

FIDIC And Its Application In Extension of Time And in Dispute And Arbitration

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Abstract- Study of need of FIDIC like structured contract book in India for different types of works in construction industry of India. Extension of time for completion clause will be studied has it is needed due to delays are caused by having much larger member of public as well as private stakeholders and due to client negligence's in proper planning and not having right way of response in construction phase. Dispute and arbitration are very much important clause which is needed to protect the interest of contractor and client from suffering loss and solve the claims or disputes which arises during construction phase can be solved at that certain period so that claim for extension of time, claim for payment does not occur and project complete within the time period.

Keywords- FIDIC, DAAB, EOT, Contract, CEAI, NACE, etc.

I. INTRODUCTION

FIDIC (founded in 1913), The International federation of consulting engineers is the global representative body for national association of consulting engineering professionals and 40,000 firms in about 100 countries worldwide. FIDIC key role and its member association around the world is to improve people's quality of life through the promotion of quality, integrity and sustainability in the infrastructure industry and the project and service it delivers on a global scale. (Source: <https://fidic.org/about-us/our-values>)

Consulting Engineers Association of India (CEAI) is the member association of FIDIC representing the consulting engineering fraternity in India. CEAI was incorporated in 1996 with merger of Association of Consulting Engineer (ACE) IN 1960 and National Association of Consulting Engineer (NACE) in 1976.

FIDIC drafts standard form of conditions for contract worldwide in construction industry and is endorsed by many multi-lateral development banks. Thus, FIDIC publishes various standard contract according to the color of book representing different types of work.

Table 1.1: Type of FIDIC Book

Types of work	Book name
For underground works	Emerald book
For largely dredging works	Blue-green book (dredgers contract)
The works of repetitive /simple and of small duration and small value	Green book (short term of contract)
Employer's design work	Red book (construction contract)
Contractor does detail design and execution of the works	Yellow book (plant and DB contract)
Contractor to take total responsibility for design, supply, installation and construction	Silver book (EPC/Turnkey contract)
Contract for design, build, operate, and maintenance	Gold book (DBO contract)
Consultancy contract for professional services	White book
Joint venture (consortium) agreement for consultants	JV agreement for consultants
Sub-contract to be used with red book	Sub-contract (condition of sub contract for construction)
Sub-contract to be used with yellow book	Condition of sub contract for plant and design build)
Construction contract for MDB funded project	Pink book (MDB harmonised version)
Sub-consultancy agreement for professional service	Sub-consultancy agreement

Source: Author

II. WHY FIDIC NEEDED IN INDIA

Construction contracts in India are most complex in nature due to having several reciprocal obligations and involvement of multiple state and central government organization having its own set of contracts when are not non-negotiable. In present contracts drafted in India are mostly having imbalance in the allocation of the risks. They are as following:

1. Subsequent legislation
2. Taking over of works in parts
3. Timelines for release of work front/drawings
4. Compensation for delay in release-work front/drawing
5. Force majeure provisions
6. EOT approval
7. Compensation for instructed suspension
8. Unreasonable variations/deviations
9. Fixed price – no price escalation

Drafting of imbalanced clauses by major employers are:

1. Delay in land handing over
2. Delay in providing/reviewing design/drawings
3. Extension of time and additional cost
4. Change of scope
5. Sectional taking over
6. Delay in interim payment

Consequences: Inequitable clauses, due to which many project and parties suffer losses as it has direct impact over contractors, employers.

In Envisioning India 2030 report made by FICCI showed that, India has increased the pace of infrastructure investment over the years and has initiated several infrastructure projects. However, progress of these projects has been majorly affected by time and cost overruns. The report of Infrastructure and Project Monitoring Division of Ministry of Statistics and Programme Implementation shows that around 26 per cent (357) of the 1362 central sector infrastructure projects (costing Rs. 150 crore and above) are experiencing cost overruns (as of June 2018) and 272 projects are delayed. The anticipated completion cost of the 1362 projects is likely to be Rs. 20.43 lakh crore, 19.91 per cent (Rs. 3.4 lakh crore) higher than the original cost of implementation of Rs. 17.03 lakh crore. Arbitration and conciliation act 2021 is used for arbitration in India. Whereas internationally international chamber of commerce is used for arbitration.

To overcome the above issues FIDIC contract is used which has following advantages:

1. General conditions: which are standardized across the FIDIC suite.
2. Particular conditions: which specify the project requirements.
3. Risk allocation balance: which are more certainty and clarity for all the parties.
4. Tendering efficient: tenderers understand and have confidence pricing risk.
5. Project staff: FIDIC contract implementation requires large pool of experience and expertise.
6. Contract administration: standardized and efficient.
7. Guides: readily available resources supporting uses in the field.
8. DAABs: in project it is built in for dispute avoidance and effective dispute resolution.
9. Flexibility, relevance and fairness is provided.
10. Time bound clauses.
11. Clear role of third-party engineer.
12. Clear priority of documents which are needed are mentioned.

13. Structural flow in clauses.
14. Having detailed definition for every role in the project and for every step in the contract.

Thus, FIDIC contract should be used in Indian construction work.

Extension of time

An extension of time (EOT) claim is a request for a change in the scheduled completion date due to a delay and time overrun that is not the contractor's fault. Thus, claim for extension of time is claimed

Time Overruns are due to following reason:

1. Delay in land acquisition
2. Delay in regulatory approvals
3. Changes in scope/delay in finalization of the scope
4. Contractual issues
5. Court cases
6. Right of way problems
7. Funding constraints
8. Geological changes
9. Delay in supply of equipment
10. Shortage of labor
11. Ineffective procurement and planning

Table 1.2: In Envisioning India 2030 report made by FICCI showed the sector with major time over run-in project

Sector	No of projects	Range of T.O.R (months)
Power	63	1-135
Road transport and highways	30	2-118
Coal	34	12-144
Railways	66	3-374
Petroleum	25	1- 74

Source: <https://ficci.in/spdocument/23058/Envisioning-India-2030-web.pdf>

Disputes And Arbitration:

In India every contract should in accordance with Indian contract act 1872. Thus, the contract between contractors and employers are mainly governed by the Indian contract act 1872, and the formats are picked from organization with an international standard in construction contract. Thus, construction sector does not follow any standard form of contract according to the type of the work unlike FIDIC then disputes cannot be solved right manner as, if the condition are in favor of employer, then judgment

passed will be in favor of employer as the condition are signed by both parties in contract. So, it says that the condition of contract should of standard so that the risk will be balance between parties involved in construction. Then the dispute and arbitration can be done accordingly and has the fairness in the judgment obtained.

FIDIC dispute resolution clauses allow the parties to resolve the disputes incrementally to get a swift or a temporary resolution which helps in concentrating on finishing the projects and still reserving the rights to go to court if the outcomes is not satisfactory. The last pointer is appointing a dispute board to avoid further disagreement during disputes.

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitration, the parties go for a private dispute resolution procedure instead of going to court.

Extension Of Time according to FIDIC

Extension of time clause 8.5 of FIDIC red book help in following manner.

Clause 8.5[Extension of Time]: If work is delayed due to variation, climatic condition, shortage of personnel and goods and due employer fault, then contractor is entitled to sub clause **20.2[claims for payment/extension of time]** and also entitled to clause **10.1[taking over the works and section]**

If work delayed by following causes, then EOT is given:

- a) Variation
- b) Exceptionally adverse climatic conditions which should be provided by the Employer under sub - clause 2.5 [Site Data and items of Reference)
- c) Unforeseeable shortage of Material.
- d) Any delay caused from the side of employer.

Contractor is entitled to sub clause 20.2 Claim for EOT: If the measured quantity of any work quantity item of according with clause 12 (Measurement and valuation) is greater than the estimated quantity of this item in BOQ or other schedule by more than 10% due to which delay to completion for the purposes of Sub - clause 10.1 [Taking over the works and sections]. The agreement or determination of any, may include review by the Engineer of measured quantities of work which should be less than the corresponding estimated quantities in BOQ of other schedule. To extent that there are Such lesser measured quantities, the Engineer may take account of any favourable effect on critical path of Programme, however they shall not result in net reduction in the Time for completion

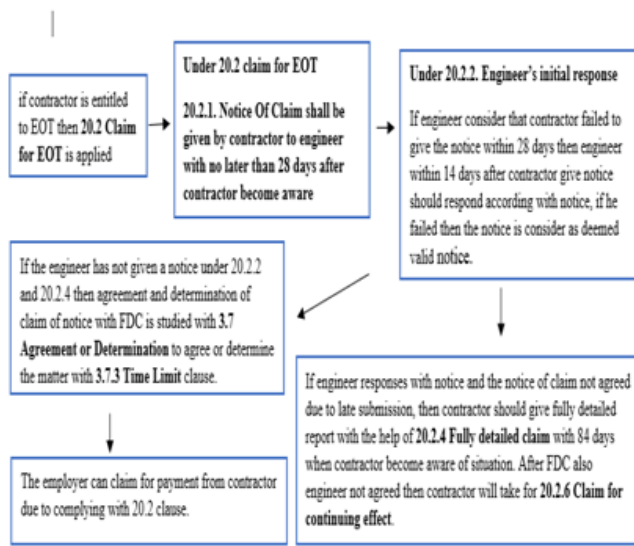
When determining each EOT under Sub - clause 20.2, the engineer shall review previous determination under sub - clause 3.7. [Agreement and Determination] and may increase but shall not decreased, the total EOT.

If delays caused employers responsibility with a delay caused by contractor's responsibility, the Contractor's entitlement to EOT Shall be assessed in accordance with rules and procedure stated in special provision, if not stated take due regard relevant to the Circumstances.

Claim for Extension of time clause

Claim for extension of time according to FIDIC it is done in as: If the contractor is entitled to extension of EOT (clause-20.1) then clause 20.2 (claim for EOT) shall be applied. Then, under clause 20.2 (claim for EOT) sub clause 20.2.1 (notice of claim) shall be given by contractor to the engineer describing the reason for delay with no later than 28 days after contractor become aware of event. Then under sub clause 20.2.2 (engineer's initial response) if engineer consider that contractor failed to give the notice within 28 days under sub clause 20.2.1 then engineer within 14 days after receiving notice of claim, give notice to contractor accordingly. If engineer does not give such notice than the notice claim shall be deemed valid notice. If employer does not agree with deemed notice then he should give a notice to engineer with details of the disagreement then sub clause 20.2.5 (agreement or determination of claim) shall include a review by the engineer of such disagreement. If the notice of claim is not agreed due to late submission, then claiming party shall include in it fully detailed claim under sub clause 20.2.4 (fully detailed claim) should be given within 84 days after contractor become aware of circumstance. If engineer disagree with fully detailed claim and contractor disagrees then contractor should submit fully detailed claim including detail of disagreement. If event gives rise to the claim having continuing effect, then refer to sub clause 20.2.6 (claim for continuing effect). If within time limit contractor fails to submit fully detailed claim then notice of claim is lapsed and engineer within 14 days should give notice accordingly, if notice not given then it is valid notice. If engineer has not given a notice under sub clause 20.2.2 (engineer initial response) and sub clause 20.2.4 (fully detailed claim) then agreement or determination of claim shall include whether or not the notice of claim shall be treated as valid notice with having of fully detailed claim and claiming party reason for disagreement. engineer shall then under clause 3.7 (agreement or determination) to agree or determine the matter within time limit only engineer should consider the matter under sub clause 3.7.3 (time limit). The employer only be entitled to claim any payment from

contractor and or make any deduction from any amount due to the contractor by complying with the sub clause 20.2.



Flow chart 1.1: Claim for Extension of Time process.

Source: Author

Without claiming the extension of time clause, we can extend the time by the use of following clauses in FIDIC.

Clause 8.3[Programme]: The contractor shall submit an initial programme for the extension of works to the engineer with 28 days after receiving the notice of commencement of work. Also submit revised programme, whenever any programme ceases to reflect actual progress or inconsistent with contractor's obligation. After that contractor shall be submitting a copy of revised/initial programme to engineer. Engineer shall review the submitted copy and give notice to contractor. If engineer given no such notice within 21 days for IP and 14 days for RP then the notice is considered as valid notice

Clause 8.4 Advance Warning: Each party shall advice the other or engineer shall advice the parties in advance or may request the contractor to submit a proposal under sub clause 13.2.2[variation by request for proposal]

Clause 13.3.2 Variation by Request for Proposal: Here engineer give notice about the proposal then contractor response by submitting proposal then engineer give consent to the proposal and instruct the variation.

Engineer's instruction

If sub clause **13.3.1 [Variation by Instruction]** applied: If the work consist of variation and does not comply

with applicable laws or reduce safety of the work or is technically impossible then, contractor shall immediately or before commence any work related to the instruction, give notice to engineer with reason. If engineer does not respond within 7 days after receiving the notice, engineer shall be deemed to have revoked the construction. Otherwise, the contractor shall comply with and be bound by terms of the engineer's response.

DISPUTES AND ARBITRATION

The disputes and arbitration process carried out in FIDIC contract by the clause 21 (dispute and arbitration)

The starting step is to form the DAAB (Dispute Avoidance/Adjudication Board) board thus the FIDIC contract sets out the procedures to be followed for the constitution of the DAAB by the use of clause 21.1 as following

Clause 21.1 Constitution of the DAAB: -

- a) Within time stated contractor can appointed DAAB or within 28 days after getting letter of acceptance.
- b) DAAB member should be 1 or 3
- c) If number is not stated in contract and parties do not agree with number then the DAAB shall comprise 3 members
- d) Selection of member should be from list in contract data and each party shall select one member of the other party.
- e) DAAB will be confirmed to be constituted on the date that the parties and member of DAAB have signed the DAAB agreement.
- f) The remuneration of DAAB member and including any expert whom DAAB consults shall be mutually agreed by both party
- g) If at any time the parties agree that they may appoint suitable qualified person or replace DAAB member or if member is
- h) unwilling to act or unable to act due to health issue then the replacement member shall be appointed in same manner as above mentioned and clause but within 42 days.
- i) The appointed member may be terminated by mutual agreement of both parry but not by employer or contractor.
- j) Unless agreed by both parties, the agreement of DAAB member shall expire either:
 - i. on the date the discharge is submitted. The discharge should be according to clause 14.12 which confirm that the full and final settlement of money is done (full payment

- of amount in FPC final payment certificate and the performance security received to contractor)
- ii. The date the parties reach a final agreement in all matter in connection with termination

The next **clause 21.3 AVOIDANCE OF DISPUTE** work as following:

If the DAAB becomes aware of issue or disagreement during the performance of the contract, it may invite the parties to make a joint request if parties so agree. Joint request can be made at any time except during the period that engineer is carrying out his/her duties under sub clause 3.7 (Agreement or determination).

The next **Clause 21.4 OBTAINING DAAB'S DECISION:**

When dispute arises between parties then either party may refer the dispute to DAAB for its decision and follow provisions which are following:

clause 21.4.1 Reference of a dispute to the DAAB: If clause 3.7 (agreement and determination) applied to the dispute, then the NOD (notice of dissatisfaction) to engineers of "notice of the parties' agreement "and "notice of the engineer's determination" shall be submitted to DAAB within 42-day period of time after that NOD is not valid

Clause 21.4.2 The Parties' obligation after the reference: In this clause both the parties will provide all the data required, access to the site and facilities required to DAAB for decision making.

Clause 21.4.3 The DAAB's decision: The decision shall be made within

- a) 84 days after receiving the reference
- b) Such period as may be proposed by the DAAB and agreed by both parties

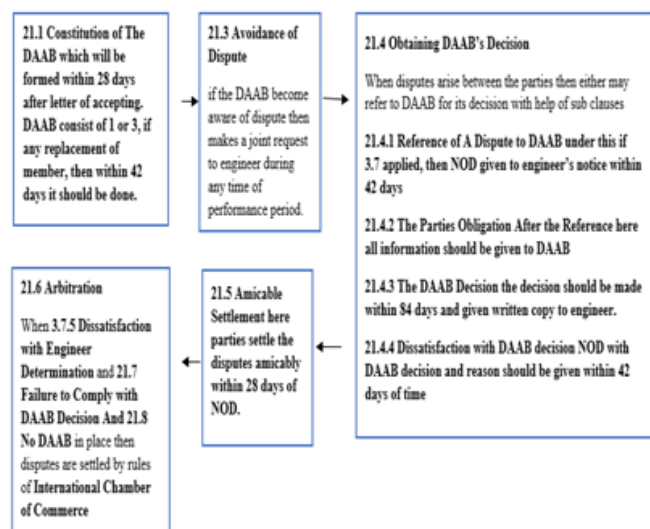
The decision shall be given written to both the parties and a copy to engineer also.

The decision should be binding to both the parties whether or not party gives a NOD with DAAB decision.

Clause 21.4.4 Dissatisfaction with DAAB 's decision: If either party is dissatisfied with the DAAB's decision: Then NOD with DAAB's decision and reason for dissatisfaction DAAB within 42-day period of time after that NOD is not valid

Clause 21.5 Amicable Settlement: When NOD given after DAAB decision then both parties shall attempt to settle the dispute amicably before the commencement of arbitration if parties does not agree then arbitration may be commenced on or after the 28 days after the NOD was given, even if no attempt at amicable settlement has been made

Clause 21.6 Arbitration: Arbitration come when dispute is related with sub clause 3.7.5 (dissatisfaction with engineer determination), sub clause 21.7 (failure to comply with DAAB's decision) and sub clause 21.8 (No DAAB in place). Disputes shall be settled under the rules of Arbitration of the International Chamber of Commerce.



Flow chart 1.2: Dispute and Arbitration

Source: Author

III. CONCLUSION

By not following FIDIC contract, the critical conditions laid down in different forms of contract-BOT, EPC, HAM, demand fairness in form or application. Both the employers and the contracting firms in all sectors of the infrastructure are suffering cost and time overrun, and the way risks are allocated, and the claims are raised or addressed in practice, and the time and effort it takes to finally arrive at an amicable solution/agreement happens, so FIDIC contract should be followed.

An important contractual matter of extension of time is best covered by FIDIC contract clause 8.5[extension of time] and supported by other clauses like clause 20[employer's and contractor's claims], 10.1[taking over the works a section], 8.3[programme], 13.3.2[variation by request for proposal], 3.5[engineer's instruction] and 8.4[advance

warning]. These supportive clauses work towards minimizing the possibilities of extension of time or they provide detailed step by step process as to sustained the claims and for extension of time. A good amount of emphasize is based on the importance of construction program in various clauses of FIDIC owing through this both the contractor and client are prompted to use construction programme with due seriousness and use it as a sound logical premise on which extension of time and disputes resolution can be based.

This paper confirmed that used contracts at Indian construction industry need to be upgraded to the new contracts management approach of disputes avoidance and for extension of time. In addition to Indian contracts are advised to appoint **the Dispute Avoidance/Adjudication Board “DAAB”** to settle any disputes from its inception and avoiding wasting time and billions at arbitration courts

REFERENCES

- [1] INDIAN CONTRACT ACT 1872
- [2] FIDIC Red Book Second Edition 2017 Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer
- [3] Application Of FIDIC Contracts in Construction Claims and Arbitration
Sherif A. Oteifal and Moustafa I. Abu Dief
- [4] Claims Under the New FIDIC Conditions of Contract
John Papworth Frics, Fciarb, Minstces, Macoste.
- [5] FIDIC golden principal 2019
- [6] FIDIC dispute resolution mechanism by ACERIS law
- [7] The Effect of FIDIC red book 2017 to avoid disputes in Egyptian construction field Author links open overlay panel D. Mohamed Abdel-Hamid Abdel-Rahman Alaa El-Din Mostaf
- [8] FIDIC Conditions of Contract and the Dispute Adjudication Procedure Christophe R. Seppala
- [9] www.fidic.org
- [10] <https://fidic.org/about-us/our-values>
- [11] <https://ficci.in/spdocument/23058/Envisioning-India-2030-web.pdf>