

FIDIC-ACEG European Regional Infrastructure Conference



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**TERMINATION UNDER
CLAUSES 15 AND 16 OF THE
FIDIC RED BOOK**

WORKSHOP 5 MARCH 2018

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FIDIC GOLDEN PRINCIPLES AND GUIDANCE

- FIDIC Golden Principles:
 - GPs 1, 2 and 3 are engaged on termination rights and responsibilities.
- FIDIC Guidance on the General Provisions:
 - Pay attention to the wording of the sub-clause;
 - Verify each ground of termination;
 - Shortens provisions to terminate for bribery/corruption;
 - Ensure consistency with governing law of the Contract.



CLAUSE 15: EMPLOYER'S TERMINATION

NOTICE TO CORRECT

- 1999 Red, Yellow and Silver Books: Engineer/Employer's right to issue a Notice to Correct if Contractor fails to carry out any obligation, requiring Contractor to make good the failure.
- 2017 Forms: Engineer or Employer's right to issue a notice to correct...

And

- Prescribed contents of Notice to Correct: describe failure and sub-clause of GCOC breached, specify [reasonable] time within which it must be remedied.



CLAUSE 15: EMPLOYER'S TERMINATION

Notice to Correct: 2017 Forms.../

Contractor **MUST** respond immediately specifying measures to be taken to remedy the failure and the date they will be started.

The time specified in the Notice to Correct does not imply any extension of the Time for Completion. [Notices substantially intended to refer to Contractor default, therefore probably no entitlement to money or costs.]



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Contractor's default:

1999 [All] Forms: GCOC 15.2(a)-(f):

- (a) Failure to provide performance security, or comply with a notice to correct;
- (b) Abandons the works... demonstrates unwillingness to continue...;
- (c) Without reasonable excuse, fails to proceed with the works... or comply with notices under sub-clauses 7.5 [rejection] or 7.6 [remedial works] within 28 days;
- (d) Subcontracts the whole of the works without the required agreement;
- (e) Bankruptcy or insolvency...;
- (f) Bribery/gifts etc. as an inducement:
 - (i) Doing or forbearing to do any action in relation to the contract; or
 - (ii) Showing for forbearing to show favour or disfavour to any person in relation to the Contract...



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Contractor's default:

2017 Forms, GCOC15.2:

Requirements/form of Employer's Notice under clause 15.2.1:

Either:

- Notice of Intention to Terminate the Contract: grounds (a) – (e) (some changes from 1999); or
- Notice of Termination in respect of grounds (f) – (h):
 - (f) Subcontracts the whole of the works without required agreement;
 - (g) Bankruptcy or insolvency... [NB position regarding JVs];
 - (h) On reasonable evidence of fraud, corruption... in relation to the works.



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Contractor's default:

2017 Forms, GCOC15.2 .../

Grounds (a) – (e) (some changes of substance from 1999) see:

- (a) Contractor's failure to comply with:
 - (i) Notice to correct;
 - (ii) an Agreement or final and binding Determination under clause 3.7; or (iii) DAAB Decision, binding or final and binding.

AND such failure constitutes a material breach of the Contractor's obligations under the Contract.



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Contractor's default .../

GCOC 15.2.2:

Unless the Contractor remedies the matters specified in the Notice of Intention to Terminate within 14 days, the Employer may terminate.

In respect of Notices in respect of GCOC 15.2.1(f)-(h), the termination is effective immediately.

2017 Forms have more detailed provisions for action after termination (15.2.3) and completion of the works (15.2.4) which, as in the 1999 Forms, includes the release of the contractor's equipment and temporary works at or near the site, or their sale if the Contractor is indebted to the Employer.



CLAUSE 15: EMPLOYER'S TERMINATION

Valuation after termination: GCOC 15.3

1999 Forms:

- Engineer/Employer to determine to agree or value the works, goods, Contractor's Documents/sums due to the Contractor;

2017 Forms:

- Engineer/Employer to agree or determine value of the works/sums due to the contractor (clause 3.7);
- The date of termination is the date for the commencement of time limits under clause GCOC 3.7.3.



CLAUSE 15: EMPLOYER'S TERMINATION

Payment after Termination: GCOC 15.4

1999 Forms:

- (a) proceed under clause 2.5 (Employer's Claims) and clause 3.5 (determinations);
- (b) withhold further payment...; or (c) recover/set off additional costs of completion.

2017 Forms:

- Emphasises the Employer's right to withhold payment until all claims/costs of completion/loss and damages, including delay damages between the Date for Taking Over the Works and the Date of Termination (if later).



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Employer's Convenience: GCOC 15.5

1999 Forms: By notice at any time, effective 28 days after the notice or the return of the performance security.

- Employer must return performance security forthwith and may not terminate to execute the works himself or by third parties.
- Works to be valued under clause 16.3, and paid as provided for in clause 19.6.

2017 Forms: As above, but Employer also: may not use Contractor's Documents (unless paid for), or Equipment, Temporary Works etc.

- Unless/until Contractor has been paid sums due on termination, the Employer may not continue the Works.
- **Note:** no prohibition against termination for Employer or third party to complete.



CLAUSE 15: EMPLOYER'S TERMINATION

Termination for Employer's convenience:

New Clause 15.6:

- The Contractor must submit particulars of the value of the work done (see clause 18.5 (optional termination)), and additions/deductions of balance due under clause 14.3 (Final Payment).
- The Engineer/Employer's Representative must determine the sums due under clause 3.7 and issue a payment certificate, time runs from the date of receipt of the Contractor's particulars.

and New Clause 15.7: Employer must pay within 112 days from date of receipt of Contractor's submission.



CLAUSE 16: CONTRACTOR'S TERMINATION

Suspension by the Contractor: GCOC 16.1

1999 Forms: Failure to issue IPC; failure to provide evidence of Employer's Financial Arrangements; failure to pay...

- 21 days notice of intention to suspend or reduce the rate of work...
- delay and costs (including profit) recoverable subject to clause 20.1, after receipt of notice;
- Engineer/Employer to determine.

2017 Forms:

- As above but conditional on any such failure constituting a material breach of Employer's obligations.



CLAUSE 16: CONTRACTOR'S TERMINATION

Termination by Contractor: GCOC 16.2

Notice of intention to terminate (14 days):

1999 Forms:

- (a) Failure to supply evidence of ability to pay (clause 2.4) within 42 days of the notice;
- (b) Failure within 56 days of receipt of Statement... to issue IPC (not S.B.);
- (c) None payment, 42 days after expiry of time for payment;
- (d) Employer's Substantial failure to perform its obligations under the Contract;
- (e) Failure to comply with provisions for execution of the Contract Agreement (1.6) or requirements for Assignment (1.7).



CLAUSE 16: CONTRACTOR'S TERMINATION

2017 Forms: Notice of intention to terminate:

- As for 1999 (a)-(c);
- **[new]** (d) failure to comply with binding agreement or final and binding determination (3.7) or binding **OR** binding and final DAAB decision;
- **AND such failure constitutes a material breach of Employer's obligations under the Contract;**
- (e) (old (d) revised) Employer substantially fails to perform, **and such failure constitutes a material breach of its obligations...;**
- (f) Failure to issue a Notice of the Commencement Date within 84 days of the receipt of the Letter of Acceptance.
- (g)(i) Failure to execute the Contract Agreement (1.6).



CLAUSE 16: CONTRACTOR'S TERMINATION

Notice of termination (immediately effective):

1999 Forms:

- (f) ((e) in S.B.) A prolonged suspension of the works as described in clause 8.11;
- (g) ((f) in S.B.) The Employer becomes bankrupt or insolvent... (or any equivalent act under local laws).
- N.B. The contractor's election to terminate the Contract is without prejudice to any other rights or remedies.



CLAUSE 16: CONTRACTOR'S TERMINATION

Notice of termination (immediately effective):

2017 Forms:

- (g)(ii) Assigns the Agreement without the required agreement.

[This came under the “intention to terminate” provisions in 1999 Forms].

- (h) A prolonged suspension of the Works (as described in clause 8.11);
or
- (i) The employer becomes bankrupt or insolvent...
- (j) **[NEW]** Employer's corruption, fraud etc. (reasonable evidence req.d).
- As in 1999 Forms, the Contractor's election to terminate is without prejudice to any other rights of remedies.



CLAUSE 16: CONTRACTOR'S TERMINATION

Notice of termination (immediately effective):

2017 Forms:

- **16.2.2 [NEW]**
- Provides that unless the Employer remedies the matter complained of in the notice within 14 days, the Contractor may, by issuing a second notice, immediately terminate the Contract. The termination is effective on the date the Employer receives the second notice.
- In respect of a notice under 16.2.2 (g)(ii), (h) or (i) termination is effective from the date of the receipt of the first notice.
- Delays and costs (including profit) incurred during the 14 day notice period, are recoverable subject to clause 20.2 provisions.



CLAUSE 16: CONTRACTOR'S TERMINATION

GCOC 16.3

1999 Forms: Cessation of work and removal of Contractor's Equipment:

- After notice of termination under clauses 15.5 (Employer's Entitlement), 16.2 (Contractor's Termination) or 19.6 (Optional Termination, Payment and Release), the Contractor shall:
 - (a) cease all further work except those necessary for protection and safety..;
 - (b) hand over Contractor's Documents, Plant, Materials etc. for which payment has been made; and
 - (c) remove all other goods from the Site except as necessary for safety and leave.



CLAUSE 16: CONTRACTOR'S TERMINATION

2017 Forms: Contractor's obligations after termination:

- Clarifies that these obligations are confined to terminations under 15.5 (Termination for Employer's Convenience), 16.2 (Contractor's termination) or 18.5 (Optional Termination – exceptional events), the Contractor shall:
 - (a) cease all further work, except as instructed for protection or safety (for which it is entitled to be paid under clause 20.2);
 - (b) Deliver up Contractor's Documents, Plant, Materials which have been paid; and
- Remove other Goods from the Site, except as necessary for safety and leave.



CLAUSE 16: CONTRACTOR'S TERMINATION

Payment after Termination: GCOC 16.4:

1999 Forms:

- The Employer shall promptly:
 - (a) return the performance security;
 - (b) Pay the Contractor in accordance with clause 19.6;
 - (c) Pay the Contractor the amount of any loss of profit or other loss or damage consequent on termination.

2017 Forms:

- As for 1999 **BUT** pay according to clause 18.6, and pay loss of profit and damage subject to clause 20.2 compliance; **BUT the return of the performance security is now moved to clause 4.2, not 16.4.**



CONCLUSIONS and QUESTIONS

- Are the changes better or worse than the provisions in the 1999 form?
- Does prescription aid or hinder – especially with reference to notices;
- Clause 20 obligations noted in 2017 forms;
- Payment, clause 3.7, and clause 21 obligations stated, but subject to condition that the breach must constitute a material breach – is this a good thing?
- Does clause 15.5 now enable the Employer to terminate for convenience to carry out the work himself or by another third party?
- The right to the return of the performance security upon Contractor's termination for Employer's breach – now moved to clause 4.2 - why?



**TERMINATION:
FIDIC COC CLAUSES 15 AND 16
THANK YOU FOR LISTENING**

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