

SOP PC-003: Claims and Disputes

PC-003 | v01

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1. Purpose and Scope

Purpose: To define the standard process for identifying, quantifying, submitting, and responding to contractual claims, and for managing disputes from initial notification through to final resolution, whether by negotiation, adjudication, arbitration, or litigation.

Scope: Applies to all capital projects where Faolan provides project controls, contract administration, or claims advisory services. Covers both Contractor-submitted claims (from the perspective of advising the Client/CA) and Client/Employer claims against Contractors. Covers claims for extension of time, additional cost, disruption, acceleration, and claims arising from termination.

Out of scope: Insurance claims (refer to the project HSEQ and insurance management procedures). Labour disputes and industrial action (refer to HR and legal). Procurement disputes prior to contract award.

2. Definitions and Abbreviations

Term	Definition
Concurrent Delay	Two or more independent delay events occurring at the same time, where each would independently cause delay to completion
DAB	Dispute Adjudication Board -- FIDIC mechanism providing a real-time interim binding decision
Disruption	Loss of productivity caused by changed or adverse working conditions, distinct from delay
EOT	Extension of Time -- relief from the contract completion date granted by the CA/Engineer
Force Majeure	An event beyond the reasonable control of either party that prevents performance (FIDIC: Exceptional Events)
TIA	Time Impact Analysis -- the prospective or retrospective analysis of a delaying event's effect on the programme
WCF	Windows Collapsed As-Planned Fragnet -- a time impact methodology accepted by courts and arbitral tribunals
Without Prejudice	Correspondence made in the context of settlement negotiations that cannot be used as evidence in proceedings

3. Roles and Responsibilities (RACI)

Activity	Claims Manager / QS	Contract Administrator	Project Controls Manager	Project Manager	Legal Counsel	Client / Owner
Identify and log claim events	R	R	C	A	I	I
Assess time entitlement (TIA)	R	C	R	A	I	I
Assess cost entitlement	R	C	C	A	I	I
Prepare claim response / defence	R	C	C	A	C	A
Negotiate settlement	C	I	I	R	C	A
Engage DAB / Adjudicator	C	I	I	R	R	A
Manage arbitration / litigation	C	I	I	C	R	A
Maintain claims register	R	C	I	A	I	I

R = Responsible, A = Accountable, C = Consulted, I = Informed

4. Procedure

4.1 Claims Prevention and Early Identification

Step 1: Establish a contemporaneous project record

1. A strong contemporaneous record is the most effective claims prevention and defence tool. Establish the following from Day 1:
 - Daily site diary / site records (conditions encountered, resources deployed, instructions received, events noted)
 - Photographic record (dated and geo-tagged where possible)
 - Correspondence register (all formal notices and instructions -- refer to SOP PC-002)
 - Programme updates (approved baseline and all revisions with dates)
 - Resource and productivity records (labour, plant, materials deployed vs. planned)
 - Weather records (where force majeure or adverse weather provisions apply)
 - Meeting minutes (all contract-related meetings)
2. Records must be signed and dated. Electronic records must be time-stamped and stored in a protected location.
3. All site-level personnel must be briefed on their record-keeping obligations at project commencement.

Step 2: Monitor for claim events continuously

1. Conduct a monthly claim event scan against the following trigger categories:

Category	Examples
Client-caused delay	Late drawings, late access, delayed approvals, varied sequence
Changed conditions	Latent physical conditions, utility conflicts, ground conditions worse than indicated
Design errors	Errors or omissions in the employer's design (FIDIC Red Book)
Scope additions	Instructions to perform work beyond the contracted scope
Disruption events	Re-sequencing, acceleration instructions, access restrictions
Statutory changes	New regulations affecting the works after the Base Date
Force majeure	Natural disaster, pandemic, war, embargoes

2. Log each potential claim event in the Claims Register immediately on identification, even before the quantum is known.
3. Issue Early Warning Notices (NEC) or equivalent notifications for potential claim events as soon as identified -- do not wait for the quantum to be established.

4.2 Claim Submission (Contractor Claims)

Step 2 note: This section addresses the process for assessing and responding to claims submitted by the Contractor. Where Faolan is advising a Contractor on claim preparation, apply these steps in reverse.

Step 1: Assess notice compliance

1. On receipt of a contractor's claim notification, check notice compliance:
 - Was the notice submitted within the contractual timeframe?
 - Does it identify the event, the clause relied upon, and the general nature of the claimed entitlement?
2. If the notice is late, assess whether the time bar is strict or may be excused:

Contract Form	Time Bar Strictness
FIDIC Red Book Sub-Clause 20.2	Strict -- 28 days; failure extinguishes entitlement unless the Engineer exercises discretion
NEC4 Clause 61.3	Strict -- 8 weeks for CE notification; Client PM has the right (not obligation) to notify on the Contractor's behalf
JBCC	Less strict -- good faith assessment of prejudice
Bespoke	As written; seek legal advice if ambiguous

3. Issue a written acknowledgement of the contractor's notice within 5 working days, confirming receipt and noting any objections to notice compliance.
4. Do not silently accept a defective notice -- document any time bar defence promptly, but seek legal advice before formally rejecting on time bar grounds alone.

Step 2: Assess time entitlement

1. Use Time Impact Analysis (TIA) as the primary methodology for all delay assessments. TIA is the approach most widely accepted by international arbitral tribunals and South African courts.

TIA Methodology -- Prospective (as the delay unfolds):

1. Take the programme in use at the time of the delaying event (the "impacted baseline").
2. Insert the delaying event as a fragnet into the programme at the point of impact.

3. Run the programme logic forward. The resulting completion date shift is the prospective EOT entitlement.
4. Apply this window-by-window (Windows Collapsed As-Planned / Fragnet approach) for multi-event delays.

TIA Methodology -- Retrospective (post-event or final account):

1. Reconstruct the as-planned logic for the relevant period.
2. Insert the employer-risk events.
3. Compare the impacted completion date with the unadjusted completion date.
4. The difference is the gross EOT entitlement before concurrent delay reduction.

Concurrent delay principles:

1. Where the Contractor caused concurrent delay, the general principle in South African and FIDIC practice is that the Contractor bears the time impact of its own concurrent delay but retains the entitlement to EOT for the employer-risk event.
2. Cost entitlement during concurrent delay periods is generally denied (Contractor cannot recover cost for a period it would have incurred regardless).
3. Document concurrent delay findings explicitly in every EOT determination.

Step 3: Assess cost entitlement

1. Establish the entitlement basis (which contract clause grants the right to additional cost).
2. Apply the contract's valuation rules:

Contract Form	Additional Cost Valuation
FIDIC	Cost (defined in Sub-Clause 1.1) plus reasonable profit where the clause provides for it
NEC4	Defined Cost (using SSCC or SSC) plus Fee
JBCC	Agreed rates where applicable; otherwise fair market rates
Bespoke	As written

3. Require the contractor to substantiate claimed costs with documentary evidence: invoices, timesheets, plant records, wage registers.
4. Audit claimed costs against the supporting records. Apply a "but for" test: but for the event in question, would this cost have been incurred?
5. Reject unsubstantiated heads of claim clearly and in writing.

Disruption claims:

1. Disruption (loss of productivity) claims are distinct from delay claims and require a separate analysis.
2. Accepted methodologies in order of preference:

Methodology	Basis	Acceptance
Measured Mile	Compares productivity in undisrupted vs. disrupted periods using project records	High (if records support it)
Industry Productivity Studies	Uses published labour productivity factors (e.g., MCAA, NECA)	Medium
Earned Value Analysis	Uses planned vs. actual cost performance	Medium
Total Cost / Modified Total Cost	Compares tendered cost to actual cost	Low (courts apply with suspicion)

3. Never accept a Total Cost claim at face value. Require the contractor to demonstrate that the tender was a reasonable and competitive estimate, that the actual costs were reasonably incurred, and that the claimable events are the cause of the entire shortfall.

4.3 Claim Defence (Client/Employer Perspective)

Step 1: Prepare a claim response

1. Issue a formal written response to all contractor claims within the contractual response period (typically 42 days for FIDIC, 13 weeks for NEC compensation events).
2. The response must:
 - State the CA/Engineer's determination of time entitlement (quantum and basis)
 - State the CA/Engineer's determination of cost entitlement (quantum and basis)
 - Address each head of claim individually
 - State any set-off, concurrent delay, or contributory negligence findings
3. Partially rejected claims must clearly identify which elements are allowed and which are rejected, with reasons.
4. Issue the response as a Certificate (where the contract requires) or as a formal determination letter.

Step 2: Maintain the claims defence file

1. For each claim, maintain a separate claims file containing:
 - The original notice and all follow-up correspondence
 - The CA's internal working papers and analysis
 - The contemporaneous project records relied upon
 - The formal determination / response
 - Any subsequent correspondence
2. Mark internal working papers "Privileged and Confidential -- Without Prejudice" where prepared in contemplation of dispute.
3. Do not commingle claims defence files with general project correspondence.

4.4 Employer Claims Against Contractor

Step 1: Types of employer claims

1. Employer claims against the contractor arise from:
 - Liquidated damages for delay to completion (or to key milestones)
 - Costs of remedying defects where the contractor fails to rectify
 - Costs of employing others to rectify emergency defects
 - Contra-charges for facilities or services provided to the contractor at the contractor's cost
 - Overpayment recovery (previous over-certification)

Step 2: Liquidated damages

1. Apply LD only after the original or extended contract completion date has passed and no EOT has been granted or is pending.

2. Calculate LD at the contractual daily rate. Do not apply LD at a higher rate than specified -- this constitutes a penalty and is unenforceable.
3. Deduct LD from the next interim payment certificate. Document the calculation.
4. Cease LD accrual on Practical Completion. LD applies from the completion date to Practical Completion only (unless the contract provides otherwise).
5. If an EOT is subsequently granted covering the LD period, refund the deducted LD in the next certificate.

Step 3: Defects and contra-charges

1. Issue formal written notice of the defect and a reasonable period for rectification before engaging others.
2. Document the cost of third-party rectification with invoices. Deduct from the next payment certificate.
3. Contra-charges for shared facilities (scaffolding, accommodation, utilities) must be grounded in the contract terms. Do not raise contra-charges not authorised by the contract.

4.5 Dispute Resolution

Step 1: Attempt amicable resolution first

1. Before invoking formal dispute resolution mechanisms, attempt amicable resolution through:
 - Senior management meeting (within 28 days of the dispute crystallising)
 - Mediation (voluntary -- use an independent mediator)
2. Document all settlement discussions as "Without Prejudice." A written settlement agreement, once signed, is binding.
3. Note: a "Without Prejudice" label does not automatically protect correspondence from disclosure. The communication must genuinely be part of settlement negotiations.

Step 2: Formal dispute resolution -- select the appropriate mechanism

1. Apply the mechanism prescribed in the contract:

Contract Form	Primary Mechanism	Final Mechanism
FIDIC 2nd Ed.	DAAB (Dispute Avoidance and Adjudication Board)	Arbitration (ICC or as specified)
NEC4	Adjudication (W2 in South Africa)	Arbitration or litigation as agreed
JBCC	Mediation then Arbitration	Arbitration
Bespoke	As written	As written

2. For South African projects, adjudication under CIDB Best Practice Guideline C3 or the Construction Industry Adjudication Rules applies where the contract incorporates them or where the parties agree.

Step 3: Adjudication process

1. Issue the Notice of Adjudication within the contractual timeframe. Include:
 - Nature and basis of the dispute
 - Relief sought
 - Nominating body (if the parties cannot agree on an adjudicator)
2. Prepare the Referral Notice within the prescribed period (typically 7 days from the Notice). The Referral is the substantive claim document -- it must be comprehensive, well-referenced, and supported by the contemporaneous record.

3. Respond to the Responding Party's Response within the prescribed period (typically 7 days from the Response).
4. An adjudication decision is temporarily binding and must be complied with immediately, even if a party intends to challenge it in arbitration.

Step 4: Arbitration

1. Arbitration is the final, binding resolution mechanism for most construction contracts.
2. Key preparation steps:
 - Instruct legal counsel early -- at adjudication stage if possible
 - Preserve and organise the full project record
 - Identify and brief expert witnesses (quantum and delay)
 - Assess settlement prospects realistically before incurring arbitration costs
3. Do not approach arbitration without a fully documented contemporaneous record. Reconstructed records are treated with suspicion by tribunals.

4.6 Decision Points

- **Contractor's time bar is arguable:** Seek legal advice. A strict rejection without legal input exposes the Client to a finding of bad faith. Respond on the merits regardless and note the time bar as a secondary defence.
- **Concurrent delay found on critical path:** Determine whether the contract addresses concurrent delay (NEC and modern FIDIC are clearer than JBCC). Apply the applicable rule. Document the finding explicitly.
- **Settlement offered at 60 cents in the Rand:** Escalate to Project Manager and Client. Conduct a risk-adjusted comparison of settlement vs. proceeding. Factor in legal costs, time, management distraction, and outcome uncertainty. Recommend in writing; do not decide unilaterally.
- **Adjudicator's decision is wrong in law:** Comply with the decision immediately. Instruct legal counsel to consider appeal via arbitration within the contractual window. Non-compliance with an adjudication decision is rarely the correct response.

5. Inputs and Outputs

Item	Type	Source / Destination	Frequency
Contractor claim notifications	Input	Contractor	Per event
Contemporaneous project records	Input	Site / CA	Continuous
Programme (baseline and revisions)	Input	Project Controls	Per revision
Contract and all annexures	Input	Contract register	Once
Claims Register	Output	Project record	Continuous
TIA reports	Output	Project record / CA	Per claim
Claim determinations / responses	Output	Contractor	Per claim
Expert reports (quantum, delay)	Output	Legal / Tribunal	Per dispute
Settlement agreements	Output	Both parties	Per settlement

Item	Type	Source / Destination	Frequency
Adjudication / arbitration filings	Output	Tribunal	Per dispute

6. Tools and Templates

Tool / Template	Purpose	Location
Claims Register (Excel)	Log all claim events and status	`05_Templates\`
TIA Template (Primavera P6 or Excel)	Time Impact Analysis	`05_Templates\`
Claim Response Template	Standard determination letter format	`05_Templates\`
Disruption Measured Mile Template	Productivity comparison	`05_Templates\`
Adjudication Referral Template	Referral Notice structure	`05_Templates\`
Medupi Claims and Disputes Reference	Project reference	`04_ReferenceData\`
AACE Contracts and Claims 3rd Ed.	Standard reference	`04_ReferenceData\`
AACE Time Impact Analysis RP 29r-03	TIA methodology reference	`04_ReferenceData\`

7. References

- AACE International Recommended Practice No. 29r-03: Forensic Schedule Analysis (Time Impact Analysis)
- AACE International: Contracts and Claims, 3rd Edition
- FIDIC Conditions of Contract for Construction (Red Book), 2nd Ed., 2017 -- Clauses 8, 13, 20
- FIDIC Conditions of Contract for Plant and Design-Build (Yellow Book), 2nd Ed., 2017
- NEC4 Engineering and Construction Contract, 2017 -- Clauses 15, 60, 61, 62, 63
- NEC3 Engineering and Construction Contract, 3rd Ed., 2013
- JBCC Series 2000 Principal Building Agreement, 6th Ed. -- Clauses 22, 27, 40
- CIDB Best Practice Guideline C3: Adjudication
- Society of Construction Law Delay and Disruption Protocol, 2nd Ed. (2017)
- Medupi Claims and Disputes Reference Procedures
- Hutchison and Pretorius (eds): The Law of Contract in South Africa, 3rd Ed.
- Farlam J. in Transnet Ltd v Sechaba Photoscan (Pty) Ltd -- on time bars in SA law

8. Quality Criteria and Checklist

Claims management health check (monthly):

- Claims Register current -- all events logged within 5 working days of identification
- All contractor notices acknowledged within 5 working days of receipt
- EOT determinations issued within the contractual response period (no overdue responses)
- Contemporaneous site records maintained for the current month
- LD deductions supported by approved EOT register (no LD applied without verified entitlement)

- All without-prejudice correspondence correctly marked and filed separately
- Adjudication timetables monitored (no missed filings)

Quality gates:

Criterion	Target
Claim events not logged within 5 working days	0
Contractor notices not acknowledged within 5 working days	0
EOT determinations outstanding beyond contractual period	0
LD applied without verified EOT register check	0
Adjudication filings missed	0

9. Revision History

Version	Date	Author	Changes
v01	2026-04-03	Pact (#31)	Initial draft

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