

# FIDIC Middle East Contract Users' Conference

Dubai,  
24-27 February 2020

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International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers





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## Review of the 2017 5<sup>th</sup> Edition of the White Book

### Content

- The White Book - History and background.
- Concerns about the 4<sup>th</sup> Edition.
- Main updates and improvements in the 5<sup>th</sup> Edition.
- Particular alignment of the 5<sup>th</sup> Ed. with the 2017 Edition of the RYS Books.





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## The White Book – History and background

- FIDIC's **Client/Consultant Model Services Agreement** (the “**White Book**” or “**WB**”), is intended for use on an international basis to appoint consultants by Employers (RB) or Contractors (YB). The White Book can also be adapted for domestic use.
- 1<sup>st</sup> Edition of the WB was published in 1990 and updated Editions in 1991, 1998 and 2006 (4<sup>th</sup> Ed).



FIDIC also publishes other Model Agreements





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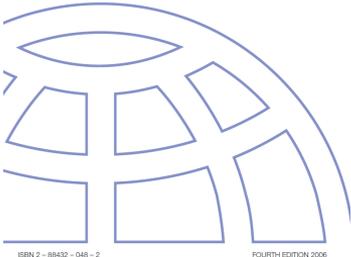
## The White Book's 4<sup>th</sup> Ed. – Overview

- **Contents:**
  - (Form of) **Agreement**.
  - **Particular Conditions:**
    - (Part) **A** - References from GC's Clauses (= **Contract Data**),
    - (Part) **B** - Additional or Amended Clauses (= **Special Provisions**),
    - (Part) **C** - (4) **Appendices**
      - 1 Scope of Services
      - 2 Personnel, Equipment, Facilities and Services of others to be provided by the Client
      - 3 Remuneration and Payment
      - 4 Time Schedule for Services
  - **General Conditions** (8 Clauses).
- **Specific features:**
  - Short GCs, **BUT** some are **too short** e.g. Cl. 4 [*Commencement, Completion, Variation and Termination*].
  - Too short (or **NO**) **guidance** for the content of the Appendices, e.g. Appendix 1 [*Scope of Services*].
  - The Scope of Services comprises **Normal**, **Additional** and **Exceptional Services**.
  - Using **Mediation** as part of a multi-tier dispute resolution process.



Client/Consultant  
**Model Services Agreement**

AGREEMENT  
GENERAL CONDITIONS  
PARTICULAR CONDITIONS  
APPENDICES 1, 2, 3 AND 4



ISBN 2 - 88432 - 048 - 2

FOURTH EDITION 2006



Mahmoud Abu Hussein





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## Main Concerns about the 4<sup>th</sup> Ed. of the White Book - 1/2



Consultant's  
Obligations

Client's  
Obligations

Extensive  
obligations

Broad Indemnity

Limited recourse

Limited obligations  
& Extensive rights





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## Main Concerns about the 4<sup>th</sup> Ed. of the White Book - 2/2

The Consultant	The Client
Responsibility <b>LIMITED</b> to duty of <b>reasonable skill, care and diligence</b> .	Gives <b>all information</b> pertaining to the Services and <b>all decisions</b> <u>within a reasonable time</u> so as not to delay the Services
Liable <b>ONLY</b> if it breaches duty of reasonable care	<b>Indemnifies</b> the Consultant against <b>all claims</b> (w/o reciprocity)
Services <b>NOT</b> subject to “Fitness for Purpose”	Variation valuation <b>NOT</b> linked to Appendices 3 and 4
<b>NO</b> obligation to comply with a professional code of conduct	<b>NO</b> variation by instruction and <b>NO</b> omissions
<b>NO</b> obligation for PI insurance	<b>NO</b> immediate termination for bankruptcy or corruption
<b>NO</b> express obligation to submit or comply with a Programme (despite Appendix 4 [Time Schedule for Services]).	<b>NO</b> delay damages





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## The White Book's 5<sup>th</sup> Ed. – Overview

- Emphasis on addressing most concerns with the 4<sup>th</sup> Ed. and elaborate Foreword explaining rationale behind the updates.
- **Two new Clauses:** **Cl. 5** [*Variation to Services*] and **Cl. 6** [*Suspension of Services and Termination of Agreement*].
- **A new Appendix** (**Appendix 5** [*Rules for Adjudication*]) as a result of replacing Mediation with Adjudication.
- Elaborate guidance for the content of the Appendices esp. Appendix 1 [*Scope of Services*] and Appendix 4 [*Programme*].
- Normal, Additional and Exceptional Services **scraped**.
- **Works Contract Administration duties** (the Engineer's role) to be clearly set out in Appendix 1 [*Scope of Services*].





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## The White Book's 5<sup>th</sup> Ed. - Main Updates and Improvements (1/4)

### Clause 1 (General Provisions)

- 'Exceptional Costs' associated with certain events e.g. Change in Laws, Variations and EE introduced (SC 1.1.12) **as a result of deleting "Exceptional Services" under the 4<sup>th</sup> Ed.**
- 'Exceptional Event' (SC 1.1.13) - **replacing 'Changed Circumstances' under the 4<sup>th</sup> Ed.** Either Party may be excused performance of affected obligations, **but Consultant entitled to Variation and EOT (SC 4.6).**
- 'Notice' (SC 1.1.19): a specific form of formal notification (SC 1.3) required for several actions/events.
- **Background / Foreground IP (SC 1.7):** Consultant may (7 days' Notice) revoke any licence if the Client in default of payment.
- New **boilerplate provisions** including joint and several liability of JV members and good faith/mutual trust obligations.
- **Priority of Documents (SC 1.15.1) – fixing a shortfall in the 4<sup>th</sup> Ed.:** the documents shall be interpreted and construed in accordance with the order of precedence of documents given in Clause 2 of the Form of Agreement.





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## The White Book's 5<sup>th</sup> Ed. - Main Updates and Improvements (2/4)

### Clause 4 (Commencement and Completion) – Now a separate Clause:

- The Consultant **shall** submit a Programme (pursuant to Appendix 4) **and amend it as necessary** (SC 4.3.1).
- **Advance Warning:** the Parties **shall promptly give Notice to each other** of any specific, actual **or probable future events** which may delay or increase the cost the Services (SC 4.3.3).
- The Consultant is entitled to EOT (and Exceptional Costs) if completion **is** or **will be** delayed (SC 4.4.1).
- Any EOT shall have due regard to the Programme and any constraints therein (SC 4.4.2).
- The Client is entitled to instruct acceleration in cases of Consultant's non-excusable delays (SC 4.5.1).





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## The White Book's 5<sup>th</sup> Ed. - Main Updates and Improvements (3/4)

### Clause 5 (Variation to Services) – **New, separate Clause**

- Variation **either** by instruction (**Variation Notice**) **or** a request for proposal **BUT** Variation shall be relevant to and NOT change the Services (SC 5.1.1). Omissions allowed only where no longer required (SC 5.1.2).
- If any instruction constitutes a Variation, Consultant can give a **Notice** as soon as reasonably practicable (**with est. impacts**) => **within 14 days the Client** shall either issue a Variation Notice, or cancel the instructions or state why it disagrees with the Consultant (**under a further Notice**) => the Consultant shall be bound **UNLESS** it disputes **within 7 days** (SC 5.1.3).
- The Consultant can object to Variation by **Notice** that **(a)** it does not possess the relevant skills or resources, or **(b)** it considers the Variation substantially changes the extent or nature of the Services (SC 5.1.4).
- The value of any Variation (**based on Appendix 3**) and its impact on the Programme **shall be agreed in writing** (SC 5.2.3) => If no agreement **within 14 days**, the Client may **by Notice** instruct Variation on a time-scale basis (**using rates in Appendix 3**) pending subsequent agreement (or settlement).





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## The White Book's 5<sup>th</sup> Ed. - Main Updates and Improvements (4/4)

### Clause 6 (Suspension of Services and Termination of Agreement) – **New, separate Clause**

- **Client suspension:** at sole discretion and for any reason under **28 days Notice** (SC 6.1.1). Services to resume **< 28 days** of Notice of resumption (SC 6.2).
- **Consultant suspension:** for specific reasons including Client's breach of SC 2.4 [*Client's Financial Arrangements*] (SC 6.1.2). Services to resume **as soon as reasonably practicable** after the matters causing suspension cease (SC 6.2).
- The Consultant **shall** mitigate the effects of suspension and may be entitled to Exceptional Costs and EOT (SC 6.3).
- **Express grounds for Termination** by the Client or the Consultant. **Reciprocal immediate termination** in cases of bankruptcy or corruption. Client **Termination for Convenience** by **56 days Notice** (but not to obtain the Services from others) – SC 6.4.
- **Clear effects stipulated for each case of termination** including Client and Consultant recourse/entitlement (SC 6.5).





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## The White Book's 5<sup>th</sup> Ed. – Particular Alignment w/ 2017 RYS

### Improved clarity and balance:

- The Client is responsible for the Client's information and shall rectify any errors by Notice or Variation. The Consultant is under duty of care to review all significant information and to notify any manifest error under a Notice (SC 2.1.2).
- The Client **shall describe the function and purpose** of the Services **explicitly in Appendix 1 [Scope of Services]** (SC 3.2).
- The Consultant shall exercise the reasonable skill, care and diligence to be **expected from a consultant experienced in** the provision of services for **projects of similar size and complexity** (SC 3.3.1).
- The Services shall **satisfy** the function and purpose specified in Appendix 1 (SC 3.3.2) - **NOT** full 'fitness-for-purpose'! – see the elaborate Foreword





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## The White Book's 5<sup>th</sup> Ed. – Particular Alignment w/ 2017 RYS

### Duties/Authority of the Engineer (ref. 2017 RYS Guidance Notes):

- The Consultant shall demonstrate that it adheres to a documented code of conduct. As a minimum the Consultant shall comply with the **FIDIC Code of Ethics** and the **FIDIC Integrity Management System** (SC 1.10.3).
- Under the Works Contract, the Consultant **shall act fairly** as go-between the Client and the contractor, exercising **independent professional judgement** and using reasonable skill, care and diligence (3.9.3).
- See also (SC 3.1.3) on **conflict of interest** and (SC 3.3.3) on compliance with all regulations and **codes of practice**.





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## Review of the 2017 5<sup>th</sup> Edition of the White Book Conclusion





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## Review of the 2017 5<sup>th</sup> Edition of the White Book

# Thank You!

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**Dr. Götz-Sebastian Hök**

FIDIC Accredited Trainer  
Dispute Adjudicator (President's List)  
Friendly Reviewer 2<sup>nd</sup> Edition  
TG 11 Member



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## MY DUTY

Sub-consultancy Agreement

Joint Venture Agreement





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## Other Developments





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## Content WB

- **Form of Agreement**
- **Particular Conditions**
- **Part A References from Clauses in the General Conditions**
- **Part B Additional or Amended Clauses**
  - **Appendices**
    1. Scope of Services
    2. Personnel, Equipment, Facilities and Services of Others to be
    3. Provided by the Client
    4. Remuneration and Payment
    5. Programme
    6. Rules for Adjudication

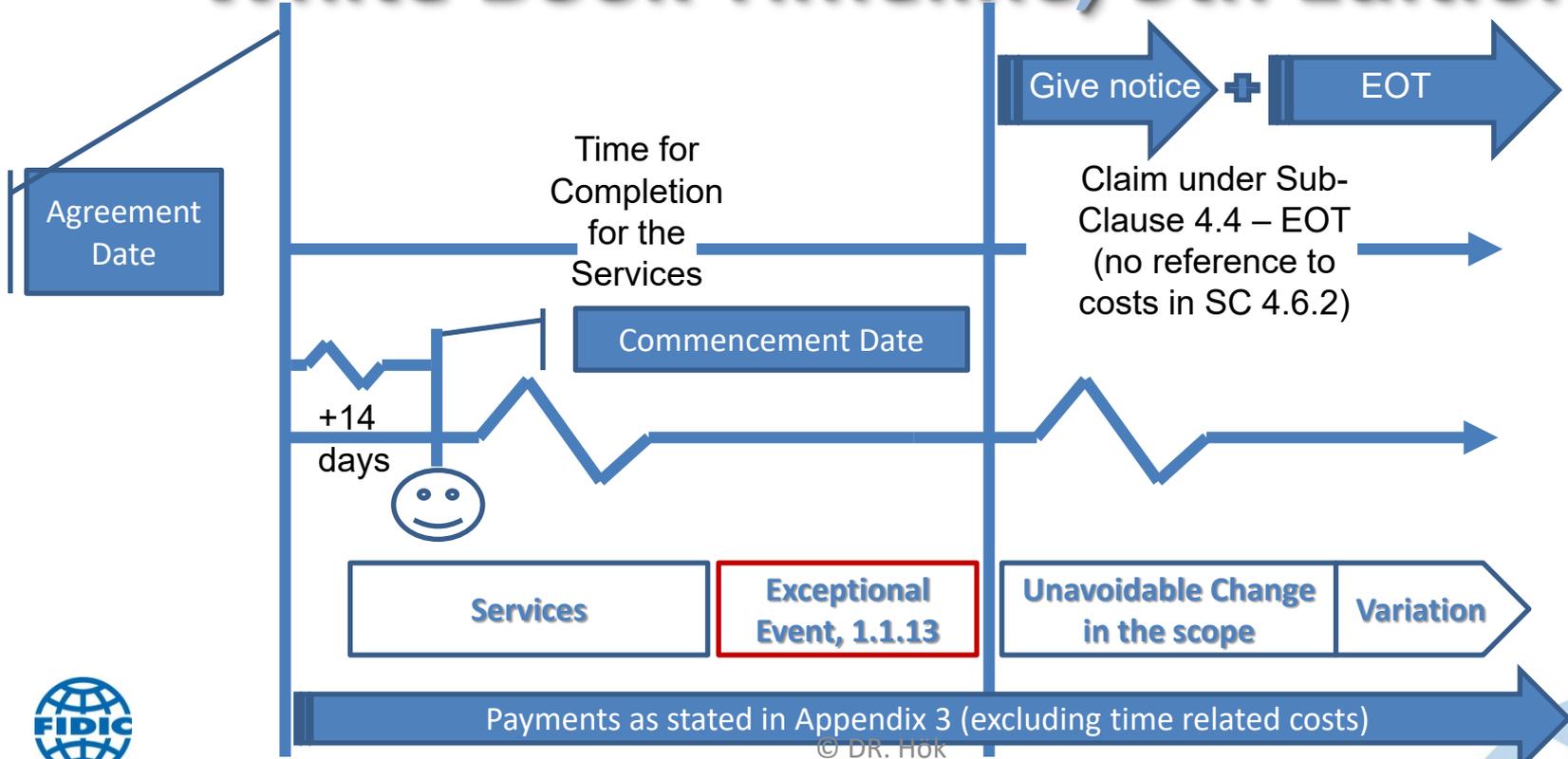
- **Client Model Services Agreement**
- **General Conditions**

- **CONTENTS**
  1. GENERAL PROVISIONS .....
  2. THE CLIENT .....
  3. THE CONSULTANT .....
  4. COMMENCEMENT ANO COMPLETION .....
  5. VARIATION TO SERVICES .....
  6. SUSPENSION OF SERVICES ANO TERMINATION OF AGREEMENT .....
  7. PAYMENT .....
  8. LIABILITIES .....
  9. INSURANCE .....
  10. DISPUTES ANO ARBITRATION .....





## White Book Timeline, 5th Edition





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## Sub-consultancy Agreement

2<sup>nd</sup> Edition – 2017



Intended for use where a Consultant appointed under the **White Book** desires to engage a **Sub-Consultant** to undertake part of the Services / however **also designed for use when head contract is not the White Book** (no *mutatis mutandis* wording + repeat of WB provisions where applicable to Sub-Consultant)

However, if intended for use **when principal contract is not the White Book** care must be taken to adapt & strengthen the **fitness for purpose requirements**. The Sub-consultancy Agreement is not fully compliant with the back-to-back approach required under FIDIC D&B contracts.

But see Sub-Clause 3.2.2 → duty to perform such that no act or omission of the Sub-Consultant shall constitute, cause or contribute to any breach of the Agreement by the Consultant of any of the Consultant's obligations under the Agreement





# Sub-consultancy Agreement

2<sup>nd</sup> Edition – 2017

- Unlike the FIDIC Subcontract for Works and D&B the FIDIC Sub-Consultancy Agreement is not fully back-to-back with the Main Contract.
- No „like“ entitlements
- But duty to perform in order to avoid liability under the White Book
- No related claim-concept, etc.
- Limited duty to achieve fitness for purpose  
Contradicting S-C 3.3.2?





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## Content

### ➤ CONTENTS

- Form of Sub-Consultancy Agreement
- Particular Conditions
- Part A References from Clauses in the General Conditions
- Part B Additional or Amended Clauses
- Appendices
  - 1 Scope of Sub-Consultancy Services
  - 2 Equipment and Facilities to be provided by the Consultant
  - 3 Remuneration and Payment
  - 4 Consultant's Programme
  - 5 Rules for Adjudication
- Annexure A
- Client / Consultant Agreement [excluding commercial matters]

### ➤ Sub-Consultancy Agreement - General Conditions

#### ➤ CONTENTS

- 1 GENERAL PROVISIONS .. ..... 1
- 2 THE CONSULTANT ..... 8
- 3 THE SUB-CONSULTANT ..... 9
- 4 COMMENCEMENT AND COMPLETION ..... 11
- 5 VARIATIONS TO SUB-CONSULTANCY SERVICES .. 13
- 6 SUSPENSION OF SERVICES AND TERMINATION OF SUB-CONSULTANCY AGREEMENT ..... 14
- 7 PAYMENT ..... 17
- 8 LIABILITIES ..... 18
- 9 INSURANCE ..... 19
- 10 DISPUTES AND ARBITRATION ..... 20

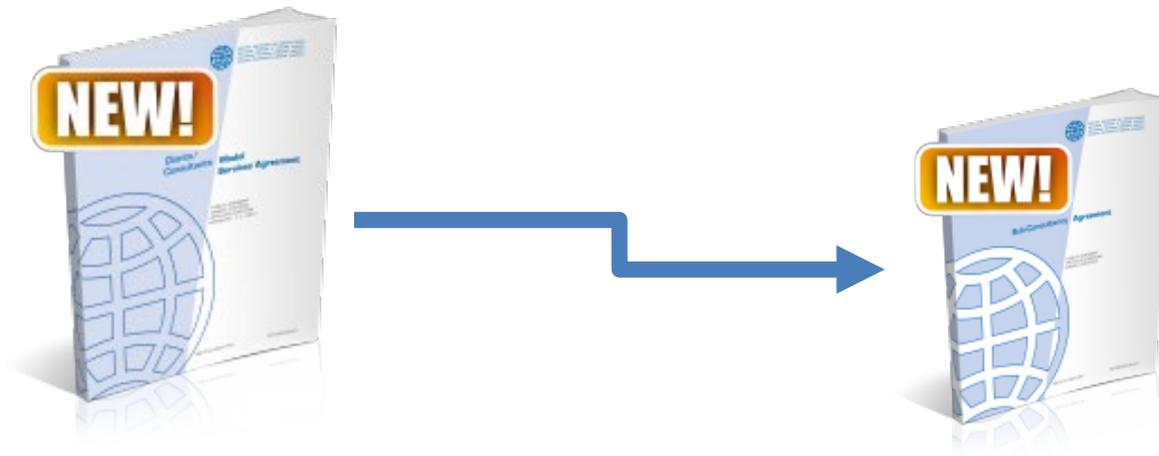




## Sub-Consultant

➤ Back-to-Bach with White Book?

➤ Sub-Consultancy Agreement





## Back-to-Back Content



### ➤ Sub-Consultancy Agreement

- Sub-Consultancy Agreement refers to Client/Consultant Agreement
- "Consultant's Programme" means the Consultant's Programme submitted to the Client under the Client / Consultant Agreement.
- "Services" means the services to be provided by the Consultant under the Client / Consultant Agreement.
- The Sub-Consultant **shall be deemed to have full knowledge of the provisions of the Agreement** as are attached at Annexure A and the Consultant shall if requested by the Sub-Consultant provide the Sub-Consultant with Annexure A without delay to the extent it is not incorporated herein the Sub-Consultancy Agreement.



### ➤ Annex A

- The Sub-Consultancy Agreement shall include a copy of the Client / Consultant Agreement **in so far as the Agreement must be complied with by the Sub-Consultant**. This will normally include all the terms and conditions and the scope of services from the Client / Consultant's Agreement but may exclude any commercially sensitive information such as the Consultant's pricing.
- The Client/Consultant Agreement does not form part of the Sub-Consultancy agreement but is a document that must be complied with by the Sub-Consultant in accordance with Clause 3.2.



## Back-to-Back Example



### ➤ Sub-Consultancy Agreement

➤ 2.3.1 If under the Client/Consultant Agreement the Consultant is entitled to assistance ... then the Sub-consultant may, by Notice to the Consultant, request similar assistance to that provided to the Consultant.

➤ **But:** This provision shall not impose any liability on the Consultant towards the Sub-consultant for the adequacy of such assistance

### ➤ White Book

➤ 2.3.1 In the Country and in respect of the Consultant, its personnel and dependants, as well as sub-consultants, if any, as the case may be, the Client shall do all in its power to assist in: ...



## Sub-Consultant Liabilities

### ➤ Obligations & Liabilities

- Clause 3
- Clause 8

### ➤ Sub-Consultancy Agreement





## Remind: WB Consultant's Duties & Liabilities → General

### ➤ 3.2.1

- Where appropriate, the Client shall describe the **function and purpose of the Services** and state the same explicitly in Appendix 1 [Scope of Services].

It emerges from S-C 3.3.1 that the essential data in Appendix 1 are:

- Clear description of scope & purpose of scope
- Size, nature & complexity of project



### ➤ 3.3.1

- Notwithstanding any term or condition to the contrary in the Agreement or any related document or any legal requirement of the Country or any other relevant jurisdiction (including, for the avoidance of doubt, the jurisdiction of the place of establishment of the Consultant), in the performance of the Services the Consultant shall have no other responsibility than to exercise the **reasonable skill, care and diligence** to be expected from a consultant experienced in the provision of such services for projects of similar size, nature and complexity.
- 3.3.2 **To the extent achievable** using the standard of care in Sub-Clause 3.3.1, and without extending the obligation of the Consultant beyond that required under Sub-Clause 3.3.1, the Consultant shall perform the Services with a view to **satisfying any function and purpose** that may be described in Appendix 1 [Scope of Services].



## Sub-Consultant's Duties & Liabilities → General

➤ 3.2.1 The Sub-Consultant shall be deemed to have full knowledge of the provisions of the Agreement as are attached at Annexure A and the Consultant shall if requested by the Sub-Consultant, provide the Sub-Consultant with Annexure A with the extent it is not incorporated in the Sub-Consultancy Agreement.

**3.2.2 The Sub-Consultant shall perform its obligations under the Sub-Consultancy Agreement so that no act or omission of the Sub-Consultant shall constitute, cause or contribute to any breach of the Agreement by the Consultant of any of the Consultant's obligations under the Agreement.**

➤ 3.2.3 The Sub-Consultant shall observe and perform the Consultant's obligations under the Agreement and the Sub-Consultancy Agreement that they relate to the Sub-Consultancy Services.

➤ 3.2.4 The Sub-Consultant acknowledges that the Consultant will rely upon the skill and judgement of the Sub-Consultant in the discharge of its obligations under the Sub-Consultancy Agreement

➤ 3.3.1 Notwithstanding any term or condition to the contrary in the Sub-Consultancy Agreement or any related document or any legal requirement ... the Sub-Consultant shall have no other responsibility than to exercise the reasonable skill, care and diligence to be expected of a professional of similar nature and complexity.

**3.3.2 To the extent achievable using the standard of care in Sub-Clause 3.3.1 and without extending the obligation of the Sub-Consultant beyond that required under Sub-Clause 3.3.1, the Sub-Consultant shall perform the Sub-Consultancy Services with a view to satisfying the function and purpose that may be specified in the Agreement**





## Sub-Consultant's Duties & Liabilities → General

- **3.2.2** The Sub-Consultant shall perform its obligations under the Sub-Consultancy Agreement so that no act or omission of the Sub-Consultant shall constitute, cause or contribute to any breach of the Agreement by the Consultant of any of the Consultant's obligations under the Agreement.
- **8. 1. 1** The Sub-Consultant shall be liable to the Consultant for a breach by the Sub-Consultant of any provision of the Sub-Consultancy Agreement.
- **8. 1 .2** The Consultant shall be liable to the Sub-Consultant for any breach by the Consultant of any provision of the Sub-Consultancy Agreement.

It emerges from S-C 3.3.2 that under the Sub-Consultancy Agreement it is essential to understand:

- Clear description of scope & purpose of scope as under the Agreement [Client / Consultant Agreement]
- Consultant's Obligation under Client / Consultant Agreement
- Size, nature & complexity of project





## Sub-Consultancy Agreement vs. D & B Subcontract



- Design & CA services only (limited scope)
- Not fully back-to-back, but
  - access to main agreement required
  - compliance with WB
  - No related claims
- Limited fitness for purpose
- No like claims
- No back-to-back dispute resolution



- Design and other services (broad scope) – but design only possible
- Fully back-to-back
  - compliance with MC
  - pay-when paid / TOC suspended etc.
  - Programming – Claims' procedure
- “when completed fitness for purpose”
- Like claims
- Back-to-back dispute resolution



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## JV Agreement 2<sup>nd</sup> Edition – 2017

Designed for unincorporated JV, where a JV of firms acts as Consultant under a **Services Agreement** such as the **White Book**

### Structure:

- Agreement General Conditions (24)
- Appendices 1 to 5
  1. Particular Conditions – Part A (References/Agreement Data) + Part B (Additional or Amended Clauses) – prevailing on GC
  2. Financial Administration Services
  3. Allocation of the obligations
  4. Financial Policy and Remuneration
  5. Steering Committee
  6. Project Director
  7. Project Manager
  8. Cross Guarantee and Indemnity Agreement
  9. Code of Conduct





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## JV Agreement 2<sup>nd</sup> Edition – 2017

**Assuming that**

**the lowest level of alliance / cooperation is intended; individual Members need to agree the allocation among themselves of the obligations and liabilities within the Joint Venture**

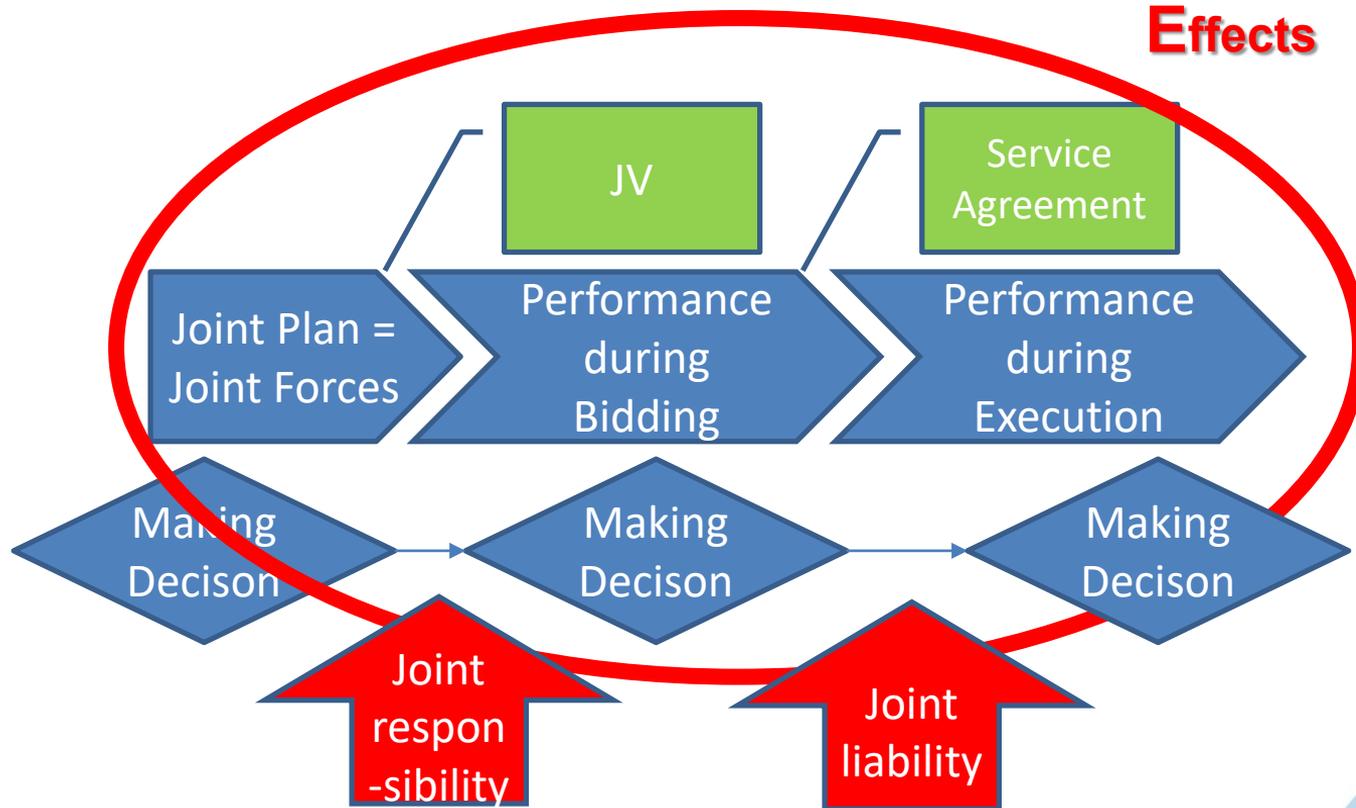
**Not creating a legal entity having individual legal capacity, but is an agreement between parties to associate for a specific project.**

**Each JV Member will typically be jointly and severally responsible and liable for the performance of Services under the main Services Agreement with the Client and for any breach of that agreement.**





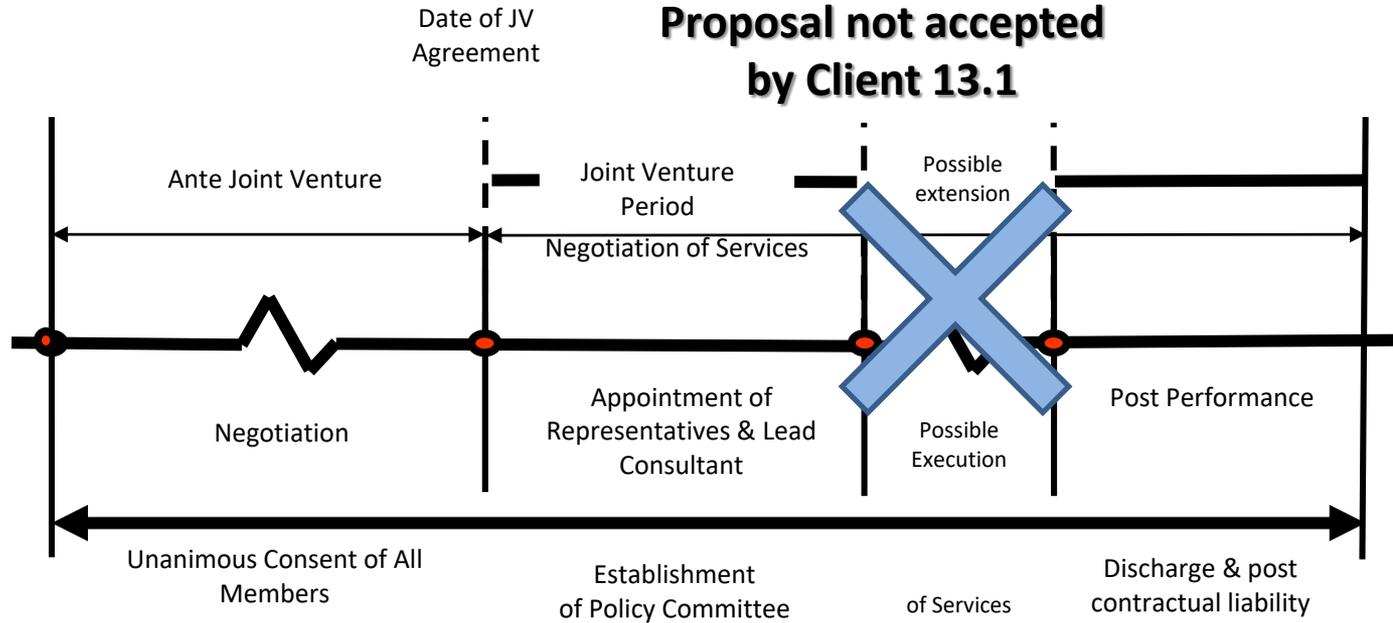
## Observations





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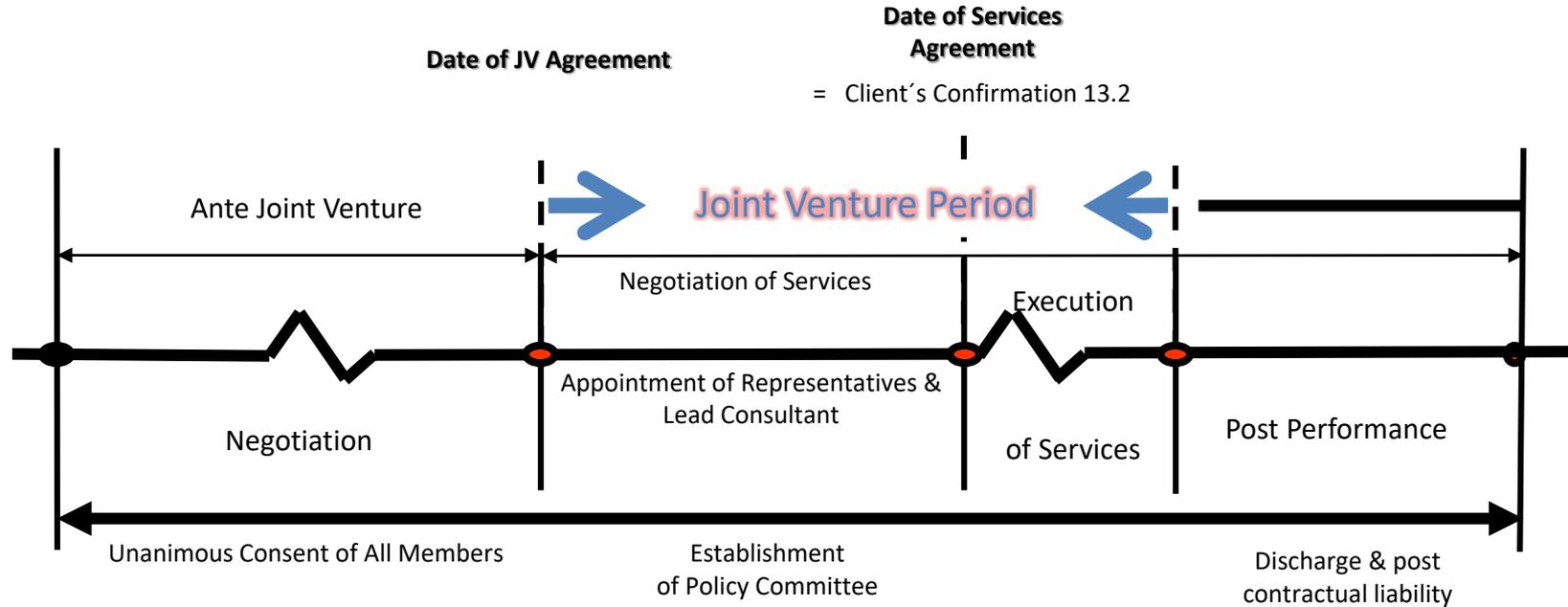
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## Conclusions

- FIDIC provides the industry with a complete set of Agreements in order to procure Consultancy services on all possible levels
- One Stop solutions: WB, Sub-Consultancy Agreement & JV Agreement are fit for each other
- New generation is more balanced
- Agreements have a broad scope of application
- Sub-Consultancy Agreement & JV Agreement provide capacity building options for a huge variety of services
- FIDIC DB Subcontract is available as an alternative if fit for purpose is key and the consultant is not too much scared (size, management capacity etc. must be available)





## Thank You

- I kindly thank you for your attention.
- [Kanzlei@dr-hoek.de](mailto:Kanzlei@dr-hoek.de)

