



The ICC Model Turnkey Contract for Major Projects

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The International Chamber of Commerce (ICC) launched the latest form in its suite of model commercial contracts in 2007. The Model Turnkey Contract for Major Projects includes many aspects familiar from other turnkey contracts but also many innovative features. This article provides a detailed overview of the form and its key aspects.

Introduction

Risk management and cost control in turnkey projects requires an adequate tender procedure (in case of a public tender), a modern and well-constructed contract, proper contract administration, efficient claims management and well-drafted dispute resolution clauses. Whereas public tender procedures depend on local public tender laws, contract administration, claim management, dispute prevention and dispute resolution depend, to a large extent, on the quality of the underlying contract.

The new ICC Model Turnkey Contract for Major Projects (2007) is the bigger but younger brother of the ICC Model Contract for the Turnkey Supply of an Industrial Plant (2003). It consists of a Main Contract Form, Conditions of Contract with 13 Chapters (1. General and Preliminary Articles; 2. The Parties' Obligations; 3. The Execution of the Project; 4. Design – Responsibility and Management, Variations; 5. Commencement, the Time to Taking Over, Scheduling and Progress; 6. Contract Price and Payment; 7. Completion and Taking Over of the Works by the Employer; 8. Defect Correction Period; 9. Allocation of Risk and Responsibility and Exclusions from Liability; 10. Force Majeure and Termination of the Contract; 11. Insurance; 12. Miscellaneous Provisions; and 13. Claims, Dispute Resolution

and Arbitration) and eight Appendices. In total, it runs to 110 pages.

The present article aims to provide some insight about the structure and scope of the contract, variations, time extension and dispute resolution. A detailed analysis of the contract as a whole is necessarily outside the scope of this article.

Background and characteristics of the Contract

The ICC Model Turnkey Contract for Major Projects (Contract), like many other model contracts such as the ones published by FIDIC, ORGALIME and other institutions, reflects the accumulated wisdom of learned practitioners and contract experts. Different models aim at different necessities of the modern construction world. Therefore, it is necessary to have certainty about the scope and structure of a contract model before choosing it for a particular project.

The Contract was developed by the Major Projects Turnkey Group of the ICC's Commercial Law and Practice Commission co-chaired by Messrs Fabio Bertolotti (Italy)

'The Model Turnkey Contract reflects the accumulated wisdom of learned practitioners and contract experts.'

and Robert Knutson (UK). Its authors were drawn from the most representative civil and common law countries, with European construction contract experts prevailing. Professionals from emerging market countries were not represented.

The Contract may be ordered from the ICC (www.iccbooks.com). However, it does not come with a CD-ROM as is the case of its smaller brother and other ICC model contracts.

According to the working group, the aim of the Contract was to provide a balanced contract for the parties to turnkey construction projects 'while recognizing the desire of all parties for price and scope certainty, the need for swift and effective dispute resolution, and the need for complete and informed allocation of risk'. Apart from that, the Contract aims 'to minimize the need to resort to national laws'.

This balance for the parties has been sought by: (1) setting out the purpose of an article at the beginning of such article; (2) equal and mirrored obligations of the parties; and (3) obligations of good faith together with a description of what such obligations mean in practice. The title page of the Contract contains an express reference to an arbitration clause and clauses limiting or excluding the liability of the parties in certain circumstances as contained in the Contract.

Quite apart from that, the Contract includes detailed provisions on software issues, bribery and corruption.

The purpose and scope of the Contract

As the Introduction of the Contract clearly states:

'There is no uniformly accepted definition of the term "turnkey". The basic concept is that the contractor shall provide the works ready for use at the agreed price. The reality is that the employer wants to be and should be actively involved in the project at all stages. While this is a turnkey contract, there are articles allowing changes to the contract scope, price and time for completion.'

According to Article 13 of the Contract, the employer is to pay the contract price and not hinder or delay the contractor in the performance of its duties. Apart from that, the employer is to evidence, upon request by the contractor, its ability to pay the contract price. On the other hand, the contractor is required, with due diligence, to design, procure, supply, execute, commission, test and complete the works, and remedy any defects in the works

in accordance with the Contract.

The scope of work is exclusively set out in the Contract (Article 20.1). Other matters should be covered by separate agreements. In order to define its scope, the Contract takes into consideration, among other things, the employer's requirements sent to the contractor prior to the reference date (which is the date 28 days prior to the first signature of the contract), the 'assumptions' provided by either party to the other party in writing before the signature of the main contract form, as well as the 'method statements'. These are statements submitted by the contractor and accepted by the employer describing how the contractor proposes to meet the employer's requirements, detailing how the contractor intends to deploy plant, personnel, material, equipment and other resources to accomplish the works in the time to taking over.

According to Article 14.1, 'When completed, the Works shall be fit for the purposes for which the Works are intended as specifically defined in the Contract.'

Applicable law

Save for any provision to the contrary, the Contract will be governed and construed in accordance with the substantive law of the country where the site is located. It goes without saying that the provisions of the Contract have to be carefully examined under the applicable law. Local contractual practices which may have an effect on the interpretation of the Contract in the country where the site is located should be taken into consideration.

Risk allocation

Design

The Contract establishes rules for the 'General allocation of responsibility of the Parties for the Design' (Article 32.1) and a 'Design Review Process' (Article 32.2). According to Article 32.1:

'[t]he basic principle to be followed in this Contract is that the Employer specifies the desired final Works and provides the information and co-operation required by the Contractor, and the Contractor develops the Design and implements the methods intended to complete the Works to specification and within the time allowed under the Contract'.

The employer is responsible for any requirements, design, materials or plant specified or required by the employer, or for

which there is no practical alternative, and the contractor for the tender and all design, goods, materials, plant and equipment it supplies and uses.

The purpose of the design review process is clearly stated in Article 33.1, according to which, '[t]he Employer has an interest in seeing the Works performed at the initially agreed Contract Price, and the Contractor has an interest in performing the Works in an efficient fashion at a budget within the range originally intended'. Such purpose is essential for the interpretation of the design review provisions contained in the Contract. Under such provisions, the contractor has to submit to the employer the contractor's documents specified as requiring review. The review period is not to exceed 21 days. In case of lack of notice by the employer, such documents shall be deemed to have been reviewed and approved by the employer.

Obstructions

The contractor has an obligation to notify any obstruction that was not reasonably expected prior to the submission of the tender as based on the information received from the employer and on a visual inspection of the site if access was available. In such case, the contractor may claim additional cost (meaning actual expense plus overheads) and/or additional time. The employer is to determine the appropriate cost and time implications related to selected construction methods, the design, resources or temporary works, using the method statement and the assumptions, among others. Such determination is binding unless revised by agreement or through the dispute resolution mechanism of the Contract (Article 23.2).

Therefore, the contractor does not have any liability for unforeseen underground conditions.

Errors

As provided in Article 19, '[e]ach party shall give prompt notice to the other party of any error, fault or other defect found in the other party's documents or any other items of reference supplied by the other party'.

The contractor is not responsible for the correctness of information and any design provided by the employer (Article 19.2).

Limitations of liability

According to Article 51.1:

'[the] purpose of [the] limitations-of-liability provisions is primarily to ensure that neither Party is liable for losses that are difficult to estimate or provide for or

are out of proportion with respect to the value of the Contract obligations, arising from breach of contract or other liability.

This approach would ensure that the Parties can agree on the most reasonable Contract Price for the Works'.

Such provisions limit the liability of a party for damage to property other than the works. No party shall be liable for treble, exemplary, moral or punitive damages, or any type of 'non-compensatory damages no matter how they are described'.

The Contract expressly excludes liability for loss of profit, loss of income, loss of production or wasted expenditure, or for indirect or consequential damage, whatever its denomination, including loss of use, loss of revenue, loss of interest, loss of data or information or similar losses, and only admits claims expressly established in the Contract such as for variations (Article 35), delay damages (Article 37), failure to certify (Article 42.7), delayed payment (Article 44.1), or performance-related liquidated damages (Article 46.12 through 46.15). The default rate for delay damages is 0.5 per cent of the initial contract price for every week from the time to taking over. However, a bonus is payable by the employer to the contractor for the taking over earlier than the end of the time to taking over.

A party's liability for individual claims is limited to an amount of 7.5 per cent of the initial contract price with the exception of liability for the violation of intellectual property rights or for defects. The overall liability of a party amounts to 30 per cent of the initial contract price, not including interest. Such liability is limited to ten years after taking over.

Variations

The provisions for variations are found in Article 35. This Article establishes the general principles for variations, the employer's right to vary the works, the contractor's right to refuse a variation, contractor-proposed variations, the procedure for variations and rules about disputed variations.

The purpose of the variations provisions is 'to ensure that the Contractor is paid a reasonable price and profit for any changes

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in the Works and the Employer preserves its right, within the framework of this Contract, to change the Works and maintain its right to Delay Damages as the Works progress' (Article 35.1).

Save where such variation is caused by the contractor's default, the Contract provides that the employer pays to the contractor all reasonable cost plus profit. Otherwise, such variations have to be borne by the contractor. Such a variation has, therefore, an effect on the contract price. Apart from that, 'the combined effect of all Variations shall be taken into consideration in the assessment of the Time to Taking Over' (Article 35.3).

The right of the employer to request variations to the works is limited to the take over of the complete works or, if the variation is agreed by the contractor, until the end of the last defect correction period. However, the employer may not order a variation which leads to an omission of any part of the works. If that happens, the employer will have to pay compensation for under-recovered overheads and profit.

In certain circumstances, the contractor may refuse a variation (Article 35.6). Such circumstances are variations that are not related to the works, are not technically practicable, not subject to the payment assurance of the employer, that materially affect the contractor's ability to fulfil any contract obligation, or that reduce the safety or suitability of the works.

The contractor may propose variations, including those that improve the works or reduce the expense to the employer of executing, maintaining or operating the works. In such case, the contractor and the employer share the value of the benefits equally.

The procedure for variations commences with a notice by the employer. Thereafter, the contractor has to prepare a so-called 'contractor's variation proposal', or a reasoned refusal, proposing, if possible, an alternative. The contractor has no obligation to make a change to the works that is not instructed as a variation.

Where the employer decides not to implement the variation, then – unless such variation was suggested by the contractor

– the employer will be obligated to pay the contractor the cost of preparing the variation proposal.

According to Article 35.13, scope disputes are submitted to a particular procedure. Work or supply subject to such procedure is regarded as 'a disputed Variation' subject to resolution under Chapter 13 of the Contract ('Claims, Dispute Resolution and Arbitration'), if requested by either party. Claims to additional payment are, in all cases, subject to dispute resolution under Chapter 13. In the case of a refusal by the contractor to execute a variation due to Article 35.6 of the Contract, the contractor is only bound to execute such variation in the case of a decision by the Combined Dispute Board (CDB).

Variations may consist of additional requirements to cooperate with the employer or other contractors, the creation of facilities for the employer or its agents not foreseen in the Contract, errors attributable to the employer in the set out data, inadequacy in the supply of services to be supplied by the employer or public utilities, among others.

Time extension

Article 36 establishes that:

'[t]he purpose of the time provisions is to ensure that the Contractor is afforded adequate time to complete the Works, given the time in which it originally agreed to complete the original scope of work, and the Employer is assured both of a predictable completion Date and retains the right to impose Delay Damages if the Contractor completes the Work or any Section of them after the Time to Taking-Over as adjusted under the Contract. It is normally preferable to reach contemporary agreement on extensions of the Time to Taking-Over'.

The start day is subject to conditions such as receipt by the contractor of the advance payment, possession of the corresponding sections of the site, the notice to proceed being issued by the employer and presentation by the contractor of its advance payment and performance guarantees.

The following delays entitle the contractor to an extension of time and, as applicable, to additional payment:

- (a) where an Article of the Contract provides that a cause of delay gives an entitlement to an extension of time and additional costs;
- (b) any suspension by the contractor to which

'Where the employer decides not to implement the variation, then the employer will be obligated to pay the contractor the cost of preparing the variation proposal.'

- it is entitled under the Contract;
- (c) any suspension, delay, impediment, default or breach of the Contract by the employer or its agents;
 - (d) any activity, act or omission of any other contractors employed by the employer preventing the contractor from proceeding efficiently with the works; and
 - (e) any action or inaction of third parties such as public authorities, which the contractor could not prevent and which delays the works.

The Contract contains an expedited procedure for the contractor to assert an entitlement to an extension of time, being the filing of a notice, the submission of further details within 42 days of such filing, the assessment or agreement by the employer, and consultations between the parties. In the case of failure by the employer to make a determination of the entitlement of the contractor for the time extension, the full extension applied for is deemed to be granted (Article 36.9). The contractor's entitlement to compensation for costs arising from any extension of time is to be negotiated at the same time.

Independently from the above, the employer has the right to direct the contractor to reschedule its programme in order to meet the time to taking over.

At the end of the time to taking over, the employer is to enter into consultation with the contractor and perform a retrospective examination of progress and determine whether the contractor is entitled to any further extension of time. Such review may not lead to a shortening of any time extensions that have been previously agreed between the parties or ordered by an arbitral tribunal or the CDB.

Payment

The Contract establishes a 'complete system' for all claims to payment or compensation arising out of or in connection with the Contract, its breach, its alleged termination or execution of the works (Article 40.1).

Late payment incurs interest at three percentage points above the basic lending rate for immediate money of the central bank of the country or countries of the currency or currencies of payment, unless otherwise agreed by the parties (Article 44.1).

The question arises whether the contractor may suspend its performance during the resolution of a dispute by the CDB or an

arbitral tribunal, in particular, for lack of payment by the employer.

According to Article 57.8, '[e]ither Party may suspend its performance of the Contract or terminate this Contract upon the occurrence of a material breach of contract by the other Party'. Suspension is subject to a notice of suspension. Such notice becomes ineffective if the breach has been cured or there has been an undertaking to cure the breach as soon as possible. The minimum cure period is to be not less than 21 days (Article 57.13).

Articles 57.9 and 57.10 establish a non-exclusive list of events that amount to a material breach by the employer or contractor, respectively. Grounds for establishing material breach applicable to both parties, as mentioned in Article 57.11 are, among others, failing without express or implied agreement from the other party to pay sums due under the Contract on more than two separate occasions and/or for more than 30 days from the due date, and failing to comply with important elements of decisions of the CDB or arbitral tribunal.

Therefore, lack of payment by the employer may entitle the contractor to suspend the works, provided the conditions set out in Article 57 are met.

Dispute resolution

The Contract contains a common procedure for all claims (Article 66 (Exclusive Remedies) – claims of all types are to be determined by these provisions). Dispute Resolution follows a three-tier approach:

- first, there is to be a fair determination by the employer, if applicable under the Contract;
- secondly, a CDB decides all claims, differences or disputes arising out of or in connection with the Contract (Article 66.1); and
- finally, disputes may be submitted to arbitration. The scope of arbitration varies according to whether a recommendation or decision has become final and binding due to a lack of a notice of dissatisfaction.

The CDB is 'empowered and expected to decide all Disputes, including any question or issues regarding its existence, validity or termination', as far as the applicable law permits. The CDB is to consist of three members, unless otherwise

'The Contract contains an expedited procedure for the contractor to assert an entitlement to an extension of time.'

agreed between the parties.

The Contract provides clear rules about the type of determination to be rendered by the CDB. A recommendation is the rule, save where the Contract provides for a decision or the parties agree that the CDB is to issue a decision. The CDB may also render a decision if one of the parties requests the CDB to do so. The main difference between a recommendation and a decision is that a recommendation only becomes binding if no notice of dissatisfaction is made.

A decision is binding from the outset until overruled by an arbitral tribunal, provided a notice of dissatisfaction has been made to allow the arbitral tribunal to rule on the merits of the dispute. This means that any sums of money agreed or ordered to be paid have to be paid immediately and not held back pending resolution of the dispute (Article 66.6).

If there is no notice of dissatisfaction or the CDB has issued a recommendation or decision within the time limit provided for in the rules, the arbitral tribunal is limited to rule on the failure to comply with a recommendation or a decision issued by the CDB. The arbitral tribunal, therefore, is likely to confirm the finding of the CDB in form of an arbitral award. A final and binding determination of the CDB has the legal effect of a contractual provision.

According to Article 67.2, a notice of dissatisfaction 'shall be specific as to what part of a decision or recommendation it refers to and disputes (if there are identifiable elements to the decision) and what parts of any decision or recommendation are not disputed'.

Arbitration may be commenced upon the termination of the time limit for the CDB established under the rules. Such arbitration may be commenced earlier if the CDB is disbanded pursuant to the rules.

In case of a violation by either party of the rules established in Articles 66.1 through 66.6 (CDB procedure and arbitration), such party will be liable for any and all costs.

A CDB decision which has become final and binding in accordance with the rules may not be revised by an arbitral tribunal. This raises a series of legal questions the examination of which is outside the scope of this article.

CDB decisions that have become final and binding are binding on a later CDB

and arbitral tribunals. Any determination is admissible in evidence in an arbitration. This appears to apply also to any determination that has not become final and binding. However, in the case of a notice of dissatisfaction, neither party is limited to the arguments put to the CDB, or to the reasons for dissatisfaction.

Upon referral by a party, the arbitral tribunal may, before the proceedings are closed and subject to the procedural rules applied by the tribunal, accumulate disputes which were brought to a CDB for a decision, when such decision has not been rendered in time or has not become final and binding. It appears that such referral is only admissible in the case of a notice of dissatisfaction by one of the parties.

After taking over, the parties may refer a dispute directly to arbitration. In this respect, it is not clear when the CDB terminates its functions. It appears that the CDB continues in place until the end of the defect correction period which, by default, is one year (Article 49.1).

Conclusion

The ICC Major Projects Contract is, without doubt, an excellent model of a modern international turnkey contract based on an equilibrium of the rights and obligations between the employer and contractor, and a balanced risk allocation. The Contract provides a clear and compact structure that facilitates its administration. The claims management and dispute resolution provisions are straightforward. Notification procedures are kept to a necessary minimum.

The Contract should be suitable for use in civil and common law and other jurisdictions. However, as is mentioned in its footnote 4, the 'parties should check if the provisions of this model contract conform with [the applicable law]'.

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