i.e. Pre-commissioning; commissioning; and trial operation.
  
  - Clause 12 (Yellow) [Tests after Completion]
    • Tests defined in the ERs and carried out as soon as possible after taking over
    • Tests are carried out by the Employer.
Taking over the whole (or section) of the works

- **S/C 10.1** [Taking Over of the Works and Sections]
  - Employer is required to take over the Works or Section when they are completed in accordance with the Contract, including:
    - Passing the Tests on Completion
    - Completing all the work stated in the Contract as being required for the Works or Section to be considered complete for the purposes of taking over
  - But excluding:
    - Any minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose
  - The Employer has no right to use the Works if the Contractor has failed to complete them in accordance with the Contract
- The Contractor applies for the TOC by written notice. He may anticipate completion up to 14 days in advance of the expected date.
- Suggest there should be a joint inspection when they appear to be complete and any minor outstanding work and defects listed.
Taking over the whole (or section) of the works

- S/C 10.1 [Taking Over of the Works and Sections]
  - The Engineer issues a Taking Over Certificate within 28 days after receiving the Contractor’s application.
  - Certificate states date on which Works or Section were completed (except for minor outstanding work and defects)
  - If Engineer does not issue Certificate he must reject the application giving reasons and specifying work to be done by the Contractor to enable a Taking Over Certificate to be issued. In this event a further notice is required.
  - If the Engineer fails to issue a Certificate or a rejection within the 28 days then the Taking Over Certificate is deemed to have been issued.
  - Defects Notification Period for the Works or Section commences on the date of issue of the TOC.
  - Once the Employer takes over the Works or Section then he is responsible for the care of the Works or Section as applicable.
Taking over the whole (or section) of the works

- What happens next?
  - Payment of first half of Retention Money (under S/C 14.9)
  - Liability for Delay Damages ceases
  - Defects Notification Periods commence
  - Contractor to submit a Statement at Completion (of the Works) within 84 days after receiving the Taking Over Certificate
  - Contractor is required to clear the Site
  - Insurance cover is reduced in respect of the Works and Contractors Equipment
  - Engineer unable to issue an Variations
  - Any outstanding payments in respect of the advance payment become immediately payable
  - Contractor not required to submit revised cash-flow estimates
  - No minimum amount for certification in Interim Payment Certificates
Taking over a part of the works

- **S/C 10.2 [Taking Over of Parts of the Works]**
  - Essentially, the Employer is prohibited to use any part of the Works unless:
    - Except as a temporary measure which is specified in the Contract or as agreed by both Parties
    - The Engineer has issued a Taking Over Certificate

In relation to the second point, S/C 10.2 gives the Employer the unilateral right to require the Engineer to issue a TOC for “any part of the Permanent Works” – i.e., that which is not a Section.

This is apparent from S/C 10.2 where it states “The Engineer may, at the SOLE discretion of the Employer, issue a TOC for any part of the Permanent Works.”

Care should be exercised when parts are taken over when incomplete or use of that part of the Works adversely affects the Contractor’s future work.

It also means the Employers’ entitlement to Delay Damages reduces.

The Contractor may be entitled to additional costs and profit as a result of the Employer taking over a part.
Performance Certificate

- S/C 11.9 *(Performance Certificate)*
  - Until the Performance Certificate has been issued the Contractor’s obligations are not considered to have been completed.
  - The Engineer issues the Certificate stating the date on which the Contractor completed his obligations under the Contract.
  - The Engineer has to issue the Certificate within 28 days of the latest of the expiry dates of the Defects Notification Periods or as soon as possible after the Contractor has delivered all the Contractor’s Documents; and completed and tested the Works including any defects.
  - However, even after the issue of the Performance Certificate each Party remains liable for the fulfilment of any obligation which remains unperformed at that time. To this extent the Contract remains in force.
Programme and Reporting
DAY 2  10:00
Speaker: BOB MATHENGE
Contents

- Introduction
- FIDIC Clauses Related to Programmes
- Contents of Programme
- Status of Programme
- Programme Updating
- Programme Updates – Illustrations
- Reporting Obligations
Introduction

• Programme and Reporting in the context of the FIDIC suite of Contracts
• Talk biased toward the “Red Book” i.e. the FIDIC conditions of Contract for Construction
• Definition of Programme
  – A schedule or chart showing stages in a scheme of work. The programme would illustrate the major phasing and sequencing requirements of a project.
  – The role of the programme is to provide a means of assessment as to the effects of identified future and actual events. That is the programme will be used to demonstrate whether any event will cause a delay to completion
FIDIC Clauses Related To Programme & Reporting

- **Sub-Clause 8.3 – Programme**
  - **Initial Submission**
    - The Contractor must submit a “detailed time programme” to the Engineer within 28 days of the notice of Commencement Date
  - **Revised Programme Submission**
    - The Contractor is to submit a revised programme whenever the previous programme is inconsistent with the actual progress and of the contractors obligations.
  - **What should be included in the time programme?**
    - Sub-clause 8.3 lists details which are to be included with any programme submitted
FIDIC Clauses Related To Programme & Reporting

- **Is the Engineers Approval Required of the Contractors Programme submission**?
  - This sub-clause does not empower the Engineer to give or withhold approval of the programme.

- **Employers Reliance on the Programme**
  - The Employers personnel shall be entitled to rely upon the programme when planning their activities.

- **Contractors Notification**
  - The Contractor shall **promptly** give notice to the Engineer of specific probable future events or circumstances which may adversely affect the work, increase the contract price or delay the execution of the Works.
FIDIC Clauses Related To Programme & Reporting

- **Sub-clause 8.8 – Rate of Progress**
  - **Revised Programme of Works**
    - If progress has fallen behind the current programme under sub-clause the Engineer may instruct a revised programme of works

- **Sub-clause 4.21 – Progress Reports**
  - **Progress Monitoring**
    - Sub-clause 4.21 (h) states that the monthly progress reports shall include “…comparisons of actual and planned progress….”
  - **Sub-clause 14.3 – Application for Interim Payment Certificates**
FIDIC Clauses Related To Programme & Reporting

- **Sub-clause 13.3 – Variation Procedure**
  - The proposal from the Contractor will include a “... description of the proposed work to be performed and a **programme for its execution**“ and “the Contractor’s proposal for any necessary modifications to the **programme according to Sub-Clause 8.3 [Programme]** and to the Time for Completion.

- **Sub-clause 15.2 – Termination by Employer**
  - Sub-clause 15.2(c) (i) , the Employer is entitled to terminate the Contract if the Contractor without reasonable excuse fails to proceed with Works in accordance with Clause 8.
FIDIC Clauses Related To Programme & Reporting

– Obligations of the Contractor under Clause 8 dealing with programme which may entitle the Employer to terminate are
  • Sub-Clause 8.3 – obligation to proceed in accordance with the programme and obligations to submit revisions to the programme on certain events
  • Sub-Clause 8.6 – obligation to accelerate if properly instructed

• Sub-clause 20.1 – Contractor’s Claim
  – Clause 20.1 requires the Contractor to give notice of a claim for extension of time. Contractor should send to the Engineer a fully detailed claim giving full supporting particulars of the basis of the claim that would naturally include a programme of works impacted with the delaying event
Contents Of Programme

• Purpose of the Programme
  – To set out how the Contractor proposes to carry out his work
  – Programme must be supported by a report that sets out the methods of working the Contractor intends to adopt
  – An estimate of the personnel and equipment resources required to carry out the works
• Attributes of the Programme
  – Should be responsive to the needs of all project stakeholders
  – Believable from the commencement of the project, to tracking up to completion
  – The programme has to be practical
Contents of Programme

- Generating a Programme
  - Construction Plan
  - Project Time
  - Key features to develop the programme
    - Activity Definition
    - Activity Sequencing
    - Activity Duration
    - Actual Programme Development
Contents of Programme

• **Form of the Programme**
  – Bar Chart
  – Critical Path Method (CPM)
  – The form the programme should take

• **Employers Requirements of Content**
  – The order in which the Contractor intends to carry out the Works
  – Each of these stages for work by each nominated Subcontractor (Defined in Clause 5)
  – The sequence and timing of inspections and tests specified in the Contract, and
Contents Of Programme

- The sequence and timing of inspections and tests specified in the Contract
- A supporting report which includes methods and reasonable estimates of resources

• Additional requirement through Particular Conditions
  - Level of programme activity detailing
  - Definition of the Work Breakdown Structure (WBS)
  - Other Additional Requirements e.g. as to the software to use, resource loading requirements, manpower histograms etc.
Status Of Programme

• Contractual status of the Clause 8.3 Programme
  – In the FIDIC suites of Contract the Programme is not a contract document.
Programme Updating

• Contractors Obligation to Update
  – Sub-Clause 4.21 (h)
    • Monthly progress reports shall be submitted to the Engineer
    • The Progress report shall include comparison of actual and planned progress

• Updating Procedure
  – the accepted Baseline Programme be updated with actual progress using the agreed project planning software
  – The Baseline Programme of Works is saved as a baseline to be included in the updates for comparison
Programme Updating

- Actual progress should be recorded by means of actual start and actual finish dates for activities, together with percentage completion of currently incomplete activities and/or the extent of remaining activity durations.
- The monthly updates should be archived electronically. Updated Programme should also be copied electronically to the Engineer, along with a report describing any modifications made to activity durations or logic of the programme.
### Programme Updates - Illustrations

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<th>Unit</th>
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<th>Baseline Sta</th>
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<td>Fri 19/09/01</td>
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<td>Wed 19/03/01</td>
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</table>
Reporting Obligations

• Contract Provisions – Sub-Clause 4.21 (h)
  – Reporting to be monthly and continue until completion of all outstanding works stated in the taking over certificate.

• Reporting Obligation Features
  – Actual & Planned Progress Comparison (Programme)
  – Events or circumstances which may jeopardise the completion (Narrative)
  – Measures being (or to be) adopted to overcome delays (Narrative)
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental

Employer’s Claims/Remedies (Sub-Clause 2.5)
DAY 2 10:50
Speaker: SIMON DELVES/MALCOLM KELLY
Employer’s Claims
(Sub-Clause 2.5)

Sub-Clause 2.5 covers Employer’s claims for:
• any payment under any clause of the Conditions
• any payment otherwise in connection with the Contract
• any extension of the Defects Notification Period

Procedure:
• Employer or Engineer gives notice and particulars to the Contractor
• notice must be given as soon as practicable after the Employer becomes aware of the event or circumstances giving rise to the claim
• particulars must specify clause or other basis of claim and substantiation of amount and/or extension claimed
• Engineer proceeds under Sub-Clause 3.5 to agree or determine the amount (if any) to be paid or the extension (if any) of the Defects Notification Period
• The amount may be included as a deduction in payment certificates
Employer’s Claims
(Sub-Clause 2.5)

Miscellaneous points:

- Notice is not required for payments due under Sub-Clauses 4.19 (electricity, water and gas) or 4.20 (Employer’s equipment and free-issue material) or for other services requested by the Contractor
- Notice seeking extension of the Defects Notification Period must be given before the expiry of the period

The Employer is only entitled to
- set off against or make any deduction from an amount certified in a payment certificate, or
- otherwise claim against the Contractor in accordance with this Sub-Clause
Defects in performance

- Contractor’s Obligations:
  - Sub-Clause 4.1 – “... shall design execute and complete the Works in accordance with the Contract (and with the Engineer’s instructions) and shall remedy any defects in the Works. (When completed the Works shall be fit for the purposes for which the Works are intended as defined in the Contract).”
  - Sub-Clause 7.1 – “… shall carry out … all other execution of the Works:
    - In the manner specified in the Contract
    - In a proper workmanlike and careful manner in accordance with recognised good practice
    - With properly equipped facilities …..”
  - Sub-Clause 7.4 – “..shall provide … as are necessary to carry out the specified tests efficiently ..... promptly forward duly certified reports of the tests…..”
Defects in performance

- Engineer’s Duties:
  - Sub-Clause 7.2 – “... consent to use of Materials for use in or for the Works …”
  - Sub-Clause 7.3 – “... shall ... then either carry out [the inspections] ... without unreasonable delay or promptly give notice that he does not require to do so....”.
  - Sub-Clause 7.4 – “...endorse the Contractor’s test certificate or issue a certificate to that effect. [NOTE: If the Engineer does not attend tests he is deemed to have accepted the readings as accurate].
  - Sub-Clause 7.5 – “... may reject any ... not in accordance with the Contract... order retests…”
  - Sub-Clause 7.6 – “... may instruct ....
    - Remove from Site and replace .... Not in accordance with the Contract
    - Remove and re-execute work not in accordance with the Contract
    - Execute any work which is urgently required for the safety of the Works whether because of an accident unforeseeable or otherwise.
Delay damages

- Sub-Clause 8.7
  - Generally known as “Liquidated Damages”.
    - Damages the parties ascertained when entering into the Contract for the injured party (the Employer in this Contract Form) to collect for a specific breach (ie late completion).
    - Pre-determined and should roughly approximate to the damage likely to be suffered by the injured party
  - Contractor pays to the Employer the pre-determined sum stated in the A to T for every day which elapses between the Time for Completion and the date stated in the Taking Over Certificate
  - Payment is subject to the Employer making a claim under SC 2.5
  - Total amount payable shall not exceed maximum amount stated in the A to T
  - Contractor is obligated to complete the Works
Sub-clause 8.7

**INTERPRETATION OF SC 8.7**

- Time for Completion
- Issue of T/O Certificate

Delay Damages = No of Days
X Rate stated in A to T
Performance Security
(Sub-Clause 4.2)

The Performance Security must be:
• in the amount and currencies stated in the Appendix to Tender (if no amount is stated, Sub-Clause 4.2 shall not apply)
• issued by an entity and from within a country approved by the Employer
• be in the form annexed to the Particular Conditions or in another form approved by the Employer

The Contractor:
• obtains the Performance Security at his cost
• delivers it to the Employer within 28 days after receiving the Letter of Acceptance (no interim payment certificate will be issued before it has been received - clause 14.6)
• ensures that it is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects
• if necessary, arranges to extend its expiry date, in accordance with Sub-Clause 4.2
Performance Security (Sub-Clause 4.2)

The Employer:

- can only claim under the Performance Security in respect of the events listed in Sub-Clause 4.2
- the claim is for the amount due under the Contract in the event in question
- indemnifies the Contractor against the consequences of making a claim to the extent that he was not entitled to make the claim
- returns the Performance Security to the Contractor within 21 days after receiving a copy of the Performance Certificate
- in the event of termination by the Contractor under Sub-Clause 16.2, returns the Performance Security promptly following notice of termination (Sub-Clause 16.4)
Performance Security (Sub-Clause 4.2)

Events entitling Employer to claim under the Performance Security:

- failure by Contractor to extend validity of the Performance Security (may claim the full amount of the security)
- failure by Contractor to pay an amount due under Sub-Clause 2.5 or Clause 20
- failure of Contractor to remedy a default
- circumstances entitling Employer to terminate under Sub-Clause 15.2
Suspension of Work

Introduction

1. By instruction from Engineer – (Sub-Clause 8.8). Contractor’s entitlement to an extension of time and cost. Prolonged suspension.

2. Suspension of work by instruction from the Engineer can be a very useful tool for the Employer who may otherwise be in breach of contract for example – failure to pay for further work undertaken or failure to provide access and/or possession.
3. By Contractor (Sub-Clause 16.1). Circumstances allowing Contractor to suspend or slow down rate of progress – certification, Engineer’s financial arrangements, payment. Entitlement to an extension of time and cost.

4. In common law systems, no right to stop work if not paid. Therefore this is potentially an extremely useful tool for the Contractor if operated properly.
Suspension of Engineer’s instructions (Sub-clause 8.8)

• Instruction may be given at any time.

• May be in respect of whole or part of Works.

• If or to the extent to which the cause of the suspension is the responsibility of the Contractor he has no remedy.

• To the extent that the suspension is not the responsibility of the Contractor, the Contractor can:
  – claim for an extension of time (Sub-Clause 8.9)
  – claim for additional cost (Sub-clause 8.9)
Suspension of Engineer’s instruction (Sub-clause 8.8) Continued

– seek payment for the value of Plant and Materials on a suspension of more than 28 days (Sub-Clause 8.10).

– for a prolonged suspension (more than 84 days) the Contractor can ultimately treat the suspension as an omission of part of the works (Clause 13) or terminate (Sub-Clause 16.2).
1. Termination is a very serious step and generally should only be used in extreme circumstances.

2. The party terminating should exercise great care as an ineffective termination may result in a repudiatory breach.

3. Termination frequently leads to adjudications and arbitration. Usually there are battles as to who terminated and it can give rise to a call of the Performance Security.
4. There are circumstances where there is no alternative e.g.:

- an Employer who consistently fails to pay or interferes;
- a Contractor who persistently fails to perform.
Termination by employer – contractor default (Sub-clause 15.2)

Grounds for Termination

• Sub-Clause 15.2(a)
  - Failure to provide and maintain a Performance Security in accordance with Sub-Clause 4.2
  - Failure to comply with a Notice to Correct under Sub-Clause 15.1
Termination by employer – contractor default (Sub-clause 15.2) Continued

• Sub-clause 15.2(b)
  - abandons the Works or
  - otherwise plainly demonstrates an intention not to perform obligations.
Termination by Employer – Contractor Default – Sub-Clause 15.2
Continued

• Sub clause 15.2 (c) – without reasonable excuse fails –
  – To proceed with the Works in accordance with Clause 8.
  – To comply with a notice under Sub-Clause 7.5 (Rejection) within 28 days.
  – To comply with a notice under Sub-clause 7.6 (Remedial Work) within 28 days.
Termination by employer – contractor default (Sub-clause 15.2) Continued

• Sub-clause 15.2(d)

  ➢ Subcontracts the whole of the Works without agreement.

  ➢ Assigns the Contract without agreement.
Termination by employer – contractor default (Sub-clause 15.2) Continued

- Sub-Clause 15.2(e)
  - insolvency.

- Sub-Clause 15.2(f) gives or offers a bribe, gift, gratuity or other thing of value, as an inducement or reward for:
  - an action or inaction in relation to the Contract.
  - favouring or not favouring any person in relation to the Contract.
Mechanics of termination by employer (Sub-clause 15.2)

Employer may terminate:

- Upon giving 14 days’ notice for Sub-Clause 15.2 (a) to (d) events.
- Immediately for Sub-Clause (e) to (f) events.
Sub-clause 15.5 Termination – No contractor default

Employer can terminate the Contract for convenience by giving notice.

- Termination takes effect 28 days after the receipt of notice or if later when

- Employer returns the performance security to the Contractor.
Sub-clause 15.5 Termination – No contractor default
Continued

• Employer may not terminate under Sub-Clause 15.5 to

  ➢ execute the Works himself or

  ➢ to give to others to execute the Works.
Consequences of sub-clause 15.2
Termination – (Contractor’s Default)

• Contractor to leave Site.

• Contractor to deliver any required Goods, all Contractor’s Documents and other design documents to the Engineer – Employer may use these.

• Assignment of sub-contracts.

• Protection of life of property.

• Safety of works.
Consequences of sub-clause 15.2  
Termination – (Contractor’s Default) - Continued

• Employer’s completion of works.

• On completion, Employer to release Contractor’s Equipment and Temporary Works or may sell them to recover monies does.
SUB-CLAUSE 15.3 VALUATION AT DATE OF TERMINATION

Following termination Engineer to as soon as practicable agree or determine the value of the Works, Goods and Contractor’s Documents (Sub-Clause 3.5).
SUB-CLAUSE 15.4 PAYMENT AFTER TERMINATION

Following termination Employer may:

- Withhold any further payments pending establishment of costs;
- Recover additional losses and costs in completing the Works consequent upon termination.

Employer shall pay balance (if any) over to the Contractor.
Consequences of sub-clause 15.5
Termination – No Contractor Default

Consequences similar to those applying when the Contractor has an entitlement to terminate (Sub-Clauses 16.3 and 19.6).
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Contractor’s Claims and Remedies
DAY 2  11:30
Speaker: SIMON DELVES/MALCOLM KELLY
Day 2: Contractor’s claims and remedies
Sub-clause 20.1 – Contractor’s claims

- This is a ‘procedural’ clause not an ‘entitlement’ clause.

- Entitlement derives from a Sub-Clause such as SC 2.1:
  - If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 to: ……………………..

- Thus, it seems clear that notice has to be given under SC 2.1 AND the claim has to be submitted in accordance with the procedures set out in SC 20.1.
Sub-clause 20.1

• **CONTRACTOR’S ACTIONS (1)**

  • If Contractor considers himself to be entitled to any extension to the TfC and/or any additional payment he shall give notice to the Engineer describing the event or circumstance giving rise to the claim.

  • The notice shall be given as soon as practicable and not later than 28 days after the Contractor became aware or should have become aware of the event or circumstance.

  • Failure to comply with the 28 days notice will discharge the Employer from any liability in connection with the claim.

  • The Contractor shall also submit any other notices required by the Contract and supporting particulars for the claim which are relevant to the event
Sub-clause 20.1

• CONTRACTOR’S ACTIONS (2)

• The Contractor is to keep such contemporary records necessary to substantiate any claim. Records to be kept on Site or at a location acceptable to the Engineer. He shall permit the Engineer to inspect records at any time.

• Within 42 days of the ‘Aware Date’ or such other period proposed by the Contractor and accepted by the Engineer, the Contractor shall send to the Engineer a fully detailed claim.
  – This claim shall include full supporting particulars of the basis of the claim; of the extension of time and/or additional payment claimed;

• If the event has a continuing effect, the fully detailed claim shall be considered as interim; the Contractor shall send further interim claim monthly and particulars as the Engineer requires; send a final claim 28 days after the end of the effect of the event.
Sub-clause 20.1

• THE ENGINEER’S ACTIONS (1)

• After receipt of ‘Notice’ the Engineer may monitor record keeping and/or instruct Contractor to keep further contemporary records.

• Within 42 days after receipt of fully detailed claim or any further particulars supporting a previous claim the Engineer responds with approval or disapproval and detailed comments on the principles of the claim.

• He may also request any necessary further particulars on the claim.

• He shall include in any Payment Certificate amounts reasonably substantiated, but only that part.
Sub-clause 20.1

• THE ENGINEER’S ACTIONS (2)

• The Engineer then proceeds in accordance with Sub-Clause 3.5 to agree or determine:

• the extension of the TfC in accordance with SC 8.4; and/or

• The additional payment to which the Contractor is entitled.

• **Note that the requirements of this SC are in addition to those of any other SC which may apply to a claim.**

• If the Contractor fails to comply with any SC in relation to a claim the Engineer takes into account the extent to which the failure has prevented/prejudiced the proper investigation of the claim.
Extensions of time

- **Reason**
  - To relieve Contractor of Delay Damages

- **Entitlement**
  - EoT for a delay if completion for the purposes of SC 10.1 [Taking Over of the Works and Sections] is or will be delayed for a cause listed in SC 8.4

- **Causes**
  - A Variation (unless EoT granted under 13.3)
  - A cause under any SC giving an entitlement eg SC 2.1
  - Exceptionally climatic conditions
  - Unforeseeable shortages in availability of personnel or Goods caused by epidemic or governmental actions
  - Any delay, impediment or prevention caused by or attributable to the Employer, Employer’s personnel or Employers other contractors on the Site

- **Action**
  - Contractor to give notice to the Engineer under SC 20.1
  - Engineer to review previous determinations and may increase.
Sub-clause 8.4

 Completion is assessed at the time of the Employer’s delay

\[ X + Y = \text{Completion for the purposes of SC 10.1 (T of C)} \]

If \( Z < Y \) then NO EoT
Prolongation

- **Definition**
  - Lengthen; carry on; continue; delay; drag out; draw out; extend; make longer; perpetuate; protract; spin out; and stretch (Collins).
  - The extended duration of the works during which Costs are incurred as a result of a delay (SoCL)

- **Responsibility**
  - From ‘Definition’ – could be either Party

- **Entitlement**
  - Derives from the Contract Terms but this time relates to ‘Cost’

- **Analysis**
  - Delay analysis using Programme – eg “impacted as planned”; “as-planned v as-built”; “collapsed as-built”; “windows analysis”; “time impact”; or “time slice”.
  - Society of Construction Law Protocol – particularly concurrent delays

- **Proof**
  - Burden of Proof on the Party who alleges
Disruption

• **Definition**
  – Disturbance, confusion, disarray, disorder, interference, interruption; and stoppage (*Collins*)
  – Disturbance, hindrance or interruption of a Contractor’s normal works progress, resulting in lower efficiency or productivity than would otherwise be achieved. Disruption does not necessarily result in a delay to progress or delay to completion (*SoCL*)

• **Entitlement**
  – Derives from the Contract Terms but relates to ‘Cost’
Force majeure (Clause 19)

Introduction

• On the happening of a Force Majeure event a party shall be excused from performance to the extent such is prevented by the Force Majeure event.

• The Contractor shall be entitled to an extension of time and is some circumstances recovery of cost.
Force majeure – Definition (Sub-clause 19.1)

Force Majeure – an exceptional event or circumstance which

• Is beyond a party’s control.

• A party could not reasonably have provided against.

• Could not reasonably have been avoided or overcome.

• Which is not substantially attributable to the other party
Force majeure – Definition (Sub-clause 19.1)
Continued

Includes but is not limited to

(i) War.

(ii) Rebellion, terrorism, civil war.

(iii) Riot, strike other than Contractor’s personnel.

(iv) Munitions, explosives, radiation.

(v) Natural catastrophes
Force majeure – Procedure (Sub-clause 19.2)

- Notice to be given to other party of
  - event constituting Force Majeure;
  - the obligations where performance will be prevented;
  - within 14 days of becoming aware of event.

- Force Majeure shall not apply to the obligation to make payment.

- Notice to be given when Force Majeure event ceases to have effect (Sub-Clause 19.3).
Subject to Sub-Clause 20.1 the Contractor is entitled to

- an extension of time if completion is delayed under Sub-Clause 8.4;

- cost for Sub-Clause 19.1 (i) to (iv) and for (ii) to (iv) if it occurs in the country;

- The Engineer is to proceed in accordance with Sub-Clause 3.5 determinations.
Suspension by contractor (Sub-clause 16.1)

• Contractor may suspend if:
  – Engineer fails to certify in accordance with Sub-Clause 14.6.
  – Employer fails to comply with Sub-Clause 2.4 (Employer’s Financial Arrangements).
  – Employer fails to comply with Sub-Clause 14.7 (Payment).
Suspension by contractor (Sub-clause 16.1)

• Contractor may, after giving not less than 21 days notice to the Employer, suspend work or reduce the rate of work.

• The right to suspend or reduce the rate of progress ends upon the rectification of the default.

• Contractor may seek recovery of (subject to notice and in accordance with Sub-Clause 20.1)
  – an extension of time
  – payment of Cost.
Termination by Contractor (Sub-clause 16.2)

Grounds for termination

- Sub-Clause 16.2(a)
  - Employer’s continued failure to comply with Sub-Clause 2.4 (Employer’s Financial Arrangements).
• Sub-Clause 16.2(b)
  ➢ Engineer’s continued failure to issue the relevant Payment Certificate.

• Sub-Clause 16.2(c)
  ➢ Employer’s continued failure to pay certified sums.

• Sub-Clause 16.2(d)
  ➢ Employer’s substantially fails to perform his obligations under the Contract.
Termination by Contractor (Sub-clause 16.2)

Grounds for termination - Continued

• Sub-Clause 16.2(e)
  ➢ Employer fails to execute Contract Agreement as agreed (Sub-Clause 1.6).
  ➢ Employer fails to comply with Sub-Clause 1.7 (Assignment).

• Sub-Clause 16.2(f)
  ➢ Prolonged suspension (Sub-Clause 8.11).

• Sub-Clause 16.2(g)
  ➢ Insolvency.
Mechanics of termination by contractor (Sub-clause 16.2)

Contractor may terminate:

• upon giving 14 days’ notice for Sub-Clause 16.2(a) to (e) events;

• immediately for Sub-Clause (f) or (g) events.
Consequences by termination of contractor (Sub-clause 16.2) or employer’s sub-clause 15.5 termination (Sub-clause 16.3)

Contractor shall promptly:

• cease further work Sub-Clause 16.3(a) (safety exclusion);

• hand over Contractor’s Documents, Plant, Materials and other work (Sub-Clause 16.3(b));

• remove Goods from the Site and leave the Site (Sub-Clause 16.3(c)) (safety exclusion).
Employer shall promptly:

- return Performance Security to Contractor (Sub-Clause 16.4(a)).
Employer shall promptly:

- pay the Contractor in accordance with Sub-Clause 19.6.

Engineer to issue a Payment Certificate in respect of:

- Amounts payable for work done (Sub-Clause 19.6(a));
- Cost of Plant and Materials delivered/ordered (Sub-Clause 19.6(b)).
Engineer to issue a Payment Certificate in respect of:

- other costs and liabilities (Sub-Clause 19.6(c));
- cost of removal (Sub-Clause 19.6(d));
- Cost of repatriation (Sub-Clause 19.6(e));
- Pay the Contractor losses arising from the Termination Sub-Clause 16.4(c).
Questions
DAY 2    12:45
AME SEMINARS
SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Lunch
DAY 2  13:00 – 14:00
Questions for Workshop

Background

A. The Government (the Employer) in the country of Utopia has carried out a feasibility study for the construction of a new port as their existing one is dilapidated and out-dated and is unable to take the size of vessels now being used world-wide.

B. The Employer carries out some preliminary designs and decides, in conjunction with an international consultant to divide the project into Packages and to provide a new rail and road system linking into the port.

C. Although Utopia is ‘cash-rich’, as a safety net they have procured a loan through a well-known bank at very competitive rates. However, the bank has decreed that any contract is to be carried out under FIDIC including the use of DABs.

D. Some Packages will be Employer Design and some will be Contractor Design and Build

E. The railway together with several stations will be Design and Build.

F. The new road, a dual 3 lane expressway is to be Employer design as there are several schemes already in the construction stage elsewhere in Utopia and the designs can be utilised and adapted relatively quickly.

G. The Employer will be represented by a Steering Committee who will have full administrative powers for the Employer.

H. There will be 3 Engineers – One for the Port Works; one for the Railway Works; and one for the Highway Works. Each of these is provided by the Programme Management Consultant (IHAVEEYESEVERYWHERE - IHEE) and will report to the Project Executive Director, a Government employee

I. The PMC is responsible for control of the Master Plan and Schedule and Supervision.

J. The Employer’s Designer is (WECANDRAW – WCD)

PORT

K. One of the first Packages is a contract for site preparation and earthworks under the FIDIC Red Book with a Commencement Date of Jan 2009. Time for Completion 24 months.

L. The Packages for the Port are:

<table>
<thead>
<tr>
<th>Package</th>
<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>Site Preparation &amp; Earthworks</td>
<td>Red</td>
<td>Jan ’09</td>
<td>Dec ’11</td>
</tr>
<tr>
<td>P2</td>
<td>Dredging of Channels</td>
<td>Dredging</td>
<td>Oct ’09</td>
<td>Sept ‘11 (estimated)</td>
</tr>
<tr>
<td>P3</td>
<td>Wharfs and Jetties</td>
<td>Red</td>
<td>Jan ’11</td>
<td>Dec ’13</td>
</tr>
<tr>
<td>P4</td>
<td>Container Terminal</td>
<td>Yellow</td>
<td>Jan ’12</td>
<td>April ’15</td>
</tr>
<tr>
<td>P5</td>
<td>Cruise Terminal</td>
<td>Yellow</td>
<td>July ‘12</td>
<td>April ’16</td>
</tr>
<tr>
<td>P6</td>
<td>Access Roads within dock</td>
<td>Red</td>
<td>Oct ’11</td>
<td>Sept ’12</td>
</tr>
<tr>
<td>P7</td>
<td>Warehousing and Offices</td>
<td>Red</td>
<td>Jan ’12</td>
<td>Dec ’14</td>
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<tr>
<td>P8</td>
<td>Port Security</td>
<td>Red &amp; Yellow</td>
<td>Dec ’09</td>
<td>Jun ’15</td>
</tr>
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</table>

M. Other Information

www.ameseminar.com
Soil is predominantly a competent limestone according to a Soil Survey carried out in 1990.

All Contracts will be a Lump Sum paid against Milestones.

Communications are to be as SC 1.3 with electronic communication by fax.

**RAILWAY**

To be carried out under the FIDIC Yellow Book with several packages as follows:

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<tr>
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<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
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<td>R1</td>
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<td>Oct ‘10</td>
<td>Sept ‘13</td>
</tr>
<tr>
<td>R2</td>
<td>Rolling Stock</td>
<td>Yellow</td>
<td>Oct ‘10</td>
<td>Dec ‘13</td>
</tr>
<tr>
<td>R3</td>
<td>Maintenance Facilities</td>
<td>Yellow</td>
<td>Oct ‘11</td>
<td>April ‘13</td>
</tr>
<tr>
<td>R4</td>
<td>Station 1</td>
<td>Yellow</td>
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<td>April ‘14</td>
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<td>R5</td>
<td>Station 2</td>
<td>Yellow</td>
<td>Oct ‘11</td>
<td>Sept ‘14</td>
</tr>
<tr>
<td>R6</td>
<td>Station 3</td>
<td>Yellow</td>
<td>Jan ‘12</td>
<td>Dec ‘15</td>
</tr>
</tbody>
</table>

N. All other information as for the Port except:

- Station 2 is to be built near a disused mine
- Part of the route of the line is through a residential area

**HIGHWAY**

O. The whole of the highway project is to be built within the same corridor as the railway and carried out under the Red Book.

P. The Commencement Date for the 2 year Contract is April ’12.

- The Contracts for previous construction projects were bespoke ones prepared in 1956 by the Roads Department
- The Contract is to be a re-measurable Contract with a Bill of Quantities.
Q.

Workshop 1

1. QUESTION 1 - GENERAL
   1.1. In terms of the 3 areas (Port, Rail and Highway) who is in control of the administration of the various contracts?
   1.2. Who gives delegation to the 3 Engineers?
   1.3. How much should be given?
   1.4. How much should be passed on to Assistants?

2. QUESTION 2 – PACKAGE P1 – Site Preparation & Earthworks
   The work includes:
   a) a rockfill causeway
   b) temporary access roads on embankment
   c) a spillway

   The Engineer instructs the Contractor to:
   i. extend his working day by 2 hours
   ii. widen the temporary access roads by 4 metres
   iii. flatten the side slopes of the causeway from 1 in 2 to 1 in 2.5
   iv. build a water treatment works adjacent to the Site so that potable water may be supplied to the region
   v. omit grouting works at the toe of the spillway so that it can be done directly by Grout Ltd

   In respect of each of i to v above:
   2.1 Is the Engineer empowered to instruct them under the Contract?
   2.2 what is the basis for valuation of the Variation?

3. QUESTION 3 – HIGHWAY CONTRACT
   In June 2010, the Contractor has just commenced earthworks, about 2 weeks after it shows on his programme. The Contractor has always intended to commence in the vicinity of the residential area as this is likely to take the longest and he perceives there may be problems. Within a week it is clear that not all the land is available and several residents are refusing to sell.
   3.1. What options are open to the Engineer?
   3.2. How should the Engineer proceed?
   3.3. How should the Contractor proceed?
4. QUESTION 4 – PORT PACKAGE P5
The Contractor is an International Contractor and has built numerous cruise terminals throughout the world.
Drawings are produced on a regular basis but the PED, who visited the Middle East during his holidays, and wants the buildings to be clad in a high class material similar to that he saw whilst he was there. Although the proposed material is compliant with the ER’s and manufacturing has started, the PED is insistent and that it should be at no additional cost.
4.1. How should the Engineer proceed?
4.2. How should the Contractor proceed?

5. QUESTION 5 – PACKAGE R5
The ERs stipulate the siting of Station 2 even though it is near to a disused mine.
Some 2 months after the commencement of the Contract, the Employer, after discussion with the PMC, decides he can save money by moving the station some 500 metres to the north and 100 metres to the west of the previous position. He instructs the Engineer accordingly.
However, the Engineer is not convinced and in order to be on the safe side requests a proposal from the Contractor.
5.1. Is the change to the positioning of the Station a valid ‘Variation’?
5.2. Is the Engineer wise to ask for a ‘proposal’ as this may delay the Contract?
5.3. What should the Engineer expect to receive from the Contractor?
5.4. On the basis the proposal is not accepted what does the Engineer then do?

IF NEEDED

6. QUESTION 5 – PORT PACKAGE P1
After a period of 3 months, the RE receives a copy of the SC 8.3 Programme and passes it to the DRE. The DRE says it looks very pretty and then writes to the Contractor as follows:

Dear Respectful Sir,
I have looked at your programme and find it to be one of the best I have seen in a long time.
I hereby approve it.
Your Obedient Servant
DRE

6.1. Please comment on whether you consider there is any procedural difficulty with the above-mentioned situation
6.2. How would you proceed in such a matter?

7. QUESTION 6 – RAILWAY PACKAGE R2

www.ameseminar.com
9 months into the work, the Project Executive Director finds that for some reason the budget on this Package up to this time is overspent and tells the Engineer to investigate and find a solution otherwise he can start looking for another job.

The Engineer finds that the RE has been giving extra work to the Contractor and failed to inform anybody. Most of the extra work involves changes to the Contractor’s Design.

The Engineer goes to the PED and suggests:

i.  Replacement of the RE – rejected
ii. Impose constraints on the RE – accepted and Engineer informed to put into action
iii. Approach Contractor and ascertain whether there are actions that can be taken to reduce overspend – grudgingly accepted. Engineer told to put into action.

7.2. What are your views on these actions?
7.3. Is there anything wrong with any of these actions?
7.4. Are there any other actions you consider could be taken?

8. QUESTION 7 – PORT PACKAGE P1

After 6 months the RE decides he is getting too involved in the day-to-day running of the Contract and not playing enough golf, so he decides that he will re-delegate all matters to the DRE and who is an employee of the Employer.

The RE Mr U No Who goes on holiday for 3 weeks and tells the Deputy RE that he is now in charge.

The Contractor is very strict in the application of the Contract, and refuses to carry out any instructions given by the DRE.

8.1. Is the Contractor within his rights?
8.2. What would you do in this situation
Workshop 2 –

1. **QUESTION 1 – PACKAGE R1**
   In his bid the Contractor proposed a Designer from another country outside Utopia, but nonetheless the references for previous work were considered adequate.
   Shortly after commencement of the Contract the Engineer gave the Contractor notice of a meeting in 3 days’ time to discuss with the Contractor the production of design drawings.
   The Contractor attended but the Designer did not.
   1.1. Do you consider there was a potential problem with this and if so why?
   1.2. If ‘yes’, how would you, as the Engineer, re-act?

2. **QUESTION 2 – PACKAGE R5**
   It is set out in the ERs that all the designs are to be approved. There is a schedule of key dates which were set in the Contract.
   2.1. How does the Contractor ensure that he complies with the key dates?
   2.2. How does the Engineer measure performance in respect of drawings?
   2.3. Are there any steps the Engineer can take to assist in progress?

3. **QUESTION 3 – PACKAGE P7**
   In this particular contract the Engineer has been restricted to a sum of money of 50,000 Utopian Dollars (UD) for each individual Variation beyond which he requires the permission of the Employer to issue one. He is also restricted to a total sum of 200,000 UD for all Variations.
   After 4 months, there have been a total of 160,000 UD worth of Variations. In Month 5 the Engineer considers that the siting of one of the office buildings is wrong and decides to issue a Variation saying that the Contractor must build the office in a different position.
   3.1. What do you suggest is the Engineer’s way forward?
   3.2. Does he have the power to issue this Variation?
   3.3. What do you do as the Contractor?

4. **QUESTION 4 – PACKAGE R6**
   The Contractor’s design programme shows the following:
   I. General layout – end April 2012. This is to permit a start to earthworks at the end of the rainy season (generally from September to April).
   II. Foundation Drawings – end June 2012
   III. Substructure Drawings – end August 2012
   IV. Superstructure Drawings – end October 2012
   V. Finishing – end November 2012
By the middle of May 2012, only a few draft drawings have been prepared and although the Engineer has been pressing for final layout drawings the Contractor states these are unlikely before the end of the month.

4.1. Give your view as to the actions the Engineer should take

The Contractor eventually submits his final drawings under a transmission slip for the General Layout at the end of May.

4.2. Is a ‘transmission slip’ sufficient?

4.3. Give your impressions of what should happen next
Workshop 3

1. QUESTION 1 – PACKAGE P3
   At the start of the Contract in Jan ’11, a Schedule of Payments was agreed and included as part of the Contract.
   By Feb ’12 the Contractor was 4 months behind his programme but was still submitting Interim Applications for Payment according to the agreed schedule.
   1.1 What should the Engineer do?

2. QUESTION 2 – HIGHWAY CONTRACT
   After 3 months the Contractor submits an IAP but the RE, who is delegated to sign certificates, is taken ill one week before he is due to sign it. In his absence, the QS on Site, who has prepared all of the information and carried out the measurements, signs.
   However, the QS disputes the value of a large Variation claimed by the Contractor and strikes it out entirely.
   The Contractor immediately refers this to the DAB claiming payment of the sum claimed together with interest at an exorbitant rate. The basis of the claim is that the QS has no delegated authority and therefore had no right to sign.
   2.1 Was the QS within his rights to sign the IPC?
   2.2 If not is the Contractor correct to refer to the DAB?

3. QUESTION 3 – HIGHWAY CONTRACT
   By Month 6, the Contractor has submitted 10 claims for various causes, including lack of access and lack of drawings at the end of Month 1. To this extent he is now 3 months behind his programme.
   However, there are no substantiating details included in the IAP for Month 5, neither is there any application for payment of the sums claimed.
   3.1 Has the Contractor complied with the Contract?
   3.2 Should the Engineer include any sums in the IPC and if so on what basis?
   3.3 What would you do if you were the Contractor?

4. QUESTION 4 – PACKAGE P1
   The Contractor eventually completes the work but is 4 months late.
   The Engineer receives an IAP and in his IPC deducts damages as stated in the Contract at 20,000 UD per day up to a maximum of 2 Million UD.
   4.1 What sum should the Engineer deduct?
   4.2 What should the Contractor do?
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Dispute Resolution 1
DAY 2 15:00
Speaker: MARK McGAW
- Dispute Boards
- Amicable Settlement
- Arbitration
Take a Ground Conditions Claim as an Example

- Notice to Engineer as soon as practicable (description; reasons why unforeseeable) (4.12)
- Entitlement to claim EOT or Cost pre-supposes such a notice
- Compliance (same or separate notice) with 28 day notice limit under cl 20
- Contractor record keeping as instructed by Engineer
- Engineer may proceed with a cl 3.5 determination, ie
  - Consults with Employer and Contractor in endeavour to reach agreement
    (agreement between Contractor and Engineer, or with Employer as well),
    failing which make a fair determination
  - gives notice of his agreement or determination
- Cl 3.5 agreement or determination given effect unless and until revised under cl 20.
- NB Guidance notes to cl 3 which reflect decline in status of Engineer by contemplating amendments to require Employer’s approval before taking specified actions.
Initial Outcomes

- Agreement
  - All matters
  - Partial
  - Possibly Employer not also agreeing
- Determination by Engineer – either party satisfied or dissatisfied
- Failure by Engineer to determine timeously or at all – either party dissatisfied
Following a cl.20 notice

- Within 42 days after Contractor aware or should become aware (Engineer may extend):
  - Fully detailed and particularised claim
  - If continuing effect, the claim is interim only
  - Further monthly claims to follow
  - Final claim within 28 days of end of effects.
  - No time barring effect re non-compliance
Engineer Action

- Within 42 days of receipt of claim (Contractor may agree extension)
  Engineer to agree, or disagree with reasons
- May request further particulars
Dispute Adjudication Board

- 20.4
- DAB phenomenon dates from 1980s, most notably World Bank bidding docs. West – East, North – South cultural conflict background.
- Reflecting the decline of the status of the Engineer (although notes contemplate possibility of Engineer acting as DAB). FIDIC 4\textsuperscript{th} ‘Engineer’s Decision’ dropped. 20.4 is derived from 1996 supplement to FIDIC 4\textsuperscript{th}.
- An elaborate variant of the adjudicator or expert decision-maker found in various commercial contexts. Different default analysis of grounds of judicial oversight from that of arbitration.
Composition and Retainer of DAB

- 1-3 member DAB. 3 as default. Identification before or after Contract or commencement of work, or deferred until dispute arises: project- and party preference-dependent. 3 member board somewhat reminiscent of early modern common law arbitral practice – each party appointed arbitrator, they agree umpire as chair, panel of three. Fall-back FIDIC mechanism for third party appointment of balance of tribunal (20.3).
- Formalised tripartite terms of appointment *inter alia* addressing shared fee liability
- Warranty by DAB of impartiality and independence; code of standards prescribed. 3 member DAB active from outset can easily cost $US 500,000 per annum even without major dispute activity due to routine visit activity at remote site.
- DAB not liable in the absence of bad faith. Cannot be called as witness at arbitration.
- In practice, a wide range of experiences: from the weak and ineffectual DAB to robustly influential and respected.
DAB Jurisdiction

- Joint referral of a ‘matter’ for DAB opinion (20.2). May not necessarily be a crystallised dispute.
- Referral by either party of a ‘dispute’ (20.4)
Dispute Referral

- Only formal requirement is that referral state that it is under cl 20.4. Copy to other party and Engineer.
- Wide definition of dispute
  - Usual ‘in connection with, or arising under’ language. Presumably wide enough to cover dissatisfaction with opinion of DAB of jointly referred matter.
  - Specifically contemplating certificate, determination, instruction, opinion, valuation of Engineer – eg cl 3.5 determination of ground condition claim.
DAB Process

- Procedural Rules contemplating routine of site visits (appropriate for DABs appointed pre-dispute), and regulating disclosure, exchange of correspondence and procedure. NB hearing not mandatory and DAB may proceed inquisitorially, take the initiative and rely on its own specialist knowledge. However, NOT to express an opinion on the merits at any hearing, and will discuss and endeavour to agree a unanimous decision through private discussion.
- Reasoned decision within 84 days of receipt of reference (possibility of agreed extension), expressly stating decision as being under cl 20.4.
- Binding on both parties, who are promptly to give effect to it unless and until revised in amicable settlement or arbitration.
- Notice of dissatisfaction (matter in dispute and reasons for dissatisfaction) within 28 days of Decision or of expiry of 84 day period for Decision. Otherwise final and binding, in which event failure to comply is ground for referral to arbitration. (20.7)
Amicable Settlement

• 20.5
• Compulsory 56 day deferral of right to commence arbitration in which it is contemplated that the parties ‘shall attempt to settle the dispute amicably’.
• In many cases, no real delay in arbitral process in that the time would in fact be devoted also to preparation of case for arbitration.
Arbitration

- A universally familiar and hugely successful phenomenon. An industry.
- Radically different except in name from the medieval and early modern concept of arbitration (references revocable at any time prior to award; agreements to arbitrate future disputes unenforceable (inability to prove damage) – except for the lawyers and retired judges, are we actually better off now?)
FIDIC Arbitration

• 20.6: ‘international arbitration’
• Rules of Arbitration of the ICC (International Chamber of Commerce), conducted in language of communication of the contract – International Court of Arbitration of the ICC
• Panel of 3
• Hearing *de novo*: parties not limited to evidence or arguments before DAB or reasons stated in notice of dissatisfaction. DAB reasons and Engineer testimony admissible.
ICC Arbitration

- Initiate by request for arbitration to ICA secretariat in Paris
- Nomination process
- Settlement of terms of reference
- The reference
- Draft award submitted to ICA for approval
- Issue of signed award via ICA secretariat
DABs
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

EDF Form of Contract
DAY 2  15:50
Speaker: Malcom Kelly
Definitions

• Unlike FIDIC, where Definitions are in the General and Particular Conditions, these are laid down in a separate document entitled:
## Structure

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<th>EDF</th>
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Some Comparisons

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<td>Taking Over Certificate</td>
<td>Provisional Acceptance</td>
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Sub-contracting

**ARTICLE 7**
- S/C must be in writing.
- Contractor shall not S/C without prior written authorisation of the Contracting Authority. Contractor to notify CA in writing and CA to confirm within 30 days
- S/C to satisfy eligibility criteria (2.3.3 of Praga)
- Contractor responsible for acts, defaults and negligence of S/C
- Any continuing obligation of S/C after expiry of DLP to be transferred to the CA
- If Contractor enters into S/C without approval the CA has a right to sanctions for breach of contract
- If S/C incompetent, CA or Supervisor may request Contractor to replace or carry out the work himself.

**ARTICLE 52**
- WHEN Supervisor receives a claim from a S/C when the Contractor has not met his financial obligations, the Supervisor shall give notice to the Contractor to pay or certify for the sum to be payable and it to be deducted from sums due to the Contractor.
Programme of implementation of tasks

- **ARTICLE 17**
  - Pre-supposes the Contractor has provided a ‘work programme’ as part of the offer
  - Contractor to provide the Supervisor with a programme of implementation of tasks within 30 days of *notification of award of contract*. Programme to be broken down by activity and by month to include:
    - Order in which Contractor proposes to carry out the work
    - Time limits within which submission and approval of drawings are required
    - An organisation chart (names and qualifications and cv of staff)
    - General description of method for carrying out the works
    - A plan for setting out and organising the site
    - Such further details as the Supervisor may reasonably require
  - Supervisor to return to Contractor within 10 days of receipt with approval and any remarks.
  - No material alteration to the programme without approval of Supervisor
  - If progress does not conform, then Supervisor may instruct Contractor to revise the programme and submit to him for approval
Detailed breakdown of prices

- ARTICLE 18
  - May have been provided in his tender, if not, Contractor to provide within 20 days following Supervisor’s request
  - Contractor to provide a detailed cash-flow estimate to the Supervisor within 30 days of notification of award of Contract – this is for information only.
  - Breakdown of cash-flow to be in quarterly intervals.
  - Revised cash-flow estimates to be provided if Supervisor requires
  - In providing such cash flow estimates there is no liability on the Contracting Authority or the Supervisor
Modifications by administrative order

- ARTICLE 37
  - Modifications include additions, omissions, substitutions, changes in quality, quantity, form, character, kind, position, dimensions, level or line, or changes in the specified sequence, method or timing of execution of the works.
  - Supervisor shall have power to order any modification to any part of the works necessary for the completion and/or functioning of the works.
  - Financial effect to be evaluated in accordance with Articles 37.5 and 37.7.
  - Unless order given orally (then confirmed), prior to order being given Supervisor to notify Contractor of the nature and form of the modification after which the Contractor is to submit a proposal to the Supervisor giving description of tasks; modifications to the programme; and adjustment to the contract price.
  - After receipt of proposal, Supervisor consults with Contractor and decides if modification is to be carried out.
  - Prices for modification to use BoQ or price schedule.
  - Contractor carries out modifications on receipt of Administrative Order.
  - Contract modifications not covered by AO must be formalised through an Addendum and must respect principles set out in Practical Guide to Contract Procedures for EU external actions.
Origin and Quality of Works and Materials

- **ARTICLE 40**
  - All goods purchased under the contract to have their origin in any eligible source country as defined in the Invitation to Tender & the Special Conditions
  - Works, components and materials to conform to specifications, drawings, surveys, models, samples, patterns and other requirements.
  - Any preliminary technical acceptance set out in the Special Conditions shall be subject of a request from the Contractor to the Supervisor.
  - Supervisor to certify they meet requirements prior to inclusion in the works.
  - Even if accepted this way, they may still be rejected and must be replaced immediately by the Contractor if further examination reveals defects or faults
Payments

- ARTICLE 44 – 56 inclusive
  - Payment to be made within 90 days of certificate of statement delivered to CA
  - Payment certificate not admissible if one or more essential requirement not met – eg substantiating documents
  - Pre-financing where Special Conditions provide – to be used exclusively for operations connected with implementation of tasks
  - Retention money limited to 10% of contract price and is to cover Contractors obligations during defects liability period.
  - The contract shall be at fixed prices which shall not be revised unless stipulated in the Special Conditions
  - For lump-sum contracts, amount due on basis of a breakdown expressed as a percentage of the contract price
  - For unit price contracts, the Supervisor to determine by measurement.
  - Supervisor certifies after any amendments considered necessary, within 30 days of receipt of application for interim payment (usually monthly)
  - Article 52 – Sub-Contracting – covered previously
### Claim Procedures

#### FIDIC

- **Extension of Time**
  - Causes – listed in SC 8.4
  - Within 28 days of aware date to give notice to Engineer of claim under SC 20.1
  - Within 42 days of aware date deliver fully detailed particulars.
  - Within 42 days of receipt of fully detailed particulars, Engineer to respond with approval or disapproval.
  - Engineer to proceed under SC 3.5 to agree or determine.

#### EDF

- **Extension of Time**
  - Causes – listed in Article 35.1
  - Within 15 days of aware date notify Supervisor of intention to claim.
  - Within 30 days of notification deliver full and detailed particulars.
  - Within 30 days of receipt of full and detailed particulars the Supervisor after consultation with CA and Contractor grant EoT or not as the case may be.
Claim Procedures

FIDIC

• Additional Payment – Sub-Clause 20.1
  – Where Contractor considers entitled under the Contract, C gives notice of intention to claim within 28 days of aware date.
  – Submits full and detailed particulars as soon as reasonably practicable but no later than 42 days after aware date.
  – Engineer responds within 42 days after receipt of f & d p with approval/disapproval.
  – Engineer proceeds in accordance with SC 3.5.
  – Claim ‘time-barred’ if notice not received in time.

EDF

• Additional Payment – Article 55
  – Where Contractor considers entitled under the Contract, C gives notice of intention to claim within 15 days of aware date.
  – Submits full and detailed particulars as soon as reasonably practicable but no later than 60 days after notice.
  – After consultation with CA and C Supervisor determines whether C entitled to additional payment.
  – Supervisor may reject any claim not complying with Article 55.
**Settlement of Disputes**

**FIDIC**

- Either Party may refer dispute to a DAB
- DAB reaches decision within 84 days
- Decision is ‘binding’ but not ‘final’
- If a Party is ‘dissatisfied’ it issues Notice of Dissatisfaction to the other Party within X days of intention to go to arbitration.
- If no Notice given then DAB decision is Final.

**EDF**

- Parties to try to settle amicably
- Once a dispute arises, a Party to notify the other Party, requesting amicable settlement within 30 days. Maximum time for settlement is 120 days
- If a Party does not respond in that time or amicable solution not reached then process is deemed to have failed.
- In absence of amicable settlement a Party may request Conciliation. Time periods same as amicable settlement.
- If both fail, then either natural jurisdiction or arbitration.
Seminar on FIDIC and EDF
1-2 March 2012, Intercontinental Hotel, Nairobi

Dispute Resolution 2 – SIMON
DELVES/MARK McGAW
DAY 2  15:50
Avoidance of Disputes

- Disputes are best avoided
  - Preserves relationships
  - Saves time and cost
  - Best outcome for project
Avoidance of Disputes

• According to one of the largest international contractors a structure which provides for the following will assist dispute avoidance
  ➢ Shared incentive
  ➢ Collaboration/no blame culture
  ➢ Team co-location
  ➢ Regular meeting arrangements
  ➢ Early identification of problems
  ➢ Reporting and planning and default mechanisms
Preparation for Disputes

- Entitlement under the Contract.
- Proof – back to the facts
  - burden of proof
- Documents as evidence e.g.
  - Letters/memos/emails
  - Minutes
  - Reports/progress/programmes (Sub-Clause 4.21 of FIDIC)
  - Diaries (training)
  - File notes
- Witness Statements – while memories fresh
Preparation for Disputes – Resourcing

• Once it has become clear that a dispute has arisen then
  ➢ A strategy for resolution must be devised.
  ➢ The resources to follow the strategy must be made available.
  ➢ The strategy must be put into effect and project managed as a project in its own right.

• Timing of outside assistance – when?
  ➢ Can early involvement assist
    - A quicker resolution
    - A more satisfactory resolution
    - Release of in-house resource to more productive matters
Dispute Resolution 2

Preparation for Disputes – Resourcing
- Can early involvement help with
  - Experience (knowledge of regional/international work/local lawyers and disputes generally).
  - Advice and/or leadership on strategy and tactics.
  - Procedural advice.
  - Fresh mind (new ideas, no preconception, no position to protect, increased objectivity)
  - Reliable legal analysis
  - Advice on further resources
  - Speed

Technical Issues
- Engineering
- Planning
- Quantum
Dispute Resolution 2

Dispute Resolution/Avoidance Techniques

- Dispute Adjudication Boards
- Mediation
- Arbitration
Dispute Adjudication Boards – Dispute Avoidance
The Role of a Dispute Adjudication Board

1. To assist parties to prevent/avoid disputes;
2. To resolve disputes by a Decision.
Dispute Adjudication Boards – Dispute Avoidance

DRBF Manual (2.3.6)

“During meetings the DRB should question the parties at length as to the progress of negotiations to settle disputes, with a view to have the parties settle the disputes themselves. Such dispute avoidance efforts are an important feature of the DRB process; a truly successful DRB may have no hearings. All disputes should be completely aired between the parties and serious negotiations exhausted before referring a dispute to the DRB.”
Dispute Adjudication Boards – Dispute Avoidance

The Mechanics of the standing DAB

• Appointment of neutral Board Members.
• Provision of information to Board Members.
• Periodic meetings.
• Provision for advisory opinions.
• Referral of disputes.
• Hearing.
• Decision.
Dispute Adjudication Boards – Dispute Avoidance
Advantages that the DAB has in Resolving Potential Disputes

- Parties’ confidence in DAB.
- Knowledge of the parties and of the project.
- Flexibility in procedure?
- Early resolution.
- Flexible/imaginative solutions?
Dispute Adjudication Boards – Dispute Avoidance
Advantages that the DAB has in Resolving Potential Disputes Parties’ Confidence in DAB

• Can be dependent upon method of appointment.
• Party appointed/agreed is best.
• Institutional appointments may be ok.
• Training of DAB members.
Dispute Adjudication Boards – Dispute Avoidance

Advantages that the DAB has in Resolving Potential Disputes

• Knowledge of the parties and of the project.
Dispute Adjudication Boards – Dispute Avoidance
Advantages that the DAB has in Resolving Potential Disputes

Does the DAB have sufficient flexibility in procedure – facilitation techniques?

- Private/caucus meetings.
- Confidentiality.
- Reality testing.
- Working groups.
- Settlement strategies.
Dispute Adjudication Boards – Dispute Avoidance

Advantages that the DAB has in Resolving Potential Disputes

• Early resolution

• Early identification and airing of the potential dispute.

• Potential to mitigate loss.

• Minimise incidence of entrenched positions.
Dispute Adjudication Boards – Dispute Avoidance
Advantages that the DAB has in Resolving Potential Disputes

Flexible/imaginative solutions

- Difficulty with ongoing project.
- Advice trap.
Dispute Adjudication Boards – Dispute Avoidance
How does the Facilitation of the Resolution of a Potential Dispute fit in with the DAB Function and Process

- Facilitation of communications.
- Effect on behaviour of parties.
- Provision of advisory opinions.
- Provision of a decision.
Dispute Adjudication Boards – Dispute Avoidance
Facilitation of Communications between the Parties

By periodic meetings

• Potential disputes, claims and solutions discussed.

• DAB should question the parties as to progress of negotiations to settle disputes.
Dispute Adjudication Boards – Dispute Avoidance

Effect of DAB on Behaviour of the Parties

Presence/existence of DAB may

• “Improve” parties’ behaviour in respect of potential disputes.
• Encourage Employer to address claims with merit seriously and at an early stage.
• Discourage Contractor from pursuing claims without merit.
Dispute Adjudication Boards – Dispute Avoidance
The Provision of an Advisory Opinion (oral or in writing)

• Is this an attempt to settle a potential dispute?
• Is it an effective way to assist in the avoidance of disputes?
  ➢ Depends upon confidence in DAB/in advisory opinion;
  ➢ It is one dimensional;
  ➢ Does it preclude facilitation?
Dispute Adjudication Boards

The Provision of a Decision

- Deals with a dispute which has formed (dispute avoidance having failed).
- Should be enforceable.
- Decision may be undermined if prior facilitative techniques employed.
Dispute Adjudication Boards

Summary

• Standing DAB is in a unique position to assist the parties to prevent/avoid disputes. Are DAB members sufficiently trained in this?

• With DABs facilitation techniques must be limited or enforceability of a future Decision may be undermined.
Dispute Adjudication Boards – Obtaining a Decision

- FIDIC requires disputes to go to the DAB prior to Arbitration (generally)
- Possibly not so in certain circumstances – Sub-Clause 20.8

“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 DAB in place, whether by reason of the expiry of the DAB’s appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and

(b) the dispute may be referred directly to arbitration, under Sub-Clause 20.6 [Arbitration].
Dispute Adjudication Boards – Obtaining a Decision continued

- Who should be the DAB
  - Qualification – lawyer/Engineer/QS
  - Experience – as DAB – of the type of project - locality

- Standing or ad hoc

- 1 or 3 people
Dispute Resolution 2

Dispute Adjudication Boards
Standard of Preparation Required for Referral/Response

- Complexity
- Urgency
- Value
- Opposition
- Cost
- Timescale
- Consequences
- Mini arbitration
Dispute Adjudication Boards
Standard of Preparation Required for Referral/Response Continued

• Referral/Response
  ➢ Introduction
  ➢ The Contact
  ➢ Definitions
  ➢ Terms relied upon
  ➢ Summary of Background/Circumstances
  ➢ The claims
  ➢ Statement of relief
  ➢ Appendices
Dispute Adjudication Boards

- Witness Statements
  - Character/qualification
  - facts
- Experts’ Reports
  - Technical/engineering issues
  - Extension of time, delay, prolongation, disruption
  - Quantity surveying
  - Currency/devaluation
- Documents
Dispute Resolution 2

Dispute Adjudication Boards

- Timing/extension proposed by DAB and approved by the Parties (Sub-Clause 20.4)
- Decision
- Notice of dissatisfaction within 28 days after receiving decision or time for decision.
Amicable Settlement (Sub-Clause 20.4)

- No arbitration until 56 days after the day on which notice of dissatisfaction given.
- Negotiation on DAB decision or otherwise.
- More structured negotiation e.g. mediation
  - Increasingly popular in some parts of the world.
  - In UK almost standard.
  - Problems with transparency?
  - Advantages.
Dispute Resolution 2

Workshop

- This is a project for construction of a 50km highway on the FIDIC Red Book.

- The Engineer has granted the Contractor an extension of time of 50 days for late possession of the site in breach of a special condition which requires him to obtain prior approval from the Employer. The Employer believes the Contractor is entitled to 2 days extension of time whereas the Contractor believes he is entitled to 100 days.
Workshop

3. Advise the Employer of the steps he must take to resolve this dispute
   (i) Can a DAB decide on this issue?
   (ii) What would be his remedy/relief sought against
        (a) the Engineer
        (b) the Contractor
   (iii) There is no DAB in place, what are the steps that the Employer must take
c          to get the DAB in place and commence DAB proceedings.
AME SEMINARS
SEMINAR ON FIDIC AND EDF
1 – 2 MARCH 2012, INTERCONTINENTAL HOTEL, NAIROBI

Workshop 3 - Payment
DAY 2 16:50
Questions for Workshop

Background

A. The Government (the Employer) in the country of Utopia has carried out a feasibility study for the construction of a new port as their existing one is dilapidated and out-dated and is unable to take the size of vessels now being used world-wide.

B. The Employer carries out some preliminary designs and decides, in conjunction with an international consultant to divide the project into Packages and to provide a new rail and road system linking into the port.

C. Although Utopia is ‘cash-rich’, as a safety net they have procured a loan through a well-known bank at very competitive rates. However, the bank has decreed that any contract is to be carried out under FIDIC including the use of DABs.

D. Some Packages will be Employer Design and some will be Contractor Design and Build

E. The railway together with several stations will be Design and Build.

F. The new road, a dual 3 lane expressway is to be Employer design as there are several schemes already in the construction stage elsewhere in Utopia and the designs can be utilised and adapted relatively quickly.

G. The Employer will be represented by a Steering Committee who will have full administrative powers for the Employer.

H. There will be 3 Engineers – One for the Port Works; one for the Railway Works; and one for the Highway Works. Each of these is provided by the Programme Management Consultant (IHAVEEYESEVERYWHERE - IHEE) and will report to the Project Executive Director, a Government employee.

I. The PMC is responsible for control of the Master Plan and Schedule and Supervision.

J. The Employer’s Designer is (WECANDRAW – WCD)

PORT

K. One of the first Packages is a contract for site preparation and earthworks under the FIDIC Red Book with a Commencement Date of Jan 2009. Time for Completion 24 months.

L. The Packages for the Port are:

<table>
<thead>
<tr>
<th>Package</th>
<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>P1</td>
<td>Site Preparation &amp; Earthworks</td>
<td>Red</td>
<td>Jan’ 09</td>
<td>Dec ‘11</td>
</tr>
<tr>
<td>P2</td>
<td>Dredging of Channels</td>
<td>Dredging</td>
<td>Oct ‘09</td>
<td>Sept ‘11 (estimated)</td>
</tr>
<tr>
<td>P3</td>
<td>Wharfs and Jetties</td>
<td>Red</td>
<td>Jan ‘11</td>
<td>Dec ‘13</td>
</tr>
<tr>
<td>P4</td>
<td>Container Terminal</td>
<td>Yellow</td>
<td>Jan ‘12</td>
<td>April ‘15</td>
</tr>
<tr>
<td>P5</td>
<td>Cruise Terminal</td>
<td>Yellow</td>
<td>July ‘12</td>
<td>April ‘16</td>
</tr>
<tr>
<td>P6</td>
<td>Access Roads within dock</td>
<td>Red</td>
<td>Oct ‘11</td>
<td>Sept ‘12</td>
</tr>
<tr>
<td>P7</td>
<td>Warehousing and Offices</td>
<td>Red</td>
<td>Jan ‘12</td>
<td>Dec ‘14</td>
</tr>
<tr>
<td>P8</td>
<td>Port Security</td>
<td>Red &amp; Yellow</td>
<td>Dec ‘09</td>
<td>Jun ‘15</td>
</tr>
</tbody>
</table>

M. Other Information

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Soil is predominantly a competent limestone according to a Soil Survey carried out in 1990.

- All Contracts will be a Lump Sum paid against Milestones.
- Communications are to be as SC 1.3 with electronic communication by fax.

**RAILWAY**

To be carried out under the FIDIC Yellow Book with several packages as follows:

<table>
<thead>
<tr>
<th>Package</th>
<th>Description</th>
<th>FIDIC Contract Form</th>
<th>Start Date</th>
<th>Finish Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>R1</td>
<td>Permanent Way</td>
<td>Yellow</td>
<td>Oct ‘10</td>
<td>Sept ‘13</td>
</tr>
<tr>
<td>R2</td>
<td>Rolling Stock</td>
<td>Yellow</td>
<td>Oct ‘10</td>
<td>Dec ‘13</td>
</tr>
<tr>
<td>R3</td>
<td>Maintenance Facilities</td>
<td>Yellow</td>
<td>Oct ‘11</td>
<td>April ‘13</td>
</tr>
<tr>
<td>R4</td>
<td>Station 1</td>
<td>Yellow</td>
<td>Jan ‘11</td>
<td>April ‘14</td>
</tr>
<tr>
<td>R5</td>
<td>Station 2</td>
<td>Yellow</td>
<td>Oct ‘11</td>
<td>Sept ‘14</td>
</tr>
<tr>
<td>R6</td>
<td>Station 3</td>
<td>Yellow</td>
<td>Jan ‘12</td>
<td>Dec ‘15</td>
</tr>
</tbody>
</table>

N. All other information as for the Port except:

- Station 2 is to be built near a disused mine
- Part of the route of the line is through a residential area

**HIGHWAY**

O. The whole of the highway project is to be built within the same corridor as the railway and carried out under the Red Book.

P. The Commencement Date for the 2 year Contract is April ‘12.

- The Contracts for previous construction projects were bespoke ones prepared in 1956 by the Roads Department
- The Contract is to be a re-measurable Contract with a Bill of Quantities.
Q.

Workshop 1

1. QUESTION 1 - GENERAL
   1.1. In terms of the 3 areas (Port, Rail and Highway) who is in control of the administration of the various contracts?
   1.2. Who gives delegation to the 3 Engineers?
   1.3. How much should be given?
   1.4. How much should be passed on to Assistants?

2. QUESTION 2 – PACKAGE P1 – Site Preparation & Earthworks
   The work includes:
   a) a rockfill causeway
   b) temporary access roads on embankment
   c) a spillway

   The Engineer instructs the Contractor to:
   i. extend his working day by 2 hours
   ii. widen the temporary access roads by 4 metres
   iii. flatten the side slopes of the causeway from 1 in 2 to 1 in 2.5
   iv. build a water treatment works adjacent to the Site so that potable water may be supplied to the region
   v. omit grouting works at the toe of the spillway so that it can be done directly by Grout Ltd

   In respect of each of i to v above:
   2.1 Is the Engineer empowered to instruct them under the Contract?
   2.2 what is the basis for valuation of the Variation?

3. QUESTION 3 – HIGHWAY CONTRACT
   In June 2010, the Contractor has just commenced earthworks, about 2 weeks after it shows on his programme. The Contractor has always intended to commence in the vicinity of the residential area as this is likely to take the longest and he perceives there may be problems. Within a week it is clear that not all the land is available and several residents are refusing to sell.
   3.1. What options are open to the Engineer?
   3.2. How should the Engineer proceed?
   3.3. How should the Contractor proceed?
4. **QUESTION 4 – PORT PACKAGE P5**
The Contractor is an International Contractor and has built numerous cruise terminals throughout the world.
Drawings are produced on a regular basis but the PED, who visited the Middle East during his holidays, and wants the buildings to be clad in a high class material similar to that he saw whilst he was there. Although the proposed material is compliant with the ER’s and manufacturing has started, the PED is insistent and that it should be at no additional cost.
4.1. How should the Engineer proceed?
4.2. How should the Contractor proceed?

5. **QUESTION 5 – PACKAGE R5**
The ERs stipulate the siting of Station 2 even though it is near to a disused mine.
Some 2 months after the commencement of the Contract, the Employer, after discussion with the PMC, decides he can save money by moving the station some 500 metres to the north and 100 metres to the west of the previous position. He instructs the Engineer accordingly.
However, the Engineer is not convinced and in order to be on the safe side requests a proposal from the Contractor.
5.1. Is the change to the positioning of the Station a valid ‘Variation’?
5.2. Is the Engineer wise to ask for a ‘proposal’ as this may delay the Contract?
5.3. What should the Engineer expect to receive from the Contractor?
5.4. On the basis the proposal is not accepted what does the Engineer then do?

**IF NEEDED**

6. **QUESTION 5 – PORT PACKAGE P1**

After a period of 3 months, the RE receives a copy of the SC 8.3 Programme and passes it to the DRE. The DRE says it looks very pretty and then writes to the Contractor as follows:

_Dear Respectful Sir,_
_I have looked at your programme and find it to be one of the best I have seen in a long time._
_I hereby approve it._
_Your Obedient Servant_  
_DRE_ 

6.1. Please comment on whether you consider there is any procedural difficulty with the above-mentioned situation
6.2. How would you proceed in such a matter?

7. **QUESTION 6 – RAILWAY PACKAGE R2**
9 months into the work, the Project Executive Director finds that for some reason the budget on this Package up to this time is overspent and tells the Engineer to investigate and find a solution otherwise he can start looking for another job.

The Engineer finds that the RE has been giving extra work to the Contractor and failed to inform anybody. Most of the extra work involves changes to the Contractor’s Design.

The Engineer goes to the PED and suggests:

i. Replacement of the RE – rejected
ii. Impose constraints on the RE – accepted and Engineer informed to put into action
iii. Approach Contractor and ascertain whether there are actions that can be taken to reduce overspend – grudgingly accepted. Engineer told to put into action.

7.2. What are your views on these actions?
7.3. Is there anything wrong with any of these actions?
7.4. Are there any other actions you consider could be taken?

8. QUESTION 7 – PORT PACKAGE P1

After 6 months the RE decides he is getting too involved in the day-to-day running of the Contract and not playing enough golf, so he decides that he will re-delegate all matters to the DRE who is an employee of the Employer.

The RE Mr U No Who goes on holiday for 3 weeks and tells the Deputy RE that he is now in charge.

The Contractor is very strict in the application of the Contract, and refuses to carry out any instructions given by the DRE.

8.1. Is the Contractor within his rights?
8.2. What would you do in this situation
Workshop 2 –

1. QUESTION 1 – PACKAGE R1
   In his bid the Contractor proposed a Designer from another country outside Utopia, but nonetheless the references for previous work were considered adequate.
   Shortly after commencement of the Contract the Engineer gave the Contractor notice of a meeting in 3 days’ time to discuss with the Contractor the production of design drawings.
   The Contractor attended but the Designer did not.
   1.1. Do you consider there was a potential problem with this and if so why?
   1.2. If ‘yes’, how would you, as the Engineer, re-act?

2. QUESTION 2 – PACKAGE R5
   It is set out in the ERs that all the designs are to be approved. There is a schedule of key dates which were set in the Contract.
   2.1. How does the Contractor ensure that he complies with the key dates?
   2.2. How does the Engineer measure performance in respect of drawings?
   2.3. Are there any steps the Engineer can take to assist in progress?

3. QUESTION 3 – PACKAGE P7
   In this particular contract the Engineer has been restricted to a sum of money of 50,000 Utopian Dollars (UD) for each individual Variation beyond which he requires the permission of the Employer to issue one. He is also restricted to a total sum of 200,000 UD for all Variations. After 4 months, there have been a total of 160,000 UD worth of Variations. In Month 5 the Engineer considers that the siting of one of the office buildings is wrong and decides to issue a Variation saying that the Contractor must build the office in a different position.
   3.1. What do you suggest is the Engineer’s way forward?
   3.2. Does he have the power to issue this Variation?
   3.3. What do you do as the Contractor?

4. QUESTION 4 – PACKAGE R6
   The Contractor’s design programme shows the following:
   I. General layout – end April 2012. This is to permit a start to earthworks at the end of the rainy season (generally from September to April).
   II. Foundation Drawings – end June 2012
   III. Substructure Drawings – end August 2012
   IV. Superstructure Drawings – end October 2012
   V. Finishing – end November 2012

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By the middle of May 2012, only a few draft drawings have been prepared and although the Engineer has been pressing for final layout drawings the Contractor states these are unlikely before the end of the month.

4.1. Give your view as to the actions the Engineer should take

The Contractor eventually submits his final drawings under a transmission slip for the General Layout at the end of May.

4.2. Is a 'transmission slip' sufficient?
4.3. Give your impressions of what should happen next
Workshop 3

1. QUESTION 1 – PACKAGE P3
At the start of the Contract in Jan ’11, a Schedule of Payments was agreed and included as part of the Contract.
By Feb ’12 the Contractor was 4 months behind his programme but was still submitting Interim Applications for Payment according to the agreed schedule.
1.1 What should the Engineer do?

2. QUESTION 2 – HIGHWAY CONTRACT
After 3 months the Contractor submits an IAP but the RE, who is delegated to sign certificates, is taken ill one week before he is due to sign it. In his absence, the QS on Site, who has prepared all of the information and carried out the measurements, signs.
However, the QS disputes the value of a large Variation claimed by the Contractor and strikes it out entirely.
The Contractor immediately refers this to the DAB claiming payment of the sum claimed together with interest at an exorbitant rate. The basis of the claim is that the QS has no delegated authority and therefore had no right to sign.
2.1 Was the QS within his rights to sign the IPC?
2.2 If not is the Contractor correct to refer to the DAB?

3. QUESTION 3 – HIGHWAY CONTRACT
By Month 6, the Contractor has submitted 10 claims for various causes, including lack of access and lack of drawings at the end of Month 1. To this extent he is now 3 months behind his programme.
However, there are no substantiating details included in the IAP for Month 5, neither is there any application for payment of the sums claimed.
3.1 Has the Contractor complied with the Contract?
3.2 Should the Engineer include any sums in the IPC and if so on what basis?
3.3 What would you do if you were the Contractor?

4. QUESTION 4 – PACKAGE P1
The Contractor eventually completes the work but is 4 months late.
The Engineer receives an IAP and in his IPC deducts damages as stated in the Contract at 20,000 UD per day up to a maximum of 2 Million UD.
4.1 What sum should the Engineer deduct?
4.2 What should the Contractor do?

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