CONDITIONS OF CONTRACT FOR CONSTRUCTION

GENERAL CONDITIONS OF CONTRACT FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER

Dispute Adjudication Rules

First Edition 1999
20. CLAIM, DISPUTE AND ARBITRATION

20.1 Contractor's Claims

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.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

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 of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond, either with approval or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion before or after its expiry in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall
be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [Discharge] shall have become effective.

Any of the following conditions apply, namely:
(a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,
(b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
(c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Particular Conditions shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 14.3 [Law and Language].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the
arbitrator(s) on any matter whatsoever relevant to the dispute. Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

In the event that:
(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision],
(b) the DAB’s related decision (if any) has become final and binding, and
(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the matter to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB’s appointment or otherwise:

(a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].

APPENDIX

General Conditions of Dispute Adjudication Agreement

Each “Dispute Adjudication Agreement” is a tripartite agreement by and between:
(a) the “Employer”;
(b) the “Contractor”; and
(c) the “Member” who is defined in the Dispute Adjudication Agreement as being:
(i) the sole member of the “DAB” (or “adjudicator”) and, where this is the case, all references to the “Other Members” do not apply, or
(ii) one of the three persons who are jointly called the “DAB” (or “dispute adjudication board”) and, where this is the case, the other two persons are called the “Other Members”.

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the “Contract” and is defined in the Dispute Adjudication Agreement, which incorporates this Appendix. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

Unless otherwise stated in the Disputed Adjudication Agreement, it shall take effect on the latest of the following dates:
(a) the Commencement Date defined in the Contract,
(b) when the Employer, the Contractor and the Members have each signed the Dispute Adjudication Agreement, or
(c) When the Employer, the Contractor and each of the Other Members (if any) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days’ notice of resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any).

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member’s representations that he/she is:
(a) experienced in the work which the Contractor is to carry out under the
General Obligations of the Member

(a) experienced in the interpretation of contract documentation, and
(b) fluent in the language for communications defined in the Contract.

(c) have no interest financial or otherwise in the Employer, the Contractor or
the Engineer, nor any financial interest in the Contract except for payment
under the Dispute Adjudication Agreement;

(d) not previously have been employed as a consultant or otherwise by the
Employer, the Contractor or the Engineer, except in such circumstances
as were disclosed in writing to the Employer and the Contractor before
they signed the Dispute Adjudication Agreement;

(e) have disclosed in writing to the Employer, the Contractor and the Other
Members (if any), before entering into the Dispute Adjudication Agreement
and to his/her best knowledge and recollection, any professional or personal
relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any
previous involvement in the overall project of which the Contract forms
part;

(f) not, for the duration of the Dispute Adjudication Agreement, be employed
as a consultant or otherwise by the Employer, the Contractor, or the
Engineer, except as may be agreed in writing by the Employer, the
Contractor and the Other Members (if any);

(g) comply with the annexed procedural rules and with Sub-Clause 20.4 of
the Conditions of Contract;

(h) not give advice to the Employer, the Contractor, the Employer's
Personnel or the Contractor's Personnel concerning the conduct of the
Contract, other than in accordance with the annexed procedural rules;

(i) not while a Member enter into discussions or make any agreement with
the Employer, the Contractor or the Engineer regarding employment by
any of them, whether as a consultant or otherwise, after ceasing to act
under the Dispute Adjudication Agreement;

(j) ensure his/her availability for any site visit and hearings as are necessary;

(k) become conversant with the contract and with the progress of the Works
(and of any other parts of the project of which the Contract forms part) by
studying all documents received which shall be maintained in the current
working file;

(l) treat the details of the Contract and all the DAB's activities and hearings
as private and confidential, and not publish or disclose them without the
prior written consent of the Employer, the Contractor and the Other
Members (if any); and

(m) be available to give advice and opinions, on any matter relevant to the
Contract when requested by both the Employer and the Contractor,
subject to the agreement of the Other Members (if any).

The Employer, the Contractor, the Employer's Personnel and the Contractor's
Personnel shall not request advice from or consultation with the Member
regarding the Contract, otherwise than in the normal course of the DAB's
activities under the Contract and the Dispute Adjudication Agreement, and
except to the extent that prior agreement is given by the Employer, the Contractor
and the Other Members (if any). The Employer and the Contractor shall be
responsible for compliance with this provision, by the Employer's Personnel
and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that
the Member shall not, except as otherwise agreed in writing by the Employer, the
Contractor, the Member and the Other Members (if any):

(a) be appointed as an arbitrator in any arbitration under the Contract;

(b) be called as a witness to give evidence concerning any dispute before
arbitrator(s) appointed for any arbitration under the Contract;

(c) be liable for any claims for anything done or omitted in the discharge or
purported discharge of the Member's functions, unless the act or omission
is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and
hold the Member harmless against and from claims from which he/she is relieved
from liability under the preceding paragraph.

Whenever the Employer or the Contractor refers a dispute to the DAB under
Sub-Clause 20.4 of the Conditions of Contract, which will require the Member to
make a site visit and attend a hearing, the Employer or the Contractor shall
provide appropriate security for a sum equivalent to the reasonable expenses to
be incurred by the Member. No account shall be taken of any other payments due
or paid to the Member.

The Member shall be paid as follows, in the currency named in the Dispute
Adjudication Agreement:

(a) a retainer fee per calendar month, which shall be considered as payment
in full for:

(i) being available on 28 days' notice for all site visits and hearings;

(ii) becoming and remaining convenient with all project developments
and maintaining relevant files;

(iii) all office and overhead expenses including secretarial services,
photocopying and office supplies incurred in connection with his
duties; and

(iv) all services performed hereunder except those referred to in sub-
paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month
in which the Dispute Adjudication Agreement becomes effective; until the last
day of the calendar month in which the Taking-Over Certificate is issued for the
whole of the Works.

With effect from the first day of the calendar month following the month in
which Taking-Over Certificate is issued for the whole of the Works, the retainer
fee shall be reduced by 50%. This reduced fee shall be paid until the first day of
the calendar month in which the Member resigns or the Dispute Adjudication
Agreement is otherwise terminated.

(b) a daily fee which shall be considered as payment in full for:

(i) each day or part of a day up to a maximum of two days' travel time in
each direction for the journey between the Member's home and the
site, or another location of a meeting with the Other Members (if any);
(ii) each working day on site visits, hearings or preparing decisions; and
(iii) each day spent reading submissions in preparation for a hearing.

(c) all reasonable expenses incurred in connection with the Member's duties,
including the cost of telephone calls, courier charges, faxes and telexes,
travel expenses, hotel and subsistence costs: a receipt shall be required for
each item in excess of five percent of the daily fee referred to in sub-
paragraph (b) of this Clause;

(d) any taxes properly levied in the Country on payments made to the
Member (unless a national or permanent resident of the Country) under
this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Adjudication
Agreement. Unless it specifies otherwise, these fees shall remain fixed for the
first 24 calendar months, and shall thereafter be adjusted by agreement between
the Employer, the Contractor and the Member, at each anniversary of the date on
which the Dispute Adjudication Agreement became effective.

The Member shall submit invoices for payment of the monthly retainer and air
fares quarterly in advance. Invoices for other expenses and for daily fees shall be
submitted following the conclusion of a site visit or hearing. All invoices shall be
accompanied by a brief description of activities performed during the relevant
period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member’s invoices in full within 56
calendar days after receiving each invoice and shall apply to the Employer (in the
Statements under the Contract) for reimbursement of one-half of the amounts of
these invoices: The Employer shall then pay the Contractor in accordance with
the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is
entitled under the Dispute Adjudication Agreement, the Employer shall pay the
amount due to the Member and any
other amount which may be required to
maintain the operation of the DAB; and without prejudice to the Employer's
rights or remedies. In addition to all other rights arising from this default, the
Employer shall be entitled to reimbursement of all sums paid in excess of one-
half of these payments, plus all costs of recovering these sums and financing
charges calculated at the rate specified in Sub-Clause 14.8 of the Conditions of
Contract.

If the Member does not receive payment of the amount due within 70 days after
submitting a valid invoice, the Member may (i) suspend his/her services (without
notice) until the payment is received, and/or (ii) resign his/her appointment by
giving notice under Clause 7.

At any time: (i) the Employer and the Contractor may jointly terminate the
Dispute Adjudication Agreement by giving 42 days' notice to the Member; or (ii)
the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Adjudication Agreement, the
Employer and the Contractor may, without prejudice to their other rights,
terminate it by notice to the Member: The notice shall take effect when received
by the Member.

If the Employer or the Contractor fails to comply with the Dispute Adjudication
Agreement, the Member may, without prejudice to his/her other rights, terminate
it by notice to the Employer and the Contractor. The notice shall take effect when
ANNEX PROCEDURAL RULES

1. Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.

2. The timing of and agenda for each site visit shall be as agreed jointly by the DAB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DAB. The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.

3. Site visits shall be attended by the Employer, the Contractor and the Engineer and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the DAB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.

4. The Employer and Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the DAB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.

5. If any dispute is referred to the DAB in accordance with Sub-Clause 20.4 of the Conditions of Contract, the DAB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:

(a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and
(b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.

6. The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.

7. Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.

8. The Employer and the Contractor empower the DAB, among other things, to:

(a) establish the procedure to be applied in deciding a dispute,
(b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it,
(c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
(d) take the initiative in ascertaining the facts and matters required for a decision,
(e) make use of its own specialist knowledge, if any,
(f) decide upon the payment of financing charges in accordance with the Contract,
(g) decide upon any provisional relief such as interim or conservatory measures, and
(h) open up review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

9. The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Therefore, the DAB shall make and give notice to its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:

(a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
(b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decision shall be made by a majority of the Members, who may require the minority Members to prepare a written report for submission to the Employer and the Contractor; and
(c) if a Member fails to attend a meeting or hearing, or to fulfill any required function, the other two Members may nevertheless proceed to make a decision, unless:

(i) either the Employer or the Contractor does not agree that they do so, or
(ii) the absent Member is the chairman and he/she instructs the other Members to not make a decision.