



WORLD BANK GROUP



MWH®

# Hydro Asia 2016

Training Course on

**Contracts Management**

**and the Practical Use of**

FIDIC Conditions of Contract in the Hydropower  
Construction Industry



**Session 3**

by *Zoltán Záhonyi*, FIDIC AIT, [zoltan.zahonyi@zandpartners.com](mailto:zoltan.zahonyi@zandpartners.com)

Sunday February 28 and Monday February 29, 2016

VIENTIANE, LAOS

# Contents of Session 3

**The Quality Issues (Plant, Materials and Workmanship)** 1

**The Time is of Essence (Commencement, Delays and Suspensions)** 2

**Completion and Taking-Over** 3

**Defects Liability** 4

**Accepted Contract Amount / Contract Price** 5

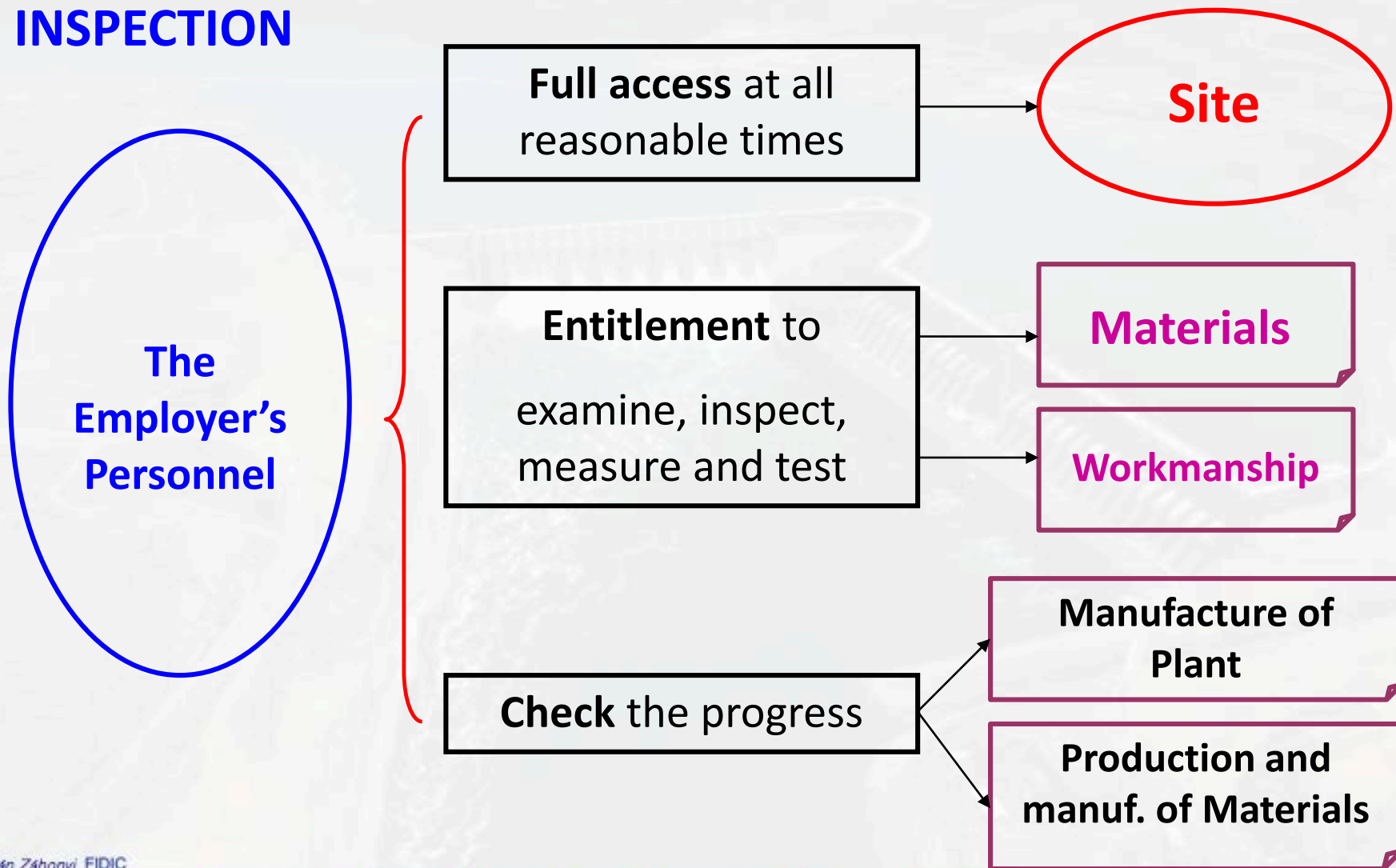
**Measurement and Valuation** 6

**Payment Procedures** 7

**Risk and Responsibility, Force Majeure and Insurance** 8

# 1. The Quality Issues (Plant, Materials and Workmanship)

## INSPECTION



# 1. The Quality Issues (Plant, Materials and Workmanship)

- ▶ Whenever any work is **ready** and before it is covered up, put out of sight, or packaged for storage or transport the **Contractor** shall give

**NOTICE**

to the **Engineer**, who shall

carry out the  
examination

**OR**

promptly give notice\*

\* about declining attendance

- ▶ **Consequences** of Contractor's failure to comply (uncovering, reinstating and making good – at the Contractor's costs).

# 1. The Quality Issues (Plant, Materials and Workmanship)

## ► Testing

**RESULT of**

- » Examination
- » Inspection
- » Measurement
- » Testing

**REQUIRED**

OR not in accordance with the Contract



The **Engineer** may **REJECT**  
(with reasons!)



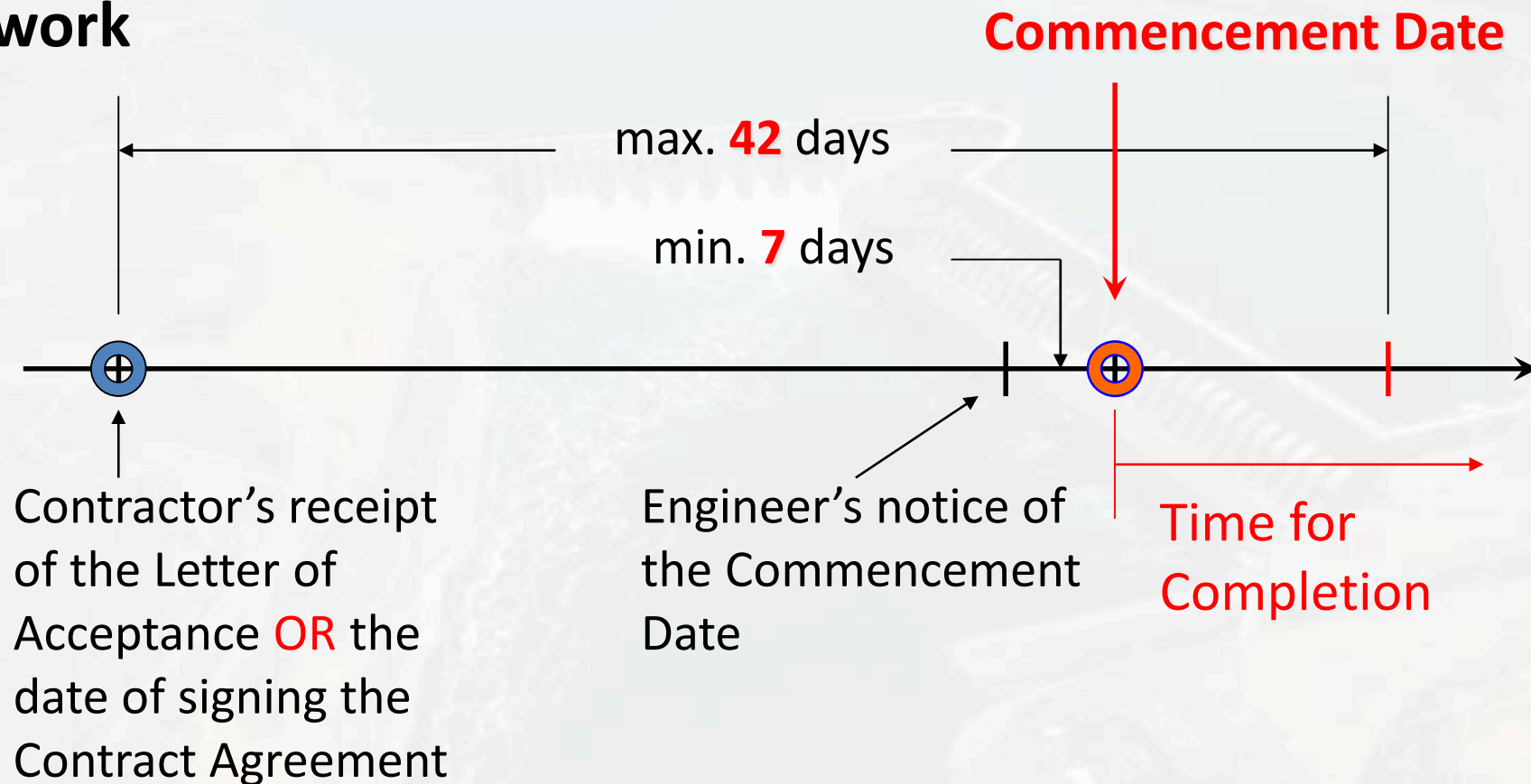
**Employer's Claim?**



**Contractor** to **CORRECT**  
promptly and **RETEST**  
(own cost, no EoT!)

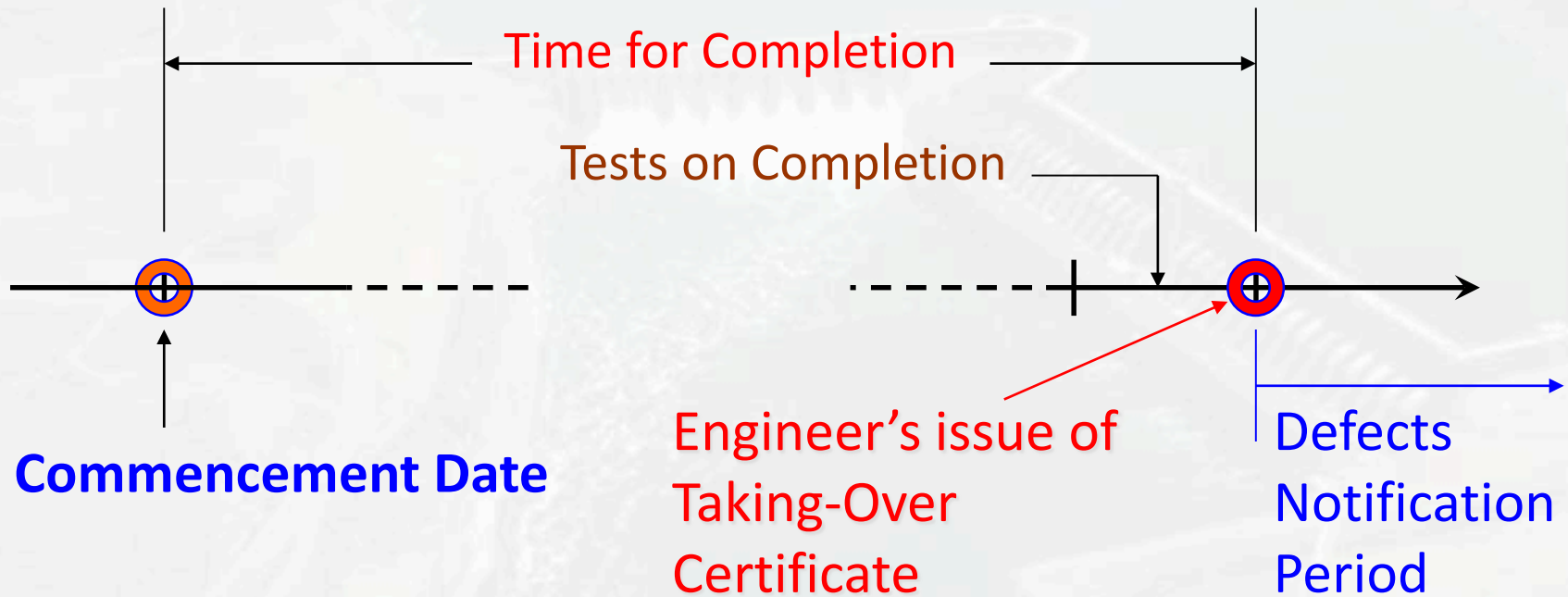
## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► The commencement of work



## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► The Time for Completion





## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► Programme

#### **The Contractor shall submit a programme**

- » within 28 days after receiving the notice of Commencement Date
- » whenever the **previous programme is inconsistent** with actual progress or with the Contractor's obligation
- » on the **Engineer's request**, if a programme fails to comply with the Contract or to be consistent with actual progress and the Contractor's stated intentions (revised Programme)

**The Engineer is NOT required to accept / approve a programme !**



## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► Extension of Time for Completion

**The Contractor is entitled for EoT in the following cases:**

- » a Variation [Clause 13]
- » any specific entitlement for EoT in any of the Sub-Clauses
- » exceptionally adverse climatic conditions
- » unforeseeable shortages (goods, personnel due to epidemic, governmental actions)
- » any delay, impediment or prevention caused by or attributable to the Employer, it's Personnel, or to his other contractors on the Site

**All subject to Sub-Clause 20.1 [Contractor's Claims]**

## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► Delay Damages

If the date indicating the completion of Works in the Taking-Over Certificate is **later** than the expiry date of the Time for Completion  
AND

The Contractor has no contractual entitlement for EoT  
THEN

- ➡ The Contractor shall pay to the Employer **Delay Damages** (daily rate and limit to be given under the Appendix to Tender).
- ➡ These are the **only damages due from the Contractor for such default.**
- ➡ These damages shall not relieve the Contractor from his **obligation to complete the Works.**

## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► Suspension of Work

There are two ways how the Works can be suspended:

» Suspension by the  
**Contractor**

Due to Contractual  
reasons (Employer's or  
Engineer's faults)

See Sub-Clause 16.1



» Suspension ordered  
by the **Engineer**

Due to Employer's  
**convenience**

See Sub-Clause 8.8

**Different causes  
and outcomes!**

## 2. The Time is of Essence (Commencement, Delays and Suspensions)

### ► Suspension of Work

#### » During suspension:

The Contractor shall **protect, store and secure** such part or the Works against any deterioration, loss or damage.

» The Engineer MAY (**but not shall!**) notify **the cause** for the suspension.

» If the cause for the suspension is NOT the Contractor's failure to comply with the Contract, then the **Contractor becomes entitled** to:

– EoT

– **payment of any Cost** (**but no profit!**) emerging due to the suspension.

» Prolonged suspension: Continue OR Omission / Termination.

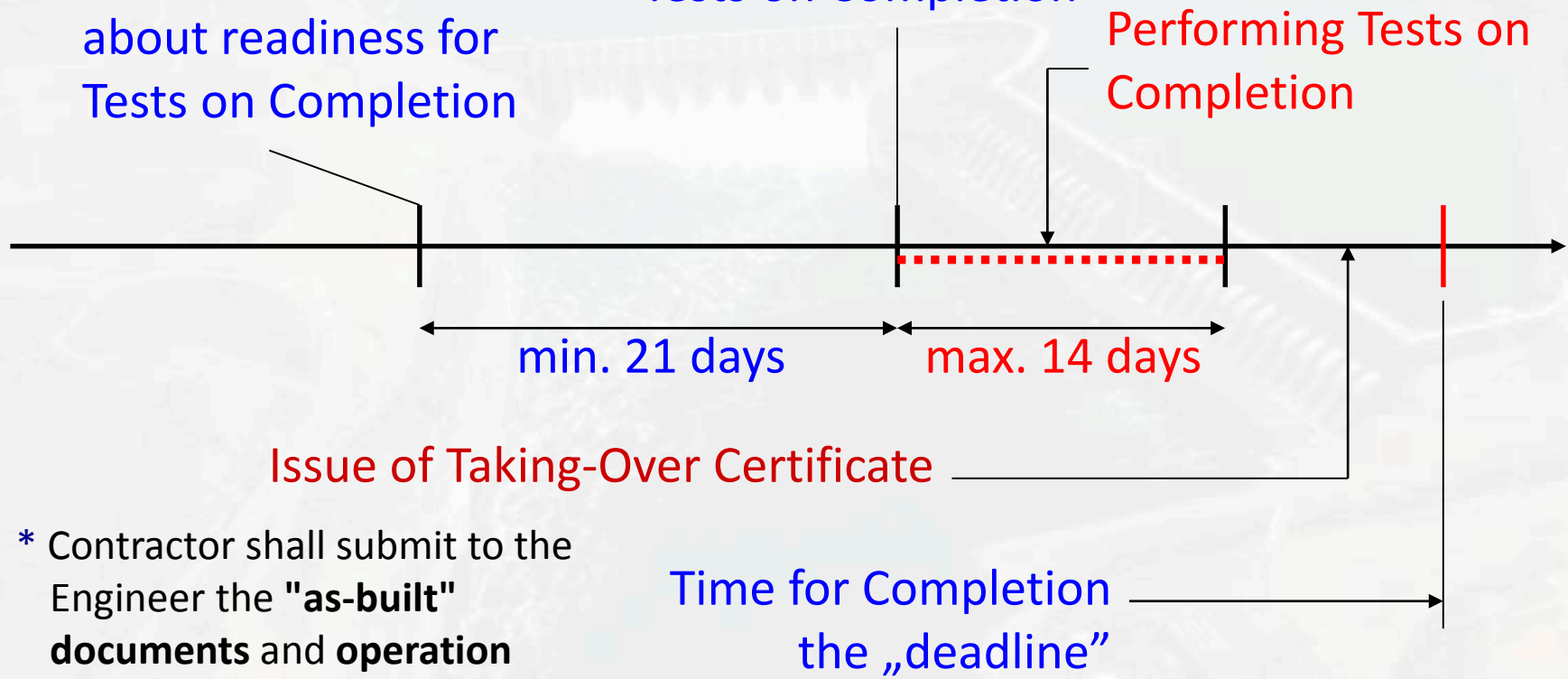
# 3. Completion and Taking-Over

## ▶ Tests on Completion



Contractor is ready for Tests on Completion\*

Contractor's **notice** about readiness for Tests on Completion



\* Contractor shall submit to the Engineer the **"as-built" documents** and **operation and maintenance manuals**.

## 3. Completion and Taking-Over

### ▶ Tests on Completion

» ...if unduly delayed by...

the **Employer**



**Contractor becomes entitled** to EoT and cost + profit

the **Contractor**



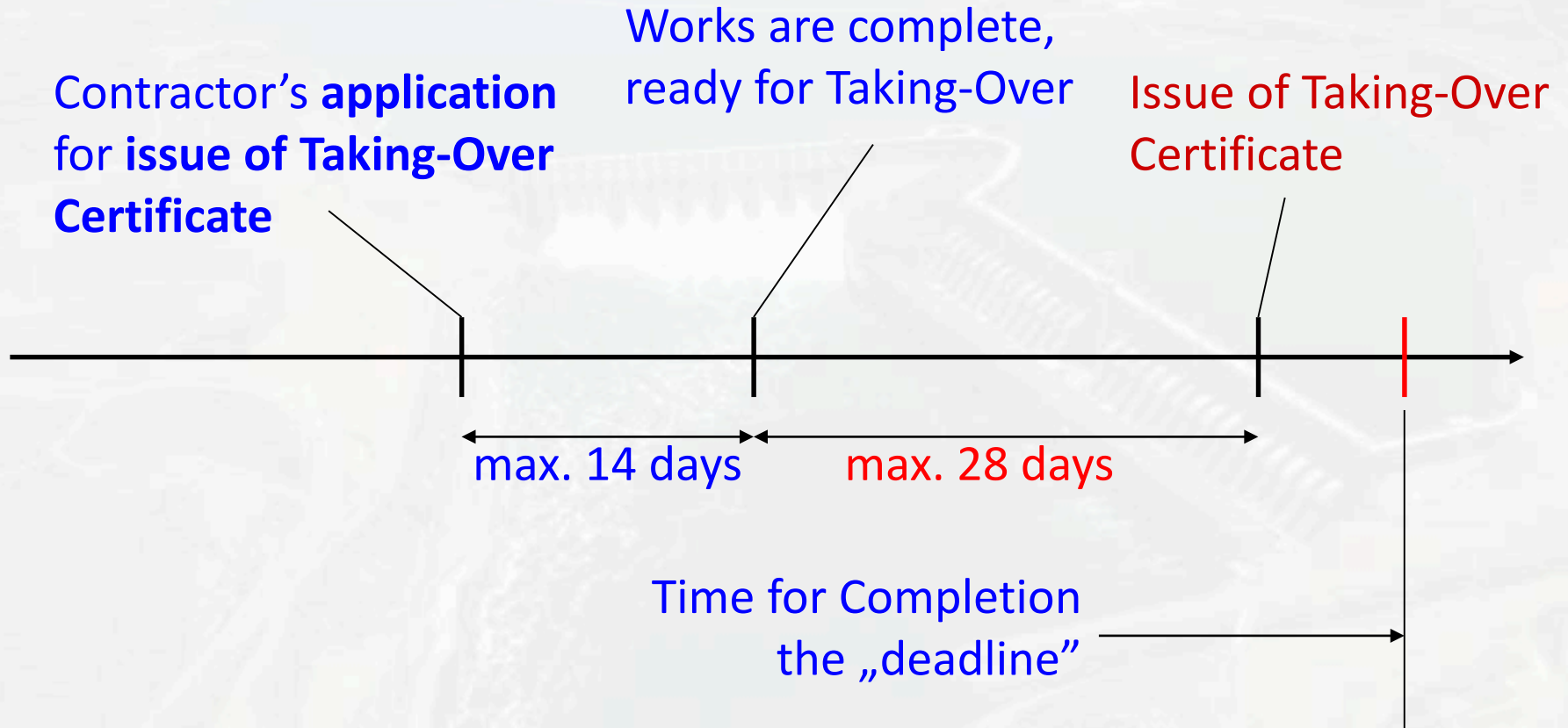
Engineer's notice to complete **within 21 days**



**Contractor's failure:**  
Employer to have others to complete these tests at the risk and cost of the Contractor.

# 3. Completion and Taking-Over

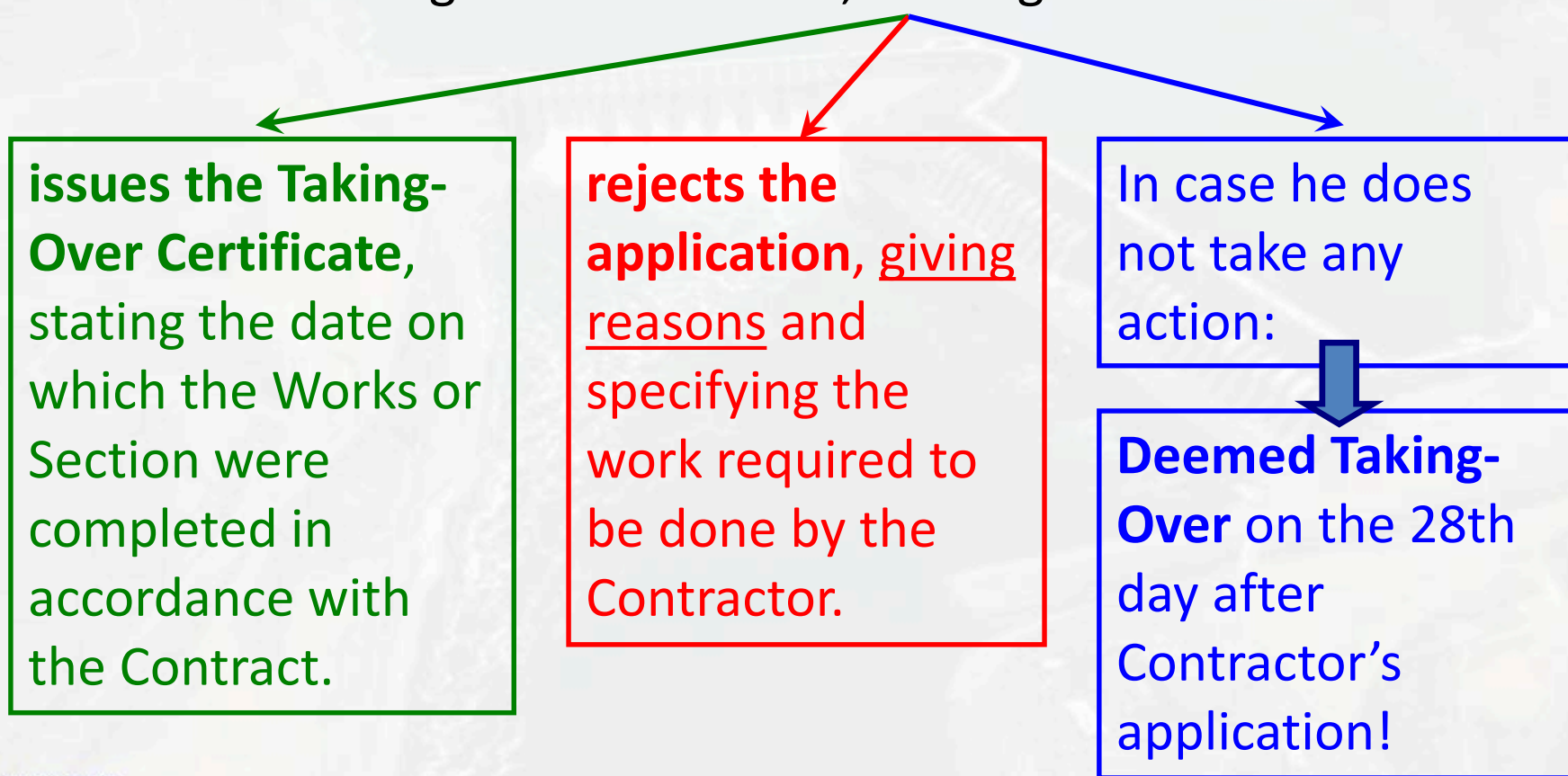
## ▶ Taking-Over



## 3. Completion and Taking-Over

### ► Taking-Over

- » Once the Engineer received the Contractor's application for issue of the Taking-Over Certificate, the Engineer





## 3. Completion and Taking-Over

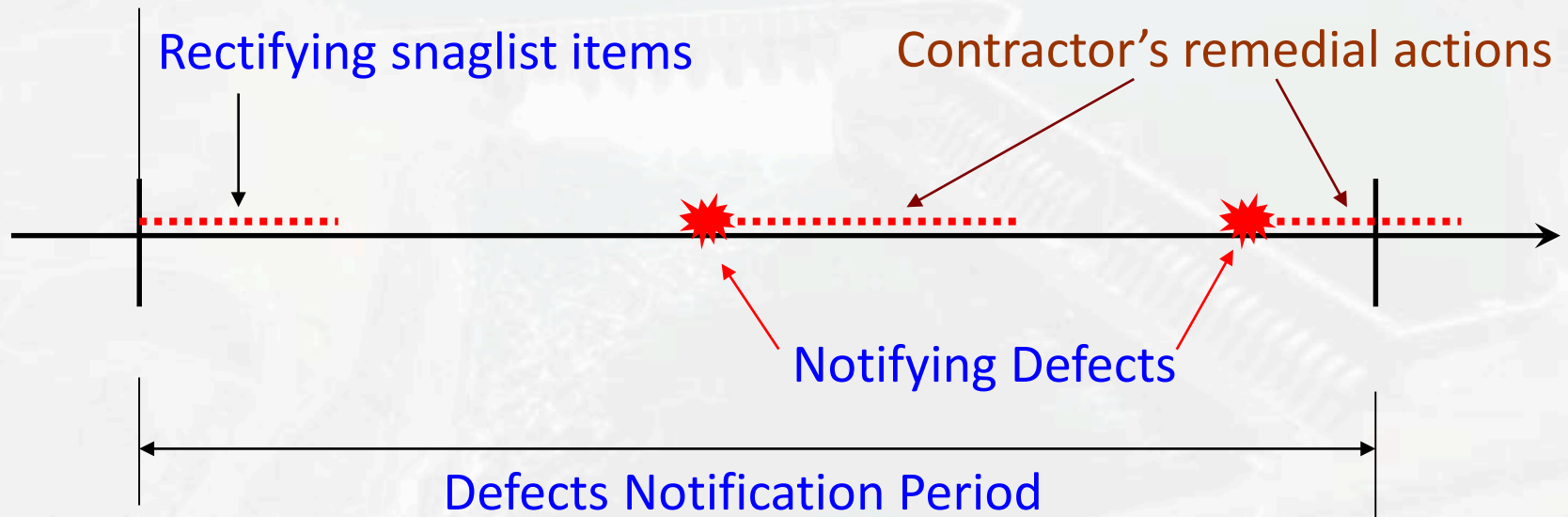
### ▶ Taking-Over

- » In case the **Employer starts using** parts of the Works (other than as a temporary measure) **before Taking-Over**, then
  - that part shall be **deemed to have been taken over** as from the date on which it is used,
  - the **Contractor shall cease to be liable** for the care of such part as from this date, when **responsibility shall pass to the Employer**,
  - if requested by the Contractor, the **Engineer shall issue a Taking-Over Certificate** for this part.

# 4. Defects Liability

## ► The Defects Notification Period

Taking-Over



## 4. Defects Liability

### ▶ Cost of Remedying Defects

- » The **risk and cost** of remedial works **rests with the Contractor**, provided that the remedial work is attributable to:
  - any **design** for which the Contractor was responsible,
  - **Plant, Materials or workmanship** not being in accordance with the Contract,
  - **failure by the Contractor** to comply with any other obligation.
- » If the remedial work was not attributable to any of the items listed above, Clause 13 [Variations] shall apply.
- » The **Defects Notification Period may be extended** as a result of Employer's claim – however extension must not exceed **2 years!**

## 4. Defects Liability

### ▶ Performance Certificate

- » Only with the **Engineer's issuing the Performance Certificate** can the Contractor's obligations be considered to have been completed [date to be stated in the Certificate!].
- » The Performance Certificate **shall be issued within 28 days**
  - the latest of the **expiry dates of the Defects Notification Periods** OR
  - as the Contractor has supplied all the **Contractor's Documents** and **completed and tested all the Works**, including remedying any defects.

**Only the Performance Certificate shall be deemed to constitute acceptance of the Works – BUT for unfulfilled obligations!**

## 5. Accepted Contract Amount / Contract Price

### ► The Contract Price

- » ...shall **include all taxes and duties** to be paid by the Contractor.
- » **Any quantities** which may be set out in the Bill of Quantities or other Schedule are **estimated** quantities and are not to be taken as the actual and correct quantities.
- » A proposed **breakdown of each lump-sum** amount in any Schedule shall be submitted to the Engineer within 28 days after the Commencement Date.

## 6. Measurement and Valuation

### ▶ Works to be measured



- » Regular payments are based on **Works performed**, as measured (calculated from the unit prices given in the BoQ).
- » It is the **Engineer to initiate measurement** – the Contractor shall attend and assist.
- » Wherever any Permanent Works are to be **measured from records**, these shall be prepared **by the Engineer** (Except as otherwise stated in the Contract).
- » In either case, **Contractor's attendance is expected**, if he fails to attend **measurements / records** shall be accepted as **accurate!**

## 6. Measurement and Valuation

### ▶ Method of measurement



...shall be **in accordance with the Bill of Quantities** or other applicable Schedules AND

...shall be made of the **net actual quantity** of each item of the Permanent Works.

- » For each item of work, the appropriate rate or price for the item shall be the rate or price **specified** for such item **in the Contract or**, if there is no such item, specified for **similar** work.
- » **New rate or price** shall be appropriate for an item of work under certain circumstances (see S-C 12.3).

## 7. Payment Procedures

### ► Advance Payment

- » If the **amount of Advance Payment** is not stated in the **Appendix to Tender** – it shall not be applicable!
- » Advance payment **becomes due only after** the Contractor
  - furnished the **Performance Security** AND
  - furnished the **Advance Payment Guarantee**.
- » Advance payment **may be made in instalments**.
- » Repayment of Advance is made always in instalments – as **deductions in the Interim Payment Certificates**.



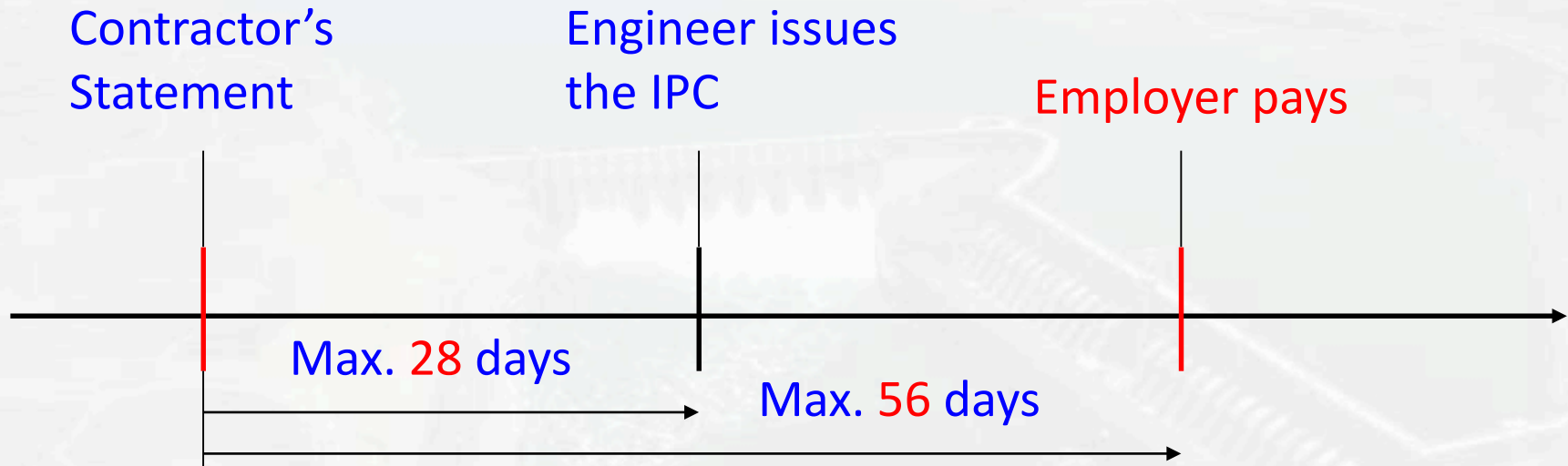
## 7. Payment Procedures

### ► Interim Payments

- » Interim payments are made by the Employer in possession of the **Engineer's Interim Payment Certificates [IPC]**.
- » The Contractor shall apply for the Engineer's issuing the IPC-s by submitting a **Statement**.
- » The Statement shall include **several items, as applicable**, which shall be expressed in the **various currencies** in which the Contract Price is payable (See Sub-Clause 14.3).
- » Issuing an IPC may be withheld by the Engineer if:
  - any thing supplied or work done by the Contractor is not in accordance with the Contract, OR
  - the Contractor was or is failing to perform any work or obligation in accordance with the Contract.

# 7. Payment Procedures

## ► Interim Payments



- » In case of delayed payments the Contractor becomes entitled to **financing charges** (without formal notice or certification or any claim procedure)

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Indemnities

**A Party shall indemnify** and hold harmless the other Party against and from all claims, damages, losses and expenses.

The **Contractor** shall indemnify for:

- » bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the **Contractor's design** (if any), the **execution and completion of the Works and the remedying of any defects** (**unless** attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents), and
- » **damage to or loss of any property, real or personal** (other than the Works) [if attributable to the Contractor...].

The **Employer** shall indemnify for:

- » bodily injury, sickness, disease or death, which is **attributable to any negligence, wilful act or breach of the Contract** by the Employer, the Employer's Personnel, or any of their respective agents, and
- » the matters for which **liability may be excluded from insurance cover**.

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Contractor's care of the Works

- » The Contractor shall take full responsibility for the care of the Works and Goods **from the Commencement Date until the Taking-Over Certificate [TOC] is issued** (After issuing the TOC responsibility for the care of the Works shall pass to the Employer).
- » **Responsibility for outstanding Works** at the issuing the TOC remains with the Contractor.
- » Contractor **shall rectify at his own risk and cost** any loss or damage happening to the Works, Goods or Contractor's Documents (from the cause not being Employer's risk) during the period of his responsibility.
- » **Contractor remains liable for his actions after TOC is issued!**



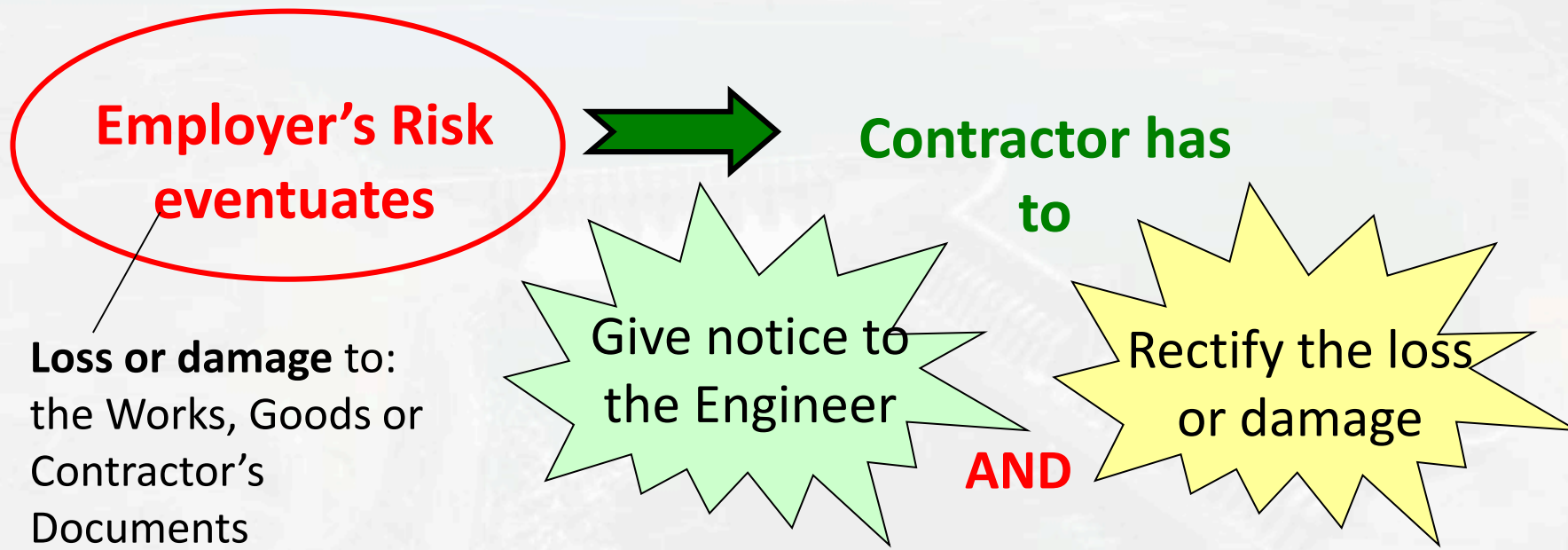
## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Employer's Risks

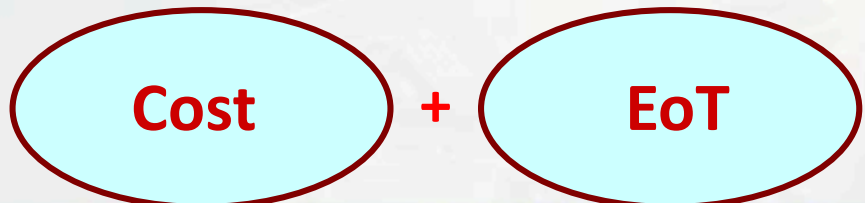
- (a) war, hostilities...
- (b) rebellion, terrorism... (within the Country)
- (c) riot, commotion... (within the Country)
- (d) munitions of war, explosives, ionising radiation... (within the Country)
- (e) pressure waves...
- (f) **use or occupation by the Employer of any part of the Permanent Works**, except as may be specified in the Contract,
- (g) **design of any part of the Works by the Employer's Personnel** or by others for whom the Employer is responsible,
- (h) any operation of the forces of nature, which is Unforeseeable...

# 8. Risk and Responsibility, Force Majeure and Insurance

## ► Consequences of Employer’s Risks



If the rectification results in **additional cost and / or delay** for the Contractor, subject to a separate notice, he becomes entitled to:



## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Limitation of Liability

- » Neither Party shall be liable to the other Party for **loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage** which may be suffered by the other Party in connection with the Contract (other than payment on termination and indemnification).
- » **The total liability of the Contractor to the Employer**, under or in connection with the Contract shall not exceed the sum stated in the Particular Conditions or (if a sum is not so stated) the Accepted Contract Amount. [EXCEPTIONS!]  
**This shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.**

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Force majeure

... means an **exceptional event or circumstance**, which:

- » is beyond a Party's control,
- » such Party could not reasonably have provided against before entering into the Contract,
- » having arisen, such Party could not reasonably have avoided or overcome, and
- » is not substantially attributable to the other Party.

FIDIC's example list [see S-CI 19.1] is an **OPEN list** ("*not limited to*") and overlaps with the Employer's Risks

The **cause** may be both **physical** or **LEGAL!**



## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Force majeure

- » If a Force Majeure event or circumstance occurs, the Party suffering from it shall **give notice within 14 days** to the other Party (shall also notify the end of being affected by the Force Majeure).
- » The Party shall, having given notice, be **excused performance** of such obligations for so long as such Force Majeure prevents it from performing them.
- » Force Majeure **shall not apply** to obligations of either Party to **make payments** to the other Party under the Contract.
- » **Each Party shall** at all times use all reasonable endeavours to **minimise any delay in the performance** of the Contract.

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Force majeure

#### » The consequences:

The Contractor shall be entitled to **EoT** and **Cost** (– only in specific Force Majeure causes! See **S-CI 19.4**).

Any **subcontractor's broader release terms** in the subcontract does not excuse the Contractor's non-performance or additional relief not entertained.

If the Force Majeure is longer than **84 days** OR an aggregate of shorter FM events exceeds **140 days** either Party may **terminate the Contract** with a 7 days notice.

Upon such termination, the **Engineer shall determine** the value of the work done and issue a Payment Certificate.

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Insurance

- » Any of the Parties can be the „**insuring Party**” (responsible for effecting and maintaining the insurance).
- » If a policy is required to indemnify joint insured, the **cover shall apply separately** to each insured as though a separate policy had been issued for each of the joint insured.
- » A policy may indemnify **additional joint insured**.
- » The **insuring Party shall**, within the periods stated in the Appendix to Tender (calculated from the Commencement Date), **submit** to the other Party: **evidence** that the insurance have been effected, AND copies of the **policies**.

## 8. Risk and Responsibility, Force Majeure and Insurance

### ► Insurance

- » Neither Party shall make any **material alteration** to the terms of any insurance **without the prior approval** of the other Party.
- » If the insuring Party fails to effect and keep in force any of the insurances required (or fails to provide satisfactory evidence and copies of policies) **the other Party may effect** them and **pay the premiums** due – and the failing Party shall **reimburse** the other party.
- » The insuring Party shall insure the **Works, Plant, Materials and Contractor's Documents** for not less than the **full reinstatement cost** including the costs of demolition, removal of debris and professional fees and profit.  
**Effectiveness:** until the date of issue the TOC.



# Hydro Asia 2016

Training Course on  
**Contracts Management**  
**and the Practical Use of**  
FIDIC Conditions of Contract in the Hydropower  
Construction Industry



Sunday February 28 and Monday February 29, 2016

VIENTIANE, LAOS

## *END of Session 3*

# *Thank you for your kind attention!*

Zoltán Záhonyi  
[zoltan.zahonyi@zandpartners.com](mailto:zoltan.zahonyi@zandpartners.com)