

# Delayed Payments by Employer – Contractors' Options

under FIDIC 'pink book'

Contract for Construction for Building and Engineering Works  
Designed by the Employer – Multilateral Bank Harmonized  
Edition June 2010

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# Background – FIDIC ‘pink book’ contract

- This overview is intended for Parties (and Engineers) who need a quick overview of how the FIDIC ‘pink book’ 2010 MDB contract template treats delayed payments. This contract consists of General Conditions of Contract (‘GCC’), which may be amended by Particular Conditions of Contract (‘PCC’).
- The FIDIC ‘pink book’ contract template is used mainly for public infrastructure projects funded by multilateral development banks (‘MDB’). It includes supervision and certification of payments to Contractor by an ‘Engineer’, usually a design and engineering consultant (who often also designs the works for the project owner (‘Employer’) under a different contract).
- Japan International Cooperation Agency (‘JICA’) share a copy of the ‘pink book’ GCC on their website:

[https://www.jica.go.jp/english/our\\_work/types\\_of\\_assistance/oda\\_loans/oda\\_op\\_info/guide/tender/c8h0vm0000aoesst-att/civil\\_02.pdf](https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/oda_op_info/guide/tender/c8h0vm0000aoesst-att/civil_02.pdf)

# Background – why this presentation?

- Payments by government employers to contractors for public infrastructure projects usually follow laws, regulations and procedures in the country of the project. These can include employers' internal auditing requirements.
- Such laws and procedures can conflict with the contractual payment provisions under FIDIC 'pink book' (and under other FIDIC forms).
- Even if laws and procedures do not conflict with the contract, some employers are unfamiliar with FIDIC procedures for payment and follow their own opinions instead.
- Conflicting provisions and lack of awareness can cause delayed payments for infrastructure work, creating budget issues for employers, cashflow issues for contractors and disputes between both.

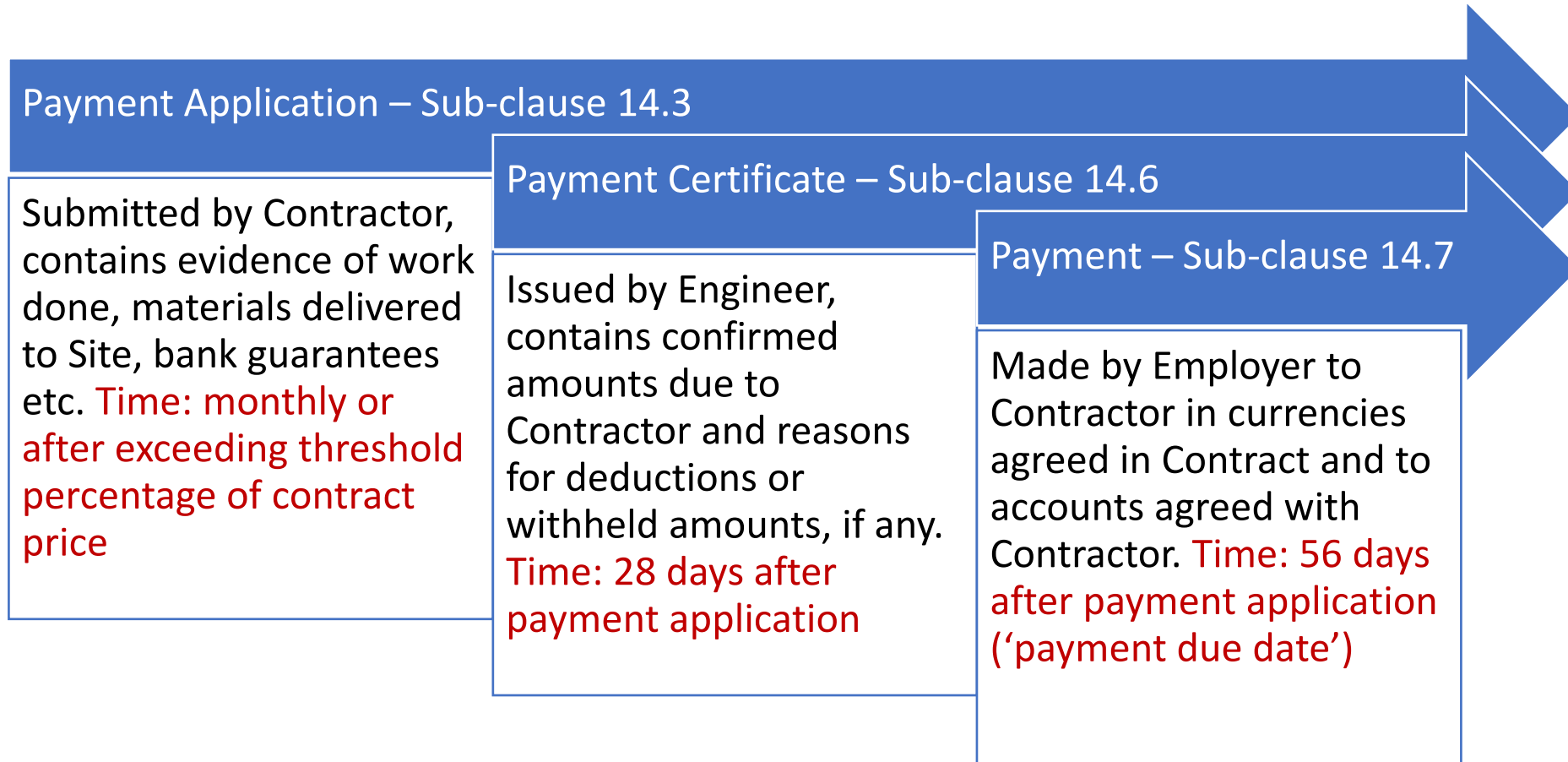
# Principles of payments to contractors in FIDIC 'pink book' contracts (part 1)

- Payments made by the Employer to the Contractor must be certified by the Engineer (with very few exceptions).
- The Engineer issues certificates for advance payments, interim payments (IPC) for work done, final payment after completion.
- The Engineer checks the Contractor's invoices and the supporting evidence, (such as advance payment security documents, evidence of work completed, materials delivered, tests passed, etc.) and then issues a payment certificate.
- If the Engineer disagrees with an invoice or supporting records, the Engineer can deduct or withhold amounts, giving reasons.

# Principles of payments to contractors in FIDIC 'pink book' contracts (part 2)

- Payment by the Employer shall only be made after a certificate by the Engineer, (with a few exceptions e.g. under GCC 14.7 (a) and GCC 20.4).
- Once the Engineer has certified the payment, the Employer shall pay it. There is no right of the Employer to delay a payment already certified by the Engineer.
- Any errors in an IPC can be corrected in future IPCs or in the final payment certificate.
- Note: – this interim basis for evaluating payments to Contractors can conflict with payment processing rules of government employers, and/or the law in the Country of the project.

# Timelines for certification and due date of interim payments in FIDIC 'pink book' contracts



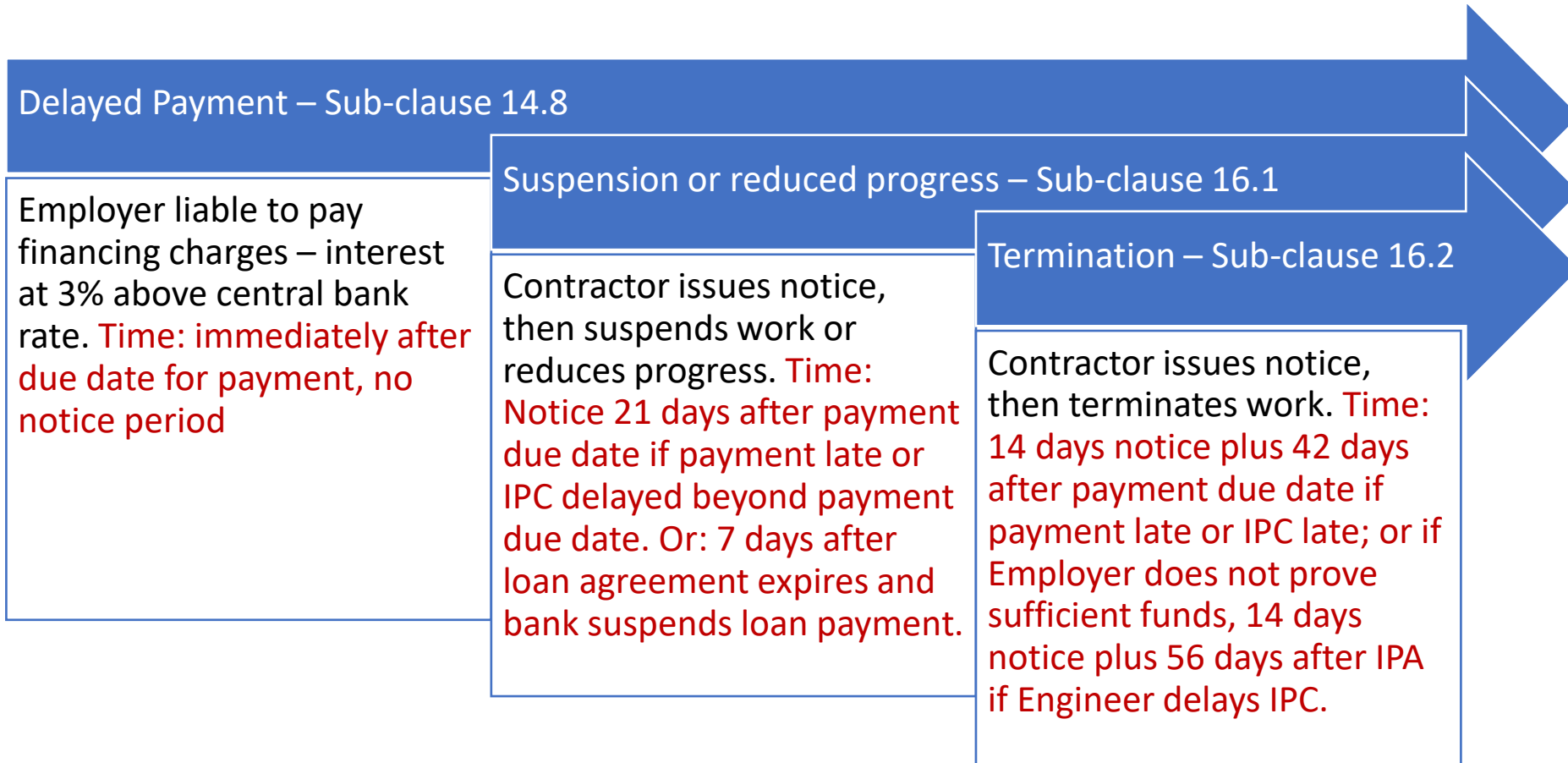
\*Note: these are timelines from General Conditions, Parties may amend them in the Particular Conditions

# Delayed payments in FIDIC 'pink book' contracts – Relevant GCC provisions

- GCC Sub-clause 14.7 (which may be amended in PCC 14.7) specifies the due date for Employer's payments to Contractor.
- If a payment to the Contractor is delayed either directly by the Employer, or due to delayed certification by the Engineer, the Contractor has the following entitlements:
  - GCC 14.8 – [Delayed Payment]: Claim for financing charges (interest or financing cost). No notice required for this entitlement! Details are often agreed in Particular Conditions / Contract Data (PCC 14.8).
  - GCC 16.1 – [Contractor's Entitlement to Suspend Work]: Suspension or reducing work progress. Contractor shall give 21 days' notice before suspending or slowing progress under this sub-clause.
  - GCC 16.2 [Termination by Contractor]: Termination after 14 days' notice.



# Timelines and remedies for delayed payment in FIDIC 'pink book' contracts



\*Note: these timelines and interest rates are from General Conditions, Parties may amend them in the Particular Conditions and/or other contract documents

# Delayed payments in FIDIC 'pink book' contracts – realities

- Employer's delayed payments in 'pink book' public construction projects are sometimes not intentional, but are caused by administrative delays and inefficiency in government organizations.
- Delayed payments can be caused by corruption/extortion by members of the Employer's organization, or the Engineer, or third party authorities (i.e. auditors). FIDIC pink book GCC 15.6 [Corrupt or Fraudulent Practices] focuses on Contractor's corruption and fails to address corruption/extortion by Employers and others.
- Financing charges for Employer's delayed payments under GCC 14.8 pink book can be rejected by supervising authorities and not budgeted in project budgets or loans. This makes settlement difficult, even if Parties agree. Dispute Board Decisions, Arbitral Awards, or pressure from funding MDB may be needed to compel the Employer to pay.

# Delayed payments in FIDIC 'pink book' contracts – what can Contractors do? (Part 1)

- If an IPC or other certificate is delayed by Engineers, Contractors can give notice under GCC 8.3 first (warning of adverse outcomes), before giving notice under GCC 16.1 and/or 16.2. This preserves options for amicable settlement of delayed payments.
- If an IPC or other certificate has deductions/withholdings that Contractor's consider unreasonable, Contractor's can give notice to disagree with the deduction (giving reasons!), and include financing charges for unreasonably withheld/deducted amounts in future invoices. This helps preserve the start date for calculation of financing charges.

# Delayed payments in FIDIC 'pink book' contracts – what can Contractors do? (Part 2)

- If payment is delayed due to Employer's or Engineer's internal issues and inefficiencies, or due to pending disputes (about variations, valuations, deductions etc.) and both parties agree that some payment is due, they may negotiate additional advance payments, 'bridge funding' or other loan agreements, where Employer 'borrows' amounts to Contractor, which are later set-off or deducted from certified quantities.
- The Contractor can waive entitlement to financing charges on delayed payments as a condition for such agreed loan or advance payment.
- Third parties such as MDB funding institutions or standing Dispute Boards may support parties in reaching such solutions.

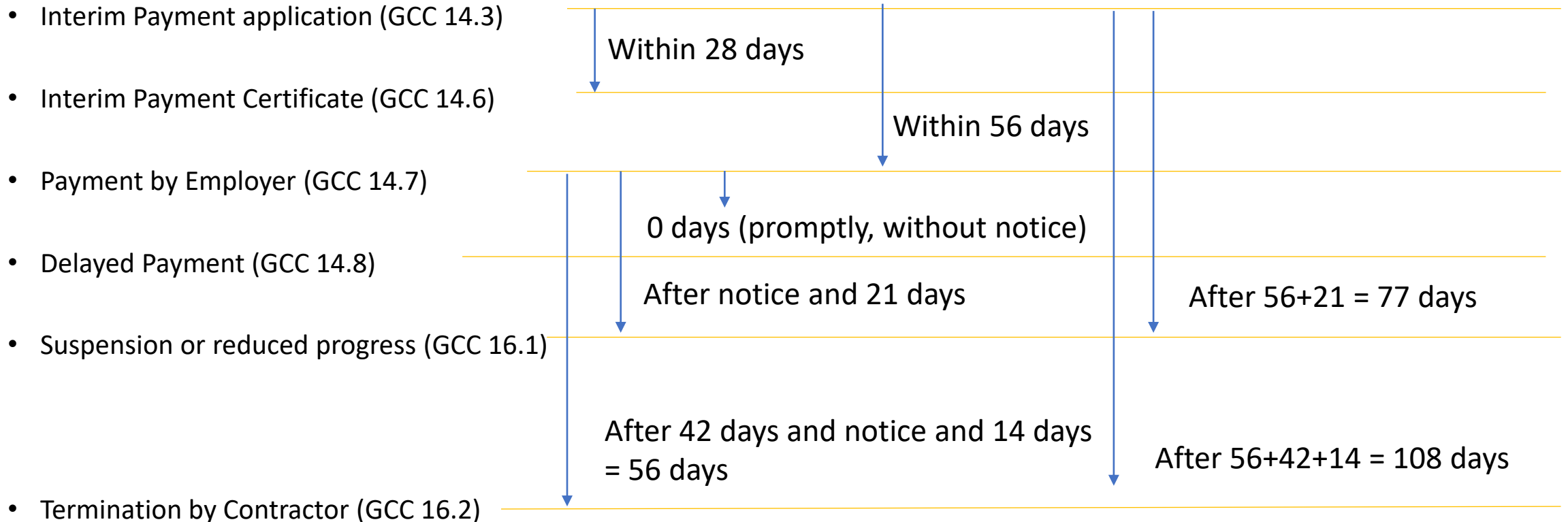
# Delayed payments in FIDIC 'pink book' contracts – what can Contractors do? (Part 3)

- If payment is delayed due to either the Employer's and/or the Engineer's review procedures, or due to valuation issues and both Parties agree that some payment is due, they may agree to amend the 'measurement and payment' provisions in the Specifications or other parts of the measurement and payment procedures to improve the cash flow of the Contractor and avoid disputes. This may include:
  - Formal contract amendments to change relevant parts of the Specifications or Bill of Quantities affecting measurement and payment of materials or work done;
  - Agreements without contract amendments to certify certain payments faster than others;
  - Agreements regarding the format or contents of supporting documents for interim payment applications.

# Delayed payments in FIDIC 'pink book' contracts – what can Contractors do? (Part 4)

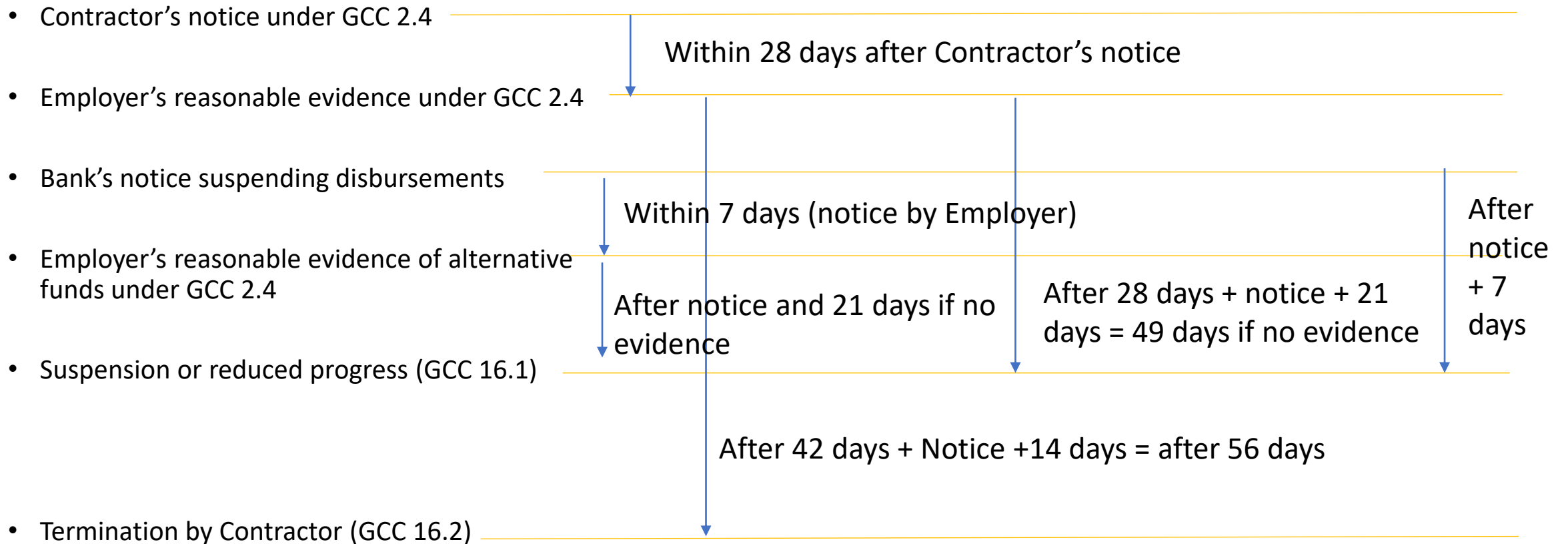
- If payments are delayed and/or disputed, and Parties cannot agree to changed payment procedures or 'loan' type interim payments (see previous page), then Contractors can follow the contractual procedures under GCC 16.1 and GCC 16.2 and/or include financing charges under GCC 14.8 in future invoices.
- Suspension or reduced progress under GCC 16.1 and Termination under GCC 16.2 require prior notices (given with sufficient time!). Without such prior notice, Contractors may be liable to damages.
- Claims for financing charges require no prior notice.
- Dispute resolution procedures under GCC 20 apply to disputed payments (including disputed deductions, withheld payments etc.).

# Timelines – late interim payment



\*Note: these are timelines from General Conditions, Parties may amend them in the Particular Conditions

# Timelines – proof of Employer’s sufficient funds





# Timelines – payment after Termination

- Termination by Contractor (GCC 16.2) — Promptly (GCC 16.4) , reasonable time - no period stated (GCC 19.6)
- Payment on Termination (GCC 16.4 and GCC 19.6) — Within 42 days (Claim), at any time (Dispute Board) or after 56 days (Arbitration)
- Disputes (GCC 20) — DB Decision normally within 84 days of Referral, payment normally 14 days after Decision
- Payment of DB Decision — Arbitration award normally within 6-18 months after Referral, payment normally 14 days after award
- Payment of Arbitral Award — Interest decided by DB and Arbitrators, normally following contractual financing charges
- Interest — Period for interest calculation decided by DB or Arbitrators, usually starting from due date for claimed payment but sometimes starting only after time for payment of DB Decision or Arbitral award

\*Note: these are timelines from General Conditions, Parties may amend them in the Particular Conditions<sub>17</sub>

# Disclaimer

- This presentation is not legal advice, and cannot replace legal advice. I am sharing opinions based on my own experience working with, and my own interpretation of, the FIDIC 'pink book' conditions of contract.
- End of this presentation. Thank you!

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