



UNFAIR CONTRACT CONDITIONS IN POLAND

October 2016

POLICY CONTEXT

The FIDIC standard forms were introduced in Poland in the late 1990s at a time of a massive influx of international and European financing and given the lack of an adequate national standard form of contract for construction. Under the Phare, Tacis and ISPA programmes, the FIDIC standard forms were used in a proper way. Following the accession of Poland as a full member to the European Union in May 2004, however, the EU Commission and the EIB were no longer authorised to scrutinise tender documents of projects for which they were providing finance. From this date on, employers in Poland started to modify the standardised FIDIC risk allocation to the disadvantage of contractors. The combination of poorly prepared tenders and unfairly modified FIDIC contract conditions has resulted in a comparably low efficiency of the national construction investment programmes. This in turn has led to massive litigation, bankruptcies and a loss of jobs in the construction sector.

EIC AND FIEC POSITION

EIC and FIEC, in conjunction with the Polish construction and consulting federations, call upon the Polish General Directorate for National Roads and Motorways (GDDKiA) to reduce the number of discrepancies in its tender documents, to revert to the application of a balanced standard form of contract and to provide for an efficient dispute settlement mechanism instead of referring all disputes to the Polish court system. In addition, EIC and FIEC are echoing the calls of the Polish construction federations to convene a Construction Industry Roundtable with the participation of all relevant parties engaged in the implementation of public infrastructure works in Poland in order to identify pragmatic solutions to the existing problems and to jointly adopt a catalogue of best practice principles.

STATUS QUO

In June 2013, EIC and FIEC convinced the **Ambassadors of six EU countries to write a joint letter to the Polish Deputy Prime Minister** in which the most flagrant deficiencies relating to public infrastructure tenders in Poland were listed. Some 18 months later, the Polish Ministry of Economics organized a respective Workshop on 5 December 2014 at



which representatives from ten EU Embassies attend alongside FIEC, EIC and the Polish construction federations. Present Embassy representatives emphasized their strong wish that the meeting became the beginning of a constant dialogue with the Polish construction and consulting industries.

A study commissioned by the University of Warsaw on the investment process management in the Polish transport industry confirmed in autumn 2014 some of the fundamental problems stressed over several years by contractors and consulting engineers. The issues highlighted in this report include the untimely materialization of strategic plans, low quality of design documentation, award of contracts based on the lowest price, the **incompetence of clients to supervise and cooperate with the designers**, and the **inappropriate risk distribution between the construction parties**.

In September 2015, FIEC and EIC participated in a **hearing of the Road Commission of the Polish Parliament** (the Sejm) and drew the deputies' attention to the urgent need to restore a balanced relationship between the public authorities in Poland, in particular the monopolistic public employers in the road and railway sectors, and contractors. They supported the proposal of the Polish construction federations to **establish a "National Contracting Forum"** as a platform for discussing the problems between the various stakeholders, including the government, public employers, consulting engineers, contractors and subcontractors. The new Polish government, in charge since November 2015, in particular the Ministry of Infrastructure, is supportive of this initiative and helped create a Council of Experts in July 2016.

On the EU level, EIC and FIEC have called upon the European Union and the EIB to oblige their borrowers to comply with generally accepted international contractual standards as prerequisite for disbursing EU taxpayers' money. In March 2016, EIC prepared a **position on the use of (un)fair contract conditions for a project financed by the Connecting Europe Facility (CEF)**", which includes a synopsis of unfair contract conditions found in a specific road construction tender in connection with the S61 express road in Poland, and which was **submitted jointly with FIEC to the Cabinet of the EU Transport Commissioner**. FIEC and EIC have been invited to follow-up talks with the EU Commission and hope that the evidence presented creates a precedent for an intervention of the EU Commission in a Polish road construction tender.

WHAT'S NEXT?

EIC and FIEC continue to liaise with its Polish partner federations and with several EU Embassies in Poland with the ultimate goal to convince the Polish government to enter into a formalised political dialogue with the Polish construction and consulting industries to identify and implement solutions to the current deficiencies on the Polish construction market, including the need to resolve the pending disputes and court cases.

DID YOU KNOW ...

The new financial framework 2014-2020 of the EU had earmarked €82.5 billion for implementing the cohesion policy in Poland (in comparison to €68 billion under the last financial framework). About €37.2 billion will be directly allocated to the Regional Operational Programmes which supervise the allocation of EU funds to infrastructure projects. This means Poland will be the largest beneficiary of the EU cohesion policy funds among all Member States.