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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

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AGENDA ITEM 03

Payments, Securities and Contractor Performance

Keeping cash flow, security instruments and performance controls working together.

Interim payments

Applications, supporting evidence, certification cycle and time limits.

Retention and advance

Purpose, release milestones and guarantee requirements.

Performance security

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



Questions for Discussion

01 Can the Employer withhold payment because of unrelated disputes?

EXAMPLE

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



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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

02 What evidence should support an interim payment application?

EXAMPLE

Measured quantities, delivery notes and approved progress records.



SC 14.3:

- (i) the estimated contract value of the Works executed
- (ii) any amounts to be added and/or deducted for changes in Laws or in Costs
- (iii) any amount to be deducted for retention
- (iv) any amounts to be added and/or deducted for the advance payment and repayments
- (v) any amounts to be added and/or deducted for Plant and Materials
- (vi) any other additions and/or deductions which have become due
- (vii) any amounts to be added for PS
- (viii) any amount to be added for release of Retention
- (ix) any amount to be deducted for the Contractor's use of utilities provided by the Employer
- (x) the deduction of amounts certified in all previous Payment Certificates.



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 to 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 How should defective work discovered after payment be treated contractually?

EXAMPLE

Waterproofing fails after certification and payment.

SC 11.4: Serve the Notice.

- (i) carry out the work or have the work carried out by others
- (ii) accept the damaged or defective work – Employer entitled for Claim
- (iii) require the Engineer to treat any part of the Works which cannot be used for its intended purpose(s) as an omission
- (iv) terminate the Contract



AGENDA ITEM 04

Variations and Price Adjustments

Controlling scope change and pricing it fairly on Bank-funded works.

Variation process

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

Valuation

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

Price adjustment

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



Questions for Discussion

01 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

02 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?

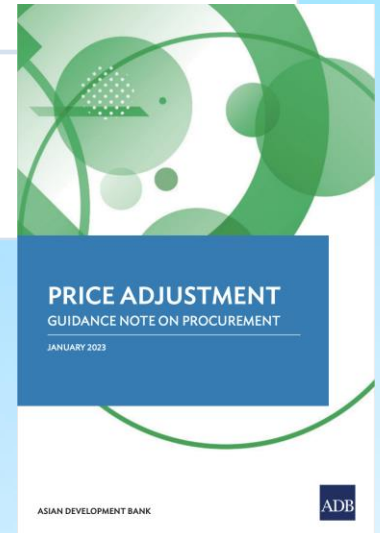


Questions for Discussion

03 What happens if price adjustment is disabled, or a large fixed factor is applied?

EXAMPLE

Fixed 2% cap set while fuel prices double.



Better Risk Allocation = Better Pricing + Fewer Claims + Better Project Outcomes



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COMMON LAW

THE REASONABLE PERSON

I ASK:
WHAT WOULD A
REASONABLE PERSON
HAVE DONE IN THE
SAME CIRCUMSTANCES?

AN OBJECTIVE STANDARD
TO ASSESS CONDUCT,
FORESEEABILITY &
ALLOCATION OF RISK.

ROOTED IN
COMMON LAW
JURISPRUDENCE
FOR CENTURIES!

**SAME LEGAL
DNA.
DIFFERENT
CONTEXT.
SAME GOAL:
FAIRNESS!**

FIDIC CONTRACTS

THE EXPERIENCED CONTRACTOR

I ASK:
WHAT WOULD AN
EXPERIENCED CONTRACTOR
HAVE FORESEEN
AT THE BASE DATE?

SPECIALISED FOR
CONSTRUCTION RISK
ALLOCATION UNDER
FIDIC CONTRACTS!

**FROM GENERAL
LAW PRINCIPLE
TO INDUSTRY-
SPECIFIC
STANDARD!**

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

04 Can the Contractor refuse to execute a variation?

EXAMPLE

Instruction to build a bridge type outside the Contractor's expertise.

SC 13.1: Right to Vary:

The Contractor shall be bound by each variation instructed & shall execute the Variation with due expedition and without delay, unless promptly gives a Notice that:

- (a) the varied work was **Unforeseeable** in relation to the scope and nature of the Works;
- (b) the Contractor cannot readily obtain the Goods required for the Variation; or
- (c) it will adversely affect the Contractor's ability to comply with SC 4.8 [Health and Safety Obligations) and/or SC 4.18 [Protection of the Environment].

Promptly after receiving this Notice, the Engineer shall respond by giving a Notice to the Contractor cancelling, confirming or varying the instruction. Any instruction so confirmed or varied shall be taken as an instruction under SC 13.3.1 [Variation by Instruction].



Questions for Discussion

05 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

06 How should overheads and profit be valued when no contract rates apply?

EXAMPLE

A bespoke facade with no comparable Bill of Quantities rate.

Reasonably incurred direct costs + attributable overheads (primary or secondary source) = Cost; then add contractual profit to arrive at a fair new rate or price

SCL D&D Protocol prefers using Actual Cost Records, Audited Financial Evidence and Project-Specific Cost Build-Up as basis but also permits using secondary methods such as using Hudson, Emden, Eichleay Formulae when (i) actual records are incomplete; (ii) actual overhead allocation is difficult to prove; or (iii) the tribunal accepts formulae based approximation.



Questions for Discussion

07 What happens when a variation affects the critical path and completion date?

EXAMPLE

Late redesign of the basement pushes completion by ten weeks.

RIGHT RISK. RIGHT PARTY. RIGHT OUTCOME.



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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ADB CHAMPIONS
FAIRNESS. TRANSPARENCY. VALUE FOR MONEY.

WE PROMOTE FAIR APPORTIONMENT OF RISKS FOR SUSTAINABLE PROJECTS AND LASTING IMPACT.

ADB
ASIAN DEVELOPMENT BANK

GOOD PROCUREMENT. GREAT DEVELOPMENT!

FAIR CONTRACTS BUILD BETTER FUTURES!

WE ENSURE THAT PROCUREMENT IS:

- ✓ FAIR
- ✓ TRANSPARENT
- ✓ COMPETITIVE
- ✓ ACCOUNTABLE

WE ALLOCATE RISKS TO THE PARTY BEST ABLE TO MANAGE IT!

- ✓ FORSEE IT
- ✓ CONTROL IT
- ✓ MITIGATE IT
- ✓ BEAR THE CONSEQUENCES OF IT

ADB CHAMPION OF FAIRNESS

WE SHARE INFORMATION OPENLY...

...WE DELIVER QUALITY AND INNOVATION!

BALANCED RISK ALLOCATION
EQUITABLE RIGHTS. SHARED SUCCESS.

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.

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 RELATIONSHIPS
- EFFICIENT DELIVERY
- QUALITY OUTCOMES
- LASTING IMPACT

BETTER PROJECT OUTCOMES!

ADB BELIEVES: RIGHT RISK. RIGHT PARTY. RIGHT OUTCOME. TOGETHER, WE DELIVER A BETTER ASIA AND PACIFIC!



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Thank you

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