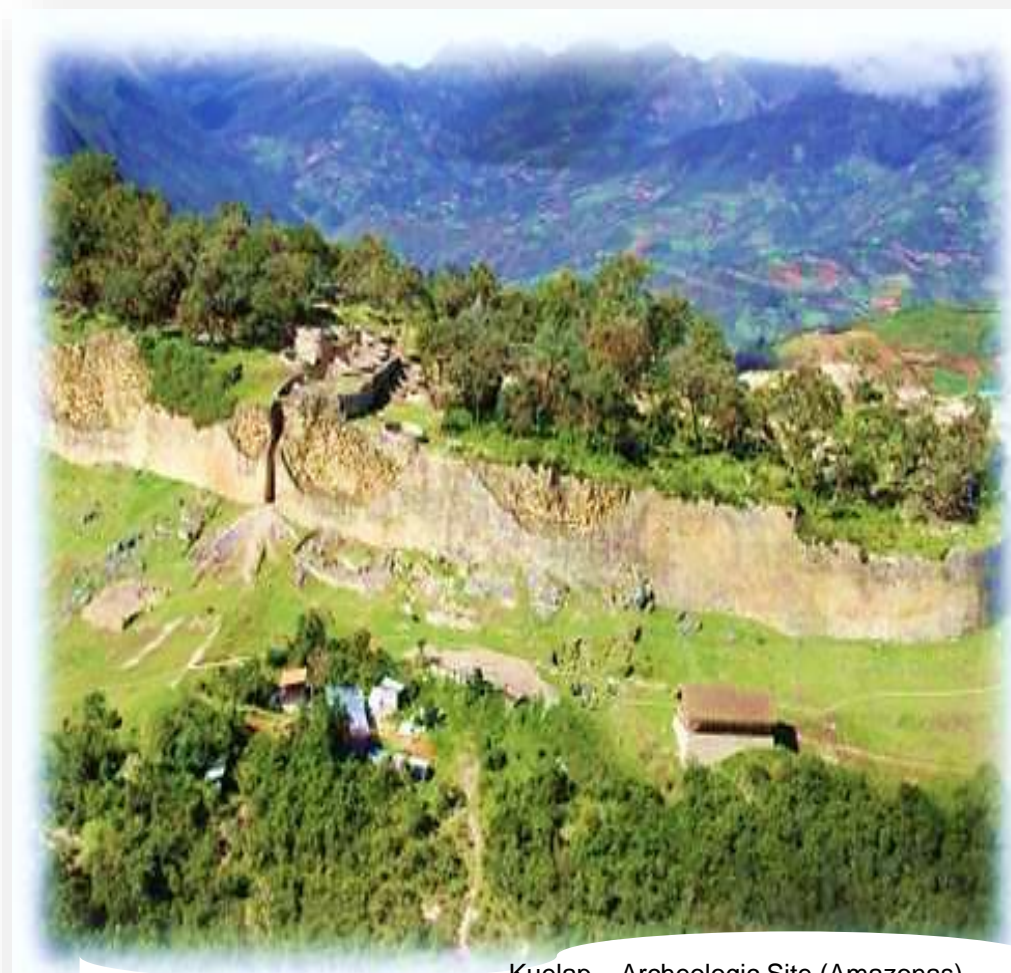


**FIDIC Latin America User´s  
Conference**

# **JICA´s Experience and Challenges in Use of FIDIC Contracts**

Japan International Cooperation Agency  
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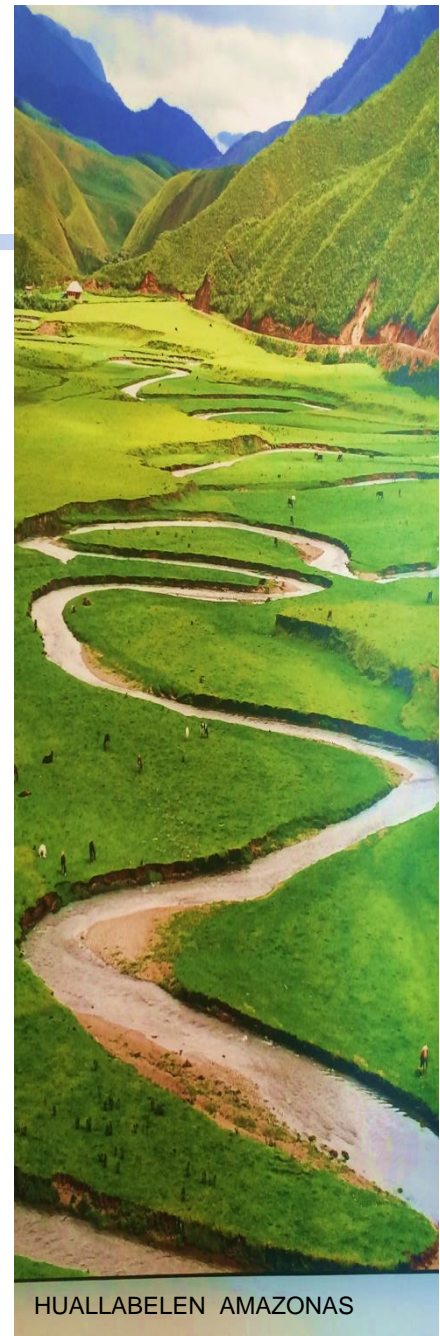


Kuelap – Archeologic Site (Amazonas)

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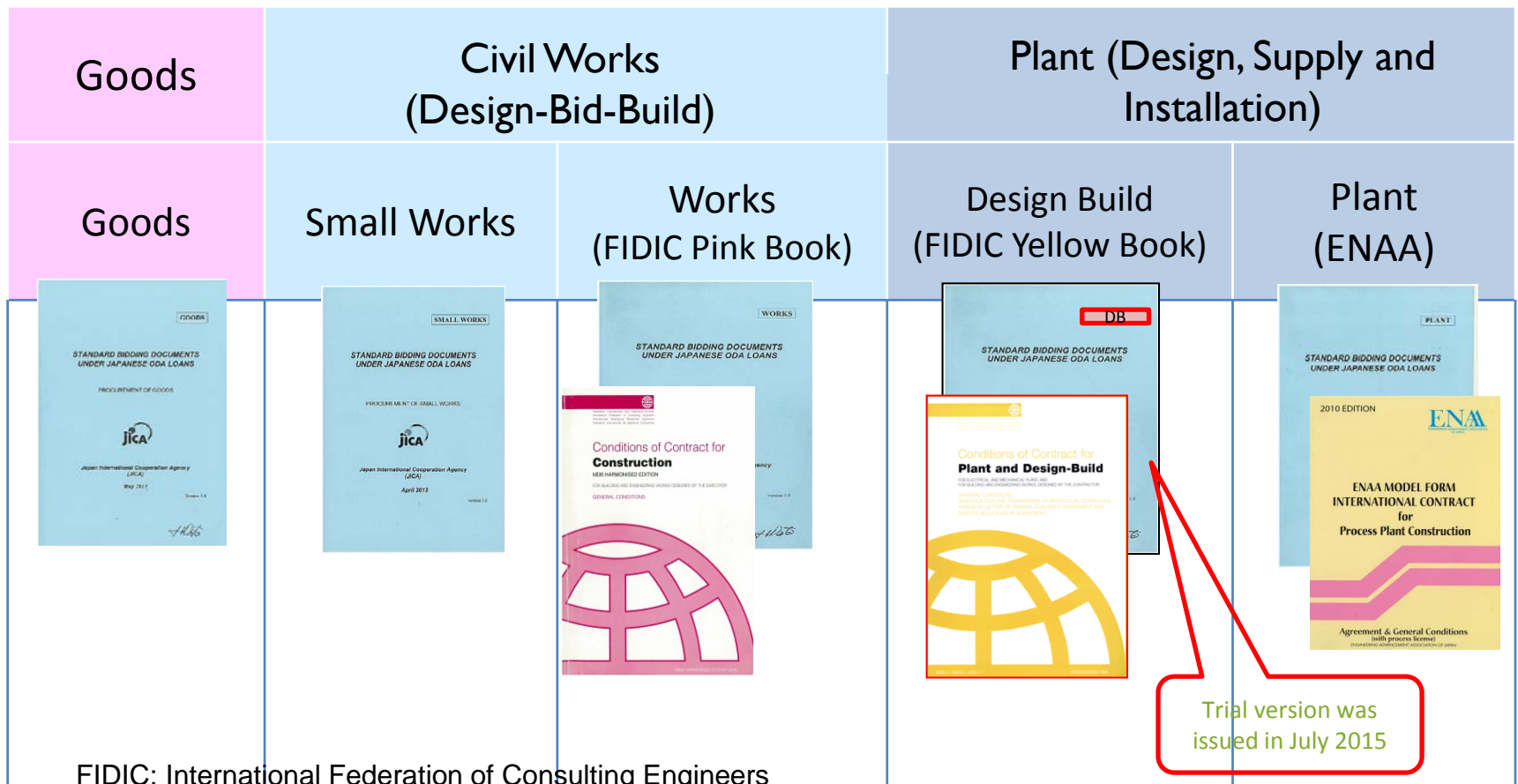
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- 1** JICA ´s Use of FIDIC Contracts
- 2** Problems in JICA financed Project
- 3** Initiatives: Check List for One Sided Contracts and Dispute Board Manual
- 4** Loan Law Framework - Peru
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# 1 JICA's Use of FIDIC Contract

There are five types of JICA's Standard Bidding Documents except for Prequalification and Consultants (Request for Proposals/Short List)



FIDIC: International Federation of Consulting Engineers  
 ENAA: Engineering Advancement Association of Japan

# Structure of SBD

## Section VII: General Conditions(GC)

- Internationally accepted contract forms (i.e. FIDIC MDB version for civil works)
- To be used without any modification
- Any amendments to the GC shall be introduced through the Particular Conditions (PC) – Strongly recommended not to make changes

Section VII. General Conditions

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### Section VII. General Conditions (GC)

*[Note to the Employer: The General Conditions of Contract set forth in Part 3, Section VII of these Standard Bidding Documents for Procurement of Works (version 1.0) published by JICA in October, 2012 (hereinafter referred to as "Standard GC"), are the MDB Harmonized Edition of the Conditions of Contract for Construction prepared and copyrighted by the International Federation of Consulting Engineers (Fédération Internationale des Ingénieurs-Conseils, or FIDIC), FIDIC 2010, all rights reserved.*

### 4 The Contractor

4.1 Contractor's General Obligations

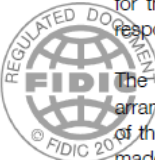
The Contractor shall design (to complete the Works in accordance with the instructions, and shall remedy any defects in the design or specifications.)

The Contractor shall provide the Contract, and all Contractor's Personnel and Services, whether of a temporary execution, completion and remediation.

All equipment, material, and services shall have their origin in any eligible country.

The Contractor shall be responsible for the design and construction of all operations and of all methods of construction of the Contract, the Contractor (i) shall be responsible for the design or specifications of Temporary Works, and such design shall be in accordance with the instructions for the item to be in accordance with the instructions responsible for the design or specifications of the Temporary Works.

The Contractor shall, whenever necessary, make arrangements and methods which shall be in accordance with the instructions of the Works. No significant alterations shall be made without this having previously been approved in writing by the Employer.



© FIDIC 2010. Conditions of Contract for Construction. For participating development bank financed contracts.

# Pink Book

1. Termination by Employer (15.6): the employer may terminate the Contract if it determines “based on reasonable evidence” that the Contractor has engaged in a fraudulent practice.
2. The duties and authority (3.1.): the employer is allowed to change the authority of the Engineer without the agreement of the Contractor.

# Pink Book

- Additionally the Engineer requires to obtain the Employer's approval before taking action under sub-clauses 4.12 (agreeing an extension of time or additional cost) 13.1 (instructing and variation except ...) 13.3 (approving a proposal for variation submitted by the Contractor ..) an 13.4 (specifying the amount payable in each of the applicable currencies)
3. Determinations (3.5): The Engineer has now a fix limit time for the determination (28 days from receipt of the corresponding claim or request)

# 1 Why Procurement matters to JICA?

1. Smooth and Successful Project Implementation
2. Effective Use of JICA Loan – using SBD is the way we want to run the project (**Public Funds/Bilateral Assistance**): Standardization, predictability
3. Correct use by the Borrower of the General principles in a JICA ODA Loan Agreement
4. Likelihood of disputes will be minimized
5. Role of JICA (JICA's review and concurrence)

# 1 Principal of Risk Allocation

1. There are only two parties: the Employer (Executing Agency) and Contractor.
2. Risks are, in principle, to be managed by the party who can best manage them.
3. Risks which neither party can control are, in principle, taken by the Employer as the initiator of the project (owner) –  
Characteristic of Public Civil work Contract is  
**HIGH UNCERTAINTY**
4. Risks are related to time (extension for completion) and money (additional payment)



# 1 Problems: Balance Risk Allocation

If modifications for any particular project alter the originally contemplated risk distribution to a large extent and the risks allocated to the Contractor become excessively high, then:

1. Unreasonable high bid price, bid failure and re-bidding - leading to delay
2. Non-participation of capable companies in the bid and award to a company that is not capable of estimating risks properly
3. Non employment of a capable consulting firm with proper terms of reference

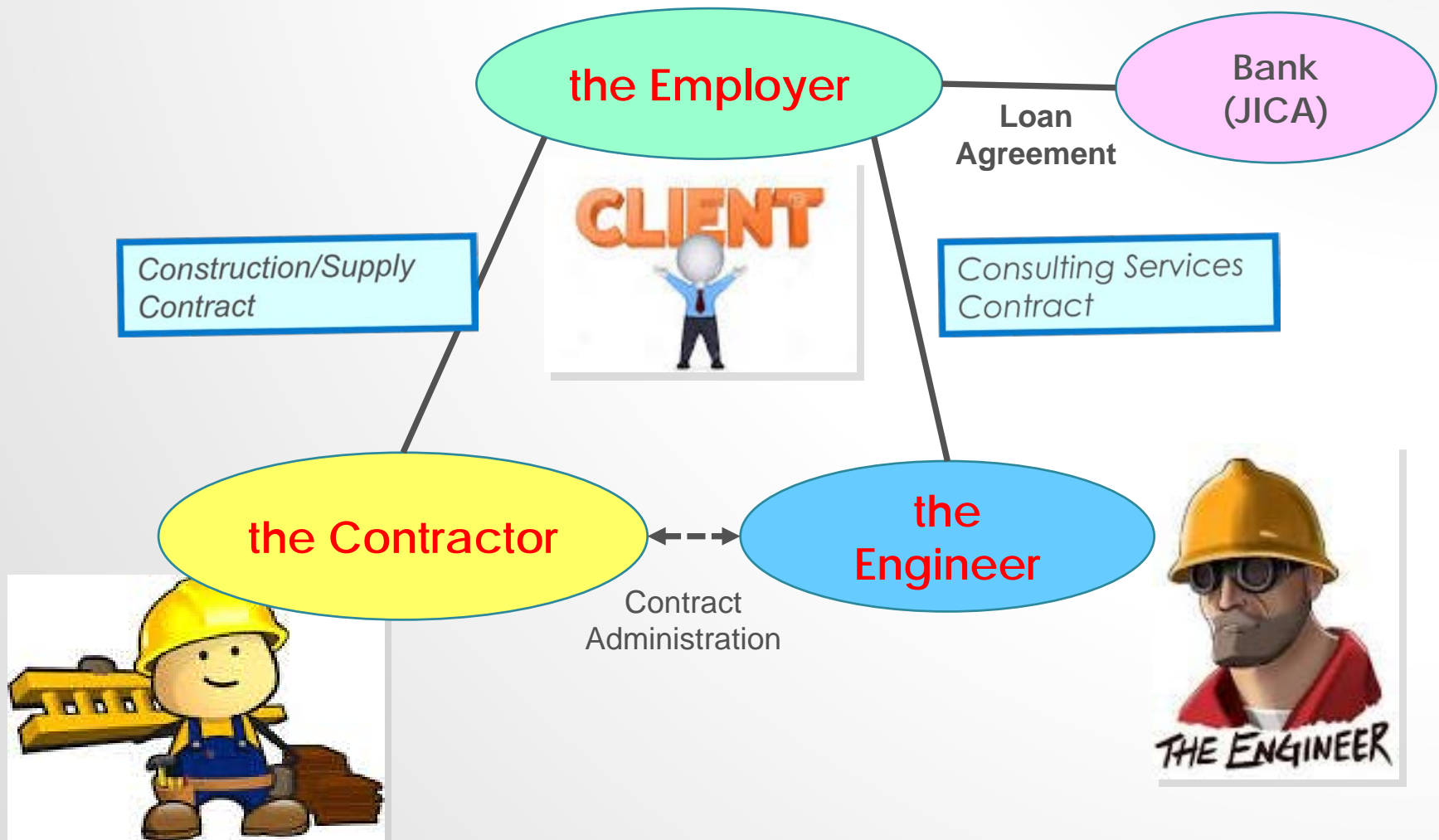
# 2 Problems: Balance Risk Allocation

4. Large number of critical disputes between the employer and the contractor/consultant, and mistrust between the employer and the contractor/consultant
  5. Poor construction quality and delay of the progress of the work due to lack of proper risk management
  6. Expensive projects considering the term extension and poor quality
- ... Propagation of skepticism against the use of this type of contracts

# 3 Reasons for making Contracts One-Sided

1. The Employer's lack of the budget for the construction work
2. Lack of the Employer's Understanding about the terms and conditions including appropriate allocation of rights and obligations, ability of contract management and sense of ownership
3. Lack of time and cost required for creating the Contract documents
4. Attention to domestic law and regulations, and domestic procedures

# PARTIES IN CONTRACT MANAGEMENT



# 3 Check list One – Sided Contract (52 check points)

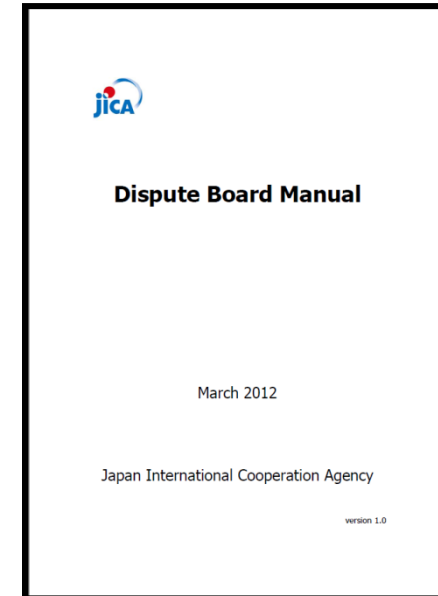
1. Considerable volume of particular conditions of contract. JICA strongly recommend not to add PC
2. Transfer of the employer's responsibility for their risks—time and cost—particularly land acquisition, right of access to the site (2.1)
3. The contractor responsible for Defects Notification Period is excessively long (11.3)
4. Inadequate dispute resolution mechanism: absence of and fair arbitration (no neutral entity) (20.6)

# 3 Check points

5. The basis of DB Members essential impartiality lies in the fact that the costs is divided equally (Appendix)
6. The Engineer's right to issue the Taking Over Certificate is subject to the prior approval of the Employer (10.1)
7. Any amendment that eliminates the Employer's task such as giving the Contractor possession of the site, should be avoid (8.1) Commencement of Works but with no possibility of really start the works

# 3 JICA's Dispute Board Manual

1. Advantages of DB: impartiality, less costly and less time-consuming than arbitration, **dispute prevention function**. DB will monitor the activities of the Engineer who may also be more impartial.
2. Establishment of DB should be discussed and agreed at appraisal. Standing Dispute Board should be established in principle in contracts with civil works amounting to 5 billion yen or more (USD 50 MM)
3. Ad- hoc is not recommended, but still acceptable.
4. Can be financed out of the Loan.



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# Bottleneck for introduction of DB in Emerging Construction Market

## Demand- Side

1. Lacking proper understanding of DB
2. Concern for the cost of DB
3. Still a new concept – Uncertainty of the benefit of DB (inclusion DB in JICA SBD since 2009)

## Supply- Side

Insufficient number of qualified adjudicators in the country/Region.



# 4 Loan Legal Framework

1. Exchange of Notes (E/N)
2. General Terms and Conditions (G.T.C.)
3. Loan Agreement (L/A)
4. Guidelines (Procurement and Employment of Consultants)
5. Standard Bidding Documents (SBDs) (FIDIC Pink Book)
6. Minute of Discussions in Appraisal (M/D)

# 4 Loan Peru Legal Framework

## 1. Ley No. 28563 - Ley General del Sistema Nacional de Endeudamiento

### 3.1 (a) Operación de endeudamiento público: Préstamo

10.2 Las operaciones de endeudamiento público y de administración de deuda están exoneradas de las normas sobre contrataciones y adquisiciones del Estado

## 2. Decreto Ley No. 1017- Ley de Contrataciones y Adquisiciones del Estado

### 3.3 La presente norma no es de aplicación para:

t) Las contrataciones realizadas de acuerdo con las exigencias y procedimientos específicos de organismos internacionales, Estados o entidades cooperantes, siempre que estén asociadas a donaciones u operaciones oficiales de crédito

## 3. Ley No. 28411 – Ley General del Sistema Nacional de Presupuesto

68.1 Las Entidades que utilicen fondos públicos provenientes de donaciones o de operaciones oficiales de crédito sujetarán la ejecución del gasto y los procesos de Licitación y Concurso a lo establecido en los respectivos Convenios de Cooperación y en los documentos anexos, así como, supletoriamente, a las disposiciones contenidas en la Ley General y las Leyes de Presupuesto del Sector Público

# Typical misunderstanding and/or invalid reason to apply Domestic Law by the Employer

1. Lack of Employer understanding on international contract procurement
2. Fear of assuming any kind of risk related to the National Audit inspection (Contraloria)
3. Bidding process period can be shortened
4. Project cost can be reduced – cap amount
5. Fixed price contract

6. For an early commencement (**short evaluating process**)
7. The Employer/consultant has insufficient knowledge on other procurement system
8. Want to pay by lump-sum just to avoid additional payments
9. Land acquisition has yet to be completed
10. Just because it is a Law of the country

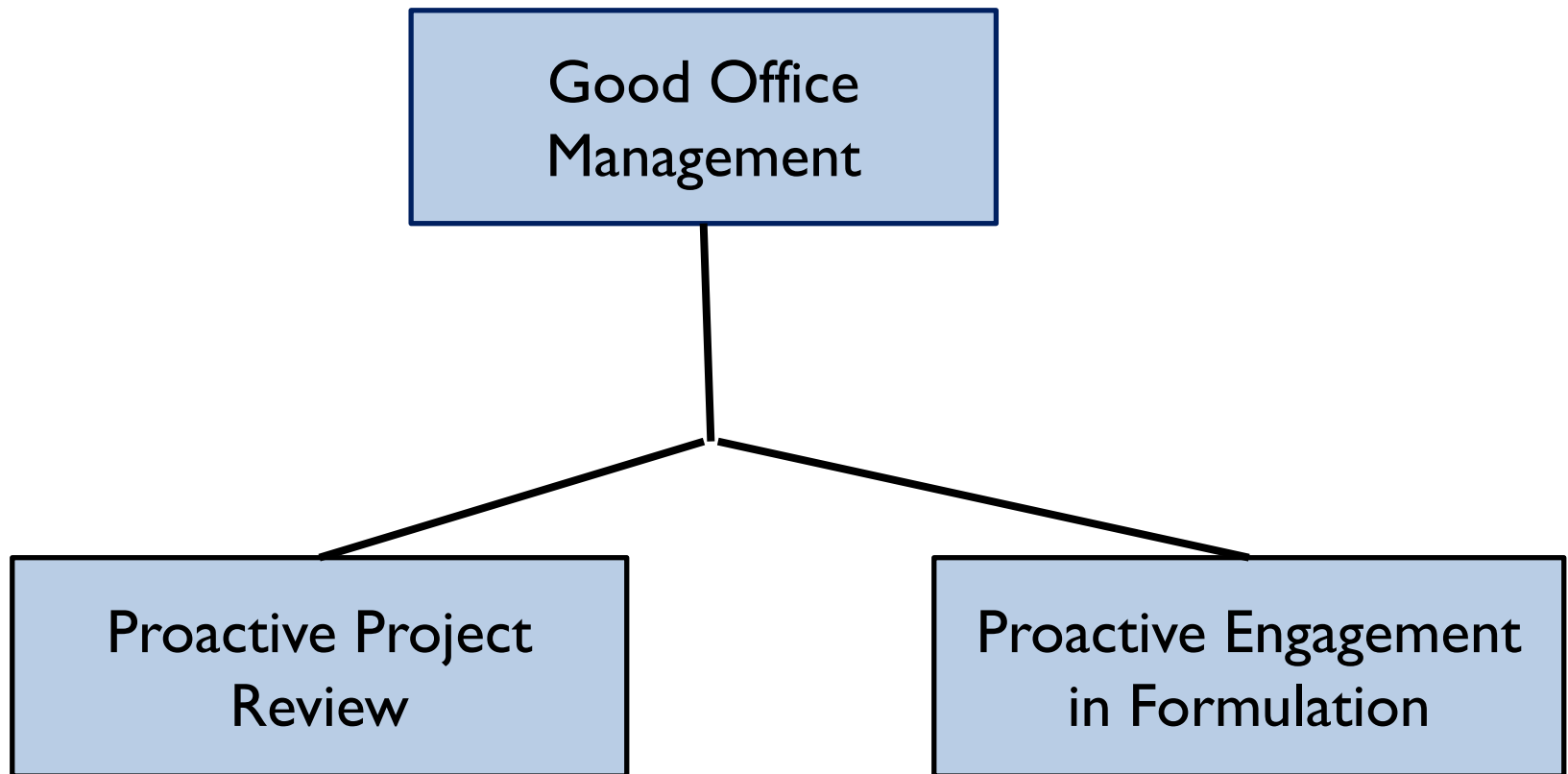
# JICA Guidelines vs. Domestic Law

JICA Guidelines should overrule domestic laws if there are any conflicts

E/N and L/A signed by the Borrower stipulate JICA Guidelines and JICA does not finance expenditures for goods and services which, in the opinion of JICA, have not been procured in accordance with the agreed procedures

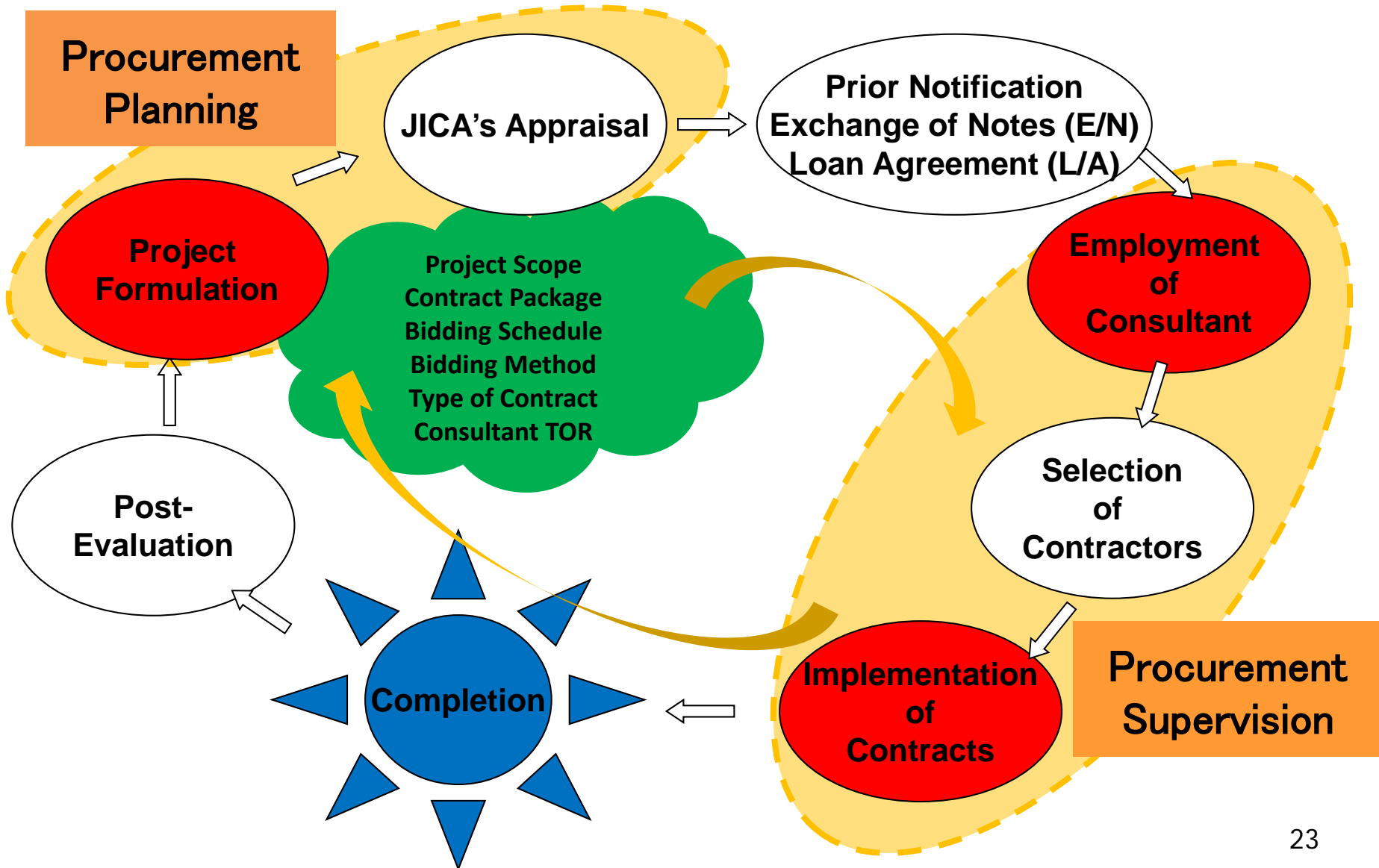
Note: Ineligible bidder under national law before the signing the contract

# JICA's Measures Against Delay



# Basics of Procurement Supervision

## Procurement in Project Cycle



# Measures Against Delay

- **Management-level** regular project review in country offices and **capacity building** of regional dep. and country offices
- **Proactive review of project progress by country offices**, including semi-annual comprehensive review followed by sending back-to-office reports with time-bound action plan
- **Jump-start of consultant selection**: Proper RFP preparation by appraisal and clarify the impact of SNIP in the role of the consultants
- Preparation of unambiguous bidding documents and adequate qualification criteria and avoidance of one-sided contracts **in accordance with JICA standard documents**
- **Quality project formulation and appraisal in light of lessons learned from on-going projects** with proactive involvement of country offices, covering detailed procurement plan, staffing, approval mechanism, and risk analysis.



# 5 Way Forward

- ⇒ Keep a continuous effort having close discussion and cooperation with Borrowers.
- ⇒ FIDIC contract conditions will be **used effectively in letter and spirit.**
  - (a) The contract conditions included in the bidding documents should be well-balanced in terms of risk allocation between the project owner (employer) and contractor.
  - (b) The appropriate bidding method and procedure to select a capable contractor should be adopted (**procurement planning from the formulation stage**)
  - (c) The project owner (employer) should carry out quality preparation (Design-Bid-Built)

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