ROMANIAN EXPERIENCE WITH FIDIC FORMS IN ROADS AND BRIDGES CONSTRUCTION

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1. The use of the FIDIC Red Book in Romania

Nowadays, FIDIC forms of contract are intended to be suitable for projects carried out around the world by all types of employers, often in a civil law environment with the extensive support of large investors such as the World Bank or the European Union. FIDIC documents, being the most popular conditions for construction contracts, are also used as contract conditions in Romania for public procurement mainly for road and bridge projects by the Ministry of Transportation or RNCMNR (here referred to as the employer).[1]

FIDIC recommends its Conditions for international use. They have two parts—the Specific and the General Conditions. FIDIC warns against changing the General Conditions and recommends that changes because of local law requirements or aspects of the project should made in the Specific Conditions. There is no doubt that the FIDIC standard forms are helpful for domestic use as well, mainly in places which lack traditional model forms of contracts or where strong international competition is expected.

From 2000 to 2010 the Romanian authorities worked mainly with the Red Book (First Edition, 1999) given the fact that Romanian legislation (relating to design and quality in construction and finance) requires the completed works to be measured, using unit and item prices that cannot be varied.

However the employer has constantly faced several problems in developing its proposed projects such as:

- slow procedure to ensure due access to the site according to clause 2.1 [*Right of Access to the Site*];
- errors in the initial setting-out data under clause 4.7 [*Setting Out*];
- mistakes in the site data under clause 4.10 [*Site Data*];

[1] Romanian National Company for Motorways and National Roads (Romanian abbreviation: CNADNR).

- the design needing adjustment to become applicable to the actual site conditions;
- slow procedure in getting permits under clause 2.2 [*Permits, Licences or Approvals*].

One other impediment has constantly been that utilities interfered with the works. As utilities are privately owned, utility owners have to be involved directly in the designing and the relocation of their networks (water, gas, oil and, mainly, electricity).These third parties are mostly foreign companies with administrations outside Romania. The approval procedures usually go on for months or years. There are no clear, uniform procedures that must be followed by contractors; the utility owners change their requirements at their choice, sometimes even imposing on the employer and contractors conditions outside the legal framework or with disregard for the law.

For example, preliminary archaeological investigations and site clearance should be carried out by the employer—RNCMNR. If, following these preliminary investigations, information about important remains is revealed, then the employer should not embark on ordinary site clearance. Sub-clause 4.24 (*Fossils*) should only operate for unexpected findings in the area of the works about which no prior data were available. Passing responsibility for archaeological investigations and site clearance to the contractor usually leads to claims for which the cost cannot be easily and strictly measured, since it depends upon specialised agents in this field (e.g., museums).

Contractors have also been facing delayed payment for work executed due to bureaucracy and to legislative restrictions. Up to six months' delay in payment for works certified by the engineer in due contractual time is not exceptional. For executed and certified works, the employer has actually increased up to 80 days the period in which he is allowed to pay from the date of approving the interim payment certificate. Moreover, the period for verifying the interim certificate by the employer is not specified in the specific conditions because of changes to the FIDIC Conditions made by the employer.

Furthermore, cases occur when this period is increased by unofficial requests to the contractor not to apply for payment or by the employer withholding payment for supplementary verification on various formal grounds. This also applies to payment for the engineer's services.

These practices lead even the most diligent of contractors to hire specialised companies for claims support and to reduce productivity (including demobilisation of resources) in an attempt to overcome delay in payments. Such hardships faced by contractors mean that that they become more concerned with claims management than with the progress of the works.

These issues have resulted in a series of claims that have been referred to DABs and finally reached arbitration, but under the Arbitration Rules of the

International Chamber of Commerce these procedures are costly and take a lot of time, consuming both the resources of the contractor and of the employer and with no guarantee of success or satisfactory compensation.

In addition, the Romanian Government considered it necessary to introduce the FIDIC Conditions as internal legislation so they will be accepted and generally applied both by national and local authorities for major infrastructure projects. This would ensure a more uniform approach for construction purposes. Decree No 1405/2010 of 28 December 2010[2] ''Concerning Approving the Use of the Contractual Conditions drawn by the International Federation of Consulting Engineers (FIDIC) for Investment Objects in the Transport Infrastructure Financed by Public Funds and of National Interest'' introduced:

- Appendix 1: Contract Conditions for Equipments and Constructions, including Designing, for electrical and mechanical equipments, for buildings and works designed by the contractor,
- Appendix 2: Contract Conditions for buildings and works designed by the employer.
- In this Decree Article 3 stated: ''Specific contract conditions, for modifying and appending the contract condition stipulated in Article 1 will be approved by Order of the Transports and Infrastructure Minister''. These Decrees are:
  - No 146/2011/01.03.2011, ''Concerning Approving the Use of the Contractual Conditions for Equipments and Constructions, including Designing, for Electrical and Mechanical Equipments, for Buildings and Works designed by the Contractor and Contract Conditions for Buildings and Works designed by the Employer drawn by the International Federation of Consulting Engineers (FIDIC) for Investment Objects in the Transport Infrastructure Financed by Public Funds and of National Interest'';
  - No 211/2012/12.03.2012, for Modifying and Appending Decree No146/2011.

2. The use of FIDIC Yellow Book in Romania

In recent years, the employer, in an attempt to minimise the errors and gaps in its tender documentation (produced by insufficient time for bidding preparation) thought of the solution offered by the FIDIC Yellow Book (First Edition, 1999). Thus it transferred design and all related risks to the contractor. These conditions have been selected by the employer as it takes less time to prepare the tender documentation and because of the imperative demand to start some projects close to the terminal dates of the Financing Memoranda. The employer has also included a lot of special

[2] Published in the *Official Gazette*, Part I, No 51, 20 Jan 2011.

clauses in these contracts, which basically alter the distribution of risks between the two parties.

Such contracts do not follow the principles of the FIDIC Yellow Book as the employer is trying to limit:

- its risk for delayed expropriations under clause 2.1 [*Right of Access to the Site*];
- its responsibility for errors in the setting-out data under clause 4.7 [*Setting Out*];
- its responsibility for errors in site data under clause 4.10 [*Site Data*];
- price increases for unforeseen physical conditions under clause 4.12 [*Unforeseeable Physical Conditions*]. This clause has been completely modified so that it does not allow any claims for time and costs for unforeseen circumstances or events.

In general, there are three basic rules of sound risk allocation:

(1) allocate risks to the party best able to manage them;
(2) allocate the risk in alignment with project goals;
(3) share risk when appropriate to accomplish project goals.

Unbalanced risk allocation:

(1) leads to project complications;
(2) has negative influence on price, time and quality;
(3) leads to speculative claims, disputes, contractor's bankruptcy, early project termination etc.

With this shift in risk, the employer has changed a balanced Yellow Book risk allocation to a Silver Book risk allocation that is not suitable for road and bridge (or underground) construction. Additionally, in many civil law jurisdictions such a shift and such onerous clauses are not likely to be valid under the applicable law being mainly contrary to the ''good faith protection'' principle (for example, in Germany and France, or in African or Middle East civil law countries and so on).

Nonetheless, although the employer is still keen (based on legislative demands) on accurate quantities and measurement, he is not allowed, according to Romanian legislation, to stipulate payment as a lump sum or percentage of the contract price according to the executed works. There is no proper measurement method for the correct valuation of the works as executed. Romanian legislation states that there must be a bill of quantities and that contractors are fully responsible for the unit prices.

Order 863/2008 of 2 July 2008, Instructions for the Application of Certain Provisions of Government Decision No 28/2008 regarding the Frame-Content Approval of Public Investments Technical-Economic Documentation, as well as the Structure and Methodology of the General

Estimate for Investment Objectives and Intervention Works,[3] states in Article 1 (A), part 4, Works Bill of Quantities:

> ''This chapter contains all necessary elements for quantifying the works' value and it contains:
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> (a) The summary of expenses for the objective (Form 1);
> (b) Expenses summary on works' categories, for every object (Form F2);
> (c) Bill of Quantities by type of works (Form F3);
> (d) Lists of quantities for equipments and plants, including instruments (Form F4);
> (e) Equipments and plants Certificates (Form F5);
> (f) Bill of Quantities for temporary works SO (Site Organization) (Form F3 may be used).
>
> NOTE:
> Forms F1–F5, filled in with unit prices and values, become the tender quotation forms and these shall be used for producing the payment applications for the executed works to be paid.''

This leads to the conclusion that a lump-sum contract cannot be validly used in the construction domain in Romania as it is contrary to law.

Thus, the employer has altered the General Conditions of the FIDIC Yellow Book through some Specific Conditions to correlate with local legislation by introducing restrictions specific to the FIDIC Red Book.[4]

For example, sub-clause 14.1 [*The Contract Price*] has been modified to include the submission by the contractor of a detailed, precise, complete bill of quantities and price breakdown for all items of works:

> ''(c) Within 14 days from the approval of the Technical Design (produced in accordance with the Technical Specifications) by the Technical Economic Committee of the Employer, the Contractor will issue to the Engineer, the Bill of Quantities detailed per work categories, containing the Unit Price per each Item of works. The summarised amount of all Items (Quantity * Unit Price) in the Bill of Quantities for each category of works must be at most equal to the Value included in the Cash Flow for that works category.
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> (d) Also, the Contractor will submit a detailed Breakdown for each Unit Price within the Bill of Quantities for the Works. The Breakdown will include the costs for manpower, materials, equipments, transport and percentages for indirect costs and profit. The Engineer shall use this Breakdown to evaluate Modifications of Unit Prices and New Prices according to cl. 13.3, but the use will not be limited to that.''

If the contractor refuses to provide this, the engineer will usually be unable to perform all his duties and from carrying out the verifications, evaluations and analysis required by the contract.

On the other hand, the law on expropriation has recently been modified: Law No 255/2010/14.12.2010 (regulations for its application issued. 2011)

[3] Published in the *Official Gazette*, No 524, 11 July 2008 (Governmental Decision No 28/09.01.2008).

[4] See n. 2, above.

relating to Expropriations for Public Concern Causes, necessary for Construction of National, Territorial or Local Objects, to ensure a more rapid access to sites for major infrastructure contracts. Article 2 (1) states:

> ''**Article 2.**—(1) According to the law herewith, public interest works are:
> (a) Construction, rehabilitation and reconstruction of national, county and local interest roads, as well as all construction, rehabilitation and expansion works for the public railway infrastructure, works necessary for the extension and improvement of the existing subway network, airport and naval transport infrastructure development works; . . . ''
>
> ''**Article 3.**—According to the present law, it is permitted to expropriate the immovable goods belonging to physical or juridical persons, with or without lucrative purpose, as well as those belonging to other entities or held as private property by the villages, towns, cities and counties affected by national, county or local public interest works.''
>
> ''CHAPTER II EXPROPRIATION PROCEDURE STAGES
> **Article 4.**—Expropriation procedure stages are:
> (a) Approving the technical-economic indicators for national, county or local interest works;
> (b) Registration of the subsequent individual amounts for compensation payment of the immovable goods which are part of the expropriation corridor and displaying the list of the corresponding owners;
> (c) Ownership transfer;
> (d) Finalisation of the expropriation procedure formalities.''

Law 255/2010 for expropriations is meant to ensure more rapid access to sites for major infrastructure contracts by allowing possession of the properties once payment has reached the owners' accounts even though litigation may not have finished.

In practice, there are still impediments concerning applying the Expropriations Law. If people are displeased with the amount paid, they will not allow access to the site and, therefore, it must be obtained by force, under the authorities' supervision and by the presence of special units.

Being aware of these difficulties, the employer introduced a provision in sub-clause 2.1 [*Access to Site*] which allows him to grant the access:

- 28 days after commencement date;
- by sections, gradually;

The contractor will not be entitled to any claims on the grounds of access to site being ensured by sections: not only have the provisions concerning entitlement to claim been deleted, but there is a clear amendment stating the contrary: ''The Contractor will not issue any Claim on the premises that access to site is to be assured gradually, by sections.''

When faced with these restrictive special conditions of contract—i.e., the modified FIDIC Yellow Book—and also with site problems such as incomplete expropriation, lengthy procedures for clearance of forest areas, tendered hydrological and geological reports that do not contain accurate data about the structure of soil or physical and climatic conditions in the

region of the project, contractors gradually decrease the number of resources used and productivity in an attempt to reduce extra costs and to maintain production to match the employer's financial capability. This results in delays to the completion of the projects (concurrent delays caused by employer and contractor) and in claim management strategies, instead of proper project management.

In addition, the engineer's role has been drastically diminished within these contracts, both through the special conditions and through specifications and supervision contracts imposed by the employer. The engineer's action regarding approvals and determinations is contingent upon the employer's final approval. Payments procedures, methods of calculation and certifications, acceptance of supporting documents are frequently a ''bully'' area for the employer and contractor, with the engineer caught in the middle.

Situations have occurred where the employer simply produced a Notice under clause 15.1 [*Notice to Correct*] and officially instructed the engineer to sign and deliver it to the contractor, without the right to correct, modify or state its point of view.

This kind of approach leads to numerous misunderstandings and misguided actions with an unpredictable effect on contract management. Contractors sometimes purely consider some contractual documents as being approved just by their submission to the engineer.[5]

For example, according sub-clause 8.3, completed with the Specific Provisions:

> ''If, at any time, the Engineer gives notice to the Contractor that a Programme fails (to the extent stated) to comply with the Contract or to be consistent with actual progress and the Contractor's stated intentions, the Contractor shall submit a revised Programme to the Engineer in accordance with this Sub-Clause, within 7 days''.

The contractors never correct, complete or in any way revise the programme of works in accordance with the engineer's comments and observations, but simply issue a programme which further includes mistakes of technical, procedural, economic or contractual nature.

This approach is meant to make it impossible for the engineer to conduct a thorough analysis of the progress of works.

3. Conclusion

In terms of risk allocation, the *FIDIC Procurement Procedures Guide* says:

(a) the construction and engineering industry is a high risk industry,
(b) management of the risks has overriding importance,
(c) every risk must be allocated to one or other party,

[5] See n. 6, below.

(d) a risk cannot ''be left hanging in the air'',
(e) practice over many years has shown that sensible and balanced risk allocation results in the lowest overall total cost for completed projects.

It is common knowledge that efficient risk allocation must be based on the principle that the risk is borne by the participant best able to control it. FIDIC contracts are based on such a principle. The Red Book and Yellow Book are internationally recognised as conditions of contract with balanced risk allocation.

It has been often said[6] that in certain Central and Eastern European countries, employers have managed to impose in public works contracts—largely financed by the EU—very onerous provisions for the contractor which radically change the allocation of risks established by the General Conditions of Contract. Furthermore, it has been often stressed that there is undoubtedly a growing trend in the region for significant risks traditionally borne by the employer under the FIDIC Yellow Book to be transferred to contractors in public works projects, often by importing provisions or principles from the Silver Book.

Such a trend calls for a rapid change in EU secondary legislation to ensure that EU-financed contracts reflect FIDIC's principles of balanced risk sharing. The decision as to what conditions are to be used within a particular project ought always to be taken by the financing party; however, it is important to stress that balanced risk allocation is the key to success in the construction industry.

Although the Romanian authorities have tried to harmonise the FIDIC Conditions of Contract with existing legislation, with respect to the Yellow Book, at least, they have not succeeded in finding a uniform approach which can be transposed and used for infrastructure projects in the form of specific conditions or in otherwise adjusting the existing legislation to comply with the FIDIC forms of contract.

[6] See Frederick Gillion, ''Use and Misuse of FIDIC Forms of Contract in Central and Eastern Europe: The Worrying Trend of Silver Book Provisions in Public Works Contracts'' at: http://fidic.org/sites/default/files/Frederickgil.pdf.