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Analysis on the Possession of Site as Physical Cause of Claim and the Related Clauses in the “FIDIC Conditions of Contract for Construction MDB Harmonised Edition”

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ABSTRACT

Construction claims dealing with delays are among the most complicated and difficult to analyze. The delay on possession of site commonly is not single; there are always overlapping or concurrent delays. It will be followed by claim on change in design and sometimes the acceleration. Different with other kind of delays, which origin are always debatable because of different interpretation, the delay on possession of site is clear, that the contractor cannot commence the Works, because of no availability of working area. Writer try to conduct the analysis on the employer's responsibility in relation with possession of site. The employer's consciousness on the importance of giving the possession of site to the contractor and its concurrence effect both phisycal, legal and financial. Whether the employer is a privet corporation, or a government agency, no one wants to expend more, which is not worth the expenses. Nowadays legal and financial consciousness of the people, develop the complexity of possession of site process, from land acquisition to other kind of possession of site. More over, many disputes caused by delay in possession of site caused by less attention paid to the contract from the pre-bid conference, pre-contract negotiation to the conditions of contract. The result of the study showed that possession of site have its wider meaning, not only the land acquisition, but also availability of infrastructure and availability of utilities. It was found that some of them could be control through management decisions while the others are beyond the control. Attention should be paid also to the clauses in the conditions of contract

KEYWORDS: possession of site, FIDIC conditions of contract, negligence, wording sentences.

INTRODUCTION

Possession in Black's Law Dictionary by Garner [1] means the fact of having or holding property in one's power, so possession of site could be interpreted as paddies possession which mean an actual possession of real property, implying either actual occupancy or use. The site is defined in most construction contracts as “the places where the Permanent Works are to be executed including storage and working areas and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of Site [2]. In the contracted construction execution, possession of site will be given to the contractor in accordance with the conditions of contract, where the date of possession of site must be clearly recorded, since it is very important especially in relation with the duration of the contract, where the delay in possession of site may raise a claim on extension of time and any other claim related. It is also in case where there are some partial possession given to the contractor to allow the contractor to commence the Works in accordance with their programme. The term "possession" or "use" or "access" or "occupation" is used in many contracts to describe the contractor's right to enter the site, occupy or use the site and carry out the specified works. During the contract period, possession will usually involve such exclusive occupation and use the site as required to construct the works. During the defects liability period, the contractor will usually only require sufficient access to those parts of the facility which allow him to remedying defects. It should be cosidered by the employer on planning the acquisition of the land, whether the land will be used permanently or just as temporary facilities, since the land compensation will involve huge amount of money.

The meaning and extent of "possession" of the site, and the apportionment of risk for events that interfere with possession, will depend upon the express and implied terms of the contract. The extent of uninterrupted possession will depend upon the nature of the work. Main purpose of possession is that the employer to give the contractor such possession or use as is necessary to enable him to perform the contract. The court on *Freeman v Hensler* in 1900 cited in Chern [3] wrote: “As stipulated in the contract, the employer shall be in position to hand over the whole site to the contractor immediately after the contract signing, There is an implied undertaking on the part of the building owner who has contracted for the buildings to be placed on his land, that he will hand over the land for the purpose of allowing the contractor to do that which he has bound himself to do”. Whilst the contractor is entitled to possession of the site for the performance of the works, once contract is signed and possession fall to the contractor it is the contractor who is “in possession”, but it should

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be understood that this does not conclude the relationship between the parties for anything other than the construction process as stated by the court in Hounslow [3]

In the case of HW Nevill (Sun blest) Ltd v William Press & Son Ltd, the court stated that possession in construction sense is really another way of describing a license given by the employer to the contractor. On the completion the license came to an end and the premises should be handed back to the employer [3]. Possession of site as stated by Hardjomuljadi [4] is actually not only related to the land acquisition through the land compensation, but possession of site have its wider meaning, not only the land acquisition, but also availability of infrastructure and availability of utilities, it is not as most of people involved in the construction phase usually thought. Considering such understanding, once they give compensation as one of the procedure of land acquisition, they thought that there will be no further problems. These thinking may caused further problems because many disputes in the possession of site wider than only land acquisition and/or right of access to the site, because it is indicated that problem often cause by negligence and improper initial promise, which put as a part of contract document, usually in the particular conditions of contract. It should be understood that the delay on possession of site caused by internal and external factors. Certainly the delay on possession of site will need scheduling change which will have important effect on project completion schedule. When scheduling changes are implemented as a result of constraints created by the employer, the basis for contractor claim may exist. Fisk [5] said that it should be kept in mind of the employer that whenever the employer issues any variation order, or work directive, the contractor will begin to calculate the impact of the above, upon the project costs and profitability. Many large contracts used to be divided into separate stages of construction one after another, which change will have accumulated effect to the overall schedule. The huge construction projects in Indonesia mostly the government projects which were financed by the financial support of international lenders, the use of FIDIC Conditions of project become mandatory in the projects utilising the loan fom international lender institution, such as World Bank, JICA, ADB AusAid etc. FIDIC development of clauses related to possession of site, such as commencement date, programme, right of access to the site are very important clauses that the employers should have deeper understanding to avoid the disputes during the course of the projects.

Based on the writers' observation, many clauses in FIDIC Conditions of contract had been developed fom time to time and become more fair and balanced. The understanding on the importance of clauses related to possession of site as one of the main causal factors in the employers' side still need to be improved

MATERIALS AND METHODS

Possession of site is one out of six main causal factors of contractors' claims as the result of the former study conducted by the writer [6], and also in other literatures, from books to project completion reports.

This paper will use the result of research by the writer, where it was found that there were 59 causal factos of contrstruction claims [6] which was extracted through the study again by a factor analysis become 6 causal factors of claim [7], where possession of site is one of the main causal factors of the construction claims in Indonesia. From the literature study which are through books, journals and other sources of information.

Many studies on claims and disputes, but mostly conducted on contractor's claims, with the result of studies: how the contractor could recover their loss caused by the delay to start on their programme, by means of submitting claims on extension of time and additional cost. The contractor's claim may become tremendous, the lost caused by delay on construction programme can not be predicted, since the uncertainty in the environment become largely developed, monetary problems such as exchange rate problem can not be predicted etc.

This study will be done on the physical causes of delay on possession of site as well as contractual and legal causes by considering the importance of "wording and sentences" in the conditions of contract related to the possession of site, and there is no deeper study in the said clauses, analysis will be done on the clauses which put the possession of site as the condition precedent to some contractual responsibility which should be fulfilled. Two concepts are useful in conduct the analysis that are time and money. Contract clauses related to possession of site, such as commencement of Work should be consulted. .

With the understanding that nowadays the claims and disputes change from formerly caused by different opinion on method of measurement to the "wording and sentences" [8] in the conditions of contract, the writer try to conduct the study on the relation of main causal factors of the claim with FIDIC Conditions of Contract.

RESULTS AND DISCUSSION

Physical causes on the delay of possession of site

With reference to what Peter Drucker said: Do not focus on finding an answer, but focus on defining the question", the writer conduct the analysis based on "The 5 Whys", it is an iterative question-asking technique used to explore the cause-and-effect relationships underlying a particular problem, introduce by Sakichi Toyoda as cited in Norihiko [9] The primary goal of the technique is to determine *the root cause of a defect or problem*. The "5" in the name derives from an empirical observation on the number of iterations

typically required to resolve the problem. Asking why 5 times: “the 5 Whys”, is a simple but powerful tool to use with any problem solving activity. It’s a technique to help you get past the symptoms of a problem, and to find its root causes. Simply ask the question “why” up to five times. It may take six or it may take three. The important thing is that you use this most powerful of words to peel away the layers that envelope any problem.

Example 1: 1.Why additional cost and extension of time (0000) happened?, because of delay in possession of site (1000). 2.Why the delay in possession of site happened?, because of delay in land acquisition (1101). 3.Why delay of land acquisition happened?, because of unclear ownership (1203), 4.Why there is unclear ownership?, because of uncertain Government Regulation. The final result is this uncertain Government Regulation is *beyond the control* of the employer.

Example 2: 1.Why additional cost and extension of time (0000) happened?, because of delay in possession of site (1000). 2.Why the delay in possession of site happened?, because of delay in land acquisition (1101). 3.Why delay on land acquisition happened?, because of lack of cultural approach (1204). 4.Why lack of cultural approach happened?, because of lack of staff capability to handle this matter (1302). The final result is this lack of staff capability *could be improved by management decision* to conduct the capacity building of the staff.

The aim of asking “5 Why” is thus to ensure the problem is examined deeper and then try to solve it. This is a simple but effective tool to find the root cause of a problem and then take further action.

a. Possession of site related to the land

The land provision is a complex matter which can not be settled in mathematics way only but also requires social and cultural approach long before the physical works start. Each location has its own culture and tradition concerning the relationship between people and their land, also the cultural relation between “legal owner” and “land user”.

In Indonesia, there are several method on acquisition of land, i.e.: ganti rugi (compensation) is land compensation to be permanently used for buildings and its infrastructure through the regional government committee.and pinjam pakai (borrow for use)

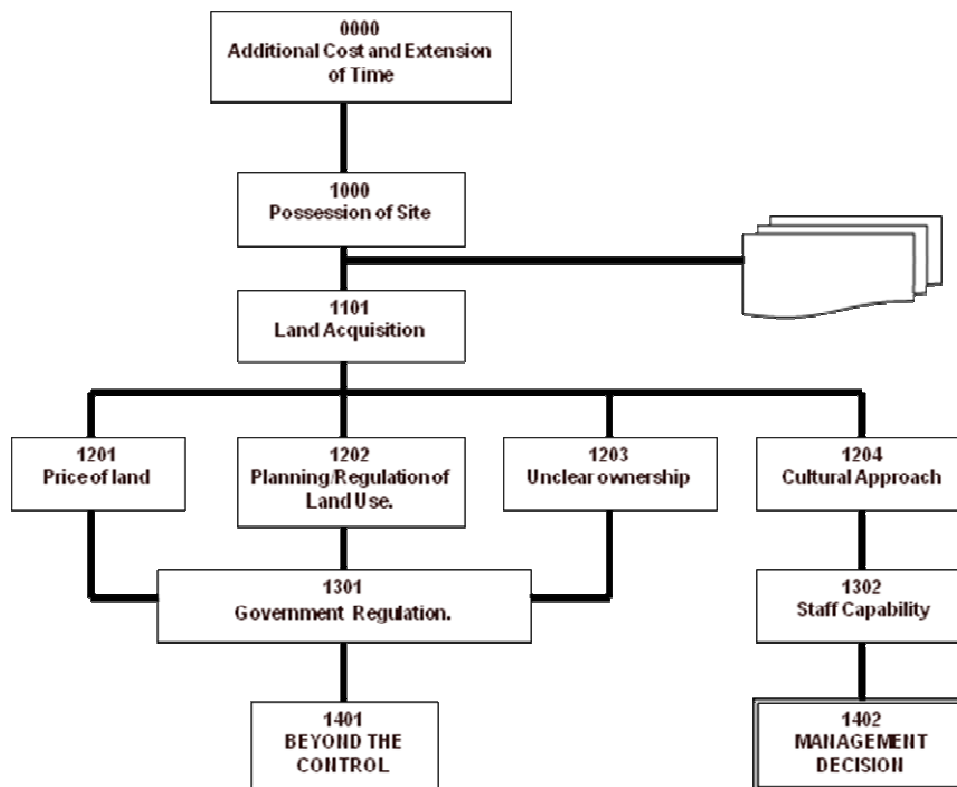


Figure 01 Possession of site – Land acquisition

b. Possession of site related to the infrastructure availabilities

The infrastructure availability is dependent on two precedent important activities. First is the planning of interfacing between first activity and the following activity, in case that the project divided into several package. Planning capability of the employer staff and/or the consultant is very important. An integrated

feasibility study should not include the technical aspect only, but also social aspects as one of the important matters to be understood.

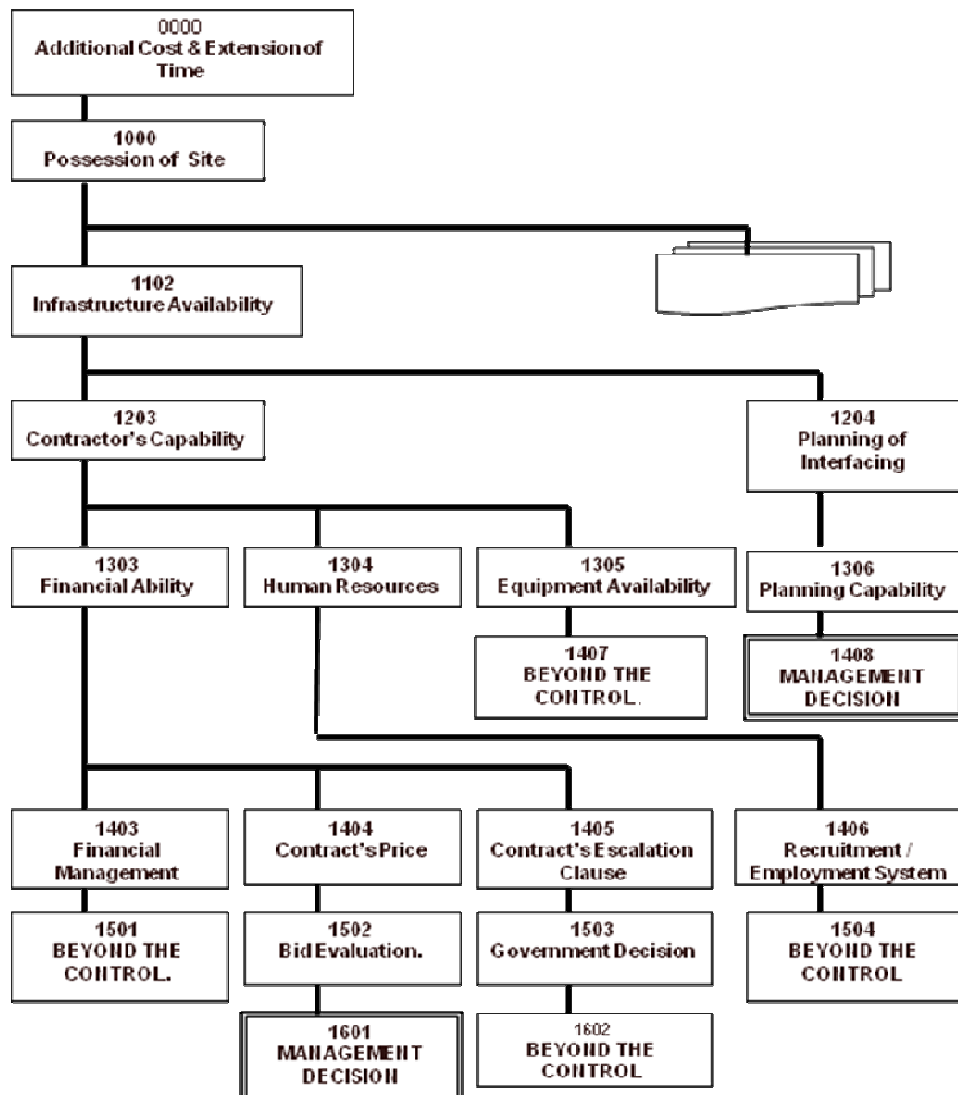


Figure 02 Possession of site – Infrastructure availability

c. Possession of site related to other utilities

The information to tenderer usually mentions that some facilities are to be provided by the employer, for example telecommunication, power supply etc. If the obligation is unfulfilled, the failure will potentially cause contractor's claim and it is difficult to predict this failure since the provision of these utilities depends on certain provider or institution as the third party.

To avoid this, it would be better that the information to tenderer does not mention any promise which is beyond the employer's control.

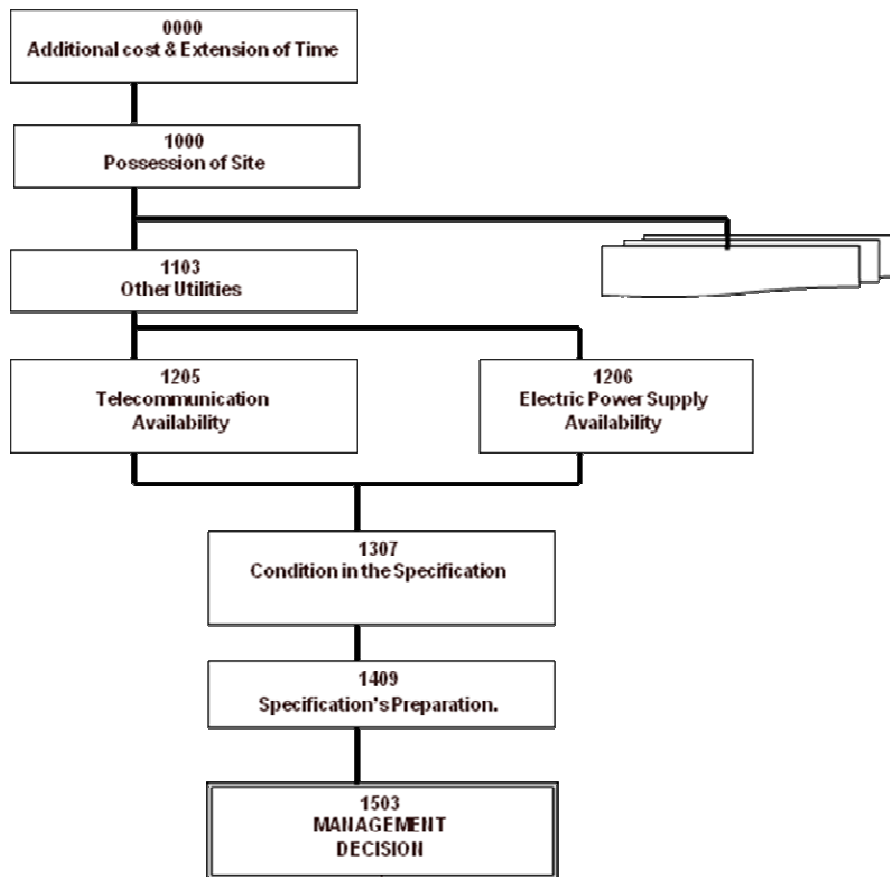


Figure 03 Possession of Site – Other utilities availability

Contractual causes related to possession of site.

Garner [1] said: “Contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”, while Martin and Law [10] mentioned “Contract is a legally binding agreement. Agreement arises as a result of “offer and acceptance”, but a number of other requirements must be satisfied for an agreement to be legally binding”. Construction Contracts Dictionary as Chow [11] mentioned that “Contract is a legally binding agreement formed when one party accepts an offer made by another and which fulfils the conditions”.

Adriaanse [12] said that “A variety of factors makes a construction contract different from most other types of contracts. These include the length of the project, its complexity, its size and the fact that the price agreed and the amount of work done may change as it proceeds”.

Contract is based on some conditions established. Garner stated that “Conditions is a future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance”. Henkin [13] said “The Conditions of Contract is intended to regulate the relationship between the parties to the contract; it defines the parties and their responsibilities to each other as well as their responsibilities for various aspects of the contract. In several standards conditions of contract, the liabilities of each of the parties and the respective risks to be taken by them are usually implicit in the defined responsibilities, but because of the complexity it is preferable to those liabilities to be explicitly defined”. In this case FIDIC Conditions of Contract explicitly defined all liabilities of the parties and also supported by the so called “claim management rules as stated by Jaeger [14] in order to avoid disputes formerly.

The contract in building and construction contract as Godfayl [15] is an agreement between an owner and a contractor that the contractor will construct a specified structure for the owner, to a specified standard and within a specification, in exchange for a specified sum of money which the owner will pay to the contractor. The contract therefore, is defined by: the date, on which it goes into effect, the parties which undertake to give it effect, the scope and quality of the work to be done, the contract sum (or consideration) to be paid for the work, the time for completion of the work.

One of the key factors in a construction contract is the time within which work is to be completed. The contractor has a contractual obligation to meet the target date, should be recognised also that events which delay the project schedule. Where the delays are attributable to causes beyond the contractors’ control, then the contractor is not at fault, the contractor may be granted extension of time within which the work is to be

completed. The construction projects are concerned only with those delays that may result in the works being delayed in reaching practical completion, that is to say, delays to critical activities. These are activities which are on the critical path of a construction program for the project. In other word, it concern with the delay of the project as a whole. Instead the individual schedule of the activity.

Delay in possession of site will affect schedule of working, which is in turn will affect the productivity which related closely with the inefficiency and disruption, the most successful weapon from the contractor to be used for their base of claims as stated by Liebing [16] and Hardjomuljadi [17].

From a, b and c above, only c could be solved through management decision, a and b mostly beyond the control. Based on the study by the writer, the most difficult problem faced by the employer is possession of site related to the land acquisition. Many reasons created by the people, people may say that the land which will be compensated is the sacred land, but actually it is new reason of the people to refuse the compensation which is mostly because of their consciousness that the future price of the land will be higher, as it will be generated after the operation of the premises, i.e, road, business area etc.

FIDIC GCC for Work of Civil Engineering Construction 2nd edition (1969) [18]

Clause 42: Possession of Site.

- (1) *Save in so far as the Contract may prescribe the extent of the Site of which the Contractor is to be given possession from time to time and the order in which such portions shall be made available to him and subject to any requirement in the Contract as to the order in which the Works shall be executed the Employer will with the Engineer's written order to commence the Works give the contractor possession of so much the site as may be required to enable the contractor to commence and proceed with the construction of the Works in accordance with the programme referred to in Clause 14 hereof (if any)..... from time to time as the Works proceed give to the Contractor possession of such further portion of the site.*
- (2) *The contractor shall bear all expenses and charges for special or temporary way leaves required by him in connection with access to the Site. The Contractor\ shall also provide at his own cost any additional accommodation outside the Site required by him for the purpose of the Works.*

Clause 41 Commencement of Works

The Contractor shall commence the Works on Site within the period named in the Tender after the receipt by him of an order in writing to this effect from the Engineer and shall proceed with the same with due expedition and without delay except as may be expressly sanctioned or ordered by the Engineer or be wholly beyond the Contractor's control.

The word "Tender" has a wide interpretation, it might be interpreted as the tender document issued by the employer or in the contrary the tender offer submitted by the contractor. This clause also mentions that there must be "an order in writing" on every order related to the Works, it means that the verbal order as site should be followed by the confirmation of verbal instruction (CVI). [4]

Clause 14 Programme to be furnished

As soon as practicable after the acceptance of his Tender the Contractor shall if required submit to the Engineer for his approval a programme showing the order of procedure and method in which he propose to carry out the Works and shall whenever required by Engineer or Enginner's Representative furnish for his information particulars in writing of the Contractor's arrangements for the carrying out of the Works and of the Constructional Plants and Temporary Works which the Contractor intends to supply use or construct as the case may be. The submission to and approval by the Engineer or Engineer's Representative of such programme or the furnishing of such particulars shall not relieve the Contractor of any of his duties or responsibilities under the Contract.

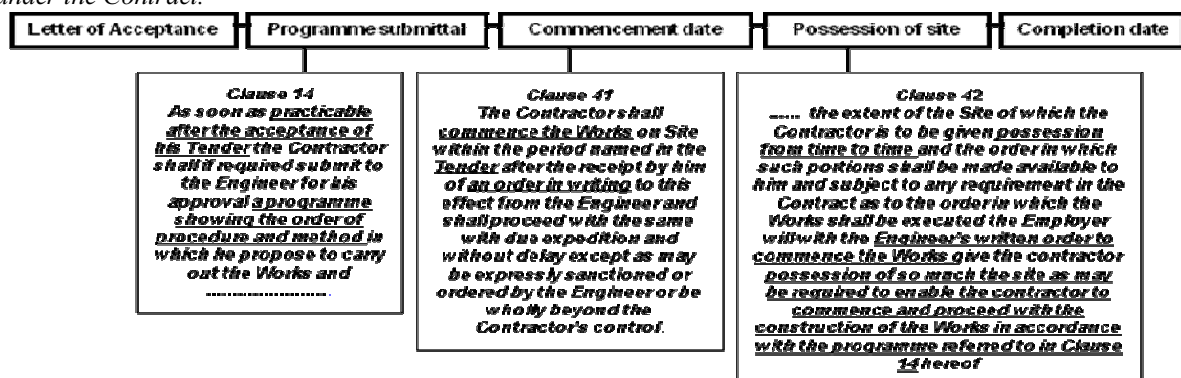


Figure 4: Relationship Possession of site – Comencement date – Programme submittal
FIDIC CC for Construction , 2nd edition 1969

FIDIC GCC for Work of Civil Engineering Construction 3rd edition (1977) [19]
Sub-Clause 42 (1): Possession of Site

- (1) *Save in so far as the Contract may prescribe the extent of portions of the Site of which the Contractor is to be given possession from time to time and the order in which such portions shall be made available to him and subject to any requirement in the Contract as to the order in which the Works shall be executed the Employer will with the Engineer's written order to commence the Works give the contractor possession of so much the site as may be required to enable the contractor to commence and proceed with the construction of the Works in accordance with the programme referred to in Clause 14 hereof (if any).....from time to time as the Works proceed give to the Contractor possession of such further portion of the site.*
- If the contractor suffers delay or incurs expense from failure on the part of the Employer to give possession in accordance with the terms of this clause the Engineer shall grant an extension of time for the completion of the Works and certify such sum as in his opinion shall be fair to cover the expense incurred which sum shall be paid by the Employer.*
- (2) *The contractor shall bear all cost and charges for special or temporary way leaves required by him in connection with access to the Site. The Contractor shall also provide at his own cost any additional accommodation outside the Site required by him for the purpose of the Works.*

Clause 41 Commencement of Works

The Contractor shall commence the Works on Site within the period named in the Appendix to the Tender after the receipt by him of a written order to this effect from the Engineer and shall proceed with the same with due expedition and without delay, except as may be expressly sanctioned or ordered by the Engineer, or be wholly beyond the Contractor's control.

"Tender" in the former edition replaced by "appendix to Tender". This wording could be interpreted firmly as the part of the document submitted as an offer by the contractor. A "written order" replaces the "order in writing" which could be interpreted as something formalized in the shape of "form".

Similar with the 2nd edition, this 3rd edition have the time frame, as it was mentioned that the contractor shall commence the Works on site after receipt an order in writing within the period named in the Tender as 2nd edition and after receipt a written order within the period named in the Appendix to Tender as 3rd edition.

Clause 14 Programme to be furnished

- (1) *Within the time stated in Part II of these Conditions, the Contractor shall, after the acceptance of his Tender, submit to the engineer for his approval a programme showing the order of procedure in which he proposes to carry out the Works. The Contractor shall whenever required by the Engineer or Engineer Representative, also provide in writing for his information a general description of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works.*

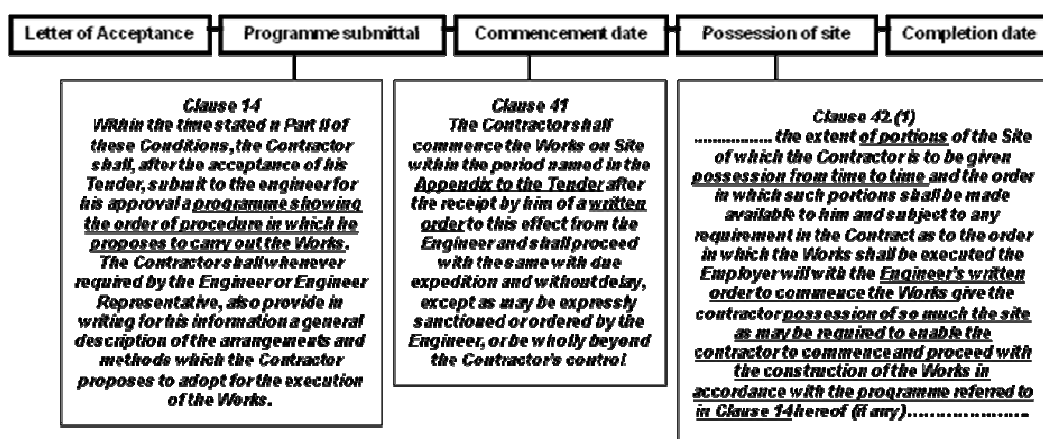


Figure 5: Relationship Possession of site – Comencement date – Programme submittal
FIDIC CC for Construction , 3rd edition 1977

FIDIC GCC for Work of Civil Engineering Construction 4th edition (1987 amended 1992) [20]
Sub-Clause 42.1: Possession of Site and Access Thereto

Safe insofar as the Contract may prescribe:

- (a) *the extent of portions of the Site of which the Contractor is to be given possession from time to time, and*

(b) the order in which such portions shall be made available to the Contractor and subject to any requirement in the Contract as to the order in which the Works shall be executed...

give the Contractor possession of:

(c) so much of the Site

(d) such access as, in accordance with the Contract, is to be provided by the Employer as may be required to enable the Contractor to commence and proceed with the execution of the Works in accordance with the programme referred to in Clause 14, if any....

The Employer will, from time to time as the Works proceed, give to the Contractor possession of such further portions of the Site as may be required to enable the Contractor to proceed with the execution of the Works with due dispatch.....

Sub-Clause 42.2: Failure to give possession

If the Contractor suffers delay and/or incurs costs from failure on the part of the Employer to give possession in accordance with the terms of Sub-Clause 42.1, the Engineer shall, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount of such costs, which shall be added to the Contract Price..

Sub-Clause 42.3: Right of Way and facilities

The Contractor shall bear all costs and charges for special or temporary rights of way required by him in connection with access to the Site. The Contractor shall also provide at his own cost any additional facilities outside the Site required by him for the purposes of the Works.

It could be seen that clause 42 in the former edition was split into sub-clause 42.1 and sub-clause 42.3. Sentence “from time to time clearly expressed that the possession of site will not be given at once, but as required to enable the contractor to proceed with the Works.

“Way leaves” and “accommodation” in the second paragraph of clause 42 (3rd edition) are respectively replaced by ‘rights of way’ and “facilities” of clause 42.3 (4th edition).

Sub-Clause 41.1 Commencement of Work

The Contractor shall commence the Works as soon as reasonably possible after the Commencement date to this effect from the Engineer, which notice shall be issued within the time stated in the Appendix to Tender after the date of the Letter of Acceptance. Thereafter, the Contractor shall proceed with the Works with due expedition and without delay.

The first note is the wording “as soon as reasonably possible” which is the neutral wording as “reasonably” could be interpreted differently. The second note is the word “notice” which is just some notes in form of letter from the Engineer. The third note is that this clause has a time frame to issue the notice to commence the works, i.e. after the letter of acceptance.

The above clause in 4th edition have no specified time for the Contractor to commence the Works, there is only mentioned that the Contractor shall commence the Works as soon as reasonably possible. Which is different from the 2nd and 3rd edition where were specified that the engineer must give notice and the contractor must start within which time frame was specified.

Sub-Clause 14.1 Programme to be submitted

The Contractor shall, within the time stated in Part II of these Conditions after the date of the Letter of Acceptance, submit to the Engineer for his consent a programme, in such form and detail as the Engineer shall reasonably prescribe, for the execution of the Works. The Contractor shall, whenever required by the Engineer, also provide in writing for his information a general description of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works.

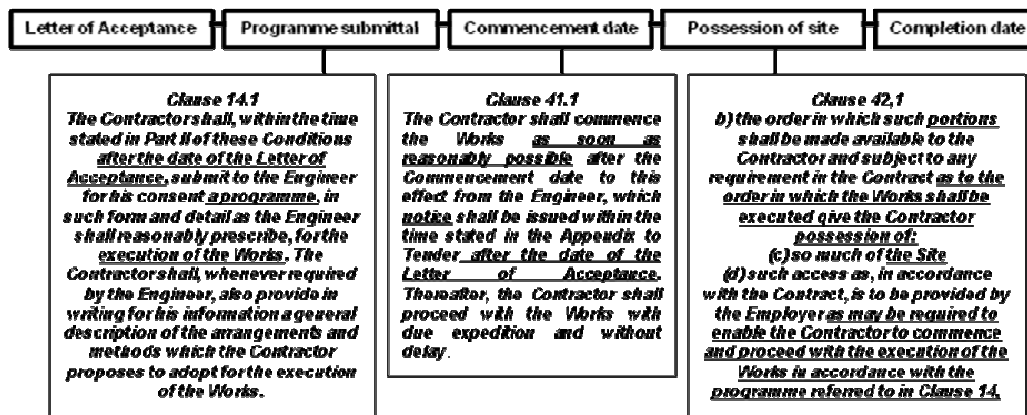


Figure 6: Relationship Possession of site – Comencement date – Programme submittal
FIDIC CC for Construction, 4th edition 1987 amended 1992

FIDIC GCC for Construction 1st edition (1999) [21]

Sub-Clause 2.1: Right of Access to the Site

The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time stated in the Appendix to Tender. However the Employer may withhold any such right or possession until the Performance Security has been received.

If no such time is stated in the Appendix to Tender, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as may be required to enable the Contractor to proceed in accordance with the programme submitted under Sub-Clause 8.3 [Programme]

If the Contractor suffers delay and/or incurs Costs as a result of failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claim] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
- (b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

Sub-Clause 8.1 Commencement of Works

The Engineer shall give the Contractor not less than 7 days notice of the Commencement Date. Unless otherwise stated in the Particular Condition, the Commencement date shall be within 42 days after the Contractor received the Letter of Acceptance.

The Contractor shall commence the execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

The above clause introduces a detailed time frame [22] (hardjomuljadi 2011) for the issuance of the Commencement date notice and the physical starting of the Works in relation to the Letter of Acceptance. The only multi-interpreted wording is “as is reasonably practicable” which is more certain than “possible” on the 4th edition, even argument about the understanding of “practicable” may still arise.

Sub-Clause 8.3 Programme

The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:

..... (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Contractor's Documents, procurement, manufacture of Plant, delivery to Site, construction, erection and testing,.....

In this edition, it could be seen that the relation of commencement of Works, programme and possession of site, are as follows: after the issuance of letter of acceptance, the first steps are Commencement of Works which should be commence within 42 days after. Within 28 days after Commencement of Works the contractor should submit the detailed programme. The relationship among letter of acceptance, commencement date, programme submittal, possession of site and completion date could be seen in figure 4.

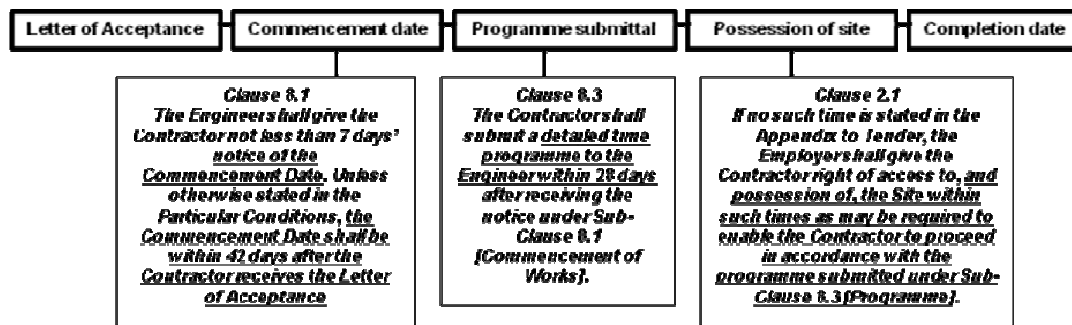


Figure 7: Possession of site – Commencement date – Programme submittal
 FIDIC CC for Construction, 1st Edition, 1999

FIDIC GCC for Construction MDB Harmonised edition (2006) [2]

Sub-Clause 2.1: Right of Access to the Site

2.1 The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time stated in the Contract Data. However the Employer may withhold any such right or possession until the Performance Security has been received.

If no such time is stated in the Contract Data, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as required to enable the Contractor to proceed without disruption in accordance with the programme submitted under Sub-Clause 8.3 [Programme]

FIDIC 1st edition 1999 facilitates this factor by Clause 2.1 [Right of Access to the Site]. The spirit of this clause is giving Right of Access to and possession of the Site within such times as may be required to enable the contractor to proceed in accordance with the programme submitted under Clause 8.3 [Programme]. In case that the Employer cannot fulfil his obligation, the contractor shall be entitled to, subject to Clause 20.1 [Contractor's Claim], an extension of time and/or payment of any such cost incurred because of the failure to get the access and/or the possession.

Clause 2.1 gives the contractor possession of all parts of the Site at the times stated in the Appendix to Tender (Particular Conditions in the Silver Form). If the contract specifies that the Employer is to give possession of any foundation, structure or plant, then he must do so in the time and manner stated in the Specification. If the Contract is silent then the possession is required to be at such time as to allow the Contractor to proceed in accordance with the submitted programme. The Employer's failure to give possession at the appropriate time entitles the Contractor to an extension of time and payment of Cost and profit if not caused by the Contractor, subject to notice. Clause 17.3 (f) Red and Orange Forms provides that the Employer's Risks, which entitle the Contractor to extension of time for consequent delay and payment of Cost incurred, includes use or occupation by the Employer of any part of the Permanent Works except as may be specified in the Contract.

Sub-Clause 8.1 Commencement of the Works

Except as otherwise specified in the Particular Conditions of Contract, the Commencement Date shall be the date at which the following precedent conditions have all been fulfilled and the Engineer's notification recording the agreement of both Parties on such fulfilment and instructing to commence the Work is received by the Contractor:

- (a) signature of the Contract Agreement by both Parties, and if required, approval of the Contract by relevant authorities of the Country;
- (b) delivery to the Contractor of reasonable evidence of the Employer's Financial arrangements (under Sub-Clause 2.4 [Employer's Financial Arrangements]);
- (c) except if otherwise specified in the Contract Data, effective access to and possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [Compliance with Laws] as required for the commencement of the Works;
- (d) receipt by the Contractor of the Advance Payment under Sub-Clause 14.2 [Advance Payment] provided that the corresponding bank guarantee has been delivered by the Contractor.

If the said Engineer's instruction is not received by the Contractor within 180 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Clause 16.2 [Termination by Contractor]. The Contractor shall commence the execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

In the MDB Harmonised edition, there is some administrative requirements added by the Multilateral Development Bank, as an additional guarantee to the contractor [15] (Hardjomuljadi 2011), in this case some risks are switched from the contractor's side to the employer's side.

The Commencement date of the Works is usually specified in the Contract and is the date from which the contractual date for Practical Completion of the Works (Date for Practical completion) is computed, albeit usually implicitly. However, delay in commencement typically does not have the contractual consequences that lateness in Practical Completion does. [23].

Sub-Clause 8.3 Programme

The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:

..... (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Contractor's Documents, procurement, manufacture of Plant, delivery to Site, construction, erection and testing,

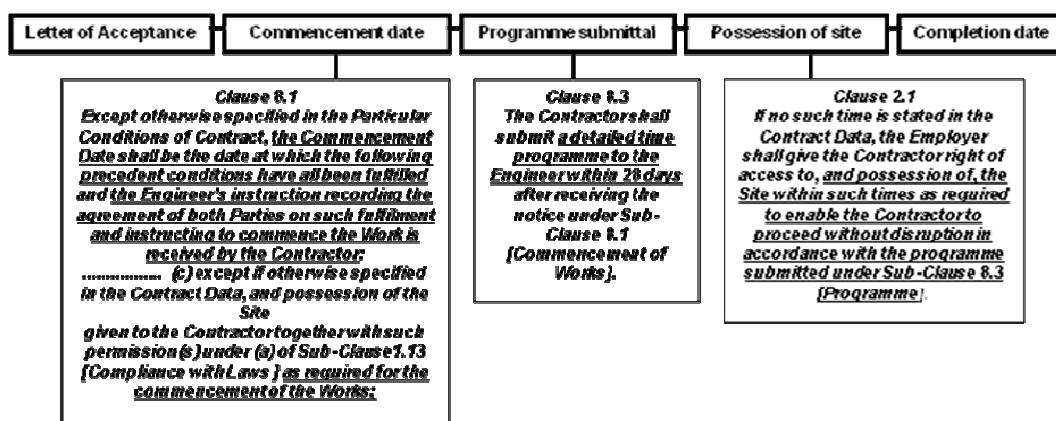


Figure 8: Possession of site – Commencement date – Programme submittal
FIDIC CC for Construction, MDB Harmonised Edition 2006

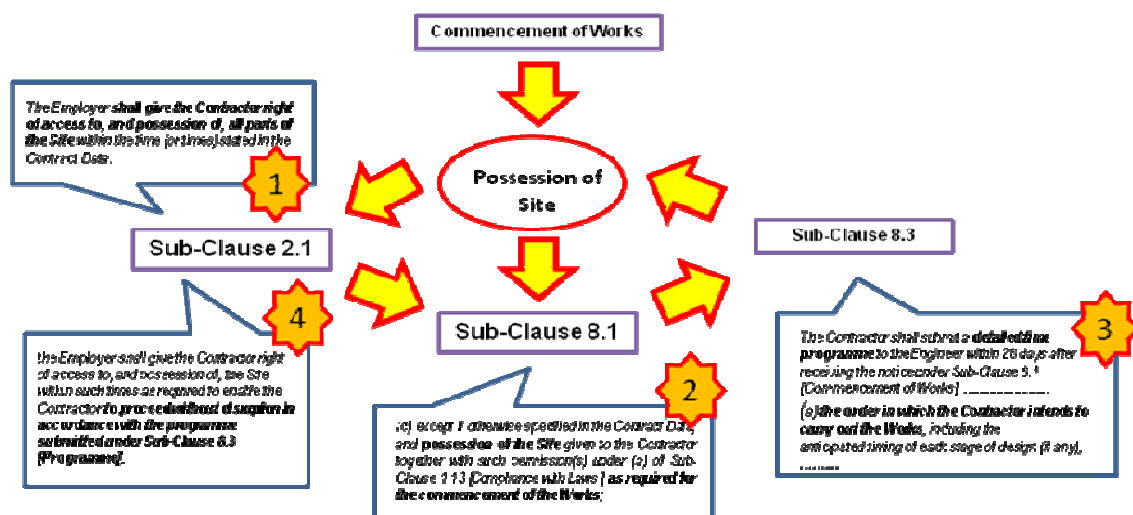


Figure 9: Flow of activities based on Sub-Clause 8.1
FIDIC CC for Construction, MDB Harmonised Edition 2006

From the above Figure 9 it could be seen that Sub-Clause 8.3 Programme, include the plan of the land required by the contractor to commence the Work, contractually such programme should be submitted after Sub-Clause 8.1 Commencement of Work, while one of the condition precedence for Commencement of Work is the possession of the land, which is based on Sub-Clause 2.1 Right of Access to the Site, where stated that the

Employer shall give the Contractor right of access to, and possession of, the Site, within such times as required to enable the Contractor to proceed without disruption in accordance with the programme submitted under Sub-Clause 8.3 [Programme]. This is the vicious circle, so that the writer suggests it should be revised in the next edition of FIDIC MDB Harmonised.

CONCLUSION

Delay caused by possession of the site could be easily known, because the contractor physically can not proceed with the Works in the location that the possession of site haven't been completed yet. One causal factor which is undoubtedly could be proven easily by parties is the possession of site.

Physically the possession of site is one of the cause of the delay and disruption on every parts of Works where possession of site not properly done by the employer.. The employer involved is mainly interested in the construction process but, at the same time, ignore and neglect of what is happening. At present, the possession of site related to land acquisition become more difficult because the people consciousness that the future price of the land after the operation of the premises will be far higher than the amount they receive as land compensation.

Contractually impact of the delay on possession of site, is the delay on commencement of the Works where in the FIDIC MDB Harmonised Edition is become one of the four conditions precedence for the Commencement of Works which is in turn may cause the delay on completion of the Works and in the worst case may cause the Termination by the Contractor if the Employer cannot fulfill such conditions as stipulated in the contract.

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