

Check List for One Sided Contracts

**For use with “Sample Bidding Documents under
Japanese ODA Loans - Procurement of Works”
June 2009 Edition**

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PREFACE

To realize the effective and prompt implementation of Japanese ODA Loan projects financed by Japan International Cooperation Agency (JICA), it is essential to set out the rights and obligations of the Borrower and the Consultant in a consultancy contract and those of the Borrower and the Contractor in a construction contract, clearly and properly. (See Section 2.02 of “Guidelines for Employment of Consultant under Japanese ODA Loans” and Section 4.04 of “Guidelines for Procurement under Japanese ODA Loans”).

JICA prepared the “Sample Bidding Documents under Japanese ODA Loans – Procurement of Works” based on the Conditions of Contract edited by Fédération Internationale des Ingénieurs-Conseils (FIDIC), and recommends all the Borrowers to use it, in “Handbook for Procurement under Japanese ODA Loans”. However, it is sometimes observed that other contract models are used, or that contracts with partial risk allocation to the Contractors are concluded by amending the Sample Bidding Documents. Such “one sided contracts” actually affect negatively the smooth implementation of projects and consequently are considered to be disadvantageous to the Borrowers due, amongst other things, to the late completion of the project.

In line with the aforesaid background, JICA commissioned the Association of Japanese Consulting Engineers (AJCE) to prepare “Check List for One Sided Contracts”, which is for preparation of reasonable bidding documents by the Borrowers and for JICA staff’s reference, summarizing examples of one sided contract conditions from Japanese ODA Loan projects. This Check List is revision of “Check List for One Sided contracts for use with Sample Bidding Documents under JBIC ODA Loans – Procurement of Civil Works, November 1999 Edition” issued on December 2006, following the Sample Bidding Documents, June 2009, based on FIDIC Conditions of Contract for Construction (Red Book MDB Edition)¹. In view of the globalization of the Japanese construction sector, it is desirable that this Check List is widely used among the entities concerned including the borrowers of the Japanese ODA loan, JICA staff, Japanese construction companies and engineering consulting firms involved in international contraction projects.

JICA recognizes that, even contract conditions maintain a balanced risk allocation with using the Check List, if these conditions do not properly apply, smooth project implementation cannot be achieved. However, to set out the proper provisions is essential for the smooth implementation. JICA will make a continuous effort to improve project implementation by close discussion and cooperation with Borrowers. JICA hopes that this check list will contribute to the improvement.

¹ This Check list will be revised when the Sample Bidding Documents will be amended further.

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Context of this Document

Check List for One Sided Contract

A check list is set out in the first part of this document. This check list is prepared to avoid one sided provisions effecting the rights, obligations and risk of contracting parties. It can be used during preparation and review of contracts documents for construction works under Japanese ODA loans.

Chapter 1 : Purpose of Check List

The purposes of the Check List are described in chapter 1 together with the background behind the necessity of such a check list.

Chapter 2 : Distinctive Features of FIDIC Red Book MDB Edition

The general features and basic concepts of the FIDIC Red Book MDB Edition, which should be well understood by writers of construction contracts under Japanese ODA loans, are set out in Chapter 2.

Chapter 3 : Factors which create One Sided Contract

The factors which create contracts one sided are examined in Chapter 3 by categorizing the effects into four groups.

Chapter 4 : Motives for Making Contracts One-Sided

The motives which make contracts one sided are examined in Chapter 4 by categorizing the effects into five groups.

Chapter 5 : Commentary on the Check List

A commentary on the Check List is set out in chapter 5 as a guide to users.

CHECKLIST TO AVOID "ONE SIDED CONDITIONS OF CONTRACT"

"Sample Bidding Documents" : JICA "Sample Bidding Documents under Japanese ODA Loans, Procurement of Works", June 2009

No.	Clause	Title	Check Point	Result
1	Whole	-	Do the contract documents conform to the Sample Bidding Documents?	
2	Whole	-	Have the bidding and contract documents (including the Particular Conditions) been drafted and edited by experienced specialists?	
3	1.1.2	Parties and Persons	Is the person appointed to be the Engineer a specialist employed by a competent consulting engineering company and not a member of the Employer's organisation?	
4	1.1.3	Dates, Tests, Periods and Completion	Is the defects notification period for the Contractor set at "365 days" as defined in the Contract Data of the Sample Bidding Documents?	
5	1.2	Interpretation	Is the "profit", if prescribed in the Contract Data, underrated?	
6	1.4	Law and Language	Is any international language specified as the "ruling language" or the "language for communications" for the contract?	
7	1.5	Priority of Documents	Is there any amendment to the priority order of documents, at the General Conditions?	
8	1.9	Delayed Drawings or Instructions	Is any restriction imposed on the rights of the Contractor to claim an extension of time and/or additional cost for delayed drawings or instructions?	
9	2.1	Right of Access to the Site	Is any restriction imposed on the rights of the Contractor to claim an extension of time and/or additional cost related to access to and possession of the Site?	
10	2.2	Permits, Licences or Approvals	Is the specific nature of the Employer's assistance mentioned? Is there any deletion or reduction in the scope of the assistance?	
11	2.5	Employer's Claims	Is there any extension to the period of time during which the Contractor has a right to claim under a provision of the contract?	
12	3.1	Engineer's Duties and Authority	Is the scope of authority which the Engineer exercises at his discretion but is required to obtain a prior consent of the Employer clearly stated? Even so, is the scope designed to be unnecessarily wide?	
13	3.3	Engineer's Instructions	Is the Employer involved in the process of the Engineer's instructions?	
14	3.4	Replacement of the Engineer	Has the Contractor's right to raise an objection to the replacement of the Engineer been limited?	
15	3.5	Determinations	Is any restriction imposed which could interfere with a fair determination made by the Engineer in accordance with the Contract?	
16	4.1	Contractor's General Obligations	Are the general obligations of the Contractor extended, for example by placing on the Contractor the Employer's responsibility for the design?	
17	4.2	Performance Security	Are the amount and the validity period of the performance security appropriate for the project?	
18	4.7	Setting Out	Are the general obligations of the Contractor extended, for example by giving the Contractor the obligation for the accuracy of the original setting out points, lines and levels for the work?	
19	4.10	Site Data	Is the Contractor forced to assume the more responsibility for the Site Data than set out in the General Conditions?	
20	4.12	Unforeseeable Physical Conditions	Is there any restriction on the Contractor's right to recover both the additional costs of unforeseeable physical conditions and an extension of time to complete the works?	
21	4.24	Fossils	Is any restriction imposed on the right of the Contractor regarding this Sub-Clause?	
22	5.2	Objection to Nomination	Is any restriction imposed on the right of the Contractor to raise reasonable objection to nomination of subcontractors? Or is the provision concerning the objection deleted?	
23	7.4	Testing	Is there any restriction on the Contractor's right to claim a time extension and additional costs for changes for testing?	
24	8.1	Commencement of Works	Are there any one-sided items stated in the Particular Conditions or other contract documents regarding the Commencement of Works or the Commencement Date of Works?	
25	8.4	Extension of Time for Completion	Is any restriction imposed on the Contractor's right to claim an extension of Time for Completion?	
26	8.7	Delay Damages	Are the Delay Damages which would be imposed on the Contractor for delay in the completion of the Work set at a reasonable amount? Does the amount of Delay Damages exceed the maximum amount shown in Contract Data included in the Sample Bidding Documents?	
27	8.9	Consequences of Suspension	Is any restriction imposed on the Contractor's right to suspend the Works for specific events?	
28	8.10	Payment for Plant and Materials in Event of Suspension	Is any restriction imposed on the Contractor's rights to be compensation for suspension of Work?	
29	8.11	Prolonged Suspension	Is any restriction imposed on the Contractor's rights to terminate the Contract due to prolonged suspension of Work?	
30	10.1	Taking Over of the Works and Sections	Have onerous changes or additions, prejudicial to the Contractor been made to the process of Taking Over of the Works?	
31	11.1	Completion of Outstanding Work and Remedying Defects	Has the Contractor's scope of responsibility for remedying defects been expanded unfairly?	
32	11.3	Extension of Defects Notification Period	Have changes been made so that the Defects Notification Period can be extended indefinitely?	
33	11.8	Contractor to Search	Is any restriction imposed on the Contractor's right when he has the obligation to search for the cause of defects and recover cost and the related profit if the defect is not attributable to the Contractor?	
34	12.3	Evaluation	Have changes or additions been made in conditions for new rates or price additions that are unfair to the Contractor?	
35	13.5	Provisional Sums	Is the rate applied in sub-paragraph (b) (ii) appropriate?	
36	13.7	Adjustments for Changes in Legislation	Is any restriction imposed on the Contractor's right to claim a time extension or additional costs?	
37	13.8	Adjustments for Changes in Cost	Is this clause valid for Work in which the construction period is set one year or more and a table of adjustment data is included in the Schedules? Is an appropriate table of adjustment data included in the contract documents?	
38	14.2	Advance Payment	Has an excessive obligation been forced on the Contractor with regard to amortisation of the advance payment?	
39	14.3	Application for Interim Payment Certificates	Has an appropriate percentage for the Retention Money been specified in line with the Contract Data in the Sample Bidding Documents?	
40	14.6	Issue of the Interim Payment Certificates	Is the Engineer's task of Sub-Clause 14.6 shifted to the Employer? Is any restriction imposed on the Contractor's rights by the Engineer extending the Interim Payment Certificate issuance deadline?	
41	14.7	Payment	Is any restriction imposed on the Contractor's rights by prolonging the Payment deadline?	
42	14.8	Delayed Payment	Is any restriction imposed on the Contractor's rights by eliminating financing charges for delayed payment?	
43	16.1	Contractor's Entitlement to Suspend Work	Is there any restriction imposed on the Contractor's rights with regard to the suspension of Works and to extension of the Time for Completion and an additional cost due to a reason attributable to the Employer?	
44	16.2	Termination by Contractor	Have changes that are disadvantageous to the Contractor been made regarding conditions in which the Contractor can terminate the contract and/or those procedures?	
45	17.3	Employer's Risks	Are the Contractor's obligations being expanded excessively by shifting the Employer's risks to the Contractor? Is any restriction imposed on the Contractor's right related to the extension of the construction period and the additional cost attributable to the Employer?	
	17.4	Consequences of Employer's Risks		
46	19.1	Definition of Force Majeure	Has the definition of Force Majeure been narrowed? Is any restriction imposed on the Contractor's right related to the extension of the construction period and the additional cost that originate from Force Majeure?	
	19.4	Consequences of Force Majeure		
47	19.6	Optional Termination, Payment and Release	Have changes that are disadvantageous to the Contractor been made regarding conditions in which the Contract can be optionally terminated and/or those procedures?	
48	20.1	Contractor's Claims	Any amendment to shorten the notification period related to the procedure for the notification of claims?	
49	20.2	Appointment of the Dispute Board	Is the deadline for the establishment of a Dispute Board set in the Contract Data written as "28 days after the Commencement date," as is shown in the Contract Data of the Sample Bidding Documents?	
50	20.3	Failure to Agree on the Composition of the Dispute Board	Are the nominated entities or officials stated clearly in the Contract Data? Are those entities/officials impartial towards both Parties?	
51	20.6	Arbitration	Is the arbitration institution set in the Contract Data in the case that the Contractor requires international arbitration for foreign contractors written as the "International Chamber of Commerce," as is shown in the Sample Bidding Documents?	
52	App.	General Conditions of the Dispute Board Agreement	Have changes in the policy of "impartial charge" been made regarding payment to the Dispute Board Members?	

1. Purposes of Check List

A contract is a document which stipulates rights, responsibilities and risks to be undertaken by each of the contracting parties. It is therefore a very important document to be used for smooth implementation of the project by the various stakeholders. Japan International Cooperation Agency (JICA) recommends that executing agencies of loan recipient countries utilize “The Sample Bidding Documents under Japanese ODA Loans, Procurement of Works” published in June, 2009 (hereinafter called as “Sample Bidding Documents”) in preparation of bidding documents for construction works. These sample bidding documents basically adopted the “Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, Multilateral Development Bank Harmonised Edition (hereinafter called as the “Red Book MDB Edition”), which was prepared by the Fédération internationale des ingénieurs-conseils (hereinafter called as “FIDIC”). In principle, the Red Book provides a well-balanced allocation of risks between the Employer and the Contractor.

The FIDIC general conditions of contract may be modified in consideration of the actual project circumstances and requirements by adding conditions of particular applications in Part II of the FIDIC Red Book. If modifications for any particular project alter the originally contemplated risk distribution to a large extent and the risks allocated to the Contractor become excessively high, the following problems may occur:-

- (1) Higher bid price
- (2) Bid failure and disruption of project implementation
- (3) Non-participation in the bid of conscientious and capable contractors
- (4) Contract award to a bidder who fails or was not capable of estimating the risks properly
- (5) Poor construction quality and delay to the progress of the work due to lack of risk contingency
- (6) Undermining the relationship of mutual trust and respect between the Employer and the Contractor
- (7) Repetition of groundless claims from the Contractor
- (8) Frequent disputes between the Employer and the Contractor
- (9) In an extreme case eventual termination of the contract

These situations interfere with the smooth implementation of projects financed by Japanese ODA loans and, may not bring the Employer any good result.

The Check List is prepared for the purpose of elimination of one sided provisions from the

contract. It is recommended for the executing agencies of loan recipient countries and for all related parties to utilize this Check List as a reference guide in preparation or review of bid documents under Japanese ODA loans in order to allocate risks and liabilities fairly between contracting parties as well as to keep fairness of the Engineer.

The Check List is drafted based on actual experience on previous construction contracts financed by Japanese ODA loans.

2. Distinctive Features of FIDIC Red Book MDB Edition

The Sample Bidding Documents adopt FIDIC Red Book MDB Edition as general conditions of contract. The Red Book has a long history¹ and is adopted in standard bidding documents for most multilateral development banks including World Bank and Asian Development Bank² as de facto standard for civil and building works contracts in international projects.

The Red Book was made of an overall revision to “Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1999 Edition)” from “Conditions of Contract for Works of Civil Engineering Construction (1987 Edition)”. The MDB Edition is a further revision of the 1999 Edition for projects to be financed by the Multilateral Development Banks. It has basically the same structure as the 1999 Edition. The name “Red Book” is associated with the color of its binding cover which is basically red. All red color books are for the FIDIC contract conditions for projects with design by the Employer. Apart from the Red Book, FIDIC has the Yellow Book, White Book, etc.

The main content of the Red Book MDB Edition is general conditions. But it is expected that the following particular conditions are prepared (See the “Sample Bidding Documents”).

- The Particular Conditions, Part A: Contract Data
Items which the General Conditions specify in the Contract Data.
Figures, proper nouns designated by the project.
- The Particular Conditions, Part B: Specific Provisions
Changes, deletions or additions modify a part of the General Conditions, which does not suites particular conditions or situations of the project.

¹ The first edition of FIDIC Red Book was issued in 1957 and it was drafted based on ICE conditions of contracts in UK.

² World Bank and Asian Development Bank issued Harmonized Edition of Sample Bidding Documents based on FIDIC Red Book 1999 in May 2005. Both banks adopted FIDIC Red Book 1987 in their previous versions of Sample Bidding Documents.

The MDB Edition is based on the following documents that form the contract. (See “Sub-Clause 1.5 Priority of Documents”).

- The Contract Agreement
- The Letter of Acceptance
- The Letter of Tender
- The Particular Conditions – Part A
- The Particular Conditions – Part B
- The General Conditions
- The Specification
- The Drawings
- The Schedule and any other documents forming part of the Contract

The basic concepts and framework of the FIDIC Red Book are summarized below. A change of the concepts and framework would affect the bilateralism of the contract.

1) Design by Employer

The Conditions of Contract in the FIDIC Red Book are suitable for Design-Bid-Build projects. The Employer designs the permanent work except for the works to be designed by Contractor in accordance with Clause 4.1, and the contractor executes the work according to those drawings and specifications provided with the bid documents.³

The design of the civil work structure largely depends on the site conditions including topography and geology. Since it is not entirely possible to know the actual geological conditions in the pre-investigation, design modification is frequently required during construction. Sub-clauses 13 “Variations and Adjustments” allows such unforeseeable variations to be efficiently achieved without contractual problems.

2) Presence of Dispute Board

The most distinctive characteristic of the Red Book MDB Edition is the presence of Dispute Board. Though the dispute board member is not concerned in a construction works contract, he/she makes a tripartite contract with the Employer and the Contractor, and makes a decision to disputes between the Employer and the Contractor during the works. General conditions of the contract, which are attached to the general conditions of contract for the works, stipulate that

³ In case of Japanese ODA loan projects, the design work is usually carried out by a consulting engineer appointed by the Employer and the design liability lies with the Employer.

he/she warrants and agrees he/she is and shall be impartial and independent of the Employer and the Contractor.

3) Presence of Engineer

Certain FIDIC Conditions of Contract stipulate a person named “Engineer”, which Red Book is one of. The Engineer is not a contracting party but his duties and authority are stipulated in the contract and the Engineer plays an essential role in the contract administration process.

The Engineer’s main parts described in the Red Book MDB Edition can be categorized into the followings.

(1) Employer’s Agent

The Engineer provides the following services to conduct the contract management based on Red Book.

- Production of detailed design drawings under Sub-Clause 1.9
- Issuance of instructions for variation of the works under Sub-Clause 13.1
- Review of plans and drawings submitted by the Contractor under Sub-Clause 4.1
- Carrying out project management services including time and cost management, quality control, testing and inspection, safety and environmental management under various Sub-Clauses especially 8.3, 13, 7, 9 and 4.9

(2) Certifier

The Engineer issues various certificates certifying the quality of the Contractor’s performance and payment therefore at the Engineer discretion. The Engineer’s certificates have a strong binding effect on both the Employer and the Contractor.

- Taking-over certificate under Sub-Clause 10.2
- Certification of work completion date under Sub-Clause 11.9
- Interim payment certificate under Sub-Clause 14.6
- Defect liability certificate under Sub-Clause 4.9
- Final payment certificate under Sub-clause 14.13

(3) Determiner in claim settlement

The Contractor has a right to claim it to the Engineer. The Engineer should consult with the both Parties on the matter in question based on Sub-Clause 3.5 in order to come to an agreement. In case the consultation reaches an impasse, a fair determination should be made based on the contract.

The Engineer therefore has three distinct and different roles:-

- 1) As Employer’s agent,

- 2) As certifier, and
- 3) As determiner in claim settlement

In carrying out the last two roles the Engineer is obliged to conduct fair contract management.

The Red Book 1987 Edition lays stress on the Engineer’s neutrality: The Engineer shall exercise such discretion (for decision, opinion, consent, expression of satisfaction, approval, determination of value or action, etc) impartially within the terms of the Contract (Sub-Clause 2.6, 1987 Edition). If a dispute arises in connection with the contract or the execution of the Works, the matter in dispute shall be referred to the Engineer and the Engineer shall be responsible to make a decision on it. The MDB Edition does not adopt such a discretion for the Engineer and newly provides that the Dispute Board shall be responsible for fair decisions and that the Engineer, a member of the Employer (Sub-Clause 1.1.2.6), shall act for the Employer (Sub-Clause 3.1). The Engineer is, however, considered to be a qualified person who is competent to carry out duties specified in the contract (Sub-Clause 3.1). In claiming, the Engineer is obliged to make a fair determination based on the contract (Sub-Clause 3.5). If the Engineer continuously makes unfair determinations, such events would frequently be submitted to the Dispute Board, which would easily reverse the Engineer’s determinations by fair determinations. Such a situation is not eventually profitable even to the Employer due to the propagation of skepticism against the Engineer. Accordingly, it goes without saying that fairness is essential to the Engineer.

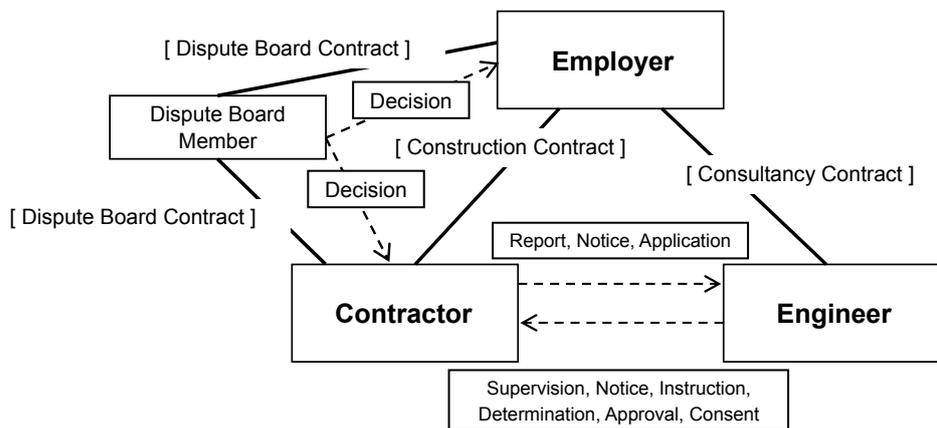


Figure 1: Concerned Party Structure (Red Book MDB Edition)

4) Claim and Dispute Settlement Procedure

Construction work is susceptible to many external influences such as variable subsurface and, metrological conditions as well as social, economic and environmental factors. It is impossible

to eliminate all uncertainties from construction work and unforeseen events are likely to occur during any lengthy construction period.

Under Red Book, the Contractor has an entitlement to extensions of time for completion of the work if he suffers delay from specified events and payment of qualifying additional cost he incurs as a result of such events. The Red Book sets out, in detail, a claims and dispute settlement procedure to cope with uncertainties involved in construction works.

Appendix-1 shows a flowchart of the claims and dispute resolution procedures under FIDIC Red Book MDB Edition.

5) Balanced Risk Allocation

It is said that the Red Book is drafted so as to allocate the risk to the contracting parties in a fair manner using the following principles:

- The party who can best manage the risk, takes such risk.
- Risks for which neither the Employer nor the Contractor can control, is in principle taken by the Employer as the initiator of the project.

6) Unit Price/Re-measurement Contract

The payment to the Contractor is based on the actual quantities of work done at the unit prices set out in the contract Bill of Quantities. The quantities set out in the contract Bill of Quantities are provisional estimates of the work to be done. The actual work quantities are measured by the Engineer in the presence of the Contractor. The Engineer certifies interim payment amounts on the basis of the measurement of the work carried out during the relevant period.

3. Factors which Create One-Sided Contract

In case that the General Conditions are revised and partially replaced by other expressions in the Particular Conditions Part – B, there would be four potential factors for one sided contracts as follows:-

- (1) The Contractor's contractual rights are unreasonably limited.
- (2) The Contractor's contractual responsibilities are unreasonably expanded, or the Employer's responsibilities are unreasonably reduced or shifted onto the Contractor.
- (3) The Engineer's determinations based on the Sub-Clause 3.5 are excessively restricted.

(4) Decision making acts by the Dispute Board are interfered.

Any of these four factors could increase the Contractor's risks regarding the contract.

Generally in governmental public works including Japanese ODA loan projects, the Employer, which is usually a governmental organization, tends to have an explicit advantage to the Contractor. Therefore, in order to eliminate one sided contracts, it is necessary to clearly state the responsibilities and the obligations of the Employer and the Contractor in the contract and establish a well-balanced relationship between the two Parties as well as to avoid any possibility of arbitrary interpretations and operations by the Employer.

1) Limitation of Contractor's Right

The entitlement to claim related to extension of the construction period or an additional cost (if an unforeseeable physical event occurs, or when there is a deviation from the contract provision not attributable to the Contractor) is one of the most important contractual rights given to the Contractor. If such entitlement is unreasonably restricted then the risk taken by the Contractor is increased.

The Red Book MDB Edition allows the Contractor to exercise his entitlement to extensions of time and consequent additional cost arises in the following situations:-

Table 1: Contractor's Claimable Events

	Event	Sub-clause	EoT ^{*1}	Add. Cost ^{*2}	Add. Benefit ^{*3}	Process
1	Delay of drawings and instructions by the Engineer	1.9	○	○	○	Engineer's determination under Sub-Clause 3.5
2	Limitation of right of access to the Site	2.1	○	○	○	Engineer's determination under Sub-Clause 3.5
3	Replacement of Engineer to an unsuitable person	3.4	-	-	-	Notice to Employer
4	Inaccuracy of setting out references	4.7	○	○	○	Engineer's determination under Sub-Clause 3.5
5	Unforeseeable Physical Conditions	4.12	○	○		Engineer's determination under Sub-Clause 3.5
6	Appearance of fossils	4.24	○	○		Engineer's determination under Sub-Clause 3.5
7	Not sufficiently competent nominated subcontractor	5.2	-	-	-	Notice to Engineer
8	Variation of testing instructed by the Engineer	7.4	○	○	○	Engineer's determination under Sub-Clause 3.5
9	Unreached the Engineer's instruction of Commencement of Works	8.1	○	○	○	Notice to Employer under Sub-Clause 16.2
10	Extension of Time for Completion caused by reasons in the Sub-Clause	8.4	○			Notice to Engineer under Sub-Clause 20.1

11	Reduction of delays resulting from Extension of Time for Completion under Sub-Clause 8.4	8.6		○		Notice to Engineer under Sub-Clause 20.1
12	Consequences of suspension instructed by the Engineer	8.9	○	○		Engineer's determination under Sub-Clause 3.5
13	Prolonged Suspension: omission	8.11		○	○	Notice to Engineer under Sub-Clause 13.1
14	Prolonged Suspension: contract termination	8.11		○	○	Notice to Employer under Sub-Clause 16.2
15	Taking over of parts of the Works by the Employer	10.2		○	○	Notice to Engineer under Sub-Clause 20.1
16	Interference with tests on completion by the Employer	10.3		○	○	Engineer's determination under Sub-Clause 3.5
17	Searching causes of a defect not responsible to the Contractor	11.8		○	○	Engineer's determination under Sub-Clause 3.5
18	Omissions forming a Variation under Sub-Clause 13.1	12.4		○		Engineer's determination under Sub-Clause 3.5
19	Value engineering	13.2	-	-	-	Engineer's determination under Sub-Clause 3.5
20	Adjustments for changing in legislation	13.7		○	○	Engineer's determination under Sub-Clause 3.5
21	Suspend Work under Sub-Clause 16.1	16.1	○	○	○	Engineer's determination under Sub-Clause 3.5
22	Termination under Sub-Clause 16.2	16.4	○	○	○	Notice to Employer
23	Loss or damage by Employer's Risks	17.4	○	○	○	Engineer's determination under Sub-Clause 3.5
24	Infringement of intellectual property rights	17.5	-	-	-	Notice to Employer
25	Force Majeure	19.4	○	○		Engineer's determination under Sub-Clause 3.5
26	Prolonged suspension by Force Majeure: termination	19.6	○	○		Notice to Employer
27	Event of Contractor's claim for Extension of Time or additional payment	20.1	○	○	○	Notice to Engineer
28	Disputes related to the Engineer's Actions	20.4	-	-	-	Reference to Dispute Board
29	Disputes unable to be settled by Decisions of the Dispute Board	20.7	-	-	-	Reference to Arbitration

Notes:

*1 : Extension of Time

*2 : Additional Cost

*3 : Additional Benefit

2) Expansion of Contractor's Responsibility or Reduction of Employer's Responsibility

The Contractor's contractual responsibility is considered to be increased unreasonably if no maximum amount is set for "Delayed Damages (Sub-Clause 8.7)" or an excessively long "Defects Notification Period (Sub-Clause 11.3)" is stipulated.

The following are typical examples of Employer's obligations and responsibilities under the FIDIC Red Book MDB Edition:-

- (1) Employer's responsibilities under Sub-Clause 1.13
- (2) The right of access to and the possession of the site under Sub-Clause 2.1
- (3) Assistance as to allow the Contractor to obtain permits, licences or approvals required by the Laws of the Country under Sub-Clause 2.2
- (4) Employer's financial arrangements under Sub-Clause 2.4
- (5) Accuracy of the original points, lines and levels of reference under Sub-Clause 4.7
- (6) Site Data made available by the Employer to the Contractor under Sub-Clause 4.10
- (7) Advance payment and Interim and Final payments under Sub-Clause 14.2, Sub-Clause 14.7
- (8) Indemnities against all claims, damages, losses and expenses in respect of the reason attributable to the Employer, the Employer's personnel or any of their respective agents under Sub-Clause 17.1
- (9) Taking Employer's Risks under Sub-Clause 17.4
- (10) Payment for additional costs due to Force Majeure, which is mentioned in the Contract under Sub-Clause 19.4
- (11) Appointment of the Dispute Board under Sub-Clause 20.2 (jointly with the Contractor)
- (12) Amicable settlement of disputes under Sub-Clause 20.5
- (13) Payment to the Dispute Board Member (equally shared by each Party) under Clause 6 General Conditions of Dispute Board Agreement, Appendix: Dispute Board

If any of the above items are excluded entirely or partially from the Employer's obligations or if such responsibilities are in all circumstances or even in certain specified circumstances transferred to the Contractor then the Contractor's contractual responsibilities would be considered to be increased unreasonably.

3) Restriction of the Engineer's Determination under Sub-Clause 3.5

As described in Chapter 2, the Red Book MDB Edition provides that, in case of time extension or additional cost, the Contractor has a right to claim it to the Engineer and that the Engineer shall consult with the both Parties on the matter in claim based on Sub-Clause 3.5 in order to come to an agreement. The sub-clause also provides that the Engineer shall make a fair determination in accordance with the Contract in case the consultation reaches an impasse.

The followings acts would be main factors for the restriction of the Engineer's determination.

- (1) To eliminate the wording “fair”, or to add a description that implies the necessity of an approval by the Employer prior to the Determinations in Sub-Clause 3.5.
- (2) To eliminate the wording “in accordance with Sub-Clause 3.5 [Determination]”, or to add a description that implies the necessity of an approval by the Employer for agreements and determinations in those sub-clauses (1.9, 2.1, 4.7, etc) which refer to Sub-Clause 3.5.

Any amendment like these examples would lead to the collapse of the base for a fair contract between the two parties and the Employer’s position would be excessively superior to the Contractor, which would result in the conclusion of an one sided contract.

4) Interference of the Dispute Board’s Decision Making

The MDB Edition entitles only Dispute Board an authority to give a decision for any dispute. The Dispute Board is accordingly obliged to be impartial and fair at high level. Clause 3 of General Conditions of Dispute Board Agreements”, which is an appendix of the General Conditions, provides that “The Member warrants and agrees that he/she shall be impartial and independent of the Employer, the Contractor and the Engineer.”

Therefore, change of the General Conditions like late or ad-hoc establishment of the Dispute Board, or elimination of the Dispute Board would be serious risks for the Contractor, as the changes may affect fair administration of the whole contract.

4. Motives for Making Contracts One-Sided

It is considered that there are four factors which could serve as motives for making a contract one-sided when preparing the Contract Documents: (i) the Employer’s lack of the budget of the construction work; (ii) lack of the Employer’s Understanding about the terms and conditions including appropriate allocation of rights and obligations, ability of contract management and sense of ownership; (iii) lack of the time and cost required for creating the Contract Documents; and (iv) attention to domestic laws and regulations, and domestic procedures.

1) The Employer's Lack of the Budget of the Construction Work

Even if the project cost is appropriately estimated at the initial stage of the planning of the Project, the budget earmarked may become insufficient by the time the execution of the

construction work is officially determined, and the preparation of the Contract Documents begins due to a rise in prices or a change in exchange rates.

The budget shortfall puts pressure on the reserve fund and the cost of the dispute adjudication board which are not stated in the specifications concerning the quantities bound in the Contract Documents. As a result, this serves as an incentive, for example, to restrain spending of the reserve fund by adding terms and conditions to the contract to limit the inspection of the quantities, extend the time to complete the construction work, or limit the payments of additional costs and related interests on one hand, and, on the other, to minimize the amount of payment to the dispute adjudication board by delaying the appointment of board members.

To avoid such circumstances, it is desirable to secure the predetermined amounts of the reserve funds and cost of the dispute adjudication board by means of reviewing the quotation of the construction cost prior to the creation of the Contract Documents, and cutting back the scope of the construction work or reconsidering the construction methods, if the cost is increasing.

2) Lack of Employer's Understanding about the Terms and Conditions including Appropriate Allocation of Rights and Obligations, Ability of Contract Management and Sense of Ownership.

The FIDIC Red Book appropriately takes the risk allocation into account. However, the lack of the Employer's understanding about the terms and conditions including appropriate allocation of rights and obligations, ability of contract management and sense of ownership would induce the Employer to shift his liabilities to the Contractor. If revisions are made to the Contract Documents to increase the interest of the Employer only, the rights of the Contractor will be undermined and the risk involved in the Project will increase, and the obligations of the Contractor will increase and the cost of the Project will increase. Eventually, the Project fails to be appropriately profitable, making good contractors reluctant to participate in the bidding.

As a result, it is likely that the Project goes to a contractor who presented a low bidding price because it did not investigate the terms and conditions carefully when preparing for the bidding, and that the contractor frequently puts forward claims so as to prevent unanticipated spending after commencement of the construction work.

For smooth progress of the construction work, it is important to secure a good, well-experienced, and responsible contractor. In order to do so, it is necessary to make the contract in consideration of the interests and risks of both the Employer and the Contractor, and form the terms and

conditions, from which the Contractor can expect appropriate profits so long as it provides quality work. It is considered that this arrangement will facilitate many responsible contractors to participate in the bidding, and naturally form fruitful competitive environments.

It is also important to let the Employer understand in early stage of project development that fair risk-allocated contract conditions eventually would be of benefit to him in many ways.

3) Lack of the Time and Cost Required for Creating the Contract Documents

The Contract Documents comprise not only the General Conditions and the Particular Conditions, but also various other documents, and these documents are mutually related. Thus, although the General Conditions stipulate the priority order among the documents, unless careful examinations are made at the time of producing the Contract Documents, problems could happen. For example, statements in a document given lower priority may turn out to be more reasonable than those in another document given higher priority. Although it is advised to refer to a certain document, but the statements in the document may turn out to be incomplete, or no such statements may be found in the document.

If any of these problems arises after the conclusion of the contract, in many cases, the Employer tends to have a stronger bargaining power and settle the problem to suit itself. In other words, uncertain or incomplete matters may be likely to become one-sided conditions unfavourable to the Contractor.

In order to eliminate these uncertain or incomplete matters, and deal carefully with questions from bidders during the bidding time, it is necessary to secure the budgets allowing to spend sufficient time on creation of the Contract Documents and to hire specialists well informed of contract management and engineers with a great deal of knowledge and experience of the construction work concerned.

4) Attention to Domestic Laws and Regulations, and Domestic Procedures

There are quite a few cases where the Employers are sensitive to the consistency with presidential orders, notifications issued by procurement committees, and laws and regulations of the country concerned, and make substantial change of the contracts by revising the terms and conditions completely to be modelled after the statements of these domestic laws and regulations or incorporating a large number of special conditions in the terms and conditions. There are also many cases where the Employers pay attention to the possibility of third parties to be involved in

the execution of the contracts in the form of, for example, approvals by the financial authorities at the time of payments, and relocation of local residents or acquisition of lands by municipalities where the project sites are located, and delete provisions concerning the related obligations which the Employers ought to assume or put restrictions on such obligations. It seems that many amendments to the terms and conditions due to the domestic laws are attributable to the fact that the Employers carelessly include provisions set forth in the domestic laws and regulations or replace provisions of the standard terms and conditions with those in the domestic laws and regulations, not fully understanding the meanings of the standard ones because they find them different from the terms and expressions used in the domestic laws and regulations. The standard terms and conditions are, in the first place, designed to encompass widely the rights and obligations of the Employer and the Contractor in a well-balanced manner, so that any substantial amendments could impair the basic structure of the terms and conditions and make them one-sided. Thus, it is advisable not to amend them significantly. The standard terms and conditions of FIDIC allows to incorporate supplementary provisions in the name of special conditions to meet the situation of individual contracts, but it is desirable for the parties concerned to call for legal advice and maintain the consistency of the terms and conditions of the contract as a whole. At the same time, where any deletion of or relief of the obligations of the Employer for purpose of paying attention to commitment of third parties is concerned, the Employer would be required to achieve consensus of the related parties in advance, to make efforts to prevent possible failure of duties and responsibilities stipulated in the Conditions of Contract, and to avoid amendments to the contract without careful considerations, which could make the contract partial.

It is important to figure out any possible discrepancies with the domestic law and the domestic procedures, and promote a better understanding of the Employer concerning the procurement procedures of ODA Loans including the standard General Conditions of Contract.

5. Commentary on Check List

The Check List to avoid one sided contracts when drafting the Conditions of Contract is as shown above. This section presents the interpretations of specific individual check points in accordance with the fundamental concepts of the FIDIC Red Book MDB Edition (*Sample Bidding Documents under Japanese ODA Loans, Procurement of Works*, June 2009).

The JICA “Sample Bidding Documents under Japanese ODA Loans, Procurement of Works”(June 2009) which should be referred to when drafting contract documents for Japanese ODA loan projects will be called the “Sample Bidding Documents” herein.

Check Point	1	Do the contract documents conform to the Sample Bidding Documents?
FIDIC Clause	Whole	
<p><Interpretation></p> <p>JICA recommends that bidding / contract documents for Japanese ODA loan projects should be prepared based on the Sample Bidding Documents. The Sample Bidding Documents incorporate the FIDIC Red Book MDB edition which the Multilateral Development Bank, MDB, commissioned FIDIC to edit by revising the 1999 Edition, de facto standard for international construction contract. This MDB Edition is considered to ensure a fair balance of risks between the Employer and the Contractor.</p> <p>There are projects for which local general and non standard conditions have been used in place of the Sample Bidding Documents. In such cases a “fair balance of risks” is not achieved and the experience is that various problems are likely to arise, such as:</p> <ul style="list-style-type: none"> ➤ It takes time to achieve the necessary understanding of the structure of the conditions of contract. ➤ The documents are likely to contain provisions deviating from usual international contractual practice. ➤ The documents are likely to fail to be sufficiently complete to be used as contract documents. <p>Bidding and contract documents should be drafted in accordance with the Sample Bidding Documents.</p>		

Check Point	2	Have the bidding and contract documents (including the Particular Conditions) been drafted and edited by experienced specialists?
FIDIC Clause	Whole	
<p><Interpretation></p> <p>As for the contract documents, the General Conditions stated in the Sample Bidding Documents, the</p>		

Particular Conditions which stipulate the conditions unique to the work required for a particular project, and a set of the documents which the parties finally approved of as the contract documents are mutually related to each other. To achieve this goal, the contract documents as a whole and the individual documents should be drafted and then edited by specialists in the relevant field. Such specialists shall also be familiar with construction work and contract management.

The General Conditions have been prepared by FIDIC. The Particular Conditions must be drafted with great care for the particular project cross checking and verification with the related clauses of the General Conditions and other contract documents.

The specialist carrying out the preparation of the bid and contract documents must be experienced construction professionals with the following attributes:

- (1) An overall knowledge of international construction contracts;
- (2) An understanding of the principles upon which the FIDIC Red Book has been drafted;
- (3) An understanding of the technical scope of the construction work to be executed;
- (4) A knowledge of construction cost estimates and time scheduling; and
- (5) A thorough command of the English language.

Check Point	3	Is the person appointed to be the Engineer a specialist employed by a competent consulting engineering company and not a member of the Employer's organisation?
FIDIC Clause	1.1.2	Parties and Persons
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>As described in Chapter 2, the Engineer is not a contracting party but it is expected that the Engineer plays a crucial role in the appropriate management of the project as stipulated in the FIDIC Red Book. The Red Book 1999 Edition provides that the Engineer is one of the Employer's Personnel (Sub-Clause 1.1.2.6), and that the Engineer is deemed to act for the Employer (Sub-Clause 3.1 (a)). But if the Engineer makes a determination which brings the Employer's benefit only, it would cause a dispute. Moreover, if the Engineer's determination is reversed by the Dispute Board which makes fair decisions, the contract operation would be interfered due to the propagation of skepticism against the Engineer.</p> <p>In some cases, the personnel or the entities belonging to the Employer sometimes held the Engineer's post concurrently. But, in such cases Employer's intention would be excessively reflected to the Engineer's determination. Therefore, it is desirable that the Engineer should be a specialist employed by a competent consulting engineering company and not a member of the Employer's organisation.</p>		

Check Point	4	Is the defects notification period for the Contractor set at "365 days" as defined in the Contract Data of the Sample Bidding Documents?
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FIDIC Clause	1.1.3	Dates, Tests, Periods and Completion
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>The defects liability period prescribed in the Contract Data is normally to be one year in the case of construction work of civil structures. Any amendment to clauses to extend the defects notification period and a consequent imposition of excessive risk on the Contractor may increase the bid price and make the project itself more costly for the Employer. Such amendment is also likely to tempt contractors to bid without a plan to handle the defects notification period, on the premise that they will not be able to recover the retention money. The Employer and the Contractor will avoid any amendment to clauses which is advantageous to neither of the parties.</p>		

Check Point	5	Is the "profit", if prescribed in the Contract Data, underrated?
FIDIC Clause	1.2	Interpretation
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>Construction work, especially civil engineering work, is strongly affected by the force of nature, so that the work in many cases fails to proceed as initially planned and designed. Therefore, the FIDIC Red Book is drafted so that the parties can amend the contents of the contract in accordance with specified changes in the conditions set out initially in the contract documents.</p> <p>This Sub-Clause makes this point clear as the Contractor is able to make a profit even if various amendments are made. This clarity serves as an incentive to the Contractor to make an effort to meet proactively the expectations of the Employer despite the occurrence of various factors adversely affecting the construction work.</p> <p>If this item is amended lower than the rate in the Contract Data, the Contractor would be driven to overcharge for their service to ensure a profit. Also the quality deterioration of the construction works might occur. This does not bring the Employer any benefit. Therefore, it is desirable to leave the rate as given in the Sample Bidding Documents unless the Employer can present reasonable grounds for setting a lower profit rate in the Instructions to Bidders.</p>		

Check Point	6	Is any international language specified as the “ruling language” or the “language for communications” for the contract?
FIDIC Clause	1.4	Law and Language
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>The ruling language and the language for communications are the means of linking all the parties concerned (the Employer, the Contractor and JICA) and thus important. Since JICA ODA loan projects are normally implemented under international biddings, the Contractor’s nationality will not necessarily be the same as that of the Employer. In addition JICA needs to understand the contents of the contract and the relevant communications. In this context, as for the ruling language or the</p>		

language for communications, the selection of other languages than English, French and Spanish, should be avoided in order that the Employer, the Contractor and the Bank should understand the language impartially.

Check Point	7	Is there any amendment to the priority order of documents, at the General Conditions?
FIDIC Clause	1.5	Priority of Documents
<p><Interpretation> Reference: the “Sample Bidding Documents”, Section IX</p> <p>The priority order of the Contract Documents stipulated in the present clause is as follows:</p> <ol style="list-style-type: none"> (1) the Contract Agreement (if any); (2) the Letter of Acceptance; (3) the Letter of Tender; (4) the Particular Conditions – Part A; (5) the Particular Conditions – Part B; (6) these General Conditions; (7) the Specification; (8) the Drawings; (9) the Scheduled and any other documents forming part of the Contract <p>Contract amendments such as "The document which describes the content in detail shall be given priority over a more general document." should be avoided. Such provisions, if included regardless of the definition of priority, would create uncertainty.</p> <p>In view of this Sub-Clause, additional provisions about the contents or the priority order of the Contract Documents in “(1) the Contract Agreement” should be drafted scrupulously so as not to make discrepancies and contradictions in the interpretation.</p>		

Check Point	8	Is any restriction imposed on the rights of the Contractor to claim an extension of time and/or additional cost for delayed drawings or instructions?
FIDIC Clause	1.9	Delayed Drawings or Instructions
<p><Interpretation></p> <p>The FIDIC Red Book MDB Edition, on which the General Conditions in the Sample Bidding Documents are based, relates “construction work designed by the Employer”. The Contractor may request the Engineer to issue the drawings and instructions concerning the designs. This Sub-Clause prescribes the procedures for the requests and handlings in the case where the drawings or instructions are delayed.</p> <p>If the Engineer delays issuing any drawings or instructions, the Contractor may either have to wait before he can commence preparation of detailed working drawings, or even delay starting the construction. The occurrence of these delays is a risk beyond the control of the Contractor, who will</p>		

be free from the risk.

In order to be fair the Employer ought not to remove the Contractor's rights to have relief for the period during which the drawings were delayed and receive the payment of any consequent cost.

Check Point	9	Is any restriction imposed on the rights of the Contractor to claim an extension of time and/or additional cost related to access to and possession of the Site?
FIDIC Clause	2.1	Right of Access to the Site
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>The Employer is responsible for any delay giving possession and access to the Site, and this is a matter which the Contractor cannot control. If there is a delay in either possession or access which affects the critical path of the work then a delay to the completion date is unavoidable.</p> <p>Any amendment to this Sub-Clause requiring the Contractor to bear this risk (which he cannot do anything to control) ought to be avoided. Namely any amendment to remove the Contractor's rights to have relief of an extension of time and consequent cost if there is a delay in the Employer giving possession and access to the Site makes the Contractor bear more cost or raise his bidding price. Responsible contractors may not submit a bid to works under contract with such amendment. This does not bring the Employer any good result. It is desirable to avoid such amendment.</p>		

Check Point	10	Is the specific nature of the Employer's assistance mentioned? Is there any deletion or reduction in the scope of the assistance?
FIDIC Clause	2.2	Permits, Licences or Approvals
<p><Interpretation></p> <p>This Sub-Clause prescribes the scope of assistance provided by the Employer concerning the acquisition of permits such as the customs clearance, the working permission, and the working visa, etc., which are necessary for the construction works, but gives no specific description of the nature of this assistance. Since the nature of assistance with which the Employer ought to provide the Contractor concerning the customs clearance varies depending on the country and the project, the nature of assistance will be described as detailed as possible in the Particular Conditions.</p> <p>Any deletion of or reduction in part of the scope of the assistance should be avoided as it may not only increase the obligation of the Contractor but may also affect implementation of the project.</p>		

Check Point	11	Is there any extension to the period of time during which the Contractor has a right to claim under a provision of the contract?
FIDIC Clause	2.5	Employer's Claims

<Interpretation>
 The notification period is 28 days same as the period for “Contractor’s Claims” under Sub-Clause 20.1. In order to be fair, the period should not be extended.

Check Point	12	Is the scope of authorities which the Engineer exercises at his discretion but is required to obtain a prior consent of the Employer clearly stated? Even so, is the scope designed to be unnecessarily wide?
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FIDIC Clause	3.1	Engineer's Duties and Authority
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<Interpretation> Reference: the Particular Conditions, Part A: Contract Data

As described in Chapter 2, the General Conditions of the Sample Bidding Documents prescribe various authorities to be exercised by the Engineer. These authorities are classifiable into the following categories:

- (1) Employer’s agent;
- (2) Certifier; and
- (3) Determiner in claim settlement

As for the above-mentioned (2), (a), (b), (c) and (d) in this Sub-Clause are conditions that require the Employer’s specific approval before taking action.. (b)(ii) gives the range of the Contract Amount change which requires the approval by the Employer. According to the Sample Bidding Document, the range is to be 10 to 15%.

The scope of the duties and authorities delegated to the Engineer is a large concern to the Employer since it is closely related to their budget management. However, if further conditions are given in addition to the above-mentioned (a), (b), (c) and (d), or the range is set to be less than 15% in (b)(ii), the Engineer’s authority would be interfered, which would lead to an one-sided situation.

Adding further conditions to the Sample Bidding Documents that require specific approval by the Employer is not recommended, unless there is a very special reason.

If specific approval is required even for the Engineer’s authority provided in Sub-Clause 3.5, the Contractor might assume that it is not possible to get any Engineer’s "fair determinations" and might anticipate an increased cost risk in the execution of the project. This anticipation might push up the bidding price and is likely to adversely affect the Employer’s budget.

Check Point	13	Is the Employer involved in the process of the Engineer’s instructions?
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FIDIC Clause	3.3	Engineer’s Instructions
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<Interpretation>

Sub-Clause 3.5 provides general descriptions on the authority and the process of the Engineer's instructions.

If the necessity of specific approval by the Employer is added to those set out in the Sample Bidding Documents, then it will signal to the Contractor that it is the Employer's intention to interfere in different aspects of the project. This anticipation might lead the Contractor to assume a one sided situation and for this reason, such amendment is not recommended.

Check Point	14	Has the Contractor's right to raise an objection to the replacement of the Engineer been limited?
FIDIC Clause	3.4	Replacement of the Engineer
<p><Interpretation></p> <p>When the Contractor considers that the person nominated by the Employer to replace an incumbent Engineer is inappropriate, then the Contractor can raise an objection. The Employer shall give full and fair consideration to the objection.</p> <p>If the Contractor's right of objection is limited then the situation can be considered unfair to the Contractor as such limitation would place hurdles to prevent from assignment of the Engineer any person who is out of fairness required under Sub-Clause 3.5.</p> <p>Therefore, any amendment to limit the Contractor's right to raise an objection or to reduction the Employer's obligation to deal with such an objection appropriately should be avoided.</p>		

Check Point	15	Is any restriction imposed which could interfere with a fair determination made by the Engineer in accordance with the Contract?
FIDIC Clause	3.5	Determinations
<p><Interpretation></p> <p>This Sub-Clause provides that the Engineer shall consult with both parties on the Contractor's claim for concluding a mutual agreement. In case that the consultation reaches an impasse, a "fair" determination shall be made based on the contract. The Employer and the Contractor should respect the Engineer's determinations and they are binding unless and until the dispute is being dealt with under Sub-Clause 20. The Engineer shall not delegate the authority to determine any matter without a mutual agreement of the both Parties. (Sub-Clause 3.2).</p> <p>If there is any interference to the Engineer's ability to make "fair determinations based on the Contract" then there is a risk of a cost increase in all the contract provisions requiring determinations under Sub-Clause 3.5. This would lead not only to pressure to drive up the bidding prices, but would also discourage competent construction companies from participating in the bidding process for the project. Therefore any amendment to Sub-Clause 3.5 regarding the Engineer's authority to make a</p>		

“fair determination” or a diminution of the status of the Engineer’s determination should be avoided.

Check Point	16	Are the general obligations of the Contractor extended, for example by placing on the Contractor the Employer’s responsibility for the design?
FIDIC Clause	4.1	Contractor's General Obligations
<p><Interpretation> The FIDIC Red Book MDB edition, which the Sample Bidding Documents incorporate as the General Conditions, sets out terms and conditions of contract based on the “construction works designed by the Employer”. Any amendment which upsets the balance of risk between the Employer and the Contractor by shifting the responsibility for structure design onto the Contractor should be avoided as such amendment makes the Contractor bear unreasonable risk.</p>		

Check Point	17	Are the amount and the validity period of the performance security appropriate for the project?
FIDIC Clause	4.2	Performance Security
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data and Appendix The performance security in the FIDIC Red Book MDB Edition secures the proper performance of the Contractor until the Contractor has executed and completed the works and remedied any defects. The security shall be valid until the Defect Notification Period expires. The validity period shown in the performance security shall correspond to the Defect Notification Period.</p> <p>The amount of performance security recommended in the Handbook for Procurement under Japanese ODA Loans (March 2009) is from 5 % to 15 % of the contract price. Many projects have performance security of 10% of the contract price. The appropriate level of performance security should be within this range.</p>		

Check Point	18	Are the general obligations of the Contractor extended, for example by giving the Contractor the obligation for the accuracy of the original setting out points, lines and levels for the work?
FIDIC Clause	4.7	Setting Out
<p><Interpretation> Any amendment which makes the Contractor assume responsibility for the accuracy of the original setting out points, lines and levels prepared by the Engineer should be avoided. The standards which the Employer applied to the designs should conform completely to the standards used for the realisation of the work.</p>		

Check Point	19	Is the Contractor forced to assume the more responsibility for the Site Data than set out in the General Conditions?
FIDIC Clause	4.10	Site Data
<p><Interpretation></p> <p>Bidders require time to carry out the measurements, surveys and estimations necessary to prepare a bid based on the data and information provided in the Invitation to Bid prepared by the Employer and Engineer. The measurements, surveys and estimations are also very expensive. Therefore a condition that the Employer has excessive expectations of the extent to which it was practicable for the Contractor to estimate inevitably leads to an imbalance of risk distribution.</p> <p>Sub-Clause 4.10 describes various matters which the Contractor is assumed to understand at the time when he submits the bidding documents. The Contractor's responsibility is limited "to the extent which was practicable (taking account of cost and time)". This is a rational limitation of the extent of the Contractor's ability to assess cost and risk.</p> <p>Therefore, if the phrases "to the extent which was practicable (taking account of cost and time)" or "to the same extent" are omitted or amended, too much responsibility would be distributed to the Contractor beyond that which he could control or manage. This would result in the bid price being increased by the inclusion of risk contingency or competent bidders declining to bid. Any amendment to eliminate these limiting phrases should be avoided.</p>		

Check Point	20	Is there any restriction on the Contractor's right to recover both the additional costs of unforeseeable physical conditions and an extension of time to complete the works?
FIDIC Clause	4.12	Unforeseeable Physical Conditions
<p><Interpretation></p> <p>"Unforeseeable" means not reasonably foreseeable by an experienced contractor. (Sub-Clause 1.1.6.8) The risks for Unforeseeable Physical Conditions lie on the Employer's side and the Contractor is supposed to have a right to claim additional costs and extension of the Time for Completion (Sub-Clauses 17.3 & 17.4). If the Contractor is required to assume the obligation for Unforeseeable Physical Conditions then it is a possibility that a bidder would be selected who could neither foresee the risk nor who could manage the consequences. In addition an experienced bidder who could foresee such risk would estimate the cost for the risk management and would not be selected or even refuse to tender at all. Any amendment that restricts the Contractor's rights regarding unforeseeable physical conditions should be avoided.</p> <p>This Sub-Clause is closely related to Sub-Clause 4.10. If a specific condition is not set out in the Employer's Invitation to Bid (for example tender information or contract documents) and an experienced bidder could not practically discover (by survey or inspection taking into account time</p>		

of tender and cost) then this condition ought to be considered as "unforeseeable".

One effective and practical way of avoiding a dispute over Sub-Clause 4.12 is that the Employer ought to conduct appropriate surveys prior to issuing the Invitation to Bid. This data could then be disclosed to all the bidders.

Check Point	21	Is any restriction imposed on the right of the Contractor regarding this Sub-Clause?
FIDIC Clause	4.24	Fossils
<p><Interpretation></p> <p>This Sub-Clause provides the Contractor's right to claim for the increase of the cost and request the extension of the time limit following the Engineer's instructions, in case that fossils, relics, or ruins are found.</p> <p>If such a cost is charged to the Contractor, or if the Contractor's right to claim for the additional payment and the extension of Time for Completion is restricted, this would result in the bid price being increased by the inclusion of risk contingency or competent bidders declining to bid. Such amendments that would not bring both of the Employer and Contractor any good result should be avoided.</p>		

Check Point	22	Is any restriction imposed on the right of the Contractor to raise reasonable objection to nomination of subcontractors? Or is the provision concerning the objection deleted?
FIDIC Clause	5.2	Objection to Nomination
<p><Interpretation></p> <p>Nominated Subcontractors have the same obligations and responsibilities as the Contractor's other subcontractors ensure that the Contractor has the obligation to perform the contract for the Employer.</p> <p>Any amendment to the contract which prevents the Contractor from being able to reject the nomination of a subcontractor ought to be avoided. If the Contractor is reluctant to conclude an agreement with a subcontractor nominated by the Employer because for example that subcontractor will not assume a particular obligations this is likely to increase the possibility of the Contractor failing to comply with the time schedule or satisfy the quality requirements.</p> <p>Any amendment that restricts the Contractor's right to select its subcontractors should be avoided, as it may reduce the Contractor's power to manage the works and thereby control quality of work and cost.</p>		

Check Point	23	Is there any restriction on the Contractor's right to claim a time extension and additional costs for changes for testing?
FIDIC Clause	7.4	Testing
<p><Interpretation></p> <p>The Engineer can instruct the Contractor to make changes, including location or details of the testing. However, if there were no problems with the testing results, the effects on the time period or costs that occur from these instructions should not be the responsibility of the Contractor and the Contractor is entitled to claim for the time and costs. Any amendment that forces the Contractor to bear the cost or restricts the Contractor's right to claim the cost should be avoided as this would make the Contractor bear uncontrollable risk.</p> <p>Sub-Clause 7.5 already makes the Contractor responsible for the time and cost consequences if is any problem with the testing results.</p>		

Check Point	24	Are there any one-sided items stated in the Particular Conditions or other contract documents regarding the Commencement of Works or the Commencement Date of Works?
FIDIC Clause	8.1	Commencement of Works
<p><Interpretation></p> <p>This Sub-Clause provides conditions on the commencement of Works. Any amendment that eliminates the Employer's tasks such as giving the Contractor possession of the site, or delivering to the Contractor of evidence of the Employer's Financial arrangement should be avoided, as the Contractor would be obliged to start the works without appropriate conditions and bear the risk that it can not control by its efforts.</p> <p>Any amendment that restricts the Contractor's right to terminate the contact if the Engineer does not fulfil these obligations should be avoided. This would result in the Contractor having to keep the workforce, and construction equipment mobilised without the possibility of progressing the Works and recovering such cost. This would lead a significant financial loss to the Contractor and competent contractors would feel loath to tender.</p>		

Check Point	25	Is any restriction imposed on the Contractor's right to claim an extension of Time for Completion?
FIDIC Clause	8.4	Extension of Time for Completion
<p><Interpretation></p> <p>The construction works shall be managed following the programme stipulated in Sub-Clause 8.3. In case that any of causes stated in this Sub-Clause affects the progress and makes the Works impossible to be completed within the Time for Completion, the Contractor is entitled to claim for an extension of time. Any amendment that restricts or removes the Contractor's right to request from the</p>		

Engineer an extension of time for the completion of the Work should be avoided as it would require the Contractor to bear the risk that the Contractor cannot control.

Check Point	26	Are the Delay Damages which would be imposed on the Contractor for delay in the completion of the Work set at a reasonable amount? Does the amount of Delay Damages exceed the maximum amount shown in Contract Data included in the Sample Bidding Documents?
FIDIC Clause	8.7	Delay Damages
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data The Handbook for Procurement under Japanese ODA Loans (March 2009) recommends the amount of Delay Damages as 0.1% per day and 0.5% per week of the Contract Price with a maximum amount 10% of the Contract Price.</p> <p>If the Delay Damages are set at a higher amount then the Contractor may price a contingency in the bidding price. If no delay in the Works actually occurs, the cost to the Employer is unnecessarily high. In addition competent contractors would feel loath to bid for the contract to avoid this risk.</p>		

Check Point	27	Is any restriction imposed on the Contractor's right to suspend the Works for specific events?
FIDIC Clause	8.9	Consequences of Suspension
<p><Interpretation> Sub-Clause 8.8 specifies that the Contractor has the right to an extension of time for completion of the Works and recovery of the additional costs incurred by the Employer suspending the Works not caused by any act of the Contractor. Any restriction of the Contractor's rights under this Sub-Clause would oblige the Contractor to take the risk which the Contractor cannot control. Any amendment that restricts or takes away these rights from the Contractor should be avoided.</p>		

Check Point	28	Is any restriction imposed on the Contractor's rights to be compensation for suspension of Work?
FIDIC Clause	8.10	Payment for Plant and Materials in Event of Suspension
<p><Interpretation> In Sub-Clause 8.10(b) the handling of the Plant and Materials in the case of suspension is stipulated. Such that the Contractor labels and the Employer can take possession of the Plant and Materials regardless of the reason for the suspension of Work, thus allowing payment to be made. If Sub-Clause 8.10(b) is deleted or amended the Contractor would be forced to bear the risk of loss of plant and materials in addition to having to maintain the Performance Security and being held out of Retention Money. This would lead to a significant financial loss to the Contractor. Therefore, such an amendment should be avoided.</p>		

Check Point	29	Is any restriction imposed on the Contractor's rights to terminate the Contract due to prolonged suspension of Work?
FIDIC Clause	8.11	Prolonged Suspension
<p><Interpretation></p> <p>Sub-Clause 8.11 specifies that the Contractor has the right to terminate the Contract if any suspension under Sub-Clause 8.8 (not as a result of an act of the Contractor) lasts for more than 84 days. It is not reasonable to hold the Contractor at risk during a suspension for a prolonged period. The Contractor would be required to keep the workforce and the construction equipment mobilised without any possibility to complete the Works. This would lead a significant financial loss to the Contractor and competent contractors would feel loath to tender. Therefore, any amendment that eliminates the Contractor's right to terminate the Contract should be avoided.</p>		

Check Point	30	Have onerous changes or additions, prejudicial to the Contractor been made to the process of Taking Over of the Works?
FIDIC Clause	10.1	Taking Over of the Works and Sections
<p><Interpretation></p> <p>If the Sub-Clause 10.1 provisions are amended to imply that the Engineer's right to issue the Taking Over Certificate is subject to the prior approval of the Employer then this is likely to indicate that the Employer view's will be too strongly reflected and unnecessarily makes the contract onerous and unfair. Such an amendment should be avoided as it is contrary to the philosophy of the FIDIC Red Book which aims at an appropriate risk distribution.</p>		

Check Point	31	Has the Contractor's scope of responsibility for remedying defects been expanded unfairly?
FIDIC Clause	11.1	Completion of Outstanding Work and Remedying Defects
<p><Interpretation></p> <p>The Sub-Clause states that "fair wear and tear" shall be "excepted" from the condition required by the Contract. Such "wear and tear" is not an item that can be controlled or managed by the Contractor. This provision is a reasonable stipulation.</p> <p>If the Contractor's responsibility is expanded to include the defects which are not caused by the Contractors fault(s) the bidding price will be higher than necessary which will not benefit the Employer. In addition competent contractors will feel loath to bid. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.</p>		

Check Point	32	Have changes been made so that the Defects Notification Period can be extended indefinitely?
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FIDIC Clause	11.3	Extension of Defects Notification Period
<p><Interpretation></p> <p>Sub-Clause 11.3 specifies the defects notification period as up to two years, even if the defect is attributable to the Contractor. If the defects are not remedied within a two year period then the Employer can employ other contractors to remedy the defects utilising the Retention Money or the Performance Security. The MDB Edition contains checking and testing provision to ensure that defects shall be identified prior to Taking Over. If the Defects Notification Period is set to be indefinite, the Contractor would be obliged to bear an uncertain risk and the bidding price will be higher than necessary which will not benefit the Employer. In addition competent contractors will feel loath to bid. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.</p>		

Check Point	33	Is any restriction imposed on the Contractor's right when he has the obligation to search for the cause of defects and recover cost and the related profit if the defect is not attributable to the Contractor?
FIDIC Clause	11.8	Contractor to Search
<p><Interpretation></p> <p>This Sub-Clause provides the Contractor's right to claim the additional cost including a proper profit for a research instructed by the Engineer in case that the defect proved to be not attributable to the Contractor.</p> <p>If the cost and the profit of any additional search costs are not reimbursed, then the Contractor would be obliged to bear this uncertain risk. The bidding price will be higher than necessary which will not benefit the Employer. In addition competent contractors will feel loath to bid. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.</p>		

Check Point	34	Have changes or additions been made in conditions for new rates or price additions that are unfair to the Contractor?
FIDIC Clause	12.3	Evaluation
<p><Interpretation></p> <p>Sub-Clause 12.3(a) provides that any increase or decrease in the measurement of the quantities actually executed up to a certain fixed percentage agreed by the Employer and the Contractor to be an acceptable risk. If the increase or decrease is exceeded such percentage, the new rate or price should be determined.</p> <p>If the percentage is too small, the adoption of new rates or price additions would need to be of more frequent, which is troublesome for both the Employer and the Contractor.</p> <p>The conditions shown in the General Conditions of the Sample Bidding Documents are generally</p>		

accepted, and changes without a clear basis should be avoided.

Check Point	35	Is the rate applied in sub-paragraph (b) (ii) appropriate?
FIDIC Clause	13.5	Provisional Sums
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>The following items are included in the sub-paragraph (b) (ii) of Sub-Clause 13.5.</p> <ol style="list-style-type: none"> (1) Work expenses: personnel and labour costs, provisional overhead costs, overhead costs, etc. (2) Head and branch office expenses (3) Profit <p>If the allowed rate is low, then an adequate allowance for overhead and profit cannot be secured when carrying out work for Provisional Sums. Accordingly it can be presumed that in general, a company providing high-quality workmanship will have a higher rate.</p> <p>The sub-paragraph (b) (ii) provides the method of this rate setting. Any amendment that allows excessively low rates in the Contract Data without adopting the rates based on the Bill of Quantity submitted by the Contractor should be avoided as competent contractors would feel loath to bid for the contract.</p>		

Check Point	36	Is any restriction imposed on the Contractor's right to claim a time extension or additional costs?
FIDIC Clause	13.7	Adjustments for Changes in Legislation
<p><Interpretation></p> <p>No Contractor is able to reflect, in its bid amount, changes in legislation after the Base Date. This is out of the Contractor's control. Therefore this Sub-Clause allows the Contractor to request an extension of time for completion of the works and to have re-imburement of any increase in cost so caused. If this right is restricted or eliminated, the Contractor would be obliged to bear an uncertain risk. Risk related to changes in legislation is considered to be serious and cannot be unconditionally accepted. If there is no protection from this risk then competent contractors would feel loath to bid for the contract. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.</p>		

Check Point	37	Is this clause valid for Work in which the construction period is set one year or more and a table of adjustment data is included in the Schedules? Is an appropriate table of adjustment data included in the contract documents?
FIDIC Clause	13.8	Adjustments for Changes in Cost
<p><Interpretation> Reference: the Specification and the Particular Conditions, Part A: Contract</p>		

Data

If suitable table of adjustment is not included in the Schedules despite a construction period of more than one year, or the Sub-Clause significantly modified, then the Contractor will be forced to increase the bid price, which is not in the interests of the Employer. In addition competent contractors will feel loath to bid for the contract. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.

Check Point	38	Has an excessive obligation been forced on the Contractor with regard to amortisation of the advance payment?
FIDIC Clause	14.2	Advance Payment
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data and Appendix</p> <p>The Advance Payment is made to finance the Contractor’s mobilisation of construction machines, carry out site preparation, carry out construction of temporary works then strengthen the Contractor’s cash flow etc; until the first interim payment. This Sub-Clause provides the process and the timing of the amortisation of the advance payment. Any amendment that requires the commencement of the amortisation of the advance payment or the time limit for payment should be avoided as this would distort the original meaning of the advance payment.</p>		

Check Point	39	Has an appropriate percentage for the Retention Money been specified in line with the Contract Data in the Sample Bidding Documents?
FIDIC Clause	14.3	Application for Interim Payment Certificates
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>The Handbook for Procurement under Japanese ODA Loans (March 2009) recommends that Retention Money should be in the range of between 5% and 10% of the Contract Price. This figure is generally accepted as the current international construction market level.</p> <p>If the Retention Money percentage is set higher, then the Contractor’s requirement to finance this retention would increase and the finance cost would increase the tender. Competent Contractors would feel loath to bid for the contract. Therefore, it is appropriate to set a percentage in line with the Standard Bidding Documents recommendations.</p>		

Check Point	40	Is the Engineer’s task of Sub-Clause 14.6 shifted to the Employer? Is any restriction imposed on the Contractor’s rights by the Engineer extending the Interim Payment Certificate issuance deadline?
FIDIC Clause	14.6	Issue of the Interim Payment Certificates
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data</p> <p>This Sub-Clause provides that the time limit of the Interim Payment Certificate issue is set to be</p>		

within 28 days.

If this time limit is specified to be more than 28 days, the Contractor's cash flow will be adversely affected and financing costs increased. In addition payments by the Contractor to their subcontractors would be affected. Competent contractors would feel loath to bid for the contract. If this task is shifted from the Engineer to the Employer, the Employer would be involved and meddle in the daily consultations between the Engineer and the Contractor, which lead to the Contractor's suspicion of the Engineer, or unexpected delay of the works. Such amendments increasing financing costs should be avoided.

Check Point	41	Is any restriction imposed on the Contractor's rights by prolonging the Payment deadline?
FIDIC Clause	14.7	Payment
<p><Interpretation></p> <p>This Sub-Clause provides the time limit within which the Advance Payment, the Interim Payment and the Final Payment must be made.</p> <p>If an amendment that provides the extension of the time limit, the Contractor's cash flow will be adversely affected and financing costs increased. In addition payments by the Contractor to their subcontractors would be affected. It would cause the increase of the bidding price and competent contractors would feel loath to bid for the contract. Such amendments increasing financing costs should be avoided.</p>		

Check Point	42	Is any restriction imposed on the Contractor's rights by eliminating financing charges for delayed payment?
FIDIC Clause	14.8	Delayed Payment
<p><Interpretation></p> <p>Any delayed payment by the Employer would result in the Contractor incurring interest costs not estimated at the time of tender. Payment of this cost by the Employer is fair and sensible.</p> <p>Any amendment that removes the right of the Contractor to receive financing charges for delayed payment would force the Contractor to pay interest which the Contractor cannot control or manage. Such an amendment might require bidders to increase the bidding price and competent contractors would feel loath to bid for the contract. Such amendments increasing financing costs should be avoided.</p>		

Check Point	43	Is there any restriction imposed on the Contractor's rights with regard to the suspension of Works and to extension of the Time for
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		Completion and an additional cost due to a reason attributable to the Employer?
FIDIC Clause	16.1	Contractor's Entitlement to Suspend Work
<p><Interpretation></p> <p>This Sub-Clause gives the Contractor rights relating to the suspension of Works due to the Employer's default and to a right to request extension of time for completion of the works and consequential additional cost.</p> <p>Any amendment that restricts or repeals these rights would force the Contractor to bear more cost. This would require bidders to increase the bidding price and competent contractors would feel loath to bid for the contract. It does not bring the Employer any good result. Amendments that upset the balance of risk between the Employer and the Contractor should be avoided.</p>		

Check Point	44	Have changes that are disadvantageous to the Contractor been made regarding conditions in which the Contractor can terminate the contract and/or those procedures?
FIDIC Clause	16.2	Termination by Contractor
<p><Interpretation></p> <p>This Sub-Clause provides the Contractor's right to terminate the contract due to a reason attributable to the Employer.</p> <p>Any amendment that restricts or repeals these rights would force the Contractor to bear the risk that the Contractor can not control by its efforts. The Contractor's cost would be increased and the bidding price would be pushed up. Experienced and qualified candidates would feel loath to bid for the contract. Judging from the viewpoint of proper risk distribution, such an amendment should be avoided.</p>		

Check Point	45	Are the Contractor's obligations being expanded excessively by shifting the Employer's risks to the Contractor? Is any restriction imposed on the Contractor's right related to the extension of the construction period and the additional cost attributable to the Employer?
FIDIC Clause	17.3	Employer's Risks
FIDIC Clause	17.4	Consequences of Employer's Risks
<p><Interpretation></p> <p>This Sub-Clause provides the Employer's risks and the Contractor's right to request a time extension and additional payment due to damages and losses caused by the risks.</p> <p>If Employer's risks are shifted onto the Contractor, or the Contractor's right related to extension of the Time for Completion and additional costs due to the risks is restricted or eliminated, then bidders</p>		

are forced to increase the bidding price. Also competent contractors would feel loath to bid for the contract. Such amendments not beneficial to either the Employer or the Contractor should be avoided.

Check Point	46	Has the definition of Force Majeure been narrowed? Is any restriction imposed on the Contractor's right related to the extension of the construction period and the additional cost that originate from Force Majeure?
FIDIC Clause	19.1	Definition of Force Majeure
FIDIC Clause	19.4	Consequences of Force Majeure
<p><Interpretation></p> <p>This Sub-Clause 19.1 provides for "Force Majeure" and Sub-Clause 19.4 stipulates the Contractor's right to request a time extension and additional payment due to "Force Majeure".</p> <p>If the interpretation of "Force Majeure" is unfairly limited, or the Contractor's right related to the extension of the construction period and the additional cost that originate from "Force Majeure" is restricted or eliminated, then the bidders might increase the bidding price because of the risks that the Contractor cannot control or manage. Competent bidders would feel loath to bid for the contract. Such amendments not beneficial to either the Employer or the Contractor should be avoided.</p>		

Check Point	47	Have changes that are disadvantageous to the Contractor been made regarding conditions in which the Contract can be optionally terminated and/or those procedures?
FIDIC Clause	19.6	Optional Termination, Payment and Release
<p><Interpretation></p> <p>This Sub-Clause provides for the rights of the Employer and Contractor, the procedure to be completed by the Contractor, and the procedure for payment of claims.</p> <p>If the Contractor's rights related to the aforesaid matters are restricted or eliminated, then bidders might increase the bidding price because of the risks that the Contractor cannot control or manage. This is not even beneficial to the Employer from any financial point of view. Competent bidders would feel loath to bid for the contract. Such amendments not beneficial to either the Employer or the Contractor should be avoided.</p>		

Check Point	48	Any amendment to shorten the notification period related to the procedure for the notification of claims?
FIDIC Clause	20.1	Contractor's Claims
<p><Interpretation></p>		

The Contractor requires some time to prepare any claim documents. The Employer requires to receive notification of an intention to claim at the earliest possible time once the necessity of a claim has arisen to verify the notified claim. This Sub-Clause provides that the notification period should be 28 days, which is a period generally adopted for many construction contracts.

Any amendment to shorten the notification period would lead to the Contractor's increasing the bidding price due to the necessity to increase its contract management staff. Also any increase in unsatisfactory claim documents attributable to lack of time would cause the Employer trouble as well. Such amendments not beneficial to either the Employer or the Contractor should be avoided.

Check Point	49	Is the deadline for the establishment of a Dispute Board set in the Contract Data written as "28 days after the Commencement date," as is shown in the Contract Data of the Sample Bidding Documents?
FIDIC Clause	20.2	Appointment of the Dispute Board
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data As described in Chapter 2, the Red Book from the 1999 Edition provides that all disputes arising from the construction works are to be referred to the Dispute Board which is obliged to, for any case, be impartial and independent of the Employer and the Contractor.</p> <p>Any amendment related to the prolongation of due date of the Dispute Board appointment, appointment after dispute arising, or the elimination of a Dispute Board would lead to a serious situation where the function to make a fair and impartial decision is absent, that is not in line with the very basis of Red Book MDB Edition. It is possible that any bidder might consider this kind of risks to be a serious one, and competent contractors would feel loath to bid for the contract. Therefore such an amendment should be avoided.</p>		

Check Point	50	Are the nominated entities or officials stated clearly in the Contract Data? Are those entities/officials impartial towards both Parties?
FIDIC Clause	20.3	Failure to Agree on the Composition of the Dispute Board
<p><Interpretation> Reference: the Particular Conditions, Part A: Contract Data If both parties fail to reach an agreement on the nomination of Dispute Board members, it is necessary for the entities entrusted with nomination to be impartial towards both Parties.</p> <p>It is desirable to nominate members to the Dispute Board from the organizations that are internationally considered to be "neutral" as shown below.</p> <ol style="list-style-type: none"> (1) International Chamber of Commerce (ICC) (2) Fédération internationale des ingénieurs-conseils (FIDIC) (3) Arbitration organizations in countries without interests in either Party <ul style="list-style-type: none"> ➤ London Court of International Arbitration, others 		

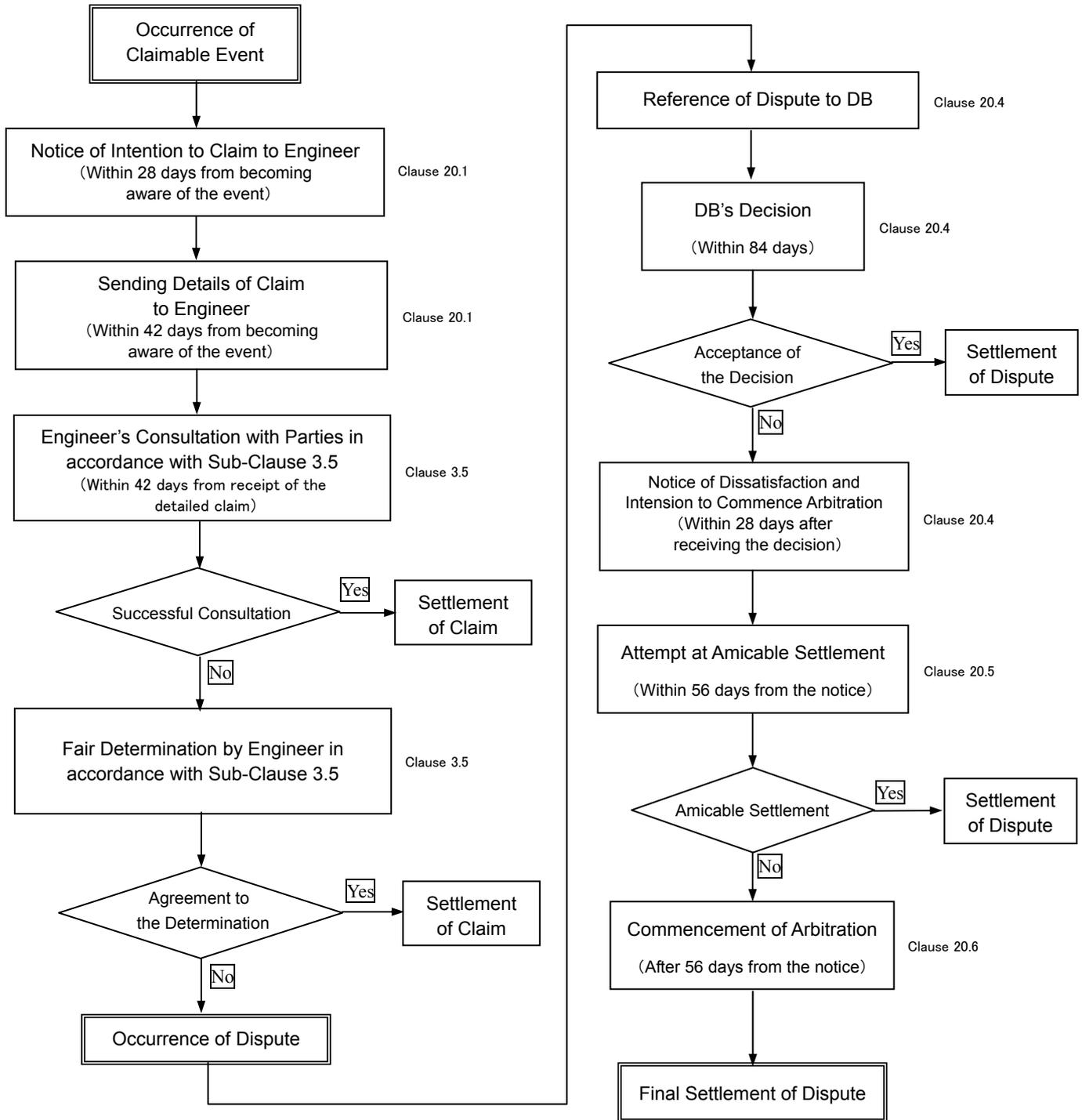
Check Point	51	Is the arbitration institution set in the Contract Data in the case that the Contractor requires international arbitration for foreign contractors written as the “International Chamber of Commerce,” as is shown in the Sample Bidding Documents?
FIDIC Clause	20.6	Arbitration
<p><Interpretation></p> <p>It is necessary for the arbitration institution to be impartial towards both Parties. The International Chamber of Commerce (ICC) noted in the Contract Data of the Sample Bidding Documents complies with this.</p> <p>If ICC is not selected for arbitrator, then another entity should be selected among the organizations with capacity equal to ICC that are internationally considered to be “neutral”.</p>		

Check Point	52	Have changes in the policy of “impartial charge” been made regarding payment to the Dispute Board Members?
FIDIC Clause	Appendix	General Conditions of the Dispute Board Agreement
<p><Interpretation> Reference: the General Conditions, Appendix</p> <p>The basis for the Dispute Board Members’ essential impartiality towards both Parties lies in the fact that the burden of remuneration and costs accompanying activities of the Dispute Board Member is divided equally between the Employer and the Contractor. Therefore, any amendment to change the policy for cost sharing should be avoided.</p>		

Appendix

Appendix – 1

Procedure of Claim and Dispute Settlement (FIDIC Red Book MDB Edition)





JAPAN

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