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ASIAN DEVELOPMENT BANK BUSINESS OPPORTUNITIES FAIR 2026

21-24 SEPTEMBER 2026 | ADB HEADQUARTERS, MANILA

VALUE FOR MONEY: DRIVING QUALITY INFRASTRUCTURE

Raising Standards in Project Delivery Contracts

Workshop on Conditions of Contracts

Mohsen I. Khan

AGENDA ITEM 03

Payments, Securities, Variations & Price Adjustment

Keeping cash flow, security instruments and performance controls working together. Controlling scope change and pricing it fairly on Bank-funded works.

Interim payments

Applications, supporting evidence, certification cycle and time limits.

Variation process

Instruction, proposal, objection rights and the limits of the power to vary.

Retention and advance

Purpose, release milestones and guarantee requirements.

Valuation

Contract rates, new rates, overheads and profit, and omissions.

Performance security

When a call is justified and the exposure created by a wrongful call.

Price adjustment

Why indexation exists and what happens when it is disabled or capped.

Questions for Discussion

01 Why does the Employer has to pay to the Contractor ?

3. In consideration of the payments to be made by the Employer to the Contractor as hereinafter mentioned, the Contractor hereby covenants with the Employer to execute and complete the Works and remedy any defects therein, in conformity with the provisions of the Contract.

4. The Employer hereby covenants to pay the Contractor, in consideration of the execution and completion of the Works and the remedying of defects therein, the Contract Price at the times and in the manner prescribed by the Contract.

Questions for Discussion

02 Can the Employer withhold payment because of unrelated disputes?

EXAMPLE

Payment held back over a delay claim on another contract. SC 14.7

The Employer must make payment *in full*, regardless of any entitlement to compensation arising from any Claim which the Employer may have against the Contractor.

If the Employer considers that it has a Claim against the Contractor (e.g., for Delay Damages), then it must comply with the procedure for Claims provided for in Clause 20 [*Employer's and Contractor's Claims*].

The Employer has no right to act unilaterally and set off or make any deduction from any amount certified as due to the Contractor.

Questions for Discussion

03 When is it appropriate to call a performance security, and what risks arise from wrongful calls?

EXAMPLE

Bond called during a genuine dispute; Contractor sues for damages.

Performance Security can be called when:
(a) failure by the Contractor to extend the PS
(b) Failure by the Contractor too pay the amount agreed or determined
(c) failure by the Contractor to remedy a default stated in a Notice
(d) Circumstances which entitle the Employer to terminate the Contract
(e) Failure to rectify the defective Plant off site.

Questions for Discussion

04 What happens if the Employer delays certification or payment certificates?

EXAMPLE

Certificate issued six weeks late; financing charges accrue.

If the Employer fails to make payments within the periods indicated, the Contractor may be entitled to financing charges, pursuant to Sub-Clause 14.8 [Delayed Payment], possibly to suspend, or reduce the rate of, work, pursuant to sub-paragraph (c) of Sub-Clause 16.1 [Suspension by Contractor], and ultimately to terminate the Contract, pursuant to Sub-Clause 16.2 [Termination by Contractor].

Questions for Discussion

05 Why and when is price adjustment necessary?

EXAMPLE

A four-year contract runs through 30% cement inflation.

SC 13.6 & 13.7: Changes in Laws & Changes in Cost .

(i) Ref is base date i.e., 28D before submission of bids.

(ii) Works both ways --- Principle of restitution

SC 13.7: Changes in Cost

i. To the extent that full compensation for any rise or fall in Costs is not covered the ACA shall be deemed to include contingencies.

ii. PA corresponds with IPA [SC14.3(ii)] i.e., at a specified frequency or *monthly.*

iii. Engr can determine provisional indices until current indices are not available --- Engr cannot change the material listed.

iv. If Works delayed by Contractor, the Curr. Index is frozen 49D before Time for Completion or Curr. Index whichever favors Employer

Questions for Discussion

06 Is it fair to ask the Employer to pay for price adjustment? Why?

EXAMPLE

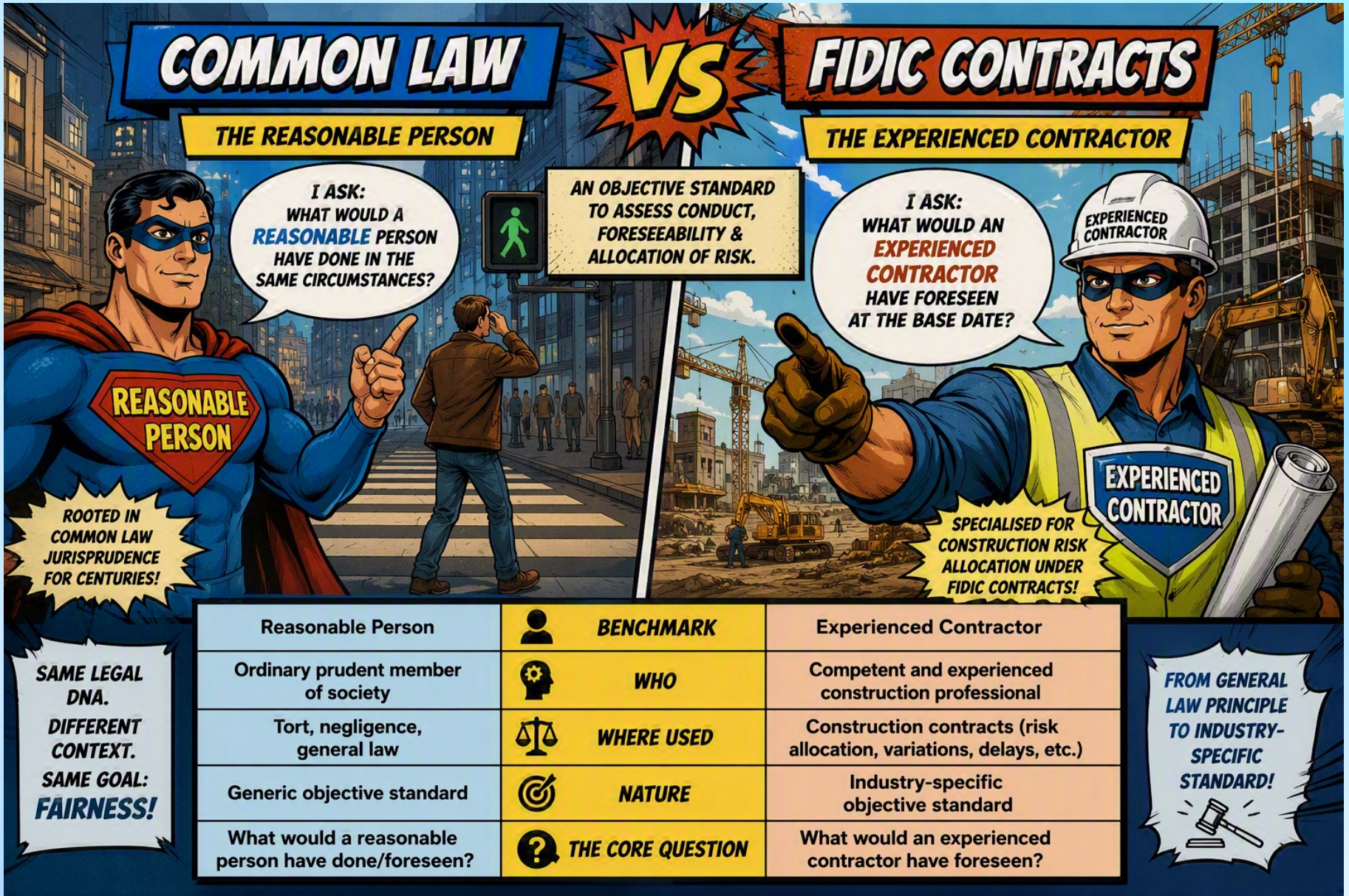
Without it, bidders add a large contingency to every price.

SC 13.6 & 13.7: Changes in Cost

Any risk should be apportioned to the Party who is most suitable to manage that risk

Who should bear the risk of Changes in Laws & Changes in Cost?

What if the Employer is also a private entity?



Reasonable Person	BENCHMARK	Experienced Contractor
Ordinary prudent member of society	WHO	Competent and experienced construction professional
Tort, negligence, general law	WHERE USED	Construction contracts (risk allocation, variations, delays, etc.)
Generic objective standard	NATURE	Industry-specific objective standard
What would a reasonable person have done/foreseen?	THE CORE QUESTION	What would an experienced contractor have foreseen?

Questions for Discussion

07 What distinguishes a variation from a completely new scope of work?

EXAMPLE

Adding two floors to a building versus a separate new annex.

SC 13.1 - Each Variation may include:
(i) changes to the quantities of any item of work included in the Contract (however such changes do not necessarily constitute a Variation);
(ii) Changes to the quality and other characteristics of any item of work;
{iii) changes to the levels, positions and/or dimensions of any part of the Works;
(iv) the omission of any work, unless it is to be carried out by others without the agreement of the Parties;
{v) any additional work, Plant, Materials or services necessary for the Permanent Works,
(vi) changes to the sequence or timing of the execution of the Works.

The Contractor shall not make any alteration to and/or modification of the Permanent Works, unless and until the Engineer instructs

Questions for Discussion

08 Can an Employer instruct a reduction in scope, and how should it be valued?

EXAMPLE

Landscaping deleted after the Contractor has ordered the materials.

SC 13.1 - Each Variation may include:
(iv) the omission of any work, unless it is to be carried out by others without the agreement of the Parties;

Thus, a Variation may comprise an omission of work if this work is not going to be carried out at all. Unlike RB/99, a Variation may also comprise an omission of work which is to be carried out by others on condition that the Contractor agrees, as the Contractor would be deprived of profit on the omitted work. To induce the Contractor to agree, SC 13.3.1(c) provides that the Contractor may include in its proposal for adjustment to the Contract Price the amount of any loss of profit and other losses and damages that it may suffer as a result.

The Contractor shall not make any alteration to and/or modification of the Permanent Works, unless and until the Engineer instructs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GOOD PROCUREMENT. GREAT DEVELOPMENT!
WE PROMOTE FAIR APPORTIONMENT OF RISKS FOR SUSTAINABLE PROJECTS AND LASTING IMPACT.
ADB PROCUREMENT PRINCIPLES
FAIRNESS
Equal treatment of all eligible bidders; equitable rights and obligations.
TRANSPARENCY
Information is clear, consistent, timely and accessible.
QUALITY
Goods, works and services of the right quality, at the right time.
VALUE FOR MONEY
Optimal benefits from resources used over the whole life cycle.
COMPETITION & INNOVATION
Open competition encourages better solutions and innovation
WE ENSURE THAT PROCUREMENT IS:
✓ FAIR
✓ TRANSPARENT
✓ COMPETITIVE
✓ ACCOUNTABLE
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CHAMPION OF FAIRNESS
WE ALLOCATE RISKS TO THE PARTY BEST ABLE TO MANAGE IT!
✓ FORSEE IT
✓ CONTROL IT
✓ MITIGATE IT
✓ BEAR THE CONSEQUENCES OF IT
BALANCED RISK ALLOCATION
EQUITABLE RIGHTS. SHARED SUCCESS.
WE SHARE INFORMATION OPENLY...
...WE DELIVER QUALITY AND INNOVATION!
EXAMPLES OF RISK ALLOCATION TO THE PARTY BEST ABLE TO MANAGE THE RISK
DESIGN RISK (Employer designs) → ALLOCATED TO EMPLOYER
SITE CONDITIONS (Unforeseeable) → ALLOCATED TO EMPLOYER
CHANGES IN LAW → ALLOCATED TO EMPLOYER
CONSTRUCTION METHODS & PRODUCTIVITY → ALLOCATED TO CONTRACTOR
EQUIPMENT & RESOURCES → ALLOCATED TO CONTRACTOR
PRICE ESCALATION (when indexation applies) → SHARED RISK
WHY IT MATTERS!
UNFAIR RISK ALLOCATION LEADS TO...
HIGHER COSTS
MORE DISPUTES
DELAYS
PROJECT FAILURE
FAIR RISK ALLOCATION LEADS TO...
BETTER PROJECT OUTCOMES!
BETTER RELATIONSHIPS
EFFICIENT DELIVERY
QUALITY OUTCOMES
LASTING IMPACT
ADB BELIEVES: RIGHT RISK. RIGHT PARTY. RIGHT OUTCOME. TOGETHER, WE DELIVER A BETTER ASIA AND PACIFIC!

Thank you

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