

Chapter Five

Standard Conditions of Construction Contracts

Introduction

- Standard forms of contract have become an essential part for the day-to-day transactions of most agreements
- In the construction industry, standard forms of contracts are pervasively in use.
- These standard forms of contracts are drawn up by professional organizations, financial organizations, and governmental organizations
- Advantages:-
 - Their use saves time and energy.
 - The contracting parties can also avoid complications in drafting the contracts as it naturally consists of various bulky documents and multiple contracting parties.
 - Recurrent use over a long period of time, makes stakeholders to be familiar with the conditions

History of Conditions of Contracts

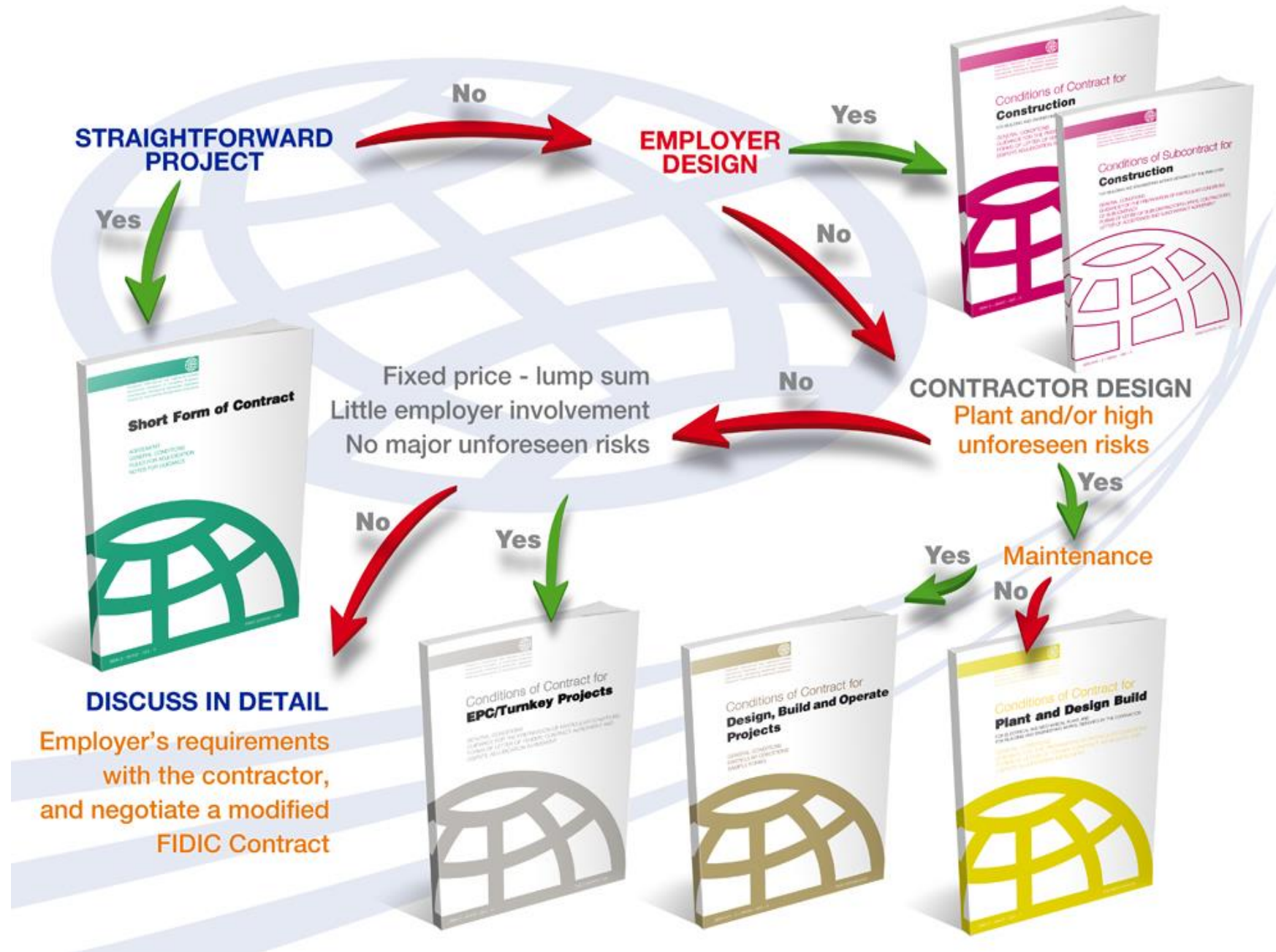
- In Ethiopia, a number of standard forms of construction contracts have been formulated and put in use. The prominent ones are:
 - a) FIDIC form of contract (The Red Book)
 - b) MoWUD (1994)
 - c) PPA(2006, 2011)

FIDIC Contract Forms

- ✓ FIDIC stands for Federation International Des Ingenieurs-Conseils (the International Federation of Consulting Engineers)
- ✓ Founded in 1913 by the national associations of three European countries (France , Belgium and Switzerland)
- ✓ The first edition for Works of Civil Engineering Construction was published in August 1957

- Since then, FIDIC has produced the contract forms used in the majority of all transnationally financed civil engineering projects carried out in the developing world
- Of the various contract forms introduced by FIDIC, the FIDIC Fourth Edition(1987) has claimed an unparalleled success throughout the world today and this success is also owed to the World Bank.
- the World Bank, the largest financing agency in the international field, produced the first edition of its standard bidding documents for the procurement of works of civil engineering construction, for contracts financed in whole or in part by it, almost entirely based upon the FIDIC Red Book
- The adoption of the Red Book by the World Bank in its SBDW is a major vote of confidence and an endorsement of the FIDIC Red Book

- Standard Conditions of Contract developed by FIDIC:
 - **Red Book**: for building & engineering works designed by the Employer
 - **Yellow Book**: for Electrical and Mechanical Plant & for building works designed by the contractor
 - **Pink Book**: MDB harmonized edition of the red book
 - **Orange Book**: for Design-Build and Turnkey
 - **Silver Book**: for EPC/ Turnkey Projects
 - **Green Book**: Short form of contract for engineering & building work of relatively small capital value
 - **Gold Book**: Design, Build & Operate Projects



MoWUD 1994 Contract Form

- This Standard Conditions of Contract for Construction of Civil Work Projects was authored by the Ministry of Works and Urban Development (MoWUD) in May 1994
- It appears to have been, with minor adjustments or even rehashes, adopted from the FIDIC Red Book (1987).
- It is being widely put in use in government construction contracts both at the federal and state levels
- It contains 75 clauses including Form of Agreement & Form of Performance Bond.
- The Project Delivery System adopted is that of Design-Bid-Build.
- The type of contract is based on BOQ i.e. it is an admeasurement contract type (see Clauses 55-57)

PPA (2006 & 2011) Conditions of Contract

- It has been in practice since 2006.
- The conditions of contract are applicable to the procurements of the federal government.
- Have forms for the following types of procurement
 - ✓ Consultancy Services;
 - ✓ Works;
 - ✓ Goods;
 - ✓ Including Simple Request for Quotations & Local Purchase Order;

Procurement of Works

- The GCC for the purpose of the procurement of Works have been prepared for International Competitive Bidding (ICB) & National Competitive Bidding(NCB), separately
- The Conditions of Contract have been also prepared both in Amharic & English language.
- The conditions of contract are based on Design-Bid-Build project delivery system.
- The type of contract could be based on BOQ, in which case it becomes measurement based.
- Or based on Activities Schedule, in which case it becomes lump sum.
- The role of the engineer is envisaged

Standard Bid Document For Procurement of Works By PPA: January 2006

Introduction

- Standard Bid Document is a document that can be used by the Procuring Entity often called an Employer for the purpose of defining procuring procedures, intended requirements and contractual conditions for getting a competitive tender!
- It is a document that results in a development of several experiences to serve as bases for use by the Procuring Entity!!!
- SBD by PPA; January 2006 is a document that was chosen by the FDRE to be used for Procurements of Public Investments of the Federal Government

Purpose

- To provide a standard document containing basic contractual provisions and safeguard the interest and requirements of public procurements at the Federal Gov't level
- To minimize time for preparation and approval of Bidding Documents with minimum changes!
- To enhance transparency in the evaluation of Tenders!

SBDs Parts

- The document is divided in to the following three parts, namely:-
 - PART I : Bidding Procedures
 - PART II: Schedule of Requirements and
 - PART III : Contract

PART I: Bidding Procedures

Section 1: Instructions to Bidders (ITBs)

Section 2: Bid Data Sheet (BDS)

Section 3: Evaluation and Qualification Criteria (EQC)

Section 4: Bidding Forms (BFs)

Section 5: Eligible Countries (ECs)



Particular Information
to the ITBs

1. Instruction to Bidders

- Instruction to Bidder (ITB) is intended to acquaint potential competitors with the nature of the tender and shall provide all the necessary information to enable bidders to prepare their offer in accordance with the requirements of the Employer.
- The ITB document includes:
 - General introductory Part covering scope of bid, sources of fund, eligibility and qualification requirements, and necessary obligations concerning the cost of tendering, site visits, etc.
 - Bid Document Part eliciting the contents, clarification and amendment processes.
 - Bid Preparation Part which states the language, documents comprising and their precedence, bid prices and its currencies, bid validity & security and alternative offer and formats and signing of bids requirements.

- Bid Submission part stressing on sealing and marking of bids, deadline for submission of bids, late bids, and Modification, Substitution and Withdrawals of bids.
- Bid Opening and Evaluation Part covering procedures and criteria for opening and evaluation of Bids, and preference for domestic or regional preferences.
- Contract Award Part stating Award criteria and signing of agreement procedures, Rejection Rights and Obligations, Contract security, and Use of Adjudicator for dispute resolution

NB:- Instructions to Bidders including all of its particular information parts are not part of a Contract Document and; therefore, will not form a part of the Contract!

2. Bid Data Sheet

- Bid Data Sheet supplements the ITB with particular information in the form of detailing specific to individual bidding documents such as:
 - Additional documentary evidences for eligibility
 - Addresses and places of important processes
 - Contract Type
 - Limit for which detail cost break down is requested
 - Adjustment of bid prices provisions
 - Amount of bid security
 - Provisions for alternative offer acceptances
 - Number of Bid Offer Copies to be submitted
 - Adjudicators proposed by the Employer and his/her hourly fee and biographical data

3. Evaluation & Qualification Criteria

- It supplements the ITB with particular information in order to inform potential competitors the criteria used by the Employer to evaluate their offers and post qualify the bidder submitting the lowest evaluated bid. This part indicates:
 - Average annual volume of construction works amount
 - Numbers of Similar experiences
 - Essential Equipment and their sources
 - Key Personnel with their qualifications and experiences
 - Liquid asset and / or credit facilities
 - Joint Venture qualifications
 - History of Litigations
 - Subcontractors qualifications

4. Bidding Forms

- IT supplements the ITB with particular information in order to inform potential competitors the forms they are expected to complete and include in their bid offer. These forms include:-
 - The Bid Submission Form
 - ✓ Use Bidder Letterhead during Submission
 - ✓ Signature by authorized person
 - The Priced Bill of Quantities or Activity Schedules
 - The Bid Security Form
 - ✓ Bank Guarantee
 - ✓ Use Financial Institutions Letterhead for submission
 - The Qualification Information Form
 - ✓ Use formats included

5. Eligible Countries

- Eligible Countries supplements the ITB with particular information in order to specify countries eligible for competitions. Two of the conditions for non eligibility are:
 - Prohibited commercial relations by the FDRE
 - Act of compliance with a decision of the UN Security Council

PART II: Schedule of Requirements

1. Scope of Works
2. Technical Specifications
3. Drawings
4. Bill of Quantities or Activity Schedules

Schedule of Requirements

- Inform bidders the Employer needs using
 - Detail description of the scope of the works including background information
 - General and Particular Quality, Specification and Methods of Measurement related Laws, Codes, Standards and regulations
 - Indicated Lists of drawings for use in the construction works
 - Detailed Bill of quantities or activity schedules for pricing purposes

PART III : Contract

Section 7: General Conditions of Contract

Section 8: Special Conditions of Contract

Section 9: Contract Forms

General Conditions of Contract

- The GCC is composed of 62 Clauses
- It is composed of the following five parts:-
 - General: (Clause 1-Clause 26)
 - Time Control: (Clause 27-Clause 32)
 - Quality Control: (Clause 33-Clause 36)
 - Cost Control: (Clause 37-Clause 54)
 - Finishing the Contract: (Clause 55-Clause 62)

General

- Definition, Interpretations, Language and Law
- Construction Works, Subcontracting, Safety, Possession of the Site
- Risks, Insurance, Discoveries
- Engineer's decision, Instructions, Delegation, Approval, Site Investigation Reports
- Disputes, Procedures and Use of Adjudicator

Time Control

- Program, Extension of Time,
- Acceleration, Suspension,
- Management Meeting, Early Warning

Quality Control

- Defects – identifying, correcting and uncorrected
- Tests

Cost Control

- Bill of Quantities or Activity Schedules
- Changes – Excess in quantities, Variations
- Payment Certificates, Payments including Advance payments, Retention, Currencies, Tax, Cash flow forecasts
- Compensation Events – Price Adjustment, Liquidated damages, Bonus
- Securities
- Day Works, Cost of Repairs

Finishing of Contract

- Completion, Taking Over, Final Account, Release from Performance
- Operation and Maintenance Manuals
- Termination, Payments upon Termination, Property

Important Points

General

- Engineer's Decisions can be restricted by the Employer
- Contractor shall rely on site investigation reports for preparing the bid offers
- Contractor can use third party for the design and approval of temporary works
- The contractor shall carryout all instructions of the Engineer
- Disputes can be handled by Adjudicator

Time Control

- Program to be submitted showing methods, organization, sequence and timing of works
- Program to be updated within reasonable intervals subject to approval by the Engineer but could not relieve contractor's obligation and could only show the effects of variation and compensations events
- Engineer shall decide EoT within 21 days of submission by the Contractor if early warning of a delay and clarification when necessary is made by the contractor

Cost Control

- Excess in quantity for a particular item by more than 25 % and its effect on the total exceeds by 5 % will be adjusted for a new rate
- Initial Contract Price exceeding by more than 15 % will be adjusted for a new rate
- Engineer shall assess the contractor's quotations in the case for variations within seven days
- Contractor is not entitled to additional payment for costs that could have been avoided by early warning
- Payment shall be for executed works
- Payment shall be within 30 cal. Days after approval by the Engineer
- Delayed or Increased payment will be compensated using commercial borrowing interest rate with the subsequent payment certificate

Cost control Continued..

- Compensation Events
 - ✓ Late possession of site
 - ✓ Schedule effects by the Employer
 - ✓ Delay or Suspensions or Instructions dealing with unforeseen condition by the Engineer
 - ✓ Delay in issuing or clarifying drawings, specifications, instructions, certification of completion unreasonably
 - ✓ Additional tests or uncovering resulting in no defects
 - ✓ Adverse ground condition
 - ✓ Delayed advance payment
 - ✓ Effects due to Employer's risk, delay or extra cost from other engaged parties inability to execute the work

Cost control Continued..

- Changes in Taxes, Duties and Levies can only be compensation events if and only if specified in the special conditions of contract
- Price Adjustment (Adjustment Formula)

$$pn = A + b \frac{Ln}{Lo} + c \frac{Mn}{Mo} + d \frac{En}{Eo} + etc.$$

- Sources of indices shall be those listed in the contractor's bid as approved by the engineer
- Weightings and sources of indices shall be submitted during bid offers

Cost control Continued..

- Liquidated damages are calculated for the total contract price not for that part of the contract price computed from delayed time as used to be
- Liquidated damage may be directly deducted from any payment certificates due to the contractor
- Bonus can be entertained
- Contract security shall be provided no later than 15 Cal. Days after receipt of the Letter of Acceptance and shall be valid until 28 days or One Year after certificate of completion in the cases of Bank Guarantee or Performance Bond provisions respectively
- Performance bond as a contract security is only allowed for Domestic Contractors

Finishing the Contract

- Employer shall take over the site and the works within 7 cal. days of the Engineer's issuing of a certificate of completion
- Engineer shall issue defect liability certificate and certify final payment due to the contractor within 60 cal. days of receiving the contractor's account and remedying of defects
- Provision of as built drawings and operation and Maintenance manual by the contractor if specified in the special conditions of the contract
- Termination / Breaches of Contract provisions
 - Contractor suspension of works more than 28 cal. Days
 - Engineer's suspension of works not withdrawn within 28 days
 - Bankruptcy
 - Payment certificate delay more than 90 cal. Days

- Engineer's notice on failure to correct defects constituting fundamental breaches
- Contractor security is not maintained
- Limit of Liquidated damage reached
- Corrupt, Fraudulent, Collusive or Coercive practices

Special Conditions of Contract

- Supplements GCCs by modifying conditions applicable for individual contracts
- The SCCs prevail over the GCCs
- Time; Insurance; Specific considerations; Fees, reimbursable expenses and appointment of Adjudicators; Engineer's duties and authorities; Remedial Right values related modifications are allowed

Contract Forms

- Constitutes:-
 - Agreement
 - Letter of Acceptance / Letters to Unsuccessful Bidders
 - Contract Security
 - ✓ Bank Guarantee / Performance Bond
 - Advance Payment Security
 - Priced Bill of Quantities / Activity Schedules

Reflections

- Less considerations, participations and awareness of the SBDs by relevant stakeholders
- Limitations with regard to
 - DBB Delivery System only
 - Admeasurements & Lump Sum Contract Types only
- Higher Qualification Requirements recommended in the user guides as compared to the capacity of domestic contractors
- User guides recommendation for exclusion of Price Adjustment provisions — Contracts with in 18 months
- Liquidated damage consideration using total contract price

- Payment for executed works amount only.
- Dispute using Adjudicator
- Less Clarity on Notice Requirements for claim considerations and necessary communications

Thank You