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CONTRACT ADMINISTRATION FOR A CONSTRUCTION PROJECT UNDER FIDIC REDBOOK CONTRACT IN ASIAN DEVELOPING COUNTRIES

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Abstract:

Contract Administration is a very undeveloped area of project management in developing countries which requires the parties to a contract to administer the daily activities with the view point of the contractual obligation and deliverables specified in the contract in order to meet the targeted progress. In developing countries, the construction projects with domestic finances are usually implemented using two-party (Owner-Contractor) system whereas three-party (Owner-Contractor-Engineer) system is used to execute the projects financed by international lenders. Most of the owners have been using the FIDIC conditions of contract with the requirements from the development partners without in depth knowledge of terms and conditions specified therein. The conditions of contract for domestic contracts are based on mutual trust however the FIDIC conditions of contract are drafted considering that there exists mutual mistrust between the Employer and the Contractor.

A Contractor working for a long time in a mutual trust environment will face difficulty for administering the contract prepared under mutual mistrust ideology. The time bar specified in the FIDIC Redbook Sub-Clause 20 to notify the Engineer of the Contractor's intention to claim is stricter than that of in FIDIC 4th edition. A Contractor may miss his rights to claim for time and cost if he is more cooperative than litigious. The Contractor is required to see with suspicious eyes every information and correspondence received from the Engineer and to notify the implication of such correspondences with intention to claim in time. Construction industry culture will be turned into litigious if the FIDIC conditions of contract are used without considering local culture. An integrated contract administration system should be established by both the Employer and Contractor in order to minimize disputes in the construction project.

Keywords: FIDIC, claim, contract administration.

1. INTRODUCTION

Developing countries are still striving for basic infrastructures such as water supply, transport infrastructure, power, etc. The domestic resources are insufficient to meet the necessary financing for the development of the infrastructures. In order to meet such gaps several other stakeholders such as international lenders, private sectors and beneficiaries/user groups are involved in infrastructure development in developing countries.

Usually, two-party (Owner-Contractor) system is followed in internally financed and in small to medium scale development project assisted by donors. The beneficiaries (user groups) are also involved for the execution of small-scale water supply and irrigation and rural access road projects. However, Owner, Contractor and Consultant (Engineer), forming a three-party system, are involved in execution of large-scale infrastructure development projects. Small scale infrastructure such as rural water supply, access road etc. are usually carried out by

beneficiaries/user groups, and local contractors following national competitive bidding are used for the construction of small to medium scale infrastructures.

2. CONTRACTING PRACTICES

A simple several pages contract document is used for making a contract with beneficiaries/user groups to carry out small scale rural infrastructures in Nepal. Contract is given to the registered user groups at the official estimated rate without overhead & profit and no tax is levied from the user groups. Such contract in fact neither stipulates the quality standard of the works nor refers to any standard specifications. The qualities of the works solely depend upon the integrity of the beneficiaries. Moreover, there is no defect liability period in such contracts. It is believed that the beneficiaries are the ultimate user of the facilities and they will not compromise the quality of the works. So, no detailed contract is made for such works and it is assumed that there exists mutual trust.

A detailed contract documents including specifications are prepared and qualification of the contractors is also done for medium to large scale construction projects. Unlike in the contract for small scale works, performance security is required, taxes are levied, delay damage is applicable and defect liability period exists in such contracts. The contract for national competitive bidding (NCB) is less exhaustive than that of international competitive bidding (ICB). However, mutual mistrust has been envisaged in both NCB and ICB contracts. Under the mutual mistrust principle, the owner assumes the contractor will perform less than he has agreed to provide and the contractor assumes that the owner will demand more than the contractor agreed (Nielsen, K.R. 2005).

Standard conditions of contract prepared by Federation Internationale des Ingenieurs Conseilste, popularly known as FIDIC (international Federation of Consulting Engineers), are used in ICB. FIDIC has issued a set of contracts, commonly known as rainbow series, which are used for Design-Bid-Build (DBB); Design and Build (D&B); Engineering, Procurement and Construction (EPC); Design, Build and Operate (DBO), etc. To be more specific, this paper focuses on the contract administration issues mainly related to civil works

contracts, FIDIC conditions of contract for Construction (the Redbook), designed by the Employer. FIDIC has published several editions of the Redbook such as FIDIC fourth (1987 edition), 1999 edition and multilateral development bank (MDB) harmonized edition 2005, 2006 and 2010. The MDB harmonized edition has been prepared for common use of nine multilateral banks: African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (The World Bank), Islamic Bank for Development Bank and Nordic Development Fund. These banks have made mandatory use of the harmonized edition of the FIDIC Redbook for the civil works contract assisted by these banks in a borrower country. Currently, FIDIC MDB harmonized edition 2006 is widely used for civil works contracts assisted by such banks. Moreover, JICA (Japan International Cooperation Agency) in 2009 has also recommended to use FIDIC MDB harmonized edition 2006 for the civil works contracts assisted by the JICA. Before such period FIDIC 1987 edition was adopted by JICA and 87 & 99 editions were adopted by other donors and government for ICB.

3. CONTRACT ADMINISTRATION IN CONSTRUCTION CONTRACTS

Contract administration handles daily contractual issues in a contract execution and copes with them in accordance with the progress of the whole project. Contractual issue may be related to time, cost, quality and other obligations set out in the contract. This paper attempts to highlight contract administration required for time and cost control for construction projects.

In a mutual trust environment, either party notifies to other of likely events which may cause delay in project completion and require addition cost. However, a contract requires the Contractor to notify the Owner/Employer/Project Manager of the event or circumstances which needs additional time and cost. As such a contract made with beneficiaries/user group does not include detailed requirements to be fulfilled by the contractor; no rigorous contract administration is required in such contracts. However, contract administration is required for NCB and ICB contracts in order to ensure that either party does not demand more or deliver less than that has been agreed at the time signing the contract. Notifying Engineer and other

party of the event or circumstances expressing intention to claim and substantiation of claims are the major part of the claim management in contract administration. Usually, there are specific deadlines for notifying and substantiation of claims under FIDIC contracts. Contract administration should ensure such contractual requirements are met and the rights of the party are established. Such contractual requirements under Japanese public works contract, Nepalese construction contract and FIDIC contract (Redbook) are discussed below.

3.1 Claims in Japanese Public Works Contract

Japanese public works contract stipulates that the Contractor is required to notify the project manager of events/circumstances which affect the completion date and/or requires additional cost. The GCC has following provisions:

The Contractor shall promptly notify the Project Manager to that effect and request that the Project Manager confirm the said facts. When the Project Manager is requested to confirm certain facts or when the Project Manager finds such facts by himself, the Project manager shall promptly conduct surveys in the presence of the Contractor.

The Owner with the consultation of the Contractor shall formulate survey results including instructions for any necessary measures. The Owner shall change/revise the drawings and specifications if necessary.

There is no any time bar for the contractor to notify the project Manager of the circumstances, and the Contractor does not lose the right to claim even he failed to give notice.

Moreover, article (3.2.) of the GCC states that *'Unless otherwise specifically provided in this Contract Form, the BOQ and the Work Program shall not be binding on the Owner or the Contractor'*.

So, in such circumstances, no rigorous contract administration is required in Japanese public works contract execution.

3.2 Domestic Contract in the Nepalese Construction Industry

Following provisions are stipulated in the General Conditions of Contract for civil works contract with domestic finances.

'The Contractor shall submit an application to the Employer for extension of time, stating the causes for delay, 7 days before the expiry of the Contract completion date'.

The project Manager shall decide whether and by how much to extend the Intended Date within 21 days of the Contractor asking the Project Manager upon the effect of a Compensation Event or Variation and supporting full supporting information.'

Such sub-clauses do not require the contractor to claim for time after the occurrence of each event which may cause delay in project completion. Instead, such clause allows to contractor to claim in a gross at the end of the initially intended completion period. There is no time bar for the contractor to notify the project manager of event when it occurs.

However, FIDIC conditions of contract have more strict provisions.

3.3 FIDIC 87

Regarding the Contractor's claim, FIDIC 87 has following provisions:

If the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen.

The Contractor is required to submit detailed particulars of the amount (time and cost) claimed and its ground to the Engineer by the Contractor within 28 days of notice of intention of claim. If the event has a continuing effect, such account is considered to be interim account and the final account is required to submit within 28 days of the end of continuing effect.

If the Contractor fails to comply with any of the provisions of this Clause 53 in respect of any claim which he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Engineer or any arbitrator or arbitrators appointed pursuant to Sub-Clause 67.3 assessing the claim considers to be verified by contemporary records (whether or not such records were brought to the Engineer's notice as required under Sub- Clauses 53.2 and 53.3). Under FIDIC 87 edition, the failure of 28 days notice does not bar the Contractor's entitlement to the claim. However, the Engineer is not bound to make any determination for time extension unless the Contractor claimed for.

However, there are stricter provisions regarding the notification of Contractor's Claim in FIDIC 99/2006 editions.

3.4 FIDIC 99/MDB 2006

Unlike in Japanese contract and Nepalese contracts, FIDIC 99 and MDB 2006 provide various provisions on which the Contractor and Employer can make claim against each other. Lists of claim applicable provisions for Contractor (Table 1) and for Employer (table 2) under FIDIC MDB 2006 are presented in subsequent pages.

The FIDIC 99 and MDB 2006 dictates following requirements under the Contractor’s claim:

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. Otherwise, the following provisions of this Sub-Clause shall apply.

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.

Similarly, FIDIC 1999 and 2006 edition stipulates that the *Force Majeure* notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting *Force Majeure*.

Under such contract provisions, the Contractor is required to be more cautious on the words “the Contractor**should have become aware**”. Although ‘should have become aware’ is prerogative of the Claimant (Contractor or Employer), the Engineer may

dictate a date after occurrence of any event by which the Contractor should have become aware. If the Contractor failed to notify the Engineer of the event within 28 days of occurrence, the Engineer may reject the claim citing the reason of Time bar.

However, the FIDIC 1999 and MDB 2006 do not enforce time bar for the Employer to claim

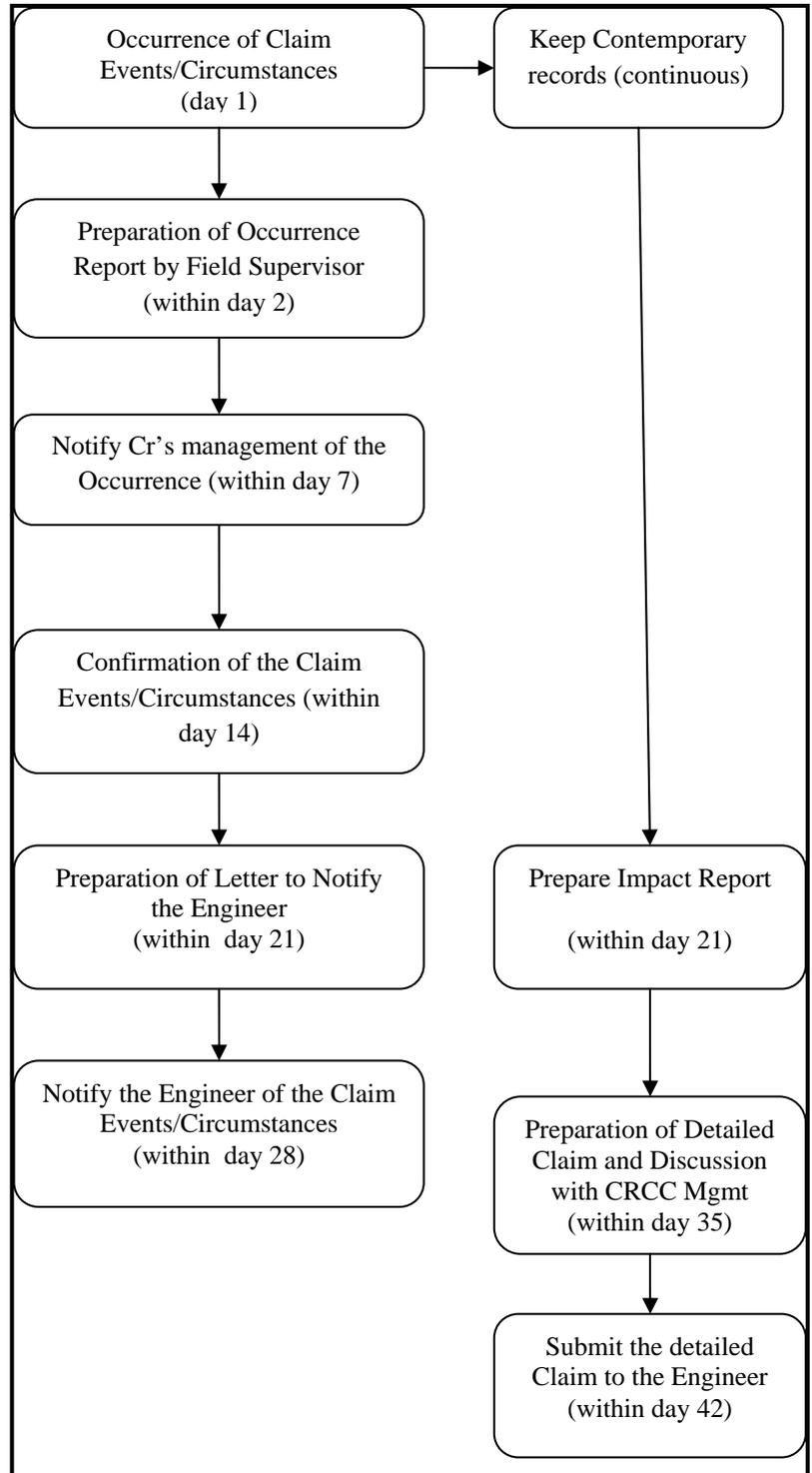


Fig. 1 Claim Documentation, Notification and Submission Flow Charts for Contractor

against the Contract. The MDB 2006 requires the Employer to notify the Contractor of his intention to make claim within 28 days of the event/circumstances. However, the Employer will not lose his right to claim even he does not notify the Contractor within 28 days of the event/circumstances. The Employer has privilege in the FIDIC contracts.

The Contractor is required to check the daily activities, the information/data provided by the Engineer/Employer against the provisions listed in Table 1 and to notify the Engineer of any implication that arises from the information provided. The Contractor should not forget to refer the Sub-clauses applicable to such implications and Sub-Clause 20.1 Contractor's Claim. The Contractor is required to see all the correspondences with references to the claim applicable provisions. The key site staff should also be trained on how such contract clauses are related to the daily activities and the information/data/instructions provided by the Engineer. The author has made the information flow system at a site office of a contractor as shown in figure 1 to promptly provide responses to any event/circumstances that occurred at site.

4. DISCUSSION AND CONCLUSIONS

The Japanese public works contract requires the Project Manager also to assess any event/circumstances or changes in conditions which require additional time and cost, and notify Contractor of his assessment. Moreover, there is no time bar for the Contractor for claiming additional time and cost. Thus, a Contractor working in Japanese environment expects cooperation from the other party and has belief that the Contractor will be compensated if there requires additional time and cost due to such events/circumstances or changes. Contractors working in such environment usually do not put attentions to time bar, and are not generally serious about the contract administration for claim management.

Similarly, the public works contract in Nepal allows the Contractor to claim in a gross at the end of the completion period. It does not require the Contractor to claim immediately after the occurrence of each events or changes in conditions. The Contractor has to keep the records of the events or changes, and he would have opportunities to collect data or keep record even after the occurrence of the events. So, Contractors

working in such environment also are not serious on the time bar and do not usually put effort on establishing contract administration function for project execution.

However, FIDIC contracts have stipulated specific deadlines to be met by the Contractor for notifying the Engineer and other party and for substantiation of the claims. The Contractor may lose his rights if he fails to meet such deadlines. Therefore, the Contractor working under FIDIC 1999/2006 editions is required to have efficient contract administration system in place at the site offices. The Contractor is required to establish internal information flow system so that all the required information for claim management are collected and sent to the Engineer and other party in time. A typical system shown in fig 1 can be adopted at site offices for information collection and communication.

In addition, FIDIC contracts do not stipulate time bar for the Employer to make claim against the Contractor the Contractor is required to administer the contract carefully and watch the Employer's activities and his intentions all the time.

Contractor working for long time in mutual trust environment will face difficulty in using FIDIC contracts. An efficient contract administration function is required to be established.

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Table1: List of Claim Applicable Provisions for Contractors

Sub-clause	Title	Contractor's Entitlement
1.9	Delayed drawings or instructions	If Engineer fails to issue notified drawings within a reasonable time
2.1	Right to access to the site	If Employer fails to give right of access to site within time stated time
4.6	Cooperation	If the Contractor to incur cost and delays due to the Engineer's instruction or contractual requirement to allow appropriate opportunity for carrying out work to the Employer's personnel, any other contractor employed by the Employer and the personnel of any legally constituted public authorities.
4.7	Setting out	for errors in original setting-out points and levels of reference
4.12	Unforeseeable physical conditions	If Contractor encounters physical conditions which are unforeseeable
4.24	Fossils	Time and cost attributable to an instruction to Contractor to deal with an encountered archeological finding
7.4	Testing	If testing is delayed by (or on behalf of) the Employer
8.4	Extension of Time for completion	If completion is or will be delayed by a listed cause (refer 8.2 and 10.1)
8.5	Delayed caused by authorities	If public authority causes unforeseeable delay
8.9	Consequences of suspension	If Engineers instructs a suspension of work
10.2	Taking Over parts of the Works	If Contractor incurs to cost by taking over a part of the works by the Employer.
10.3	Interference with tests on completion	If Employer delays a test on completion
11.8	Contractor to search	If instructed to search for cause of a defect for which he is not responsible
12.3	Evaluation (new rates)	For work whose quantity has been changed/varied
12.4	Omissions	If an item was for work which has been omitted by variation
13.2	Value engineering	If saving from value engineering
13.3	Variations	If variation order is issued
13.7	Adjustments for changes in legislation	Time and cost attributable to a change in the laws of the country
14.4	Schedule of payment	If interim payment instalments were not defined by reference to actual progress, and actual progress achieved in executing the works, and if actual progress is found to be less or more than that on which this schedule of payment was originally based, the instalments may be revised
14.8	Delayed payments	If Contractor does not receive payment in accordance with Sub-clause 14.7
16.1	Contractor's entitlement to suspend work	If Engineer fails to certify or if Employer fails to pay amount certified or to evidence his financial arrangements, and the Contractor suspend work
16.4	Payment on Termination	for losses and damages after terminating contract
17.1	Indemnities	Cost attributable to a matter against which he is indemnified by the Employer

17.4	Consequences of Employer's risk	If works, goods, or Contractor's documents are damaged by the Employer's risk as listed in Sub-clause 17.3
18.1	General requirements for insurance (if Employer is insuring party)	for premiums if Employer fails to effect insurance for which he is the 'insuring party'
19.4	Consequence of Force majeure	If Force majeure prevents him from performing obligations
19.6	Optional Termination, payment and release	Contractor's work and other costs are valued and paid after progress is prevented by a prolonged period of Force majeure and either party gives notice of termination
19.7	Release from Performance	If it becomes impossible or unlawful to perform contractual obligations, Contractor may be released from performance and can claim as in 19.6

Table2: List of Claim Applicable Provisions for Employers

Sub-clause	Title	Employer's Entitlement
4.19	Electricity, water and Gas	Charges for the use of power, water, gas and other services
4.2	Employer's equipment, and free issue materials	If the Contractor uses Employer's equipment, materials
7.5	Rejection	If the rejection and retesting cause the Employer to incur additional cost
7.6	Remedial work	If the Contractor fails to comply with Engineer's instruction to comply with the requirement set in the contract (remove from site or replace plant/equipment, execute work)
8.6	Rate of progress	If revised method of execution cause the Employer to incur additional costs
8.7	Delay damage	If the Contractor fails to comply with time for completion sub-clause 8.2 (liquidated damage)
9.4	Failure to pass test on completion	If the Works, or a Section, fail to pass the Tests on Completion repeated under Sub-Clause 9.3 [Retesting], and the Employer takes over the project, the reduced value of work
11.3	Extension of Defect notification period	If and to the extent that the Works, Section or a major item of Plant (as the case may be, and after taking over) cannot be used for the purposes for which they are intended by reason taking over) cannot be used for the purposes for which they are intended by reason of a defect or by reason of damage attributable to the Contractor
11.4	Failure to remedy defects	If the Contractor fails to remedy the defects or damage by the notified date and this remedial work was to be executed of the cost of the contractor
15.4	Payment after termination	After Termination by employer, the costs of execution, completion and remedying of any defects, damages for delay in completion
18.1	General Insurance	If the contractor fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the contract, and the Employer neither approves omissions nor effect insurance for the coverage relevant to this default, any money which should have been recoverable under this insurance
18.2	Insurance for works and Contractor's Equipment	If, more than 1 year after the Base date, the insurance cover for the damage to or loss of the works which is attributable to the use or occupation by the Employer, ceases to be available at commercially reasonable terms, the amount equivalent as the Contractor should have expected to have paid