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Serbia's perspective for sustainable growth

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REPUBLIC OF SERBIA
MINISTRY OF EUROPEAN INTEGRATION

MINISTRY OF FINANCE
Department for Contracting and Financing
of EU Funded Projects

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Contract Management, How to

Part 1: Introduction to PRAG-FIDIC model

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PRAG & FIDIC

„An arranged marriage“

PRAG

- Applicable procurement procedural instructions/rules in case of IPA (co)funded projects
- It sets context & contents of the Contract, with an exception in case of infrastructural projects exceeding 5 MEUR/PRAG (FIDIC instead of PRAG GC) under IPA
- Infrastructural projects funded from IFI loans/grants: mix of IFI specific rules and the PRAG, with PRAG representing procurement and the contract backbone

FIDIC

- General conditions in case of infrastructural projects exceeding 5 MEUR/PRAG (FIDIC instead of PRAG GC) under IPA
- As consulting industry golden standard fine tuned during last 50 years, preferred contract solution in case of big infrastructural projects, when intention is to draw attention of the biggest economic operators

PRAG & FIDIC

Why then not to use PRAG GC whenever using IPA funds, after all GC are standard PRAG annex (aligned vocabulary, best procurement-contract management fit, designed and maintained by EC, gratuitous/publicly accessible), while PRAG may be considered as best international practice?

FIDIC = level playing field, tested in case of biggest infrastructural projects, elaborated by third party.

FIDIC International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

Contract structure

Contract building blocks and why are they considered crucial

- the Contract
- the Particular/Special Conditions
- the General Conditions
- the Employer's Requirements (i.e. technical/performance specifications), including clarifications

Contract structure

Contract building blocks and why are they considered crucial

- the Design Documentation (drawings)
- the Schedules/breakdown of the lump-sum price/bill of quantities /detailed breakdown of prices (after arithmetical corrections)
- the Tender with appendix
- Any other documents forming part of the Contract including LEF, BAF, the templates for various guarantees (pre-financing, performance, retention money)

THE CONTRACT (Contract form)

Contract form – standard PRAG template stipulating key contractual provisions at the rudimentary level (contract parties, contract title, scope and the structure).

NB: order of precedence between contract parts/documentation is also set in the Contract form

Why considered a building block: starting point for resolution of discrepancies between provisions contained in various contract parts and gaps which were not observed at the stage of tender dossier preparation & tender evaluation.

THE PARTICULAR/SPECIAL CONDITIONS (PC/SC)

In own words:

These particular conditions amplify and supplement, if necessary, the General Conditions (GC) governing the contract.

The General Conditions of Contract and the Particular Conditions of Contract define the rights and obligations of the parties (i.e. the Employer and the Contractor). In case of any discrepancy between the General Conditions of Contract and the Particular Conditions of Contract, the provisions of the Particular Conditions of Contract shall prevail. Provisions of clauses unchanged in the Particular Conditions of Contract shall be valid in the form given in the General Conditions of Contract.

THE PARTICULAR/SPECIAL CONDITIONS (PC/SC)

In own words:

The numbering of the Articles of the Particular Conditions is not consecutive but follows the numbering of the Articles of the General Conditions.

Why considered a building block: just step down from the contract form, it enables CA to emphasize contract specifics. NB: Any derogation(s) to GC should be announced here. In case of IPA, bear in mind that requests for derogation require prior approval by EC as well as, additional processing time.

THE GENERAL CONDITIONS

General Conditions of Contract contain **standard set of terms and conditions**, to be read in conjunction with Particular conditions.

PRAG 2019 – General conditions are listed as annex d4p.

FIDIC – Two dominant forms of contract conditions under IPA for works; (1) construction only contracts where the contractor executes works which are designed by the Employer or consultant (designer) - FIDIC RED BOOK and (2) design and build contracts where the Contractor will design and build the works - FIDIC YELLOW BOOK.

THE GENERAL CONDITIONS

Why considered a building block:

General Conditions of Contracts, in any form, usually specify:

- The responsibilities, obligations, entitlements and liabilities of the parties to the contract and also stipulate authorities, duties and responsibilities of the Engineer to the contract;
- Allocate risks to the parties that are “most suitable” to bear such risks; and
- Sets out procedures to follow in various stages of the contract namely execution of the works such as commencement, execution, completion and handing over, defects notification period, contract close out, changes, claims, suspension, termination and dispute resolution

EMPLOYER'S REQUIREMENTS

INCLUDING CLARIFICATION DURING TENDER PREPARATION PROCESS

The Contractor is required to design (if specified), execute and complete the Works in accordance with the quality standards prescribed in the Technical Specifications (TS) / Employer’s Requirements (ER).

The Employer’s requirements are elaborated as part of tender dossier, required to precisely define scope and quality of the Works.

PRAG definition of TS: The document drawn up by the contracting authority setting out its requirements and/or objectives in respect of the provision of supplies or works, specifying, where relevant, the methods and resources to be used and/or results to be achieved.

EMPLOYER'S REQUIREMENTS

INCLUDING CLARIFICATION DURING TENDER PREPARATION PROCESS

Why considered a building block: either detailed set of technical requirements (RED FIDIC) or set of marching orders/mandatory outputs (YELLOW FIDIC).

NB: misspelled/erroneous/deficient TS/ER are zealously tracked by experienced “litigation chasers”. They are commonly not interested in completing works as much as taking CA/final beneficiary’s (FB) money. Key reason to stick to proven solutions in case of big infrastructural projects (read: FIDIC or equivalent national conditions of contract) .

THE DESIGN DOCUMENTATION (DRAWINGS)

PRAG 2019: Drawings provided by the contracting authority and/or the supervisor, and/or drawings provided by the contractor and approved by the supervisor, for the carrying out of the works.

FIDIC: Drawings" means the drawings of the Works, as included in the Contract, and any additional and modified drawings issued by (or on behalf of) the Employer in accordance with the Contract.

Why considered a building block: Most of works can't be carried without corresponding drawings.

NB: absence of "as built drawings" may constitute valid reason for not issuing taking over certificate. On the other side, delayed submission of drawings by the employer may constitute valid reason for time/cost/profit claim.

SCHEDULES/THE BREAKDOWN OF THE LUMP-SUM PRICE/BILL OF QUANTITIES /DETAILED BREAKDOWN OF PRICES (AFTER ARITHMETICAL CORRECTIONS)

PRAG 2019, bill of quantities: The document containing an itemized breakdown of the works to be carried out in a unit price contract, indicating a quantity for each item and the corresponding unit price.

PRAG 2019, budget breakdown: The schedule which breaks down the contract value according unit prices and lump sums for each item provided.

FIDIC, schedules means the document(s) entitled schedules, completed by the Contractor and submitted with the Letter of Tender, as included in the Contract. Such document may include the **Bill of Quantities**, data, lists, and **schedules of rates and/or prices**.

SCHEDULES/THE BREAKDOWN OF THE LUMP-SUM PRICE/BILL OF QUANTITIES /DETAILED BREAKDOWN OF PRICES (AFTER ARITHMETICAL CORRECTIONS)

Why considered a building block:

Contract scope/objective itemised & expressed in monetary terms.

Unforeseen items can result in non-performing contract/litigation (NB: unforeseen circumstances - has the need for modification been brought about by circumstances which a diligent contracting authority could not have foreseen).

TENDER WITH APPENDIX TO TENDER

PRAG & FIDIC: tender (including relevant clarifications sought and obtained during tender evaluation) constitutes part of the contract.

FIDIC, appendix to tender means the completed pages entitled appendix to tender which are appended to and form part of the Letter of Tender (FIDIC)/forming part of the contract (PRAG-FIDIC mix). It is integral part of the tender providing short overview of specific requirements in the form of acceptance letter to be signed by the tenderer/contractor.

Why considered a building block: it reminds contractor and CA about what has been offered in response to tender dossier (TD)requirements. In case of discrepancy between ER/TS and tender, ER/TS prevail.

NB: Appendix to tender may also set specific provisions on advance payment percentage.

ANY OTHER DOCUMENTS

Legal entity form (LEF), financial identification form (FIF), the templates for various guarantees (pre-financing, performance, retention monies).

Why considered a building block: it is designated depot where you store significant non-essentials. Appreciation for having standardised elements such as financing guarantees comes only after being in situation of not having them around or when they should be agreed with contractor. Even seemingly less important elements such as LEF and FIF are well integrated into PRAG/FIDIC ecosystem.

Overview of ex-ante findings & recommendations and in-house generated best practice

What to avoid in order to save time and resources

Overview of ex-ante findings & recommendations and in-house generated best practice

What to avoid in order to save time and resources

Under IM with ex-ante controls, ex-ante findings & recommendations constitute important source of procedural knowledge and practice. As CA IM gains capacity, importance of in-house generated best practice will be increasingly important. SHARED MANAGEMENT under ESIF: Managing Authority issues guidance and interpretative notes. Intermediary bodies commonly execute ex-ante and ex-post controls.

CASE 1: Contractor's key staff - extensive number of profiles required, profiles narrowly defined.
Impact: infrastructure projects tend to be on a longer side. Longer the contract, bigger the risk of "loosing" proposed key staff. Key staff profiles are assessed during technical compliance check (hence having direct impact on compliance & award decision). Hence, any changes affecting key staff in the course of implementation will require contract administration while bearing a risk of being challenged as contradicting principle of legality/regularity.
Remedy: Limit number of key staff to be assessed during tender evaluation to a very minimum, with other profiles being subject of pre-contract commencement check.

CASE 2: Not having dedicated template for List of materials and supplies
Impact: Non-comparable offers, compromising legality of tender evaluation proceedings.
Remedy: Compile the list of essential materials and supplies to be procured under the project and insert it into tender dossier.

CASE 3: Failure to envisage most-likely reasons for contract modification under particular contract and to clearly describe corresponding procedure in the Contract.
Impact: Increased risk of errors when assessing whether contract modification is allowed and how should be implemented. Corresponding loss of funds or claims.
Remedy: Introduce special review clauses covering most-likely modifications into PC/SC.

Case 4: Volume 3, Technical Specifications – contrary to Sector Fiche (programming document), TS envisages procurement of the Vessel and IP cameras, with ownership being transferred to the Beneficiary
Impact: Purchase of non-eligible items under IPA may result in subsequent withdrawal EU funds.
Remedy: Identify needs and appropriate course of action to meet them at the programming stage. (procurement of equipment = supply tender).

Case 5: Design documentation and TS insufficiently developed
Impact: failure to sufficiently, clearly and concisely elaborate what is required from the contractor leads to disputes, claims and/or contract implementation halt.
Remedy: engage external expertise in preparation/revision of design documentation and then request additional opinion at the tender preparation stage. Or prepare yourself to contractor's claims later.

Case 6: Period for contract implementation not established realistically

Impact: Increased risk of unsuccessful tender procedure: underestimating contract implementation period compared to volume of works may lead to inflated tender price). Following conclusion of the contract, contractor most likely becoming entitled to time extension/possible disputes/breach of legally bounding deadlines such as deadline for implementation of activities under Financing agreement.

Remedy: Duly elaborated design documentations and BoQ prepared prior to tender dossier publication helps turning assumptions into realistic provisions. Also, seek expert's advice (hands-on experience is indispensable).

Case 7: Terminology used not aligned with the standard contract terminology

Impact: frequent case when marrying different sets of rules and corresponding practice (e.g. PRAG and FIDIC, PRAG and IFI rules).

Remedy: PRAG + FIDIC = particular conditions (translating PRAG terminology contained in its annexes into FIDIC terminology).

Case 8: Brand names for some of equipment still indicated in the drawings.

Impact: Reference to particular brand in drawings can be considered as an omission which needs to be rectified before tender launch. If not observed, it may result in non-eligible expenditure.

Remedy: What may be considered desired in case of design documentation drawn for private sector entities, represents significant error when introduced into tender dossier/contract resulting from public procurement procedure. Clearing out all references to brand names in the course of tender dossier check is an imperative.

….be sure that someone assigned with preparation/control of tender documentation has perfect command over English technical terminology, e.g.

3.1 Number 6: the description could be misleading since "reconstruction" could mean repair or restoration. The description should be consistent and read as such that it is immediately clear which works are subject to the tender. Supposedly "reconstruction of existing main wastewater collectors" is the same as what is called in Volumes 3 and 5 "Restoration". The "service reservoir" is indicated in Volume 5 on the drawings as "Water Tank". In principle the Notion "water reservoir" seems to be the most understandable.

7.4 BoQ, No. 1.2, B1: "Exhumation" might not be the suitable notion for the act of removing top soil (humus) and ditch might not be the suitable one for trenches which are being dredged for the purpose of pipe laying. Ditch means a natural water course. Please correct. This Comment applies to several entries. Please cross check.

On some drawings (for example 2.4.1 and 2.8.1) it is not clear at once what the tenderer is supposed to built and what not. There are different wordings in the box "interpretation" meaning legend/caption such as:
"Designed sewerage (not design object), planned sewerage" and "designed sewerage"
Or
"Designed overflow object" versus "designed overflow object (not design object)"
Or
"designed pumping station" versus "designed pumping station (not designed object)". Please clarify.

On some drawings the translation into English has not been totally completed.

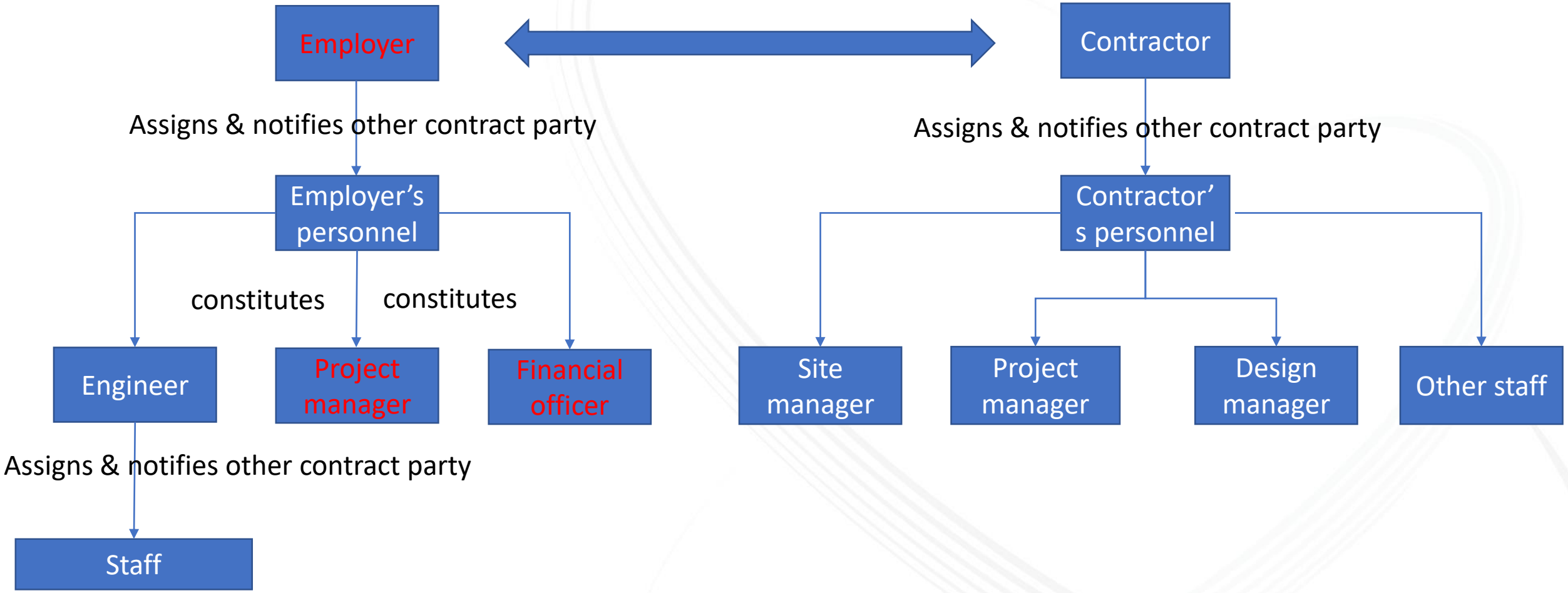
Contract management

Division of roles and responsibilities

The main parties to a FIDIC contract are the **“Employer”** and **“Contractor”.** In the case of IPA projects in Serbia, the Employer is the Contracting Authority, headed by the Head of CA, who signs the Works contract with the Contractor. The management of the Works contract is facilitated by the **“Engineer”,** who is appointed by the Employer through a Service Contract for Supervision.

Contract Management with respect to an Contracting Authority should be carried out by the dedicated Project Manager designated among Contracting Authority’s (CA) staff. Even in FIDIC forms of contracts **Engineer** assumes central contract administration role.

Project manager as an Employer’s representative has also an important role, in particular in a EU financed project with the more complex environment than with the „pure“ FIDIC type of contract.


Employer
Contractor
Assigns & notifies other contract party
Assigns & notifies other contract party
Employer's personnel
Contractor's personnel
constitutes
constitutes
Engineer
Project manager
Financial officer
Site manager
Project manager
Design manager
Other staff
Assigns & notifies other contract party
Staff

FIDIC definitions:

Employer means the person named as employer in the Appendix to Tender and the legal successors in title to this person.

Contractor means the person(s) named as contractor in the Letter of Tender accepted by the Employer and the legal successors in title to this person(s).

Engineer means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [Replacement of the Engineer].

FIDIC definitions:

Contractor's Representative means the person named by the Contractor in the Contract or appointed from time to time by the Contractor under Sub-Clause 4.3 [Contractor's Representative], who acts on behalf of the Contractor.

Employer's Personnel means the Engineer, the assistants referred to in Sub-Clause 3.2 [Delegation by the Engineer] and all other staff, labour and other employees of the Engineer and of the Employer; and any other personnel notified to the Contractor, by the Employer or the Engineer, as Employer's Personnel.

Contractor's Personnel means the Contractor's Representative and all personnel whom the Contractor utilises on Site, who may include the staff, labour and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Works.

Contract management

Imperatives

SOUND FINANCIAL MANAGEMENT

Every decision is measured against overarching principle of sound financial management (efficiency, effectiveness and economy).

LEGALITY & REGULARITY

Imperative stemming from specific status of CA: public body bound to act in line applicable national and EU laws and procedural rules.

Contract management

Imperatives

RECORD KEEPING/AUDIT TRAIL

- ✓ Proof/acceptance of deliveries
- ✓ Evidence that deliveries are at the tendered cost
- ✓ Evidence that deliveries correspond to the technical specifications
- ✓ Invoices
- ✓ Justification of contract modifications in specific circumstances, if relevant.

VISIBILITY

Specific feature being subject of EU and other donor's rules on visibility of funding. Incompliance may have financial impact.

AMICABLE RESOLUTION OF DISPUTES

Both, PRAG GC and Red & Yellow FIDIC conditions of contract contain procedures for dispute settlement/resolution.

PRAG GC, Art. 68.1: The parties shall make every effort to settle amicably any dispute relating to the contract which may arise between them, or between the supervisor and the contractor.

Contract management

Change management & monitoring

Contract management may be broken into:

Delivery management ensures that the works is been performed as required with the proscribed quality and timeframe as stated in contract. In involves various levels of controls and inspections of works performed by contractor.

Relationship management should ensure smooth cooperation between all parties in open and constructive way. It should allow resolving any tensions, and identify potential problems at an early stage.

Contract administration handles formal management of contract ensuring that everyday aspects of contract are properly documented, effectively and efficiently managed.

CHANGE MANAGEMENT

Relation between change management and contract management: change management may be considered as specific aspect of contract management dealing with various aspects of changes introduced during the contract lifetime. Changes are to be introduced when existing set-up does not produce expected results (e.g. need for improving quality of coordination between contract parties, reporting, quality controls etc.).

Change management goes hand in hand with monitoring: monitoring is integral part of change management process – contract implementation monitoring is used to identify when changes are needed while every change after being introduced should be monitored (in terms of whether it delivers what is expected and how does affects stakeholders).

Change management should employ clear metrics: without metrics, it can be hardly assess whether particular change has met its goal.

Change management process may involve elaboration of change management plan.

CHANGE MANAGEMENT

Change management plan elaborates activities and roles to manage and control change during the contract implementation. Change is measured against the baselines such as project scope, budget, schedule, and plans to manage quality and risks.

One of key changes associated with the contract management are contract modification.

Key about contract modifications is to recognize when they are manifestly important for attaining project purpose and objective(s) and above all, whether they are legally correct (remember: legality & regularity and sound financial management).

When contract modification is no-go*:
Modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure.
The modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement.
The modification extends the scope of the contract or framework agreement considerably.

* Source: Public procurement guidance for practitioners, EC, February 2018 (on avoiding the most common errors in projects funded by the European Structural and Investment funds)

Contract modification mantra: KEEPING ALL ELEMENTS UNDERPINNING AWARD DECISION INTACT.

If significant additional works, supplies or services are needed then a new contract should be tendered. Auditor’s mantra: give market a chance. CA mantra: avoid retendering, if possible.

NB: Modifications of contracts and/or the (mis)use of a negotiated procedure for additional tasks with an existing contractor without any tendering of these additional works, supplies or services is one of the most common and serious errors in public procurement procedure.

MONITORING

- It is important to monitor changes affecting elements having impact on services & works delivery: e.g. changes in engineer's or contractor's staff, introduction of new sub-contractors/suppliers, delivery timelines etc.
- It is important to observe when one must react: e.g. tentative approvals in case of Employer's silence. Don't waste time looking for perfect solution to seemingly unsolvable problems. Even trivial comments may abolish "silence clause".
- One of the key inputs are Monthly monitoring reports prepared by engineer.
- Monitoring adherence to time schedule: delays commonly result in damages. CA/AA failure to realise that may be seen as a weakness in management & control system.

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Questions and assistance

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Thank you for your attention!