



Joint Statement of FIEC and EIC

on

Sound management of EU Structural & Cohesion Funds and Public Procurement

(4th May 2011)

I. About Us

The **European construction industry**, in EU27 in 2009, accounted for investments of around €1.200 billion per year, equating to around 10% of the GDP and around 52% of gross fixed capital formation. The 3.1 million construction enterprises, of which 95% are SMEs with less than 20 workers, employ a total workforce of 14.9 million, whilst some 26 million workers depend directly or indirectly on the construction sector. The international (outside EU27) revenues of European contractors amounted in 2009 to some €75 billion.

FIEC, the **European Construction Industry Federation** represents, through its 34 national Member Federations from 29 European countries, the European interests of construction enterprises of all sizes, i.e. craftsmen, SMEs and “global players”, carrying out all forms of building and civil engineering activities.

EIC, **European International Contractors**, has 15 national Member Federations and represents the interests of the European construction industry in all aspects related to its international construction activities. For almost 40 years, now, EIC is being consulted by FIDIC as a “friendly reviewer” for its standard forms of contract. In addition, since March 2000, EIC publishes, for each volume of the FIDIC Conditions of Contract, a “Contractor's Guide” which is available also in the FIDIC bookshop.

II. The importance of the EU Structural and Cohesion Funds

The **Structural and Cohesion Funds** are the key financial instruments to implement the Regional Policy of the European Union which has the aim to reduce regional disparities in terms of income, wealth and opportunities. The overall budget for the financial period 2007-2013 amounts to €347 billion of which €201 billion are allocated to the European Regional Development Fund, €76 billion to the European Social Fund and €70 billion to the Cohesion Fund.

III. In order to avoid misunderstandings

Member firms working in Central and Eastern European Countries (CEEC) have informed us of worrying developments in several of these countries. If this statement concentrates on one country in particular, namely Romania, this is simply due to the perceived rapid and dramatic deterioration of the situation in this country. This requires urgent action, in particular from the EU-Commission.

It is evident that the member firms concerned will also use the remedies provided by contracts and national law, although recent developments indicate that not all of this corresponds to the standards which citizens and business may rightly expect to find in EU Member States.

IV. EU Funds for Romania

According to the Indicative Financial Allocations for the EU's Regional Policy in the financial period 2007-2013, **Romania is granted approximately €19.2 bn.** (€12.7 under the European Regional Development Fund (ERDF) and €6.5 under the Cohesion Fund (CF)) for the co-financing of expenditures eligible under the "Convergence objective".

In the context of "**Operational Programme Transport**" (SOPT) for Romania, EU Community assistance amounts to €4.56 billion within a total programme budget of €5.7 billion, whilst in the context of the "**Operational Programme Environment**" (SOP ENV) for Romania, EU Community assistance amounts to €4.5 billion within a total programme budget of €5.6 billion. Thus, Romania can draw on approximately €9 billion in the financial period 2007-2013 for upgrading its national infrastructure networks and to increase long-term competitiveness and sustainable regional development.

V. Legal Principles

- A. According to the fundamental principle of sound financial management, stipulated in the EU Financial Regulation, EC No. 1605/2002, all budget appropriations shall be used and administrated in accordance with the principles of economy, efficiency and effectiveness. With respect to the implementation of the budget appropriations, the EU Commission shall secure an efficient internal control which shall achieve the following objectives:
- Effectiveness, efficiency and economy of operations;
 - Reliability of reporting;
 - Safeguarding of assets and information;
 - Prevention and detection of fraud and irregularities;
 - Adequate management of the risks relating to the legality and regularity of the underlying transactions, taking into account the multiannual character of programmes as well as the nature of the payments concerned.
- B. Article 23 of the Directive 2004/18 obliges Member States' Contracting Authorities to define the technical specifications in a manner which gives equal access for tenderers and does not have the effect of creating unjustified obstacles to the opening of public procurement to competition. The provision also stipulates that parameters provided must be sufficiently precise to allow tenderers to determine the subject matter of the contract and to allow the Contracting Authorities to award the contract

C. Annex VI, § 1 of Directive 2004/18 specifies that "technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting authority..

VI. Situation in Romania

The following facts show that these legal principles are systematically not respected in Romania, both as a matter of fact and by virtue of Orders 1405/2010 (published 28/12/2010) and 146/2011 (published 17/3/2011).

A. Insufficient project preparation

1. Reliable tender documents, including precise and state-of-the-art specifications and drawings are the basis for the successful execution of any infrastructure project, as they define the scope and the technical requirements of the project. In the case of design-build projects it is a key duty of the Contracting Authority to carefully define the Employer's Requirements which provide the basis for the contractor to propose adequate technical solutions.
2. In our experience, however, Romanian Contracting Authorities have very often not done their homework, so that the specifications and other documents on which the tenders have to be submitted are incomplete or misleading, sometimes both. Instead, with the enactment of the above-mentioned Order 146/2011, the Contractor is made responsible for any omission, insufficiency and accuracy of all the documents provided by the Employer. Even if the design responsibility is explicitly a duty of the Employer, the Contractor, in case of discrepancies between the design provided by the Employer and the site conditions, shall be responsible for all revised working drawings and the technical specifications necessary to finalise the contract. Thus, the Contractor's must assume also the role of the designer during the contract.
3. Romania Contracting Authorities often reject adequate technical solutions with the argument that the technical proposals are not consistent with regional practise. Thus, the most valuable asset of international construction companies, their broad technical expertise is not used efficiently to a mutual benefit.
4. At the same time, certain risks which are undoubtedly part of purely public competences, e.g. the expropriation of real property, which according to Romanian law is a public responsibility as it deals with issues of "national interest", have been increasingly shifted to the contractor who has neither the power nor the competence to handle such matters.
5. Therefore, we recommend that the Commission obliges Contracting Authorities, assisted by broadly experienced and sufficiently staffed international Consulting Engineers, if required, to engage in a technical and organisational project preparation which takes the various strengths and experience of each project partner into consideration. In this context, we also recommend that the Consulting Engineers, which assist and support the Contracting Authorities in preparing the project, will be paid directly by the European donor institution – and not by the national Contracting Authority – in order to ensure their neutrality and independence.

B. Unusual, poorly managed tender procedures

1. According to Article 53 of Directive 2004/18/EC, the criteria used by the Contracting Authorities in awarding their public contracts are either the lowest price only or, where the contract is awarded to the most economically advantageous tender (MEAT), various criteria linked to the subject matter of the contract in question (quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, etc.).
2. In this context, the European construction industry generally takes the view that there are potential disadvantages associated with the "lowest price only" criterion as bidders cannot distinguish themselves on quality aspects and may be forced, due to competitive pressure, to bid below cost and seek to break even by curbing quality or by extensively seeking additional payment during the execution phase. Instead, we advocate the use of a quality-based competition which incentivises bidders to align themselves at an early stage with the objectives of the project, thus facilitating a sound and innovative quality competition.
3. We therefore welcome, in principle, that Romanian Contracting Authorities presently are in the process of revising their former lowest-price-only policy and are now scrutinising technical award criteria also.
4. Against that background, FIEC and EIC would like to recommend that the following two precautionary measures are used to ensure a transparent, fair and efficient use of the "MEAT" award procedure:
 - a) Contracting Authorities in the CEEC region should either reinforce the "lowest price only" award procedure by carrying out beforehand a serious prequalification procedure which would raise the standard of the competition by setting out minimum requirements to be met in terms of the bidders' technical abilities, financial position, capacity and experience.
 - b) Alternatively, the "MEAT" award procedure should be applied in such a way that the technical quality of the tenders will have been evaluated *before* the respective prices are known ("two-envelope system").

C. Unfair and unbalanced contract conditions

1. The risk allocation in new motorway projects in Romania, generally shifted to the detriment of the Contractor by virtue of particular conditions(see enclosure), together with some other elements, does not comply with the Directive, as it creates an unjustified obstacle to competition. In fact, such an accumulation of uncalculable risks without allowing for corresponding risk margins and reliable recourse mechanisms prevents renowned, seriously calculating contractors from tendering and opens the door for "non-transparent risk coverage mechanisms". As a consequence, competition in Romania is restricted more than necessary and the offers from the remaining bidders are hardly comparable to the extent that the risk premiums added to the individual positions are somewhat speculative.
2. In the same way that precise technical specifications and drawings are necessary to define the scope and quality of the works, the Conditions of Contract set out the contractual framework under which the works are to be executed. Best international practice reveals that, in order to complete a project within the required time and budget, it is essential that each phase of its execution is formulated with precision and that the balance of risks and responsibilities is clearly defined. Presently, the FIDIC 1999 suit of standard form of contracts, in particular the FIDIC "Red Book" for Construction and the FIDIC "Yellow Book" for Design-Build and Turnkey are globally accepted by public and private financiers, institutional clients and independent consulting engineers as fair and even-handed standard forms of contract.

3. We currently observe that Romanian Contracting Authorities, presumably following respective instructions by the Government, are drastically modifying the original FIDIC Contract Conditions to the detriment of the contractor. For instance, Romanian Contracting Authorities in the FIDIC "Red Book" and "Yellow Book" contracts currently decree that payments under the contract shall not exceed 110 % of the initial contract price regardless of the causes leading to the additional costs. Moreover, unquantifiable risks such as risk for ground conditions, fossils, archaeological findings, permits and the like shall as well be transferred to the Contractor. In line with our remarks under VI/A/4, the Contractor's right of access to the site has been significantly limited by burdening him with the expropriation risk. The position of the Contractor is further weakened by extending the guarantee periods beyond normal limits, by significantly delayed payments and by the limiting the Contractor's right to suspend the works only after 183 days from the Employer's notification, whereas the Employer's termination has immediate effect. For more details see enclosure.
4. Some of these Particular Conditions are more or less precisely taken out of the FIDIC "Silver Book" (Engineering/ Procurement/ Construction "EPC Turnkey Projects") which is inadequate for other types of projects. FIDIC itself does not consider the "Silver Book" as a balanced standard form of contract and has asked users not to use "Silver Book" provisions "*if construction will involve substantial underground work or work in other areas which tenderers cannot inspect*" or "*if the Employer [i.e. Contracting Authority] intends to supervise closely or control the Contractor's work, or to review most of the construction drawings*".
5. At the same time, the important role of the Engineer in the FIDIC Contract Conditions is regularly devaluated by the Contracting Authorities. All major determinations which the Engineer is in charge to make (such as on time extension, cost reimbursement and the like) he needs to get the prior approval of the Employer. This obviously contradicts the spirit of the FIDIC concept of a strong Engineer who takes **fair** decisions to the very best of all – the project and the parties involved.
6. Another regrettable issue observed in Romania increasingly often is the deletion of the FIDIC standard provisions relating to the instalment of a Dispute Adjudication Board (DAB). Due to the technical, organisational and legal complexity of infrastructure projects the consequences resulting from delayed determinations and decisions are usually much higher than the direct additional costs. It adds to the burden if disputes have to be settled in a long-winded judicial proceeding before a local court, probably involving also one or more appeals procedures. Unfortunately, in Romania as well as in other CEEC the DAB clause is either deleted already in the tender documents or, if not, Contracting Authorities do not accept DAB decisions against them as a principle, so that litigation becomes necessary despite the DAB's decision.
7. FIEC and EIC call on the European Commission to promote the implementation in law and practice of fair and balanced contract conditions in public procurement construction contracts, including the DAB procedure. As the abovementioned Romanian Orders clearly show, such unfair contract conditions, only superficially based on the FIDIC forms, will be used for all upcoming roads and railway projects. If not changed rapidly, this would lead to a market, in which experienced European contractors would refrain from tendering, so that the overall quality of the works delivered would decrease considerably. This is not in the interest of Romania and the EU, financing most of these projects.
8. We understand that FIDIC, EFCA and the Romanian consulting association are discussing this issue with the Ministries of Transport and Environment and we trust that these talks will lead to the re-introduction of genuine FIDIC standard forms of contract, unflawed by unfair and counterproductive particular conditions.

VII. Conclusion

FIEC and EIC have made these observations on the basis of the broad, long-standing and proven experience as European contractors, having worked with FIDIC conditions in the whole world for more than 50 years.

With all that expertise, we are at the disposal of the European and national institutions for contributing to genuinely competitive markets, in the EU and worldwide, with fair and transparent statutory and contractual conditions. This includes also financing conditions, such as the new financial architecture for the financial period 2014-2020 which is under preparation.

New FIDIC Particular Conditions of Contract for road works in Romania: the recent Order 146/2011 of 17 March 2011 by Oana Soimulescu

The FIDIC Conditions of Contract were introduced in Romania about 15 years ago when Romania started to receive funding from the EU and multi-lateral development banks to finance public works projects in the transport infrastructure and utilities sectors.

No particular legal framework then regulated their application, except the general provisions contained in the Financing Memoranda signed between the Romanian Government and the EU.

In June 2008, a ministerial order (Order 915/2008) was however released incorporating a set of mandatory (non-negotiable) particular conditions of contract and a set of optional (negotiable) conditions of contract, which were expected to solve some of the problems encountered then in practice from the lack of correlation between the Romanian legislation and the FIDIC General Conditions. These particular conditions of contract were applicable to any contract for works with Romanian authorities. Order 915/2008 was however short-lived as in May 2009, after less than one year, it was repealed without any official reasons.

That idea of mandatory particular conditions has now resurrected in the form of a new order published in March 2011 which imposes the use of the FIDIC Conditions of Contract for road works in Romania.

The official enactment came in January 2011 with the publication of a Government Decision imposing the use of FIDIC forms of Contract for road works and attaching the Romanian translation of the General Conditions of the FIDIC Red and Yellow books. New sets of particular conditions of contract were eventually enclosed as Annexes 1 and 2 to Order 146/2011, published on 17 March 2011.

A review of these new particular conditions reveals that substantial changes have been made to the FIDIC General Conditions, which result in increased risks being now borne by contractors. The changes are particularly significant for the Yellow Book as the new particular conditions have literally adopted provisions from the Silver Book relating to the Contractor's responsibility for unforeseen events and the Employer's Requirements. This is explained further below.

The most significant changes introduced by the new particular conditions annexed to Order 146/2011 are the following:

- **Contractor's right of access to the Site (Sub-Clause 2.1)** - The right to claim for lack of access to the Site has been significantly restricted. The contract now provides that the access to the Site may be given gradually by sections which are to be defined at the Commencement Date and by reference to which the Contractor is to adjust its programme of Works. The Contractor waives any right to claim against the handing over of the Site by sections, regardless of (1) how large or small these sections are; (2) where they are located; (3) the disruption and additional costs associated with any necessary mobilisation and re-mobilisation.
- **Unforeseeable Physical Conditions (Sub-Clause 4.12)** – Sub-Clause 4.12 is completely re-written and lift provisions from Sub-Clause 4.12 [Unforeseen Difficulties] of the Silver Book. According to the new Sub-Clause 4.12, the Contract Price shall not be adjusted to take account of any difficulty or unforeseen costs. By entering into the Contract, the Contractor therefore accepts having made the necessary allowance for any difficulties and costs in order to complete the Works.
- **Responsibility for the accuracy of the Employer's Requirements (Sub-Clause 5.1 of the Yellow Book)** – Similarly, the new particular conditions of the Yellow Book adopt to a large extent the wording of Sub-Clause 5.1 of the Silver Book with respect to the Employer's Requirements. The Contractor now takes over the responsibility for the accuracy of the Employer's Requirements which, as in the Silver Book, he is deemed to have scrutinized prior to the Base Date. The Employer shall not

be responsible for any error, inaccuracy or omission of any kind whatsoever in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information.

- **Claims for errors in the Employer's Requirements (Sub-Clause 1.9 of the Yellow Book)** – Whilst Sub-Clause 5.1 of the Yellow Book now provides for the Contractor to take responsibility for any error in the Employer's Requirements, Sub-Clause 1.9 has not been amended in the new particular conditions. As a result, any claim for errors in the Employer's requirements will be limited to those aspects which are expressly excluded in Sub-Clause 5.1, namely: (a) portions data and information which are stated in the Contract as being immutable or the responsibility of the Employer; (b) definitions of intended purposes of the Works or any parts thereof (c) criteria for testing and performance of the completed works. These three exclusions are those which appear in Sub-Clause 5.1 of the Silver Book with the exception of the last one - "portions, data and information which cannot be verified by the Contractor except as otherwise stated in the Contract" – which has been deleted from the list of exclusions in the new particular conditions of the Yellow Book. In that sense, these new particular conditions impose an even stricter design obligation on the Contractor than in the Silver Book.
- **Claim for exceptionally adverse climatic conditions (Sub-Clause 8.4(c))** - In support of a claim for adverse climatic conditions, the Contractor will now need to demonstrate the exceptionality of those conditions by reference to the relevant statistics of the last 10 years.
- **Delay damages** – They are payable if interim milestones are not met. In the event that the final milestone is eventually met any delay damages which have been paid shall be reimbursed.
- **The Contract Price cannot be increased by more than 10% of the Accepted Contract Amount** except when price adjustments result from Sub-Clauses 13.7 [Changes in Legislation] and 13.8 [Changes in Costs]. This compares with what Anca Boagiu, the Transport Minister, stated in her press release dated 28 December 2010, namely that the increase in the Contract Price "shall only be accepted for unforeseen circumstances which are acknowledged as such by FIDIC". Mrs Boagiu also suggested that "this threshold is internationally accepted because there were numerous cases when the Romanian party, being under-represented, has lost important amounts of money". Those statements are particularly surprising given that the Contractor is no longer able to claim any costs in consideration of unforeseen circumstances under Sub-Clause 4.12.
- **Payment** - The Contractor is obliged to provide breakdown of prices and payment is made strictly in relation to actual progress. The Employer will make payment based on measured works and is entitled to suspend payment in the event of delays in the completion of any milestone. Furthermore, the Employer allows to itself 45 days interest-free in addition to the 56 days from the Engineer's notification and the Contractor is deemed to have waived its right to interest on late payment if no invoice is issued within two months.
- **Contractor's entitlement to suspend work (Sub-Clause 16.1)** – The notification of 21 days before suspension has been prolonged to 183 days.
- **Termination by Employer (Sub-Clause 15.2) and by Contractor (Sub-Clause 16.2)** – Given the high number of termination cases over the past few years, the Ministry of Transport probably felt that something had to be done to restrict the Contractor's right to termination. This is now done with Order 146/2011. Although termination by the Employer operates immediately without any formality being required after notification by the Employer, this is no longer the case for the Contractor. If the Contractor serves a notice of termination upon the occurrence of one of the events listed in Sub-Clause 16.2 and the ground for terminating the Contract is disputed by the Employer, then 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. Until such time, the Contractor shall be bound to comply with its obligations under the Contract and the Employer shall be under no obligation to return the Performance Security.



- **Arbitration (Sub-Clause 20.6)** – Although the new particular conditions do not seek to amend the arbitration clause set out in Sub-Clause 20.6, contractors will need to bear in mind that Sub-Clause 1.4 has been amended to the effect that the language for communications under the Contract is Romanian. 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.

All new tenders for road works in Romania which will be launched later this year will use those new FIDIC particular conditions of contract. Contractors wishing to bid for road work will need to approach these new tenders with great care in light of the risks which have now been shifted to them.

Oana Soimulescu & Mona Dragan-Costin

SDC & Partners
Futura Building
238 Mihai Eminescu, Sector 2, 020085
Bucharest, Romania
T: + 40 21 201 94 87
E: oana.soimulescu@oflaw.eu
E: mona.dragan-costin@oflaw.eu

Nicholas Gould & Frederic Gillion

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
T: +44 (0) 20 7421 1986
E: ngould@fenwickelliott.co.uk
E: fgillion@fenwickelliott.co.uk
www.fenwickelliott.co.uk