

FIDIC's

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Restraints on the Execution of Works

by

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1. Synopsis

Following on from my earlier paper on Managing Risk, it can be seen from the various provisions of the Contract that the risks are allocated to the contracting parties through the various Conditions of that Contract creating a number of matrices of risk, each relating to a different area of the project. Thus, for example, a matrix of risks relating to Plant, Materials and Workmanship is identified and allocated under Clause 7 of the Contract Conditions of the 1999 Red Book. Another matrix, relating to Commencement, Delays and Suspension is under Clause 8 of the Contract Conditions of the 1999 Red Book. However, one of the most far reaching matrices is that relating to Restraints to the execution of the Works and completion of the Contract, which is dealt with under mainly four Clauses of the Contract Conditions of the 1999 Red Book: Clauses 8, 15, 16 and 19 of these Conditions. They contain the rights and obligations of the Parties that flow from the risks relating to suspension and termination of the Contract. The Red Book is referred to here as an example of the three 1999 Forms for major works, with the knowledge that the Yellow and the Silver Books follow similar wording.¹

2. Introduction

- 2.1 Whereas a contract using one of the 1999 FIDIC forms for major works may be suspended or terminated in certain specified circumstances, the conditions permitting such a drastic action by either of the contracting parties differ. The differences are important to consider and remember, since what is permitted for the Employer may not be so for the Contractor.

¹ See Chapter 27 of the book by the author "*The FIDIC Forms of Contract*", 3rd Edition, Blackwell Publishing Limited, Oxford, 2005, where the differences between the three major works contracts are set out.

- 2.2 The events and circumstances that permit suspension by the Employer are set out in Sub-Clause 8.8 [*Suspension of Work*], whereas those that permit termination are set out in Clause 15 [*Termination by Employer*]; and Sub-Clause 19.6 [*Optional Termination, Payment and Release*]. They extend over a large number of the events that may occur and the activities contained in a construction or an engineering project. The events and circumstances that permit suspension by the Contractor are set out in Sub-Clause 16.1, whereas those that permit termination are set out in Sub-Clauses 8.11 [*Prolonged Suspension*]; 16.2 [*Termination by Contractor*]; and 19.6 [*Optional Termination, Payment and Release*]. In this connection, it should be remembered that the Contract Conditions do not exclude the right of either party to suspend or to terminate the Contract under the applicable law.
- 2.3 The consequences of suspension and termination must also be carefully considered as these two acts are extremely serious and drastic measures relating usually to complex risks. The consequences that follow are factually and legally taxing and whichever is the initiating party to suspension or termination, whether the Employer or the Contractor, would often find it difficult to obtain adequate remedy. They are spread through Clauses 8 [*Commencement, Delays and Suspension*]; 15 [*Termination by Employer*]; 16 [*Suspension and Termination by Contractor*]; and 19 [*Force Majeure*], and Sub-Clauses 4.4 [*Subcontractors*]; 11.3 [*Extension of Defects Notification Period*]; and 14.2 [*Advance Payment*].

3. Sub-Clause 8.8 [*Suspension of Work*] by Employer

- 3.1 The Engineer may, under Sub-Clause 8.8 of the Contract Conditions, suspend the progress of the Works on behalf of the Employer.² Sub-Clause 8.8 provides as follows:

² Under the Silver Book, it is the Employer who is entitled to suspend the progress of the Works.

“Suspension of Work

8.8 *The Engineer may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.*

The Engineer may also notify the cause for the suspension. If and to the extent that the cause is notified and is attributable to or the responsibility of the Contractor, the following Sub-Clauses 8.9, 8.10 and 8.11 shall not apply.”

3.2 As stated in the second paragraph of Sub-Clause 8.8, the application of the provisions of Sub-Clauses 8.9, 8.10 and 8.11 will depend on whether the cause of the suspension is due to the Employer or the Contractor.

4. Clause 15: Termination by Employer

4.1 The Employer is allowed to terminate the contract provided he gives notice under Sub-Clause 15(1). Such termination may be initiated due to an event caused by the Contractor or at the convenience of the Employer; under Sub-Clauses 15(2) and 15(5), respectively. Sub-Clause 15(1) provides as follows:

“Notice to Correct

15.1 *If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.”*

4.2 As can be seen from the wording of Sub-Clause 15(1) and in fact all the other sub-clauses relating to suspension and termination, referred to above, notices play an important part in the procedure of both acts and compliance with the notice provisions set out in the FIDIC Forms is of paramount importance. The Notice requirements appear in Sub-Clause 1.3 under the heading “*Communications*” and is sometimes supplemented by other requirements under the applicable law, including statutory rights and regulations, which may override the provisions in the Contract. The Notice must be: sent to the right address; given at the correct time; sent by the correct method; and in writing.

- 4.3 Starting with an event entitling the Employer to terminate at his convenience, the provisions of Sub-Clauses 15(5) form a new concept for FIDIC, which is extremely useful to the Employer in certain unusual circumstances, particularly if a major defect in the planning or the design of the project is discovered during construction; or if a restraining event is encountered. Sub-Clause 15(5) provides as follows:

“Employer’s Entitlement to Termination

15.5 The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release].”

- 4.4 As can be seen from the provisions of Sub-Clause 19.6, quoted in paragraph 6.1 below, the payment is based on the Cost of a number of elements. Cost is a defined term of the Contract, in sub-paragraph 1.1.4.3 of the Conditions: ***“all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit”***.

- 4.5 However, more usually, the cause of termination is an event caused by the Contractor, as provided in Sub-Clause 15(2), quoted below:

“Termination by Employer

15.2 The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct],***
- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,***

- (c) *without reasonable excuse fails:*
- (i) *to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or*
 - (ii) *to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,*
- (d) *subcontracts the whole of the Works or assigns the Contract without the required agreement,*
- (e) *becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or*
- (f) *gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:*
- (i) *for doing or forbearing to do any action in relation to the Contract, or*
 - (ii) *for showing or forbearing to show favour or disfavour to any person in relation to the Contract,*
- or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.*

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor."

- 4.6 In connection with Clause 15, the new Multi Lateral Development Banks Form of Contract, "*the MDB Form*" contains an added sentence in Sub-Clause 15(5) and a new Sub-Clause, Sub-Clause 15.6. The first states that "*or to avoid a termination of the Contract by the Contractor under Clause 16.2 [Termination by Contractor]*", which aims at preventing the Employer from misusing the power to terminate at his convenience. The new Sub-Clause 15.6 in the MDB relates to "*Corrupt or Fraudulent Practices*". It provides as follows:

"If the Employer determines that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 14 days notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such expulsion had been made under Sub-Clause 15.2"

- 4.7 It is worth mentioning in connection with the newly added clause in the MDB form of Contract that it is usually very difficult to obtain clear and unequivocal evidence that would justify termination on grounds of corruption or collusive tendering. In recent years, with the initiative of the World Bank and the United Nations, a number of international anti-corruption treaties and conventions have been concluded, including the United Nations Convention against corruption; the United Nations Declaration against Corruption and Bribery in International Commercial

Transactions; and the United Nations Convention against Transnational Organised Crime.³

5. Clause 16: Suspension and Termination by Contractor

5.1 Clause 16 is divided into two parts: Firstly, Suspension by the Contractor, as provided for in Sub-Clause 16.1; and secondly, termination by the Contractor, as provided for in Sub-Clause 16.2.

5.2 Cash flow has been called the life blood to a contractor. Therefore, to be paid what is properly due on time is very much a question of life and death to a contractor. To ensure, at least with a high incentive to the Employer, that the Contractor is paid promptly what is due under the Contract, the Contractor's right to suspend work is provided for in Clause 16.1. The provisions of Sub-Clause 16.1 are as follows:

“Contractor's Entitlement to Suspend Work

16.1 If the Engineer fails to certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates] or the Employer fails to comply with Sub-Clause 2.4 [Employer's Financial Arrangements] or Sub-Clause 14.7 [Payment], the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.

The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [Termination by Contractor].

If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

³ In this connection, see definition of the terms “corrupt practice”, “fraudulent practice”, “collusive practice”, and “coercive practice” in the World Bank Standard Bidding Document for Procurement of Works & Users Guide, May 2005.

- (a) *an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and*
- (b) *payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.*

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.”

5.3 There is an added text in Sub-Clause 16.1 of the MDB Form of Contract to that in the FIDIC Forms. It states that if the Bank has suspended disbursements under its loan, which finances in whole or in part the execution of the Works and no alternative funds are provided for, then the Contractor can suspend or reduce the rate of work at any time but not less than 7 days after the Borrower having received the suspension or notification from the Bank. In essence, this added text reflects an acceptance that the contractual relationship between the Contractor and the Employer is directly affected by the loan account between the Employer and the lending Bank, reflecting the reality in most cases that if the Bank does not provide the necessary funds, the Contractor is unlikely to get paid.

5.4 The second part of Clause 16 relates to termination. It provides as follows:

“Termination by Contractor

16.2 The Contractor shall be entitled to terminate the Contract if:

- (a) *the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] in respect of a failure to comply with Sub-Clause 2.4 [Employer's Financial Arrangements],*
- (b) *the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,*
- (c) *the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [Payment] within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 [Employer's Claims],*
- (d) *the Employer substantially fails to perform his obligations under the Contract,*

- (e) *the Employer fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment],*
- (f) *a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [Prolonged Suspension], or*
- (g) *the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.*

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract. However, in the case of sub-paragraph (f) or (g), the Contractor may by notice terminate the Contract immediately.

The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.”

5.5 A new text is also added in Sub-Clause 16.2 of the MDB Form. It provides that if the Bank suspends credit from which payments to the Contractor are being made, and if the Contractor has not received sums due to him upon expiration of the 14 days referred to in Sub-Clause 14.7 for payments under Interim Payment certificates, the Contractor may:

- (i) suspend work or reduce rate of work, **and/or**
- (ii) terminate his employment by giving notice to the Employer with a copy to the Engineer. Such termination to take effect 14 days after the giving of such notice.

5.6 Three matters should be noted in connection with the provisions of Sub-Clause 16.2. Firstly, the provisions of sub-paragraphs (f) and (g) of Sub-Clause 16.2 entitle the Contractor, by notice to the Employer, to terminate the Contract immediately and without the delay period of 14 days. Secondly, the Contractor's decision to terminate the Contract does not prejudice any of his other rights under the Contract or otherwise; and thirdly, if the Contractor decides to terminate for non-payment, this could only occur after a period of 56 days following the **“Statement”** submitted by him to the Engineer under paragraph (b) of Sub-Clause 14.7, [Payment], plus 42

days under paragraph (c) of Sub-Clause 16.2, *[Termination by Contractor]*. Accordingly, non-payment would end as being for work of at least 128 days, which could constitute quite a large sum of money, particularly for large projects.

6. Sub-Clause 19.6: Optional Termination, Payment and Release in Force Majeure

6.1 Sub-Clause 19.6 provides as follows:

“Optional Termination, Payment and Release

19.6 If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].

Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;***
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;***
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;***
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and***
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.”***

6.2 Force Majeure events are defined under Sub-Clause 19.1. However, it should be noted that the definition is of a very broad nature and may be different from the definition of Force Majeure in certain jurisdictions. Sub-Clause 19.1 provides a list of examples of Force Majeure of Force Majeure events, but the list is not inclusive of all qualifying events. Reference to this topic is made in another paper by the author, which would provide further information on this topic.⁴

7. Consequences of the Restraints

7.1 The consequences of the relevant events forming the restraints on the execution of Works are provided for in the other sub-clauses of Clauses 15 and 16 of the Contract Conditions, which have not been referred to above. These are as follows: For termination by the Employer, Sub-Clause 15.3, “*Valuation at Date of Termination*”; and Sub-Clause 15.4, “*Payment after Termination*”.

For Suspension and Termination by the Contractor: Sub-Clause 16.3, “*Cessation of Work and Removal of Contractor’s Equipment*”; and Sub-Clause 16.4, “*Payment on Termination*”.

7.2 It is worthy of note that Sub-Clauses 15.3 and 15.4 bring into operation the provisions of Sub-Clauses 3.5 and 2.5, respectively.

⁴ “FIDIC’s Green Book – Clauses 6, 13 and 14: Risk, Responsibility, Liability, Indemnity, Insurance and Force Majeure”, *International Construction Law Review*, Volume 19, Part 2, April 2002, p. 220 – 228

Figure 1 – Suspension by the Employer & the Contractor

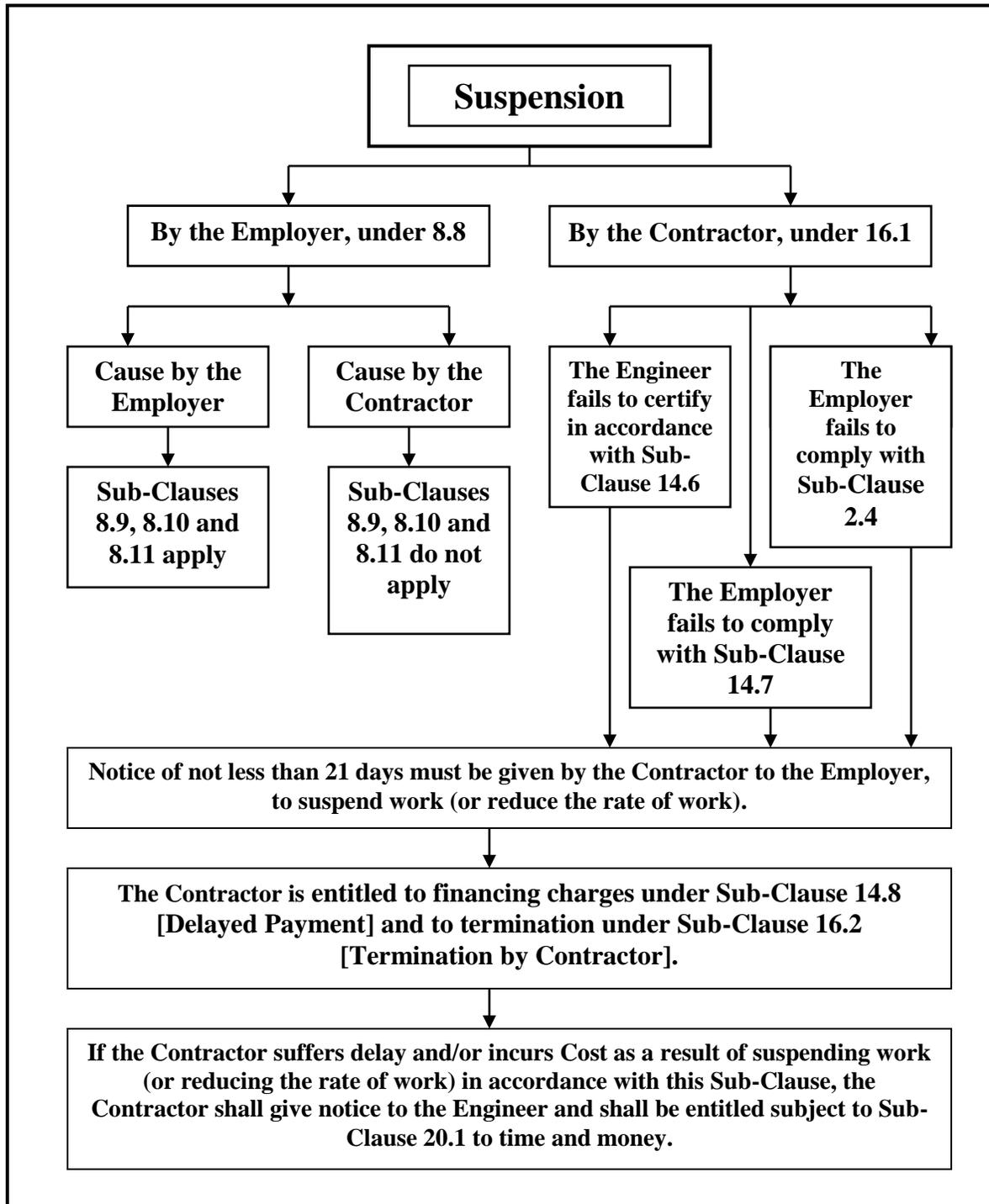


Figure 2 – Termination by the Employer

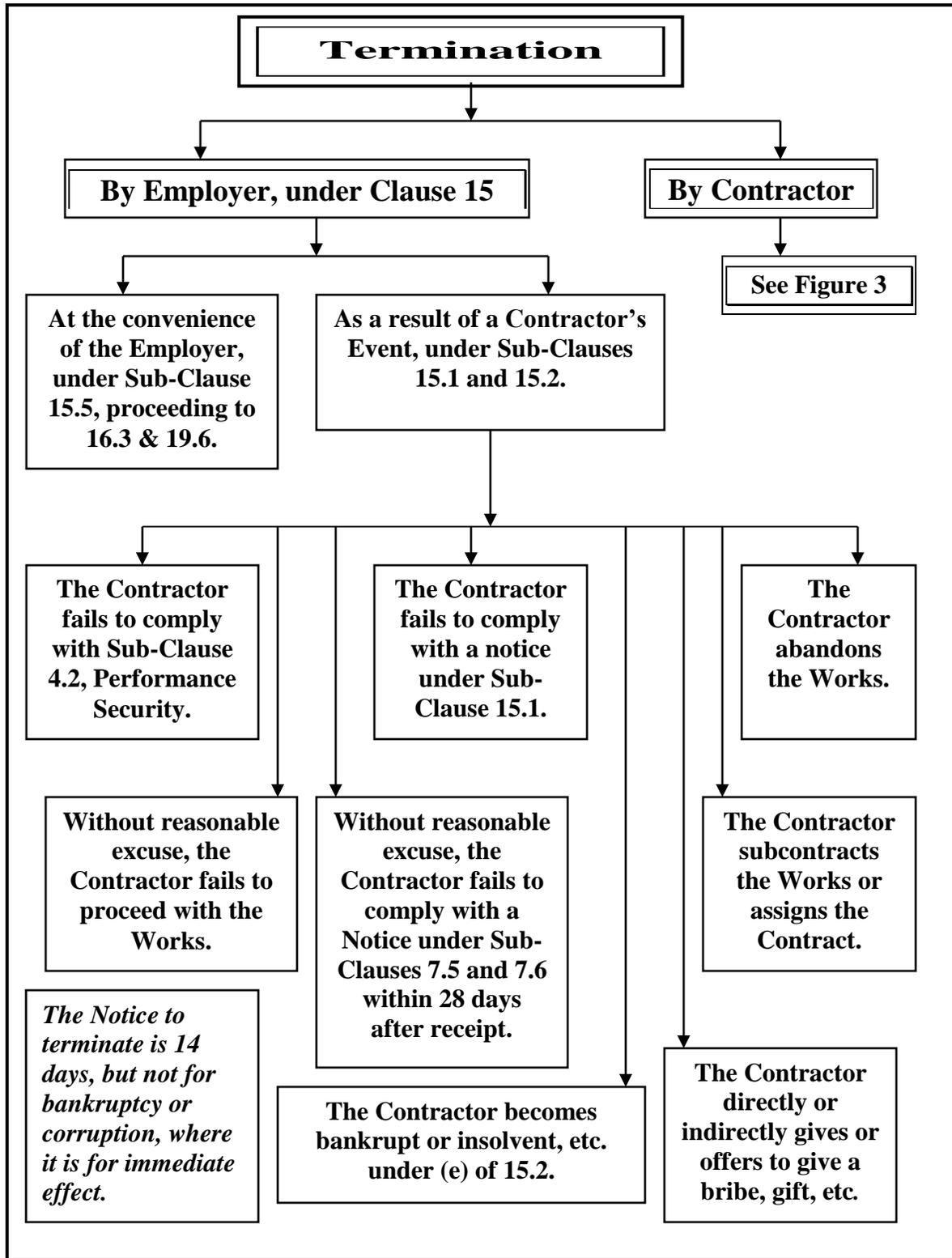


Figure 3 – Termination by the Contractor

