

DBO Design-Build-Operate Briefing Seminar

Conditions of Contract for Design - Build and Operate Projects
The New FIDIC Form of Contract

London
 Thursday, 11th October 2007

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 Chairman DBO Task Group

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 Member DBO Task Group

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FIDIC General Conditions Design-Build-Operate

1. General Introduction

- Introduction to FIDIC

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FIDIC

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Fédération Internationale des Ingénieurs-Conseils

International Federation of Consulting Engineers

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FIDIC Member Associations

Representing more than 1 million professionals in 75 countries

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Committees of FIDIC

CONTRACTS
 Draft standard international CONTRACTS between EMPLOYER and CONTRACTOR

AGREEMENTS
 Draft model between CLIENTS and CONSULTANTS or between consultants

BUSINESS PRACTICE
 Prepare publications on:
 BEST practice
 RISK management
 LIABILITY
 INTEGRITY management
 QUALITY management
 SUSTAINABLE development

CAPACITY BUILDING
 Prepare training materials based on the GUIDE TO PRACTICE and organise training events

TASK FORCES
 Analyse current issues
 Liaise with organisations
 Help manage FIDIC affairs

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Advantages of FIDIC Contracts

CLEAR, COHERENT
 Essential clauses - detailed definitions - consistent structure

FAIR, EQUITABLE
 Risk allocated to party best placed to control it, bear it, and deal with it

THIRD PARTY
 Drafted by Consulting Engineers

COMPLETE, FLEXIBLE
 Range covers most needs - readily adaptable to fit requirements

RECOGNISED
 Positive FIDIC image - world-wide acceptance - tested - established - successful

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FIDIC General Conditions of Contract

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• Introduction to the new
DBO Document

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Contracts Committee and DBO Task Group

Contracts Committee
 Geoff French
 Axel-V. Jaeger
 Chris Wade
 Philip Jenkinson
 Nael Bunni
 Chris Seppala
 Michael Mortimer-Hawkins

EC Representative
 Chairman
 Past Chairman

Legal Adviser
 Special Adviser

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 Axel-V. Jaeger
 Des Barry
 Christoph Theune
 Toni Bauer
 Erica Lund

Chairman

With Special Advisers Nael Bunni, Chris Seppala and Gordon Jaynes
 And special thanks to Enrico Vink and Peter Boswell at FIDIC Secretariat

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FIDIC DBO Format

Design - Construction - Long-term Operation
 One Contract and One Contractor

On-going commitment by Contractor

a sequence of **Design – Build – Operate**
 “green field” scenario :
 20 year Operation period

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Advantages of DBO

Time: Minimizing delays and optimizing construction activities

Financial: Single point responsibility and long-term commitments

Quality: Fitness for purpose and long-term reliability

Optimization of life-cycle costs

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DBO Format of Document - 1

20 clause layout
 Same terminology and definitions
 (where appropriate)

Flow Charts
 General Conditions
 Particular Conditions
 Part A - Contract Data
 Part B - Special Provisions
 Sample Forms
 Guide (2008)

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DBO Format of Document - 2

Principal Parties: Employer
Contractor
Employer's Representative

Principal Stages: **Design** and Planning
Build and Construction
Operate and Maintain

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2. Parties to the DBO Contract

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Contract Continuity

Consultant design

Contractor design

Various formats

Uniform format

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FIDIC General Conditions Design-Build-Operate

new approach

Continuous format

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FIDIC General Conditions Design-Build-Operate

Published September 2007
Gold Book

Conditions of Contract for
**Design, Build and Operate
Projects**

GENERAL CONDITIONS
SCHEMES FOR THE PREPARATION OF PARTICULAR CONDITIONS
FORMS OF TENDER, CONTRACT AGREEMENT AND
DISPUTE ADJUDICATION AGREEMENT

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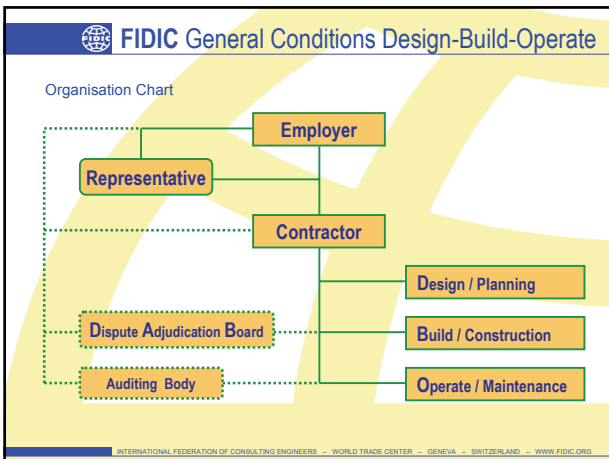
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graph TD
    Employer[Employer] --> Representative[Representative]
    Employer --> Contractor[Contractor]
    Representative --> Contractor
  
```

Employer: Requirements, Contract Data, Representative to administer the Contract

Contractor: Design, Execute, Complete, Remedy Defects, Operation Service

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FIDIC General Conditions Design-Build-Operate

2. Parties to the DBO Contract

§ 2 The Employer

§ 3 The Employer's Representative

§ 4 The Contractor

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FIDIC General Conditions Design-Build-Operate

The Parties to the DBO **Design – Build – Operate** Service Contract approach are :

- The **Employer**
named in the Contract Data, combines **Design, Build** and **Operation Service** into a single contract, with one legal entity.
- The **Employer's Representative**
named as such in the Contract Data, appointed by the Employer prior signing of the Contract.
- The **Contractor**
named and accepted in the Letter of Tender.

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2. Parties to the DBO Contract

The Dispute Adjudication Board DAB

§ 1.1.2.10

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The Dispute Adjudication Board, DAB

- Disputes arising during the **Design-Build Period** shall be adjudicated by one person or three persons. Jointly appointed by the date stated in the Contract Data.
- Disputes arising during the **Operation Service Period** shall be settled by a one person Operation Service DAB.

Jointly agreed and appointed at the time of issue of the Commissioning Certificate.
Appointment for a term of five years.
Re-appointing possible.

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2. Parties to the DBO Contract

The Auditing Body

§ 1.1.2.9

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The Auditing Body

- to conduct the §10.3 Independent Compliance Audit during the Operation Service Period,
- to be jointly appointed prior the commencement of the Operation Service,
- purpose to audit and monitor the performane of both, in compliance with the Operation Management System/Plan, provided by the Employer/Contractor,
- both Parties will cooperate with the Auditing Body.

3. DBO Procedures and Terminology

New Terminology

- 1.1.1.3 Operating Licence
- 1.1.1.10 Contract Data
- 1.1.1.11 Operation Management System
- 1.1.2.11 Auditing Body
- 1.1.3.3 Contract Period
- 1.1.3.4/5 Design-Build/Operation Service Period
- 1.1.3.8 Commissioning Certificate
- 1.1.3.11 Contract Completion Certificate

- 1.1.3.14 Retention Period
- 1.1.3.15 Cut Off Date
- 1.1.4.5 Cost Plus Profit
- 1.1.4.17 Maintenance Retention Fund
- Maintenance Retention Guarantee
- 1.1.4.18 Asset Replacement Fund
- 1.1.5.9/10 Design-Build/Operation Service
- 1.1.6.4 Exceptional Risk
- 1.1.6.10 Operation and Maintenance Plan

- 1.1.6.11 Commercial Risk
- 1.1.6.12 Risk of Damage

- 1.2 Interpretation
- (e) “shall”
- (f) “may”

New Procedures

Design-Build to Operate (Clauses 9 and 10)

The link between Design-Build



Operation Service

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Asset Replacement during the Operation Service (Clause 14.18)

Parts and Plant will need replacing
Money must be available
It must be a controlled procedure

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Operation Methodology

Operation Management System
- prepared by the Employer

Operation and Maintenance Plan
- prepared by the Contractor



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Defects (Clause 12)

The Contractor has a defects liability - but there is no Defects Liability Period

Delays
Normal provisions for Extension of Time during the Design-Build Period (Clause 9.3)
No Extension of Time during the Operation Service Period (Clause 10.6)


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Termination by the Employer (Clause 15)

Can the Employer terminate for convenience during the Operation Service
According to DBO document - YES (Cl. 15.5)
But only if the Law allows him to.

Clause 20 Claims and Disputes



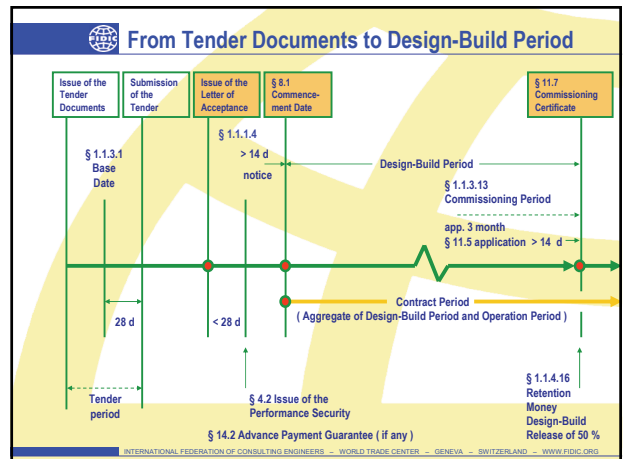
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4. The Contract Period

- The overall time framework for the complete Contract

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The Commissioning Period § 1.1.3.13

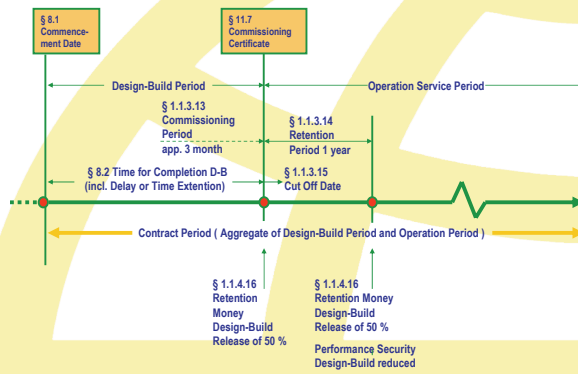
- The Commissioning Period means that period of time when commissioning tests are being carried out on Completion of Design-Build like :
 - pre-commissioning tests and functional tests
 - commissioning specified operational tests
 - trial operation

The Commissioning Certificate § 1.1.3.8

to be issued when :

- the Works have been fully designed and erected,
- the Works have passed the Tests on Completion of Design-Build,
- the As-Built Documents and the Operation and Maintenance Manuals have been supplied,
- marking the end of the Design-Build Period and the Commencement of the Operation Period.

From Commencement to Commissioning D-B



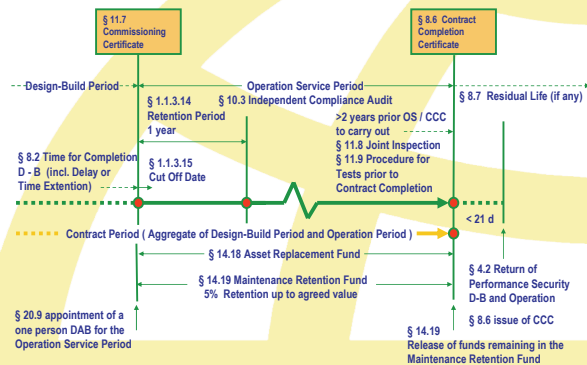
The Retention Period § 1.1.3.14

- the period of 1(one) year for the completion of outstanding work,
- when Commissioning Certificate issued
 - release of the first half of the Retention Money,
- when Final Payment Certificate for Design-Build issued
 - release of the second half of the Retention Money

The Cut Off Date § 1.1.3.15

- the date at the end of a specified period stated in the Contract Data, after the Time for Completion of the Design-Build.
- failure to complete the Design-Build prior to the Cut Off Date :
 - the Employer may :
 - permit to continue for a further named period, or
 - terminate the Contract.

From Commissioning to Contract Completion OS



Joint Inspection Prior to Contract Completion § 11.8

- two years prior the expiry date of the Operation Service Period
- to submit a report identifying maintenance works, replacements and other works required to be carried out
- satisfy the requirements of the Operation and Maintenance Plan
- carry out all or part of the works identified

Procedure for Tests Prior to Contract Completion § 11.9

- tests to be carried out towards the end of the Operation Service Period
- tests results to be compiled and evaluated
- Contractor to notify, that the Works are complete and ready for final inspection
- notify the Employer prior issue of the Contract Completion Certificate upon being satisfied regarding such final inspection

Contract Completion Certificate § 8.6

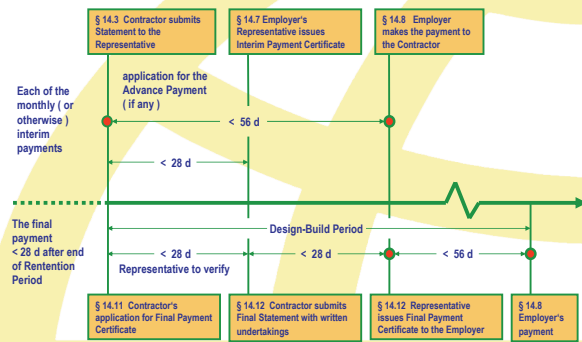
- to be signed when both, the Design-Build and the Operation Service have been completed.
- No extension of the Operation Service Period shall be allowed.
- Only the Contract Completion Certificate shall be deemed to constitute acceptance of the completion of the Contract.

Residual Life § 8.7

- (if any) shall be stated in the Contract Data,
- and shall be incorporated in the design and construction of the facility.

5. Payment

- Interim and Final Payment during Design-Build Period
Operation Service Period

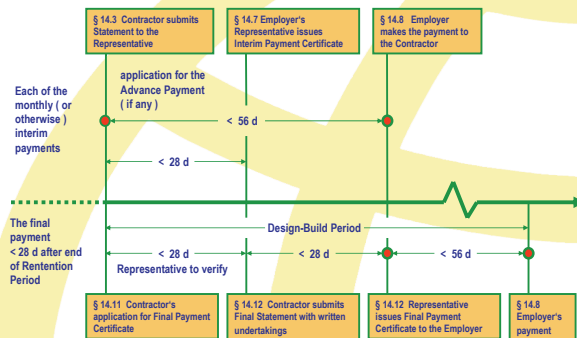


Advance Payment (if any) § 14.2

- Interim Payment Certificate for the advance payment after receiving an application and after the Employer receives :
 - the Performance Security
 - a guarantee equal to the advance payment

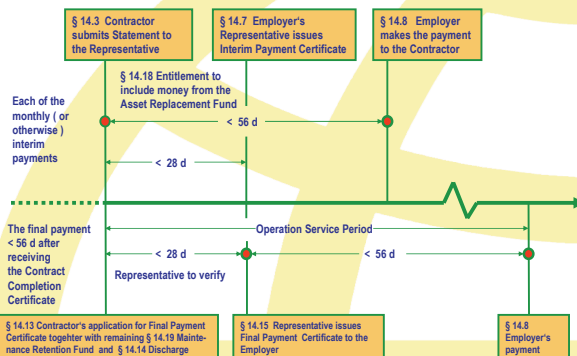
Payment of Retention Money

- when Commissioning Certificate issued – release of the first half of the Retention Money,
- when Final Payment Certificate for Design-Build issued – release of the second half of the Retention Money



5. Payment

- Interim and Final Payment during Design-Build Period
- Operation Service Period



Asset Replacement Fund 1.1.4.18, § 14.18

- to provide the necessary funding for the replacement of items of Plant identified in the Asset Replacement Schedule
- to be prepared by the Contractor, covering the identification and timing of asset replacements
- required for the continued efficient operation of the Works
- Payment will not be released until
 - such replacement has been effected, or
 - replacement date has been reached.

Asset Replacement Fund § 1.1.4.18, § 14.18

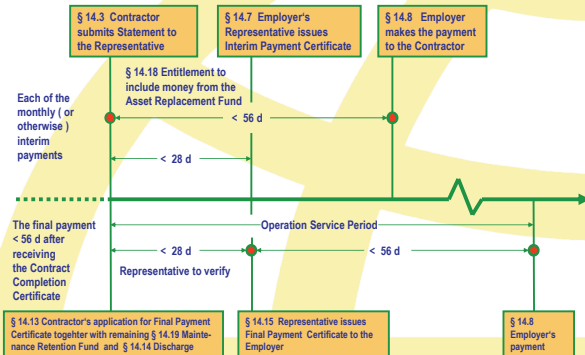
- remaining money in the Asset Replacement Fund upon completion of the Contract shall be shared equally between the Parties.
- Contractor shall be entitled to include his share in his Application for Final Payment Certificate Operation Service.

Asset Replacement Fund § 1.1.4.18, § 14.18

- shall not cover the cost of :
 - routine maintenance items
 - replacement of Plant and Material less than five years life expectancy
 - providing spares between scheduled dates for major plant replacement
 - the replacement of Plant and Materials which are not identified in the Asset Replacement and shall be included elsewhere in the Contract

Maintenance Retention Fund § 1.1.4.17, § 14.19

- is required to provide an incentive to ensure that the Works are in proper condition
- shall be created by deducting five percent from payments within the Operation Service Period
- may be replaced by a Maintenance Retention Guarantee
- all remaining funds shall be paid with the final payment



6. Risks and Insurance

**Risks and Insurance
Clauses 17 - 19**

Risk is about **probability** of an event occurring and the **severity** of the consequences

- Risk**
- Responsibility**
- Liability**
- Indemnity**
- Insurance**

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Balance of Risk Sharing
Traditional FIDIC

EPC

COST PLUS

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Changes in the DBO document

- o Restructured Clauses 17 - 19
- o Identified the Risks to be carried by each Party
- o Differentiated between Risks during the **Design-Build Period** and **Operation Service Period**
- o Classified the Risks into **Commercial Risks** and **Risks of Damage**
- o Taken away the term **Force Majeure**

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Restructuring of Risk and Insurance Clauses

- Clause 17 **Risk Allocation**
- Clause 18 **Exceptional Risks**
- Clause 19 **Insurance**

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7. Handling Disputes

- Determination
- Contractor's Claims
- Determination / Dispute
- Adjudication / Decision
- Dissatisfaction / Arbitration

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7. Handling Disputes

- **Determination § 3.5**
- Contractor's Claims
- Determination / Dispute
- Adjudication / Decision
- Dissatisfaction / Arbitration

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Employer's Representative Determination

when Employer's Representative shall proceed according to § 3.5 Determinations

§ 3.5 Determinations by the Employer's Representative

Representative shall consult with each Party to reach agreement

fair determination if agreement is not achieved

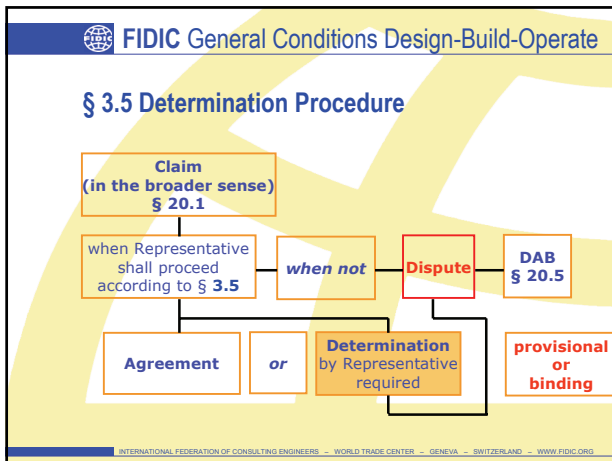
shall give notice to both Parties

in accordance with the Contract, taking due regard of all relevant circumstances

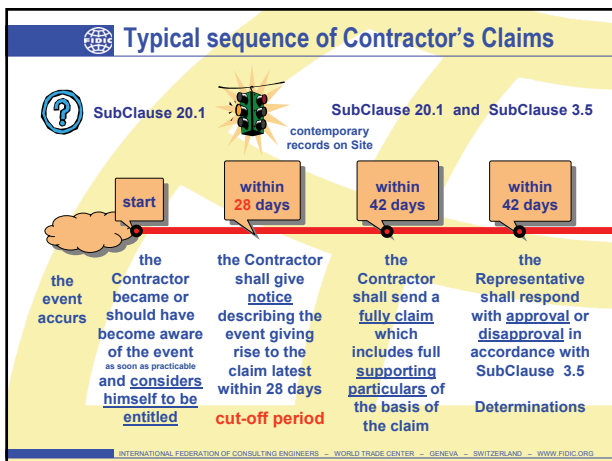
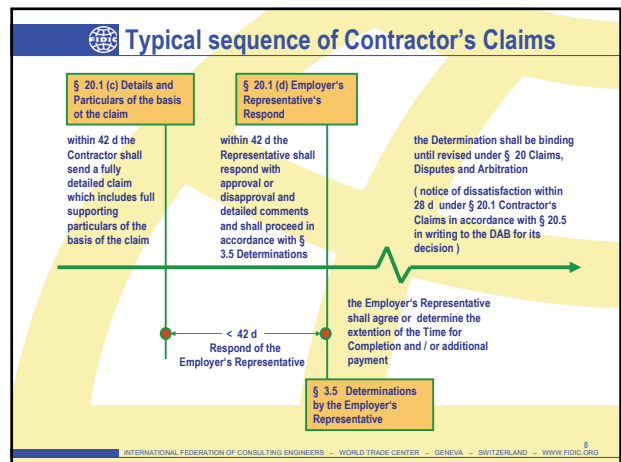
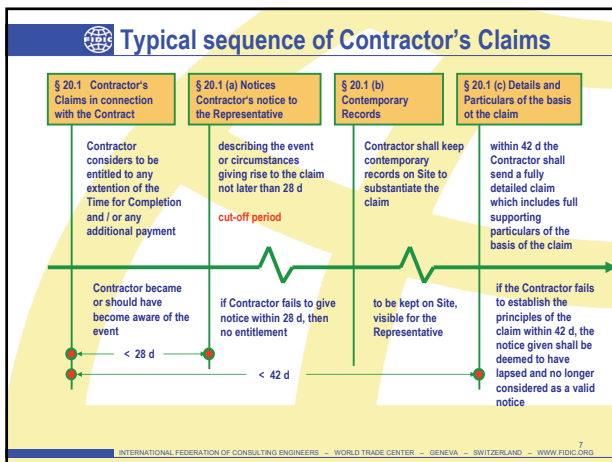
of each agreement or determination

binding until revised under § 20 Claims, Disputes and Arbitration

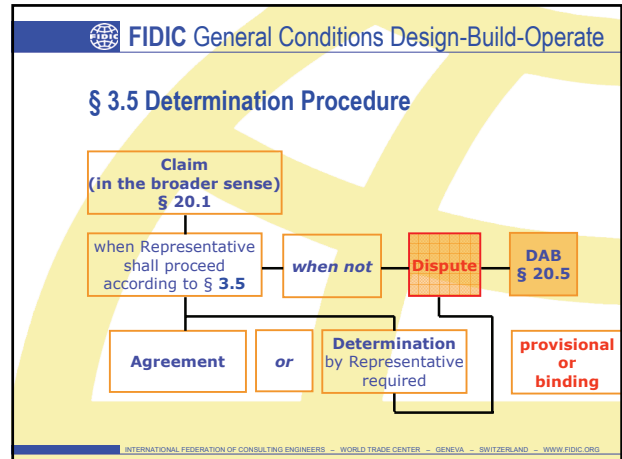
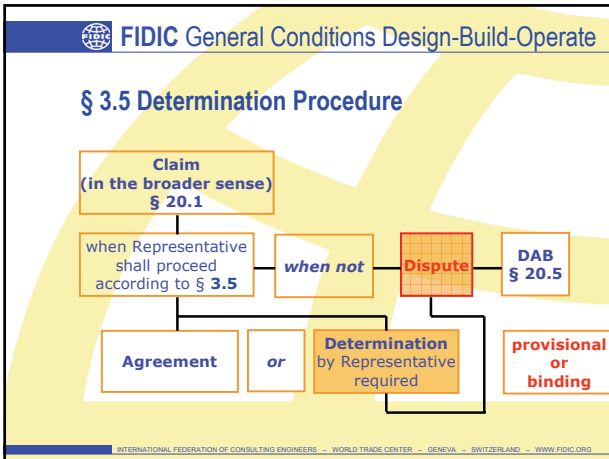
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- FIDIC General Conditions Design-Build-Operate**
- ## 7. Handling Disputes
- Determination
 - Contractor's Claims § 20.1
 - Determination / Dispute
 - Adjudication / Decision
 - Dissatisfaction / Arbitration
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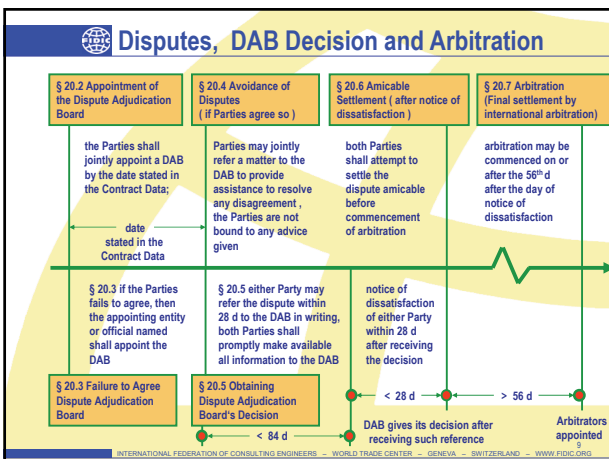


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- ## 7. Handling Disputes
- Determination
 - Contractor's Claims
 - Determination / Dispute § 3.5, § 20.1(d)
 - Adjudication / Decision
 - Dissatisfaction / Arbitration
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- ## 7. Handling Disputes
- Determination
 - Contractor's Claims
 - Determination / Dispute
 - Adjudication / Decision § 20.5
 - Dissatisfaction / Arbitration § 20.7
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- ### The Steps in the Procedure for Dispute Settlements
1. Avoidance of Dispute
 2. Dispute
 3. Referral to DAB
 4. Decision – 84 days
 5. Notice of Dissatisfaction
 - 28 days - or Final and Binding
 6. - 56 days - for Parties to attempt Amicable Settlement
 7. International Arbitration may be begun as to that dispute only, at/after the 56th day after the day of notice of dissatisfaction
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8. Particular Conditions


Part A - Contract Data

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Particular Conditions
Part A - Contract Data
 Part B - Special Provisions

The Tender The Contract Data



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- ☞ Contract Data is to be filled in by Employer
- ☞ Information to be filled in by Contractor must be clearly identified
- ☞ Omissions will mean fall-back provisions will apply, or
- ☞ Document will be incomplete

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Particular Conditions


Part B - Special Provisions

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Particular Conditions
 Part A - Contract Data
Part B - Special Provisions

The Contract Data The Special Provisions



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A complete and valid Contract can be based on:

- ♥ General Conditions
- ♥ Contract Data

But more often than not, we require

- ♥ Special Provisions

These show the reader that something has been
Added or Changed

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When preparing Special Provisions
REMEMBER

- ♥ Terminology must be consistent
- ♥ Use same clause numbering
- ♥ Don't change the Balance of Risk
- ♥ Don't compromise duties and obligations
- ♥ Don't upset long term commitment
- ♥ Remember 'fitness for purpose'

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Order of Precedence

1. Particular Conditions Part A - Contract Data
2. Particular Conditions Part B - Special Provisions
3. General Conditions



Other Important Matters

- Contract Data must be complete
- Tender Period must be realistic
- Tender Validity must allow sufficient time for evaluation, negotiation and award



All this is **Special** to the project



Confucius

...if the language is not accurate, then is that, what is said, not that, what has been meant.