

Application of FIDIC CC for EU-Funded Projects in Bulgaria

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Context

- Application of:
 - FIDIC Conditions of Contract
 - ... in Bulgaria
 - ... in the public sector
 - ... for EU-funded projects



FIDIC General Conditions of Contract

- Designed for international use and suitable for private contracts
- Fair risk allocation
- Agreement between the parties
- Contract Price subject to adjustments
- Time for Completion subject to extensions
- Flexible Variation provisions
- Important duties and authority to the Engineer



Bulgarian Legislation

- The main laws:
 - Spatial Development Law
 - Civil Law
 - Civil Procedures Code



Public Sector Specifics

- The main law is the Public Procurement Law:
 - The parties are not equal
 - Focus on transparency and accountability
 - Bureaucratic (very much)
- Previous revisions of the Public Procurement Law were severely limiting the possibility for Contract Price adjustment, extension of the Time for Completion and Variations
- A new Public Procurement Law – in compliance with Directive 2014/24/EU

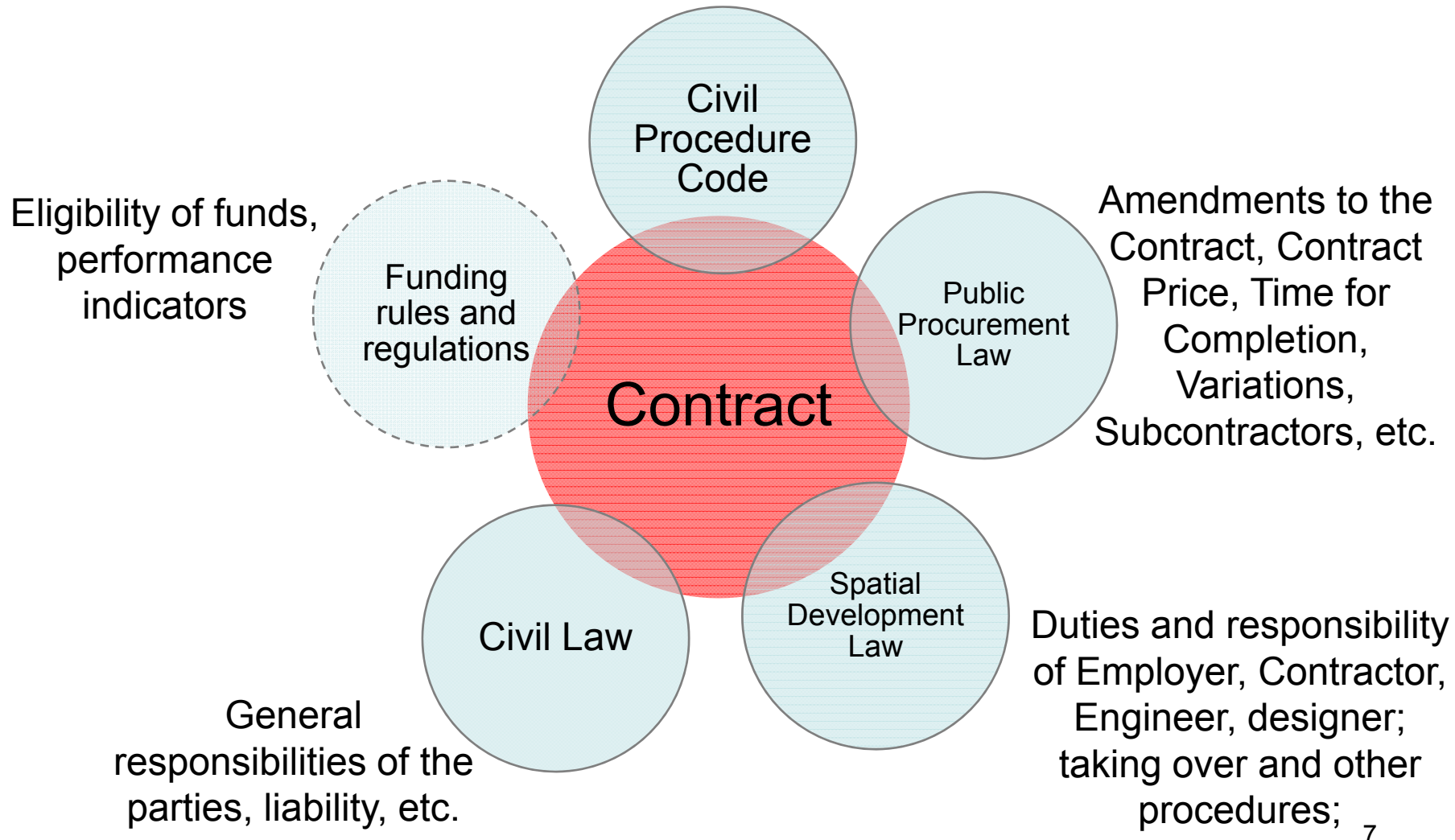


EU-Funded Projects

- The main rules and regulations are:
 - The Procedures Manual of the Beneficiary (that is, the Employer)
 - The Procedures Manual of the Managing Authority
 - The internal rules of the National Fund
 - The Law for Management of European Funds
 - Regulation (EU) 1303/2013

Legal Context

Role of DAB





Development of Particular Conditions of Contract – Preconditions

- Consider an appropriate form of contract – Red, Yellow, Green, Silver Book
- Understanding of the principles of risk allocation
- In case of Yellow Book – understanding of Contractor's design duties and the importance of the Employer's Requirements
- Understanding the Public Procurement Law and the Spatial Development Law
- Consider using remeasurement or Lump Sum contract
- Consider the role and nature of the DAB



Development of Particular Conditions of Contract – Main Principles

- Make the least possible changes; use uniform language
- Use FIDIC Guidance Notes as fully as practicable
- Avoid repeating text across the various documents that form the Contract
- Strictly follow GCC directions as to the document in which data is stated to be included:
 - Appendix to Tender (contractual data)
 - Particular Conditions (alterations to General Conditions and project specific data)
 - Technical Specification or Employer's Requirements (technical data)



Specific Recommendations (1/14)

- The following recommendations apply directly to:
 - *Road* infrastructure projects (but may easily adapted to railways and other linear infrastructure)
 - *Yellow Book* contracts (but with some modifications may be largely used for Red Book contracts as well)



Specific Recommendations (2/14)

Sub-Clause 3.1 [*The Engineer*]

- Consider limiting the power of the Engineer by requiring Employer's prior approval when:
 - consenting to the substitution of suppliers and subcontracts (Sub-Cl. 4.4 [*Subcontractors*])
 - suspending all the Works (Sub-Cl. 8.8 [*Suspension of the Works*]); and
 - instructing or agreeing Variations (under Clause 13 [*Variations and Adjustments*]) above an amount for single event and above an aggregate amount
- Make sure the limitations do not limit the authority of the Engineer under the Spatial Development Law

Specific Recommendations (3/14)

Sub-Clause 3.3 [*Instructions of the Engineer*]

- Consider clarifying that all instructions related to the Works shall be given in writing and shall be recorded in the site book (required under the Spatial Development Law)

Sub-Clause 3.5 [*Determinations*]

- *“Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration], with the exception of agreements or determinations for extension of the Time for Completion or increase of the Contract Price above the Maximum Contract Price, which shall become into effect only after being confirmed by the signing of an addendum to the Contract in compliance with Art. 43 from the Public Procurement Law.”* **NOTE: applicable under the old PPL!**



Specific Recommendations (4/14)

Sub-Clause 4.2 [*Performance Security*]

- Consider reflecting that under the PPL the performance security is a condition for contract signature

Sub-Clause 4.3 [*Contractor's Representative*]

- The person named as “Project Manager” in the tender
- Put restrictions on the periods of absence from the Site
- If not fluent in Bulgarian, the Contractor shall provide a full-time interpreter / translator



Specific Recommendations (5/14)

Sub-Clause 4.18 [*Protection of the Environment*]

- Require the Contractor to liaise with authorities and receive garbage dumping permits, pay the costs thereof, and properly treat construction waste
- Require the Contractor to comply with environmental measures described in the EIA decision
- Burden the Contractor with responsibility to rectify environmental damage caused by Contractor's Personnel

Sub-Clause 4.24 [*Fossils*]

- Consider clarifying the procedures under the Cultural Heritage Law



Specific Recommendations (6/14)

Sub-Clause 4.21 [*Progress Reports*]

- Contractor to provide rolling one-year financial forecasts
- Report key performance indicators applicable to the project

Sub-Clause 4.25 [*Technical Infrastructure*]

Consider adding a new Sub-Clause to:

- Reinforce Contractor's duty to search for and bear responsibility for existing infrastructure
- Take care when, and be responsible for, restoring existing roads
- Agree the scope of work with the Engineer and ensure appropriate supervision

Specific Recommendations (7/14)

Sub-Clause 5.1 [*General Design Obligations*]

Sub-Clause 5.2 [*Contractor's Documents*]

- Specify whether construction license has been issued
- Employer's preliminary design defines parcel planning boundaries within which the Contractor's detailed design must remain wherever feasible
- Contractor's Documents and Contractor's duty to support the Employer aligned with requirements of the Spatial Development Law
- Specify the approval process of the detailed design prior to commencing the Works

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Specific Recommendations (8/14)

Sub-Clause 5.1 [*General Design Obligations*]

Sub-Clause 5.2 [*Contractor's Documents*]

(continued)

- Direct reference made to the data contained in the Employer's Requirements
- Set time limited review periods for the Engineer and review & approval periods for the Employer
- Set a period for the Contractor to have completed and submitted his design
- Set a period of 180 days for approval by the authorities

Specific Recommendations (9/14)

Sub-Clause 5.6 [*As-built Documents*]

- Contractor required to produce and submit these incrementally with each interim payment application
- No Talking-Over Certificate to be issued prior to the As-built Documents being submitted

Specific Recommendations (10/14)

Sub-Clause 7.4 [*Testing*]

- Contractor required to have an accredited, on-site laboratory, to which the Engineer has access, and so as to demonstrate specification and compliance with the Employer's Requirements

Sub-Clause 9 [*Tests on Completion*]

- These, together with those below, principally to ascertain whether the Works are *fit for the purposes* for which Works are intended as defined in Contract

Specific Recommendations (11/14)

Sub-Clause 8.2 [*Time for Completion*]

- In addition to his other obligations, within the Time for Completion the Contractor shall:
 - Obtain the Engineer's approval of the As-built Documentation
 - Have Act 15 issued

Sub-Clause 8.3 [*Programme*]

- The Time for Completion should be linked to Contractor's application for Act 15
- The Contractor to additionally show temporary traffic management in his detailed time programme
- The design period to be made a milestone

Specific Recommendations (12/14)

Clause 10 [*Employer's Taking Over*]

- Prior to issue of the Taking-over Certificate (ToC), Contractor to submit all documentation under the Laws, including those necessary for Employer to apply for permission to use the Works
- 'As soon as practicable' after the ToC has been issued, Contractor to request for the Employer to establish the commission to issue Act 15
- Date of successful application shall be the completion date (requiring a modification to the definition at Sub-Clause 1.1.3.3 [*Time for Completion*])

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Specific Recommendations (13/14)

Clause 10 [*Employer's Taking Over*]

(continued)

- Engineer to trigger Employer's application for issue of Act 16: either 56 days after Act 15 or after outstanding work completed and defects rectified
- Date of issue of Act 16 sets the commencement of the Defects Notification Period

Specific Recommendations (14/14)

Sub-Clause 14.1 [*The Contract Price*]

- Contractor to provide breakdowns of proposed prices within 56 days of Commencement Date

Sub-Clause 14.3 [*Application for Interim Payment Certificates*]

- Only 3 copies of Contractor's Statement required
- Contractor to provide evidence for payment to Subcontractors

Sub-Clause 14.7 [*Payment*]

- Contractor to provide separate invoices for the eligible and non-eligible for EU funding amounts



Conclusion

- Doing contract management right is difficult
- Doing contract management right without a good contract is impossible
- Preparing decent Particular Conditions requires deep knowledge of both FIDIC GCC and the national legislation
- Particular Conditions must be gradually evolved

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