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EIC Contractor's Guide
to the
FIDIC Conditions of Contract
for
EPC Turnkey Projects

THE EIC SILVER BOOK GUIDE

EIC Contractor's Guide
to
the FIDIC Conditions of Contract
for
EPC Turnkey Projects

(2nd edition)

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Foreword to the First Edition

FIDIC and EIC have held many constructive discussions since the September 1997 draft of the Conditions of Contract for EPC Turnkey Projects (known as the Silver Book) was issued. As a result of these discussions and those held with other interested parties, the first edition of the Silver Book has incorporated some improvements by comparison with the original draft. To EIC however, the Silver Book represents such a significant departure from FIDIC's traditional approach to the contractual and risk sharing relationship that has prevailed over the years between Employer and Contractor that EIC has decided to take the unusual step of publishing a contractor's guide to the Silver Book. Contractors often take comfort from the fact that a contract is to be carried out under FIDIC terms and conditions but this will certainly not be the case where the Silver Book is used. The purpose of this guide is to highlight the potential risks and pitfalls.

It is FIDIC's view that the individual nature of the turnkey project invariably requires a fair degree of flexibility on the part of Employer and Contractor and extensive negotiations are essential prior to contract signature and they offer the Silver Book as a good starting point for negotiation. EIC does not share this view and in the preparation of this guide, EIC has tried to highlight for contractors, particularly those who may be confronted with this form of turnkey contract for the first time, some of the more important issues to be addressed in bid preparation and client discussions.

EIC wishes to make it clear that this document is not exhaustive and is intended for guidance only. Expert legal advice should always be obtained before submitting an offer or making any commitment to enter into a contract. Neither EIC nor the authors of this document accept any responsibility or liability in respect of any use made by any person or entity of this document or its contents which is and shall remain entirely at the user's risk.

Foreword to the Second Edition

In the three years since the Guide to the Silver Book was first published much debate has taken place on its suitability for use on turnkey contracts. The most enthusiastic support comes from the promoters of infrastructure projects with limited recourse financing. The vehicle for carrying out such works is invariably a Special Purpose Company with little substance; hence the desire to transfer as much risk as possible to the contractor. EIC remains strongly opposed and has heard nothing new or convincing in the arguments put forward to justify the transfer from Employer to Contractor of the onerous and unquantifiable risks contained within the Silver Book. The 2nd edition of our guide incorporates comments adapted from our EIC Contractor's Guides to the FIDIC New Red and Yellow Books, previously not included in the 1st edition.

1 General Provisions

- 1.1.2.6**
Employer's Personnel
- The new definition of the Employer's Personnel includes the personnel of both the Employer, and those of the Employer's Representative and any other personnel notified to the Contractor. This could include a very significant number of people, especially where the Employer is a national government or government agency.
- 1.1.4.2**
Cost
- The definition of Cost excludes profit and could result in the Contractor carrying out extra work or incurring expense, possibly quite substantial in extent, without profit. Such work or expense could arise under various Sub-Clauses, for example, 4.24 [*Fossils*], 8.9 [*Consequences of Suspension*], 13.7 [*Adjustments for Changes in Legislation*], 17.4 [*Consequences of Employer's Risks*], and 19.4 [*Consequences of Force Majeure*]. Under each of those clauses any entitlement would exclude profit unless tenders have been otherwise qualified.
- 1.4**
Law and Language
- Provides that **"The Contract shall be governed by the law of the Country (or other jurisdiction) stated in the Particular Conditions"**. The Contractor should be aware that under certain Civil Law jurisdictions some Silver Book conditions may be considered unfair trade terms and therefore inapplicable. Mandatory laws may also exist, which cannot be overridden by the Contract. Any potential conflict between the Contract and such mandatory legal requirements is best clarified by taking expert advice during the tender period.
- 1.9**
Confidentiality
- Obligates both Parties to treat the details of the Contract as confidential. If the Contractor's design contains data which is commercially sensitive and which he does not wish to be placed in the public domain, the second sentence of this Sub-Clause, referring to restrictions on publication or disclosure of particulars, should also be an obligation on the Employer.
- 1.13**
Compliance with Laws
- The Contractor shall comply with all applicable laws. However, the responsibility for obtaining permits, licences or approvals is not entirely clear when Sub-Clauses 1.13 (a) and (b) are compared:
- Sub-Clause 1.13 (a) provides that **"the Employer shall have obtained (or shall obtain) the planning, zoning or similar permissions for the Permanent Works"**. Sub-Clause 1.13 (b) states that **"the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the design, execution and completion of the Works and the remedying of any defects"**.
- Responsibility for obtaining permissions is ambiguous and should be clarified. For instance, what is "similar permissions"