

18th March 2016

FIEC/ EIC Position Paper

on the

Use of (un)fair contract conditions in projects financed by the Connecting Europe Facility (CEF)

About FIEC and EIC

The European Construction Industry Federation (FIEC) represents via its 33 National Member Federations in 29 countries (28 EU & EFTA and Turkey) the European interests of construction enterprises of all sizes, i.e. small and medium-sized enterprises as well as “global players”, carrying out all forms of building and civil engineering activities.

European International Contractors (EIC) has as its members construction industry trade associations from fifteen European countries, linked directly or indirectly to the European Construction Industry Federation (FIEC) and represents the interests of the European construction industry in all questions related to its international construction activities. The prime task of EIC is to improve the political and legal framework for the international construction activities of its member companies. In 2014, European international contractors were active in all world regions and generated an international construction turnover of more than 165 bn. € of which around one third or approximately 57 bn. € was earned *inside* the European Union.

Introduction

When executing construction works outside their home markets, the standard forms published by the International Federation of Consulting Engineers (FIDIC) – with the notable exception of the FIDIC 1999 “*Silver Book*” – are generally accepted by employers and international contractors around the world as providing fair procedures for the administration of international construction contracts.

The **World Bank and other Multilateral and Bilateral Development Banks** acknowledge this necessity by **mandating the use of the so-called FIDIC “MDB Harmonised Edition”** for the administration of major civil works contracts that they are financing.

This “**MDB Harmonised Edition**” as well as the General Conditions of Contract of the **FIDIC 1999 “Red & Yellow Books”** **allocate the risks between the parties on a fair and equitable basis**, taking account of matters such as sound principles of project management, insurability and each party’s ability to foresee and mitigate the effects of the circumstances relevant to each risk.

In the EU context it is important to recall that these two FIDIC standard forms of contract have been used successfully in connection with the **ISPA Programme**.

Whilst the FIDIC General Contract Conditions are intended to be used unaltered for every project, the **Particular Contract Conditions** are prepared for a specific project taking account of any changes or additional clauses to suit the local particularities of the project.

According to the World Bank, the purpose of Particular Contract Conditions is to **complement the FIDIC standard form 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.

Regrettably, over time an aggressive attitude towards contractors has developed amongst many employers around the world, which has led them to **use the Particular Conditions not for project- or country-specific amendments but to re-allocate the risk** of the General Contract Conditions. This is often based on the erroneous perception that “more risks to the Contractors” leads to a better bargain for employers, whereas experience has shown that the opposite is the case.

To the extent that modifications on any particular project alter the originally contemplated risk distribution, the **risks allocated to the Contractor become excessive** and, as a consequence, the **following problems** are likely to occur during the life of the project:

- Non-participation in the bid of conscientious and capable contractors,
- Bid failure and disruption of project implementation,
- Extensive provisions for uncontrollable risks that raise the contract price;
- Award to a bidder who fails or was not capable of estimating the risks properly,
- Poor construction quality and delay to the progress of the work,
- Frequent disputes between the Employer and the Contractor,
- In extreme cases, eventual termination of the contract.

Whereas the Multilateral Development Banks, including the EIB in relation to Operations outside the EU, as mentioned above, **tie the disbursements of their funds in connection with civil works projects to the use of fair contract conditions**, the **EU Structural Funds are silent** with respect to the subject matter.

Whilst EU Member States as beneficiaries of the EU Structural Funds are bound to comply with the European Procurement Directive 2014/24/EU as an integral part of the “*acquis communautaire*”, it only addresses the procurement aspect up to the tender award, but not the subsequent contract execution.

This is why FIEC and EIC were highly appreciative of the Regulation (EU) No. 1316/2013 establishing a **Connecting Europe Facility** because this legal instrument provides in its **Recital No. 65** for the following:

*"In order to ensure broad and fair competition for projects benefitting from CEF funds, the form of the contract should be consistent with the objectives and circumstances of the project. **Contract conditions** should be drafted in such a way as to **fairly allocate the risks** associated with the contract, in order to maximise cost-effectiveness and enable the contract to be performed with the optimum efficiency. This principle should apply **irrespective of whether a national or international contract model is used.**"*

Bearing in mind that Recitals are used by the European Commission as interpretative tools and that the preamble of a legal act is a useful means for interpreting it, FIEC and EIC hold that the **tender dossier** prepared for the **CEF-financed project** „Projekt i budowa Obwodnicy miastø Suwathi w ciøgu drogi ekspresowej S-61 _ Odcinek A i Odcinek B” (Design and construction of the bypass Suwalki in the S61 express road - section A and section B.) **is not in compliance with the above-mentioned EU Regulation.**

To illustrate the abusive nature of unfair contract conditions, FIEC/ EIC prepared a synopsis of the contract conditions found (in Polish language) on the above-mentioned tender and compared them to the (English) text of the FIDIC 1999 “Yellow Book” (cf. Annex).

FIEC/ EIC offer their full cooperation and practical experience for any further information and discussion of the issues raised.

FIEC/ EIC Analysis on the “Projekt i budowa obwodnicy miasta Suwałki w ci gu drogi ekspresowej S61 – Odcinek A i odcinek B.”

(Design and construction of the bypass Suwalki in the S61 express road - section A and section B.)



Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
1.1.4.3	Cost	“Cost” means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.	<p>The modifications reduce the Cost for an extension of time for completion of the works to 0.007% of the contract value per day of extension. The Contractor’s entitlement to Cost covers all claims arising out of the events specified in the contract, both in terms of claims for damages and claims for an increase in salary. The Contractor is not entitled to claim damages in excess of the Cost.</p> <p><u>Conclusion: Re-establish the original definition of “Cost” according to FIDIC Sub-Clause 1.1.4.3 which refers to any reasonably incurred expenses, including overheads and other fees.</u></p>
	Profit		<p>Under Sub-Clauses 1.9, 2.1., 4.7, 7.4, 10.2, 10.3, 11.8, 12.4, 13.3, 13.5, 16.1, 16.3, and 17.4 of the FIDIC 1999 “Yellow Book” the Contractor is entitled to receive ”Cost plus a reasonable profit”. All respective entitlements have been deleted.</p> <p><u>Conclusion: Re-establish the Contractor’s right for including “reasonable profit” in accordance with the original FIDIC wording.</u></p>
1.13	Compliance with Statutes, Regulations and Laws	<p>The contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Particular Conditions:</p> <p>(a) the Employer shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Employer’s Requirements as having been (or being) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and</p>	<p>The Contractor is responsible for obtaining the building permit. The Employer is only responsible for the environmental decision (except for changes resulting from the design) which is necessary to obtain the building permit:</p> <p>Particular Condition 1.13 states:</p> <p>Sub-paragraph (a) is deleted and replaced by:</p> <p>The Employer will make available the environmental decision for the agreed realisation of the project and will bear the responsibility for its validity and defects. The change of environmental conditions resulting from a re-evaluation with influences for the environment, which maybe the effect of adopted design solutions, is not a defect of the environmental decision for the agreed realisation of the project in the meaning of its Clause.</p> <p>In sub point (b) after words “obtain all permission” there following words are added: “opinion, agreements”.</p> <p>Generally this Particular Condition shifts all responsibility for the necessary permissions to the Contractor.</p>

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Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
		(b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain design, execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so.	
2.2	Permits, Licenses or Approvals	<p>The Employer shall (where he is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor.</p> <p>(a) by obtaining copies of the Laws of the Country which are relevant to the Contract but are not readily available, and</p> <p>(b) for the Contractor’s applications for any permits, licences or approvals required by the Laws of the Country:</p> <p>(i) which the Contractor is required to obtain under Sub-Clause 1.13 [Compliance with Laws],</p> <p>(ii) for the delivery of Goods, including clearance through customs, and</p> <p>(iii) for the export of Contractor’s Equipment when it is removed from the Site.</p>	<p>Moreover, Sub-Clause 2.2 is deleted, which means that the Employer does not have any obligation for supporting the Contractor in obtaining the permissions required by Clause 1.13.</p>
2.1	Right of Access to the Site	<p>The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender. The right Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Employer’s requirements. However, the Employer may withhold any such right or possession until the Performance Security has been received...</p>	<p>In road tenders, the Employer usually transfers the risk of having obtained all permits in time to the Contractor. EIC believes that the Employer should at least ensure a comprehensive preparation of investment in the frame of the public consultation in order to obtain a decision on the investment location, full access to the site and Decision concerning impact on the environment, this decision should be valid for of last 2 year.</p> <p><u>Conclusion: In public infrastructure projects, the Employer has a duty to make the best investment preparation before the tender, give the Contractor the basic formal decisions and ensure full availability of construction sites. The Employer should interact with the Contractor during the whole period of the project and, if necessary, find joint solutions with the Contractor to provide access to the Site.</u></p>

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Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
3.1	Engineer’s Duties and Authority	<p>The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. The Engineer’s staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.</p> <p>The Engineer shall have no authority to amend the Contract.</p> <p>The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Employer undertakes not to impose further constraints on the Engineer’s authority, except as agreed with the Contractor.</p> <p>However, whenever the Engineer exercises a specified authority for which the Employer’s approval is required, then (for the purposes of the Contract) the Employer shall be deemed to have given approval.</p> <p>Except as otherwise stated in these Conditions:</p> <p>(a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer;</p> <p>(b) the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and</p> <p>(c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.</p>	<p>The Particular Conditions are to the detriment of the Contractor:</p> <p>The second sentence of the 3rd paragraph beginning with the words “If the Engineer it required...” is deleted and replaces as follows: “The Engineer is obliged to obtain the Employer’s agreement in writing before a determination in the scope resulting from the following provisions: Sub-Clause 6.8, Sub-Clause 8.8, Sub-Clause 13.1, Sub-Clause 13.2, Sub-Clause 13.3 and Sub-Clause 20.1”.</p> <p>The Engineer’s determination will be submitted to the Contractor together with the written agreement from the Employer. Whenever the Contract Conditions refer to Sub-Clause 20.1, the Engineer is obliged to obtain the agreement of the Employer in writing before making his determination.</p> <p>The third sentence from 3rd paragraph of Clause 3.1 beginning from the sentences “The Employer undertakes not to impose further constraints(...)” is deleted.</p> <p>The above-mentioned Particular Contract Conditions cause that e.g. the verification of Contractor’s claims is strictly dependent on the Employer. The Engineer will hardly approve the claim against the will of the Employer. In such a case he is not independent.</p> <p>This is a significant limitation of the role of the independent Engineer designated to supervise the proper realisation of the contract in accordance with the agreement and the fulfillment of obligations by the Contractor and the Employer. The FIDIC form allow to specify the scope of action and decisions of the Engineer with the prior consent of the Employer, but the list of restrictions used in this case, and in Poland in general, is very long and further expanded, which causes loss of the true role of the Independent Engineer.</p> <p><u>Conclusion: A list of actions / decisions of the Engineer, for which it must obtain the approval of the Employer, should be limited to the necessary minimum e.g. to change the scope of the contract agreement.</u></p> <p><u>Moreover, penalties for the Engineer’s action without any earlier agreement of the Employer shall be crossed out from the Contract between Employer and Engineer.</u></p>

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Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
3.5	Determinations	Whenever these Conditions provide that the Engineer shall proceed in accordance with the Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances...	Considering that according Sub-Clause 3.1 the Engineer is obliged to obtain the Employer’s agreement before e.g. a claim approval or rejection, it is senseless to provide for a consultation. It is the contractual practice that the Engineer will take the Employers position resulting from the agreement. Moreover, the Engineer often doesn’t want to proceed with consultations in accordance with Sub-Clause 3.5 and it happens that the Engineer doesn’t proceed. A possible cause might be the following Particular Condition after the first sentence: “Consultations may be proceeded in writing”. Such condition may lead to delayed and avoided consultations.
4.7	Setting Out	<p>The Contractor shall set out the Works in relation to original points, lines and levels of reference specified in the Contract or notified by the Engineer. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works.</p> <p>The Employer shall be responsible for any errors in these specified or notified items of reference, but the Contractor shall use reasonable efforts to verify their accuracy before they are used.</p> <p>If the Contractor suffers delay and/or incurs Cost from executing work which was necessitated by an error in these items of reference, and an experienced contractor could not reasonably have discovered such error and avoided this delay and/or Cost, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [<i>Contractor’s Claims</i>] to:</p> <p>(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [<i>Extension of Time for Completion</i>], and</p> <p>(b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.</p>	<p>The Particular Condition states that the wording of this Sub-Clause is deleted and replaced as follows:</p> <p>“The Contractor is responsible for proper location of all part of the works. The Contractor will ensure necessary land surveyors’ activity in accordance with the Building Law and other Laws. After completion of the works, the Contractor will provide and deliver to the Employer the as-built geodesy documentation.”</p> <p><u>Comment: Generally, this Particular Contract Conditions changes the meaning of the original clause significantly as the responsibility for surveying and positioning is now fully transferred to the Contractor.</u></p>

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		<p>After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [<i>Determinations</i>] to agree or determine (i) whether and (if so) to what extent the error could not reasonably have been discovered, and (ii) the matters described in subparagraphs (a) and (b) above related to this extent.</p>	
4.10	Site data	<p>The Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer’s possession on sub surface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer’s possession after the Base Date. The Contractor shall be responsible for interpreting all such data.</p> <p>To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):</p> <ul style="list-style-type: none"> (a) the form and nature of the Site, including sub-surface conditions, (b) the hydrological and climatic conditions, (c) the extent and nature of the work and Goods necessary for the execution and completion of the Works and remedying of any defects, (d) the Laws, procedures and labour practices of the Country, and 	<p>EIC notes also severe changes through this Particular Condition: “The entire first paragraph of Clause 4.10 is deleted and replaced as follows: The information about the area of the Site in the possession of the Employer is included in the Employer’s Requirements. The Contractor will acquire the remaining data at its own efforts”.</p> <p><u>Comment: When analysing the claim, the Engineer often argues on its basis that the Contractor has not complied with the amended provision and is not entitled to any claim.</u></p>

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		(e) the Contractor’s requirements for access, accommodation, facilities, personnel, power, transport, water and other services.	
8.7	Delay Damages	<p>If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer’s Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender.</p> <p>These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.</p>	<p>EIC notes severe changes through the respective Particular Condition. There is a long list of penalties which the Contractor shall pay, i.e.;</p> <ul style="list-style-type: none"> a. For missing the completion date, b. For termination according the Clause 15.2 c. For not achieving the milestones d. For not submitting the Program of Works or not having included Engineer remarks e. For missing the deadline for removal of the defects included in Taking-Over Certificate, etc. f. For missing or delaying the payment to the Subcontractors. g. For not submitting to the Employer for acceptance the contract with the Subcontractor h. For not submitting the contract with subcontractor for the Employer’s information after it is approved. i. For execution of the works with a subcontractor which is not indicated in the Contract j. For working without quality program, traffic organisation design. <p>Moreover, the list of Liquidated Damages Expanded is expanded to a dozen cases whereas the Employer’s entitlement to make deductions from payments or the Performance Bond should be limited to few cases. The total sum of Liquidated Damages is usually 20% of contract value.</p> <p>The Employer may only be liable for termination of the Contract due to his fault and it will only pay damages in the case of termination by the Contractor. Such provisions requires the Contractor to pay huge penalties for things which are not really important.</p>

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			<p>As the Employer often calls for penalties, such penalties shall be given back when the project target was reached by the Contractor and no damages results for the Employer. Due to huge amount of possible resulting penalties the Employer shall be requested to settle all open entitlements (time/money) before proceeding with penalties. Moreover, up to the final completion, penalties shouldn't be deducted from open payments and the Employer should allow for covering of penalties by guarantees.</p> <p><u>Conclusion: Introduce the balance of liquidated damages, and limit their list to a few, maximum 3-4 of circumstances that have the greatest impact on timely execution of the contract in accordance with the terms of the agreement.</u></p>
10.1	Taking-Over of the Works and Sections	<p>Except as stated in Sub-Clause 9.4 [Failure to Pass Tests on Completion]...</p> <p>The Contractor may apply by notice to the Engineer for a Taking-Over Certificate not earlier than 14 days before the Works will, in the Contractor’s opinion, be complete and ready for taking over. If the Works are divided into Sections, the Contractor may similarly apply for a Taking-Over Certificate for each Section.</p> <p>The Engineer shall, within 28 days after receiving the Contractor’s application...</p>	<p>The Particular Condition adds after the 2nd paragraph the following sentences: “Before a Taking over Certificate for Works or Section is issued, the Contractor is obliged to prepare and complete full documentation and statements necessary by the Building Law to obtain the permission for use of Works or Section and obtain in the name of Employer the permission for use.”</p> <p>The Engineer will not issue Taking-Over Certificate until the Employer receives from the Contractor the quality guarantee which is required by the Contract.</p>
13.7	Adjustments for Changes in Legislation	<p>The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligation under the Contract....</p>	<p>The Employer sometimes deletes this Sub-Clause in the tender documents.</p>

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13.8	Adjustment for Changes in Costs	<p>...</p> <p>If this Sub-Clause applies, the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, goods and other inputs to the Works, by the addition or reduction of the amounts determined by the formulae prescribed in the Sub-Clause. To the extent that full compensation for any rise or fall in costs if not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.</p> <p>The adjustment to be applied to the amount otherwise payable to the Contractor, as valued in accordance with the appropriate Schedule and certified in Payment Certificates, shall be determined from formulae for each of the currencies in which the Contract Price is payable. No adjustment is to be applied to work valued on the basis of Cost or current prices. The formulae shall be of the following general type:</p> $P_n = a + b \dots$ <p>where:</p> <p>“P_n” is the adjustment multiplier to be applied to the estimated contract value in the relevant currency of the work carried out in period “n”, this period being a month unless otherwise stated in the Appendix to Tender;</p> <p>“a” is a fixed coefficient, stated in the relevant table of adjustment data, representing the non-adjustable portion in contractual payments;</p> <p>“b”, “c”, “d”, ... are coefficients representing the estimated proportion of each cost element related to the execution of the Works, as stated in the relevant table of adjustment data; such tabulated cost elements may be indicative of resources such as labour, equipment and materials;</p> <p>“L_n”, “E_n”, “M_n”, ... are the current cost indices or reference prices for period “n”, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the date 49 days prior to the last day of the period (to which the particular Payment Certificate relates); and</p>	<p>Contrary to the FIDC standard, there is no real indexation of the price of materials, equipment and labour which has resulted in the bankruptcy of many Polish companies in the light of execution periods of 2-4 years.</p> <p>Whereas GDDKiA has introduced recently the possibility of adjusting contract price in case of decrease or increase of works prices, there is a cap of 1%. It is not calculated for the main prices of the production means for the given contract but in relation to the price indicators of road construction “Wd” and bridges “Wm” published after a long time lag by the Head Statistics Office (GUS) that do not reflect the real cost increase.</p> <p><u>Conclusion: Revert to the principle, and price increase of a 1% should be included in the bid price by the Contractor. Any further, difficult to estimate, cost increase of major materials, equipment and labor in subsequent years after the first year of the contract execution, should be covered by the Employer. The calculation of price increase should take place as foreseen by FIDIC.</u></p> <p><u>At least the Contract shall provide fair indices. It can be assumed as practical that each bidder is providing for main groups of to be executed works a list of applicable indices, which will be evaluated during contract period. As Employer in his position and decision about execution of the long term public tender programme is extremely interfering the market after submission of offers, such approach can resolve most of the resulting problems.</u></p>

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		<p>“Lo”, “Eo”, “Mo”, ... are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date.</p> <p>The cost indices or reference prices stated in the table of adjustment data shall be used. If their source is in doubt, it shall be determined by the Engineer. For this purpose, reference shall be made to the values of the indices at stated dates (quoted in the fourth and fifth columns respectively of the table) for the purposes of clarification of the source; although these dates (and thus these values) may not correspond to the base cost indices.</p> <p>In cases where the “currency of index” (stated in the table) is not the relevant currency of payment, each index shall be converted into the relevant currency of payment at the selling rate, established by the central bank of the Country, of this relevant currency of the above date for which the index is required to the applicable.</p> <p>Until such time as each current cost index is available, the Engineer shall determine a provisional index for the issue of Interim Payment Certificates. When a current cost index is available, the adjustment shall be recalculated accordingly.</p> <p>If the Contractor fails to complete the works within the Time for Completion, adjustment of prices thereafter shall be made using either (i) each index or price applicable on the date 49 days prior to the expiry of the time for Completion of the works, or (ii) the current index or price: whichever is more favourable to the Employer.</p> <p>The weightings (coefficients) for each of the factors of cost stated in the table(s) of adjustment data shall only be adjusted if they have been rendered unreasonable, unbalanced or inapplicable, as a result of Variations.</p>	

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Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
16.2	Termination by Contractor	<p>The Contractor shall be entitled to terminate the Contract if:</p> <ul style="list-style-type: none"> (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [<i>Contractor’s Entitlement to Suspend Work</i>] in respect of a failure to comply with Sub-Clause 2.4 [<i>Employer’s Financial Arrangements</i>], (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate, (c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [<i>Payment</i>] within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 [<i>Employer’s Claims</i>]), (d) the Employer substantially fails to perform his obligations under the Contract, (e) the Employer fails to comply with Sub-Clause 1.6 [<i>Contract Agreement</i>] or Sub-Clause 1.7 [<i>Assignment</i>], (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [<i>Prolonged Suspension</i>], or (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events. 	<p>The cases in which the Contractor is entitled to terminate the contract are reduced from 7 to only 3 cases.</p> <p><u>Conclusion: Re-establish the original paragraph of FIDIC Sub-Clause 16.2.</u></p>

FIEC/ EIC Analysis on the “Projekt i budowa obwodnicy miasta Suwałki w ci gu drogi ekspresowej S61 – Odcinek A i odcinek B.”

(Design and construction of the bypass Suwalki in the S61 express road - section A and section B.)



Sub-Clause	Sub-Clause Title	FIDIC “Yellow Book” Original Text	FIEC/ EIC comment on Employer’s modification
		<p>In any of these events or circumstances, the Contractor may, upon giving 14 days’ notice to the Employer, terminate the Contract immediately.</p> <p>The Contractor’s election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.</p>	
20.2	<p>Dispute Adjudication Board</p>	<p>Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decision]. The Parties shall jointly appoint a DAB by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a DAB in accordance with Sub-Clause 20.4...</p>	<p>Usually, the Employer does not appoint the Dispute Adjudication Board (DAB) at the beginning of the Contract. In addition, the vast reduction of the authorities of the Engineer as indicated above will lead to the submission of the disputes to the General Court. This forces the Contractor to long-term investigation of own rights and claims including due payments and can lead to bankruptcy.</p> <p><u>Conclusion: Re-establish the obligation to appoint three members Dispute Adjudication Board as an important instance to resolve disputes before they will be referred to the court.</u></p>
20.6	<p>Arbitration</p>	<p>Unless settled amicably, any dispute in respect of which the DAB’s decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties...</p> <p>...</p>	<p>The respective Particular Contract Condition makes severe changes. The Sub-Clause 20.6 is not named Arbitration but the Particular Contract Condition is called now “Dispute resolution”. The Particular condition provide for direct referral to the Court.</p> <p>“Any dispute that may arise form Contract realisation will be settled by the court competent for the Employer’s Headquarter”.</p>

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<p>Prequalification and Tender Phase</p>	<p>The Employer announces a restricted tender which does not include market specifics, including knowledge of local laws, geological and climatic conditions, and extends the list of companies that can meet the criteria to twenty companies. As a result the Contractors without proper experience and preparation qualify to tender and offer underestimated prices without including specifics of the market, which ended up with not finishing the contract on time and with the required standards.</p> <p><u>Conclusion: Limit the number of contractors who will be qualified to 5, max to 10, with additional criterion for assessing individual experience on the local market in the last 10 years. The Employer should make use of existing systems capable to evaluate received offers in respect to price and/or project details, methods, suitable period for guarantee, design life, management of project and train his staff accordingly; for such size of projects and very short (compared to other countries) period for execution, competitive dialogue procedure could resolve most of the resulting disputes already in advance and MEAT criteria can be much better addressed/fulfilled in tender process.</u></p> <p>Most of the tenders are announced as "Design & Build" with far too limited time for bid preparation and obtaining Employer's clarifications. Therefore sufficient time for tender preparation is essential.</p> <ul style="list-style-type: none"> • Most of the tenders for the construction of new expressways including the Via Baltica, which in the new budget perspective are led by GDDKiA (General Directorate of Roads and Auto routes) and planned by Polish Rail, are based on a model of "Design & Build" where Contractor is obliged to base the design and carry out construction works on Functional and Utility Program (PFU). This is seldom subject to expert verification; it contains many errors, contradictions and deficiencies. <p><u>Conclusion: Introduce mandatory professional verification of quality and content of PFU and Employer's clarifications should be comprehensive and unambiguous.</u></p> <ul style="list-style-type: none"> • The shortest possible period for projects > 5.1m Euro consistent with the Polish Public Procurement Law is the period of 40, is often set to prepare and submit tenders for "design & build" projects of value exceeding 50 million Euro, although this period should also be fit and sufficient to prepare a tender in accordance with this Law. This period for preparation is later usually extended several times by 1 – 3 weeks up to several months due to hundreds of requests and questions asked by Contractors to clarify the conditions of the tender and scope of the PFU. Period of time, inadequate to the size and complexity of works, extended repeatedly is not accelerating procurement and disorganizes work of Contractor and Employer. <p><u>Conclusion: Adjust the time for tender preparation to its size and complexity, and for tenders of significant values in the model of "design & build" set this period at a minimum of 90 days with possibility of extension.</u></p> <ul style="list-style-type: none"> • There is only a short period of time to obtain clarifications from the Employer. According to Polish Public Procurement Law, Employer is obliged to provide explanations only during half of the time originally designated to prepare and submit the offer, even though it is significantly extended. It is only good will of the Employer to answer further questions asked by the Contractors after this time. <p><u>Conclusion: Extend time for mandatory explanation from Employer up to 14 days before the final deadline of a tender.</u></p>
<p>MEAT criteria</p>	<p>Application of the criterion: Extension of the warranty for selection of the offer is dangerous for the Contractor - extending of warranty to 10 or even 20 years, demanding conditions included in very long document "Quality Assurance". Contractor is forced to provide 5 years warranty even for equipment with standard warranty of 2 years given by Producer and furthermore is provoked by criterion of warranty to extend it for further years.</p> <p><u>Conclusion: Re-establish previously used warranty period of 2 years with the possibility of extension by the Contractor in the offer to the max. 7 years except devices, horizontal thin-layer surface marking and greenery.</u></p>