

FIDIC 2017: Clause 16 - Suspension and Termination by Contractor

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The main changes in Clause 16 are the new grounds for suspension and termination

- Non-compliance with a final and binding Engineer's Determination and binding or final and binding DAAB decision, to the extent that such failure constitutes a "*material breach*" of the Employer's obligations under the Contract. (Sub-Clauses 16.1(d) and 16.2.1(d)).

What constitutes a "*material breach*" is likely to be the subject of many disputes (see the commentary on Clause 15).

- Non-receipt of a Notice of the Commencement Date under Sub-Clause 8.1 [*Commencement of Works*] within 84 days after receiving the Letter of Acceptance. (Sub-Clauses 16.2.1(f)).

This is development to ground (h) in the FIDIC Pink (MDB) Book which states: "*the Contractor does not receive the Engineer's instructions recording the agreement of both Parties on the fulfilment of the conditions for the Commencement of the Works under Sub-Clause 8.1 [Commencement of Works]*".

This protects the Contractor from the financial consequences of fluctuations in the rates and prices during an extended delay to the start of the Works, although the Contractor would be entitled to damages for breach of contract in any event. More importantly, this gives the Contractor loss of profit on the entire project.

- Engagement in corrupt, fraudulent, collusive, or coercive practice at any time in relation to the Works or to the Contract. (Sub-Clauses 16.2.1(j).) This introduces parity between the Employer and Contractor. The wording is identical to that under Sub-Clause 15.2.1(h).
- In the FIDIC 1999 editions, the Employer was entitled to terminate if the Contractor gave or offered an inducement or reward etc, but there was no reciprocal arrangement.



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Other changes to note include:

- The additional wording in Sub-Clause 1.16 [*Contract Termination*] which seeks to avoid arguments which can arise in some countries on whether termination can only take place with additional formalities, such as the approval of the courts. It states, "*Subject to any mandatory requirements under the governing law of the Contract, termination of the Contract under any Sub-Clause of these Conditions shall require no action of whatsoever kind by either Party other than as stated in the Sub-Clause*". This probably does not apply to the consequences of termination.
- The ground for termination in Sub-Clause 16.2.1(c) is no longer restricted to the non-payment of Interim Payment Certificates and relates to a failure by an Employer to pay the advance, interim, or final payment.
- The ground for termination in Sub-Clause 16.2.1(e) now requires that a substantial failure to perform be a "*material breach*" of the Employer's obligations under the Contract. (Sub-Clauses 16.2.1(e)).



- The ground for termination in Sub-Clause 16.2.1(i) regarding bankruptcy and insolvency etc. has been widened, for example, with reference to winding-up and dissolution. The wording is identical to that under Sub-Clause 15.2.1(g), except in relation to joint ventures.
- Sub-Clause 16.4 [*Payment after Termination by Contractor*] is carved out from Sub-Clause 1.15 [*Limitation of Liability*] which states that, "*neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage...other than under: ...(d) Sub-Clause 16.4 [Payment after Termination by Contractor]*". Liability for "*loss of profit or other losses and damages*" is capped at the sum stated in the Contract Data or, if no such sum is stated, the Accepted Contract Amount.

Conclusion

In the FIDIC 1999 editions, if an Employer realised the Contractor intended to terminate, and good grounds existed for the Contractor to terminate under Sub-Clause 16.2, the Employer may have sought to save himself considerable expense by terminating first for convenience under Sub-Clause 15.5 [*Employer's Entitlement to Terminate*].

This dubious strategy is less attractive in the FIDIC 2017 editions now that an Employer who terminates under the new Sub-Clause 15.5 [*Termination for Employer's Convenience*] is liable to pay the Contractor for loss of profit or other losses and damages.

Further, under Sub-Clause 15.5, the Employer's termination takes effect 28 days after the date on which the Contractor receives Notice or the return of the Performance Security (whichever is later). Whereas, under Sub-Clause 16.2, the Contractor may terminate 14 days after giving Notice to the Employer. So, it is still possible for the Contractor's termination to take effect first.

**Please get in touch at
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thoughts or to discuss any concerns.**

