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REPUBLIC OF SERBIA
MINISTRY OF EUROPEAN INTEGRATION

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

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Infrastructure projects – Implementation

Key challenges from the Employer and End Recipient / Beneficiary point of view

Roles and responsibilities of stakeholder during the project implementation

- Roles and responsibilities of contractual parties
- Challenges of Implementing of EU finance contract in line with Serbian Construction laws
- Modification of signed contract PRAG and FIDIC

Roles of the Employer, the Contractor and the Engineer

- General
- Pre-contract activities
  - The Employer
  - The Contractor
  - The Engineer
- Commencement
  - The Contractor
  - The Engineer
  - The Employer

Roles of the Employer, the Contractor and the Engineer

- Normal Procedures
  - **Communications*****
  - Design
  - Day-to-day supervision
  - Instructions
  - **Meetings*****
  - Measurement
  - **Interim Payment Certificates*****
  - Variations
  - Claims
  - Resolution of disputes
  - Tests on Completion
  - Employer’s Taking Over
  -

*****Subject of the Session 3**

Roles of the Employer, the Contractor and the Engineer

- Defects Notification Period
  - General
  - **Statement at Completion*****
  - Performance Certificate
- **Final Payment*****
  - **General**
  - **Discharge**
  - **Final Payment Certificate**

*****Subject of the Session 3**

Roles of the Employer, the Contractor and the Engineer

- Variations
  - General
  - How to initiate variation?
- Claims
  - General
  - Contractor’s Claims
  - Employer’s Claims
- Dispute resolution
  - General
  - Ad-hoc and Standing DAB
  - Obtaining DAB Decision
  - Arbitration

1. General

- **The Employer:**
  - Provides Site
  - Pays the Contractor
  - (Liaises with Financiers)
- **The Engineer:**
  - Administers the Contract
  - Supervises the Works

*Note difference between Engineer and Supervisor per SCL (Serbian Construction Law)

- **The Contractor:**
  - Executes the Works in compliance with the Contract and Law (and good engineering practice)

2. Pre-contract activities

Employer (Contracting Authority):

- Carries out tendering in accordance with prevailing legislation and financier's procedures*
- Conducts Contract Negotiations with successful tenderer**
- Awards and signs the Contract (or issues Letter of Acceptance)
- Appoints the Engineer

Also:

- The Employer's responsibilities comprise obtaining and making available information regarding required licenses, approvals and relevant procedures.
- Arrangements regarding providing the Site and making payments to the Contractor according to provisions of Contract

2. Pre-contract activities

Contractor (Tenderer):

- Tendering. Prepares a fully compliant proposal and provides additional information as required
- Participates to Contract Negotiations
- Signs the Contract

Also:

- The Contractor shall study and understand his obligations to scrutinise the Tender Documents and other information made available by the Employer (CA) and to give notice under sub-clause 5.1 of any error, fault or other defect discovered, within the time limit specified in Appendix to Tender (YB).

2. Pre-contract activities

Engineer

- No pre-defined role before signing of Contract, but often the Consultancy agreement includes assistance to Employer (CA) during pre-contract stage

3. Commencement

- The Employer provides evidence of permits*
- The Engineer gives notice of the Commencement Date to the Contractor
- The Contractor submits a detailed programme to the Engineer within 28 days after receiving the notice
- The Engineer notifies of non-compliance within 21 days, otherwise the Contractor can proceed accordingly.
- The Contractor appoints Contractor's Representative prior to Commencement Date, if not named in the Contract
- The Employer gives the Contractor right of access to the Site within times stated in Appendix to Tender**
- The Employer and Contractor and DAB Member(s) sign Dispute Adjudication Agreement, if so specified.

3. Commencement

The Contractor

- Obtains licenses and permits, as appropriate
- Establishes site offices etc. according to programme
- Effects insurances, submits evidence and copies of policies
- Submits Performance Security to the Employer within 28 days from receiving Letter of Acceptance (or signing of Contract)
- Submits Advance Payment Guarantee
- Submits Application for Interim Payment Certificate No. 1 (advance payment)

3. Commencement

The Engineer

- Receives copies and checks appropriateness of Performance Security and Advance Payment Guarantee*
- Issues Interim Payment Certificate No. 1 (advance payment)
- Establishes procedures for communications, meetings, inspections, oral and written instructions, etc., calls first monthly meeting

3. Commencement

The Employer

- Receives and approves Performance Security & informs the Engineer accordingly
- Effect payment of Interim Payment Certificate No.1 (advance payment)
- Liaise with concerned authorities, follow processing of payment, establish accepted procedures to ensure smooth processing of future payments

4. Normal procedures

Design (Employer's design / Red Book)

- The Employer delivers the design documents in a timely manner to the Engineer who forwards the agreed number of copies to the Contractor and instructs the Works to be executed accordingly
- The Contractor designs to the extent specified in the Contract (e.g. working drawings) and submits his design documents for the Engineer's approval *
- The Engineer approves and gives consent for the Contractor to proceed with the Works
- The Contractor maintains as-built records of the Works executed

*In accordance with procedures specified in the Contract

4. Normal procedures

Design (Contractor's design / Yellow Book)

- The Contractor designs in accordance with the Employer's Requirements and as necessary to obtain all regulatory approvals*
- The Contractor submits under Sub-Clause 5.1 the documents described in the Employer's Requirements as "Contractor's Documents" to the Engineer for review and/or approval, as specified in the Contract.

4. Normal procedures

Day-to-day supervision

- The Contractor submits daily/weekly programmes to the Engineer according to the established procedure*
- The Engineer observes the Contractor's activities on site and verifies that the works are executed according to approved design documents
- The Engineer carries out site inspections and records the results in "inspection sheets" according to the established procedure
- The Engineer observes laboratory and other testing and confirms the results according to the established procedure

4. Normal procedures

Day-to-day supervision

- The Contractor obtains the Engineer’s consent prior to covering of any works according to the established procedure. E.g. casting of structural concrete.

* Good practice: The Engineer should prepare before start of the works on site – Site Supervision Manual with templates for inspection sheets

4. Normal procedures

Instructions

- The Engineer issues instructions to the Contractor.
- The Employer shall not issue instructions to the Contractor
- All instructions to be recorded in writing
- Oral instructions can be confirmed retroactively by the Engineer’s letter or a form “confirmation of oral instruction” signed by CTR and ENG

4. Normal procedures

Measurement (RB)

- The Engineer gives notice to the Contractor about intention to measure any part of the Works, as part of an agreed and continuous procedure.*
- The Contractor's Representative or another qualified representative attends and assists the Engineer in making the measurement and supplies any particulars requested by the Engineer.

Note the difference with standard engineering practice in Serbia.

4. Normal procedures

Measurement (RB)

- Works can be measured on site, from the Drawings or from detailed records prepared by the Contractor if so specified, or otherwise by the Engineer.*
- Method of Measurement as specified in the preamble to the Bill of Quantities and/or in accordance with a publication (CESMM or similar) referenced in the Bill of Quantities.**

4. Normal procedures

Tests on Completion

1. The Contractor provides As-Built Documents, Operation and Maintenance Manuals and other documents as specified in the Contract
2. The Contractor gives the Engineer not less than 21 days notice of the day after which the Contractor will be ready to carry out each of the Tests on Completion.
3. YB: Tests on Completion are normally carried out as follows:
   i. Pre-commissioning tests (inspections, “dry” testing)
   ii. Commissioning tests (operational tests under all available operation conditions)
   iii. Trial Operation (Operation to demonstrate that the Works perform reliably and in accordance with the Contract*

4. Normal procedures

Tests on Completion

iv. During trial operation the Contractor gives notice to the Engineer that the Works are ready for any other Tests on Completion, including Performance Testing.

4. The Engineer considers the results of the Tests on Completion, making allowances for the effect of any use of the Works by the Employer and certifies the test results accordingly.
5. The Contractor submits a certified report of the results of these Tests to the Engineer

4. Normal procedures

Employer's Taking Over

1. The Contractor applies by a notice to the Engineer for a Taking-Over Certificate not earlier than 14 days before the Works (or a Section) will be ready for taking over.
2. The Engineer, within 28 days after receiving the application, either (i) issues the Taking-Over Certificate stating the date when the Works (Section) were completed in accordance with the Contract or (ii) rejects the application with reasons and specifying the work still required.
3. If the application was rejected, the Contractor completes the Works as instructed and issues a further notice

4. Normal procedures

Employer's Taking Over

4. Minor outstanding work (if any) which does not substantially affect the use of the Works can be completed after issue of Taking-Over Certificate in accordance with a agreed programme ("snag list" and programme to be agreed).
5. After issuing the Taking-Over Certificate, the Engineer certifies the first half of the Retention Money for payment to the Contractor.
6. Adjustments for Changes in Cost stop
7. Delay Damages stop

5. Defects Notification Period*

General:

- The Defects Notification Period commences on the date stated in the Taking-Over Certificate
- The Employer effects insurances in accordance with the Contract and submits copies of the policy to the Engineer and the Contractor.
- During the Defects Notification Period ,and within such time as agreed with (or instructed by) the Engineer, the Contractor completes all outstanding work.
- The Contractor executes all work required to remedy defects notified by or on behalf of the Employer on or before the expiry date of the Defects Notification Period.

5. Defects Notification Period*

Performance Certificate:

- Promptly after expiry of the Defects Notification Period the Engineer certifies the outstanding balance of the Retention Money, unless work remains to be executed.
- Within 28 days after the latest of the expiry dates of the Defects Notification Periods the Engineer issues the Performance Certificate to the Contractor stating the date on which the Contractor completed his obligations under the Contract. These obligations include supply of all Contractor's Documents, completion and testing of all Works and remedy of all defects.

5. Defects Notification Period*

Performance Certificate:

- Only the Performance Certificate shall be deemed to constitute acceptance of the Works
- Within 21 days after receiving a copy of the Performance Certificate the Employer returns the Performance Security to the Contractor

7. Variations

Variations can be initiated in three ways:

1. The Engineer instructs without prior agreement of price (urgent works and all re-measurable (RB) works).
2. The Contractor may initiate his own proposals, which may be approved as a Variation, or he may be given other instructions, which constitute a Variation
3. A proposal may be requested in an endeavour to reach prior agreement on its effect and thereby avoid dispute

7. Variations

- ALT I:

    4. The Engineer inspects the Works and certifies accordingly
    5. The Employer liaises with financiers and ensures that payment will be effected timely

7. Variations

- ALT II: The Contractor initiates his own proposals under 13.2 *Value Engineering* or he may be given other instructions, which constitute a Variation :

  1. The Contractor submits to the Engineer a written proposal with particulars substantiating the benefits of the variation
  2. The Engineer forwards the proposal to the Employer and provides technical assistance to the Employer for assessing the merits of the proposal
  3. The Employer directs the Engineer to instruct the Contractor to execute to Works as proposed or modified , as appropriate, including evaluation criteria

7. Variations

- ALT II:

5. The Engineer instructs the Contractor accordingly and determines adjustment to Contract Price and (RB only) the Contractor's fee, which is 50% of the achieved savings
6. The Contractor acknowledges receipt, designs and executes the Works and includes the value of Variation in his next Application for Interim Payment Certificate

7. Variations

- ALT III: A proposal may be requested in an endeavour to reach prior agreement on its effect and thereby avoid dispute

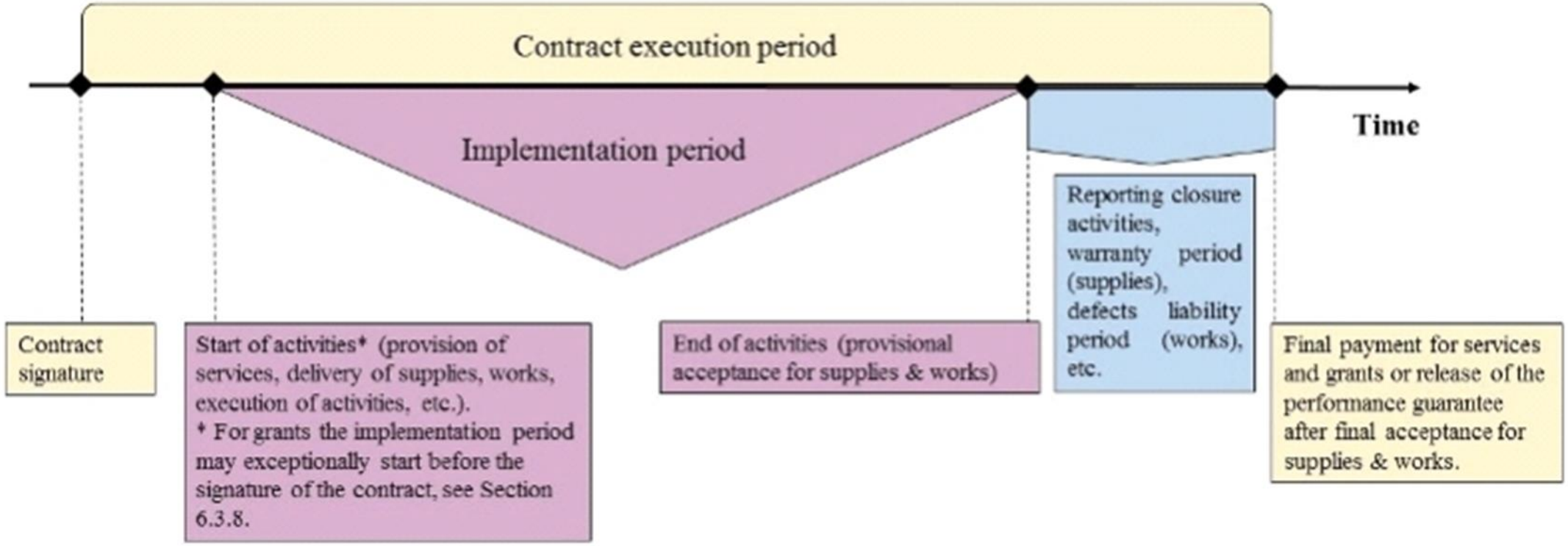
  1. The Engineer, on his own or the Employer's initiative, requests under Sub-Clause 13.3 the Contractor to submit a proposal for a specific variation
  2. The Contractor submits (or refuses to submit, with supporting particulars) the requested proposal with description of the Works, programme for execution, modifications to overall programme and proposal for evaluation (price)

7. Variations

- ALT III:

3. The Engineer forwards the proposal to the Employer and provides technical assistance to the Employer for assessing the merits of the proposal
4. The Employer directs the Engineer to instruct the Contractor to execute to Works as proposed or modified , as appropriate, including evaluation criteria
5. The Engineer instructs the Contractor accordingly and determines adjustment to Contract Price and (RB only) the Contractor's fee, which is 50% of the achieved savings
6. The Contractor acknowledges receipt, designs and executes the Works and includes the value of Variation in his next Application for Interim Payment Certificate

7. Variations/Modifications



7. Variations/Modifications

PRAG

- Any changes to the contract must be made officially by means of an administrative order or an addendum in accordance with the general conditions. Substantial changes to the contract must be made by means of an addendum. Such an addendum must be signed by the contracting parties (and, under an indirect *ex ante* management, approved and endorsed by the European Commission).
- Contracts cannot be amended after the end of the execution period.
- Any modification extending the period of implementation must be such that implementation and final payments can be completed before the expiry of the financing agreement (if any) under which the initial contract was financed.

7. Variations/Modifications

PRAG

- No changes to the contract may alter the award conditions prevailing at the time the contract was awarded.
- Following this logic, major changes, such as a fundamental change to the terms of reference or to the technical specifications, cannot be made by means of an addendum or an administrative order.
- The purpose of the addendum or administrative order must be closely connected with the nature of the project covered by the initial contract.
- Requests for contract modifications must be made (by one contracting party to the other) in time to allow the addendum to be signed by both parties before the expiry of the execution period of the contract.

7. Variations/Modifications

Where no contract modification is needed

- In the vast majority of cases, the works contract stipulates that it is paid by measurement: in such contracts, the quantities indicated in the bill of quantities are estimates, as is the initial contract price derived from these estimated quantities.
- Whenever an application for payment is submitted, the supervisor measures, for each item, the actual quantities of the works executed and calculates the amount due by applying the unit rates.

7. Variations/Modifications

Where no contract modification is needed

- Increases vis-à-vis the initial contract price that are the sole result of the measured actual quantity exceeding the stated bill of quantities or price schedule do not represent a change of the contract and do not require an administrative order to amend the contract or an addendum.
- Likewise, the application of the price revision clause of the contract will have the same effect. Again, since the price revision formula is already agreed upon by the contracting parties in the initial contract, the contract does not need to be amended to allow increases vis-à-vis the initial contract price to deal with their effect.

7. Variations/Modifications

Administrative order

- In a works contract, the supervisor has the power to issue an administrative order to change any part of the works if necessary, for the proper completion and/or functioning of the works. These changes may include additions, omissions, substitutions, changes in quality, quantity, form, character, kind, position, dimension, level or line and changes in the specified sequence, method or timing of execution of the works. See Article 37 of the general conditions.*
- The contractor is bound to make the changes ordered. The contractor cannot delay the works ordered pending a decision on the claim he might have either to extend the period of implementation or for additional payment.

7. Variations/Modifications

Addendum

- Changes to the contract not covered by an administrative order must be formalised through an addendum. An addendum must be issued when the change entails an increase or reduction of the total value of the works in excess of 15% of the initial contract price.

8. Claims

- Contractor's Claims:

  1. The Contractor, as soon as practicable, gives notice to the Engineer, with a copy to the Employer, of the event or circumstance giving raise to his claim.
  2. If notice is not given within 28 days after the Contractor should have become aware of the event or circumstance, he loses his entitlement for extension of time and additional payment
  3. The Contractor keeps contemporary records necessary for substantiating the claim.

  *The importance of good record-keeping cannot be over-emphasised. The DAB or arbitrator(s) will rely on unchallenged records kept by one Party in case the other Party fails to present his own records.

8. Claims

- Contractor's Claims:

4. The Engineer may monitor and inspect the records and request copies, as appropriate.
5. Within 42 days after the Contractor became or should have become aware of the concerned event/circumstance, the Contractor sends his fully detailed claim to the Engineer. If continuing effect, interim claims and final claim within 28 days after end of effect.
6. The Engineer, within 42 days after receiving the fully detailed claim or further supporting particulars, responds with approval or disapproval with detailed comments. The Engineer may, but is not obliged to, liaise with the Employer prior to his response in order to minimise the risk of consequent disputes

8. Claims

- Contractor’s Claims:

    7. The Engineer agrees or determines the extension of Time for Completion and/or additional payment to which the Contractor is entitled under the Contract
    8. The Contractor includes respective amount in his next Application for Interim Payment Certificate
    9. The Engineer certifies accordingly

8. Claims

- Employer’s Claims:

1. The Employer or the Engineer gives notice and particulars to the Contractor as soon as practicable after the Employer became aware of the event or circumstance giving rise to the claim.

* Although FIDIC does not define a period for notifying, the applicable law may do so.

2. The Contractor includes such notice (as well as his own notices) in his progress reports.

8. Claims

- Employer’s Claims:

3. The Engineer proceeds according to sub-clause 3.5 to consult with each Party in endeavour to reach agreement. If no agreement, the Engineer determines the amount the Employer is entitled to and/or the extension to the Defects Notification Period.
4. The Engineer notifies both Parties of the resulting agreement or determination, which then becomes binding unless and until revised under dispute resolution procedures

9. Resolution of disputes

Resolution of Disputes (contracts with a Dispute Adjudication Board)

Appointment of an *ad hoc* DAB:

1. One Party (Employer or Contractor) gives a notice to the other Party of its intention to refer a dispute to a DAB
2. Within 28 days (after giving the notice) the Parties appoint a DAB in accordance with the Contract, either from a list of potential members included in the Contract or otherwise.
3. If the Parties fail to agree the DAB member(s) the appointment will be made by the entity indicated in the Appendix to Tender.

9. Resolution of disputes

Resolution of Disputes (contracts with a Dispute Adjudication Board)

Appointment of a *permanent* DAB:

1. The Parties jointly appoint the DAB by the date stated in the Appendix to Tender, either from a list of potential members included in the Contract or otherwise.
2. If the Parties fail to agree the DAB member(s) the appointment will be made by the entity indicated in the Appendix to Tender.

9. Resolution of disputes

Obtaining DAB's decision:

1. A Party refers a dispute in writing to the DAB for its decision. Such reference shall state that is has been made under Sub-Clause 20.4.
2. Both Parties make available all information and access to site and appropriate facilities as may be required by the DAB for the purposes of making a decision on the dispute.
3. Within 84 days after receiving the reference the DAB gives its reasoned decision, stating that it has been given under Sub-Clause 20.4

9. Resolution of disputes

Obtaining DAB's decision:

4. The DAB's decision is binding for both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award.
5. If a Party is dissatisfied with the DAB's decision, it gives within 28 days after receiving the decision a notice to the other Party of its dissatisfaction. The notice shall set out the matter in dispute and reasons for dissatisfaction and it shall state that it is given under Sub-Clause 20.4
6. If no notice of dissatisfaction is given in 28 days, the decision becomes final and binding upon both Parties

9. Resolution of disputes

Amicable Settlement:

1. Where a Party has given notice of dissatisfaction under Sub-Clause 20.4, both Parties attempt to settle the dispute amicably before commencement of arbitration
2. Arbitration may commence on or after 56th day after notice of dissatisfaction has been made, even if no attempt at amicable settlement has been made

9. Resolution of disputes

Arbitration:

1. Unless settled amicably, any dispute in respect of which the DAB's decision has not become final and binding shall be finally settled by international arbitration.
2. The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators.

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Pitanja i pomoć

Srđan Topalović

Predavač EU PPF6

+381 11 4040 721

info@ppf.rs

www.ppf.rs

Hvala Vam na pažnji!