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FAIR AND BALANCED CONTRACT CONDITIONS

October 2016

POLICY CONTEXT

Besides having prepared EIC's own standard form of turnkey contract form back in 1994, the "EIC Turnkey Contract", EIC's Working Group "Contract Conditions" has been reviewing the new and updated FIDIC standard forms of contract for more than forty years. Starting with a commentary on the unbalanced FIDIC "Silver Book" in the year 2000, EIC has published altogether five "EIC Contractor's Guides", namely on the FIDIC 1999 suite of construction contracts, on the FIDIC Design, Build and Operate form and on the MDB Harmonised Construction Contract. Presently, the Working Group's focus is on the forthcoming updates of the FIDIC 1999 suite of contracts, on the proposed new FIDIC standard form of contract for Underground Works and on preventing the uninhibited misuse of the FIDIC standard forms by the use of unfair Particular Conditions, in particular in the context of infrastructure projects financed by EU taxpayers.

EIC POSITION

The FIDIC 1999 suite of contracts contains a rather demanding risk profile for contractors when compared with the earlier FIDIC standard forms of the last century. Except, however, for the unacceptable risk allocation in the "Silver Book", the current "Red & Yellow Books" as well as the new "Gold Book" provide in general for a fair balance of risks and responsibilities. With respect to the proposed new FIDIC standard form for Underground Works, EIC insists that the employer be under an obligation to disclose all available geological and geo-technical information and to make use of a contractually binding Geo-technical Baseline Report. EIC also advocates introducing innovative contract management tools, e.g. a Risk Register, in this new FIDIC standard form. Concerned about the widespread bad habit of public employers, and their advisors, to modify the balanced risk profile of the FIDIC standard forms by means of Particular Contract Conditions, EIC stresses that the very purpose of Particular Conditions is to complement the standard forms with specified data and contractual requirements linked to the special circumstances of the country, the employer, the engineer, the sector, the overall project, and the Works.



STATUS QUO

EIC has started its “friendly review” of the update of the FIDIC 1999 “Yellow Book” in October 2015 knowing that FIDIC announced that the updated “Yellow Book” will not be published separately but together with the other two other major Conditions of Contracts, namely the “Red and Silver Books”. EIC calls upon FIDIC to continue with its time-honoured tradition that the FIDIC standard forms of contract take the form of a **“manual of good engineering practice prepared by engineers for practical use”**. Given that the FIDIC 1999 “Yellow Book” is widely accepted in the market, EIC recommends that FIDIC concentrates its drafting work on **closing existing loopholes and amending those passages that require improvement or correction** in line with FIDIC users’ experience rather than embarking upon an extensive rewrite of the current edition. It would be a disservice to the industry if well-established procedures and tried and tested conditions were substantially amended to such an extent that will be new to future contracting parties.

Concerning the planned new FIDIC/ITA standard form of contract for Underground Works, EIC agrees with the current conceptual approach that the **employer be obliged in relation to tunneling works to provide a preliminary design detailed enough to allow the contractor to prepare a tender design and to calculate a tender price**. EIC suggests that the employer be asked to describe the scope of the works by means of measures that the contractor shall undertake to perform the works and that in case that additional measures become necessary, the contract provides for a mechanism to agree on additional cost and time. EIC further recommends that the employer be under an obligation to disclose all available geo-technical information and to make use of a **contractually binding geo-technical baseline report**.

EIC is in constant dialogue with FIDIC in order to identify ways to **prevent the frequent misuse of the FIDIC forms**, with a particular focus on EU-financed infrastructure projects in Central and Eastern Europe. Whilst FIDIC maintains that adjustments to national laws, procedures and formalities are necessary to make the FIDIC forms compatible with the respective national jurisdiction, it generally shares the view that **many FIDIC contracts are “over-tweaked”** so that the intention of the original forms is lost. FIDIC is currently working on a **concept of so-called “Golden Principles”** which must be honoured by the client if it wishes to advertise that a project is based on an FIDIC form.

WHAT'S NEXT?

EIC will again act as “friendly reviewer” for the Test Editions of the updates of the FIDIC 1999 “Red & Silver Books”. This work is expected to commence by the end of 2016 or in early 2017. EIC shall also continue the dialogue with the FIDIC/ITA Task Group on Underground Works throughout the drafting process of this new standard form. Finally, EIC will liaise with FIDIC on its new concept of “Golden Principles” obliging clients not to deviate from the traditional risk allocation under the FIDIC standard forms.

DID YOU KNOW ...

The first edition of the FIDIC Red Book, published in 1957, was drafted in conjunction between FIDIC and the European construction federation. Over time, further sponsors from other world regions joined the process and the 2nd and 3rd editions (in 1967 and 1977) were also approved by the Asian and West Pacific as well as the North and South American regional construction federations. Only with the 4th edition of the FIDIC Red Book of 1987 FIDIC became the sole publisher of its forms, inviting, however, “friendly reviews” from interested stakeholders, including EIC.