

Issue No : 20  
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Article No : 1  
Author : Roger Trett  
Title : Statutory Adjudication

The following is part of a discussion paper given by Roger to a group of Contractors.

The Housing Grants, Construction and Regeneration Act 1996 will make it compulsory for many construction contracts to be subject to adjudication. The Act covers construction contracts for work in England, Wales and Scotland, and includes all contracts for the construction alteration, repair, maintenance, extension, or demolition of buildings, structures and other works forming part of the land (such as roads, railways, canals, walls, docks, power lines, pipelines, sewers, reservoirs, industrial plant and coastal defences).

Contracts for the extraction of oil, gas and minerals are excluded. So too are contracts for the construction, installation or demolition of plant, machinery or associated steelwork on sites where the primary activity is nuclear processing, power generation, water or effluent treatment or the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drinks. (The engineering industry obviously had stronger lobbying powers than the general construction industry!).

In the following notes, I offer some challenging points on the Act:-

### **1. The Effect of the Entitlement to Adjudicate**

Will the Act speed up or reduce the process of settlement of financial disputes or will it have detrimental effect upon the progress of the works?

In the comfortable scenario of a single dispute properly and fairly pursued in the spirit of the Act, then yes, it may well be the answer to many a Contractor's or Sub-contractor's prayer. In other words, we appoint an Adjudicator and prepare the *submission* and within 28 or 42 days (if the referral party agrees to the 14 day extension), we have a decision which the parties abide by.

But what happens if the Adjudication concerns the monthly valuation of Sub-contractors works and each month several (or many) Sub-contractors individually instigate the adjudication process? An enormous administration burden will arise and this will surely have a detrimental effect upon the progress of the works (for the parties will be pre-occupied with the Adjudication processes).

### **2. The Adjudication Period**

The timescale seems extraordinarily tight, although the Act (2c) requires the Adjudicator to reach a decision within 28 days or such longer period "*as is agreed by the parties after the dispute has been referred*". In my view, it is unlikely that the claiming party will agree to any extension.

The Act also "*allows*" the Adjudicator to extend the 28 day period by up to 14 days "*with the consent of the party by whom the dispute was referred*". Again, this consent is unlikely to be given.

I assume that the 28 day period commences with the receipt of one parties submission (this may have taken many days or weeks to prepare). Within 28 days, the Adjudicator will be required to receive and review a response and to possibly:-

- *Meet and question the parties and their representatives either together or separately.*
- *To visit the site (if appropriate)*
- *Request the production of documents or the attendance of people whom the Adjudicator considers could assist.*
- *Issue such other directions as the Adjudicator consider to be appropriate.*
- *Appoint experts, assessors or legal advisors.*
- *Order inspections, tests, samplings or experiments.*

In many instances, in order for the Adjudication to work, it will be absolutely necessary, in my view, for the timescales to be extended.

### **3. The Submission**

The scheme contemplates that a written *submission* will be made with a limit of 5,000 words i.e. approx. 10 pages, accompanied by drawings if necessary but it must be accompanied by copies of all relevant documentation.

The submission will require the input of site personnel and in view of the tight timescales and the implications if the submission is not issued quickly or inadequately (ie possible wrong decision by Adjudicator), will need to take priority over other, *more productive* work, ie the project may suffer.

What happens when the 5,000 words are supported by a contract programme, a complex network analyses and activity listing together with a detailed delay analysis? Will the other party have sufficient time to undertake a proper analysis of a complete programme within the period allowed?

### **4. The Decision**

The Adjudicator is required to give his decision within 28 days or 42 days or whatever period the parties agree. This decision has to be communicated in writing, signed and dated.

The decision must indicate what actions must occur and who must implement them. The Adjudicator may specify when such action should take place (including payments) otherwise they must take place immediately.

The Adjudicator is not required to provide reasons for his decision but may do so under a separate agreement with one or more parties.

The decision can be referred to Arbitration or the Courts, whichever is appropriate, to provide an award or ruling which would override the Adjudicator's decision. The timing of referral will depend upon the restrictions in the contract. In the meantime, the parties have to fulfil the obligations created by the Adjudicator's decision.

If a party refuses to comply with a monetary decision, an action for Summary Judgement would have been a preferred route but the 1996 Arbitration Act seems to have removed that possibility. If the decision is other than a monetary one, it seems that the next step, if it is not honoured, is to give notice of Adjudication and the same procedure takes place again. This time, however, it would be prudent to put a monetary value on the dispute.

The only other remedy that is available is to exercise the right to suspend the works in accordance with section 112 of the Act. This can only apply where the decision consisted of a monetary award, but the procedure under section 112 will have to be followed i.e. 7 days notice to the defaulter will have to be given.

## 5. Conclusion

Will the Act work? Will it improve the amount of 'fair play' between Contractor/Sub-contractor relationships, which is said to be the main intention. Many commentators praise the intentions of the Act, but in my view, we need to wait and see what happens in 4 key areas:-

- *how frequently the Adjudication process is used (abused) on a project.*
- *how the Adjudicator's decision is enforced.*
- *what happens to Contractor/Sub-contractor relationships, and most importantly,*
- *it's impact upon project performance.*

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Author : David Carrick  
Title : Conciliation in Action

## **CONCILIATION IN ACTION**

### **David Carrick relates his experiences as a conciliator**

Conciliation can mean a variety of different processes distinguished from each other by detail. For our present purpose let us consider conciliation under the 1994 Institution of Civil Engineer's Conciliation Procedure.

The process consists of two-stages. The first stage is very akin to mediation. The Conciliator meets with the parties in an endeavour to bring them together in a mutual agreement resolving their dispute. If the conciliator fails to achieve this primary objective the next step is very similar to adjudication. A recommendation is made by the conciliator which is binding upon the parties unless they decide to proceed to arbitration or such other tribunal as their contract prescribes.

Let us look at the procedure in more detail. If it is used in certain ICE contracts it may be incorporated by the express provision, eg ICE 6th. Here the contractor must first ask for an engineer's decision. Either the employer or the contractor may then take the matter to conciliation by serving notice on the other. Where the procedure is not expressly incorporated into the contract, in other words it is adopted on an adhoc basis by the parties, then each side simply enters into a conciliation agreement as a first step. I have been involved in several conciliations using the ICE 6th Form of Contract where the parties have agreed not to request an engineer's decision first and by consent, go straight to conciliation. Fortunately this has worked in both instances. There is of course a danger if the conciliation process does not end up in a settlement or an acceptable award. The danger is that the party feeling aggrieved goes back to the beginning, ask for an engineer's decision and then takes it to a second conciliation. Whilst this all seems a bit pointless it could be used to procrastinate.

The ICE Procedure comprises a preface, the conditions under which the parties and the conciliator enter into a contract and an agreement. The ethos of the process is set out in Rule 2 in the following terms "*This Procedure shall be interpreted and applied in the manner most conducive to the efficient conduct of the proceedings with the primary objective of achieving a settlement to the dispute by agreement between the Parties as quickly as possible.*" This allows the conciliator extremely wide powers to conduct matters virtually without limit or hindrance. Provided the parties have chosen their conciliator wisely, this is a real plus point for the process. Remarkably the conciliator's award, if he or she requires to write one, is governed by Rule 16 in the following terms "*The Conciliator's Recommendation shall state his solution to the dispute which has been referred for Conciliation. The Recommendation shall not disclose any information which any Party has provided in confidence. It shall be based on his opinion as to how the Parties can best dispose of the dispute between them and need not necessarily be based on any principles of the Contract, law or equity. The Conciliator shall not be required to give reasons for his Recommendation. Nevertheless should he choose to do so, his reasons shall be issued as a separate document, within 7 days of giving of his Recommendation*". I do not think it is unreasonable to assume that the laws of natural justice would also be impliedly incorporated.

Of vital importance to the process is confidentiality. To date I have been involved in more than twenty conciliations with a significant number being under the ICE Procedure. In the vast majority I have managed to effect a complete settlement. In a few instances we have achieved partial settlement and have later heard from one of the parties that other matters

were settled by negotiation at a later date. None have proceeded to arbitration. In order not to sound too boastful I believe this is a product of the process rather than of my appointment.

Let us consider a typical conciliation. Having been appointed I usually invite the parties to send me a brief statement of their point of view and the matters in dispute. This is copied to the other party. Usually this focuses the matters in dispute, but on occasions it would appear that parties were talking about different contracts! If the matter is a complex one then it may be advantageous to have what amounts to a preliminary meeting. During this meeting it is useful to set out a timescale, venues and any procedural matters. On one occasion a settlement was effected at such a meeting - this being quite exceptional.

Regardless of whether or not such a meeting takes place I like to have a fairly formal start to the conciliation proper. I normally ask the parties to introduce themselves and to explain their role in the dispute and within their organisation. Usually I request a short verbal statement from each party explaining their dispute. There then follows two vital steps. The first is to explain the rudiments of the process to the parties together with an explanation of the procedure which we will be adopting for their conciliation. The second, and arguably the more important, is to ascertain with total clarity and understanding that the parties' representatives have the authority to settle the matter. If either or both the parties don't then the conciliator faces his first decision. Generally, if the parties have authority to take the matter virtually to an agreement but require a final rubber stamping by someone who is contactable by telephone at short notice, it may be appropriate for the conciliation to continue. It is much more difficult if the matter needs to be referred to a Board of Directors or to Partners. I invariably have a notebook computer and portable printer with me so that when an agreement is reached it can be set down on paper and executed on the spot. I have yet to abandon a conciliation at this first hurdle but if one of the parties was simply not in a position of authority I would seriously consider doing so.

Generally I will then meet with each party in private. During these private caucuses the parties will divulge information which remains completely confidential to that party and to myself. Nothing of this discussion will be conveyed to the other party unless I have the express, unambiguous agreement of the party concerned. At the end of each caucus I invariably summarise what has been told to me and what of that I am at liberty to take back to the other party. That of course doesn't mean to say I will inevitably do so immediately.

The conciliation then proceeds interspersed by individual caucuses or communal meetings as circumstances demand. The usual philosophy of breaking large disputes into several smaller disputes works well in conciliation, if it is possible to do so. It is very comforting to get early agreement on some preliminary point between the parties thus providing a foundation for more comprehensive agreement. None of these meetings are taken under oath or affirmation and the parties may or may not be legally represented as they choose. I must confess to have being somewhat nervous when I first encountered a conciliation where the parties were legally represented. However, my fears were groundless and the solicitors involved very much entered into the spirit of the conciliation but of course looked after their client's interests.

Although I have yet to face the situation, there may come a point where it is so unlikely that further movement can be achieved that an agreed settlement will be impossible. It would be callous and pointless for the conciliator to press on when there is plainly no hope for an agreed settlement. The art, as opposed to the science, of conciliation is to know when further probing is needed and is likely to be effective. A party saying "no" might well be saying "no under these circumstances".

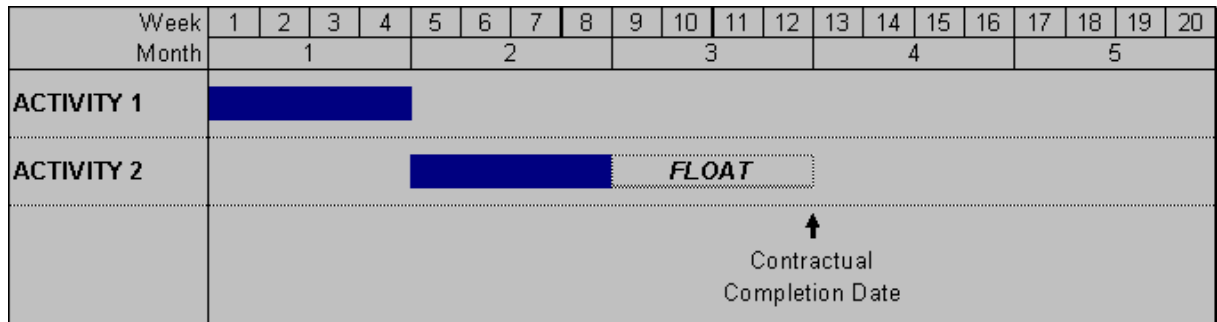
There is no prescribed method by which the parties are brought to a final settlement. Sometimes the conclusion is surprisingly quick with a small number of pivotal agreements coming together as whole. On other occasions the process seems to be inordinately piecemeal with every single issue requiring detailed attention from the conciliator.

In conclusion it is difficult not to compare the process with adjudication, mediation, litigation or other forms of ADR. My experience suggests that it is very effective but I must stress that this

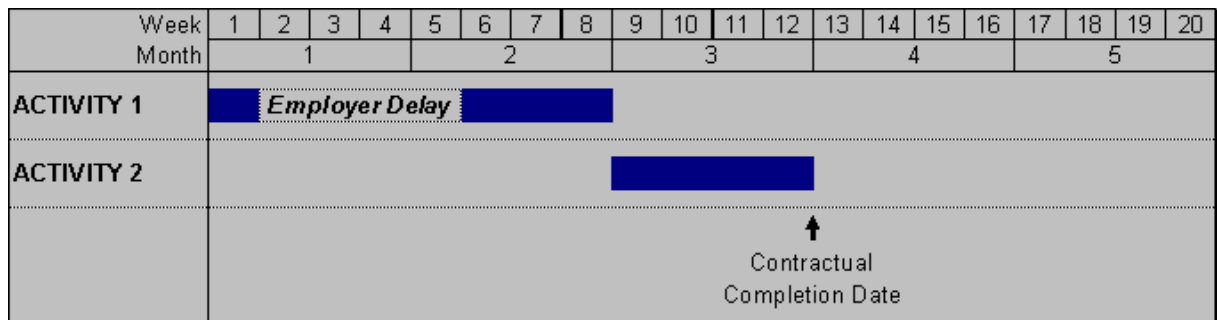
has always been under circumstances where the parties have had a keen desire to resolve the matter in contention. There are those who would criticise the process insofar as it can be used by the party with the money to keep it a little longer. Any process is prone to this kind of procrastination and I do not think it is realistic to level it against any non binding process. Compared with arbitration, in my experience, the costs have been a tiny fraction of what the parties might expect in an arbitration. Speaking as a Scottish arbiter, I have frequently yearned for the opportunity of getting my sleeves rolled up and getting to grips with the real issues in contention. Therefore, under the right circumstances, I would commend the process to parties who genuinely wish an assisted settlement but would feel comforted with the fallback of a recommendation.

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 Author : Anthony Farrow  
 Title : The Thorny Issue of Programme 'Float'

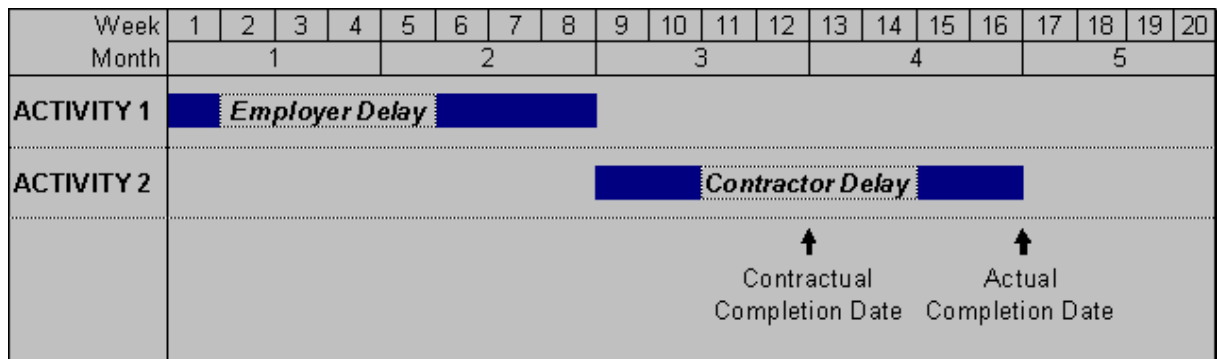
There is a simple project involving 2 sequential activities, each taking a month and the contract allowing 3 months to complete the work. The Contractor submits the following programme:-



During Activity 1, the Employer delays the works by one month (eg by failure to deliver necessary free-issue materials). The adjusted programme becomes:-



During Activity 2, the Contractor delays the works by one month (eg because he has to replace some defective work). The final *as-built* programme is:-



On the basis of the above facts, I conclude that the contractor is obliged to pay the Employer 4 weeks liquidated damages in month 4 and the Employer is obliged to pay the Contractor 4 weeks loss and expense during months 1 and 2 (weeks 2 to 5). My reason for reaching this conclusion is that the Employer 'got to the float' first and at the end of his delay, the

Contractor was still in a position to complete the works by the completion date. From the end of month 2, the only reason the project was late was due to the Contractor's delay.

### **Alternative Views**

I invite readers to offer their own views based on the simple facts of the case as presented and also against the background of the various standard forms of contract. These will be published in the next Trett Digest. Please post, fax or email your views to the Altrincham office - details on the outside cover.

Issue No : 20  
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Author : G Lowson and N Roberts  
Title : Variations and Exclusive Remedies Under MF/1

## **VARIATIONS AND EXCLUSIVE REMEDIES UNDER MF/1**

***STRACHAN & HENSHAW LIMITED -V- STEIN INDUSTRIE (UK) LIMITED and***

***GEC ALSTHOM LIMITED***

***by Greg Lowson and Nick Roberts of***

***Solicitors Pinsent Curtis***

An instruction to move site cabins is not a variation under the MF/1 conditions even though it increases the contractor's costs. Furthermore, clause 44.4 in MF/1 is effective to exclude liability for pre-contract misrepresentation and any breach of contract unless it is expressly provided for in the MF/1 conditions. These were the findings of the Court of Appeal restoring the Arbitrator's decision and overturning the judgment of the Official Referee in the first appeal in the case of *Strachan & Henshaw Limited -v- Stein Industrie (UK) Limited and GEC Alsthom Limited*.

### **The Facts**

Stein Industrie (UK) Limited (Stein) acting as agent for GEC Alsthom Limited (GECA), employed Strachan & Henshaw Limited (S&H) to erect two steam generators at Little Barford Power Station. The contract incorporated the I Mech. E model form of conditions (MF/1). S & H claimed that they had a contractual right to put cabins on the site next to their works. They also said pre-contract representations were made to this effect. In the event, having put the cabins on site, S & H were told to remove them. Their workforce had to continue clocking on and taking breaks in cabins in the contractors' compound half a mile away. S&H claimed approximately £1.6 million as the alleged additional cost resulting from their workforce having to walk back and forth between the cabins and the works in paid time.

### **The Issues**

In order to succeed, S&H had to establish that the instruction to remove the cabins was a variation under clause 27 of MF/1, or an actionable breach of contract, or that they had been induced to enter into the contract in reliance on the alleged misrepresentation. The arbitrator held that the instruction to remove the cabins was not a variation. He also considered that clause 44.4 in the MF/1 conditions excluded the walking time claim whether it was based on breach of contract or misrepresentation. S&H appealed to the High Court where the Official Referee reversed the arbitrator's findings on these key points. Stein and GECA appealed further, and the Court of Appeal gave judgment on 9 December 1997 overturning the decision of the lower court.

### **Variation**

The Court of Appeal found that the instruction to move the cabins was not a variation - i.e. an alteration in the "work to be done" by S&H under the contract. S&H sought to establish that the instruction gave rise to a change in the way the work was to be done, and that this should rank as a variation. The Court of Appeal rejected this contention and accepted the opposing argument that there is only a variation if the work to be done under the construction contract, as defined, is changed. These words mean what they say and should not be distorted so as

to encompass the arrangements made by the contractor to bring its workforce to the workplace.

#### **Clause 44.4 - Exclusive Remedies**

Clause 44.4 in MF/1 reads as follows:-

*"The Purchaser and the Contractor intend that their respective rights, obligations and liabilities as provided for in the Conditions shall be exhaustive of the rights, obligations and liabilities of each of them to the other arising out of, under or in connection with the Contract or the Works, whether such rights, obligations and liabilities arise in respect or in consequence of a breach of contract or of statutory duty or a tortious or negligent act or omission which gives rise to a remedy at common law. Accordingly, except as expressly provided for in the Conditions, neither party shall be obligated or liable to the other in respect of any damages or losses suffered by the other which arise out of, under or in connection with the Contract or the Works whether by reason or in consequence of any breach of contract or of statutory duty or tortious or negligent act or omission".*

The difficulty faced by S&H was that the contractual document they relied on to establish their alleged right to put cabins on the site was not incorporated in the conditions. Consequently, clause 44.4, which restricts rights and obligations to those expressed in the conditions, left them without a remedy for the alleged breach. They sought to get over this hurdle by arguing that clause 44 means only that remedies expressed in the conditions are exhaustive of the matters to which they relate, not that a party would be left without a remedy for matters referred to elsewhere in the contract.

This reasoning was rejected by the Court of Appeal which held that clause 44.4 should be given its natural breadth and meaning. The Court of Appeal referred to the commercial sense, in complex contracts, of the parties providing expressly for claims they intended to allow and simply excluding all other possible claims. If the parties wish to limit their potential liability in this manner, there is no reason why the law should prevent them.

S&H's alternative argument was based on innocent misrepresentation and therefore it was also necessary to consider whether or not clause 44.4 excluded such a claim. The Court of Appeal accepted that a claim for misrepresentation is not a claim for "breach of contract or of statutory duty", and would not arise necessarily as a result of "a tortious or negligent act or omission". However the Court of Appeal held that these words in clause 44.4 were examples of excluded claims rather than an exhaustive list. It considered S&H's claim, whether for breach of contract or for damages under the Misrepresentation Act 1967, was unquestionably a claim "arising ... in connection with the contract", and was therefore excluded by clause 44.4. The Court of Appeal also mentioned in passing that the pre-contract assurance regarding the cabins was not a representation upon which a damages claim under the Misrepresentation Act 1967 could be based.

#### **Conclusions**

Care needs to be taken when deciding exactly what constitutes a variation of the works. It would not be safe to assume that any alteration to site arrangements necessarily ranks as a variation under MF/1. The judgment tends to support the mainstream view as to the meaning and effect of clause 44.4 in MF/1. Rights and remedies are indeed limited to those stated in the conditions. Caution should therefore be exercised in drafting the contract and assembling the contract documents to ensure that the rights and remedies which the parties wish to include are enforceable.

*The successful appellants, Stein and GECA, were represented by Pinsent Curtis, Solicitors, who instructed Trett to advise on quantum issues.*

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Author : Simon Olimi Kabuzi  
Title : One of My Favoutite Forms of Contract

### **One of my My Favourite forms of Contract**

Simon Olimi Kabuzi finds contractual bliss in the land of the rising sun!

For eight years I worked for a UK-based international process engineering and contracting company of repute. In my travels I came across many horrendous forms of contract but I recall one that I thought was first class.

### **The ENAA**

The Engineering Advancement Association of Japan (ENAA) was formed in 1978 with the objective of **"contributing towards the sound development of Japan's engineering industry by establishing engineering, scientific and technological systems which are adaptable to constant social and economic change."**

ENAA has a membership of more than 200 companies which are leaders in the engineering, shipbuilding, steel, equipment and civil and building construction fields.

The first step made by the Contract Standardisation Committee in 1981 and 1982, was the preparation of a model form of contract, to be entered into between an Owner and a Contractor, for the engineering and construction of process plants on a single responsibility lump sum basis.

Process plants come in a very wide variety of forms and each Owner and indeed, funder, has traditional or particular methods of procurement. The Model Form is a very good endeavour and is fairly all-embracing, without compromising the clarity of its objectives. In the preface to the first edition published in 1986, ENAA stated that it believed that **"the Model Form represents a fair and reasonable balance of interests between Owner and Contractor and will be of use to all Owners and Contractors intending to enter into turnkey lump sum construction contracts for process plants,"** such as fertiliser, oil refinery, gas processing, petrochemical, cement and other plants.

### **The Present Family of the ENAA Model Forms of Contract**

There are three members in this family.

- 1992 Edition for Process Plant Construction

Volume 1 Agreement and General Conditions (with process license)

Volume 2 Samples of Appendices

Volume 3 Guide Notes

Volume 4 Work Procedures

- 1992 Edition Alternative Form of Industrial Plant

Volume 5 Agreement and General Conditions (without Process License).  
Volumes 2, 3 and 4 would also apply here.

- 1996 Edition for Power Plant Construction

Volume 1 Agreement and General Conditions

Volume 2 Samples of Appendices

Volume 3 Guide Notes

### **The ENAA Model Form of Contract for Process Plant Construction.**

This form of contract has five constituents:-

- The Agreement, with specific provisions for the project.
- The Appendices, with technical and specific provisions for the project.
- The Special Conditions, again project specific and if required.
- The General Conditions; these are applicable to any project. They have two schedules appended to them. Schedule 1 is a standard form of Mechanical Completion Certificate and Schedule 2 is a standard form of Acceptance Certificate.

- The Work Procedures.

### **The Main Features of the ENAA Model Form.**

The draftsmen of the Model Form say that it has the following main features:-

1. Emphasis is placed on process-related provisions such as performance tests and process performance guarantees.
2. Consideration has been given to a fair and reasonable balance between the Owner and Contractor of the various risks involved in international projects on a turnkey lump sum basis. This is a feature which will be worth examining in another issue in the context specifically of risk allocation and of variations and the time for completion.

Risk distribution is provided for in Part VII of the General Conditions and, as one would expect, the time-honoured "turnkey" risks that Contractors regularly undertake with regard to the scope of work, changes and extensions of time are not in this Part VII! You have been warned! In the Model Form, Risk Distribution is about:

- Transfer of Ownership
- Care of Works
- Loss or Damage to Property/Accident or Injury to Work/Indemnification
- Insurance

- Unforeseen Conditions
  - Change in Laws and Regulation
  - Force Majeure
  - War Risks
3. Samples of forms necessary for process engineering and other projects, for example, letters of credit, bonds, mechanical completion certificate and acceptance certificate; samples of broad scopes of work, for ease of reference in the preparation of the actual contract; Work Procedure.
  4. The Model Form does not have the concept of 'the Engineer' but it contemplates that the Contractor will provide all the work required for the execution and completion of a new plant on single responsibility basis.

The matters that the Contractor is to provide range from an obligation to grant a process licence (in the case of the 'with process licence' Model Form) to the provision of the process design, basic and detailed designs, procurement and construction performance, to providing training of the Owner's operating and maintenance personnel. The Model Form contemplates that after the specified guarantees have been fulfilled, the plant will be delivered to the Owner.

The Model Form has the concept of an 'Expert' who performs an important role in the settlement of disputes between the parties. The appointment of the Expert is consensual on each occasion but his decision is not final and binding. The appointment of the Expert is without prejudice to the arbitration provisions and the ENAA is of the opinion that an Expert should be in a position akin to a conciliator or a mediator in resolving the disputes in question.

Adherents of the Joint Contracts Tribunal Forms of Contract, which contain sub-contract nomination provisions, will be delighted to know that Britain, without any earnings, visible or invisible, has effected the transfer of "technology" to Japan! The Model Form includes provisions for the nomination of sub-contractors and an interesting reason is given that, **"several countries require nominated sub-contractors to be employed in order to develop local industries"**! More likely, to protect ineffective local companies!

### Positive Features

There are two features that I have certainly enjoyed in the Model Form. The first is the division of the General Conditions into only a few parts; it is easy for practical construction professionals to follow the layout, without having to play at being a lawyer.

The parts are as follows:-

Part I Contract and Interpretation

Part II Subject Matter of Contract

Part III Payment

Part IV Intellectual Property

Part V Work Execution

Part VI Guarantees and Liabilities

Part VII Risk Distribution

Part VIII Change in Contract Elements

(Parts VII and VIII are interesting enough to merit a commentary in another issue of the Digest).

The second of my two features of interest are the Work Procedures in a list of 226 pages, in Volume IV. They may appear like an unwanted conformist straight-jacket! To the disciplinarians, however, the list constitutes matters of good practice which should appear in any quality assurance manual.

There are ten sample Works Procedures:-

WP 1 Correspondence

2 Payment Application

3 Approval and Review

4 Works Changes

5 Procurement

6 Expediting

7 Shop Inspection

8 Field Inspection

9 Progress Report

10 Commissioning and Performance

Those of us who have worked on international projects will, I am sure, recall project procedures which bore no relationship to the project in question, never mind having a bearing to the general and special conditions. It is, I think, more heartening than discouraging, that cultural uniformity is being advanced by the Japanese process contractors whose worldwide effectiveness is still held in awe! Perhaps, a lesson is there for the learning.

It is over 10 years ago that I first came across the ENAA Model Form and it's later additions are forms of contract that I remain happy to work with.

**Simon Olimi Kabuzi is Trett Consulting's Director in charge of the London office.**