

Comparison of Contractual Payment Terms and Conditions¹

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ABSTRACT

Payments between two parties have always existed, and for many centuries this information has been gathered into contracts. A contract is an agreement between private parties creating mutual obligations enforceable by law. The Terms and Conditions (T&C) are here to explain every level of details in each clause, in order to avoid conflicts between the parties.

This paper is important because we will focus on the payments terms and conditions, a risky clause because this is one of the main source of conflict. There is a huge amount of contract written every day, and they all have this clause included. The matter of this paper is to show how many differentiations we can find about this clause, and which scientific document can help a lawyer to write perfectly the payments clause.

Three scientific documents have been compared, two have been eliminated thanks to the use of Multi-Attribute Decision Making (MADM method). The final most completed document that has been kept is the Engineers' Joint Contract Document Committee (EJCDC) document.

This paper helps us understand how many information this clause should contain, and may help the owner of an organization to understand how to write the perfect payments terms and conditions without forgetting any details.

Key words: Contract, clause, price, cost, owner/contractor, reimbursement, Engineers' Joint Contract Document Committee

INTRODUCTION

Nowadays, a conflict can easily arise between two parties, before or after the signature of the contract. A contract is the first document that links the two parties together, so this is the opportunity to add as much details as possible. The Terms and Conditions (T&C) are written in

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order to be clear between the Owner and the Contractor but sometimes some elements are missing, and create conflicts.

This topic is based on the payment clause of a recruitment agreement contract from a Sydney-based start-up. The scope of this paper is a specific situation because it's a comparison between contractual payment term & conditions from an existing contract and a baseline such as the American Institute of Architects (AIA), the Engineers' Joint Contract Document Committee (EJCDC) document and the International Federation of Consulting Engineers (FIDIC). The comparison will help the reader to understand that some main points can be forgotten in a contract, and it's important to add a lot of details to avoid future eventual conflicts about payment terms.

1. Problem definition

This paper is important but difficult as well because there are not two similar contracts. The T&C are all the time different from one to another, and especially the payment terms since it depends on what is the work that needs to be done, how it will be delivered, and how much does it cost to be done. It is also an important part of the contract because it includes the reimbursement of the work if it hasn't been delivered. This paper aims at, first defining the "contractual payment terms and conditions" clause, then to identify this clause in three different documents and analyse them, and see what's the preferable solution to be sure the clause is perfect from the owner and contractor's perspective.

Once this analyse done, we will be able to answer the question:

- How is "contractual payment terms and conditions" defined in three professional documents?
- What is the best document that will help as a support to perfectly write this clause?

METHODOLOGY

This paper is using the **Multi-Attribute Decision Making**, also referred as MADM, which is a tool that evaluates several conflicting measures in a decision making. This will help us to understand which is the most favourable solutions between three different documents that will be used as a comparison baseline.

Our first document is an actual contract from a Sydney-based start-up, a recruitment and labour service agreement between the owner and the contractor. This contract explains the work that needs to be done to hire an employee for the client, the scope of work, the cost and the special conditions. In the T&C, the payment terms and conditions are named as "price and costs". This contract will be our baseline for this paper, and our goal is to find feasible

alternatives from other documents to see if this actual clause is completed enough, or could be improved.

Here is the actual payment terms and conditions of our base contract:

“PRICE AND COSTS

The Placement Fee will be invoiced on the earlier of:

*execution of the Permanent Employee’s employment agreement; or
the Permanent Employee’s first day.*

The Company will invoice the Client in respect of services provided in connection with Temporary/Contract Employee on a fortnightly basis unless otherwise stated in the Proposal.

All invoices are due and payable by the Client to the Company within 14 days from the date thereon.

The price of the Services quoted in the Proposal is exclusive of GST. In addition to the price payable for the Services, where required by law, the Client must pay to the Company, in accordance with a valid tax invoice issued by the Company, the GST payable in respect of the supply of the Services.

Unless the parties agree otherwise in writing, the Company is entitled to be reimbursed for any out of pocket expenses reasonably incurred in connection with the performance of Services under this Agreement, including any miscellaneous project-related costs or expenses including associated reasonable travel or accommodation expenses which will be charged as an additional cost to the Client. Out of pocket expenses incurred by the Company are in addition to, and do not form part of the total cost of the works disclosed in the Proposal, unless otherwise expressly stated.

The price in connection with this agreement also does not include: medical/police checks;

advertising expenses;

out of pocket expenses incurred by the Candidate to attend interviews, which may include items such as accommodation, meals and travel.

The Client must pay all amounts due to the Company (whether under these terms and conditions or otherwise):

*without set-off, deductions counter-claims or conditions; and
in available cleared funds.*

If the Client owes any amount to the Company (whether under these terms and conditions or otherwise), the Company may, in its sole discretion and without prejudice to any of its other rights, do one or more of the following:

withhold all future supplies of Services until that amount has been paid in full;

set-off that amount against any amount owing by the Company to the Client; and/or

immediately demand all amounts due and payable under this Agreement from the Client.

If an amount due under these terms and conditions is paid after the due date the Client must pay the Company, in addition to the overdue amount:

interest at the Default Rate calculated based on a 365-day year from the date of the default until the date the amount (together with all accrued interest) is paid in full; and

all costs and expenses incurred by the Company in collecting the overdue amount.

The Client’s obligation to pay an amount owing applies notwithstanding any delay in the delivery of the Services.”²

² This « price and costs » clause has been extracted from our Sydney-based start-up, which will remain confidential.

2. Feasible alternatives

This paper is based on three other alternatives that may help improving our previous payments terms and conditions citation:

- The American Institute of architects (AIA) document
- The Engineers' Joint Contract Document Committee (EJCDC) document
- The International Federation of Consulting Engineers (FIDIC) document

3. Development of the outcomes of the alternatives

First, it is important to know how different can be these three other alternatives in terms of payments clause.

In the appendices, there is a table that has been created by only reading all processes of each documents, in order to highlight six different attributes. Those attributes will help us understand the differentiations between each document and will help this paper to find the perfect and suitable alternative in order to compare and improve the actual Sydney-based start-up's contract.

4. Selection of criteria

We chose six attributes that will guide our analyse: **contract sum, application for payments, certificates for payments, progress payments/schedule of payments, failure of payments and final payments.**

Those attributes had been chosen because they are part of the payment process of each contract. There are many others but those were the most relevant for our analysis, starting from the beginning (contract sum) to the end (final payments).



This paper will qualify these criteria by using the **Non-Compensatory Model Technique 1: dominance**, from the Multi-Attribute Decision Making (MADM). Below is the table used for the MADM method.

Figure 1: dominance analysis between the three alternatives – by author

		AIA vs contract	FIDIC vs contract	EJCDC vs contract
1. Contract sum		Equal	Worse	Worse
2. Application for Payments (AP)	<i>when is it prepared?</i>	better	better	better
	<i>what does it include?</i>	worse	better	better
3. Certificates for payments (CP)	<i>first step</i>	better	better	better
	<i>second step</i>	better	better	better
	<i>third step</i>	better	better	better
4. Progress Payments / Schedule of Payments	<i>what regulates the progress payment?</i>	equal	N/A	better
	<i>any specification regarding subcontractors?</i>	N/A	N/A	better
	<i>any differentiation regarding the type of the contract?</i>	N/A	N/A	better
5. Failure of payments	<i>contractors' rights</i>	equal	equal	worse (too long)
	<i>contract time</i>	equal	N/A	equal
	<i>contract sum</i>	equal	N/A	better
6. Final Payments	<i>before FP</i>	N/A	better	equal
	<i>documents related?</i>	N/A	N/A	
	<i>completion of work</i>	equal	equal	equal
	<i>Payment becomes due</i>	N/A	worse (too long)	equal
Dominance?		NO	MAYBE	MAYBE

The important principle of this technique is to select the one that dominates the other, so as many “better” criteria as possible.

We can see that AIA document is not complete enough to help analysing our paper, so we will eliminate this document. FIDIC is good and may be a solution, but this is not clear enough to say that it dominates the competition between these three documents. EJCDC is clearly the best document because there are a lot of criteria that have been highlighted as “better than the Sydney-based start-up contract”.

FINDINGS

5. [Analysis of the two alternatives](#)

Now that we have only two feasible solutions to improve our contract, which are FIDIC and EJCDC document, we need to eliminate another one and choose best scientific document. We will use the powerful **Compensatory Model Technique 2: Additive Weighting Technique**.

First of all, we need to compare the two remaining documents: FIDIC and EJCDC. To do so, we use the **relative weighted technique** in order be able to fill the next table. In the **Non-Compensatory Model Technique 1: dominance**, we used three words related to three different colours: **better**, **equal** and **worse**. Those will be converted in numbers for the next table:

Figure 2: additive relative technique – by author

Attributes	FIDIC	EJCDC
Contract Sum	0,330	0,330
AP	1	1
CP	1	1
Progress payments	0	1
Failure of payments	0,330	0,600
Final payments	0,330	0,600
SUM	2,990	4,530

- Better = 1
- Equal = 0,6
- Worse = 0,33
- N/A = 0

Before going to the next step, we have to know the ordinal ranking of each criterion, using **Non-Compensatory Model Technique 3: Disjunctive Reasoning**. This is a simple pair wise comparison that will help us knowing which criteria are the most important.

Figure 3: disjunctive reasoning analysis – by author

	Contract Sum	AP	CP	Progress payments	Failure of payments	Final payments	Ordinal Ranking
Contract Sum		0	1	0	0	0	1
AP	1		1	1	1	1	5
CP	1	0		1	0	0	2
Progress payments	0	0	0		0	0	0
Failure of payments	1	0	1	1		1	4
Final payments	1	1	1	1	0		4

As we can see, the two most important attributes are failure of payments and final payments. Indeed, those have to be fully explained in the payments clause because it will avoid a lot of future conflicts between the contractor and the owner.

Finally, we can use our **Compensatory Model Technique 2: Additive Weighting Technique** to fill this last table and see which document outstands the analyse.

Figure 4: additive weighting technique – by author

	Step 1	Step 2		FIDIC		EJCDC	
Attributes	Relative Rank	Normalized Weight (A)		(B)	(A) x (B)	(C)	(A) x (C)
Contract Sum	1	1/16	= 0,063	0,330	0,021	0,330	0,021
AP	5	5/16	= 0,313	1	0,313	1	0,313
CP	2	2/16	= 0,125	1	0,125	1	0,125
Progress payments	0	0/16	= 0	0	0	1	0
Failure of payments	4	4/16	= 0,250	0,330	0,083	0,600	0,150
Final payments	4	4/16	= 0,250	0,330	0,083	0,600	0,150
SUM	16	16/16	= 1	2,990	0,623	4,530	0,758

6. Selection of the best alternative

This is now the time to realise how much our options are better or worse.

In the figure 2, the **additive relative technique**, the EJCDC document is 151,5% better than the other document. Indeed, 4,530 divided by 2,990 is 1,515 multiplied by 100, which is 151,5%. The EJCDC is a better choice by 151,5%.

In the figure 4, the **additive weighting technique**, the same calculation gives us as a result, 121,66% ($0,758/0,623 = 1,2166 * 100 = 121,66\%$). EJCDC, for the second time, is a better choice regarding this method.

There is not a huge difference between those two scores but this is enough to assume that EJCDC is a better solution to help us improve our document.

The final rank is:

- First place: **EJCDC document**
- Second place: FIDIC document
- Third place: AIA document

CONCLUSIONS

This paper has been written in order to highlight the difficulties to create the perfect clauses in the Terms and Conditions of a contract. We mainly focused on the payments T&C and discovered that, within three different scientific books (and there are many more!), there can be a lot of differentiations.

We wanted, in this paper, to answer two questions:

- How is “contractual payment terms and conditions” defined in three professional documents?
- What is the best document that will help as a support to perfectly write this clause?

The first question has been answered by reading all the processes of payments in each baseline, AIA, FIDIC and EJCDC document, and the information have been gathered in a table (cf. appendices). This first step allowed us to understand how different the same clause can be. Indeed, there can several different terms that mean the same thing, for example Payments progress and Schedule of Payments; but also a difference of schedule (each document allows a certain amount of time to let the owner pay the contractor, etc.).

After comparing our three baselines, we used three different tools in order to choose the best and most appropriate solution to help us compare our payments clause. It appeared that the best one in this case is the EJCDC document. This is the most complete, and this criterion is really important in order to avoid future conflicts between the owner and the contractor.

To sum up, if an owner wants to avoid as much conflict as possible in terms of payments, he needs a relevant and complete Terms and Conditions in his contract, especially for the payments clause. EJCDC is then a good baseline to help him create the best clause.

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APPENDIX

Comparison of the feasible alternatives				
Selection attributes		AIA	FIDIC	ECDC
1. Contract Sum		stated in the agreement	contract price shall be subject to adjustments	The cost of work is a component of the contract price, under cost-plus-fee
		includes authorizes adjustments total amount payable by the owner to the contractor		
2. Application for Payment (AP)				
	<u>when is it prepared?</u>	10 days before paying progress: Itemized AP prepared	before the end of the month	at least 20 days before the date established in the agreement for each progress payment (but not more often than once a month)
	<u>what does it include?</u>	The AP should not include a request for payment	the statement should be submitted in 6 copies, including: the estimated contract value of the work executed and the contractor's documents produced up to the end of the month; any amounts to be added/deducted, any other additions or deductions which may have become due under the contract	starting with the second AP -> each application shall include an affidavit of contractor stating that all previous progress payments received have been applied on account to discharge contractor's legitimate obligations associated with prior AP.
3. Certificates for payment (CP)				
	<u>first step</u>	within 7 days after receipt of the contractor's AP, 1) issue to the owner a CP (full amount of the AP) with copy to the contractor	The CP are called "Application for interim Payment Certificates", which is then a mix between the Application and the Certification. Please refer to the previous criteria.	within 10 days -> 1) indicate in writing a recommendation of payment and present the application to owner
	<u>second step</u>	2) issue to the owner a CP for such amount as the Architect determines		2) return the application to contractor indicating in writing engineer's reasons for refusing to recommend payment.
	<u>third step</u>	3) withhold certification of the entire AP and notify Contractor/Owner of the architect's reason for doing this		
4. Progress Payments / Schedule of Payments				
	<u>what regulates the progress payment?</u>	once the architect receives CP, the owner has to make payment within time provided in the contracts' documents		the schedule of values is the basis for progress payments and will be incorporated into a form of AP
	<u>any specification regarding subcontractors?</u>	each subcontractor must be paid by the contractor, no later than 7 days after receiving the payment		
	<u>any differentiation regarding the type of the contract?</u>			Progress payment for Unit Price Work: will be based on the number of units completed during the pay period
				Progress payment for cost-based work: will be based on cost of the work completed by contractor during the pay period
5. Failure of payments				
	<u>contractors' rights</u>	contractor can stop the work until payment of the amount owing has been received	the contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delays.	if owner doesn't pay the contractor for 30 days, contractor may, upon 7 days written to owner and engineer, terminate the contract and recover from owner payment.
	<u>contract time</u>	contract time shall be extended if needed		
	<u>contract sum</u>	contract sum shall be increased by the amount of the contractor's reasonable costs of shutdown and delay + interests as provided for in the contracts docs.		
6. Final Payments				
	<u>before FP</u>		the contractor received the Performance Certificate and within 56 days, has to send six copies of a draft of final statement with the value of work done and any further sums which the contractor considers to be due to him under the contract	if work completely done -> contractor may make application for FP.
	<u>documents related?</u>			the FP should be accompanied by consent of the surety to final payment + satisfactory evidence that all issues have been resolved + disputes that contractor believes are unsettled
	<u>completion of work</u>	once contractor's notice that the work is ready for final inspection -> final inspection	work complete when it's ready for final payment	work complete when it's ready for final payment
	<u>Payment becomes due</u>		the employer shall pay to the contractor the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance; the amount certified in each Interim Payment Certificate within 56 days after the engineer receives the statement and supporting documents; the amount certified in the FP within 56 days after the employer receives this Payment certificate.	payment has to be done within 30 days after the presentation of the FP

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Lore Paganet is a business school student specialised in Project and Programme Management & Business Development. After a Higher National Diploma (HND) in Hospitality and Catering, she decided to level up her knowledge at SKEMA Business School, one of the Top Ten French Business School. With several previous activities in Human Resources and Contracts Management, she gathered a lot of information about contracts of any type. She is now fully dedicated to her Project Management studies and has just been certificated (AgilePM and Prince2, and more to come) in this field.

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