

# ***Conditions of Contract – 3. Disputes and Termination***

*Presentation for RAP3 Senior Technical  
Management (STM) Course*

***Bill Seal, Engineering Team Leader***

*August 2016*

# Conditions of Contract - Topics

1. Extensions of Time & Control
2. Contractual Claims (Costs)
- 3. Disputes and Termination**

# Topics

## 1. Disputes

- ❑ PM's Role
- ❑ Amicable Settlement
- ❑ Adjudicator & Arbitrator

## 2. Termination

- ❑ Reasons for Termination
- ❑ Valuation at Termination
- ❑ Recovery of Dues
- ❑ 'Release from Performance'

# Project Manager's Role

- ❖ **‘Project Manager’** – the person appointed by the Employer to administer the Contract, who .... *‘shall decide contractual matters between the Employer and Contractor in the role representing the Employer’* (GCC 4.1)
- ❖ **Delegation:** *‘The PM may delegate any of his duties and responsibilities to other people, except to the Adjudicator, after notifying the Contractor, and may cancel any delegation after notifying the Contractor.’* (GCC 5.1)

# Amicable Settlement (1 of 2)

## ❖ *Settlement Priority Order:*

- 1<sup>st</sup> Project Manager's Decision
- 2<sup>nd</sup> Amicable Settlement (30 day process)
- 3<sup>rd</sup> Adjudicator (or DRC) (30 day process)
- 4<sup>th</sup> Arbitrator (longer formal process)
- [5<sup>th</sup> Court of Law (outside the Contract)]

# Amicable Settlement (2 of 2)

- ❖ *'The Employer and the Contractor shall attempt to settle amicably by direct negotiation any disagreement or dispute arising between them under or in connection with the Contract.'* (GCC 23.1)
- ❖ *'Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be referred to the Adjudicator or Dispute Resolution Committee (DRC) by either Party.'* (GCC 23.2)

# Adjudicator & Arbitrator (1 of 2)

## ❖ Adjudicator or DRC

- ❑ **Definition:** *'The **Adjudicator** is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance ..'* (GCC 1.1.c)
- ❑ **Appointment:**
  - *'The **Adjudicator** shall be as specified in SCC if identified and agreed by the Employer and the Contractor during the contract agreement. If not identified in the SCC, the adjudicator shall have to be agreed and appointed whenever the dispute arises; by the consensus of the Employer and the Contractor....'* (otherwise by NEPCA) (GCC 24.1)
  - *'The **DRC** shall comprise of three members. Each Party shall appoint one member each and the third member who shall act as the Chairman shall be appointed by the two members appointed by the Parties...'* (GCC 24.3)

# Adjudicator & Arbitrator (2 of 2)

## ❖ Arbitration

- ❑ **Referral:** *‘Either party may refer a decision of the Adjudicator or DRC to an Arbitrator within 30 days of the Adjudicator’s or DRC’s written decision. If (n)either party refers the dispute to arbitration within the above 30 days, the Adjudicator’s or the DRC’s decision shall be final and binding.’ (GCC 25.2)*
- ❑ **Appointment:** *‘In case of arbitration, the arbitration shall be conducted in accordance with the arbitration procedures published by the Nepal Council of Arbitration (NEPCA) ...’ (GCC 25.4)*



# Grounds for Termination

## ❖ Termination Principles

- ❑ *'The Employer or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.'* (GCC 57.1)
- ❑ *'When either party to the Contract gives notice of a breach of Contract to the Project Manager for a cause other than those listed under GCC 57.2 above, the Project Manager shall decide whether the breach is fundamental or not.'* (GCC 57.3)
- ❑ *'Notwithstanding the above, the Employer may terminate the Contract for convenience.'* (GCC 57.4) – but it will cost him!

# Fundamental Breaches (1 of 2)

- ❖ Shall include but not limited to (GCC 57.2):
  - a) the Contractor stops work for 30 days when no stoppage of work is shown on the current Program and the stoppage has not been authorized by the Project Manager;
  - b) the Project Manager instructs the Contractor to delay the progress of the Works, and the instruction is not withdrawn within 30 days;
  - c) the Employer or the Contractor is made bankrupt or goes into liquidation ....;
  - d) a payment certified by the Project Manager is not paid by the Employer to the Contractor within 90 days of the date of the Project Manager's certificate;

# Fundamental Breaches (2 of 2)

## ❖ Continued:

- e) the Project Manager gives Notice that failure to correct a particular Defect is a fundamental breach of Contract and the Contractor fails to correct it within a reasonable period of time determined by the Project Manager;
- f) the Contractor does not maintain a Security, which is required;
- g) **the Contractor has delayed the completion of the Works by the number of days for which the maximum amount of liquidated damages can be paid, as defined in the SCC. [usually 200 days]**
- h) If the Contractor, in the judgment of the Employer has engaged in corrupt or fraudulent practices .....

# Valuation at Termination (Contractor's Breach GCC 60.1)

*'If the Contract is terminated because of a fundamental breach of Contract by the Contractor,*

- ❖ the Project Manager shall issue a certificate for the value of the work done and Materials ordered less advance payments received up to the date of the issue of the certificate, and*
- ❖ less the percentage to apply to the value of the work not completed, as indicated in the SCC. [normally 25% PPMO]*
- ❖ Additional Liquidated Damages shall not apply.*
- ❖ If the total amount due to the Employer exceeds any payment due to the Contractor, the difference shall be a debt payable to the Employer.'*

# Valuation at Termination (Employer's Breach GCC 60.2)

*'If the Contract is terminated for the Employer's convenience or because of a fundamental breach of Contract by the Employer,*

- ❖ the Project Manager shall issue a certificate for the value of the work done,*
- ❖ Materials ordered,*
- ❖ the reasonable cost of removal of Equipment, repatriation of the Contractor's personnel employed solely on the Works, and*
- ❖ the Contractor's costs of protecting and securing the Works, and less advance payments received up to the date of the certificate.'*

# Settlement of Dues

- ❖ Recovery of any 'debt payable' can be made from following sources:
  - ❑ Measured work yet to be paid,
  - ❑ Retention monies held on account (normally 5% of work done),
  - ❑ Performance Security (normally 5% Contract Amount).
- ❖ Note: any balance (e.g. from Security must be released in a Final Account)

# 'Release from Performance'

- ❖ *'If the Contract is frustrated by the outbreak of war or by any other event entirely outside the control of either the Employer or the Contractor, the PM shall certify that the Contract has been frustrated. The Contractor shall make the Site safe and stop work as quickly as possible after receiving this certificate and shall be paid for all work carried out before receiving it and for any work carried out afterwards to which a commitment was made.'*  
(GCC 62.1)
- ❖ FIDIC provides for 'Release from Performance' also after '84 days of Force Majeure' with full Costs.

END

