

Procurement Sexual Exploitation and Abuse and Sexual Harassment (SEA/SH) Prevention and Response Measures

Contractor/Sub-contractor disqualification for breach of SEA/SH contractual obligations

QUESTIONS & ANSWERS

Introduction

1. What are SEA/SH prevention and response measures?

These new measures create an incentive for Contractors and their Sub-contractors to strengthen their performance in preventing Sexual Exploitation and Abuse (SEA) and Sexual Harassment (SH) (SEA/SH) and improving how they respond to SEA/SH incidents in the event that they occur. The measures apply to procurement of Works in Projects assessed as high-risk for SEA/SH.

The new measures hold Contractors and Sub-contractors accountable for implementing the SEA/SH prevention and response obligations in their contracts. If the Contractor/Sub-contractor does not comply with their SEA/SH prevention and response obligations they are disqualified from being awarded a Bank-financed contract for a period of 2 years. The Bank believes this will create an added incentive for better performance.

The contractor disqualification mechanism builds on existing good practice in current Bank-financed project. It achieves this in Works projects by applying the FIDIC (International Federation of Consulting Engineers) General Conditions of Contract, including leveraging the role of the independent Dispute Avoidance/Adjudication Board (DAAB). The DAAB comprises independent expert(s) which visit the site quarterly to review any contractual issues or disputes between the Borrower and the Contractor and to assist them in resolving issues or disagreements before being elevated to costly disputes. The mechanism leverages the DAAB role by relying, in particular, on its reviews of, and decision/s on, the contractor's compliance with its SEA/SH prevention and response obligations.

2. Isn't this covered by INT/Sanctions or the Grievance Redress Service (GRS)?

No. This is separate from the Bank's Sanctions regime and GRS. This mechanism focuses purely on whether the Contractor complied with its contract obligations to prevent SEA/SH and respond accordingly.

Background

3. Why is SEA/SH an issue?

SEA/SH is a global issue that affects 1 in 3 women in their lifetime, and also affects some men, girls and boys. Incidents of SEA/SH have occurred in projects financed by the World Bank. As a result, the Bank is taking concerted measures to strengthen its approach to management and prevention of SEA/SH risks.

Scope

4. What is the effective date?

The new measures came into effect on January 1, 2021.

They apply to all Works procurements, whose procurement process is initiated after January 1, 2021, under Projects assessed as high-risk of SEA/SH that apply [SPDs](#) (based on FIDIC General Conditions)¹.

Any application for retroactive financing or where advance procurement has been undertaken by the Borrower will need to show that SEA/SH risks are fully addressed and that any firm awarded a contract to undertake the initial work is/was not disqualified by the Bank at the time the contract was awarded to be considered eligible projects for financing.

5. What is the scope of the disqualification?

A disqualified Contractor will be disqualified from being awarded any Bank financed contract for procurement of Works, Goods, Consulting Services and Non-Consulting Services.

6. Can a Borrower choose not to apply the SEA/SH disqualification mechanism?

Not for Works contracts where the project is classified as high-risk for SEA/SH that use the SPDs described above.

7. Does the Borrower have to use the FIDIC contract form regardless of value?

The Procurement Plan will require use of the FIDIC General Conditions with DAAB and the disqualification mechanism as part of risk mitigation regardless of value – unless the nature of the works does not fit with existing FIDIC contract forms (only SPDs for OPBRC, Water Loss Reduction). The French Civil Law, and Small Works SPD are not to be used.

Note: However, there is flexibility for National Procurement, see question 29 later.

How does this work in practice?

8. What changes have been made to the SPD (large Works) to enable the disqualification mechanism?

SEA/SH Declaration: To enable the application of the SEA/SH disqualification mechanism during contract execution, bidders/proposers are required to submit a declaration accepting that, if awarded the Contract, the Bank may disqualify them (including any non-complaint Subcontractor) from being awarded a Bank-financed contract for a period of two years, following a DAAB determination of non-compliance with contractual SEA/SH obligations.

Contract: The contract describes the SEA/SH obligations that the Contractor has committed to deliver. These provisions are contained in the Particular Conditions and collectively referred to as “SEA/SH Prevention and Response obligations”.

¹ Currently these SPDs are: RFBs (large) Works, RFPs Works: Design and Build, Design Build and Operate and Engineering Procurement and Construction.

9. What should the Contractor do to prevent SEA/SH?

The Contractor must comply with the SEA/SH Prevention and Response obligations described in the contract. Actions to prevent Gender-based Violence and SEA have been included in SPDs since 2017. It is only the disqualification mechanism that is new. The SPDs set out (in the Specific Conditions of contract) the minimum requirements for Contractors to prevent and respond to SEA/SH. Among other things, these include:

- a. SEA/SH conference: participate in the SEA/SH conference, organized by the Borrower prior to commencement of any physical work. Attendees include the Contractor, Borrower, Engineer, Sub-contractors, the DAAB and other relevant persons. The objective of the conference is to ensure a common understanding of the applicable SEA contractual requirements and remedies.
- b. Mobilization: mobilization to site will not be carried unless, among other things, the Engineer provides a No-objection to the contractor's measures to manage SEA/SH risks.
- c. Code of Conduct: prepare and issue a code of conduct for personnel, train staff in its use and monitor its implementation in accordance with the contract provisions.
- d. SEA/SH Response mechanism: put in place an ethical and safe process for receiving, investigating and addressing allegations of SEA and/or SH from the Contractor's or Borrower's personnel or any other person including third parties, and inform personnel at the time of engagement of the response mechanism and measures put in place to protect against any reprisal for its use.
- e. Training: deliver, on an ongoing basis, induction and training on preventing SEA/SH.
- f. Subcontractors: make it a contractual requirement that subcontractors comply with the SEA/SH Prevention and Response obligations that are pertinent to the subcontractor's work.
- g. Key personnel: engage SEA/SH expert/s for the duration of the contract.

10. What happens when an allegation of SEA/SH is made?

A contracting party (Borrower or Contractor) on receiving an allegation documents the relevant details, while keeping the identity of the alleged survivor and the alleged perpetrator confidential. That party then notifies the other party and the Engineer. On receiving or being notified of an allegation, the Contractor applies its SEA/SH Response Mechanism.

The Borrower refers the allegation to the DAAB. The DAAB is tasked to determine if the Contractor has complied with its SEA/SH Prevention and Response obligations. The DAAB focuses on compliance by the Contractor with the contract. The DAAB does not consider the facts and circumstances of the alleged incident or assess the merits of the case.

11. How is contractual non-compliance with SEA/SH obligations managed?

Even in the absence of an allegation, the Borrower and its Engineer have the obligation to monitor the Contractor's compliance with its SEA/SH Prevention and Response obligations on an ongoing basis.

If any non-compliance is identified, the Engineer issues a Notice to Correct to the Contractor copied to the Borrower and the DAAB. This may result in the Engineer's determination that the matter is resolved, or otherwise determine non-compliance with the notice to correct. If the latter, the Engineer notifies the Borrower and the Contractor of the Contractor's failure to

correct. On being notified of the non-compliance and failure to correct the Borrower sends a SEA/SH referral to the DAAB for review, copied to the Contractor and the Engineer.

Potential non-compliance may also be identified by the DAAB as part of their activities. The same process applies i.e. the Engineer issues a Notice to Correct to the Contractor etc. as described above.

Dispute Avoidance/Adjudication Board (DAAB)

12. What is a DAAB?

The DAAB is an independent Board (1 or 3 individuals) that works collaboratively with the Borrower and the Contractor to resolve any issues between them before they escalate to a dispute and to serve as a dispute resolution mechanism prior to any arbitration. The DAAB focuses on all aspects of contractual compliance by both parties. This includes the Contractor's compliance with its SEA/SH Prevention and Response obligations. Whilst other issues can be identified, it is only non-compliance with SEA/SH Prevention and Response obligations that trigger the disqualification process.

DAAB is not unique to the World Bank. The use of a DAAB has been established as good practice in several jurisdictions, as well as being a general provision in FIDIC. The DAAB comprises accredited members. Evidence suggests the vast majority of issues are resolved by the DAAB, via non-binding opinions, without proceeding to arbitration. The majority of Binding Decisions referred by a Contractor to an Arbitral Tribunal are upheld by the Tribunal. Importantly, a minimal number of decisions made by a DAAB are overturned in Arbitration.

13. What are the benefits of DAAB?

Evidence suggests that the use of a DAAB can reduce overall project delivery timescales and reduce final project outturn costs. In addition to the financial benefits, the DAAB contributes to faster, more agile implementation. Other benefits of DAAB include:

- a. Timely/early identification of issues that can be tackled as they arise.
- b. Reduced process costs (as opposed to litigious routes).
- c. Support Borrower and Contractor to focus on project execution.
- d. Maintains productive relationships between the Borrower and the Contractor.
- e. Reduces formal disputes.
- f. High levels of project management/engineering expertise available from independent technical expert(s) with significant experience in supporting, delivering and managing projects.
- g. Better support for Borrowers, particularly low capacity.

For the Bank it means that independent technical experts are embedded into the contract and agreed by the parties. This provides increased supervision of the project and increased support to the Borrower with project implementation as they have regular interaction with the DAAB on emerging project and contract delivery issues quarterly throughout the project delivery.

14. How much does the DAAB cost? Who pays?

As the DAAB is already a feature in Bank-financed Works contracts based on FIDIC, the incremental cost due to the added tasks resulting from the SEA/SH disqualification mechanism is not expected to be significant.

DAAB costs are split 50/50 between the Borrower and Contractor. The Bank may be able to provide financing to help the Borrower finance its share.

15. Can a Borrower choose not to use a DAAB?

No. The use of a DAAB is mandatory in all Works contracts that apply the Bank's SPDs (based on FIDIC General Conditions).

Larger Works require a 3-person DAAB, but smaller Works may comprise a single member DAAB in the interest of proportionality.

16. What is the DAAB's role in relation to SEA/SH non-compliance?

The DAAB's role is to review and decide on the Contractor's compliance with its SEA/SH Prevention and Response obligations.

Following receipt of a referral, the DAAB requests the Contractor to provide a statement demonstrating its with its SEA/SH contractual obligations and, where there has been an allegation of actual SEA/SH, that the Contractor's actions, in response to the allegation, are compliant with the contract.

The DAAB reviews the Contractor's compliance and the Contractor's statement. It issues its decision within 42 days of receiving the referral. The decision will state that the Contractor is either in compliance or not with its SEA/SH Prevention and Response obligations. The DAAB sends the decision to the Borrower and the Contractor and copies the Engineer. The DAAB's decision is binding on the Contractor and the Borrower. The Borrower notifies the Bank of the decision.

The DAAB's dispute monitoring role is outlined in the FIDIC General Conditions of Contract, and in the project specific Terms of Reference set by the Borrower.

17. Can a Contractor appeal the DAAB decision?

Yes. The Borrower or the Contractor may appeal the DAAB decision if they are dissatisfied with the determination. This is done through formal ICC arbitration procedures initiated by a party requesting the appointment of an Emergency Arbitrator. An appeal must be initiated within 28 days of receiving the DAAB determination. Such arbitration is in addition to the ongoing compliance review and informal role in helping parties to resolve SEA/SH issues in a preventative way.

18. How does the Bank get involved?

The Borrower notifies the Bank of the DAAB decision. Where the DAAB has determined that the Contractor is not in compliance with its SEA/SH Prevention and Response obligations the Bank conducts a procedural review of the DAAB decision. However, this review cannot proceed until the period (28 days) for making an application to an Emergency Arbitrator:

- a. has expired with no application being made, or
- b. an application has been made and the Arbitrators decision has been determined.

Following the Bank's procedural review of the DAAB decision the Bank may disqualify the Contractor from being awarded a Bank-financed contract for a period of 2 years.

Arbitration

19. Can a Contractor or Borrower appeal the DAAB decision? How?

Yes, the Contractor or Borrower:

- a. gives a contractual Notice of Dissatisfaction to the other party and sends a copy to the DAAB (and Engineer if made by the Contractor). The Notice must set out the matter in dispute and the reason/s for the dissatisfaction with the DAAB decision. The Notice must be given within 28 days of receiving the DAAB decision;
- b. makes an application for the matter to be referred to full Arbitration under the International Court of Arbitration (ICC) Arbitration Rules; and
- c. have recourse to an Emergency Arbitrator, under the ICC Arbitration Rules.

20. What does the ICC Emergency Arbitrator do?

The Emergency Arbitrator conducts the review proceedings in a manner which the arbitrator considers to be appropriate, taking into account the nature and urgency of the application.

The Emergency Arbitrator must issue its decision within 15 business days of being appointed. The Emergency Arbitrator's decision takes the form of an Order. The Order states the reasons for the decision. The Order may uphold the DAAB determination that the Contractor is non-compliant, or it may find in favor of the Contractor.

Bank disqualification

21. How does the Bank disqualify a Contractor/Sub-contractor?

The Bank can disqualify a Contractor (and any Sub-contractors) where:

- a. the DAAB has determined that the Contractor/Sub-contractor is not in compliance with its SEA/SH Prevention and Response obligations, and
- b. the DAAB decision has not been overturned by an Emergency Arbitrator.

22. Who decides?

The decision to disqualify is taken by the OPSVP following advice from the Bank's Legal Operations General Counsel.

The CPO communicates the decision to the Contractor/Sub-contractor and Bank staff.

23. Can a Contractor/Sub-contractor appeal the Bank's decision?

No. However, if a Contractor/Sub-contractor is not satisfied with the DAAB's decision they can issue a Notice of Dissatisfaction as described above. If the Contractor/Sub-contractor is still not satisfied with the decision of the Emergency Arbitrator they may invoke full Arbitration through the ICC. The Bank will review any disqualification decision in light of any full arbitration decision received.

24. If a Contractor/Sub-contractor's non-compliance is overturned in full arbitration can the Bank be prosecuted for loss of business?

No. When bidding the Contractor (which includes all Contractor's Personnel, including Sub-contractors) accepts the Bank's disqualification process.

25. What happens to disqualified Contractors/Sub-contractors existing projects?

The current contract continues to be implemented in accordance with its conditions. The Borrower may exercise contractual remedies in relation to the breach of SEA/SH obligations, as appropriate. Such remedies are separate, and in addition to, the Bank's disqualification measures.

Other existing contracts continue to be implemented. However, the CPO advises Bank staff of specific projects the Contractor/Sub-contractor is working on so that additional due diligence can be performed.

Any material amendments to existing contracts being performed by a disqualified Contractor/Sub-contractor must be referred to the CPO for decision. The Bank does not usually finance amendments to contracts with disqualified Contractors/Sub-contractors.

26. Is the main Contractor disqualified when only the Sub-contractor is at fault?

Yes. Under the General Conditions, the Contractor is responsible for all of the actions of its Sub-contractors, so if the Sub-contractor is at fault, automatically the Contractor is also at fault for not managing them correctly.

27. Are all Sub-contractors disqualified if the main Contractor is disqualified?

No. Only those Sub-contractors that are not in compliance with the SEA/SH prevention and response obligations are disqualified. Those that are compliant are not affected.

28. How long does the disqualification last? and what happens when it expires?

Disqualification lasts for 2 years. The disqualification expires 2 years after the date of disqualification.

The contractor may initiate participation in bidding opportunities following the expiry of the disqualification. However, some additional process applies and the contractor, in its first bidding process, must:

- a. declare its previous disqualification when bidding on future Bank-financed contracts and
- b. demonstrate in its application/bid for its first Bank-financed Works contract, that it has measures in place to prevent and effectively manage SEA/SH risks.

Common questions from Task Teams

29. Is there flexibility for National Procurement?

Yes. For National Procurement, decisions to use the FIDIC contract forms may be made on a case by case basis depending on risk mitigation – seek advice of the CPO.

30. Can a Borrower use other FIDIC contract forms?

Borrowers select from the latest FIDIC forms agreed by OPCS as applicable to the type of contract e.g. FIDIC Red, Silver, Gold etc.

31. Can a Borrower decline to use the FIDIC form due to language/law preferences?

No, for example the French Civil Law SPD is not to be used.

Note: The Bank is fast tracking translations from FIDIC, in the meantime the English version is to be used.

32. If use of FIDIC, DAAB, and the disqualification mechanism does not seem appropriate for the nature of the works, how do TTLs seek an exception?

Exceptional circumstances that warrant a different approach other than FIDIC contract form, DAAB, disqualification mechanism will require prior approval by the CPO.