The controversial new FIDIC Particular Conditions of Contract for road works in Romania

by Frederic Gillion, Partner

In March 2011, the Romanian government introduced new FIDIC conditions of contract applicable to road works, officially to address inconsistencies between the FIDIC forms of contract and Romanian legislation. Those new conditions of contract have quickly caused much controversy among those contractors which are tendering for road works in Romania and were even the subject of a joint statement issued by the European Construction Industry Federation (FIEC) and the European International Contractors (EIC) and addressed to the European Commission in May 2011.

Making standard and compulsory particular conditions of contract so as to meet local requirements and regulations is fairly common and obviously totally acceptable. However what is questionable is the attempt of the Romanian government to change the allocation of risks in the process.

The change in the allocation of risks has been particularly significant with the Yellow Book as the new conditions of contract have literally imported entire provisions from the Silver Book (applicable to turnkey projects) when FIDIC itself recognizes that this form is not a balanced form of contract and that it should not be used "if construction will involve substantial underground work". Having Silver Book provisions relating to the Contractor's responsibility for unforeseen events and the Employer's Requirements applied to road projects is clearly worrying.

A quick review of some of the changes introduced by those new conditions of contract is sufficient to explain why international contractors are becoming increasingly cautious about the new invitations to tender launched this year under these new conditions of contract. In a nutshell: additional risks have been shifted to the Contractor and the Contractor's entitlement to claim under the Contract has been significantly restricted.

• Contractor's right of access to the Site (Sub-Clause 2.1) – The Contractor waives any right to claim in respect of the handing over of the Site in sections irrespective of the size of those sections, their location or the additional costs associated with a completion of the Works in sections.

• Unforeseeable Physical Conditions (Sub-Clause 4.12) – Here the provisions of Sub-Clause 4.12 of the Silver Book [Unforeseen Difficulties] have been introduced, which means that the Contractor is deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works. Unquantifiable risks such as risks for ground conditions, fossils, archaeological findings have now been transferred to the Contractor.

• Responsibility for the accuracy of the Employer's Requirements (Sub-Clause 5.1 of the Yellow Book) – In the same vein, by adopting more or less provisions of Sub-Clause 5.1 of the Silver Book, the Contractor is now responsible for the accuracy of the Employer's Requirements.

• Delay damages – Delay damages can now be levied in the event that specific milestones are not met. However, if the final milestone is eventually met, those delay damages that have been paid shall be reimbursed.

• Payments under the Contract shall not exceed 110% of the Accepted Contract Amount – Regardless of the causes leading to the additional costs (except in the event of a price adjustments resulting from Sub-Clauses 13.7 [Changes in Legislation] and 13.8 [Changes in Costs]).

• Delayed payment – The Contractor is deemed to have waived its right to interest on late payment if no invoice is issued within two months and the Employer is also given an additional 45 days (in addition to the 56 days from the Engineer's certificate) before having to pay the Contractor.

• The Contractor's right to suspend work has been significantly restricted (Sub-Clause 16.1) – This can only be done after 183 days from the Employer's notification as opposed to 21 days.

• Termination by Employer (Sub-Clause 15.2) and by Contractor (Sub-Clause 16.2) – Conscious that the exceptionally high number of termination cases clearly affected the completion of major road projects in Romania, a solution was found by the Ministry of Transport with the following amendment to Sub-Clause 16.2: termination will only take effect after having obtaining a final and binding DAB (which is unlikely to happen as the Employer will undoubtedly issue a notice of dissatisfaction) or an arbitral award confirming the Contractor's entitlement to terminate and the effectiveness of such termination. This means that the Contractor is completely deprived in practice from its right to terminate the Contract as the Contractor will be required in the meantime, under the new conditions of contract, to comply with its obligations under the Contract irrespective of its notice of termination and the Employer's failures.

• Arbitration (Sub-Clause 20.6) – An important, although not obvious, change as been introduced by the new conditions of contract in relation to the arbitration clause. Although Sub-Clause 20.6 has not been amended per se, Sub-Clause 1.4 has been amended to the effect that the language for communications under the Contract is now Romanian. In practice, this means that by virtue of paragraph (c) of Sub-Clause 20.6, the language to be used in any arbitration proceedings is also Romanian unless this paragraph is amended.

The above changes introduced by the new FIDIC particular conditions of contract have so drastically modified the original FIDIC conditions of contract that one can no longer describe them as either fair or balanced. The pressure exercised recently by European contractors and organizations representing them for a rapid change in legislation is a welcome move. Until then a number of experienced contractors now refrain from tendering for road projects in Romania. This is obviously not in the interest of Romania and certainly not of the EU which is financing a very large portion of these projects.

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