



# **Dispute Resolution in MCC Funded Works Contract**

Dispute Resolution Board Foundation  
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# Outline

- MCC Investment Criteria
- MCC Standard Bidding Documents
- Experience with Dispute Resolution
- Capacity Building of MCAs

MCC Principles

Compact Programs

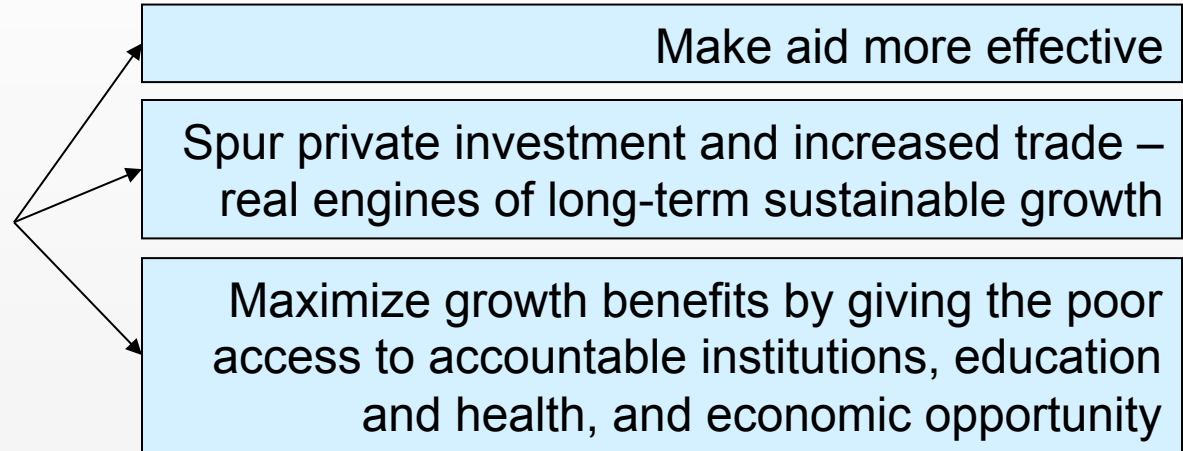
Compact Overview

# **MCC INVESTMENT CRITERIA**

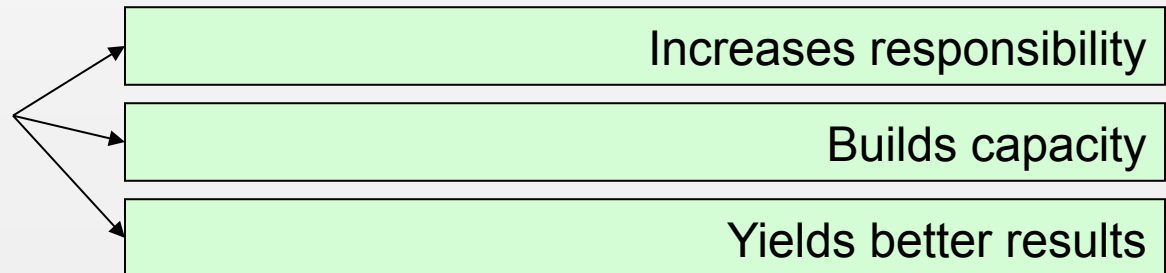
# MCC Guiding Principles

*Sound Policies, Ownership & Results Matter*

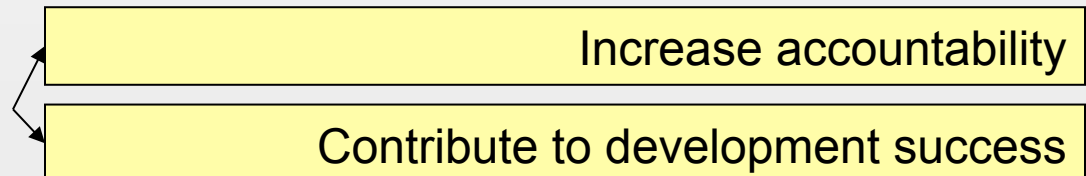
**Sound governance,  
economic and social  
policies**



**Broad country-  
ownership of  
development efforts**



**Clear objectives,  
measurement of results  
and transparency**



# MCC Selection Criteria for FY2013

## Ruling Justly:

- Civil Liberties
- Political Rights
- Freedom of Information
- Government Effectiveness
- Rule of Law
- Control of Corruption

## Economic Freedom:

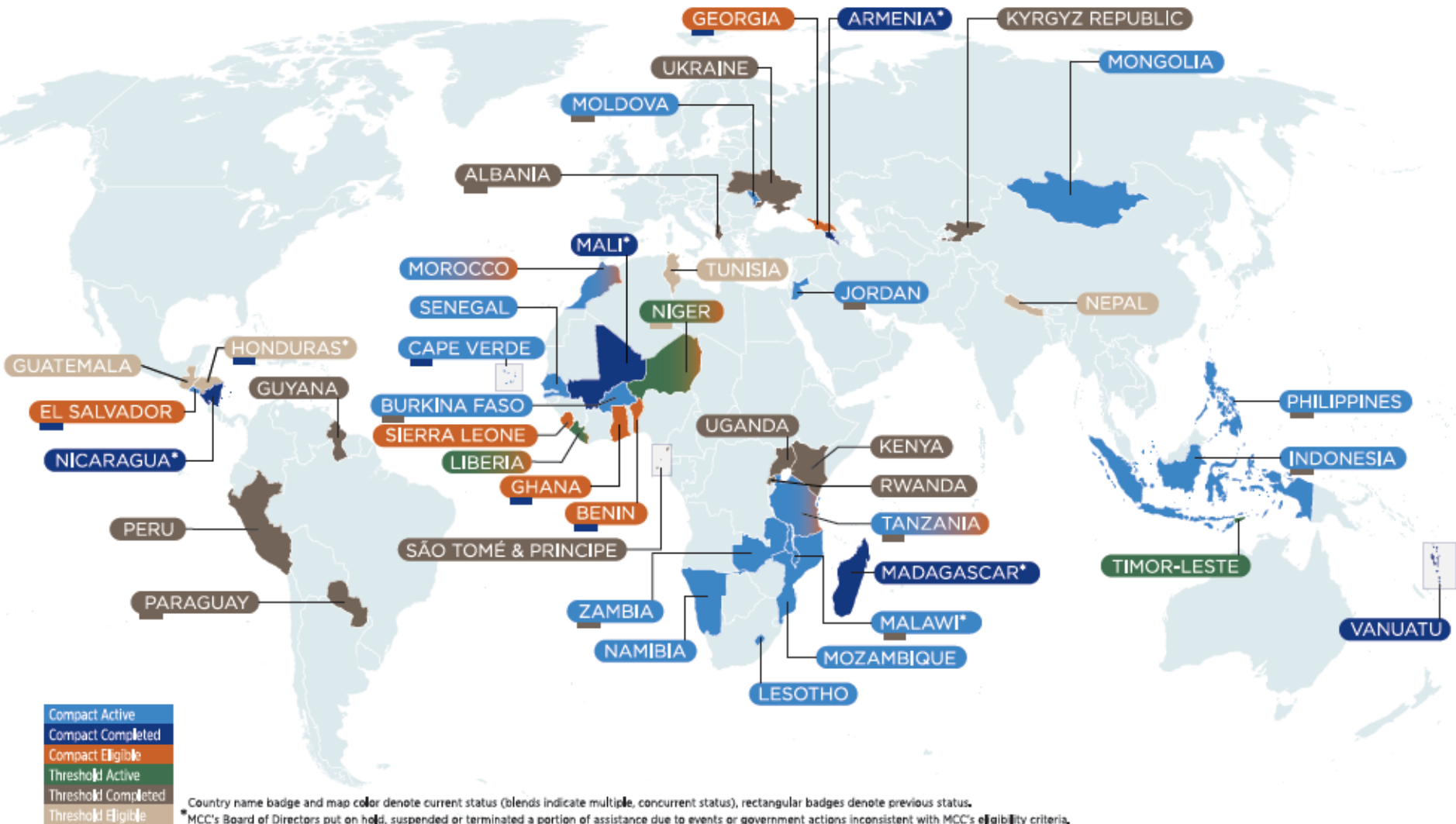
- Inflation
- Fiscal Policy
- Business Startup
- Trade Policy
- Regulatory Quality
- Land Rights and Access
- Access to Credit
- Gender in the Economy

## Investing in People:

- Public Expenditure on Health
- Public Expenditure on Primary Education
- Immunization Rates
- Girls' Primary Education Completion (LIC Countries)
- Girls' Secondary Education Enrollment (LMIC Countries)
- Child Health
- Natural Resource Protection

Benin, El Salvador, Georgia, and Ghana reselected as eligible for assistance;  
Morocco and Tanzania selected as eligible for second compact;  
Liberia, Niger, and Sierra Leone selected as newly eligible countries

# MCC Program Countries



# MCC Investment Criteria

- Economic Rate of Return of at least 10% for each discrete project
- Clear program logic, showing a clear link to the constraints identified in the constraints analysis and demonstrating how program activities will lead to a measurable impact on specific beneficiaries
- Can be completed within 5 years
- Pro-poor, socially inclusive and integrate MCC Gender Policy and Gender Integration Guidelines into design
- Adhere to the MCC Environmental Guidelines (IFC Performance Standards)

# Other Investment Considerations

Projects under consideration:

- ✓ Incorporate sector policy reform into compact project design where appropriate
- ✓ Attract capital from private sector/other donors and implement new financing structures and innovative delivery models
- ✓ Can be maintained post-Compact (operationally, financially, institutionally) and are therefore sustainable
- ✓ Are scalable, preferably, given that Compacts have a fixed budget in US dollars over a five-year period
- ✓ Are relatively advanced in terms of level of preparedness at time of investment decision -- if possible
- ✓ Are evaluable



# Characteristics of Strong Program

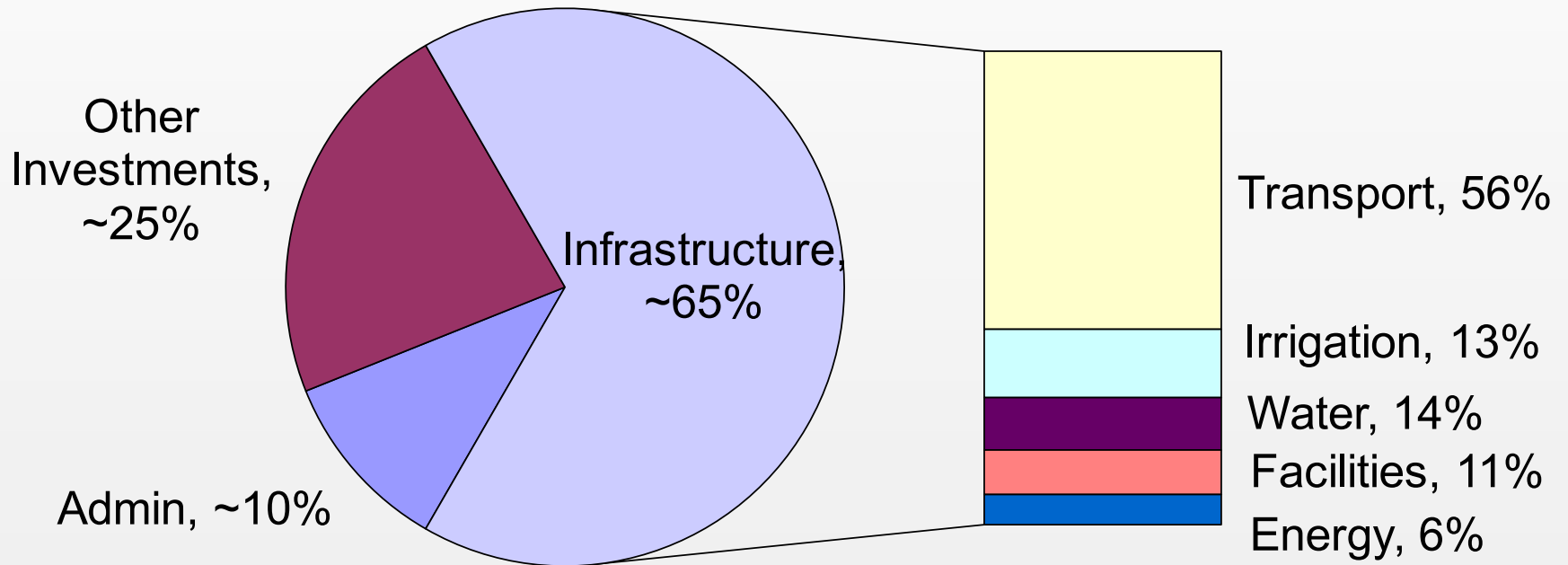
- ✓ Promotes sustainable economic growth and poverty reduction
- ✓ Reflects extensive domestic consultations and addresses key development priorities
- ✓ Identifies specific activities, beneficiaries, expected results and implementation mechanisms
- ✓ Focuses on addressing in depth one or two key constraints, rather than a scattered approach that addresses superficially a variety of problems
- ✓ Builds on national development strategies and other donors' activities
- ✓ Builds on or expands proven innovative approaches to development
- ✓ Is technically and economically feasible
- ✓ Is socially and environmentally sound
- ✓ Focuses on “public goods” (and hopefully leverages private sector investment)
- ✓ Improves relevant policies: accompanied by relevant policy reforms that will increase the economic impact of the investments

# Compact Overview

- Principal agreement between MCC and a partner country through which MCC grants funding
- Strict 5-year implementation term (following entry into force) after which no further funds may be expended
- Establishes the broad framework through which the Compact Program will be carried out
- Describes the projects and activities that will be implemented – if it is not set out in the compact, it cannot be funded
- Describes policy, legal and regulatory reform obligations to be undertaken by the government

# What MCC Funds

\$9.3 Billion in 26 Compacts



*Infrastructure portfolio mix shifting from transport to water and energy; adding more reform to hard assets*

Introduction in 2008

Revisions of Procurement Guidelines

Pending Modifications

# **MCC STANDARD BIDDING DOCUMENTS**

# MCC Standard Bidding Documents

In Nov 2007, MCC decided to create Standard Bidding Documents:

- Small works
- Consulting services
- Design-bid-build
- Design-build
- Goods
- And others

Why adopt Standard Bidding Documents?

- To streamline the procurement and bidding process across MCC-funded projects
- To ensure consistency in key contract documents, including general and particular conditions of contract, to the extent possible
- To promote efficiency, consistency, predictability, recognition in the market place

# Forms of Contract

## Large Works

- MCC has purchased licenses from the International Federation of Consulting Engineers (FIDIC) for large works:
  - Design-Bid-Build (Red Book)
  - Design-Build (Yellow Book)
- MCC General Conditions – FIDIC General Conditions of Contract
- Conditions of Particular Application (COPAs) supplement and amend the General Conditions



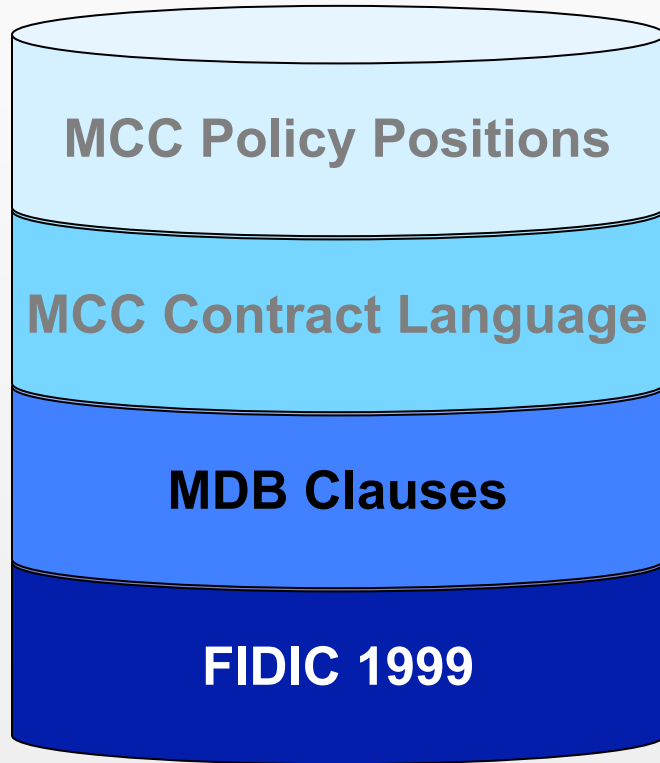
International Federation  
of Consulting Engineers

## Small Works, Goods & Consulting Services

- For these contracts, MCC is using World Bank standards with accommodations to reflect MCC regulatory and other requirements



# Development of Contract Documents



**Internal task force comprised of infrastructure, environmental, procurement, & legal staff**

Adds MCC Environmental Guidelines, policy guidance on financial aspects

Add necessary USG contract language; Compact flowthrough provisions; MCC standard language on taxes, fraud and corruption, eligibility

Developed in collaboration between FIDIC and consortium of MDBs; address concerns of financial institution

The foundation – widely recognized and accepted form of contract internationally -- familiarity

# General Provisions of Compact

## *Compact Provisions are Mandatory*

- ✓ MCC Status; Reserved Rights; Third-Party Beneficiary
- ✓ Limitations on the Use or Treatment of MCC Funding
- ✓ Procurement Guidelines; Eligibility Requirements
- ✓ Reports and Information; Access; Audits; Reviews
- ✓ Compliance with Anti-Corruption Legislation
- ✓ Compliance with Anti-Money Laundering Legislation
- ✓ Compliance with Terrorist Financing Statutes and Other Restrictions
- ✓ Publicity, Information and Marking
- ✓ Insurance Requirements
- ✓ Conflict of Interest
- ✓ Inconsistencies
- ✓ Compact Flowthrough Provisions



# Evolution of Environmental Clauses

## *Responsibilities of the Contractor include:*

### **FIDIC**

Simple text:

- Take reasonable steps to protect the environment (on and off the Site)
- Limit damage and nuisance to people and property
- Ensure that emissions, discharges effluent not exceed values in law and specs

### **MDBs**

- Essentially same text as found in FIDIC contract

### **MCC**

Added requirements:

- Comply with MCC Environmental Guidelines
- Apply recommendations of the EMP
- Request confirmation re RAP
- Address waste disposal and site restoration
- Ensure subcontractors operate in accordance with principles and requirements
- Notification re incidents

# Evolution of Social Clauses

## *Responsibilities of the Contractor include:*

### **FIDIC**

- Engage staff and labor; provide for payment, housing, feeding, transport
- Comply with labor law, pay prevailing rates of wages, observe normal working hours
- Maintain health and safety; provide medical facility
- Prevent disorderly conduct

### **MDBs**

Added requirements:

- Conduct HIV/AIDS awareness campaign
- Not employ child labor or forced or compulsory labor
- Supply food, water
- Respect religious customs
- Ban import of alcohol and arms by personnel

### **MCC**

Incorporate some

MDB provisions:

- Conduct HIV/AIDS awareness campaign
- Not employ child labor
- Assist foreign personnel with visas, work permits; ensure return upon death
- Maintain records

# Funding Considerations

- Compact as source of funding – international agreement governed by international law
- Rights of funding entity
- Notification to contractor if suspension of Compact disbursements
- No co-financing permitted (parallel financing allowed)
- Engineer obligation to obtain specific approval from Employer for extensions of time and cost (beyond limits)
- No Government-owned Enterprises (added in 2010 to ensure a level playing field for commercial firms from all countries)
- Curtailing trafficking in persons (added in 2011 to formalize procedures to help ensure that contractors, subcontractors and employees of MCA Entities are not engaged in such practice)

# SBD Review – Issues

*Some of issues taken up during recent review of experience:*

- Managing works within funding and time constraints
- Managing claims in context of time-bound funding availability
- Managing defects liability periods that extend beyond life of Compact
- Engineer's duties and quality of supervision
- Labor conditions – ensuring good practices
- Environmental, health and safety provisions – ensuring compliance
- Incentives and penalties

# Revised Large Works SBD

## Imminent release of revised SBD for Large Works:

- Concept of Alternative Bids was removed;
- Provision for electronic bidding was removed (as MCAs are not setting up e-bidding systems);
- Section III was changed to more accurately reflect distinction between bidder qualification process and process by which bids are determined to be responsive;
- Award of Contract: timelines of various actions (Notice of Intent, award contract signing, etc.) modified to reflect the “bid challenge period”;
- New Form of Notice of Intent to Award added to address additional step in the procurement/contract award process;
- Form of Performance Bank Guarantee and Form of Bank Guarantee for Advance Payment have each been updated; and
- New Form of Retention Money Guarantee has been added (none formerly existed in the SBD).



# Changes to Clauses

- New Particular Condition Sub-Clause 1.7 added to provide the Employer with right to assign contract to another entity of the Government (or another entity designated by the Government) without the consent of the Contractor at any time concurrent with or following the expiration of the Compact.
- New Particular Condition (Sub-Clause 2.1) added that, among other things (i) creates additional Contractor responsibilities with respect to resettlement, and (iii) allows the Employer to suspend work under certain circumstances.
- Particular Condition Sub-Clause 3.5 added to require that should either party disagree with any agreement or determination made pursuant to GCC 3.5 and intends to seek a revision under GCC 20 (Claims, Disputes and Arbitration), that party must give notice of its disagreement to the Engineer and the other party within 28 days of receiving the relevant agreement or determination.

# Changes to Clauses

- Particular Condition Sub-Clause 4.8 changed to create additional Contractor obligations with respect to a site-specific Health and Safety Management Plan.
- Particular Condition Sub-Clause 4.8 changed to require that the Contractor notify the Engineer and the Employer (and MCC) within 24 hours or as soon as reasonably possible after an accident.
- Particular Condition Sub-Clause 4.18 changed to create additional Contractor obligations with respect to a site-specific Contractor's Environmental & Social Management Plan.
- New Particular Condition Sub-Clause 4.25 added to provide certain obligations on the part of the Contractor with respect to the Employer's Social and Gender Integration Plan.
- New Particular Condition Sub-Clause 6.13 added to provide certain obligations on the part of the Contractor with respect to the [non] employment of forced or compulsory labor.
- New Particular Condition Sub-Clause 6.17 added to clarify certain obligations of Contractor with respect to prohibitions on sexual harassment.



MCC Recommendations  
Experiences

# **DISPUTE RESOLUTION IN MCC FUNDED CONTRACTS**



# Appointment of DAB

- Most MCA bid/contract documents specify that DAB will comprise one member (the Adjudicator).
- MCA's Conditions of Particular Application call for DAB to be appointed within 28 days of signing of Contract.
- Appendix to Bid specifies appointing entity for DAB, in case Parties fail to agree on appointment of DAB.
- In addition to FIDIC President's List of adjudicators, other sources for finding adjudicator include persons who served on similar contracts in the project country or on other MCC projects.
- Usually, construction contracts include a pay item as a provisional sum for payment of the Employer's portion of DAB fees.

# Comments on DAB Engagement

- Often, the appointment of DAB is delayed, because Parties cannot find or agree on a suitable candidate, because they do not consider it a high priority, because they want to wait until a dispute arises before engaging a DAB, etc.
- All good adjudicators are busy and not immediately available, and most shy away from “last minute” engagements, after a dispute has arisen.
- DAB brought on board well after the start of a construction contract would require time to familiarize itself with Parties, Contract, its progress, project documentation, elements that could lead to dispute, and other related issues.
- Unavailability of a DAB when a dispute arises or its lack of prior familiarity with the Contract, would aggravate disputes, lengthen period until resolution and increase dispute costs.

# DAB Engagement and Involvement

- Engage DAB in a timely manner, as specified in the Contract (i.e., within 28 days of contract signature).
- Ensure that DAB is qualified for the size and complexity of the Contract.
- Provide for DAB to receive a monthly retainer, visit the site periodically (about every four months), and receive copies of Contractor's progress reports, Contract amendments, variation orders, Engineer's determinations, and other relevant documents, so as to be available and prepared if and when a dispute is referred to it.
- Turn to DAB as source of advice, informal reviews.

# Georgia Roads Project

- One Adjudicator, several construction contracts.
- Monthly retainer, periodic site visits and meetings.
- Adjudicator offered opinion on several matters brought to its attention by Parties. Such opinions often forestalled Contractor's claims.
- One Contract was terminated due to extensive delays; Contractor submitted the case directly to arbitration; subsequently, Contractor withdrew the case from arbitration and referred it to Adjudicator.
- Contractor was dissatisfied with Adjudicator's decision.
- Eventually, the case was settled for an amount close to Adjudicator's decision.

# Cape Verde Roads Project

- Three-member DAB – one from Contractor's country, and two from Cape Verde, including the DAB Chairman.
- Few site visits and meetings.
- Several disputes referred to DAB by Contractor.
- DAB decisions on first referrals appeared fair and accepted by both Parties.
- Decisions on subsequent disputes referred to DAB appeared unreasonable and unfair for Employer (as it turned out, DAB Chairman had a land compensation dispute with MCA, which he had not disclosed).
- MCA expressed dissatisfaction with DAB's decision.
- Following negotiations, disputes were settled amicably.

# Ghana Highway Project

- Failure on part of Employer and Contractor to agree up front and hence appoint DAB as per contract.
- Major claim (relating to costs incurred due to delays in granting site access and subsequent need for acceleration) arose and proved beyond capacity of Engineer to resolve.
- Employer attempted to use services of Project Management Support Consultant to resolve dispute but that firm also unable to achieve breakthrough.
- MCC as funder exercised rights under Compact and contract to intervene and paid for services of its Independent Engineer to negotiate settlement between the Parties in order to allow project to move forward and to be completed within compact term.



# Observations and Comments

- Level of understanding of requirements and process on part of Contractors and Engineers often less than it should be
- Weak contract administration and management; poor quality of documentation
- Parties wait too long before going to DAB or attempt to circumnavigate the process
- Considerable regional differences in terms of expertise – e.g., good pool of skilled candidates to serve as DABs in Central America but very difficult to find well qualified persons to serve in Francophone Africa (contract documents in French)

MCC Direct Funded Activities

Compact Funded Activities

# **CAPACITY BUILDING OF MCAS**



# Capacity Building of MCAs

## MCC Funded Activities

- FIDIC training (modules 1 and 2) from vendor
- Project management and construction management training
- Kick-off meetings with Contractors and Engineers
- MCC hosted “colleges” for MCAs
- Project management and contract administration tools for use by MCAs

## Compact Funded Activities

- Services of Procurement Agents
- Fees and expenses of DABs
- Training program for professional development of procurement practitioners
- Additional training of MCA staff under own admin budget – some have availed of additional FIDIC and dispute resolution training

## Reducing Poverty Through Growth