



ASIAN DEVELOPMENT BANK BUSINESS OPPORTUNITIES FAIR 2026

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Raising Standards in Project Delivery Contracts

Workshop on Conditions of Contracts

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AGENDA ITEM 05

Claims, Time for Completion and Extension of Time

Notices, records and programme discipline decide most claims before the merits do.

EOT entitlement

Contractor's EOT entitlement, and Notice requirements, time bars.

Time and programme

Commencement, programme requirements and update obligations.

Claims management

Claims, time bars, substantiation and lessons learned.



Questions for Discussion: **EOT for Variation**

- 01 For an Extension of Time (EOT) **claim arising due to Variation** (PB, RB2017),
- Does the Contractor need to give Notice under Sub-Clause 20.1 (PB)/Sub-Clause 20.2 (RB2017)?
-

Example

Due to difficulties in acquiring some land parcels along the originally designed route, the Engineer issues Variation Instruction to divert the road alignment, which causes increase in total road length by 15%, which causes critical path, and is likely to delay Time for Completion by several months. In evaluating the impact of the Variation, the Engineer evaluates an increase in the Contract Price, but does not consider an additional Time for Completion required on account of the Variation.



Questions for Discussion: EOT due to Variation

01a For an Extension of Time claim arising due to Variation (PB, RB2017), does a Contractor need to give Notification under Sub-Clause 20.1 (PB)/Sub-Clause 20.2 (RB2017)?

Refer

- **PB SC 8.4(a):** *The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion ... is or will be delayed by any of the following causes: (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract, ...*
- **RB2017 SC 8.5(a):** *The Contractor shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to Extension of Time if and to the extent that completion ... is or will be delayed by any of the following causes: (a) a Variation (except that **there shall be no requirement to comply with Sub-Clause 20.2** [Claims For Payment and/or EOT]); ...*



Questions for Discussion: **EOT due to adverse Climate**

02

Under FIDIC contract (RB2017) what constitutes exceptionally adverse climatic conditions, that would entitle the Contractor for Extension of Time for Completion?

Example

In case of a heavy rain fall, floods, landslides, or tidal waves at the Site, how do you decide whether it is exceptionally adverse climatic condition, in considering Extension of Time?



Questions for Discussion: EOT

What constitutes exceptionally adverse climatic conditions [8.4 (c): PB; 8.5(c): RB2017]

02a

- **PB**: Probability of occurrence four or five times the Time for Completion (FIDIC Contracts Guide 2000, not binding)
- **RB2017**: must **at the Site**, and must be **Unforeseeable** as per:
 - SC 2.5 climatic data made available, and/or
 - Climatic data published in the Country for the location of the Site

“**Unforeseeable**” means not reasonably foreseeable by an experienced contractor by the Base Date. (SC 1.1.85)



Questions for Discussion: what's in EOT for Employer

- 03 **RB2017** SC 8.5(e) provides **EOT entitlement to the Contractor for any delay**, impediment or prevention caused by or **attributable to the Employer**, the Employer's Personnel, or the Employer's other contractors on the Site.
- Does this provision also protect the Employer's legitimate contractual interest, and if yes, how?

EXAMPLE

Employer delays in handover of the Site, the Engineer delays in issuing Drawings, the Employer's other contractors fail to complete the interface works on time.



Questions for Discussion: **what's in EOT for Employer**

03a **RB2017** SC 8.5(e) provides EOT entitlement to the Contractor for any delay caused by the Employer. Does this provision also protect the Employer's legitimate contractual interest, and if yes, how?

EOT provisions in SC 8.5 (in particular, SC 8.5 (e)) protect the Employer, from the

- (a) possibility of the Contractor's time-related fundamental obligation under SC 8.2 being invalidated under applicable Laws, and
- (b) risk that the Employer would lose its rights to claim Delay Damages under SC 8.8.

EXAMPLE

Employer delays in handover of the Site, the Engineer delays in issuing Drawings, the Employer's other contractors fail to complete the interface works on time.



Questions for Discussion: **Concurrent Delays**

04 How should concurrent delays caused by both parties be treated?

EXAMPLE

Late Employer design overlaps with a Contractor labour shortage.

EOT to be assessed in accordance with

- the rules and procedures stated in the Special Provisions,
- if not stated in Special Provision, appropriately, with due regard of all relevant circumstances



Questions for Discussion: **EOT & payment entitlement**

05

RB2017 Sub-Clause 8.5 provides entitlements and conditions for EOT. If a contractor under this Sub-Clause is entitled for EOT, does it **automatically** entitle the Contractor to additional payment?

EXAMPLE

Any EOT entitlement under SC 8.5 (a) to (e), does it automatically entitle additional payment?



Questions for Discussion: **Contractor's Delay**

06

Work progress is significantly behind the Program, solely because of the on going mobilization delays by the Contractor. The Engineer instructs the Contractor to expedite progress, so as to complete the Works within the Time for Completion.

- If the Contractor incurs additional costs in complying with this instruction, can the Contractor claim for related additional costs?

EXAMPLE

Contractor submits revised Program with revised method, importing additional equipment, and working night shifts ordered to recover time slip. As a result, the Contractor incurred additional cost, on account of importing additional equipment, and paying 25% additional fee for labour for night shift work.



Questions for Discussion: **Time for Completion expired!**

07

- What happens if the Time for Completion expires and the Contractor has not yet completed the Works?
 - Can the Employer continue to pay to the Contractor, without extending Time for Completion?
-

EXAMPLE

EOT has not been granted, but the Contractor keeps working after the expiry of the Time for Completion and the Employer has not terminated the Contract, is it possible to pay the Contractor?



Questions for Discussion: **Notice of Claim**

- 08 Have you ever come across a case where the Engineer rejected the Contractor's Notice of Claim? Was the Engineer right?
- What are the minimum requirements, for a valid Notice of Claim?
 - Is it necessary for a Notice of Claim to refer to relevant clause?
 - A Contractor issued a "Notice of Claim" directly to the Employer, was that a valid Notice?



Questions for Discussion: **Notice of Claim**

- 09
- **Contents:** state that it is a Notice. Describe the event or circumstance giving rise to the Claim.
 - **Communication:** Notice must be in writing (not oral)
 - **Timing:** no later than 28 days after the event/circumstance
 - **Notice Recipient:** the Engineer, with a copy to the other party to the Contract.
 - **Delivery Address:** address of the recipient(s), as stated in the Contract Data (or updated address provided by the recipient(s))
 - **Notice to take effect:** takes effect when received (or deemed to have been received) at the recipient's current address. If a Notice is electronically transmitted, the Notice is deemed to have been received on the **day after** transmission

“Notice” means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [Notices and Other Communications]. [SC 1.1.56]



Questions for Discussion: **Late Notice of Claim**

- 10
- Under RB2017, if a Party fails to submit Notice of Claim (or to submit the contractual/legal basis of the Claim) within the prescribed time limit, can such Claim still stand?
 - If yes, what circumstances would justify such late submission?

EXAMPLE

Notice served on day 40 against a 28-day time bar, or the failure to submit contractual/legal basis of the Claim within 84 days.



Questions for Discussion: **Late Notice of Claim**

10a Agreement or determination of the Claim [SC 20.2.5]

The following **may** be taken into account:

- Whether or to what extent the other Party would be prejudiced by acceptance of the late submission.
- In case of the time limit for the Notice, any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, and/or
- In case of the time limit for the failure to provide the contractual/legal statement with the fully detailed Claim, any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim.

EXAMPLE

Notice served on day 40 against a 28-day time bar.



Questions for Discussion

11 What records are sufficient to prove delay entitlement?

EXAMPLE

Daily site diaries, labour returns and an updated programme.



Questions for Discussion

12 What are the consequences of failing to update the programme regularly?

EXAMPLE

No baseline update for six months, so delay cannot be proven.



AGENDA ITEM 06

Dispute Avoidance and Resolution

Using a standing board to prevent disputes rather than arbitrate them later.

DAAB / DB

One member or three, appointment, and qualification.

Proactive avoidance

How a standing board reduces the volume and cost of disputes.

Non-Compliance with DAAB Decision

What are the consequences of non-complying DAAB Decision.



Dispute Avoidance & Resolution options under **FIDIC 2017 Edition (Rainbow Suite)**

Forum	Agreement/Law	Effect
Avoid Dispute (DAAB)	Consensual	
Amicable settlement	Consensual	
Mediation	Consensual, Statutory	Not binding
Adjudication (DAAB)	Consensual, Statutory	Binding, Not final, Local jurisdiction
Arbitration	Consensual, Statutory	Binding, Final, International jurisdiction
Court of law	Law	Binding, Several layers before final, Local jurisdiction



Question for Discussion: Why standing DAAB

02

Standing DAAB: In 2017 edition books, FIDIC contract conditions require to have standing DAAB. **What's the rationale for Standing DAAB** from start to completion of a contract?

DAAB: SC 1.1.22 " DAAB" or " Dispute Avoidance/Adjudication Board" means the sole member or three members (as the case may be) so named in the Contract, or appointed under Sub-Clause 21.1 [Constitution of the DAAB] or Sub-Clause 21.2 [Failure to Appoint DAAB Member(s)].

Timing to appoint DAAB member(s): SC 21.1 The Parties shall jointly appoint the member(s) of the DAAB within the time stated in the Contract Data (if not stated, **28 days**) after the date the Contractor receives the **Letter of Acceptance**.

[Note: ADB SBD: **28 days after the Commencement Date**]



Questions for Discussion: No. of DAAB member(s)

03 In constituting DAAB, what would be the number: **one or three—when and why?**

EXAMPLE

A small \$5m contract versus a complex \$500m tunnel project.

ADB SBD Note for one or three DAAB members (based on estimated contract cost):

- Larger than \$50 million, DAAB may comprise three members.
- Between \$20 million to \$50 million, DAAB may comprise three members or a sole member.
- Less than \$20 million, a sole member is recommended



Questions for Discussion: Qualification of DAAB member(s)

04

SC 21.1 requires DAAB member(s) to be “suitably” qualified.

- How do you **identify** and **ensure** suitable qualifications?
- Is it mandatory to appoint **FIDIC certified adjudicator**?

EXAMPLE

A member with no experience in interpretation of FIDIC contract is named.

Notes:

DAAB Agreement General Conditions (3.3)

- experienced and/or knowledgeable in the type of work,
- experienced in the interpretation of construction/engineering contract,
- fluent in the language for communications

ADB SBD requirement in appointing DAAB member(s): If the Contract is with a foreign Contractor, the DAAB members shall not have the same nationality as the Employer or the Contractor.



Questions for Discussion: Dispute Avoidance Initiative

- 05 A key theme of the Second Edition [FIDIC Rainbow Suites] is the **increased emphasis on dispute avoidance**, by opening way to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between the Parties during the performance of the Contract.
- **Can any Party ask for assistance?**
 - **Can DAAB itself take initiative?**

EXAMPLE

Can the Contractor by itself validly request DAAB for informal assistance to informally resolve an issue?



Questions for Discussion: Dispute Avoidance Emphasis

05a SC 21.3 If the **Parties** so agree, they **may jointly request** (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the **DAAB** becomes aware of an issue or disagreement, it **may invite the Parties to make such a joint request**.

General Conditions of DAAB Agreement

SC 5.1(e) – General obligations of the DAAB Member: The DAAB Member **shall be available to give Informal Assistance** when requested jointly by the Parties.

SC 1.4– DAAB’s Activities: “DAAB’s Activities” means the activities carried out by the DAAB in accordance with the Contract and the GCs, including all Informal Assistance, meetings (including meetings and/or discussions between the DAAB members in the case of a three-member DAAB), Site visits, hearings and decisions

SC 1.6 – Informal Assistance: “Informal Assistance” means the informal assistance given by the DAAB to the Parties when requested jointly by the Parties under Sub-Clause 21.3 [Avoidance of Disputes] of the Conditions of Contract.



Questions for Discussion: DAAB Payment using ADB fund

06

Can a project use proceeds of ADB financing to pay DAAB member(s) for the Employer's share?

EXAMPLE

Employer's half of the DB monthly fee charged to the loan.



Questions for Discussion: DAAB Payment using ADB fund

ADB SBD Special Provision

Sub-Clause 13.4 Provisional Sums: The following is inserted as the penultimate paragraph:

“A specific Provisional Sum for the work of the DAAB shall be used to cover the Employer’s share of the DAAB members’ fees and expenses, in accordance with Clause 21 [Dispute and Arbitration]....The Contractor shall submit the DAAB members’ invoices and satisfactory evidence of having paid 100% of such invoices as part of supporting documents of those Statements submitted under Sub-Clause 14.3 [Application for Interim Payment]....”



Questions for Discussion: Compliance with DAAB Decision

07

What happens if the Contractor or the Employer does not comply with DAAB's Decision?

EXAMPLE

A binding decision on payment is simply ignored.



Questions for Discussion: Terminating DAAB Agreement

- 08 A Party disagrees with DAAB's Decision, because it was not what that Party had genuinely anticipated. So, that Party thinks that DAAB is either corrupt or incompetent, and decided to terminate DAAB agreement with DAAB member(s).
- **Can a Party validly terminate a DB member's engagement without the other Party's consent?**



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Thank you

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CLOSING

Discussion

VALUE FOR MONEY: DRIVING QUALITY INFRASTRUCTURE