

# CLAIM/DISPUTE MANAGEMENT PROVISIONS IN JAPANESE PUBLIC CONSTRUCTION WORKS AND ODA CONSTRUCTION PROJECTS

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## INTRODUCTION

The Japanese construction business law requires parties involved in a construction contract to make the contract based on equal footing and to fulfill their own duties faithfully and honestly. Thus Japanese contracts are formed on the basis of 'mutual trust' where the contracting parties are expected to perform their duties and fulfill obligations honestly and faithfully. Japanese public construction works have been carried out under the two-party i.e. Owner-Contractor system and the role of the Consultants is not evident for the execution of the projects. The Consultants are being employed for design and making construction documents. However, the Consultants are employed in Japanese official development assistance (ODA) projects for investigation, design and supervision of the construction in the aid recipient countries.

Unlike to the Japanese public works construction and grant aid projects, the contracts under the JBIC (Japan Bank for International Cooperation) ODA loan projects have been designed and executed under the 'mutual mistrust' environment. The owner in the Japanese public construction works assumes large authority to determine and to make decision over any issue aroused whereas the Consultants play significant role in the claim/dispute management in ODA construction projects. This paper based on the standard form of contract for public construction works, typical contract agreement used in Japanese grant aid project and JBIC procurement guidelines for civil works discusses the related clauses/sub-clauses to claim/dispute management in public construction work in Japan, and Grant aid and JBIC ODA project execution in aid recipient countries.

## PUBLIC CONSTRUCTION WORK IN JAPAN

### Standard Form of Contract for Public Construction Works

A construction project is executed under the conditions and scopes stipulated in the contract. The special and general conditions of contract stipulates the roles, responsibility and liabilities of the contracting parties and provides the procedures for whole contract execution including payment, inspection, variation, claim/dispute settlement. The major provisions included in the Japanese general conditions of contract for public construction works for the consideration and resolution of claims/disputes are: i) claims on action regarding the Superintendent, Engineer and Project Manager (article 12), ii) Differing Site Conditions (article 18), iii) Changes to drawings and specifications (article 19), iv) Suspension of works (article 20), v) Extension of construction period (article 21), vi) Acceleration of construction period (article 22), vii) Procedures for adjustment of construction period (article 23), viii) Procedures for adjustment of contract price (article 24), ix) Adjustment of contract price due to price level change (article 25), ix) General provision for Damages (article 27), x) Damages upon third party (article 28), xi) Damages from force majeure (article 29), xii) Alternative to adjustment to contract price, xiii) Liquidated Damages for arrears (article 45). The main players' roles and other stipulations regarding the claim/dispute management are discussed below.

### Role of Project Manager

The project manager is the Owner's representative for the execution of the Contract. The duties of the

Project Manager, according to the article 9.1, are to exercise the power mentioned in the drawings and specification for instructions, approvals and consultation with the Contractor's representative; preparation and delivery of detailed drawings, etc. or approval of drawings, etc. prepared by the Contractor; and management & observation including inspection of the execution of works and testing/inspection of the construction materials. The project manager does not have the authority to independently decide and give his/her opinion on any contractual matter. The contract assumes that the Owner itself assumes all the authority to decide and notify the contractor.

### **Role of Contractor's Superintendent/Engineer**

The Contractor's representative is normally supposed to exercise all the powers vested to the Contractor. However, the superintendent/engineer in Japanese public construction contract by virtue of the Contractor's representative only can not exercise the Contractor's power such as to adjust the contract price; make claim and receive payments; receive, determine & notify claims against the Contractor's personnel; and to terminate contract. The Contractor needs to notify the Owner beforehand in writing what authority the superintendent/engineer shall exercise directly on behalf of the Contractor.

### **Variation**

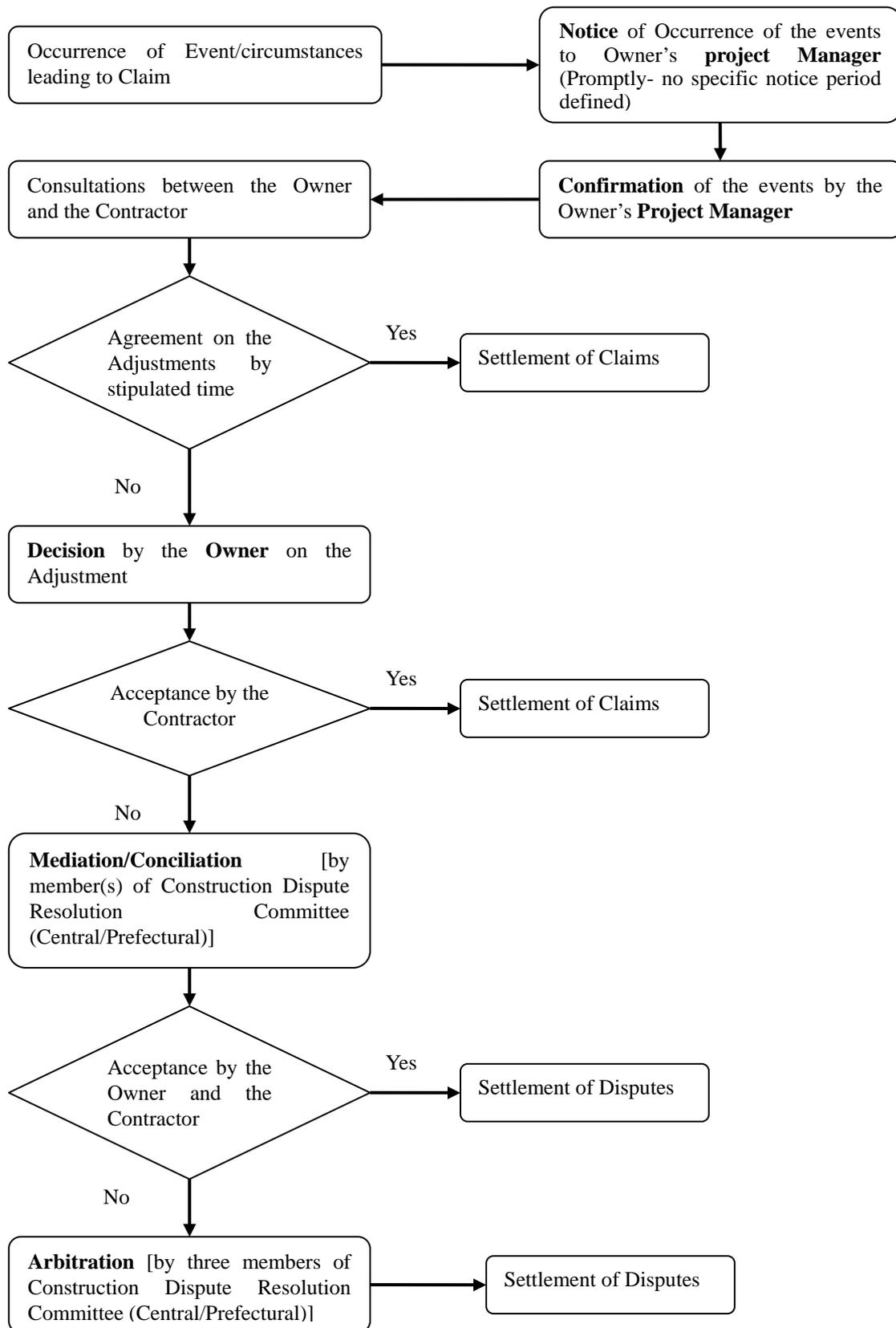
Variation in the Japanese construction industry has been addressed under the articles: Differing Site conditions (article 18) and Changes to Drawings and Specifications (article 19). These articles require the Contractor to promptly inform the Owner about the differing site conditions but do not stipulate any notification deadline beyond which the Contractor is not entitled to be compensated. The contract is not clear about the requirement for the Contractor to submit the Owner sufficient supporting documents to show the changes in the site condition has actually affected or will affect in the schedule and quantity of works, but it provides the provisions for the Project manager to verify and survey to confirm the difference in the site conditions. Similarly, when the Owner changes the original drawings and specifications it is dealt under Changes to drawing and specifications. In both the cases if the Owner confirms the changes, the articles say that 'the Owner shall adjust the Construction period or the Contract price, if necessary, and shall bear damages incurred by the Contractor, if any.'

### **Procedure for Adjustment of Construction Period and Contract Price**

Once the Contractor notify the project manager about the changes and situations which were beyond the Contractor's control and do not fall under the Contractor's liability that caused contractor to spend more time and money, the contractor may claim specifying the reasons in writing for extension of the Construction period if the Contractor is unable to complete the works within the stipulated construction period. The owner's project manager confirms the situations and consultation between the Owner and Contractor starts. If the agreement on the adjustment of contract price and/or construction period could not be reached from the consultation, the Owner decides over the adjustment and notifies the same to contractor. The contractor may request for mediation if the decision by the Owner was not acceptable to the Contractor. The mediation is done by member(s) of Construction Dispute Resolution Committee (Central/Prefectural). If the Contractor still do not agree with the decision by the mediation the final and binding arbitration process will be started. The process of claim/dispute management has been summarized in figure 1.

## **JAPANESE GRANT AID PROJECT**

A typical contract document for construction contracts under Japanese Grant Aid has envisaged claim free contract and the execution in good faith. Lump Sum contract with advance, interim and final Payment system without incorporating any clause for time and/or cost claim has been used. It does not include any distinct procedure for notifying the other party regarding the intention of the party to claim for time and/or cost. However, the contract has envisaged the occurrence of dispute concerning the interpretation or performance of the contract and assumed to settle such disputes through mutual consultation of the contracting parties. If the amicable settlement can not be reached, the contract dictates, the dispute referred to arbitration by three arbitrators, one each recommended by the contracting parties and the third one is from the recommendation of two arbitrators. The International Chamber of Commerce (ICC) rules of arbitration shall be followed for arbitration.



**Figure 1: Claim and Dispute Resolution in Japanese Public Construction Works**

## **JBIC ODA LOAN PROJECT**

Unlike to the Japanese public construction work, the Japanese ODA loan projects are executed in the mutual mistrust environment and the conditions of contract are based on the FIDIC conditions of contract. The process of claim/dispute management is similar to other international construction projects based on FIDIC contracts where the engineer is required to perform his duty impartially. The notification period by each contracting party and Engineer, and time to make decision by the Engineer and Board, and the liabilities of the respective parties are clearly stipulated in the conditions of contract.

The Contractor is required to inform the Engineer within 28 days of the occurrence of the claim event. The Contractor has to include the claim with supporting evidences in the monthly progress report. The Engineer examines and evaluates the claim and gives his/her decision within 28 days after receiving the claim. If either the Owner or the Contractor is not agreed with the Engineer's decision, then the Owner or the Contractor may refer the claims to Dispute Adjudication Board (DAB). The DAB is required to give its decision within 84<sup>th</sup> day after the reference of the case to DAB. If either party (Owner or Contractor) is dissatisfied with the DAB's decision, then either party, on or before 28<sup>th</sup> day after the day on which it received notice of such decision, may notify the other party and the Engineer of its dissatisfaction. The parties then attempt to settle the dispute amicably before the commencement of arbitration. Arbitration may be commenced on or after the 56<sup>th</sup> day after the day on which notice of dissatisfaction was given.

## **DISCUSSION AND CONCLUSIONS**

Unlike to the FIDIC conditions of contract for construction, the stipulations on the role and authority of the Project manager in the Japanese standard for of contract for public construction do not provide the Engineer to judge and decide independently and to improve his/her knowledge/skills in evaluating the contractual matter. As a result the project manager may assume that his/her duties in the Contract are to just issue/approve the drawings and observe the construction works. Such practice in the Japanese construction industry has been inhibiting the Engineer to enhance their skills for contract administration and in interpreting the contractual obligations, and consequently their ability has remained at lower level than other western counterparts

The dealing and compensating variation in Japanese public works contract is very simple and straightforward. The Owner confirms the Variations itself and provides the compensation to the Contractor through consultation with the Contractor. The article indicates that the Owner can unilaterally decide the time or money to be compensated to the Contractor. Because of such provision, the Owner may easily hide its or designer's fault if any found during the execution of the Contract and compensate the Contractor for the same. This system of dealing variation in Japanese construction industry provides the Owner opportunity to dictate his decision unilaterally and do not consider the Contractor on equal footing.

As such the grant aid construction projects are executed through lump sum contract and do not include distinct claim/dispute management procedure, the contractors may suffer loss if there is design change, differing site conditions, changes in specifications during the construction. However, JBIC loan project includes distinct claim/dispute management procedure and provides the contracting parties equal opportunity to exercise their rights.

Making the Japanese public works execution including the contract administration system consistent to the JBIC ODA and compatible with other international construction project execution systems would help internationalize the Japanese construction industry, and improve the transparency in determination and decision making system in the construction project execution including claim/dispute management.

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