

AN ANALYSIS OF PARTICULAR GENERAL CONDITIONS OF EPC CONTRACTS (SILVER BOOK) AND THEIR IMPLEMENTATION UNDER UZBEKISTAN LEGISLATION

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Abstract: *This thesis will be interesting for lawyers working in company specialized on construction of infrastructure facilities in Uzbekistan.*

During the last 10 years in the Republic of Uzbekistan several projects have been built based on turnkey principle in the oil and gas, energy and mining industries, in particular, in construction of gas processing plants, hydroelectric power plants and other infrastructure projects. In the framework of these projects participants have faced with various inconstancies and restrictions between the terms and conditions of the EPC contracts and legal requirements for employers and contractors under the construction laws of Uzbekistan. The subject of this thesis is to review and identify particular issues in the implementation of EPC contracts in Uzbekistan.

Keywords: *EPC contract, Silver Book, fast-track, construction.*

In 1957 The International Federation of Consulting Engineers (FIDIC) published a rainbow suite of construction contract forms which eventually modified to enable it to be used anywhere in the world⁷. Nowadays, these types of the contract are widely using on infrastructure projects in developing countries where construction funds by international financial institutes, among them, *Conditions of Contract for Construction for Building and Engineering Works designed by the Employer*, (Red Book), *Conditions of Contract for Plant and design-build contract* (Yellow Book), *Conditions of Contract for the EPC/Turnkey projects* (Silver Book) or *Design, Build and Operate Projects* (Gold Book, EPCM contracts). Every form of the contract has its own features depending mainly on the parties' obligation, the scope of work and the allocation of responsibility.

EPC contracts (**the "EPC"**) are intended for use in international projects where foreign elements would be involved. This "internationality" gives rise to some potentially complex issues related to the applicability of the laws. The practice shows that participants of the projects give their preference to English law. In this research, the author will try to evaluate to what extent provisions of FIDIC's EPC are align with implied terms of uzbek laws and give recommendations on an amendment to national legislation.

FIDIC introduced the Conditions of Contract for the EPC/Turnkey contract (Silver Book) in 1999, explaining it that during recent years it has been noticed that much of the construction market requires a form of contract where the certainty of the final price, and often of the completion date, were of extreme importance. Employers on such turnkey

⁷ W.Hughes, R.Champion, *Construction contracts. Law and management*, 5th edn, Routledge, (2015), p.128

projects are willing to pay more sometimes considerably more for their project if they can be more confident that the agreed final price will not be exceeded. Among such projects can be found many financed by private funds, where the lenders require greater certainty about a project's cost to the Employer than is allowed for under the allocation of risks provided for by FIDIC's traditional forms of contracts⁸. Essential idea behind EPC is that the government or SOE in a country wants to have a totally finished project but does not wish to or cannot finance such a project itself. It, therefore, agrees with the contractor that it would design, build and carry-on commissioning and, in the case of EPCM, render the plant operational. After the end of construction or the period of operation, the government will finally obtain ownership or control of the plant.

So-called EPC stands for engineering, procurement and construction contract and is used more as the brand name of certain types of DB contracts. EPC mainly labels the risk allocation method, where the contractor has duties to design (engineering), procure the equipment and materials and build the facility which would fit for purposes prescribed at the employer's requirements. It is very similar to DB contracts (Yellow book) where the Employer can benefit from single-point contractor responsibility for problems arising from design and construction and have a lump-sum price or fixed price⁹. Whether the Yellow book is recommended for the provision of electrical or mechanical plant and the design and execution of building or engineering works, the EPC is suitable for the provision on a "turnkey" basis of a process or power plant, of a factory or similar facility, or of an infrastructure project other types of development, where a higher degree of certainty of final price and time is required, and the contractor takes total responsibility for the design and execution of the project, with little involvement of the Employer¹⁰. Minimum involvement of the Employer under EPC constitutes that only the provision of preliminary drawings, site data and technical specifications as well as the level of outputs from the completed plant is requested from the Employer.

The principal "turnkey" basically refers to the moment when after completion of the works, the project can be turned and everything will be ready for use¹¹. The definition of "turnkey" was challenged in the case *Cable (1956) Ltd vs Hutcherson Bros Pty Ltd*¹², where the judge stated that "...turnkey" expression meant that the builder warranted the efficacy of the works he had agreed to erect". The next paragraph describes the main issues in implementation EPC in Uzbekistan

⁸ E.Baker, *FIDIC contracts: Law and Practice*, 5th edn., Routledge, (2009), p.21

⁹ Ibid, p.21

¹⁰ "FIDIC Comparison between Red Book, Yellow Book, Silver Book" available at <https://legalbusinessforms.wordpress.com/2015/05/08/fidic-comparison-between-red-book-yellow-book-silver-book/> accessed on 14.03.2023.

¹¹ Goudsmit, "Legal Liability in Contract Structures" in LLOYD (ed), *The Liability of Contractors* (Longman, 1986) page 25. See also Kristensen, "Correspondence" [1986] ICLR 217; Wabnitz, "Correspondence" [1986] ICLR 428 cited from Julian Bailey "Construction Law" 1st edn, Routledge, (2011), p. 38

¹² (1969), 123 CLR 143, cited from Julian Bailey "Construction Law" 1st edn, Routledge, (2011), p. 38

EPC is not a separate form of the contract under national legislation. It is a mixed contract and has elements of a contract for construction works¹³, a supply agreement¹⁴ and a contract for rendering services¹⁵ regulated by the Civil code provisions. The parties should consider the implied terms mandatory for the abovementioned contracts under national laws while negotiating particular conditions of EPC.

The contractor under EPC usually has the status of non-resident. Therefore, parties will sign a kind of import contract. According to the Resolution of Cabinet of Ministers of the Republic of Uzbekistan No.283 dated May 14, 2020 (“**Resolution 283**”) there is a list of mandatory clauses that should be included in any import contracts, as well as into EPC contract¹⁶. It should be considered as inconsistency between Uzbek laws and the Silver Book conditions, but cannot be avoided by the parties.

Clause 1.4. of the Silver Book states that the contract shall be governed by the law of the country (or another jurisdiction) stated in the contract. In accordance with article 1189 of the Civil code of the Republic of Uzbekistan parties are entitled to choose governing law for a particular contract. These local laws are often either mandatory as a matter of public policy, such that they cannot be avoided by choosing other governing laws (e.g. labour laws, construction standards and norms), or apply because of the physical location where the work is being performed, mainly the site (e.g. planning and building regulations, taxes, customs regulations)¹⁷.

In practice, lenders and contractors prefer to use English as a ruling language for drafting and communications. However, under Resolution 283 if an import contract is drafted in a language other than the state language, the EPC shall be translated into the state Uzbek language. At the same time, parties are entitled to express that the ruling language in our case English will prevail in case of discrepancies.

According to clause 1.7 of the Silver Book party may assign the whole or any part of the contract with the prior agreement of the other party, at the sole discretion of such other party. Nevertheless, under article 313 of the Civil Code allows to novate or assign contract rights and obligations there are some limitations for Employers who should comply with laws related to governmental procurements, for example state-owned entities (SOE).

During the bid process potential contractors are checked through the special due diligence by the employer’s tender committee and by Center of expertise under the Ministry of economy and finance¹⁸, in particular, contractor’s validity to render the services and works, financial stability, conflict of interests and other criteria are challenged. Moreover, the EPC with the foreign contractor would be registered in a bunch of

¹³ Civil code of the Republic of Uzbekistan (1996), article 666

¹⁴ Ibid, article 437

¹⁵ Ibid, article 703

¹⁶ Please see Clause 4 of the Attachment No.1 of the Resolution 283

¹⁷ E.Baker, *FIDIC contracts: Law and Practice*, 5th edn., Routledge, (2009), p. 46

¹⁸ Clause 2 of the Presidential Decree No. 332 dated July 26, 2022

government systems¹⁹, where the detail of the parties included. Considering that assignment or transfer of contractor's rights and obligations leads to the step-in of third party who didn't participate in bidding process, it would be almost impossible to give consent by the SOE as employer to such an assignment unless there is a special governmental permission for that.

In performing the Contract, the contractor and the employer shall comply with all applicable laws (clause 1.12 of EPC). Definition "Laws" in FIDIC mean "any statute all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority"²⁰. The Parties are generally required to comply not only with laws adopted when EPC was awarded, but also with changes that might be made to laws during the term of EPC.

Compliance with the laws also assumes an additional duty to obtain the relevant permits, approvals and licenses set out in the country. Under the FIDIC's form of contracts distribution of duties for obtaining necessary permits, licenses and approvals is the following: the Employer should obtain permits for planning, zoning and building, and the contractor must obtain all other permissions concerning the works. Such allocations are mainly intended to hold the contractor liable for construction methods. Still, they also can be used to control the contractor liable for defects arising from conflicts with building codes and standards²¹.

Considering that Silver Book provisions have an advisory nature, parties can "tailor" particular conditions of the parties and reallocate the duties. Such a situation took place in particular project in our country. The EPC expressly stated that building permits and related costs should have been obtained and paid by the Contractor respectively. Obtaining building permits required paying a fee for construction supervision by the State Inspection under the Ministry of Construction. The amount of fee was too large, which is why the contractor refused to pay this fee arguing that under the FIDIC's Silver Book building permit cost should be covered by the Employer. Consequently, the State Inspection sued the Employer and Contractor for non-paying of the fee. Nevertheless, that EPC conditions address the above obligations to the Contractor, the local court dismissed this provisions and judged that under uzbek legislation building permit can be obtained only by the Employer even if contract indicates otherwise. Such a situation demonstrate that parties cannot "tailor" any condition of the EPC and should firstly check the national laws restrictions.

In Uzbekistan construction products should satisfy the requirements of construction standards and norms for civil and technological facilities. During the implementation of the investment projects, many Contractors have faced difficulties in complying with such uzbek standards because the design of the plant was made pursuant to international standards.

¹⁹ Law of the Republic of Uzbekistan "On governmental procurements", Article 70

²⁰ E.Baker, *FIDIC contracts: Law and Practice*, 5th edn., Routledge, (2009), p.50

²¹ Smith, Currie & Hancock, *Common sense Construction Law*, 5th edn., John Wiley & Sons, (2015), p.50

Before February 2020, employers and contractors had to obtain exemption through the relevant legal act from such obligations, but in order to support projects, the government has adopted a statute permitting to use of foreign norms and standards of the EU, the UK, China, Korea, Russian Federation, the USA and Japan in the territory of our state until 2028²². However, after this period the issue will comeback, hence it would be more useful to allow adopt the international standards on permanent basis at least for projects involved foreign elements.

Following Clause 5.1 of EPC the Contractor shall be deemed to have scrutinized the Employer's Requirements and shall carry out, and be responsible for, the design of the works and for the accuracy of such Employer's Requirements. In traditional construction methods, the Employer contracts with design professionals to transform the employer's general concept into a complete set of plans and specifications from site preparation until completion²³. The prepared documents are then used to receive proposals from the general contractor responsible for constructing the plant based on the finished design.

Saving costs and time during the implementation of project is one of the main goals of the Employer. In this regard under EPC the Employers prefer the fast-track construction method. This method phases the design and construction so that construction can begin on preliminary items of work, such as site work, and foundations, while design of the plant is still prepared.

Under the Presidential Decree No. UP-5445 dated May 22, 2018, investments projects on a "turnkey" basis should be implemented through a "fast-track" method (simultaneous design, procurement and construction works) by creating a consortium between contractors and design companies under the condition of imposing on the consortium participants joint responsibility for quality and timely implementation of the project. The parties should be careful with implementing this Decree because it authorised the Ministry of Construction to allow contractors to implement the project under EPC conditions with a fast-track method. Hence, the Decree itself does not give overall permit to use fast track, there should be separate document from Ministry of Construction.

The main issue that fast track considerably is used only in investment or PPP projects. Our local constructions are still built based on traditional methods – first of all approving the design of the project and then starting the construction process. Taking into account positive experience of fast track in international projects, national construction industry should be legally allowed to employ this method in internal constructions.

Price and payment are core elements of every EPC. These provisions include not only costs for construction but also how the price will be paid. By contrast to the Red book

²² Attachment No.1 to Presidential Decree No.UP-5963 dated March 13, 2020 "On additional measures to deepen reforms in the construction industry of the Republic of Uzbekistan"

²³ Smith, Currie & Hancock, *Common sense Construction Law*, 4th edn., John Wiley & Sons, (2009), p.10

where the remeasurement approach works, the Silver book employ a lump-sum price approach.

Under lump-sum price-based EPC, the contractor is paid the fixed price which includes the cost of works, construction materials, cost plus profit (Sub-clause 14.1(a) of the EPC), all applicable taxes, duties and fees (Sub-clause 14.1(b) of the EPC). The lump sum cannot be adjusted or changed due to the fluctuations of the prices related to the labour wages, costs of materials, rates of the taxes. However, the fixed price in EPC can be adjusted in case of changes in legislation, the construction extension time due to force-majeure events or variations initiated by the employer or engineer. In Uzbekistan parties should be aware that any amendments of the price should be made in written form by execution of relevant supplemental agreement to the EPC, because they are subject to registration by the official organs²⁴.

There is a limitation to adjusting the price for Employers represented by SOEs or governmental organizations. In accordance with article 34 of the Law «On governmental procurements» parties can increase the total cost of the contract only by 10%. The Parties should obtain exemption by adopting a Presidential Decree or Resolution of the Cabinet of Ministers to avoid this restriction.

Another issue that causes difficulties in implementing the EPC contracts is the advance payment. According to the sub-clause 14.2.2 of EPC the employer shall make the advance payment within 14 days after receiving Performance Security and AP guarantee. The advance payment is repaid through percentage deductions in interim payments within the term of the contract. It means that the paid funds will be repatriated only after completing the works. However, it contradicts to the rules in the Law “On currency regulation”. Subject to the Article 11 of the said Law, repatriation of funds under the import contracts means that the importer must ensure goods, works and services are received and accepted within 180 days after the payment. Taking into account the long-term of the EPC (up to 3-4 years) and the fact that the full amount of advance payment will be repatriated after the completion of the contract, the employer would automatically in breach of the Law “On currency regulation”. Obviously this risk should be readdressed by adopting the relevant changes to the actual legislation.

In conclusion the recent reforms in the field of construction law illustrate our government's intention to develop international construction standards by adopting legal acts for simplifying the implementation of EPC. However, there are still legal limitations that must be revised and addressed to prevent parties from violating laws and encourage using of a “turnkey” contract as a delivery method of construction.

Firstly, the EPC should be recognised as a separate type of foreign trade (import) contract which will legally allow parties to avoid current restrictions under Resolution 283.

²⁴ The Resolution of Cabinet of Ministers No.283 dated May 14, 2020 “On measures to further improve the monitoring of foreign trade transactions in the Republic of Uzbekistan”, clause 5

Secondly, the Employers, which have a status of SOEs, should have the right to give their consent to assign rights and obligations of the Contractor to the third parties as well as to increase the total price of the EPC by more than 10% if necessary

Thirdly, it is recommended to amend the currency laws of the state by including exemption clauses related to the rules of repatriations of advance payment paid by the employer to the contractor under the EPC. Author suggests to use an Advance Payment bond as a guarantee that paid funds would be repatriated.

Fourth, it should be permitted to EPC contractor to design the projects based on international standards on permanent basis.

Fifth, under EPC contract the Contractor should be bind to pay all fees necessary to obtain any permits.

Sixth, parties should be allowed to use fast track method not only in international constructions projects but also in local projects.

Overall, even if turnkey projects can be rather costly for the owner, this method of delivery should be more developed in our country considering that it provides an opportunity for employers to be a little involved in the project and be on the safety side because the contractor takes the whole responsibility for design, construction, procurements and outcome of the project.

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